



PERSONS WITH DISABILITIES AND BARRIERS TO EQUAL ACCESS TO JUSTICE IN SOUTH AFRICA

A RESEARCH STUDY OF THE CRIMINAL JUSTICE SYSTEM

POSITION PAPER

INTRODUCTION AND BACKGROUND

Studies show that persons with disabilities participate in the criminal justice system in various capacities, including as complainants and as accused persons. Further, persons with disabilities encounter numerous barriers to accessing justice on an equal basis with others. Furthermore, the implementation of the right to access justice, found in article 13 of the United Nations Convention on the Rights of Persons with Disabilities (UNCPRD), remains weak in many countries on the continent. The ineffective participation by persons with disabilities in the criminal justice system can partly be attributed to inadequate research into the specific barriers which hinder their effective participation, and how those barriers can be overcome. To that end, a research study was conducted in South Africa to map out the various barriers to accessing justice faced by persons with disabilities who are either complainants or accused persons in the criminal justice system.¹ Using the social model of disability as the conceptual framework and the provisions in article 13 of the CRPD and article 13 of the African Disability Protocol as a standard, this position outlines the findings from the research study on the barriers to accessing justice faced by persons with disabilities in South Africa.



The Supreme Court of Appeals in Bloemfontein, South Africa.

CONCEPTUALISING ACCESS TO JUSTICE FOR PERSONS WITH DISABILITIES

There is no standard definition for ‘access to justice’. It is however commonplace to discuss the concept of access to justice through its constituent elements. In this paper, the approach to access to justice is guided by different elements identified in both the narrow and broad understanding of access to justice. These include access to:

- 1 A conducive and adequate regulatory framework which protects fundamental rights and freedoms.
- 2 Appropriate legal information and education which enhances legal knowledge.
- 3 Legal services including access to qualified and competent legal service providers.
- 4 Justice institutions with fair, non-discriminatory and user-friendly legal procedures.
- 5 Adequate and legally enforceable solutions.
- 6 Legal and non-legal support mechanisms and resources.
- 7 User-friendly environment for protection of fundamental rights and freedoms.

The standard of access to justice that is herein relied on is that articulated by article 13 of the CRPD. Article 13 guarantees the right to access to justice FOR all persons with disabilities. It is the first international human rights treaty that guarantees ‘access to justice’ as an explicit right. Article 13 is unique in that it recognises the need for States Parties such as the Government of the Republic of South Africa to



guarantee effective access to justice to persons with disabilities. It, HOWEVER, does not define what effective access to justice means, since the interpretation could vary in different contexts. Arlene S. Kanter avers in this regard that article 13 does not simply guarantee the same treatment to all persons with disabilities.² It also requires the consideration of an individual's impairment, and ensuring that necessary modifications or accommodations are put in place to guarantee their equal access to the justice system. Article 13 mandates States Parties to ensure that legal proceedings are accessible to all persons with disabilities, and that procedural and age-appropriate modifications are undertaken to ensure effective access. On her part, Flynn argues that article 13 entitles persons with disabilities to participate in legal proceedings both directly and indirectly thereby guaranteeing equal and meaningful participation of persons with disabilities in all aspects of the justice system.³ Article 13 also requires that those involved in the administration of justice are adequately trained to meet the justice needs of persons with disabilities. Article 13 envisages a situation where persons with disabilities, who have been excluded in many justice systems of the world, are not only entitled to the right to access justice but are also directly and indirectly empowered to do so. The Article 13 provision should be read together with other provisions of the CRPD, including articles 5(3) on equality, 9 on accessibility, and 12 on the legal capacity of persons with disabilities.

SOUTH AFRICA'S REGULATORY FRAMEWORK FOR ADVANCING THE RIGHT TO ACCESS TO JUSTICE FOR PERSONS WITH DISABILITIES IN SOUTH AFRICA

The legal framework on the protection of the right to access justice for persons with disabilities in South Africa consists of global and regional human rights instruments as well as national laws. South Africa has signed and ratified international and regional human rights treaties relevant to the promotion and protection of access to justice rights for persons with disabilities. For instance, it ratified the UNCRPD and its Optional Protocol on the 7th of November 2007.⁴ It also signed the AU Disability Protocol on the 29th of April 2019, which is not yet in force.⁵ Further, the Constitution of the Republic of South Africa guarantees the right of access to justice, including criminal justice, primarily through the promotion and protection of fundamental rights and freedoms, the provision of courts and the administration of justice, and the provision of state institutions supporting constitutional democracy. Despite the existence of legislative provisions that seek to promote and protect the right of access to justice for all including persons with disabilities, there are legal provisions and practices that stifle access to justice for persons with disabilities illustrated in the research findings below.



FINDINGS FROM THE RESEARCH STUDY

As there were no significant differences between the findings of the desktop research and the key informant interviews, the findings from the two sources will be presented jointly in this position paper. The following barriers were identified:

a) **Barriers arising from negative attitudes by the society**

Negative societal and institutional attitudes deny persons with disabilities enjoyment of their fundamental rights including the right to access to justice. For instance, the practice of investigators or the requirement for adjudicators to consider a witness' demeanor during reporting, investigation and trial, as the case may be, lends itself to misrepresentation and bias towards persons with disabilities as was attested to by many study participants and documented by various authors cited in the study report.

b) **Barriers arising from the denial of legal capacity**

Many persons with cognitive and psychosocial disabilities are deemed not to have the legal capacity to assert their rights and pursue their justice needs.⁶

c) **Barriers arising from lack of or inadequate protective legal provisions**

These were placed in three broad categories.

- i. Laws affecting access to effective legal remedies: Criminal laws are often not informed by the experiences of persons with disabilities thus they do not adequately protect their rights. From the research findings, many criminal laws in South Africa do not offer equal protection to persons with disabilities, with many persons being denied access to effective remedies for the rights violations they experience. Access to effective remedies can be attained by ensuring multiple avenues for seeking redress as well as a broad range of remedies, including individual and public interest remedies
- ii. Legal assessments on fitness to stand trial and competence to testify as a witness: The requirement to determine one's fitness to stand trial in criminal proceedings poses a threat to the enjoyment of the right to access to justice for persons with disabilities mostly because it is discriminatory at least on two fronts. First, it deems persons with disabilities unfit to stand trial solely or mainly on account of their disability. Secondly, it indiscriminately ignores the requirements for designing a criminal justice system that meets the fair trial needs of persons with disabilities.
- iii. Legal assessments for determining criminal responsibility must also be fair:⁷ The Criminal Procedure Act⁸ sets the test for determining criminal responsibility of an accused person who raises the defence of insanity. While such legal assessments may seem as progressive for attainment



of justice for persons with disabilities, they are often susceptible to further violating fundamental human rights of the persons involved. This is because “they can lead to deprivation of liberty of persons with disabilities in a discriminatory way.”⁹ The findings reveal that although the South African courts have made attempts to improve the criminal procedure affecting persons with disabilities, these fall short of the UNCRPD standard and are thus ineffective in guaranteeing enjoyment of the right to justice to persons with disabilities in South Africa.

d) Barriers arising from complex and inaccessible legal procedures

Processes in the criminal justice system in South Africa have tended to exclude persons with disabilities including women and children with disabilities thus leaving them vulnerable to abuses of their justice rights.¹⁰ Complaint mechanisms do not ensure that procedures for reporting crimes by persons with disabilities are easy to follow and accommodate persons with different types of impairments. Several study participants illustrated the many ways in which complex and inaccessible legal procedures in the South African criminal justice system operate as barriers to access to justice. The complexity mostly arose from strict adherence to numerous and complex legal procedure with no room for reasonable accommodation for persons with disabilities. This was compounded by the prevalence of COVID-19 and additional regulations for its containment.

The literature review of this study revealed that at least a three-tier intervention must be attained for achieving procedural justice for persons with disabilities in South Africa, i.e. broaden the types of legally recognised accommodations and support services to capture all persons with disabilities; ensure that persons with disabilities who are most vulnerable and marginalised including women and children have access to legally guaranteed accommodations and support services and ensure training of justice actors.

e) Barriers arising from economic hardship

The study revealed that expenses for accessing justice are incurred right from inception when a violation or legal or human rights occurs. The cost of participating in lengthy criminal justice processes as victims, witnesses and even as accused persons present financial burdens to persons with disabilities involved.

f) Barriers arising from lack of or inadequate access to legal representation

Although many of the study participants acknowledged the important role that legal representation plays in ensuring access to justice for persons

with disabilities, many participants looked at such access through the lens of the charity model to disability and not a matter of a person's right. The concept of reasonable accommodation must never be equated to adjustments made to accommodate a person with a disability through the charity approach. Remedies for violations of legal and human rights often require the intervention of lawyers and thus it is important to ensure a rights-based approach to legal representation. The rights based approach is particularly important because many persons with disabilities are unable to access lawyers due to the high cost of hiring legal and related services. Even when a person with disability has access to a legal representative either through their own retainer or through the state legal aid system, they often have inadequate legal representation due to the limited knowledge legal representatives may have on types of disabilities and disability rights. The barriers arising from lack of, or inadequate legal representation are exacerbated by limited access to legal information and legal services thereby limiting self-agency and effective participation of persons with disabilities in the criminal justice system of South Africa.

g) Barriers arising from lack of or limited access to information, education and communication materials and systems: Access to information, education and communication materials and systems are cardinal to facilitate access to justice for persons with disabilities not only because they facilitate their communication needs, but also empower them with legal knowledge. The study found that the low prevalence of criminal reports among persons with disabilities was due to lack of information on their right to and importance of reporting violations that they experience. The study also found that most information on the criminal justice system in South Africa is not in accessible formats. This includes signage in court rooms, content and formats of legal documents and legal procedures.

h) Barriers arising from communication difficulties

The majority of study participants identified communication and physical barriers as the key barriers to access to justice for persons with disabilities. With regards to communication barriers, some participants lamented the difficulty of reporting violations experienced by children with intellectual disabilities attributable to the communication difficulties they experience. This coupled with the fact that the majority of their caregivers are not aware of their rights and are often the violators of rights makes it difficult to ensure cases are reported, investigated and remedied. Similarly, persons with visual impairments, hearing impairment and intellectual disabilities experience challenges in communicating with justice actors.



i) Barriers arising from physically inaccessible institutions and spaces

The study also found that persons with physical disabilities and those with sensory disabilities may experience challenges in physically accessing justice institutions such as police stations, court rooms, safe houses, correctional centers etc. In this case persons with disabilities were disadvantaged whether they were victims or perpetrators of crime, or serving as police or correctional officers, advocates, prosecutors or judges. Artificial modifications to existing buildings do not make them physically accessible, but constitute cosmetic changes that effectively do not address existing barriers. Further, the distance of justice institutions from where persons with disabilities reside also posed a physical barrier to accessing them.



The Constitutional Court in Braamfontein, Johannesburg.



CONCLUSION AND RECOMMENDATIONS

Findings from the research study prove that even though South Africa has many favorable legal provisions that contribute to the attainment of access to justice for persons with disabilities who find themselves in the criminal justice system, such laws are inadequate to guarantee effective access to justice. This is attributable to a myriad of reasons including:

- 1 Poor implementation of laws such as the South African Language Practitioners Act of 2014 that guarantees access to qualified sign language interpreters;
- 2 Inadequate regulations to support the implementation of laws;
- 3 Limited response to the diverse and unique needs of the different types of disabilities persons have and failure to adequately recognise the heterogeneity of persons with disabilities and their unique challenges in the criminal justice system, including those arising from their disability and socioeconomic circumstances.
- 4 Existence of negative attitudes, stigma and discrimination of members of the public as well as various service providers in the justice sector;
- 5 Preference for the charity model rather than the rights-based model to practical interventions for ensuring access to justice;
- 6 The existence of procedurally unfair and inaccessible systems that do not take into account persons with disabilities including the establishment of rigid evidentiary rules that disadvantage the attainment of justice for persons with disabilities;
- 7 Failure to provide reasonable accommodations for ensuring their access to justice and failure to budget to systems and services that ensure the attainment of justice on an equal basis with other persons without disabilities in South Africa's criminal justice system.

Stakeholders in the criminal justice system recommended several interventions including:

- 1 Ensuring that existing progressive laws and policies are implemented including the White Paper on the rights of persons with disabilities which was adopted in 2016 and also exploring localised mechanisms for access to justice in South Africa, taking into account the great dependence on customary justice systems and high demand for legal aid.
- 2 The need for systemic and ad hoc adjustments to the criminal justice system that ensure that the system holistically responds to the needs of persons with disabilities generally as well as their unique, individual needs when they interact with the criminal justice system including:



- Fast-tracking preliminary and other processes such as mental assessments;
 - Introduction of identification aids for court rooms and court cases;
 - Strengthening of coordination among justice service providers involved in criminal cases from the inception to the completion of the cases;
 - Flexibility in processes such as identification parades to allow for a system that responds to the needs of a person with a hearing impairment among others.
- 3 That actors in the criminal justice system of South Africa learn best practices from the region and beyond, particularly countries like Kenya and Israel, which have made remarkable progress in facilitating access to justice for persons with disabilities.
 - 4 That all actors in the criminal justice system be trained on how to accommodate persons with disabilities in their respective portfolios to address negative attitudes towards persons with disabilities. Training was also recommended for persons with disabilities to know their rights and empower them to claim such rights.
 - 5 The need to strengthen monitoring systems to track the extent to which persons with disabilities access the criminal justice system.



Notes

- 1 This research study is part of a larger research project on the barriers to accessing justice in two other countries, namely, Zambia and Botswana. The findings from the studies in South Africa and Zambia are contained in separate reports. The research project also includes training of criminal justice personnel on how to accommodate persons with disabilities in Zambia, South Africa and Botswana.
- 2 Arlene S Kanter 'The development of disability rights under international law: From charity to human rights' (2015) Routledge New York at 221
- 3 Eilionoir Flynn 'Disabled justice? Access to justice and the UN Convention on the Rights of Persons with Disabilities' (2015) Ashgate Surrey at 40-41
- 4 <https://www.gov.za>>files
- 5 <https://www.women.gov.za>
- 6 Felicity Kayumba Kalunga, Chipso Mushota Nkhata 'Protection of the Rights of persons with mental disabilities to liberty and informed consent to treatment:A critique of Gordon Maddox Mwewa & others v. Attorney-General & another' (2018)6 African Disability Rights Yearbook 60-81 at 79
- 7 Diana Msipa 'How assessments of testimonial competence perpetuate inequality and discrimination for persons with intellectual disabilities: An analysis of the approach taken by South Africa and Zimbabwe (2015) 3 African Disability Rights Yearbook 63-90 at 64
- 8 Section 78(1) of the Criminal Procedure Act no. 51 of 1977
- 9 Julinda Beqiraj, Lawrence McNamara, Victoria Wicks 'Access to justice for persons with disabilities: From international principles to practice' (2017) International Bar Association at 34-35
- 10 Diana Msipa 'Survivors of Sexual Assault with Intelletual Disabilities: Accommodating difference in the courtroom' (2013) LLM thesis submitted to McGill University

