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AFRICA
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The right to access to justice for persons with disabilities *In conversation with Ms Dianah Msipa*

Africa Rights Talk is a [Centre for Human Rights](#) podcast series exploring human rights through conversations with academics, practitioners and activists. The Africa Rights Talk series is hosted by [Tatenda Musinahama](#). Each episode offers insight into the African human rights system and the state of human rights in Africa, and globally.

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Tatenda: Please explain to the audience what it is that drove you into working in this field?

Dianah: I have a legal background, I come from a legal background so I started off my career in law as criminal prosecutor, and during my time as a criminal prosecutor, I handled a number of cases that involved witnesses in particular with disabilities and I think having handled those cases without any prior training or knowledge on disability rights or how to accommodate persons with disability made it clear to me that there was definitely a gap in terms of knowledge on how to assist persons with disability to access to justice on an equal basis with others. So that is the singular thing that sparked my interest in this area. So I went on to do a master's degree that focuses on the rights of persons with disability, particularly the right to access to justice.

Tatenda: Can you describe the nature of your work with the Disability Rights Unit at the Centre for Human Rights?

Dianah: Certainly, so the Units' main vision and mission is to address the right persons with disability in the African continent, and we do this in various ways such as conducting research on disability rights standards and norms. And also building the capacity of various stakeholders including government, national human rights institution, and academia. So the work that the unit does is quite varied in nature. We have academic programmes, given the fact that the unit is housed within the faculty of law, we do have academic functions that we fulfil. So we have academic programmes such as the [Masters in Disability Rights](#) in

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an African context, which is actually the very first master's degree on the continent focusing solely on the rights of persons with disability. And we also have the [Advanced Short Course on Disability Rights in an African context](#) which we offer on an annual basis in March. It is an advanced course that takes place for a week and it brings together people from academia, civil society, and government and so on and so forth, who have an interest in learning about disability right from a human right perspective. We also have a publication that is dedicated to the rights of persons with disabilities. It is an accredited journal known as the [African Disability Rights Yearbook](#). The aim of the year book is to encourage as much home grown African scholarship around African disability rights as much as possible. We also hold an annual [Disability Rights Conference](#) which is held every year in November. So this brings together people who are working on disability rights issues. The Annual Disability Rights in Africa conference brings together different people from the region. The second thing is that both these instruments require all staff working in the administration of justice to receive a training on how to ensure that persons with disability access justice on an equal basis with others.

Tatenda: What are the relevant human right treaties for access to justice for persons with disabilities and how do these treaties really impact the persons with disabilities at local level?

Dianah: To answer your first question, on what are the relevant human right treaties dealing with access to justice, I would say that there are two disability specific international human rights instruments that provide for the right for access to justice. So at the global level, we have the [Convention on the Rights on Persons with Disabilities](#) or the CRPD in short. And at regional level, we have the protocol to the [African Charter on Human and People's Rights on the Right of Persons with Disability in Africa](#). In short, the Africa Disability Protocol. Both these instruments provide for the right to access to justice in Article 13. So Article 13 of the CRPD is on access to justice and similarly, article 13 of the African disability protocol is also on access to justice.

Both of these provisions in these instruments state that all persons with disability, without exception, are entitled to enjoy the right to access to justice in an equal basis with others. These provisions also states how access to justice is to be achieved and the first is through the provisions of accommodation. So the CRPD provides that state parties MUST provide procedural and age appropriate accommodations. Similarly, the African disability protocol states that parties must provide procedural age and gender appropriate accommodations. Just to explain what we mean by accommodations, an accommodation is simply any modification or adjustment to the way things are normally done. So for example, normally court cases takes place in public, they are open to the public, anyone can sit in the gallery observe the court proceeding taking place.

However, for certain witnesses, they might require an accommodation or an adjustment or modification to that specific procedure by simply holding those proceedings in private, so that means only allowing the necessary personnel to be in there and no more.

So the impact of that accommodation is that it can assist someone to communicate more effectively by eradicating the anxiety that is probably associated with having to speak in front a number of people. So that is an example of an accommodation that may be made to enable someone to testify effectively in a court of law.

So the second requirement for access to justice in both of these instrument is the requirement for the training for those working in the administration of justice. So this includes police, prison staff, court staff and anyone who is working in the administration of justice have to receive training on how to provide accommodations not just in the criminal justice system but in every arm of justice, every system of justice to ensure that persons with disabilities can participate on an equal basis with others. The African Disability Protocol has additional requirements that you do not find in the CRPD, the rational or the reason for this is because the African Disability Protocol contextualises the rights issue to the African context. The addition requirements in the African Disability Protocol include the following: first, state parties are required to ensure that customary law processes are inclusive. As we all know, in the African legal system we do have customary law processes and the CRPD does not reflect on this, but the African Disability Protocol does. States are required to ensure that when they look at the justice system, they also take into account the customary law processes.

The second requirement that is in the African Disability Protocol which you do not find in the CRPD, is the requirement for the provision of legal assistance, including legal aid. In our African context, persons with disabilities in particular face a lot of economic hardships, economic challenges and affording a legal counsel is one of the main barriers that persons with disabilities in Africa face. This why the African disability protocol has a requirement for the provision of legal assistance, including legal aid.

The second part of your question, Tatenda, was what impact these treaties have at local level. Just to answer that very simply, I would say that bit depends on the place of international law in any given country. Some nations are dualist states, while others are monist states. The dualist states would require all international treaties to first be domesticated through an act of parliament, in order for them to be binding at domestic level. Whereas, a monist state is one where the very fact that government has ratified a treaty meaning that that treaty is directly incorporated into the legal structure of the domestic jurisdiction and judges and magistrate can directly apply those international treaties. So all of this really depends on how international law is treated within that specific country.

Tatenda: What are the challenges that persons with disabilities face in access justice particularly in the face of the Corona virus pandemic?

Dianah: Persons with disabilities face different types of challenges as you have noted. But the thing I want to note before I get into the answer is that when we speak about persons with disability, we are covering a number of disabilities. So we

are speaking about person with psycho-social disabilities, persons with intellectual disabilities, persons with visual impairments, hearing impairments and so on and so forth. So each individual has unique strengths and needs. The answer that I am going to give is going to be more or less generalised but I just want to point out that there are differences that each individual with disability would have their unique strengths and needs.

Having said that, the general barriers or challenges that persons with disabilities face include the following: so we have attitudinal barriers. Persons with disabilities face a lot of attitudinal barriers in the sense that people have misconceptions about persons with disabilities, their ability to be reliable witnesses in court and so on. And this barrier affects the ways that persons with disabilities are treated particularly in the criminal justice system. I should just point out here that I am speaking here about barriers in general and from here I am going move onto barriers that are specifically related to the COVID-19 pandemic. The second barrier that persons with disabilities generally face in accessing justice is an accessibility barrier. Here when we are talking about accessibility we are talking about the accessibility of the environment as well as the accessibility of information. In some buildings for example, where justice systems are administered, may not be environmentally accessible to persons with disabilities. For example, a person in a wheelchair might find it difficult to navigate a building that does not have wheelchair ramps or lifts for them to use and on the other hand, we also have an accessibility barrier that is related to accessing information. So the criminal justice system, the civil justice system and other forms of justice systems are somehow complex to a certain extent. And information is very important in those systems and sometimes, information is not provided in accessible formats. For example, someone is accused of a crime might not be given the charge sheet, the witness statements, in braille format or in a format that they can understand. So there is that barrier of accessing information.

There is also the economic barrier which I alluded to earlier in the sense that persons with disabilities are not always in the position to access quality legal advice due to economic barriers and economic challenges and so on and so forth. Another barrier is known as the procedural and legal barriers. So this is where the procedures themselves or the law themselves may actually act as a barrier. A very common example that I normally give of this is the provisions that state that persons with intellectual disabilities are not competent to act as witnesses in court. So you find that it is in the law that certain persons with mental disabilities cannot actually testify in a court of law. And a further barrier that persons with disabilities generally face is the communication barrier. Persons with hearing and speech impairments may not always have sign language interpreters for example, readily available to assist they communicate at the different stages in the justice system.

I keep referring to the criminal justice system, but we need to look at it more broadly, the justice system in general. And the final general barrier is the lack of accessible information. I think I already referred to this earlier on.

Now in terms of barriers that have risen specifically as a result of COVID-19 pandemic, is as you are aware, government across the world have asked people to stay at home, they have instituted lockdowns and asked people to stay at home.

So justice systems including in South Africa are resulting to the use of technology to hear cases for example, and also to even postpone cases that may have already begun. The problem with persons with disabilities is sometimes they do not have access to computers, telephones, mobile phones, smart phones that they can use or even internet or a reliable Wi-Fi connection to enable them to partake in these processes. So that's one challenge. The other challenge in respect of technology is that the technology may not be accessible to certain persons with disabilities. For example, the use of closed captioning for persons with hearing impairments or the availability of sign language interpreters for persons with hearing and speech impairments. The use of technology is yes a solution to a certain extent but it does present certain challenges for persons with disabilities.

Another specific challenge that has risen as a result of the COVID-19 pandemic is escalation of domestic violence. I think you would have heard in recent media reports that domestic violence is on the rise. Now for persons with disabilities, violence and abuse is generally higher in comparison to persons without disabilities. So even during the COVID lockdown period, persons with disabilities are also being subjected to abuse at a higher rate than normal. And so this is another challenge that arises for persons with disabilities. And the final challenge which is directly connected to COVID-19 pandemic is the lack of access to information. I think as you would know, the government keeps sending out information about the different levels we are on, what is allowed in level 4, in level 3 and so on as so forth. The information on the COVID-19 pandemic is rapidly evolving and affecting many areas of life, so information is vital at this time but however, information is not always available to persons with disabilities in accessible format. I get a number of text on my phone from the government with advice on stay at home, maintain social distancing and so forth. But I can imagine for persons with disabilities who perhaps don't have access to a mobile phone or are not able to access this kind of information, how left behind they are in terms of access to information.

Tatenda: So let suppose that in an incident where there is violence like you pointed out earlier are there additional barriers in terms of accessing police stations because already there are travel regulations travel restrictions, how much does this impact their right to report cases and for those cases to be heard and tried in a fair and just manner?

Dianah: So there is a significant impact on the ability to report. We must note in the beginning right from the start that the ability of persons with disability to report is generally problematic even without the COVID-19 pandemic in the sense that most of the violence is perpetrated by people who are in a carer role or a support role. So family members who are providing care to persons with disabilities, you find out that these are people that they rely on for assistance.

They rely on them for help to perform daily activities. So with the COVID-19 pandemic, there is also the issue of travelling. Like travelling to the police station. In a case where the perpetrator is someone within your home, you are going to need their assistance to go and report and with the restriction on travel

I think that also makes it quite difficult for persons with disabilities to go and report any such cases. I will say however, that particularly in South Africa, the courts are allowing cases to be heard. And they are allowing people who are material in the case to attend court. There is this possibility but also let us bear in mind that persons with disabilities often require assistance from other people and it becomes much more difficult when there is travel restrictions. It becomes much more difficult if the person they are travelling with could possibly be the person who is perpetrating that violent. So there is a need to definitely look into the situation of persons with disabilities specifically in relations to domestic violence and abuse.

Tatenda: So what are some of the recommendations you would proffer for advancing access to justice for persons with disabilities generally speaking and particularly in the light of the pandemic?

Dianah: The very first recommendation I think would be to provide accessible information. As I already mentioned earlier, the COVID-19 pandemic has made it necessary for us to access information very quickly as the situation is changing rapidly. So it is important that we don't leave out persons with disabilities and in order to do so, we need to provide information in accessible format that persons with different types of disabilities can access. Secondly, I would also say we need inclusive decision making platforms. So I would suggest that persons with disabilities or organisations of persons with disabilities be consulted in terms of decision making about how to keep people safe particularly persons with disability safe during the pandemic. I think including persons with disabilities in decision making is important particularly to understand how IT solutions can be inclusive, we would need to involve persons with disabilities in that specific discussion.

The other recommendation that I would have is that in light of the fact that persons with disabilities do rely on other people for support, we should take into account that family members and caregivers should continue to provide support to persons with disabilities. Specifically, when it comes to going to court, and anything that is related to the justice system. So I think these are the recommendations that I would offer, they are probably not exhaustive as this is still a new pandemic and the exact impact to access to justice is still being assessed. But from the information that we have available at the moment, these are the recommendations that I would make.

Tatenda: Would you have any concluding remarks or any other things that you would like to say as far as access to justice is concerned?

Dianah: I would say that it is important for us to take into account the fact that training need to be carried out, access to justice is still relatively new, particularly in relations to persons with disabilities, the provisions of accommodations is still

relatively a new concept, and I think it is important to take seriously the need to train personnel in the justice system on how to ensure that persons with disabilities can access justice system on equal basis with others.

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