



ZAMBIA



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

A research study of the
criminal justice system



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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>



ACKNOWLEDGEMENTS

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EXECUTIVE SUMMARY

On 2 February 2010, the Government of Zambia ratified the Convention on the Rights of Persons with Disabilities (CRPD), thereby indicating its willingness to be bound by and 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. In order to fulfil this duty, it is imperative that state parties understand the nature of the barriers/challenges, and the possible ways of eliminating them. 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 Zambia. The study involved interviews with various stakeholders in the Zambian criminal justice system as well as a legislative review. The main findings from the interviews are as follows:

- Although persons with different types of disabilities participate in the criminal justice system, persons with hearing and speech impairments make up the highest number.
- Although persons with disabilities interacted with the criminal justice system both as accused persons and as complainants, the majority of the cases reported by respondents involved accused persons with disabilities.
- Most accused persons and complainants with disabilities were involved in

serious offences such as murder and sexual offences.

- The respondents reported encountering a number of barriers when handling cases involving persons with disabilities, with the majority encountering communication barriers.
- There was no uniform/coordinated response to the challenges/barriers; there was a range of responses including appropriate and inappropriate ones.

A legislative review was also conducted to determine if there are any legislative provisions that constitute barriers for persons with disabilities. A number of procedural and substantive barriers were identified. They include:

- The assessment of testimonial competence;
- The assessment of fitness to plead and detention at the President's pleasure;
- The procedure for issuing summons;
- The narrow interpretation of the word 'language';
- The practice of observing and recording demeanour;
- The requirement to give oral evidence in person and in open court; and
- The failure to recognise the legal capacity of persons with intellectual and psychosocial disabilities.

Based on the research findings, the report provides a number of recommendations as follows:

- Provide procedural and age-appropriate accommodations tailored to meet the needs of persons with different types of disabilities.
- Accommodations need to be provided to all persons with disabilities interacting with the criminal justice system, including as complainants, accused persons or as witnesses. The fact that persons with disabilities are usually involved in serious cases heightens the need to provide effective accommodations throughout the criminal justice process.
- Train all criminal justice personnel on disability rights and appropriate accommodations.
- Revise the assessments of testimonial competence and align them with the social model of disability.
- Revise the assessments of fitness to plead.
- Include a requirement to issue summons in accessible formats.
- Include sign language and other non-spoken languages within the definition of the term 'language'.
- Either abolish the practice of observing and recording demeanour or

exempt persons with disabilities from this practice.

- Provide an exception for persons with disabilities from the requirement to give oral evidence in person and in open court.
- Recognise that all persons with disabilities have the right to enjoy legal capacity.

ACRONYMS AND ABBREVIATIONS

CPC	Criminal Procedure Code
CRPD	Convention on the Rights of Persons with Disabilities
DEC	Drug Enforcement Commission
DSW	Department of Social Welfare
EA	Evidence Act
HCA	High Court Act
ICCPR	International Covenant on Civil and Political Rights
LAA	Legal Aid Act
LAB	Legal Aid Board
MoJ	Ministry of Justice
MHA	Mental Health Act
NPA	National Prosecuting Authority
PCA	Penal Code Act
ZCS	Zambia Correctional Service
ZPS	Zambia Police Service



INTRODUCTION

Following rights violations, people generally turn to the various systems of justice to seek redress.¹ The criminal justice system exists to adjudicate violations that are criminal in nature.² A violation of the right to freedom from exploitation, violence and abuse, for example, may give rise to a criminal charge, such as rape or assault, which is resolved through the criminal justice system.³ Similarly, a violation of the right to life constitutes the criminal offence of murder. Participation in the criminal justice system is therefore, crucial for obtaining justice for criminal wrongs. Access to justice is fundamental because it impacts the enjoyment of other rights.⁴ Cappelletti and Garth accurately describe its importance when they state that the 'possession of rights is meaningless without mechanisms for their effective vindication'.⁵

Nevertheless, certain population sub-groups may find it more difficult to access and participate in the criminal justice system. Research shows that persons with disabilities face numerous barriers to accessing justice on an equal basis with

1 Examples of justice systems include the criminal justice system, the civil justice system and administrative justice system.

2 In certain circumstances, it is possible to seek redress from more than one system of justice.

3 Art 16 Convention on the Rights of Persons with Disabilities (CRPD) GA Res A/RES/61/06 adopted on 13 December 2006 and entered into force on 3 May 2008.

4 M Cappelletti & B Garth 'Access to justice: The newest wave in the worldwide movement to make rights effective' (1978) 27 *Buffalo Law Review* 181 at 185.

5 As above.

others.⁶ In very simple terms, access to justice refers to the ability to effectively access the 'systems, procedures, information, and locations used in the administration of justice'.⁷ In recognition of the widespread barriers to accessing justice faced by persons with disabilities throughout the globe, the right to access justice was enunciated as a substantive right for the very first time in the first disability-specific international human rights instrument, the Convention on the Rights of Persons with Disabilities (CRPD).⁸ Prior to the coming into force of the CRPD in 2008, access to justice was not a substantive right in any other international human rights law instrument. Nevertheless, the idea of equal access to justice for all was encapsulated in the right to an effective remedy present in other international human rights law instruments.⁹ The need for a substantive right of access to justice in the CRPD arose from the lived experience of persons with disabilities who continuously faced numerous barriers to accessing justice on an equal basis with others.¹⁰ The right of persons with disabilities to access justice on an equal basis with others is enshrined in article 13 of the CRPD.

A decade after the coming into force of the CRPD, the African Union adopted an African disability-specific human rights instrument, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (the African Disability Protocol).¹¹ The African Disability Protocol seeks to contextualise the rights experience of persons with disabilities in Africa.¹² It retained the right to access justice, which is also enshrined in its article 13, indicating that persons with disabilities in Africa continue to face numerous barriers to accessing justice on an equal basis with others.

The majority of African countries, 48 out of 54 countries, have signed and ratified the CRPD, and 49 African countries have signed and ratified the Optional Protocol to the CRPD.¹³ Zambia ratified the CRPD on 2 February 2010. The African Disability

6 S Ortoleva 'Inaccessible justice: Human rights, persons with disabilities, and the legal system' (2011) 17 *ILSA Journal of International and Comparative Law* 281 at 283.

7 Ortoleva (n 6) 284.

8 Ortoleva (n 6) 292.

9 See eg the International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171, art 2(3)(a), (entered into force 23 March 1976) (ICCPR).

10 F Mégret 'The Disabilities Convention: Human rights of persons with disabilities or disability rights?' (2008) 30 *Human Rights Quarterly* 494 at 512.

11 Protocol to the African Charter on Human and People's Rights on the Rights of Persons with Disabilities in Africa (African Disability Protocol) adopted by the thirtieth ordinary session of the Assembly, held in Addis Ababa, Ethiopia on 29 January 2018.

12 See for example the reference in the Preamble to the maiming or killing of persons with albinism on the continent.

13 United Nations Treaty Collection 'Convention on the Rights of Persons with Disabilities: Status as at 17 August 2020' https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en (accessed 17 August 2020).

Protocol is not yet in force and will only come into force 30 days after the deposit of the 15th instrument of ratification by a member state.¹⁴ Nevertheless, it became part of the African human rights framework upon its adoption by the African Union on 29 January 2018 and its provisions represent the African regional standard for the protection of the rights of persons with disabilities on the continent.¹⁵ Both the CRPD and the African Disability Protocol require states parties to ensure that all persons with disabilities enjoy access to justice on an equal basis with others.¹⁶ It is therefore, imperative for states parties to know and understand the various barriers to accessing justice faced by persons with disabilities in order for them to discharge their treaty obligations to ensure equal access to justice for all persons with disabilities. To that end, a research study was conducted in Zambia 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.¹⁷ 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 research report outlines the findings from the research study on the barriers to accessing justice faced by persons with disabilities in Zambia.

The report is comprised of four parts. In the first part, the evolution of the concept of disability and its implications for law and policy is explained. The second part outlines the methodology adopted for this research study. In part three, the findings from the research study are presented. The fourth part concludes the report by making recommendations for interventions that may be taken to overcome the barriers to accessing justice on an equal basis with others as outlined in the report.

14 Art 38 of the African Disability Protocol.

15 So far, nine African states have signed the African Disability Protocol, though none have ratified it. The nine states that have signed the African Disability Protocol are Angola, Burkina Faso, Cameroon, Central African Republic, Gabon, Mali, Rwanda, South Africa and Togo.

16 Art 13(1) of the CRPD & art 13(1) of the African Disability Protocol.

17 This research study is part of a larger research project on the barriers to accessing justice in two other countries, namely, Botswana and South Africa. The findings from the studies in South Africa and Botswana 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.

UNDERSTANDING DISABILITY

THE MODELS OF DISABILITY AND THEIR IMPLICATIONS FOR LAW AND POLICY

Disability is a complex concept that has evolved over time leading to the development of several models of disability. In very simple terms, a model of disability is a way of understanding disability. These models, however, do not only explain the causes of disability, they also influence the nature of any interventions through law and policy.¹⁸ The most influential models of disability are outlined below. The first is the moral or religious model of disability, which is the oldest model of disability based on the Judeo-Christian tradition.¹⁹ According to one variation of this model, disability is a punishment from God for sins committed by the person with a disability or his/her parents or ancestors.²⁰ The central idea of the moral or religious model is that disability is an act of God that no one can do anything about. In the mid-1800s, the way disability was understood evolved as a result of advancements in science that led to a better understanding of impairments.²¹ The result was the development of the medical model of disability.²² According to the medical model, impairments, such as visual or hearing impairments, result in disability. Therefore, disability is inherent in the individual with impairment. Contrary to the moral or religious model, intervention in the form of a cure or rehabilitation is possible under the medical model.²³

Ideas on the concept of disability evolved once again in the 1960s and 1970s ushering in the social model of disability according to which disability is understood as socially constructed as opposed to innate in an individual with impairment. The social model understands disability as the result of the interaction between a person with impairment and attitudinal and environmental barriers. Having an impairment alone, does not make one disabled.²⁴ An environment that takes little or no account of people with impairments contributes to disabling people.²⁵ Both the CRPD and the African Disability Protocol are based on this understanding of disability as a social construct.²⁶ The appropriate intervention therefore, is to make

18 M Retief & R Letšosa 'Models of disability: A brief overview' (2018) 74 *HTS Teologiese Studies/Theological Studies* 1.

19 Retief & Letšosa (n 18) 2.

20 As above.

21 As above.

22 As above.

23 R Olkin *What psychotherapists should know about disability* (1999) 26.

24 Union of the Physically Impaired against Segregation *Fundamental principles of disability* (1976) 14.

25 As above.

26 Preamble para e of the CRPD and art 1 of the African Disability Protocol.

changes to the external environment in response to the innate needs of the person with impairment. This is distinct from the medical model, which locates the disability in the individual and responds by attempting to cure or rehabilitate the individual.

The different models of disability influence the response to disability through law and policy. For instance, because the moral or religious model of disability understood disability as an act of God which nothing could change, the response to disability in law and policy was one of charity intended to make life easier for them. In contrast, the medical model, which perceives disability as a medical condition inherent in the individual impairment, gave rise to laws and policies that sought to cure or rehabilitate the individual as far as possible. The social model of disability espouses the idea of disability as the result of the interaction between a person with impairment and attitudinal and environmental barriers and therefore favours interventions intended to effect social change in response to the individual's needs.²⁷ An example of such an intervention in the context of access to justice is the provision of accommodations.

RESPONDING APPROPRIATELY TO DISABILITY THROUGH THE PROVISION OF ACCOMMODATIONS

As stated above, both the CRPD and the African Disability Protocol espouse the social model of disability. The CRPD states that disability results from the 'interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society'.²⁸ Similarly, the African Disability Protocol identifies persons with disabilities as those who have

physical, mental, psycho-social, intellectual, neurological, developmental or other sensory impairments which in interaction with environmental, attitudinal, or other barriers hinder their full and effective participation in society on an equal basis with others.²⁹

It is therefore, not surprising that one of the interventions mandated in both instruments in relation to access to justice is the provision of accommodations. Article 13(1) of the CRPD and article 13(1) of the African Disability Protocol both create a duty for states to provide procedural, age-appropriate and gender appropriate accommodations to ensure that persons with disabilities access justice on an equal basis with others. The provision of accommodations is a duty as exemplified

27 C Barnes, G Mercer & T Shakespeare 'The social model of disability' in A Giddens & P Sutton (eds) *Sociology: Introductory readings* (2010) 163.

28 Preamble para e of the CRPD

29 Art 1 of the African Disability Protocol.

by the fact that the denial of reasonable accommodations constitutes disability discrimination.³⁰

The concept of accommodations typifies a social model response to disability that recognises the importance of the interaction between factors internal to the person (the impairment) and factors external to the person (such as attitudinal and environmental barriers). Accommodations are defined as

necessary and appropriate modification and adjustment ... where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.³¹

In very simple terms an accommodation is 'any modification to usual practice'.³² For instance, the practice in court is that witnesses give their testimony in open court. A witness with an intellectual disability, for example, may find it difficult to communicate in open court and in response, the court may order that the trial takes place 'in camera' with only the necessary court personnel present. By making such an order, the court is modifying the usual practice and is therefore accommodating the witness. The modification is taking place in the external environment. This is not to say that the individual's impairment is irrelevant. The decision as to which of the many accommodations are to be provided to a particular witness is made by considering the specific needs of that witness arising from their impairment. Accommodations are therefore, interventions made to the external environment in response to the individual's internal needs and this reflects the interactional process that is central to the social model of disability. This study espouses to the social model of disability.

30 Art 2 of the CRPD and art 1 of the African Disability Protocol.

31 Art 2 of the CRPD. See also art 1 of the African Disability Protocol for a similar definition.

32 R White & D Msipa 'Implementing article 13 of the Convention on the Rights of Persons with Disabilities in South Africa: Reasonable accommodations for persons with communication disabilities' (2018) 6 *African Disability Rights Yearbook* 99 at 103.

THE DIFFERENT TYPES OF DISABILITIES

People may have different types of disabilities, including physical disabilities, sensory disabilities, psychosocial disabilities and intellectual disabilities.³³ Persons with physical disabilities may have difficulties with movement and mobility, and can find entering private and public spaces, including police stations and courts of law challenging. Those with sensory disabilities may have sight, speech or hearing impairments. Persons who are partially sighted or who cannot see at all constitute persons with sight/visual impairments. Those with hearing impairments include persons who are hard of hearing and those who cannot hear at all. Persons with speech impairments include those who cannot speak at all and those with difficulty speaking. Psychosocial disabilities are those disabilities that used to be termed mental health problems/conditions including depression, post-traumatic stress disorder (PTSD), bi-polar disorder, and schizophrenia amongst others.³⁴ They are distinct from intellectual disabilities, which affect an individual's learning, communication and ability to perform everyday activities.³⁵ An example of an intellectual disability is Down syndrome. The disability may be present at birth or may develop during childhood.³⁶ People with intellectual disabilities often have limited language ability, including comprehension and communication skills.³⁷ The study sought to discover the barriers faced by all persons with disabilities, not just persons with a particular type of disability.

33 Art 1 of the CRPD and art 1 of the African Disability Protocol. It is important to bear in mind that disability is an evolving concept (Preamble paragraph e of the CRPD) and what constitutes disability may change over time. For example, albinism has only recently been recognised as a disability. This list is therefore not an exclusive and a closed one.

34 For more information on psychosocial disabilities, see also Disability Rights Fund 'Psychosocial disability: One of the most misunderstood areas of disability' <http://disabilityrightsfund.org/our-impact/insights/psychosocial-disability/> (accessed 10 April 2022).

35 RL Schalock et al *Intellectual disability: Definition, classification, and systems of supports* (2010) 47.

36 As above.

37 As above.



METHODOLOGY

The research question, on a mixed method analysis involving qualitative and quantitative analysis, that the researcher sought to answer is: 'What are the barriers to persons with disabilities accessing justice on an equal basis with others in the Zambian criminal justice system?' In order to answer this research question, the researcher collected data for a period of eight weeks using two main methods.

- a) Interviews with key stakeholders/data collection through questionnaires completed by key stakeholders. The key stakeholders were drawn from institutions and organisations that are involved at every stage of the criminal justice system from investigation right up to the delivery of delivery and execution of criminal orders.
- b) Desktop review of relevant Acts of Parliament.

INTERVIEWS WITH KEY STAKEHOLDERS/COMPLETION OF QUESTIONNAIRES

The researcher conducted interviews with key stakeholders to find out what they perceive to be the main challenges/barriers to persons with disabilities accessing justice on an equal basis with others. Where it was not possible to conduct interviews, data was collected through questionnaires that were completed by the key stakeholders.

Participants who work for government departments that have an investigative mandate, provide legal services and those that are involved in the administration of criminal justice involving persons with disabilities were included in the study. Furthermore, only those with direct experience handling a case involving a person with a disability were included in the study whilst those with no direct experience were excluded from the study. Participants from disabled persons' organisations were also included in the study on the basis that they receive requests for support with navigating the criminal justice system. Only personnel who had provided such support were included in the study.

TABLE 1: COMPOSITION OF RESPONDENTS

A total of 25 interviews were carried out with people from different government departments or organisations as follows:

Department	Mandate/Responsibility	Number of respondents
Legal Aid Board	Provides legal aid services in criminal and civil cases to 'indigent' persons. ³⁸	5
Zambia Correctional Service	Manages and controls all prisons and correctional centres in the country.	4
Judiciary (courts)	Responsible for the administration of justice.	3
Zambia Police Service	Maintains public order and safety, enforces the law, prevents, detects and investigates criminal activities.	3
Department of Social Welfare	Provides and promotes quality social welfare services aimed at 'alleviating poverty, reducing destitution, promoting family values and reducing juvenile delinquency'. ³⁹ Social Welfare officers may sometimes be called upon to assist in court where a person with a disability is involved.	3

38 Legal Aid Board Zambia 'About' <http://www.legalaidboard.org.zm/about/> (accessed 1 September 2020).

39 Ministry of Community Development and Social Services <https://www.mcdmch.gov.zm/> (accessed 1 September 2020).

Anti-corruption Commission	Investigates cases of corruption in Zambia.	2
Drug Enforcement Commission	Investigates drug and money laundering offences. ⁴⁰	1
National Prosecuting Authority	Prosecutes criminal cases that have been investigated by the different investigative wings of the Government of Zambia. ⁴¹	1
Department of Immigration	Facilitating and regulating 'the movement of persons entering and leaving the country and control the stay of immigrants and visitors in order to contribute to the internal security and sustainable socio-economic development'. ⁴²	1
Zambia Deaf Youth and Women (DPO)	DPO advocating for the rights of deaf persons in Zambia.	1
Ministry of Justice	Provides legal services, facilitates the dispensation of justice and promotes governance mechanisms.	1
Total number of respondents		25

40 <http://www.deczambia.gov.zm/> (accessed 1 September 2020).

41 <http://www.npa.gov.zm/index.php> (accessed 1 September 2020).

42 <https://www.zambiaimmigration.gov.zm/about/> (accessed 1 September 2020).

The questions posed in the interviews and questionnaires sought to collect the following information:

- The types of disabilities involved;
- The capacity in which the persons with disabilities interacted with the criminal justice system;
- The nature of offences persons with disabilities either allegedly committed or were the victims of;
- The specific barriers which the respondents encountered when handling cases involving persons with disabilities; and
- How they handled the barriers.

DESKTOP REVIEW OF RELEVANT LEGISLATION

A desktop review of the relevant legislation governing the procedural and substantive aspects of the criminal justice system was also carried out with the aim of ascertaining whether there are any provisions that act as a barrier to persons with disabilities accessing justice on an equal basis with others. The following Acts were reviewed:

- The Constitution of Zambia 1991 with amendments through to 2016;
- The Criminal Procedure Code Act Chapter 88;
- The Penal Code Act Chapter 87;
- The Evidence Act Chapter 43;
- The Legal Aid Act Chapter 34;
- The High Court Act Chapter 27;
- The Subordinate Courts Act Chapter 28;
- The Juveniles Act Chapter 53;
- The Juveniles (Amendment) Act 3 of 2011;
- The Persons with Disabilities Act 6 of 2012;
- The Mental Health Act 6 of 2019;
- The Anti Gender Based Violence Act of 2011; and
- The Gender Equity and Equality Act.



RESEARCH FINDINGS: BARRIERS TO EQUAL ACCESS TO JUSTICE FOR PERSONS WITH DISABILITIES IN ZAMBIA

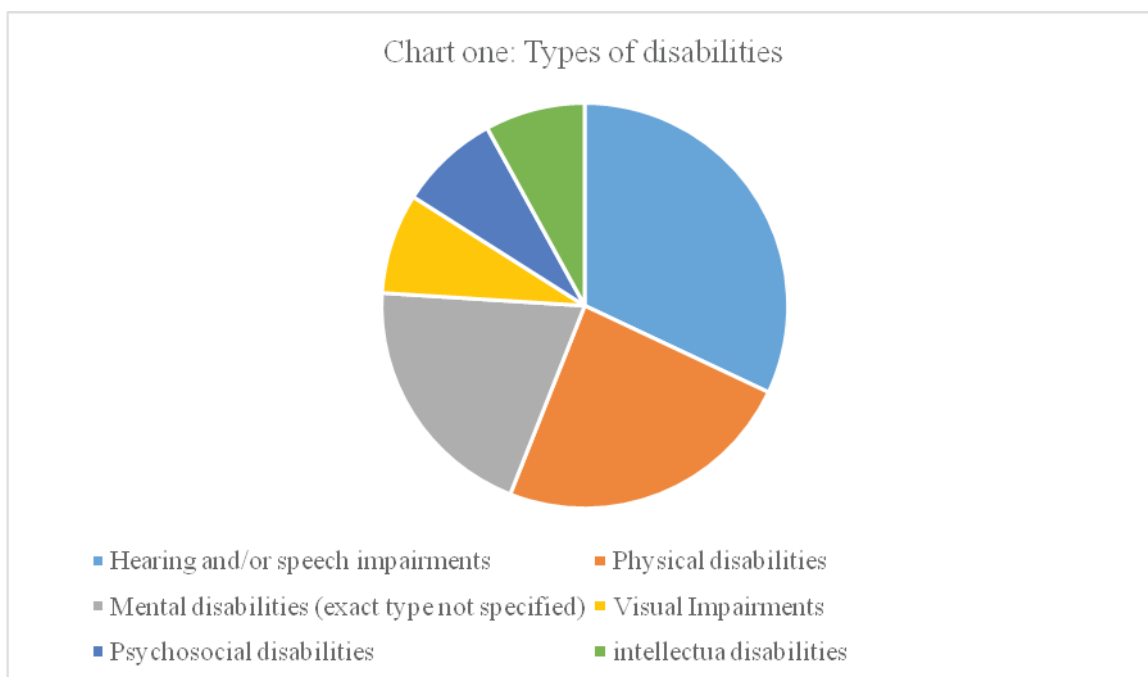
FINDINGS FROM KEY INFORMANT INTERVIEWS AND QUESTIONNAIRES

The aim of the study was to establish the specific barriers to accessing justice faced by persons with disabilities in Zambia. In order to make this determination, the respondents were asked to answer a number of questions either in an interview or through a questionnaire. The findings are as follows:

MOST OF THE CASES INVOLVED PERSONS WITH SPEECH AND HEARING IMPAIRMENTS

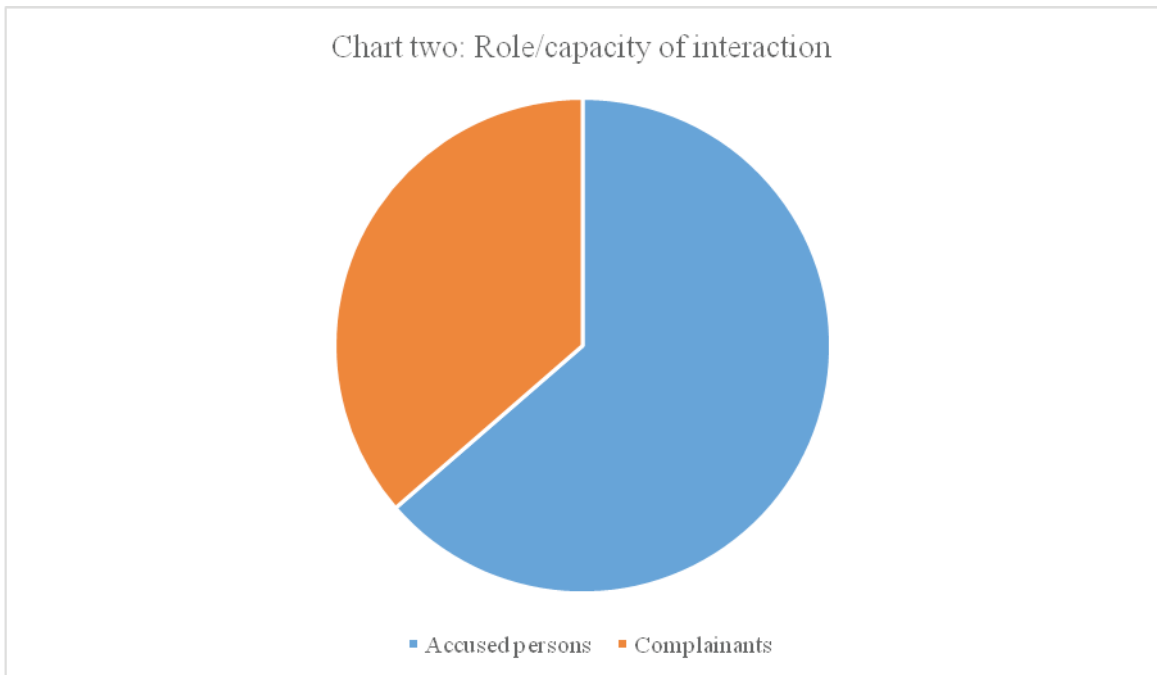
The respondents were asked to recall cases they had previously handled involving persons with disabilities; they were further asked to specify the types of disabilities those complainants or accused persons had. Most respondents provided case studies that they dealt with in their every-day interaction with persons with disabilities in the criminal justice system. Although the respondents dealt with cases involving persons with different types of disabilities, certain disabilities were more prevalent. The highest number of cases involved persons with hearing and speech impairments. Eight out of 25 cases (32 per cent) involved persons with hearing and speech impairments. The second highest number of cases involved persons with physical

disabilities. Six of the 25 cases (24 per cent) involved persons with physical disabilities. Cases involving persons with mental disabilities (exact type not specified) were also high with five out of the 25 cases (20 per cent) constituting persons with mental disabilities. The lowest number of cases involved persons with visual impairment, psychosocial or mental disabilities and intellectual disabilities, each with only two out of the 25 cases (eight per cent).



MOST OF THE CASES INVOLVED PERSONS WITH DISABILITIES WHO WERE ACCUSED OF A CRIME

The respondents were also asked to specify the capacity in which the person with a disability was interacting with the criminal justice system. Most of the cases involved persons with disabilities who were accused of a crime. Of the 25 respondents who reported that they had dealt with a case involving a person with a disability, three of the respondents did not clarify whether the person with a disability interacted with the criminal justice system as a complainant or as an accused person. Only 22 respondents were specific about the capacity in which the person with a disability interacted with the criminal justice system. In the majority of the cases, persons with disabilities interacted with the criminal justice system as accused persons. Of the 22 cases, 14 cases (63.6 per cent) involved accused persons with disabilities and eight cases (36.4 per cent) involved complainants with disabilities.

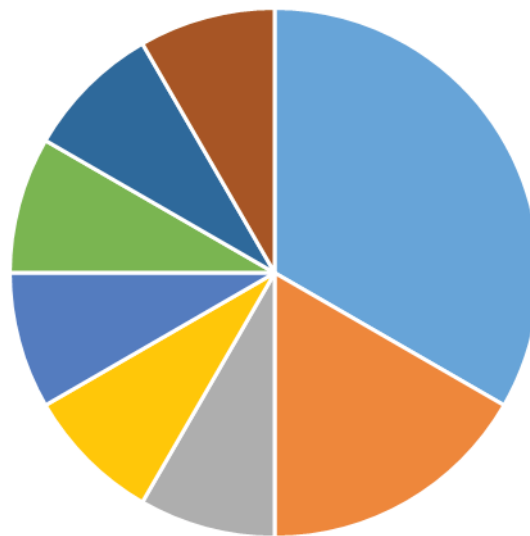


MOST OF THE ACCUSED PERSONS WITH DISABILITIES WERE CHARGED WITH MURDER⁴³

Of the 14 respondents who reported having dealt with cases involving accused persons with disabilities, two of the respondents did not disclose the exact offence. This leaves the number of cases with known offences at 12. The highest number of cases involved murder charges. There were four cases (33.3 per cent) reported involving persons with disabilities who were charged with murder. Two cases (16.7 per cent) involved drug offences. There was one case reported of each of the following offences: defilement (8.3 per cent), theft (8.3 per cent), abuse of authority of office (8.3 per cent), bribery (8.3 per cent), arson (8.3 per cent) and aggravated assault (8.3 per cent).

⁴³ It is not our intention to perpetuate the misconception that persons with disabilities are dangerous, rather these statistics indicate that persons with disabilities who are accused of crimes need to be accommodated especially since they are accused of such serious crimes.

Chart three: Nature of offences committed by accused persons with disabilities

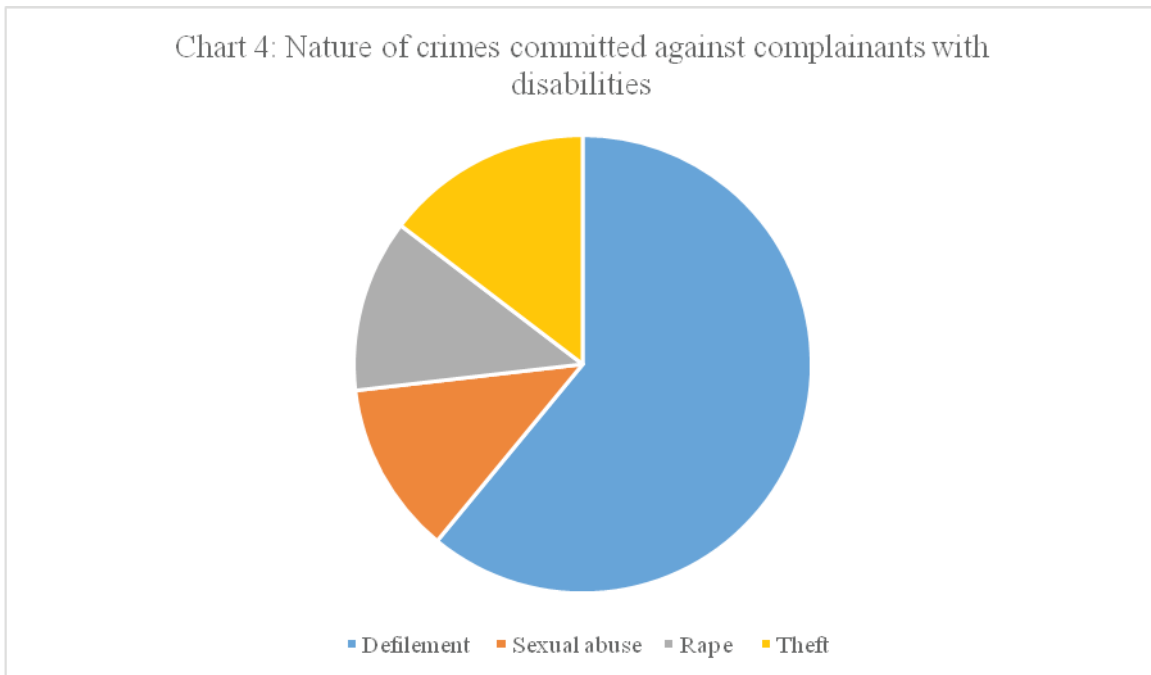


- Murder
- Drug-related offences (unlawful possession and trafficking in cannabis)
- Defilement
- Theft
- Abuse of authority of office
- Bribery
- Arson
- Aggravated assault

MOST COMPLAINANTS WITH DISABILITIES REPORTED SEXUAL OFFENCES

Of the eight cases involving complainants with disabilities, the majority of the cases were sexual offences. Five of the eight cases (62.5 per cent) involved a defilement offence. The respondents reported one sexual abuse case of indecent assault and attempted rape (12.5 per cent), one rape case (12.5 per cent) and one theft case (12.5 per cent).

Chart 4: Nature of crimes committed against complainants with disabilities



MOST OF THE RESPONDENTS ENCOUNTERED COMMUNICATION BARRIERS WHEN HANDLING CASES INVOLVING PERSONS WITH DISABILITIES

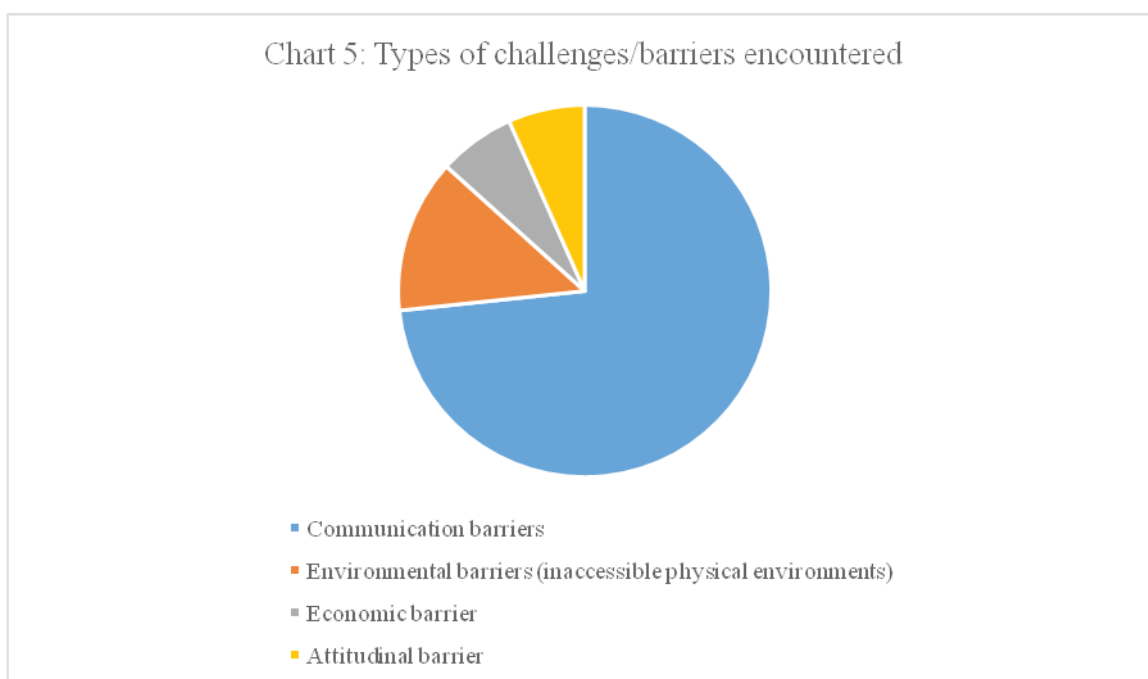
The respondents were asked to state the challenges they encountered when handling cases involving persons with disabilities. Most of the respondents reported encountering communication barriers. Ten of the 25 respondents did not disclose any challenges or barriers. Only 15 respondents reported having encountered challenges.

The study found that most respondents encountered communication barriers when handling cases involving persons with disabilities. Eleven of the 15 respondents (73.3 per cent) reported facing communication barriers. The communication barriers were encountered in cases involving persons with speech and hearing impairments, persons with intellectual disabilities and persons with psychosocial disabilities. In relation to persons with speech and hearing impairments, the communication barrier arose as a result of the lack of sign language interpreters. In one case, correctional officers sought assistance from one of the inmates to interpret between the accused person and his lawyer. The defence counsel in this case complained that he could not obtain instructions from his client on time because the inmate who was acting as a sign language interpreter was working in the fields at the time he wanted to obtain instructions from his client. In relation to persons with intellectual and psychosocial disabilities, defence counsel particularly those from the Legal Aid Board who represent indigent clients and those who cannot afford to hire a private lawyer reported having challenges obtaining instructions from them.

Two of the 15 respondents (13.3 per cent) reported an environmental barrier arising from the fact that the court rooms were not accessible by wheelchair for persons with physical disabilities.

One respondent (6.7 per cent) who is a police officer, reported an economic barrier. A minor girl with a psychosocial disability was residing with her sister and her sister's husband at the time and reported being raped by her sister's husband. Police officers could not pursue this case further because they could not find the complainant. After the case was reported by a neighbour, the complainant's family took her away to a remote village so that the police could not find her. The accused person was the sole breadwinner in the family and they did not want him to go to prison and leave the entire family destitute.

In one of the cases (6.7 per cent), an attitudinal barrier was present in that the investigating officer did not pursue the case because he did not think that a complainant with a speech and hearing impairment can testify in court.



THERE WERE A RANGE OF RESPONSES TO THE DIFFERENT CHALLENGES

Respondents were asked to state how they handled the challenges/barriers that they faced. There was a range of responses to the different challenges/barriers, some good and others bad. In eight of the 15 cases (53.3 per cent), the respondents handled the challenges appropriately by accommodating the person with a disability. Six of these eight cases involved persons with speech and hearing impairments who were accommodated through the provision of sign language interpreters. The

sign language interpreters were mostly family members and in one case, a fellow inmate who was conversant with sign language was asked to act as a sign language interpreter.⁴⁴ One defendant with an intellectual disability was accommodated through the use of simplified language court. Another defendant with a visual impairment was accommodated by being permitted to bring a support person of her choice to the court room.

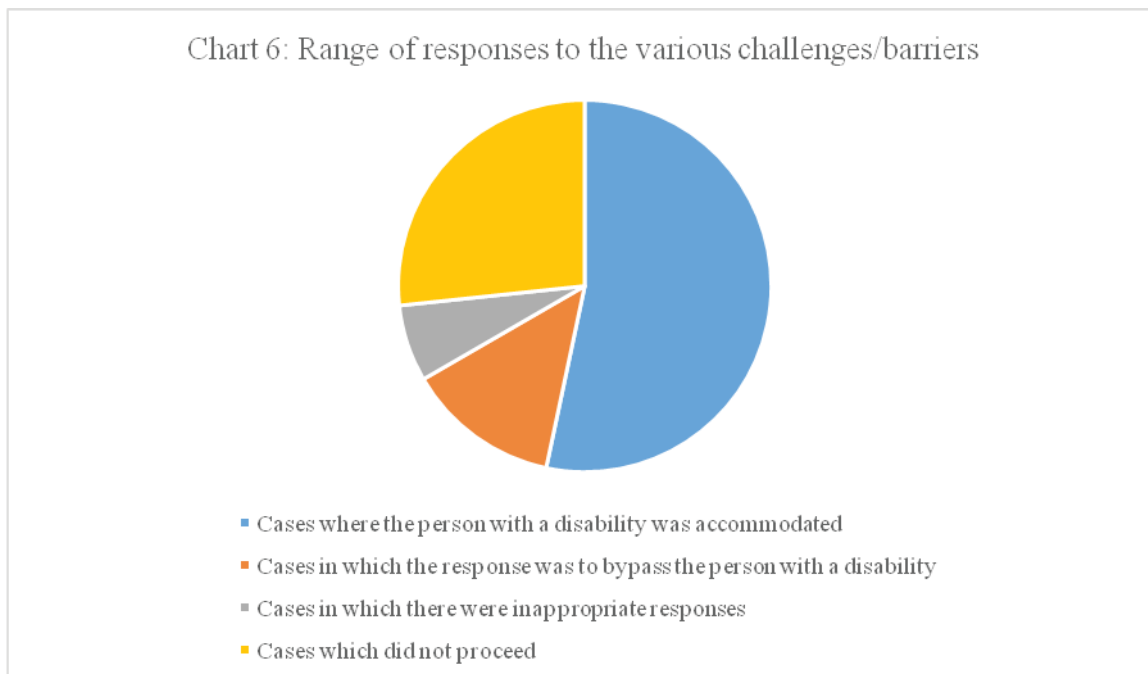
Others responded to the challenges/barriers inappropriately. For example, in two of the 15 cases (13.3 per cent), the respondents attempted to bypass the testimony of the person with a disability by relying on other evidence. One of these two cases involve an accused person with a psychosocial disability who was accused of committing a crime. The person's (suspect's) legal aid counsel, reported facing communication challenges when trying to obtain instructions from him. He responded to this challenge by proceeding without instructions and relying on depositions from other witnesses, consequently denying his client his legal capacity. The second case involved an accused person with a physical disability with whom he also faced communication challenges. The respondent overcame this barrier by using other avenues and channels to obtain the information he needed.

In one case (6.7 per cent), there was an inappropriate response in that the complainant who was a wheelchair user, was lifted up the stairs to the court room because there was no lift or wheelchair ramps leading to the court room.

In the worst cases, the response was to abandon the case whereby there are no accommodations or accessibility measures provided to the user because of the challenges resulting from disability. Four of the 15 cases (26.7 per cent) did not proceed due to the barriers encountered. One respondent who is a legal aid officer reported that if he is approached by someone with a psychosocial disability, he usually informs them that he cannot assist them because he has difficulty understanding their instructions. In another case, the complainant was a young girl with intellectual disability who was ordered to undergo a medical examination. The doctor stated in his report that the girl prefers to give signs rather than communicate verbally. Because of this, the court did not admit her evidence and the accused person was acquitted. The third case involved a young girl with hearing and speech impairments who was allegedly raped by her uncle. The police did not investigate this case further because the girl could not give a proper statement about the alleged offence even with a sign language interpreter since she was not conversant in official sign language. The fourth case involved a complainant with a psychosocial disability who was allegedly raped by her sister's husband with whom she was residing. A

44 It is ideal for the sign language interpreter to be a neutral professional to avoid allegations of bias and evidence tampering. Nevertheless, it is commendable that these respondents recognised the need for the person to participate effectively through a sign language interpreter.

report was made to the police, but the family subsequently changed their minds and decided not to proceed with the case. The accused was the sole bread winner in the family and the family would not be able to earn a living if the accused person was imprisoned. The family took the complainant to a village where the police could not find her and the case did not proceed.



FINDINGS FROM LEGISLATIVE REVIEW

A review of the legislation governing criminal justice in Zambia (the Criminal Procedure Code Act Cap 88) was conducted in order to determine whether there were any laws that act as barriers to persons with disabilities accessing justice on an equal basis with others. The following are the findings:

ASSESSMENTS OF TESTIMONIAL COMPETENCE ARE A BARRIER TO ACCESSING JUSTICE

Competence to testify 'relates to the ability or the capacity of a person to give evidence in court proceedings'.⁴⁵ Only witnesses who are competent may testify in court.⁴⁶ Generally, everyone is considered competent to testify. In Zambia, the

45 *Koali Moshoeshoe v DPP CC/14/2017* para 7. A witness is compellable if they may be required to give evidence in court.

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

Criminal Procedure Code states that everyone is competent to testify.⁴⁷ Nevertheless, practice in the courts indicates that the testimonial competence of complainants with intellectual and psychosocial disabilities is often challenged. In the past, courts relied on the Mental Disorders Act of 1951 which required the court to conduct an assessment in order to determine whether notwithstanding their impairment, they could give evidence and their testimony could be relied on. This Act has since been repealed by the Mental Health Act of 2019. Nevertheless, the new Act does not go far enough in changing the position because the recognition of legal capacity is not absolute. Section 4 of the 2019 Mental Health Act states as follows:

Section 4 of the Mental Health Act

'Subject to the other provisions of this Act, a mental patient shall enjoy legal capacity.'⁴⁸

'Where the nature of the mental illness, mental disorder or mental disability results in the absence of mental capacity of that mental patient, the mental patient shall not enjoy legal capacity and is legally disqualified from performing a function that requires legal capacity.'⁴⁹

The courts also rely on common law as a basis for conducting a *voir dire* in order to assess a complainants' testimonial competence.⁵⁰ This indicates that the testimonial competence of witnesses with intellectual and psychosocial disabilities is constantly in question due to the nature of their disability and the misconception that their disability makes them incompetent and unreliable witnesses.⁵¹ A finding of incompetence means that the witness will not be permitted to testify and this may in turn have a negative impact on the outcome of the case. Assessments of testimonial competence are therefore a barrier to equal access to justice.

Testimonial competence ought to be understood in the light of the social model of disability. Persons with intellectual and psychosocial disabilities are not inherently incompetent to testify. Rather, their impairments, in interaction with attitudinal and environmental barriers in the external environment may make it challenging for them to participate effectively as witnesses in court. However, they can still provide reliable testimony if they are provided with appropriate accommodations. Both the CRPD and the African Disability Protocol require states parties to provide procedural, age and gender-appropriate accommodations to enable all persons with

47 Criminal Procedure Code Chap 88 (CPC).

48 Sec 4(1) of the Mental Health Act 6 of 2019.

49 Sec 4(2) of the Mental Health Act.

50 *R v Hill* [1986] 1 SCR 313.

51 GH Gudjonsson, G Murphy & ICH Clare 'Assessing the capacity of people with intellectual disabilities to be witnesses in court' (2000) 30 *Psychological Medicine* 307.

disabilities, including those with intellectual and psychosocial disabilities to access justice on an equal basis with others.⁵² An accommodation is any modification or adjustment made for the purpose of enabling a person to participate effectively and on an equal basis with others.⁵³ Instead of preventing persons with intellectual and psychosocial disabilities from testifying in court on the basis that they lack testimonial competence, they should be permitted to testify with the necessary and appropriate accommodations.

ASSESSMENTS OF FITNESS TO PLEAD AND DETENTION AT THE PRESIDENT'S PLEASURE IS A BARRIER TO EQUAL ACCESS TO JUSTICE

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.⁵⁴ 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.⁵⁵ The provision reads as follows:

Section 160 of the Criminal Procedure Code

'Where on the trial of a person charged with an offence punishable by death or imprisonment the question arises, at the instance of the defence or otherwise, whether the accused is, by reason of unsoundness of mind or of any other disability, incapable of making a proper defence, the court shall inquire into and determine such question as soon as it arises.'⁵⁶

If the accused is indeed found to be unfit to make his defence, the court shall enter a plea of not guilty and hear the evidence for the prosecution and for the defence.⁵⁷ If the evidence does not justify a conviction, the court shall acquit and discharge the accused.⁵⁸ Even if one is acquitted and discharged, they may still be detained in terms of that Act.⁵⁹ However, if the evidence would justify a conviction, the Court shall order

52 Art 13 of the CRPD & art 13 of the African Disability Protocol.

53 See art 2 of the CRPD and art 1 of the African Disability Protocol.

54 Sec 160 of the Criminal Procedure Code Chap 88.

55 Sec 160 of the Criminal Procedure Code.

56 As above.

57 Sec 161(1) of the Criminal Procedure Code.

58 Sec 161(2)(a) of the Criminal Procedure Code.

59 Sec 161(3) of the Criminal Procedure Code.

the accused to be detained during the President's Pleasure.⁶⁰ Accused persons may be detained during the President's pleasure 'in any mental institution, prison or other place where facilities exist for the detention of persons, and for his conveyance to that place'.⁶¹ Such detention constitutes lawful custody.⁶²

At any time, the President may discharge a person detained during the President's Pleasure either absolutely or subject to certain conditions.⁶³ A conditional discharge may be revoked by the President at any time resulting in the person's detention at the President's Pleasure as if he had never been discharged at all.⁶⁴ The President may, on the advice of a medical officer, direct a person detained during the President's pleasure to be taken before a court to have the question of his capacity to make a proper defence re-examined.⁶⁵ If the court finds, after conducting such an inquiry, that the accused is capable of making a proper defence, the order of detention during the President's pleasure ceases to be in effect and the trial commences afresh.⁶⁶ If, after conducting the inquiry, the court finds that the accused is still incapable of conducting a proper defence, 'the order under which the accused has been detained during the President's pleasure shall continue to be of force and effect'.⁶⁷ All these assessments occur without any accommodations and without the participation of the accused person. Fitness to plead is treated as inherent in the individual with impairment. The assessment of fitness to plead is therefore, a barrier to equal access to justice contrary to article 13 of the CRPD and article 13 of the African Disability Protocol.

THE PROCEDURE FOR ISSUING SUMMONS MAY ACT AS A BARRIER TO EQUAL ACCESS TO JUSTICE

The attendance of an accused person at court may be secured in one of two ways; through a summons or through a warrant.⁶⁸ Where a summons is issued, there is a requirement for the summons to be issued in writing.⁶⁹ However, the Interpretation and General Provisions Act Cap 2 of the Laws of Zambia defines a document to include:

60 Sec 161(2)(a) of the Criminal Procedure Code.

61 Sec 163(1) of the Criminal Procedure Code.

62 Sec 163(2) of the Criminal Procedure Code.

63 Sec 164(1) of the Criminal Procedure Code.

64 Sec 164(2) of the Criminal Procedure Code.

65 Sec 165(1) of the Criminal Procedure Code.

66 Sec 165(2) of the Criminal Procedure Code.

67 Sec 165(3) of the Criminal Procedure Code.

68 Sec 91(1) of the Criminal Procedure Code.

69 Sec 92(1) of the Criminal Procedure Code.

[A]ny publication and any matter written, expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, which is intended to be used or may be used for the purpose of recording that matter.

The summons must then be personally served by a police officer, or an officer of the court⁷⁰ and the accused person must sign the back of the duplicate copy to confirm receipt.⁷¹ Similarly, the attendance of a witness at court is secured through a summons.⁷² If the witness disobeys the summons, a warrant of arrest may be issued.⁷³ Summons are not issued in accessible formats. There is no requirement for the summons to be issued in Braille or in easy read format. There is a danger that an accused person or a witness who requires information in accessible formats may not understand the contents of the summons. This may have dire consequences because failure to respond to a summons results in the issuing of a warrant of arrest whereby the accused person or suspect is detained in police custody.

Although the law requires affidavits to be completed in accessible formats,⁷⁴ no such accommodations exist in relation to summons. The law expressly requires persons with visual impairments to be accommodated by providing that the affidavit shall state the fact that it was read over and the witness understood it.⁷⁵ The provision reads as follows:

Section 20(g) of the High Court Act

'Where the witness is illiterate or blind, it shall state the fact, and that the affidavit was read over (or translated into his own language in the case of a witness not having sufficient knowledge of English), and that the witness appeared to understand it.'⁷⁶

The law does not provide for similar accommodations to be made in relation to summons and the manner in which they are currently issued may act as a barrier to equal access to justice for some persons with disabilities.

70 Sec 93(1) of the Criminal Procedure Code.

71 Sec 93(2) of the Criminal Procedure Code.

72 Sec 143 of the Criminal Procedure Code.

73 Sec 145 of the Criminal Procedure Code.

74 Section 2 of the Interpretation and General Provisions Act Cap 2.

75 Sec 20(g) of the High Court Act.

76 As above.

THE NARROW INTERPRETATION OF THE WORD 'LANGUAGE' IS A BARRIER TO EQUAL ACCESS TO JUSTICE

Zambia's Constitution is the supreme law of the land and any other law that is inconsistent with the Constitution is 'void to the extent of the inconsistency'.⁷⁷ The Constitution provides that a criminal trial must take place in a language that the accused person understands.⁷⁸ It also states that '[a]ny person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention'.⁷⁹ Furthermore, the law requires that evidence be interpreted to an accused in open court in a language he understands.⁸⁰ This provision is interpreted narrowly to only include spoken languages such as English or Nyanja for example. Sign language is not popularly used or employed as an alternative form of communication in court. For example, the law also states that: '[i]f he appears by advocate, and the evidence is given in a language other than the English language, and not understood by the advocate, it shall be interpreted to such advocate in the English language'.⁸¹

Similarly, though there is a requirement for 'documents ... put in for the purpose of formal proof ... to be interpreted'⁸² that requirement is limited to language and does not extend to accessible formats.

In the CRPD, the term 'language' includes 'spoken and signed languages and other forms of non-spoken languages'.⁸³

THE PRACTICE OF OBSERVING AND RECORDING Demeanour MAY BE A BARRIER TO EQUAL ACCESS TO JUSTICE

The law permits the court to record the demeanour of a witness in a trial and may use that information to make a determination as to their reliability.⁸⁴ The provision reads as follows:

77 Sec 1(1) of the Constitution of the Republic of Zambia.
78 Sec 13(2) of the Constitution of the Republic of Zambia.
79 As above.
80 Sec 195(1) of the Criminal Procedure Code.
81 Sec 195(2) of the Criminal Procedure Code.
82 Sec 195(3) of the Criminal Procedure Code.
83 Art 2 of the CRPD.
84 Sec 196 of the Criminal Procedure Code.

Section 196 of the Criminal Procedure Code

'A magistrate shall record the sex and approximate age of each witness, and may also record such remarks (if any) as he thinks material respecting the demeanour of any witness whilst under examination.'⁸⁵

It is erroneously assumed that all demeanour and human behaviour may be interpreted in the same way.⁸⁶ In fact, the demeanour of some persons with disabilities often may in some cases not be interpreted in the same manner that one would for a non-disabled person. Speaking with your head down, avoiding direct eye contact and fidgeting may be interpreted as a sign of dishonesty. However, for persons with intellectual disabilities for example, this may not be the case. Ziv explains the position succinctly when she states that:

People with disabilities – in particular cognitive and mental disabilities – pose a unique challenge to evidence law. Some of the central elements upon which the rules of evidence are based, such as ... credible behavior and reliable conveyance of information, may differ when offered by persons with mental disabilities.⁸⁷

Therefore, the requirement to observe and record a witness's demeanour may act as a barrier for witnesses with disabilities because it is based on the erroneous assumption that all human behaviour can be interpreted in the same way. It is proposed that the court and law enforcement officers take this into account.

THE REQUIREMENT TO GIVE ORAL EVIDENCE IN PERSON AND IN OPEN COURT MAY BE A BARRIER TO EQUAL ACCESS TO JUSTICE

As a general rule, the witnesses at a trial shall be examined *viva voce* in open court.⁸⁸ This means that a witness is usually required to appear before the court in person and give oral evidence. The principle of orality is a fundamental feature of the adversarial trial.⁸⁹ However, it assumes that all witnesses possess the ability for effective oral communication, which is not the case.⁹⁰ Some disabilities affect a person's ability to verbally communicate. Furthermore, the anxiety associated with speaking in open court may further hinder their ability to communicate effectively in court. Such

85 As above.

86 N Ziv 'Witnesses with mental disabilities: Accommodations and the search for truth' (2007) 27 *Disability Studies Quarterly*.

87 As above.

88 Sec 24 of the High Court Act.

89 L Ellison *The adversarial process and the vulnerable witness* (2001) 11.

90 Ziv (n 86).

witnesses may need to be accommodated by conducting trials *in camera* for example or by allowing the use of an intermediary to facilitate communication between the court and the person with a disability. A strict application of the requirement for *viva voce* testimony in open court may act as a barrier to equal access to justice. Therefore, the court should also employ other forms of communication to accommodate those with hearing impairments.

THE FAILURE TO RECOGNISE THE LEGAL CAPACITY OF PERSONS WITH INTELLECTUAL AND PSYCHOSOCIAL DISABILITIES MAY BE A BARRIER TO EQUAL ACCESS TO JUSTICE

The right to equal recognition before the law is one of the most fundamental human rights. This right is enshrined in the CRPD⁹¹ and in the African Disability Protocol.⁹²

Throughout history, all persons with disabilities have been denied the right to equal recognition before the law.⁹³ Persons with intellectual and psychosocial disabilities in particular are denied the right to legal capacity which is part of the right to equal recognition before the law.⁹⁴ The right to legal capacity includes both the capacity to have rights (identity) and the capacity to act (agency).⁹⁵ The term bears the same meaning in the African Disability Protocol.⁹⁶ The term is defined in the African Disability Protocol as ‘the ability to hold rights and duties and to exercise those rights and duties’.⁹⁷ The capacity to hold rights is not usually challenged. However, the capacity of persons with intellectual and psychosocial disabilities to act in order to exercise their rights has been more problematic. Thus they are prohibited from entering into contracts, buying and selling property, participating in public and political life etc. The situation is the same in Zambia. Though the Persons with Disabilities Act states that a ‘person with disability shall enjoy legal capacity on an equal basis with others in all aspects of life’ the legal capacity of persons with disabilities is not recognised.⁹⁸ Often, persons with disabilities are represented by others in court as a next friend or *guardian ad litem*.⁹⁹ The Legal Aid Act provides

91 Art 12 of the CRPD.

92 Art 7 of the African Disability Protocol.

93 Para 8 of CRPD General Comment 1: Article 12: Equal recognition before the law (2014) UN Doc CRPD/C/CG/1 dated 19 May 2014 https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/1&Lang=en (accessed 10 April 2022).

94 General Comment 1 (n 93) para 9.

95 General Comment 1 (n 93) para 12.

96 See art 1 of the African Disability Protocol.

97 As above.

98 Sec 8(1) of the Persons with Disabilities Act 2012.

99 Sec 15(1) of the Legal Aid (General) Regulations.

that applications for legal aid must be made on behalf of persons with disabilities.¹⁰⁰ Although the Mental Health Act 2019, states that mental patients shall enjoy legal capacity, this is not absolute.¹⁰¹ The Act goes on to qualify this by stating that:

Where the nature of the mental illness, mental disorder or mental disability results in the absence of mental capacity of that mental patient, the mental patient shall not enjoy legal capacity and is legally disqualified from performing a function that requires legal capacity.¹⁰²

The court may therefore appoint a supporter for a mental patient to recognise and give effect his or her right to legal capacity.¹⁰³ The failure to recognise the legal capacity of persons with intellectual and psychosocial disabilities, in particular, may act as a barrier to their accessing justice on an equal basis with others.

100 Sec 23 of the Legal Aid Act Chap 34.

101 Sec 4(1) of the Mental Health Act 2019.

102 Sec 4(2) of the Mental Health Act.

103 Sec 4(3) of the Mental Health Act.



CONCLUSION AND RECOMMENDATIONS

Both the CRPD and the African Disability Protocol create a duty for states to provide accommodations for the purpose of ensuring equal access to justice for all persons with disabilities.¹⁰⁴ The failure to provide accommodations is so grave that it constitutes disability discrimination.¹⁰⁵ This research sought to provide data on the nature of interactions that persons with disabilities have with the criminal justice system and to understand the nature of the barriers they face.

The research study found that persons with different types of disabilities participate in the criminal justice system in Zambia. Although the respondents dealt with cases involving persons with different types of disabilities, certain types of disabilities were more prevalent than others. The highest number of cases involved persons with hearing and speech impairments whilst the lowest number of cases involved persons with visual impairment, psychosocial disabilities and intellectual disabilities. Since persons with different types of disabilities do interact with the criminal justice system, it is important for the Zambian criminal justice system to formulate accommodations that are tailored to meet the needs of persons with different types of disabilities.

The study also found that persons with disabilities interacted with the criminal justice system as accused persons and as complainants. However, most of the cases

104 Art 13(1) of the CRPD and art 13(1) of the African Disability Protocol.

105 Art 2 of the CRPD and art 1 of the African Disability Protocol.

involved persons with disabilities who were accused of a crime. All cases involving accused persons and complainants with disabilities involved serious offences. The study found that most of the accused persons with disabilities were charged with murder. Similarly, the complainants with disabilities reported sexual offences. Therefore, accommodations need to be provided to complainants as well as accused persons with disabilities. The fact that they are usually involved in serious cases heightens the need to provide effective accommodations throughout the criminal justice process. The penalty for murder is imprisonment or the death sentence and this makes it crucial for an accused person with disabilities to be accommodated so that they can properly conduct their defence and have a fair trial.¹⁰⁶ Similarly, sexual offences are serious offences and complainants with disabilities need to be accommodated to enable them to obtain justice.

The respondents reported encountering a number of barriers when dealing with cases involving persons with disabilities. Most of the respondents encountered communication barriers. The communication barriers were encountered in cases involving persons with speech and hearing impairments, persons with intellectual disabilities and persons with psychosocial disabilities. This indicates that in providing accommodations, enabling effective communication should be the priority. For example, sign language interpreters should be provided for persons with hearing and speech impairments and intermediaries should be provided for persons with psychosocial and intellectual disabilities.

The study also found that there were a range of responses to the different challenges/barriers. The responses show how the respondents think about disability. Those who attempted to accommodate, have a social model understanding of disability, whilst those who attempted to bypass the person with disability and those who abandoned the case altogether, adopted a medical model approach that perceives the problem as innate in the individual and therefore concluded that they could do nothing to assist the person. There is therefore, a need to train all criminal justice personnel to understand disability and to understand accommodations. The CRPD and the African Disability Protocol both require states to provide training to all criminal justice personnel.¹⁰⁷

The research study also involved conducting a review of the legislation governing criminal justice in Zambia to determine whether there were any laws that act as barriers to persons with disabilities accessing justice on an equal basis with others. A number of legal barriers were uncovered.

Assessments of testimonial competence constitute a barrier to complainants with disabilities accessing justice on an equal basis with others. There is therefore,

106 Sec 25 of the Penal Code Act Chap 88.

107 Art 13(2) of the CRPD and art 13(3) of the African Disability Protocol.

a need to revise assessments of testimonial competence in accordance with a social model understanding of disability. Instead of asking whether this witness is competent, the question should be 'how can this witness be accommodated to enable them to participate effectively as a witness?'

Similarly, assessments of fitness to plead and detention at the President's Pleasure constitute a barrier to accused persons with disabilities accessing justice on an equal basis with others. These assessments need to be revised through a reformulation of the central inquiry. As with the assessment of testimonial competence, the question should not be whether a particular accused person can properly conduct their defence; it should be 'how can this accused person be accommodated to enable them to properly conduct their defence?'

The study also found that the procedure for issuing summons to secure the attendance of witnesses and accused persons at court is not inclusive in that the summonses are not available in accessible formats. There is therefore, a need to ensure that summonses are made available in accessible formats.

The narrow interpretation of the word 'language' in the law constitutes a barrier for persons with disabilities. This term should be interpreted widely to include sign language and other forms of non-spoken languages in the same way that the CRPD does.

The study also found that the practice of observing and recording demeanour may constitute a barrier for some persons with disabilities. Either this practice should be abolished altogether, or an exception should be made for persons with disabilities.

The requirement to give oral evidence in person and in open court may also be a barrier for some persons with disabilities. It should therefore not be applicable to all witnesses. Those witnesses who cannot give oral evidence and need to testify *in camera* should be permitted to do so and the law should expressly state that this requirement is not absolute.

Finally, the study also found that the failure to recognise the legal capacity of persons with intellectual and psychosocial disabilities may also act as a barrier to equal access to justice. The law in Zambia should recognise that all persons with disabilities have the right to enjoy legal capacity, just as the CRPD does.



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