

**A Critical Analysis of Zambia's Disability Discrimination Legal  
Framework: Reasonable Accommodation and the Right to Work  
for Persons with Disabilities in Zambia**

By

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degree of

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## **Declaration of Authenticity and Author's Rights**

This thesis is the result of the author's original research. It has been composed by the author and has not been previously submitted for examination which has led to the award of a degree.

Parts of chapter 6 are from Dumisani J Ngoma, 'Combating Workplace Discrimination on the Basis of HIV Status through Disability Law in Zambia' (2022) 22 The International Journal of Discrimination and the Law 30.

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Date: 27<sup>th</sup> January 2023

## **Dedication**

For Mum

## **Acknowledgement**

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## **Abstract**

By recognising the beneficial role that law plays in reducing societal disparities, this thesis aims to broaden understanding of disability equality and anti-discrimination law in Zambia, focusing on reasonable accommodation and kindred issues in fostering equality and the right to work in Zambia. Given the necessary constraints, this thesis examines various statutory and constitutional issues relating to equality, as it translates into the right to work for persons with disabilities. The thesis also seeks to provide an overview of Zambia's disability legal framework from colonialism to the present. The thesis lays the groundwork for examining the strengths and limits of current laws in addressing discrimination and fostering equality for persons with disabilities in the workplace and labour market. The main argument advanced by this thesis is that applying a communitarian approach, perceived through the lens of Zambian Humanism, provides the most compelling means of advancing substantive equality and addressing disability discrimination.

The thesis seeks to demonstrate that Zambian Humanism, as a homegrown theory and philosophy, advances the ideals implicit in the Convention on the Rights of Persons with Disabilities (CRPD). The CRPD calls for a holistic approach to tackling disability discrimination, and thus goes beyond consistency of treatment and neutrality between individuals or groups. To this end, the thesis argues that Zambian Humanism provides the normative framework and rationale for providing reasonable accommodation and other positive measures for people with disabilities. By reflecting on Zambian Humanism and its approach to racialism, apartheid and inequality, this thesis proposes that communitarianism offers a more suitable and viable approach to addressing the disadvantages experienced by persons with disabilities and other marginalised and disadvantaged populations. Zambian Humanism was progressive for its time and therefore can still provide the foundation for addressing the plight of Zambians with disabilities today. The thesis argues that Zambian Humanism principles have indirectly re-entered the legal system, despite the philosophy being discarded in 1991. This, therefore, lends credence to the authenticity of the philosophy in providing a prescriptive guide towards an approach to equality that promotes and enhances the right to work for persons with disabilities in Zambia.

The thesis concludes with recommendations to enrich the implementation of disability anti-discrimination and equality laws in Zambia.

## Acronyms and Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
AIDS	Acquired Immune Deficiency Syndrome
ART	Antiretroviral Therapy
BFOQ	Bona Fide Occupational Qualification
CDT	Critical Disability Theory
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CEEC	Citizens Economic Empowerment Commission
CEEF	Citizens Economic Empowerment Fund
CESCR	Committee on Economic, Social and Cultural Rights
CP rights	Civil and Political Rights
CRPD	Convention on the Rights of Persons with Disabilities
CRT	Critical Race Theory
CSO	Civil Society Organisation
DPO	Disabled Peoples' Organisation
ECJ	European Court of Justice
EEOC	Equal Employment Opportunities Commission
ESC rights	Economic, Social and Cultural Rights
HIV	Human Immunodeficiency Virus
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICF	International Classification of Functioning, Disability and Health
ILO	International Labour Organisation
RLI	Rhodes-Livingstone Institute
TAS	Traditional African Society
UDHR	Universal Declaration of Human Rights
WHO	World Health Organization

ZAPD

Zambia Agency for Persons with Disabilities

ZNDS

Zambia National Disability Survey

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## Chapter 1: Setting the Stage

### 1.1 Introduction

The International Labour Organisation (ILO) estimates that close to a billion people worldwide (15 per cent of the world's population) are persons with disabilities.<sup>1</sup> According to the Zambia National Disability Survey 2015 (ZNDS 2015), about 11 per cent of Zambia's adult population (18+ years) have a disability. The prevalence of disability is higher in urban areas than in rural regions, with estimates indicating that more females than males have a disability.

Research consistently indicates that the employment and economic activity rates for persons with disabilities are disproportionately lower than the overall population. The ILO observes that in instances where dependable data is accessible, it is evident that persons with disabilities face noticeably higher unemployment rates compared to their non-disabled counterparts. Moreover, their engagement in the labour market remains substantially lower, primarily attributed to the fact that many of them refrain from actively seeking employment opportunities.<sup>2</sup> The situation for countries like Zambia is even less promising when we consider the estimates of the employment rates for persons with disabilities 'in low-income countries, standing at 58.6 per cent for males and 20.1 per cent for females, compared with 71.2 per cent and 31.5 per cent for males and females without disabilities'.<sup>3</sup> The 2015 disability survey confirmed that very few persons with disabilities are engaged in formal employment and tend not to be engaged in other economic activities compared to those without disabilities. The situation in rural areas is much worse. Men are also more likely than women to be formally employed.<sup>4</sup> Comparing the statistics presented under the

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<sup>1</sup> International Labour Office, *Disability Inclusion Strategy and Action Plan 2014-17: A Twin-Track Approach of Mainstreaming and Disability-Specific Actions* (ILO 2015) 1.

<sup>2</sup> *ibid* 1.

<sup>3</sup> Sophie Mitra, 'Employment Challenges and Successes in Low- and Middle-Income Countries' in Jody Heymann and others (eds), *Disability and Equity at Work* (OUP 2014) 269.

<sup>4</sup> Central Statistical Office and Ministry of Community Development and Social Services, *Zambia National Disability Survey 2015* (UNICEF 2018) 7.

2015 disability survey to an earlier study published in 2006 indicates that not much has changed regarding the employment prospects for persons with disabilities.<sup>5</sup>

Despite Zambia's obligations under the Convention on the Rights of Persons with Disabilities (CRPD), there remains little awareness of the rights, needs and aspirations of persons with disabilities, who continue to endure untold stigma and discrimination.<sup>6</sup> The lack of awareness is particularly pronounced when one considers the lack of equal employment opportunities, with entry and access into the labour market posing a considerable challenge for persons with disabilities.<sup>7</sup> The inability to access the labour market 'to become economically independent is a major complaint expressed by disabled people (sic)'.<sup>8</sup>

Where employed, persons with disabilities are usually subjected to entry-level or low-paying jobs in the informal as opposed to the formal economy.<sup>9</sup> The Committee on Economic, Social and Cultural Rights (CESCR) has observed that employment within the informal sector indicates high unemployment within a country.<sup>10</sup> A study on the economic success of persons with disabilities in Kenya, Uganda and Zambia found the lack of available employment opportunities often led many into farming and other forms of self-employment.<sup>11</sup> Those employed in the formal sector are usually in non-technical jobs requiring little skill.<sup>12</sup> Relegating them to entry-level occupations because of their disability thus sends a social message that these people are less than fully human.<sup>13</sup> Opportunities for sustainable self-employment are also scarce for persons with disabilities, as obtaining credit finance or loan facilities to establish an enterprise can be more demanding compared to

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<sup>5</sup> See Arne H Eide and Mitch E Loeb, *Living Conditions among People with Activity Limitations in Zambia: A National Representative Study* (SINTEF Report, Norwegian Federation of Organisations of Disabled People 2006).

<sup>6</sup> Evance Kalula and others, *Zambia Labour Law Reform: Issues Paper* (ILO 2013).

<sup>7</sup> Elijah Ngwale, 'Plight of Persons with Disabilities' (*Zambia Daily Mail*, 31 March 2015).

<sup>8</sup> Jean-Francois Trani and Mitchell Loeb, 'Poverty and Disability: A Vicious Circle? Evidence from Afghanistan and Zambia' (2012) 24 JID S19, S33.

<sup>9</sup> Ministry of Labour and Social Security, *Zambia Decent Work Country Programme 2013-2016* (MLSS 2013).

<sup>10</sup> UNCESCR, 'General Comment No 18 Article 6: The Right to Work' (6 February 2006) UN Doc E/C.12/GC/18, para 10.

<sup>11</sup> Tom Shakespeare and others, 'Success in Africa: People with Disabilities Share their Stories' (2019) 8 AJD 1,5.

<sup>12</sup> Song Ju, Eric Roberts and Dalun Zhang, 'Employer Attitudes Toward Workers with Disabilities: A Review of Research in the Past Decade' (2013) 38 Journal of Vocational Rehabilitation 113.

<sup>13</sup> Jeffrey O Cooper, 'Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act' (1991) 139 U Pa L Rev 1423, 1423.



their non-disabled counterparts.<sup>14</sup> Women with disabilities are also particularly hard-hit by the challenging realities of their disabilities. Unlike males, females are less likely to be presented with educational and vocational opportunities that would otherwise provide them with the requisite training and qualifications to find employment in the long run. It is challenging for them to climb the economic ladder as they experience more difficulties early on.<sup>15</sup> Unfortunately for others, the limited prospects confine them to a life of begging on the street.

Further, persons with disability are also at greater risk of failing to access sufficient social protection, which is crucial in reducing extreme poverty. Persons with disabilities experience limited social security cover due to unemployment and fewer opportunities for economic activity, thereby significantly reducing their ability to participate in social security contributory schemes. Contributory schemes tend to provide higher and better benefits when compared to non-contributory programmes and play an essential role in providing social protection to persons with disabilities.<sup>16</sup> Ultimately, the unemployment of persons with disability leads to poverty and thus perpetuates a cycle of social inequality.

### **1.1.1 Nature of disability discrimination in the workplace**

The workplace represents a community of sorts. Based on the relational nature of the employment contract, the workplace fosters and creates long-lasting ties of interdependence, care and commitment. It is also a place where the worker can obtain social status and self-esteem and provides an opportunity to develop other social relationships.<sup>17</sup>

As the thesis will show, personal participation in a community is a critical ingredient in creating relational ties. The workplace provides a platform for social connections, especially

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<sup>14</sup> Marc Labie and others, 'Discrimination by Microcredit Officers: Theory and Evidence on Disability in Uganda' (2015) 58 QREF 44.

<sup>15</sup> Cindy Lewis, 'Microfinance from the Point of View of Women with Disabilities: Lessons from Zambia and Zimbabwe' (2004) 12 Gender and Development 28,31.

<sup>16</sup> Catalina D Aguilar, 'Social Protection and Persons with Disabilities' (2017) 70 ISSR 45,54.

<sup>17</sup> Douglas Brodie, *The Future of the Employment Contract* (Elgar 2021); *Reference Re Public Service Employee Relations Act* (1987) 1 SCR 313 [91].

where other means of citizen participation are impossible. Therefore, people will likely turn to their co-workers for dialogue, networking, and relationship building.<sup>18</sup>

As these relationships in the workplace take root, they create a 'work culture', which basically 'defines the social, behavioural expectations of interaction that manifest in everything from informal interactional style and appearance signals to specific displays of competence'.<sup>19</sup> The work culture of an organisation, just like any other community, creates expected standards of behaviour, expectations, norms, values, and principles which must be adhered to if an individual is to enjoy success within the organisation. Thus, in today's world, an employee's success and productivity will be measured against the organisation's work culture, and non-conformity to cultural expectations can harm chances of success.<sup>20</sup> This means that employers, to ensure productivity, are likely to only hire people they think fit into their existing work culture.

However, an organisation's work culture can propagate discrimination and segregation in the workplace.<sup>21</sup> Hence today, we hear phrases such as 'toxic work environment'. The idea that only those who are a perfect fit and conform to the established work culture have a chance at employment or promotion within the organisation can be detrimental to those with disabilities. Unfortunately, the workplace is often regarded as the place for fit, unencumbered able-bodied males.<sup>22</sup> This standard inevitably presents a challenge for persons with disabilities. It is not a secret that employers will not readily hire persons with disabilities, as they do not fit the 'traditional' work environment. Even apparently neutral practices or policies can have discriminatory effects on persons with disabilities, mainly if they have been created with the 'ideal worker' in mind.<sup>23</sup>

Additionally, it is well documented that within the common law world, the balance of power between the employer and the employee or master and servant is almost always skewed in favour of the employer/master, but for the intervention of legislation which tries to alleviate

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<sup>18</sup> Tristin K Green, 'Work Culture and Discrimination' (2005) 93 CLR 623.

<sup>19</sup> *ibid* 627.

<sup>20</sup> *ibid* 633.

<sup>21</sup> *ibid*.

<sup>22</sup> Nicole Busby and Grace James, *A History of Regulating Working Families: Strains, Stereotypes, Strategies and solutions* (Hart 2020) 28.

<sup>23</sup> Eline Jammaers and others, 'Constructing Positive Identities in Ableist Workplaces: Disabled Employees' Discursive Practices Engaging with the Discourse of Lower Productivity' (2016) 69 *Human Relations* 1365, 1368.

this imbalance.<sup>24</sup> While current legislative intervention has attempted to cure this imbalance for many non-disabled employees, persons with disabilities still face various hurdles within and outside the workplace. Because of their already vulnerable position, persons with disabilities will not always have the necessary voice to present their case in the workplace for fear of being discriminated against further. And because they may find it harder to get jobs, they may understandably take any position they can. This might lead them to accept lower-paying jobs or less desirable positions.

Doyle identifies four ways discrimination against persons with disabilities can be conveyed in employment.<sup>25</sup> In the first place, he observes that discrimination emanates from a place of distaste for persons with disabilities, similar to the kind that a misogynist would have towards women. This can originate from a fear of persons with disabilities conjured by images of the possibility of becoming disabled in the future from accidents, illness or old age.

Secondly, the discrimination against persons with disabilities is often unrelated to their ability to perform. Instead, it is a reflection of wider social biases and prejudice.<sup>26</sup> The discrimination comes from stereotypical perceptions that persons with disabilities are 'unfit' or 'weak' and incapable of performing the tasks that an 'able-bodied' individual can perform. Therefore, employers are less enthusiastic about employing persons with disabilities whom they perceive to be incompetent or unqualified and thus unable to perform their duties or that they are underserving of certain positions.<sup>27</sup> The discriminator may justify their attitudes towards them on the mistaken assumption that they are protecting them from exploitation or less favourable treatment. In short, a paternalistic element guides the discriminator's views and attitudes. Although unrelated to employment, one of the very few cases on the rights of persons with disabilities in Zambia illustrates this paternalistic attitude. In the High Court case of *Frankson Musukwa and others v Road*

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<sup>24</sup> David A Cabrelli, *Employment Law in Context: Text and Materials* (4th edn, OUP 2020).

<sup>25</sup> Brian Doyle, *Disability, Discrimination, And Equal Opportunities: A Comparative Study of the Employment Rights of Disabled Persons* (Mansell 1995) 19.

<sup>26</sup> Cooper (n 13).

<sup>27</sup> Janet Njelesani and others, 'Experiences of Work Among People with Disabilities who are HIV-Positive in Zambia' (2015) 14 AJAR 51.

*Transport and Safety Agency* (hereinafter *Musukwa*),<sup>28</sup> the court held that the law<sup>29</sup> that prohibited deaf people from obtaining driving licenses was not discriminatory, nor did it infringe on their constitutional right to freedom of movement and enjoyment of rights on an equal basis with others. Instead, premising its decision on the wide derogations permitted under the Zambian Constitution, the court held that the statute that excluded the deaf from obtaining driver's licences and, by implication, not allowing them to drive on Zambian roads was necessary for public safety. The court went on to note that:

[The law] protects the petitioners [the deaf] and other road users... that a deaf person cannot hear a siren nor hooting sounds from other vehicles hence posing a risk to other road users. ...that there are other associated challenges of deaf drivers failing to communicate with other road users and traffic law enforcement officers.<sup>30</sup>

And despite the court sympathising with the deaf and agreeing with the need to adhere to international best practices, the court still justified its decision by arguing that the country's 'facilities are not developed to the extent that the deaf can safely drive on the roads. *The law in its current form...is for the protection of persons living with this disability*'.<sup>31</sup> Interestingly the court maintained its decision despite acknowledging that evidence from around the world indicated that deaf drivers are not a threat to other road users in countries where they are permitted to drive. The court even recognised the importance of adhering to the CRPD and the need to protect from discrimination persons with disabilities. It also recognised that persons with hearing impairments are deprived of the mobility needed to access essential services, and social opportunities, including employment prospects and life in general. Despite this, the court still maintained its earlier position. It merely recommended that Zambian facilities be improved, and the law amended to allow those with hearing impairments to drive.

As will be seen from some of the court decisions to be analysed in this thesis, nothing precluded the court from adopting an expansive interpretation of the law to allow the deaf to obtain licences and drive on Zambian roads as a means of fostering their freedom of movement. Instead, the court based its decision on the assumption that persons with

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<sup>28</sup> [2021] ZMHC 5

<sup>29</sup> Road Traffic Act 1999, s 62.

<sup>30</sup> *Musukwa* (n 28) J25 (Chawatama J).

<sup>31</sup> *ibid* J26 (Emphasis added).

hearing impairments need to be protected from harm, essentially saying they are incapable of navigating their way around. In this case, the court's decision reflects wider perceptions that persons with disability are rarely viewed as normal citizens but as a vulnerable minority and hence in need of care. Unfortunately, the court did not give much weight to the Persons with Disabilities Act 2012 (PDA 2012), which, as will be examined, enjoys a level of supremacy subject only to the constitution where disability is concerned.<sup>32</sup> There was also a failure on the part of the court to recognise that deaf people often consider themselves as part of a linguistic minority who use sign language to communicate. The PDA 2012, following the CRPD, recognises sign languages and other forms of non-spoken languages within the meaning of language.<sup>33</sup> As will be identified below, the court's reasoning is reflective of an ableist approach to disability anchored on the medical and charity models of disability where persons with disabilities are not 'regarded as rights holders but are instead "reduced" to their impairments'.<sup>34</sup>

Thirdly, Doyle observes that disability discrimination is born out of ignorance of what persons with disabilities can or cannot do. Unfortunately for persons with disabilities, ignorant views and misinformation about their capacity and ability can inform decisions within the employment setup. A study on access barriers for people with mobility impairment in Zambia shows that such prejudices have contributed to difficulties in gaining or seeking employment.<sup>35</sup>

Lastly, disability discrimination can result from 'statistical discrimination'. Statistical discrimination is based on how an employer makes employment decisions even without overt prejudice.<sup>36</sup> Because their knowledge of an applicant's efficiency is limited, employers might fill the information void by resorting to general statistical information about a particular group.<sup>37</sup> For example, an employer may not have a problem hiring people with

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<sup>32</sup> See Persons with Disabilities Act 2012 (PDA 2012), s 3.

<sup>33</sup> See *ibid* s 2 and CRPD art 30(4).

<sup>34</sup> UNCRPD Committee, 'General Comment No 8: The Right of Persons with Disabilities to Work and Employment' (9 September 2022) UN Doc CRPD/C/GC/8, para 7.

<sup>35</sup> Martha Banda-Chalwe and others, 'Impact of Inaccessible Spaces on Community Participation of People with Mobility Limitations in Zambia' (2013) 3 AJOD 1.

<sup>36</sup> Doyle (n 25) 19.

<sup>37</sup> Kevin Lang and Jee-Yeon K Lehmann, 'Racial Discrimination in the Labour Market: Theory and Empirics' (2012) 50 JEL 959,985.

disabilities as such but base their hiring decisions on group information rather than an individualised assessment.

### 1.1.2 The right to work for persons with disabilities

For many, work offers financial independence and, in numerous situations, a means of escaping poverty. In Zambia, employment goes beyond financial autonomy but is also a communal duty. Not only is being able to work a right, but work is also an important communitarian duty that forms the basis of various social relations. The national policy on disability has thus noted that one's social acceptance is enhanced when they are economically empowered.<sup>38</sup> Being employed makes it easier to be included in society and take part in activities that are part of daily life.<sup>39</sup> Paid employment is essential to fulfilling one's primary obligations of providing for their immediate and extended family. In a communitarian society (such as Zambia) validates membership through work, being deprived of an opportunity to work in such a society denies individuals their self-worth and human dignity. Thus, because work constitutes a characteristic part of the communitarian society, society must make the right to work a reality for persons with disabilities as required under international human rights treaties and instruments to which Zambia is a party.

Article 23 of the Universal Declaration of Human Rights (UDHR)<sup>40</sup> provides that everyone has the right to work. The right encompasses the ability to choose one's employment freely, to just and favourable conditions of work and to protection against unemployment. Also included within the right to work is the right to equal pay for equal work and the right to just and favourable remuneration. Collective labour rights, such as freely joining a trade union, are also envisaged within the right to work.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) elaborates more on the right to work under Articles 6,7 and 8. The ICESCR recognises the right of everyone to the opportunity to gain their living by work which they freely choose or accept.

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<sup>38</sup> Ministry of Community Development, Mother and Child Health, *National Policy on Disability: Empowering Persons with Disabilities* (Republic of Zambia 2013) 7.

<sup>39</sup> Elisabeth Hästbacka, Mikael Nygård and Fredrica Nyqvist, 'Barriers and Facilitators to Societal Participation of People with Disabilities: A Scoping Review of Studies Concerning European Countries' (2016) 10 Alter 201.

<sup>40</sup> GA Res 217 A (III) of 10 December 1948.

According to the CESCR, employment opportunities for persons with disabilities should not be restricted to 'sheltered facilities' with poor conditions or limited to only working in certain sectors and occupations.<sup>41</sup> Equal opportunities for productive and gainful employment in the labour market also require the identification and removal of barriers in society that prevent persons with disabilities from being employed. This means providing accessible systems to enable persons with disabilities to access jobs whilst ensuring that their needs are reasonably accommodated in the workplace. The State must also put in place measures that protect persons with disabilities from discrimination with respect to wages or other conditions of employment. States must take measures enabling persons with disabilities to secure and retain appropriate employment and to progress in their occupational field, thus facilitating their integration or reintegration into society.<sup>42</sup>

Because the treaties mentioned above are of general application, the interpretation of the rights contained therein do not entirely address the particular needs and concerns experienced by persons with disabilities. Because of this, States can easily interpret rights such as the right to work in a manner that excludes persons with disabilities.<sup>43</sup> With the CRPD having come into force on 3 May 2008, there now exists a treaty that aims to advance their welfare.<sup>44</sup> It facilitates the interpretation of all human rights in a manner that accounts for the varying needs of persons with disabilities. The purpose of the CRPD is 'to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity'.<sup>45</sup> As a convention specific to persons with disabilities, the CRPD provides detailed and elaborate provisions of the State's legal obligations in implementing the rights in question. Zambia, being a dualist State, has ratified the CRPD and domesticated several of its provisions under the PDA 2012. Zambia, therefore, must guarantee the right to work and employment of persons with disabilities in a manner consistent with the requirements of the CRPD.

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<sup>41</sup> UNCESCR (n 10) para 17.

<sup>42</sup> *ibid.*

<sup>43</sup> Paul Harpur, 'Embracing the New Disability Rights Paradigm: The Importance of the Convention on the Rights of Persons with Disabilities' (2012) 27 *Disability and Society* 1,6.

<sup>44</sup> Zambia signed the CRPD on 9 May 2008 and ratified it on 1 February 2010.

<sup>45</sup> CRPD art, 1.

Article 27 of the CRPD sets out the right to work for persons with disabilities and thus provides the framework of obligations that State parties must abide by and meet. It develops from the provision of the UDHR and the ICESCR. It further contextualises the measures essential for realising the right to work.<sup>46</sup> Harpur observes that before the CRPD, there was confusion regarding how to implement the right to work for persons with disabilities. In the wake of the CRPD, much of this uncertainty has been reduced.<sup>47</sup> The CRPD is the backdrop against which disability legislation and policy are to be measured to determine the appropriateness of the particular law or policy. The CRPD must also be used to assess the protection and promotion of the rights of persons with disabilities. The CRPD requires state parties to comply with the provisions established under it fully, and national courts are not excluded from this obligation. Domestic courts are called upon to interpret the rights of persons with disabilities in a manner consistent with the CRPD's commitments.<sup>48</sup>

Article 27 (1) provides that the right of persons with disabilities to work on an equal basis with others includes: the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. State parties to the CRPD are required to safeguard and promote the realisation of the right to work for persons with disabilities by taking various appropriate steps, including through legislation. Protections must also be extended to those who acquire a disability during employment. Article 27 lists several obligations that State parties are required to implement towards the realisation of the right to work for persons with disabilities.<sup>49</sup> The PDA 2012, having domesticated the CRPD's general obligations contained in Article 4, imposes on Zambia the obligations to respect, protect and fulfil all rights. According to the CRPD committee:

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<sup>46</sup> 'Article 27 of the UN CRPD cross-references the prescriptions of the ICESCR, though not in an as exhaustive way, as it intends by no means to replace the ICESCR, but for stressing the importance of applying a disability lens in the field of work' (Sabrina Ferraina, *Analysis of the Legal Meaning of Article 27 of the UN CRPD: Key Challenges for Adapted Work Setting* (EASPD 2012) 10.

<sup>47</sup> Harpur (n 43) 7.

<sup>48</sup> Deli Ferri, 'Reasonable Accommodation as a Gateway to the Equal Enjoyment of Human Rights: From New York to Strasbourg' (2018) 6 *Social Inclusion* 40,41.

<sup>49</sup> See CRPD, art 27 (1)(a) to (k).



[T]he obligation to fulfil contains obligations to facilitate, provide and promote. The obligation to respect contained in article 4 (1)(d) of the Convention, requires the State to refrain from engaging in any act or practice that is inconsistent with the Convention. The obligation to protect is contained in article 4 (1)(c) and (e), wherein the State party is required to take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes and to take all appropriate measures to eliminate discrimination on the basis of disability by third parties, including private enterprises.<sup>50</sup>

The onus is on State parties to ensure that persons with disabilities have equal access to an open labour market and employment and are also protected from employment discrimination based on disability in both public and private sectors. Although employers within the private sector are not directly responsible for enforcing the convention's obligations, the State is still required to ensure that the private sector complies with the convention's provisions.<sup>51</sup>

Under the CRPD, eliminating discrimination goes beyond non-interference with a person's rights but also involves implementing positive/special measures to facilitate the equal enjoyment of rights by persons with disabilities.<sup>52</sup> As regards the right to work, the prohibition of discrimination on the basis of disability encompasses all spheres of employment; this includes the processes of recruitment, hiring and employment, the continuance of employment, career advancement and safe and healthy working conditions.<sup>53</sup> The CRPD defines discrimination on the basis of disability as:

Any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.<sup>54</sup>

A cardinal tenet of this thesis is that the CRPD's definition of 'discrimination on the basis of disability' recognises the denial of reasonable accommodation as discrimination. (The PDA 2012 adopts this approach). Arguably this element sets the CRPD apart from other

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<sup>50</sup> UNCRPD Committee (n 34), para 55.

<sup>51</sup> See CRPD art 4 (1)(e).

<sup>52</sup> *ibid* art 4

<sup>53</sup> *ibid* art 27(1)(a).

<sup>54</sup> *ibid* art 2.

international human rights conventions.<sup>55</sup> It is incumbent upon the State to take all appropriate steps to ensure that reasonable accommodation is provided to promote equality and eliminate discrimination.<sup>56</sup> The reasonable accommodation duty is a fundamental element for facilitating the enjoyment of rights for persons with disabilities. Although the reasonable accommodation duty applies to various sectors, it is mainly applied within spheres of work and employment. Thus, employers must provide reasonable accommodations for persons with disabilities when needed. The substance of what the reasonable accommodation duty requires is examined in greater detail in subsequent chapters of the thesis.

Zambia is also a party to several International Labour Organisation (ILO) instruments related to the right to work for persons with disabilities, which precede the CRPD. The main ones are Convention No 159 on Vocational Rehabilitation and Employment (Disabled Persons) Convention 1983 and Recommendation No 168 on Vocational Rehabilitation and Employment (Disabled Persons) 1983.

## **1.2 Aims, rationale and objectives of thesis**

By recognising the beneficial role that law plays in reducing societal disparities, this thesis aims to broaden understanding of disability equality and anti-discrimination law in Zambia, focusing on reasonable accommodation and kindred issues in fostering equality and the right to work in Zambia. Given the necessary constraints, this thesis examines various statutory and constitutional issues relating to equality as it translates into the right to work for persons with disabilities. The thesis also seeks to provide an overview of the evolution of Zambia's disability legal framework from colonialism to the present. The thesis lays the groundwork for examining the strengths and limits of the current laws in addressing discrimination and fostering equality for persons with disabilities in the workplace and labour market. The main argument advanced by this thesis is that applying a communitarian

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<sup>55</sup> Marco Fasciglione, 'Article 27 of the CRPD and the Right of Inclusive Employment of People with Autism' in Valentina D Fina and Rachele Cera (eds), *Protecting the Rights of People with Autism in the Fields of Education and Employment: International, European and National Perspectives* (Springer 2015) 150.

<sup>56</sup> CRPD, art 5 (3).

approach, perceived through the lens of Zambian Humanism, provides the most compelling means of advancing substantive equality and addressing disability discrimination.

The thesis seeks to demonstrate that Zambian Humanism, as an indigenous theory and philosophy, advances the ideals implicit in the CRPD. The CRPD calls for a holistic approach to tackling disability discrimination and thus goes beyond requiring the sameness of treatment between individuals or groups. To this end, the thesis argues that Zambian Humanism provides the normative framework and rationale for providing reasonable accommodation and other positive measures for persons with disabilities.

The thesis also demonstrates that Zambian Humanism recognises that economic, social and cultural (ESC) rights are fundamental to an individual's well-being and vital to enabling one to contribute to and benefit from socioeconomic growth through work. The thesis also advances the idea that Zambian Humanism provides Zambia with the theoretical impetus of ensuring the promotion and legal enforcement of ESC rights in a democratic society bearing in mind the absence of such rights within the country's constitution. The thesis sets four objectives, these are to:

1. Establish how Zambian Humanism provides a sound basis for incorporating a human rights approach towards the rights of persons with disabilities as expressed in the CRPD;
2. Examine how Zambia's legislative and regulatory framework protects persons with disabilities at work and in the labour market;
3. Explore some of the legal complexities regarding the concept of reasonable accommodation; and
4. Demonstrate that legal protection and enforcement of ESC rights, such as the right to work, are essential for persons with disabilities in Zambia.

### **1.3 Identifying the research gap and justification of this thesis**

Despite the panoply of legislative enactments, considerable work is still required to challenge perceptions that disability is a human rights issue rather than a charitable one. There is a mismatch between the positive legislative pronouncements and the reality on the

ground.<sup>57</sup> Discrimination against persons with disabilities continues to be a serious problem despite efforts, legislation, and identified benefits of hiring people with disabilities. It is hypothesised that one of the major reasons for this is the lack of legislative guidance to explain in detail the demands and application of equality and anti-discrimination laws. The few court decisions that have considered disability discrimination have not taken the time and initiative to scrutinise the meaning and implications of the current definition of disability and what disability discrimination entails, as demonstrated by the decision in *Musukwa* considered earlier. Ultimately the jury is still out on how Zambian courts will handle cases involving employment disability-discrimination. This thesis tries to bridge this gap by examining the definition of disability and the components of disability discrimination in employment and proposes interpretations that consider the best human rights practices.

Further, until recently, laws aimed at tackling employment inequity and discrimination in Zambia have been framed in the language of prohibition. This means that discrimination has often been treated as a statutory tort requiring only those who suffer harm to bring rights of action against the alleged discriminator. Smith and Allen refer to this approach of addressing discrimination as the 'fault-based model'.<sup>58</sup> In such a system, the law does not impose any duty on the employer or service provider beyond a negative duty to refrain from committing prohibited conduct.<sup>59</sup> Discrimination is treated as a rare occurrence carried out as an individual act that leads to harm against a specific victim and therefore suggests that there is no need for a certain amount of proactivity. In a sense, there is a certain degree of the presumption of innocence where the infraction has occurred unless proved otherwise.<sup>60</sup> In other words, it mis-individualises what is in fact the outcome of a structurally based problem. Arguing from the perspective of racial discrimination in the US, Freeman argues that fault-based anti-discrimination law focuses more on the perpetrator's perspective, instead of the victim's. Discrimination is seen as the intentional conduct of a few 'misguided' individuals, and the law is only there to 'neutralise' the blameworthy conduct.<sup>61</sup> Here anti-

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<sup>57</sup> Shakespeare and others (n 11) 2.

<sup>58</sup> Belinda Smith And Dominique Allen, 'Whose Fault is it? Asking The Right Question to Address Discrimination' (2012) 37 *Alternative LJ* 31,31.

<sup>59</sup> *ibid.*

<sup>60</sup> *ibid* 31.

<sup>61</sup> Alan D Freeman, 'Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine' (1978) 62 *Minn L Rev* 1049,1053.

discrimination law is not concerned with providing a remedy to the socio-economic structures that give rise to the conditions associated with discrimination, that is, seeing discrimination from the victim's perspective.

The converse to the fault-based approach is the 'capacity-based model'. This model or approach addresses inequality within wider society rather than as a single discriminatory act.<sup>62</sup> It recognises that discrimination is widespread and ingrained in practices, systems, institutions and norms that have far-reaching consequences affecting more than a single identifiable victim. Thus, rather than waiting for victims of discrimination or unfavourable treatment to come forward, the capacity-based approach imposes duties to take action where evidence of inequality has been established. 'The notion of equality built into this model assumes all members of society have the potential to develop and contribute to society in a range of ways and that all members are entitled to dignity and the opportunity to develop their capabilities'.<sup>63</sup> This approach calls for removing barriers to equality that exclude certain groups and hamper the development of their capabilities. As will be demonstrated in this thesis, *Zambian Humanism* envisions such an approach.

The last decade has seen an increase in legislative enactments suggesting that Zambia is moving away from traditional anti-discrimination law's complaint-based approach reflective of the fault-based system to a capacity-based approach to equality. However, recent Zambian equality and anti-discrimination legislation has not been comprehensively or academically researched to determine what it represents for the rights of persons with disabilities. This thesis aims to fill part of the knowledge gap regarding the legal meaning of equality regarding the right to work for persons with disabilities in Zambia.

Further, Fasciglione, observes that in several jurisdictions, the implementation of the principle of reasonable accommodation in disability-related laws is slow.<sup>64</sup> Two factors explain this. Firstly, there is a lack of knowledge of what reasonable accommodation is. Reasonable accommodation is easily confused with other general duties, such as accessibility or other positive or special measures necessary to ensure equality for persons with disabilities. A perusal of research conducted with reference to Zambia indicates that

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<sup>62</sup> Smith and Allen (n 58) 31.

<sup>63</sup> *ibid* 32.

<sup>64</sup> Fasciglione (n 55) 151.

more emphasis is placed on accessibility than reasonable accommodation.<sup>65</sup> Secondly, there is also the misconception that reasonable accommodation is costly, which translates into employers' reluctance to employ persons with disabilities. The State must raise awareness of what reasonable accommodation entails in employment.<sup>66</sup> The CRPD Committee's concluding observations indicate a lack of awareness and understanding of reasonable accommodation duties in employment and other spheres.<sup>67</sup> Unfortunately, Zambia is not an exception.<sup>68</sup> The Zambia Agency for Persons with Disabilities (ZAPD) bemoans that the public and government disability focal point persons (DFPPs) are inadequately versed in disability issues, policies and the legislative framework governing the rights of persons with disabilities.<sup>69</sup> This thesis aims to raise awareness about the rights of persons with disabilities and the duty of reasonable accommodation in the workplace.

#### 1.4 Theoretical framework

This thesis uses Zambian Humanism as its theoretical framework. It is a version of African communitarianism developed by Zambia's first President, Kenneth David Kaunda. It advocates for an inclusive and egalitarian society where everyone has equal opportunities to have access to, participate and contribute to the welfare of the community while becoming self-reliant individuals where possible.

Rather than being a static philosophy and ideology, Kaunda conceived Zambian Humanism as a dynamic and evolving collection of ideas that finds its root in a person-centred (instead of a power-based) society based on traditional African society and theistic principles within Christianity. Zambian Humanism transcends various aspects of human endeavour that affect the political, economic, social and cultural, scientific and technological, and defence and security dimensions.<sup>70</sup> This thesis does not provide an exhaustive analysis of these topics.

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<sup>65</sup> See generally, Banda-Chalwe (n 35); Eide and Loeb (n 5).

<sup>66</sup> CRPD, art 8.

<sup>67</sup> See for example UNCRPD Committee, 'Concluding Observations on the Initial Report of South Africa' (23 October 2018) UN Doc CRPD/C/ZAF/CO/1.

<sup>68</sup> UNCRPD Committee, 'List of Issues in Relation to the Initial Report of Zambia' (20 October 2020) UN Doc CRPD/C/ZMB/Q/1, para 5.

<sup>69</sup> Zambia Agency for Persons with Disabilities (ZAPD), *Strategic Plan 2017 – 2021: Promoting Inclusive and Sustainable Development*.

<sup>70</sup> Kenneth D Kaunda, *Humanism in Zambia and A Guide to its Implementation: Part II* (Division of National Guidance 1974).

Instead, its emphasis is on aspects that affect the right to work and employment for persons with disabilities in Zambia. Although others have argued that Zambian Humanism was ineffective in changing Zambia's economic fortunes, this thesis does not engage in those debates because they are too peripheral to the central research question of this thesis.

Nonetheless, this thesis shows that several aspects of Zambian Humanism are re-emerging in policy, legislative and judicial pronouncements despite being discarded as a national ideology in 1991 after the end of Kaunda's presidency. This arguably gives credence to the veracity of Zambian Humanism as a viable theory for enhancing and protecting the rights of persons with disabilities and other disadvantaged groups. Zambian Humanism, with its basic tenets of human dignity, respect, inclusiveness, acceptance, reciprocity, mutual aid and others, can accommodate the rights of persons with disabilities. Kaunda permits this philosophy's development and practical adaptations to everyday life that must evolve through discussion and engagement.<sup>71</sup>

Zambian Humanism has much in common with the political and philosophical ideology called African socialism/Humanism. To this end, it resembles 'Ujamaa' by Nyerere of Tanzania, 'Consciencism' by Nkrumah of Ghana, and South African *Ubuntu*, among others. African Socialism is contextually dependent. Each version of African socialism has distinct features rooted in local cultural traditions and socioeconomic realities.<sup>72</sup> In one breath, it might encompass secular ideals instrumental in social cohesion whilst taking on religious objectives in another, as does Zambian Humanism. What unites the different understandings of African socialism is the shared understanding that colonialism engendered African inequalities and disrupted traditional African culture.<sup>73</sup> Also, each of these ideologies claims to represent a third way between liberal capitalism and Marxist socialism.

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<sup>71</sup> Henry S Meebelo, *Main Currents of Zambian Humanist Thought* (OUP 1973).

<sup>72</sup> Dimas A Masolo, 'Western and African Communitarianism: A Comparison' in Kwasi Wiredu (ed), *A Companion to African Philosophy* (Blackwell Publishing 2004) 489.

<sup>73</sup> *ibid* 493.

### 1.4.1 The rationale for adopting **Zambian humanism**

Article 2 of ILO Convention No 111 provides that State parties should ‘declare and pursue a national policy designed to promote, *by methods appropriate to national conditions and practice*, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof’.<sup>74</sup> Thus, **Zambian Humanism** is adopted to reflect the country’s history and socio-economic and political values. There is growing sentiment in Zambia about departing from legislative provisions reminiscent of the colonial era. These sentiments are based on colonialism institutionalising harmful practices and perpetuating societal inequality that exists today. For example, regarding persons with disabilities, Zambia inherited and continues to maintain statutes that use derogatory terms to describe persons with disabilities. Words such as ‘idiot’, ‘imbecile’, ‘rogue’, and ‘vagabond’ appear under the inherited Penal Code and Criminal Procedure Code, enacted in 1930 and 1933, respectively. As a post-colonial theory, **Zambian Humanism** provides the necessary ideological foundation that sets the country on a path that seeks to depart from the vestiges of colonialism.

Despite being homegrown, **Zambian Humanism**, as a theoretical and analytical instrument, is strange and foreign to legal studies in Zambia. This is surprising considering Kaunda’s challenge to **Zambian lawyers** to create a legal system that reflected the values and circumstances of the **Zambian people**, post-independence, rather than relying on the inherited British legal theory and common law, which he believed was not suitable for the country’s development.<sup>75</sup> Kaunda believed that lawyers should prioritize the interests of Zambia rather than individualistic and capitalist approaches to law. Accordingly, this thesis is structured to assist the reader in grasping **Zambian Humanism’s** fundamental tenets and realising its potential for assessing the rights of not only persons with disabilities but other vulnerable and marginalised groups. By adopting **Zambian Humanism** as the theoretical framework, this thesis aims to provide the vital link between its values and those of the CRPD and other human rights conventions to which Zambia is a party.

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<sup>74</sup> Discrimination (Employment and Occupation) Convention, 1958 (No. 111) (emphasis added).

<sup>75</sup> Kenneth Kaunda, ‘The Watershed Speech’ (Address to the National Council of the United National Independence Party, 30 June – 3 July 1975) 18.



## 1.4.2 Relationship to Critical Disability Theory

Born out of a quest to fight colonialism, racism and apartheid, Zambian Humanism can situate itself among the various disability theories that have now become mainstream. To this end, when applied to the plight of persons with disabilities, Zambian Humanism finds points of convergence with ideas emanating from Critical Disability Theory (CDT). Critical disability theory 'refers to a diverse, interdisciplinary set of theoretical approaches [whose] task is to analyse disability as a cultural, historical, relative, social, and political phenomenon'.<sup>76</sup> CDT is therefore a way of understanding disability that emphasises the importance of inclusivity and considers the specific needs and experiences of persons with disabilities rather than just upholding abstract ideas of rights.<sup>77</sup> Just like CDT, Zambian Humanism is concerned with challenging the political, socio-economic and cultural conditions oppressive towards persons with disabilities. Zambian Humanism converges with CDT in four places, as demonstrated below.

### 1.4.2.1 Global South perspective

Much of what exists about disability comes from perspectives of the Global North. It is not unusual to find a generalised view of disability in the Global South with minimal regard to the different political histories, cultures and ethnicities spread across it and how perceptions of disability might differ.<sup>78</sup> This is despite the Global South accounting for the highest prevalence of persons with disabilities due to the devastating effects of war, famine, poverty and disease, to mention a few.<sup>79</sup> Grech laments that the exportation of theories and epistemologies from the West has carried with it 'generalisations simplifications, omissions and neo-colonising tones' in understanding disability across different cultures. This does not leave room for an understanding of disability and persons with disabilities that considers

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<sup>76</sup> Melinda C Hall, 'Critical Disability Theory', *The Stanford Encyclopaedia of Philosophy* (Winter edn, 2019) 1.

<sup>77</sup> Richard Devlin and Dianne Pothier, 'Introduction: Toward a Critical Theory of Dis-Citizenship', in Dianne Pothier and Richard Devlin (eds), *Critical Disability Theory: Essays in Philosophy, Politics, Policy and Law* (UBC Press 2006) 2.

<sup>78</sup> Toyin Falola and Nic Hamel, 'Africanizing Disability: Toward an Articulation of African Disability Studies', in Toyin Falola and Nic Hamel (eds), *Disability in Africa: Inclusion, Care, and the Ethics of Humanity* (University of Rochester Press 2021) 2.

<sup>79</sup> Helen Meekosha, 'Decolonising Disability: Thinking and Acting Globally' (2011) 26 *Disability & Society* 667, 679.

varying ways in which disability is perceived and treated whilst taking stock of various factors and dynamics under which persons with disabilities are situated.<sup>80</sup>

When applied to disability rights, Zambian Humanism lends itself to understanding disability rights issues from a Global South perspective, as some critical disability theorists have voiced the need for so doing.<sup>81</sup> Meekosha, a CDT theorist advocates for Global South perspectives to be heard within disability rights discourse. Meekosha attributes the emergence of some impairments in the Global South to the Global North's corporate colonialism. She observes, 'impaired people are produced...by the north, either directly or indirectly in the struggle over the control of minerals, oil and other economic resources...'.<sup>82</sup> Ervellas also posits similar views by observing that 'conditions of global capitalism produce spaces of extreme exploitation and oppression in both the imperialist states and their former colonies'.<sup>83</sup> The World Health Organization (WHO) also acknowledges that colonisation has contributed to indigenous peoples' high prevalence of disability.<sup>84</sup> From a Zambian perspective, Kaunda observed that even after the formal emblems of colonialism were eliminated, their ghostly presence continued to haunt politically and constitutionally independent people.<sup>85</sup> To this end, a perspective shared in common between Zambian Humanism and CDT is that they are both very wary of the exploitative nature of Western capitalism.

#### 1.4.2.2 Indigenous theory and Post-colonial Theory

Whyte and Ingstad note that disability research must consider 'people's own experiences of what is disabling in their world rather than in some universal definition'.<sup>86</sup> However, Onazi observes that human rights literature rarely addresses how African ethical and moral values

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<sup>80</sup> Sahun Grech, 'Disability and the Majority World: A Neo-Colonial Approach' in Dan Goodley, Bill Hughes and Lennard Davis (eds), *Disability and Social Theory* (Palgrave Macmillan 2012) 59.

<sup>81</sup> Shaun R Cleaver and others, 'Finding Help: Exploring the Accounts of Persons with Disabilities in Western Zambia to Improve Their Situation' (2019) JHR 1.

<sup>82</sup> Meekosha (n 79) 668.

<sup>83</sup> Nirmala Erevelles, *Disability and Difference in Global Contexts: Enabling A Transformative Body Politic* (Palgrave Macmillan 2011) 122.

<sup>84</sup> Lisa J Pulver and others, 'Indigenous Health—Australia, Canada, Aotearoa New Zealand and the United States—Laying Claim to a Future that Embraces Health for Us All' (World Health Report 2010 Background Paper No 33).

<sup>85</sup> Kenneth D Kaunda, *A Humanist in Africa: Letters to Colin Morris from Kenneth Kaunda* (Longmans 1963) 50.

<sup>86</sup> Susan Reynolds Whyte and Benedicte Ingstad, 'Introduction: Disability Connections' in Benedicte Ingstad and Susan Reynolds Whyte (eds), *Disability in Local and Global Worlds* (University of California Press 2007) 11.

can correct cultural attitudes and views about disability.<sup>87</sup> As an indigenous theory, Zambian Humanism can add its voice to disability rights scholarship by providing a glimpse of some of the attitudes and behaviours that accompany the treatment of persons with disabilities in Zambian society. The central tenets of Zambian Humanism were inspired by traditional African society, albeit modified to fit current needs to make the concept practical. Kaunda conceived Zambian Humanism as a synthesis of traditional African society's social values and norms and the aspirations and conditions of modern Zambia.

In a sense, part of the end goal of Zambian Humanism was to undo the harm done by colonialism's dehumanisation of indigenous cultures and values by erasing the identities of the colonised, through the forced assimilation of colonised peoples into the dominant culture of the colonisers. Kaunda believed that it was important for Zambia to reclaim and promote its own culture and moral foundations to restore the dignity of its people and its nation. He believed that by doing so, Zambia could counter the negative western influences and reclaim its own identity, which was essential for the preservation of nationhood.<sup>88</sup> He acknowledged that borrowing positive aspects of foreign cultures can be beneficial but emphasised the need to defend against values that could erode or undermine Zambian culture 'through cultural conquest'.<sup>89</sup> He also spoke about the importance of rejecting and fighting against cultural activities that could destroy Zambian cultural values and dehumanise Zambians by making them into 'faint carbon copies' of other cultures.<sup>90</sup>

Kaunda's sentiments here reflect Fanon's description of how colonialism is not only disruptive of a people's culture but also works towards obliterating it. Fanon thus notes that 'this cultural obliteration is made possible by the negation of national reality, by new legal relations introduced by the occupying power, the marginalisation of the indigenous population and their customs by colonial society, by expropriation and enslavement'.<sup>91</sup>

As a post-colonial theory, Zambian Humanism is a philosophy aimed at demolishing the systemic racism, the ostracising othering and oppression of black people by colonialism. Its

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<sup>87</sup> Oche Onazi, *An African Path to Disability Justice: Community, Relationships and Obligations* (Springer 2020) 10.

<sup>88</sup> Kaunda (n 75) 28.

<sup>89</sup> *ibid* 28.

<sup>90</sup> *ibid*.

<sup>91</sup> Frantz Fanon, *The Wretched of the Earth* (Richard Philcox tr, Grove Press 2004) 170.

views about the role of colonialism in creating disabling bodies and perpetuating discrimination and segregation find their expression within CDT. As observed earlier, CDT recognises colonialism's role in disabling indigenous populations. Colonialism dehumanised them and destroyed their 'physical, emotional, economic and cultural life'.<sup>92</sup> Similarly, Kaunda, in conceiving Zambian Humanism, was concerned with colonialism's psychological trauma on the black person and how it dehumanised them when he said:

... colonialism..., devalued Man. It created elite societies in which man's worth was determined by an irrelevant biological detail – skin pigmentation. And even more serious, the colonialists set out to destroy our self-confidence. They dinned into the African mind the idea that we were primitive, backward, and degraded, but for their presence amongst us, we would be living like animals.<sup>93</sup>

Here Kaunda also demonstrates the intersectionality between race and disability. Hence just like CDT, Kaunda, recognises that 'ability and dis/ability are perceived and created based on ideologies of race and located within social and institutional structures...'.<sup>94</sup> The intersections of exclusion based on race and disability found their expression in colonial laws and policies, some still in force today, with Kaunda asserting that 'racial attitudes hardened over generations are not easily reversed'.<sup>95</sup> The colonialists transformed their monopoly on power and skills into a philosophy of racial dominance. Black Africans faced restrictions and disabilities that the white minority population did not. Instead, white populations received more favourable and preferential treatment than blacks. Chapter 3 of the thesis will also show how scientific racism was employed to validate racial hierarchies and segregation and further ostracise Africans with disabilities.

Further, Zambian Humanism shows that racial inequality, discrimination, segregation and oppression flow as natural corollaries of unequal distribution of power and resources. Post-colonial scholar Said shares this view in his depictions of the 'Occident' and the 'Orient' where the colonised is depicted as a lesser underdeveloped being 'ruled by a superior, developed or metropolitan coloniser'.<sup>96</sup> In *Orientalism*, Said speaks about how biological determinism and moral-political admonishments were used to frame the Orientals, as with

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<sup>92</sup> Meekosha (n 79) 672.

<sup>93</sup> Kaunda (n 85) 21.

<sup>94</sup> Subini A Annamma, David Connor and Beth Ferri, 'Dis/ability Critical Race Studies (DisCrit): Theorizing at the Intersections of Race and Dis/ability' (2012) 16 *Race Ethnicity and Education* 1,7.

<sup>95</sup> Kaunda (n 85) 58.

<sup>96</sup> Edward W Said, *Reflections on Exile and Other Essays* (Harvard University Press 2000) 295.

all other people, as backward, degenerate, uncivilised, and retarded. He further observes that the Orient had something in common with elements within Western society that were perceived as not conforming to the normative standards of citizenship, such as ‘delinquents, the insane, women and the poor’. He thus states, ‘[o]rientalists were rarely seen or looked at; they were seen through, analysed not as citizens, or even people, but as problems to be solved or confined or-as the colonial powers openly coveted their territory -taken over’.<sup>97</sup> Similar sentiments reflect the treatment of Zambians during the colonial era, as will be uncovered in chapter 3.

Baynton observes that ‘when categories of citizenship were questioned, challenged, and disrupted, disability was called on to clarify and define who deserved, and who was deservedly excluded from, citizenship’.<sup>98</sup> Therefore, to comprehend the structural significance of disability and how those with disabilities are excluded from ‘citizenship’, it is necessary to take stock of historical realities and how they affect the current and future circumstances of persons with disabilities.<sup>99</sup> Zambian Humanism is therefore valuable for understanding the intricacies of the environment in which disability in Zambia is created.

Further, Kaunda’s views about the dehumanisation of black people because of racism and colonialism parallel CDT’s articulation and analysis of ‘ableism’. Annamma and others observe that the ‘forces of racism and ableism circulate interdependently, often in neutralised and invisible ways, to uphold notions of normalcy’.<sup>100</sup> They thus conclude that attempts to relate disability, in the form of lesser intelligence, to black and brown bodies have returned in innumerable forms throughout history. (Today, IQ test scores are used to validate such assumptions).<sup>101</sup> Ableism refers to social prejudice and discrimination against persons with disabilities founded on the notion that certain bodily and mental traits are superior and, therefore, must be valued above others. Like racism, ableism labels entire groups of individuals as the ‘other’ and involves conscious and unconscious prejudices,

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<sup>97</sup> Edward W Said, *Orientalism* (Vintage Books 1978) 207.

<sup>98</sup> Douglas C Baynton, ‘Disability and the Justification of Inequality in American History’ in Paul K Longmore and Lauri Umansky (eds) *The New Disability History: American Perspectives* (New York University Press 2001) 33.

<sup>99</sup> Richard Devlin and Dianne Pothier, ‘Dis-citizenship’ in the Law Commission of Canada (ed), *Law and Citizenship* (UBC Press 2006).

<sup>100</sup> Subini A Annamma, Beth Ferri, and David Connor, ‘Disability Critical Race Theory: Exploring the Intersectional Lineage, Emergence, and Potential Futures of DisCrit in Education’ (2018) 42 *Review of Research in Education* 46, 55.

<sup>101</sup> *ibid.*

beliefs, and generalisations about persons with disabilities. According to Campbell, ableism refers to:

A network of beliefs, processes and practices that produces a particular kind of self and body (the corporeal standard) that is projected as the perfect, species-typical and therefore essential and fully human. Disability then is cast as a diminished state of being human.<sup>102</sup>

Similarly, Kaunda recognises that colonialism set whiteness and Eurocentric ideals as the normative standards for blacks to emulate and attain. To borrow the words of Erevelles, (speaking from the American perspective): ‘whiteness as the property was an intrinsic part of the ensemble of discourses of competitive entrepreneurship, the work ethic, productivity, efficiency, and autonomy, among others’.<sup>103</sup> From a Zambian Humanism perspective, Kaunda thus asserts that colonialists attempted to create white men out of Africans and to create a new identity for the colonised.<sup>104</sup> Kaunda thus laments the colonial attitude of trying to ‘civilise’ the African. He argues that this attitude by the colonialists imbued within the Africans an inferiority complex that, even after independence, continued to exist in that Africans continued to live by white validation. He observed:

...even today in an independent African State you will find a certain sector of the population suffering from a *Bwana* complex, they cannot stand on their own feet as free men but must look over their shoulder all the time for the approval of the White Man.<sup>105</sup>

Kaunda’s observations about the psychological legacy left by colonialism here reflect what Critical Race Theory (CRT) terms ‘internalised racism/ oppression’, where people of colour think less of themselves because of experiences with racism.<sup>106</sup> By adopting this approach of internalised oppression, Campbell advances the notion of internalised ableism or disabled self-hatred.<sup>107</sup> Campbell argues that the internalisation of ableism is a two-pronged approach, ‘the distancing of disabled people from each other and the emulation by disabled

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<sup>102</sup> Fiona K Campbell, *Contours of Ableism: The Production of Disability and Aabledness* (Palgrave Macmillan 2009) 5.

<sup>103</sup> Nirmala Erevelles, ‘(Im)Material Citizens: Cognitive Disability, Race, and the Politics of Citizenship’ in Matthew Wappett and Katrina Arndt (eds), *Foundations of Disability Studies* (Palgrave Macmillan 2013) 166.

<sup>104</sup> Kaunda (n 85).

<sup>105</sup> *ibid* 21.

<sup>106</sup> Fiona K Campbell, ‘Exploring Internalized Ableism using Critical Race Theory’ (2008) 23 *Disability & Society* 151.

<sup>107</sup> *ibid* 151.

people of ableist norms'.<sup>108</sup> The first prong ('tactics of dispersal') suggests that the dominance of the medical field, negative portrayal of disability, and lack of celebratory role models make it difficult for the disabled to form an identity and culture. The second prong (emulating the norm) refers to how marginalised or disabled people are required to conform to normative standards set by society. Campbell thus states that '[i]n order to attain the benefits of a 'disabled identity' one must constantly participate in the processes of disability disavowal, aspire towards the norm, reach a state of near able-bodiedness, or at the very least to affect a state of 'passing'''.<sup>109</sup>

There is a sense of Zambian Humanism that recognises the challenges of trying to emulate the norm. Kaunda argues that there are certain bounds that equality cannot cross. Thus, whilst arguing that the 'pursuit of equality is to prohibit the ruthlessness in the strong, and to protect the weak from wanton injury', Kaunda notes that equality 'does not seek to eliminate individual difference or their consequences'.<sup>110</sup> The goal must be to accommodate differences instead. In Zambian Humanism, the individual is the highest symbol of God's creation and deserves respect and dignity. As such, Kaunda partly conceived Zambian Humanism as one of the means of decolonising the Zambian mind from internalised oppression that had set in on account of colonialism. (See 4.2.1).

Zambian Humanism asserts that all people, regardless of cultural achievements, are fundamentally the same, no matter how obvious their superficial distinctions are. Negative prejudices that one might have against those with disabilities would, therefore, not reflect Zambian Humanism and the inclusive society it seeks to achieve. Under Article 3 of the CRPD, respect for difference is one of the convention's general principles; therefore, 'acceptance of persons with disabilities as part of human diversity and humanity' is cardinal.<sup>111</sup>

However, even with all the good, it stands for, Zambian Humanism and African communitarianism generally are not immune to creating ableist societies. This stems from African communitarian's conception of personhood, whose attainment requires an

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<sup>108</sup> *ibid* 155.

<sup>109</sup> *ibid* 156.

<sup>110</sup> Kenneth Kaunda, *Letter to my Children* (Veritas 1973) 62.

<sup>111</sup> CRPD, art 3; UNCRPD Committee, 'General Comment No 6 Article 5: Equality and Non-discrimination' (26 April 2018) UN Doc CRPD/C/GC/6, para 9.

individual to develop socially appropriate capacities.<sup>112</sup> African communitarianism often emphasises the need to conform to communal norms and rules such that those who do not face the prospect of ostracism from their community. Within African communitarianism, to be a person or fully human, one must be capable of communal relations and mutual obligations that facilitate attaining personhood. Individuals must 'identify with each other and exhibit solidarity with one another' to maintain the communal relationship.<sup>113</sup> For persons with disabilities, this places them at an obvious disadvantage. Depending on the severity of their impairments, they might not always be able to fulfil reciprocal obligations. In response to such concerns, Onazi calls for a departure from the symmetrical nature of mutual obligations towards an asymmetrical one premised on altruism.<sup>114</sup> Kaunda advances a similar argument by observing that it is not about what or how much one can or cannot do for a society that matters. Instead, it is about society appreciating one's mere existence that matters.<sup>115</sup> In this sense, reciprocity of obligations does not equate to a quid-pro-quo arrangement. The Western communitarian theorist MacIntyre also takes a similar approach by calling for communal recognition of those who cannot actively participate in community life. Writing about the place of the person with disabilities in the community, MacIntyre calls for their recognition in a manner that promotes their self-respect. Thus, a fundamental aspect of this communal recognition rests on the belief that each community member is a source from whom we can learn and might need to learn about our shared well-being and personal growth.<sup>116</sup>

The CRPD Committee, addressing the right to work, has noted that an ableist system is harmful to persons with disabilities. It recognises that ableist ways of thinking contribute to the misfortune and suffering of those with disabilities, which devalues their existence.<sup>117</sup>

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<sup>112</sup> Masolo (n 72).

<sup>113</sup> Thaddeus Metz, 'An African Theory of Moral Status: A Relational Alternative to Individualism and Holism' (2011) 15 *Ethic Theory Moral Prac* 387, 393.

<sup>114</sup> Onazi (n 87) 23.

<sup>115</sup> Kaunda (n 85) 27.

<sup>116</sup> Alasdair MacIntyre, *Dependent Rational Animals: Why Human Beings Need the Virtues* (Open Court 1999) 135.

<sup>117</sup> UNCRPD Committee (n 34), para 3 and 7.



### 1.4.2.3 Recognises the limits of neo-liberalism

Meekosha and Shuttleworth observe that 'what unites [critical disability studies] theorists is an agreement that disabled people are undervalued and discriminated against and this cannot be changed simply through liberal or neo-liberal legislation and policy'.<sup>118</sup> From a CDT perspective, Goodley also observes that neoliberalism creates a privatised version of ableism that privileges the non-disabled in work, entrepreneurship and education. Thus, owing to the desire for autonomy and independence, the emphasis in a society driven by market supremacy is that the neoliberal-able citizen will progress through individual merit and hard work.<sup>119</sup> Persons with disabilities are seen as unproductive in a neoliberal society and are likely to be ostracised. And in the name of austerity, social benefits that would otherwise help them are sacrificed. On the other hand, the rich and giant multinational corporations get tax breaks, bailouts and other incentives under the pretext that they are more beneficial to improving society.<sup>120</sup>

As will be demonstrated in this thesis, Zambian Humanism seeks to dismantle systems that perpetuate societal inequalities. Like other forms of communitarianism, Zambian Humanism is the antithesis of the excesses of individualism espoused by liberal ideology.<sup>121</sup> In this regard, Zambian Humanism argues that capitalism via neo-liberalism does not adequately address inequality. Zambian Humanism is inclusive of everyone in all aspects of life. It envisages a society with no room for 'the oppressed' and 'the oppressor'.<sup>122</sup> Like CDT, it rejects economic and political systems based on individualism and competition that create classes within society.<sup>123</sup> Kaunda acknowledges that those who compete economically can earn rewards and be assessed by their accomplishments, not their circumstances of birth. However, he does not downplay the fact that 'the opportunity of attainment implies the possibility of failure'; those who fail to meet economic standards are made to feel useless

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<sup>118</sup> Helen Meekosha and Russell Shuttleworth, 'What's So 'Critical' About Critical Disability Studies?' (2009) 15 *AJHR* 47, 65.

<sup>119</sup> Dan Goodley, *Dis/Ability Studies: Theorising Disablism and Ableism* (Routledge 2014) 26.

<sup>120</sup> *ibid.*

<sup>121</sup> Dimas A Masolo, *Self and Community in a Changing World* (Indiana University Press 2010) 14.

<sup>122</sup> Kenneth Kaunda, *Humanism in Zambia and a Guide to Its Implementation: Part I* (ZIS 1967) 6.

<sup>123</sup> Patrick E Idoye, 'Ideology and the Theatre: The Case of Zambia' (1988) 19 *Journal of Black Studies* 70.

and unwanted.<sup>124</sup> In *Zambian Humanism*, social and relational ties weigh much more in balance than individual achievement.

Communitarians' main objection against the liberal theory is its conceptualisation of the individual self.<sup>125</sup> As far as liberalism is concerned, the individual exists before any social attachments. In other words, the individual is considered self-reliant and free from relational ties with others. Any relationships and cooperative engagements must be a product of agreement under a social contract. In contrast, for communitarians, social attachments not only determine the self but an individual is seen as forming a constituent element of the community in which they live.<sup>126</sup> Western communitarian thinkers such as Michael Sandel argue for the importance of an individual's relational ties to their communities. Arguing against the Rawlsian self, Sandel notes that it:

Rules out the possibility that common purposes and ends could inspire more or less expansive self-understandings and so define a community in the constitutive sense, a community describing the subject and not just the objects of shared aspirations.<sup>127</sup>

Contrary to perceptions that communitarianism diminishes individual self-worth, it is a more accurate reflection of the social nature of human beings and offers a more successful way of organising society.

#### **1.4.2.4 Recognises the limits of formal equality**

While neo-liberalism does not consider difference as a reason for responding to political, social and legal inequality, CDT calls for a response that sometimes requires consideration of individual and contextual differences when tackling inequalities faced by persons with disabilities.<sup>128</sup> CDT borrows its arguments on the limits of formal justice/equality found in Critical Race Theory (CRT). CRT argues that formal justice/equality cannot respond to the socioeconomic inequalities faced by the historically marginalised.<sup>129</sup> Like CDT, *Zambian Humanism* supports a version of equality that considers differences in some situations. It

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<sup>124</sup> Kaunda (n 85) 52.

<sup>125</sup> Michael Sandel, *Liberalism and the Limits of Justice* (CUP 1998).

<sup>126</sup> Shlomo Avineri and Avner De-Shalit, 'Introduction', in Shlomo Avineri and Avner De-Shalit (eds), *Communitarianism and Individualism* (OUP 1992) 3.

<sup>127</sup> Sandel (n 125) 62.

<sup>128</sup> David L Hosking, 'Critical Disability Theory' (4<sup>th</sup> Biennial Disability Studies Conference, Lancaster University, 2008) 11.

<sup>129</sup> Erevelles (n 103) 148.

requires a form of equality that corrects past and structural discrimination. As will be demonstrated in this thesis (See 4.6), *Zambian Humanism* reflects Fredman's four-dimensional approach to substantive equality, developed to address inequality practically. Fredman's four-dimensional approach encompasses several key aspects, namely: (i) addressing and rectifying disadvantage; (ii) addressing and rectifying stigma, stereotyping, and humiliation; (iii) promoting social inclusion and political voice through active participation; and (iv) accommodating difference and facilitating structural change.<sup>130</sup> In alignment with Fredman's framework, the CRPD Committee in General Comment No. 6 adopts a comparable approach through its conceptualisation of 'inclusive equality'.<sup>131</sup> The Committee acknowledges that the concept of inclusive equality adopts a substantive understanding of equality and expands upon its scope by encompassing the following dimensions:

- (a) a fair redistributive dimension aimed at addressing socioeconomic disadvantages.
- (b) a recognition dimension focused on combating stigma, stereotyping, prejudice, and violence, while also recognizing the inherent dignity of individuals and their intersectionality.
- (c) a participative dimension that reaffirms the social nature of individuals as members of social groups and emphasizes the complete recognition of their humanity through inclusion in society.
- (d) an accommodating dimension that emphasizes the importance of creating space for difference as an essential aspect of human dignity.<sup>132</sup>

Although the exact wording of the term 'substantive equality' might not have existed at the time Kaunda conceived *Zambian Humanism*, there is a strong sense and evidence to suggest (as will be demonstrated in chapter 4), that the theory encompasses this four-dimensional approach. By its very nature, substantive equality transcends negative obligations in protecting individual rights but also requires positive action. As such, to adequately respond to the needs of persons with disabilities and enable them to participate in society fully, CDT requires an equal appreciation of both civil and political rights (CP rights) and ESC rights. Substantive equality enforces the idea that human beings have responsibilities towards one

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<sup>130</sup> Sandra Fredman, 'Substantive Equality Revisited' (2016) 14 *ICON* 712.

<sup>131</sup> UNCRPD Committee, 'General Comment 6: Equality and Non-discrimination' (26 April 2018) UN Doc CRPD/C/GC/6, para 11.

<sup>132</sup> *ibid* para 11.

another. It recognises that they are interdependent and calls for fair and equitable sharing of resources. Whilst appreciating the importance of individual autonomy, it still recognises that an individual is part of a larger group and thus has a mutual responsibility to share resources with the vulnerable and disadvantaged in society. Therefore, it is placed upon the government to institute positive measures that address the unfortunate results of past discrimination. This thesis will argue that Zambian Humanism calls for a similar perspective.

After evaluating the reasons for using Zambian Humanism as the guiding theoretical framework for this thesis, it is necessary to briefly discuss the various methods used to examine the subject matter of the study.

## **1.5 Methodology**

Doctrinal, interdisciplinary, comparative and historical methods are used to analyse the subject matter of this thesis thoroughly and efficiently.

### **1.5.1 Doctrinal approach**

This study is a doctrinal examination of Zambia's legal framework. The research was conducted through desk research which involved a review of Zambian and foreign legislation and case law. This also involved an examination of international and regional instruments, reports and guidelines applicable in the area of disability anti-discrimination law and to which Zambia is a party. The study made use of various articles, and books in the areas of disability law, equality, discrimination law, human rights law and other works governing some of the theories in disability studies.

Regarding the sources of Zambian Humanism, its pure and practical elements are found in two of Kenneth Kaunda's works, *Humanism in Zambia and A Guide to its Implementation* (Part I 1967; and Part II 1974). Other essential aspects of the ideology are drawn from Kaunda's other works ranging from books, academic and newspaper articles, speeches and political addresses, and interviews. This thesis also depends on several works that critically assess Zambian Humanism from the vantage point of disciplines other than law.

The study also incorporates an interdisciplinary approach, drawing insights from experts in various fields such as equality, critical disability studies, sociology, economics, philosophy, anthropology, and more. The fact that Zambian Humanism transcends various disciplines also warrants this approach. Additionally, this approach is important because disability is a complex phenomenon that cannot be fully understood through a single lens or discipline. As uncovered in this thesis, disability is not just a medical or individual problem, but is also shaped by social, economic, and political factors. Therefore, an interdisciplinary approach is necessary to gain a comprehensive understanding of disability and its impact on individuals and society. To this end, 'one must take account not only of legislative rules, judicial decisions, the "law in the books", and also of general conditions of business, customs, and practices, but in fact of everything whatever which helps to mould human conduct in the situation under consideration'.<sup>133</sup>

### 1.5.2 Comparative approach

Although this thesis does not aim to be an in depth comparative legal study, it nonetheless adopts a comparative element by drawing on legal material from other jurisdictions, mainly the US, UK, Canada, and South Africa. The comparative element is employed to ascertain whether existing legal models from the comparator jurisdictions can serve as instructive practices or standards to be adopted or best avoided by Zambia by highlighting both the benefits of such practices or how they have generated difficulties for persons with disabilities. This approach is primarily adopted in chapters 6 and 7 which both examine the inherent challenges with Zambian law within the context of the research topic and how the comparator jurisdictions have approached similar challenges and the potential for legal reforms in Zambia. Zweigert and Kötz make the case for the comparative study of law by stating that:

The method of comparative law can provide a much richer range of model solutions than a legal science devoted to a single nation, simply because the different systems of the world can offer a greater variety of solutions than could be thought up in a lifetime by even the most imaginative jurist who was corralled in his own system.<sup>134</sup>

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<sup>133</sup> Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998) 11.

<sup>134</sup> *ibid* 15.

Therefore, the main aim of adopting this comparative element is to aid in identifying the existing gaps within Zambia's legal framework and to understand the concept of reasonable accommodation and other issues that are conspicuous within disability discrimination laws throughout the world. The thesis thus develops from an understanding that when it comes to disability law, these comparator jurisdictions are very influential geopolitically and as regards the development of international legal standards. As such, the use of comparative analysis in this work can be justified because it is a 'useful methodology for considering the desirability of introducing forms of legal regulation that have been successfully introduced in other jurisdictions as a response to analogous issues'.<sup>135</sup> When presenting the now PDA 2012 as a bill before parliament, it was noted that the bill, when enacted into law, would ensure that Zambia complied with its international obligations and the prevailing best practice in the promotion and protection of all human rights for persons with disabilities.<sup>136</sup>

Accordingly, the comparator jurisdictions are helpful both as illuminating and persuasive authorities regarding the duty of reasonable accommodation and similar issues. For instance, the promotion of equality and civil rights for persons with disabilities in international law can be credited to the influence of the American social model via the Americans with Disabilities Act 1990 (ADA).<sup>137</sup> The ADA has had a great influence on the disability laws of a number of countries which have formulated their statutes in a similar manner in a bid to guarantee equal rights and equal access to their citizens with disabilities.<sup>138</sup> The ADA was also seen as instrumental in transposing a rights-centred version of the social model into European Union legislation.<sup>139</sup>

Zambia being a common law jurisdiction and a former British colony continues to borrow and rely heavily on a number of legal provisions and court decisions emanating from the UK. It is thus prudent that any discussion of the law in Zambia be premised on the prevailing situation in the UK. And with reference to the study of disability law and concepts such as

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<sup>135</sup> Michael Salter and Julie Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Pearson 2007) 183.

<sup>136</sup> National Assembly, *Official Verbatim Report of the Parliamentary Debates of the Third Meeting-First Session of the Eleventh National Assembly, 19 June - 20 July 2012* (National Assembly of Zambia 2012) 122.

<sup>137</sup> Michael Ashley Stein and Penelope J S Stein, 'Beyond Disability Civil Rights' (2006) 58 *Hastings LJ* 1203,1208.

<sup>138</sup> *ibid* 1208.

<sup>139</sup> Vlad Perju, 'Impairment, Discrimination, and the Legal Construction of Disability in the European Union and the United States' (2011) 44 *Cornell Intl LJ* 279, 285.

reasonable accommodation, Lawson notes that the UK is an instructive point of reference for other jurisdictions, having been the first European country to introduce such laws.<sup>140</sup>

The choice of South Africa is because it lies in close proximity to Zambia (both being countries in Southern Africa). Apart from the obvious geographical position, Zambia and South Africa have a shared history in the struggle against apartheid, with Kaunda having committed tremendous efforts towards this struggle influenced by his own Zambian Humanist philosophy. Importantly the South African human rights legal system is also among the most progressive in the world. Its court decisions provide a wealth of material concerning the interpretation of disability law and kindred issues. Of practical importance to this thesis is that the South African courts have readily applied *Ubuntu* (the South African version of African communitarianism) in some of their decisions on human rights and equality. Like South Africa, Canada's disability jurisprudence is equally progressive and adopts a more expansive conception of disability discrimination than the US and the UK.

### 1.5.3 Historical approach

This thesis includes an element of historical contextualisation. Recent judicial decisions and legislative enactments that have enlarged the rights of historically disadvantaged groups require consideration of Zambia's historical context. The very nature of understanding the legal aspects of disability and the rights of persons with disabilities requires historical reflection. As will be demonstrated in this thesis, the legal definition of disability and the various models underpinning the conceptualisation of disability are all products of history. According to Bhat, 'historical legal research exposes the social transformation dimension of law and gives clues for understanding the present law'.<sup>141</sup> Applying this approach to the current thesis contributes to a more thorough and nuanced analysis of understanding the significance of the current legal and policy reforms. Historical enquiries are an important means of appreciating 'the extent to which the guiding ideas, beliefs and values contained within, or otherwise attributed to or associated with, the research topic has come to be constituted in their present but still developing form'.<sup>142</sup> Additionally, an analysis of the law

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<sup>140</sup> Anna Lawson, *Disability and Equality Law in Britain: The Role of Reasonable Adjustment* (Hart 2008).

<sup>141</sup> P Ishwara Bhat, *Ideal and Methods of Legal Research* (OUP 2020) 206.

<sup>142</sup> Salter and Mason (n 135) 193.

based on Zambian Humanism cannot be divorced from a consideration of Zambia's political and socio-economic history.

## **1.6 Structure of thesis**

Chapter one, laid out above, sets the scene for the rest of this thesis consisting of nine chapters. Chapter two outlines the various models of disability that apply to Zambia. The chapter discusses the models that shape how disability is conceptualised and understood in Zambian society and their influence on disability legislation. Chapter three explores the colonial history of disability legislation in Zambia. This chapter aims to illustrate how some of the existing ableist norms today reflect the country's colonial past. By exploring colonial disability legislation and policies, the chapter demonstrates colonialism's sordid past and how it institutionalised systemic discrimination against persons with disabilities, the effects of which are still felt today.

Chapter four seeks to situate the meaning of equality in post-independence Zambia by looking at the two political ideologies that reflect Zambia's response to discrimination and inequality as an independent state. These ideologies are Zambian Humanism and neo-liberalism. Therefore, the chapter begins by examining Kenneth Kaunda's Zambian Humanism as a developmental philosophy for Zambia and a human rights tool against colonialism, apartheid, and the racial mistreatment of black Africans. The chapter outlines the features of Zambian Humanism and how they interact with various themes within disability and human rights discourse. Chapter four also examines the entry of neo-liberalism's free market ideologies in response to Zambian Humanism and what it signified for persons with disabilities. By considering parallels to Fredman's four-dimensional approach to substantive equality, the chapter concludes that Zambian Humanism is relevant in today's human rights discourse concerning the rights of persons with disabilities.

In seeking to demonstrate the implied return of Zambian Humanism's values, chapter five examines Zambia's current equality and disability legislative framework and what it means for the right to work for persons with disabilities. The chapter demonstrates that the current legislative direction is consistent with the ideological agenda of Zambian Humanism and the CRPD's goal of advancing substantive equality.



Chapter six introduces and examines the concept of reasonable accommodation presented within Zambia's legal framework. Focusing on the definition of disability and the duty to provide reasonable accommodation, it interrogates whether the Zambian policy and legislative framework provide sufficient protection to persons with disabilities in the workplace. It examines how the comparator jurisdictions have interpreted and implemented similar statutory provisions. The chapter also addresses the competing goals of accommodating employees with disabilities in the workplace while respecting the employer's right to organise and run their undertaking efficiently. The ultimate purpose of this chapter is to interrogate the law on reasonable accommodation in Zambia.

Chapter seven proceeds from the foundation set by chapter six. This chapter aims to examine the acceptable justifications against providing reasonable accommodation, as provided under Zambian law. It examines the relationship between reasonable accommodation and undue burden and how the comparator jurisdictions, including the CRPD committee, have approached this relationship. It also examines the inherent requirements of a job defence and whether it is a legitimate defence against the refusal to employ and reasonably accommodate those with disabilities. The chapter concludes by arguing that Zambia should adopt the CRPD Committee and South African approaches to reasonable accommodation.

Chapter eight pulls the arguments of all the chapters together and advocates for the practical realisation of ESC rights in Zambia. It focuses on how the Zambian courts have operated when confronted with questions on the legal enforcement of ESC rights. It seeks to determine the court's role in promoting the right to work for persons with disabilities within ESC rights. It argues that the courts should adopt the reasonableness review process developed by the South African Constitutional Court as a mechanism for assessing the State's compliance with its obligations in realising ESC rights, primarily the right to work. The argument is made on the basis that reasonableness is consistent with the principles of Zambian Humanism.

Chapter nine is the concluding chapter. It concludes by providing an overall summary of the thesis and makes recommendations. The chapter identifies weaknesses and shortcomings in Zambia's current equality legislation and advocates for changes to be made. It also provides

recommendations for the enforcement and monitoring of equality and disability legislation to ensure effective implementation and benefit for persons with disabilities in the workplace and labour market. The chapter also makes recommendations for the courts, specifically the High Court, as some of its decisions do not align with the legislative shift towards substantive equality for persons with disabilities and other disadvantaged groups.

## 1.7 Terminology/ Language

Before proceeding to the next chapter, it is essential to make a few clarifications that will allow a better comprehension of the subject in this thesis.

First, the thesis utilises person-first language, ‘person with a disability’, as evidenced above. This proceeds from its usage in the CRPD. It has also been the preferred terminology in Zambia since the enactment of the Persons with Disabilities Act 1996 (PDA 1996). Where the context provides and were deemed appropriate, identity-first language (‘disabled person’) is employed occasionally.

Second, the terms duty and obligation are used synonymously and interchangeably in this thesis. Some argue that there are clear distinctions between the two terms, with ‘duties’ being more specific and legally defined, while ‘obligations’ being more general and morally based.<sup>143</sup> However, in practice, the terms are often used interchangeably as both terms refer to actions and behaviour that are expected to protect and promote human rights. As such, this thesis employs both terms as relating to the same thing as it acknowledges that both terms refer to the same concept, and it allows the thesis to use the most appropriate term depending on the context and the argument being made.

Thirdly, the utilisation of Zambian Humanism as a theory in this thesis is not meant to be a comprehensive study of Zambian Humanism, nor is it intended to critique it. Instead, it is being used as a tool to aid in the interpretation and analysis of Zambia’s disability, equality and anti-discrimination laws. The goal of the thesis is to use Zambian Humanism as a framework to understand and evaluate the current legal framework for protecting the rights of persons with disabilities in Zambia and to identify areas where improvements can be

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<sup>143</sup> See for example HLA Hart, ‘Are There Any Natural Rights?’ (1955) 64 *The Philosophical Review* 175, 179.

made. Because Zambian Humanism is encompassed and conceived within the broader framework of 'communitarianism', 'African communitarianism', and 'African Humanism', these terms are sometimes used interchangeably as denoting the same concept unless where context does not permit for purposes of clarity.

Finally, it is important to keep in mind that Kaunda's writings were a product of their time and hence direct quotations from his works which refer to 'Man/MAN' should be seen as references to all human beings and persons generally. Kaunda himself remarked that 'Man means my mother, my wife my children, my friends, the citizens of my country'.<sup>144</sup> Where possible, every effort has been made to use gender-neutral language.

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<sup>144</sup> Kaunda (n 85) 47.

## Chapter 2: Models of Disability Operating in Zambian Society

### PART I

#### 2.1 Introduction

The phenomenon of disability has existed throughout human history; it is universally recognised and acknowledged in all parts of the world and cultures. Although it is a global phenomenon, a 'disability' in one region might not be in another. Central to the conceptualisation of disability are several models of disability that govern the understanding of disability in society. Understanding the models that influence a society might help answer questions about how persons with disabilities are treated and perceived. Understanding some of the models of disability existing today is therefore vital in shaping our understanding of how people in different parts of the world form perceptions and ideas about disability and how they treat those they consider disabled.<sup>145</sup>

This chapter examines the models that have shaped and continue to shape perceptions about disability in Zambian society. The chapter utilises a theoretical analysis in outlining some of the key characteristics of these models and how they influence the Zambian worldview of disability and persons with disability. Part two of the chapter begins by examining those models of disability that might strongly influence the treatment of persons with disabilities in the everyday lives of Zambians. These models are categorised as cultural and religious models. Part three of the chapter examines the two models of disability that have primarily influenced disability legislation and policy in Zambia. This will therefore involve an analysis of the medical and social models of disability, giving insight into what each model represents regarding the treatment of persons with disabilities.

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<sup>145</sup> Marno Retief and Rantosa Letšosa, 'Models of Disability: A Brief Overview' (2018) 74 HTS Theological Studies 1.

## PART II

### 2.2 Cultural model of disability

There are various ways in which the cultural model of disability is defined. One way seeks to understand the conceptualisation of disability from a postcolonial perspective to identify 'examples of disability in cultural contexts'.<sup>146</sup> Another way is to look at disability from a religious perspective which seeks to 'articulate a range of values, ideals, or expectations that are important to that culture's organisation and identity'.<sup>147</sup> An analysis of the cultural model of disability can also come from the portrayal and reflection of persons with disability in the media, literature, drama, film and other forms of artistic expression.<sup>148</sup> Ultimately, the cultural model includes various aspects that influence the lives of a particular people or society, such as their traditions, rituals, customs, social behaviour, attitudes and identities.<sup>149</sup> Waldschmidt is thus quick to point out that 'critical disability studies should acknowledge that disability is both socially and culturally constructed'.<sup>150</sup>

Religious, cultural, and traditional beliefs play a central role in Zambian society. These beliefs have a tremendous influence on Zambian life, from family to political and civic engagement. Meekosha observes that 'different cultures maintain diverse interpretations and casual factors relating to [disability]. Indigenous people still use indigenous knowledge to make sense of their world'.<sup>151</sup> Hence, any understanding and perception of disability cannot ignore the effects of religion, culture and tradition on the conceptualisation of disability and the treatment of persons with disabilities in Zambia. Focusing on a people's culture enhances one's understanding of the material oppression that those with disabilities might face and provides an opportunity to look into their lived experiences.

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<sup>146</sup>Anne Waldschmidt, 'Disability Goes Cultural: The Cultural Model of Disability as an Analytical Tool' in Anne Waldschmidt, Hanjo Berressem and Moritz Ingwersen (eds), *Culture – Theory – Disability: Encounters between Disability Studies and Cultural Studies* (Transcript Verlag 2017) 23.

<sup>147</sup> *ibid* 23.

<sup>148</sup> Tom Shakespeare, 'Cultural Representation of Disabled People: Dustbins for Disavowal?' (1994) 9 *Disability and Society* 283.

<sup>149</sup> Waldschmidt (n 146) 24.

<sup>150</sup> *ibid*.

<sup>151</sup> Meekosha (n 79) 679.

In understanding disability, Zambia faces the challenge of incorporating certain western ideologies due to the long-lasting effects of colonialism and globalisation while still trying to maintain its cultural and traditional heritage. Although many in Zambia see impairments as bad luck caused by witchcraft or curses, others still view them as caused by genetics, infectious diseases, accidents, and neglect.<sup>152</sup>

Due to urbanisation and a seemingly vocal disability movement that has existed for a considerable time in Zambia, perceptions about persons with disabilities continue to improve. Whilst some superstitions and myths about disability continue to exist, the prevalence of stigma and discrimination is no longer as widespread as it once was. Thus, matters concerning persons with disabilities often appear in the local media and press now and then, insisting that those with disabilities are no different from anyone else. However, there have been some disturbing reports of gruesome killings, body-part mutilations and attacks on persons with albinism in Zambia.<sup>153</sup> These unfortunate occurrences come from various myths and misconceptions concerning those with albinism. For instance, people with albinism are seen by some as ghosts returned from the dead.<sup>154</sup> For the most part, witch doctors (also referred to as traditional healers) are often the culprits where killings and mutilations are involved with their fake get-rich schemes whose prescription to wealth consists of using body parts from a person with albinism.<sup>155</sup> This unfortunate occurrence is prevalent in many African countries. The CRPD has thus been criticised for not addressing the effects of harmful traditional practices and beliefs on the rights of persons with disabilities.<sup>156</sup> However, in the communication of *X v United Republic of Tanzania*,<sup>157</sup> the CRPD readily condemned the harmful practices against persons with albinism.

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<sup>152</sup> Jacob R S Malungo and others, *Qualitative Study from Zambia on Barriers to and Facilitators of Life-Long Learning: Summary of Results* (Central Statistical Office Zambia 2018) 24.

<sup>153</sup> Report of the Secretary-General, 'Social Development Challenges Faced by Persons with Albinism' (24 March 2022) UN Doc A/76/769.

<sup>154</sup> Elvis Imafidon, 'Dealing with the Other between the Ethical and the Moral: Albinism on the African Continent' (2017) 38 *Theoretical Medicine and Bioethics* 163, 168.

<sup>155</sup> Ross Velton, 'Cancer: The 'silent killer' of Africa's Albinos' *BBC Global News* (25 April 2017)

<sup>156</sup> Andrea Broderick and Delia Ferri, *International and European Disability Law and Policy Text, Cases and Materials* (CUP 2019) 535; Japhet Biegon, 'The Promotion and Protection of Disability Rights in the African Human Rights System' in Ilze Grobbelaar-du Plessis and Tobias van Reenen (eds), *Aspects of Disability Law in Africa* (PULP 2011) 77.

<sup>157</sup> Communication No 22/2014 (31 August 2017), UN Doc CRPD/C/18/D/22/ 2014.

Some people in Zambian society believe in the supernatural and will consult witch doctors for cures and explanations for the causes of certain events. Sometimes they resort to witch doctors where 'western-type medicine' has failed. Here there is a belief that a witch doctor or traditional healer can see beyond the physical realm and thus provide a spiritual remedy.<sup>158</sup>

While it might be easy to dismiss some of these superstitious beliefs as backward, it cannot be taken for granted that such beliefs are how others perceive their misfortunes daily, where the material world connects with the spiritual world. In this regard, an observation is made by Devlieger, noting that 'it would be correct to say that African knowledge of disability is "embedded" in its seeking for links between the occurrence of disability and several world orders'.<sup>159</sup> A spiritual infrastructure upholds African ideals, beliefs, and traditions.

Although society might perceive persons with disabilities as having more misfortune, there is also an understanding within the social fabric that tries to protect and care for them. In Zambian culture, making fun of persons with disabilities is taboo, as one might face a similar fate. This is true for other Bantu-speaking African countries as well. These taboos are not meant to scare a superstitious society. They aim to foster a sense of care for persons with disabilities.<sup>160</sup> However, such taboos can reinforce ideas that one's impairment is a 'form of punishment, something to be ashamed of or to get rid of'.<sup>161</sup>

### **2.3 Religious model of disability: The Christian factor in Zambia**

This section (although similar to the one above) focuses on how religion, particularly Christianity, plays a prominent role in conceptualising disability in Zambia. Christianity

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<sup>158</sup> Clive Dillon- Malone, 'Mutumwa Nchimi Healers and Wizardry Beliefs in Zambia' 26 *Social Science and Medicine* 1159.

<sup>159</sup> Patrick Devlieger, 'Experience of Disability: Sub-Saharan Africa' in Gary L Albrecht (ed), *Encyclopaedia of Disability* (SAGE 2006) 693.

<sup>160</sup> *ibid.*

<sup>161</sup> Victoria Phiri, 'See no Evil' in Richard Sandell, Jocelyn Dodd and Rosemarie Garland-Thomson (eds), *Re-Presenting Disability: Activism and Agency in the Museum* (Routledge 2013) 53,56.

maintains a firm foothold in Zambian society.<sup>162</sup> At least 90 per cent of the population identifies as Christians. To this end, the Zambian Constitution has declared Zambia ‘a Christian Nation while upholding a person’s right to freedom of conscience, belief or religion.’<sup>163</sup> The inclusion of a ‘Christian Nation Declaration’ in the constitution was preceded by Zambia’s second President, Frederick Chiluba’s proclamation of Zambia as a Christian nation on 29 December 1991, having been influenced by his evangelical and pentecostal faith. Even before this proclamation, Christianity in Zambia has always played an important role in the country’s political life, giving legitimacy to the presidency of Zambia’s first president Kenneth Kaunda, a son of a Presbyterian preacher.<sup>164</sup> Kaunda attributed his Christian faith as instrumental in articulating his Zambian Humanism philosophy. (Refer to 4.2.1).

It is not the place of this paper to go into the complexities of the Christian nation declaration.<sup>165</sup> Still, it will suffice to say that one cannot ignore the place of Christianity in Zambian society and its effect on persons with disabilities. Christian views on disability tremendously affect how many in Zambian society perceives and conceptualises disability. One can argue that Christianity in Zambia has merely replaced and not changed the prominence of traditional African religions in how Zambians perceive their world. In African traditional religions, the material world is affected by the spiritual world and *vice versa*.

Similarly, the declaration of Zambia as a Christian nation blurs the lines between the sacred and the secular. There is thus an underlying assumption that politics and social policy ought to reflect Christian principles and values. Whether or not this is the case is yet to be seen as its significance lies more in political expediency for politicians during election time. What is, however accurate, is that Christianity is widely practised in Zambia both privately and publicly as a communal experience.

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<sup>162</sup> Terence O Ranger and Isabel Apawo Phiri, ‘President Frederick Chiluba and Zambia: Evangelicals and Democracy in a “Christian Nation”’ in Terence O Ranger (eds), *Evangelical Christianity and Democracy in Africa* (OUP 2006).

<sup>163</sup> Constitution of Zambia (Amendment) Act No 2 of 2016 (COZ 2016), preamble.

<sup>164</sup> Paul Gifford, ‘Chiluba’s Christian Nation: Christianity as a Factor in Zambian Politics 1991-1996’ (1998) 13 *Journal of Contemporary Religion* 363.

<sup>165</sup> For a detailed study, see David M Gordon, *Invisible Agents: Spirits in a Central African History* (Ohio University Press 2012).



The religious or moral model of disability is the oldest and is based on the idea that disability is due to punishment for sins or is God's will.<sup>166</sup> Sometimes this model justifies disability as a form of virtuous suffering, which encourages passive acceptance of disability as a condition willed by God or as momentary suffering that one has to 'endure to gain heavenly reward'.<sup>167</sup>

Christianity, as with other religions, can positively or negatively affect how persons with disabilities are seen and treated. Positive virtues in Christianity's dealings with those with disabilities include care, respect, tolerance, and compassion.<sup>168</sup> However, certain Christian doctrines and theological persuasions about disability can and do negatively affect the perception and treatment of persons with disabilities. Within some doctrinal persuasions, disability is viewed as a divine retribution for an individual's wrongdoing or moral shortcomings, or it is attributed to being under the influence of demonic forces.<sup>169</sup> Such doctrinal beliefs are premised and justified on interpretations of specific passages of the Christian Bible where diseases such as leprosy or impairments such as blindness, deafness and paralysis are attributed to curses or as an attribute of God's wrath for 'disobedience and transgressions of sin'.<sup>170</sup> Zambia's healing and faith movements carry such beliefs with promises of the healing of any impairment where one has faith. The idea is that good health and material prosperity are evidence of God's blessing on the faithful. Unfortunately, these beliefs continue to stigmatise and exclude persons with disabilities.<sup>171</sup> Eiesland regards a theology that attributes disability to God's punishment as a 'disabling theology' which willingly prevents persons with disabilities from full participation in Church and society. She argues that Christians sometimes misinterpret and spin theologies to advance narratives

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<sup>166</sup> Retief and Letšosa (n 145).

<sup>167</sup> Nancy L Eiesland, 'Encountering the Disabled God' (2005) 120 PMLA 584,585.

<sup>168</sup> Alexandra Lewis Gargett and others, 'Global Cultures and Understandings of Disability', in Edurne Gacia Iriate, Roy McConkey and Robbie Gilligan (Eds.), *Disability and Human Rights* (Palgrave Macmillan, 2016).

<sup>169</sup> Nelly Mwale and Joseph Chita, 'Religious Pluralism and Disability in Zambia' (2016) 42 *Studia Historiae Ecclesiasticae* 53; Jerome E Bickenbach, *Physical Disability and Social Policy* (University of Toronto Press 1993) 190.

<sup>170</sup> Mary Nyangweso, 'Disability in Africa: A Cultural/Religious Perspective' in Toyin Falola and Nic Hamel (eds), *Disability in Africa: Inclusion, Care, and the Ethics of Humanity* (University of Rochester Press 2021) 128.

<sup>171</sup> *ibid.*

that stereotype and segregate persons with disabilities without acknowledging their lived experiences.<sup>172</sup>

Despite all this, others, particularly those encompassing more conservative and traditional doctrines, opt instead to help those with disabilities through philanthropic activities such as the provision of 'education, health and home care services'.<sup>173</sup> This benevolent approach to persons with disabilities falls under the charity model of disability. The charity model portrays persons with disabilities as victims of circumstances that need help.<sup>174</sup> While the benevolent practices of the Church have provided great relief to persons with disabilities, the charity model solicits pity by presenting them as helpless and suffering victims.<sup>175</sup> They are portrayed as people who require constant care rather than fully-fledged human beings with their own agency. Shakespeare observes that the portrayal of persons with disabilities by charities is demeaning and only aimed at eliciting 'pity and sympathy in "normal people", who are then motivated to donate money'.<sup>176</sup> In this regard, pity is but 'an expression of superiority' no different from 'hatred and aggression'.<sup>177</sup>

While there is criticism of the religious approach towards persons with disabilities, the Church and other religious groups in Zambia have stepped in to provide essential services where the government has failed. Religion in Zambia has ended up being a frequent feature in the provision of various social services to the vulnerable and marginalised, which would ordinarily be the preserve of the state.

### PART III

Much of Zambia's legal and policy framework on disability today is primarily influenced by two schools of thought commonly referred to as the medical and social models of disability. Developments in Zambian legislation and policies dealing with disability can thus be attributed to these two models. The chapter now focuses on these two models.

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<sup>172</sup> Nancy L Eiesland, *The Disabled God: Toward a Liberatory Theology of Disability* (Abingdon Press, 1994) 70.

<sup>173</sup> Mwale and Chita (n 169) 66.

<sup>174</sup> George Henderson and Willie V Bryan, *Psychosocial Aspects of Disability* (Charles C Thomas 2011).

<sup>175</sup> *ibid.*

<sup>176</sup> Shakespeare (n 148) 288.

<sup>177</sup> *ibid* 288.

## 2.4 Medical model of disability

As the name suggests, the medical model (sometimes referred to as the individual model), emanates from the medical and scientific fields of study. In sharp contrast to the religious or moral model,<sup>178</sup> much of the conceptualisation under this model is biological and views disability as a medical occurrence.<sup>179</sup> The medical model is steeped in scientific approaches as the primary means through which the phenomenon of disability can be investigated and understood. This model regards disability as an impairment or a disease requiring medical intervention or rehabilitation to enable disabled individuals to perform functions like their non-disabled counterparts.<sup>180</sup>

Under the medical model, an individual's impairment is seen as a departure from what is accepted as normal, thus resulting in a disability which inhibits or restricts an individual from performing certain tasks or activities.<sup>181</sup> For instance, the repealed Persons with Disabilities Act 1996 (PDA 1996) defined disability as 'any restriction resulting from or inability to perform any activity in the manner or within the range considered normal for a human being...'<sup>182</sup> The social disadvantages experienced by an individual with an impairment is attributed wholly to functional limitations imposed by their impairment. Under the medical model, disability is a defect in the individual, be it sensory, psychological, or physical, caused by injury, disease and ill health, or an 'abnormality' that is genetically inherited.<sup>183</sup>

The medical model focuses on normalising and standardising the 'disabled' individual through medical interventions to become adaptable to the society around them.<sup>184</sup> The aim is to cure or rectify the impairment without considering the restrictive nature of the physical or social environment around them. The medical model's exclusive focus is on the

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<sup>178</sup> Devlieger (n 159).

<sup>179</sup> Justin Anthony Haegele and Samuel Hodge, 'Disability Discourse: Overview and Critiques of the Medical and Social Model' (2016) 68(2) *Quest* 193.

<sup>180</sup> Katerina Kazou, 'Analysing the Definition of Disability in The UN Convention on the Rights of Persons with Disabilities: Is it Really Based on a 'Social Model' Approach?' (2017) 23 *IJMHL* 25.

<sup>181</sup> Lorella Terzi 'The Social Model of Disability: A Philosophical Critique' (2004) 21 *Journal of Applied Philosophy* 141.

<sup>182</sup> PDA 1996, s 2 (repealed).

<sup>183</sup> Haegele and Hodge (n 179).

<sup>184</sup> Sophie Mitra, 'The Capability Approach and Disability' (2006) 16 *JDPS* 236.

limitation(s) associated with a person's disability, which essentially '[disregard] environments that might intensify or adversely affect a person's functional abilities'.<sup>185</sup>

This is rationalised on the basis that medical treatment is essential to eradicate the 'harmful, and undesirable deviation or discontinuity... associated with impairment or discomfort...'.<sup>186</sup> If rectification is impossible, the focus shifts to rehabilitating the individual to re-enter society at an opportune time.<sup>187</sup> Moreover, for those for whom rehabilitation does not work, institutionalisation and other forms of exclusion from the public eye are often seen as the answer. In turn, the individual with an 'incurable disability' becomes the object of charity needing help and care.<sup>188</sup>

Under the medical model, the 'impairment' defines the individual— it is something that lies internally within an individual. Persons with impairments are placed in the 'sick role' and have to accept their status of patienthood.<sup>189</sup> Three key elements can be extracted as attributes inherent in this sick role. Firstly, the 'sick' person is not responsible for their impairment—it is because of biological factors that they cannot prevent. Secondly, the sick person is excused from society's ordinary commitments, such as attending school, getting a job, assuming family responsibilities, and so on. And thirdly, social legitimacy is placed on the individual if they cooperate with physicians in pursuit of recovery.<sup>190</sup>

#### 2.4.1 Criticisms of the medical model

The medical model has been criticised on two fronts. First is that it is insufficient/limited in its understanding of disability; on the other hand, it is criticised for being oppressive.<sup>191</sup>

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<sup>185</sup> Susan L Kasser and Rebecca K Lytle, *Inclusive Physical Activity: A Lifetime of Opportunities* (2nd edn, Human Kinetics 2013) 5.

<sup>186</sup> George L Engel, 'The Need for a New Medical Model: A Challenge for Biomedicine' (1977) 196 *Science* 129, 130.

<sup>187</sup> Lawson (n 140).

<sup>188</sup> Haegele and Hodge (n 179).

<sup>189</sup> Deborah Kaplan, 'The Definition of Disability: Perspective of the Disability Community' (2000) 3 *JHCLP* 352,353.

<sup>190</sup> *ibid* 354; Peter McTigue, 'The Challenge of HIV – Social Stigma or Disability?' (2010) 5 *Web JCLI*.

<sup>191</sup> Andrew J Hogan, 'Moving Away from the "Medical Model": The Development and Revision of the World Health Organization's Classification of Disability' (2019) 93 *BHM* 241.

### 2.4.1.1 Insufficiency of the medical model

The criticism of the medical model as insufficient originated from psychiatry. An early critic of the medical model was Hungarian American psychiatrist Thomas Szasz, who bemoaned medicine's propensity to reduce every disease or disability to biological factors.<sup>192</sup> Szasz believed that mental illness did not have a biological basis and therefore excluded certain aspects of medicine, such as psychiatry, from medical intervention.<sup>193</sup> Supporters of this exclusionist view saw medical intervention in mental illness as stigmatising and oppressive. Klerman, labelling this group of exclusionists as 'anti-psychiatrists', observed:

Their challenge is to the application of the medical model to so-called mental illness. They question the claims that drugs, psychotherapy, or any behavioural interventions under medical auspices are really therapeutic. Their challenge is basically moral and political: They assert that in the guise of medical treatment, potent methods of altering behaviour are being used for social control rather than for the individual's best interests, labelled the "patient."<sup>194</sup>

Others within the field of psychiatry, such as George L Engel, did not call for a complete exclusion of biomedical intervention but instead advocated for reform in medical practice requiring medical practitioners to be more aware of the social aspects of disease. Engel argued:

The dominant model of disease today is biomedical, with molecular biology as its basic scientific discipline. It assumes disease to be fully accounted for by deviations from the norm of measurable biological (somatic) variables. It leaves no room within its framework for the social, psychological, and behavioural dimensions of illness.<sup>195</sup>

Engel thus advocated for what he termed a 'Biopsychosocial Model of medicine', which provided a blueprint for the 'social, psychological, and behavioural dimensions of illness'.<sup>196</sup> This biopsychosocial model of disability has since gained expression under the current version of the WHO International Classification of Functioning, Disability and Health (ICF).<sup>197</sup> The current International Classification of Functioning, Disability and Health (ICF) has moved

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<sup>192</sup> Thomas S Szasz, 'Some Observations on the Relationship between Psychiatry and the Law' (1956) 75 *AMA Arch Neurol Psychiatry* 297,302.

<sup>193</sup> *ibid.*

<sup>194</sup> Gerald L Klerman, 'Mental Illness, the Medical Model, and Psychiatry' (1977) 2 *JMP* 220, 224.

<sup>195</sup> Engel (n 186) 130.

<sup>196</sup> *ibid* 135.

<sup>197</sup> Mitra (n 184).

away from its earlier versions, which classified disability as a consequence of disease.<sup>198</sup> The ICF defines disability as ‘a difficulty in functioning at the body, person, or societal levels, in one or more life domains, as experienced by an individual with a health condition in interaction with contextual factors’.<sup>199</sup> This definition mitigates the narrow view of disability that exclusively views disability as either a medical phenomenon or a socially created construct (as discussed below).<sup>200</sup> The ICF definition not only recognises that the origin of a disability is a health-related matter resulting in impairments but also acknowledges the limitations imposed by the social environment in which an individual lives.<sup>201</sup> Therefore, taking this synergised approach as stipulated within the ICF allows for both medical interventions that address the functional limitations imposed by impairments and provides a means of addressing the social-environmental challenges to provide a platform for equal opportunities for persons with disabilities.

#### **2.4.1.2 Medical model as oppression**

The rise of disability self-advocacy during the 1970s and 1980s in the US and Britain culminated in approaches that criticised the medical model as being oppressive to persons with disabilities.<sup>202</sup> Disability self-advocates call for social and political approaches as the primary (sometimes the only) means of addressing the disadvantage faced by those with disabilities as opposed to addressing disability as an individual biomedical issue.<sup>203</sup> Thus, one main criticism levelled against the medical model is inherent in its need to locate the cause of the disability within the person instead of viewing disability as a socially created concept.<sup>204</sup> The medical model is therefore criticised for not recognising the role played by society in creating a disabling environment for those with impairments, as its main preoccupation is providing a cure or treatment for the impairment with the sole aim of restoring ‘normalcy’ in an individual.

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<sup>198</sup> *International Classification of Functioning, Disability, and Health* (ICF) (World Health Organization 2001).

<sup>199</sup> Matilde Leonardi and others, ‘The Definition of Disability: What is in a Name?’ (2006) *The Lancet* 1219, 1219

<sup>200</sup> *ibid* 1219.

<sup>201</sup> Mitra (n 184).

<sup>202</sup> Hogan (n 191).

<sup>203</sup> *ibid*.

<sup>204</sup> Louise Humpage, ‘Models of Disability, Work and Welfare in Australia’ (2007) 41 *Social Policy & Administration* 215.

The medical model, therefore, tends to categorise or classify individuals based on limitations experienced in their bodily or intellectual functions. This categorisation is achieved through diagnosis by a medical practitioner who then attaches labels on an individual based on the nature and extent of their impairment.<sup>205</sup> Through these categorisations, the needs of a person with disabilities are assessed with them having little or no say in what they value and want.<sup>206</sup> Under this model, unless and until the medical practitioner assesses the individual, access to resources and benefits is determined by the medical practitioner who acts as custodian.<sup>207</sup> The medical model also serves as the guardian of legislation primarily aimed at providing workman's compensation and social welfare benefits. The medical practitioner's diagnosis is vital in establishing whether someone is sufficiently disabled to entitle them to claim benefits under such legislation. For example, under the Workers Compensation Act 1999 (WCA 1999), an employee can only claim compensation if a medical practitioner grants a certificate certifying 'that [the employee] is suffering from a scheduled disease-causing disablement or that a scheduled disease caused the death of a worker'.<sup>208</sup> Under the medical model, medical practitioners wield tremendous power in evaluating what is considered 'normal' or 'abnormal'.<sup>209</sup> Therefore, medical practitioners have the ultimate role in determining whether an individual has the requisite 'functional' capacity to participate in work activities.

To this end, disability self-advocates and social model proponents (examined below), such as Oliver, view the medical model as a product of capitalism-induced materialism. Oliver insists that the medical model developed from capitalism's insistence on defining individuals as either being 'able-bodied' or 'able-minded' and whether they had the requisite ability to perform job functions or operate machinery. Those who were found incapable of performing specific job functions or unable to operate machinery were tagged as being disabled. This led to the medicalisation and individualisation of disability, where individuals are either normal or abnormal.<sup>210</sup> The result is the exclusion and oppression of those with

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<sup>205</sup> Dimitris Anastasiou and James M Kauffman, 'The Social Model of Disability: Dichotomy between Impairment and Disability' (2013) 38 JMP 441.

<sup>206</sup> Haegele and Hodge (n 179).

<sup>207</sup> Michael Oliver, *The Politics of Disablement* (Macmillan 1990) 48.

<sup>208</sup> The Workers' Compensation Act 1999, s 91(1); s 77(1).

<sup>209</sup> Retief and Letšosa (n 145).

<sup>210</sup> Oliver (n 207); Terzi (n 181).

impairments in society. Therefore, those labelled as disabled are taken to be of lesser value and are segregated as they are considered economically unproductive.<sup>211</sup> (Similar observations have been made following the entry of colonialism in Zambia, as will be shown in the next chapter).

Terzi criticises this materialist notion of disability by arguing that not every proponent of the social model attributes the exclusion of the disabled to global capitalism.<sup>212</sup> As such, other disability theorists acknowledge that advances in new technologies have also contributed to the inclusion of persons with disabilities. Today, means and processes of production are evolving at a rate that is taking into consideration those with impairments.<sup>213</sup>

It is also argued that the medical model's focus on impairment contributed to the proliferation of mental health and guardianship laws that deprive persons with mental, intellectual and psychosocial impairments of their legal capacity.<sup>214</sup> Thus 'while the law attempts to remedy issues of inequality among disabled individuals, it has been suggested that in some cases, the law perpetuates attitudes inadvertently that reinforce rather than combat discrimination, through the use of the individual or medical model, as opposed to the social model'.<sup>215</sup> Some Zambian laws are a testament to this unfortunate state of affairs in which the legal capacity of persons with mental disabilities is curtailed. (See 5.6.2.3).

## 2.5 Social model of disability

Several approaches have been used to define the social model of disability: the British/UK model, the North American model, and the Nordic relational model.<sup>216</sup> The focus will, however, be on the British and North American models, which are most likely to have a more significant impact and influence on Zambia. Nonetheless, it is important to highlight the distinction between the Nordic model and the other forms of the social model from the onset. The Nordic model distinguishes itself by viewing disability as a relationship between

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<sup>211</sup> Stephen Bunbury, 'Unconscious Bias and the Medical Model: How the Social Model may Hold the Key to Transformative Thinking about Disability Discrimination' (2019) 19 IJDL 26.

<sup>212</sup> Terzi (n 181) 145.

<sup>213</sup> *ibid.*

<sup>214</sup> Theresia Degener, 'Disability in a Human Rights Context' (2016) 5 *Laws* 35.

<sup>215</sup> Bunbury (n 211) 28.

<sup>216</sup> Tom Shakespeare, 'The Social Model of Disability' in Lennard J Davis (ed), *The Disability Studies Reader* (Routledge 2013) 17.



an individual and their environment. Disability under the Nordic model is ‘a mismatch between the person’s capabilities and the functional demands of the environment’.<sup>217</sup> The model has been adopted in countries such as Norway, and calls for universal redesign of the built environment to achieve accessibility for persons with disabilities.<sup>218</sup> Unlike the Nordic model, the American and British social models do not define disability as the relationship between an individual and the environment *per se* but rather look at society as a whole as the ultimate cause of disability.<sup>219</sup> The environment is not restricted to the built environment. Other aspects of society, such as attitudes, ideas, values and cultures, which affect how persons with disabilities are treated, are also considered.

The conceptual framework established by the North American and British social models has often been referred to as the new paradigm of disability.<sup>220</sup> However, the rejection of the medical definition of disability as the sole determinant of disability is common among these different strands of the social model.<sup>221</sup> The social model of disability was introduced by disability rights organisations and further developed by activists and academics in parallel processes in the US and Britain. It offered a fundamental critique of capitalist society and a new way of thinking about disability.

The British social model defined disability in terms of social oppression. In contrast, the American approach developed a model reflective of the discrimination experienced by minority groups within the US.<sup>222</sup>

### 2.5.1 Social Model and Oppression (British model)

The British social model of disability, which Pfeiffer describes as the crypto-Marxist version, views disability as a product of society and was developed in Britain between the 1970s and

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<sup>217</sup> Jan Tøssebro, ‘Introduction to the Special Issue: Understanding Disability’ (2004) 6 SJDR 3, 4.

<sup>218</sup> Mary A Jackson, ‘Models of Disability and Human Rights: Informing the Improvement of Built Environment Accessibility for People with Disability at Neighborhood Scale?’ (2018) 7 Laws 10.

<sup>219</sup> Tøssebro (n 220).

<sup>220</sup> Carol J Gill, Donald G Kewman and Ruth W Brannon, ‘Transforming Psychological Practice and Society: Policies that Reflect the New Paradigm’ (2003) 58(4) American Psychologist 305.

<sup>221</sup> Janine Owens, ‘Exploring the Critiques of the Social Model of Disability: The Transformative Possibility of Arendt’s Notion of Power’ (2015) 37 (3) Sociology of Health and Illness 385.

<sup>222</sup> *ibid.*

1980s.<sup>223</sup> It emerged as disability rights organisations (run mainly by persons with disabilities) began highlighting the various social and economic exclusions they experienced in society. They did this by challenging the medical approach to disability by focusing not on the individual but on the social and environmental obstacles, which they argued were discriminatory toward the disabled.<sup>224</sup> In 1976 proponents of the social model working under the auspices of the Union of the Physically Impaired Against Segregation (UPIAS) in *Fundamental Principles of Disability*, conceptualised disability as a creation of society. Disability was defined as something imposed on top of an individual's impairment which excluded them from full participation in mainstream social activities and society. Disability was, therefore, conceived as a particular form of social oppression.<sup>225</sup> In 1983 Oliver introduced and presented the social model as a critique of the individual model (medical model) by arguing that disability was not a medical condition but a social state.<sup>226</sup> The model, therefore, aims at changing societal structures responsible for creating conditions that prevent persons with impairments from participating on equal footing with others in society. The UK social model conceived disability as the consequence of social, economic and political oppression in a capitalist environment that perpetuated prejudice and discrimination against persons with impairments.<sup>227</sup>

The basis of defining disability in this way was that disability should not be viewed as a problem within an individual's body requiring treatment by health or medical professionals but should be viewed as a social-political problem that creates barriers that negatively affect individuals with impairments.<sup>228</sup> According to this model, an individual's full participation in society is restricted by the 'disabling' environment and not by their impairment. Therefore, it is society's responsibility to remove obstacles (such as cultural attitudes and practices, infrastructure, transport systems or health services) to address disability adequately.

Therefore, hypothetically, the social model formulated in this way means a person with an impairment is not disabled if they live in a society without obstacles. Thus, an encumbrance-

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<sup>223</sup> David Pfeiffer, 'A Comment on the Social Model(s)' (2002) 22(4) DSQ 234,234.

<sup>224</sup> Kazou (n 180).

<sup>225</sup> Union of Physically Impaired Against Segregation, *Fundamental Principles of Disability* (UPIAS 1976) 4.

<sup>226</sup> Michael Oliver, *Social Work with Disabled People* (Macmillan 1983).

<sup>227</sup> Owens (n 221); Oliver (n 207).

<sup>228</sup> Nick Watson, Alan Roulstone and Carol Thomas, *Routledge Handbook of Disability Studies* (Routledge 2014).

free environment would ultimately mean the non-existence of disability once the barriers in the social arrangement are eradicated.<sup>229</sup> The model does not view disability as a natural occurrence or something that might be brought about by illness but instead as an unfortunate product of society's negative interactions with a person's impairment resulting in stigma and a debilitating environment.<sup>230</sup> Michael Oliver puts it this way:

[The social model] does not deny the problem of disability but locates it squarely within society. It is not individual limitations, of whatever kind, which are the cause of the problem but society's failure to provide appropriate services and adequately ensure the needs of disabled people are fully considered in its social organisation.<sup>231</sup>

Whereas the medical model tries to make those with impairments fit into society, the social model demands societal change so that those with impairments can live with dignity like everyone else.

## 2.5.2 Social Model and Discrimination (North American Model)

The social model has been used as a key framing to highlight societal discrimination and oppression of persons with disabilities.<sup>232</sup> The model acknowledges social discrimination as the major issue faced by disabled individuals and as the source of many of the problems that the other models consider intrinsic to disability.<sup>233</sup> In this regard, it also takes the view that persons with disabilities are an oppressed and marginalised minority.<sup>234</sup> The notion that those with disabilities are a discriminated minority became prominent under the North American social model.<sup>235</sup>

This variant of the social model viewed persons with disabilities as experiencing stigma, prejudice, and discrimination similar to those experienced by other disadvantaged groups, such as ethnic, sexual and racial minorities.<sup>236</sup> With such a view, the North American social

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<sup>229</sup> Tom Shakespeare, *Disability Rights and Wrongs* (Routledge, 2006).

<sup>230</sup> Anita Silvers and others, *Disability, Difference, Discrimination: Perspectives on Justice in Bioethics and Public Policy* (Rowman & Littlefield 1998).

<sup>231</sup> Michael Oliver, *Understanding Disability: From Theory to Practice* (Macmillan 1995) 32.

<sup>232</sup> Degener (n 214).

<sup>233</sup> Kaplan (n 191).

<sup>234</sup> Shakespeare (n 216).

<sup>235</sup> Tom Shakespeare, 'Disability, Identity and Difference' in Colin Barnes and Geof Mercer (eds), *Exploring the Divide* (The Disability Press 1996).

<sup>236</sup> Owens (n 221).

model took on a civil rights approach that required advancing and protecting the rights of persons with disabilities on similar terms as those of racial minorities and women.<sup>237</sup> The 1990s also saw the introduction of a feminist perspective to the wider disability rights advocacy movement.<sup>238</sup> The Americans with Disabilities Act 1990 (ADA 1990) was thus enacted to give expression to the protection of persons with disabilities by taking a civil rights approach.

The main distinction between the American and the British social models is that the British version focuses on 'equality in political and material participation.' In contrast, the American version is focused on 'psychology, identity, personal affirmation and moral development'.<sup>239</sup>

### 2.5.3 Distinguishing disability and impairment

At the heart of the social model is the difference between impairment and disability. As a necessary means of understanding the oppression faced by persons with disabilities, the social model, unlike the medical model, distinguishes between impairment on one hand and disability on the other.<sup>240</sup> The distinction is, rooted in the 'psychological and social dimensions' of disability.<sup>241</sup> The two are distinct in that one can have an impairment but not be considered disabled. The disability occurs when an individual's impairment is disadvantaged by the social environment. This social environment is informed by social norms, beliefs, the built environment, economics, politics, culture, and attitudes about disability.<sup>242</sup>

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<sup>237</sup> Sara Pfister Johnston, 'Unequal treatment or uneven consequence: a content analysis of Americans with Disabilities Act Title I disparate impact cases from 1992 - 2012' (2015) 35 DSQ; Bickenbach (n 169) 169.

<sup>238</sup> Hogan (n 191).

<sup>239</sup> See Helen Meekosha, 'Drifting Down the Gulf Stream: Navigating the Cultures of Disability Studies' (2004) 19 *Disability & Society* 721,722. Meekosha concludes that the North American perspective centres on minority group rights and highlights individual experiences of disability, influenced by academic disciplines rooted in identity politics that arose from liberation movements in the 1960s (such as feminism, race and ethnic studies, and gay and lesbian studies). Conversely, the British model places emphasis on the tangible circumstances of oppression and is closely connected to sociology, social policy, and the politics of the welfare state in Britain (Meekosha (n 239)).

<sup>240</sup> Jaqueline Nicolaisen, Bodil Stilling Blichfeldt and Florian Sonnenschein, 'Medical and Social Models of Disability: A Tourism Providers' Perspective' (2012) 54 *World Leisure Journal* 201.

<sup>241</sup> Anastasiou and Kauffman (n 205) 445.

<sup>242</sup> Adam M Samaha, 'What Good is the Social Model of Disability?' (2007) 74 *U Chi LRev* 1251.

The social model proponents argue that individuals with an impairment are categorised as 'disabled' only because of the existing social order. The terms or tags used to describe individuals with impairments as disabled have been placed on them by society. It is society that has set restrictions and boundaries on what persons with impairments can or cannot do or whether or not they can have equal access to opportunities as everybody else.<sup>243</sup>

Disability should thus not be viewed as characteristic of an individual's anatomy but interwoven with other elements such as the physical, societal and environmental attitudes around the person.<sup>244</sup> In certain instances, impairment is understood as a natural and constituent part of the differences in traits we have as human beings.<sup>245</sup> Oliver notes that 'impairment is, in fact, nothing less than a description of the physical body'.<sup>246</sup>

By delinking impairment from disability, the social model shifts the focus away from the perceived disadvantage created by one's impairment to instead focus on addressing and challenging society's discriminatory attitudes towards persons with disabilities.<sup>247</sup> The focus is not on treating or curing the impairment or rehabilitation of the individual; instead, its focus is on the inclusion of persons with disabilities in society. Inclusion, therefore, requires changes in attitudes, acceptance and access to society's amenities for those with impairments.<sup>248</sup> Thus, despite most impairments being not curable, '... all disability can be eradicated by changes to the way we organise society'.<sup>249</sup>

#### 2.5.4 Criticisms of the social model

While the social model of disability has been highly effective in improving the quality of life for individuals with disabilities by confronting discrimination and marginalisation through civil rights and political activism, it has not been immune to criticism. With its development steeped in political activism, the social model was simple to explain and with obvious life-

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<sup>243</sup> Oliver (n 226).

<sup>244</sup> Jerome E Bickenbach, 'Disability and Equality' (2003) 2 J L & Eq 7.

<sup>245</sup> Degener (n 214).

<sup>246</sup> Oliver (n 226) 35.

<sup>247</sup> Owens (n 221).

<sup>248</sup> Sara Goering, 'Beyond the Medical Model? Disability, Formal Justice, and the Exception for the "Profoundly Impaired"' (2002) 12 Kennedy Institute of Ethics Journal 373.

<sup>249</sup> Michael Oliver, *Understanding Disability: From Theory to Practice* (2nd edn, Palgrave 2009) 44.

changing implications.<sup>250</sup> And by taking on the characteristic of identity politics, it places the onus on society to challenge societal attitudes by highlighting the need to remove and deal with the various barriers, prejudices and discriminations faced by persons with disabilities.<sup>251</sup>

Despite these positives, Shakespeare has argued that the social model's strengths have also become its weaknesses.<sup>252</sup> Shakespeare argues that the model has not been revised from its original form and thus restricts its reach.<sup>253</sup> Unlike other movements, such as the feminist movement, which has transformed over time, the social model has remained dormant. It has thus been described as a 'rigid concept of formal justice that narrowly treats similarly situated people as alike'.<sup>254</sup> This part of the chapter will examine two prominent criticisms of the social model of disability. The first criticism concerns the over-socialisation of disability as characteristic of the traditional social model. The second criticism seeks to answer the question of whether the removal of barriers can, in fact, bring an end to disability, as argued by the earlier formulations of the social model.

#### 2.5.4.1 Over-socialisation

The social model has been criticised for an 'over-socialisation of disability'. The argument is that proponents of this model have tended to focus exclusively on the social aspects of disability.<sup>255</sup> One reason for this is that it is based on the 'minority model' propagated by disability advocates under the auspices of social scientists who argued that persons with disabilities constituted a distinct and isolated minority sharing similar 'disability experiences' of the world around them.<sup>256</sup> In this sense, disability is seen as a 'social experience'<sup>257</sup> with

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<sup>250</sup> Shakespeare (n 229).

<sup>251</sup> *ibid.*

<sup>252</sup> Tom Shakespeare, *Disability Rights and Wrongs Revisited* (2nd edn, Routledge 2014) 20.

<sup>253</sup> *ibid.* 21.

<sup>254</sup> Stein and Stein (n 137) 1210.

<sup>255</sup> Goering (n 248).

<sup>256</sup> Bickenbach (n 244).

<sup>257</sup> Sylvanus B Effiom, 'Disability Discrimination and Substantive Equality: What Lessons Could Be Learned from the British Public Sector Equality Duty?' (2015) 4 *E-Journal of International and Comparative Labour Studies* 1, 10.

the hope that those with disabilities will one day rise up, move in unison, and challenge oppression.<sup>258</sup>

However, it is argued that the assumption that all persons with disabilities experience oppression fails to recognise the experiential differences associated with the diversity of impairments. It is therefore important to understand that disabilities are many and everyone experiences varied lives.<sup>259</sup> The social model's push for positive change in society and the environment is commendable. Still, it ignores the different experiences of persons with disabilities by treating them as a single group: 'The great diversity of the disability community must be acknowledged and respected'.<sup>260</sup> Such inclusiveness needs varied attitudes and views to be accepted. Although most people with disabilities experience social mistreatment and institutional obstacles, not everyone agrees or shares that perspective.<sup>261</sup> Anastasiou and Kauffman argue that disability definitions must be based on individual criteria to address the rights of people with disabilities adequately.<sup>262</sup>

The differences in disability also imply divergent experiences that individuals might encounter owing to general cultural settings as well as a 'specific culture of difference' stemming from 'gender, ethnicity, sexuality and type of impairment'.<sup>263</sup> In short, not everyone with a disability undergoes the same negative experience or exclusion because of the existing socio-economic arrangement. For instance, those with hearing impairments such as the deaf experience barriers in language, communication and culture as opposed to the barriers inhibiting access to the built environment.<sup>264</sup> And as mentioned in chapter 1, deaf individuals might refer to themselves as a linguistic minority instead of disabled.

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<sup>258</sup> Owens (n 221).

<sup>259</sup> Barbara Murray, 'Pointing The Way Forward: International Trends in Legislation for Persons with Disabilities' (People With Disabilities: Pathways To Decent Work Report of a Tripartite Workshop Lusaka, Zambia, 9-10 May 2006).

<sup>260</sup> Goering (n 248) 385.

<sup>261</sup> David Wasserman and Sean Asch, 'Disability: Definitions, Models', *The Stanford Encyclopaedia of Philosophy* (Summer edn, 2016).

<sup>262</sup> Anastasiou and Kauffman (n 205) 448.

<sup>263</sup> Terzi (n 181) 146.

<sup>264</sup> *ibid.*

Terzi also observes that society cannot be entirely responsible for all forms of disability.<sup>265</sup> For example, society is not to blame for an impairment resulting from an injury after wilfully participating in a dangerous activity or sport. In such instances, it is the individual who wilfully placed themselves in harm's way, not society at large.<sup>266</sup> On the other hand, one can still argue that as much as society may not be to blame for the impairment, society still bears the responsibility of curtailing any disabling experience that may arise from the self-inflicted impairment. Although Terzi's argument is valid, society is also to blame for many impairments resulting from wars, poverty, environmental degradation, and even slavery and exploitation.<sup>267</sup> These factors alone are sufficient to account for the creation and perpetuation of impairments, particularly in the Global South, where most of these issues continue to this day.

The strong emphasis on placing the blame on society for the disadvantage experienced by persons with impairments has led to others taking a radical view that completely disapproves of medical intervention to alleviate the effects of impairment or to search for a 'cure'.<sup>268</sup> There is some support for this extreme view. For example, it is argued that the focus should be on the elimination of barriers and the advancement of rights and not on seeking medical treatment and cures, which are perceived to be distractions in the cause for social change.<sup>269</sup> As Stanley Hauerwas notes, 'If justice comes to mean the elimination of the victim of injustice rather than the cause of the injustice, we stand the risk of creating admittedly a less troubled but deeply unjust world'.<sup>270</sup> This signifies an apprehension that a focus on the biological aspects of impairment might fail to transform society's negative attitude and biases towards persons with disabilities.<sup>271</sup>

On the contrary, Anastasiou and Kauffman argue that where 'biological or intrinsic characteristics' are excluded from the conceptualisation of disability as proponents of the

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<sup>265</sup> *ibid* 153.

<sup>266</sup> *ibid*.

<sup>267</sup> Meekosha (n 79).

<sup>268</sup> Goering (n 248).

<sup>269</sup> Shakespeare (n 229) 32.

<sup>270</sup> Stanley Hauerwas, 'Suffering the Retarded: Should We Prevent Retardation?' in John Swinton (ed), *Critical Reflections on Stanley Hauerwas' Theology of Disability: Disabling Society, Enabling Theology* (Routledge 2008) 99.

<sup>271</sup> Sara Goering, 'Rethinking Disability: The Social Model of Disability and Chronic Disease' (2015) 8(2) *Current Reviews in Musculoskeletal Medicine* 134.



social model would like to argue, disability merely 'becomes a neutral thing— something we do not really care about one way or the other'.<sup>272</sup> They argue that the social model of disability, which does not associate disability with 'body, brain, and mind-related conditions', is an inaccurate conceptualisation of disability. Instead, human beings are not devoid of bodies, nor can they survive without a brain in the real world.<sup>273</sup> An accurate depiction of disability cannot ignore the interaction between biology and society: 'Neither biological/individual differences nor social context alone can provide an adequate account of disabilities'.<sup>274</sup>

Others argue that the social model negatively affects research because it weighs heavily on environmental factors as the sole cause of disability. As a result, research into individual experiences is neglected with medical treatment and cures for impairments treated with suspicion.<sup>275</sup> A better approach would be to allow for social transformation and medical approaches to operate simultaneously to alleviate disadvantages.<sup>276</sup>

#### **2.5.4.2 A barrier-free world?**

Another criticism levelled against the social model is that it is difficult to imagine a society where all barriers are eradicated for those with impairment.<sup>277</sup> This is due to several reasons, but chief among these is that differences in impairments, resource constraints, or the unfavourable environmental-natural landscape are factors beyond one's control. Terzi argues that even if we were to eliminate discrimination and all social barriers against persons with disabilities, we would still be unable to overcome the challenges, limitations, and restrictions resulting from an impairment. Societal structures may worsen the disadvantage experienced by those with impairments, but physical or mental impairments can also be detrimental in themselves.<sup>278</sup> Thus, whilst a barrier-free world is the ultimate goal for social model advocates, and as desirable as it is, it remains a cumbersome and huge undertaking to achieve.

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<sup>272</sup> Anastasiou and Kauffman (n 205) 441.

<sup>273</sup> *ibid* 446.

<sup>274</sup> *ibid* 450.

<sup>275</sup> Steven D Edwards, 'The Impairment/Disability Distinction: A Response to Shakespeare' (2008) 34 JME 26.

<sup>276</sup> Goering (n 271).

<sup>277</sup> Anastasiou and Kauffman (n 205); Shakespeare (n 252) 26.

<sup>278</sup> Terzi (n 181) 152.

It can nonetheless be argued that by designing products, environments, and spaces that can be accessed and used by the widest range of people or circumstance, universal design can help to create a more inclusive and accessible society.<sup>279</sup> However, it is important to note that universal design alone may not be able to fully eliminate all barriers. Universal design does not always consider the diverse needs of persons with disabilities and may not always provide a complete solution for addressing the barriers faced by people with disabilities.

Some impairments limit an individual even where accommodations are made.<sup>280</sup> Goering lists impairments such as fatigue, pain, depression, or chronic illness that might benefit from medical intervention beyond removing social and environmental barriers.<sup>281</sup> Crow argues that although impairment is not the sole cause of disability, it still contributes to the experience of the disabled.<sup>282</sup> Therefore, overcoming impairments is necessary in some cases to address limitations and obstacles faced by persons with disabilities.<sup>283</sup> Terzi in adding his voice to the debate observes that:

In asserting the total separation between impairment and disability, it opens up the chance of a 'proliferation' of terms other than disabilities, to denote inability or being unable to do things, which, if politically correct, appears less justified theoretically.<sup>284</sup>

Such a proliferation of terms might result in creating a wider range of claimants in comparison to the medical model. This would have the undesirable effect of creating legal uncertainty. This uncertainty can create opposition from employers and other social service providers, as they would be exposed to many legal suits. This could lead to a diluted response by the courts towards protecting persons with disabilities and their concerns.<sup>285</sup> Shakespeare equally argues that impairment is necessary for the construction of disability by saying, 'there can be no impairment without society, nor disability without

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<sup>279</sup> Inger M Lid, 'Universal Design and Disability: An Interdisciplinary Perspective' (2014) 36 *Disability and Rehabilitation* 1344.

<sup>280</sup> Lisa Waddington, 'Fine-Tuning Non-Discrimination Law: Exceptions and Justifications Allowing for Differential Treatment on the Ground of Disability' (2015) 15 *IJDL* 11.

<sup>281</sup> Goering (n 271) 135.

<sup>282</sup> Liz Crow, 'Including All of Our Lives: Renewing the Social Model of Disability' *Coalition* (July 5-9 1992) 3.

<sup>283</sup> Terzi (n 181).

<sup>284</sup> *ibid* 152.

<sup>285</sup> Nicholas Bamforth and others, *Discrimination Law: Theory and Context: Text and Materials* (Sweet & Maxwell 2008).

impairment'.<sup>286</sup> If there is no impairment, then any construction of disability becomes uncertain and can mean any form of restriction society imposes.<sup>287</sup> Bickenbach also argues that if disability discrimination is to be differentiated from other forms of discrimination, then our understanding of disability must consider the role played by impairment.<sup>288</sup>

## PART IV

### 2.6 Conclusion

This chapter examined the models of disabilities relevant to the conceptualisation of disability in Zambian society. An interrogation into the implications of applying these models is crucial in understanding how social conditions inform a country's attitude towards persons with disabilities. Zambia is a country with multiple cultural influences and identities. With a view to fostering diversity, there must be a proper balance between encouraging the preservation of a people's cultural heritage and practices and eliminating harmful and discriminatory practices against those with disabilities.

Models of disability significantly impact a country's legislative and governmental policies. The legal definition of disability has significant consequences for those with disabilities, as the model adopted by a society determines access to employment, goods, and services for them. Therefore, whatever model a given country decides to adopt as its guiding principle in formulating policies and laws will affect how disability is defined and determines the extent of protection against discrimination accorded to its citizens with disabilities.

A legal definition of disability will usually depend on what a particular jurisdiction intends to achieve in its treatment of its citizens living with disabilities. If the intention is care and rehabilitation, then the definition will seek to achieve that aim. On the other hand, if the legal rationale is achieving equality and preventing non-discrimination, it would be safe to say that the definition would be crafted and interpreted to reflect the achievement of those aims. The concept of disability must not be 'susceptible to a rigid, incontestable definition'

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<sup>286</sup> Shakespeare (n 229) 34.

<sup>287</sup> *ibid.*

<sup>288</sup> Bickenbach (n 169).

whilst, at the same time, the definition should not be too flexible to render it uncertain as to whom it intends to protect.<sup>289</sup> Any legal definition must therefore be helpful and consistent to reflect the law's intended purpose by considering all the complexities that might arise in addressing the concept of disability. Ensuring that such a balance is achieved is no mean feat. It will not always be clear who falls within the scope of protection of the law because of the difficulties in drawing a line between protected and unprotected individuals. A legal definition of disability must balance the necessity of ensuring that persons with disabilities are adequately protected against unjustified discrimination on the one hand and the need to limit the scope of the protection within coherent, sustainable and practical parameters on the other. Although traditions and religion influence some perceptions and attitudes towards persons with disabilities in Zambian society, some are a direct consequence of colonialism, as the next chapter seeks to demonstrate.

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<sup>289</sup> Charles Ngwena, 'Deconstructing the Definition of Disability under the Employment Equity Act: Social Deconstruction' (2006) 22 SAJHR 613,618.

## Chapter 3: Colonial History of Disability Legislation in Zambia

### PART I

#### 3.1 Introduction

Disability legislation has existed in Zambia since colonial times when the territory of Northern Rhodesia (now Zambia) was administered as a British protectorate. The colonial rule in Zambia can be divided into three eras: the British South African Company (BSAC) administration (under Charter from the British Crown) from 1890 to 1924; the British Colonial Office administration from 1924 to 1952; and the Federation of Northern Rhodesia and Nyasaland from 1953 to 1963. Between 1899 and 1911, the country was formally divided into the territories of North-Eastern Rhodesia and North-Western Rhodesia. This chapter's primary focus is concerned with disability policies and legislative developments during the colonial era. It seeks to examine colonial conceptualisations and perspectives of disability and the treatment of persons with disabilities by following the legislative developments that took place at the time. This chapter seeks to validate the widely held view of CDT theorists regarding the intersections and interactions between disability and race and how disability is aggravated by colonialism.

Like other African countries, Zambia cannot erase the legacy of colonialism. As such, the framing and conceptualisation of disability in Zambia cannot ignore that legacy. Grech observes that 'disabled people, like others, do not exist outside history, and were impacted as part of the colonised'.<sup>290</sup> By looking at how disability was construed and constructed during the colonial era, this chapter contributes to understanding disability from a Global South standpoint instead of understanding disability perceived through the lens of the Global North. This makes for interesting reflections, more complex and nuanced analysis, and links the colonial elements that are part of Zambia's legal system and the discursive practices that are emulating the colonial practices of centralising in law the idea of the white 'abled man'. To borrow the words of Gaze and Smith, 'many systems of social allocation in our society were developed in days when a small and powerful but unrepresentative group

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<sup>290</sup> Shaun Grech, 'Decolonising Eurocentric Disability Studies: Why Colonialism Matters in the Disability and Global South Debate' (2015) 21 *Social Identities* 6,9.

of upper-middle-class, white, able-bodied men controlled social systems that served their interests'.<sup>291</sup>

Part two provides the foundation of this chapter by examining how the entry of colonialism was disruptive to the indigenous population and how it contributed to socio-economic inequalities. Part three examines colonial policy concerning disability and the racial othering of the native persons with disability. Part four proceeds to look at the legislative enactments and how they influenced the treatment of Africans with disabilities. Part five concludes by examining the case of *Gordon Maddox Mwewa & others v Attorney General & another*, (hereafter *Mwewa*),<sup>292</sup> to demonstrate the long-lasting legacy that colonial legislation has had on the treatment of persons with disabilities in Zambia.

## PART II

### 3.2 Colonialism's effects on the indigenous population

The entry of European settlers and colonialism into the territory now known as Zambia was a complete disruption of how Africans lived and worked. The introduction of large-scale mining (particularly in the Copperbelt province) by European settlers, starting first with the BSAC and then the British colonial office, not only introduced the native and indigenous black populations to new forms of labour but also exposed them to unfamiliar occupational hazards, diseases, sickness and impairments brought about by violent work conditions, land appropriation and exploitation.<sup>293</sup> To meet the extensive labour demands that mining required, the BSAC and, later on, the colonial government imposed mandatory taxation on all 'able-bodied' males from the territory. By implication and because 'the law did not [permit] labour in lieu of tax',<sup>294</sup> the native Africans had to abandon their preferred means of living. This also meant relocating to where the mines were situated leaving, families behind in a bid to earn money to not only meet their needs but also to pay the newly

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<sup>291</sup> Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (CUP 2017) 18.

<sup>292</sup> [2017] ZMHC 77.

<sup>293</sup> See Siobhan Senier and Beatriz Miranda-Galarza, 'From Colonialism to Postcolonialism and Contemporary Empire' in Shaun Grech and Karen Soldatic (eds), *Disability in the Global South: The Critical Handbook* (Springer 2016).

<sup>294</sup> Colonial Office, *Annual Report on The Social and Economic Progress of The People of Northern Rhodesia 1932* (HM Stationery Office 1933) 43.

imposed taxes or risk punishment.<sup>295</sup> Colonialists also used vagrancy laws (such as the Vagrancy Ordinance 1929) to coerce Africans to enter forced employment under the threat of imprisonment. The two world wars are also known to have further escalated the demands for African labour.<sup>296</sup> Because activities such as mining are physically demanding on the body, natives with disabilities were automatically excluded from wage labour and could, therefore, only depend on the benevolence of others. Employment was only open to 'all male natives above the age of eighteen years of age and were not indigent by reason of age, disease, or such other cause...'<sup>297</sup> The colonial ideal of fit able-bodied males thus framed 'the path for contemporary narratives of normativity...normalcy or ableism... sustaining the devaluation of disabled bodies in the broader metanarrative...'.<sup>298</sup>

Kaunda, cognisant of the industrialisation brought about by colonialism, observes how it created an 'economic competitiveness' set in a philosophy with its own standards of success, performance and related rewards. Individuals were/are, therefore 'judged not by what they were born [with] but by what they can/could make of themselves by the effort of will and muscle and brain'.<sup>299</sup> Without seeking to romanticise pre-colonial African tribal society, Kaunda's concern with colonialism here is that it was disruptive to the African's tribal way of life where 'no one need feel discarded because he could not make the grade'.<sup>300</sup> Kaunda's arguments stem from the extended familial and communitarian relationship where the worth and uniqueness of each individual found their fulfilment through selfless concern for others in society. By contrast, the demands and standards set by industrialisation meant that those who failed to attain the required standards were rendered useless and unwanted.<sup>301</sup> Whereas certain African communitarian concepts concerning personhood present themselves as ableist, it is, often, the inherited colonial ideas of what an ideal worker should be, that still hold sway in most of today's employment

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<sup>295</sup> Thandekile RM Mvusi, 'The 'Politics of Trypanosomiasis' Revisited: Labour Mobilization and Labour Migration in Colonial Zambia: The Robert Williams Company in Lubemba, 1901-1911' (1994) 23 *Transafrican Journal of History* 43; Colonial Office, *Annual Report: Northern Rhodesia 1924-25* (HM Stationery Office 1926) 14.

<sup>296</sup> Ian Henderson, 'Labour and Politics in Northern Rhodesia, 1900-1953: A Study in the Limits of Colonial Power' (PhD thesis, University of Edinburgh 1972).

<sup>297</sup> Colonial Office (n 294).

<sup>298</sup> Grech (n 290) 10.

<sup>299</sup> Kaunda (n 85) 52.

<sup>300</sup> *ibid* 52.

<sup>301</sup> *ibid*.

practices reinforcing the marginalisation of persons with disabilities. Kaunda's sentiments can be equated to the views held by Oliver, who speaking from a British perspective, associates disability with the rise of industrialisation and materialistic capitalism.<sup>302</sup>

The fact that the majority of the native workforce in Northern Rhodesia was comprised of a male 'able-bodied' population working away from their homes (sometimes as far as Southern Rhodesia and the Katanga district of then Belgian Congo), inevitably meant that women were left to care and provide for, their young and those with disabilities in their communities.<sup>303</sup> This would have obviously put a strain on women leading to disability for some. In the same way, men who became impaired due to occupational injuries or disease lost out on wage labour, ushering them and their families into poverty. Kaunda thus observes that despite colonial urbanisation providing the stimulus for the creation of new communities and relationships 'based upon individual choice rather than tribal solidarity', it was also instrumental in destroying the 'unquestioning support of the extended family and clan'.<sup>304</sup> Grech also observes that colonialism was not only instrumental in shifting gender roles and heightening patriarchal systems but also worked towards the obliteration of cultures, customs, practices, beliefs, communities as well as languages.<sup>305</sup> This suggests that some of the criticism against today's African practices, as they relate to difference, merely reflect the vestiges left by puritanical colonial practices and ideologies and are therefore not a true reflection of the African fabric.

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<sup>302</sup> Mike Oliver, 'A Sociology of Disability or a Disablist Sociology?' in Len Barton (ed) *Disability and Society: Emerging Issues and Insights* (Routledge 1996) 33; see also Oliver (n 207) 48.

<sup>303</sup> 'By 1939 more than half of the male able-bodied population was working away from home'. (Karen T Hansen, 'Urban Research in a Hostile Setting: Godfrey Wilson in Broken Hill, Northern Rhodesia, 1938-1940' (2015) 41 *Kronos* 193,207.

See Godfrey Wilson, 'Anthropology in Northern Rhodesia' (1938) 38 *Man* 130,130 who observed that:

In Northern Rhodesia....the total able-bodied male population of the territory (44 per cent) are always at any one time in European employment; 17½ per cent are outside the territory (in South Rhodesia and the Lupa Gold Fields of Tanganyika for the most part) and 26½ per cent inside; but the vast majority in all cases are many miles from their rural homes. Within the territory, the mines (on the Copper Belt and at Broken Hill), the railways, farms, domestic service, commerce, the Government, the Municipalities, and the Missions, all need African labour, and all obtain it.

<sup>304</sup> Kaunda (n 85) 51.

<sup>305</sup> Grech (n 290) 8; see also Alice Evans, 'History Lessons for Gender Equality from the Zambian Copperbelt, 1900-1990' (2015) 22 *Gender, Place & Culture* 344.



## PART III

### 3.3 Colonial policy towards African disability

The normative conceptualisation of disability during colonial rule was not only marked by ableist ideas but was also used to signify racial differences between whites and blacks, with blacks considered to be inferior to whites. From the inception of colonialism, activities were governed along racial lines. Wilson attributes the racial classification system in Northern Rhodesia to three key causes. The first was that the indigenous people were regarded as 'semi-primitive'. Second, 'the absorbing civilisation was itself articulated into classes and dominated by capital accumulation', and third, 'the factor of colour'.<sup>306</sup> Undoubtedly the European settler community in Northern Rhodesia had its ideology built on the myth of European racial superiority which it used to justify its complete control over the political and economic affairs of the territory. Racial inequality, discrimination and segregation were therefore a natural occurrence flowing from this ideological position.<sup>307</sup>

During colonial times, disability was mainly perceived through the lens of the individual/medical models of disability and as a social welfare issue premised on charitable responses.<sup>308</sup> The health care system and facilities in Northern Rhodesia were segregated with European settlers receiving better and superior facilities and allowances (where applicable) than the native Africans.<sup>309</sup> Prior to World War II, medical care for the African population was mainly administered by missions who used 'Western medicine' as a means of advancing Christianity's 'civilising mission' and evangelical efforts in Africa.<sup>310</sup> Later on, health care and social welfare services in the territory were provided by the concerted efforts of the Government, the local authorities and voluntary bodies (particularly missions).

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<sup>306</sup> Godfrey Wilson, 'An Essay on the Economics of Detribalization in Northern Rhodesia: Part I' (1941) 5 *The Rhodes-Livingstone Papers* 1, 26.

<sup>307</sup> Robert Molteno, 'Zambian Humanism: The Way Ahead' (1973) 3 *The African review* 541.

<sup>308</sup> Sibonokuhle Ndlovu, 'Humanness and Ableism: Construction and Deconstruction of Disability' in Melissa Steyn and William Mpofu (eds), *Decolonising the Human: Reflections from Africa on Difference and Oppression* (Wits University Press 2021).

<sup>309</sup> Colonial Office, *Annual Report of Northern Rhodesia 1927* (HM Stationery Office 1928).

<sup>310</sup> Walima T Kalusa, 'Language, Medical Auxiliaries, and the Re-interpretation of Missionary Medicine in Colonial Mwinilunga, Zambia, 1922-51' (2007) 1 *JEAS* 57.

With specific regard to Africans with disabilities, the response of the colonial government was mixed. On the one hand, the colonial administration's attitude towards the welfare of Africans with disabilities bordered on complete neglect<sup>311</sup> and, on the other hand, reflected the widely held belief that persons with disabilities needed care and assistance, as they were perceived to be unable and incapable of independent living.<sup>312</sup> The colonial government, in explaining why it could not extend social-care services to 'disabled' Africans, argued that it could not take lightly nor ignore the fact that in the African social system, it was 'the duty of the family to look after its destitute or disabled members'.<sup>313</sup> In some cases, 'distressed' or 'handicapped' (sic) Africans, whether aged or not, were either assisted by 'ration issues or by *ad hoc* grants or returned to their tribes and families to be cared for by members of their own kinship group'.<sup>314</sup> A 1959 study investigating the problem of destitution and the extent of unemployment among the 'physically and mentally handicapped' in Broken Hill (now Kabwe) the oldest town in Northern Rhodesia, concluded that there was a tendency for those with disabilities to return to rural areas (from where they had obviously been drawn to meet the labour demands of the town) when they were not able to work and where no support was given. The study found the inclination to remain in urban areas was greater where support was given. In very rare cases 'where houses were not tied to work or provided so as to encourage more permanent settlement, deviates (sic) stayed in town in greater numbers.'<sup>315</sup> Because services such as housing were almost always tied to employment, being disabled not only meant a loss of income, but the loss of accommodation as well. To this end, the fear of becoming destitute in town compelled many to go back to their villages.

Although it is easier to conclude the existence of neglect by the colonial administration towards providing health services to Africans, it is also possible that it recognised the importance of African communal care. Brelsford observed that the duty to care for those with mental health issues among the Bemba often fell on the family, who would provide

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<sup>311</sup> Alan Haworth, 'Psychiatry in Zambia' (1988) 12 BJPsych Bulletin 127.

<sup>312</sup> Paul Chaney, 'Civil Society, Rights and Welfare: Exploring the Implementation of the Convention on the Rights of Persons with Disabilities in the Commonwealth of Independent States' (2021) *Europe-Asia studies* 1.

<sup>313</sup> Colonial Office, *Annual Report on Northern Rhodesia for the Year 1949* (HM Stationery Office 1950) 38.

<sup>314</sup> *ibid* 38.

<sup>315</sup> W Clifford, *Physical Handicap Amongst Africans in Broken Hill* (Ministry of Local Government and Social Welfare 1960) 18.

them with food and clothing to help them lead a decent life. Those without relatives often survived on the generous handouts of others or from the friendly communal meals of village life. The treatment of those with mental disabilities was not always benevolent, as those who exhibited violent tendencies would be confined in some way or restrained by other mechanical means, such as being tied to a heavy load.<sup>316</sup> Carothers, a government psychiatrist in colonial Kenya, whose views about the African mind, psychology and psychiatry gained traction among colonial governments in Africa, in his now controversial 1953 monograph, did admit to the admirable levels of care and skill exhibited by families and witch doctors in the treatment of 'psychiatric patients'.<sup>317</sup> Writing earlier, Carothers also observed that 'every individual in an African community plays an important part in that community, has ceremonial and other duties to perform, and is regarded as a valuable asset by his clan'.<sup>318</sup>

An important observation must be made concerning the colonial perception of African communal care and collective responsibility. Based on the social anthropology views of the time, which sought to explain the fundamental differences between Africans and Europeans, the assertion was that Africans were incapable of experiencing individual autonomy owing to their inseparable ties to the collective. Therefore, for many colonial psychologists and psychiatrists keen on establishing this difference, it was argued that the African mind was incapable of developing beyond adolescence.<sup>319</sup> Carothers viewed African social interactions and relations as primitive in contrast to the Europeans, whom he regarded as civilised owing to their 'individual self-sufficiency', whose 'essential feature is the constant necessity for personal choice and decision'. Carothers viewed the African communal relations and social interaction as being devoid of any personal responsibility 'for the past, and of concern for the future'. The attainment of self-sufficiency and personal responsibility according to Carothers, therefore, required 'a higher minimum intelligence', which the African lacked owing to his social environment.<sup>320</sup> Similarly, Davidson writing from

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<sup>316</sup> W V Brelsford, 'Insanity Among the Bemba of Northern Rhodesia' (1950) 20 *Africa* 46,48.

<sup>317</sup> John Carothers, *The African Mind in Health and Disease: A Study in Ethnopsychiatry* (WHO 1953) 123.

<sup>318</sup> John Carothers, 'A Study of Mental Derangement in Africans, and an Attempt to Explain its Peculiarities, More Especially in Relation to the African Attitude to Life' (1947) 93 *Journal of Mental Science* 548, 556.

<sup>319</sup> Megan Vaughan, *Curing their Ills: Colonial Power and African Illness* (Stanford University Press 1991).

<sup>320</sup> Carothers (n 318) 595.

a psycho-analytic perspective on 'Psychiatric work among the Bemba' (a tribe in Zambia) arrived at the same conclusion. He argued that the abrupt weaning of the African child arrested their learning ability beyond adolescence.<sup>321</sup> Africans were therefore perceived as incapable of managing their affairs and could not survive outside familial and kinship ties or without the help of others. From these perspectives, colonial medical science infantilised Africans and gave credence to the colonial government's white supremacy ideas. Africans were thus denied property ownership alleging that they lacked the requisite capacity to manage it.<sup>322</sup>

The colonial government often dismissed genuine cries for help, alleging that Africans had a 'government must help me complex'.<sup>323</sup> Vaughan also observes similar treatment from colonial officials in Botswana, who were often hesitant to respond to African requests for government intervention in dealing with mental illness as they were, 'for a variety of reasons, inclined to the view that African communities could care for their own 'lunatics''.<sup>324</sup>

From the above, the picture generated is that being an African with a disability in colonial Zambia meant economic doom for an individual. Africans with disabilities could not readily receive governmental support outside their families. Disability during the colonial era (as well as today) was not a singular experience but mediated by various factors within the social, political and historical context in which an individual resides.<sup>325</sup> Africans with disabilities faced multiple and intersecting forms of discrimination. Not only did they experience disability discrimination, but they also experienced racial injustice, sex and gender discrimination and economic exclusion. And, because the colonial government favoured certain ethnic groups at the expense of others, persons with disabilities belonging to the so-called lower ethnic tribes also experienced ethnic marginalisation on that front.

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<sup>321</sup> S Davidson, 'Psychiatric Work among the Bemba' (1949) 7 Rhodes-Livingstone Journal 75, 77.

<sup>322</sup> Simon Jarrett, *Those They Called Idiots: The Idea of the Disabled Mind from 1700 to the Present Day* (Reaktion 2020).

<sup>323</sup> Haworth (n 311) 128.

<sup>324</sup> Vaughan (n 319) 55.

<sup>325</sup> Annamma, Connor and Ferri (n 94) 1.

Having briefly established the setting in which persons with disabilities found themselves during the colonial period, this chapter now seeks to analyse disability-specific legislative developments in Northern Rhodesia.

## **PART IV**

### **3.4 Colonial legislative developments**

The history of disability regulation dates back to when the territory which was to become Northern Rhodesia was first administered by the BSAC, and then as two separate territories: Barotseland North-Western Rhodesia (under the High Commissioner for South Africa) and North-Eastern Rhodesia (under the BSAC), which by virtue of their respective Orders in Council (The North-Western Rhodesia Order in Council 1899 and The North-Eastern Rhodesia Order in Council 1900), extended the application of the law of England in these territories.<sup>326</sup> Generally, the laws in England relating to the treatment of persons with disabilities (mainly mental health laws), could be applied in the territories as far as local circumstances permitted.<sup>327</sup> Upon the establishment of the Northern Rhodesia Order in Council 1911, the two territories were united into one territory, which came to be known as Northern Rhodesia.

#### **3.4.1 Lunacy Ordinance 1927 (LO 1927)**

One of the earliest pieces of legislation affecting persons with disabilities in Northern Rhodesia was the Lunacy Ordinance 1927 (LO 1927), passed by the Northern Rhodesia Legislative Council. By enacting this Ordinance, Northern Rhodesia was simply following the legislative developments that had occurred in other colonies such as Southern Rhodesia, Uganda and Nigeria. The Northern Rhodesia LO 1927 was modelled on the Ugandan Lunacy Ordinance 1906.<sup>328</sup> Commenting on the Ugandan Ordinance, Pringle notes that the Ordinance ideally aimed at addressing the 'European cases of insanity, rather than African

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<sup>326</sup> See The Barotseland--North-Western Rhodesia Order in Council 1899, art 16; The North-Eastern Rhodesia Order in Council 1900, art 21,22.

<sup>327</sup> *ibid.*

<sup>328</sup> 'South Africa' (1930) 12 J Comp Leg 141, 162.

patients'.<sup>329</sup> The Northern Rhodesia Lunacy Ordinance's preamble stated that it was 'an Ordinance for the detention of lunatics and suspected lunatics and to regulate the law relating to lunacy in the territory'.<sup>330</sup> The LO 1927 granted the High Court jurisdiction in lunacy and went on to define the term, lunatic, as 'including any idiot and any other persons of unsound mind'.<sup>331</sup> It is important to note that the use of such language (although not as commonly used today but still retained in some statutes), to describe mental disability, is susceptible to very broad and arbitrary interpretations. The use of words and phrases such as 'idiot' or 'unsound mind' do not necessarily define or identify a mental disorder.<sup>332</sup>

The works of Vaughan give some insight into the treatment of mental health and psychiatry in British colonial Africa and the treatment of Africans. Vaughan, referencing the Nyasaland Native Lunatics Ordinance 1913, describes how defining insanity was a very confusing matter for white colonialists because of a failure to understand and appreciate the culture, customs, and practices of the native Africans. Observing also that the courts were usually presided over by 'British district officials' ill-qualified in legal matters, Vaughan notes how defining insanity in another culture was equally challenging, and the use of African court assessors as linguistic translators, only made the situation worse.<sup>333</sup>

Regardless of how confusing defining lunacy or insanity was, the ultimate decision of determining who was insane was that of the white British official who was likely to apply their subjective reasoning of what constituted lunacy since terms such as 'unsoundness of mind' are fluid legal concepts and not a medical category of a mental disability. Because of the custodial nature of the treatment of 'lunacy' in Northern Rhodesia, native Africans were an easy target for this kind of legislation because of the racist ideas that Africans were supposedly different and of inferior intelligence who needed to be civilised 'from primitive to modern' (a recurring theme in Colonial Annual Reports). It should be noted that the enactment of Lunacy legislation in colonial Africa coincided with the peak of European

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<sup>329</sup> Yolana Pringle, *Psychiatry and Decolonisation in Uganda* (Palgrave-Macmillan 2019) 32.

<sup>330</sup> Lunacy Ordinance 1927, preamble.

<sup>331</sup> *ibid* s 3.

<sup>332</sup> Melvyn Freeman and Soumitra Pathare, *WHO Resource Book on Mental Health, Human Rights and Legislation* (WHO 2005) 25.

<sup>333</sup> Vaughan (n 319) 102.

scientific racism, which viewed Africans as ‘the most primitive of all people’.<sup>334</sup> It was during this era, therefore that the tools of scientific racism were used to justify discrimination, segregation, and the unequal treatment of Africans.<sup>335</sup> Vaughan, McCulloch, and Campbell, in their separate works on African psychiatry during colonial times, explore the writings on African psychology and psychiatry by famous psychiatrists such as J. C Carothers, Dr H.L. Gordon and F.W. Vint, who plied their trade in colonial Africa and whose writings provided ‘scientific proof’ that the Africans were racially inferior owing to their underdeveloped brains and frontal lobes in comparison to the Europeans.<sup>336</sup> These descriptions of the intellectual ineptitude of Africans applied to both those on the African continent, and those in America as well. Thus, in his essay *Race Intelligence*, W.E.B. Du Bois (1920) chronicled how science was used to justify the racial discrimination of blacks through continued attempts to prove that they were of a lesser intelligence and not fully human. He wrote:

For a century or more it has been the dream of those who do not believe Negroes are human that their wish should find some scientific basis. For years they depended on the weight of the human brain, trusting that the alleged underweight of less than a thousand Negro brains, measured without reference to age, stature, nutrition or cause of death, would convince the world that Black men simply could not be educated. Today scientists acknowledge that there is no warrant for such a conclusion and that in any case the absolute weight of the brain is no criterion of racial ability.<sup>337</sup>

Added to this were stereotype claims that certain psychiatric conditions such as depression were alien to Africans. And when they were found to occur, this was usually dismissed by assertions that conditions like depression were the results of interaction with the civilised European culture. Depression in an African person was seen as a sign of being close to the European civilisation.<sup>338</sup> Carothers thus argued:

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<sup>334</sup> Harriet Deacon, ‘Racism and Medical Science in South Africa's Cape Colony in the Mid- to Late Nineteenth Century’ (2000) 15 *Osiris* 190.

<sup>335</sup> Annamma, Connor and Ferri (n 94).

<sup>336</sup> Vaughan (n 319); Jock McCulloch, *Colonial Psychiatry and ‘The African Mind’* (CUP 1995); Chloe Campbell, *Race and Empire: Eugenics in Colonial Kenya* (Manchester University Press 2007).

<sup>337</sup> W E B Du Bois, ‘Race Intelligence’ *The Crisis* (July 1920) 118.

<sup>338</sup> Lynette A Jackson, *Surfacing Up: Psychiatry and Social Order in Colonial Zimbabwe 1908-1968* (Cornell University Press 2005).

In general, it seems, therefore, that classical depressive syndromes are seldom seen, at least in Africans untouched by alien influences; and it behoves one to consider whether other cases do occur but are not disclosed.<sup>339</sup>

The purported increase of schizophrenia among Africans was also explained along similar lines.<sup>340</sup> It is, therefore, possible that the reported increase in Africans of these 'exclusively European' mental conditions was seen as another indicator of the colonialists' civilising mission of the natives. These theories gained much traction in the perception and treatment of Africans by the colonial governments such that any other theories which proposed a contrary view were often dismissed. Referencing the Kenyan colonial experience, Campbell writes that Gordon's eugenicist views 'in the 1930's became a major preoccupation for the medical profession in Kenya, and the Kenyan eugenicist doctors made their agenda central to debates about African welfare and development and related medico-legal questions'.<sup>341</sup>

In Northern Rhodesia, the establishment of the Rhodes-Livingstone Institute (RLI)<sup>342</sup> in 1937 as the first anthropological research institution in Africa and the various works published under it were influential in steering colonial perceptions and attitudes about African bodies, minds and social conditions. Although established as an independent institute, free from direct colonial governmental control, it still received funding from the colonial government. The RLI had two important missions. Firstly, by utilising tools in social anthropology it would generate 'scientific' knowledge about Africans and the effects of colonialism on them. Secondly, 'it would provide the colonial authorities with useful information that could be used to facilitate the smooth and humane operation of colonial rule'.<sup>343</sup> The researchers at the RLI considered themselves as progressive but the colonial government sometimes viewed them with a sense of ambivalence owing to their highest academic and scholarly approach towards anthropological research concerning the colonial subjects.<sup>344</sup> However, despite some of their works being critical of Gordon and Vint's phrenological conclusions on African intelligence and mental defects, there is a palpable sense that their writings stemmed from perspectives that essentialised the differences between the European and

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<sup>339</sup> Carothers (n 317) 146.

<sup>340</sup> *ibid.*

<sup>341</sup> Campbell (n 336) 39.

<sup>342</sup> Now, Institute for African Studies at the University of Zambia.

<sup>343</sup> Kate Crehan, *The Fractured Community: Landscapes of Power and Gender in Rural Zambia* (University of California Press 1997) 55.

<sup>344</sup> *Ibid* 56.



the Black African. This is clearly demonstrated in the previously mentioned writings of Captain S Davidson on 'Psychiatric work among the Bemba'. Kalusa and Phiri also observe that the knowledge generated by colonial anthropologists about African society was used by colonial authorities to maintain colonial power.<sup>345</sup>

During this period, the preoccupation of the colonial psychiatrist lay in trying to figure out what characterised a 'normal' African as opposed to investigating mental illness. Thus, by pathologizing what constituted 'normal' African psychology, colonial psychiatry's main goal was to provide compelling scientific arguments about the inferiority of Africans to Europeans. Vaughan, observes:

Colonial psychiatry did identify the 'lunatic' and sometimes incarcerated her or him... but in general the need to objectify and distance the 'Other' in the form of the madman or the leper, was less urgent in a situation in which every colonial person was in some sense, already 'Other'.<sup>346</sup>

With the legislative use of words such as 'idiot', which in ordinary usage can mean a person of low intelligence, to describe 'lunacy', coupled with the racist scientific beliefs about race and ability, it is easy to see how the Colonial government could use the Lunacy Ordinance as a means of social control over the African.<sup>347</sup> Law could then be used to justify unnecessary and unreasonable detentions or to constrain individuals perceived to be troublesome by certifying them as insane.

As per its preamble, the LO 1927 did not have any provision for treatment, but it instead provided for custodial confinement.<sup>348</sup> As such, the ordinance gave magistrates the authority to hold hearings regarding an individual's sanity upon the receipt of sworn information from an informant who believed that any person within the magistrate's jurisdiction was a 'lunatic'.<sup>349</sup> The determination of whether the suspected individual was a lunatic required an examination by two registered medical practitioners who would have to certify 'stating that the suspected person was in their opinion a lunatic and a proper subject

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<sup>345</sup> Walima T Kalusa and Bizeck J Phiri, 'Introduction: Zambia's Postcolonial Historiography' (2014) 5 Zambia Social Science Journal 1,1.

<sup>346</sup> Vaughan (n 319) 10.

<sup>347</sup> Martin Summers, 'Suitable Care of the African When Afflicted with Insanity: Race, Madness, and Social Order in Comparative Perspective' (2010) 84 BHM 58.

<sup>348</sup> LO 1927, s 6.

<sup>349</sup> *ibid* s 4.

for confinement'.<sup>350</sup> In the event that no medical practitioner was available, a magistrate could authorise the apprehension and detention of a person considered to be of unsound mind pending an examination by a medical practitioner. If the suspected individual were a native African, certification by one medical practitioner would suffice. Native commissioners were also given the authority to order apprehensions and detentions in certain circumstances. However, the exercise of such power had to be reported to the nearest magistrate, who would then take over the matter. Where confinement was deemed unnecessary, the magistrate could direct that the suspected lunatic be placed in the care of their relatives or friends. If they were African, they would be handed over to a chief or headman. Sadowsky, commenting on the Nigerian colonial experience, notes that preferences for placing the suspected African 'lunatics' in the care of their chief or headman were a manifestation of the colonial doctrine of indirect rule, which gave African rulers authority to administer African affairs by applying the existing customary legal systems as a means of preserving traditional African structures.<sup>351</sup> However, customary law was only applicable to the extent that it did not undermine British supremacy and that it was not 'repugnant to natural justice, equity, or good morality and that it was neither in its terms nor by necessary implication in conflict with any written law'.<sup>352</sup> In this case, in the event of a conflict between customary law or practice and the imposed British law concerning matters of determining 'lunacy' or 'insanity', the British law would ultimately prevail.<sup>353</sup> Additionally, African beliefs in witchcraft as the cause of insanity in certain instances were readily dismissed by the colonial authorities, who were quick to deny its existence.<sup>354</sup> The existence of legislation such as the Witchcraft Ordinance also made it more challenging for Africans to explain certain classifications and causes of insanity for fear of being punished under the Witchcraft Ordinance.<sup>355</sup> All in all, the responsibility for making decisions of whether one was a 'lunatic' was a legal one and not necessarily a medical one.

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<sup>350</sup> *ibid* s 5.

<sup>351</sup> Jonathan Sadowsky, 'Psychiatry and Colonial Ideology in Nigeria' (1997) 71 BHM 94,95.

<sup>352</sup> Muna Ndulo, 'African Customary Law, Customs, and Women's Rights' (2011) 18 *Ind J Global Legal Studies* 87, 95.

<sup>353</sup> Sadowsky (n 351).

<sup>354</sup> Davidson (n 313) observed that insanity among the bemba of Northern Rhodesia was usually attributed to possession by evil spirits.

<sup>355</sup> Vaughan (n 319).

The growth of the British Empire and global domination also meant the introduction of British institutions into the colonies. One such institution was the custodial model in dealing with the 'insane' or 'lunatics' by confining them to asylums.<sup>356</sup> Unlike other colonies, Northern Rhodesia did not have an asylum for the specialised treatment or confinement of those with mental disorders or disabilities. Instead, some buildings were designated and set apart as gaols to house 'lunatics' whenever possible.<sup>357</sup> Those housed in these conditions were subjected to prison like conditions so appalling even for that period.<sup>358</sup>

In exceptional cases 'persons of unsound mind' would by special arrangement with the Southern Rhodesian Government be admitted to the Ingutsheni Asylum (Ingutsheni Mental Hospital) in Bulawayo.<sup>359</sup> This situation continued until 1962 after the establishment of the first and only mental health hospital in Zambia, the Chianama Hills Hospital.<sup>360</sup> Like everything else, the wards at this facility were segregated on racial lines as well. Europeans were well housed in comparison with the African patients who were housed in less than conducive and generally overcrowded wards.<sup>361</sup> This racially segregated environment made it possible for whites to receive better treatment and attention than their African counterparts who were highly susceptible to gross abuse.<sup>362</sup>

The introduction of European-styled asylums to Africa was predominantly used to confine and house the 'African insane' and, to a lesser extent 'the European insane, for fear that they would become vagrant or otherwise compromise British prestige'.<sup>363</sup> However, as Vaughan observes, there was no 'great confinement' for natives with mental illness in African asylums during the colonial era in comparison with what was happening in European asylums at the same time.<sup>364</sup> Fernando notes that the introduction of asylum-psychiatry into sub-Saharan Africa did not necessarily meet the needs of the natives with mental disabilities

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<sup>356</sup> Jonathan Sadowsky, 'Confinement and Colonialism in Nigeria' in Roy Porter and Davide Wright (eds), *The Confinement of the Insane: International Perspectives, 1800-1965* (CUP 2003) 299.

<sup>357</sup> 'South Africa' (n 320) 162.

<sup>358</sup> Haworth (n 311) 127.

<sup>359</sup> Jackson (n 338).

<sup>360</sup> Haworth (n 311).

<sup>361</sup> Lynett A Jackson, 'The Place of Psychiatry in Colonial and Early Postcolonial Zimbabwe' (1999) 28 *IJM* 38.

<sup>362</sup> *ibid.*

<sup>363</sup> Sadowsky J, 'Confinement and Colonialism in Nigeria' in Roy Porter and Davide Wright (eds), *The Confinement of the Insane: International Perspectives, 1800-1965* (CUP 2003) 301.

<sup>364</sup> Vaughan (n 319).

who in most instances (as examined above) got help from their family and community, and resorted to religious and indigenous medicines to treat their mental health problems.<sup>365</sup> These observations reflect Carothers' views who noted that institutionalisation was mainly reserved for those who proved to be a nuisance and could not be managed at home.<sup>366</sup> McCulloch goes on to indicate that the common African psychiatric inmate was male, and had either been in the prison system or displayed violent and unmanageable behaviour.<sup>367</sup> These observations were also true for Northern Rhodesia as confirmed by Haworth who observes that the transfer of patients to neighbouring Southern Rhodesia was seen by the colonial officials as being too cumbersome and administratively challenging.<sup>368</sup> To this end it was more convenient and obviously cheaper for the colonial government to return patients to their villages for supervision by the headman instead of going through with the 'ordeal of certification, confinement in a gaol and subsequent transfer hundreds of miles by train under an escort and across an inter-territorial border to an asylum where few if any of the staff or inmates can speak their language'.<sup>369</sup>

### 3.4.2 Mental Disorders Ordinance 1949 (MDO 1949)

Another major legislative development in Northern Rhodesia was the enactment of the Mental Disorders Ordinance 1949 (MDO 1949), which repealed and replaced the Lunacy Ordinance. The Ordinance proceeded from the recommendations of a 1947 committee that had been set up to examine the operations of the LO 1927. According to Haworth, the committee strongly advocated for the construction of an asylum in Northern Rhodesia, arguing that it was in the real interest of African communities to keep those with mental illness detained for long periods.<sup>370</sup> The MDO 1949 also coincided with developments in mental health views on the need to provide curative treatment and not merely custodial confinement for those with mental health challenges. There was thus a shift from trying to investigate what 'normality' and 'abnormality' meant for an African, to one aimed at

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<sup>365</sup> Suman Fernando, *Mental Health Worldwide: Culture, Globalization and Development* (Palgrave-Macmillan 2014) 75.

<sup>366</sup> Carothers (n 317).

<sup>367</sup> Jock McCulloch, *Colonial Psychiatry and 'The African Mind'* (CUP 1995) 18.

<sup>368</sup> Haworth (n 311) 128.

<sup>369</sup> *ibid* 127.

<sup>370</sup> *ibid* 127.

researching mental illness.<sup>371</sup> This was based on the fears of European psychiatrists that urbanisation, industrialisation, and detribalisation would negatively affect the African mind.<sup>372</sup> It was about exploring how the Africans would or were coping with changes to their social order in the advent of industrialisation. The threats of decolonisation and fears of the rise of nationalist anti-colonial sentiments only heightened the sense of urgency amongst European psychiatrists who called for accelerated efforts in assessing mental health risks which were expected to befall the Africans due to the drastic changes they would experience.<sup>373</sup> Keller, therefore, notes that, 'under colonialism, where the ruling state is in almost constant tension with the population, the position of psychiatric knowledge becomes even more complex'.<sup>374</sup> To this effect, the 1949 Ordinance proceeded earlier calls by Donald Mackay, a mission doctor in Northern Rhodesia, on the need to conduct 'extensive research on African Mental health'.<sup>375</sup> Mackay called for the establishment of 'mental clinics in every township and men trained in psychiatry and steeped in African background to stem the tide of threatening maladjustment. We hear much of development— but where is their development so pressing as this'.<sup>376</sup>

For Mackay, it was not enough for psychiatrists to understand the African mind from the European perspective of what it meant to be normal or abnormal. There was instead the need to take a holistic approach to understand the African mind in its own setting by considering the Africans 'background, his faiths, his hopes, his fears, his sex life—and everything else that makes up the mosaic of his mental environment'.<sup>377</sup>

It was also around this period that the likes of Colonel Davidson, a psychiatrist, writing for the RLI, called for the use of shock therapy as part of the treatment for some psychiatric cases.<sup>378</sup> Davison in advocating for collaborative work between the study of psychiatry and

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<sup>371</sup> Irene Yuan Sun, 'Population as Discourse: Medicine in Late Colonial Kenya' (Honours Degree Thesis, Harvard University 2007).

<sup>372</sup> Vaughan (n 319); Carothers (n 318); Brelsford (n 316) 51.

<sup>373</sup> Ana Antić, 'Decolonizing Madness? Transcultural Psychiatry, International Order and Birth of a 'Global Psyche' in The Aftermath of the Second World War' (2022) 17 *Journal of Global History* 20.

<sup>374</sup> Richard Keller, 'Madness and Colonization: Psychiatry in the British and French Empires, 1800-1962' (2001) 35 *Journal of Social History* 295, 297.

<sup>375</sup> Donald Mackay, 'A Background for African Psychiatry' (1948) 25 *East African Medical Journal* 2,4.

<sup>376</sup> *ibid* 4.

<sup>377</sup> *ibid* 2.

<sup>378</sup> Davidson (n 321).

anthropology, argued that work in this area would 'be of great value both to the Government and to the private industrial concerns'.<sup>379</sup> The benefits would therefore result 'in more efficient administration, reduced policing costs, better physical health and worker discipline, and an improved international image for enlightened colonial rule'.<sup>380</sup> He also made recommendations for the establishment of a psychiatric hospital for Northern Rhodesia.

Ultimately the purpose of this MDO 1949 was 'to bring the law relating to the care and treatment of mentally disordered and defective persons into line with modern medical practice' (at the time).<sup>381</sup> The Ordinance was modelled on the Mental Disorders Act of Southern Rhodesia of 1936 (also formulated after the England and Wales 1930 Mental Treatment Act) since most patients of mental illness were 'detained' there for treatment.<sup>382</sup> Apart from amending the terminology to conform to the medical standards of the time, the Ordinance also sought to 'permit administrative improvements in adjudication and the detention and release of patients'.<sup>383</sup> The Ordinance in keeping with the individual and clinical view that mental disability is an individual defect of intelligence, defined 'mentally disordered' or 'defective person' as:

Any person who in consequence of mental disorder or disease or permanent defect of reason or mind, congenital or acquired-

- (a) is incapable of managing himself or his affairs; or
- (b) is a danger to himself or others; or
- (c) is unable to conform to the ordinary usages of the society in which he moves;
- or
- (d) requires supervision, treatment or control; or
- (e) (if a child) appears by reason of such defect to be incapable of receiving proper benefit from the instruction in ordinary schools.<sup>384</sup>

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<sup>379</sup> *ibid* 85.

<sup>380</sup> Marc Epprecht, *Heterosexual Africa?: The History of an Idea from the Age of Exploration to the Age of AIDS* (Ohio University Press 2008) 75.

<sup>381</sup> Colonial Office (n 313), 44.

<sup>382</sup> 'South Africa' (1951) 33 J Comp Leg 96, 107.

<sup>383</sup> PEH Pike and others, 'East Africa' (1951) 33 J Comp Leg 96, 107.

<sup>384</sup> Mental Disorders Ordinance 1949 (MDO 1949), s 2.

And continuing on the same trajectory of ambiguously defining mental health conditions, the Ordinance further provided for six classifications of a mentally disordered or defective person namely, mental disorder; mentally infirm; idiot; imbecile; feeble-minded; and moral imbecile.<sup>385</sup> It has been argued that the rationale for such classifications was aimed at providing alternative treatments for certain types of mental illness which could be cured over time and to also differentiate between serious mental disorders that warranted certification and those considered less serious that did. It was also claimed that these classifications were necessary to distinguish between the 'criminal lunatics' and other categories of the insane to avoid generalisations of housing them in the same facilities.<sup>386</sup>

Jackson commenting on the Southern Rhodesian Act which had the exact same categorisations and definition of mental disorders as the Northern Rhodesian Ordinance, argues that the terminology used facilitated the merger of 'the colonial social agendas with science'.<sup>387</sup> It, therefore, seems that the passage of time had not changed the views of colonial psychologists and psychiatrists' views as regards the African mind as they were still keen to establish a causal link between the African contact with 'European civilisation' and African mental illness. The classifications of mental disorders or insanity for the colonial psychiatrist and psychologists was unquestionably targeted at not just understanding mental illness among Africans but had the ulterior motive of describing and defining African inferiority generally. Thus, despite replacing the LO 1927, any reference to the term, lunacy, remained unaffected going by the wording of section 37 of the MDO 1949 which read:

Wherever in any law any reference to a lunatic or to lunacy or to an asylum is contained, that reference shall be read and constructed as a reference to a patient or to a mentally disordered or defective person within the meaning of this Ordinance, or, as the case may be, to mental disorder or defect or to a mental hospital.<sup>388</sup>

The Ordinance allowed for the care of those with 'mental disorders' but also allowed for magistrates and other officers to apprehend and detain suspected 'mentally defective persons' without a warrant or medical certification if they were considered a danger to

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<sup>385</sup> *ibid*, s 5.

<sup>386</sup> Edward D Myers, 'The 1959 United Kingdom Mental Health Bill: Comparison of Some Aspects with the Mental Disorders Act of Southern Rhodesia' (1962) *Cent Afr J Med* 139.

<sup>387</sup> Jackson (n 338) 112.

<sup>388</sup> MDO 1949, s 37.

themselves or others, or unable to take care of themselves.<sup>389</sup> The Ordinance also contained provisions for the temporary and involuntary detention of those suspected of having a mental disorder for a period not exceeding fourteen days for the purposes of inquiring into the state of mind of the 'patient'. The period of detention could be further renewed for another fourteen days.<sup>390</sup> Admission into a specialised facility required the opinion and certification of two medical practitioners.<sup>391</sup> It is also important to note that the specialised facilities for the reception, treatment or detention of persons suffering from mental disorders were less than pleasant. The absence of a mental hospital in Northern Rhodesia meant that many persons with mental disabilities were kept amongst criminals in deplorable conditions in prisons.<sup>392</sup> Unfortunately, even the few mental observation centres attached to some of the general and district hospitals were also not different from the prisons 'with high barred windows and heavy doors giving access to rows of small cell-like rooms.'<sup>393</sup> And as noted earlier, transfers to the Ingutsheni Lunatic Asylum continued till the opening of the Chainama Hills Hospital in 1962 which to this day remains the country's only specialised psychiatric hospital save for a few hospitals in the country that have dedicated mental health annexes. And like the LO 1927, the 1949 Ordinance also had provisions that gave magistrates the option to make a control order for the care and control of a patient with mental disabilities by 'his friends or relatives, or to a native authority or village headman'.<sup>394</sup> The Ordinance also gave the High Court jurisdiction 'to administer and control estates and property of patients, including the power to appoint committees and administrators'.<sup>395</sup> Because the Ordinance did not have any provisions related to the determination and assessment of competence and capacity, the law, therefore, created the assumption that every patient did not have the requisite capacity to administer their estate. This, therefore, enshrined into Zambian law the idea that persons with mental disabilities are incapable of individual agency when it comes to making decisions concerning their

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<sup>389</sup> *ibid* s 7 and s 8.

<sup>390</sup> *ibid* s 9.

<sup>391</sup> *ibid* s 10.

<sup>392</sup> Davidson (n 321).

<sup>393</sup> Haworth (n 311) 128.

<sup>394</sup> MDO 1949, s 13.

<sup>395</sup> *ibid* s 17.



life.<sup>396</sup> Although appeals against orders made by a Magistrate could be brought before the High Court<sup>397</sup> the Ordinance did not contain clear appeals procedures for challenging involuntary detentions.

### 3.4.3 Blind Persons' Ordinance 1961 (BPO 1961)

Away from mental health legislation, an important development was the enactment of the Blind Persons Ordinance 1961 (BPO 1961) for the welfare of the blind in Northern Rhodesia. The Ordinance established the Northern Rhodesia Council for the Blind, chaired by a Commissioner for Blind Welfare.<sup>398</sup> The Commissioner for the Blind was to advise the Minister on all matters affecting the education, training, and employment of blind persons. The Council aimed to coordinate the work of existing organisations in the field of blind welfare, which also included supporting the Royal Commonwealth Society for the Blind, in its campaign with mobile clinics in certain provinces of Northern Rhodesia. The BPO 1961 also provided for the voluntary registration of blind persons by the Boards for the blind established by the Council for the Blind or to the District Commissioner if no Board was in place.<sup>399</sup> Where an application was made, the individual had to be examined by an authorised officer to certify if they were blind.<sup>400</sup>

As the name suggests, the BPO 1961 as well as the Northern Rhodesia Council for the Blind, were not all-encompassing of other impairments but restricted their reach to the blind only. The main reason for concentrating efforts in this way was because of the high prevalence rate of blindness among children in the northern provinces of Northern Rhodesia. Grant-aided institutions were instrumental in creating schools, training and employment centres for the blind where they engaged in basket-work and brush-making. The rationale for the creation of these centres was aimed at equipping them for settlement in the rural areas where it was hoped that they would become self-sufficient.<sup>401</sup>

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<sup>396</sup> Natalie Drew and others, 'Mental Health Law in Africa: Analysis from a Human Rights Perspective' (2013) 12 JPMH 10.

<sup>397</sup> MDO 1949, s 30.

<sup>398</sup> BPO 1961, s 3 and s 4.

<sup>399</sup> *ibid* s 10.

<sup>400</sup> *ibid* s 10(3).

<sup>401</sup> Colonial Office, *Report on Northern Rhodesia for the Year 1961* (Her Majesty's Stationery Office 1962).

## PART V

### 3.5 Conclusion

In sum, this chapter examined how the colonial period was governed by a racial ideology underpinning all facets of life. The urban economy was for the white enclave of international companies and settlers, while the rural economy was for the African majority whose purpose in the urban areas was to provide cheap labour. Because of segregation the settler community had a higher standard of living and more opportunities than the African community. This segregation was supported by questionable scientific knowledge that presented black Africans as intellectually inferior to whites. Policies, laws and programmes were developed to reflect this, denying black Africans rights. The colonial period thus marked the entry of notions of ability and employability based on ableist ideals of what was considered 'normal' and 'abnormal'. The demand for male 'able-bodied' labour spelt doom for those with disabilities who, based on colonial capitalist norms, were not the ideal type of labourer. Without a doubt, colonisation bolstered the vulnerability of persons with disabilities. The social stratification along racial lines led to immense social inequalities between sections of the population, with persons with disabilities bearing the brunt of unequal treatment. The distortion of the African social fabric occasioned by European colonialism inevitably resulted in the further marginalisation of Africans with disabilities.

It should be noted that the enactment of mental health legislation in Zambia under colonialism marked the entry of Western influences and methods of treating mental health and persons with mental disabilities. The creation of psychiatric institutions, the institutionalisation of persons with mental disabilities without due process and the administration of questionable forms of treatment, has to this day continued to contribute to the discrimination and stigma faced by those with mental disabilities. To appreciate the lasting effects of colonialism's legislative history and the treatment of persons with disabilities in Zambia, one need only look at how the Zambian High Court interpreted and applied the Mental Disorders Ordinance/Act 1949, 68 years after its enactment. This piece of legislation remained on Zambia's statute books until 2019 when it was repealed and replaced by the Mental Health Act 2019 (MHA 2019). Thus, most of the institutions and the methods of treatment and care for persons with mental disabilities in Zambia reflect the

1949 Ordinance, which according to one commentator, 'criminalises those with mental disabilities'.<sup>402</sup> Speaking generally against the inherited British law at independence, Kaunda argued that although the common law was transplanted into colonies like Northern Rhodesia, it was not the British civil law, but the penal law which was projected. This was aimed at protecting colonial Britain's capitalist interests and enforcing obedience to colonial officials and private enterprise by the colonised people. Kaunda believed that the inherited law was designed to serve British commercial and industrial interests and was therefore not suitable for Zambia's development into a Humanist society and should not have been fully adopted in Zambia because the circumstances of the two countries were different.<sup>403</sup> Kaunda therefore stated that 'laws and institutions which have served the commercial and industrial interests of the British society should not have been transplanted *in toto* into the Zambian environment...'<sup>404</sup> To this end Kaunda encouraged the review of laws that hindered Zambia's development and the creation of a legal system that aligned with the values and circumstances of the Zambian people. However as exemplified by the Mental Disorders Ordinance/Act 1949 and other laws, changes to oppressive laws and institutions are not always immediate and it can take several decades for them to be repealed and replaced for the better.

The place of the Mental Disorder Act 1949 (MDA 1949) in twenty-first century Zambia became the subject of judicial interpretation in *Mwewa*.<sup>405</sup> In this case, the court was faced with the legal challenge of determining the constitutionality of the MDA 1949. The three petitioners, in this case, were persons with mental disabilities who averred that they had experienced involuntary detentions and/or treatment under the provisions of the MDA 1949. They petitioned the High Court to repeal the Act pursuant to Article 28 of the Constitution by arguing that the Act unreasonably infringed upon a number of their rights, namely, their rights to dignity; personal liberty, and to freedom from discrimination; their right to be protected against torture and inhuman or degrading treatment; the right to protection from deprivation of property; and their rights to legal capacity and informed

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<sup>402</sup> Kate Karban and others, 'Scaling Up Mental Health Services in Zambia: Challenges and Opportunities Reported in an Education Project' (2013) 42 IJMH 60, 62.

<sup>403</sup> Kaunda (n 75) 18.

<sup>404</sup> *ibid* 19.

<sup>405</sup> *Mwewa* (n 292).

consent to treatment.<sup>406</sup> The petitioners also argued that the Act had been repealed by implication following the enactment of the PDA 2012.<sup>407</sup> The petition was also premised on the fact that the Act used discriminatory and derogatory language to describe and categorise persons with mental disabilities. The petitioners also placed their arguments on the basis that the Act sanctioned the detention of persons with disabilities on grounds of their disability, which also included locking them up in criminal detention facilities. It was also argued that the Act authorised psychiatric treatment without informed consent. Other arguments were that the Act denied legal capacity to persons with mental disabilities thus rendering them without the equal and effective protection of the law; and that the Act unlawfully discriminates against people with mental disabilities in accessing healthcare and rehabilitation services.

The court concluded that it would be irrational to hold the entire Act as being unconstitutional without a critical review of the legislation, which it held as being a largely legislative process as opposed to a judicial one. The court was, however, content in looking at specific provisions of the Act to determine their constitutionality as opposed to a wholesale determination of the unconstitutionality of the Act. In so doing, the Court found section 5 of the Act to be discriminatory and unconstitutional because it used derogatory words such as mentally infirm, idiot, imbecile, feeble-minded and moral imbecile to describe persons with mental disabilities. The High Court went on to declare section 5 unconstitutional and thus null and void. In effect, this finding severed section 5 from the Act. The court found the definitions and classifications used in the section to be highly offensive, derogatory and discriminatory and that they had no place in modern society and that it was clear that the protection of human rights and fundamental freedoms was not the concern of the legislative authorities in 1949. However, despite this finding, the court ruled that the other matters complained of were not in any way unconstitutional.

Regarding the detention of persons with mental disabilities, the court noted that despite circumstances under which certain patients are detained or admitted to health institutions

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<sup>406</sup> The petitioners' arguments concerning the unconstitutionality of the MDA 1949, was premised on the Zambian Constitutional provision that if any other law is inconsistent with it, that other law shall, to the extent of the inconsistency, be void.

<sup>407</sup> Refer to 5.6.1.1 regarding 'superiority' of the PDA 2012.

involuntarily and without their consent, the court was of the view that the principle of proportionality should be applied. It held that, 'there needs to be a balance between the competing considerations on detention and admission to mental health institutions, which appear to be involuntary on the one hand and the affected person's rights'.<sup>408</sup> For the court, therefore, understanding the circumstances and severity of the mental disorder was essential in determining whether obtaining consent was necessary. On this point, the court concluded by stating that 'the decision to determine the detention or admission of mental patients to prisons or medical institutions is a medical question and cannot be determined by this Court'.<sup>409</sup> Here the court, despite acknowledging the social model of disability following the ratification and domestication of the CRPD, followed the medical model instead. By implication, the court inferred that persons with mental disabilities do not have the legal capacity or agency to make independent decisions.

Having analysed how the welfare of persons with disabilities was addressed during colonialism, the thesis now turns its attention to *Zambian Humanism's* approach to equality and discrimination.

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<sup>408</sup> *Mwewa* (n 292), J33.

<sup>409</sup> *ibid* J23.

## Chapter 4: Contextualising Equality in Zambia: **Zambian Humanism versus Neoliberalism**

### **PART I**

#### **4.1 Introduction**

The participation of persons with disabilities is primarily influenced by the philosophical and theoretical basis of a country's equality laws and policies. In a post-independent Zambia, laws and policies to address inequality reflect the country's political ideologies at each stage. 'Legislation is not only the product of the democratically elected parliament, but also tends to reflect the views of those with power in society'.<sup>410</sup> Cabrelli notes that there are varying and diverse normative reasons to justify equality laws. These can range from 'recognition and promotion of individualism, personal autonomy, dignity, State neutrality, democratic participation, the prevention of relative group disadvantage in the interests of enhancing individual freedom, redistribution, social inclusion, restitution, and procedural justice'.<sup>411</sup> Ultimately, equality can mean many different things. Theoretically, equality can be defined under two broad categories: formal equality and substantive equality. In Zambia, the two notions of equality can be located within the African socialism/communitarianism context of **Zambian Humanism** and Western neo-liberalism free market capitalism. To understand Zambia's current disability and equality legislative framework (examined in the next chapter), an examination of the post-independence political ideologies that informed and surrounded the treatment and welfare of Zambians needs to be conducted.

This chapter surveys and analyses the political ideologies that informed the treatment of persons with disabilities in Zambia's socio-economic development during the first three decades of its existence as an independent state. The chapter begins by examining **Zambian Humanism** as a political ideology and philosophy and its response to colonialism. This part is approached under several themes. The themes serve as a guide towards understanding

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<sup>410</sup> Gaze and Smith (n 291) 276.

<sup>411</sup> Cabrelli (n 24) 349.

Zambian Humanism in detail. This part of the chapter concludes with a brief examination of the Handicapped Persons Act 1968 (HPA 1968). The chapter in part three then proceeds to briefly explore the entry of neo-liberalism as a response to Zambian Humanism, culminating in other disability legislative developments, namely, the Persons with Disabilities Act 1996 (PDA 1996). The chapter concludes that Zambian Humanism's ideals are more adaptable to dealing with inequality. This conclusion is arrived at by drawing parallels between Fredman's four-dimensional approach to substantive equality and Zambian Humanism.

## PART II

### 4.2 From colonialism to Zambian humanism

Zambia gained independence from British colonial rule on 24 October 1964, with Kenneth Kaunda as President of Zambia until 2 November 1991. The advent of independence was marked by conscious attempts by Kaunda and his government to redress the social inequalities of the colonial era. One of the most important developments after Zambia became independent was the adoption of Kaunda's Zambian Humanism as the nation's guiding philosophy on 27 April 1967. Zambian Humanism espouses equal opportunity ideals, which Kaunda and his government tried to translate into practice through the provision of free education up to the tertiary level, free medical services and other social welfare services. This was targeted at bringing Zambian Humanism into reality by redesigning Zambian society into a classless person-centred one rather than a capitalistic one where wealth is concentrated in the hands of a few, as was the case during colonialism.<sup>412</sup>

Kaunda regarded capitalism as a form of evil responsible for 'imperialism, colonialism, neo-colonialism, fascism and racism in all their manifestations'.<sup>413</sup> The aims and objectives of Zambian Humanism were to eliminate what he described as 'anti-social forms of behaviour such as greed, envy, oppression, self-indulgence, laziness, theft, plunder and murder'.<sup>414</sup> All these were regarded as forms of exploitation of one human being by another. Kaunda's arguments must be considered in light of traditional African Society (TAS), whose values are not premised on capitalist laissez-faire values of aggression and individualism. Instead, it

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<sup>412</sup> Irving Kaplan, *Area Handbook for Zambia* (US Government Printing Office 1969).

<sup>413</sup> Kaunda (n 70) 13.

<sup>414</sup> *ibid* 13.

developed around communal and collective ownership and management of resources in advancing the common good.<sup>415</sup> The only life known in African society is 'life-in-community'.<sup>416</sup> By basing Zambian Humanism on the structures of TAS, Kaunda refutes assertions that traditional African communities were 'chaotic and primitive'. Instead, he argues that 'these societies were developed around a highly organised and delicately balanced network of relationships which held their members together'.<sup>417</sup> From this, Kaunda frames Zambian Humanism around three facets of TAS as central to his philosophy. These factors are:

1. Community as a *mutual* society—society is organised to satisfy the basic human needs of all its members.
2. Community as an *accepting* community—acceptance is about accommodating individual differences where everyone is accepted for whom they are regardless of their contribution or capacity to contribute, provided they can live in social harmony with everyone.<sup>418</sup>
3. Community as an *inclusive* society—society is arranged around various relationships involving mutual responsibilities widely spread.<sup>419</sup>

Humanism believes the State as a community should provide equality for all without prejudice. To this end, Zambian Humanism emphasises community, unity, and peace. It emphasises collaboration over conflict, egalitarianism over social position, and shared humanity over tribal identity.<sup>420</sup>

Although Humanism can be described as a rejection of the extremes of Western capitalist values in preference for traditional communal values, Zambian Humanism also rejects Marxist communism in equal measure. While Zambian Humanism shares communism's rejection of capitalism's exploitative and oppressive economic system, it explicitly rejects

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<sup>415</sup> Kenneth Mwenda, 'Benevolent and Enlightened Dictators, and Standards of Human Rights in Africa' (2000) 7 *MurUEJL* 37.

<sup>416</sup> Kaunda (n 85) 35.

<sup>417</sup> *ibid* 24.

<sup>418</sup> On this point, Kaunda concludes that in an accepting community, failure is not considered in an absolute manner. Rather, individuals who are 'slow, inept, or incapable' are still regarded as valuable members of the community. Social qualities hold greater significance than personal achievements, and the obsession with success and failure is seen as a 'disease of the age of individualism'. See Kaunda (n 85) 27.

<sup>419</sup> *ibid* 24-27.

<sup>420</sup> Irving Kaplan, *Zambia: A Country Study* (American University 1979) 40.



the atheism which permeates communism and the framework within which the communist rejection of capitalism is presented.<sup>421</sup> Kaunda argued that communism also 'falls into the same trap as Capitalism, [of] measuring a [human being's] importance by his social class'.<sup>422</sup> Regarding capitalism, *Zambian Humanism* appreciates its values of hard work, personal enterprise, thrift and accountability.<sup>423</sup> Ultimately, *Zambian Humanism* is neither capitalist nor communist, nonetheless, Kaunda noted that lessons can still be learnt from both ideologies towards creating a humanist and classless society.<sup>424</sup>

The idea of distributive justice in *Zambian Humanism* as a relational theory is premised on mutual aid and cooperation, where everyone is expected to contribute to society to the best of their ability.<sup>425</sup> This view is comparable to Anderson's 'democratic equality', which 'integrates principles of distribution with the expressive demands of equal respect...by appealing to the obligations of citizens in a democratic state... where citizens make claims on one another in virtue of their equality, not their inferiority, to others'.<sup>426</sup> *Zambian Humanism*, accordingly, favours African democratic socialism.<sup>427</sup> The main goal of African democratic socialism is to remove all types of exploitation, particularly those perceived as inherent in the capitalistic socioeconomic system and related to class oppression and greed. Common ownership has priority over State ownership.

Kaunda's conception of *Zambian Humanism* and its contribution to the rights and welfare of Zambians found part of its inspiration from Christian principles in understanding the place of the individual in society with the goal of abstracting the principles of human equality, human dignity and person-centredness. Kaunda was determined to see Christ's teachings applied to everyday life, especially the abolition of racial discrimination and injustice. He considered any divisions based on class or race as 'ungodly' and contrary to the philosophy of *Zambian Humanism*.<sup>428</sup> This can be contrasted with how some Christian denominations

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<sup>421</sup> Clive Dillon-Malone, *Zambian Humanism, Religion and Social Morality* (Mission Press 1989).

<sup>422</sup> Howard Simson, *Zambia: A Country Study* (SIDA 1985) 21.

<sup>423</sup> *ibid.*

<sup>424</sup> MA Ranganathan, *The Political Philosophy of President Kaunda of Zambia* (Holmes McDougall 1985) 42.

<sup>425</sup> Meebelo (n 71).

<sup>426</sup> Elizabeth S Anderson, 'What Is the Point of Equality?' (1999) *Ethics* 287,289.

<sup>427</sup> Dillon-Malone (n 421) 37 citing Kenneth Kaunda, 'The Attainment of Humanism through Socialism' (Paper circulated at the seminar of Religious Leaders, Lusaka, 18 March 1982) 5.

<sup>428</sup> As quoted in Kaplan (n 412) 143.

used religion to support South African apartheid and to claim that racial segregation was God's will.<sup>429</sup>

Kaunda's framing of Zambian Humanism around Christianity might appear as a paradox when considered against Western Christian missionaries' involvement in the colonial process in Zambia. Kaunda was fully aware of this but contended that the message of Christianity could be distorted to advance ulterior motives that promote oppression and inequality. Instead, Kaunda recognised the revolutionary message of Christianity that emphasised fighting for the oppressed and challenging inequality in society.<sup>430</sup> Kaunda argues that Jesus Christ 'worked for a classless society' as conveyed in all that he said and did.<sup>431</sup> Kaunda believed Western capitalism was at odds with Christianity because it used it to support commercialisation and inequality when he wrote:

Christian principles can never be split, they have either to be accepted or sacrificed as they are.... For Christian Churches not to condemn racial discrimination, whether practised by black or white governments or any other groups is to sacrifice Christian principles. What is immoral cannot safely be passed as Christianity['s] right.<sup>432</sup>

Kaunda's understanding of Christianity and the 'revolutionary thrust of Christian social teaching' situates itself within Liberation theology.<sup>433</sup> Just like Liberation theology, Kaunda argues that 'Jesus proclaimed a God who seems to have a pronounced bias in favour of the poor, the outcast and the oppressed'.<sup>434</sup> In this regard, when seen through a Christian lens, Zambian Humanism is concerned with the liberation of the oppressed from political, social and economic exploitation and oppressive structures. When perceived from the perspective of disability, Zambian Humanism resembles the social model of disability examined in chapter 2. Zambian Humanism's theistic expression also means that it is at odds with Marxist-Leninism or communism.<sup>435</sup>

Further, Kaunda's views on equality can be seen from his opposition to apartheid and hatred of racialism. For Kaunda, the idea of any form of segregation is 'economic lunacy'. He

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<sup>429</sup> David Bilchitz and others, *Jurisprudence in an African Context* (OUP 2020).

<sup>430</sup> Kenneth Kaunda, *Zambia Shall Be Free* (Heinemann 1962) 147.

<sup>431</sup> Kaunda (n 70) 120.

<sup>432</sup> Kaunda (n 430) 149.

<sup>433</sup> Dillon-Malone (n 421) 61.

<sup>434</sup> Kenneth Kaunda and Colin Morris, *Kaunda on Violence* (Sphere 1980) 124.

<sup>435</sup> See Kaunda (n 70) 8; Patrick E Ollawa, *Participatory Democracy in Zambia* (Arthur H Stockwell Ltd 1979) 142.

argues that segregation fails to utilise human resources to the greatest extent possible. A nation denies itself the fortunes that come with an increase in economic performance when it deprives others of the opportunity to contribute to its economic life. Kaunda defines segregation as the 'unequal distribution of resources that perpetuates injustice'.<sup>436</sup> He observes that segregation by giving a monopoly of wealth to one group whilst keeping others in poverty deforms the shape of a true community. The result is a distortion of true community and the generation of tensions that will blow up and tear the nation apart sooner or later.<sup>437</sup> Western communitarian thinker Sandel also has a similar perspective and observes that a widening gap between the rich and the poor weakens the sense of community necessary for democratic citizenship. Thus, deepening social inequality causes people to live increasingly isolated lives, contributing to the decline of civic virtue.<sup>438</sup> Humanism recognises that people belong to each other and that no one is an island, or 'self-entire'.<sup>439</sup> It is about realising that no race, class or group has a monopoly of all human gifts and powers. Recognising that race is a social construct [and indeed dis/ability],<sup>440</sup> Kaunda argues that society must be inspired by individuals who share a common history to achieve a common destiny. African communitarian scholar Wiredu thus notes that in a communitarian society, individuals' interests are intrinsically bound up with the interests of others.<sup>441</sup>

#### 4.2.1 **Zambian humanism and colonialism's psychological trauma**

Fanon's work on the dynamic interaction between the colonised and the coloniser, and how the colonised struggle to become fully independent because of the psychological damage shaped by colonialism, finds its expression in Kaunda's writings and work on Humanism.<sup>442</sup> Apart from addressing the ills of political, social, and economic inequality, Kaunda also promulgated Zambian Humanism as an ideology that considered the divergent psychological needs and expectations of the times. Thus, Kaunda observes that colonialism devalued

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<sup>436</sup> Kaunda (n 110) 56.

<sup>437</sup> *ibid* 56.

<sup>438</sup> Michael J Sandel, *Justice: What's the Right Thing to Do?* (Penguin Books 2009) 267.

<sup>439</sup> Kaunda (n 110) 57.

<sup>440</sup> CRPD Committee (n 34), para 8.

<sup>441</sup> Cited in Dimas A Masolo, *Self and Community in a Changing World* (Indiana University Press 2010) 247.

<sup>442</sup> Fanon (n 91); Kaunda (n 85).

Africans and destroyed their self-confidence when discussing African adjustment to independence by inculcating the idea that they were primitive, backward and degraded. The task at hand for Kaunda and his government was to demonstrate that Africans were not an inferior race to the European and were, therefore, more than capable of self-rule and self-governance without the paternalistic oversight of the British colonial rulers. Fanon, writing about the mental health challenges and trauma experienced by colonised people, speaks of the mind of the colonised as having undergone a process of depersonalisation not only at the individual level but as a collective where the colonised 'owe their very existence to the presence of the coloniser'.<sup>443</sup> Kaunda was concerned not only about the psychological problems wrought by the adverse effects of colonialism on the people of Zambia but also about the psychological toll brought about by independence itself.<sup>444</sup> For Kaunda, the psychological effects of colonialism on the Zambian people could not be ignored as it shaped not only their past but their present and future circumstances.<sup>445</sup> For Kaunda, any viable government could not ignore colonialism's negative attributes and legacy and was therefore required to consider 'the psychological effects of radical change' in formulating policy.<sup>446</sup>

Therefore, Zambian Humanism was an attempt by Kaunda to undo the psychological trauma embedded in the Zambian psyche by colonialism. It was a process of enabling Zambians to affirm who they were. It was a message of empowerment and self-love. Although Kaunda acknowledges the complexities of colonialism, he readily noted the inferiority complex engrained in the African mind due to colonialism and its philosophy of racial dominance, which he described as creating a 'deepening awareness of servitude' in Africans.<sup>447</sup> Kaunda's nationalist agenda, through his humanist philosophy, was therefore aimed at not only giving the Zambian people a sense of identity but at restoring their sense of self-worth and self-respect (their human dignity). Here Zambian Humanism parallels the social model of disability. Shakespeare speaks of the social model of disability as being instrumental 'in

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<sup>443</sup> Fanon (n 91) 220.

<sup>444</sup> Kaunda (n 85).

<sup>445</sup> *ibid* 48.

<sup>446</sup> *ibid* 48.

<sup>447</sup> *ibid* 50.

improving the self-esteem of disabled people and building a positive sense of collective identity...the social model has the power to change the perception of disabled people'.<sup>448</sup>

#### 4.2.2 **Zambian humanism and capabilities**

Based on the communitarian principle of the duty to the community and responsibility to give something back, Kaunda argues that societal problems can be tackled by taking a cooperative approach to life to achieve equality and equal wealth distribution.<sup>449</sup> Kaunda says the government must 'raise the standard of living of Zambians and strive to make them contented and happy'.<sup>450</sup> Kaunda asserts that creating a more just and equitable society requires structural changes to provide opportunities to those who have been denied all elements of the good life—education, health, responsibility and a fair return for labour.<sup>451</sup> Kaunda asks how can those historically excluded and deprived of education, advancement and positions of responsibility compete on equal terms with [those] who have benefitted from all these things over a long period? He thus argues that equality can only be achieved by 'cleaning up the historically accumulated mess' by ensuring that those who have been historically marginalised are given opportunities of advancement they were once denied. This is necessary if individuals are to compete on equal terms.<sup>452</sup> Kaunda's arguments and his question are significant when examining the case of persons with disabilities in Zambia. Creating equal opportunities for them requires dismantling structures perpetuating their exclusion in mainstream society. This also entails transforming the social environment to accommodate them and provide them with opportunities to enhance their capabilities.

Thus, in a resolute manner, Kaunda overtly advocates for the significance of economic, social, and cultural (ESC) rights, particularly emphasising the rights to adequate housing, education, food, and clothing. He explicitly maintains that every individual in Zambia should be able to lead a life of dignity, where no one experiences hunger, homelessness,

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<sup>448</sup> Shakespeare (n 216) 19.

<sup>449</sup> Kaunda (n 122) 8.

<sup>450</sup> *ibid* 11

<sup>451</sup> Kaunda (n 85) 66.

<sup>452</sup> *ibid* 66.

destitution, tattered clothing, or malnourishment.<sup>453</sup> Hence, Kaunda notes that the government's main objective is to improve the quality of life of the people.<sup>454</sup> The State, therefore, should remove obstacles which hinder the full enjoyment of rights. It is therefore, 'the duty of the state to do everything possible to strengthen human weaknesses, curb human greed, and provide every possible facility to enable its citizens to expand their horizons and release the inherent abilities locked within each of them'.<sup>455</sup> Thus, by re-situating individuals as actual subjects, Zambian Humanism seeks pragmatic solutions for their varying needs. Kaunda recognises that people can only contribute to society and become self-reliant if their basic needs are taken care of first. For instance, he observes that 'the purpose of keeping an individual healthy is to see that they contribute fully to the growth of their country whether it is political, economic, social, cultural or scientific'.<sup>456</sup> For persons with disabilities, this entails providing them with opportunities to develop their capabilities by ensuring they have access to equal educational and employment opportunities.

Kaunda's views here parallel Martha Nussbaum's contribution to the capabilities approach. First articulated by economist, Amartya Sen, the capabilities approach seeks to provide a theoretical and critical framework for considering equality and development.<sup>457</sup> The fundamental tenet of the capabilities approach is the normative commitment to defining well-being in terms of capabilities, functions and resources. Just like Kaunda, the capabilities approach provides a theoretical 'account of core human entitlements that should be respected and implemented by the government of all nations, as a bare minimum of what respect for human dignity requires'.<sup>458</sup> The capabilities approach aims to enable people to make choices to live the life they have reason to value, that is, 'what is a person able to do and to be' when presented with genuine opportunities.<sup>459</sup>

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<sup>453</sup> Kaunda (n 122) 36.

<sup>454</sup> Kenneth Kaunda, 'Speech to the 20th National Council of the United National Independence Party' (Mulungushi Hall, Lusaka, 30 September to 5 October 1985) 9.

<sup>455</sup> Kenneth Kaunda, 'Humanism and Apartheid' (1993) 37 *St Louis U LJ* 835, 840.

<sup>456</sup> Kaunda (n 122) 41.

<sup>457</sup> Amartya Sen, *Commodities and Capabilities* (North-Holland 1985); Amartya Sen, *Development as Freedom* (OUP 2001).

<sup>458</sup> Martha C Nussbaum, *Frontiers of Justice: Disability, Nationality and Species Membership* (Harvard University Press 2006) 70.

<sup>459</sup> Martha C Nussbaum, *Women and Human Development: The Capabilities Approach* (CUP 2001) 5.

Nussbaum notes that the basic idea of her approach is premised on the inherent dignity of human beings and of a life worthy of that dignity. In explaining the link between the capabilities approach and human rights, Nussbaum observes that human beings have core entitlements based on their humanity. Nussbaum lists ten 'Central Human Capabilities' required to live well, flourish, and make a life fully human.<sup>460</sup> The lists consist of, Life; Bodily health; Bodily integrity, the Development and expression of senses; Imagination and thought; Emotional health; Practical reason; Affiliation (personal and political); Relationships with other species and the world of nature; Play and control over one's environment (both material and social).<sup>461</sup> These capabilities are held to be essential for every person. Society's primary purpose is to respect and support those entitlements by giving them the freedom to choose opportunities that are fundamental to them.<sup>462</sup> Each person is treated as an end, not as a mere adjunct or means to many others. All rights understood as entitlements to capabilities have material and social preconditions requiring government action.<sup>463</sup> Furthermore, the fundamental principles behind the capabilities approach may be found in the CRPD and, by extension, the PDA 2012.

Additionally, 'Zambian Humanism seeks to create an egalitarian society, that is, a society in which there is equal opportunity for self-development for all'.<sup>464</sup> Premising his ideas on the common humanity of all people and human dignity, Kaunda asserts that a person should not be used as a means to an end to further the country's social, political, or economic goals.<sup>465</sup> Accordingly, he conceives Zambian Humanism as a way of life which emphasises the importance of 'MAN (sic) as the centre of all activity'.<sup>466</sup> Therefore, every form of human organisation, from the family to the State, exists to serve people. Service to people must be the goal of any law, policy or economic measure. Zambian Humanism recognises that under all the technicalities of economics, finance, and administration, there are people whose lives and happiness will be affected by every decision taken or avoided. A humanist society's task is to defend and enlarge the people's rights. The only sure way of affording citizens equal

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<sup>460</sup> Martha C Nussbaum, *Creating Capabilities: The Human Development Approach* (Harvard University Press 2011) 33.

<sup>461</sup> *ibid* 33.

<sup>462</sup> *ibid* 64.

<sup>463</sup> *ibid*.

<sup>464</sup> Kaunda (n 70) xiii.

<sup>465</sup> Kaunda seems to adopt Kantian moral philosophy here.

<sup>466</sup> Kaunda (n 122) 7.

opportunities for things that matter to them is by implementing programmes that meet the various socio-economic needs of Zambians.<sup>467</sup> People can only excel where poverty, hunger, ignorance, disease, crime and ‘the exploitation of man by man’ have been dealt with. Kaunda argues that treating people as a means to an end leads to their exploitation by the State under the guise of ‘efficient government’.<sup>468</sup> People must be above social institutions as they are the ‘absolute standard by which all systems should be measured’.<sup>469</sup> Social institutions in politics, commerce, or entertainment, serve people, not the other way around. Conditions must be created in which Zambians will eventually realise their true worth as human beings, thereby developing a sense of self-reliance.<sup>470</sup>

### 4.2.3 Human dignity and Human rights

Kaunda regards human dignity as foundational to human rights and Zambian Humanism. He summarises the content of Zambian Humanism by stating:

This high valuation of MAN and respect for human dignity which is the legacy of our tradition should not be lost in the new Africa. However, ‘modern’ and ‘advanced’ in a Western sense this young nation of Zambia may become, we are fiercely determined that this Humanism will not be obscured. African society has always been Man-centred.<sup>471</sup>

According to Kaunda, human rights give expression to human dignity. He describes human dignity as every human being’s intrinsic worth, emphasising their significance as the centre of creation, the highest representation of God’s image in all creation, and the essential actor in the never-ending stream of events in our changing world.<sup>472</sup> Kaunda’s depiction of human dignity is premised on the Christian understanding of dignity and is reflected in Natural Law understandings of rights. The Christian sense of human dignity is that it is innate and, in some ways, universal. It is not earned, given to us by anyone, nor can it be taken away.<sup>473</sup> Donnelly also argues that the source of human rights is ‘man’s moral nature’ to this end,

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<sup>467</sup> Ranganathan (n 424).

<sup>468</sup> Kaunda (n 122) 46.

<sup>469</sup> *ibid* 46.

<sup>470</sup> *ibid*.

<sup>471</sup> *ibid* 7.

<sup>472</sup> Kenneth Kaunda, ‘The Imperative of Human Dignity’ (Speech at the Inaugural Session of the Non-Governmental Organisations International Conference on Human Rights, 15 September 1968) 4.

<sup>473</sup> Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press 2013) 124.



'human rights are "needed" not for life but for a life of dignity'.<sup>474</sup> For persons with disabilities, the recognition that the inherent dignity of all human beings is the basic foundation from which rights flow is consistent with the CRPD, which mandates respect for one's inherent dignity. Kaunda asserts that dignity confers on an individual the inalienable rights enshrined in the UDHR (both civil and political rights, and socio-economic rights).<sup>475</sup> Like other forms of African Humanism, Zambian Humanism does not take a dichotomised view of rights. Instead, it 'advocates a more holistic approach toward protecting human rights'.<sup>476</sup>

#### 4.2.4 The individual's obligations to community

'The thesis that every citizen has rights and responsibilities is a communitarian keystone'.<sup>477</sup> While Kaunda is respectful and supportive of individual liberties and freedom, he observes that because an individual does not exist in a vacuum but associates with others in society, an individual has duties towards others in advancing the collective good of society.<sup>478</sup> Thus, Zambian Humanism shares the communitarian argument that 'a discourse on justice and equality that is focused primarily on individual rights often overlooks the obligations of individuals toward others and ignores legitimate community interests'.<sup>479</sup> Kaunda conceives these duties as being duties of honesty and loyalty to the State, obedience, and responsibility for order.<sup>480</sup> Kaunda premises these duties on the right to belong and the importance of human community as an expression of human dignity. Society is strengthened when people exercise their gifts for the benefit of others and a country's economic performance is enhanced when people work together. Under Zambian Humanism, the idea of having an inclusive society implies that individuals have mutual obligations towards each other. As Kaunda puts it, 'the web of relationships in [traditional African society] involved some degree of mutual responsibility'.<sup>481</sup> This viewpoint is

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<sup>474</sup> *ibid* 15.

<sup>475</sup> Kaunda (n 472).

<sup>476</sup> Albert Venter and Michele Oliver, 'Human Rights in Africa: Nyerere and Kaunda' (1993) 10 *IJWP* 21, 28.

<sup>477</sup> Amitai Etzioni, 'We Must Not Be Enemies' (2017) 86 *The American Scholar* 20, 23.

<sup>478</sup> Kaunda (n 110).

<sup>479</sup> Carlos A Ball, 'Looking for Theory in All the Right Places: Feminist and Communitarian Elements of Disability Discrimination Law' (2005) 66 *Ohio St LJ* 105, 125.

<sup>480</sup> Kaunda (n 472) 5.

<sup>481</sup> Kaunda (n 85) 27.

reflected in the African Charter on Human and Peoples' Rights (ACHPR), which not only highlights individual human rights but also places emphasis on people's rights and individual obligations towards the State. Through this perspective, the charter shifts the concept of Zambian Humanism from a religious context to a set of rights that can be claimed. Thus Article 27 of the Charter provides:

1. Every individual shall have duties towards his family and society, the State and other legally recognised communities and the international community.
2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

Where persons with disabilities are concerned, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (African Disability Protocol),<sup>482</sup> requires State Parties to recognise that persons with disabilities have duties on an equal basis with others as provided under the ACHPR.<sup>483</sup> In other words, the Charter and the Protocol embody the communitarian ideal of respecting the worth and dignity of all individuals who find fulfilment in their commitment to the community's well-being.<sup>484</sup> This communitarian ideal rejects egoistic individualism in favour of selfless concern for others. Thus, rather than being interpreted as a diminution of individual worth, the African communitarian model tries to capture the intrinsic social essence of human beings. Hence, Zambian Humanism 'seeks to free man from man, to allow him to find his truth as man-in-community'.<sup>485</sup> Kaunda conceives the idea of a 'Common Man' [person] in a humanist society as one who 'is not a special class', but is 'a representative Man, sharing the qualities with all other men'.<sup>486</sup> The Constitution of Zambia as amended in 2016 (COZ 2016), also recognises individual duties to the State and others.<sup>487</sup> The PDA 2012 also establishes a similar duty. (See 5.6.1.4).

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<sup>482</sup> Zambia has not signed this Protocol.

<sup>483</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, art 31 (1).

<sup>484</sup> The idea of individual duties is also present in the preambles of the International Covenant on Civil and Political Rights (ICCPR), the ICESCR and the CRPD.

<sup>485</sup> Kaunda (n 70) 1.

<sup>486</sup> *ibid* 1.

<sup>487</sup> COZ 2016, art 2, art 256.

#### 4.2.5 The State's obligations in protecting human rights.

Kaunda recognises that rights entail not only negative obligations of non-interference but also impose positive obligations on the State to facilitate their realisation. He observes that an individual cannot fulfil their obligations to others and the State unless the State creates the conditions suitable for the fulfilment of those obligations. The State must create conditions where individuals can contribute positively and with dignity to the nation's welfare. Hence Kaunda argues that a 'fuller life' will only come about if everyone in society is provided with decent food, clothes and shelter. Liebenberg makes similar observations that human life and health are jeopardised if 'basic subsistence needs are not met'. Where these basic needs have not been met, 'human capabilities cannot be developed, including the ability to fulfil life plans and participate effectively in political, economic and social life'.<sup>488</sup> A similar view is also expressed in the African Disability Protocol. It provides: 'State parties shall ensure that persons with disabilities are rendered the forms of assistance and support, including reasonable accommodations, which they may require in the performance of such duties'.<sup>489</sup>

Kaunda observes that democracy fails where inequalities and injustices are allowed to exist. A constitutional democracy must work to ensure that everyone lives in peace, happiness, and wealth. Citing the importance of universal access to education 'up to the highest level that the country's resources will allow', he states that democracy cannot flourish in a country where the masses are illiterate. Only where the general populace has attained a high degree of national intelligence and education can they actively and consciously participate in the nation's democratic institutions actively and consciously.<sup>490</sup> To strengthen his argument, Kaunda notes that education is an essential tenet of democratic institutions as it is connected to the principle of equal opportunity. Thus, when children are not given equal educational opportunities, the nation risks splitting into two groups: 'the haves and the have-nots'.<sup>491</sup> The accumulation of wealth by a tiny segment of society is detrimental to the supportive attitude of a true African community since equality is a fundamental element

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<sup>488</sup> Sandra Liebenberg, 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (2005) 21 SA J Hum Rts 1,2.

<sup>489</sup> African Disability Protocol (n 473) art, 31 (2).

<sup>490</sup> Kenneth D Kaunda, 'The Future of Democracy in Africa' (1964) 15 Transition 37,38.

<sup>491</sup> *ibid* 38.

of Humanism.<sup>492</sup> Kaunda recognises that civil and political rights (CP rights) and ESC rights are interrelated and interlinked by stating that the mutual-aid society ‘includes all facets of life—political, economic, social, scientific and cultural’.<sup>493</sup> One ‘set’ of rights cannot exist without guaranteeing and respecting the other.

Kaunda’s arguments concerning the roles and obligations of the State are buttressed by contemporary legal scholars such as Fredman, who observes that ‘all rights can be seen to give rise to a range of duties, including both duties of restraint and positive duties’.<sup>494</sup> Fredman observes that it will not always be possible to distinguish between rights based on whether they give rise to positive duties or duties of restraint. It is therefore essential to realise that all rights have ‘a cluster of obligations, some of which require the State to abstain from interfering, and others which entail positive action and resource allocation’.<sup>495</sup> Shue, therefore, argues that ‘there are no one-to-one pairings between kinds of duties and kinds of rights’. Each type of right requires the execution of various duties to be fully satisfied. Accordingly, for a right to be adequately upheld, three different types of duties must be fulfilled. These are ‘duties to *avoid* depriving’, ‘duties to *protect* from deprivation’, and ‘duties to *aid* the deprived’.<sup>496</sup> (This view is reflected in the UN’s tripartite typology of human rights obligations). Within Zambian Humanism, these duties also find their expression in Kaunda’s words, where he calls for upholding the rights to be, belong, and have.

#### 4.2.6 The right to be, the right to belong, and the right to have

Zambian Humanism promotes equality to counter privilege and any artificial disparities that cannot be justified for the common good. Kaunda argues that apartheid and segregation deprive individuals of their ‘right to be’, the ‘right to belong,’ and the ‘right to have’.<sup>497</sup> Apartheid and segregation are forms of economic, social and cultural violence. Thus, denying the ‘right to be’ is as good as social violence; denying someone the ‘right to belong’

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<sup>492</sup> Kaunda (n 122).

<sup>493</sup> *ibid* 35.

<sup>494</sup> Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008) 65.

<sup>495</sup> *ibid* 143.

<sup>496</sup> Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton University Press 1980) 51.

<sup>497</sup> Kaunda (n 110) 54-58; Kaunda (n 455).

equates to cultural violence, and denying the 'right to have' is economic violence.<sup>498</sup> By extension, any denial of rights and discrimination against persons with disabilities equally translates to economic, social and cultural violence. Therefore, according to Zambian Humanism, society must be organised in a manner that seeks to fight and eliminate all forms of exploitation.

The communitarian principle of inclusiveness, encapsulated within Kaunda's idea of participatory democracy, encompasses the 'right to be', 'the right to belong', and the 'right to have'. The objective of participatory democracy is to guarantee freedom, increase and widen the scope of citizens' involvement in their various institutions, and express the political, economic, social and cultural life to foster progress and prosperity in society.<sup>499</sup> The underlying theme of participatory democracy is that people who have to be affected by decisions on various issues must, in one way or the other, be involved in making those decisions. Therefore, dialogue and consensus are requisite elements of participatory democracy and decision-making. According to Meebelo, 'dialogue is part of the African cultural process, and includes cardinal democratic principles as open and free discussion, popular participation and involvement, and pluralism'.<sup>500</sup> This idea of participation in community life is a common thread among communitarian thinkers. For communitarians, participation, dialogue, and communication are key ingredients for individuals to come together and discuss their aspirations and matters they hold in common. This, in turn, prevents the isolation or alienation that can result from the promotion of liberal individualism, which on the other hand, advocates for the pursuit of separate individual interests or claims without any consideration for the welfare of others.<sup>501</sup> As examined in chapter 6, the duty of reasonable accommodation is anchored on the principles of inclusion and participation.

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<sup>498</sup> *ibid.*

<sup>499</sup> Meebelo (n 71) 48.

<sup>500</sup> *ibid* 51.

<sup>501</sup> Ball (n 479).

### 4.3 Handicapped Persons Act 1968

In 1968, to extend the coverage and provision of social care and rehabilitation services to all persons with disabilities, the Kaunda government enacted the Handicapped Persons Act 1968 (HPA 1968), which repealed the BPO 1961. The Act kept several provisions of the BPO 1961 but expanded coverage to include all disabilities. By basing its definition of disability on the medical/individual model of disability, the Act defined the handicapped persons as:

Persons who by reason of defect of mind, senses, or body, congenital or acquired are unable to take part in normal education, occupation and recreation or require special assistance and training to enable them to take part in normal education, occupation and recreation and “handicap” shall be construed accordingly.<sup>502</sup>

The Act did not contain any equality or anti-discrimination provisions prohibiting discrimination because of disability, nor did it have any provisions mandating accessibility for the disabled. Its approach (similar to the repealed BPO 1961) was to cater to the care, social and welfare needs of persons with disabilities rather than providing a list of substantive rights. Thus, as a means of providing social services and catering to their needs, the Act established the Zambia Council for the Handicapped to advise in all matters affecting their welfare, education, training, rehabilitation, health and employment. Other functions included promoting ‘public interest in the welfare of the handicapped (sic) and all matters relating to the prevention of handicap, and the care of the handicapped (sic)’.<sup>503</sup> Following its enactment, the State established several sheltered employment centres providing employment opportunities for persons with disabilities. Several rehabilitation centres, skills training facilities and specialised hospitals were also opened. The Act also provided the necessary framework for the application and registration of groups and associations whose aim was ‘the promotion of the welfare of the handicapped’.<sup>504</sup> To achieve some of these projects, the government requested the assistance of the ILO in developing vocational rehabilitation services for persons with disabilities.<sup>505</sup> This also culminated in Zambia

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<sup>502</sup> HPA 1968, s 2.

<sup>503</sup> HPA 1968, s 16.

<sup>504</sup> HPA 1968, s 19 (1)(a).

<sup>505</sup> ILO, *Strategies for Skills Acquisition and Work for Persons with Disabilities in Southern Africa: Zambia* (International Labour Office 2007).

ratifying the ILO convention 159 on Vocational Rehabilitation and Employment of persons with disabilities in 1989.

Although there will always be an ongoing debate concerning the extent to which Zambian Humanism permeated Zambian society and how it transformed Zambia, Zambian DPOs credit Kaunda as having the 'goodwill to improve opportunities for people with disabilities in Zambia'.<sup>506</sup> Kaunda's humanism can also be credited for the peace and stability that Zambia has enjoyed. Zambians continue to enjoy social harmony transcending region, class, and clan, all thanks to Kaunda having coined the motto 'One Zambia, One Nation', which to this day has remained Zambia's national motto. As such, Zambian Humanism is the foundation of Zambian unity. The goal for Kaunda was to ensure that every Zambian, regardless of colour, race, religion, creed or any other matter that forms an artificial barrier, had the capacity to act in pursuit of a humanist society with equal rights and equal opportunities for everyone.

Having looked at how Zambian Humanism guided Zambia's Kaunda's African socialist ambitions in seeking to create an egalitarian society for all Zambians (including persons with disabilities), the chapter now focuses on ideological developments post-Kaunda's presidency.

### **PART III**

#### **4.4 From Zambian Humanism to neo-liberalism**

Under the leadership of Kenneth Kaunda, Zambia had in 1972 become a one-party state, but in 1990, Zambia reverted to a multi-party democracy following popular discontent with Kaunda's presidency. On 31 October 1991, the first multi-party general elections were held since 1968, and Frederick Chiluba of the Movement for Multiparty Democracy (MMD) was elected Zambia's second president (2 November 1991 – 2 January 2002). Politically, the country under the MMD embraced capitalism anchored on political neo-liberalism and free-market economics. Frederick Chiluba had dismissed Humanism as a 'ruse behind which

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<sup>506</sup> Chola Kafwabulula, 'Recent Developments Regarding the Laws and Policies concerning the Employment of Persons with Disabilities' (People with Disabilities: Pathways to Decent Work Report of a Tripartite Workshop, Lusaka, 9-10 May 2006) 18.

there is nothing of substance'.<sup>507</sup> It has been noted that 'Chiluba's economic development path with a heavy leaning on capitalism which epitomises the supremacy of the market over anything else was diametrically opposite to Kaunda's route, which placed the State as the main player in the economy'.<sup>508</sup>

As often is the case, the appeal of adopting neo-liberalism is the belief that democracy and freedom generally cannot be divorced from the economic freedom offered by free market arrangements.<sup>509</sup> However, Oakes observes that an approach anchored in free market libertarian principles does not do much for the rights of persons with disabilities and only perpetuates past inequalities.<sup>510</sup> As the market increasingly becomes society's focus, people become more individualistic and self-centred, caring less about cooperation and working together.<sup>511</sup> Because free market principles are designed around classical liberal theories and freedom to contract, government redistribution of resources is not a concern, so government action to help persons with disabilities and other marginalised groups is limited.<sup>512</sup> Therefore, the superiority of the markets means that State needs only protect citizens from violence, theft and fraud and the facilitation of contractual obligations.<sup>513</sup> This calls for small government, which minimises its role in redistributive justice.

The Chiluba government implemented structural adjustment programmes (SAPs), hoping to increase efficiency in the public and commercial sectors through market-enhancing policies. Bowing to pressure from the World Bank and the International Monetary Fund (IMF), the Chiluba government anchored its developmental agenda on privatising the Mines and other State-owned enterprises. The legislative focus was geared toward attracting private

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<sup>507</sup> Carolyn Baylies and Morris Szeftel, 'The Fall and Rise of Multiparty Politics in Zambia' (1992) 54 *Review of African Political Economy* 75, 76.

<sup>508</sup> *A Critical Analysis of The Poverty Reduction Strategy Papers (PRSPs) Process and Outcomes: The Case of Zambia* (AFRODAD 2003) 14.

<sup>509</sup> Margaret Thornton, 'The Political Contingency of Sex Discrimination Legislation: The Case of Australia' (2015) 4 *Laws* 314. See also Milton Friedman, *Capitalism and Freedom* (University of Chicago Press 1982) 8.

<sup>510</sup> Wayne T Oakes, *Perspectives on Disability, Discrimination, Accommodations, and Law: A Comparison of the Canadian and American Experience* (LFB 2005) 11.

<sup>511</sup> Thornton (n 509).

<sup>512</sup> Richard Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (Harvard University Press 1992).

<sup>513</sup> Robert Nozick, *Anarchy, State and Utopia* (Blackwell, 1974) 26.



enterprises to invest in the Zambian economy.<sup>514</sup> Unfortunately, privatisation led to redundancies and massive unemployment and deprived many of an income and social safety net. This also meant further reduced employment opportunities and prospects for persons with disabilities. With a free-market economy, persons with disabilities are required to compete with their non-disabled counterparts for the limited options available without governmental support or positive measures aimed at equalising opportunities.<sup>515</sup> Additionally, implementing market-oriented policies led to an increase in the informal labour market, which ultimately placed most workers outside the remit of employment and labour law's protective scope.

Proponents of the free-market economy, particularly those influenced by libertarianism, oppose the need for equal employment opportunity and anti-discrimination laws to combat discrimination in employment and the labour market.<sup>516</sup> They reason that unrestrained market forces are enough to eliminate discrimination.<sup>517</sup> For persons with disabilities, this implies that they can only be accommodated in the workplace if doing so would be economically advantageous to an employer's business.<sup>518</sup> (See 7.3.1). In essence, the benefits of any accommodations made for employees with disabilities must not outweigh any cost incurred by the business operations.<sup>519</sup> As will be observed in chapter 7 this approach often calls for a cost-benefit analysis and has been applied by US courts as a basis for determining the reasonableness of an accommodation. As will be seen (in chapter 7), equality, human rights, and other non-financial convictions are not emphasised as the basis to reasonably accommodate persons with disabilities under this approach. For Goodley, neo-liberalism 'normalises through the constitution of the ideal citizen, an idealisation pursued through transforming economies, restructuring nation states and worshipping the

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<sup>514</sup> Felix C Kani, 'Structural Adjustment and Economic Reform Programmes, Labour Market Institutions, Employment and The Role of Social Partners: The Zambian Experience' (2000) ILO SAMAT and Social Dialogue Discussion Paper No 5.

<sup>515</sup> See Karen Soldatic and Anne Chapman, 'Surviving the Assault? The Australian Disability Movement and the Neoliberal Workfare State' (2010) 9 *Social Movement Studies* 139.

<sup>516</sup> Oakes (n 510).

<sup>517</sup> See Richard Posner, 'The Efficiency and Efficacy of Title VII' (1987) *U Pa L Rev* 136, 513; Epstein (n 512).

<sup>518</sup> Lawson (n 140).

<sup>519</sup> *ibid.*

market'.<sup>520</sup> The able-bodied individual thus has the upper hand in finding work as their worth is determined by what the markets want.

Although proponents of the libertarian agenda might agree that persons with disabilities face discrimination and are treated unfairly, they would still argue against the enactment of anti-discrimination laws. For example, Epstein, in his opposition to the ADA 1990 (US) and the Rehabilitation Act 1973 (US), argues that:

[Although persons with disabilities have been and are] subjected to unfair treatment in the marketplace, the source of the unfairness does not lie in the inability of the handicapped to receive subsidies for work but in government interference with the control of their labour. Like everyone else, the disabled should be allowed to sell their labour. At whatever price, and on whatever terms, they see fit.<sup>521</sup>

Epstein's argument is primarily based on the assumption that the markets themselves are an appropriate means of dealing with discrimination where people are at liberty to refuse to contract or associate with those who discriminate against others for whatever reason.<sup>522</sup> Therefore, it is argued that the government can incentivise employers who employ persons with disabilities as a substitute for anti-discrimination legislation. Deakin replies, *au contraire*, that anti-discrimination legislation is not at variance with market freedom.<sup>523</sup> Instead, he holds that individual participation in the markets can only be possible where they have 'the civil capacity to hold property and enter into contracts'.<sup>524</sup> He argues that classic liberal rights do not guarantee effective economic participation. 'They cannot prevent inequality and social exclusion, which diminish the scope of the market and threaten its existence. A market which benefits only a minority cannot ultimately be sustained'.<sup>525</sup> Therefore it can be argued that market incentives alone cannot address systemic discrimination, which is deeply embedded in social, cultural and institutional norms. For example, discrimination against certain groups, such as people with disabilities, may be so deeply ingrained in society that employers may not be motivated to hire them,

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<sup>520</sup> Goodley (n 119) 26.

<sup>521</sup> Epstein (n 512) 484.

<sup>522</sup> *ibid.*

<sup>523</sup> Simon Deakin, 'Equality, Non-discrimination, and the Labour Market: A Commentary on Richard Epstein's Critique of Anti-discrimination Laws' in Richard A Epstein (ed) *Equal Opportunity or More Opportunity?* (Cromwell Press 2002).

<sup>524</sup> *ibid* 41.

<sup>525</sup> *ibid* 42.

even if incentives are offered.<sup>526</sup> Arguably incentives must be accompanied by anti-discrimination legislation and policies to effectively address discrimination. (See 5.6.1.5).

Despite fully embracing capitalism and free-market principles, the Chiluba government didn't completely eliminate disability legislation. Instead, they made changes to shift the focus from providing care to promoting anti-discrimination and social/economic inclusion for people with disabilities. This shift was evident in the enactment of the Persons with Disabilities Act 1996, which will be briefly examined below. However, it is important to note that with its free market policies, the Chiluba government rejected the inclusion of justiciable ESC rights and disability-specific rights in the country's constitution. (See chapter 8 on the implications of this).

#### **4.4.1 Persons with Disabilities Act 1996**

In 1996, the HPA 1968 was repealed and replaced by the Persons with Disabilities Act 1996 (PDA 1996). The Act established the Zambia Agency for Persons with Disabilities (ZAPD) functions, Management Boards, and the National Trust Fund. Like the HPA 1968, the PDA 1996 also defined disability and persons with disability under the medical model approach of disability. Disability was defined as:

Any restriction resulting from an impairment or inability to perform any activity in the manner or within the range considered normal for a human being and would or would not entail the use of supportive or therapeutic devices and auxiliary aids, interpreters, white cane, reading assistants, hearing aids, guide dogs or any other trained animals trained for that purpose.<sup>527</sup>

A person with disability was defined as 'a person with a physical, mental or sensory disability, including a visual, hearing or speech functional disability'.<sup>528</sup> The Act expressly prohibited disability-based discrimination for the first time in Zambia. The Act prohibited discrimination generally and in employment and learning institutions specifically.<sup>529</sup> Section 19 (1) defined discrimination as:

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<sup>526</sup> Michael Ashely Stein, 'The Law and Economics of Disability Accommodations' (2003) 53 Duke LJ 79.

<sup>527</sup> Persons with Disabilities Act 1996 (PDA 1996), s 2 (repealed).

<sup>528</sup> *ibid* s 2.

<sup>529</sup> *ibid* s 19-21.

- (a) Treating a person with a disability less favourably from a person without a disability.
- (b) Treating a person with a disability less favourably from another person with a disability.
- (c) Requiring a person with a disability to comply with a requirement or condition which persons without a disability may have an advantage over.
- (d) Not providing different services or conditions required for that disability.

From the above definition, the Act was not only concerned with direct discrimination requiring similar or consistent treatment but, as evidenced by section 19 (1)(c) of the PDA 1996, also went a step further in prohibiting indirect discrimination.<sup>530</sup> However, it is important to understand that the failure or success of sustaining a discrimination claim under section 19 fell on how the comparator requirement of disability-related discrimination was interpreted.<sup>531</sup>

One can make a case that this Act represented a notable advancement from the HPA 1968, given its inclusion of legal provisions aimed at preventing discrimination and ensuring accessibility for individuals with disabilities, although its scope was somewhat constrained. A particularly noteworthy aspect was the incorporation of a form of the reasonable accommodation principle (though not explicitly labelled as such), allowing for distinct treatment of individuals with disabilities by offering specific services or conditions tailored to address their respective disabilities. In the particular context of employment, the Act prohibited discrimination regarding advertising; recruitment; conditions and terms of employment; promotions, transfers and training; and the provision of other benefits related to employment. Additionally, the Act bestowed eligible employers, who were registered under its provisions and employed a minimum of three individuals with disabilities, with a

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<sup>530</sup> Indirect discrimination, or disparate impact, is when a policy or practice negatively affects someone compared to another, even though the rules are applied in a formally neutral manner. An individual claiming indirect discrimination would argue that a seemingly neutral standard is actually detrimental to them, compared to the impact on others. (Sandra Fredman, *Anti-Discrimination Laws and Work in The Developing World: A Thematic Overview* (World Development Report 2013) 22.

<sup>531</sup> Anna Lawson, 'Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated' (2011) 40 *ILJ* 359.

tax rebate. In essence, the Act introduced the accommodation principle within Zambia's disability law, thus formalising the necessity of an inclusive employment paradigm.

In providing social and welfare services for persons with disabilities, the ZAPD, like its predecessor, was also tasked with promoting, coordinating, and providing services for those with disabilities and advising the Minister on disability affairs. ZAPD was also responsible for the National Trust Fund for the Disabled to provide facilities such as loans to persons with disabilities for commercial ventures, funds for training persons with disabilities and support for disability-related research.

#### **4.5 The neo-liberal conception of equality**

Despite the seemingly progressive 1996 disability legislation, the fortunes of persons with disabilities in the areas of work and employment must still be weighed against the overall objectives of what employment equality represents under neoliberalism. Thornton observes that neoliberalism usually leads to a significant decline in workers' rights in favour of the employer prerogative to attract economic capital.<sup>532</sup> Thus in Zambia, the need to attract foreign capital investments initiated a rise in casualisation, outsourcing of labour, weakening of trade unions and the overall deterioration of working conditions. All these factors have a profound effect on persons with disabilities. And as mentioned in chapter 1, neo-liberalism's obsession on productivity, individual performance and profit maximisation often leads to the exclusion of persons with disabilities from employment, as they are not seen as meeting the standards of the ideal employee.

Further, because laws enacted under the guidance of liberalism often target protecting individual rights and freedoms to pursue their interests without interference, equality is described as exclusively consisting of equal treatment. Within theoretical conceptions of equality, the equal treatment principle is known as formal equality. Formal equality thrives on the idea of the consistency of treatment or neutrality and that people should be treated in the same way regardless of whichever attributes they possess, or to which protected group they belong. Although it acts as a first step to countering direct discrimination (often reflected as less favourable treatment) by creating a neutral playing field, its enforcement

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<sup>532</sup> Thornton (n 509) 316.

can still produce unequal results.<sup>533</sup> Where persons with disabilities are concerned, formal equality is problematic as they sometimes require that their difference is taken into consideration to even the playing field. Because formal equality requires simply the same treatment, it does not envisage positive measures such as affirmative action, reasonable accommodation and other prophylactic aspects that would correct the inequalities experienced by those with disabilities. To this end, formal equality merely serves to preserve ‘the privileged normative standard of a non-disabled person’.<sup>534</sup> The decision in *Musukwa* examined in chapter one clearly illustrates this point where the underlying assumption from the court was that deaf drivers ought not to be provided with differential or special treatment in obtaining driver’s licences despite holding that they are ‘different’ from the majority.

Additionally, the formal equality model requires a complaint and appropriate comparator to establish a discrimination claim. For persons with disabilities, finding a suitable comparator in ‘a comparable situation’ can be daunting. A non-disabled comparator can prove unrealistic where claims of unequal treatment on the grounds of disability are made. Thus, without a comparable comparator, discrimination cannot be established. Arguably formal equality individualises every instance of discrimination without seeing it as part of a deeply rooted cultural structure. It, therefore, makes it challenging to achieve the necessary political, social, and environmental changes that ‘correct the factual inequalities and imbalance of power’.<sup>535</sup>

When taken as a whole, the dictates of formal equality described above are similar to those of the medical model of disability examined in chapter 2. An apparent reason for this similarity is that the development of formal equality within early international instruments, was merely a reflection of the medical model, which was the prevailing theoretical model of disability at the time.<sup>536</sup> Degener argues that ‘the medical model of disability is associated

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<sup>533</sup> Catherine Barnard and Bob Hepple, ‘Substantive Equality’ (2000) 59 CLJ 562, 563.

<sup>534</sup> Andrea Broderick, *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities: The United Nations Convention on the Rights of Persons with Disabilities* (Intersentia, 2015) 32.

<sup>535</sup> *ibid* 32.

<sup>536</sup> *ibid*.

with formal equality because impairment is regarded as a difference that either must be ignored or which might legitimise different, unfavourable treatment'.<sup>537</sup>

Arguably formal equality, despite its many shortcomings, is not without value and was merely a first step (albeit in a limited sense) towards removing direct discrimination and disseminating the concept of equality into wider consciousness. An example where the formal equality principle of consistency of treatment proved beneficial was the Zambian High court case of *Edith Nawakwi v Attorney-General*.<sup>538</sup> In this case, it was held that requiring a father's consent to have a child's name included in their mother's passport was discriminatory against mothers and female applicants. (This decision was made at a time when 'sex' and 'gender' were not listed as protected attributes under the definition of discrimination in the Bill of rights).

The apparent limitations of formal equality necessitated a shift in how equality is conceptualised, particularly for vulnerable and marginalised groups such as persons with disabilities. There has now been a move from neo-liberal notions of non-discrimination toward an approach based on substantive equality reflecting the social model of disability. The CESCR notes that substantive equality is concerned with the 'effects of laws, policies and practices and with ensuring that they do not maintain, but rather alleviate, the inherent disadvantage that particular groups experience'.<sup>539</sup> The conclusion of this chapter below provides a brief analysis of substantive equality and how it shares similarities with Zambian Humanism.

## PART IV

### 4.6 Conclusion

While appreciating that there are progressive elements in both Zambian Humanism and neo-liberalism, when it comes to creating opportunities for persons with disabilities, this thesis argues in favour of the tenets championed by Zambian Humanism. For persons with disabilities, the equality envisioned by Zambian Humanism is reflective of the version

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<sup>537</sup> Degener (n 214) 18.

<sup>538</sup> (1990 – 1992) ZR 112.

<sup>539</sup> UNCESCR, 'General Comment No 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights' (11 August 2005) UN Doc E/C.12/2005/4, para 7.

envisaged by the CRPD, based on Sandra Fredman's four-dimensional approach to substantive equality.<sup>540</sup> The four dimensions are redistribution, recognition, participation and transformation.<sup>541</sup> Substantive equality envisages a form of equality that does not restrict itself to a version of equality premised only on dignity, equality of opportunity, or equality of results but regards equality as a 'multi-dimensional concept'.<sup>542</sup> By examining each of the four dimensions, commonalities can be found between Zambian Humanism and substantive equality.

According to Fredman, policies promoting substantive equality are comparable to those aimed at combating poverty and social exclusion.<sup>543</sup> It can therefore be argued that by its very nature, Zambian Humanism as a philosophy designed around challenging societal inequality bears similarities with Fredman's theory of substantive equality.

The **redistributive dimension** is concerned with taking proactive steps towards redressing the disadvantage faced by members of a protected class. It is concerned with removing obstacles that stand in the way of social equality, not just on the economic front, but also the cultivation of capabilities to enlarge one's pool of available choices. As examined above, Humanism takes a similar stance, where Kaunda calls for an end to all forms of exploitation and the need to end inequalities based on artificial differences. Concerning the need to develop capabilities, Fredman formulates the redistributive dimension around the capabilities approach,<sup>544</sup> which, as evidenced above, can be accommodated within Zambian Humanism.

The **recognition dimension** requires treating everyone with respect and dignity. It seeks to counter prejudice, stigma, stereotyping, humiliation and violence based on a protected characteristic.<sup>545</sup> Recognition, according to Fredman, is about acknowledging that everyone is equal, and no one needs to be discriminated against, 'humiliated or degraded through racism, sexism, violence, or other status-based prejudice'.<sup>546</sup> As already indicated, human

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<sup>540</sup> UNCRPD Committee (n 131), para 11.

<sup>541</sup> Sandra Fredman, *Discrimination Law* (2nd edn, OUP 2011) 25; Fredman (n 130).

<sup>542</sup> *ibid* 25.

<sup>543</sup> Sandra Fredman, 'Providing Equality: Substantive Equality and the Positive Duty to Provide' (2005) 12 SAJHR 163.

<sup>544</sup> Fredman (n 130) 729.

<sup>545</sup> *ibid*.

<sup>546</sup> *ibid* 730.



equality is the ultimate goal of Zambian Humanism. Thus, before becoming president, Kaunda embraced, as an integral component of his guiding ideology, the sentiment expressed in the US Declaration of Independence, asserting that 'all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness'.<sup>547</sup> Kaunda also stated that his philosophy meant that 'no race need fear victimisation or oppression'.<sup>548</sup> Zambian Humanism mandates the complete eradication of all forms of prejudice. As articulated by Kaunda, a genuine humanist stands devoid of any prejudices.<sup>549</sup> Within the framework of Zambian Humanism, the realisation of a society centred around the individual can only be attained through the universal reverence for every human being, irrespective of their ethnicity, race, tribe, or any other distinguishing trait. Consequently, Kaunda emphasises that any system or practice that exploits or debases a fellow human must be vehemently opposed until its complete cessation.<sup>550</sup>

The **participative dimension** is about social inclusion and political voice. Fredman argues that equality laws should provide those who have often been deprived of effective political voice avenues to exercise their voice. It is about giving political power to those whose interests and rights have been ignored or neglected. As mentioned above, Zambian Humanism is concerned with doing the same under participatory democracy. Participation within Zambian Humanism is rooted in the TAS where consensus arrives at decisions. Hence under Zambian Humanism, 'every section of society must participate in all activities—political, economic, social, cultural, scientific and technological'.<sup>551</sup>

Fredman adopts a communitarian perspective regarding social inclusion. Like communitarians, she frowns upon the idea of an atomistic individual existing outside the social and communal fabric. Fredman argues that 'rather than the universal, abstract individual of formal equality, substantive equality recognizes that individuals are essentially social'.<sup>552</sup> Similar to communitarians, she also argues that individuals, as social beings, are

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<sup>547</sup> Philip Brownrigg, *Kenneth Kaunda* (KKF 1989) 64.

<sup>548</sup> *Ibid* 64.

<sup>549</sup> Meebelo (n 71) 33.

<sup>550</sup> Kenneth Kaunda, 'Take up the Challenge' (UNIP National Council, Lusaka, 7 November 1970) 7.

<sup>551</sup> Kaunda (n 170) 25.

<sup>552</sup> Fredman (n 130) 732.

shaped by their interactions with others. Elsewhere she observes that ‘substantive equality is, therefore, based on the principle that to be fully human includes the ability to participate on equal terms in community and society more generally’.<sup>553</sup> Her argument here is similar to the African communitarian concept of personhood which conceives personhood as being closely linked to social-communal relations and interactions. Exclusion from the community entails exclusion from citizenry participation and takes away from the individual the opportunity to fully develop as a person.<sup>554</sup> From the perspective of Zambian Humanism, Kaunda argues that while an individual is a free agent, attaining perfection requires them to be community-minded by observing their obligations to society in much the same way that society recognises their rights. In Zambian humanist society, the relationship between the individual and society is one of an intricate and finely balanced system of reciprocal obligation based on mutual aid.<sup>555</sup>

Lastly, the **transformative dimension** is concerned with accommodating difference and structural changes. This view suggests that tackling discrimination requires structural changes to existing norms that perpetuate discrimination. Thus, instead of an approach that calls for consistency in treatment that overrides any form of individual and contextual difference, dismantling the structures that perpetuate discrimination sometimes requires acknowledging individual differences. For example, most work arrangements are developed in accordance with the attributes of the dominant group, the able-bodied man with no caring responsibilities. This by itself already places persons with disabilities at a disadvantage if a formal approach to equality was to be applied. Therefore, to ensure a more equitable and inclusive society for those with disabilities, discrimination is tackled by considering their disability by removing barriers that disadvantage them and foster discrimination without them having to conform to ableist norms. Within Zambian Humanism, the transformative dimension must be seen from Kaunda’s desire to dismantle the institutions created under colonialism and how they perpetuated inequality and disadvantaged black Africans. As indicated above, Kaunda recognises that an equal,

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<sup>553</sup> Sandra Fredman, *Working Together: Human Rights, the Sustainable Development Goals and Gender Equality* (The British Academy 2018) 14.

<sup>554</sup> Elizabeth Dickson, ‘A Communitarian Theory of the Education Rights of Students with Disabilities’ (2012) 44 *Educational Philosophy and Theory* 1093.

<sup>555</sup> Meebelo (n 71).

egalitarian and inclusive society can only come about by proactively implementing measures aimed at correcting the wrongs of discrimination and bringing about positive change. According to Broderick, transformative equality challenges the deeply ingrained roles and ideologies within society and 'disrupts the hierarchical legal and social status quo'. It, therefore, requires changes to social, legal and political systems to effect the 'full and effective realisation of the equality norm and the recognition of the inherent dignity of individuals'. She goes on to observe that the transformative dimension, 'can be aligned with the redistributive model of social justice, in so far as it seeks to achieve a more equitable distribution of benefits for all'.<sup>556</sup> As examined above, Zambian Humanism is premised on the idea of social justice and equal distribution of wealth.

While Zambia has pursued a path of neo-liberalism in economic matters, the current amendments in disability and equality legislation exhibit an alignment with the principles of Zambian Humanism. These legislative changes underscore the adoption of a substantive equality approach, moving away from a purely formal one, to address socio-economic disparities in the country, as will be elucidated in chapter 5. As previously mentioned in chapter 1, recent legal enactments have witnessed a shift from a 'fault-based model' of addressing discrimination to a 'capacity-based model'. This shift suggests a recognition that the progression of African society through various socio-economic stages often inclines towards communitarianism, where values and ethos of the common good are ingrained in the social responsibilities of both the state and individuals.<sup>557</sup> Kahn-Fogel argues that although liberalism has found its way into various African legal systems partly due to the influence of international human rights law, communitarian norms continue to impact many African societies significantly.<sup>558</sup> This is because African cultures favour 'group welfare and individual responsibility over individual rights'.<sup>559</sup> As such, communitarian values are likely to have a greater hold on applying the law than liberal ideals. This might explain why recent legislative enactments, despite having abandoned Zambian Humanism in preference for neo-liberalism, have departed from an exclusively liberal formal equality approach in preference for a substantive approach that takes a prophylactic approach to discrimination.

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<sup>556</sup> Broderick (n 534) 37.

<sup>557</sup> Mwenda (n 415), para 23.

<sup>558</sup> Nicholas Kahn-Fogel, 'Western Universalism and African Homosexualities' (2013) 15 ORIL 315, 316.

<sup>559</sup> *ibid* 316.

The next chapter will delve into this legislative transition by examining the current equality and anti-discrimination laws.

## **Chapter 5: Equality and Anti-discrimination Law in Zambia**

### **PART I**

#### **5.1 Introduction**

As examined in the previous chapter, Zambian Humanism recognises that attaining equality requires more than consistency of treatment. It calls for substantive equality, which encompasses taking positive measures or actions towards achieving equality, equal opportunities and eliminating discrimination in society. Building on the foundation set in the previous chapter, this chapter examines some salient provisions of Zambian anti-discrimination legislation regarding equality and equal opportunities for persons with disabilities in the labour market. To do this effectively, the chapter in part two begins by looking at the difference between the symmetrical and asymmetrical approaches to anti-discrimination law and how the latter approach is more consistent with how Zambian Humanism deals with discrimination. This will then feed into an examination of why disability law requires the application of positive measures to eliminate discrimination and promote equality for persons with disabilities. This part also looks at what constitutes positive measures, why they are essential and why they can be contentious. In part three, the chapter examines the different pieces of Zambian legislation, the extent to which they protect persons with disabilities from discrimination in the workplace, and the extent to which the law requires the application of positive measures. To this end, this chapter also serves as an analysis of Zambia's disability legislative framework. Given the necessary constraints, this chapter restricts its analysis to the provisions in Zambia's written legislation that directly bear upon persons with disabilities regarding equality, equal employment opportunities, and elimination of disability discrimination in the workplace and labour market. Part four concludes the chapter with a reflective summary.

## PART II

### 5.2 Symmetrical and asymmetrical law

Anti-discrimination law can take various forms. In its traditional sense, it takes a neutral and symmetrical approach when distributing goods, services and other resources.<sup>560</sup> A neutral and symmetrical system means that protection against discrimination extends to everyone in the same way with minimal consideration of the historical (or present) disadvantages and marginalisation that members of a particular group experience. This is in line with formal equality, where everyone is treated the same and thus 'has an equal right to inclusion and participation in society regardless of race, sex or other traits'.<sup>561</sup> For instance, although gender equality laws aim to protect women from discrimination, the symmetrical definition of 'sex' implies that men can also experience discrimination and make a discrimination claim.<sup>562</sup> For example, the Gender Equity and Equality Act 2015 (GEEA 2015) calls for 'upholding the rights of both sexes and to respect and safeguard the dignity of both sexes'.<sup>563</sup> Similarly, racial equality laws apply to everyone regardless of race.

Other statutes provide a more targeted approach by asymmetrically defining attributes to protect only those who traditionally experienced disadvantage.<sup>564</sup> For instance, the PDA 2012 asymmetrically defines disability (see below). This means that protection against discrimination under the PDA 2012 is only available to persons with disabilities or someone who has experienced discrimination on the ground of disability.<sup>565</sup> It also implies that the favourable treatment of a person with a disability would not constitute discrimination, nor would it be prohibited.<sup>566</sup> For example, in the field of employment, an employer under disability discrimination law would be permitted to consider an individual's disability to

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<sup>560</sup> This is based on direct discrimination (or disparate treatment) which prohibits differential treatment.

<sup>561</sup> Gaze and Smith (n 291) 207.

<sup>562</sup> Gender Equity and Equality Act 2015 (GEEA 2015) defines sex as 'the biological characteristics which define humans as female or male'.

<sup>563</sup> GEEA 2015, s 16. Note that the Act takes an asymmetrical approach on certain grounds. For example, section 15 (2) prohibits discrimination 'against a woman due to the woman's pregnancy or the fact that she has given birth to a child'. Because there is no analogous experience for men, pregnancy is an inherently asymmetrical attribute.

<sup>564</sup> Gaze and Smith (n 291).

<sup>565</sup> PDA 2012, s 6.

<sup>566</sup> Lawson (n 140).

create a more inclusive and accessible workplace. This is different from how anti-discrimination law in the traditional sense is applied. In the traditional or symmetrical sense, an employer would be prohibited from considering an individual's protected characteristics when making an employment decision. Where disability is concerned, however, ignoring a person's disability under the pretext of equal treatment (in the sense of similar treatment) would only propagate their already disadvantaged position.<sup>567</sup>

As examined in the previous chapter, it is now recognised that taking the traditional formal equality approach is insufficient in dismantling discrimination and inequalities faced by historically (or currently) marginalised and disadvantaged individuals and groups.<sup>568</sup> Tackling discrimination through the traditional method primarily requires an individualised adversarial approach to fight discrimination and inequalities through the court system.<sup>569</sup> Unfortunately, despite being an essential means of pursuing claims, the court process tends to be lengthy, stringent and costly (especially for the less privileged). As such, many victims are reluctant to seek redress through the judicial system.<sup>570</sup> Procedurally the burden of proof for discrimination in employment is usually on the complainant, which can be an impossible obstacle to overcome. The discrimination is more often suspected than proven, and difficult to establish. This is especially true for indirect or systematic discrimination, where the evidence is usually held by the person accused.<sup>571</sup> As has sometimes been the case in Zambia, courts following conventional approaches will not readily make an order (especially against the State) to implement proactive and positive measures that address inequality and discrimination. Also, injunctive orders to prohibit a party from directly or indirectly discriminating against another do not address historical discrimination and inequality sufficiently.

Recognising the inherent shortcomings of the traditional anti-discrimination approach towards certain disadvantaged groups and individuals, the concept of discrimination has

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<sup>567</sup> Sandra Fredman, 'Disability Equality, A Challenge to the Existing Anti-Discrimination Paradigm?' in Anna Lawson and Caroline Gooding (eds), *Disability Rights in Europe: From Theory to Practice* (Hart 2005) 203.

<sup>568</sup> Waddington (n 280).

<sup>569</sup> Fredman (n 530).

<sup>570</sup> Sandra Fredman, 'Making Equality Effective: The Role of Proactive Measures' (2010) Oxford Legal Studies Research Paper No 53/2010.

<sup>571</sup> ILO, *Labour Legislation Guidelines* (ILO 2001)

<<https://www.ilo.org/legacy/english/dialogue/ifpdial/llg/index.htm>> accessed 6 June 2022.

changed in recent years. The focus of discrimination law has moved from one requiring equal formal treatment to one aimed at addressing prevailing inequalities and disadvantages by actively removing the barriers certain groups face in the labour market and elsewhere.<sup>572</sup> This change in focus has seen the development and emergence of positive measures for the practical realisation of equal opportunities and for eliminating discrimination in society. Fredman notes that ‘rather than [discrimination claims] being initiated by individual victims against individual perpetrators’, addressing inequality requires the state, employers and other actors in positions of power to take an active role in removing discrimination and promoting equality.<sup>573</sup> Such a proactive approach is fundamental in facilitating the socio-economic participation of vulnerable and disadvantaged groups such as persons with disabilities.<sup>574</sup>

A proactive approach is consistent with communitarianism which requires collective action when tackling societal challenges. Communitarianism as a relational theory is premised on attaining meaningful equality, which requires eliminating obstacles that hinder its attainment.<sup>575</sup> Zambian Humanism also recognises the limits of the traditional approach toward discrimination. Kaunda realises the limitations of Aristotelian justice, that likes should be treated alike. For Kaunda, the Aristotelian formulation of justice of ‘giving to every man his due’ is a formula that does ‘not consider the selfishness which plays some role in every human action’.<sup>576</sup> By this, he means that while one may be alert to the circumstances in which they receive less than their due, they may still fail to be sensitive to the unjust treatment of another. And that there may be circumstances wherein both parties cannot receive their due.<sup>577</sup> In essence, Kaunda is alive to the fact that uniformity of treatment or impartiality with which a symmetrical approach metes out justice will not always produce a just result. Kaunda thus warns that ‘there is always the possibility of the judicial system being the instrument of injustice, however unintentional’.<sup>578</sup> Zambian

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<sup>572</sup> Fredman (n 530).

<sup>573</sup> *ibid* 3.

<sup>574</sup> UNCESCR, ‘General Comment No 5: Persons with Disabilities’ (9 December 1994) UN doc E/1995/22 para 19.

<sup>575</sup> Ball (n 479).

<sup>576</sup> Kaunda (n 110) 93.

<sup>577</sup> *ibid* 94.

<sup>578</sup> *ibid* 96.



Humanism, therefore, demands a form of equality, which goes beyond sameness of treatment. Kaunda argues that whilst justice must be ‘impersonal in the sense that it ignores the wealth class, tribe or wisdom of those who seek it’, such an approach is not readily consistent with African tribal society, which requires the application of partiality in some instances.<sup>579</sup> Although this approach might be viewed as amounting to favouritism, Kaunda observes that such an approach is consistent with the ‘network of obligations’ present among members of a communitarian society.<sup>580</sup> Although the formal equality approach might be appreciated for being impartial or impersonal in a sense, Kaunda’s argument here is that there are times when it will be necessary to consider someone’s circumstances in the distribution of goods.<sup>581</sup> Kaunda notes:

Humanism in Zambia requires those of us in responsible positions to create a situation or an atmosphere in which the common [individual] can develop [their] talents to their limit unimpeded by any artificial barriers such as relates to colour, tribe, religion, creed, [disability] or [their] station in life.<sup>582</sup>

Kaunda’s perspective is also seen from his description of the ‘right to have’. In his objection against apartheid, Kaunda notes that apartheid is a form of discrimination that favours the strong, the wealthy and the powerful. On the other hand, he describes Zambian Humanism as one that ‘discriminates in favour of the weak and underprivileged’. It, therefore, ‘recognises that a society of equality is a dream until all men can engage in healthy competition from a position of equal opportunities. Only then can there be equity’.<sup>583</sup> Kaunda’s words are particularly important when one considers the case of persons with disabilities in Zambia. The goal is to create an inclusive society. To achieve this, factors that support inequality must be removed. Therefore, it is appropriate to now focus attention on positive measures and their significance in promoting the rights of persons with disabilities.

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<sup>579</sup> *ibid* 95.

<sup>580</sup> *ibid* 95.

<sup>581</sup> *ibid* 95. Kaunda thus argues that ‘even in the most impersonal system of justice there will be occasions when account must be taken not only of human actions but also of personal circumstances’.

<sup>582</sup> Kaunda (n 122) 50.

<sup>583</sup> Kaunda (n 455) 839.

### 5.3 Positive measures

Positive measures are ones that ensure that members of a protected or disadvantaged group have an equal opportunity to benefit from the goods and services within a society. The terminologies used to describe positive measures vary from one jurisdiction to another and across different international human rights treaties. For example, the US uses the term ‘affirmative action’ or ‘reverse discrimination, whereas the preferred terminologies used in Britain are ‘positive discrimination’ and ‘positive action’.<sup>584</sup> Other commonly used terms are ‘preferential treatment’, ‘special measures’, ‘specific action’, and ‘appropriate measures’. It is also not uncommon to find domestic and international law using these terms interchangeably. The CRPD uses ‘specific’ and/or ‘appropriate’ measures in several instances.<sup>585</sup> The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) provides ‘special measures’ to ensure the equal enjoyment or exercise of human rights and fundamental freedoms.<sup>586</sup>

A perusal of anti-discrimination and equality legislation in Zambia indicates no preferred terminology or uniform approach to what constitutes positive measures. Because of this lack of uniformity and for convenience’s sake, this thesis adopts ‘positive measures’ as the preferred term as it connotes the idea of active participation in addressing discrimination and equality. Thus, although these terms might have subtle differences, these measures are essentially the same. They all connote a type of proactive action and initiative that requires the positive performance of some obligation or duty ‘rather than merely responding to complaints’ when addressing inequality and discrimination.<sup>587</sup>

The CRPD Committee describes specific measures as ones that ‘imply a preferential treatment of persons with disabilities over others to address historic and/or systematic/systemic exclusion from the benefits of exercising rights’.<sup>588</sup> Therefore positive measures include accommodations, direct benefits, or certain advantages for members of a disadvantaged group and require institutions to take steps to promote equal

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<sup>584</sup> Lawson (n 140) 189, 272.

<sup>585</sup> See for example CRPD art 5 (4) and art 4 (1)(b).

<sup>586</sup> Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) art 4(1).

<sup>587</sup> Fredman (n 530) 3.

<sup>588</sup> UNCRPD Committee (n 131), para 25 (c).

opportunities.<sup>589</sup> These measures are, in essence, positive discrimination but will not count as discrimination or unfavourable treatment in and of themselves. For example, Article 5(4) of the CRPD provides that ‘specific measures which are necessary to accelerate or achieve *de facto* equality of persons with disabilities shall not be considered discrimination under the terms of the Convention’. According to the CRPD committee, specific measures include ‘outreach and support programmes, allocation and/or reallocation of resources, targeted recruitment, hiring and promotion, quota systems, advancement and empowerment measures, as well as respite care and technological aids’.<sup>590</sup>

Lawson observes that positive discrimination or preferential treatment is determined in two ways. In the first place, it can entail preferential treatment for members of a disadvantaged group. This type of preferential treatment is not based on merit but because one belongs to a particular group. In the second sense, it applies as a ‘tie-breaker’. This might apply to situations where individuals are equally qualified, but a decision is made in favour of the one belonging to the disadvantaged group.<sup>591</sup>

Because positive measures are usually applied to benefit a wider disadvantaged group, they are not usually put in place as a permanent remedy. As such, they tend to be ‘programmatic in nature’<sup>592</sup> and mainly used as a remedial measure to help alleviate the effects of past (even present) discriminations and wrongs of a particular group.<sup>593</sup> However, certain situations may require that permanent measures be put in place. This will ‘depend on context and circumstances, including by virtue of a particular impairment or the structural

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<sup>589</sup> Lawson (n 140).

<sup>590</sup> UNCRPD Committee (n 131), para 28.

<sup>591</sup> Lawson (n 140) 189.

<sup>592</sup> Janet E Lord and Rebecca Brown, ‘The Role of Reasonable Accommodation in Securing Substantive Equality for Persons with Disabilities: The UN Convention on the Rights of Persons with Disabilities’ in Marcia H Rioux, Lee A B Marks and Melinda Jones (eds), *Critical Perspectives on Human Rights and Disability Law* (Brill 2011) 279.

<sup>593</sup> Cooper (n 13) 1431.

See also ruling of the ECJ in Case C-450/93 *Kalanke v Freie Hansestadt Bremen* [1995] IRLR 660. ECJ ruled that Article 2(4) of Council Directive 76/207/EEC (Equal Treatment Directive) (which provides that the directive is to be without prejudice to measures taken to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women’s opportunities), must be read restrictively. The ECJ ruled that ‘national rules which guarantee women absolute and unconditional priority for appointment or promotion go beyond promoting equal opportunities and overstep the limits of the exception in Article 2(4) of the Directive’. As such, a German regional law conferring automatic preference to a female candidate amounted to unjustifiable reverse discrimination. Cf Case C-158/97 *Georg Badeck and Others* [2000] ECR I-1875.

barriers of society'.<sup>594</sup> There are two schools of thought as to whether or not positive measures have a lifespan or not. One school of thought argues that legislation requiring positive measures must have a 'sunset clause', in the sense that positive measures are only temporary until the limiting barriers are removed, or equality is achieved. The rationale for having such a clause is to prevent what is termed as 'reverse discrimination'.<sup>595</sup> In the South African case of *Unisa v Reynhardt*,<sup>596</sup> the Labour Appeal Court held that preferential treatment following affirmative action considerations need not apply where the targets/goals of the particular affirmative actions have been attained. The other school of thought argues against the need for a sunset clause. The argument is premised on addressing not just historical inequalities but present and existing ones.<sup>597</sup> Most positive measures in Zambian legislation provide for permanent instead of temporary measures. Some statutes expressly state that conduct that amounts to positive measures does not constitute discrimination, as shown below.

### 5.3.1 Participation and consultation

By requiring the implementation of positive measures, discrimination and inequality are addressed not only by a determination of a breach of the law by a court in an individual action but by the collective and consultative process involving the State and other stakeholders such as employers, the would-be victims themselves and other organisations.<sup>598</sup> This reflects the essence of communitarianism and Zambian Humanism, as taking positive measures requires active participation, dialogue, and communication, as noted in chapter 4. The CRPD Committee warns against measures perpetuating isolation, segregation, stereotyping, stigmatisation or discrimination against persons with disabilities. It urges State parties to consult with and involve representative organisations of persons with disabilities when they adopt specific measures.<sup>599</sup> In this way, discrimination and inequality are addressed more holistically in that positive measures are the primary means

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<sup>594</sup> UNCRPD Committee (n 131), para 28.

<sup>595</sup> Muriel Mushariwa, '*Unisa v Reynhardt* [2010] 12 BLLR 1272 (LAC): Does Affirmative Action have a Lifecycle?' (2012) 15 PER/PELJ 412,412.

<sup>596</sup> [2010] 12 BLLR 1272 (LAC).

<sup>597</sup> Mushariwa (n 595).

<sup>598</sup> Fredman (n 567).

<sup>599</sup> UNCRPD Committee (n 131), para 29.

of achieving substantive equality.<sup>600</sup> Understood in a communitarian manner, the application of positive measures captures the idea that rights also give rise to duties or obligations, as was examined in chapter 4. Therefore, society must be structured to strike a proper balance between rights and responsibilities as opposed to the liberal views that argue that rights have priority over duties.<sup>601</sup>

### 5.3.2 Monitoring, enforcement and compliance

Positive measures can be a contentious issue, as they go against the well-established equal and neutral treatment principle by giving special treatment to certain groups at the expense of others.<sup>602</sup> As noted above, positive measures address inequalities, even where there are no allegations of rights being infringed, as opposed to individual claims and litigation for already committed conduct.<sup>603</sup> This is because positive measures take a prophylactic approach to discrimination. However, difficulties can arise where anti-discrimination provisions are drafted neutrally or symmetrically. Where this is the case, someone may consider the application of positive measures as constituting unlawful discrimination or unequal treatment. This is particularly true for quotas, where discussion of qualifications and merit comes into play.<sup>604</sup> To guard against such difficulties, 'it is generally necessary to have an express legal mandate to permit such measures'.<sup>605</sup> Positive-action statutes must be built around the fundamental rights they seek to defend and not as policy directives whose implementation is subject to the decision-maker's political will or their whims and caprices.<sup>606</sup> The objectives of positive measures must be clearly stated in the law that governs their implementation. And because positive measures are an alternative to adversarial approaches, effective monitoring, enforcement and compliance mechanisms must be built into the law.<sup>607</sup> As shown below, recent Zambian statutes take this approach and impose a duty on employers to report progress towards their equality obligations,

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<sup>600</sup> Lawson (n 140).

<sup>601</sup> Roger Hopkins Burke, 'Theorising the Radical Moral Communitarian Agenda' (2015) 13 BJCJ 7.

<sup>602</sup> Fredman (n 530).

<sup>603</sup> Fredman (n 494).

<sup>604</sup> UNCEDAW Committee, 'General Recommendation No 25: Article 4(1) of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures' (2004) para 23.

<sup>605</sup> Fredman (n 530) 51.

<sup>606</sup> Fredman (n 567).

<sup>607</sup> *ibid.*

publish equality outcomes, and employment information. Where this requirement is strictly adhered to, decision-makers are unlikely to abandon or neglect their duty of complying with provisions requiring positive measures to address existing inequalities.

At this juncture, this chapter now examines Zambian equality and anti-discrimination laws protecting persons with disabilities from discrimination in the workplace.

## **PART III**

### **5.4 Equality and anti-discrimination legislation**

Zambian law is pluralistic. It is comprised of an ecosystem of very different legal traditions and social and cultural influences. The laws of Zambia consist of the Constitution, laws enacted by Parliament, statutory instruments, Zambian customary law, and British laws which extend to Zambia.<sup>608</sup> This part of the paper is divided into five sections and deals with legislative material: First, constitutional. Second, legislation specifically related to persons with disabilities. Third, general employment legislation. Four, economic empowerment legislation, and lastly, gender equality legislation. Except for the provisions of the Bill of rights, this section examines twenty-first-century legislative enactments that seek to address the rights of persons with disabilities in Zambia.

### **5.5 Constitutional context**

#### **5.5.1 Constitution**

As the country's supreme law, the Constitution binds all persons in Zambia, State organs and State institutions.<sup>609</sup> It primarily forms the foundation of human rights in Zambia and is thus the first point of call for Zambians whose rights have been or are likely to be violated. The Constitution has undergone several amendments, with the latest amendments in 2016, resulting in the enactment of the Constitution of Zambia (Amendment) Act No 2 of 2016 (COZ 2016). The amendments essentially replaced the 1991 Constitution (as amended in 1996), except for the Bill of Rights, which has remained unchanged from 1991. Changes to

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<sup>608</sup> COZ 2016, art 7.

<sup>609</sup> COZ 2016, art 1.

the Bill of rights require the holding of a referendum.<sup>610</sup> However, Zambians rejected amendments to the Bill of rights following a referendum on 11 August 2016.<sup>611</sup>

#### 5.5.1.1 Prohibition of discrimination under the Bill of rights

The Constitution under the Bill of Rights prohibits the discriminatory treatment of persons residing in Zambia 'by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority'.<sup>612</sup> The Bill of Rights takes a formal approach to discrimination by defining discriminatory conduct as:

[A]ffording different treatment to different persons attributable, wholly or mainly to their respective descriptions by race, tribe, sex, place of origin, marital status, political opinions colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.<sup>613</sup>

However, following the 2016 constitutional amendments and the failure to amend the Bill of Rights, the amended definitions section (Article 266) of the Constitution provides a different but more expansive definition of discrimination. It defines discrimination as:

Directly or indirectly treating a person differently on the basis of that person's birth, race, sex, origin, colour, age, disability, religion, conscience, belief, culture, language, tribe, pregnancy, health, or marital, ethnic, social or economic status.<sup>614</sup>

This new definition is significant as Article 23 under the Bill of Rights does not list disability as a prohibited ground of discrimination. Similarly, the Constitution had no definition of disability before the 2016 amendments.<sup>615</sup> Where courts can characterise the petitioner's status in essentialist terms, they are more likely to provide extensive protection against

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<sup>610</sup> Section 79(3) of the Constitution of Zambia, provides, *inter alia*, that a bill for the alteration of the Bill of Rights cannot be passed unless before the first reading of the bill in the National Assembly it has been put to a national referendum of not less than 50 % eligible voters. However, the August 2016 constitutional referendum failed to meet the minimum threshold 50 % as only 44.4 % of the eligible voters took part in the referendum.

<sup>611</sup> The proposed Bill of Rights had several progressive clauses which would have broadened the protection of human rights in Zambia. It would have incorporated economic, social and cultural rights and the recognition of specific rights for persons with disabilities, older persons and children within the constitution.

<sup>612</sup> The Constitution of Zambia 1996 (COZ 1996), art 23(2).

<sup>613</sup> *ibid*, art 23 (3).

<sup>614</sup> COZ 2016, art 266.

<sup>615</sup> *ibid*. Refer to chapter 6 on definition of disability.

discrimination.<sup>616</sup> Therefore, the significance of including these definitions in the Constitution cannot be understated. The listing of protected attributes is an essential element in discrimination law. The listed attributes define the scope and extent of legal protection. To establish a discrimination claim, an individual must not only show that they have experienced discrimination but that they belong to a protected group as defined by law. Therefore, due to the absence of disability as a listed prohibited ground of discrimination under the Bill of Rights, persons with disabilities might have lacked the confidence to bring disability claims before the courts.

Unfortunately the Bill of Rights does not have a catch-all ground like 'other status', which would ideally expand its reach and guarantee protection from discrimination for persons with disabilities and other minorities or marginalised groups.<sup>617</sup> Nonetheless, the Supreme Court has recently held that the discrimination prohibited by Article 23 is not restricted to the expressly listed attributes.<sup>618</sup> Article 11, which can be regarded as the saving provision to Article 23, provides that '*...every person in Zambia has been and shall continue to be entitled to the fundamental rights and freedoms of the individual*'.<sup>619</sup> According to Article 11, the protected rights and freedoms under the Constitution are:

- a) life, liberty, security of the person and the protection of the law;
- b) freedom of conscience, expression, assembly, movement and association;
- c) protection of young persons from exploitation;
- d) protection for the privacy of his home and other property and from deprivation of property without compensation.

Hence, despite Article 23 not listing disability as a prohibited discriminatory ground, persons with disabilities can still pursue their claims by relying on Article 11, which guarantees every person's fundamental rights and freedoms in Zambia. The Supreme Court of Zambia in

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<sup>616</sup> Nicholas Kahn-Fogel, 'African Law and the Rights of Sexual Minorities: Western Universalism and African Resistance' in Muna Ndulo and Cosmas Emeziem (eds), *Handbook on African Law* (Routledge 2022) 413.

<sup>617</sup> CEDAW bemoans the absence of a general prohibition against discrimination in the Constitution (UNCEDAW Committee, 'Concluding observations – Zambia' (19 September 2011) CEDAW/C/ZMB/CO/5-6, para 13).

<sup>618</sup> See *Attorney General v Nkonde and Others* [2020] ZMSC 161 [58].

<sup>619</sup> Emphasis added.



*George Peter Mwanza and Melvin Beene v Attorney General* (hereinafter *Mwanza*),<sup>620</sup> noted that Article 11 offers general protection regarding all civil and political rights. A violation of any of the distinct rights under the Bill of Rights would also invariably entail a violation of Article 11. Therefore, it was the Court's opinion that one must first establish that their rights under the Bill of Rights have been or are likely to be violated if they are to allege a violation of Article 11. Nonetheless, in this case, the Supreme Court took a broad and expansive reading of the right to life (Article 12) as one that encompasses the right to food despite it not being listed as a specific right under the Bill of Rights. (Refer to chapter 8 for a detailed discussion of the case).

However, although Article 11 guarantees equality for everyone, it is limited by the exceptions under Article 23(4), which does not prohibit discrimination in certain instances. For example, it will not render as discriminatory customs or practises developed under customary law. The problem with this provision is that some customary practices discriminate against women, children and persons with disabilities. Persons with disabilities, especially those in rural areas where customary law is highly influential, are more likely to be on the receiving end of these practices. This exception can therefore apply to negative practises such as 'early marriages..., the practice of property division after the death of a husband (property-grabbing), sexual cleansing, and polygamy'.<sup>621</sup> It is such a paradox that this area of law, which affects most African life, is exempt from the Constitution's anti-discrimination clause.<sup>622</sup> Article 4 (b) of the CRPD requires States 'to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities'.<sup>623</sup> Thus to ensure that persons with disabilities enjoy equal protection of the law and the fullest enjoyment of human rights, Zambia, as a State party to the CRPD, has an obligation to repeal or modify existing statutory provisions that discriminate against persons with disabilities.

Other significant amendments that are key in enhancing the constitutional protection of persons with disabilities include Articles 8 and 9. Article 8 of the Constitution provides for

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<sup>620</sup> [2019] ZMSC 33 [12.0]-[12.2] (Malila SCJ).

<sup>621</sup> UNCEDAW Committee (n 617) para 13.

<sup>622</sup> Alfred W Chanda, 'Gaps in the Law and Policy in the Implementation of the Convention on the Rights of the Child in Zambia' (2000) 32 Zam LJ 1,4.

<sup>623</sup> CRPD, art 4(b).

national values and principles, which include, among others, ‘equity, social justice, equality and non-discrimination’. Article 9(1) provides that ‘the national values and principles shall apply to the interpretation of the constitution, the enactment and interpretation of the law, and the development and implementation of state policy’. Therefore, for persons with disabilities, the Constitution requires that principles and values of equity, social justice, equality and non-discrimination be considered when interpreting or applying any law that would affect their rights. In this vein, the Constitution addresses the crucial issue of legal recognition by affording equality before the law, and equal protection of the law to persons with disabilities, as required by Article 11 of the Bill of Rights. (See chapter 8).

### 5.5.1.2 Equality and equal employment opportunities in the Constitution

The 2016 constitutional amendments profess a commitment to promoting diversity in public service employment by providing another set of values and principles to guide the public service in the performance of its functions.<sup>624</sup> The Constitution requires, among other things, that the public service provides ‘adequate and equal opportunities for appointments, training and advancement of members of both gender and members of all ethnic groups’.<sup>625</sup> With particular reference to persons with disabilities, the Constitution requires their representation within the public service at all levels (national, provincial and local government).<sup>626</sup> The representation of persons with disabilities is a requirement that must be adhered to by all State organs and State institutions.<sup>627</sup> Persons with disabilities employed as public officers are protected (like any other public officer) against victimisation and discrimination in performing their ‘functions in good faith in accordance with [the] Constitution or other law’.<sup>628</sup> Any removal from office, reduction in rank or other punishment is subject to just cause and due process.<sup>629</sup>

However, several constitutional provisions cast the issue of disability in negative terms. Some of the provisions within the Constitution explicitly deny the exercise of certain rights

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<sup>624</sup> COZ 2016, art 173.

<sup>625</sup> *ibid* art 173(1)(j).

<sup>626</sup> *ibid* art 173(1)(k).

<sup>627</sup> *ibid* art 173(2)(b). See CRPD Art 27 (g) which requires State parties to ‘employ persons with disabilities in the public sector’.

<sup>628</sup> *ibid* art 173(3)(a).

<sup>629</sup> *ibid* art 173(3)(a).

for persons with disabilities by omitting any reference to reasonable accommodation to enable them to exercise those rights and participate in the nation's governance structures. For example, article 70 (2)(d) disqualifies a person from being elected as a Member of Parliament if they have a 'mental or physical disability that would make [them] incapable of performing the legislative function'. Under Article 83 (1)(b), one-third of the Members of Parliament may move a motion to remove the Speaker or Deputy Speaker for reasons of having a mental or physical disability. Article 100 (2)(f) disqualifies an individual from filing a presidential candidate nomination because of 'a mental or physical disability that would make the person incapable of performing the executive functions'. Similar provisions also apply to Judges, Ministers, Councillors, and other constitutional officeholders. The CRPD committee has expressed concern over these provisions. The Committee has signalled that Zambia must amend these articles to 'ensure that persons with disabilities have the right to stand for elections and hold public office'.<sup>630</sup>

Admittedly, these provisions are concerned with fitness to hold office but can also be subject to abuse due to the existing societal and negative attitudes towards those with disabilities. Persons with disabilities are likely to be subjected to more rigorous scrutiny than their non-disabled counterparts even when they are competent enough to carry out the functions of a particular office. Any mistakes made while performing their functions can be erroneously attributed to their condition and thus further perpetuate negative attitudes against persons with disabilities. Therefore questions about disability or fitness for office must be addressed within the confines of the reasonable accommodation duty and other positive measures.<sup>631</sup> Distinctions must be drawn between disabling conditions because the physical and social environment fails to accommodate them and those conditions that will still result in the inability to perform the functions of an office even if the disabling barriers are removed.<sup>632</sup> Thus, an impairment should only disqualify an individual from occupying a particular office if the functions of that office cannot be performed even where reasonable accommodations are provided.

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<sup>630</sup> UNCRPD Committee (n 68), para 26.

<sup>631</sup> See ZAFOD and DRW, 'Alternative Report on the implementation of the UN Convention on the Rights of Persons with Disabilities in Zambia: Submitted to the Committee on the Rights of Persons with Disabilities for the 14th Pre-Sessional Working Group' (16 Jul 2020).

<sup>632</sup> The definition of disability in the Constitution envisages such a scenario (refer to chapter 6).

### 5.5.1.3 Enforcement of the Bill of rights

The High Court is responsible for enforcing the Bill of Rights as stated in Article 28 (1) of the Constitution. Article 28 (1) allows anyone whose rights have been, are or are likely to be violated to seek redress from the High Court. The High Court is also empowered by Article 28 (1)(b) to make such orders, issue such writs, and give such directions as it may consider appropriate to enforce or secure the enforcement of any of the provisions under the Bill of rights. In the case of *Sela Brotherton and another v Electoral Commission of Zambia* (hereinafter *Brotherton*),<sup>633</sup> it was held that even though disability is not listed as a protected attribute under Article 23, public officers should not administer public resources in a discriminatory manner that excludes persons with disabilities. Therefore, the respondent was found to have discriminated against the applicants by failing to provide appropriate support services to allow persons with disabilities to participate in the electoral process.

Having found that the respondent unlawfully discriminated against persons with disabilities, the court directed the respondent to put measures in place that would ensure that the petitioner and other persons with disabilities were able to exercise their right to vote. The court held that the respondent, being a creation of the Constitution, was bound by Article 23 not to discriminate against those seeking its services. The court also held that the respondent's failure to make their polling stations accessible for persons with disabilities amounted to less favourable treatment as envisaged by section 19 of the PDA 1996.

The decision of the court, in this case, is highly commendable. The court was fully aware of the limits of taking a formal approach to addressing the challenges experienced by persons with disabilities when exercising their right to vote and opted for a more substantive approach. Even more commendable is that the decision was made when disability rights were expressed as non-justiciable rights under the Constitution's Directive Principles of State Policy clause.<sup>634</sup> The court's position is consistent with the CRPD Committee's views, which acknowledging the importance of substantive equality regards it as the 'most appropriate means of addressing the "dilemma of difference", as it can both ignore and

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<sup>633</sup> [2011] ZMHC 32 J16, J26.

<sup>634</sup> Refer to Chapter 8.

acknowledge individual differences to attain equality and that it addresses structural and indirect discrimination and takes into account power relations'.<sup>635</sup>

The expansive approach in interpreting the Bill of Rights taken by the High Court in *Brotherton* and the Supreme Court in *Mwanza* provides much promise for realising the rights of persons with disabilities. (These cases are revisited in chapter 8). While the Constitution of Zambia does not have specific and detailed provisions addressing employment barriers for persons with disabilities, there are disability-specific laws, which aim to promote and protect the rights of persons with disabilities, including in the area of employment. At this point, focus is now turned to consider these laws.

## **5.6 Disability-specific legislation**

### **5.6.1 Persons with Disabilities Act 2012 (PDA 2012)**

Following Zambia's ratification of the CRPD in 2010, persons with disabilities in Zambia gained important and progressive legal protections by incorporating most parts of the CRPD into the PDA 2012. The Act repealed and replaced the PDA 1996. The enactment of the PDA 2012 was preceded by a pledge from Members of Parliament to bring the CRPD into Zambian law to realise the rights of persons with disabilities fully.<sup>636</sup> The Act's enactment also involved consultations with persons with disabilities and their representative organisations.

The PDA 2012 is Zambia's most important and comprehensive piece of legislation for disability rights. The introduction of the PDA 2012, like the CRPD, was a paradigm shift from the medical/ individual model of disability to the social model of disability. The enactment of this statute called for a drastic change in how Zambian society views and treats persons with disabilities. The PDA 2012 challenges Zambian society to empower persons with disabilities, treat them with dignity, equality, and humanity, and allow them to participate effectively in all spheres of society. In essence, it requires that the rights of persons with disabilities are made a reality. To this end, it calls for promoting the participation of persons

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<sup>635</sup> UNCRPD Committee (n 131) para 10.

<sup>636</sup> UNICEF/ILO, 'Zambia: MPs Pledge Action on Rights of Disabled' (19 Aug 2009) < <https://reliefweb.int/report/zambia/zambia-mps-pledge-action-rights-disabled> > accessed 5 August 2021.

with disabilities and providing them with equal opportunities in the civil, political, economic, social and cultural spheres. The Act provides for mainstreaming disability issues as an integral part of national policies and strategies for sustainable development. By incorporating several aspects of the CRPD and other international instruments to which Zambia is party, the Act seeks to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by persons with disabilities and to promote respect for their inherent dignity.

The Act aims to promote equality by eliminating discrimination and ensuring that equal opportunities are made available for persons with disabilities to encourage full participation in all dimensions of Zambian society. The Act follows the CRPD's textual structure of 'zoning' rights. It contains provisions on non-discrimination, accessibility, education, employment, social protection, health, habilitation and rehabilitation, participation in cultural life, recreation, leisure and sport, and political and public life.

Zambia's PDA 2012 symbolises a change in social policy regarding persons with disabilities, from one geared primarily toward providing services and financial assistance to recognising disability as a protected category, a shift from charity to human rights. The PDA 2012 not only seeks to protect persons with disabilities against discrimination, but it also seeks to encourage them to be self-sufficient and independent so that they can freely and without hindrance participate on an equal footing with others in the welfare of the State as a whole. The PDA 2012 essentially brings to the fore a rights-based approach towards understanding disability and moves away from viewing persons with disability as objects of charity or welfare to be pitted and excluded from mainstream society. It recognises that persons with disabilities are rights holders just like everybody else.

#### **5.6.1.1 The superiority of the PDA 2012**

A pivotal characteristic of the PDA 2012 is its authoritative stance, ranking as the supreme legal framework (second only to the Constitution) concerning matters related to disabilities and the rights of persons with disabilities. Section 3 provides:

Subject to the Constitution, where there is any inconsistency between the provisions of any other written law impacting on the rights of persons with disabilities as

provided in this Act or any other matter specified or prescribed under this Act with respect to persons with disabilities, the provisions of this Act shall prevail to the extent of the inconsistency.

Section 3 acts as a safeguard for the rights of persons with disabilities. No action taken against persons with disabilities can be justified even if that action or omission has legal backing from other written laws. This might raise interesting disputes on the categorisation of claims. As already alluded to in chapter 3, the superiority of the PDA 2012 was put to the test in *Mwewa*.<sup>637</sup> On whether the PDA had impliedly repealed the MDA 1949, the Court held that, unlike the Constitution, subordinate legislation such as the PDA 2012 could not invalidate or void the MDA 1949. Although it cannot be disputed that the validity of Zambian legislation should be measured against the Constitution, it is submitted that the learned judge should have provided clear guidance on the import of section 3 of the PDA 2012 in her judgment. The judge seems to have ignored the provisions of section 3 of the PDA 2012, which suggests that it occupies a position of primacy when a matter is determined as being one that constitutes disability or persons with disability. Arguably, the PDA 2012 is not meant to invalidate other pieces of legislation (in terms of repealing or voiding them), but it should be followed in preference to other laws where the subject matter of any law concerns disability and persons with disabilities. This seems to be the position taken by the Employment Code Act 2019 (ECA 2019), as demonstrated further below.

#### 5.6.1.2 Who can bring a claim under this Act?

As already alluded to, the PDA 2012 defines disability asymmetrically. This means that protection against discrimination under the PDA 2012 only extends to persons with disabilities. By implication, the favourable treatment of a person with a disability to facilitate the enjoyment of rights would not be the basis of a discrimination claim, nor would it be prohibited because there is no comparable experience for those without a disability. This would be the case where the reasonable accommodation duty is concerned.

The PDA 2012 defines disability as ‘a permanent physical, mental, intellectual or sensory impairment that alone, or in combination with social or environmental barriers, hinders the

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<sup>637</sup> *Mwewa* (n 292).

ability of a person to fully or effectively participate in society on an equal basis with others'.<sup>638</sup> It further defines a person with disability as 'a person with a permanent physical, mental, intellectual, or sensory impairment which, in interaction with various barriers, may hinder that person to fully and effectively participate in society on an equal basis with others'.<sup>639</sup>

The asymmetrical nature of the Act can also be gathered from its definition of discrimination. Section 2 of the Act defines discrimination as:

[A]ny distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field, and includes all forms of discrimination, such as denial of reasonable accommodation, and the term "discrimination on the basis of disability" shall be construed accordingly.

This definition is further reinforced by the prohibitions set out in section 6, which provides:

- (1) A person shall not discriminate against a person with disability on the basis of disability.
- (2) A person shall not exploit or subject a person with disability to abusive, violent or degrading treatment including their gender-based aspects.
- (3) A person shall not call a person with disability any derogatory name because of the disability of that person.

The Act's definition of discrimination clearly illustrates the legislature's desire to enhance the protection and realisation of human rights for persons with disabilities. The definition thus recognises that disability discrimination is not only a result of an individual or entity directly or indirectly discriminating against persons with disabilities but also recognises the role of environmental and social-structural obstacles in creating disability. For this reason, it regards a refusal to reasonably accommodate as discrimination. The definition also symbolises a strong focus on implementing positive measures. Persons with disabilities should therefore not be excluded from participating in all spheres of life as any unreasonable exclusions would constitute discrimination.

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<sup>638</sup> PDA 2012, s 2.

<sup>639</sup> *ibid.* Refer to chapter 6 for analysis of this definition.



### 5.6.1.3 General principles

Section 4 of the Act duplicates all the general principles established under Article 3 of the CRPD. Therefore, the general principles provide the basis for assessing Zambia's conformity to the CRPD. They form the foundation and are an interpretive guide to the various substantive rights within the Act. These principles aim to holistically address the different elements associated with disability/ human rights in a bid to 'reverse oppression and bring about transformation'.<sup>640</sup> The principles embed the need to respect persons with disabilities as equal participants in all aspects of society. Their rights must thus be preserved and protected just like everybody else's. This, therefore, casts aside an approach that calls for the segregation of persons with disabilities under the misguided notion that they cannot make significant contributions to society's development and progress. By requiring full and effective participation and inclusion in society of persons with disabilities, the principles acknowledge the importance of their contributions to society.

### 5.6.1.4 Duty to respect and uphold rights and dignity of persons with disabilities

Section 5 of the Act provides for a horizontal application of the PDA 2012 by placing a duty on every person 'to uphold the rights of persons with disabilities and to respect and safeguard the dignity of persons with disabilities'. This provision can be said to give effect to paragraph (w) of the CRPD's preamble, which '[realises] that the individual, having duties to other individuals and to the community to which he or she belongs, is under a responsibility to strive for the promotion and observance of the rights recognised in the International Bill of Human Rights.' This can be interpreted as an attempt at establishing a duty of due diligence on the State to ensure that there is vigilance to prevent violations of a right or a due diligence when allegations occur about the existence of one. Alternatively, this can also be seen as an attempt by the Zambian legislature to implement a duty similar to the public equality duty found under the UK Equality Act 2010 (EqA 2010). The significant difference with the Zambian duty is that it applies to every person in Zambia, not just the public sector,

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<sup>640</sup> Tabithe Mary Collingbourne, 'Realising Disability Rights? Implementation of the UN Convention on the Rights of Persons with Disabilities in England- A critical Analysis' (The University of Sheffield Phd Thesis, 2012) 88.

as is the case under the UK EqA 2010. As provided in section 149 of the EqA 2010, the UK public sector equality duty is a much more detailed provision setting out exactly how the duty is supposed to be implemented compared to section 5 of the PDA 2012. The EqA 2010 helpfully explains that having due regard for advancing equality involves: removing or minimising disadvantages suffered by people due to their protected characteristics; taking steps to meet the needs of people from protected groups where these are different from the needs of other people; and encouraging people from protected groups to participate in public life or in other activities where their participation is disproportionately low. The EqA 2010 also provides that meeting different needs involves taking steps to take account of disabled people's disabilities. It describes fostering good relations as tackling prejudice and promoting understanding between people from different groups. It states that compliance with the duty may involve treating some people more favourably than others.

How every person in Zambia is supposed to respect and uphold the rights and dignity of persons with disabilities is not clear. Where does this duty begin and end for the private citizen? Is it a general duty to stop discrimination, prejudice or stigma towards those with disabilities? Or can it be said that every Zambian is required to provide reasonable accommodation or accessibility for those with disabilities in their homes? As desirable as this duty might sound, section 5 of the Act is decidedly vague because it is unclear what obligations are imposed on the individual citizen to uphold the rights and dignity of persons with disabilities, especially where the rights in question require the allocation of resources.

Another way might be to look at this duty as one of self-reflection and vigilance based on Zambian Humanism and its approach towards a community that recognises collective and societal responsibility towards the welfare of others despite its recognition of the importance of individual agency as well.<sup>641</sup> Thus, based on the extended family and kinship model, with its communitarian values, Zambian Humanism requires respect for all individuals' dignity and worth, including persons with disabilities. Therefore, section 5 can be viewed as a call upon Zambians to always demand full compliance with the law to ensure that the rights of persons with disabilities are respected.

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<sup>641</sup> Cleaver and others (n 81).

### 5.6.1.5 Discrimination against employees and job applicants

The Act prohibits discrimination on the basis of disability concerning all forms of employment, including conditions of recruitment, hiring and employment, the continuance of employment, the creation, classification and abolition of positions; the determination of wages; pensions or other benefits; apprenticeship; promotion; career advancement; and safe and healthy working conditions.<sup>642</sup> Part of the employer's non-discrimination mandate under the Act extends to the provision of reasonable accommodation and appropriate facilities for an employee with a disability to enable them to perform the job functions.<sup>643</sup> And following the definition of discrimination under the Act, a failure to reasonably accommodate constitutes discrimination.<sup>644</sup> The CRPD committee has also stated that protection from discrimination extends to discrimination by association. This is when someone is discriminated against for their association with someone of a protected class, not because they are part of that class. The CRPD committee also regards harassment as a form of discrimination. Unfortunately, there is no provision related to harassment under the PDA 2012. The Act does, however, provide that the Minister responsible for labour should issue regulations and take measures to protect persons with disabilities from harassment. In the absence of these regulations, persons with disabilities can rely on the Anti-Gender-Based Violence Act 2011 (AGBV 2011), which has detailed provisions on harassment. The Employment Code Act 2019 (ECA 2019) also requires an employer to have a harassment policy within the workplace.

### 5.6.1.6 Employment of persons with disabilities

The PDA 2012 provides that the Minister of Community Development, with the Minister of labour, and the Technical Education, Vocational and Entrepreneurship Training Authority (TEVETA) should issue regulations or take other measures to give effect to the rights of people with disabilities concerning employment.<sup>645</sup> Section 37 of the Act obligates the government to provide special incentives to individuals with disabilities operating their own

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<sup>642</sup> PDA 2012 s 35(2).

<sup>643</sup> *ibid* s 37(3).

<sup>644</sup> *ibid* s 2.

<sup>645</sup> PDA 2012, s 35(3)(i).

businesses and business organisations employing persons with disabilities. The provision of incentives is a positive drive for implementing equality and non-discrimination laws.<sup>646</sup> The Act does not define 'special incentives' nor provide a list of possible incentives. Nonetheless, the Act entitles employers to a tax rebate for any improvements or modifications made to their facilities or where they offer special services and reasonable accommodations for employees with disabilities.<sup>647</sup> The Act also exempts an employee with a disability from paying income tax.<sup>648</sup>

Such tax incentives are a recognition that in many cases, addressing disability discrimination 'imposes 'costs' on the community which are not ordinarily imposed when addressing discrimination on the grounds of sex, race or religious group'.<sup>649</sup> Therefore, the tax rebate should be seen as an incentive to employers who might be reluctant or refuse to employ persons with disabilities because of the perception that meeting their positive obligations mandate might be too costly for them. The provision of tax incentives should also be seen as part of communitarian ideals that reinforce notions of identity and solidarity and thus see the employment of persons with disabilities as a responsibility that benefits all of society.<sup>650</sup> Such incentives are society's way of sharing the burden of costs incurred by the employer in fulfilling their obligation to accommodate employees with disabilities. By providing an employer with a tax incentive, society 'spreads the burden of accommodation beyond the employer's pocketbook to the rest of society'.<sup>651</sup> In this sense, the provision of reasonable accommodations and other positive measures are a shared responsibility between the employer on the one hand and the whole of society on the other hand.<sup>652</sup> (See chapters 6 and 7).

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<sup>646</sup> Fredman (n 530).

<sup>647</sup> PDA 2012, s 37(4).

<sup>648</sup> *ibid* s 37(5).

<sup>649</sup> Dickson (n 554) 1096.

<sup>650</sup> Nicole B Porter, 'Reasonable Burdens: Resolving the Conflict between Disabled Employees and Their Coworkers' (2007) 34 Fla St U L Rev 313.

<sup>651</sup> Mung'omba Constitution Review Commission, *Report of the Constitution Review Commission* (2005), 144.

<sup>652</sup> Persons with disabilities should not bear the costs for reasonable accommodations. See UNCRPD Committee (n 131), para 26(f).

### 5.6.1.7 Monitoring, enforcement and compliance

The CRPD Committee observes that the adoption of enforcement measures is required to effectively enjoy the rights to equality and non-discrimination for persons with disabilities.<sup>653</sup> Therefore, the challenge is for the Act's interpretation, application, and enforcement to give effect to its various principles and obligations in advancing human rights for persons with disabilities in Zambia.

One way of ensuring the realisation of these principles is through ZAPD, established under part 3 of the Act.<sup>654</sup> The ZAPD has wide-ranging functions under the Act.<sup>655</sup> One of its primary functions is to ensure compliance with the Act. It therefore has a duty to 'monitor and evaluate the provisions of services to persons with disabilities and the implementation of the Act and any policy or national strategy on disability'.<sup>656</sup> In exercising its functions, ZAPD has an obligation to develop and implement measures to achieve equal opportunities. ZAPD must ensure that persons with disabilities can obtain an education and employment, participate fully in sporting, recreation and cultural activities, and be granted full access to community and social services.<sup>657</sup> ZAPD also has a duty to make recommendations to any State organ or institution regarding implementing measures to prevent discrimination against persons with disabilities.<sup>658</sup> In consultation with relevant State institutions, organisations of persons with disabilities and other civil society organisations, the Agency must also take appropriate measures to eliminate disability discrimination by any person, organisation or private enterprise.<sup>659</sup>

Under part 9 of the Act, ZAPD can also pursue claims through the Attorney-General and take legal action against persons or groups engaged in discriminatory conduct prohibited by the Act. ZAPD can also request the Attorney-General to take appropriate legal action where a matter affecting persons with disabilities raises issues of public interest.<sup>660</sup> However, this

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<sup>653</sup> *ibid* para 31.

<sup>654</sup> PDA 2012, s 11 and s 19.

<sup>655</sup> *ibid* s 14

<sup>656</sup> *ibid* s 14 (1)(n)

<sup>657</sup> *ibid* s 14 (1)(b).

<sup>658</sup> *ibid* s 14 (1)(h).

<sup>659</sup> *ibid* s 14(1)(i). Note that the consultation mandate emanates from CRPD art 4(3); UNCRPD Committee (n 131) para 33.

<sup>660</sup> PDA 2012, s 64.

provision poses a challenge where the alleged perpetrator of discriminatory conduct is a public body/person exercising their public functions. As chief legal adviser to the Government, the Attorney-General cannot pursue legal action against themselves. In such instances, the Agency would have to rely on its corporate status and sue under its corporate name.<sup>661</sup>

Additionally, ZAPD's Director-General can inspect institutions and issue adjustment orders. Failure to comply with an adjustment order constitutes an offence.<sup>662</sup> The Act imposes a general penalty for those who contravene any provisions of the Act where no specific penalty is specified.<sup>663</sup> The Act also prohibits the concealment of persons with disabilities<sup>664</sup> and makes it an offence to cause a disability on another person from negligence.<sup>665</sup> The punishment upon conviction can be a fine or imprisonment, or both.<sup>666</sup>

Overall, the Act's emphasis on positive measures and reasonable accommodation to achieve equality highlights its substantive equality approach. By promoting active citizenship, social inclusion, and community participation, the Act demonstrates a commitment to adhere to the communitarian ideals of Zambian Humanism. It does this by recognising both civil and political rights and economic, social and cultural rights.

### 5.6.2 **Mental Health Act 2019 (MHA 2019)**

As observed in chapter 2, the MDA/O 1949 did little to guarantee the respect and protection of the rights of persons with mental disabilities in Zambia. Having ratified the CRPD in 2010, Zambia has an obligation to repeal and replace any repressive disability legislation by enacting legislation that conforms to the convention's standards. Additionally, the WHO states that the 'fundamental aim of mental health legislation is to promote and improve the lives and mental well-being of citizens'.<sup>667</sup> The WHO further provides that 'legislation that protects vulnerable citizens (including people with mental disorders) reflects a society that

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<sup>661</sup> *ibid* s 11.

<sup>662</sup> *ibid* part VII.

<sup>663</sup> *ibid* s 65.

<sup>664</sup> *ibid* s 61.

<sup>665</sup> *ibid* s 62.

<sup>666</sup> *ibid* s 62.

<sup>667</sup> Freeman and Pathare (n 332) 1.

respects and cares for its patients'.<sup>668</sup> As such, a country needs to enact legislation that aims to protect the rights of persons with mental disorders and promote and provide mental health care.

The inadequacies of the MDA/O 1949, as illustrated by the petitioners' arguments in *Mwewa* (see 3.5), prompted calls to review mental health legislation in Zambia. Some of the inadequacies related to the ambiguous definitions of mental health conditions or mental disorders; the absence of provisions on informed consent and voluntary treatment and care; the absence of provisions related to the determination of competence and capacity; the lack of clear appeal procedures for involuntary detentions; and inadequate provisions on promoting community-based care.<sup>669</sup> Because of these inadequacies, those with mental disabilities were left particularly vulnerable to human rights abuses and violations, thereby making them more prone to marginalisation, stigma, and discrimination.

Zambia repealed and replaced the MDA 1949 in 2019 with the MHA 2019. The enactment of this Act was preceded by calls for reforming mental health legislation from Civil Society Organisations (CSOs) and Disabled Peoples' Organisations (DPOs) over a two decade period.<sup>670</sup> Although the development of the Mental Health Bill initially involved an active consultative process with various stakeholders before 2014, developments in the preparation of the Bill by Parliament after that remained a mystery as the contents of the Bill were hidden from the public domain.<sup>671</sup> The Bill was finally published and made available for public scrutiny on 13 February 2019. However, the Bill was criticised for abandoning some of the pertinent issues agreed upon during the consultative process. The Bill was criticised for not fully appreciating the rights of persons with disabilities as stipulated within the PDA 2012 and the CRPD. Of particular concern were provisions relating to legal capacity and those that permitted seclusion and restraint in treatment.<sup>672</sup> However, the Bill was enacted into law without taking on the recommendations, despite concerns and

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<sup>668</sup> *ibid* 1.

<sup>669</sup> Drew and others (n 396).

<sup>670</sup> Annabel Raw, 'You only Have Rights if you are a Person: How Zambia is Legislating away the Rights of Persons with Psychosocial disabilities' *AfricanLii* (20 June 2019).

<sup>671</sup> *ibid*.

<sup>672</sup> Helene Combrinck and Enoch Chilemba, 'The Revolution Will Not Be Televised: Recent Developments in Mental Health Law Reform in Zambia and Ghana' in Michael A Stein and others (eds), *Mental Health, Legal Capacity, and Human Rights* (CUP 2021).

the Parliamentary Committee's recommendations to Parliament to have the Bill redrafted.<sup>673</sup>

#### **5.6.2.1 Positive measures**

Regarding discrimination, the MHA 2019, like the PDA 2012, prohibits discrimination against persons with mental disabilities and the use of degrading treatment and derogatory language against them.<sup>674</sup> Concerning positive measures, the Act requires the Minister, in consultation with other relevant Ministries, to take policy measures that: promote mental health; prevent or reduce the occurrence of mental illness; enhance awareness about mental health; prevent or reduce the stigma associated with mental illness; train and sensitise law enforcement officers and adjudicators on mental health issues, and ensure the provision of adequate mental health services.<sup>675</sup>

#### **5.6.2.2 Monitoring, enforcement and compliance**

The Act establishes the National Mental Health Council, whose functions, amongst several others, are to develop systems and facilitate the monitoring and evaluation of mental health service delivery.<sup>676</sup>

#### **5.6.2.3 Criticisms of MHA 2019**

Although some argue the MHA 2019 is comprehensive and meets the WHO-RB guidelines for ideal mental health legislation<sup>677</sup>, others view it as a missed opportunity to further the rights of persons with mental disabilities.<sup>678</sup>

The main criticism of the MHA 2019 is the wording of section 4 as it relates to the legal capacity of those with mental disabilities, with some CSOs and DPOs calling for its repeal. The criticism against section 4 stems from the fact that it recognises and grants legal

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<sup>673</sup> Raw (n 670).

<sup>674</sup> MHA 2019, s 6.

<sup>675</sup> *ibid* ss 6, 7.

<sup>676</sup> *ibid* s 10.

<sup>677</sup> See Brian Maila and others, 'A Comparative Analysis of Zambia's Mental Health Legislation and the World Health Organisation's Resource Book on Mental Health, Human Rights and Legislation' (2020) 47 *Medical Journal of Zambia* 327.

<sup>678</sup> See Raw (n 670); Parliamentary Committee on Health, Community Development and Social Services, 'Report on the Mental Health Bill No 1 of 2019' (NA 2018 3/12) para 8.0-9.0.



capacity on the one hand whilst taking it away on the other. Thus, while section 4(1) of the Act provides that ‘a mental patient shall enjoy legal capacity’, section 4(2) goes on to state:

where the nature of the mental illness, mental disorder or mental disability results in the absence of mental capacity of that mental patient, the mental patient shall not enjoy legal capacity and is legally disqualified from performing a function that requires legal capacity.

Section 4(3) makes provision for supported decision-making by permitting the court to appoint a supporter where ‘a mental patient lacks legal capacity’. In contrast, section 4(4) allows a mental patient with legal capacity the authority to appoint a supporter through advance instructions.<sup>679</sup> On the other hand, section 4(5) takes away the right to appoint a supporter through advance instructions when a court decides that the person with a disability does not have legal capacity.

The Act does not define legal capacity but mental capacity is said to be ‘the capability to make independent, informed decisions and to act on that decision and understand the consequences of the decision made and action taken’.<sup>680</sup> This gives the sense that the Act equates mental capacity with legal capacity. The use of both mental and legal capacity in section 4(2) is confusing as it is unclear if the intention was for the two phrases to be used synonymously. Thus, section 4(2), when read together with section 4(5), are seen as a complete undoing of section 4(1), which guarantees the right to legal capacity. Kalunga argues that the provisions of section 4(2) would require one to undergo a mental functionality test to determine whether they are entitled to legal capacity, a situation the CRPD sought to address. The wording of section 4(2) suggests that an individual can lose their right to legal capacity without the necessity of a court process provided they fall within the definition of mental patient and that their condition results in the absence of mental capacity.<sup>681</sup> Raw also argues that one’s mental capacity should not be used as a determinate of legal capacity because ‘mental capacity is something that varies in all people’.<sup>682</sup> Although

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<sup>679</sup> MHA 2019, s 2 defines ‘supporter’ as ‘a person who represents a mental health service user or mental patient’s rights or interests’.

<sup>680</sup> *ibid* s 2.

<sup>681</sup> Felicity K Kalunga, ‘A legally- Disqualified Person’: The Mischief Created by Zambia’s Parliament in the 2019 Mental Health Act’ (Commonwealth Lawyers Association).

<sup>682</sup> Raw (n 670).

the two concepts are sometimes used to mean the same thing, the UNCRPD Committee maintains that the two concepts are different and state that:

Legal capacity and mental capacity are distinct concepts. Legal capacity is the ability to hold rights and duties (legal standing) and to exercise those rights and duties (legal agency). It is the key to accessing meaningful participation in society. Mental capacity refers to the decision-making skills of a person, which naturally vary from one person to another and may be different for a given person depending on many factors, including environmental and social factors.<sup>683</sup>

The Committee goes on to explain that the provisions of Article 12 (Equal recognition before the law) of the CRPD do not permit the denial of legal capacity-based labels such as “unsoundness of mind” or any such discriminatory labels. Therefore, the Committee’s view is that any ‘perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity’.<sup>684</sup>

Although the determination of legal capacity would require a consideration of several factors, such as the type of decision to be made, or the time within which a decision is to be made, or how it should be made, a reading of section 4 seems to suggest that a person is disqualified from exercising their right to independent decision-making in all situations that require legal capacity without any exceptions.

The other major problem created by section 4 is that the PDA 2012 guarantees the unrestricted right to legal capacity. Thus, in contrast to section 4 of the MHA 2019, Section 8 of the PDA 2012 extends legal capacity to all persons with disabilities without exception. Section 8(1) of the PDA 2012 provides that ‘a person with disability shall enjoy legal capacity on an equal basis with others in all aspects of life’. Section 8(2) requires the judiciary to ‘take necessary measures to ensure that persons with disabilities have equal and effective protection and equal benefit of the law without discrimination.’ And section 8(3) requires a court to ‘take into account the condition of the person with a disability and provide procedural and other appropriate facilities, to enable the person with a disability to access justice and participate effectively in the proceedings’.

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<sup>683</sup> UNCRPD Committee ‘General Comment No 1 Article 12: Equal Recognition Before the Law’ (19 May 2014) UN Doc CRPD/C/GC/1 para 12.

<sup>684</sup> *ibid* para 12.

The discrepancy between section 4 of the MHA 2019 and section 8 of the PDA 2012 is perplexing. It remains to be seen how the provisions of the two Acts will be interpreted and applied by the courts given that the MHA 2019 is much more recent whereas the PDA 2012 though enacted earlier enjoys some form of superiority as stipulated under section 3. One can only speculate that Parliament neglected to consider submissions that called for safeguarding the right to legal capacity for persons with mental disabilities.<sup>685</sup>

In any case, the importance of an individual's legal capacity cannot be understated where the right to work for persons with disability is concerned. The right to work is recognised by the MHA 2019 under its definition of what constitutes mental health and under the provisions that call for protections against forced labour and poor remuneration.<sup>686</sup> The Act defines mental health as 'a state of well-being in which a person realises that person's potential to cope with the normal stresses of life, can work productively and is able to make a contribution to the person's community'.<sup>687</sup> This definition clearly takes on board the communitarian ideals, where work is a means of self-fulfilment and a social obligation. Section 16 (n) provides that 'a mental patient has the right to be protected from forced or inadequately remunerated labour within an institution, workplace and the community'.<sup>688</sup> Here again, the importance of communal involvement in protecting persons with mental disabilities from any form of labour exploitation, in whatever form, is conveyed.<sup>689</sup>

The right to legal capacity is necessary for entering into contracts, such as employment contracts. Therefore, any arbitrary restrictions on this right deprives a person of his/her guarantee to equality before the law and the right to equal employment opportunities. It must also be pointed out that the requirement of supported decision is a move away from substitute decision-making, which was common under guardianship laws, conservatorship, and certain mental health laws, as clearly seen from some of the provisions of the repealed MDA 1949. Thus, emanating from the social model of disability and supported by the CRPD, supported decision-making is vital in protecting one's legal personhood, which 'incorporates

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<sup>685</sup> Raw (n 670).

<sup>686</sup> CRPD, art 27(2) mandates States Parties to 'ensure that persons with disabilities are not held in slavery or in servitude, and are protected, on an equal basis with others, from forced or compulsory labour'.

<sup>687</sup> MHA 2019 s 2.

<sup>688</sup> *ibid* s 16.

<sup>689</sup> Another sense in which the Act gives effect to communitarianism is by setting out a community-based approach to mental health care.

both legal agency and legal standing'.<sup>690</sup> In this sense, supportive decision-making can be seen as a form of reasonable accommodation that helps to 'remove cognitive and communication barriers for people with mental disabilities'.<sup>691</sup> However, the CRPD Committee cautions that reasonable accommodation should not be confused with 'support to exercise legal capacity'.<sup>692</sup> In any case, one's right to appoint a supporter must be respected in much the same way as the duty to reasonably accommodate would. The CRPD Committee has to this effect requested that Zambia take 'steps to replace substituted decision-making regimes with supported decision-making regimes that comply with the Convention and take into account the Committee's General comment No 1 (2014)'.<sup>693</sup>

Having established the importance of legal capacity and its impact on decision-making, the chapter will now focus on employment-specific legislation and how it eliminates discrimination and promotes equality for persons with disabilities.

## **5.7 Employment-specific legislation**

### **5.7.1 Employment Code Act 2019 (ECA 2019)**

The ECA 2019 repealed and replaced various statutes that governed the employment relationship in Zambia, including the Employment Act 1965; the Employment (Special Provisions) Act 1966; the Employment of Young Persons and Children Act 1933; and the Minimum Wages and Conditions of Employment Act 1982.

The ECA 2019 adopts a comprehensive approach to tackling employment discrimination and promoting workplace equality and equal opportunities. The expansive approach adopted by the ECA 2019 emanates from the governmental commitment to address discrimination and negative stereotypes in society, employment and other key decision-making positions. The government's various policy instruments demonstrated this commitment before the enactment of the ECA 2019, through policy documents such as the Fifth National

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<sup>690</sup> Anna Arstein-Kerslake and Eilionóir Flynn, 'The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: A Roadmap for Equality Before the Law' (2016) 20 *Intl J Hum Rts* 471, 474.

<sup>691</sup> Faisal Bhabha, 'Advancing Disability Equality through Supported Decision-Making: The CRPD and the Canadian Constitution' in Michael A Stein and others (eds), *Mental Health, Legal Capacity, and Human Rights* (CUP 2021) 143.

<sup>692</sup> UNCRPD Committee (n 131) para 25(c).

<sup>693</sup> UNCRPD Committee (n 68) para 9.

Development Plan 2006-2010, the Sixth National Development Plan 2011-2015 and the National Gender Policy and National Youth Policy. In addition to these broader policy documents, Zambia has ratified several ILO documents that call for eliminating discrimination and providing decent work in the country.<sup>694</sup> Before the Act's enactment, ILO, through its Committee of Experts on the Application of Conventions and Recommendations (CEACR), recommended that Zambia ensure that its laws take additional measures to tackle employment inequality.<sup>695</sup>

Prior to the ECA 2019, employment discrimination was mainly dealt with under the Industrial and Labour Relations Act 1993 (ILRA 1993), as the previously applicable Employment Act 1965 (EA 1965), which has since been repealed, did not address this issue despite being the most important legislation governing the employment relationship between employers and employees. Regrettably, the 2015 amendments to the EA 1965, which introduced a non-discrimination provision, did not include disability as a protected characteristic. Additionally, although the ILRA 1993 contains a non-discrimination provision, it also does not designate disability as a protected characteristic, thus providing limited protection for persons with disabilities in the workplace. In this context, the ECA 2019 emerges as a crucial development, bringing forth several significant enhancements as examined below.

#### **5.7.1.1 Prohibition of discrimination under the ECA 2019**

Whereas the ILRA 1993 only recognises direct discrimination, the ECA 2019 explicitly recognises both direct and indirect discrimination and calls for equal employment opportunities. Therefore, section 5(1) provides that an employer 'shall promote equal opportunity in employment and eliminate discrimination in an undertaking'. Section 5(2)(a) of the Act goes on to state that:

An employer shall not, in any employment policy or practice discriminate, directly or indirectly, against an employee or a prospective employee—

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<sup>694</sup> See Kalula and others (n 6).

<sup>695</sup> ILO Report of the CEACR (101st Conference Session Geneva 2012).

- (a) on grounds of colour, nationality, tribe or place of origin, language, race, social origin, religion, belief, conscience political or other opinion, sex, gender, pregnancy, marital status, ethnicity, family responsibility, disability, status, health, culture or economic grounds.

For the first time in Zambian employment legislation, disability is explicitly mentioned as a protected class. Nonetheless, an important observation concerning the ECA 2019 is that it does not provide definitions of the listed prohibited grounds of discrimination, nor does it define 'discrimination'. The absence of definitions is unfortunate and might imply that one is at liberty to adopt their preferred definition. While not providing definitions might not appear significant at first appearance, certain terms are likely to be a subject of contention. For example, the distinction between sex and gender is a highly contentious issue such that the extension of legal protections for some will rest on how these terms are defined. The same goes for disability, whose definition is influenced by many models as already established. Offering definitions for the listed grounds is even more critical when one considers the application of positive measures where a distinction must be made between the symmetrical or asymmetrical application of anti-discrimination law.

Further, although disability is listed as a protected attribute, the Act does not contain any separate and detailed provisions dealing with disability discrimination in the workplace. However, the Act requires an employer to comply with the PDA 2012 and MHA 2019 concerning the employment of a person with a disability.<sup>696</sup> The employer must therefore adhere to the mechanism for addressing disability discrimination established under disability-specific legislation concerning the recruitment, hiring and employment of a person with a disability. Therefore, this takes care of the need of not including the definition of disability under the ECA 2019.<sup>697</sup> It also means that discrimination against persons with disabilities includes the denial of reasonable accommodation per the PDA 2012. The ECA 2019 thus gives effect to section 3 of the PDA 2012 as argued above.

Not only is an employer prohibited from discriminating during the subsistence of the contractual relationship, the ECA 2019 now prohibits an employer from discriminating

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<sup>696</sup> ECA 2019 s 6.

<sup>697</sup> See Kalula and others (n 6) who recommended that the draft Employment Act should incorporate a definition of disability that was consistent with the CRPD and the PDA 2012.

during the process of ‘making a determination as to who should be offered employment’.<sup>698</sup> Thus for the first time in Zambian law, an applicant is now at liberty to bring an unlawful discrimination suit against a prospective employer. This is demonstrated by section 5(2)(a), which not only prohibits discrimination against an existing employee but also prohibits discrimination against a ‘prospective employee’. Section 5(2)(a) also makes it unlawful for an employer to discriminate during the recruitment process. It can thus be argued that not only is it unlawful to discriminate during the selection and interview process, but the substance of this provision would also extend to job advertisements. It is, therefore, unlawful for an employer to publish or cause to be published an advertisement that might be reasonably understood as being either directly or indirectly discriminatory.<sup>699</sup> It is also unlawful for an employer to discriminate regarding opportunities for training, promotion and other matters arising from the employment relationship.

An employee can also bring an action for discrimination based on discriminatory terms of their contract of employment provided they can show that their terms signify less favourable treatment compared to the terms of other similarly situated employees. This is an essential safeguard for employees, especially where matters of pay or hours of work are concerned. As a result, section 5(4) provides that ‘an employer shall pay an employee equal wages for work of equal value’. Within communitarian theory, equitable pay is premised on the tenet of mutual respect where society must treat everyone fairly regardless of their traits.<sup>700</sup> The CEACR, brought to the attention of the Zambian Government the fact that the concept of ‘work of equal value’, (which lies at the heart of the fundamental right of equal remuneration for men and women for work of equal value), goes beyond equal remuneration for ‘equal’, ‘the same’ or ‘similar’ work, but also encompasses work that is of an entirely different nature, which is nevertheless of equal value.<sup>701</sup> CEACR has since requested the Government of Zambia to provide information on the measures taken to raise awareness among workers, employers and their respective organisations of the ‘new equal remuneration provisions and the existence of penalties for non-observance’.<sup>702</sup>

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<sup>698</sup> Colin Bourn and John Whitmore, *Anti-Discrimination Law in Britain* (Sweet & Maxwell 1996).

<sup>699</sup> *ibid.*

<sup>700</sup> Burke (n 601).

<sup>701</sup> ILO Report of the CEACR (108th Conference Session Geneva 2019) 454.

<sup>702</sup> *ibid.*

## 5.7.2 Equality and equal employment opportunities under the ECA 2019

Besides prohibiting direct and indirect discrimination, the Act also applies positive measures to promote equality and eliminate discrimination in the workplace. To this end, section 5 (3) of the Act provides that it is not discrimination to:

- (a) take affirmative action measures consistent with the promotion of equality or the elimination of discrimination in an undertaking.
- (b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job. (See chapter 7 for detailed analysis).
- (c) restrict employment to citizens.
- (d) restrict access to limited categories of employment where it is necessary in the interest of state security.

Additionally, section 65 accords the Skills Advisory Committee (SAC) (a committee composed of a representative from government ministries, the federation of employers and the federation of trade unions)<sup>703</sup> the mandate to advise the Minister of Labour on implementing measures necessary to ensure that:

- (a) Zambian citizens are accorded priority in respect of an opportunity for employment.
- (b) affirmative action measures in employment and labour relations are taken in favour of citizens in accordance with the Citizens Economic Empowerment Act 2006 (analysed below).
- (c) certain categories of employment are restricted to citizens where it is necessary in the interest of state security.
- (d) citizens are accorded the same wages as an expatriate for work of equal value.
- (e) the welfare of citizens in employment and labour relations is promoted.

The introduction of the SAC is a welcome development within Zambia's employment law. It provides a consultative forum for pursuing the Act's equal employment opportunity objectives by bringing together relevant stakeholders. Consultation is a crucial ingredient for the effective operation of positive measures and goes to the root of a communitarian active participation imperative.

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<sup>703</sup> See ECA 2019 s 63 and s 64.



Further, section 95(1) requires employers to formulate various policies and procedures that promote equality and eliminate discrimination in the workplace. An employer must ensure that they have in existence the following: an employment policy, procedure and code; a HIV and AIDS policy; a health and wellness policy; a harassment policy; a performance management policy; and a grievance procedure and code of conduct. Section 95(2) goes on to provide that an ‘employer shall not, in any employment policy, produce or practice discrimination directly or indirectly against an employee or prospective employee’. An employer is obligated to ensure that all employees are aware of all workplace policies and procedures.<sup>704</sup> A failure to formulate these policies can attract administrative sanctions per section 96 of the Act.

Recognising that unemployment and underemployment continue to be a significant challenge for youths, women and persons with disabilities in Zambia,<sup>705</sup> the application of such positive measures can be the means through which they can enter into the formal employment sector. The listed measures, including the various policies that an employer must formulate, signal Zambia’s commitment to encourage the inclusion and participation of historically disadvantaged and marginalised groups within the labour market. As mentioned in chapter 1, work in a communitarian society is a significant part of social citizenship. Formal employment provides the means through which one can make valuable contributions to society, as expected in a communitarian society. Therefore, by facilitating equal employment opportunities through positive measures, persons with disabilities are provided with the means to make an active contribution to society and, in so doing, can meet their mutual obligations as they relate with others in the community.

Although protecting the employment of persons with disabilities within the traditional workplace is one of the surest ways to protect their right to work, other ways outside the formal sector also offer economic and non-economic benefits. Thus, sometimes persons with disabilities might opt to follow an entrepreneurial or self-employment path to earn a decent living. However, being an entrepreneur is not easy as several obstacles (such as a lack of access to capital) stand in the way of realising one’s ambition to become an

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<sup>704</sup> *ibid* s 95(3).

<sup>705</sup> Ministry of Labour and Social Security, *Zambia Decent Work Country Programme 2020 – 2022* (Ministry of Labour and Social Security 2021).

entrepreneur or self-employed.<sup>706</sup> Such barriers must be recognised and addressed as well. One way of addressing the challenges faced by persons with disabilities wishing to pursue an entrepreneurship path is by the State providing financing through economic empowerment schemes. Therefore, it is only prudent that some attention is given to legislation that provides the framework for economically empowering the entrepreneurship dreams of vulnerable individuals such as persons with disabilities in Zambia.<sup>707</sup>

## 5.8 Economic empowerment legislation

### 5.8.1 Citizens Economic Empowerment Act 2006 (CEEA 2006)

The CEEA 2006 is the first statute whose dominant focus is implementing positive measures. The Act was formulated to encourage and make it easier for indigenous Zambians to be included in the economy's private sector, which has been skewed in favour of foreign Multinationals and State enterprises.<sup>708</sup> Although the CEEA 2006 predates the 2016 constitutional amendments, it can be said to give legislative effect to the constitutional imperative, which requires the government 'to promote the economic empowerment of citizens so that they contribute to sustainable economic growth and social development'.<sup>709</sup>

The CEEA 2006 aims to 'economically empower' marginalised Zambians (termed 'targeted citizens') and enable them to participate in the country's economic activities.<sup>710</sup> As if to reinforce the communitarian agenda, the Act defines 'empowerment' as:

an integrated broad-based and multi-faceted strategy aimed at substantially increasing meaningful participation of targeted citizens, citizen empowered companies, citizen influenced companies and citizen owned companies in the economy and decrease income inequalities.<sup>711</sup>

Whereas a 'targeted citizen' is defined as:

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<sup>706</sup> Saptarshi Dhar and Tahira Farzana, 'Barriers to Entrepreneurship Confronted by Persons with Disabilities: An Exploratory Study on Entrepreneurs with Disabilities in Bangladesh' (2017) 31 Management Development 73.

<sup>707</sup> CRPD art 27(1)(f) requires State Parties to 'promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business'.

<sup>708</sup> Peter Kragelund, 'Bringing 'Indigenous' Ownership Back: Chinese Presence and the Citizen Economic Empowerment Commission in Zambia' (2012) 50 JMAS 447.

<sup>709</sup> COZ 2016, art 10(2)

<sup>710</sup> CEEA 2006, Preamble.

<sup>711</sup> *ibid* s 3.

a citizen who is or has been marginalised or disadvantaged and whose access to economic resources and development capacity has been constrained due to various factors including race, sex, educational background, status and disability.<sup>712</sup>

Therefore, the CEEA 2006 provides a legal framework for persons with disabilities to access funds for entrepreneurial and business activities and other employment opportunities. This is welcome, given the many barriers that hinder the participation of persons with disabilities in social and economic spaces. Through the establishment of the Citizens Economic Empowerment Commission (CEEC) and the Citizens Economic Empowerment Fund (CEEF), the CEEA 2006 aims to level the playing field to raise the citizens to a position where they can effectively participate in the national economy. The CEEC, among other functions, is thus empowered by the Act to:

- Encourage an increase in broad-based and effective ownership and meaningful participation of targeted citizens; citizen-empowered companies; citizen-influenced companies; and citizen-owned companies in the economy to contribute to sustainable economic growth.
- Remove social customs, statutory provisions or other practices that limit access to skills training essential for effective participation in the economic sector.
- Promote employment by removing structural and discriminatory constraints that hinder any particular gender from employment opportunities and ensure equitable income distribution.
- Promote equal opportunity for targeted citizens; citizen-empowered companies; citizen-influenced companies; and citizen-owned companies in accessing and being awarded procurement contracts and other services from State institutions.
- Promote greenfield investment through joint ventures and partnerships between local and foreign investors to enhance broad-based economic empowerment.

#### **5.8.1.1 Positive measures**

Regarding discrimination in the workplace, the Act stipulates that ‘a person or company shall not discriminate, directly or indirectly, against an employee in any employment policy

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<sup>712</sup> *ibid.*

or practice due to that employee's status, disability or gender'.<sup>713</sup> However, a mere prohibition of discrimination will not translate into equality in practice. Specific positive measures are required to effectively promote equal opportunities for persons with disabilities.<sup>714</sup> To this end, the Act requires State institutions and private companies to implement economic empowerment measures to ensure 'broad-based economic empowerment of targeted citizens, citizen empowered companies, citizen influenced companies and citizen-owned companies'.<sup>715</sup> These economic empowerment measures must include:

- Identifying and eliminating employment barriers in the company's policies and practices that adversely affect targeted citizens.
- Creating a diverse and inclusive workplace based on the dignity and respect of all people.
- Making reasonable adjustments for targeted citizens to ensure they enjoy equal opportunities and are equitably represented at the board and management level and in the workforce.
- Ensuring equitable representation of suitably qualified people from targeted citizens in all occupational categories and levels in the workforce.
- Retaining and developing targeted citizens in employment, including implementing appropriate training programmes for skills development.<sup>716</sup>

Furthermore, to achieve the various economic empowerment measures outlined in the Act, the Act requires employers to formulate and implement an employment equity plan to attain employment equity. A company's employment equity plan, which must not be shorter than one year nor longer than five years, must clearly state the objectives to be achieved in each year of its existence. The employment equity plan must also identify areas where targeted citizens are under-represented and, in so doing, set out the 'numerical goals to achieve the equitable representation of suitably qualified targeted citizens in each

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<sup>713</sup> *ibid* s 14.

<sup>714</sup> Morris Montalti and Adrian Bellengère, 'Is A Right to Affirmative Action the Solution to the Orwellian Postulate that all are Equal But' (2008) 65 *Transformation* 146.

<sup>715</sup> CEEA 2006, s 13

<sup>716</sup> *ibid*.

occupational category and level in the workforce'.<sup>717</sup> This must be accompanied by a timetable and the specific strategies for achieving the goals.<sup>718</sup>

Within the larger labour market framework, section 21 grants the President, through the Ministry of Commerce, the power to reserve specific areas of commerce, trade and industry for targeted citizens, citizen-empowered companies, citizen-influenced companies and citizen-owned companies. For example, under the CEE (Reservation Scheme) Regulations 2017, the sale of live birds in markets and domestic haulage for all public procurements are reserved for targeted citizens, citizen-empowered companies, citizen-influenced companies and citizen-owned companies.<sup>719</sup> (Restricting the sale of live birds in markets was probably because of public outcry following the influx of Chinese business in this sector).<sup>720</sup>

Despite the Act restricting the definition of discrimination to direct and indirect discrimination, an individual can still pursue a discrimination claim against an employer where the employer fails to institute economic empowerment measures and employment equity plans to promote equality in the workplace. Under the Act, an individual does not have to go through the rigours of showing direct discriminatory conduct, such as unfavourable treatment or establishing the disparate impact of an employer's otherwise neutral practice or standard. It will suffice 'to show a pattern of under-representation or other evidence of structural discrimination'.<sup>721</sup> The Act, therefore, requires a continuous process of 'diagnosing the problem, working out possible responses, monitoring the effectiveness of strategies, and modifying those strategies as required'<sup>722</sup> as demonstrated by its monitoring, enforcement and compliance procedures.

#### **5.8.1.2 Monitoring, enforcement and compliance**

Section 16 requires a State institution and a company to compile and submit to the CEEC information on employment policies and practices and the working environment for the CEEC to identify employment barriers that have or may adversely affect targeted citizens.

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<sup>717</sup> *ibid* s 15 (2)(c).

<sup>718</sup> *ibid*.

<sup>719</sup> Citizen Economic Empowerment (Reservation Scheme) Regulations 2017, reg 3 and 4.

<sup>720</sup> Justin Rowlett, 'Chinese Chicken Farmers Ruffle Zambian Feathers' *BBC News* (Lusaka, 5 February 2011).

<sup>721</sup> Sandra Fredman, 'Equality: A New Generation?' (2001) 30 *ILJ* 145, 164.

<sup>722</sup> *ibid* 164.

The Act also requires every State institution and company to submit, once every year, a report on the progress being made to achieve broad-based economic empowerment in accordance with a sector plan or strategy.<sup>723</sup> However, the effectiveness of this reporting process is solely based on how seriously the CEEC takes it and whether there are any repercussions for failing to meet the set goals. The CEEC has the authority to request and obtain a written undertaking of compliance from an institution where there are reasonable grounds to suspect a failure to prepare or implement an employment equity plan or to submit or publish a report. A State Institution or company that repeatedly fails to comply with the provisions of the Act can be barred from accessing any funds CEEC or an benefiting from any incentives under the Act.<sup>724</sup> The CEEC also has the power to ‘enter and inspect, during reasonable hours, the premises of any State institution or company to ensure that the Act is being complied with’.<sup>725</sup>

From the above, it is clear that the CEEA 2006 embraces one of the fundamental tenets of communitarianism: participation of all citizens in all spheres of societal life, which in this case, is the country’s economic sector. To illustrate how this Act has been instrumental in enabling persons with disabilities in Zambia to participate in economic activities, ZAPD in the North-Western Province of Zambia reported that the empowerment funds from CEEC have allowed persons with disabilities ‘to start up business ventures’.<sup>726</sup> For example, one DPO was able to get funding for the construction of a shopping complex in Solwezi, thereby ‘helping its members earn a living’.<sup>727</sup> All in all, the CEEA 2006 provides the framework for persons with disabilities to pursue self-employment, entrepreneurship, and develop cooperatives in accordance with the PDA 2012.<sup>728</sup>

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<sup>723</sup> CEEA 2006, s 35.

<sup>724</sup> *ibid* s 34.

<sup>725</sup> *ibid* s 36.

<sup>726</sup> Lusaka Times, ‘ZAPD Happy with Government Empowerment Programmes’ *Lusaka Times* (Lusaka, 22 August 2018).

<sup>727</sup> *ibid*.

<sup>728</sup> See PDA 2012, s 35(3)(f).

## 5.9 Gender equality legislation

### 5.9.1 Gender Equity and Equality Act 2015 (GEEA 2015)

Despite not having provisions on disability, the GEEA 2015 is yet another statute that affects the rights of persons with disabilities (mainly women) both in and outside the workplace and the labour market. Therefore, by taking an intersectionality approach to gender and disability, the GEEA 2015 supplements the PDA 2012 regarding the rights and the advancement of equal opportunities for women and girls with disabilities, who, as earlier indicated, are exceedingly vulnerable and face discrimination on multiple fronts as observed by the Committee on the Elimination of Discrimination Against Women.<sup>729</sup> In its report on Zambia in 2011, the Committee expressed concern that Zambia had not fully incorporated the convention into domestic law.<sup>730</sup> The Act addresses these concerns by domesticating CEDAW and provisions of various regional and international instruments dealing with women's rights and other gender equality matters.<sup>731</sup>

Thus, following the ratification of these international and regional instruments and incorporating them into the GEEA 2015, Zambia has agreed to ensure women's full enjoyment of human rights on an equal basis with men.<sup>732</sup> To this end, the GEEA 2015 reflects CEDAW's Article 15 and Article 3 of the ACHPR. The GEEA 2015 not only recognises the equality of both sexes before the law but also guarantees the equality of women, including the legal capacity to conclude contracts, acquire, own and administer property, as well as the right to choose residence and domicile.<sup>733</sup> Therefore, this statute seeks to eliminate gender discrimination in economic and social life and public and political life, thereby making it easier for everyone to participate in public life.<sup>734</sup> To this end, the Act also establishes the Gender Equity and Equality Commission (GEEC), whose functions, according to Article 231 of the Constitution of Zambia (as amended in 2016), are to:

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<sup>729</sup> UNCEDAW Committee, 'General Recommendation 5: Temporary Special Measures' (1988) UN Doc. A/43/38.

<sup>730</sup> UNCEDAW Committee (n 617), para 9.

<sup>731</sup> See GEEA 2015, preamble.

<sup>732</sup> *ibid* s 14(1).

<sup>733</sup> *ibid* s 14(2).

<sup>734</sup> See *ibid* ss 24, 27 and 29.

- (a) monitor, investigate, research, educate, advise and report on issues concerning gender equality;
- (b) ensure institutions comply with legal requirements and other standards relating to gender equality;
- (c) take steps to secure appropriate redress to complaints relating to gender inequality, as prescribed; and perform such other functions as prescribed.

#### **5.9.1.1 Prohibition of employment discrimination**

In the area of employment, the GEEA 2015 guarantees, among other rights, the right to access employment opportunities for women and prohibits all forms of discrimination against women concerning the advertisement of jobs, selection, hiring, promotions, training, apprenticeship or access to other opportunities for advancement, remuneration, benefits, retirement and social security. Section 31(3) of the Act prohibits an employer from discriminating against a woman by dismissing or demoting her based on sex, marriage, disability, pregnancy or maternity leave or subjecting her to any other disadvantage in employment. The Act also provides that 'a person, public body and private body has a duty to uphold the rights of both sexes and to respect and safeguard the dignity of both sexes'.<sup>735</sup> Section 31(5) mandates an employer to 'take appropriate measures to eliminate discrimination against women in the workplace'. Therefore, although the Act prohibits discrimination against both sexes, measures taken to eliminate discrimination against women in employment will not amount to discrimination against male employees.

#### **5.9.1.2 Gender equity and equality**

The Act also aims at eliminating adverse social and cultural practices and conduct. This is targeted at eradicating stereotypes about the roles of women and men, which is very prevalent in Zambia.<sup>736</sup> To this end, the Act provides that 'a woman has on an equal basis

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<sup>735</sup> *ibid* s 16 (1).

<sup>736</sup> See *ibid* s 28; Women in Zambia are concentrated in the lowest-paying sectors and non-technical jobs due to lower education levels. Also, discrimination against women in the country exists in traditional practices which limits their economic progress (Ministry of Gender and Child Development, *National Gender Equality Policy* (Republic of Zambia 2014).



with a man, the same *right to access employment opportunities and work in all sectors of the economy* as well as the right to '*choose a profession and field of employment*'.<sup>737</sup>

The situation for women with disabilities is much worse as they are likely to face stereotypical attitudes not only from men but from non-disabled females as well. The CRPD Committee has noted:

[B]esides the general barriers that persons with disabilities face when trying to exercise their right to work, women with disabilities also face unique barriers to their equal participation in the workplace, including sexual harassment and unequal pay and the lack of access to seek redress because of discriminatory attitudes dismissing their claims, as well as physical, information and communications barriers.<sup>738</sup>

As such, the CRPD and the CEDAW Committees severally recommend that State parties take special measures to eliminate discrimination against women who may suffer from multiple forms of discrimination and its compounded negative impact because of additional grounds such as disability.<sup>739</sup> The GEEA 2015, like the CEEA 2006, shows a move from traditional discrimination formulations to a model fostering positive measures to promote equality.

The development of positive measures (couched as special measures) is a recurring theme throughout the Act. Several provisions of the Act require the Minister of Gender, in consultation with the GEEC and other stakeholders, to put in place special measures to attain gender equity and equality, eliminate all forms of discrimination against women, and empower women.<sup>740</sup> The Act defines special measures as 'programmes, affirmative action or steps designed to ensure gender equity and equality which promote equal opportunities, real choices and positive outcomes'.<sup>741</sup> The Act also clarifies that 'a special measure shall not be considered discriminatory'.<sup>742</sup>

Further, the Act requires the establishment of affirmative action programmes with particular reference to women to eliminate barriers that prevent women from participating meaningfully in all spheres of life and create a conducive environment for such

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<sup>737</sup> See GEEA 2015, s 31 (emphasis added).

<sup>738</sup> UNCRPD Committee, 'General Comment No 3: Women and Girls with Disabilities' (25 November 2016) CRPD/C/GC/3 para 58.

<sup>739</sup> *ibid.*

<sup>740</sup> GEEA 2015, s 4.

<sup>741</sup> *ibid* s 2.

<sup>742</sup> *ibid* s 5(4).

participation.<sup>743</sup> The Act defines affirmative action as ‘a policy, programme or measure that seeks to redress past discrimination to ensure equal opportunity and positive outcome in all spheres of life for women’.<sup>744</sup> Therefore, the Act requires both public and private bodies to develop equity and equality plans, codes of practice, regulatory mechanisms, and other measures to effectively promote gender equity and equality in the body’s area of operation.<sup>745</sup> Additionally, the Act requires both public and private bodies to promote gender equity and equality in all spheres of life by changing conditions and circumstances that may hinder the attainment of sustainable and substantive gender equity and equality. Organisations must also promote gender equity and equality in all spheres of life by mainstreaming gender in all strategies, policies, programmes and budgets so as to empower and benefit both sexes.<sup>746</sup> The Act provides that institutions must establish appropriate and special measures to recognise and support women’s multiple roles. Notably, the Act requires all public and private bodies to implement special measures that actively seek to eliminate all forms of discrimination, afford both sexes equal representation and participation in all spheres of life, and eliminate the exploitation of both sexes in the labour market.

### 5.9.1.3 Monitoring, enforcement and compliance

As stated above, the primary responsibility for monitoring, investigating, researching, educating, lobbying, advising and reporting on gender equity and equality lies with the GEEC.<sup>747</sup> The GEEC can recommend to appropriate authorities that they take any necessary measures to promote and protect gender equity and equality in Zambia.<sup>748</sup>

To ensure compliance with employment equity plans, the GEEA 2015 requires public bodies to provide an action plan for achieving gender equity and equality which must be submitted to the Ministry of Gender.<sup>749</sup> However, the action plan’s approval is subject to consultations

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<sup>743</sup> *ibid* s 5(2)(c).

<sup>744</sup> *ibid* s 2.

<sup>745</sup> *ibid* s 17 and s 18.

<sup>746</sup> *ibid* s 19.

<sup>747</sup> *ibid* s 9.

<sup>748</sup> *ibid* s 9(1)(c).

<sup>749</sup> *ibid* s 17(3).

between the Minister of Gender, the Human Rights Commission, and other stakeholders.<sup>750</sup> For private bodies, the Act requires the Minister to formulate a statutory instrument that provides regulations for the development and implementation of and a reporting mechanism for the equity and equality plans and codes of practice developed by private bodies. The Statutory instruments must consider the private body's size, resources and influence.

A directive of non-compliance can be issued by the Minister where there are reasonable grounds to believe that a person, public or private body has substantially failed to comply with the Act. The person or body so directed must submit a written report to the Minister within a stipulated timeframe.<sup>751</sup> The wilful or unlawful failure to comply with the directive can attract a fine or imprisonment.<sup>752</sup>

Overall, the GEEA 2015 signifies Zambia's commitment to depart from 'a purely formal legal or programmatic approach', which according to the CEDAW Committee, is insufficient to ensure 'women's de facto equality (substantive equality) with men' more so for women with disabilities.<sup>753</sup> Where persons with disabilities are concerned, the Act is a step in the right direction of addressing the 'negative attitudes and multiple and intersectional discrimination that women and girls with disabilities face in achieving sustainable livelihoods and gaining access to social services'.<sup>754</sup>

## PART IV

### 5.10 Conclusion

In conclusion, this chapter sought to examine some of the salient provisions of Zambian equality and anti-discrimination legislation on employment equality and the creation of equal employment opportunities for persons with disabilities. The chapter argued that an

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<sup>750</sup> *ibid* s 17(4).

<sup>751</sup> *ibid* s 48.

<sup>752</sup> *ibid* s 47(4).

<sup>753</sup> UNCEDAW Committee (n 604) para 8.

<sup>754</sup> See UNCRPD Committee (n 68) para 3.

asymmetrical approach to anti-discrimination law is consistent with how general communitarianism and Zambian Humanism deal with discrimination and inequality. This then fed into examining why disability law requires positive measures to eliminate discrimination and promote equality for persons with disabilities. The chapter also considered positive measures, why they are essential, and how they can be contentious. The last part of the chapter examined the current legislative framework that governs the rights of persons with disabilities in the labour market.

Although Zambia continues to maintain its dualist approach to international treaties, this chapter demonstrates that Zambia's domestic law framework reflects a commitment to meeting its international human rights obligations, as evidenced by the domestication of provisions found in treaties such as the CRPD, CEDAW, CERD and ILO conventions. The effect of the ratification and domestication of these conventions into Zambian law is that it placed an obligation upon the State to adopt all appropriate legislative, administrative and other measures to realise the rights of persons with disabilities. The provisions requiring the State, public and private bodies, and employers to formulate positive measures are commendable. The importance of these statutes cannot be overlooked. They signify a movement away from the traditional, reactive approach of addressing discrimination, which burdens the individual with the responsibility of seeking redress through the adversarial court system, 'towards a more proactive approach which 'mainstreams' equality by requiring [decisions] to take equality issues into account in the development of their policies and programmes'.<sup>755</sup> Thus decision-making bodies and employers need not wait for individual discrimination complaints but must, on their own initiative, take responsibility to remedy discrimination and inequality within an establishment.

Further, although not explicitly stated in any policy or legislative documents, Zambia seems to be returning to the communitarian principles of Zambian Humanism, namely communal participation, acceptance, inclusiveness, egalitarianism, and non-discrimination. However, due to the absence of judicial precedents, it is difficult to gauge the extent to which these measures are respected as an alternative means to securing the employment rights of persons with disabilities. Furthermore, the effective implementation of the statutes

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<sup>755</sup> Ian Smith, Aaron Baker and Owen Warnock, *Smith & Wood's Employment Law* (15th edn, OUP 2021) 259.

examined in this chapter continues to present challenges due to the constrained institutional capacity of the various monitoring bodies involved.

Nonetheless the existence of anti-discrimination legislation and policies can help to change societal attitudes towards certain groups and create a level playing field for all individuals to participate in the labour market. Additionally, it provides a legal framework for individuals to seek justice and remedies for discrimination. Therefore, at an individual level, to assess the depth of Zambian disability laws in protecting individuals with disabilities from discrimination in the workplace, it is essential to examine specific aspects of disability law such as reasonable accommodation and how they balance against employer's rights and discretion. The next two chapters will therefore focus on examining elements that are crucial in protecting persons with disabilities from discrimination in the workplace.

# Chapter 6: The Legal Construction of Disability and Reasonable Accommodation in Zambia

## PART I

### 6.1 Introduction

This chapter will analyse how the law addresses workplace disability discrimination at an individual level. It builds on the foundation set in the previous chapter detailing Zambia's equality and anti-discrimination legislation. This is done by focusing on the concept of reasonable accommodation. Although reasonable accommodation is included in the wider meaning of positive measures in the broadest sense of the term, it differs in application from other measures. Unlike positive measures, which, as observed, are mainly concerned with challenging discrimination at a structural or systemic level within wider society, reasonable accommodation (as will be illustrated in this chapter and the next) is only available to a specific individual as and when required to provide a platform for equal participation.<sup>756</sup> It aims to address the 'unique needs of an individual with a disability to ensure the equal right to work, education, health and an adequate standard of living'.<sup>757</sup> As Ferri and Lawson point out, the purpose of the duty is 'the removal of the specific disadvantage to which a particular disabled individual would otherwise be exposed so as to ensure equality'.<sup>758</sup> For this and other reasons, reasonable accommodation has emerged as the primary and frequently contested issue in disability-based discrimination in employment, as evidenced by the court decisions of the foreign jurisdictions that will form part of this chapter's analysis.<sup>759</sup> Further, to borrow from the words of Lawson, the reasonable accommodation duty is a 'concept which raises interesting theoretical questions

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<sup>756</sup> CRPD Committee (n 131), para 25(c).

<sup>757</sup> Lord and Brown (n 592) 279.

<sup>758</sup> Delia Ferri and Anna Lawson, *Reasonable Accommodation for Disabled People in Employment: A legal Analysis of the Situation in EU Member States, Iceland, Liechtenstein and Norway* (European Commission, 2016) 48

<sup>759</sup> See, Charles Conway, 'Ordinarily Reasonable: Using the Supreme Court's Barnett Analysis to Clarify Preferential Treatment under the Americans with Disabilities Act' (2014) 22 Am U J Gender Soc Pol'y & L 721.

for equality and non-discrimination law and one which has the potential to touch the lives of almost every person in [Zambia]'.<sup>760</sup>

The reasonable accommodation duty has existed in Zambia for over ten years, but there has been little to no public debate on it. The concept has never attracted debate or discussion from parliament before passing any statutes that refer to it. And whilst appreciating the critical role of litigation in providing necessary feedback concerning the applicability of various legal concepts within a specific jurisdiction, there is unfortunately not much to go by with as far as judicial precedent is concerned about reasonable accommodation in Zambia. Although other jurisdictions have shown that claims under disability and employment discrimination laws raise a slew of challenging and complex questions specific to disability jurisprudence, Zambian courts are yet to be seriously tested where disability discrimination claims are concerned. In addition, the extent of the legislative provisions under the PDA 2012 is also not very easy to ascertain because of the absence of comprehensive regulations and guidance that would help clarify the operative provisions specific to the employment of persons with disabilities, as is the case in other jurisdictions.<sup>761</sup> Thus, compared to jurisdictions such as the US, UK, Canada and South Africa, Zambian policymakers and the judiciary are yet to give clear and proper guidance regarding the implementation of the reasonable accommodation duty in a way that will consider the country's social, political, economic and cultural circumstances.

As will be seen from the decisions emanating from these judicial comparators, the concept of reasonable accommodation presents unique and complex issues that are, in several respects, unique to discrimination law. First, the concept of reasonable accommodation (when understood within the broader framework of positive measures) challenges the traditional definition of discrimination, as already observed in the previous chapter. To this end, Lawson notes that reasonable accommodation's departure from the conventional conceptualisation of discrimination under political and civil rights can be seen from the fact that it is 'highly proactive in nature' and thus imposes financial obligations on the duty-bearer.<sup>762</sup> Second, it is a concept anchored in the definition of disability. How disability is

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<sup>760</sup> Lawson (n 140) 1.

<sup>761</sup> Refer to chapter 7 on the importance of codes of practice and guidance.

<sup>762</sup> Lawson (n 140) 32.

defined can expose an individual seeking legal intervention against disability-based discrimination to disability and fitness assessments via medical inquiries and medical examinations. Third, individual scrutiny is also extended to whether an individual can meet the qualification and performance standards of the job for which the accommodations are required. Finally, although a failure to provide reasonable accommodation constitutes discrimination, the acceptable justifications against reasonable accommodation tend to pose an interpretive challenge in various jurisdictions, as will be demonstrated in the next chapter.

This chapter examines the first three of the four underlying issues of the reasonable accommodation duty. Accordingly, the chapter is divided into five parts after this introduction, followed by a conclusion. Because the existence and application of the reasonable accommodation duty is anchored on the definition of disability, as will be shown, it is only convenient that part II of this chapter begins by examining the definition of disability in Zambia and its practical and legal consequences. Part III considers the legal definition of reasonable accommodation in Zambia and its role in facilitating the participation and inclusion of persons with disabilities in society. Part IV addresses whether the Zambian legal framework supports disability disclosure and if it permits pre- or post-employment medical examinations and pre-employment inquiries about disability. Much of the text in part IV is adapted from the article titled ‘Combating Workplace Discrimination on the Basis of HIV Status through Disability Law in Zambia’.<sup>763</sup> Part V seeks to answer whether the law in Zambia requires that a person with a disability be able to perform the ‘essential functions’ of a job (with or without reasonable accommodation) to gain the statute’s protection. Part VI provides a reflective conclusion.

## **PART II**

### **6.2 Definition of disability**

Where disability discrimination is alleged, the first step for a person seeking legal protection under disability anti-discrimination law or seeking redress from the courts is to establish

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<sup>763</sup>Dumisani J Ngoma, ‘Combating Workplace Discrimination on the Basis of HIV Status through Disability Law in Zambia’ (2022) 22 IJDL 30.



whether they are, in fact, disabled under the law. Disability can be mutable and immutable.<sup>764</sup> What might be considered a disability today might not be one the next day. Besides, there is a very high probability of everyone experiencing a disability at some point in their lives. This is different from other forms of discrimination, such as race discrimination, where one's race is often apparent and will not come under microscopic scrutiny or inquiry. In disability discrimination cases, the parameters to find a discrimination case are essentially drawn from the definition of disability. 'The definition limits the scope of protective coverage', as it were.<sup>765</sup> Therefore any consideration of equality or discrimination on the basis of disability must start with the legal definition of disability.

The definition of disability in national legislation is vital in removing barriers and providing opportunities for persons with disabilities.<sup>766</sup> However, because persons with disabilities are not a homogeneous group, defining disability is not easy: as earlier mentioned in chapter 2, disability means different things in different societies. A key challenge for disability legislation is balancing the competing goals of the various models of disability as examined in chapter 2. Legislation steeped in the medical approach might address social security, social protection, health and medical rehabilitation, worker's compensation, and other civil liability claims that might result from injury or negligence.<sup>767</sup> By contrast, legislation underpinned by the social model is usually aimed at fighting stigma, addressing inequality and combating discrimination against those with disabilities.<sup>768</sup> Thus, whichever definition or model a country adopts must aim at incorporating all the pertinent aspects that constitute disability.<sup>769</sup>

The starting place for considering the definition of disability in Zambia is the Constitution which, as the supreme law, defines disability as:

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<sup>764</sup> Laura William, Birgit Pauksztat and Susan Corby, 'Justice obtained? How Disabled Claimants Fare at Employment Tribunals' (2019) 50 IRJ 314.

<sup>765</sup> Oakes (n 510) 94.

<sup>766</sup> Ikenna D Ebuenyi and others, 'Legal and Policy Provisions for Reasonable Accommodation in Employment of Persons with Mental Disability in East Africa: A Review' (2019) 64 Intl JL & Psychiatry 99.

<sup>767</sup> Murray (n 259).

<sup>768</sup> *ibid.*

<sup>769</sup> Jan Grue, 'Inclusive Marginalisation? A Critical Analysis of the Concept of Disability, Its Framings and Their Implications in the United Nations Convention on the Rights of Persons with Disabilities' (2019) 37(1) Nordic Journal of Human Rights 3.

A *permanent* physical, mental, intellectual or sensory impairment that *alone, or in combination* with social or environmental barriers, hinders the ability of a person to fully or effectively participate in an activity or perform a function as specified in this Constitution or as prescribed.<sup>770</sup>

Similarly, the PDA 2012 defines disability as:

A *permanent* physical, mental, intellectual or sensory impairment that *alone, or in combination* with social or environmental barriers, hinders the ability of a person to fully or effectively participate in a society on an equal basis with others.<sup>771</sup>

The PDA 2012 definition has also been adopted by the Children’s Code Act 2022 (CCA 2022). On the other hand, section 2 of the Mental Health Act 2019 (MHA 2019) defines mental disability as ‘long-term psycho-social impairment which may hinder a person’s full and effective participation in society on an equal basis with others’.

At first glance, the Zambian definition of disability in the Constitution and the PDA 2012 seems to incorporate both the medical model of disability and the social model. There is a sense in which the legislation tries to balance the two approaches with the phraseology suggesting that reliance can be placed on either the medical model or the social models of disability. Disability can therefore be conceived as an impairment *alone* (medical model) or a *combination* of both impairments and social barriers (social model).<sup>772</sup> One might argue that defining disability in this way seeks to take care of some criticisms levelled against the strict adherence to the social model understanding of disability that ignores impairment as a cause and source of disabilities but instead focuses exclusively on the social barriers that disadvantage those with impairments. Additionally, by recognising sensory impairments, this definition also addresses the criticisms that a strict social model approach ignores the disabling or limiting nature of experiences such as pain and fatigue.<sup>773</sup>

By defining disability in this manner, it can thus be argued that the definition is alive to the fact that disability can be a result of impairments alone and that its occurrence can also be attributed to other socio-environmental factors. The definition of disability in this way ‘serves to limit the “over socialisation” of the radical form of the social model of disability,

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<sup>770</sup> COZ 2016, art 266 (Emphasis added).

<sup>771</sup> PDA 2012 s 2 (Emphasis added).

<sup>772</sup> Emphasis added.

<sup>773</sup> Goering (n 248).

which gives the impression of denying the role played by an impairment in generating disadvantage'.<sup>774</sup>

However, the challenge posed by defining disability in this way is that one is at liberty to define disability using the individualistic medical model without considering the disabling nature of the social environment. The definition, as phrased, can easily give prominence to the negative aspects of impairment as the primary cause of disability without much consideration to the disabling nature of the socio-environment or without reference to discriminatory conduct. A 'permanent physical, mental, intellectual or sensory impairment *alone...*' is a sufficient indicator to warrant a conclusive definition of disability. In contrast, socio-environmental factors alone (even where they hinder an individual) do not meet the definition requirement in the absence of impairment.<sup>775</sup> This definition is likely to exclude those with so-called 'attitudinal disabilities' where the individual does not have an impairment as defined but is nonetheless treated as having an impairment that limits their effective participation or performance of certain functions within society.<sup>776</sup> For example, some people might experience disability discrimination based on their appearance or because they have had an impairment in the past. Doyle has thus observed that:

[A] definition of disability which focuses upon functional limitations produced by impairment does not go far enough. The argument is that many [persons with impairments] do not consider themselves to be limited in life activities yet are 'disabled' by the reaction of others. The rights of all persons with impairments must also be protected, including those who are wrongly perceived as being disabled.<sup>777</sup>

The CRPD Committee has thus observed that to be effective, anti-discrimination law must have a definition that 'includes those who have long-term physical, psychosocial, intellectual or sensory impairments, and should include past, present, future and presumed disabilities, as well as persons associated with persons with disabilities'.<sup>778</sup>

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<sup>774</sup> Mohammed A Rashed, 'In Defense of Madness: The Problem of Disability' (2019) 44 JMP 150, 155.

<sup>775</sup> See for example, the decision of the European Court of Justice in Case C-13/05 *Chacón Navas v Eurest Colectividades SA* (2006) where the Court indicated that the concept of 'disability' must be understood as referring to 'a limitation which results in particular from mental or psychological impairments, and which hinders the participation of the person concerned in professional life'.

<sup>776</sup> Gerard Quinn, Maeve McDonagh and Cliona Kimber, *Disability Discrimination Law in the United States, Australia and Canada* (Oak Tree Press 1993) 10.

<sup>777</sup> Doyle (n 25) 174.

<sup>778</sup> UNCRPD Committee (n 131), para 73(b).

### 6.2.1 ‘Permanent impairment?’

An interesting and peculiar feature of the Zambian definition of disability is the word ‘permanent’ in the Constitution and the PDA 2012.<sup>779</sup> Surprisingly, the Act does not define a permanent impairment or the term impairment. The phrase ‘permanent impairment’ raises questions that have a bearing on the meaning of disability in Zambia. It raises questions about the extent and effect of an impairment/disability. Questions arise about whether an individual with a disability would still be considered disabled if corrective devices or medication lessened the effects of their impairment. In other words, should persons be judged as having a disability by looking only at the ‘unmitigated or uncorrected’ nature of their impairment? Or that the impairment must be ‘more than minor or trivial’?<sup>780</sup>

Other questions may pertain to the duration of an impairment. Specifically, how long must an individual experience an impairment to be classified as a person with a disability? Should the impairment have been in existence at birth? Does it mean that temporary disabilities resulting from prolonged illness would not fall under this definition? These are but a glimpse of some of the questions that are likely to arise from the taxonomy used to define disability in Zambia.

The term ‘permanent disability/ impairment’ is often used in negligence cases to assess the severity of an individual’s injury or in worker’s compensation or social security claims where ‘disability is defined as the inability to work’.<sup>781</sup> It, therefore, suggests that an individual must have an impairment that results in a change in life from which there is no foreseeable return and will therefore involve medical considerations and questions in determining whether one has a disability. For instance, the European Court of Justice’s earlier definition of disability under the Employment Equality Directive<sup>782</sup> defined disability as ‘a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life’.<sup>783</sup> The Court further explained that:

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<sup>779</sup> Notice that the MHA 2019 uses Long-term instead. However, no definition is provided.

<sup>780</sup> See for example *Goodwin v Patent Office* [1995] ICR 302.

<sup>781</sup> Kaplan (n 189) 354.

<sup>782</sup> Council Directive (EC) /78/EC on equal treatment in employment and occupation.

<sup>783</sup> *Chacón Navas* (n 775) [43].

Continued...

The importance which the community legislature attaches to measures for adapting the workplace to the disability demonstrates that it envisaged situations in which participation in professional life is hindered over a long period of time. *In order for the limitation to fall within the concept of “disability” it must therefore be probable that it will last for a long time.*<sup>784</sup>

With such a view, it might be assumed that individuals with a temporary, partial or recurring impairment are excluded from the protection of the law, nor would they qualify for reasonable accommodation. This situation always underscores the need for legal action to establish the individual’s medical condition, if they are ‘disabled enough to qualify for protection under the law’, and if they are ‘disabled enough’ to not be able to do the job’s essential requirements.<sup>785</sup> This can therefore lead to what Whittle describes as the ‘protected class mentality’, which he defines as a ‘pre-occupation of whether an individual’s functional limitations are substantial enough to warrant a classification as a ‘true’ disability and, as a result, worthy of protection under the law’ as opposed to the unworthy or feckless claimant.<sup>786</sup> This ‘protected class mentality’ can easily be seen as operating in the US ADA 1990 and the UK EqA 2010. Section 3 of The ADA 1990, as amended by the ADA Amendment Act of 2008(ADAAA), defines disability as:

- (a) a physical or mental impairment that substantially limits one or more major life activities of such individual;

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Following the influence of the CRPD, the CJEU has since adopted a different definition of disability. Thus, in *Joined Cases C-335/11 and C-337/11 HK Danmark, acting on behalf of Jette Ring v Dansk Almennyttigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S (Ring and Skouboe Werge)* [2013], the Court held that:

The concept of ‘disability’ must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers (para 38).

This definition has since been replicated in the *Case C-363/12 Z v A Government Department* [2014] IRLR 563 and *Case C-354/13 Kaltoft v Kommunernes Landsforening* [2015] IRLR 146. However, note that the Court’s definition covers only participation in professional life whereas the CRPD refers broadly to participation in society. To this end, and as far as EU anti-discrimination law is concerned, it is argued that the protections offered to persons with disabilities are limited both in scope and application, i.e., with regard to employment only (See Lisa Waddington, ‘Saying All the Right Things and Still Getting it Wrong: The Court of Justice’s Definition of Disability and Non-Discrimination Law’ (2015) 22 *Maastricht J Eur & Comp L* 588).

<sup>784</sup> *ibid*, [45] (emphasis added).

<sup>785</sup> Bamforth and others (n 285) 1010.

<sup>786</sup> Richard Whittle, ‘The Concept of Disability Discrimination and its Legal Construction’ (Paper presented by invitation at the ‘Discrimination and affirmative action on the labour market – legal perspectives’ (in preparation of the Swedish Presidency of the European Union), National Institute for Working Life, Sweden, Brussels, November 2001) 3.

- (b) a record of such an impairment; or
- (c) being regarded as having such an impairment....

Further, section 6 of the UK EqA 2010 defines disability in this way:

A person (P) has a disability if—

- (a) P has a physical or mental impairment, and
- (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

The effect of this 'protected class mentality' is that it ignores the social dimension of disability, which in Zambia is supposed to be the focus of the current legal framework of disability.<sup>787</sup> Commenting on the definition of disability in the UK and the US, Lawson has observed that determining whether one has a disability is more of an intrusive process, which opens a claimant to public scrutiny concerning the details of their impairments and their limiting characteristics. She compares this invasiveness to being analogous to 'the cross-examination of rape victims'.<sup>788</sup> By employing the phrase 'permanent impairment', the meaning of disability is narrowed to only account for those considered as having severe impairments or physical harms rather than the more intangible or invisible impairments, as analysed later in the chapter. The focus will inevitably be on the impairment's effect on an individual instead of the disabling nature of society itself. Within the sphere of employment, this implies that the disability status of an individual will be governed by the employer's reaction to the impairment and any medical evidence.<sup>789</sup> It might also mean that the impairment must have a substantial and possibly long-term effect to qualify as a disability. This, in turn, is likely to limit the category of individuals who might otherwise fall under the umbrella of disability from claiming protection against disability discrimination. Therefore, progressive, short-term but recurring or temporary conditions would not qualify as a disability under the law's definition. Thus, 'where courts interpret this notion restrictively, this will exclude individuals who perhaps have only a limited impairment from protection

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<sup>787</sup> *ibid.*

<sup>788</sup> Lawson (n 531) 362.

<sup>789</sup> Cabrelli (n 24) 488.

under the law'.<sup>790</sup> In the British case of *Mowat- Brown v University of Surrey*,<sup>791</sup> the Employment Appeals Tribunal (EAT) upheld the decision that a diagnosis of multiple sclerosis did not fall within the meaning of disability, as the substantial adverse effect of the condition could not be ascertained despite its progressive nature. Reid J stated:

The question to be asked is whether, on the balance of probabilities, the claimant has established that the condition in his case is likely to have a substantial adverse effect. It is not enough simply to establish that he has a progressive condition and that it has or has had an effect on his ability to carry out normal day-to-day activities. The claimant must go on and show that it is more likely than not that at some stage in the future he will have an impairment which will have a substantial adverse effect on his ability to carry out normal day-to-day activities. How the claimant does this is up to him. In some cases it may be possible to produce evidence of his likely prognosis. In other cases it may be possible to discharge the onus of proof by statistical evidence.<sup>792</sup>

For Zambia, the case above illustrates the challenges of a medicalised conceptualisation of disability for those with conditions such as HIV, which, in its early stages or where they are on antiretroviral therapy (ART), do not present symptoms. Where one is asymptomatic, it is more than likely that they would not be regarded as having a permanent impairment that substantially affects their lives or prevents them from participating in society on an equal basis with others. In such a situation, it becomes difficult to prove the existence of a disability and thus request reasonable accommodations for such things as doctor's appointments and other therapies that might be necessary to prevent the onset of AIDS.<sup>793</sup> To eliminate such challenges, the CRPD Committee recommends implementing an anti-discrimination law that is disability-inclusive and aims to outlaw and prevent a discriminatory act rather than target a defined protected group.<sup>794</sup>

The other challenge posed by the phrase 'permanent impairment' is that it is likely to restrict the meaning of disability to unmitigated conditions only. Going back to the example

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<sup>790</sup> Waddington (n 280) 18. See also *Chacón Navas* (n 775) where it was held that disability was not the same as sickness, which, by implication meant that the prohibition of discrimination on grounds of disability in the workplace could not be extended to sickness.

<sup>791</sup> [2002] IRLR 235.

<sup>792</sup> *ibid*, [21].

<sup>793</sup> See UNHRC, 'Report of The Special Rapporteur on the Rights of Persons with Disabilities: Zambia' (19 December 2016) UN Doc A/HRC/34/58/Add.2 expressing the importance of extending services rendered to persons with disabilities to people living with HIV/AIDS.

<sup>794</sup> UNCRPD Committee (n 131), para 73(b).

of people living with HIV, this might imply that they are likely to lose out on legislative protections where they can mitigate their condition through the use of ARTs which in turn lessen the effects or eliminate symptoms associated with HIV/AIDS. This raises the question of whether determinations of an individual's impairment should be made with or without consideration of mitigating measures.

The US Supreme Court has had the opportunity of deciding whether corrective or mitigating measures should be considered when determining whether an impairment constitutes a disability. In the US case of *Sutton and others v United Airlines*<sup>795</sup> (a pre-ADA Amendment Act of 2008 (ADAAA) case),<sup>796</sup> the US Supreme Court ruled that mitigating measures should be considered when deciding if an individual's impairment meets the statutory requirements of disability under the ADA 1990. This case involved twin sister pilots with severe myopia, mitigated with corrective lenses. The respondent airline denied the sisters' employment because the airline required its global airline pilots to have an uncorrected vision of 20/100 or better. Without the use of glasses, the sisters recorded a vision worse than 20/200, whereas their visual acuity was 20/20 with the help of corrective lenses. Consequently, the sisters sued the airline for disability discrimination. In a split decision, the Supreme Court ruled that the petitioners' use of mitigating measures in the form of corrective lenses meant that they were not disabled under the meaning of the Act.<sup>797</sup> The Court rejected the Equal Employment Opportunity Commission's (EEOC) interpretive guidance that the determination of whether an individual is substantially limited in a major life activity must be made without regard to mitigating measures. The Court determined that the legislature's intention under the ADA excluded those with correctable disabilities. As such, the plaintiffs could not be considered substantially limited in the major life activity of working. Justice O'Connor rendering the majority decision, opined:

A "disability" exists only where an impairment "substantially limits" a major life activity, not where it "might," "could," or "would" be substantially limiting if mitigating measures

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<sup>795</sup> 527 U.S. 471 (1999).

<sup>796</sup> The 2008 amendments redefined the word disability in order to widen the Act's coverage of people with disabilities as a reaction to *Sutton* and other cases that interpreted disability narrowly.

<sup>797</sup> Steve J dissented from the majority judgment and relying on the legislative history of the ADA was of the opinion that individuals should be examined in their unmitigated state. He argued that the majority's decision created an absurdity. It meant that those who were once disabled but who are now fully recovered are covered by the ADA (under the past disability provision), while those with treatable impairments are not.



were not taken. A person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently “substantially limits” a major life activity.... To be sure, a person whose... impairment is corrected by mitigating measures still has an impairment, but if the impairment is corrected it does not “substantially limit” a major life activity.<sup>798</sup>

By this, the Court in *Sutton* meant that one could only be considered disabled where corrective measures fail to lessen the impact of their medical impairment and whose impairment significantly limits them in one or more of the major life activities. The Supreme Court, in the same year, applied its *Sutton* decision in two other cases, that is, *Murphy v United Postal Services*<sup>799</sup> and *Albertsons, Inc., Petitioner v Hallie Kirkingburg*.<sup>800</sup> The US Supreme Court, in the case *Toyota Motor Manufacturing, Kentucky Inc. v Williams*<sup>801</sup> also followed its ruling in *Sutton* by holding that:

To be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives. The impairments must also be permanent or long-term.... It is insufficient for individuals attempting to prove disability status under this test to merely submit evidence of a medical diagnosis of an impairment. Instead, the ADA requires those “claiming the Acts protection...to prove a disability by offering evidence that the extent of the limitation [caused by their impairment] in terms of their own experience... is substantial...”<sup>802</sup>

Interestingly, the Canadian Supreme Court in *Grabovski v Canada (Minister of Employment and Immigration)*<sup>803</sup> criticised the US Supreme Court’s approach in *Sutton*. The Court emphasised that the ultimate concern should be with human rights and discriminatory treatment, not biomedical conditions, even though ‘notions of impairment and functional limitation (real or perceived) are important considerations in the disability analysis’.<sup>804</sup> Therefore, the Court ruled that the fact that the functional limitations of an individual with a physical impairment have been eliminated does not necessarily imply that they do not have

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<sup>798</sup> *Sutton* (n 795) 483 (O’Connor SCJ).

<sup>799</sup> 119 S. Ct 2133 (1999).

<sup>800</sup> 119 S. Ct 2162 (1999).

<sup>801</sup> 534 U. S. 184 (2002).

<sup>802</sup> *ibid*, 198.

<sup>803</sup> [2000] 1 SCR 703. In this case, the Court ruled that the plaintiff on medication for severe hypertension was not disabled because medication could control his high blood pressure.

<sup>804</sup> *ibid* [39].

a disability.<sup>805</sup> Similarly, the Labour Court of South Africa in *Standard Bank of SA v Commission for Conciliation, Mediation and Arbitration and Others*<sup>806</sup> noted that many disabled persons would lose their protection from discrimination if the US approach in *Sutton and Murphy* is used.<sup>807</sup>

A look at Zambia's legislative history suggests that a determination of disability could be made by reference to either the unmitigated or mitigated state of one's impairment. The definition of disability in the repealed PDA 1996 is evidence of this. It defined disability as:

Any restriction resulting from an impairment or inability to perform any activity in the manner or within the range considered normal for a human being and *would or would not entail the use of supportive or therapeutic devices and auxiliary aids, interpreters, white cane, reading assistants, hearing aids, guide dogs or any other trained animals trained for that purpose*'.<sup>808</sup>

Given this legislative history, it is unlikely that Zambian courts will interpret disability similarly to *Sutton* when their time to do so materialises.<sup>809</sup>

Be that as it may, the use of the phrase 'permanent impairment... alone' still heavily relies on the medical model, which tends to categorise or classify individuals based on limitations experienced in their bodily or intellectual function to the exclusion of other social and environmental factors. As examined in chapter 2, a medicalised approach to defining disability would require an individual to convincingly show that they have a medical condition which qualifies as a disability. A medicalised approach to determining what constitutes a permanent impairment thus requires an individual to gather enough 'clinical evidence to satisfy a tribunal or court that they suffer from an impairment affecting' their ability to fully or effectively participate in society on an equal basis with others.<sup>810</sup> A strong

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<sup>805</sup> *ibid.* See also Oakes (n 510) 87, who in comparing the court decisions from USA and Canada observed that US courts by focusing on biomedical assessments of disability interpreted disability narrowly, limiting remedies available to plaintiffs. Canadian courts tend to have a broader understanding of disability, focusing on rights, which leads to more disabled plaintiffs winning their cases.

<sup>806</sup> (2008) 29 ILJ 1239 (LC).

<sup>807</sup> *ibid* [69]. See also ADA Amendment Act of 2008 s, 2 where US Congress found 'the holdings of the Supreme Court in *Sutton* [...] and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect'.

<sup>808</sup> PDA 1996, s 2 (emphasis added).

<sup>809</sup> In any case, the US position has since changed following the enactment of the ADA Amendments of 2008 (ADAAA). Determining the existence of a disability must now be made with regard to any mitigation measures (section 3(4)(E)).

<sup>810</sup> Cabrelli (n 24) 488, 478.

emphasis on the need to produce medical evidence of the specific nature of the impairment may contribute to the stigma and labelling faced by persons with disabilities in pursuing employment prospects (as further examined below).<sup>811</sup> Additionally, a situation that requires medical proof of the existence of a disability does not take into account disability discrimination attributable in whole or part to 'presumed impairment'. Disability discrimination can occur even where an impairment does not exist, but one might be presumed to have a disability and thus be subjected to negative social attitudes and stigma.<sup>812</sup> Considering disability as a medical condition lays the groundwork for prejudice and discrimination because it is impossible to separate disability from the people who live with it.<sup>813</sup> A construction of disability largely skewed towards the medical model and ignorant of the connection between stigma and discrimination overthrows the entire purpose of anti-discrimination law. Stigma and discrimination are interrelated. Stigma does not exist in a vacuum; it is a constituent element of discrimination.<sup>814</sup> Stigma may also affect access (or the lack thereof) to social, economic and political power in the same way that other grounds of discrimination, such as race, might be used as the basis for stigma.<sup>815</sup> The CRPD Committee has therefore noted that 'persons victimised by disability-based discrimination seeking legal redress should not be burdened by proving that they are "disabled enough" to benefit from the protection of the law'.<sup>816</sup>

Although the definition of disability within Zambian laws tries to mirror Article 1 of the CRPD, this chapter argues that because of how it is couched, as analysed above, it does not fully capture the social model of disability as envisioned by the CRPD. The Zambian definition of disability starts from the medical perspective, where a trier of fact or duty-bearer must first make a disability assessment on the existence of a 'permanent impairment alone', basing their decision on the functional limitations of an individual without considering the disabling social and environmental factors. The definition seems only to

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<sup>811</sup> Katie Wells, 'The Impact of the Framework Employment Directive on UK Disability Discrimination Law' (2003) 32 *ILJ* 253.

<sup>812</sup> Gauthier de Beco, 'Is Obesity a Disability: The Definition of Disability by the Court of Justice of the European Union and Its Consequences for the Application of EU Anti-Discrimination Law' (2016) 22 *Colum J Eur L* 381.

<sup>813</sup> Thomas P Dirth and Nyla R Branscombe, 'Disability Models Affect Disability Policy Support through Awareness of Structural Discrimination' (2017) 73 *JSI* 413, 415.

<sup>814</sup> Ngwena (n 289).

<sup>815</sup> *ibid.*

<sup>816</sup> UNCRPD Committee (n 131), para 73(b).

present an assessment of disability based on the social model as an option that can either be included or excluded at will. Because legal definitions of disability have historically leaned towards the medical approach rather than one focusing on social attitudes, there is a possibility that the courts, employers and others will be inclined towards the medical approach in the absence of clear interpretive and explanatory guidance. Surprisingly, the MHA 2019 (perhaps because it is a more recent enactment) seems to have avoided this problem, as evidenced by its definition of mental disability (see definition above), which is primarily premised on the social model of disability and the CRPD. The approach taken by the Zambian legislature in defining disability in the Constitution and PDA 2012 fails to appreciate the significance of environmental and/or social factors in the creation of disability. This is fundamentally different from what Article 1 of the CRPD stipulates when it reads:

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments *which in interaction* with various barriers may hinder their full and effective participation in society on an equal basis with others.<sup>817</sup>

While the CRPD acknowledges impairments in the above description of persons with disabilities, its view of disability in this context ‘fully reflects the social-contextual approach, and understands disability as resulting from an interaction between an impairment and the environment’.<sup>818</sup> As if to save face for the problematic definition of disability, the PDA 2012 uses the CRPDs definition of ‘person with disability’, examined below.

### **Person with disability**

Cabrelli observes that disability rights advocates and commentators favour the social model of disability because it avoids intrusive scrutiny by deliberately avoiding a definition.<sup>819</sup> Perhaps for this reason, the CRPD influenced by the social model does not contain an explicit definition of ‘disability’.<sup>820</sup> Instead, it provides a non-exhaustive list of those who

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<sup>817</sup> Emphasis added.

<sup>818</sup> Lisa Waddington, ‘Saying All the Right Things and Still Getting it Wrong: The Court of Justice's Definition of Disability and Non-Discrimination Law’ (2015) 22 Maastricht J Eur & Comp L 576, 583.

<sup>819</sup> Cabrelli (n 24).

<sup>820</sup> It was argued that providing a definition of disability would exclude people in need of protection. See Edurne G Iriarte, ‘Models of Disability’ in Edurne G Iriarte and others (eds.), *Disability and Human Rights: Global Perspectives* (Palgrave Macmillan 2016).

might come under its protection.<sup>821</sup> It thus defines ‘persons with disabilities [as including] those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others’.<sup>822</sup> The PDA 2012, despite defining ‘disability’ as examined above, also adopts the CRPD approach of conferring a similar description of ‘persons with disabilities’ but substitutes the word ‘long-term’ for the word ‘permanent’ instead. The definition from the PDA 2012 reads:

‘Person with disability’ means a person with a permanent physical, mental, intellectual, or sensory impairment *which, in interaction* with various barriers, may hinder that person to fully and effectively participate in society on an equal basis with others.<sup>823</sup>

The legislature’s rationale for providing separate definitions of ‘disability’ and ‘person with disability’ is unclear and might, in the future, be a recipe for confusion before the Zambian Courts. Perhaps Zambia’s preferred method of providing definitions for both disability and persons with disabilities can be attributed to past practice following the 1996 PDA, which defined both ‘disability’ and ‘person with disability’. Alternatively, the motivation for defining ‘disability’ may have been merely to highlight the medical and social-environmental causes of disability, as suggested above. In addition, by defining ‘person with disability’, it can be demonstrated that those with an impairment are disabled not because of their impairments but by society’s discriminatory and prejudicial attitudes and other barriers imposed by the built environment.

Nonetheless, the PDA 2012 clearly indicates the complexities surrounding defining disability, as examined above. The definition of disability and the description offered by the Act as to who a person with disability is, are not entirely the same upon closer examination. Zambia’s position can be contrasted with the UK definition under section 6 (2) of the EqA 2010, which states that ‘a reference to a disabled person is a reference to a person who has a disability’. By not providing a separate or distinct description of a disabled person, the EqA 2010 seems to take care of any problems that might ensue in situations with a distinct description or definition of persons with disabilities. Under the EqA 2010, a person with a disability (albeit

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<sup>821</sup> Grue (n 769).

<sup>822</sup> CRPD, art 1.

<sup>823</sup> PDA 2012, s 2 (emphasis added).

referred to as a disabled person) is simply described as one falling within the definition of disability defined in subsection (1) of section 6. This does not seem to be entirely so under the Zambian Act. A person with a disability is not necessarily defined as one falling within the definition of 'disability'. As mentioned earlier, having a permanent impairment 'alone' under the definition of 'disability' is a sufficient element of disability, exclusive of any other barriers or hindrances.

On the other hand, for one to come under the description of 'person with disability' an impairment does not stand alone but must operate 'in interaction with various barriers.' It remains to be seen how this anomaly will play out and how the courts will interpret these similar yet distinct definitions. In any case, going by the definition of person with disability under the PDA 2012, Zambian law signifies an understanding of disability that takes into account the limitations and 'frailties of the human body and mind' and also understands disability from the perspective of an individual's relationships with others and the environment in which they live.<sup>824</sup> This is clearly in line with the CRPD's social model imperative, which, as already seen, requires identifying and removing barriers. By emphasising the need for 'full or effective participation in society' for persons with disabilities, Zambia must address various obstacles that those with impairments face in accessing opportunities in society. This also includes ensuring reasonable accommodations.<sup>825</sup>

The adoption of the CRPD's description of 'person with disability' suggests that persons with disabilities are no longer to be perceived as patients in need of a cure. Instead, those with impairments must be provided with a platform for equal social participation. The advantage of this definition is that it is open-ended, rather than having a restricted or fixed definition of what a disability is.<sup>826</sup> Constructing the meaning of person with disability on the CRPD model provides the necessary ammunition in securing substantive equality as it recognises the realities of disability discrimination and the importance of taking a more active approach to bringing down the existing hindrances which stand in the way of persons with

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<sup>824</sup> Ball (n 479) 135.

<sup>825</sup> Lisa Vanhala, 'Twenty-Five Years of Disability Equality? Interpreting Disability Rights in the Supreme Court of Canada' (2010) 39 CLWR 27.

<sup>826</sup> In the South African case of *Standard Bank of SA* (n 806) the Court said: 'If disability is interpreted restrictively rather than purposively the entire purpose of preventing discrimination may be thwarted' [69].

disabilities.<sup>827</sup> From the wording of the definition of person with disability, the focus shifts from the individual's physical, mental, intellectual or sensory impairment to how the impairment affects their ability to participate in 'society on an equal basis with others'. The goal thus becomes the removal of barriers in society. This is where positive measures and reasonable accommodation come in to facilitate the participation of persons with disabilities on an equal basis with others.

The barriers envisaged within the definition of person with disability are not only restricted to the physical or environmental structure within society or the workplace. This definition captures discrimination against those with impairments based on stereotypical attitudes, ignorance and prejudice. Such a situation was perfectly explained as early as 1987 by the US Supreme Court in *School Board of Nassau County v Arline* where it observed that '...society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment'.<sup>828</sup> To this end, using the social model confirms the need to have a broader and more detailed understanding of what constitutes disability outside the medical realm.<sup>829</sup>

Despite some of the challenges with the definition of disability examined above, the overall language used in Zambia's current disability legal framework suggests a shift from the medical model toward the social model of disability. The difference between the PDA 2012 and PDA 1996's definition of person with disability is evidence for this. Under the repealed PDA 1996, 'person with disability' was defined as 'a person with a physical, mental or sensory disability, including a visual, hearing or speech functional disability'.<sup>830</sup> The PDA 1996 definition limited disability to an individual's restricted experiences in bodily or intellectual function without taking into consideration the existence of other external factors as the current definition does. And as shown from the repealed Act's definition of disability, the focus was more on what an individual could or could not do by reinforcing ableist ideas of what constituted 'normal' and 'abnormal'.<sup>831</sup>

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<sup>827</sup> Effiom (n 257).

<sup>828</sup> 480 U.S. 273 (1987) 284.

<sup>829</sup> Humpage (n 204).

<sup>830</sup> PDA 1996, s 2 (Repealed).

<sup>831</sup> Refer to chapter 3.

However, despite having a similar definition of disability to the PDA 2012, the Constitution does not follow that path with its definition of ‘person with disability’. The Constitution adopts a strictly medical model approach and thus defines ‘person with disability’ as ‘a person with a permanent physical, mental, intellectual or sensory impairment’.<sup>832</sup> The Constitution omits the sentence ‘...which, in interaction with various barriers, may hinder that person to fully or effectively participate in a society on an equal basis with others’. The definition presents a challenge for persons with disabilities. As analysed in the previous chapter, several constitutional provisions cast the issue of disability in negative terms. Some constitutional provisions explicitly deny persons with disabilities opportunities to hold certain positions in the country’s governance structure. Without the words ‘in interaction with various barriers, may hinder that person to fully and effectively participate in society on an equal basis with others’, the Constitution’s definition does not envisage the proactive removal of barriers that stand in the way of equal opportunities for persons with disabilities as required by the CRPD. Under Zambian constitutional law, constitutional provisions are sacrosanct. Where other laws are inconsistent with constitutional provisions, the provisions of the other law are rendered void to the extent of the inconsistency.<sup>833</sup> The courts in Zambia are yet to apply their minds to this inconsistency, but it is nonetheless important to draw attention to the effect of the constitutional definition of person with disability. Since there has not been any constitutional challenge to the PDA 2012, it can be assumed that the Act’s definition, although different, is not inconsistent with that of the Constitution. In any case, it merely enhances the rights and protections afforded to persons with disabilities by extending legal protections beyond what is conferred by the Constitution.<sup>834</sup> Article 9 of the Constitution also makes it clear that the interpretation of the law must be in line with the national values and principles of ‘human dignity, equity, social justice, equality and non-discrimination’.<sup>835</sup> It would thus be perfectly fine to adopt the Act’s definition in preference to the Constitution’s. (See 8.2.3 on purposive interpretation of Constitution). To this end, the PDA 2012’s definition of ‘person with disability’ recognises that ‘the interaction between an individual’s impairment and the physical or social environment can result in the inability

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<sup>832</sup> COZ 2016, art 266.

<sup>833</sup> *ibid* art 1.

<sup>834</sup> See reasoning of the South African Constitutional Court in *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC), [43].

<sup>835</sup> COZ 2016, art 8 and art 9.



to perform a particular function, job or activity in the conventional manner', and thus the need to provide reasonable accommodation for those with disabilities.<sup>836</sup>

The chapter will now focus on reasonable accommodation, what it means, and its implications for the inclusion of persons with disabilities.

## PART III

### 6.3 **Zambian definition of reasonable accommodation**

An understanding of reasonable accommodation is important for persons with disabilities, the courts, employers, and society. The importance of reasonable accommodation for persons with disabilities is to allow access to an open and inclusive environment through specific adaptations. The courts must therefore maintain a clear and consistent understanding of the concept to benefit those with disabilities.<sup>837</sup> A clear understanding of reasonable accommodation is also crucial for employers who are otherwise under an unpredictable obligation to reasonably accommodate employees and job applicants with disabilities. In addition, if society is to affirm the worth and dignity of those with disabilities, there must be a clear understanding of reasonable accommodation to tackle the constraints faced by those with disabilities effectively.<sup>838</sup> Thus the law on reasonable accommodation and non-discrimination, in general, is only a part of an attempt at a certain amount of societal transformation.

Reasonable accommodation has been described as the cardinal or central element in disability anti-discrimination law.<sup>839</sup> The CRPD requires accommodations for those with disabilities, acknowledging that society is mainly designed for those without disabilities.<sup>840</sup> Thus, reasonable accommodation is the actualisation of substantive equality within the disability context to facilitate the participation and inclusion of persons with disabilities.

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<sup>836</sup> Lisa Waddington, 'Reasonable Accommodation: Time to Extend the Duty to Accommodate Beyond Disability?' (2011) 36 NTM|NJCM -Bulletin 186,186.

<sup>837</sup> Stewart J Schwab and Steven L Willborn, 'Reasonable Accommodation of Workplace Disabilities' (2003) 44 Wm & Mary L Rev 1197.

<sup>838</sup> *ibid.*

<sup>839</sup> *ibid.*

<sup>840</sup> Grue (n 769).

In most jurisdictions, reasonable accommodation is a relatively new phenomenon. Apart from the USA, where it first appeared in the context of religious discrimination,<sup>841</sup> the concept of reasonable accommodation only began to appear on the statute books of most countries in the latter part of the 20th century and the beginning of the 21st century. The pace has accelerated since the coming into force of the CRPD in 2008.<sup>842</sup> The first time the concept of reasonable accommodation appeared in Zambian law was under the CEEA 2006, where it appeared as 'reasonable adjustment'. However, the reasonable accommodation duty became a prominent feature in Zambian law after ratifying the CRPD and passing the PDA 2012. The duty is an admission that certain modifications and adjustments must be made for persons with disabilities to enable their inclusion and participation in society on an equal basis with others. The PDA 2012 defines reasonable accommodation as the:

Necessary and appropriate modification, adaptation and adjustments, not imposing 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>843</sup>

The MHA 2019 also adopts this definition by stating that 'reasonable accommodation has the meaning assigned to the words in the Persons with Disabilities Act, 2012'.<sup>844</sup> The CEEA 2006 defines reasonable adjustment as 'any modifications or adjustment to a job or working environment that enables a targeted citizen to have access to participate or advance in employment'.<sup>845</sup> Although the PDA 2012 stipulates that reasonable accommodations should only be made available for persons with disabilities, the CEEA 2006 takes a much broader view by stating that reasonable adjustments must be made for 'targeted citizens in order to ensure that they enjoy equal opportunities and are equitably represented at board and management level and in the workforce'.<sup>846</sup> The expansive approach adopted by the CEEA 2006 goes against the common misconception that the need for reasonable accommodations is limited to the attribute of disability. By extending the reasonable accommodation duty to other attributes, the CEEA 2006 signals a commitment toward

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<sup>841</sup> Equal Employment Opportunity Act 1972 (amending Civil Rights Act 1964, 42 USC 2000e).

<sup>842</sup> Lawson (n 140).

<sup>843</sup> PDA 2012, s 2.

<sup>844</sup> MHA 2019, s 2.

<sup>845</sup> CEEA 2006, s 2.

<sup>846</sup> *ibid*, s 13.

attaining substantive equality for other protected groups by requiring more than just less favourable treatment from employers. The South African Employment Equity Act 1998 (EEA 1998) takes a similar approach to reasonable accommodation.<sup>847</sup> However, as alluded to in chapter 5, the CEEA 2006 only applies to institutions, programmes and citizens who have received or are receiving funding from the CEEC thereby confining its range of effectiveness.

### 6.3.1 Purpose of reasonable accommodation

The idea of reasonable accommodation came about to address the issue of impairment and to recognise the need for persons with disabilities to be treated differently than persons without disabilities, to make rights 'real' for them.<sup>848</sup> Reasonable accommodation has an equalising function as it entails a change that places a person with a disability on the same or similar footing as their non-disabled counterpart.<sup>849</sup> Although this thesis focuses on the workplace, reasonable accommodation is not so confined but is part of a general programme of societal inclusion. The idea is thus to enable an individual with a disability to participate in much the same way as a non-disabled person in the different areas of their social and economic life, be it in places of work, housing, transportation, school or health facility.<sup>850</sup>

Hence, 'to ensure fair and equal consideration of a person's functional abilities, non-discrimination requires reasonable accommodation'.<sup>851</sup> It is a concept built on the notion that society is designed in a way that is skewed towards the non-disabled individual. There is a need to reconstruct the social environment to redress the imbalance and thus create an environment where persons with disabilities can live on par with non-disabled society.<sup>852</sup> The duty of reasonable accommodation provides an avenue for realising equal opportunities by removing barriers and obstacles that hinder equal access to various social, economic,

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<sup>847</sup> EEA 1998, s 15(2)(c) (SA).

<sup>848</sup> Lawson (n 140).

<sup>849</sup> 'Three Formulations of the Nexus Requirement in Reasonable Accommodations Law' (2013) 126 Harv L Rev 1392.

<sup>850</sup> *ibid.*

<sup>851</sup> Colette G Matzzie, 'Substantive Equality and Antidiscrimination: Accommodating Pregnancy under the Americans with Disabilities Act' (1993) 82 Geo LJ 193, 214.

<sup>852</sup> Maya Sabatello, 'A short history of the international disability rights movement' in Maya Sabatello and Marianne Schulze (eds), *Human Rights and Disability Advocacy* (University of Pennsylvania Press 2013).

cultural, civil and political activities.<sup>853</sup> Reasonable accommodation enables persons with disabilities to be integrated. It provides for their inclusion into mainstream society, thereby achieving equality and restoring their dignity, as rightly observed by the Labour Court of South Africa in *Standard Bank of SA*.<sup>854</sup> The right to work can thus be preserved and protected for persons with disabilities by requiring employers to provide reasonable accommodation.

Therefore, in the realm of employment, reasonable accommodation is concerned with removing the disadvantage a person with a disability is subjected to by the employer's standard working practices or systems generally designed and developed for non-disabled people.<sup>855</sup> To this end, that reasonable accommodation should be provided to the individual requirements of persons with disabilities is a requirement of the PDA 2012.<sup>856</sup> The duty stems from the definition of discrimination under the Act, which regards the denial of reasonable accommodation as discrimination.<sup>857</sup> This duty to provide reasonable accommodation proceeds from the employer's paramount obligation not to discriminate following section 35(2), which prohibits discrimination on the basis of disability with regard to:

All forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, the creation, classification and abolition of positions, the determination of wages, pension or other benefits, apprenticeship, promotion, career advancement and safe and healthy working conditions.<sup>858</sup>

Accordingly, section 37(3) of the PDA 2012 requires an employer who employs a person with a disability to make reasonable accommodations and provide appropriate facilities for them to perform the functions required by the employment efficiently. Therefore, reasonable accommodation recognises that, at times, a person's impairment may negatively affect the realisation of several employment opportunities. Reasonable accommodation, therefore, requires more from the employer than either directly or indirectly

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<sup>853</sup> Kristin Henrard, 'Duties of Reasonable Accommodation in Relation to Religion and the European Court of Human Rights: A Closer Look at the Prohibition of Discrimination, the Freedom of Religion and Related Duties of State Neutrality' (2012) 5 *Erasmus L Rev* 59.

<sup>854</sup> *Standard Bank of SA* (n 806).

<sup>855</sup> Ferri and Lawson (n 758).

<sup>856</sup> Emphasis added.

<sup>857</sup> PDA 2012, s 2.

<sup>858</sup> *ibid*, s 35 (2).

discriminating. It is true that in all discrimination models, an employer is required to desist from discriminating against protected groups. However, reasonable accommodation requires an employer to carry out certain actions which at times might be costly to assist persons with disabilities who, but for those additional measures, would not be as productive as their non-disabled counterparts.<sup>859</sup> Thus in the South African case of *MEC for Education: Kwazulu-Natal and Others v Pillay*,<sup>860</sup> then Chief Justice Langa had this to say about the ‘content of the principle’ of the reasonable accommodation obligations:

At its core is the notion that sometimes the community, whether it is the State, an employer or a school, must take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally. It ensures that we do not relegate people to the margins of society because they do not or cannot conform to certain social norms.<sup>861</sup>

The above description of the reasonable accommodation duty encompasses communitarian principles of encouraging a sense of community in society. And in a communitarian society where work is recognised as an essential duty to the community, members of the community, such as employers, have a corresponding duty to remove barriers that might hinder persons with disabilities from participating in work. (This also suggests that reasonable accommodation can be quite culturally adaptable, which might increase its appeal in the Zambian workplace). In this sense, the reasonable accommodation duty is solution-oriented, focusing on identifying ways of removing the disadvantage experienced by the individual in the workplace that the employer can realistically implement.<sup>862</sup>

Accordingly, the procedural aspect of reasonable accommodation ‘encourages communication and compromise between the employee with a disability and the employer’.<sup>863</sup> Waddington, therefore, notes that it is ‘good practice for an employer to engage in dialogue with the disabled person to identify appropriate accommodation. Failure to do this may result in a breach of obligation’.<sup>864</sup> The CRPD Committee in *Richard Sahlin v Sweden* states that ‘the process of seeking reasonable accommodation should be

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<sup>859</sup> Steven L Willborn, and others, *Employment Law: Cases and Materials* (5th edn, LexisNexis 2012).

<sup>860</sup> 2008 (1) SA 474 (CC).

<sup>861</sup> *Ibid* (Langa CJ), [73].

<sup>862</sup> *Ferri and Lawson* (n 758).

<sup>863</sup> *Ball* (n 479) 148.

<sup>864</sup> Lisa Waddington, ‘The Concepts of Disability and Reasonable Accommodation’ <[http://www.era-comm.eu/oldoku/Adiskri/07\\_Disability/2011\\_09\\_Waddington\\_EN.pdf](http://www.era-comm.eu/oldoku/Adiskri/07_Disability/2011_09_Waddington_EN.pdf)> accessed 29 May 2022.

cooperative and interactive and aim to strike the best possible balance between the needs of the employer and the employee'.<sup>865</sup> Within Zambian Humanism, this element of the reasonable accommodation duty is akin to the principle of participation, and 'life-in-community', as Kaunda puts it. Kaunda's concept of participatory democracy (which transcends the political space and applies to other spheres such as the workplace) is anchored on the idea that an individual should be involved in the process/es of decision-making where any decision made is likely to affect them. Within the context of employment Kaunda, calls for industrial participatory democracy requiring employees to participate in the decision-making processes within an organisation. Kaunda further submits that this concept is premised on the understanding that 'wisdom, knowledge and skills' are not the monopoly of any group.<sup>866</sup> Kaunda's point here supports the idea that participation is about considering other viewpoints to produce more desirable results.<sup>867</sup> Consultations can also involve employee representatives such as trade unions or collective bargaining units.

Unlike traditional conceptualisations of discrimination which, as already examined in the previous chapters, only require one to refrain from discriminatory conduct, reasonable accommodation is an interactive process that imposes positive obligations on the employer to address the barriers faced by an employee with a disability. This is because reasonable accommodation, while having as its premise the attainment of individual justice, non-discrimination and equality, does so by respecting dignity, autonomy, and individual agency.<sup>868</sup> Therefore, the very nature of reasonable accommodation requires a discourse between the people upon whom the obligation to accommodate falls and the person or individuals to whom this duty is owed. The duty-bearer cannot make any assumptions about implementing accommodations without consultation and dialogue with the individual to whom this duty is owed.<sup>869</sup> As might be expected from the use of the word 'appropriate' in

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<sup>865</sup> CRPD Committee, 'Communication No 45/2018 *Richard Sahlin v Sweden*' (23 September 2020) CRPD/C/23/D/45/2018, para 8.9.

<sup>866</sup> Kaunda (n 70) 101.

<sup>867</sup> See *Standard Bank of SA* (n 806) [91] where it was said that 'the search for accommodation is a multi-party inquiry.... The process should be interactive, a dialogue, an investigation of alternatives conducted with a give and take attitude'.

<sup>868</sup> UNCRPD Committee 'General Comment No 2 Article 9: Accessibility' (22 May 2014) UN Doc CRPD/C/GC/2 para 26.

<sup>869</sup> Anna Lawson, 'Disability Equality, Reasonable Accommodation and the Avoidance of Ill-Treatment in Places of Detention: The Role of Supranational Monitoring and Inspection Bodies' (2012) 16 IJHR 845.

the definition of reasonable accommodation, when a request for an accommodation is made, an employer must provide adjustments that consider the needs of the employee, the resources of the business, and the requirements of the task or job function, as analysed below.<sup>870</sup> (See chapter 7).

Waddington states that the obligation to provide reasonable accommodation emanates from ‘the recognition that, on occasions, the interaction between an individual’s impairment and the physical or social environment can result in the inability to perform a particular function, job or activity in the conventional manner’.<sup>871</sup> In this sense, reasonable accommodation must be tailored to the unique requirements of a particular individual with a disability, as can be gleaned from the definition’s use of the phrase ‘particular case’.<sup>872</sup> It is thus a duty to alter the physical and organisational structures and procedures to accommodate the particular circumstances of a person with a disability on a case-by-case basis.<sup>873</sup> Because of this, a line must be drawn between the employer’s reasonable accommodation duty in meeting the specific needs of an employee or prospective employee with a disability and the other accessibility requirements that are owed to a broader array of persons with disabilities in general as prescribed by law.

### 6.3.2 Difference between reasonable accommodation and accessibility

One of the issues that might prove to be challenging is that of knowing the difference between the reasonable accommodation duty and the duty to ‘ensure accessibility by persons with disabilities to the physical, social, economic and cultural environment and to health, education, information, communication and technology’, as the PDA 2012 puts it.<sup>874</sup> It is not uncommon for people and institutions in Zambia to conflate the reasonable accommodation duty with accessibility obligations. For example, the TEVETA *Guidelines on the Inclusion of Persons with Disabilities in Technical, Education, Vocational and Entrepreneurship Training* conflate the provision of reasonable accommodation with that of

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<sup>870</sup> Matzzie (n 851).

<sup>871</sup> Lisa Waddington and Mark Bell, ‘The Right to Request Flexible Working Arrangements under the Work-Life Balance Directive – A Comparative Perspective’ (2012) 12 ELLJ 508,516.

<sup>872</sup> Anna Lawson, ‘Disability, Equality, Reasonable Accommodation and the Avoidance of Ill-Treatment in Places of Detention: The Role of Supranational Monitoring and Inspection Bodies’ (2012) 16 IJHR 845.

<sup>873</sup> *ibid.*

<sup>874</sup> This mirrors the CRPD, preamble para (v).

accessibility.<sup>875</sup> Some might therefore assume that their reasonable accommodation obligations expire once they make their buildings or facilities accessible through the provisions of ramps for wheelchair use, installation of elevators or providing disabled parking slots.<sup>876</sup> However, the CRPD committee states that ‘an individual can legitimately request reasonable accommodation measures even if the State party has fulfilled its accessibility duty’.<sup>877</sup> It cannot be disputed that some of the claims brought against the violation of disability rights in the workplace will involve alleged violations of both the reasonable accommodation duty and the accessibility duty, in the sense that both demand the application of positive duties from duty-bearers. Therefore, although the two concepts are related and might sometimes imply the same thing, it is important that some of their distinguishing features be laid bare to avoid confusion.<sup>878</sup>

By mirroring the CRPD, the accessibility imperative appears throughout the PDA 2012. It appears in the Preamble of the Act and under section 4 of the Act as a general principle. Under division 5<sup>879</sup> of the Act, accessibility appears as a stand-alone obligation that places a duty on the public and private sectors providing public services and facilities to ensure accessible and appropriate facilities are offered to persons with disabilities. Like the CRPD,<sup>880</sup> the PDA 2012 requires duty-bearers to identify and remove barriers that prevent persons with disabilities from having equal access to ‘the physical environment, transportation, information and communications and other facilities and services open or provided to the public, both in urban and rural areas’.<sup>881</sup> The CRPD committee emphasises this point by holding that the focus is no longer on legal personality and the public or private nature of those who own and provide services. All goods, products and services available to

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<sup>875</sup> See TEVETA *Guidelines on the Inclusion of Persons with Disabilities in Technical, Education, Vocational and Entrepreneurship Training*, para 4.1.1.

<sup>876</sup> CRPD, art 9 (2)(C) requires State parties to ‘provide training for stakeholders on accessibility issues facing persons with disabilities’.

<sup>877</sup> UNCRPD Committee ‘General Comment No 4 Article 24: Right to Inclusive Education’ (2 September 2016) UN Doc CRPD/C/GC/4, para 28.

<sup>878</sup> ‘The notion of reasonable accommodation (an individual requirement) is often confused with accessibility measures (a general requirement) or with positive action’ (Broderick and Ferri (n 156) 229).

<sup>879</sup> PDA 2012, s 40- s 50.

<sup>880</sup> CRPD, art 9.

<sup>881</sup> PDA 2012, s 40; The CESCR observes that accessibility is comprised of four overlapping dimensions, namely: Non-discrimination; Physical accessibility; Economic accessibility (affordability); and Information accessibility. (UNCESCR, ‘General Comment No 14: The Right to the Highest Attainable Standard of Health’ (11 August 2000) UN Doc E/C.12/2000/4 para 12(b)).



the public must be accessible, regardless of who owns or provides them. Persons with disabilities should have access to all goods, products and services that are open to the public in a way that ensures their effective access and respects their dignity.<sup>882</sup>

Within the employment context, accessibility is a precondition to the enjoyment of the right to work with accessible workplaces and systems, constituting an essential element for persons with disabilities to have equal and unrestricted access to employment opportunities similar to their non-disabled counterparts.<sup>883</sup> The CRPD Committee holds that a denial of access should be viewed as discrimination<sup>884</sup> and on the right to work goes on to state that ‘a refusal to adapt the workplace constitutes a prohibited act of disability-based discrimination’.<sup>885</sup> On the other hand, under the PDA 2012, a failure to take necessary measures to meet the accessibility requirements for persons with disabilities where an adjustment order is issued constitutes an offence.<sup>886</sup> The Committee goes on to state:

Besides the physical accessibility of the workplace, persons with disabilities need accessible transport and support services to get to their workplaces. All information pertaining to work, advertisements of job offers, selection processes and communication at the workplace that is part of the work process must be accessible through sign language, Braille, accessible electronic formats, alternative script, and augmentative and alternative modes, means and formats of communication. All trade union and labour rights must also be accessible, as must training opportunities and job qualifications. For example, foreign language or computer courses for employees and trainees must be conducted in an accessible environment in accessible forms, modes, means and formats.<sup>887</sup>

Without going into the debate of whether accessibility is a right in and of itself or merely a necessary precursor to the enjoyment of other rights, it is still important to note that accessibility has generated some debate about whether it is a right.<sup>888</sup> The CRPD committee sticks to the idea that the CRPD does not create new rights but only makes them accessible to persons with disabilities. It views the State’s obligation to provide accessibility as a

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<sup>882</sup> UNCRPD Committee (n 868), para 13.

<sup>883</sup> Ferri and Lawson (n 758).

<sup>884</sup> UNCRPD Committee (n 868) para 29.

<sup>885</sup> *ibid*, para 41.

<sup>886</sup> See PDA 2012, s 60.

<sup>887</sup> UNCRPD Committee (n 868), para 41.

<sup>888</sup> See Frederic Megret, ‘The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?’ (2008) 30 *Hum Rts Q* 494, who contends that the CRPD not only confirms existing human rights but also reformulates them and creates new categories of rights that significantly extend a number of existing rights.

corollary of the right to access as enshrined in existing international human rights treaties such as the UDHR, ICCPR, and CERD.<sup>889</sup>

Broderick has argued that the CRPD does create new and self-standing rights, and accessibility is one such right.<sup>890</sup> Therefore, Broderick argues that access and accessibility must be distinguished. Thus ‘ensuring access to a good or service signifies a guarantee that all individuals can exercise or enjoy that good or service without discrimination and on an equal basis with others’.<sup>891</sup> Whereas ‘accessibility is a disability-specific concept, and the CRPD’s accessibility norm goes far beyond the outer limits of the access norm in terms of its substantive content’. Broderick thus concludes by saying that the ‘accessibility norm appears to satisfy the definition of a third-generation human right of the collective variety, since individuals can raise accessibility claims on behalf of a wider cohort of individuals who face barriers to accessibility’.<sup>892</sup> In short, accessibility requires structural changes to the design of the social environment or what is now commonly understood as universal design. On the other hand, Lawson has concluded that questions about whether accessibility is a new right are not as significant as questions concerning its precise nature and reach.<sup>893</sup>

Turning now to the difference between reasonable accommodation and accessibility, the CRPD Committee views accessibility as group-oriented whilst reasonable accommodation is individually-oriented.<sup>894</sup> Accessibility is therefore described as ‘an *ex ante* duty’. This implies that it requires a proactive approach instead of a reactive one.<sup>895</sup> As a proactive duty, it requires duty-bearers to remove barriers by acting in anticipation of challenges that a broad spectrum of persons with disabilities may encounter in accessing various goods, products and services. State parties ‘have the duty to provide accessibility before receiving an individual request to enter or use a place or service’.<sup>896</sup> Accessibility standards must

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<sup>889</sup> The committee has noted that ‘accessibility should be viewed as a disability-specific reaffirmation of the social aspects of the right of access’ and further reiterates that accessibility should be considered in the context of the right to access from the specific perspective of disability (UNCRPD Committee (n 868) para 4).

<sup>890</sup> Andrea Broderick, ‘Of Rights and Obligations: The Birth of Accessibility’ (2020) 24 IJHR 393.

<sup>891</sup> *ibid* 399.

<sup>892</sup> *ibid* 401.

<sup>893</sup> Anna Lawson, ‘Accessibility Obligations in the UN Convention on the Rights of Persons with Disabilities: *Nyusti & Takacs V Hungary*’ (2014) 30 SAJHR 380, 381.

<sup>894</sup> UNCRPD Committee (n 868), para 25.

<sup>895</sup> *ibid* para 25.

<sup>896</sup> *ibid* para 25.

therefore be broad and standardised and require duty-bearers to consider the diversity of persons with disabilities. In this sense, accessibility envisages a group dimension.<sup>897</sup>

In contrast, the Committee regards the duty of reasonable accommodation as ‘an *ex nunc* duty’. This means that ‘it is enforceable from the moment an individual with an impairment needs it in a given situation, for example, workplace or school, in order to enjoy her or his rights on an equal basis in a particular context’.<sup>898</sup> Although the reasonable accommodation duty is couched as a reactive duty in several instances in the PDA 2012, there is still a sense in which it appears as an anticipatory or proactive duty in other places. Section 47 regarding public service vehicles is a good example of the reasonable accommodation duty as an anticipatory duty. Section 47 (1) provides that ‘an owner or operator of a public service vehicle shall make reasonable accommodation for persons with disabilities in the prescribed manner’. Thus, unlike the employment context where the reasonable accommodation applies in favour of ‘a person with disability’, (singular/individual),<sup>899</sup> the duty in the public transport context under section 47 applies to ‘persons with disabilities’ (plural/ group), rather than just ‘a person with a disability’ (singular). Writing on the UK’s anticipatory reasonable adjustment duty as it appears in the EqA 2010, Lawson and Orchard observe, ‘it is through this conversion of phrases in section 20(3)–(5), from the singular to the plural, that the EqA 2010 unleashes the anticipatory dimension of its reasonable adjustment duties in contexts of services and public functions’.<sup>900</sup> Applying Lawson and Orchard’s observations and logic to the Zambian context, a public service vehicle operator has an obligation to take reasonable measures ‘to remove a disadvantage that would otherwise be encountered by broad groups of [persons with disabilities], rather than one responding to the particularities of the specific case in question’.<sup>901</sup>

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<sup>897</sup> UNCRPD Committee, ‘Communication No 21/2014: *F v Austria*’ (21 September 2015) UN Doc CRPD/C/14/D/21/2014.

<sup>898</sup> UNCRPD Committee (n 868), para 26.

<sup>899</sup> See PDA 2012, s 37. See also s 9, which also operates in the singular by requiring law enforcement agencies to make reasonable accommodation for a person with disability where they have been arrested, detained, on trial, under confinement, or during investigations. However, the CRPD committee argues that: “Procedural accommodations” in the context of access to justice should not be confused with reasonable accommodation; while the latter is limited by the concept of disproportionality, procedural accommodations are not’ (UNCRPD (n 131), para 25(d)).

<sup>900</sup> Anna Lawson and Maria Orchard, ‘The Anticipatory Reasonable Adjustment Duty: Removing the Blockages?’ (2021) 80 CLJ 308,313.

<sup>901</sup> *ibid* 322.

Another important distinction between reasonable accommodation and accessibility lies in the manner of their realisation. Implementing the accessibility obligation might infer gradual realisation similar to the progressive realisation standards of ESC rights.<sup>902</sup> Because the accessibility obligations under Article 9 of the CRPD relate to the attainment of socio-economic rights, which ‘require resources and extensive systemic change’, it is highly likely that the realisation of the accessibility obligation is to be achieved progressively in line with Article 4(2).<sup>903</sup> The progressive realisation of the accessibility standard is echoed by the CRPD Committee’s views in the individual communication in *Nyusti and Takács v Hungary*<sup>904</sup> and in its General Comment No 2, which reaffirmed this position.<sup>905</sup> However, the Committee requires that State parties embark on steps to ensure compliance with their accessibility obligation. State parties must, therefore, ‘establish definite time frames and allocate adequate resources for the removal of existing barriers’.<sup>906</sup> Thus according to the Committee, the implementation of accessibility is unconditional, and the failure to offer accessibility cannot be justified by citing the burden of providing access to persons with disabilities.<sup>907</sup>

On the other hand, because a denial of reasonable accommodation amounts to disability discrimination, it places an immediate obligation upon the duty-bearer and therefore requires immediate realisation. ‘The duty to provide reasonable accommodation is applicable from the moment it is requested or where the need becomes apparent’.<sup>908</sup> However, this immediate realisation is subject to the defence of undue or disproportionate burden as its definition suggests and where appropriate, job qualification requirements.<sup>909</sup>

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<sup>902</sup> Stylianos Charitakis, ‘Access Denied: The Role of the European Union in Ensuring Accessibility under the United Nations Convention on the Rights of Persons with Disabilities’ (Doctoral Dissertation, Maastricht University 2018).

<sup>903</sup> Janet E Lord, ‘Accessibility and Human Rights Fusion in the CRPD: Assessing the Scope and Content of the Accessibility Principle and Duty under the CRPD’ (Delivered at the General Day of Discussion on Accessibility, Committee on the Rights of Persons with Disabilities, Geneva, 7 October 2010).

<sup>904</sup> Communication No 1/2010 (21 June 2013) UN Doc CRPD/C/9/D/1/2010.

<sup>905</sup> UNCRPD Committee (n 868), para 11.

<sup>906</sup> UNCRPD Committee (n 877), paras 24, 11, 25, 28 & 30.

<sup>907</sup> UNCRPD Committee (n 897), para 8.4.

<sup>908</sup> UNCRPD Committee (n 34), para 19.

<sup>909</sup> Lawson (n 140) 32 argues that the concepts of ‘reasonableness’ and ‘undue burden’ have the effect of progressive realisation as well to a certain extent. They are sensitive to the particular needs of the individual as well as the circumstances of the duty-bearer.

(See chapter 7). These defences do not apply to accessibility obligations which the CRPD committee refers to as 'unconditional'.<sup>910</sup>

As a reactive duty with an individual focus, as examined above, reasonable accommodation places an additional burden on an individual with a disability to prove to an entity obliged to provide them with accommodations that their impairment warrants such accommodations. This might also mean proving that their impairment 'falls outside the scope of any accessibility standard'.<sup>911</sup> In some situations, this can open individuals up to a certain level of scrutiny to evaluate whether they are disabled enough to claim the accommodations sought. With that being said, it is now appropriate for this chapter to consider what the law has to say about such scrutiny.

## Part IV

### 6.4 Disability inquiry

As already demonstrated, unlike other forms of discrimination that apply to all job applicants and employees, the PDA 2012 applies only to individuals who can show that they have an impairment that must be accommodated.<sup>912</sup> Consequently, the employer is expected to know that an employer requesting reasonable accommodations falls within the statutory definition of disability.<sup>913</sup> Due to the numerous forms of impairments, it becomes necessary to determine who can request to be reasonably accommodated. As an *ex nunc* duty, the duty to provide reasonable accommodations is owed only to a particular employee whom the employer knows has a disability and who is likely to be disadvantaged if accommodations are not made. Because of its reactive nature and because employers are required to base their decision on facts as to whether an employee has a disability, an employer would likely find it easier to accommodate those with visible and easily recognisable impairments and disabilities.

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<sup>910</sup> UNCRPD Committee (n 868) para 25.

<sup>911</sup> *ibid.*

<sup>912</sup> David Goss, Fiona Goss and Derick Adam-Smith, 'Disability and Employment: A Comparative Critique of UK Legislation' (2000) 11 IHRM 807, 812 call this a 'double-hurdle'.

<sup>913</sup> Ebuenyi and others (n 766).

### 6.4.1.1 Disability disclosure

In Zambia, there is no legal obligation to disclose a disability to an employer. However, what happens in a situation where the disability or the need for accommodation is not obvious? It is common knowledge that the employer cannot visibly ascertain or identify certain impairments. As such, it becomes difficult for the employer to decide whether the employee has a disability or not.<sup>914</sup> Disclosure of a disability is not always easy for those concerned. This is particularly true in the case of invisible or hidden disabilities which encompass ‘a wide range of physical and psychological conditions’ that do not have visible features commonly associated with a disability.<sup>915</sup> They might include but are not restricted to the following: ‘psychiatric disabilities (e.g. major depression, bipolar disorder, schizophrenia, anxiety disorders, and the like); traumatic brain injury; epilepsy; HIV/AIDS; diabetes; chronic fatigue syndrome; cystic fibrosis; attention deficit-disorder or attention-deficit/hyperactivity disorder; learning disabilities; chronic illness or pain and sensory disabilities (vision or hearing problems).’<sup>916</sup> Some disabilities also generate more negative responses than others because of the stigma associated to them.<sup>917</sup> The situation becomes more perplexing when conditions are categorised as sickness and hence outside the scope of the disability law’s protections and the reasonable accommodation mandate.<sup>918</sup>

While an individual with an invisible disability is more likely to be employed in the first place, they have a higher burden of proving the existence of a disability that requires them to be reasonably accommodated compared to those with visible impairments.<sup>919</sup> The same is true where litigation is concerned, and as Harpur and others suggest, there are socially created hierarchies of impairment within disability.<sup>920</sup> Thus a claimant with invisible or

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<sup>914</sup> Roger M Sullivan, ‘Balancing the Rights of the Alcoholic Employee with the Legitimate Concerns of the Employer: Reasonable Accommodation vs Undue Hardship’ (1985) 46 Mont L Rev 401.

<sup>915</sup> Alecia M Santuzzi, Pamela R Waltz and Lisa M Finkelstein, ‘Invisible Disabilities: Unique Challenges for Employees and Organizations’ (2014) 7 Industrial and Organisational Psychology, 204, 204.

<sup>916</sup> Carrye Syma, ‘Invisible Disabilities: Perceptions and Barriers to Reasonable Accommodations in the Workplace’ (2019) 40 Library Management 113, 113.

<sup>917</sup> *ibid*

<sup>918</sup> See for example *Chacón Navas* (n 775).

<sup>919</sup> However, where an employer is required to meet employment equity targets, employers will more than likely prefer to employ those with physical disabilities. (Willene Holness, ‘The Invisible Employee: Reasonable Accommodation of Psychosocial Disability in the South African Workplace’ (2016) 32 SAJHR 510, 511).

<sup>920</sup> Paul Harpur, Ursula Connolly and Peter Blanck, ‘Socially Constructed Hierarchies of Impairments: The Case of Australian and Irish Worker’ Access to Compensation for Injuries’ (2017) 27 JOR 507, 508.

hidden impairments is less likely to meet the definition of disability than one with visible or physical impairments.<sup>921</sup> As observed, the situation in Zambia is made difficult by the legislative rendering of 'permanent impairment', which might preclude episodic impairments from coming under the definition of disability.

Therefore, employees with invisible disabilities have no choice but to disclose the disabling nature of their impairments to the satisfaction of the employer if they are to be accommodated. Sometimes, an employee with an invisible disability might be apprehensive in requesting an accommodation for fear that their co-workers will see their request as soliciting special treatment or privileges from the employer.<sup>922</sup> Proof of the existence of a disability becomes necessary to dispel any notions that they might be faking a disability to obtain special favours or special treatment from the employer. However, even if the law offers protection against disability, the societal stigma attached to some disabilities is difficult to eradicate and thus makes disclosure difficult. An inclusive workplace culture that promotes tolerance and community can reduce or eliminate stigma.<sup>923</sup>

#### **6.4.1.2 Disability-related assessment**

Although proving an impairment to meet the legal definition of disability lies with the employee or prospective employee, Zambian law does not prevent employers from conducting disability assessments or asking questions related to disability. The PDA 2012 is silent on whether an employer can ask an employee or job applicant disability and health-related questions. Sometimes proof of disability may require a medical examination where limitations are not apparent. Unfortunately, this can be intrusive, affecting an individual's privacy rights.<sup>924</sup>

Pre-ECA 2019, employment medical screening was only allowed after a written contract of service was agreed upon (post-offer). The ECA 2019 permits pre-employment medical examinations before entering an employment contract. Section 17 (1) of the ECA 2019 thus provides:

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<sup>921</sup> William, Pauksztat and Corby (n 764).

<sup>922</sup> Santuzzi, Waltz and Finkelstein (n 915).

<sup>923</sup> Katharina Vornholt and Others, 'Disability and Employment – Overview and Highlights' (2018) 27 EJP 40.

<sup>924</sup> Lawson (n 531).

Subject to subsection (3), an employer may, prior to entering into a contract of employment with an employee, require the employee to be medically examined by a medical doctor for purposes of determining the fitness of the employee to undertake the work for which the employee is proposed to be employed.

Therefore, employers in Zambia are now at liberty to ask job applicants about their health, which would inform the employer's decision on whether to employ an applicant based on their health condition. However, the Act does not define the meaning of 'medical examination'. Therefore, it is unclear if the medical examination is broad enough to include questions, inquiries, or other means to establish whether the employee has any disability. This can be contrasted with the South African Employment Equity Act 1998 (EEA 1998), which defines medical testing broadly as '[including] *any test, question, inquiry or other means designed to ascertain*, or which has the effect of enabling the employer to establish, whether an employee has any medical condition.'<sup>925</sup>

Further, the ECA 2019 is unclear whether a medical examination is required before or after an offer but before commencing the job. One can assume that a medical examination can be conducted at any stage before entering an employment contract, including the recruitment and interview process. Additionally, the statutory language does not clarify whether an employer can ask disability-related questions or request a medical examination during employment. Section 28 of the ECA 2019 may provide guidance. According to Section 28 (3)(c), a medical examination in accordance with section 17 must be conducted before any endorsement for a transfer can be made by an authorised officer. Other than that, the only other times a medical examination and certificate would be needed is to decide if an employee should be placed on sick leave or medically discharged due to illness or injury not caused by the employee default, as well as for maternity leave.<sup>926</sup>

Carrying out pre-employment medical examinations has several benefits. These include, among others, being able to determine an individual's fitness to carry out particular work or tasks, enabling an employer to manage a worker better, preventing or reducing an employer's liability for an employee's pre-existing conditions and as a precondition for health insurance policies.<sup>927</sup> Moreover, under common law, the employer has a duty to take

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<sup>925</sup> EEA 1998, s 1 (SA) (emphasis added).

<sup>926</sup> ECA 2019, s 38 and s 41

<sup>927</sup> Kalula and others (n 6).



all reasonable steps to provide a safe working environment. Therefore, it may become necessary to carry out pre-employment medical examinations to ensure, as far as is reasonably practicable, the health, safety and welfare of the employees of the employer at a workplace. As a health and safety issue, a medical examination can also serve as a means through which an employer makes a job placement determination. Thus, section 16 (3) of the Occupational Health and Safety Act 2010 (OHSA 2010) requires an employer to ‘place and maintain an employee in an occupational environment adapted to the employee’s physical, physiological and psychological ability’. The other statute that an employer can rely on as the basis for conducting pre-medical examinations on individuals to determine their fitness to work is the Medical Examination of Young Persons (Underground Work) Act 1973.<sup>928</sup> Because these statutes are not targeted at those with disabilities *per se* but apply to a broader spectrum of individuals, employers need to apply these provisions in a non-discriminatory manner.

Although pre-employment medical examinations can be a necessary tool for ensuring the health and safety of employees, they can unfortunately be used to discriminate against individuals with disabilities.<sup>929</sup> This might be the case when the employer has little or no knowledge of their reasonable accommodation duty and where they rely on preconceived ideas or stereotypes about those with impairments without acknowledging the disabling socio-environmental factors that might exist within the workplace outside an individual’s impairment.<sup>930</sup>

Employers must be careful not to use pre-employment medical examinations to screen out persons with disabilities but rather to make their decisions based on the qualifications required for the particular job and the business necessity standards allowed by law.<sup>931</sup> If not appropriately applied, pre-employment medical examinations may raise grounds for indirect and direct discrimination under ECA 2019. Although a medical examination can be seen as a perfectly neutral standard or criteria that an employer can apply to all job applicants, it

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<sup>928</sup> see Medical Examination of Young Persons (Underground Work) Act 1973, s 4 and s 5.

<sup>929</sup> Quinn, McDonagh and Kimber (n 776).

<sup>930</sup> Dickson (n 554).

<sup>931</sup> William D Goren, ‘Internet Addiction, the Americans with Disabilities Act, and Employment’ (2015) 32 GPSolo 62.

might operate adversely and exclude those with disabilities.<sup>932</sup> And where this is the case, a claim for indirect discrimination can be raised against the employer. Employers must also know that medical examinations and disability assessments affect individuals' privacy rights. As such, the courts in Zambia have ruled that obtaining informed consent from a person to be medically examined or assessed is a prerequisite of such examinations, the omission of which constitutes an infringement of the individual's human rights.<sup>933</sup>

As the law currently stands in Zambia, persons with disabilities may not be assessed based on their qualifications for a job. Instead, they risk being evaluated based on their physical or mental conditions (actual or perceived). The law does not provide sufficient safeguards for those with disabilities or other long-term health conditions concerning pre-employment medical examinations. Nothing in the legislation requires any medical evaluation of an individual's fitness to be conducted against the backdrop of the duty to reasonably accommodate employees with disabilities. Consequently, the current legislative framework in Zambia does not provide sufficient safeguards to protect job applicants and employees with disabilities from unfair labour practices where medical examinations are concerned compared to the jurisdictions examined below. There is a need to provide adequate guidelines to safeguard the rights to equality of job applicants and employees with disabilities where disability and health-related questions are concerned, given that discrimination during the recruitment process can be difficult to detect.

#### **6.4.1.3 Comparison with other jurisdictions (South Africa, UK and USA)**

Zambia's position is different to South Africa's, which only allows medical testing of an employee under specific circumstances. The South African Employment Equity Act 1998 (EEA 1998) prohibits the medical testing of an employee unless 'legislation permits or requires the testing; or it is justified in light of medical facts, employment conditions, social

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<sup>932</sup> Olivier De Schutter, 'Pre-Employment Inquiries and Medical Examinations as Barriers to the Employment of Persons with Disabilities: Reconciling the Principle of Equal Treatment and Health and Safety Regulations Under European Union Law' in Olivier De Schutter and Gerard Quinn (eds), *Equality and Disability. The Protection of Persons with Disabilities from Discrimination* (Bruylant 2011).

<sup>933</sup> In *Stanley Kingaipe and another v Attorney General* [2010] ZR 94 the Zambian High Court ruled that the mandatory HIV/AIDS test without prior informed consent was a violation of privacy rights and amounted to inhumane treatment.

policy, the fair distribution of employee benefits or the inherent requirements of a job'.<sup>934</sup> The Act also prohibits psychological tests or other similar assessments unless they are scientifically valid and reliable, can be applied fairly to all workers and are not biased against any employee or group.<sup>935</sup> The South African Act also provides additional safeguards where testing for HIV is concerned. HIV testing is only permitted where permission from the Labour Court has been obtained.<sup>936</sup> The *Zambia Labour Law Reform Issues Paper* (whose recommendations influenced some of the provisions in the Zambian ECA 2019) had recommended the enactment of provisions prohibiting compulsory HIV testing for employment purposes and the adoption of requirements guaranteeing the confidentiality of an employee's HIV status. It was also recommended that specific measures or dispute-resolution mechanisms be adopted to enable employees to address privacy breaches, confidentiality and other protected rights.<sup>937</sup> It is unknown why these progressive recommendations were not adopted under the ECA 2019. Nonetheless, an employer must maintain a confidential file containing an employee's medical information regarding medical examinations to determine the employee's fitness to work. The failure to do so constitutes an offence.<sup>938</sup>

The Zambian position on pre-employment medical examinations can further be contrasted to that of the UK. The UK EqA 2010 prohibits pre-employment health checks save for certain exceptions.<sup>939</sup> Section 60 of the EqA 2010 prohibits employers from asking job applicants about their health before offering them work.<sup>940</sup> This also applies to applications placed 'in a pool of applicants' from where an employer may select in the future.<sup>941</sup> Concerning disability discrimination, the EqA 2010 provides that merely asking about an applicant's health would 'not contravene a relevant disability provision'.<sup>942</sup> However, the employer's 'conduct in reliance of the information given in response' will be a relevant consideration to

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<sup>934</sup> EEA 1998, s 7(1)(a)(b) (SA).

<sup>935</sup> *ibid* s 8.

<sup>936</sup> *ibid* s 7(2).

<sup>937</sup> *Kalula and others* (n 6).

<sup>938</sup> ECA 2019 s 17(5).

<sup>939</sup> *Lawson* (n 531).

<sup>940</sup> EqA 2010, s 60 (1)(a).

<sup>941</sup> *ibid* s 60 (1)(b).

<sup>942</sup> *ibid* s 60 (3).

determine whether they have contravened 'a relevant disability provision'.<sup>943</sup> The UK's EqA 2010 provides several exceptions when an employer may ask a job applicant about health. The exceptions relate to questions which are necessary to determine the necessity to adjust the interview and assessment process; to establish whether the applicant would be able to carry out the functions intrinsic to the job; as a means of monitoring diversity; and to determine whether a particular disability is a work requirement.<sup>944</sup>

Similarly, in the US, the ADA 1990 prohibits pre-employment medical examination and any disability-related inquiries before an offer of employment is made<sup>945</sup> 'even if they are related to the job'.<sup>946</sup> An employer can, however, make a disability-related inquiry and request a medical examination 'after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination' provided that all those entering into employment are also subjected to the same examination regardless of disability.<sup>947</sup> During employment, the ADA prohibits an employer from making disability-related inquiries and requests for medical examinations unless they are 'job-related and consistent with business necessity'.<sup>948</sup> The ADA also lists possible defences against discrimination charges where an employer makes a disability-related inquiry or medical examination that is job-related and consistent with business necessity, where an employer reasonably believes that:

- (a) an employee cannot perform essential job functions due to a medical condition; or
- (b) an employee will pose a direct threat to the health or safety of other individuals in the workplace due to a medical condition.<sup>949</sup>

There is a possibility that similar defences can also be relied upon within the Zambian setting. This can be done in two ways. First, an employer can rely on section 38 of the ECA 2019, which provides for sick leave and medical discharge where an employee cannot

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<sup>943</sup> *ibid* s 60 (4).

<sup>944</sup> *ibid* s 60 (6).

<sup>945</sup> ADA 1990, s 102 (d)(2)(4).

<sup>946</sup> EEOC, 'Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA)' (2000).

<sup>947</sup> ADA 1990, s 102 (d)(3)(A).

<sup>948</sup> *ibid* s 102 (d)(4)(A).

<sup>949</sup> *ibid*; *Arline* (n 828).

perform their normal duties due to illness or injury not occasioned by the employee's default. Thus, according to section 38(5), 'an employer may, on the recommendation of a medical doctor, discharge an employee on medical grounds where the employee does not recover from the illness or injury ...after six months of the date of the illness or injury, and the employee's entitlement to sick leave shall cease'. However, the provisions of section 38 only operate where 'the incapacity arises from an occupational-related accident or disease as provided for under the Workers' Compensation Act [1999]' and not 'where an employee is incapacitated due to illness or injury not occasioned by the employee's default'.<sup>950</sup> Generally, an employer has a greater obligation to accommodate an employee injured or disabled while working.<sup>951</sup> Thus where an employee's disability is a consequence of their employment, an employer is obliged to accommodate them as stipulated under the PDA 2012. Section 38(2) of the PDA 2012 provides:

Where an employee suffers a disability as a result of the employment, the employer shall make reasonable accommodation for that employee, counsel, retrain and re-deploy the employee to another section more suitable to persons with disability.

Section 38(2) is further supplemented by the provisions of subsection (3), which provides that 'the provisions of subsection (2) shall be in addition to any other relief which the employee is entitled to under the Workers Compensation Act 1999'. Unfortunately, the practice, common among employers in Zambia, is to 'encourage early retirement on medical grounds of workers who acquire an impairment at work, instead of investing in their reintegration in the labour market'.<sup>952</sup> Such employee practices are at odds not only with the PDA 2012 and its reasonable accommodation mandate but with other statutes whose goal is to promote equal opportunities for everyone, including persons with disabilities and the goals of substantive equality as envisioned by Zambian Humanism. Therefore, every attempt must be made to accommodate employees who become disabled because of their work to enable them to remain productive and valuable members of the workforce and society.

The second way an employer can formulate a defence against discrimination charges where they make a disability-related inquiry or medical examination that is job-related and

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<sup>950</sup> ECA 2019, s 38(3) as read with ss 38(1) and 38 (2).

<sup>951</sup> Clement Marumoagae, 'Disability Discrimination and the Right of Disabled Persons to Access the Labour Market' (2012) 1 PER/PELJ 344.

<sup>952</sup> UNHRC (n 780), para 53.

consistent with business necessity is by relying on the provisions of the OHSA 2010. The Act requires an employer 'to ensure, so far as is reasonably practicable, the health, safety and welfare of the employees of the employer at a workplace'.<sup>953</sup> However, 'the employer's compliance with health and safety obligations must also be approached with considerations of legitimacy, rationality and proportionality'.<sup>954</sup> Thus, an employer's decision to exclude job applicants with disabilities based on generalised assumptions about risks to health and safety is likely an unfair labour practice and discrimination on the grounds of disability. In any case, the OHSA 2010 does permit reasonable accommodations to a certain extent by requiring that an employer 'place and maintain an employee in an occupational environment adapted to the employee's physical, physiological and psychological ability'.<sup>955</sup>

While disability disclosure is a pre-condition to requests for reasonable accommodation in the workplace, an employee with disabilities must still prove that they have the necessary competencies to perform the job with or without accommodations. As the Labour Court of South Africa Court said in *Standard Bank of SA*, 'defining disability in relation to employment shifts the focus from the diagnosis of the disability to its effect on both the employee's ability to work and to find work'.<sup>956</sup> Attention must therefore be turned to consider this point.

## PART V

### 6.5 Efficient performance of employment

As stated above, reasonable accommodation, not being a positive measure in the strictest sense of the term, does not expect an employer to lower their recruitment or performance standards where persons with disabilities are concerned. Thus, where positive measures such as affirmative actions are concerned, an employer, when trying to attain the requirements/targets of an employment equity plan, does not necessarily have to employ or promote the most suitably qualified candidate to meet the employment equity targets.

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<sup>953</sup> See OHSA 2010, s 16.

<sup>954</sup> Charles Ngwena, 'HIV in the Workplace: Protecting Rights to Equality and Privacy' (1999) 15 SAJHR 513, 523.

<sup>955</sup> OHSA 2010, s 16 (1)(b).

<sup>956</sup> *Standard Bank of SA* (n 806), [68].

However, as regards reasonable accommodations, an employer needs to assess whether the employee or job applicant with a disability can perform the job's essential requirements with or without an accommodation. The very nature of reasonable accommodation is about creating changes within the workplace to ensure that an employee with a disability can effectively perform the core functions of their employment.<sup>957</sup> Consequently, the PDA 2012 requires an employer who employs a person with a disability to make reasonable accommodations and provide appropriate facilities needed by the employee with a disability to perform the functions required by the employment efficiently.<sup>958</sup> In this sense, an employer's duty to reasonably accommodate an employee with a disability is not absolute. Therefore, an employer would not be liable for discrimination if they decide against employing persons with a disability based on the job's performance requirements or operational needs.<sup>959</sup> An example can be taken from the EU Employment Equality Directive, which provides:

This Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities.<sup>960</sup>

An inherent drawback associated with the inclusion of 'essential function' or 'competence' clauses in the context of reasonable accommodation lies in their susceptibility to misuse by employers, potentially leading to unfavourable consequences for individuals with disabilities, including the peril of unemployment and dismissals in cases where they are already employed. Employers are essentially given the leeway to make subjective determinations of what constitutes essential functions of the job or, in the case of Zambia, what amounts to 'efficient performance of the functions required by the employment'.<sup>961</sup> Employees can also formulate qualification standards and tests that make it unreasonably

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<sup>957</sup> See dissenting joint opinion of some of the CRPD Committee members in Communication No 5/2011 *Jungelin v Sweden* (14 November 2014) CRPD/C/12/D/5/2011 para 4.

<sup>958</sup> PDA 2012, s 37(3).

<sup>959</sup> Lawson (n 140).

<sup>960</sup> Council Directive (EC) /78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16, recital 17.

<sup>961</sup> Patrick Daly and Darius Whelan, 'Disability in Employment Equality Law: A Reappraisal of the Reasonable Accommodation Duty and Issues arising in Its Implementation' (2021) 28 *Maastricht J Eur & Comp L* 744; PDA 2012, s 37(3)(b).

difficult for persons with disabilities to take up certain positions.<sup>962</sup> Thus, without clear guidance regarding what constitutes ‘efficient performance of the functions required by the employment’, employers can easily escape their reasonable accommodation duty by simply stating that an employee is incompetent.<sup>963</sup>

Nonetheless, it is still incumbent upon the employer to consider other steps to enable an employee with a disability to meet those requirements.<sup>964</sup> This seems to be how Article 5(3) of the CRPD envisages the reasonable accommodation duty, by requiring that all appropriate steps are taken to ensure that reasonable accommodation is provided to promote equality and equal opportunities. To this end, Lawson notes that a determination must first be made regarding the source of the employee’s inability to perform the essential functions. If the failure stems from an impairment, then attention should be given to whether reasonable accommodations could enable them to carry out the job’s essential functions.<sup>965</sup> The employer’s ‘essential functions defence’ will be weighed against reasonable accommodation options such as training, re-deployment, or transfer to another role.<sup>966</sup> As examined above, Section 38(2) of the PDA 2012 requires considering such options, especially when an employee becomes disabled on the job.

### **6.5.1 Comparison with other jurisdictions (US and UK)**

In the US, reasonable accommodation is extended only to a ‘qualified individual with a disability’ under the ADA 1990. A qualified individual is defined ‘as an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires’.<sup>967</sup> This definition, therefore, entails that an employer makes an investigation on two fronts:

- (1) to determine the essential functions of the particular job; and

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<sup>962</sup> Concerns about indirect discrimination can however arise in such a case.

<sup>963</sup> *ibid.*

<sup>964</sup> Willborn and others (n 859).

<sup>965</sup> Lawson (n 140) 75.

<sup>966</sup> *ibid.*

<sup>967</sup> ADA 1990 (as Amended), s 101(8).



(2) to ascertain whether a reasonable accommodation is necessary for an individual to perform the essential functions of that particular job.<sup>968</sup>

In *Arline*,<sup>969</sup> the US Supreme Court had to determine what 'essential function' implied, albeit from section 504 of the Rehabilitation Act 1973.<sup>970</sup> The court stated:

An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap...In the employment context, an otherwise qualified person is one who can perform "the essential functions" of the job in question... When a handicapped person [cannot perform] the job's essential functions, the court must also consider whether any "reasonable accommodation" by the employer would enable the handicapped person to perform those functions.<sup>971</sup>

The US Equal Employment Opportunity Commission (EEOC), the administrative agency charged with promulgating regulations to implement the statutory language of the ADA 1990, defines 'essential functions' as the 'fundamental job duties' of the employment position but excludes those functions that are merely 'marginal' in nature.<sup>972</sup> The regulations state that a job function may be essential if the position exists to perform that function. Sometimes the functions involve a high degree of specialisation such that the incumbent in the position is hired for their expertise or ability to perform the particular function. The function can also be rendered essential because only a few employees are available to perform the job function.

Thus, once it is known what the job's core functions are, the employer is under an obligation to ask the employee whether they can perform those functions with or without the need to be reasonably accommodated. The employer becomes obligated to provide reasonable accommodations (unless it would cause undue hardship or pose a direct threat to others' health or safety) when it becomes clear that the employee cannot perform the essential

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<sup>968</sup> Stephen F Befort, 'The Most Difficult ADA Reasonable Accommodation Issues: Reassignment and Leave of Absence' (2002) 37 Wake For LRev 439.

<sup>969</sup> *Arline* (n 828).

<sup>970</sup> The Rehabilitation Act 1973 was the first civil rights law to be enacted in the United States that prohibited discrimination on the basis of disability and by virtue of its accompanying regulations introduced the reasonable accommodation duty. However, its reach is limited to the federal government and programmes that receive federal financial assistance.

<sup>971</sup> 480 U.S.275, 288 (1987), footnote 17.

<sup>972</sup> EEOC, 'Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA' (October 2002).

elements of the job without accommodations.<sup>973</sup> The link between the essential Job function requirement and reasonable accommodation can be determined by imagining ‘three categories of individuals with disabilities’.<sup>974</sup> The first involves an individual with a disability who, because of the disability, cannot meet the essential functions of a particular job even when an employer is willing to reasonably accommodate them. This makes them unqualified under the Act and effectively prevents them from receiving the law’s protection. The second category includes an individual with disabilities who cannot perform essential job functions but could with the appropriate accommodation. Here, the individual ‘is deemed a qualified individual’ and thus entitled to protections. The third scenario is an individual with a disability who can still perform the job’s essential functions without accommodation. In this case, the individual is qualified, and the protective provisions of the law are extended to them.<sup>975</sup>

The UK’s EqA 2010 does not have an explicit ‘essential job function’ requirement. However, in *Bruce v Chamberlain*<sup>976</sup> the Court of Appeal (basing its decision on the now repealed Disability Discrimination Act 1995) held that an employer was not required to make adjustments to the selection criteria for a disabled applicant where the reasons for not meeting the criteria were unconnected to the disability. On the other hand, in *Archibald v Fife*,<sup>977</sup> the House of Lords had to consider whether an employer had a duty to reasonably accommodate an employee by transferring them to another role different from their original position. The court determined that because the employer’s terms, conditions and arrangements relating to the essential functions of the employment placed the appellant at a substantial disadvantage compared to her non-disabled colleagues who could perform the job, the employer was under a duty to provide reasonable adjustments. The court reasoned that an employer was obligated to take reasonable steps to prevent the terms of the disabled person’s contract from placing them at a substantial disadvantage. This also entails transferring them to a vacant post where they can carry out the job’s essential functions.<sup>978</sup>

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<sup>973</sup> Befort (n 968).

<sup>974</sup> Quinn, McDonagh and Kimber (n 776) 59.

<sup>975</sup> *ibid.*

<sup>976</sup> [2004] EWCA Civ 1047.

<sup>977</sup> [2004] UKHL 32.

<sup>978</sup> *ibid* [35]-[45].

A fundamental aspect of the court's decision in *Fife* is that it takes a social model approach. Thus, the first thing to consider is how the employer's work environment and systems interact with the employee's impairment. The effect is that the employer must base their competence requirements in conjunction with their reasonable accommodation duty. Only then can it be determined if an employee with a disability can perform the functions required by the employment.

## Part VI

### 6.6 Conclusion

Gyekye submits that, 'the fundamental meaning of community is the sharing of an overall way of life, inspired by the notion of the common good'.<sup>979</sup> Therefore the communitarian workplace should provide equal opportunities to integrate employees with disabilities into the organisation. The idea of participation in one's community (the workplace, in this case) has crucial implications for empowerment.<sup>980</sup> In the workplace, virtues such as togetherness, cooperative participation and mutual aid can be nurtured. Reasonable accommodation allows persons with disabilities to participate in work programmes where they can participate in reciprocal obligations and achieve their goals.

On its face, the duty of reasonable accommodation appears to be a straightforward concept. However, it presents several hurdles for anyone seeking to enforce it. One of the first challenges posed concerns the definition of disability in the law. Enforcement of the reasonable accommodation duty is premised on the meaning of disability. Only those who come under the statutory definition of disability can be reasonably accommodated. However, as analysed in this chapter, disability is a challenging concept to define. The definition of disability in Zambian law is likely to be a recipe for confusion. The analysis in this chapter has spelt out the various ways why and how this might happen. The meaning of 'permanent impairment' is unclear and is likely to be the subject of considerable dispute. It

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<sup>979</sup> Kwame Gyekye, 'Beyond Cultures: Perceiving a Common Humanity' in George F McLean (ed), *Cultural Heritage and Contemporary Change: Series II, Africa* (The Council for Research in Values and Philosophy 2004) 94.

<sup>980</sup> Oscar Mwaanga and Davies Banda, 'A Postcolonial Approach to Understanding Sport-Based Empowerment of People Living with HIV/AIDS (PLWHA) in Zambia: The Case of the Cultural Philosophy of Ubuntu' (2014) 18 *Journal of Disability & Religion* 173.

narrows the scope of protection for persons who might seek legal redress under Zambian anti-discrimination and disability law. However, the saving grace lies in adopting the CRPD's definition of 'person with disability' by the PDA 2012. The definition as adopted broadens the scope of protection from disability discrimination, but for the use of 'permanent impairment' there. To avoid confusion, the law should be amended by either providing a meaning to the phrase 'permanent impairment' or alternatively be replaced with the phrase 'long-term', similar to the CRPD and retained by the MHA 2019 (unfortunately, it does not define long-term either). Under US, UK, and South African law, long-term equates to twelve months.

The CRPD's definition of person with disability envisages the removal of barriers for persons with disabilities. It is premised on facilitating the inclusion and participation of persons with disabilities on an equal basis with others in society. Within the sphere of employment, this requires the provision of reasonable accommodations for employees and job applicants with disabilities. The focus of reasonable accommodation is on the individual needs of the person with disability, to improve their workplace experience. For this reason, the duty considers various personal circumstances that might go to the root of informing the nature of the accommodation required. As such, it is a reactive duty, as opposed to other positive, anticipatory measures, such as accessibility which extend to a broad range of persons with disabilities.

As examined in the chapter, the reactive nature of reasonable accommodation entails that an employee or duty-bearer must be aware of an individual's disability if they are to be provided with reasonable accommodation. However, this creates a challenge for those with hidden disabilities, where disclosing their disability might expose them to stigma and discrimination. Nonetheless, they are left with no choice but to disclose their disability for them to come under the protection of the law and where they require accommodations. Disclosure might also imply intrusive medical procedures and disability assessments at the employer's behest. Unfortunately, Zambian laws do not provide adequate protection where disability-related assessments are concerned compared to other jurisdictions.

Because reasonable accommodation in the workplace removes barriers to effective and efficient job performance, it is a fundamental requirement that the person reasonably

accommodated is qualified to perform the job's essential functions. Employers can, however, use this requirement as an easy means of escaping their reasonable accommodation duty. To guard against this, it is necessary to put in place legislative guidance on what this entails, as relying on the employer's word of what counts for essential functions of the job might be very limiting. An employer's description can also deliberately exclude those with disabilities from employment. Therefore, this limiting requirement must be applied with care when considering reasonable accommodation. With this in mind, it is only prudent for the next chapter of the thesis to examine some of the applicable limits or in other words, the legal defences that exist against the duty of reasonable accommodation.

## Chapter 7: Limits of the Reasonable Accommodation Duty

### PART I

#### 7.1 Introduction

The reasonable accommodation duty is one of the most fundamental concepts for realising the right to work for persons with disabilities. However, although an unjustified failure to provide reasonable accommodation constitutes discrimination within the law (as shown in the previous chapter), it does not necessarily imply that an employee or prospective employee will be entitled to an accommodation as a matter of right whenever the need to be accommodated arises. While an employee or prospective employee with a disability can request reasonable accommodations, the employer also has competing rights to run and manage their undertaking.<sup>981</sup> To this end, the law affords certain defences to employers to enable them to justify their refusal or inability to provide accommodations.

As already established, the reasonable accommodation mandate imposes certain costs (financial or administrative) and other demands on duty-bearers who might not always be able to make the necessary modifications or adjustments to workplaces to accommodate employees with disabilities. It will not always be clear what accommodations are ‘reasonable’ and the extent to which duty-bearers can decline requests for reasonable accommodation either on account of their incapacity (financial or otherwise) or for health and safety reasons and other considerations deemed pertinent.

For an employee or potential employee with a disability, the word ‘reasonable’ may suggest that a reasonable accommodation is one that is effectively suited to their actual needs and enables them to perform their job functions regardless of the cost.<sup>982</sup> For the employer, the term ‘reasonable’ might connote the idea that they are only obligated to provide accommodations that will not impose costs, difficulties or complications. Anything else

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<sup>981</sup> Katja Karjalainen and Marjo Ylhäinen, ‘On the Obligation to Make Reasonable Accommodation for an Employee with a Disability’ (2021) 12 ELLJ 547.

<sup>982</sup> *ibid.*

would thus be considered unreasonable.<sup>983</sup> Further, given that both the CRPD and the PDA 2012 refer to the notion of ‘undue burden’ as the limiting feature of the reasonable accommodation duty, any accommodation considered an undue burden on an employer will be regarded as unreasonable and not require the employer to make adaptations for an employee with a disability.

Given these competing perspectives, some attention must be given to examining what is meant by ‘reasonable’ in the term reasonable accommodation and the legal justifications that can be raised against the implementation of the duty by examining the term ‘undue burden’. Additionally, recent changes to Zambian employment law under the ECA 2019 have introduced the ‘inherent requirement of a job’ as a defence against employment discrimination and unfair dismissal claims. Where disability is concerned, the new defence raises the question of whether an employer can use it to not employ an individual with a disability in a specific position.

The CRPD Committee in *Jungelin v Sweden* noted that ‘when assessing the reasonableness and proportionality of accommodation measures, State parties enjoy a certain margin of appreciation’.<sup>984</sup> Unfortunately, as is the case with the other areas of disability and anti-discrimination law in Zambia, there is no guidance regarding what ‘reasonable’ entails, nor is there guidance regarding what constitutes an ‘undue burden’. Similarly, the inherent requirement of a job defence is yet to receive judicial scrutiny, nor is there additional guidance regarding its constituent elements. For this reason, this chapter adopts a similar approach as the previous one, where lessons and comparisons are made from other jurisdictions. For consistency, this chapter uses the same jurisdictions as points of reference. A notable contribution made by these jurisdictions is that they have issued elaborate legislative codes of practice and guidance that aid in interpreting the requirements of disability discrimination and employment legislation. For example, South Africa has a *Code of Good Practice on Employment of Persons with Disabilities*<sup>985</sup> issued by the Department of Labour and lists several examples of what constitutes reasonable accommodation. Although

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<sup>983</sup> Lisa Waddington, ‘When it is Reasonable for Europeans to Be Confused: Understanding When a Disability Accommodation is Reasonable from a Comparative Perspective’ (2008) 29 Comp Lab L & Pol’y J 317.

<sup>984</sup> *Jungelin* (n 957) [10.5].

<sup>985</sup> Department of Labour, *Employment Equity Act No 55 of 1998: Code of Good Practice on Employment of Persons with Disabilities* (2015).

the Code ‘is neither an authoritative summary of the law nor does it create additional rights and obligations’, it is nevertheless a practical interpretive guide for courts and tribunals when interpreting and applying the EEA 1998.<sup>986</sup> Employers, employees and their organisations must use it to develop, implement and refine disability-equity policies and programmes suitable to the needs of their workplaces.<sup>987</sup> Additional guidance can also be sought from the *Technical Assistance Guidelines on the Employment of Persons with Disabilities* (TAG), also issued by the Department of Labour.<sup>988</sup>

In the UK, codes of practice issued under statutory authority provide helpful information and guidance concerning details of the employment relationship. The most notable codes of practice concerning employment equality and protection against discrimination are the *Equality Act 2010 Codes of Practice on Employment*, and *Equal pay*, both issued by the Equality and Human Rights Commission as per its mandate under section 14 of the Equality Act 2006. With particular emphasis on disability, section 6(5) of the EqA 2010 provides that ‘[a] Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of [the definition of disability]’. To this end, the Secretary of State has issued *Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability*.<sup>989</sup> These codes and guidance serve as a helpful guide to employees, employers, lawyers, tribunals and courts. Although the codes and guidance are not binding on the courts as statutes are, courts and tribunals must nonetheless consider them when deciding a case before them.<sup>990</sup> However, the courts have been quick to point out that their job in the first instance is to interpret statutory provisions and resort to the statutory codes, and guidance will not always be required, especially where the statute’s wording is clear and precise. Thus, the starting point must always be what the statute says.<sup>991</sup>

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<sup>986</sup> *ibid* para 3.1.

<sup>987</sup> *ibid* para 3.4.

<sup>988</sup> Department of Labour, ‘Technical Assistance Guidelines on the Employment of Persons with Disabilities (TAG)’ para 1.1.

<sup>989</sup> *Equality Act 2010: Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability* (Office for Disability Issues, 2010).

<sup>990</sup> See for example EqA 2010, sch 1, para 12 (UK).

<sup>991</sup> *SCA Packaging v Boyle* [2009] UKHL 37; *Elliot v Dorset County Council* [2021] UKEAT 0197. Cf *City of York Council v Grosset* [2018] EWCA Civ 1105 where the Court of Appeal used the Employment Code of Practice to support their decision.



In the US, the EEOC has legislative authority to issue procedural regulations to enforce Title VII of the Civil Rights Act 1964 (CRA 1964), the Age Discrimination in Employment Act 1967 (ADEA 1967) and the ADA 1990 as amended by the (ADAAA 2008). The EEOC has also issued several guidelines that aid in interpreting discrimination legislation. For instance, it has issued 'Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA',<sup>992</sup> which 'addresses the rights and responsibilities of employers and individuals with disabilities regarding reasonable accommodation and undue hardship under Title I of the ADA'.<sup>993</sup> EEOC regulations and guidance 'help employees and employers understand their rights and obligations, and inform the public of EEOC's policy positions'.<sup>994</sup> As in the case of both South Africa and the UK, EEOC regulations and guidelines are not legally binding on the courts. However, they are still helpful as persuasive guides that may be taken into consideration by the courts in making its decisions.<sup>995</sup>

Though not legally binding, these regulations and codes of guidance help simplify complex legal provisions for the end user. For instance, not only do they define what reasonable accommodation means, but they also give non-exhaustive examples of what kinds of modifications or adjustments can constitute reasonable accommodations in practice. Thus, in the workplace, reasonable accommodation for persons with disabilities can involve, among other things, making existing infrastructure accessible, job restructuring, redeploying an employee to a suitable work area, changing working hours or modifying equipment and so on.

In Zambia, the PDA 2012 requires the Minister to issue regulations or take other measures to give effect to the rights of persons with disabilities in relation to employment.<sup>996</sup> In line with this mandate, TEVETA has issued *Guidelines on the Inclusion of Persons with Disabilities in Technical, Education, Vocational and Entrepreneurship Training*.<sup>997</sup> While the TEVETA guidelines are a welcome development, they lack the depth in detail expected of guidelines

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<sup>992</sup> EEOC (n 972).

<sup>993</sup> *ibid.*

<sup>994</sup> EEOC, 'What You Should Know: EEOC Regulations, Subregulatory Guidance and other Resource Documents' (5 May 2016).

<sup>995</sup> *ibid.*

<sup>996</sup> PDA 2012, s 35(3)(i).

<sup>997</sup> TEVETA (n 875).

on disability. The guidelines are not as comprehensive and detailed as the comparator jurisdictions' guidelines and codes of practice. Although they give a few examples of the types of reasonable accommodations, they do not provide clear guidance on the kinds of tests to be applied regarding the reasonableness of an accommodation or what amounts to an undue burden. In fact, they do not even define the term 'undue burden'. However, in situations where they apply, the guidelines provide that when deciding how to provide reasonable accommodations, an entity should consider the following factors: changes to facilities and equipment; the provision of special services; and creative thinking and problem-solving. Regarding creative thinking and problem solving, the guidelines emphasise that reasonable accommodations need not be expensive but that there are several innovative ways of making an environment accessible.<sup>998</sup> Further, employers and employees cannot rely on the guidelines, nor would they be expected to, because their scope of application is limited to vocational training institutions.

In its initial report to the CRPD Committee, the Zambian government stated that in a bid to enhance the rights of persons with disabilities in Zambia, it was considering introducing a statutory instrument to compel employers to give equal employment opportunities to persons with disabilities.<sup>999</sup> It also stated that the statutory instrument would mandate employers to reserve 5 per cent of the jobs for persons with disabilities.<sup>1000</sup> Unfortunately, this statutory instrument is yet to materialise.<sup>1001</sup> This has proved to be a source of concern for various DPOs in Zambia who lament the absence of regulations on employment for persons with disabilities and known protocols for addressing the work-related challenges they face with work and employment.<sup>1002</sup> To this end, the CRPD Committee has requested that the Zambian government provide information on the status of implementation of the statutory instruments on employment per the provisions of the PDA 2012.<sup>1003</sup> It is important to note that unlike the regulations and codes of guidance issued in the comparator

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<sup>998</sup> *ibid* para 4.0.

<sup>999</sup> UNCRPD Committee, 'Initial Report Submitted by Zambia under Article 35 of the Convention, due in 2012' (19 October 2020) UN Doc CRPD/C/ZMB/1 para 228.

<sup>1000</sup> *ibid*.

<sup>1001</sup> The Committee on the Rights of the Child urges Zambia to finalize statutory instruments on education, health, labour and transportation under the PDA 2012. (CRC, 'Concluding observations: Zambia' (27 June 2022) CRC/C/ZMB/CO/5-7 para 30.

<sup>1002</sup> ZAFOD and DRW (n 631) 24.

<sup>1003</sup> UNCRPD Committee (n 68), para 24.

jurisdictions, the statutory instrument will have the compelling force of legislation and will thus be binding on duty-bearers.

Whereas the courts and other legal professionals can utilise their expertise by referring to the provisions and guidance provided in other jurisdictions, the individuals for whose benefit the law exists are left at a considerable disadvantage in seeking the protection of the law where guidelines are not in place. Because reasonable accommodation is a novel concept in Zambia, it goes without saying that the issuance of a statutory instrument in the form of a code of practice or explanatory legislative guide can help determine the precise extent of the duty of reasonable accommodation. The reasonable accommodation duty is a complex requirement.<sup>1004</sup> Without proper legislative guidance or codes of practice, a lack of clarity concerning the concept of undue burden and what amounts to an accommodation provides an easy escape route for employers not to adhere to their legislative duty. Procedural guidance is essential when dealing with barriers associated with hidden disabilities that are not as easy to identify and remove as visible ones.<sup>1005</sup> The lack of guidance and regulations hampers those with disabilities from proving breaches of the law and discrimination.

Be that as it may, the purpose of this chapter is to examine the justifications for not providing reasonable accommodation, as provided under Zambian law. Part two of this chapter examines the relationship between reasonable accommodation and undue burden, and how the CRPD committee, the US and South Africa have approached it. Part three looks at the inherent requirements of a job defence and if it is a valid defence against not hiring and accommodating those with disabilities. Part four concludes by recommending the approach Zambia should follow.

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<sup>1004</sup> Waddington (n 836) 188.

<sup>1005</sup> Anna Lawson, 'People with Psychosocial Impairments or Conditions, Reasonable Accommodation and the Convention on the Rights of Persons with Disabilities' (2008) 26(2) *Law in Context* 62.

## PART II

### 7.2 Relationship between reasonable accommodation and undue burden

Because Zambia's disability law is based on the CRPD, it is only prudent to start with an examination of the CRPD Committee's approach to this issue. The USA and South African approaches will also be analysed in this part.

### 7.3 CRPD Committee approach

The relationship between reasonable accommodation and undue burden stems from the definition of reasonable accommodation itself. The CRPD defines reasonable accommodation 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>1006</sup>

The Zambian definition is similar but for the addition of the word 'adaptation' and the omission of the word 'disproportionate'. (See 6.3 for definition).

It is striking that the definition of 'reasonable adjustment' under the CEEA 2006 is not supplemented with the 'undue burden' reference. This makes for interesting reflection in the sense that the term 'reasonable' may be perceived as modifying the extent of the reasonable accommodation duty. On the contrary, the CRPD Committee argues that the reasonableness of accommodation is related to the effectiveness of accommodation, rather than the extent of the duty as examined below.

Different jurisdictions use a variety of phrases expressing the same idea of limiting the scope of the reasonable accommodation duty. For example, the US legislation uses the words 'undue hardship' while South Africa utilises both 'undue hardship' and 'undue burden' within its various pieces of legislation. The words 'disproportionate' and 'undue' were

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<sup>1006</sup> CRPD, art 2.

contested among the CRPD delegates during the preparatory works. Some delegates were also concerned about using the word 'burden' and argued in favour of 'hardship' instead. Other delegates felt the phrase 'disproportionate burden' was too low a standard and preferred 'undue hardship', which was perceived as 'setting a higher standard'.<sup>1007</sup> It was argued that 'burden' had negative connotations and perpetuated the negative idea that persons with disabilities are 'burdens' on society.<sup>1008</sup> (See South Africa's arguments on using 'unjustifiable hardship' below). The CRPD Committee concluded that the terms disproportionate or undue burden refer to the same idea; 'that the request for reasonable accommodation needs to be bound by a possible excessive or unjustifiable burden on the accommodating party'.<sup>1009</sup>

Neither the CRPD nor the Zambia PDA 2012 define undue burden; in a way, the definition seems to be left to chance. Precise guidance is essential to determining the meaning of 'reasonable' and the degree of burden for the defence of 'undue burden' to succeed. Without such guidance, the duty-bearer is left with enormous discretion in construing reasonable accommodation and an undue burden. This, therefore, makes it easy for the duty-bearer to escape from their accommodation duty towards persons with disabilities.

The definition of reasonable accommodation in the PDA 2012 can be divided into two parts. The first part requires the performance of positive duties via the provisions of 'necessary and appropriate modifications or adjustments' where required 'in a particular case' to level the playing field, as it were. This part captures the interest of the person to be accommodated. On the other hand, the interests of the duty-bearer are captured in the second part, which sets the limitations of reasonable accommodation by stating that the modifications or adjustments should not impose an undue burden on the duty-bearer.<sup>1010</sup>

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<sup>1007</sup> See Chair's Summary, Daily Summary of discussion at the Seventh Session of the Ad Hoc Committee related to Article 2 Definitions (31 January 2006).

<sup>1008</sup> *ibid.*

<sup>1009</sup> UNCRPD Committee (n 131) para 25(b).

<sup>1010</sup> *ibid* para 25.

At first sight, the definition suggests that for an accommodation to be reasonable, it must not ‘impose excessive difficulties or costs’ on the duty-bearer.<sup>1011</sup> Here the reasonableness of an accommodation would be a separate and distinct defence from the undue burden defence.<sup>1012</sup> Therefore, the burden is on the individual requesting an accommodation to establish that the requested accommodation is not costly, excessive or seems reasonable ‘on its face, i.e., ordinarily or in the run of cases’ as the US Supreme Court has ruled in *US Airways v Barnett* (hereinafter *Barnett*),<sup>1013</sup> examined below. Here ‘reasonable’ is used as a qualifier or modifier to the duty to accommodate. This also connotes the idea that the undue burden issue is only reached after an accommodation has been proven reasonable.<sup>1014</sup> If they cannot prove that an accommodation is reasonable in this sense, then the employer’s duty falls away at the ‘reasonableness stage’. However, even if the employee can prove that the accommodation is reasonable, the employer can still raise the undue burden defence, thus rendering a ‘reasonable’ accommodation unreasonable.<sup>1015</sup> Therefore the duty-bearer has two types of defences available, allowing them to choose the most favourable defence depending on the circumstances. By looking at the relationship between reasonable accommodation and undue burden in this manner, it begs the question, how can a reasonable accommodation ever impose an undue burden? Or does the word ‘reasonable’ modify the duty to accommodate, or does it refer to the accommodation itself?’<sup>1016</sup>

The CRPD Committee has answered these questions by saying:

“Reasonable accommodation” is a single term, and “reasonable” should not be misunderstood as an exception clause; the concept of “reasonableness” should not act as a distinct qualifier or modifier to the duty. It is not a means by which the costs of accommodation or the availability of resources can be assessed – this occurs at a later stage when the “disproportionate or undue burden” assessment is undertaken.

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<sup>1011</sup> Lisa Waddington, ‘Reasonable Accommodation’ in Dagmar Schiek, Lisa Waddington and Mark Bell (eds.), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart Publishing 2007) 669.

<sup>1012</sup> *ibid.*

<sup>1013</sup> 535 U.S. 391 (2002), 402.

<sup>1014</sup> Steven L Willborn and others, *Employment Law: Cases and Materials* (6th ed, Carolina Academic Press 2017).

<sup>1015</sup> *Borowski v Valley Central School District* 63 F.3d 131 (1995) (US).

<sup>1016</sup> Lucy-Ann Buckley and Shivaun Quinlivan, ‘Reasonable Accommodation in Irish Equality Law: An Incomplete Transformation’ (2021) 41 LS 19, 26.

Rather, the reasonableness of an accommodation is a reference to its relevance, appropriateness and effectiveness for the person with a disability. An accommodation is reasonable, therefore, if it achieves the purpose (or purposes) for which it is being made and is tailored to meet the requirements of the person with a disability.<sup>1017</sup>

Based on this information, the reasonableness of an accommodation is not determined by whether it is costly or challenging to implement by the duty-bearer but by how it helps the person with disabilities perform their job functions. In other words, modifications or adjustments made for an individual with a disability will only be considered reasonable if they facilitate the efficient performance of the job and, in turn, the enjoyment of the right to work. Zambian law seems to encompass this view under section 37(3) of the PDA 2012. First, section 37(3)(a) sets out the employer's general obligation to reasonably accommodate the employee with a disability and secondly, section 37(3)(b) continues to state that the employer should: '*provide appropriate facilities required by the person with disability for the efficient performance of the functions required by the employment*'.<sup>1018</sup> Read together, this suggests that the reasonableness of an accommodation is determined by how effectively it enables the relevant individual to perform their job functions efficiently. Therefore, to avoid confusion, the test applied to determine whether an employee with a disability can or cannot perform the job efficiently is premised on the employee's competencies and how they interact with the performance standards set by the employer with or without reasonable accommodations.

Consequently, the essential functions of the job or the competence provisions discussed in the previous chapter are not defences against the duty-bearer's failure to provide reasonable accommodations in the strictest sense. Instead, they address the qualifications and performance capabilities of the person with a disability, and the 'accommodations provided only serve to ensure that the individual is assessed according to their own personal abilities rather than presumed group characteristics'.<sup>1019</sup> Hence, if an employee with a disability is not qualified or cannot perform their duties with reasonable accommodations,

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<sup>1017</sup> UNCRPD Committee (n 13), para 26(d).

<sup>1018</sup> Emphasis added.

<sup>1019</sup> *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)* [1999] 3 SCR 868, [19].

the employer can deny employment or relieve them of duties. The reasonable accommodation mandate does not arise in this instance.

Given the CRPD Committee's understanding of reasonableness, it is safe to assume that a duty-bearer only has one type of defence in their arsenal, and that is the 'stricter disproportionate or undue burden test', as Waddington puts it.<sup>1020</sup> The Committee requires the application of a proportionality test when determining whether a sought accommodation places an undue burden on the duty-bearer. This proportionality analysis necessitates considering all relevant facts, the most important of which is the relationship between the means used and the goal, which is the enjoyment of the right.<sup>1021</sup> The Committee's view reiterates the dissenting opinion in *Jungelin v Sweden*,<sup>1022</sup> that reasonable accommodation should be analysed on a case-by-case basis. And the assessment of the reasonableness and proportionality of proposed accommodations should consider the context in which the requested accommodations are made. The test of reasonableness and proportionality should therefore ensure, among other things that:

- (i) the accommodation measures were requested to promote the employment of a person with a disability, with the professional capacity and experience to perform the functions of the applied position; and
- (ii) the entity to which the candidate applied can reasonably be expected to adopt and implement accommodation measures.<sup>1023</sup>

The CRPD committee's approach focuses on the benefits for the person with a disability, before considering any negative effects on the duty-bearer. Therefore, accommodations must first aim to ensure equality and eliminate discrimination against persons with disabilities.

By its very nature, the proportionality test is a balancing of the accommodation needs and interests of a person with a disability against those of the duty-bearer.<sup>1024</sup> However, it can be difficult, if not impossible, to quantify the benefits of employing persons with disability

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<sup>1020</sup> Waddington (n 1011) 669.

<sup>1021</sup> UNCRPD Committee (n 131), para 25.

<sup>1022</sup> *Jungelin* (n 957), para 4 (dissenting opinion).

<sup>1023</sup> *ibid*, para 4 (Appendix).

<sup>1024</sup> Ferri (n 48).



prospectively. As such, the right to equal employment opportunities will almost always outweigh the financial and other considerations of adapting an enterprise to benefit an employee with disabilities. Nonetheless, the Committee identifies several factors to consider when determining whether the proportionality standard has been met. These include 'financial costs, resources available (including public subsidies), the size of the accommodating party (in its entirety), the effect of the modification on the institution or the enterprise, third-party benefits, negative impacts on other persons and reasonable health and safety requirements'.<sup>1025</sup> These factors essentially account for the reactive and individualised nature of the reasonable accommodation duty, which requires considering the circumstances of the duty-bearer and the needs of the person to be accommodated. As an individualised duty, what might be a reasonable accommodation for one employee might not be for another, and what might be considered an undue burden for one employer would also vary. For example, because larger undertakings are likely to have more resources than smaller ones, the size of the accommodating party may be crucial in determining the entity's ability to bear the expenses and make the appropriate changes.<sup>1026</sup> The Committee also notes that the cost should not be borne by the person with a disability requesting the accommodation and that the burden of proving undue burden lies with the duty-bearer.<sup>1027</sup> As will be shown below, the Committee's position above is different from that taken by the American courts and, in a sense, suggests a reaction to the restrictive nature in which the courts of some jurisdictions had interpreted the relationship between reasonable accommodation and undue burden pre-the CRPD.

At this juncture, the chapter focuses on the approach adopted by some US courts. The US has not ratified the CRPD, and its approach is only analysed to demonstrate a restrictive interpretation of reasonable accommodation and undue burden. As a non-party to CRPD, the US approach might be less appropriate direction for Zambia, which is a CRPD party.

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<sup>1025</sup> UNCRPD Committee (n 131) para 26(e).

<sup>1026</sup> Broderick (n 534).

<sup>1027</sup> UNCRPD Committee (n 131), paras 26(f)- (g).

### 7.3.1 USA approach

Under the ADA 1990, 'not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability' will not amount to discrimination if the 'covered entity can demonstrate that the accommodation would impose undue hardship on the operation of the business'.<sup>1028</sup> The Act defines undue hardship as 'an action requiring significant difficulty or expense when considered in light of the following factors':<sup>1029</sup>

- (i) the nature and cost of the accommodation needed....;
- (ii) the overall financial resources of the facility...the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
- (iii) the overall financial resources, the overall size of the business...; and
- (iv) the type of operation....

According to the EEOC, a claim of undue hardship cannot be based on generalised inferences. Instead, an individual assessment of existing circumstances that shows that a specific reasonable accommodation would entail significant difficulty or expense is required to establish undue hardship.<sup>1030</sup> As a result, employers should assess undue hardship on a case-by-case basis, taking into account the factors highlighted above, including the 'impact of the accommodation on the operation of the facility'.<sup>1031</sup> The guidance also indicates that employers should consider external funding possibilities to assess whether a particular accommodation would be too costly.<sup>1032</sup> Thus, a business that benefits from State funding or incentives has a more significant burden of proving that an accommodation creates an undue hardship.<sup>1033</sup>

Unlike the CRPD's position, the US courts view the reasonableness of an accommodation, and undue hardship as two sides of the same coin. By proving undue hardship, an employer

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<sup>1028</sup> ADA 1990, s 102(b)(5)(A).

<sup>1029</sup> *ibid* s 101(10)(A)-(B).

<sup>1030</sup> EEOC (n 972), para 42.

<sup>1031</sup> *ibid* para 42.

<sup>1032</sup> *ibid*.

<sup>1033</sup> *ibid*.

discharges the burden of demonstrating that a particular accommodation is unreasonable. This view emanates from criticisms (by efficiency theorists and libertarians) that the ADA's reasonable accommodation mandate imposes a significant cost on employers, especially those operating small enterprises.<sup>1034</sup> Thus, according to Epstein, because reasonable accommodation costs money, 'it impedes the operation and efficiency of firms'.<sup>1035</sup> Because of this, US courts favour a cost-benefit analysis when determining the reasonableness of an accommodation and undue burden. Consequently, some of the circuit courts and the Supreme Court have held that an accommodation is reasonable and thus not unduly burdensome on the employer if its benefit is proportionate to its cost.<sup>1036</sup>

As illustrated by the two US cases considered below, the US cost-benefit analysis is sensitive to the financial implications that an accommodation places on the employer. Unfortunately, this approach seems less concerned with the detriment to an employee (that is, potential unemployment), which can be much worse than the costs likely to be incurred by the employer in accommodating them. It overlooks the benefits of employing persons with disabilities that are likely to be experienced and extended to third parties and society. In essence, there is no focus on equality, human rights or other non-financial convictions under the US approach.

One of the most prominent and often criticised American cases on the meaning of reasonable accommodation and undue hardship is that of *Vande Zande v State of Wisconsin Department of Administration* (hereinafter *Vande Zande*).<sup>1037</sup> In this case, Judge Posner (a leading advocate in the field of law and economics), whilst adopting a cost-benefit analysis, interpreted the meaning of 'reasonable' within the law of negligence as akin to that of the duty of reasonable care for example. The court, in this case, rejected the plaintiff's claim that the term reasonable meant 'apt or efficacious' and that an accommodation is reasonable if it is suited to the individual's disability. The plaintiff also argued that costs should not be considered when determining what is 'reasonable' but rather when determining what constitutes 'undue hardship'. It was Posner's view that the word

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<sup>1034</sup> Dianne Avery and others, *Employment Discrimination Law: Cases and Material on Equality in the Workplace* (8th edn, West Academic 2010).

<sup>1035</sup> Epstein (n 512) 484.

<sup>1036</sup> Oakes (n 510).

<sup>1037</sup> 44 F 3d 538 (7th Cir 1995).

‘reasonable’ played the role of a qualifier, thereby weakening ‘accommodation’.<sup>1038</sup> Therefore ‘reasonable’ was interpreted as implying ‘something less than the maximum possible care’.<sup>1039</sup> This means an accommodation is reasonable if an employer has made some reasonable effort rather than the maximum possible or desirable effort. In this sense, costs are also implied within the meaning of ‘reasonable’.

Further, by equating ‘undue hardship’ to ‘unduly costly’ and hence an employer’s financial condition, it was Posner’s opinion that the cost of accommodating an employee with a disability should be proportionate to the employer’s resources. Thus, the employee must show that the requested accommodation is both ‘efficacious and proportional to costs’.<sup>1040</sup> However, even if the employee succeeds in showing that the accommodation is reasonable in the sense that it is effective and not disproportionate to costs, the employer can still rebut this by demonstrating that:

- (i) the costs are excessive in relation either to the benefits of the accommodation<sup>1041</sup> or
- (ii) the employer’s financial survival or health is at stake.<sup>1042</sup>

The implication of this is that the duty-bearer is furnished with two defences against the failure or refusal to accommodate a person with a disability as explained above. The employer can thus refuse to accommodate an employee at the ‘reasonableness stage’ by arguing that the requested accommodation is unlikely to benefit the individual or, even if it would, that the cost of doing so would be disproportionate to the benefit. Therefore, Posner stated that an employer could not be liable for failing to accommodate what it would consider a ‘trivial’ benefit to the employee even if the employer had the resources to do so.<sup>1043</sup> He said that an employer is ‘not required to expend enormous sums to bring about a trivial improvement in the life of a disabled employee’.<sup>1044</sup> This is so even if an employer does not plead undue hardship because they are so large or wealthy or they are the State (as it was in this case) which could raise taxes to finance any accommodations for disabled

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<sup>1038</sup> *ibid* 542.

<sup>1039</sup> *ibid* 542.

<sup>1040</sup> *ibid* 543.

<sup>1041</sup> *ibid* 543.

<sup>1042</sup> *ibid* 543.

<sup>1043</sup> *ibid*.

<sup>1044</sup> *ibid* 542.

employees.<sup>1045</sup> Therefore, an accommodation may be considered unreasonable in itself, even when hardship is minimal or absent.<sup>1046</sup> Thus, the court rejected the plaintiff's request for the kitchenette sink to be lowered in this case. Judge Posner concluded that the accommodation was unnecessary since she already had access to a bathroom sink that was just as effective.

As regards the undue hardship stage, the employer need only show that accommodating an employee with disabilities would not be financially viable for the employer even if the proposed accommodations would provide an effective and efficient means of performing the job. Therefore, an accommodation that requires more than a *de minimis* cost would not be considered reasonable, and would hence be deemed to impose an undue hardship on the employer or duty-bearer.<sup>1047</sup> Hence, in *Vande Zande*, the court rejected the plaintiff's request for a computer to enable her to work from home. Posner held that such a scenario would overstretch the concept of reasonable accommodation and that 'an employer is not required to accommodate a disability by allowing the disabled worker to work, by himself, without supervision, at home'.<sup>1048</sup>

However, it must be remembered that a benefit that might appear trivial to the employer and the court could be significant for the employee with a disability.<sup>1049</sup> Davis notes that the so-called trivial issues should not be ignored and dismissed in discrimination and civil cases. Discrimination often builds up its impact from the trivial levels, which then expands upwards 'to a substantial level of discrimination in the aggregate'.<sup>1050</sup> Although Posner's view suggests that regard must be given to both the employee and employer by weighing up the merits and detriments to each party, there is a sense in which the employee's interests or benefits are not the primary concern. The primary concern is the employer's business operations rather than removing barriers. It appears to privilege financial costs to the employer in defining undue burden. This understanding of reasonable accommodation

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<sup>1045</sup> *ibid.*

<sup>1046</sup> Leticia de Campos Velho Martel, 'Reasonable Accommodation: The New Concept from an Inclusive Constitutional Perspective' (2011) 8 SUR - Int'l J on Hum Rts 85.

<sup>1047</sup> *ibid.*

<sup>1048</sup> *Vande Zande* (n 1037) 545.

<sup>1049</sup> Oakes (n 510).

<sup>1050</sup> Lennard J Davis, 'Bending Over Backwards: Disability, Narcissism, and the Law' (2000) 21 Berkeley J Emp & Lab L 193, 202.

and undue hardship/burden limits the scope of those with disabilities who can be accommodated. Thus, an employee with a disability will likely be accommodated if the changes require minimal economic effort. Those whose accommodations are not considered efficient and economical will likely be excluded. The Court of Appeal of the Second Circuit in *Borkowski v Valley Central School District*<sup>1051</sup> also applied a cost-benefit analysis similar to *Vande Zande*.

The US Supreme Court in *Barnett*<sup>1052</sup> also adopted Judge Posner's understanding of the meaning of the words 'reasonable accommodation'. The court rejected the plaintiff's argument that the words 'reasonable accommodation' meant an effective accommodation. The plaintiff based their interpretation on EEOC regulations which provided that 'reasonable accommodation means.... [m]odifications or adjustments... that enable a qualified individual with a disability to perform the essential functions of [a] position'.<sup>1053</sup> The court's opinion was that this interpretation was wrong and that the word 'accommodation' conveyed the 'need for effectiveness'. The court further rejected the plaintiff's argument that any understanding of reasonable accommodation other than in terms of 'effectiveness' implied that the words 'reasonable accommodation' and 'undue burden' were identical, thereby creating 'a practical burden of proof dilemma'. The court, however, held that there was a distinction between the two and that the plaintiff/employee only needs to 'show that an "accommodation" seems reasonable on its face, i.e., ordinarily or in the run of cases'.<sup>1054</sup> To this end, the reasonableness standard is met if the employee can show that the employer can, by all appearances, readily implement the accommodation. The court thus agreed with *Borkowski's* shifting burdens of proof that 'the plaintiff satisfies the burden of production by showing plausible accommodation', that is, the possibility of an accommodation.<sup>1055</sup> On the other hand, the defendant/ employer will be required to 'show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances'.<sup>1056</sup> Here undue hardship refers to the additional challenges or costs

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<sup>1051</sup> 63 F.3d 131 (2d Cir.1995).

<sup>1052</sup> *Barnett* (n 1013).

<sup>1053</sup> As cited in *ibid* 399.

<sup>1054</sup> *Barnett* (n 1013) 402.

<sup>1055</sup> *ibid* 402.

<sup>1056</sup> *ibid* 402.

associated with implementing the accommodation considering the employer's unique circumstances.

The US approach examined above differs from the South African one, which examines the relationship from the employee's perspective and the benefits of employing persons with disabilities in wider society. The employer's burden of proof in proving undue hardship is higher in the South African approach as examined below.

### 7.3.2 South African approach

The South African Code of Good practice requires employers to reasonably accommodate the needs of persons with disabilities. The Code also provides that an accommodation must aim at 'reducing the impact of the impairment of the person's capacity to fulfil the essential functions of a job'.<sup>1057</sup> The South African position here is consistent with the CRPD discussed above. The effectiveness of the accommodation is also dependent on a proportionality analysis. Thus, an employer must 'assess and adopt *effective measures*, both in terms of cost and quality that is consistent with removing the barriers to perform the job and to enjoy equal access to the benefits and opportunities of employment'.

Further, an employer is not obliged to accommodate a qualified job applicant or employee with a disability if it would be an unjustifiable hardship on the employer's business.<sup>1058</sup>

Unjustifiable hardship is:

An action that requires significant or considerable difficulty or expense. This involves considering, amongst other things, the effectiveness of the accommodation and the extent to which it would seriously disrupt the operation of the business.<sup>1059</sup>

The TAG notes that using the term 'unjustifiable hardship' instead of 'undue hardship' connotes the idea that a higher standard is required to justify a denial of reasonable accommodation.<sup>1060</sup> In *Standard Bank of SA*, the court said unjustifiable hardship means:

More than mere negligible effort. Just as the notion of reasonable accommodation imports a proportionality test, so too does the concept of unjustifiable hardship.

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<sup>1057</sup> Department of Labour (n 985), para 6.1.

<sup>1058</sup> *ibid* para 6.11.

<sup>1059</sup> *ibid* para 6.12.

<sup>1060</sup> TAG (n 988), para 6.11.

Some hardship is envisaged. A minor interference or inconvenience does not come close to meeting the threshold, but a substantial interference with the rights of others does....<sup>1061</sup>

In this case, the court held that the employer's failure to produce evidence of productivity loss from the employee's abstention did not amount to unjustifiable hardship. The court stated that the employer, being a financially sound institution, would find it challenging to prove unjustifiable hardship. Therefore, reasonable accommodation was a better option for addressing the parties' mutual interests.<sup>1062</sup> This decision is consistent with the CRPD Committee's view, which requires a consideration of the impact of the accommodation on the 'overall assets rather than just the resources of a unit or department within an organisational structure'.<sup>1063</sup>

The TAG states that the higher standard requirements are to encourage the employment and accommodation of persons with disabilities in South Africa and to 'encourage employers to make more effort to reduce and eliminate discrimination and/or promote affirmative action'.<sup>1064</sup> To express this another way, reasonable accommodation, despite being an individualised reactive duty/right, has a 'social ripple effect'.<sup>1065</sup> A reasonable accommodation can also extend benefits to others. For example, redesigning the workplace to be more accessible, providing ergonomically designed furniture, and creating a comfortable working environment, can increase efficiency and performance.<sup>1066</sup> These benefits are extended to both present and future employees. The employment of persons with disabilities has a general overarching benefit to society in the sense that they can contribute to the productive capacity of society. An employer must thus be able to see beyond the costs attached to their business when requests for accommodations are made.<sup>1067</sup> Therefore, the courts in South Africa have not shied away from calling on employers to be more receptive toward those with disabilities and other vulnerable groups

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<sup>1061</sup> *Standard Bank of SA* (n 806), [98].

<sup>1062</sup> *ibid* [138].

<sup>1063</sup> UNCRPD Committee (n 131), para 26 (e).

<sup>1064</sup> TAG (n 988), para 6.11.

<sup>1065</sup> Dimitris Anastasiou, Michael Gregory and James M Kauffman, 'Article 24: Education' in Ilias Bantekas, Michael A Stein and Dimitris Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (OUP 2018) 684.

<sup>1066</sup> Anna Nilson, 'Article 2: Definitions' in Ilias Bantekas, Michael A Stein and Dimitris Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (OUP 2018).

<sup>1067</sup> Michael Ashely Stein, 'The Law and Economics of Disability Accommodations' (2003) 53 *Duke LJ* 79.



whenever they make decisions that are likely to impact their employment opportunities negatively. For instance, in *Legal Aid South Africa v Jansen* (hereinafter *Jansen*),<sup>1068</sup> the Labour Appeal Court, noting the prevalence of depression in South Africa, stated that ‘employers have a duty to deal with [depression] sympathetically and should investigate it fully and consider reasonable accommodation and alternatives short of dismissal’.<sup>1069</sup> And in *Hoffmann v South African Airways* (hereinafter *Hoffmann*),<sup>1070</sup> the Constitutional Court stated that people living with HIV must be treated with compassion and understanding. The court thus called on employers to apply the African communitarian principle of *ubuntu* and to consider the inherent worth and dignity of employees living with HIV before applying and justifying an inherent requirement of the job standard that only HIV-negative individuals could be considered for employment as cabin crew.<sup>1071</sup> (This case is revisited in part III of the chapter).

From these cases, the proportionality analysis also considers the inherent dignity of persons with disabilities, the right to equality and the need to eliminate unfair employment discrimination. Ultimately an employer’s undue hardship defence will also have to be weighed against society’s benefit of promoting equal employment opportunities for persons with disabilities. Hence in *SA Airways (Pty) Ltd v Jansen van Vuuren and Another*,<sup>1072</sup> the court said:

What is clear is that in considering the issue of fairness under the [EEA 1998], the position and interests of the employee and employer must be considered and balanced, and that the objectives of the EEA must be the guiding light in applying a value judgment to established facts and circumstances. The determining factor, however, is the impact of the discrimination on the victim. This is consistent with the approach in *Hoffmann*.<sup>1073</sup>

The South African courts place the burden of proving the impossibility of accommodating an employee without imposing unjustifiable/undue hardship or insurmountable operational difficulty on the employer. Here again, South Africa’s approach to the burden of proof is

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<sup>1068</sup> [2020] ZALAC 37.

<sup>1069</sup> *ibid* [50].

<sup>1070</sup> [2000] ZACC 17.

<sup>1071</sup> *ibid* [38].

<sup>1072</sup> [2014] ZALAC 108.

<sup>1073</sup> *ibid* [44].

consistent with that of the CRPD Committee, which does not call for shifting burdens of proof, unlike the American position. The CRPD notes that ‘the burden of proof rests with the duty-bearer who claims that his or her burden would be disproportionate or undue’.<sup>1074</sup> Therefore, according to the TAG, an objective assessment must be carried out to raise unjustifiable hardships as a justification for not providing accommodation.<sup>1075</sup> This objective process involves the following:

- (a) the effectiveness of the reasonable accommodation and the extent to which it might negatively affect an employer’s business operations.
- (b) the impact of providing or failure to provide reasonable accommodation to the employee.
- (c) the systemic patterns of inequality in society.
- (d) the objectives of the EEA 1998 Act and the Constitution.<sup>1076</sup>

Unlike the American approach, as demonstrated above, the South African approach appears more concerned with the hardship and detriment that an individual with a disability is likely to experience if they are not reasonably accommodated instead of the employer’s hardship. The approach is consistent with that of the CRPD Committee. Whilst acknowledging the cost implications associated with accommodating persons with disabilities in the workplace, the TAG is quick to point out that the ‘benefits [of] employing persons with disabilities often outweigh the cost of reasonable accommodation’.<sup>1077</sup> To reduce the financial burden employers might face in accommodating persons with disabilities, the TAG has commended firms that have established a central fund for financing reasonable accommodation.<sup>1078</sup> A central fund maintains consistency of criteria for accommodations and optimises efficiency.<sup>1079</sup> The Code of Good Practice also provides that ‘an accommodation that imposes an unjustifiable hardship for one employer at a specific time may not be so for another or for the same employer at a different time’.<sup>1080</sup> The Code is, therefore, cognisant of the fact that reasonable accommodation is not a one-size-fits-all scenario and that each

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<sup>1074</sup> UNCRPD Committee (n 131), para 26(g).

<sup>1075</sup> TAG (n 988) para 6.12.

<sup>1076</sup> See *Standard Bank of SA* (n 806) [106].

<sup>1077</sup> TAG (n 988), para 6.14.1.

<sup>1078</sup> *ibid* para 6.14.2.

<sup>1079</sup> *ibid*.

<sup>1080</sup> Department of Labour (n 985) para 6.13.

case must be judged on its own merits (as noted above). Therefore, according to the TAG, ‘an unjustifiable hardship that was identified previously should not influence current or future reasonable accommodation decisions’.<sup>1081</sup>

While undue burden operates as a defence against discrimination following a failure to reasonably accommodate an employee with a disability, another defence open to an employer relates to the ‘inherent requirements of a job’ examined below.

### **PART III**

#### **7.4 An inherent requirement of a job**

Some jobs may require an individual to possess specific attributes or characteristics considered desirable and a prerequisite for a particular job. For instance, some jobs may have age, height, weight, sex, or nationality requirements or the need to meet specific physical fitness standards. Such conditions are, for all intents and purposes, discriminatory. It is, therefore, crucial to determine if a requirement or qualification is necessary for the performance of a particular job and not discriminatory. Indeed, the employer is usually the only one with information on the selection criteria, credentials, and evaluation of candidates for a position.<sup>1082</sup>

The law in Zambia under the ECA 2019 now provides an employer with a defence against an unfair discrimination suit in situations where the employer makes an employment decision based on criteria which would otherwise be discriminatory. Section 5(3)(b) of the ECA 2019 provides that, ‘it is not discrimination to ‘distinguish, exclude or prefer any person on the basis of an inherent requirement of a job’. As such, the prohibition against discrimination in the workplace is not absolute. Therefore, employers in Zambia can reject candidates who cannot meet a particular position’s inherent requirements. For example, section 14 of the ECA 2019 requires an employer to prioritise the employment of Zambians unless they lack the skills or don’t apply for the position. In this sense, nationality (Zambian citizenship) can be regarded as an inherent job requirement, and an employer’s preference for employing

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<sup>1081</sup> TAG (n 988) para 6.13.

<sup>1082</sup> ILO (n 571).

Zambian citizens will not constitute unlawful discrimination. The Act does not define an inherent requirement of a job or what employers must consider when raising this defence.

#### 7.4.1 The meaning of inherent requirements of a job

The origins of using inherent requirements of the job standards can be traced to ILO's Convention 111 of 1958.<sup>1083</sup> The Convention explicitly prohibits discrimination based on race, colour, sex, religion, political opinion, national extraction and social origin.<sup>1084</sup> On the other hand, Article 1(2) of the Convention provides that 'any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination'. The ILO CEACR states that to be permissible under the Convention, any distinction or exclusion that nullifies or impairs equality of opportunity and treatment in employment and occupation must be based on the inherent requirements of a particular job.<sup>1085</sup>

The meaning of the word 'inherent' in the English text of the ILO Convention was based on the Oxford English Dictionary, which defined it as: 'existing in something as a permanent attribute or quality; forming an element, especially an essential element, of something; intrinsic, essential'.<sup>1086</sup> Therefore, the inherent requirements of a job relate to those that are 'necessary because of the very nature of the job in question'.<sup>1087</sup> When determining whether a limitation can be justified as essential, it is not enough to evaluate whether circumstances exist that would necessitate action to achieve a goal for which the provision in question authorises limitations. It is also important to assess if the actual form and scope of the measures proposed or implemented are appropriate for the circumstances. 'In other words, the limitation must be proportionate to the aim pursued'.<sup>1088</sup> Ultimately, the exception for inherent job requirements must cover legitimate needs specific to the job, post or position.

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<sup>1083</sup> Discrimination (Employment and Occupation) Convention, 1958 (No 111).

<sup>1084</sup> *ibid* art 1.

<sup>1085</sup> ILO Report of the CEACR (106th Conference Session Geneva 2017).

<sup>1086</sup> ILO, *Report of the Commission of Inquiry appointed under Article 26 of the Constitution of the International Labour Organisation to examine the observance of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), by the Federal Republic of Germany* (ILO Official Bulletin 1987), para 531.

<sup>1087</sup> *ibid* para 531.

<sup>1088</sup> *ibid* para 531.

Cole and Van der Walt note that the word ‘inherent’ suggests that ‘possession of a personal characteristic (for example being male, female, speaking a particular language, being free of a disability) must be necessary to perform the duties attached to a particular position effectively’.<sup>1089</sup> Inherent requirements of a job will also relate to the nature of the establishment in which the work is to be performed and not so much the activities and tasks being done.<sup>1090</sup> As such, the defence also takes into account the broader legislative and industrial context in which the job is performed. Further, ‘the necessary qualifications may be defined as those required by the characteristics of the particular job, in proportion to its inherent requirements’.<sup>1091</sup> Any limitation must therefore be required by the characteristics of the particular job in proportion to its inherent requirements.

It also needs to be pointed out that different jurisdictions may have different phrases which essentially all concern the same concept of ‘inherent requirements of the job’. In the UK the phrase used is ‘Occupational Qualifications’, whereas, ‘Bona Fide Occupational Qualification’ (BFOQ) is the preferred term in USA and Canada. For South Africa, the preferred phrase is ‘Inherent Requirement of a Job’ similar to Zambia. In fact, Section 5(3)(b) of the Zambian ECA 2019 is the same as Section 6(2)(b) of the South African EEA 1998, which refers to an inherent job requirement as a defence against unfair discrimination.<sup>1092</sup> The South African Labour Relations Act 1995 also provides that ‘a dismissal may be fair if the reason for dismissal is based on an inherent requirement of the particular job’.<sup>1093</sup> South African courts have adopted ILO’s definition of the meaning of ‘inherent’ and thus interpret an inherent requirement of the job as a ‘permanent attribute or quality forming...an essential element...and an indispensable attribute which must relate in an inescapable way to the performing of the job’.<sup>1094</sup>

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<sup>1089</sup> Elsabé Cynthia-Leigh Cole and Adriaan Van der Walt, ‘The Effect of Labour Legislation in the Promotion and Integration of Persons with Disabilities in the Labour Market’ (2014) *Obiter* 508, 520.

<sup>1090</sup> ILO (n 571).

<sup>1091</sup> ILO, ‘Survey on Equality in Employment and Occupation in respect of Convention No III’ (83rd Conference Session Geneva 1996) para 119.

<sup>1092</sup> Note that *The Zambia Labour Law Reform Issues Paper*, whose recommendations influenced some of the provisions in the ECA 2019, drew comparative perspectives from countries in the SADC sub-region such as South Africa and others. See Kalula and others (n 6) 3.

<sup>1093</sup> s 187 (2)(a).

<sup>1094</sup> See *Dlamini v Green Four Security* (2006) 11 BLLR 1074 (LC) [40]; *TDF Network Africa (Pty) Ltd v Faris* [2019] 2 BLLR 127 (LAC).

The ECA 2019 is silent on whether reasonable accommodations must be factored into an assessment of the inherent requirements of the job. The inherent requirements exception can disadvantage persons with disabilities where the exemption is not clarified. Without considerations of reasonable accommodation, an employer can make decisions based on preconceptions that an individual with impairments cannot do the job requirements. For example, 'an employer that is unfamiliar with the adapted equipment or technologies available may be unable to envision how a person with one arm or a visual impairment may execute specific activities'.<sup>1095</sup> According to the ILO, exclusions based on inherent requirements should be made objectively and with consideration of individual capacities.<sup>1096</sup> For persons with disabilities, this requires considering whether they can perform the inherent job requirements with or without accommodations.

Zambian courts are yet to make judicial pronouncements on the importance and place of the inherent requirements of the job exception in employment and disability law. However, the High Court in *Kingaipe*<sup>1097</sup> (decided before the enactment of the ECA 2019 and PWD 2012) considered whether employees with HIV/AIDS could be dismissed from work because of their HIV-positive status. Although the case does not directly address the inherent requirement of a job defence, the case is important as one which addresses, among other issues, medical discharge due to ill health. In this case, the court had to determine if the mandatory testing of two employees for HIV without their consent violated their human rights. The court also had to decide if the termination of employment for reasons related to their HIV status violated their rights as guaranteed by the Constitution and other international human rights instruments. In this case, the petitioners were two former Zambia Air Force (ZAF) employees. During their employment, the petitioners (albeit on different occasions) were requested to appear before a ZAF medical board of inquiry to assess their illnesses, determine their fitness to serve, and continue working in the Zambia Air force. They were later required to undergo compulsory medical check-ups where blood samples were taken. Neither petitioner was informed that an HIV test would be conducted. They were prescribed medication but not informed that they were being treated for HIV.

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<sup>1095</sup> Gaze and Smith (n 291) 140.

<sup>1096</sup> ILO (n 571).

<sup>1097</sup> *Kingaipe* (n 933).

Each petitioner was subsequently discharged from ZAF for being unfit for service but was never told about their HIV status. The petitioners only discovered that they had HIV after receiving counselling and undergoing blood tests from other health centres following their discharge from ZAF.

The court affirmed the respondent's decision to dismiss the petitioners on medical grounds and rejected the idea of accommodating them despite the court's position that the plaintiffs' prolonged illness constituted a disability. The court upheld the respondent's argument that the meaning of disability in the military was different from other settings in the sense that it had to do with 'physical fitness to perform military duties in ZAF'.<sup>1098</sup> Disability was defined as 'loss of normal function of a body part either temporal [sic] or permanent'. The court held that the petitioners were not medically fit for the positions they were originally employed for. The court agreed with and upheld the respondent's arguments that the 'petitioners were not discharged because of their HIV status but because of their medical conditions, which it was believed would likely remain the same'.<sup>1099</sup> It was argued that their medical conditions prevented them from maintaining the requisite standard of fitness expected by the military as stipulated in the provisions of the Defence Act and Regulations established under the Act, the ZAF manual and the assessment of the ZAF medical board. Although not explicitly mentioned, the court's opinion suggests that medical fitness of a prescribed standard was an inherent requirement of being employed in a military institution by stating that: 'It is the fitness of the soldier which determines the course of action and not necessarily the disease'.<sup>1100</sup> Ultimately, the court rejected the petitioners' request for reinstatement in the same capacity, rank and department or to be reassigned to 'appropriate and alternative' sections within the military establishment. The court observed that although the Defence Force Regulations provided for transfer or redeployment to another department, they did not apply to soldiers who were discharged for being permanently medically unfit for military service. The court disregarded the petitioners' testimony that they could still work in an alternative capacity

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<sup>1098</sup> *ibid* J52.

<sup>1099</sup> *ibid* J53.

<sup>1100</sup> *ibid* J55.

that did not require strenuous military tasks.<sup>1101</sup> Instead, the court heavily relied on the medical opinion regarding the petitioner's fitness and ability to work.<sup>1102</sup>

Although the *Kingaipe* case deals with employment in the military, it is still a good illustration of how employment standards and inherent job requirements can be applied in a manner that discriminates and excludes persons with disabilities from employment. Unfortunately, the court in *Kingaipe* did not address some of the dangers that are likely to arise when applying an inherent requirement of the job or similar standard for certain protected groups. Nonetheless, the facts of the case reveal how an inherent requirement of a job exception can exclude and disadvantage members of certain protected groups. Without guidance on examining the reasonableness of an inherent job requirement, it is difficult to challenge it when raised as a defence to a discriminatory job requirement.

Additionally, it is unclear if Zambian employers can successfully raise the inherent requirement of a job exception against disability discrimination claims in light of section 35(2) of the PDA 2012. Section 35(2) proscribes discrimination on the basis of disability with regard to:

[A]ll forms of employment, *including conditions* of recruitment, hiring and employment, continuance of employment, the creation, classification and abolition of positions, the determination of wages, pension or other benefits, apprenticeship, promotion, career advancement and safe and healthy working conditions'.<sup>1103</sup>

The defence's applicability against the employment of persons with disabilities is also complicated because the ECA 2019 transfers the responsibility of addressing workplace disability discrimination to the PDA 2012 and the MHA 2019. (See 5.7.1.1). Further, considering that the PDA 2012 enjoys 'superiority' (subject only to the Constitution) over other laws concerning the rights of persons with disabilities,<sup>1104</sup> the inherent requirement of a job exception can be questioned. A plaintiff can easily argue that the PDA 2012 has provided a specific defence (undue burden), and the inherent requirement of a job defence

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<sup>1101</sup> The petitioners did demonstrate this by stating that they were able to find employment elsewhere and in different capacities.

<sup>1102</sup> This case is a good illustration of how powerful the medical model of disability is in controlling the conceptualisation of disability in law and society generally. The court seemingly ignored the petitioners' lived experiences in preference for doctor's opinion regarding their ability to work.

<sup>1103</sup> Emphasis added.

<sup>1104</sup> PDA, s 3.



is not one of them. Nonetheless, it is indisputable that an employer is not under any obligation to employ a person who is not qualified to perform the essential functions of the job with or without reasonable accommodations. An employer is also not expected to employ someone who falls short of a fair and reasonable inherent requirement of a job standard, considering the nature of the occupational activities to be performed and the environment in which they are carried out. The lack of an inherent requirement of the job defence in the PDA 2012 does not mean that employers cannot raise it as a defence. Examining the criteria employed by other jurisdictions to determine the reasonableness of an inherent requirement of a job standard is helpful at this point as it provides some perspective concerning the nature of the defence.

#### 7.4.2 Comparative approaches to inherent job requirements

Although most of the decisions from the comparator jurisdictions do not touch on disability but mainly concern other protected attributes, courts are still required to interpret the inherent requirement of a job defence very strictly regardless of the attribute in question.<sup>1105</sup> The defence must be interpreted narrowly on a case-by-case basis to avoid any undue restriction to non-discrimination and equality of opportunity and treatment in employment.<sup>1106</sup> According to ILO, the general rule is that the burden of proof lies on the employer to prove that 'the special treatment is justified by objective reasons unrelated to a discriminatory criterion, or that this criterion constitutes an essential (or bona fide or legitimate) requirement for the work involved'.<sup>1107</sup>

Similarly, the CJEU in *Bougnaoui and Another v Micropole SA*<sup>1108</sup> stated that 'it is only in very limited circumstances that a characteristic related,... to [protected attributes] may constitute a genuine and determining occupational requirement'.<sup>1109</sup> The court thus observed that a 'genuine and determining occupational requirement', is 'objectively dictated by the nature of the occupational activities concerned or of the context in which

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<sup>1105</sup> Marié McGregor, 'The Inherent Requirements of a Job as a Justification for Discrimination' (2002) 10 JUTA'S BUS L 171.

<sup>1106</sup> ILO (n 1082).

<sup>1107</sup> ILO (n 571) ch VII.

<sup>1108</sup> Case C-188/15.

<sup>1109</sup> *ibid* [38].

they are carried out'.<sup>1110</sup> The court noted that subjective considerations such as customer preferences could sometimes apply. However, the court in this case held that customer preferences for an employee not to wear an Islamic headscarf did not constitute a genuine occupational requirement.

#### 7.4.2.1 South Africa

The South African courts also apply a restrictive interpretation of the inherent requirement of a job defence. In *Dlamini*,<sup>1111</sup> the Labour Court of South Africa stated, 'If a requirement in a code conflict with human rights law, the latter prevails'.<sup>1112</sup> Further, in *TDF Network Africa*,<sup>1113</sup> the Labour Appeal Court observed that the exceptional nature of the defence required a strict interpretation of an inherent requirement of a job standard. A purely commercial justification will not suffice. When it comes to establishing what an employer must prove when claiming that a particular characteristic or attribute is an inherent requirement of employment, the court held that the test was one of proportionality. To succeed, an employer must show that 'the requirement is rationally connected to the performance of the job' by demonstrating:

- (a) the requirement was adopted in a genuine and good faith belief;
- (b) it was necessary to fulfil a legitimate work-related purpose; and
- (c) it was reasonably necessary to accomplish that purpose.<sup>1114</sup>

However, even if the employer succeeds in establishing the above elements, the enquiry does not end there. According to the court, the employer must also prove 'that it is impossible to accommodate the individual employee without imposing undue hardship or insurmountable operational difficulty'.<sup>1115</sup> In this regard, the Court referred to and cited with approval the decision of the Labour Court in *SA Clothing and Textile Workers Union and*

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<sup>1110</sup> *ibid* [40].

<sup>1111</sup> *Dlamini* (n 1094).

<sup>1112</sup> *ibid* [43].

<sup>1113</sup> *TDF Network Africa* (n 1094).

<sup>1114</sup> *ibid* [37].

<sup>1115</sup> *ibid* [38].

*Others v Berg River Textiles - A Division of Seardel Group Trading (Pty)*,<sup>1116</sup> where it was held that:

The employer must establish that it has taken reasonable steps to accommodate the employee's religious convictions. Ultimately the principle of proportionality must be applied. Thus, an employer may not insist on the employee obeying a workplace rule where that refusal would have little or no consequence to the business.<sup>1117</sup>

The court in *TDF Network Africa*<sup>1118</sup> went on to note that 'the duty of reasonable accommodation imposed on the employer is one of modification or adjustment to a job or the working environment that will enable an employee operating under the constraining tenets of [the employee's] religion to continue to participate or advance in employment'. Further, the court stated that 'the evidentiary burden of showing undue hardship by non-compliance with the requirement is on the employer'.<sup>1119</sup> In this case, the employer's failure to reasonably accommodate the employee and the failure to discharge the evidentiary burden necessary to sustain the defences of fair discrimination meant the employee's dismissal for refusing to work on Saturdays for religious reasons was automatically unfair.

While these cases above are mainly concerned with religious discrimination, the proportionality principle and the accommodation requirements can equally be applied where disability discrimination is concerned. Thus, in *Hoffmann*,<sup>1120</sup> the Constitutional Court of South Africa held that being HIV/AIDS negative was not an inherent requirement of a job for a cabin attendant in the national airline. While the decision, in this case, does not employ a proportionality test, it warns employers against basing their inherent requirement of job standards on stereotype, ignorant or prejudicial assumptions about persons with disabilities (in this case, people living with HIV). Therefore, while acknowledging that legitimate commercial requirements are important in determining whether to employ an individual, the Constitutional Court warned 'against allowing stereotyping and prejudice to creep in under the guise of commercial interests'.<sup>1121</sup> As shown below, this is a thematic commonality with other comparator jurisdictions. (In the USA, the courts will not readily

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<sup>1116</sup> (2012) 33 ILJ 972 (LC).

<sup>1117</sup> *ibid*, [38.6].

<sup>1118</sup> *TDF Network Africa* (n 1094).

<sup>1119</sup> *ibid* [48]-[49].

<sup>1120</sup> *Hoffmann* (n 1070).

<sup>1121</sup> *ibid* [34].

accept the inherent requirements of a job defence as a 'get-out' clause where an employer's requirements are based on stereotypical assumptions about a particular class or protected group).

Further, the court in *Hoffmann* noted that the acceptance of every human being's inherent dignity and the abolition of all forms of discrimination are necessary for society's greater good.<sup>1122</sup> Thus an interesting aspect of the court's decision was its extension and use of the African communitarian concept of *Ubuntu*, stating that employers must show *Ubuntu* towards people living with HIV.<sup>1123</sup> Thus, any employer's decision or application of an inherent requirement of a job standard will have to consider the 'economic death' that the marginalised, such as people living with HIV and, by extension, persons with disabilities, are likely to face when deprived of equal opportunities in employment.<sup>1124</sup> To this end, the court adopted the remarks of Tipnis J in *MX of Bombay Indian Inhabitant v M/s ZY and another*<sup>1125</sup> where it was stated:

...the most important thing in respect of persons infected with HIV is the requirement of community support, economic support and non-discrimination of such person....the State cannot be permitted to condemn the victims of HIV infection, many of whom may be truly unfortunate, to certain economic death....The interests of the HIV positive persons, the interests of the employer and the interests of the society will have to be balanced in such a case.<sup>1126</sup>

#### 7.4.2.2 Canada

The South Africa proportionality principle is the mirror image of the three-part test developed under Canadian jurisprudence. In Canada, the test was developed to distinguish between direct and adverse effect discrimination in determining if a BFOQ could be justified. To succeed in establishing the BFOQ defence, the Canadian Supreme Court in *British Columbia (Public Service Employee Relations Commission) v BCGSEU*<sup>1127</sup> (*Meiorin* case), formulated a three-part test requiring an employer to demonstrate on a preponderance of probabilities that:

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<sup>1122</sup> *ibid.*

<sup>1123</sup> *ibid* [38].

<sup>1124</sup> *ibid* [38].

<sup>1125</sup> AIR 1997 Bom 406, 431.

<sup>1126</sup> As quoted in *Hoffman* at [38].

<sup>1127</sup> [1999] 3 SCR 3.

- (a) it adopted the standard for a purpose rationally connected to the performance of the job;
- (b) it adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
- (c) the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose.

Additionally, to show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

Further, according to the Supreme Court of Canada in *British Columbia (Superintendent of Motor Vehicle)*,<sup>1128</sup> the *Meiorin* test allows the employer or duty-bearer to choose its purpose or goal provided they do so in good faith or legitimately. Once this is done, the focus will be on how the purpose or goal will be achieved. Additionally, 'the means must be tailored to the ends'.<sup>1129</sup> Nonetheless, a BFQO can only be justified where the employer or duty-bearer 'has made every possible accommodation short of undue hardship'. Every effort must therefore be made to ensure that 'standards are as inclusive as possible'.<sup>1130</sup> The Court also noted that providing reasonable accommodation is important because it ensures that each person is assessed according to their abilities rather than presumed group characteristics.

#### 7.4.2.3 UK

The principle of proportionality also applies in the UK under the occupational requirement defence in paragraph 1(1) of Schedule 9 to the EqA 2010. The defence covers all the protected grounds, including disability (but only applies to direct and indirect discrimination). For one to successfully raise an occupational requirement defence, they must establish, whilst having regard to the nature or context of the work, that:

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<sup>1128</sup> *British Columbia (Superintendent of Motor Vehicle)* (n 1019).

<sup>1129</sup> *ibid* [21].

<sup>1130</sup> *ibid* [21]-[22].

- (a) it is an occupational requirement;
- (b) it is a proportionate means of achieving a legitimate aim; and
- (c) a job applicant or worker does not meet the job requirements, or the employer has reasonable grounds for not being satisfied that the applicant or worker meets the requirement.

*The Equality Act 2010 Code of Practice on Employment* provides additional guidance by stating that 'the requirement must not be a sham or pretext and there must be a link between the requirement and the job'.<sup>1131</sup>

#### 7.4.2.4 USA

In the USA, the BFOQ defence is expressly permitted under Title VII of the Civil Rights Act 1964,<sup>1132</sup> and the Age Discrimination in Employment Act 1967 (ADEA 1967).<sup>1133</sup> The ADA 1990, instead of a BFOQ defence, has a business necessity defence. Therefore, the employer has a defence against a disparate impact (or indirect discrimination) complainant if they can establish that applying qualification standards, tests, or selection criteria is job-related and consistent with business necessity. Employers must also show that the job cannot be performed with reasonable accommodation as required under the Act.<sup>1134</sup> According to the EEOC's technical guidance, 'if a test or other selection criterion excludes an individual with a disability because of the disability and does not relate to the essential functions of a job, it is not consistent with business necessity'.<sup>1135</sup> Thus, if a person with a disability can perform the job's essential functions, they are deemed qualified for the position, and the business necessity defence will not stand. Additionally, even if the employer can show that a qualification standard or selection criterion is job-related and compatible with business

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<sup>1131</sup> Equality and Human Rights Commission, *Employment Statutory Code of Practice*, para 13.7.

<sup>1132</sup> Civil Rights Act 1964, s 703(e).

<sup>1133</sup> ADEA 1967, s 623(f)(1).

<sup>1134</sup> ADA 1990, s 103(a).

<sup>1135</sup> EEOC, *Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act* (1992), para 4.3(2).

necessity, it may not be used to exclude someone with a disability if the standard or criterion can be met with reasonable accommodation.<sup>1136</sup>

In most cases, BFOQs only apply when they are deemed reasonably necessary for the normal running of a business. The courts require that a BFOQ be genuinely necessary for the business and the efficient performance of the job. Thus, similar to the decisions of the South African Courts, a BFOQ cannot be based on stereotypical assumptions about a particular class.<sup>1137</sup> Where sex is a BFOQ, an employer must have a factual and evidence-based justification demonstrating that the exclusion of a particular sex is premised on the efficient performance of the job and health and safety concerns.<sup>1138</sup> The justification for a BFOQ defence in sex discrimination cases can also be extended to disability discrimination cases where safety concerns are an issue.<sup>1139</sup> For example, a blind individual will not be able to meet the requirements of a bus driving job.<sup>1140</sup>

Further, race or colour cannot be used as determinants of a BFOQ.<sup>1141</sup> Although not prohibited, the US courts will also not readily accept customer preference as a means of justifying employment discrimination in the areas of religion, gender, and national origin. For instance, in *Diaz v Pan Am World Airways, Inc*<sup>1142</sup> it was held that it would be inappropriate to refuse to hire a male flight attendant solely because passengers preferred to be served by female attendants.

The above analysis has revealed several common themes in how the inherent requirement of a job defence is applied and interpreted. As an exception to discrimination, an inherent job requirement should be applied cautiously. The inherent requirement of the job defence will rarely be allowed as evidenced from the court decisions from the comparator jurisdictions above. The test applied is based on rationality where the employer must show that the inherent requirement was established in good faith and is legitimate and reasonably necessary to perform the job. The courts will not accept this defence where an

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<sup>1136</sup> *ibid.*

<sup>1137</sup> *International Union v Johnson Controls, Inc* 499 U.S. 187, 206-07 (1991).

<sup>1138</sup> *ibid.*

<sup>1139</sup> See *Matter of Schor v St. Francis Hospital* 111 AD 2d 852 (1985).

<sup>1140</sup> Gaze and Smith (n 291).

<sup>1141</sup> EEOC, 'Guidance on Section 15 Race and Color Discrimination' (19 April 2016).

<sup>1142</sup> 442 F.2d 385 (1971).

employer has not made reasonable efforts to accommodate an individual to the point of undue burden. Disregarding the accommodation duty would probably make an inherent job requirement discriminatory.

## PART IV

### 7.5 Conclusion

This chapter examined the statutory defences against the reasonable accommodation duty. It was observed that the meaning of the terms 'reasonable' and 'undue burden' can create challenges for implementing the reasonable accommodation duty in Zambia. This is because the law does not provide concrete guidance concerning the practical implementation of reasonable accommodation beyond its definition. The law does not define the term 'undue burden' or provide for the factors that would constitute an undue burden. Without guidance on reasonable accommodation and other disability-related matters, eliminating discrimination and promoting equality for persons with disabilities becomes challenging. Zambia should implement guidelines to aid the interpretation and application of disability law, similar to what some comparator jurisdictions have done.

The comparative analysis observed that the relationship between reasonable accommodation and undue burden requires balancing the needs and interests of the individual to be accommodated and those of the duty-bearer. This balancing act considers the relevance and effectiveness of accommodations, as well as the expected goal of countering discrimination against duty-bearers' undue burden defence.

This thesis endorses the CRPD and South African approaches to reasonable accommodation and undue burden.<sup>1143</sup> The reasonableness and proportionality test under both approaches seeks to ensure the employment of persons with disabilities, promotes equality and eliminates discrimination. The reasonableness of an accommodation is based on its effectiveness and how it allows a person with disabilities to perform job functions efficiently. Although an employer has a duty to accommodate an employee with a disability

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<sup>1143</sup> It still needs mentioning that although South Africa has adopted an expansive approach to reasonable accommodation it still needs to improve awareness among employers about the importance of reasonable accommodation, as pointed out by the CRPD Committee. (See UNCRPD Committee (n 67)).



to the point of undue burden, both approaches require the employer to show that all viable options have been explored to accommodate the employee. Both approaches consider the benefits of employing persons with disabilities for society. Therefore, for the employer, employing persons with disabilities can improve the company's efficiency and profitability, thereby giving it a competitive advantage over others.<sup>1144</sup> Other employees are also likely to enjoy working in a diverse environment. For persons with disabilities, employment can help them gain a sense of identity, self-worth and fulfilment as equal contributors to society's welfare.<sup>1145</sup> For society, the employment of persons with disabilities reduces the unemployment rate. Indeed, with an increased income from employment comes a higher standard of living, ultimately translating into poverty reduction. And as persons with disabilities become more financially independent, there will be a reduction in public expenditure owing to the decrease in the number of people requiring social-welfare benefits such as unemployment allowances. Further, the tax base is also likely to widen, thereby increasing the pool of resources from which the government can draw. Brown notes that courts can 'correct the asymmetric treatment of costs by recognising the existence of positive externalities of accommodation and taking these into account when evaluating whether a proposed accommodation is reasonable'.<sup>1146</sup>

The efficiency of measures to accommodate persons with disabilities must not only seek to achieve equality but must also consider human dignity.<sup>1147</sup> Therefore, the CRPD Committee notes that 'reasonable accommodation seeks to achieve individual justice in the sense that non-discrimination or equality is assured, taking the dignity, autonomy and choices of the individual into account'.<sup>1148</sup>

In addition to the above, by requiring that employers show *ubuntu* to employees with disabilities, the South African courts essentially view the duty of reasonable accommodation within the workplace as similar to other forms of communal help and support within wider

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<sup>1144</sup> Magdalene C H Ang, 'The Challenges and Benefits of Employing Persons with Disabilities: The Japanese Multinational Corporations' (2017) 5 IJIMT 359.

<sup>1145</sup> Sara Saunders and Bernadette Nedelec, 'What Work Means to People with Work Disability: A Scoping Review' (2014) 24 JOR 100.

<sup>1146</sup> Christopher B Brown, 'Incorporating Third-Party Benefits into the Cost-Benefit Calculus of Reasonable Accommodation' (2010–2011) 18 Va J Soc Pol'y & L 18 319, 329.

<sup>1147</sup> Broderick (n 534).

<sup>1148</sup> UNCRPD Committee (n 868), para 26.

society. As has already been examined, the whole premise of African communitarians lies in its emphasis on the interdependence of community: hence the Zulu adage, *Umuntu Ngumuntu Ngabantu* which means 'a person is a person because of others'.<sup>1149</sup> Nussbaum notes that '*Ubuntu* is the consciousness of our natural desire to affirm our fellow human beings and to work and act towards each other with the communal good in the forefront of our minds'.<sup>1150</sup>

Therefore, if a person is excluded from society, in this case, the workplace, they are denied the ability to enjoy the fruits of full citizenship and deprived the opportunity to fully develop.<sup>1151</sup> Inclusion is important to communitarians, as echoed in one of the fundamental principles of Zambian Humanism. (See chapter 4). Thus, regarding workplace relations, the worker in a humanist society must have a direct say in how the enterprise's affairs are managed. This also includes having a say in how resources should be allocated.<sup>1152</sup> For an employee with disabilities, the implications of this are that they must have a voice concerning the resources required for the provision of a requested accommodation. While this might sound far-fetched considering managerial prerogative over resource allocation, it still places the employer on notice that they cannot easily sidestep their accommodation duty by simply raising the undue burden defence. The employer will be required to explore all possible alternatives in conjunction with the employee with disabilities before they can successfully raise the undue burden defence.

In this regard, Zambia must adopt an expansive interpretation of reasonable accommodation to promote and protect equal employment opportunities for persons with disabilities. Canadian jurist and former Chief Justice of Canada Madam Justice Beverley McLachlin, states the case for reasonable accommodation by noting that societies have two choices. They can either choose the 'route of no accommodation where those with power set the agenda, and the majority rules prevail'. Alternatively, they can pursue the route of reasonable accommodation. Adopting the former approach results in 'the exclusion of some

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<sup>1149</sup> Augustine Shutte, 'Umuntu Ngumuntu Ngabantu: An African Conception of Humanity' (1990) 5 *Philosophy and Theology* 39.

<sup>1150</sup> Barbara Nussbaum, 'African Culture and Ubuntu Reflections of a South African in America' (2003) 17 *Perspectives* 1,2.

<sup>1151</sup> Dickson (n 554).

<sup>1152</sup> Kaunda (n 122).

people from useful endeavours on irrelevant, stereotypical grounds and the denial of individual dignity and worth...'.<sup>1153</sup> On the other hand, the route of reasonable accommodation is premised on one's 'individual worth and dignity and entitlement to equal treatment and benefit'. 'It operates by requiring that the powerful and the majority adapt their own rules and practices, within the limits of reason and short of undue hardship, to permit the realisation of these ends'.<sup>1154</sup>

Lastly, arising from the various thematic commonalities from the comparator jurisdictions, Zambia would do well to amend the ECA 2019's inherent requirement of a job provision to apply the principle of proportionality. A proportionality test will stop employers from using the inherent requirement of a job exception to unfairly disqualify people with disabilities and other protected groups from employment. This will also ensure that any job requirement is rationally connected to and reasonably necessary for performing the job's essential functions.

Overall, the interplay between inherent requirements of a job and reasonable accommodation aims to strike a balance between the rights of persons with disabilities to fair employment opportunities and the legitimate needs of employers to maintain effective and productive workplaces. Employers must be proactive in providing reasonable accommodation when required, ensuring a more inclusive and diverse workforce.

While chapters 6 and 7 have been mainly concerned with reasonable accommodation and other related issues that an individual with disabilities must navigate in the workplace, the next chapter goes beyond the workplace and examines the role of the courts in protecting the right to work as an ESC right.

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<sup>1153</sup> Justice Beverley McLachlin, 'Reasonable Accommodation in a Multicultural Society' (Address to the Canadian Bar Association Continuing Legal Education Committee and National Constitutional and Human Rights Section, Calgary, Alberta, 7 April 1995) quoted in Alice Taylor, 'Disability Discrimination, the Duty to Make Adjustments and the Problem of Persistent Misreading' (2019) 45 Mon LR 461.

<sup>1154</sup> *ibid* 462.

## **Chapter 8: The Role of the Courts in Protecting the Right to Work for Persons with Disabilities in Zambia**

### **PART I**

#### **8.1 Introduction**

This chapter focuses on how the Zambian courts have operated when confronted with questions on the legal enforcement of ESC rights. It will determine the court's role in promoting the right to work for persons with disabilities in the context of ESC rights. The chapter pulls the themes of the other chapters together by analysing the right to work within the broader context of ESC rights.

The right to freely choose or accept work for persons with disabilities and, indeed, for anyone is contingent on various conditions. As indicated in chapter 1, the State has a general obligation to respect, protect and fulfil each person's right to work and the freedom to choose or accept work. The State must put in place measures to ensure the labour market meets the needs and preferences of those seeking employment (as much as is feasible). The lack of employment opportunities for persons with disabilities is a multifaceted issue linked to a lack of educational opportunities and limited access to health care and social services. Therefore, guaranteeing access to the labour market for persons with disabilities requires allocating resources to social services and public infrastructure. However, implementing several of these measures is subject to their progressive realisation and depends upon the availability of resources. Unfortunately, the State might disguise as legitimate the deliberate derogation of its obligations to facilitate the employment of persons with disabilities by arguing that it does not have the resources to do so or because of a financial crisis and debt restructuring mechanism.<sup>1155</sup> What recourse would persons with disabilities have in such a situation?

Disability-based discrimination is likely to be more pervasive within the socioeconomic and cultural contexts as opposed to the civil and political contexts. Therefore, ensuring that persons with disabilities have access to work and equal employment opportunities requires

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<sup>1155</sup> Fasciglione (n 55).

a holistic approach to human rights beyond protecting individual civil liberties and freedoms. As such, the CRPD Committee requires State parties to create accessible and effective means to address disability discrimination and to ensure that victims of disability discrimination have equal access to justice.<sup>1156</sup> The Committee also requires timely intervention from a State party where the rights to equality and non-discrimination of persons with disabilities have been violated by the acts or omissions of either public or private actors in terms of civil and political rights (CP rights), as well as ESC rights.<sup>1157</sup>

One significant challenge in Zambia is that the constitutional framework only provides for a select number of rights – primarily CP rights and not ESC rights. Considering that the Zambian Bill of Rights does not expressly guarantee ESC rights, presenting complaints for violations of a right not explicitly stipulated can be quite challenging. This, therefore, requires that the judiciary take an active role in enforcing ESC rights by adopting a more expansive reading of the Constitution’s non-discrimination clause, the CP rights provisions, and the Constitutional values and principles. The courts can also serve as a valuable means of monitoring the duty-bearer’s obligations and violations of rights.

Therefore, this chapter supports Broderick’s proposal to use ‘reasonableness’ (as developed by the South African Constitutional court) to assess the State’s compliance with its obligations to realise ESC rights for persons with disabilities.<sup>1158</sup> Notably, the factors considered by the reasonableness review process reflect Zambian Humanism principles. Among the factors are equality, human dignity, participatory democracy and accountability. The chapter will also show that the Constitution can support these factors despite the unfortunate absence of ESC rights and disability rights in the Constitution.

The chapter has several parts. Part two, which comes after this introductory part, examines how the courts in Zambia approached the issue of judicial enforcement of ESC rights before 2019. Part three examines the Supreme Court’s 2019 landmark *Mwanza* decision and how it embraced justiciable ESC rights via CP rights. This part also examines what *Mwanza* might entail for disability rights. Parts four and five explore the progressive realisation of ESC rights

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<sup>1156</sup> UNCRPD Committee (n 131), para 31(b).

<sup>1157</sup> *ibid* para 73(h).

<sup>1158</sup> Andrea Broderick, ‘Harmonisation and Cross-Fertilisation of Socio-Economic Rights in the Human Rights Treaty Bodies: Disability and the Reasonableness Review Case Study’ (2016) 5 *Laws* 1; Broderick (n 534).

and argue that the courts should use the reasonableness review to assess compliance with the country's obligations to respect, protect and fulfil ESC rights for persons with disabilities. Part six concludes with a reflective summary.

## PART II

### 8.2 Judicial interpretations of ESC rights in Zambia

This section of the thesis examines how the judiciary in Zambia has interpreted Economic, Social and Cultural (ESC) rights from their establishment as directive principles of state policy before 2016 to the period following the 2016 constitutional revisions. It is important to have an understanding of the hierarchy of the courts in Zambia (Figure 8-1), specifically the High Court, the Constitutional Court and the Supreme Court, as they are the focus of this chapter. The Supreme Court is the highest court in the country and serves as the final court of appeal. The Constitutional Court has the same level of authority as the Supreme Court but only has the power to determine constitutional matters. The High Court has both original and appellate jurisdiction and has original jurisdiction in determining matters related to the Bill of Rights.

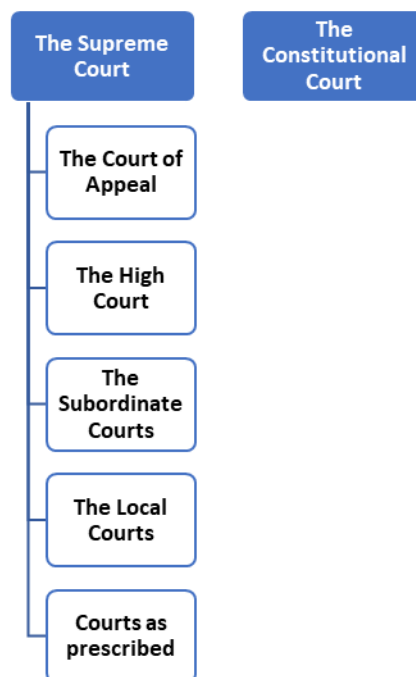


Figure 8-1 Hierarchy of courts in Zambia

### 8.2.1 Directive principles of state policy (pre-2016)

Before the 2016 constitutional amendments, ESC rights, such as the right to work and disability rights, were expressed as 'Directive Principles of State Policy' in the Constitution.<sup>1159</sup> Therefore, given their characterisation via a neo-liberal lens, ESC rights could only enjoy the status of aspirational developmental goals. To this end, the State was to endeavour to:

- Create an economic environment to encourage individual initiative and self-reliance and promote private investment;
- Create conditions suitable for securing livelihood and employment opportunities;
- Provide water, medical facilities, and shelter;
- Provide equal and adequate educational opportunities;
- Provide persons with disabilities, the aged and other disadvantaged persons social benefits and amenities suitable to their needs in a just and equitable manner; and
- Recognise the right to fair labour practices and safe and healthy working conditions.<sup>1160</sup>

Although described as rights, these principles were non-legally binding.<sup>1161</sup> Their purpose was to guide the executive, legislature and judiciary in their functions. Moreover, applying the directive principles was always a political decision, as they could only be observed to the extent of State resources or where the cabinet deemed necessary for public welfare.<sup>1162</sup>

Relegating ESC rights to non-justiciable directive principles of state policy made pursuing violations of ESC rights more complex than CP rights. This is illustrated by the High Court's decision in *Kingaibe*.<sup>1163</sup> In this case, among other things, the petitioners alleged violations of their rights to adequate medical and health facilities and equal and adequate educational opportunities under the Constitution's directive principles of state policy. The petitioners also alleged that the respondents had violated their right to secure adequate means of livelihood and employment. The petitioners argued that the directive principles of state

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<sup>1159</sup> Constitution of Zambia (as amended by Act No 18 of 1996) (COZ 1996), art 112 (repealed).

<sup>1160</sup> *ibid.*

<sup>1161</sup> *ibid* art 111.

<sup>1162</sup> *ibid* art 110(2).

<sup>1163</sup> *Kingaibe* (n 933). (Refer to 7.4.1 for facts of case).

policy, while not legally enforceable, constituted enforceable rights within international human rights treaties. However, the court did not agree with the petitioners' argument.<sup>1164</sup> Lamentably, the court did not address whether the directive principles could be regarded as legally enforceable and justiciable rights when brought under the ambit of international human rights treaties. Without any guidance on the issue, the court dismissed the petitioners' argument by holding that they had not provided evidence supporting any violations of the rights in question. The question remains whether the court would have regarded the violation of the rights established under the directive principles as legally enforceable had the evidence been produced to support the claims.<sup>1165</sup>

### 8.2.2 Enter 'national values, principles and economic policies' (post-2016)

Following its amendment in 2016, the Constitution does not contain any 'Directive Principles of State Policy' provisions. Instead, the Constitution contains a list of 'National Values, Principles and Economic Policies', which have replaced the Directive Principles of State Policy.<sup>1166</sup> According to the Constitution, the national values and principles are:

- (a) morality and ethics;
- (b) patriotism and national unity;
- (c) democracy and constitutionalism;
- (d) human dignity, equity, social justice, equality and non-discrimination;
- (e) good governance and integrity; and
- (f) sustainable development.<sup>1167</sup>

The Constitution provides that the values and principles must be applied when interpreting the Constitution, enacting legislation and developing and implementing State policy.<sup>1168</sup> There is no provision in the Constitution suggesting that the national values, principles and economic policies are non-justiciable rights or require progressive realisation. Despite this, some courts still regard them as having the same or similar effect as their predecessors.

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<sup>1164</sup> Interestingly the court had resorted to international human rights treaties when considering the right to privacy and the right to protection from inhuman and degrading treatment.

<sup>1165</sup> Mumba Malila, 'The Dearth of the Rights of HIV-Positive Employees in Zambia: A case Comment' on *Stanley Kangaibe and Another v Attorney-General* (2012) 12 Afr Hum Rts LJ 579.

<sup>1166</sup> See *Mwanza* (n 620), [7.6].

<sup>1167</sup> COZ 2016, art 8 and 9.

<sup>1168</sup> *ibid* art 9.



Thus, in *Mwewa*,<sup>1169</sup> the Zambian High Court held that national values and principles are symbolic and influence society's interpretation and application of the law. The court held that the Government could only progressively realise the national values and principles as they are merely aspirations that do not attach any immediate obligation to the Government.<sup>1170</sup>

To that end, the court was hesitant to address the State's alleged infringement of access to healthcare and rehabilitation services due to the State's continued reliance on the pre-colonial MDA 1949. Instead, the court held that 'there was more need for a socio-economic approach in implementing the identified need rather than a preference for a legal declaration'.<sup>1171</sup>

The court's avoidance of a ruling on the right to health care and rehabilitation services may have been due to arguments that ESC rights are outside the court's authority under the separation of powers doctrine. That is, the judiciary should not enforce ESC rights, as this would interfere with the executive policymaking and resource allocation powers.<sup>1172</sup> It is often suggested that the protection of ESC rights should be the preserve of policymakers, not the judiciary, which lacks the expertise to handle social-economic issues.<sup>1173</sup> 'Critiques of judicial enforcement of socio-economic rights suggest that the courts, which hear cases on an individual basis, are not equipped to deal with issues that require a broader view'.<sup>1174</sup> However, this can be challenged, given that courts regularly handle cases that require decisions on complex issues. Courts often have to make decisions under many legal matters, which could have implications even for those whose claims would not have come before the courts.<sup>1175</sup> Thus, 'Judges who know their business... can find both properly adjudicative standards for testing claims of social-rights violations and worthwhile, properly judicial

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<sup>1169</sup> *Mwewa* (n 292).

<sup>1170</sup> *ibid* J24.

<sup>1171</sup> *ibid* J46.

<sup>1172</sup> Amir Paz-Fuchs, 'The Fiscal Objection to Social Welfare Rights' in Gideon Sapir, Daphne Barak-Erez and Aharon Barak (eds), *Israeli Constitutional Law in the Making* (Hart 2013).

<sup>1173</sup> Mumba Malila, 'The Sleep of the Just: Misunderstanding Economic, Social and Cultural Rights in Zambia' (2010) 41 *Zam LJ* 106.

<sup>1174</sup> Paz-Fuchs (n 1172) 337.

<sup>1175</sup> *ibid*.

remedies for violations when found<sup>1176</sup> as ably demonstrated by the decision in *Brotherton* highlighted chapter 5.

Further, the Supreme Court in *Mwanza* has observed with regret the apathy of High Court judges to pronounce themselves on socio-economic matters that warrant positive action from the State. According to *Mwanza*, this is because ESC rights are listed as directive principles of state policy or as national values.<sup>1177</sup> Secondly, because they are subject to progressive realisation where government resources permit, ‘they have traditionally not been legally enforceable like their civil and political counterparts’.<sup>1178</sup> As such, the common-sense attraction for judges has often been to think that ‘all rights of a social economic and cultural kind, are not justiciable’.<sup>1179</sup> As will be examined below, the Supreme Court has held that this approach is ‘conceptually wrong and empirically unfounded’.<sup>1180</sup> Some ESC rights can also be protected negatively and will not always require positive action from duty-bearers.<sup>1181</sup> And as *Brotherton* demonstrates, CP rights violations may also occur from the State’s inaction to take proactive steps to remove obstacles towards their enjoyment.

### 8.2.3 A purposive approach to national values, principles, and economic policies

Unlike the High Court’s decision in *Mwewa*, the Constitutional Court has held that the judiciary’s role in upholding the values and principles also entails adopting a purposive approach to interpreting the Constitution where the literal or ordinary meaning of the words leads to absurdity.<sup>1182</sup> Hence, in *Steven Katuka and Law Association of Zambia v The Attorney General and Ngosa Simbyakula and others*, the Constitutional Court stated:

As a starting point, we wish to observe that Article 267 (1) enjoins us to interpret the Constitution in accordance with the Bill of rights and in a manner that promotes its

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<sup>1176</sup> Frank I Michelman, ‘The Constitution, Social Rights and Liberal Political Justification’ in Daphne Barak-Erez and Aeyal M Gross (eds), *Exploring Social Rights: Between Theory and Practice* (Hart 2007) 23.

<sup>1177</sup> *Mwanza* (n 620).

<sup>1178</sup> *ibid* [7.6].

<sup>1179</sup> *ibid* [7.7].

<sup>1180</sup> *ibid* [7.7].

<sup>1181</sup> Bruce Porter, ‘Reasonableness and Article 8(4)’ in Malcolm Langford and others (eds), *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (PULP 2016).

<sup>1182</sup> [2016] ZMCC 1, J57.

purposes, values and principles. This entails that this court must have in mind the broad objects and values that underlie any particular subject matter.<sup>1183</sup>

The court further explained that the purposive approach entails adopting a construction or interpretation that promotes the provision's general legislative purpose regarding the context and historical origins, where necessary. This exercise would sometimes require reading into what the legislature had intended.<sup>1184</sup>

In a recent judgment, the Supreme Court has also followed a similar approach and has held that 'when it comes to the interpretation of a constitution containing a Bill of rights, the courts will usually adopt a generous and purposive approach'.<sup>1185</sup> The court's rationale is that there must be flexibility when interpreting the Constitution, considering varying situations without requiring amendment. Thus, constitutional provisions must be taken as a whole at any given time, bearing in mind the Constitution's language, foundational values, traditions and usage that could have influenced its language. Hence, although the starting point in interpreting the Constitution is to use the literal interpretation, a generous and purposive approach must be adopted when interpreting a constitutional provision that confers rights on individuals.

The above approach to the Constitution is progressive for the rights of persons with disabilities and other marginalised groups. A purposive approach to interpreting disability discrimination under the Constitution would, therefore, include an unreasonable failure to provide reasonable accommodation, even if it is not explicitly stated in the constitutional definition of discrimination.

Unfortunately, in *Musukwa* the High Court failed to appreciate the Constitutional Court's perspective on the purposive approach. Instead, it held that a purposive reading of the law warranted the withdrawal and proscription of driver's licenses to deaf drivers as the law was meant to protect them and other road users from harm.<sup>1186</sup> This thesis argues that a genuine application of the purposive approach, as stated by the Constitutional Court, would have led to a different result. The refusal to provide driver's licences to deaf drivers would

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<sup>1183</sup> *ibid* J57.

<sup>1184</sup> *ibid* J57.

<sup>1185</sup> *Nkonde* (n 618), J22.

<sup>1186</sup> *Musukwa* (n 28), J25.

be considered discriminatory under a broad view of the constitutional provisions on freedom of movement and the fundamental values of non-discrimination, equality, and human dignity.

The importance of constitutional values and principles cannot be understated. As demonstrated below, they are vital in administering justice and resources. The State must ensure that these national values and principles are respected and enforced in upholding ESC rights. It is, therefore, not enough for the courts to recognise these values and principles by merely giving lip service to their existence. The courts must deliberately apply their minds to the centrality of these values and principles with the importance they deserve and must give effect to them in the interpretation of rights. Constitutional values and principles are not only to be viewed as tools of statutory interpretation but should be viewed with the seriousness that one would attach to fundamental rights and freedoms. For such reasons, the Constitution mandates that the judiciary be guided by them when exercising their functions and protect and promote them.<sup>1187</sup> The Bill of Rights must thus be interpreted in a way that ‘permits the development of the law’ and ‘contributes to good governance’.<sup>1188</sup> Under the CRPD, equality and non-discrimination are both principles and rights. They are also an interpretive tool for all the other principles and rights enshrined in the Convention.<sup>1189</sup> Therefore courts can make ESC rights constitutionally justiciable and enforceable by interpreting constitutional values and principles purposively. This seems to be the position taken by the Zambian Supreme Court in its landmark decision, *Mwanza*,<sup>1190</sup> examined below.

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<sup>1187</sup> COZ 2016, art 118 (2)(f).

<sup>1188</sup> *ibid* art 267.

<sup>1189</sup> UNCRPD Committee (n 131) para 12.

<sup>1190</sup> *Mwanza* (n 620).

## PART III

### 8.3 From non-justiciable rights to justiciable rights

The Constitution's silence on ESC rights does not mean that they cannot be interpreted as guaranteed rights. Thus, in response to the absence of justiciable ESC rights in the Constitution, the Supreme Court in *Mwanza* interpreted the Constitution's Bill of rights broadly to protect ESC rights indirectly through CP rights. Although the court recognised that the ICESCR and other soft law instruments could not be the primary means of fully realising ESC rights in Zambia, the court observed a growing trend in several jurisdictions of directly implementing international human rights treaties and standards in the domestic courts. Thus, by taking into account the CESCR's General Comment No 9 in favour of judicial remedies for violation of ESC rights and drawing examples from jurisdictions such as India,<sup>1191</sup> the court adopted an expansive interpretation of CP rights as an appropriate means of judicially enforcing ESC rights under Zambia's constitutional order.

In *Mwanza*, the appellants were two HIV-positive prison inmates on antiretroviral therapy (ART). They alleged they did not receive a balanced diet in prison, which impacted their condition and the medication's efficacy. They also alleged that deplorable prison conditions, including poor ventilation, unsanitary toilets and overcrowding, negatively affected their health. To this end, the appellants' claim was against violations of their rights under the Constitution's Bill of Rights—the right to life and protection from inhuman and degrading treatment. They also claimed violations of their right to adequate food under the ICESCR (art 11) and the Standard Minimum Rules for the Treatment of Prisoners (art 20 (1)). They further contended that the State had violated their right to medical and health facilities under the 1996 Constitution's directive principles.<sup>1192</sup>

In essence, the Supreme Court was called upon to give guidance on the role of the courts in Zambia in realising ESC rights within the context of the CP rights addressed in the Constitution. By recognising that the main point of contention concerned the justiciability of ESC rights, the court defined justiciability as:

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<sup>1191</sup> The court accepted the approach taken by the Indian Supreme Court in the cases of *Francis Mullin v Administrator Union Territory of Delhi* [1981] AIR 746; *Olga Tellis v Bombay Municipal Corporation* [1986] AIR 180.

<sup>1192</sup> COZ 1996, art 112(d). Note that this case was commenced prior to the constitutional amendments of 2016.

The ability to claim a remedy before an independent and impartial body when a violation of a right has occurred or is likely to occur. It implies access to a mechanism that redresses violation for recognised rights. Accordingly, justiciable rights grant rights holders a legal recourse to enforce them whenever the duty-bearer fails to live by its duty to honour those rights.<sup>1193</sup>

The court held that the fact that ESC rights are presented as directive principles or national values and that they can only be achieved following the availability of resources does not make them non-justiciable.<sup>1194</sup> The court recognised that ESC rights are now increasingly being widely recognised as enforceable in the courts either directly or indirectly through CP rights.<sup>1195</sup> The court accepted that the right to life encompasses the right to food and health, even though the Constitution has no explicit category of the right to food and health.

The court held that the right to life 'inevitably dovetails and is interlinked with other rights such as the right to food and the right to health'.<sup>1196</sup> The court thus held that an expansive interpretation of the right to life ought to consider 'human dignity, encompassing a wider range of aspects of the right to food nutritious [enough] to sustain a dignified human life'.<sup>1197</sup> The court also held that the right to life entailed providing special or preferential consideration for prisoners with special dietary needs because of 'conditions like HIV, diabetes, high blood pressure, cholesterol problems, allergies,...'.<sup>1198</sup> The court also noted that the furtherance of the right to life meant accommodating the prisoner's religious dietary preferences, including vegetarian ones. Concerning the appalling prison conditions, the court held that the conditions amounted to degrading and inhuman treatment, hence a violation of Article 15 of the Constitution. Another interesting and important aspect of the court's decision is that it was unfazed at the prospect of deciding on a matter with budgetary ramifications. The court rejected the argument that a lack of resources excused the respondent from improving the country's correctional facilities. Citing the Human Rights Committee's General Comment No 9,<sup>1199</sup> the court held that a state cannot use the lack of resources as justification for inhumane treatment and is obliged to provide detainees and

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<sup>1193</sup> *Mwanza* (n 620) [ 7.2].

<sup>1194</sup> *ibid* [7.7].

<sup>1195</sup> *ibid* [13.11].

<sup>1196</sup> *ibid* [13.13].

<sup>1197</sup> *ibid* [13.17].

<sup>1198</sup> *ibid* [16.6]; [13.17].

<sup>1199</sup> HRC, 'CCPR General Comment No 9: Humane Treatment of Persons Deprived of Their Liberty' (30 July 1982).

prisoners with essential needs and services.<sup>1200</sup> The court, however, acknowledged that the executive and not the judiciary is responsible for developing and implementing the services and policies required to make ESC rights a reality. The court also noted that the judiciary was not the most appropriate organ for monitoring the results of measures adopted for the realisation of prisoners' ESC rights. Political and independent constitutional bodies such as the Human Rights Commission would be more appropriate. Nonetheless, the court ordered the State to take immediate measures to decongest the prison and to report the progress of doing so to the session judge of the High Court on all subsequent opening days of the Lusaka session of the High Court. The State was also ordered to increase resources to the prison to improve dietary needs, with attention to HIV-positive prisoners on ART, and ensure that inmates' nutritional needs comply with Prison rules.

### 8.3.1 What does *Mwanza* mean for the rights of persons with disabilities?

The Judiciary's reluctance to recognise ESC rights as human rights within the constitutional framework before *Mwanza* meant that violations of these rights had gone unchecked, as many victims could not seek judicial redress for violations of their rights. A limitation to achieving substantive equality for persons with disabilities in Zambia was the perception that ESC rights that require positive action from the State were not justiciable, as evidenced from the High Court's decisions in *Mwewa* and *Kingaipe*. The court's decision in *Mwanza* has changed this perception. In the first place, *Mwanza* will make it easier for persons with disabilities to seek judicial remedies for rights violations, especially where there is a deliberate failure to implement positive measures. The language used in the CRPD and similarly adopted by the PDA 2012 suggests that a failure to meet ESC rights for persons with disabilities constitutes discrimination. An essential aspect of the court's decision in *Mwanza* is that it endorses the ICESCR's tripartite typology of obligations requiring states to respect, protect and fulfil ESC rights.<sup>1201</sup> Even if it did not explain each component of the three-fold duty, the court's endorsement acknowledges that 'all human rights require both positive action and restraint on the part of the State'.<sup>1202</sup> The court proved that ESC rights

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<sup>1200</sup> *Mwanza* (n 620) [14.8].

<sup>1201</sup> *ibid* [13.7].

<sup>1202</sup> Donnelly (n 473) 43.

are just as justiciable as CP rights by demonstrating the indivisibility, interrelatedness, and interdependence of rights. Acknowledging the indivisibility and interrelatedness of human rights leads to a fuller understanding and realisation of the rights of persons with disabilities.<sup>1203</sup> This is why the CRPD does not take a dichotomised view of CP and ESC rights. Indivisibility is a central theme carried throughout the convention beginning from the preamble, which reaffirms ‘the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms and the need for persons with disabilities to be guaranteed their full enjoyment without discrimination’.<sup>1204</sup>

The CRPD erases this artificial separation between civil/political rights and social/economic rights by placing positive obligations on rights that are historically considered ‘negative rights’ such as the right to life, the right to non-discrimination and the right to equality.<sup>1205</sup> By placing positive provisions, the CRPD promotes the meaningful advancement of ESC rights.<sup>1206</sup> Interestingly, the definition of reasonable accommodation (under the CRPD and PDA 2012) shows no segregation between the ‘two types’ of rights. The concept of reasonable accommodation ‘directly challenges the traditional clear-cut division between civil and political rights, on the one hand, and economic, social and cultural ones, on the other’.<sup>1207</sup> The purpose of the reasonable accommodation is to ‘ensure that persons with disabilities enjoy or exercise on an equal basis with others *all human rights and fundamental freedoms*’.<sup>1208</sup> In *HM v Sweden*<sup>1209</sup> the CRPD Committee observed that reasonable accommodation was necessary for ensuring that persons with disabilities enjoy and exercise all human rights on an equal basis with others and without discrimination.

Secondly, although not expressly stated, the decision in *Mwanza* gives effect to substantive equality by acknowledging the importance that special measures such as preferential treatment (special diet) and other positive obligations play in protecting the rights of vulnerable and marginalised populations. The court’s position regarding preferential

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<sup>1203</sup> Lawson (n 140).

<sup>1204</sup> CRPD, preamble para C.

<sup>1205</sup> Jayna Kothari, *The Future of Disability Law in India* (OUP 2012).

<sup>1206</sup> Janet E Lord and Michael A Stein, ‘Social Rights and the Relational Value of the Rights to Participate in Sport, Recreation, and Play’ (2009) 27 BU Int’l LJ 249.

<sup>1207</sup> Lawson (n 1005) 67.

<sup>1208</sup> Emphasis added.

<sup>1209</sup> Communication No 3/2011 (21 May 2012), UN Doc CRPD/C/7/D/3/2011.



treatment is further consolidated by its recent decision in *Nkonde*,<sup>1210</sup> which held that differential treatment will not always imply discrimination. Instead, differential treatment must be weighed against the society's values, traditions and customs or a constituent part of it. Thus, 'once it is viewed in its proper context, differential treatment may or may not turn out to be discriminatory under Article 23. The court should, therefore, not judge differential treatment merely at face value without examining the context in which it is done'.<sup>1211</sup> Ultimately, the court endorses Zambian Humanism's approach to human rights and thus puts the neo-liberal objections to justiciable socio-economic rights to rest.

Holding that ESC rights are justiciable removes them from being seen only as political goals or aspirations. It also equips the judiciary with powers to check governmental actions and decisions to ensure that they do not infringe on people's ESC rights. This, therefore, means that Zambians now have legal redress for infringements and violations of their ESC rights.

However, while the court recognises that the language of 'progressive realisation' of rights as set out in the ICESCR often results in the reluctance of State parties to implement ESC rights,<sup>1212</sup> it did not provide guidance on what progressive realisation entails. Guidance was warranted, given that a roadblock to ESC rights implementation is the argument that a developing country like Zambia cannot readily meet the nation's competing interests amid resource constraints.<sup>1213</sup> Although the court held that resource constraints do not justify the failure to protect ESC rights, it would have been desirable if it had directed its mind towards the implications of the 'progressive realisation' wording of most ESC rights provisions. What then is meant by the progressive realisation of ESC rights?

## PART IV

### 8.4 Progressive realisation of ESC rights

The 'progressive realisation' wording under the ICESCR and the CRPD may suggest several things.<sup>1214</sup> It can indicate that there is no specific timeframe for implementing ESC rights,

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<sup>1210</sup> *Nkonde* (n 618).

<sup>1211</sup> See *ibid* [56]-[58].

<sup>1212</sup> *Mwanza* (n 620), [7.4].

<sup>1213</sup> *Malila* (n 1165).

<sup>1214</sup> See ICESCR, art 2(1); CRPD, art 4(2).

much to the detriment of citizens.<sup>1215</sup> It might also mean ESC rights deserve less attention than CP rights which enjoy immediate implementation.<sup>1216</sup>

Nonetheless, the CESCR has stated that the progressive realisation of rights must not be misunderstood. The ICESCR's objectives are to realise ESC rights fully.<sup>1217</sup> Therefore the progressive realisation of ESC rights is merely an affirmation that the realisation of these rights requires significant resource mobilisation towards their implementation than CP rights.<sup>1218</sup> Fredman also observes that 'progressive realisation means that obligations cannot be uniform or universal, but vary according to levels of development and available resources'.<sup>1219</sup> It does not imply that the State should completely abstain nor be complacent in effecting the realisation of these rights. If permitted, such a situation would be detrimental to those with disabilities.<sup>1220</sup> Instead, the CESCR requires the performance of specific steps which are 'deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognised in the Covenant'.<sup>1221</sup> States are therefore obligated to ensure the realisation of economic, social and cultural rights for the vulnerable in society, and this must be done to the 'maximum of their available resources' and 'within a reasonably short time'.<sup>1222</sup> The CRPD also adopts similar language that obligates state parties to allocate the maximum of available resources to progressively achieve the realisation of ESC rights.<sup>1223</sup> In fiscal terms, this means that the Government should prioritise the distribution of resources to areas where the enjoyment and realisation of ESC rights are urgently required.<sup>1224</sup> Similarly in disagreeing with 'the argument that financial constraints should be a factor in determining whether ESC rights should be justiciable or

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<sup>1215</sup> Sital Kalantry, Jocelyn E Getgen & Steven Arrigg Koh, 'Enhancing Enforcement of Economic, Social, and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR' (2010) 32 Hum Rts Q 253.

<sup>1216</sup> Allison Corkery and Ignacio Saiz, 'Progressive Realization Using Maximum Available Resources: The Accountability Challenge' in Jackie Dugard and others (eds), *Research Handbook on Economic, Social and Cultural Rights as Human Rights* (Elgar 2020).

<sup>1217</sup> UNCESCR, 'General Comment No 9: The Domestic Application of the Covenant' (3 December 1998) UN Doc E/C.12/1998/24.

<sup>1218</sup> Lawson (n 140).

<sup>1219</sup> Fredman (n 494) 81.

<sup>1220</sup> UNCESCR (n 574).

<sup>1221</sup> UNCESCR, 'General Comment No 3: The Nature of States Parties Obligations' (14 December 1990) UN Doc E/1991/23, para 2.

<sup>1222</sup> *ibid* para 2.

<sup>1223</sup> CRDP, art 4(2).

<sup>1224</sup> Helena Hofbauer and others, *Dignity Counts: A Guide to Using Budget Analysis to Advance Human Rights* (Fundar, IBP and IHRIP 2004).

not', the Mung'omba Commission observed that 'what is required to realise these rights is not necessarily an increase in the resources, but optimal utilisation of the resources'.<sup>1225</sup> Zambian Humanism employs comparable language, as seen in Kaunda's reference to the right to education, where he advocates that universal access to education should be made available 'up to the highest level that the country's resources will allow'.<sup>1226</sup>

Further, the CESCR notes that where a guarantee is made that the exercise of rights will be without discrimination, immediate and not progressive realisation is required.<sup>1227</sup> Consequently, where persons with disabilities are concerned, the effective exercise of their rights attracts the positive duty of reasonable accommodation, which going by the shared reasoning of the CESCR and CRPD Committee, requires immediate implementation as it falls under the scope of non-discrimination.<sup>1228</sup> (see 6.3.2).

#### **8.4.1 Maximum available resources**

A statement like 'maximum available resources' is highly ambiguous.<sup>1229</sup> While the goal is clearly to encourage countries to prioritise the fulfilment of ESC rights in their resource allocation, figuring out how much of the State's resources are required for the effective realisation of particular rights is difficult.<sup>1230</sup> Nevertheless, it is still possible to determine whether the maximisation of available resources has been achieved.

According to Fredman, this can be achieved in three ways. One way is the 'sufficiency of government investment' which seeks to assess and evaluate government spending or resources allocated for a particular sector against the country's Gross Domestic Product (GDP) and total government spending. This must be assessed against benchmarks set by international bodies like the UN regarding the percentage of the country's budgetary allocation to a particular sector.<sup>1231</sup>

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<sup>1225</sup> Mung'omba Commission (n 651) 104.

<sup>1226</sup> Kaunda (n 490) 38.

<sup>1227</sup> UNCESCR (n 1221), para 1.

<sup>1228</sup> Ferri (n 48).

<sup>1229</sup> Hofbauer (n 1224).

<sup>1230</sup> Broderick (n 534).

<sup>1231</sup> Fredman (n 494) 164; Hofbauer (n 1224) 35.

Another way to evaluate resource prioritisation is to compare spending between sectors. Fredman calls this approach the ‘efficiency of spending’.<sup>1232</sup> The efficiency of spending approach necessitates that a government department utilises its allocated resources to effectively achieve a specific right. The budgetary allocations must be fully utilised and expended to fulfil the obligations arising from those particular rights.<sup>1233</sup> The CRC Committee also provides guidance on allocating resources to achieve ESC rights. It calls on States to develop and implement transparent and efficient public finance procedures and processes to ensure value for money when purchasing goods and services to advance rights.<sup>1234</sup> States must also address ineffective and inefficient public spending stemming from ‘poor quality of goods or services, inadequate financial management or procurement systems, leakages, untimely transfers, unclear roles and responsibilities, insufficient absorptive capacity, weak budget information systems and corruption’.<sup>1235</sup> The CESCR also notes that corruption impedes the effective promotion and protection of human rights as it negatively affects a country’s ability to mobilise resources for delivering services essential for the realisation of ESC rights.<sup>1236</sup> Failure to implement adequate anti-corruption measures in both the public and private sectors constitutes a violation of obligations toward the realisation of ESC rights.<sup>1237</sup>

The third conceivable option concerning the allocation of maximum available resources is referred to as the ‘equity of patterns of expenditure’ approach. This approach examines the distribution of government resources among different protected groups. It advocates for a fair and just allocation of available resources across various sectors and regions.

Kaunda’s Humanism also advocates for equity in resource distribution, as evident in his statement that ‘the aim of the government is to spread its limited wealth to every corner of the country in a uniform manner, to stimulate local initiative’.<sup>1238</sup>

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<sup>1232</sup> *ibid* 164.

<sup>1233</sup> *ibid*.

<sup>1234</sup> CRC, ‘General Comment No 19: Public Budgeting for the Realization of Children’s Rights’ (20 July 2016) UN Doc CRC/C/GC/19, para 94.

<sup>1235</sup> *ibid* para 95.

<sup>1236</sup> UNCESCR, ‘General Comment No 24: ‘State Obligations Under the ICESCR in the Context of Business Activities’ (10 August 2017) UN Doc E/C.12/GC/24, para 20.

<sup>1237</sup> *ibid* para 18.

<sup>1238</sup> Kaunda (n 122) 35.

In this context, both the ‘equity of patterns of expenditure’ approach and Kaunda's Humanism share a common objective of promoting fairness and uniformity in the distribution of resources to empower various communities and foster local development initiatives.

An important observation from Zambia’s Constitution is that it calls for similar approaches to distributing public resources among the various guiding values and principles spread throughout the Constitution. Thus, reflected within the Constitution’s guiding principles on public finance is that a public finance system must ensure that:

- (i) the burden of taxation is shared fairly;
- (ii) revenue raised nationally is shared equitably among the different levels of Government; and
- (iii) expenditure promotes the equitable development of the country.<sup>1239</sup>

The Constitution further calls for ‘sustainable public borrowing to ensure inter-generational equity and prudent and responsible use of public resources’.<sup>1240</sup> Corkery and Saiz note that ‘the mobilisation of resources domestically, through taxation, and the mobilisation of resources internationally, through overseas development assistance and government borrowing, are an important component of complying with ‘the maximum available resources doctrine’.<sup>1241</sup> Therefore a tax policy must be ‘adequate and socially equitable and improve tax collection, to ensure the mobilisation of resources sufficient for implementing economic, social and cultural rights, with special attention paid to disadvantaged and marginalised individuals and groups’.<sup>1242</sup> However tax breaks for businesses and a failure to prevent tax avoidance and evasion reduce the revenue necessary to meet obligations for realising ESC rights.<sup>1243</sup> The CESCR also observes that States are entitled to foreign assistance in the form of aid in meeting their obligations in achieving the maximum of available resources.<sup>1244</sup>

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<sup>1239</sup> COZ 2016, art 198.

<sup>1240</sup> *ibid* art 198(c)&(d).

<sup>1241</sup> Corkery and Saiz (n 1216) 285.

<sup>1242</sup> See UNCESCR, ‘Concluding Observations: Canada’ (23 March 2016) E/C.12/CAN/CO/6 para 10; CESCR, ‘Concluding Observations: Paraguay’ (20 March 2015) E/C.12/PRY/CO/4 para 10.

<sup>1243</sup> UNCESCR (n 1236) para 37.

<sup>1244</sup> UNCESCR, ‘An Evaluation of the Obligation to Take Steps to the “Maximum of Available Resources” under an Optional Protocol to the Covenant’ (10 May 2007) UN Doc E/C12/2007/1 para 5.

Analysing budgetary figures alone is insufficient to determine compliance with the duty to progressively realise ESC rights. Establishing a causal connection between the resources and the realisation of the rights in question is necessary. This can be done by examining the reasonableness of resource decisions, policies and programmes in light of how these will impact the full realisation of human rights over time.<sup>1245</sup>

## PART V

### 8.5 Applying the reasonableness review to the progressive realisation of ESCR

Inspired by South African jurisprudence Broderick proposes adopting a test of reasonableness to determine if State action or inaction can be justified in achieving progressive ESC rights for persons with disabilities under the CRPD.<sup>1246</sup> The CESCR has also adopted reasonableness in its adjudication of claims per Article 8(4) of the Optional Protocol to the ICESCR.<sup>1247</sup> (Zambia is yet to ratify the Optional Protocol). Article 8(4) provides:

When examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.

According to Porter, this provision was designed to respond to the problems and arguments about the justiciability of ESC rights. Its purpose is to guide the CESCR in adjudicating State party violations of ESC rights under the ICESCR when they fail to take reasonable measures to realise ESC rights. It also tackles the relationship between individual communications and the significant issues of socio-economic policy.<sup>1248</sup> Applying this to the national setting, the Zambian courts can adopt a reasonableness approach to adjudicating ESC rights claims, which the Supreme Court has ruled are justiciable. This approach is warranted because Zambia's anti-discrimination legal framework, examined in chapter 5, takes a substantive approach to equality, requiring the State and other duty-bearers to adopt positive measures and policies in various sectors to protect vulnerable groups. Most violations of ESC rights

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<sup>1245</sup> Corkery and Saiz (n 1216).

<sup>1246</sup> Broderick (n 534) 192.

<sup>1247</sup> UNGA, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (Sixty-third session, 2008) UN Doc A/RES/63/117.

<sup>1248</sup> Porter (n 1181) 173.

that affect disadvantaged groups often result from the State's failure to ensure appropriate measures are in place to ensure the immediate and progressive realisation of rights.<sup>1249</sup> Therefore, it is only a matter of time before the failure to implement positive measures and policies as required by the existing legislative framework become mainstream legal issues before the courts. The reasonableness approach not only assists the judiciary in adjudicating diverse claims pertaining to rights but also serves as a means to evaluate whether governmental budgetary decisions and policies constitute suitable methods to safeguard, realise, and uphold ESC rights to the best extent possible within the constraints of available resources. As the South African Constitutional Court has said, 'a dispute concerning socio-economic rights is thus likely to require a court to evaluate state policy and to give judgment on whether or not it is consistent with the Constitution'.<sup>1250</sup>

Reasonableness offers 'a flexible and context-sensitive review standard able to respond to a diversity of circumstances and needs'.<sup>1251</sup> The reasonableness approach 'seeks to ensure that the content of socio-economic norms is adjudicated upon in relation to the marginalised group in question, rather than basing an analysis on technical or abstract indicators and benchmarks'.<sup>1252</sup> Therefore invoking a reasonableness review to assess alleged violations of disability rights requires an assessment tailored to the specific national context at issue and the socio-economic disadvantage faced by persons with disabilities in that context.<sup>1253</sup>

As already pointed out above, the judiciary must uphold, protect and promote the values and principles of the Constitution. Although the decision in *Mwanza* is a good starting point for judicial adjudication and remedies for violating ESC rights, it fails to articulate some of the substantive values necessary for realising ESC rights. While it is appreciated that the court considered human dignity and accountability as constituent elements of both CP rights and ESC rights, other constitutional values, such as equality and participation, are also essential in the enjoyment of ESC rights. The South African Constitutional Court's

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<sup>1249</sup> *ibid.*

<sup>1250</sup> *Minister of Health and Others v Treatment Action Campaign and Others (TAC)* [2002] ZACC 15, [101].

<sup>1251</sup> Sandra Liebenberg, 'Direct Constitutional Protection of Economic, Social and Cultural Rights in South Africa' in Danwood M Chirwa and Lilian Chenwi (eds), *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (CUP 2016) 332.

<sup>1252</sup> Broderick (n 1158) 2.

<sup>1253</sup> *ibid.*

articulation of reasonableness is a good example of how the values and principles can be applied to ESC rights.

### 8.5.1 How is reasonableness assessed?

The South African Constitutional Court case of *Government of the Republic of South Africa and Others v Grootboom*<sup>1254</sup> is a widely cited case on reasonableness as a test for determining the enforcement of ESC rights in South Africa. In this case, the respondents, adults and children, had been evicted from informal dwellings on private property earmarked for formal low-cost housing. They contended that the State was obligated to provide homeless people with decent shelter or temporary housing. The constitutional provisions at issue, in this case, were sections 26 and 28(1)(c) of the South African Constitution 1996. Section 26 provides:

1. Everyone has the right to have access to adequate housing.
2. The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
3. No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

Section 28(1)(c) provides that:

1. 'Every child has the right... (c) to basic nutrition, shelter, basic health care services and social services'.

The main question for the court, in this case, concerned the enforceability of ESC rights in a given situation.<sup>1255</sup> In its analysis of section 26, the court held that the State's obligation to implement ESC rights is not absolute or unqualified. Instead, it requires a consideration of three separate elements, namely:

- (a) the obligation to take reasonable legislative and other measures;
- (b) to achieve the progressive realisation of the right; and
- (c) within available resources.<sup>1256</sup>

As regards the first element, the court held that a reasonable programme allocates responsibilities and tasks to the different spheres of government (national, provincial, local)

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<sup>1254</sup> (CCT11/00) [2000] ZACC 19.

<sup>1255</sup> *ibid* [20].

<sup>1256</sup> *ibid* [38].



and ensures that the appropriate financial and human resources are available to carry out their constitutional obligations.<sup>1257</sup> While acknowledging that the State must take reasonable legislative and other measures, the court noted that legislative measures alone are insufficient to satisfy constitutional compliance. The court held that legislative measures must be supported by well-planned programmes and policies run by the executive. The ‘policies and programmes must be reasonable both in their conception and their implementation’.<sup>1258</sup> Further, the court held that the reasonableness of the measures must consider the problems in question in their ‘social, economic and historical context’ and the institutional capacity of the duty-bearer. In addition, the court held that the programme must be balanced and flexible with proper consideration given to short, medium, and long-term needs. Consequently, a programme is unreasonable if it excludes a large part of society.<sup>1259</sup> The court further held that to be reasonable:

measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights, therefore, is most in peril, must not be ignored by the measures aimed at achieving the realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right.<sup>1260</sup>

After evaluating all of the facts, the court found the State action unreasonable because it did not do enough to meet the needs of those who needed housing, given the available resources.

## **8.6 Finding the legislative and theoretical basis for employing reasonableness by the Zambia courts**

As demonstrated below, other South African cases provide further insight into the various factors and considerations relevant to assessing the reasonableness of State action or inaction towards the realisation of ESC rights. These factors can be legally supported in Zambia under the Constitution and the PDA 2012. From a theoretical perspective, they can also be bolstered by various tenets of Zambian Humanism.

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<sup>1257</sup> *ibid* [39].

<sup>1258</sup> *ibid* [42].

<sup>1259</sup> *ibid* [43].

<sup>1260</sup> *ibid* [44].

According to Broderick, the reasonableness test employed to evaluate compliance with ESC rights bears resemblance to the one utilised by the CRPD committee to assess the obligation of reasonable accommodation.<sup>1261</sup> As depicted in chapter 7, the duty of reasonable accommodation involves a delicate balancing act that takes into account both the interests of the individual and the duty-bearer.

This process entails the consideration of various factors, including the effectiveness of the measures implemented, principles of equality, preservation of dignity, active participation and accountability, as well as the assessment of any undue burden and potential third-party benefits. Through this evaluation, the concept of reasonable accommodation seeks to strike an equitable and justifiable balance between the rights of individuals with disabilities and the responsibilities of duty-bearers in facilitating inclusive and accessible environments. In the same vein, measures, policies, laws, and programmes by the State towards the realisation of ESC rights for persons with disabilities must meet the effectiveness criteria. When employing reasonableness, the judiciary will have to assess whether the State has met these considerations towards the realisation of ESC rights on a case-by-case basis.

#### 8.6.1.1 Equality

Equality considerations are important in assessing the reasonableness of government programmes or policies in realising ESC rights. Although not specifically presented as an argument in *Grootboom*, the South African Court in *Khosa and others v Minister of Social Development and others*<sup>1262</sup> held that ‘...equality must also be taken into account along with the availability of human and financial resources in determining whether the state has complied with the constitutional standard of reasonableness’.<sup>1263</sup> Regarding equality considerations, the goal of any government measures aimed at the progressive realisation of ESCR is to ensure that ‘*de facto* equality is attained—in other words, that the systemic inequalities and substantive disadvantage experienced [in society]...is remedied’.<sup>1264</sup> Where equality is a key aspect in the adjudication of ESC rights and a point of consideration of State measures, any alleged infringement of rights by the State can only be justified for good and

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<sup>1261</sup> Broderick (n 1158) 6.

<sup>1262</sup> [2004] ZACC 11.

<sup>1263</sup> *ibid* [44].

<sup>1264</sup> Broderick (n 1158) 9.

compelling reasons.<sup>1265</sup> Therefore, the reasonableness of measures for realising ESC rights in Zambia must be evaluated against the values of equality and non-discrimination in the Constitution. In essence, just as the reasonable accommodation duty aims to alleviate the disadvantages experienced by persons with disabilities, the measures adopted by the State must create equal opportunities for all, especially the disadvantaged. Kaunda thus notes that ‘the main policy driving any humanist nation must be to reduce those inequalities which rob people of their life’s chances through no fault of their own’.<sup>1266</sup>

The concept of equality is an essential ingredient in the eradication of several barriers that persons with disabilities face. Equality provides a foundation upon which participation in other aspects of society is made possible.<sup>1267</sup> Within employment and labour, its applicability provides a platform upon which persons with disabilities can participate in the labour market. Thus:

‘Equal and effective access to the market leads to productive lives and independent living and helps ensure the maintenance and elevation of self-esteem and human dignity... it also considerably reduces the dependence of individuals with disabilities on the State for income support’.<sup>1268</sup>

As evidenced by the various statutes analysed in chapter 5, the goal is to realise substantive equality by implementing various positive measures to create equal opportunities for the marginalised in society. For instance, the PDA 2012 calls for developing and implementing measures to ensure, ‘to the maximum extent possible,’ that persons with disabilities have equal opportunities for education and employment, participation in sporting, recreation and cultural activities, and full access to community and social service.<sup>1269</sup> Under the Constitution, equality as a national value and guiding principle must be adhered to in interpreting and enacting laws and when formulating and implementing State policy. The Constitution also provides that the public service must carry out its services in an ‘effective, impartial, fair and equitable manner’.<sup>1270</sup> As a social goal, equality is about creating an egalitarian society, as demonstrated by Zambian Humanism.

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<sup>1265</sup> Broderick (n 534).

<sup>1266</sup> Kaunda (n 455) 839.

<sup>1267</sup> Quinn, McDonagh and Kimber (n 776).

<sup>1268</sup> *ibid* 3.

<sup>1269</sup> PDA 2012, s 14(b).

<sup>1270</sup> COZ 2016, art 173.

### 8.6.1.2 Human dignity

Related to the equality principle must be a consideration of human dignity. The court in *Grootboom* emphasised the importance of considering human beings' intrinsic dignity when analysing State action's appropriateness. Accordingly, the court held that the State was obligated to ensure, at the very least, that the eviction was humane.<sup>1271</sup> Dignity considerations aim to ensure that citizens, especially the disadvantaged and marginalised, have access to facilities and services that enable them to live a life of dignity. In the context of the full enjoyment of the right to work, for instance, this calls for the State to create conditions that enable individuals to 'freely choose or accept [decent] work, including the right not to be deprived of work unfairly'. This also means securing the enjoyment of just and favourable conditions of work in a safe working environment.<sup>1272</sup>

The basis of human dignity is the equal worth of all humans.<sup>1273</sup> This means that regardless of individual differences, human rights must be recognised and upheld equally, and no one should be subjected to degrading circumstances while exercising their human rights.<sup>1274</sup> The Canadian Supreme Court in *Law v Canada (Minister of Employment and Immigration)* observed that 'human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits'. On the other hand, 'it is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences'.<sup>1275</sup> Liebenberg observes that 'the quest for equal worth or dignity is not a quest for uniformity but a quest to eliminate the disadvantages and inferior status that attach to membership of particular groups'.<sup>1276</sup> The PDA 2012 not only treats inherent human dignity as a general principle but also imposes a duty on every person to respect and uphold the rights and dignity of persons with disabilities.<sup>1277</sup> Liebenberg thus remarks that, 'human dignity best captures the interdependence between individual and social welfare and illuminates the circumstances in which people have justified claims to social resources'. She states that

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<sup>1271</sup> *Grootboom* (n 1254) [88].

<sup>1272</sup> UNCESCR (n 10) para, 4.

<sup>1273</sup> Broderick (n 1158).

<sup>1274</sup> *ibid.*

<sup>1275</sup> [1999] 1 SCR 497 [53].

<sup>1276</sup> Liebenberg (n 488) 14.

<sup>1277</sup> PDA, s 5.

where human dignity is presented as a relational concept, society's failure to address socio-economic disadvantages experienced by the marginalised 'represents a collective failure to value human dignity'.<sup>1278</sup>

### 8.6.1.3 Participation

Another key element of the reasonableness standard that emerged from *Grootboom* is that of meaningful engagement, where the court held that it 'expected officials... responsible for housing to engage with these people as soon as they became aware of the occupation'. It also thought that it would have been appropriate if the municipality made some effort to 'resolve the difficulty on a case-by-case basis after an investigation of their circumstances before the matter got out of hand'.<sup>1279</sup> Although not fully developed in *Grootboom*, meaningful engagement has been explored and elaborated further in other cases.<sup>1280</sup> Meaningful engagement highlights the participatory processes of realising ESC rights. It introduces participatory democracy as an important factor in assessing the reasonableness of State social policy.<sup>1281</sup> The participatory process for assessing state-taken measures for ESC rights means that policies or decisions must result from consultation with various stakeholders. The stakeholders are those affected or likely to be affected by the policies or decisions, the State, independent experts, and NGOs. For example, ILO Convention No. 159 requires the government to consult with representatives of employers and workers, as well as those of and for persons with disabilities, when implementing national policy on vocational rehabilitation and employment.<sup>1282</sup> Effective and meaningful participation is at the core of the CRPD.<sup>1283</sup> Article 4(3) of the CRPD requires State Parties to consult with and involve persons with disabilities, including children with disabilities, through their representative organisations in developing and implementing legislation and policies to

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<sup>1278</sup> Liebenberg (n 488) 13.

<sup>1279</sup> *Grootboom* (n 1254) [87].

<sup>1280</sup> See for example *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* [2008] ZACC 1. For a detailed analysis on meaningful engagement, see Lilian Chenwi, 'Meaningful Engagement' in the Realisation of Socio-Economic Rights: The South African Experience' (2011) 26 SAFL 128.

<sup>1281</sup> Liebenberg (n 1251) 316.

<sup>1282</sup> ILO Convention C159: Vocational Rehabilitation and Employment (Disabled Persons) (1983), art 5; UNCESCR, 'General Comment No 19: The right to Social Security' (4 February 2008) UN Doc E/C.12/GC/19, para 69.

<sup>1283</sup> UNHRC, 'Report of the Special Rapporteur on the Rights of Persons with Disabilities' (12 January 2016) UN Doc A/HRC/31/62, para 16.

implement the Convention and other decision-making processes concerning persons with disabilities.

Because persons with disabilities are in the best position to identify their own needs, they must participate in decisions that affect them. Efficiency and the equitable distribution of resources are guaranteed where they are part of the decision-making process.<sup>1284</sup> Additionally, effective participation is about the diversity of perspectives for better outcomes. Divergent views and opinions enhance prospects for efficiency and creativity, and better account for the various demands of citizens. States that encourage all people, including those with disabilities, to actively participate are more likely to minimise tensions and therefore promote social cohesiveness.<sup>1285</sup> These observations are similar to Kaunda's views on participatory democracy.

Zambian Humanism stresses the importance of participation in a communitarian society. In Zambian Humanism, participation aims to improve the quality of life of the masses and eliminate all forms of social inequalities within Zambian society. Participation goes beyond participation by proxy through elected officials but calls for individuals to be directly involved in the decision-making process. Kaunda regards participation as a means of 'exercising power from the bottom up'.<sup>1286</sup> Kaunda's concept of participation is that people at the bottom of the social strata or most likely to be affected by decisions must be included in decision-making. He observes, 'there is no substitute for the people's own participation, motivation and hard work for achieving permanent development'.<sup>1287</sup> In line with this perspective, the realization of national development under Zambian Humanism requires the implementation of initiatives and programs that encompass the active inclusion of all Zambians in various aspects of social, political, and economic life. The aim is to create a society where meaningful participation is fostered, leading to the betterment of the lives of the people and the elimination of social disparities.

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<sup>1284</sup> *ibid* para 26.

<sup>1285</sup> *ibid* para 27.

<sup>1286</sup> Kaunda (n 70) 98.

<sup>1287</sup> Republic of Zambia, *Second National Development Plan: January 1972- December 1976* (Ministry of Development Planning and National Guidance 1971) v.

The South African Constitutional Court in *TAC* thus held, '[a] programme that excludes a significant segment of society cannot be said to be reasonable'.<sup>1288</sup> Additionally, just as the report of the Special Rapporteur on the rights of persons with disabilities observes that participation reduces tension and promotes social cohesion, Kaunda, too, asserts that the alienation of individuals or groups can only end where a democratic, participatory process is in place.<sup>1289</sup>

Bilchitz provides a further argument for the importance of participation rooted in what he terms the 'principle of equal importance'.<sup>1290</sup> He argues that societies show their respect and dedication to valuing each individual by allowing everyone to participate equally in decision-making processes.<sup>1291</sup> However, equal participation can only be appreciated where it does not undervalue some sections of society, hence the South Africa case of *Occupiers of 51 Olivia Road*<sup>1292</sup> held that meaningful engagement is an expression of people's dignity. Where it does lead or is likely to lead to undervaluing certain sections of society, then it would be in the interest of equal importance to depart from equal participation.<sup>1293</sup>

An essential aspect for Zambia is the recognition of participation as a fundamental right, emphasised in the preamble to the Constitution, which states: 'We the people of Zambia.... Confirm the equal worth of women and men and their right to freely participate in, determine and build a sustainable political, legal, economic and social order'.<sup>1294</sup> This affirmation sets the stage for various substantive provisions in the Constitution that promote and encourage active participation and meaningful engagement of citizens.

For instance, Article 89(1) stipulates that 'the National Assembly shall facilitate public involvement in the legislative process'. Moreover, in the exercise of executive functions, the President, in consultation with the Secretary to the Cabinet, has the authority to invite

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<sup>1288</sup> *TAC* (n 1249), [68].

<sup>1289</sup> UNHRC (n 1283); Kaunda (n 70).

<sup>1290</sup> David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-economic Rights* (OUP 2008).

<sup>1291</sup> *ibid.*

<sup>1292</sup> [2008] ZACC 1.

<sup>1293</sup> *ibid.*

<sup>1294</sup> COZ 2016, preamble [Emphasis added].

individuals whose presence is desired to attend and actively participate in Cabinet meetings.<sup>1295</sup>

The local government system also promotes people's participation, and public engagement is seen as a guiding value and principle in public service.<sup>1296</sup> At all levels of government, public participation is mandated in the formulation of financing frameworks, development plans, and the preparation of annual budgets.<sup>1297</sup>

Likewise, the Constitution underscores the importance of public participation in the management and development of Zambia's environment and natural resources.<sup>1298</sup> Consequently, decisions, policies, and programmes must, by all means, incorporate meaningful participation and inclusive deliberation with those whose rights are directly affected or likely to be affected to be considered reasonable and justifiable. This approach ensures that the voices of the people are heard and considered, fostering a more inclusive, responsive, and democratic governance in Zambia.

#### 8.6.1.4 Accountability

Related to participation is the principle of accountability. Accountability requires those in authority to follow the wishes of the majority. It also implies that proper explanations and appropriate justifications must guide any actions they perform.<sup>1299</sup> According to *TAC*, government policies and measures must be transparent in order to meet the reasonableness criteria. If a measure is to be optimally implemented, it must be communicated effectively to all relevant stakeholders.<sup>1300</sup> Under *Zambian Humanism*, Kaunda argues that people must be brought on board to understand governmental action in the country's economic life. People must not be looked at as 'mere pawns in a game'; instead, they should be able to 'participate fully' in all governmental plans and actions.<sup>1301</sup>

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<sup>1295</sup> COZ 2016, art 115(6).

<sup>1296</sup> *ibid* art 173(1)(d).

<sup>1297</sup> *ibid* art 173(1)(d).

<sup>1298</sup> *ibid* art 255(l) and art 257(d).

<sup>1299</sup> Fredman (n 494).

<sup>1300</sup> *TAC* (n 1249), [123].

<sup>1301</sup> Kaunda (n 122) 31.



Under the Zambian Constitution, accountability is a fundamental guiding principle in the exercise of governmental authority. The Constitution requires accountability for administrative acts in public service.<sup>1302</sup> As such, those in public service must ‘proactively provide the public with timely, accessible and accurate information’.<sup>1303</sup> Accountability is also required of local authorities under the local government system.<sup>1304</sup> To this end, Councillors are collectively and individually accountable to the national Government and residents in their wards and districts for the performance of their functions.<sup>1305</sup> In addition, Article 198 of the Constitution requires transparency and accountability in developing macro-economic frameworks, socio-economic plans and the budget. In addition, Article 210 requires the public procurement and disposal of State assets to be conducted fairly, equitably, transparently, competitively, and cost-effectively. Transparency is also a guiding principle in land policy development on land use and management.<sup>1306</sup>

As regards the judiciary, Article 118(1) of the Constitution provides that the courts must exercise their judicial power in a just manner that promotes accountability. The importance of accountability as an essential element in enforcing ESC rights is reflected in *Mwanza*. As noted earlier, to ensure that the State complied with its positive obligations, the court ordered the prison authorities to submit a report to the session judge on the opening day of the session of the High Court in Lusaka. Undoubtedly, the court’s order acknowledged that accountability by duty-bearers is essential to meeting the objectives of ESC rights. Ultimately, laws and policies prescribing ESC rights must have effective built-in monitoring, enforcement, and compliance mechanisms, as mentioned in chapter 5. The Constitution also empowers the legislature to oversee the performance of executive functions by ensuring equity in the distribution of national resources among the people of Zambia. It also has the power to scrutinise public spending and approve public debt before it is contracted.<sup>1307</sup>

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<sup>1302</sup> COZ 2016, art 173(g).

<sup>1303</sup> *ibid* art 173(h).

<sup>1304</sup> *ibid* art 151(i).

<sup>1305</sup> *ibid* art 156.

<sup>1306</sup> *ibid* art 253 (e).

<sup>1307</sup> COZ 2016, art 63.

### 8.6.1.5 Disproportionate/undue burden and third-party benefits (resource constraints)

Like the duty to provide reasonable accommodation, evaluating the progressive realisation of ESC rights to the maximum of available resources necessitates striking a balance between the needs of the duty-bearer and the citizen, but on a larger scale than an employer.<sup>1308</sup> Although the duty-bearer would not be expected to provide an employee with an accommodation that imposes an undue burden on them, in the same way, the State is only expected to realise ESC rights within its available resources. As pointed out above, even if public resources are limited, the State must ensure that ESC rights are realised to the maximum extent possible under the circumstances. When balancing areas of prioritisation for resource allocation to meet various competing interests, the State's primary obligation is to protect the ESC rights of the most vulnerable in society. In *Grootboom*, the court thus held:

[t]o be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights, therefore, is most in peril, must not be ignored by the measures aimed at achieving realisation of the right.<sup>1309</sup>

To achieve this, Broderick remarks that:

National authorities should develop performance-based budgets, which seek to allocate resources to achieve certain objectives and, thereby, allow assessment of the cost-effectiveness of measures taken relative to achieving the desired result for all those in need.<sup>1310</sup>

Indeed, *Zambian Humanism* advocates for a comparable approach. The quest for national development requires the identification of the 'major areas of concern' that are of primary importance for national development.<sup>1311</sup> By prioritizing these key areas, the government can focus its efforts, resources, and policies to address the most critical challenges and promote sustainable development for the entire nation. This strategic approach aligns with the core principles of *Zambian Humanism*, emphasising the equitable distribution of resources and active participation of all citizens in the development process, ultimately contributing to the well-being and upliftment of society as a whole.

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<sup>1308</sup> Broderick (n 1158) 7.

<sup>1309</sup> *Grootboom* (n 1254) [44].

<sup>1310</sup> Broderick (n 1158) 13.

<sup>1311</sup> Kaunda (n 122) 36.

Further, akin to the determination of what constitutes a reasonable accommodation (which considers the potential benefits of accommodating persons with disabilities to third parties), the reasonableness of measures adopted by the State towards the progressive realisation of ESC rights should also consider the impact that those measures have on wider society.<sup>1312</sup> Therefore the reasonableness of measures to realise ESC rights for persons with disabilities will be determined by their wider societal impact. Attention should also be paid to the equitable and effective use of available resources.<sup>1313</sup>

Although resources are significant in determining the State's ability to meet its commitments to realise ESC rights, it does not diminish the urgency of meeting these obligations, 'nor do resource constraints alone justify inaction'.<sup>1314</sup> (A fact appreciated by the court in *Mwanza*.) The CESCR observes that 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party'.<sup>1315</sup> Although the idea of minimum core obligations is debatable, the rationale for having them is that they represent a threshold below which a country cannot fall in realising ESC rights. Therefore, the minimum core obligations of specific ESC rights require immediate realisation. Although resource constraints can be considered when determining whether the State has met the minimum core obligations, the resource constraint defence can only succeed if it is shown that 'every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations'.<sup>1316</sup> However, the South African courts have rejected the minimum core concept in their construction of the reasonableness test. This can therefore be a point of departure for the Zambian courts if they elect to adopt the reasonableness test. And, because the reasonable accommodation duty is immediately applicable and not subject to progressive realisation, the duty can be seen as a minimum core obligation from which the State cannot deviate.<sup>1317</sup>

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<sup>1312</sup> *ibid.*

<sup>1313</sup> Limburg Principles para 27.

<sup>1314</sup> UNCESCR (n 1221), para 10.

<sup>1315</sup> *ibid* para 10.

<sup>1316</sup> *ibid* para 10.

<sup>1317</sup> Fasciglione (n 55) 167.

## PART VI

### 8.7 Conclusion

The incorporation and bedding in of parts of the CRPD into Zambian law has provided Zambia with an opportunity to protect the ESC rights, including the right to work, of persons with disabilities. Through the CRPD, Zambia now has a template that integrates CP rights and equality measures by demystifying the dichotomy between negative rights and positive rights by referencing their indivisibility. The CRPD applies positive duties to achieve equality for persons with disabilities, which challenges the discriminatory practices and negative societal attitudes faced by persons who have been marginalised. Zambian Humanism recognises the interdependence of CP and ESC rights. It recognises that the realisation of ESC rights is a precondition to enjoying human rights. Hence it is said that ‘Humanism starts with the physical needs of man, progresses with mental development and culminates in spiritual perfection’.<sup>1318</sup> Kaunda therefore argues that the maximisation and the enjoyment of CP rights as outlined in the Constitution can only come about if all areas of human endeavour are realised.<sup>1319</sup> If the goal is to realise the values and principles enunciated in the Constitution for all Zambians, especially the disadvantaged among us, the justifications for positive steps to redress disadvantage patterns become even more important. Where an expansive interpretation of equality and discrimination is taken by the courts, constitutional protections available for CP rights can be extended by implication to cover ESC rights despite their absence in the Constitution, as now demonstrated by the Supreme Court in *Mwanza*.

This chapter has further argued that the courts should adopt a test of reasonableness to assess compliance with the progressive realisation of ESC rights. By adopting reasonableness, the courts will not be reinventing the wheel but merely giving effect to the provisions of the law. By so doing, especially where the rights of persons with disabilities are concerned, the courts will be playing their role in securing substantive equality for persons with disabilities and other marginalised groups when matters of a socio-economic nature are brought before them. By highlighting some of the issues that should be considered

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<sup>1318</sup> Ranganathan (n 424) 42.

<sup>1319</sup> *ibid* 45.

when determining compliance with progressive realisation under reasonableness, the chapter has demonstrated that support for adopting such an approach exists within Zambia's own philosophical, legal, and constitutional frameworks.

## Chapter 9: Conclusion and Recommendations

### 9.1 Introduction

As noted in Chapter 1, this thesis sought to examine the right to work and employment for persons with disabilities in Zambia by focusing mainly on reasonable accommodation and kindred issues. The research had four main objectives:

- a) Establishing how Zambian Humanism provides a sound basis for incorporating a human rights approach towards the rights of persons with disabilities as expressed in the CRPD;
- b) Examining how Zambia's legislative framework adequately protects persons with disabilities at work and in the labour market;
- c) Exploring the legal complexities regarding the concept of reasonable accommodation; and
- d) Demonstrating that legal protection and enforcement of economic, social and cultural rights, such as the right to work, are essential for persons with disabilities in Zambia.

The thesis used a combination of doctrinal, comparative, historical, and interdisciplinary approaches to examine these objectives. This chapter brings the thesis to a close by summarising the findings and making recommendations to improve the implementation of disability anti-discrimination and equality laws in Zambia as examined below. The recommendations put forward in this chapter revolve around the amendment of legislation, enhancing monitoring and enforcement of rights, the necessity for legislative guidance, and ultimately urging the courts to interpret the rights of persons with disabilities in a manner that fosters substantive equality and safeguards them against discrimination. By embracing the recommendations that are put forth below, Zambia can strengthen its legal framework and create an environment that fosters greater inclusivity, equality, and protection of the rights of individuals with disabilities. The collective efforts to implement these changes will contribute to the advancement of disability rights and lead to a more just and inclusive society for all.

## 9.2 Significance of this thesis

The original contribution that this thesis makes is that it offers a comprehensive examination of Zambia's legal framework and its treatment of persons with disabilities concerning their right to work and employment. The thesis has demonstrated that the rights of persons with disabilities in Zambia are interconnected with the country's history, and that the barriers and discrimination they experience are due to historical, political, economic, social and cultural factors. By exploring disability law from the perspective of colonialism, where it was used to justify discrimination, to the present day, where it seeks to combat discriminatory conduct and exclusion, this thesis has filled an important gap in the literature concerning the implications of the current equality laws for the legal rights of persons with disabilities in Zambia.

The historical context provided a deeper appreciation of colonialism's sordid legacy of entrenching ableist ideals within the country's legal structures rooted in hegemony, patriarchy and oppression. Colonialism engraved the conceptualisation of disability in terms of the medical and charity models. The entire colonial system, including its legal system, was aimed at legitimising discrimination and segregation, instead of preventing it. Colonialism, guided by the 'scientific' study of race and the racial classification of human beings, with whiteness situated at the top of the pyramid and blackness at the bottom, was instrumental in establishing social inequalities and economic disparities. The entire colonial apparatus reflected the worst forms of prejudice, stereotypes and fears concerning the indigenous black people. Black people were considered inferior, unintelligent, and unsophisticated, and African culture was considered primitive and backward. Africans were judged according to western normative concepts of what was considered normal and abnormal. This racialism was also reflective of the treatment of persons with disabilities.

Although an independent Zambia is no longer segregated along racial lines, other forms of discrimination experienced by those with disabilities continue to exist partly due to the inherited colonial legal and institutional framework. The desired goal of preventing massive disruption to existing institutions post-independence and keeping the governance wheels moving meant the retention of discriminatory and disabling laws, such as the MDA 1949. Other colonial statutes, such as the Penal and Criminal Procedure Codes that use

discriminatory terminology, are still in force today, perpetuating the cycle of discrimination and negative stereotypes associated with disability.

By reflecting on *Zambian Humanism* and its approach to racialism, apartheid and inequality, this thesis proposed communitarianism as a more suitable and viable approach to addressing various disparities experienced by persons with disabilities and other marginalised and disadvantaged groups. When approached within the modern context of substantive equality, this thesis has shown that *Zambian Humanism* was ahead of its time. It thus provides a solid basis for removing barriers faced by Zambians with disabilities. This thesis has demonstrated that *Zambian humanistic principles* are incorporated into the current legal system and therefore provides a prescriptive guide towards an approach to equality that promotes and enhances the right to work for persons with disabilities in Zambia. The neo-liberal conceptual framework of formal equality is ill-fitted to offer practical solutions for persons with disabilities in Zambia. It is more likely to legitimise inequality than reduce it. Instead, this thesis concludes that *Zambian Humanism* and its communitarian commitments seek to strike a balance between individual human rights and individual and communal responsibility towards protecting rights.

### **9.3 Findings and recommendations**

#### **9.3.1 Legislation**

Protecting the right to work and promoting equal employment opportunities requires an appreciation of the legal framework by various stakeholders, including the public and private sector, employers, employees, trade unions, business enterprises, and society generally. This thesis has revealed that the laws on work and employment for persons with disabilities are ‘fragmented’ across several statutes. This partly reflects the intersecting layers of identity in which persons with disabilities find themselves. While legal protections for persons with disabilities have been enhanced via various measures aimed at advancing equality and equal opportunities, the laws have lacunae, overlap, and appear contradictory and inconsistent at times. The anomalies create confusion and legal uncertainty for persons with disabilities, employers, workers, and stakeholders. The thesis has revealed several contradictions within the law. Chapter 5 revealed an apparent contradiction between the MHA 2019 and PDA 2012 regarding the legal capacity of persons with disabilities. Another



contradiction relates to the definition of disability and the terms 'permanent' and 'long-term' impairment that fall within the meaning of disability. The Constitution also presents another challenge. While disability is a protected class following the 2016 amendments, the Constitution has provisions that exclude persons with disabilities from occupying certain offices. Thus, even though the Constitution requires equitable representation, which also involves the inclusion of persons with disabilities in various institutions, it removes the prospects of inclusion and participation by negatively presenting them. Also, the definitions of 'disability' and 'persons with disability' are contradictory, as examined in chapter 6.

The thesis also revealed that terms crucial to advancing the employment of persons with disabilities are not defined. For example, the ECA 2019 does not define 'discrimination' (both direct and indirect discrimination), and despite introducing the 'inherent requirement of a job defence', no definition is given nor what it entails. Additionally, the PDA 2012, despite mentioning undue burden as the limitation placed on the reasonable accommodation duty, neither defines what it means nor explains what factors might constitute an undue burden. On the other hand, the CEEA 2006 does not include undue burden as a limitation or defence against the reasonable accommodation duty.

The recent legislative shift towards addressing disabling barriers experienced by persons with disabilities is undoubtedly a positive and encouraging step. However, it is essential to acknowledge that the highlighted deficiencies within the law pose challenges in fully realising the desired changes mandated by a social model agenda and the CRPD. Due to these contradictions and gaps within the legal framework, the concepts of reasonable accommodation and other disability rights provisions may be prone to misunderstandings and misapplications, ultimately affecting the very individuals they are meant to protect.

The existence of these contradictions creates uncertainties and challenges for persons with disabilities, particularly concerning the application of reasonable accommodation and other positive measures. The lack of clarity and consistent interpretation of the law may hinder the effective implementation of necessary accommodations and support systems for persons with disabilities. Consequently, this can lead to situations where the rights of persons with disabilities are not fully upheld, and they may continue to face barriers in accessing essential services, education, employment opportunities, and other aspects of daily life. To truly advance disability rights and create an inclusive society, addressing these

challenges and resolving the contradictions within the law becomes imperative. A comprehensive and coherent legal framework that aligns with the principles of the social model and the CRPD is necessary to ensure that the rights of individuals with disabilities are fully protected and upheld.

### 9.3.1.1 Recommendations

Precise definitions within the realm of anti-discrimination law play a pivotal role as they establish the parameters for determining the individuals protected under the law.<sup>1320</sup>

Definitions of terms related to impairments are essential for determining the duration and nature of disabilities that warrant legal protection. By providing clarity on the temporal aspect of impairments, the legal framework can effectively encompass individuals with disabilities, leaving no room for potential loopholes resulting from ambiguous definitions. Precise definitions will contribute to consistency and promote better comprehension among lawmakers, legal professionals, and individuals seeking protection against discrimination.

In essence, harmonising terminology and concepts related to discrimination and disability would enhance the understanding of rights and obligations across various legal frameworks. Consistency would facilitate effective implementation, prevent confusion, and promote a more streamlined approach to combating discrimination. Alignment in definitions would also foster interdisciplinary collaboration, as stakeholders engage with a shared understanding of key terms and concepts.

Therefore, it is highly advisable to enhance existing legislations, such as the ECA 2019 and PDA 2012, by incorporating more explicit and consistent definitions of key terms associated with discrimination and disability. This necessitates the inclusion of comprehensive definitions pertaining to discrimination, indirect discrimination, and inherent job requirements. Furthermore, terms such as 'affirmative action' and 'equal work' should also be clearly defined to promote uniformity and avoid ambiguity.

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<sup>1320</sup> Anna Lawson and Mark Priestley, 'The Social Model of Disability: Questions for law and legal scholarship?' in Peter Blanck and Eilionóir Flynn (eds), *Routledge Handbook of Disability Law and Human Rights* (Routledge 2016).

Additionally, it is imperative to provide further clarity to the definition of ‘undue burden’ outlined in the PDA 2012. This clarification is necessary to prevent any misinterpretation or subjective assessments of the term, ensuring a more equitable implementation of the law. Furthermore, terms such as ‘permanent’ and ‘long-term impairment’ require explicit definitions to eliminate potential ambiguities and provide a precise understanding of their scope and applicability. The overarching objective is to enhance the protective measures of these laws against discrimination by offering clear and unambiguous guidance on the delineation of discriminatory practices and the rights and protections available to individuals. By establishing specific and consistent definitions, the laws can effectively safeguard individuals from discriminatory acts, promote fairness, and foster a more inclusive society.

Further, legislation can benefit from the inclusion of a non-exhaustive list of impairments that may be covered under disability non-discrimination laws in Zambia. Including a non-exhaustive list of impairments in legislation can provide clarity and guidance on the types of conditions that are protected under disability non-discrimination laws. Highlighting specific conditions such as HIV/AIDS and albinism within this list can also serve to draw attention to the need for specific protections for these marginalised groups. Additionally, a non-exhaustive list can help to ensure that the legislation is inclusive and covers a wide range of impairments, rather than only focusing on a limited number of conditions. The CRPD committee therefore emphasises the importance of having laws that are inclusive of persons with disabilities, and that these laws must be broad in scope and provide effective legal remedies. They also note that for these laws to be effective, they must be based on a comprehensive definition of disability that includes long-term physical, psychosocial, intellectual, or sensory impairments, and should take into account past, present, future, and presumed disabilities, as well as individuals associated with people with disabilities.<sup>1321</sup>

Importantly, reforming definitions in anti-discrimination laws necessitates meaningful engagement with relevant stakeholders. Consultation processes should include individuals with disabilities, advocacy groups, legal experts, and employers. By incorporating diverse

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<sup>1321</sup> UNCRPD Committee (n 131), para 73(b).

perspectives, concerns, and expertise, these consultations ensure that the reformed definitions accurately reflect the needs and realities of those affected by discrimination. Such collaboration promotes a participatory approach, resulting in more effective and inclusive legal provisions. To this end, anti-discrimination and equality laws should incorporate provisions for periodic review and updates of definitions. Regular evaluations would allow for the adaptation of definitions to evolving societal changes, emerging forms of discrimination, and an improved understanding of discrimination-related issues. By fostering a dynamic legal framework, these reviews would ensure that definitions remain relevant, comprehensive, and responsive to the evolving needs of persons with disabilities.

### **9.3.2 Monitoring and enforcement**

As observed in chapter 1 and 5, Zambia's current versions of equality and anti-discrimination laws move away from a fault-based approach to a capacity-based approach to tackling discrimination. The goal is to address discrimination holistically as a systemic issue instead of relying on individual complaints that regard discrimination as an isolated incident. The equality legal framework requires various positive measures to tackle discrimination and inequality and to provide equal opportunities for disadvantaged groups in Zambia. Because of this, the existing legal framework requires an interplay among multiple players. Effective enforcement, monitoring, and reporting procedures are required to achieve compliance in implementing the equality provisions and measures mandated by equality and anti-discrimination legislation. While each of the statutes examined in this thesis has its own compliance monitoring and enforcement bodies, there is a need to develop and build their capacity. Most of these bodies do not have sufficient human and financial resources to allow them to monitor legislative compliance and discrimination claims systematically and effectively. Further, concerted efforts and collaborations are required between the enforcement and monitoring bodies because of the intersectionality of disability issues and recognising that discrimination can occur based on more than one protected characteristic. Such collaborations will ensure consistency when handling complaints and violations of the law.

### **9.3.2.1 Recommendations**

To ensure effective implementation and enforcement of disability non-discrimination laws in Zambia, it is important to allocate sufficient resources to expand the institutional capacity of the various monitoring bodies. This could include providing funding for additional staff and equipment, as well as training and professional development opportunities for existing staff.

In addition to expanding the capacity of monitoring bodies, it is also important to conduct awareness-training programs on the rights of persons with disabilities. These programs can be targeted at a wide range of audiences, including government officials, employers, and the general public, and should aim to increase understanding and knowledge of the rights and needs of persons with disabilities. This can help to promote more inclusive and equitable societies and can also help to create more awareness of the issues that persons with disabilities face in their daily life.

### **9.3.3 Legislative guidance**

The entire premise of the social model of disability and the CRPD is to remove barriers to rights. This, therefore, requires an obligation to take measures aimed at realising the full enjoyment of rights for persons with disabilities. Although Zambia has enacted several laws to protect the rights of persons with disabilities, it is difficult to comply with them without the necessary legislative guidance. Thus, the limited employment prospects for persons with disabilities might be that employers are unaware of their obligations for equal employment opportunities and what it means to have an equal, inclusive and diverse workplace. As indicated in chapters 2 and 6, the meaning of disability can be challenging and complex. While the State can argue that Zambia has adopted the social model approach to defining disability, the average employer and employee cannot be expected to know what such an approach entail. Other factors, such as who, how and when to request a reasonable accommodation, are also outside their purview, as such concepts are a recent phenomenon in Zambian law. As this thesis has established, reasonable accommodation, despite being an essential tool to facilitate the inclusion and participation of persons with disabilities in the workplace, requires consideration of several factors for its implementation. Some of these

factors include disability-related assessments, medical examinations, qualification requirements, institutional capacity, the types of accommodations, as well as a host of business reasons why an employer may legitimately refuse to employ those with disabilities. A lack of clarity around these issues hinders the employment of persons with disabilities. Unfortunately, Zambia's law is unclear on many of these issues. To ease the challenges of interpreting and complying with the demands of equality and anti-discrimination legislation, the comparator jurisdictions, namely the US, UK and South Africa, have each instituted legislative guidance to make the provisions and requirements of the law simple to understand.

In Zambia, section 37 of the PDA 2012 requires the Minister of Community Development and Social Services, in consultation with the Minister of Labour and Social Security, to formulate regulations to ensure compliance with the provisions that promote and protect employment opportunities for persons with disabilities. The PDA 2012 has existed for ten years, but the ministerial regulations are yet to be implemented. In an era where competitiveness and economic efficiency are highly valued, it is easy for a country like Zambia to abandon legislative intervention championing equality measures under the guise of attracting major capital investment and stimulating economic growth. As already identified in the thesis, the fit, 'able-bodied' male will always be prized as the ideal worker in an ableist society. Without legislative intervention promoting equal employment opportunities and inclusive employment policies, persons with disabilities bear the brunt of employment exclusion. It has become common for employers in Zambia to subject job applicants to aptitude tests as part of the job application and interview process without any concern towards reasonably accommodating job applicants with disabilities. Such a trend indicates that employers are unaware of their obligations to institute positive measures against discrimination.

#### **9.3.3.1 Recommendations**

It is recommended that comprehensive legislative guidance on the employment of persons with disabilities is implemented as soon as possible. This could involve drawing examples from other countries such as South Africa, the UK, and the US, which developed legislative guidance and policies in this area. Additionally, it is recommended to increase budgetary

allocation to the Zambia Agency of Persons with Disabilities (ZAPD) to enhance its capacity to pursue its legislative mandate and to promote collaborative efforts between various ministries towards supporting equality and equal opportunities for persons with disabilities.

In the absence of legislative guidance, it is proposed that the country adopts the CRPD Committee and South African approaches when evaluating the relationship between reasonable accommodation and the undue burden defence. These approaches emphasise factors that promote equal opportunities for persons with disabilities, and the South African approach requiring employers to show *ubuntu* to employees with disabilities would be consistent with Zambian Humanism and the broader communitarian agenda for equality. This approach is distinguished from the US cost-benefit analysis approach, which is more individualistic and market-oriented.

#### 9.3.4 The Courts

While there has been a legislative shift from a model based purely on formal equality towards a conceptual framework of substantive equality, the High Court has not entirely caught up with this shift. Apart from *Brotherton*,<sup>1322</sup> the various decisions from the High Court regarding disability discrimination suits examined in this thesis do not inspire much confidence towards protecting persons with disabilities. Although *Brotherton* was decided before the domestication of the CRPD, the court's decision was progressive and reflective of the goals of substantive equality. On the other hand, the High Court's findings post the PDA 2012 and CPRD, such as *Musukwa*<sup>1323</sup> and *Mwewa*,<sup>1324</sup> reflect formal equality that shields duty-bearers (the State in both cases) from taking positive measures aimed at tackling disability discrimination. Despite acknowledging the existence of the CRPD and what it calls for, the decisions in both cases are illustrative of the vestiges of a legal system rooted in paternalism and ableism that contributes to inequality and prejudice. This is a worrying trend emanating from the High Court, particularly given that it is the first point of contact in adjudicating discrimination claims. Unfortunately, unless the Supreme Court or the Constitutional Court pronounces themselves on the nature and meaning of disability

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<sup>1322</sup> *Brotherton* (n 633).

<sup>1323</sup> *Musukwa* (n 28).

<sup>1324</sup> *Mwewa* (n 292).

discrimination, High Court judges remain at liberty to offer interpretations of the law in a manner that leads to social prejudice, inequality and discrimination against persons with disabilities.

Further, the High Court, post-PDA 2012, has opted to apply the medical individualised approach to disability instead of the social and human rights model as demanded by the CRPD and PDA 2012. Whereas *Brotherton*, *Musukwa* and *Mwewa* do not directly deal with disability discrimination in the workplace and labour market, a case that does is *Kingaipe*.<sup>1325</sup> Regrettably, even this case does not inspire confidence concerning the duty to reasonably accommodate persons with disabilities in the workplace.

However, given the dearth of case law on the question of the right to work for persons with disabilities in Zambia, it is impossible to discern a pattern of consistency regarding how the courts will decide reasonable accommodation claims. Nonetheless, a pattern that can be gathered from the High Court decisions examined in this thesis is that the individual medical model of disability is deeply entrenched in the judges' minds. Several reasons can be given for this.

Firstly, the courts have not seriously engaged with the social model's ontology and definition of disability and persons with disabilities as adopted from the CRPD under the auspices of the PDA 2012. As chapter 2 observes, the medical model situates disability as an individual problem that must be cured or cared for. On the other hand, the social model takes a holistic approach that looks at disability as the interaction between a person's impairment and their socio-environment and how disabling the socio-environment can be. Thus, where disability is perceived through the lens of the social model, the goal is the removal of barriers that stand in the way of persons with disabilities from participating and enjoying their rights on an equal basis with others.

Secondly, while the CRPD, when applied through the PDA 2012, have provided prescriptive guidance on how to ensure that the rights of persons with disabilities are respected and protected, by approaching disability under the medical model, the courts are unlikely to treat persons with disabilities as rights-holders. Consequently, the courts will fail to call

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<sup>1325</sup> *Kingaipe* (n 933).



upon duty-bearers to effect the necessary positive changes to facilitate the enjoyment of rights. As observed in the thesis, the medical model is reminiscent of formal equality, which turns a blind eye to individual and contextual differences. Instead, it insists that everyone is treated the same and therefore frowns on ameliorating disadvantages by taking positive measures for certain groups to promote equality and inclusion as prescribed by substantive equality.

Thirdly, except for *Brotherton*, the High Court has avoided making decisions requiring the State to take active measures to ensure persons with disabilities can enjoy their rights. As the Supreme Court, in its landmark decision of *Mwanza*, has observed, this can be attributed to a misinterpretation of the 'progressive realisation' of ESC rights and the inability to appreciate that CP rights also give rise to positive duties in their implementation. It also indicates a failure by some High court judges to appreciate the indivisibility and interrelatedness of CP and ESC rights.

There is a need to recognise that ESC rights are human rights and not welfare entitlements subject to the whims and caprices of the State. It is essential to understand that fully implementing ESC rights goes to the heart of CRPD implementation. As Flóvenz asserts, '...in those States in which economic, social and cultural rights have not been sufficiently implemented until now, there may arise some problems in implementing the Convention as a whole'.<sup>1326</sup> It is easier to implement positive measures aimed at equal opportunities where these measures are instituted as giving effect to fundamental rights instead of political policy directives.

It is only hoped that the next time the High court is faced with a case concerning the rights of persons with disabilities, it will adhere to the principles and approach applied in *Mwanza* towards the constitutional safeguard of human rights. As examined in chapter 8, the decision in *Mwanza* not only goes beyond the remit of formal equality but encompasses substantive equality requiring the State to adhere to its international human rights obligations to respect, protect and fulfil all human rights. As examined in the thesis, the failed attempt at including an extensive constitutional rights regime for people with

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<sup>1326</sup> Brynhildur G Flóvenz, 'The Implementation of the UN Convention and the Development of Economic and Social Rights as Human Rights' in Oddný M Arnardóttir and Gerard Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Martinus Nijhoff 2009) 26.

disabilities in the Bill of Rights necessitates a broad approach to interpreting the existing constitutional rights. This thesis has recommended that to give clarity and certainty to this expansive approach, the courts must adopt 'reasonableness' towards the adjudication of ESC rights claims such as the right to work. The 'reasonableness' approach not only signifies the justiciability of ESC rights but also provides effective remedies for breach. The thesis has revealed that such an approach would be consistent with communitarianism as it seeks to strike a balance between rights and duties when examined from a Zambian Humanism perspective.

#### **9.3.4.1 Recommendations**

In the first place there is a need for constitutional reforms and amendments to the Bill of Rights to explicitly include ESC rights and disability rights. The CRPD committee has also recommended that provision be made in the Bill of Rights to clarify that the denial of reasonable accommodation constitutes discrimination.<sup>1327</sup> Amendments to the Bill of Rights are likely to be challenging owing to the suspicions that often characterise the constitutional reform agenda in Zambia. As explained in the thesis, the last attempt at amending the Bill of Rights, which would have seen the inclusion of ESC and disability-specific rights, was an exercise in futility owing to the failure to garner the requisite number of voters at the 2016 referendum. Nonetheless, fresh attempts can still be made to include these rights. This will require extensive awareness campaigns from persons with disabilities and their constituent organisations, other civil society organisations, MPs, religious and traditional leaders, and others. Although various pieces of legislation, most notably the PDA 2012, regulate the rights of persons with disabilities, in a constitutional democracy such as Zambia, all the rights of persons with disabilities must be constitutionally guaranteed and protected. Because State power is limited to the constitutional framework, constitutional guarantees of human rights are the best protection against rights violations.<sup>1328</sup>

Secondly it is important to raise awareness of the CRPD among legal professionals and adjudicators in Zambia, particularly regarding how it has been incorporated into Zambian law. It is important for judges and lawyers to be conversant with the various models of

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<sup>1327</sup> UNCRPD Committee (n 68), para 2.

<sup>1328</sup> Gaze and Smith (n 291).

disability and how each model affects persons with disabilities. The current legislative order guided by the CRPD has repositioned persons with disabilities within the human rights discourse. Further, as clearly examined in this thesis, there has been a paradigm shift from seeing disability as an individual misfortune to focusing on the role played by the environment, attitudes and societal barriers in creating disability. This, therefore, requires the courts to look at disability-based discrimination from the perspective of the person with disabilities instead of the perpetrator's perspective.

#### **9.4 Recommendations for future research**

There are many aspects that could not be explored within the scope of this thesis. One area where further research could be carried out is therefore the analysis of the extent to which political ideologies influence judges' decisions in discrimination cases in Zambia. Another area of research could be to study the feasibility of enacting a consolidated statute on equality and anti-discrimination in Zambia, similar to the UK's Equality Act 2010.

#### **9.5 Concluding remarks**

Any discussion on legal rights in Africa cannot ignore the communitarian philosophy deeply rooted in African countries such as Zambia. The thesis has demonstrated that when applied to disability issues, principles in Zambian Humanism are similar to the values presented in the CRPD, which call for inclusion, participation, respect for human dignity, non-discrimination, equality of opportunity, and the State's obligations to ensure the protection of rights. The CRPD has sometimes been criticised as not entirely reflective of the challenges experienced by persons with disabilities in Africa. A major criticism is that it is skewed towards neo-liberalism's values of individual autonomy, independence and self-sufficiency at the expense of African communal values. Nevertheless, this criticism can be mitigated in the national context by Zambian Humanism's person-centredness approach, which requires a high valuation of the individual, who must remain the focal point for all social action.

This thesis has shown how traditional values of community, and mutual support are integral to understanding the barriers and challenges faced by persons with disabilities in accessing employment opportunities. It is clear that the principles of Zambian Humanism, such as the belief in the inherent worth and dignity of all individuals, can serve as a guiding force in

shaping policies and programmes that aim to promote the inclusion of persons with disabilities in the workplace and labour market. Therefore, as we move forward, it is essential that we continue to incorporate the values of Zambian Humanism in our efforts to remove barriers and create a more inclusive society where the right to work for persons with disabilities can be fully realised. In its attempt to create a humanist society, Zambian Humanism as mentioned in this thesis insists upon creating an inclusive community. This also translates to being able to accommodate individual differences. Therefore, while the generic African communitarian approach is that the community comes prior to the person, Zambian Humanism drawing inspiration from its theistic foundation calls for treating people with equal respect and dignity based on common humanity if a humanist society is to be achieved. Thus, in Kaunda's own words:

Humanism is the striving towards an ideal of individual fulfilment where every member of society is given the chance to achieve the best that is in them. That is not just a pious cliché; it has vital social and political implications.<sup>1329</sup>

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<sup>1329</sup> Kaunda (n 110) 27.

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