

BOTSWANA

PERSONS WITH DISABILITIES AND BARRIERS TO EQUAL ACCESS TO JUSTICE IN BOTSWANA

A research study of the
criminal justice system





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ACRONYMS AND ABBREVIATIONS

CP&EA	Criminal Procedure and Evidence Act
CRPD	United Nations Convention on the Rights of Persons with Disabilities
CSO	Civil Society Organisation
DPO	Disabled Persons Organisation
DPP	Directorate of Public Prosecutions
LAB	Legal Aid Botswana
SADC	Southern Africa Development Committee
UDHR	Universal Declaration of Human Rights

ABOUT THE CENTRE FOR HUMAN RIGHTS

Recognised internationally for excellence in human rights law in Africa, the Centre for Human Rights (the Centre) at the University of Pretoria is uniquely positioned as both an academic department and a non-governmental organisation. The Centre is a leader in human rights education in Africa and works towards greater awareness of human rights, the wide dissemination of publications on human rights in Africa, and the improvement of the rights of women, persons with disabilities, children, indigenous peoples, sexual minorities and other disadvantaged or marginalised persons or groups across the continent.

The Centre's website is available at: <https://www.chr.up.ac.za/>

ABOUT THE DISABILITY RIGHTS UNIT

The Disability Rights Unit at the Centre for Human Rights is committed to finding evidence-based ways of addressing the rights of persons with disabilities on the African continent. This includes conducting research on international disability rights standards and instruments, building capacity among governments, national human rights institutions, academia, civil society and communities, and engaging with judicial, quasi-judicial and non-judicial redress mechanisms.

For more information, see: <https://www.chr.up.ac.za/units/disability-rights-unit>

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EXECUTIVE SUMMARY

The Government of Botswana acceded to the Convention on the Rights of Persons with Disabilities (CRPD) in 2021, thereby indicating its willingness to adhere to its norms and standards. The Convention enshrines a wealth of rights for persons with disabilities, including the right to access to justice on an equal basis with others under article 13. Article 13 creates a duty upon state parties to provide accommodations to overcome the numerous barriers to accessing justice faced by persons with disabilities. Even though Botswana is yet to domesticate the CRPD, it is imperative that the state understands the nature of the barriers that impede the full and effective participation of persons with disabilities, including in the criminal justice system, and the possible ways of eliminating such barriers. To this end, a research study was conducted to establish the specific barriers to accessing the criminal justice system faced by persons with disabilities in Botswana. Qualitative research was conducted in Gaborone and the surrounding areas and a desktop review undertaken to assess laws that pose barriers to accessing the criminal justice system by persons with disabilities in Botswana. The study found that there are numerous legal, structural and administrative barriers that hinder the participation of persons with disabilities in the criminal justice system. Criminal cases that involve persons with disabilities as complainants, for instance, are not taken seriously by the Botswana police during reporting. The justice sector personnel are also not trained on how to accommodate persons with disabilities who interact with the criminal justice system. Case related

information and communication is not provided in accessible formats such as sign language and braille.

METHODOLOGY

The study combined both secondary research of existing data, by conducting a legislative review of the available criminal laws in Botswana, and qualitative research – using questionnaires and interviewing people in the below categories:

- organisations of persons with disabilities;
- criminal justice sector personnel;
- stakeholders in the justice system; and
- attorneys.



INTRODUCTION

Access to justice is a fundamental right, and a prerequisite for the protection of all other human rights.¹ Access to criminal justice for persons with disabilities in Botswana is a precarious subject. This is due, primarily, to the fact that most legislation that addresses persons with disabilities of any age is centered on civil law with little mention of provisions for or considerations of persons with disabilities in criminal justice legislation.

Further to this legislative exclusion, the over 90 000 persons with disabilities² in Botswana face other barriers that make their access to justice, including the criminal justice system, more difficult. Barriers concerning communication and societal attitudes toward persons with disabilities, for instance, are compounded with legal and procedural barriers that render persons with disabilities disadvantaged over the marginalisation that they already experience.³

Central to the analysis is the understanding of what access to justice and the

-
- 1 United Nations Department of Economic and Social Affairs: Social Inclusion 'Toolkit on disability for Africa: Access to justice for persons with disabilities' <https://www.un.org/esa/socdev/documents/disability/Toolkit/Access-to-justice.pdf> (accessed 17 July 2021).
 - 2 Statistics Botswana 'Botswana demographic survey report 2017' at 60 <http://www.statsbots.org.bw/sites/default/files/publications/Botswana%20Demographic%20Survey%20Report%202017.pdf> (accessed 9 June 2021).
 - 3 A Eide & T Mmatli 'Sintef report: Living conditions among people with disability in Botswana' Sintef Technology and Society (2016).

criminal justice system entail. Article 13(1) of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) states that access to justice for persons with disabilities should be facilitated

on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.⁴

Criminal justice for purposes of this report concerns laws, procedures, institutions, and policies at play before, during, and after the commission of a crime. The two central ideas governing the system are that ‘criminals and victims of crime have certain rights, and criminal conduct should be prosecuted and punished by the state following set laws and conclusion of the process in court’.⁵ As such, recognition of the right of access to justice that persons with disabilities have in conjunction with Botswana’s responsibility to ensure that the criminal justice system is unbiased and able to represent persons with disabilities holistically is crucial to granting unimpeded access. It is important to note that the operational definition of persons with disabilities is not age-specific and applies to all people granted disability status. In this report, efforts will be made to contextualise how this general approach to disability classification affects children with disabilities and their access to justice concerning the legal instruments that govern children’s access to justice in Botswana.

Therefore, this report will assess and analyse in general access to justice and specifically access to criminal justice by persons with disabilities in Botswana. Specific attention will be paid to the national legal structure that accommodates the operation of two legal systems,⁶ the customary law and civil law side by side, and observation of gaps, challenges, and barriers in law and the dual systems as affecting the lived realities of persons with disabilities. An analysis of Botswana local laws, regional and African commitments, and international law will be offered to elucidate positives, negatives, progress, and lack thereof regarding access to justice in the criminal system by persons with disabilities. The analysis will culminate in the presentation of thematic recommendations on reducing barriers to access to justice by persons with disabilities in Botswana.

4 UN General Assembly, Convention on the Rights of Persons with Disabilities: resolution/adopted by the General Assembly, 24 January 2007, A/ RES/61/106.

5 Cornell Law School, Legal Information Institute ‘Criminal justice’ https://www.law.cornell.edu/wex/criminal_justice (accessed 9 July 2021).

6 O Jonas ‘The right to inclusive education in Botswana: Present challenges and future prospects’ (2014) 2 *The African Disability Rights Yearbook* 3.

DEFINING PERSONS WITH DISABILITIES IN BOTSWANA

It is important to note from the onset that Botswana does not have a disability-specific legislation although there is mention of disability in various Acts and policy documents that will be addressed in the report.

The National Policy on Care for People with Disabilities⁷ referred to herein as the National Policy was adapted in 1996 with a policy objective 'to guide those parties interested in disability issues to involve them in the process effectively'.⁸ There are various principles, which guide the National Policy while expected to assist government structures including the justice system to streamline efforts for enforcing the rights of persons with disabilities. The Policy, however, does not comprehensively define disability.⁹

In 2011, Parliament discussed and revised the National Disability Policy (2011) which is aligned with the tenets and the spirit of the CRPD. The revised Policy, however, has not progressed to implementation and is yet to be passed in Parliament. The revised Policy, which may offer promotion and protection, and equality for persons with disability defines disability as:

Long term impairment, be it physical, mental, intellectual, or sensory, whether inherited or acquired which, when combined with environmental and societal barriers limits the person's ability to function on an equal basis with others who have no impairment.¹⁰

This definition bridges two models of disability – the medical model and the social model.¹¹ The understanding of these two models is important when engaging persons with disabilities in the criminal justice system.

On the one hand, the medical model of disability looks at the impairment or condition that a person has and classifies them as incapable due to the impairment or condition.¹² This model is criticised for viewing persons with disabilities as needing to be fixed. On the other hand, the social model of disability acknowledges that people

7 The Government of Botswana 'The National Policy on Care for People with Disabilities' approved and adopted by Presidential Directive Cab: 5/96 (14 February 1996) <https://afri-can.org/wp-content/uploads/2019/08/BOTSWANA.pdf> (Accessed 17 July 2021).

8 National Policy (n 7) Clause 4.1.

9 BR Dinokopila 'The rights of people with disabilities in Botswana: Legal, institutional and policy framework' in I Grobbelaar-du Plessis & T van Reenen (eds) *Aspects of disability law in Africa* (2011) 261-280.

10 The Revised National Disability Policy (not yet operational).

11 B Albert 'Briefing note: The social model of disability, human rights and development' (2004) http://enil.eu/wp-content/uploads/2012/07/The-social-model-of-disability-human-rights-development_2004.pdf (accessed 7 July 2021).

12 World Health Organisation 'World report on disability' (2011) 4 https://www.who.int/disabilities/world_report/2011/chapter1.pdf (accessed 19 July 2021).

may have impairments or conditions that limit their abilities to participate 'on an equal basis as those without impairments' when reasonable accommodations are not made to enable this.¹³ This model places the onus of equalising the playing field on society rather than on the person with an impairment or condition. In this model, impairment does not result in a disability, societal exclusion and barriers that prevent free access to services, technology or spaces are what create disabling environments for people with impairments, thus rendering them disabled.

There exist regional and international instruments that Botswana is a signatory to, that may enhance access to justice for persons with disabilities. With regards to inclusion as a right under international law, Jonas states that

it is important to note that Botswana is a dualist state. This means that provisions of international instruments such as the CRPD do *not create justiciable rights in the country* unless they are legislatively incorporated into Botswana law.¹⁴

These instruments – including the Protocol to the African Charter on Human and Peoples' Rights on the rights of persons with disabilities and the CRPD – shall be discussed later in the report as international practices and standards that Botswana can adopt to protect and promote the rights of persons with disabilities.

In order to dehomogenise persons with disabilities in Botswana, the Botswana Demographic Survey Report of 2017, the most recent data reference available, recorded a total of 90 945 individuals who reported having disabilities, accounting for 4.2 per cent of a population of 2 154 863.¹⁵ The most prevalent forms of disabilities were:

- sight/visual impairment (44 939);
- hearing impairment (16 854);
- speech impairment (7 764);
- impairment of leg(s) (26 115); and
- impairment of arm(s) (9 520).

The survey also asked respondents if they had 'difficulty of remembering' (9 092) and 'difficulty with self-care' (6 796) which do not in and of themselves amount to a recognisable disability.

Intellectual/psychosocial impairments and conditions are not formally classified as disabilities in Botswana, hence the lack of data. This oversight of invisible

13 As above.

14 Jonas (n 6).

15 Statistics Botswana 'Botswana demographic survey report' (2017) 60 <http://www.statsbots.org.bw/sites/default/files/publications/Botswana%20Demographic%20Survey%20Report%202017.pdf> (accessed 9 June 2021).

disabilities further calls into question the national approach to disability and persons with disabilities beyond what is visible and easily compartmentalised. The language used in describing disability is itself problematic as it infringes on the fundamental human rights of people in being treated with dignity and equality. The Mental Health Disorders Act¹⁶ further defines people with intellectual disabilities in a rather inhumane way, it provides that ‘mentally disordered or defective person’ means,

any person who in consequence of a mental disorder or disease or permanent defect of reason or mind, congenital or acquired, is incapable of managing himself or his affairs, or is in consequence of such disorder or disease or defect a danger to himself or others, or is unable to conform with the ordinary usages of the society in which he moves, or who in consequence of such disorder, disease or defect requires supervision of treatment or control, or who, if a child, appears because of such defect to be permanently incapable of receiving proper benefit from instruction in ordinary schools.

OVERVIEW OF THE CRIMINAL JUSTICE SYSTEM IN BOTSWANA

This section will analyse legislation relating to criminal laws and procedures in Botswana, and assess the provisions of the various Acts in direct relation to access to justice and criminal justice in Botswana by persons with disabilities. Botswana has a dual legal system, being common law and customary law, which operate separately but not in isolation of one another – as it is not uncommon for processes to require mobilisation of both systems. Botswana recognises customary law and common law, and their applicability depends on matters and jurisdiction.

Customary law is applied at the level of traditional customary law and an institution called Kgotla (singular) or Dikgotla (plural), which is led by traditional authorities. Unlike customary law, common law is provided by way of Acts of parliament and national policies; it is also applicable across a hierarchy of courts. Customary law applies to the extent that the traditions and customs as will be applied do not interfere and violate the provisions of the Constitution, which embody fundamental human rights.¹⁷

The criminal procedure legislation concerning criminal justice in Botswana is notably the Penal Code, and the Criminal Procedure and Evidence Act. The legislation that directly addresses persons with disabilities includes the Mental Health Disorders Act (1969), the Children’s Act (2009), High Court Rules, and Magistrates Rules. As previously mentioned, The National Policy on Care for People with Disability (1996)

16 Cap 63:02.

17 Sec 2 of the Customary Law Act Cap 16:01.

and National Disability Policy (2011) will also be analysed as policies that are used in Botswana for the furtherance and promotion of persons with disabilities' rights and care.

In furtherance of access to justice, there exists a separation of civil and criminal law and how they are accessed. Civil law in Botswana is governed by civil procedures and private law where private parties are litigants in civil suits and the criminal law is governed as a measure to control and promote peace and the state under a dual functionality of the Botswana Police Services and the Directorate on Public Prosecutions. The state takes the lead as prosecutor and legal defence for those who have been wronged and/or violated. Various legislation that makes up the bulk of the criminal system will be discussed.

Concerning civil and criminal procedure in Botswana, the hierarchy of courts provides different jurisdictions for varied types of cases. In general, the highest court is the Court of Appeal, which only serves as an appellate court and not a court of the first instance. The High Court, as the court with unlimited jurisdiction and as a court of the first instance, entertains all matters across civil and criminal law. The lowest court is the Magistrates Court, which has limited jurisdiction and cannot entertain certain civil and criminal matters. The Customary Court system is divided into three institutions, namely: the Customary Court of Appeal, the Customary Courts, and the Court of Arbitration. Customary Courts have limited jurisdiction in terms of civil and criminal law and do not allow any legal representation. Depending on the issue before the Customary Courts, matters are appealable to the High Court as the court with unlimited jurisdiction and the Magistrates Courts.

THE CONSTITUTION OF BOTSWANA

The Constitution¹⁸ is central to this discourse as it embodies political and civil rights and is devoid of socio-economic rights. There is no specific reference to persons with disabilities or by inference. Sections 3 to 15 of the Constitution of Botswana provide for fundamental human rights, which upon interpretation, may be used to promote the right to access to inclusive and effective justice by persons with disabilities. In the absence of mention and reference of persons with disabilities, the Constitution provides for positive interpretation under its various provisions.

Section 10 has specific provisions that must be used in securing the protection of the law in criminal offences, which apply to all people, including persons with disabilities. There is the presumption of innocence until proven guilty by a fair

18 Cap 00:00.

and impartial court.¹⁹ While it is provided that the court will use the language that the offender knows to understand the nature of the charge, the ‘facilities for the preparation of their defense’²⁰ are not adequately explained as that could assist with different needs for persons with disabilities. The clear expression of the Constitution for the provision of an interpreter at the state’s expense is a positive provision for persons with disabilities who may be deaf and use sign language and may not understand the language of the court, which in Botswana is English. It therefore may promote fair access in terms of language clarity in criminal proceedings.

With respect to access to justice in the Constitution, the following provisions may be interpreted to enhance access to justice for persons with disabilities. Sections 3 to 15 of the Constitution afford fundamental human rights including the right to protection of the law. In section 3, the right to life, and the right not to be subjected to inhuman and degrading treatment is entrenched. However, the said provisions are subject to limitation as section 15(3) prohibits discrimination and explains that the expression ‘discriminatory’ means affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour, creed or sex 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.

Notably, the Constitutional provisions on the freedom and protection of the law to every person are not enough to provide equality for persons with disabilities. This can be remedied by attaining the standards outlined in national strategic documents such as the National Development Plan 11,²¹ which is the national plan that is used to project Botswana’s development plans every ten years and Vision 2036,²² which is a national strategy that is in its second phase from Vision 2016. The Visions are used to set in motion values and principles that are centered around *botho* (respect for all) to propel social and economic development in Botswana and prosperity for all. Vision 2036 provides in Pillar 3: Human and Social Development that:

People living with disabilities and the elderly will be empowered to have equal access to services and socio-economic opportunities enjoyed by all Batswana. Policies, programs, and laws will be reviewed (including infrastructure development) to accommodate the needs and interests of people living with disabilities and the elderly.

19 Sec 10(2)(a).

20 See secs 10(2)(b) and 10(2)(f).

21 Botswana National Development Plan 11, Vol 1, April 2017-March 2023.

22 The Vision 2036 Presidential Task Team ‘Botswana Vision 2036: Achieving prosperity for all’ <https://vision2036.org.bw/sites/default/files/resources/Vision2036.pdf> (accessed 10 June 2021).

THE PENAL CODE

The Penal Code, an Act established as a code of criminal laws uses the word 'insanity' to refer to those who may have intellectual capacity limitations. It does not in any way refer to various disabilities as alluding to in the introduction of this paper. Section 11 of the Act provides:

A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his mind is affected by the disease if such disease produces upon his mind one or other of the effects mentioned above about that act or omission.²³

Apart from this, section 10 of the Constitution provides that there is a presumption of sanity until proven otherwise. Like section 11, section 148 of the Penal Code refers to persons with intellectual disability as 'idiots' and 'imbeciles'. The section provides for criminal charges against the defilement of persons with intellectual disability where the accused person is aware that a person is an 'imbecile'. Therefore, lack of knowledge of a person's intellectual disability is a defence to the offence of defilement in this case. This limits the right of persons with intellectual disability to access justice on an equal basis with others.

THE CRIMINAL PROCEDURE AND EVIDENCE ACT (CP&EA)

The CP&EA informs the process and procedure in criminal cases relating to the competency of a witness, admissibility of evidence, defence of lunacy at a trial, and private prosecutions. Section 216 provides that:

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

The use of the words 'idiocy' 'lunacy' and 'insanity' symbolises the prejudices of the society towards persons with mental disabilities. Such an attitude can inspire violations of the rights of persons with disabilities in criminal proceedings.²⁴ This

23 Penal Code Cap 00:01.

24 J Maphisa "'Lunacy defence" in Botswana's criminal law: Reflections of a mental health practitioner' (June-December 2016) *University of Botswana Law Journal* 82.

section must be read together with section 11 of the Penal Code, which takes away criminal responsibility if at the time in question a person is, through any disease affecting their mind, incapable of understanding their actions.

The lunacy defence is also introduced in the CP&EA through sections 157-175. According to section 158(1), when in the course of a trial or preparatory examination the judicial officer has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, the judicial officer shall inquire into the fact of such unsoundness. The CP&EA also empowers the court to rely on a medical practitioner to assess the accused and submit a report. Subsequently, where the report shows that the person is of sound mind, then the trial may be allowed to proceed. If it is determined that the accused is of unsound mind, the court will postpone proceedings, and either remand the accused in custody such as a prison, or release the accused to a place where they will not harm themselves or cause harm to other persons. If two medical doctors subsequently declare that such an accused is of sound mind, a report may be made to the President for determination of the continuity of the case, or the release of the person. Pursuant to the Mental Disorders Act,²⁵ the examination of the mind of the accused is undertaken at the institution or other place where they are detained.

While there is provision for a lunacy defence, the CP&EA does not delve into how the accused person can be afforded a fair and just trial, the emphasis is placed more on the continuity of the trial and confinement of the accused person who has pleaded lunacy, than the accused person with intellectual limitations being afforded support. Apart from the Master of the Court appointing a *curator bonis* for a person who has pleaded lunacy and been found to be of unsound mind by the court and medical doctors, there is no other obligation in law for providing accommodations to the accused during the trial or when in custody.

Several cases have been determined in Botswana regarding the competency to give evidence, and the position of judicial officers to declare persons as incompetent to proceed with trial. In *Sete v Directorate of Public Prosecutions*,²⁶ Motswagole J held:

Insanity or sickness of the mind has different levels and there may be an intermittent period of sanity. As judicial officers, we are not equipped to fully appreciate, on our own, the complexities of such issues and we, therefore, need to be assisted by experts for us to make an informed decision. Whilst the judicial function of adjudication is for the judicial officer alone, and a judge may even overrule an expert, a judicial officer can only decide after hearing and evaluating evidence.

25 Cap 63:02 sec 47.

26 2010 3 BLR 234 (HC) 238-239.

In an earlier case of *State v Mathabathe*,²⁷ there was a contention of whether the expert evidence of a medical professional carries more weight than that of a judicial officer. Judge Dendy was of the view that the judicial officer must be satisfied with the assessment before making a determination on the competency of an accused person.

Notably, the CP&EA provides for private prosecutions under section 14, which can be undertaken by legal guardians or curators of minors or lunatics in respect of offences committed against their wards. However, undertaking a private prosecution is costly, and can only proceed with the leave of the Attorney General. Both the Penal Code and the CP&EA must be harmonised so that they resonate and provide adequate measures for persons with disabilities to access criminal justice fairly.

CHILDREN'S ACT

Since disability affects everyone, it is critical to acknowledge that children with disabilities may be in conflict with the law or be victims of crime. The Children's Act of 2009 scantily provides for children with disabilities. Section 42(d) states

for the purposes of this Act, a child in need of protection means a child – (d) who has a disability and is subjected to discrimination or is deprived of proper parental care as a result of that disability.²⁸

In the case of children in conflict with the law, there are no express provisions on children with disabilities. While section 95(2) of the Act stipulates that the state 'shall provide counsel to represent any person involved in proceedings before a children's court if that person cannot afford the cost of legal representation', there is no mention of the accommodations that would be provided to address the special needs of children with disabilities. As such, while this provision can be applied to afford free representation for children with disabilities, there remains a gap on how other barriers that impede access to justice for children with disabilities can be addressed.

Smith Thiel et al, identifies five different types of victimisation that children with disabilities, particularly those with severe communication disabilities face in criminal justice.²⁹ These include:

- silent victimisation: this occurs in the home or school setting and does not rise to reported victimisation, for example, bullying at school;
- civil victimisation: this occurs in the judicial proceedings that involve the

27 1968-1970- BLR 214 (HC) 215-216.

28 Children's Act of 2009.

29 K Smith Thiel et al 'Fetal alcohol spectrum disorder and victimization: Implications for families, educators, social services, law enforcement and the judicial system' (2011) 39 *Journal of Psychiatry & Law* 24.

‘best interests of the child’, such as termination of parental rights and moving a child into a place of safety;

- criminal victimisation: this occurs in the law enforcement proceedings when the special needs of individuals are not accommodated. For example, assistance in reporting a crime or preparing the victim for testifying in court.
- secondary victimisation: this occurs when a person with a disability is used by others to perpetrate a crime. For example, if they are over-eager to please others and do not understand the consequences of their actions, they may commit a crime on behalf of others; and
- victimisation due to criminal justice system failures: this type of victimisation occurs in the absence of a skilled professional who is able to identify the person with a disability and make the required reasonable accommodations.

LEGAL AID BOTSWANA (LAB)

According to the Legal Aid Act of 2015, the ‘objectives of Legal Aid Botswana are to provide legal advice, legal representation and public education on legal matters to indigent persons’.³⁰ In particular, section 5(a) states that Legal Aid Botswana shall ‘provide legal advice, legal representation and public education on legal matters’. This measure, by way of being extended to all persons in Botswana, addresses persons with disabilities – albeit without explicit mention anywhere in the Act.

MAGISTRATES COURT RULES AND HIGH COURT RULES

As alluded to in the introduction of this report, the courts in Botswana have a prescribed due process code for use during processing and determination of matters. This process is set out in the Rules of the Courts, which act as guidelines for dispensing justice in court. The High Court is a superior court of record with unlimited jurisdiction while the Magistrates Courts have limited jurisdiction. The High Court presides over matters beyond the jurisdiction of the lower courts, and appeals emanating from the lower courts.

As evident in the Magistrates and High Court Rules, Botswana is committed to providing legal assistance to litigants with limited financial means who are involved in civil and criminal cases. The Magistrates Court Rules provide that ‘[i]n criminal trials/ appeals, *pro-deo* lawyers (lawyers whose fees are paid directly by the government) can be assigned to defendants of limited financial means’. Accused persons charged

30 Act 18 of 2013.

with murder, manslaughter, attempted murder or treason are also entitled to *pro-deo* representation.³¹ Order 46 of the High Court Rules provides that one may sue or defend as a poor litigant if they provide proof that they are unable to pay the fees of the action. In that case, the Registrar of the Court will allocate a legal practitioner to represent the person. If the poor litigant is successful in their suit, the court may make an order that the costs be taxed, and some fees be allocated to the appointed legal practitioner.³² A similar provision is found in Order 5 of the Magistrates Court Rules.

These, in line with the abovementioned provisions, may provide cover for persons with disabilities only in the event of them appearing before the court as 'poor applicants' like the Legal Aid provisions. Where persons with disabilities occupy a position where they are deemed financially able to bear the costs of appearing before the court, it is apparent that there will be no consideration regarding the general status of persons with disabilities to their economic subjugation. The extent of the inclusion of persons with disabilities is wanting in the Rules and there must be harmonisation between the laws and the Rules so that access to justice by persons with disabilities is made efficient and just.

REGIONAL HUMAN RIGHTS INSTRUMENTS ON THE RIGHTS OF PERSONS WITH DISABILITIES

Botswana is a member of the Southern Africa Development Committee (SADC)³³, which aims at harmonisation and uniformity of regional laws and standards and improvement of people's lives in the region. The SADC Treaty was signed in 1992 and it gives rise to protocols and charters on different human and development issues for the SADC region. The rights of persons with disabilities are captured in the Code on Social Security in the SADC flowing from article 5(a) of the SADC Treaty which requires members to amongst other things: 'enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration'. Article 9 of the SADC Gender Protocol and Development provides that state parties must align their local laws, particularly health laws, with international laws.

At the regional level, Botswana is party to the African Charter on Human and Peoples' Rights, which was adopted on 27 June 1981, known as the Banjul Charter.³⁴ The Banjul Charter's mandate is for African member states to provide

31 Magistrates' Courts Act Cap 04:04 (2011).

32 Order 46(3)(d). See also Order 5(4) of the Magistrates Court Rules.

33 Southern Africa Development Community, Lusaka Declaration (1 April 1980).

34 OAU Doc CAB/LEG/67/3 rev. 5, 21 ILM 58 1982 <https://www.achpr.org/legalinstruments/detail?id=49> (accessed 17 July 2021).

quality development of their people in all sectors. Critical to the discussion of this study, article 3 of the Charter provides that every individual is equal before the law and article 3(1) expands on this by providing that everyone is entitled to equal protection of the law. The right to a fair trial is recognised in article 7. Additionally, article 9 provides that all persons are entitled to receive information to express and disseminate it upfront. Comprehensively, the provisions discussed can be interpreted as enhancing the right to effectively access justice for all people including persons with disabilities.

The analysis of the African Commitments and Protocols shows that they do not have specific and direct provisions of the right to access criminal justice nor the challenges that could be overcome to create an inclusive environment. The instruments do not have specific provisions to promote the right to equality and non-discrimination of persons with disabilities who may have acted contrary to the law and those who may be violated. While it is evident that some of the mentioned African human rights instruments make mention of persons with disabilities, their content is by and large informed by the deficit/medical rather than the social/rights model of disability. It is therefore necessary that the rights of persons with disabilities are set out correctly to conform to the letter and spirit of the CRPD.

INTERNATIONAL LEGAL INSTRUMENTS ON ACCESS TO JUSTICE FOR PERSONS WITH DISABILITIES

The CRPD³⁵ was adopted on 13 December 2006 in New York; it was opened for signature on 30 March 2007 and came into effect on 3 May 2008. The Convention is an instrument that is meant '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'. It is elaborate on how states should make available accommodations that enable persons with disabilities to access justice. Article 13 provides that:

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

To make this provision even more effective articles 5 and 6 provide for the right to equality and non-discrimination for women and girls with disabilities and the right to equal protection of the law in article 14.

Article 5(1) prohibits discrimination and encourages states to remove all barriers

35 CRPD (n 4).

that are discriminatory against persons with disabilities. To buttress this provision, article 12 provides for the legal capacity of persons with mental and intellectual disabilities. Read together, these articles call for states to be deliberate on measures that will enhance the full and effective participation of persons with disabilities in the justice system at an equal basis with others. The CRPD is a progressive instrument that not only provides for inclusivity and recognition, but also provides that every human being must be afforded dignity and fundamental human rights. According to Jonas:

it is important to note that Botswana is a dualist state. This means that provisions of international instruments such as CRPD do not create justiciable rights in the country unless they are legislatively incorporated into Botswana law.³⁶

Thus, as observed by Mukhopadhyay and Moswela the failure of Botswana to ratify the CRPD has had the result that 'individuals with disabilities are failing to exercise their rights and are mostly dependent on the whims and fancies of the policymakers'.³⁷ They rightly note that

The CRPD is an instrument that revolutionized the way the legal framework responds to the rights of Persons with Disabilities. It has the potential to protect the rights of individuals with disabilities as well as help the individuals with disabilities to come -out of a benevolence welfare mindset that creates the 'dependency syndrome'. In addition, it places the dignity of persons with disabilities at the forefront to promote and protect equal opportunities. It is important to underscore that the agenda of the CRPD is not to create a new set of rights for people with disabilities; it articulates and asserts the application of disability rights instruments to Persons with Disabilities and provides a conceptual framework for ensuring those rights.³⁸

Apart from the CRPD, the provisions of the Universal Declaration of Human Rights (UDHR),³⁹ and the International Covenant on Civil and Political Rights (ICCPR)⁴⁰ provide for the right to life, the right to equality and non-discrimination, and fair trial. As part of the international law and practices, these instruments must be used to grant persons with disabilities fundamental rights and effective legal protections, including through specific legislation, and systems that will focus on including them as equal persons in society.

36 Jonas (n 6).

37 S Mukhopadhyay & E Moswela *Situation analysis of disability rights in the context of Botswana* (2016) 6.

38 Mukhopadhyay & Moswela (n 37) 5.

39 Universal Declaration of Human Rights, GA Res 217 A (III), UN Doc A /810 71 (1948).

40 International Covenant on Civil and Political Rights, GA res 2200A(XXI) 21 UN GAOR Supp (No 16) 52, UN Doc A/6316 (1966), 999 UNTS 3 (entered into force 23 March 1976).



COMPARATIVE ANALYSIS

Having outlined the few provisions in place that address the need to accommodate persons with disabilities with regards to access to criminal justice, formulations can be made to overcome various barriers that exist. Looking at case studies from South Africa and Namibia, it is evident that innovation within the criminal justice system can allow for better access and effectiveness when serving or dealing with persons with disabilities. The following examples allow us to frame how following the human rights approach to disability⁴¹ can allow for better systemic provisions to enable persons with disabilities to gain seamless access to the criminal justice system.

According to Bornman et al,⁴² 'victim empowerment protocols' are enforced in South Africa, such that one's status as a person with a disability is not a hindrance and they are saved the additional micro-aggressions of underprepared or intolerant service providers. This is an important consideration because while it is possible for persons with disabilities to knowingly be on the wrong side of the law, there is a disproportionate representation of persons with disabilities as victims of crime due to systemic ableism.⁴³

41 G Quinn et al *Human rights and disability: The current use and future potential of United Nations human rights instruments in the context of disability* (2002) 10.

42 J Bornman et al 'Identifying barriers in the South African Criminal Justice System: implications for individuals with severe communication disability' (2016) 29 *Acta Criminologica: African Journal of Criminology & Victimology*.

43 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability

In South Africa, some victim empowerment protocols, which include victims of crime who have a disability are available, although strategies to support those individuals with severe communication are limited.⁴⁴ However, when the reported crime is a sexual offence, police officers will typically contact social workers – who play a vital role in the process of ensuring justice for victims with disabilities.⁴⁵ In these instances, social workers are required to do the following:

- assist in keeping the alleged victim with a disability safe;
- report the crime to the Sexual Offences Court;
- refer the victim and their family to appropriate services; and
- most importantly, prepare the victim with a disability to appear in court.⁴⁶

In the case of Zambia, on 9 October 2017, the High Court declared a definitional provision of the Mental Disorders Act unconstitutional and invalid, criticising the Act on human-rights grounds.⁴⁷ The Court further affirmed that all persons with disabilities have a right to receive healthcare services without discrimination and that mental-health services should be made available at the primary healthcare level. While Botswana aims to repeal its Mental Disorders Act,⁴⁸ considerations should be made regarding the right of access to justice for persons with disabilities. Denying persons with disabilities legal capacity infringes on their rights to dignity, liberty, and freedom from discrimination. Botswana should adopt a multi-pronged approach in its reform agenda in order to ensure full access to justice to persons with disabilities.

SPECIFIC BARRIERS TO ACCESS TO JUSTICE IN BOTSWANA

It has been observed that in developing countries such as Botswana, there is a lack of capacity in understanding persons with disabilities, stigma, and discrimination, and lack of accessible infrastructure.⁴⁹ The following barriers are identified from the

'People with disability over represented at all stages of the criminal justice system' (2020) <https://disability.royalcommission.gov.au/news-and-media/media-releases/people-disability-over-represented-all-stages-criminal-justice-system> (accessed 12 June 2021).

44 South African Police Service (2016) 3.

45 Western Cape Forum for Intellectual Disability, 2014.

46 Bornman et al (n 43) 2.

47 Southern African Litigation Centre 'Zambia: Challenging the Mental Disorders Act' (2017) <https://www.southernafricalitigationcentre.org/2017/12/14/zambia-challenging-the-mental-disorders-act-of-1949/> (accessed 10 June 2021).

48 N 24.

49 M Omotoye 'BIDPA Working Paper 49: Public policy implementation prospects and challenges in Botswana: Case of the National Policy on Care for People with Disabilities' (March 2018) <https://bidpa.bw/wp-content/uploads/2020/06/Public-Policy-Implementation-Prospects-and-Challenges-in-Botswana-A-Case-of-the-National-Policy-on-Care-for-People-with-Disabilities.pdf> (accessed 20 July 2021).

legislative review and desktop study of the Botswana criminal justice system:

- Implications of an ‘interpreter’, section 10 of the Constitution of Botswana, is potentially exclusionary for indigenous persons, people who need/prefer braille documents rather than having someone read to them, people who do not speak Setswana sign language, etc. Considering that interpretation is not a translation, the bridge is that legalese will be given to the receiver in terms that make sense to them.
- The fitness to stand trial of accused persons with intellectual and psychosocial disabilities is often questioned on the basis that they are not able to conduct a proper defence due to the nature of their disability. This is based on the misconception that the inability to properly conduct one’s defence is innate in the individual with impairment. Where an accused person’s fitness to stand trial is at issue, the court is required to conduct an inquiry to determine whether the accused is indeed fit to plead.
- Communities that are geographically marginalised and remote do not have expedient access to some of the criminal justice system mechanisms as they might be confined to a space where they are far from accessing all courts, and limited to customary law courts which may be an added multi-layered challenge in accessing justice by persons with disabilities. As a result, persons with disabilities in these communities are likely to face compounded challenges.
- Guardianship and minors’ access to justice when state services are limited impedes speedy resolutions.
- The lack of provisions on the structural challenges that are experienced by persons with disabilities in accessing institutions to seek and access justice is another barrier that continues to make access impossible for persons with disabilities. In a study that was undertaken in 2017 by Hancock et al⁵⁰ one respondent stated that: ‘It [inaccessibility] goes back to the council that approves the buildings. When people build, ...they also need to take into consideration that there is a certain group [people with disabilities] that also needs to be catered for’. These buildings range from social welfare offices, police stations, district commissioners’ offices, hospitals, and other services providers.
- The general stigma for instance societal attitudes⁵¹ that surrounds persons with disabilities in everyday life may impede those who have been

50 JH Hancock et al ‘Preparedness of civil society in Botswana to advance disability inclusion in programmes addressing gender-based and other forms of violence against women and girls with disabilities’ (2020) 9 *African Journal of Disability*.

51 Mukhopadhyay & Moswela (n 37) 6.

violated from reporting crimes against them as there is an already existing perception in terms of how they will be treated.⁵² There is a lack of capacity and awareness in accommodating persons with disabilities and among the capacity that needs to be built is in the judicial system for effective dispensation of justice.⁵³

- In the wake of COVID-19, the capacity of the justice system in Botswana has been unveiled –with restricted access to court and entertaining urgent matters only. This coupled with limited financial and human resources to allow timely services sideline those who are already marginalised.

52 Omotoye (n 49).

53 As above.



CONTEXTUAL CONCLUSION

It is clear, through the above analysis, that while Botswana has legislation that provides for, and enshrines, access to justice, there are glaring oversights that affect persons with disabilities full access. The paternalistic approach to disability is a root that must be severed to facilitate the legislative, institutional, and cultural shifts necessary. The social model of disability positions society at the core of the creation of problems and challenges faced by persons with disabilities, and it can serve as a practical tool in the social justice project in Botswana.

When it comes to access to the criminal justice system, sufficient and secure data collection regarding the ways persons with disabilities engage with it must be conducted. While the minority status of persons with disabilities is unlikely to change significantly in the foreseeable future given Botswana's small population, this cannot be used to justify systemic oppressions that are reinforced by ambiguity in the legal systems of the country.

While intimations have been made by the government of Botswana regarding repealing the Mental Disorders Act,⁵⁴ without executive action being taken the Act remains in operation. This legislation may be interpreted in such a manner that perpetuates civil, criminal, and secondary victimisation due to criminal justice failures upon persons with cognitive (also referred to as intellectual) disabilities in Botswana.

54 Mental Disorders Act Cap 63:02.

ANALYSIS OF THE QUALITATIVE STUDY

A qualitative study was undertaken to gather data from respondents, mainly Disabled Persons Organisations (DPOs), judicial personnel, and persons with disabilities on their experience and knowledge of access to criminal justice by persons with disabilities in Botswana:

- 80% of judicial officers stated that the law is a hindrance in many cases and needs to be reviewed in order to accommodate persons with disabilities. 20% did not have experience in criminal law as their focus was on civil law.
- 100% of the DPOs interviewed had experience with criminal cases that had been referred to them by persons with disabilities. Most of the respondents are aware that there are challenges in the law that hinder and create barriers for persons with disabilities to have access to justice, however, the respondents did not know or mention the exact laws.
- 90% of the individuals interviewed have 'heard' about violence against persons with disabilities.
- 10% of the respondents observed that persons with disabilities experienced violence and were not adequately assisted by the police service as they were not considered as credible witnesses due to their disabilities.
- It is evident from the study that cases that involve persons with disabilities do not progress as quickly as others. 99% of the DPOs stated that the cases that they are aware of are either postponed numerous times or are never concluded.

The data gathered from the study showed that changes must be made to create a safe and inclusive space for persons with disabilities to have equal and equitable access to criminal justice. All participants in the study made similar recommendations in respect of changes in laws and processes that will enable persons with disabilities to access criminal justice as witnesses or victims. It was evident from the data that the existence of stigma and discrimination experienced by persons with disabilities in Botswana remains a great challenge. Thus, it has led to persons with disabilities declining/failing to report violations because of a lack of confidence in the police service.

- Some of the key findings are listed below.
- Some DPOs receive requests for sign language interpretation by the courts in cases that involve persons with hearing impairment.
- Some DPOs have received complaints, which are criminal cases from some of their beneficiaries as persons with disabilities do not know where to report and at times lack confidence in the police service.

- While 96% of respondents stated that there is need for interventions in law, they did not know the specific criminal laws that could create barriers for access to justice for persons with disabilities.
- There is a lack of effort by police to make progress in matters that involve persons with disabilities. This is a common occurrence as will be noted from the case studies – unreported and those before courts.
- Justice sector infrastructure is not accessible for persons with disabilities.
- It was noted that there is a deliberate exclusion of persons with disabilities in criminal justice processes from the point of reporting to the conclusion.
- There is a lack of trained and dedicated persons with knowledge of disability rights in the criminal justice sector and generally in the justice sector in Botswana.
- Almost all matters for or against persons with disabilities do not make any progress before the courts.
- There are disjointed efforts between civil society organisations (CSOs), development partners, government, and persons with disabilities in advocating for criminal law reforms for persons with disabilities.
- There is a lack of specific laws in place to protect, promote and respect access to justice by persons with disabilities.
- There are limited options for court representation for persons with disabilities involved in criminal matters.
- Lack of knowledge of the differences between criminal and civil law was evident in the interviews. There is a need for awareness of such knowledge among the DPOs and other stakeholders so that they can assist their beneficiaries effectively.
- The use of indirect and incorrect language in naming violations, for instance, a respondent used the word 'slept with' instead of rape in one of the case studies. This is very important as violations must be called what they are.
- There is hesitancy to report criminal matters among persons with disabilities as there is no evidence of the criminal justice system working effectively for persons with disabilities.
- The DPOs lack capacity to support their beneficiaries in court, and do not have enough resources to engage internal legal officers.
- The Disability Unit under the Office of the President stated that they assist where they can but always refer persons with disabilities who report criminal matters to the police and the prosecuting authority.
- DPOs and persons with disabilities conflated the mandate of the Disability Unit and expressed having no hope in the Unit as a structure that could be

of assistance to them.⁵⁵

- The judiciary personnel⁵⁶ who participated in the interview had limited experience on access to criminal justice by persons with disabilities. They however indicated the need for the judiciary to train its staff on accommodating persons with disabilities, and to develop specific measures to enhance access to justice for persons with disabilities. All seven persons interviewed stated that the courts remain inaccessible structurally and administratively to persons with disabilities. One respondent said that in his area of jurisdiction there are limited ramps and that the court buildings are double story buildings with no access even by elevators, which hinders persons with physical disabilities from accessing the buildings.

55 This question was not asked as part of the study questions, however, some respondents referred to Disability Unit and that it ought to assist persons with disability to be able to gain better, equitable services when accessing justice in Botswana.

56 The High Court sits in Lobatse, Gaborone and Francistown; the Court of Appeal in Gaborone and all major villages have a Magistrates Court.



CASE STUDIES

The following case studies were shared by respondents from DPOs, and judicial officers (two registrars and one court clerk). The private attorneys interviewed in the study did not have experience in the subject except in cases of civil matters.

STATE V AMOS NDARA CMMGM-000080-13

The case, which was presented before the court in 2013, involved a young girl who had an intellectual disability and was raped by an accused who was known to the complainant. During the hearings, the complainant consistently forgot what happened due to her low concentration span and forgetfulness. This proved to be challenging to the court as the case had to be postponed on numerous occasions. She was referred to a medical doctor for assessment pursuant to the provisions of the Criminal Procedure Act, Magistrate Court Rules, and the Penal Code. The magistrate recollected that the Medical Doctor recommended that the complainant be excluded from the proceedings as she did not have the mental capacity to testify. After receiving the medical assessment, the magistrate ordered that the complainant be assisted by a psychiatrist through the court process so that justice can be served. As a result of the psychiatrist's support and training, the complainant managed to testify in two sessions with a clear recollection of what happened. The magistrate stated that the complainant remained calm when being asked questions during the cross-examination and the accused was subsequently convicted and sentenced for rape.

THE STATE V BRIAN NDLOVU CASE NO CMMPS-000596-18

A court clerk at the Gaborone High Court stated that she has been part of the case involving theft by a person with a disability who is deaf. The case is recent and was still before the court at the time of the interview. The challenge, in this case, was that there have been many postponements due to a communication barrier. The court had to engage two sign language interpreters who did not manage to grasp the innate language of the accused. The court then postponed the case indefinitely until it could find a suitable sign language interpreter.

CASE A

This is an unreported case that was recounted by Kgosi (a traditional leader). He recalled that a person with a hearing impairment had reported that their money had been stolen by the caretaker of their house to their Kgotla (traditional court system). The Kgosi said that the matter was resolved after the Botswana Police provided them with an interpreter who understood the complainant's innate language. It was discovered that the caretaker had received money, which served as her salary but failed to return to work as was expected. The caretaker was found guilty of obtaining money by pretense.

CASES ENCOUNTERED BY AN INTERPRETER AT A DPO

The informant who is a sign language interpreter working for a DPO reported that they receive at least ten cases annually. Some cases are referred to the police stations or psychosocial counselling organisations. The informant works consistently with the Department of Justice across different courts to interpret. He has learned both local and international sign language by training and is also self-taught. At times he also understands innate sign language if he is given sufficient time with a person with hearing impairment.

STATE V GABATWESEPE TLHAPATSO

The informant recollected that in 2020 one criminal case, on stock theft, involved a person with hearing impairment in a village called Molepolole. When the matter was fully investigated the prosecutors found that the perpetrators had falsely accused the person with hearing impairment in the case. They ended up being arrested and the person with hearing impairment was discharged by the Molepolole Magistrate Court. The informant interpreted for him.

CASE C

This is a police case in which a person with hearing impairment bought a cellphone from someone and did not know it was stolen property. Upon conducting investigations, the police tracked the cellphone to the person with hearing impairment. The local police sought the assistance of the informant's DPO to interpret for the accused person. The police located and identified the person who sold the phone to the person with hearing impairment. At the time of the interview, the accused was still held in custody and the person with hearing impairment was released.

THE STATE V BRIAN NDLOVU CMMPS-000596-18

This is a case before the Selebi Phikwe Magistrate Court, where one of the accused is a person with hearing impairment and of Zimbabwean descent. The informant was called to assist with sign interpretation as he understands international sign language. The accused with hearing impairment and his co-accused, were found with stolen property. The informant advised that the accused had been before the same court around 2015 for a similar offence as the current one (theft).

The informant assisted with interpretation in 2017, which resulted in the accused being deported to his home country, Zimbabwe. The case has been ongoing and it was found that the accused and his co-accused broke into 11 houses. During the trial in 2019, the accused pleaded guilty to three offences, which involved theft in four houses. The case was interrupted by COVID-19 restrictions. Post 2020, the court could not find an interpreter since the informant was no longer available. At the time of conducting the interview, the informant advised that the accused is still held in custody.

STATE V KABELO BAEMEDI

The defendant was already convicted. The informant through his DPO was asked to interpret for a 20-year-old male with hearing impairment who was remanded at a prison facility in Gaborone in 2020. The informant was requested to assist the warders communicate with the prisoner. The details of the crime that he committed were not the focus of the prison visit, the accused's needs were. There was a communication breakdown between the convicted person, the warders and his fellow prisoners, which affected his ability to access basic needs.

STATE V SEHULARO

The informant was asked to be an interpreter in a case in December 2017 to 2018 in Palapye Magistrates Court. A person with hearing impairment had killed his niece in

a family domestic misunderstanding. The misunderstanding began when the mother of the accused had taken him to a traditional doctor, without his prior knowledge. When at the traditional doctor the accused was requested to undress so that he could be bathed with traditional medicines. The whole process made him so angry, as he felt disrespected and belittled. Upon his return home, he assaulted everyone as they thought he was 'stupid' and 'took [him] to that man.' According to the informant, the accused wanted to kill his mother, and his other family members were casualties as they were home.

The accused started physically assaulting his mother, resulting in her fracturing both hands. He then beat his sister who managed to run away. Amid this, the accused's 2-year-old niece, his sister's child, ran to him when everyone was running away from the homestead, the accused beat the child to death with a spade. The mother, sister, and other family members witnessed the crime. At some point, the accused was said to be on medication as his mental stability was in question. At the time of the interview the informant, who had interpreted for the accused from 2017 to 2019, assisted the accused person in court. She does not know how far the matter has progressed and has not been called on to assist since late 2019.

AKANYANG PITSANE (RESPONDENT IN THE RESEARCH)

This was personally experienced by the informant and not reported to the police. The informant shared that her phone was stolen from her at a bank while withdrawing money in the evening when she was with her friend who is also partially impaired. They went to the local police station, where they were 'ignored and paid no attention to' because of their visual impairment. The informant recollected that she felt humiliated as the police asked them how they can prove that a phone was stolen from them 'as they cannot see'. Also, how would they know the person who stole from her? She provided that she would have identified the voice of the thief, as he had hackled her for about 5 minutes. The police disputed this and disagreed with her. She was not allowed to register a case as she and her friend were not credible and they will not be able to give evidence before a court of law. She abandoned the case because she was considered an untrustworthy witness and gave this as the reason why many persons with disabilities do not report matters to the police. This enables perpetrators to take advantage of the system and violate persons with disabilities.

STATE V JACKSON TJIHONGE

A young man who had mild intellectual disabilities was sexually molested by the accused person who after internal investigations was dismissed from his place of

work. The matter was then reported to the police. The social worker made their assessment and the young man confirmed the allegations to them. At the time, he was 20 years old, and his level of intellectual disability ranged between mild and moderate. During the trial, the victim was cross-examined by the perpetrator's lawyer. The informant stated that the accused's lawyer put so much pressure on the victim to the extent that the victim admitted that the organisation had sent him to make those allegations against the accused. The accused was acquitted. The informant stated that the victim could not keep up with the speed and the line of questioning of the accused's lawyer. It did not help that he was ill prepared, and the state's attorneys did not have much experience in prosecuting such matters.

The informant stated that from his observation the courtroom itself was not friendly to the victim with disability. He felt intimidated by the large number of people in court. Special arrangement should have been put in place, such as hearing the matter *in camera*. The state needs to empower and capacitate their service providers to understand the needs of clients with disabilities. In terms of state prosecutors, the respondent stated that they should be trained and prepared on how to handle and deal with cases involving persons with disabilities. The respondent shared in hindsight that: 'The accused was made to stand toe to toe with a lawyer, so you can imagine an individual with intellectual disabilities having to face a professional like a lawyer, how this young man was devoured with questions.'

MATTER REFERRED TO THE BOTSWANA RED CROSS

The names in this matter were not shared for confidentiality purposes. A female with intellectual disability and speech impairment who is a former trainee reported to the DPOS in May 2021 that she was raped. She went over to a bar near her home where some men took advantage of her vulnerabilities and raped her. The victim stated that '*one a tsenya condom mo gonna ke robotse, ke kaname*' (he was putting a condom inside me while I was sleeping, while I was lying down). The victim also shared with the informant that her sister sells alcohol and encourages men to violate her sexually. The mother also explained that there is this constant activity going on at home where the sister will encourage her to sleep with the men that come *ko lapeng* (at home). The incident was reported to the victim's pastor. Upon receiving the complaint, the informant together with the mother and the complainant attended to a social worker for assistance. The victim and the mother also reported it to the police, and it has never been to court.

The informant advised that the feedback she received from the victim's mother was that the police did not take the case seriously and only referred the

victim to a psychologist at Marina Hospital for assessment. The victim's mother had not updated the informant on the progress of the matter at the time of the interview. The informant had also referred the matter to another justice institution for handling.



RECOMMENDATIONS

Based on the findings from the desktop review and the qualitative research from interviews with DPOs, legal practitioners, and state departments, there are several recommendations made in order to bridge the gaps between persons with disabilities and their access to the criminal justice system in Botswana. The following recommendations are made.

LEGISLATION

- Enacting, harmonising, and implementing disability-specific legislation, policies, and interventions.
- Domestication of the CRPD to enhance access to justice for persons with disabilities pursuant to article 13, read together with other provisions.
- Revision of the National Policy on Care for People with Disabilities so that it offers comprehensive relief to challenges faced by persons with disabilities presently.
- Enacting the Revised Disability Policy of 2011 into law.
- Consideration of including the specific rights of persons with disabilities in the Constitution as it undergoes revision.
- Repealing of the Mental Disorders Act, such that people with intellectual disabilities are not susceptible to arbitrary confinement or victimisation.

- Inclusion of mental/psychosocial conditions and impairments in disability-specific legislation.
- Harmonising the Penal Code and the CP&EA to reflect the provisions of the CRPD and to make access to criminal justice by persons with disabilities equal and just.

INSTITUTIONAL

- For girls and women with disabilities to be considered as a key demographic when crafting interventions to laws and applying judgments in courts that affect the status of girls and women in the view of the law.
- Persons with disabilities in communities outside of the mainstream, for instance, indigenous people, to be provided for in legislation directly addressing the rights of persons with disabilities.
- To build the capacity of justice sector service providers in order to enhance their capacity to accommodate the specific needs of persons with disabilities.

ACCESSIBILITY TO SERVICES AND PREMISES

- Comprehensive dissemination of information regarding means of access to the criminal justice system in mediums accessible to persons with disabilities of all ages.
- Building the capacity of officers and service providers to manage engagements with persons with disabilities in ways that allow for efficient and satisfactory reception.

DATA COLLECTION, MANAGEMENT, AND PROTECTION

- There should be development and implementation of comprehensive data collection regarding persons with disabilities in Botswana who interact with the justice system.
- The information collected regarding persons with disabilities, in the event of the establishment of a national registry, should be protected against exploitation.

AUTONOMY AND SELF-DETERMINATION

Supported decision making mechanisms should be adopted to replace substituted decision making practices. Two respondents recommended that persons with disabilities must be given the space and right to express themselves – and where they

can be given the support of specialists to assist when persons with disabilities need them. The major concern is that sometimes families are not the most suitable persons to report and make decisions on behalf of a person with a disability.

One respondent added that:

'I also believe that people with disabilities should be heard, and their voices shouldn't be shadowed by the voices of their guardians, it is like most of the time they take the voices of the guardians as the gospel truth and not the one that comes from the person with the disability.'

ACCESSIBILITY OF COURTS

This was a recurring recommendation among respondents that most courts in Botswana remain difficult to access.

That structural accessibility is needed – ramps and elevators – and wheelchair users should be able to access courts and all other buildings.

Administrative access: The ability to reach the court to register cases, follow up on cases, or make court-related inquiries is said to be difficult for persons with disabilities. Enhanced and disability-friendly services should be introduced to assist with access to the courts.

LANGUAGE AND COMMUNICATION

- There is a need for documents that indicate the communication methods of different cohorts of persons with disabilities, including sign language, video conferencing, pictorial illustrations, animations amongst others. 'It should be established which disability is being accommodated, in order to identify the best way of [accommodating] them.'
- Interpretation, which according to the High Court Rules and the Penal Code and the Criminal Procedure Act is mandatory, 'is elusive for persons with disabilities as sign language is different and needs different expertise'.
- Persons with visual impairment should be provided with materials in alternative formats such as braille and accessible electronic formats.
- Audio high pitch and low pitch devices. The courts must be fitted with audio technology that is friendly to all users and takes into consideration persons with audio and visual impairment.
- Easy to read formats can make the processes of the court, particularly trials and hearings easier for a person with disabilities to understand the otherwise 'complicated language used in court documents'. Simplified documents and language will make the process easier for persons with disabilities.

- Lighting and friendly courtrooms. The use of appropriate lighting technology is a much needed reformation that can assist persons with disabilities to be able to be part of court proceedings without challenges.

TRAINED AND SPECIALISED PERSONNEL

It was consistently stated by all respondents that there is a lack of trained, specialised, and dedicated staff to assist persons with disabilities. It was recommended that specialised persons or teams who understand how to support witnesses or complainants with disabilities in court be used to assist them understand court processes, expectations, communication, and language.

PSYCHOSOCIAL SUPPORT

- Some of the case studies show that cases may be wrongly prosecuted because there is no support afforded to the person with a disability as a complainant, witness, or perpetrator of a crime. This makes cases challenging and where there can be progress some are abandoned because the system is not made for persons with disabilities. It is costly to justice and people as they ultimately must deal with unfinished matters which some like sexual assaults have devastating psychological and emotional consequences.
- It was recommended that clients and families where needed should have counseling so that they also understand what criminal justice involves. Sometimes a client is victimised by family members who do not understand the nature of the cases involved.

REFORM OF POLICE SERVICES TO BE ACCOMMODATIVE OF PERSONS WITH DISABILITIES

- Respondents particularly from the DPOs and individuals shared that the police do not take matters that involve persons with disabilities seriously from initial reporting to prosecution. As evidenced by some of the case studies reported, cases do not make any progress.
- Persons with disabilities are not given priority in terms of justice and legal services: 'In all the cases that I am aware of, none of them were processed fully to our satisfaction. Cases will drag on and they will not end'.
- Prison facilities and police holding cells are not user-friendly for persons with disabilities and should be improved to be able to accommodate persons with disabilities.

ADVOCACY CAMPAIGNS ON STIGMA AND DISCRIMINATION

The DPOs stated that there is still a high prevalence of stigma and discrimination towards persons with disabilities to the extent that they cannot access any assistance. It is needful to have advocacy and awareness.



CONCLUSION

From the foregoing, it is clear that there needs to be an overhaul of the existing criminal law provisions that create barriers to persons with disabilities who access the justice system. The institutionalisation of persons with disabilities without clear structures at the mercy of the president or a judicial officer, for instance, impedes effective access to justice by persons with mental and intellectual disabilities. The current laws: The Criminal Procedure Act and the Penal Code, which largely provide for the procedure are minimal and may pose challenges for persons with disabilities. Further, the justice infrastructure, including courts, prisons and police stations are not accessible for persons with disabilities. Most of these facilities were built without persons with disabilities in mind. The communication barriers also ought to be eliminated through the adoption of alternative communication formats such as braille, and sign language interpretation. From the study, it is evident that sign language interpreters are hired on an *ad hoc* basis, which means that cases are often postponed due to lack of permanent and salaried sign language interpreters. The capacity of the criminal justice sector personnel to accommodate persons with disabilities should also be enhanced.

The existence of the Disability Policies and the Disability Unit in Botswana has not improved the status of persons with disabilities. This is despite the development of the National Policy on Care for People with Disabilities and the yet to be implemented Revised National Disability Policy of 2011 which stresses the importance of integrating

people with disabilities and ensuring equal opportunities for all. Notably, both policies focus on the care aspect and not specifically improving and enhancing all rights of persons with disabilities. There is therefore a need to overhaul all the policies, enact laws that are specific to persons with disabilities and create an environment that will promote equality, equity, fair and just access to justice. The noted silence on the rights of persons with disabilities in the constitution and other laws is an indication of deliberate disregard of the rights of persons with disabilities in Botswana, which further deepens inequalities and vulnerabilities. Comprehensive framing of disability will assist in mapping where the law overlooks the agency of persons with disabilities, where the law enables others to take advantage of persons with disabilities, and where the law and systems do not recognise persons with disabilities as significant rights-bearing members of Botswana's society.

Botswana has acceded to the CRPD to realise, promote and protect the rights of persons with disabilities in Botswana. While that is a welcome step, the Botswana legal system can only fully accept the operation and implementation of the CRPD when it is domesticated and is legislated as a law by the Parliament of Botswana. As it is, in its status, it operates more from an international treaty than as a law in Botswana. The domestication of the CRPD will assist in the broader and inclusive access to justice by persons with disabilities in Botswana.



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