AN ANALYSIS OF THE LEGAL CHALLENGES EXPERIENCED BY OFFENDERS WITH HEARING AND/OR SPEECH IMPAIRMENT IN THE SOUTH AFRICAN CRIMINAL JUSTICE SYSTEM

by

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A thesis submitted in partial fulfilment of the requirements for the LLM degree in the Faculty of Law, University of the Western Cape

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Declaration

I, Isiphile Petse declare as follows:

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2. This dissertation is my own, original work. Where someone else’s work has been used (whether from a printed source, the internet or any other source) due acknowledgment has been given and reference made according to the requirements of the Faculty of Law.

3. I did not make use of another student’s work and submit it as my own.

4. I did not allow anyone to copy my work with the aim of presenting it as his or her own work.

Signature: _______________________________

Date: September 2019
Acknowledgements

I humble myself and I say thank you to my father, provider and source of my being God almighty in the wonderful name of Jesus. I thank you Lord, for all that you have instilled in me, which has resulted to such good work and great achievement.

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Key Words

Constitution

Convention on the Rights of Persons with Disabilities

Court proceedings

Criminal Justice System

Disability

Equality

Human Rights

Vulnerability

Voluntary statement

Incarceration
Abstract

This study identifies and analyses legal impediments faced by certain offenders who have impaired speech and hearing in the criminal justice system. It focuses on some of the challenges which arise during the pre-trial stage, trial and during incarceration. In particular, the thesis considers the barriers which offenders face in making or seeking to make voluntary statements, challenges due to an inability to understand court proceedings and the plight of such offenders during incarceration.

Some of the major barriers which ought to be addressed in terms of the law are identified and highlighted while endeavouring to make some recommendations which may improve the position of offenders with hearing and/or speech impairment in the South African criminal justice system.
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<td>CEDAW</td>
<td>Convention on the Elimination of All Forms of Discrimination Against Women</td>
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<td>Convention on the Rights of Persons with Disabilities</td>
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<td>ICCPR</td>
<td>International Convention on Civil and Political Rights</td>
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<td>PEPUDA</td>
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CHAPTER ONE
INTRODUCTION AND OVERVIEW

1.1. Definition of terms

The following terms will be used throughout this thesis. For the purpose of clarity these terms will bear the meaning provided here, unless it is indicated otherwise:


‘Disability’ - A person who is unable to use a part of their body because of some permanent injury or illness, such inability is considered a disability. The Convention on the Rights of Persons with Disabilities A/RES/61/106, 2007 recognises disability as an evolving concept. Article 1 provides that ‘persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which may limit their full and effective participation in society on an equal basis with others’.

‘Hearing Aid’ – An electric device which aids in improving a person’s hearing.

‘Interpreter’ - ‘A person who translates what someone is saying into a different language’.

‘Hearing impairment’ – ‘is the condition which results from the impairment of the sense of hearing to an extent that it interferes with communication and affects the social, emotional, educational and vocational aspects of the life of an individual’.

‘Remedy’ - For the purpose of this thesis a remedy is an action or a method (procedure) that enables offenders with SHI to communicate effectively within the criminal justice system.

‘Sign Language’ - Signs made with the hands and fingers used for communication by people who are not able to hear or speak very well.8

1.2. Background to the study

Historically, disability was considered a medical paradigm.9 Much of the literature denotes that persons with disabilities were unable to meet social expectations.10 They were perceived as problematic for society.11 Individuals with severe speech impairments have also suffered as much as persons categorised as disabled.12 Speech and hearing are senses that are crucial for communication of persons.13 ‘Hearing impairment at any stage of life can compromise the communication process and influence an individual’s quality of life’.14 The impairment leads to educational disadvantage, social isolation and ultimately economic disadvantage15 of many persons that have such impairment. Persons who experience all these disadvantages and who come into conflict with the law will therefore inevitably find it challenging to traverse the criminal justice system whether they are guilty or not. It may be contended that such persons may require special accommodations to ensure that they are treated equally before the law and that their rights are not infringed upon.

14 Gondim LMA and Balen SA ‘Study of the prevalence of impaired hearing and its determinants in the city of Itajaí, Santa Catarina State, Brazil’ 2012 Brazilian Journal of Otorhinolaryngology78(2) 33.
15 Ramma and Sebothoma (2016) 1.
In Chapter 2 it will be shown that it was only in recent years that disability appeared on the agenda of the international community. In Africa, the issue of disability generally did not enjoy much legal attention, but the African Charter brought some improvement by giving specific protection to persons with disabilities. This will be further discussed in Chapter 2. As time progresses in South Africa and elsewhere in the world, persons with disabilities continue to constitute one of the most excluded groups in society and face serious barriers to the full enjoyment of their human rights. The key barrier that they face is frequently not the impairment itself, but rather a combination of social, cultural, attitudinal and physical obstacles they encounter in their daily lives. Many policies and the rules in society have failed to focus on discrimination against persons with disability due to the belief that persons with disabilities cannot conform to standards of the mainstream society. This study thus contends that these obstacles are prevalent and exacerbated in the context of the criminal justice system and may violate the rights of persons with speech and or hearing impairment (SHI).

The final Constitution of the Republic of South Africa (the Constitution) mentions disability under its equality clause. The Constitution ‘guarantees the right of persons with disabilities to equality, non-discrimination and human dignity and provides for the recognition of South African Sign Language as a language for Deaf South Africans’. Since 1994, many
principles have been adopted and put in place to promote equal rights around language.\textsuperscript{21} The Constitution has served as a benchmark for persons with disability.\textsuperscript{22}

In 2015 the White Paper on the Rights of Persons with Disability (WPRPD)\textsuperscript{23} was approved by the cabinet.\textsuperscript{24} ‘The Vision of the WPRPD is to promote a free and just society inclusive of all persons with disabilities as equal citizens’.\textsuperscript{25} This directly means that laws in spheres of government have a huge impact on the lives of persons with disabilities.\textsuperscript{26} The purpose of the WPRPD is to deal with the ‘lack of access to justice across the value chain of the justice system, caused by communication barriers between appointed South African Sign Language interpreters and hearing impaired persons’.\textsuperscript{27} These communication barriers are experienced by SHI persons who do not have enough proficiency in South African Sign Language.\textsuperscript{28}

The Criminal Procedure Act 51 of 1977 (CPA) is the main legislation pertaining to the operation of the criminal justice system. The CPA provides that the

expression \textit{‘viva voce’} shall, in the case of a ‘deaf and dumb’ witness, be deemed to include gesture-language and, in the case of a witness under the age of eighteen years, be deemed to include demonstrations, gestures or any other form of non-verbal expression.\textsuperscript{29}

This is the only reference which the CPA makes to persons with SHI. The CPA is silent on how persons with SHI should be dealt with in the criminal justice system.

\textsuperscript{22} Heap and Morgans (2006) 134. See also Haricharan HJ and Heap M et al ‘Can we talk about the right to healthcare without language? A critique of key international human rights law, drawing on the experiences of a Deaf woman in Cape Town, South Africa, Disability & Society’ (2013) 28 \textit{Disability & Society} 1 57.
\textsuperscript{23} WPRPD (2016).
\textsuperscript{24} The Cabinet of South Africa is the most senior level of the executive branch of the Government of South Africa. It is made up of the President, the Deputy President, and the Ministers.
\textsuperscript{25} WPRPD (2016) 42.
\textsuperscript{26} WPRPD (2016) 48.
\textsuperscript{27} WPRPD (2016) 66.
\textsuperscript{28} WPRPD (2016) 66.
\textsuperscript{29} Criminal Procedure Act 51 of 1977, s 161.
The absence of reasonable legislative provisions to address the plight of offenders with SHI persists in the correctional system too. The South African Correctional Services Act 111 of 1998 (CSA) only ‘defines disability as a physical or mental condition which prevents an inmate from operating in an environment developed for persons without such impairment’. This ‘includes deafness, dumbness, non-certifiable mental conditions and blindness or extreme impairment of vision’. Usually it is alleged that the accommodation for inmates with disabilities have to meet similar standards to inmates who do not have disabilities. Inmates with SHI are therefore not only at a disadvantage, but there is a major risk that their rights may be unjustifiably limited.

1.3. Problem statement

Based on the above background, it is evident that more laws should be crafted in a manner that speaks to the actual challenges faced by accused and convicted persons with disabilities in the criminal justice system. In South Africa there are not many South African Sign Language interpreting services available for public areas, such as hospitals, courts and police stations. The lack of these communication services affect offenders with SHI, as communication is important in the criminal justice system. In the Kruse case it was held that the accused must understand the proceedings and it is equally important that the court understands the accused as well. However, understanding is infinitely more difficult for a deaf accused because their only method of communication may be by sign language. ‘Victimisation of people with severe communication disability is compounded by the fact that their victimisation is generally unaddressed and largely invisible’.

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30 Correctional Services Act (CSA) 111 of 2004, s 1.
31 CSA 2004, s 1.
34 Kruse v S (A100/2018) [2018] ZAWCHC 105; 2018 (2) SACR 644 (WCC).
35 Kruse v S, para 4.
Research has shown that during the pre-trial stage, ‘some police officers view people with SHI as unreliable in providing an adequate statement’. Police officers are also not sensitive to the needs of offenders with disabilities because they find it difficult to communicate with them. Offenders may also be unable to make statements themselves or give it to a person that will write the statement on their behalf because of the absence of skilled interpreters. In the past ‘police officers in South Africa have acknowledged that they felt ill-equipped to take statements from those with severe communication disability’. Unsurprisingly it has been claimed that statements did not mirror the facts as understood by the statement-givers. These statements were produced and used before trial and in court.

In addition to the difficulties faced with statement giving during the pre-trial, people with SHI ‘face significant challenges when they need to testify in court’. This includes miscommunication and communication failure between interpreters and these accused. These accused are then unable to understand court proceedings and to follow instructions from court officials. Their right to understand is thus negated. There is also controversy around the legal test for competency to testify, this will be discussed in greater detail in the Kruse case in Chapter 3 of this thesis.

43 Dagut and Morgan (2003) 30. See also Kruse v S, para 19.
46 Dagut and Morgan (2003) 30. See also Kruse v S, para 11.
In many prisons, offenders with SHI are sometimes not offered interpreters or hearing aids due to financial constraints.\textsuperscript{48} The CSA makes no provision for the special treatment of disabled prisoners; therefore all inmates are treated the same despite their disabilities.\textsuperscript{49} It has been said that persons with disabilities in prison are treated like all other prisoners, except they sleep in the hospital.\textsuperscript{50} The question of how may South African law give effect to the constitutional rights of offenders with SHI in the criminal justice system thus looms.

1.4. Research question

How may the legal challenges that offenders with SHI face in the South African criminal justice system be addressed: in respect of voluntary statements, the right to understand or to be ensured effective communication in court proceedings, and during incarceration?

1.5. Significance of study

This study addresses some of the legal challenges faced by persons with SHI who are otherwise marginalised in the criminal justice system. There is limited literature available on the issue of SHI in the South African criminal justice system. There is a need to create awareness of the legal challenges which offenders may face when they have to traverse the criminal justice system. It is opportune that these challenges should be expounded.

1.6. Limitation of study

The study will only focus on speech and hearing impairment as a disability. It will also only focus on arrested persons (excluding minor offenders) who have to give statements during the pre-trial stage, accused who give testimony during trial and/or sentenced persons serving a

\begin{itemize}
\item \textsuperscript{50} News 24 archives 20 February 2013‘No special treatment for disabled inmates’ available at \url{https://www.news24.com/southafrica/news/no-special-treatment-for-disabled-inmates-20130220} (accessed 18 July 2018). By sleeping in hospital, it means that disabled alleged offenders are separated from nondisabled offenders.
\end{itemize}
term of imprisonment. The study will thus focus on challenges that SHI offenders face in the
criminal justice system at the aforementioned stages, which is the inability to give voluntary
statements to police officers, the inability to understand court proceedings and the inability to
communicate when serving a term of imprisonment.

1.7.  Aim and objective

The aim of this research is to identify; discuss and analyse legal challenges faced by offenders
that have impaired hearing and speech in the South African criminal justice system, taking
into consideration some procedures during an arrest, during court proceedings and
incarceration. The objective is to identify existing laws which may be relevant to addressing
such challenges; highlight gaps in the law insofar as these challenges are concerned and make
appropriate recommendations.

1.8.  Methodology

This thesis will be a strictly desktop study. International and regional legal instruments are
considered. Domestic legislation, case law and policies as well as secondary sources such as
law journals, government reports, reports by non-governmental organisations will be analysed
to gauge the current legal position of persons with SHI.

1.9.  Literature review

Dagut and Morgan believe that ‘there are barriers to justice, which the Deaf face in the South
African justice system and each barrier result in an infringement of rights’. They are of the
view that, the first barrier arises during the giving of police statements by Deaf accused or
complainants in the absence of skilled interpreters. It is evident that once an offender with
SHI is not provided a skilled interpreter, police officers are likely to find it difficult to
communicate with such an offender. Sometimes there might also be a miscommunication
between the offender and the police. The literature does, however not propose concrete, long-
term solutions which may be uniformly enforced during contemporary times.

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Bornman correctly contends that persons with disabilities face access barriers, since they lack ‘knowledge about the criminal justice system, as well as financial and/or organisational skills’ needed.\(^{53}\) Bornman is of the view that these skills can assist persons with disabilities ‘to advocate on their own behalf for changes to the criminal justice system’.\(^{54}\) Though there is merit in his contention, it is not a practical solution for persons in South Africa as many persons with SHI are marginalised.

Notwithstanding the challenges mentioned above, Vernon and Miller suggest that because an arrest is the first stage in the criminal justice system, there should be clear communication.\(^{55}\) They assert that if an arrest presents a communication barrier\(^ {56}\), then such arrest can result in a loss of civil rights.\(^ {57}\) In support of Vernon and Miller, Gardner believes that miscommunication happens when police and the criminal courts ignore the basic communication needs of deaf individuals and also when little effort is made to ensure that deaf defendants completely understand all criminal justice proceedings.\(^ {58}\) One may agree with this. Offenders with SHI communicate differently compared to offenders that do not have impaired communication because of this offenders with SHI deserve to be offered basic effective communication.

Dagut and Morgan aver that there are also barriers found in the courtrooms. They contend that there is miscommunication and communication failure between interpreters and the deaf which disadvantage the deaf.\(^ {59}\) Similar to Dagut and Morgan, Pillay also opine that in the ‘South African context, people with severe communication disabilities face significant difficulties when they need to testify in court’.\(^ {60}\) The impact of these challenges may vary on a case-to-case basis.

Vernon and Miller believe that the barriers experienced by deaf persons in court are even greater than at the time of arrest.\(^ {61}\) Individuals in court are unable to participate in their own

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55 Vernon and Miller (2005) 286.  
56 Vernon and Miller (2005) 286.  
57 Vernon and Miller (2005) 286.  
58 Gardner E ‘Deaf Victims and Defendants in the Criminal Justice System’ (1985) 19 Clearinghouse Review 748.  
60 Pillay (2012) 313.  
61 Vernon and Miller (2005) 286.
defence and, in some cases, will not even be able to understand the charges against them.\textsuperscript{62} The Court in \textit{Pachcourie v Additional Magistrate, Ladysmith and another},\textsuperscript{63} held that once the court fails to make provision for an offender to understand, this may constitute a grave violation of the accused’s right to be present at his own trial as ‘presence’ denotes understanding the proceedings as pointed out earlier.\textsuperscript{64}

Furthermore, Miller believes that an examination of a deaf individual’s competence should commence only after professional interpreting services are deemed ineffective.\textsuperscript{65} He is of the view that such action by the court is akin to holding a hearing to determine if someone who speaks Spanish is competent or can understand English well enough to proceed, without ever having provided a Spanish-English interpreter to that individual.\textsuperscript{66} Gardner states that a problem occurs when deaf defendants are found incompetent to stand trial simply because of lack of communication skills.\textsuperscript{67}

Gardner further argues that presiding officers are often not providing deaf persons the assistance they need in order to understand the proceedings and testimony against them.\textsuperscript{68} She is of the view that this situation occurs most frequently when a deaf person does not understand sign language and needs other accommodation to understand the trial.\textsuperscript{69} Dagut states that court officials appear to assume that the mere appointment of any sign language interpreter is enough to overcome barriers.\textsuperscript{70} In the South African context, this appears to have occurred in the trial court in the \textit{Kruse} case (discussed in detail in Chapter 3).

Dagut and Morgan recommend that skilled \textit{r}elay interpreters should be based at all police stations.\textsuperscript{71} They also recommend that an educational programme to educate people with SHI about their rights in court procedures, how to use interpreters and legal terminology.\textsuperscript{72} Bornman recommends that ‘more training, specifically interdisciplinary

\begin{thebibliography}{99}
\bibitem{62}Vernon and Miller (2005) 289.
\bibitem{63}\textit{Pachcourie v Additional Magistrate, Ladysmith and another} [1978] 1 All SA 85 (N).
\bibitem{64}\textit{Pachcourie v Additional Magistrate, Ladysmith and another}, 91.
\bibitem{66}Miller (2001) 329.
\bibitem{67}Dagut and Morgan (2003) 32.
\bibitem{68}Gardner (1985) 750.
\bibitem{69}Gardner (1985) 750.
\bibitem{70}Dagut and Morgan (2003) 32.
\bibitem{71}Dagut and Morgan (2003) 32.
\bibitem{72}Dagut and Morgan (2003) 52.
\end{thebibliography}
training involving all these stakeholders will ensure full access to justice for this vulnerable and neglected group of individuals in our society’.\(^{73}\) Once court officials, police officers or any state official is trained, offenders with SHI will be less vulnerable. Though these are excellent recommendations they may have to be embedded in law in order to ensure compliance. Gardner also supports the education of police, courts, attorneys, and correction officials.\(^{74}\) While the system progresses, existing laws can and should be used to ensure that wrongs against individuals with SHI are corrected.\(^{75}\)

Vernon and Miller states that incarceration is difficult for deaf offenders because prisons are not designed to accommodate hearing loss.\(^{76}\) Officers give their orders through spoken language or by other auditory signals, such as buzzers or the rolling of the doors. They are of the view that when prisoners do not respond quickly to these orders and cues, they are disciplined and punished.\(^{77}\) In this manner inmates with SHI may suffer severe infringements of their rights.

Bruyns recommends that laws should be created in order to instruct the DCS on when to permit adjustments and what these adjustments should be like.\(^{78}\) Her view is that South Africa has manifested its intention to provide for all its citizens through the wording of its Constitution, disabilities acts, and anti-discrimination laws.\(^{79}\) However, because of deficiency, organized corruption and congested prisons, putting these ideas in practice has been found to be complicated.\(^{80}\)

Vernon and Miller are of the view that difficulties associated with providing sign language interpretation to deaf individuals must be recognised and addressed by the legal system.\(^{81}\) This includes more laws which speak to the actual challenges faced by persons with disabilities in the criminal justice system.

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\(^{73}\) Bornman (2016) 14.
\(^{74}\) Gardner E (1985) 751.
\(^{75}\) Gardner E (1985) 751.
\(^{76}\) Vernon and Miller (2005) 289.
\(^{77}\) Vernon and Miller (2005) 289.
\(^{79}\) Bruyns (2017) 482.
\(^{80}\) Bruyns (2017) 482.
\(^{81}\) Vernon and Miller (2005) 290.
1.10. Chapter outline

The first chapter focuses on the background of the study, the problem statement, the significance of the problem and limitations of the study. It further has a research question, a literature review and a research methodology of the study.

Chapter two provides a discussion and analyses of International laws to determine the framework which protects/or fails to protect offenders with SHI.

Chapter three identifies, discusses and analyses South Africa’s national laws and policies which may reasonably and generally protect the rights of persons with disabilities in the criminal justice system.

Chapter four identifies challenges that offenders with SHI face in the South African Criminal Justice system by specifically focusing on the right to make voluntary statements, the right to understand or to be ensured effective communication in court proceedings and in incarceration. It also seeks to determine whether or not the laws are adequate to address the challenges identified.

Chapter five summarises the essential elements of the right to make voluntary statements, the right to be able to understand court proceedings and the rights to effective communication while serving imprisonment. It also makes recommendations to ensure the constitutional rights of offenders with SHI.
CHAPTER TWO
INTERNATIONAL LAW AND REGIONAL LAW RELEVANT TO OFFENDERS WITH SPEECH AND/OR HEARING IMPAIRMENT (SHI)

2.1. Introduction

This chapter identifies international and regional laws to determine whether these legal frameworks are crafted in a manner that adequately protect offenders with SHI in the criminal justice system. This Chapter will also discuss the gaps in International law which may exist in respect of speech and/or hearing impairment in the criminal justice system.

2.2. International legal framework

Below, various instruments are discussed for the purpose of identifying remedies or protections in respect of persons with SHI in the criminal justice system.

2.2.1. Universal Declaration of Human Rights

The Universal Declaration was drafted between 1947 and 1948. After World War two the formulation of the ‘Universal Declaration of Human Rights has made possible the subsequent flourishing of the idea of human rights’.\(^1\) Though human rights abuses did not end, countless people have gained greater freedom.\(^2\) The UDHR focused on all persons in general, but did not mention persons with disabilities or offenders with SHI in the criminal justice system. Despite this omission certain provisions in the UDHR may be interpreted in a manner which could offer protection to offenders with SHI. These articles will be discussed in detail below.

Article 1 provides that ‘all human beings are born free and equal in dignity and rights’. ‘All human beings’ mean every person including offenders with SHI in the criminal justice system. The Article creates or places an obligation on state parties to protect the dignity, freedom and rights of persons including offenders with SHI. Their obligation may thus include providing special assistance to ensure effective communication.

\(^1\) Morsink J _The Universal Declaration of Human Rights_ (1999) 9.

http://etd.uwc.ac.za/
Article 8 of UDHR states that ‘everyone has the right to an effective remedy by competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by law’. Everyone including offenders with SHI deserve or should be granted an effective remedy that will directly focus on dealing with challenges that affect their right to equality and dignity when they are subjects of the criminal justice system.

Furthermore Article 10 provides that ‘everyone is entitled to full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him’. Considering that a fair and public hearing can only occur if the SHI offender is able to understand the case against him, this implies that accommodations must be made for such offenders. The Geneva Convention which supports this will be discussed next.

2.2.2. Geneva Convention

The Rome Statute was not the only international instrument that made provision for the accused, but also the Geneva Convention. The first Geneva Convention marked the first modern International treaty dealing with mitigating the circumstances of war. There are more than two Geneva Conventions but this section will focus on the Geneva Convention Relative to the Protection of Civilian Persons in Time of War. Its sole focus was the protection of civilians in wartime and the Geneva Convention Relative to the Treatment of Prisoners of War, which was formed as a response to the massive numbers of prisoners who were subjected to abuse during the First World War. Both these Conventions came into being in 1929.

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3 Universal Declaration of Human Rights 1948, 217 A (III), article 8.
4 Universal Declaration of Human Rights 1948, 217 A (III), article 10.
7 Taulbee (2017) 68.
8 Taulbee (2017) 72.

http://etd.uwc.ac.za/
2.2.2.1. Geneva Convention Relative to the Protection of Civilian Persons in Time of War—Fourth Geneva Convention (GCIV)

The Convention makes provision for courts, representatives (state authority) and accused persons. Article 72 states that

accused persons shall, unless they freely waive such assistance, be aided by an interpreter, both during preliminary investigation and during the hearing in court.\(^9\) They shall have the right at any time to object to the interpreter and to ask for his replacement.\(^10\)

Though the Convention allows the accused to have an interpreter in and out of court, it does not specify the kind of accused that may have access to an interpreter. It may therefore be arguable that offenders with SHI in the criminal justice system may claim this right. The Article appears quite powerful in that it recognises the importance of having the appropriate interpreter or translator.\(^11\) The accused’s life and liberty was at stake and thus the scope for errors in translation and interpretation should be limited as far as possible. This should also apply to SHI.

The Convention at Article 123 states that

before any disciplinary punishments are imposed, the accused internee shall be given precise information regarding the offences of which he is accused, and given an opportunity of explaining his conduct and of defending himself. He shall be permitted, in particular, to call witnesses and to have recourse, if necessary, to the services of a qualified interpreter.\(^12\)

The Convention also makes provision for representatives or delegates of the protecting powers to ‘have access to all premises occupied by protected persons and shall be able to interview the latter without witnesses, personally or through an interpreter’.\(^13\) The Article makes provision for an interpreter in court, which is of significance for offender with SHI. An interpreter may enable offenders with SHI to communicate effectively in and out of

\(^9\) GCIV 1949, article 72.
\(^10\) GCIV 1949, article 72.
\(^11\) GCIV 1949, article 72.
\(^12\) GCIV 1949, article 123.
\(^13\) GCIV 1949, article 143.
courts. Though the Article does not directly refer to offenders with SHI, the provision can be taken in consideration as international law crafted in a manner that speaks directly to the challenges faced by offenders with SHI in court proceedings.

2.2.2.2. Geneva Convention Relative to the Treatment of Prisoners of War [THIRD GENEVA CONVENTION (GNCIII)]

The Geneva Convention Relative to the Treatment of Prisoners of War states that

a prisoner of war shall be entitled to assistance by one of his prisoner comrades, to defence by a qualified advocate or counsel of his own choice, to the calling of witnesses and, if he deems necessary, to the services of a competent interpreter.\(^{14}\) He shall be advised of these rights by the Detaining Power in due time before the trial.\(^{15}\)

This provision is important as we may borrow from it the principle that offenders (even those with SHI) should be alerted of the right to an interpreter before trial. Debatably the instrument denotes that having a competent interpreter is as important as having a qualified legal representative. An offender with SHI must therefore be given a chance to select an interpreter so that they can communicate effectively with authorities upon arrest, during trial and detention. The right to an interpreter enables an offender with SHI to understand their position during an arrest, court proceeding and detention. In practice thus such offenders are often not alerted to these rights.

2.2.3. International Covenant on Civil and Political Rights

The International Covenant on Civil and Political rights (ICCPR) was adopted unanimously by the United Nations General Assembly in 1966 and it entered into force on 1976.\(^{16}\) ‘South Africa signed the Covenant in 1994 and it came into force in 1999’.\(^{17}\) The Covenant does not mention disability and further the drafters of the Covenant did not have persons with

\(^{14}\) Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) (GNCIII), 12 August 1949, article 105.

\(^{15}\) GNCIII 1949, article 105.

\(^{16}\) Committee on Foreign Relations International Covenant on Civil and Political Rights Report (1992) 1.


http://etd.uwc.ac.za/
disabilities in mind, yet there are articles in the Covenant that could deal directly with challenges faced by offenders with SHI in the criminal justice system.

Article 14(3)(f) states that ‘with respect to criminal proceedings a person must have free assistance of an interpreter if he cannot understand or speak the language used in court.’ The emphasis on understanding is significant. It may be argued that offenders with SHI are therefore also entitled to interpreters to ensure that they understand proceedings in the court.

2.2.3.1. General Comment adopted at the Twenty-first Session of the Human Rights Committee

The Human Rights Committee which is responsible for overseeing implementation of the ICCPR through its consideration of state reports and individual complaints, highlighted in its General Comment No. 13 the importance of communication in criminal proceedings as stated in article 14(3)(f). The General Comment states

that if the accused cannot understand or speak the language used in court, he is entitled to the assistance of an interpreter free of any charge. The Comment further clarifies that ‘this right is independent of the outcome of the proceedings and applies to foreign nationals as well as to nationals.

It is of significance in cases where there is a lack of knowledge with regards to language used in court and obscurity in understanding which may become a major barrier to the right of defence. These obstacles can be similar to the challenges faced by an offender with SHI. They too are entitled to defend their cases without obstacles which impede their communication. This may necessitate the use of an interpreter.

19 ICCPR 1966, article 14(2) (f).
21 CCPR General Comment No. 13: article 14 (Administration of Justice), Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law 1984, para 1
General Comment 35 explains that deprivation ‘must be applied only as a measure of last resort and for the shortest appropriate period of time, and must be accompanied by adequate procedural and substantive safeguards established by laws’. The General Comment seeks to address ‘the deprivation of liberty and security of person that historically have been principal means for impairing the enjoyment of other rights’. This affirms that offenders with disabilities are vulnerable in the criminal justice system, therefore they require explicit protection in the legal system.

The ICCPR does not cater directly for persons with disabilities and specifically for offenders with SHI in the criminal justice system, but there are protective provisions for persons in general, which may be interpreted in a manner that offers protection to offenders with SHI. Despite this, however, the absence of explicit protection denotes a historic neglect of the needs of persons with disabilities.

2.2.4. International Covenant on Economic, Social and Cultural Rights (ICESCR)

The International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted in 1966 and came into force in 1976. South Africa signed the Convention in 1994 and ratified the instrument later on in 2015. Scholars and advocates around the world are increasingly focusing their attention on poverty eradication, sustainable development, dignity realisation, the implementation of the right to housing, education, food, water, health, social security, work and culture.

The central importance of the ICESCR ‘in relation to the human rights of persons with disabilities has frequently been underlined by the international community’. Article 15 states that, state parties to the ICESCR should recognise ‘the right of everyone to take part in cultural life, to enjoy the benefits of scientific progress and its application and to benefit from the protection of the moral and material interests resulting from any scientific, literary or

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23 General comment no. 35, article 9 (Liberty and security of person), 2014, CCPR/C/GC/35, para 19.
24 General comment no. 35, article 9 (Liberty and security of person), 2014, CCPR/C/GC/35, para 1.
artistic production of which he is the author’. On the face of it this Article appears to be irrelevant to offenders in the criminal justice system, but General Comment No. 5 discussed below provides the basis for an argument which supports the plight of offenders with SHI.

2.2.4.1. General Comment Adopted at the Eleventh Session of the Committee on Economic, Social and Cultural Rights

The General Comment No 5 ‘requires that communication barriers should be eliminated to the greatest extent possible’ by state parties. These measures might include ‘the use of talking books, papers written in simple language and with clear format and colours for persons with mental disability, [and] adapted television and theatre for deaf persons’. By like token, such measures may also be taken in respect of offenders with SHI; they will then also fully enjoy their rights in the criminal justice system.

Articles 13 and 14 state ‘that education shall enable all persons to participate effectively in a free society, promote understanding and further the activities of the United Nations for the maintenance of peace and to adopt a detailed plan of action for the progressive implementation of the principle of compulsory education free of charge for all’. In order to implement the Articles 13 and 14 approach, States should ensure that teachers are trained to educate children with disabilities within regular schools and that the necessary equipment and support are available to bring persons with disabilities up to the same level of education as their peers who do not have disabilities.

This principle, though unrelated to offender and the criminal justice system, exemplifies the additional measures a state should take to ensure equality, where persons with disabilities are concerned.

Educating persons with disabilities will also benefit offenders with SHI within the criminal justice system. ‘In the case of deaf children (also adults) for example, sign language should

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29 International Covenant on Economic, Social and Cultural Rights 1966 (ICESC), article 15 (1) (a) – (c).
32 ICESC 1966, article 13.
33 ICESC 1966, article 14.
be recognised as a separate language to which the children and adults should have access and whose importance should be acknowledged in their overall social environment. Education of offenders with SHI will enable them to communicate effectively in the criminal justice system.

2.2.5. The Convention on the Elimination of All forms of Discrimination Against Women

The Convention on the Elimination of All Forms of Discrimination against Women (the CEDAW) was adopted by the General Assembly of the United Nations in 2000. South Africa signed and ratified the CEDAW in 1995. This Convention has been the only document that obligates states ‘to eliminate discrimination against women by granting them legal rights as well as equal opportunities’.

The Convention further states that ‘discrimination against women violates the principles of equality of rights and respect for human dignity and this has become an obstacle to the participation of women on equal terms with men’. The Convention does not mention disability or any form of impairment. The Convention further does not provide protection for woman in court proceedings or in incarceration. The Convention was not crafted in a manner that speaks to the actual challenges faced by women offenders with SHI in the criminal justice system. Women offenders may therefore, remain unprotected in the criminal justice system.

In 2018 the renowned disability rights activist Ana Peláez Narváez was the first woman with a disability to be elected to the CEDAW Committee. She stated that ‘there are 600 million women with disabilities in the world, but very few organisations specifically represent

34 General Comment No. 5: Persons with Disabilities 1994, E/1995/22, para 35.
them’.\textsuperscript{40} It would be valuable that women with disabilities such as SHI who are subjects of the criminal justice system also be included in this perspective.

In \textit{R.P.B. v the Philippines}\textsuperscript{41},

the Committee on the Elimination of Discrimination against Women considered the obligations of states in relation to women and girls with disabilities for the first time.\textsuperscript{42} In the absence of textual recognition of the specific situation of women and girls with disabilities in the CEDAW, the Committee satisfied itself with observing that myths and stereotypes prevent courts from considering the individual circumstances of the victim, which may include disability and age.\textsuperscript{43}

With reference to the General Recommendation No. 18 the Committee decided that women with disabilities face more unfairness when it comes to their living circumstances.\textsuperscript{44} In the above case it is evident that CEDAW does not adequately protect women with disabilities. Therefore the CEDAW committee should address this urgent matter by integrating some of the Convention on the Right of Person with Disabilities provisions in order to reason on future cases involving women with disabilities.\textsuperscript{45} According to Truscan and Martignoni this would perhaps ‘help establish jurisprudence based on the recognition of multiple discrimination, rather than severing and prioritising personal experiences’,\textsuperscript{46} but also taking into account woman offenders with SHI that face challenges in the criminal justice system.

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\textsuperscript{43} Truscan and Martignoni (2016) 118.
\textsuperscript{44} \textit{R.P.B. v the Philippines}, para 8.3.
\textsuperscript{45} Truscan and Martignoni (2016) 120.
\textsuperscript{46} Truscan and Martignoni (2016) 120.
\end{flushleft}
2.2.6. Convention on the Rights of the Child

The Convention on the Rights of Children (CRC) was adopted by the United Nations General Assembly in 1989, which was thirty years after the adoption of the Universal Declaration of the Rights of the Child. The CRC was signed in 1993 by South Africa and it became ratified in 1995. The CRC contains civil and political rights and social, economic and cultural rights. The CRC ‘is the first comprehensive, rights based international treaty specifically constructed to protect and enhance the position of children’.  

Article 3 emphasises that ‘in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration’. According to the General Comment 9:

Article 3 should be the basis on which programmes and policies are set and it should be duly taken into account in every service provided for children with disabilities and any other action affecting them. The Article further addresses legislators who are entrusted with setting the legal framework for protecting the rights of children with disabilities as well as the decision-making processes concerning children with disabilities.

The best interest of minor offenders with SHI in the criminal justice system should be of primary consideration for states to implement measures that directly deal with challenges or obstacles in the criminal justice system. The best interest of the child is of particular ‘relevance in institutions and other facilities that provide services for children with disabilities’.

52 General comment No. 9 (2006), para 29.
53 General comment No. 9 (2006), para 29.
54 General comment No. 9 (2006), para 29.
55 General comment No. 9 (2006), para 29.
Article 19 provides that protective measures should include effective procedures for the establishment of social programmes that will provide necessary support for the child and for those who have the care of the child, as well as for purposes of investigation and for judicial involvement.\textsuperscript{56} These include ‘prompt access to legal and other appropriate assistance,\textsuperscript{57} free assistance of an interpreter if the child cannot understand or speak the language used’.\textsuperscript{58} The CRC, though protective of children with disabilities, does not explicitly envisage the situation of child offenders with SHI.


General Comment 10 on paragraph 23f states that Children's Rights in Juvenile justice should be in line with the spirit of Article 40(2)(vi) and in accordance with the special protection provided to children with disabilities. The Committee ensures that children with speech impairment or other disabilities are provided with adequate and effective assistance by well trained professionals, e.g. in sign language, in case they are subject to the juvenile justice process.\textsuperscript{59}

Though some of the CRC provisions do not mention persons with disabilities, these provisions can be used in a manner that speaks to the actual challenges faced by juvenile offenders with SHI in the criminal justice system.

2.2.7. The Rome Statute of the International Criminal Court

The Rome Statute was signed by South Africa in 1998 ratified in 2000 and came into force in 2002.\textsuperscript{60} The Statute created a permanent international court to enforce the law, which enriched the content of international law.

Article 55 states that ‘in respect of an investigation a person shall, if questioned in a language other than a language he fully understands and speaks’, that person may be assisted by a

\textsuperscript{56} CRC 1989, article 19.
\textsuperscript{57} CRC 1989, article 37 (d).
\textsuperscript{58} CRC 1989, article 40 (2) (b) (vi).
competent interpreter free of charge. Such translations are necessary to meet the requirements of fairness. Article 55 of the Rome statute does not specifically focus on persons or offenders with SHI in the criminal justice system, however the statute makes provision that any persons during an investigation should fully understand. It may therefore be argued that persons with SHI also have a right to understand. Hence Article 55 affords them protection too. The measures to assist them in understanding should consequently also be availed to them.

The Rome Statute provides that ‘the accused shall be entitled to a public hearing, to a fair hearing conducted impartially and to full equality’. 61 This should be done by providing

free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented to the Court are not in a language which the accused fully understands and speaks. 62

This provision speaks to the actual challenges faced by offenders with SHI in the criminal justice system, as it refers to an accused in court, of which can also be an offender with SHI. The provision further implies that any accused that does not fully understand is entitled to a competent interpreter. This also assists offenders with SHI in court but not in incarceration.

International treaties have not dealt with conditions of imprisonment that affect offenders with speech and hearing impairment in prisons. This is a gap in the law which renders offenders more vulnerable compared to other prisoners. Laws should therefore be crafted in a manner that deals with challenges faced by offenders with SHI.


In 2006 the U.N. Ad Hoc Committee concluded its five year long task by reaching an agreement on the substance of the International Convention on the Rights of Persons with Disabilities (CRPD) treaty. 63 In 2007 South Africa signed and ratified the CRPD. 64 The

The purpose of the CRPD is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, this includes promoting respect for inherent dignity. Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various (attitudinal and environmental) barriers may hinder their full and effective participation in society on an equal basis with others.

Article 5 provides that ‘positive action must be taken by state parties to remedy the disadvantage suffered by persons with disabilities in order to achieve substantive equality’. Discrimination also applies when an offender that has SHI is not granted an interpreter upon arrest, but still such offender’s statement is used in court to prove he or she is guilty beyond a reasonable doubt by state.

Article 13 of the CRPD guarantees the right of persons with disabilities to effective access to justice on an equal basis with others. Effective access to justice means access to all phases of the administration of justice; this includes direct and indirect participation, such as being witnesses and receiving procedural and age appropriate accommodations which will help to facilitate such access to justice.

The Article further provides that States are required ‘to provide training to those working in the administration of justice in order to help ensure effective access to justice for persons with disabilities’.

Article 13 is relevant to offenders with SHI in the criminal justice system, mainly because it focuses on addressing pre-trial challenges, trial challenges and provision for accommodation. However, as any other international treaty, Article 13 does not directly focus on offenders with SHI even though it encourages positive action from state parties as also provided for in

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66 CRPD 2006, preamble (e).
67 CRPD 2006, article 5 (4).
68 CRPD 2006, article 13 (1).
69 CRPD 2006, article 13 (2).
Article 5. The Article can be referred to, to amplify measures to be applied by state parties to address challenges faced by offenders with SHI.

The principle of reasonable accommodation is mentioned under Article 13 and Article 2.

In Article 2 ‘reasonable accommodation’ means necessary and appropriate modification and adjustments that ensure that a person with a disability can enjoy or exercise her or his rights, not imposing a disproportionate or undue burden where needed in a particular case.

The accommodation is to ensure that persons with disabilities are able to exercise all human rights and freedoms as others who do not have any form of disability. Cina and Fera are of the view that standard practices and procedures ought to be adjusted to eliminate disadvantages which may inhibit persons with disabilities in their quest at accessing justice.

In support of Cina and Fera, Lord and Guernsey opines that as part of reasonable accommodation, persons with disabilities must be accommodated ‘in court and other legal proceedings, such as administrative hearings, as this relates to the fundamental right to be heard’. All of these include stages of a judicial process of access to reasonable accommodation which must be provided to all participants, in or out of court.

Accessibility just like equality, dignity and reasonable accommodation form part of the CRPD and ‘it means that persons with disabilities have access on an equal basis with others to the physical environment’. The rationale is to remove hurdles that may hinder the full enjoyment of human rights by persons with disabilities. This includes providing or enabling training for those working in the justice system, so that they can assist persons with

70 Human Rights Committee on Persons with Disabilities General Comment on Equality and non-discrimination CRPD/C/19/R.3 (2018) v (c) (c) or see 5.
71 CRPD 2006, article 2.
72 CRPD 2006, article 2.
75 Lord and Guernsey (2012) 3.
76 CRPD 2006, article 9.
disabilities with access to justice. It is evident that accessibility places a positive duty upon state parties to make provisions for persons with disabilities but it was ‘found that there is no uniform approach across the world to training or certifying legal sign language interpreters or making such people available for deaf people in the justice system’.

In summation, the CRPD does not directly focus on challenges experienced by offenders with SHI in the criminal justice system. The Convention provides for access to interpreters however, this is not broadly applicable for purposes of investigation, in court and in incarceration.

2.3. Regional legal framework

Regions have also ‘applied their regional human rights instruments and treaties to the rights of persons with disabilities’. Despite these worldwide initiatives many people with disabilities throughout the world have been denied basic civil and human rights. This includes the right to fair trial and the right to an interpreter for those who have speech and hearing impairment (SHI).

2.3.1. European Convention on Human Rights

The European Convention on Human Rights was adopted in 1950 and it ‘was the first comprehensive treaty for the protection of human rights to emerge from the post second world war’. The Convention was formed by the Council of Europe in the course of the first post war attempt to unify Europe. The European Convention should ‘be viewed in the context of a much longer struggle to secure respect for personal autonomy, the inherent dignity of persons and the equality of all men and women’.

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78 Convention on the Rights of Persons with Disabilities 2006, article 13 (2).
The Convention provides for the right to security and liberty under Article 5(2)(e), which states that

everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.\textsuperscript{84}

This includes providing free assistance of an interpreter upon the person’s arrest if he or she cannot understand or speak the language used in court.\textsuperscript{85}

The above provision does not specifically refer to persons with disability, but may be applied to arrested person with SHI. Article 14 may therefore afford protection to arrestees with SHI.\textsuperscript{86} Article 14 states that ‘the enjoyment of the rights and freedoms set in the Convention shall be secured without discrimination on any ground such as birth or other status’.\textsuperscript{87} The European Court of Human Rights held that Article 14 covers disabilities and various health conditions, within the words ‘or other status’.\textsuperscript{88} This should therefore include offenders with SHI in the criminal justice system.

\textit{Glor v Switzerland}\textsuperscript{89} was the first ruling by the European Court of Human Rights in which it has found to be a breach of Article 14 on the grounds of disability. The applicant was turned down for military service due to disability, despite that the applicant was nevertheless taxed for not performing military service. The Court held that there had been discrimination contravening the European Convention on Human Rights and a breach of Article 14 (the anti-discrimination provision). The \textit{ratio} of the Court was that Article 14 is not limited to the sex, race, colour etc. as listed, but it also includes ‘or other status’.\textsuperscript{90} Therefore the court concluded that there is no doubt that Article 14 includes a prohibition of discrimination based on disability.\textsuperscript{91}

\textsuperscript{84} Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, article 5 (2) (e).

\textsuperscript{85} European Convention for the Protection of Human Rights and Fundamental Freedoms, article 5 (2) (e).

\textsuperscript{86} Kiyutin v. Russia, Application no. 2700/10. See also Council of Europe: European Court of Human Rights, 2011 – HIV positive status was held to fall within article 14.

\textsuperscript{87} European Convention for the Protection of Human Rights and Fundamental Freedoms, article 14.


\textsuperscript{89} Glor v Switzerland, Application no. 13444/04, Judgment of 30 April 2009.

\textsuperscript{90} Glor v Switzerland, para 44.

\textsuperscript{91} Glor v Switzerland, para 44.
The Council of Europe has also provided protection for the rights of persons with disabilities through both the European Social Charter and the European Convention on Human Rights.\textsuperscript{92} In 2006, the Council of Europe Disability Action Plan 2006–2015 was adopted.\textsuperscript{93} The Plan provided a flexible framework that aimed to enforce anti-discriminatory and human rights measures to enhance equal opportunities and independence of people with disabilities.\textsuperscript{94} The objective of the plan is to guarantee efficient admission for persons with disabilities on an equal basis with others.\textsuperscript{95}

The Council of Europe Action Plan deals with legal protection. It states that persons ‘with disabilities should have access to the legal system on the same basis as other citizens, by taking appropriate measures to eliminate discrimination against people with disabilities’.\textsuperscript{96} Even though the action plan encourages access to a legal system it does not directly focus on access to courts or access to resources (like qualified interpreter) that will enable offenders with SHI to communicate effectively in the criminal justice system.

The Plan also states that specific action by member states should be taken to provide protection against discrimination through the setting up of specific legislative measures bodies, reporting procedures and address mechanisms.\textsuperscript{97} To ensure that people that people with disabilities have equal access to the justice system by securing their right to information and communication that are accessible to them.\textsuperscript{98}

In this regard the plan addresses the significance of securing the right to communication. This means that the plan works towards implementing or granting offenders with SHI a right to effective communication with parties or state authorities within the criminal justice system. The plan also encourages states to set up specific legislative measures or bodies.

\begin{itemize}
\item \textsuperscript{93} Favalli (2018) 519.
\item \textsuperscript{94} Favalli (2018) 519.
\item \textsuperscript{95} Recommendation Rec (2006)5 of the Committee of Ministers to Member States on the Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006, para 3.12.2
\item \textsuperscript{96} Recommendation Rec (2006), para 1.3.
\item \textsuperscript{97} Recommendation Rec (2006), para 3.12.3 (i).
\item \textsuperscript{98} Recommendation Rec (2006), para 3.12.3 (v).
\end{itemize}
2.3.2. African Charter on Human and Peoples Rights

The African Charter on Human and Peoples Rights (African Charter) came into force in 1986 and was developed under the auspices of the Organization of African Unity which was transferred to African Union in 2002. The struggle for human rights on the African continent has always been far from over because of the constant violations of human rights. Therefore the African Charter became a legal foundation that could potentially play the same role with other regional human rights systems in Europe and in America. Despite the African Charter, offenders with SHI still face challenges in the criminal justice system.

Article 18(4) states that ‘old aged and disabled persons shall have the right to special measures of protection in keeping with their physical or moral needs’. However this article has been subjected to some criticism because persons with disabilities receive social welfare benefits based on only their design and rationale. As a consequence of this, education mainstreaming and integration also included disability rights.

2.3.3. Protocol to the African Charter on Human and People’s Rights on the Rights of persons with disabilities in Africa

Disability rights slowly made their way into the draft Protocol on the Rights of Persons with Disabilities which was recently finished and approved by Heads of State on the 31st of January 2018. ‘The Disability Rights Protocol complements the United Nations Convention on the Rights of Persons with Disabilities (CRPD)’

References:
102 African Charter on Human and Peoples’ Rights (”Banjul Charter”) 1981, article 18 (4)
103 Combrinck and Hute (2014) 139.
104 Combrinck and Hute (2014) 310.
105 Combrinck and Hute (2014) 310.
The purpose of the Disability Protocol is to ‘establish a firm legal continental framework as a basis for policies, laws, administrative actions and resources to ensure the rights of persons with disabilities’.\textsuperscript{108} The protocol wants to promote, protect and ensure these rights in order to enable persons with disabilities to enjoy fully and equally all their human rights and fundamental freedoms.\textsuperscript{109} The only way that a person with disability including offenders with SHI could fully enjoy their human rights and fundamental freedoms are through measures created by state parties to improve the criminal justice system’s response to their needs.

Article 3 of the draft protocol states that States ‘Parties shall take steps to ensure that specific measures, as appropriate, are provided to persons with disabilities in order to promote equality and eliminate discrimination’.\textsuperscript{110} The protocol also states that ‘State Parties should recognise that persons with disabilities are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law’.\textsuperscript{111} To promote equality and eliminate any form of discrimination, state parties should craft laws that deal with challenges faced by offenders with SHI in the criminal justice system.

Article 9 of the Disability protocol states that

\begin{quote}
States Parties shall take all appropriate and effective measures to ensure that persons with disabilities have access to justice on an equal basis with others, by providing procedural, age and gender appropriate accommodations.\textsuperscript{112} This should be done in order to facilitate their effective roles as participants in all legal proceedings.\textsuperscript{113}
\end{quote}

Article 9(3) states that ‘[a]ll law enforcement and justice personnel shall be trained at all levels to effectively engage with and ensure the rights of persons with disabilities are recognised and implemented without discrimination’.\textsuperscript{114}

\begin{flushleft}
\textsuperscript{109} Protocol to the African Charter 2018, preamble.
\textsuperscript{110} Protocol to the African Charter 2018, article 3 (4).
\textsuperscript{111} Protocol to the African Charter 2018, article 8.
\textsuperscript{112} Protocol to the African Charter 2018, article 9 (1).
\textsuperscript{113} Protocol to the African Charter 2018, article 9 (1).
\textsuperscript{114} Protocol to the African Charter 2018, article 9 (3).
\end{flushleft}
Article 16 provides that States Parties shall take appropriate and effective measures to facilitate full enjoyment by persons with disabilities, on basis of equality including; facilitating provision of assisters, including interpreters, guides, auxiliary and augmentative supporters and caregivers, while respecting the rights, will and preferences of persons with disabilities. Persons with disabilities are protected by the law once they are offered support systems that will minimise challenges. In this instance article 16 can be of assistance to encourage support systems such as interpreters that will enable offender with SHI to communicate effectively in the criminal justice.

2.4. Conclusion

International and Regional instruments do not deal directly with the plight of offenders with SHI. However, the GCIV\textsuperscript{116}, GNCIII\textsuperscript{117}, ICCPR\textsuperscript{118} and the Rome Statute\textsuperscript{119} can be reasonably applied, as these Conventions can be interpreted in a manner that applies positively to the plight of offenders with SHI. Though none of these instruments expressly address the barriers in the criminal justice system, they allude to the need for equality.

\textsuperscript{115} Protocol to the African Charter 2018, article 16 (2) (d).
\textsuperscript{116} Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (GCIV).
\textsuperscript{117} Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949 (GCIII).
\textsuperscript{118} International Covenant on Civil and Political Rights, 1966.
CHAPTER THREE
SOUTH AFRICAN DOMESTIC LAW RELEVANT TO OFFENDERS WITH SPEECH AND/OR HEARING IMPAIRMENT

3.1. Introduction

Chapter three identifies, discusses and analyses South African domestic law to determine whether or not these (domestic) laws are crafted in a manner that may support the rights of offenders with SHI in the South African criminal justice system. The Constitution, legislation, case law and policies will be discussed in this regard to ascertain whether or not protection may be found in existing laws.

3.2. The Constitution of the Republic of South Africa

The South African Constitution does mention disability under its equality clause.\(^1\) The drafters of the Constitution therefore anticipated the need for specific protection of persons with disabilities. The inclusion of disability as a ground for which specific protection is guaranteed in the equality clause will be discussed next.

3.2.1. Equality Clause and disability

The equality clause states that everyone is equal before the law and has the right to equal protection and benefit of the law.\(^2\) Section 9(2) furthermore provides that ‘the state should promote the achievement of equality through legislative and other measures designed to protect and or advance persons, or categories of persons’.\(^3\)

This entails that any legislation that is drafted should be crafted in a manner that advances and protects persons equally. This means that the state should draft laws that protect persons with disabilities (including offenders with SHI) from experiencing discriminative challenges and or barriers within the criminal justice system. The equality clause does ‘not only affirm existing rights, but requires that positive steps be taken to promote and realise the right to

\(^1\) Constitution of South Africa 1996, s 9.
\(^2\) Constitution of South Africa 1996, s 9 (1).
\(^3\) Constitution of South Africa 1996, s 9 (2).
equality of all. This provision therefore has been described as requiring ‘restitutionary equality’.

‘Restitutionary equality builds on the concept of substantive equality and further requires the remedying of lingering consequences of past discrimination through active and positive measures’. These measures should be implemented without unfairly discriminating directly or indirectly against any person on a ground of disability. Section 9(3) of the Constitution is not a closed list. The equality clause states that ‘discrimination on (one or more of the grounds listed in subsection (3)) is unfair unless it is established that the discrimination is fair’. Since disability is a listed ground, discrimination against persons with SHI is unfair unless that can be proven to be fair.

The last provision of section 9 makes provision for the limitation of the right to equality, this means that rights in the Bill of rights are not absolute, but subject to limitation upon determination of a specific criteria. However, such limitation may be applicable only on the basis that the limitation or discrimination is fair, reasonable and justifiable.

In terms of section 36 of the Constitution, ‘rights may be limited in certain circumstances’. This means that the state may only limit a right when it is reasonable and justifiable to do so. ‘These criteria are that the limitation must be found in a law of general application (that is, national legislation, common law or customary law)’. In other words the rights in the Bill of Rights connected to a valid rationale/purpose may be limited.

The limitation of the rights of offenders with SHI in the criminal justice system cannot easily be said to be connected to a legitimate government purpose.

The Department of Women, Children and People with Disabilities has noted that what the Constitution of South Africa seeks to ensure is an environment that is ‘conducive to the full

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4 National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC), para 60.
5 South African Police Service v Solidarity obo Barnard 2014 (10) BCLR 1195 (CC) para 32; National Coalition for Gay and Lesbian Equality v Minister of Justice, para 60.
6 Constitution of South Africa 1996, s 9 (3).
7 Constitution of South Africa 1996, s 9 (4).
8 Constitution of South Africa 1996, s 36 (1).
9 Constitution of South Africa 1996, s 36 (1).
10 Du Plessis v De Klerk 1996 (3) SA 850 (CC), para 44 and 136.
and equal participation of men, woman and children with disabilities in society, including equal access to opportunities, accessibility and the protection of the inherent dignity of the person.\(^\text{12}\) These legal principles must be upheld in the criminal justice system with regards to all offenders with disabilities.

3.2.2. Dignity

Section 10 of the Constitution, states that ‘everyone has inherent dignity and the right to have their dignity respected and protected’.\(^\text{13}\) The principle of dignity goes hand in hand with non-discrimination, equality between men and women, equality of opportunities, accessibility, respect for diversity and full inclusion in society.\(^\text{14}\)

‘The right to dignity has historically been linked to other rights in the Bill of Rights, in the sense that a life lived in dignity is a life that includes rights and freedoms that have been incorporated into the Constitution’.\(^\text{15}\) One of the ‘foundational values’ of our Constitution has been portrayed as the right to dignity.\(^\text{16}\)

This should be applied in the criminal justice system too to all offenders including those with SHI. A failure to make accommodations for those with communicative difficulties such as SHI, may be a serious limitation of their right to dignity.

3.2.3. Arrested, detained and accused persons

Section 35(1) of the Constitution states that ‘everyone who is arrested for allegedly committing an offence has the right to remain silent, to be informed promptly of the right to remain silent and of the consequences of not remaining silent’.\(^\text{17}\) If a person is taken into custody and he or she waives his or her right to remain silent by volunteering a statement, he


\(^{13}\) Constitution of South Africa 1996, s 10.

\(^{14}\) Constitution of South Africa 1996, s 9(3).

\(^{15}\) Constitution of South Africa 1996, s 9 (1) and (2).

\(^{16}\) Constitution of South Africa 1996, s 9 (1), (2), (3), (4), (5).

\(^{17}\) S v Makwanyane1995 (6) BCLR 665 (CC), para 144. See also Chaskalson A ‘Human Dignity as a Foundational Value of our Constitutional Order’ (2000) 16 SAJHR 204.

\(^{18}\) Chaskalson A (2000) 196.

\(^{19}\) Constitution of South Africa 1996, s 35 (1) (a) – (b) (i-ii).
or she should be allowed to make such a statement but should first be cautioned.\textsuperscript{20} The failure to caution an arrested person in this regard may result in the subsequent statement being inadmissible in court.\textsuperscript{21} Offenders with SHI usually cannot understand when being cautioned due to hearing limitations. It is thus possible that they may feel compelled to make a statement in writing or through other means. Thus while the right extends to all offenders, offenders may need extra measures to uphold their rights.

Section 35(2) states ‘that everyone who is detained, including every sentenced prisoner, has the right to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation which refers to physical environment, nutrition, reading material and medical treatment’.\textsuperscript{22} This thus includes everyone including offenders with disabilities and those with SHI in incarceration or detention. The guarantee of ‘dignity’ and adequate accommodation are arguably indicative of an environment in which offenders with SHI can better understand and be understood.

Offenders with SHI in court or during court proceedings can be protected under section 35(3), which states that ‘every accused person has a right to a fair trial, including the right not to be compelled to give self-incriminating evidence’.\textsuperscript{23} In respect of offenders with SHI, section 35(3) may mean that precautions ought to be taken to avoid breach of this right.

Section 35(3) further states that the ‘accused has the right to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language’.\textsuperscript{24} In the case of an accused with SHI, a court must be alive to the fact that special measures may be necessary to comply with subsection 35(3).\textsuperscript{25} Many of the rights guaranteed in s 35(3) depend on effective communication by and with the accused.\textsuperscript{26} The Court in \textit{Kruse v S}, further makes an example, that the ‘right to be present when being tried implies an ability to hear and understand the import of the evidence and the nature of the proceedings’.\textsuperscript{27}

\begin{itemize}
\item \textsuperscript{20} Joubert C \textit{Applied Law for Police Officials 3 ed} (2010) 230.
\item \textsuperscript{21} Joubert (2010) 230.
\item \textsuperscript{22} Constitution of South Africa 1996, s 35 (2) (e).
\item \textsuperscript{23} Constitution of South Africa 1996, s 35 (3) (j).
\item \textsuperscript{24} Constitution of South Africa 1996, s 35 (3) (k).
\item \textsuperscript{25} \textit{Kruse v S} (A100/2018) [2018] ZAWCHC 105; 2018 (2) SACR 644 (WCC), para 23.
\item \textsuperscript{26} \textit{Kruse v S}, para 4.
\item \textsuperscript{27} \textit{Pachcourie v Additional Magistrate, Ladysmith and Another}, at 991 B – H.
\end{itemize}
Lord Reading CJ explained that

The reason why the accused should be present at the trial is that he may hear the case being made against him and have the opportunity, having heard it, of answering it. The presence of the accused means not merely that he must be physically in attendance, but also that he must be capable of understanding the nature of the proceedings.\(^\text{28}\)

Based on the discussion above it may be contended that interpretation is very important for offenders with SHI as they need to understand court proceedings. A failure to assist them in this regard may violate section 35(3)(k). The right to adduce and challenge evidence depends on the accused’s ability to hear and understand the testimony of witnesses and to make him or herself properly understood when instructing counsel and giving evidence.\(^\text{29}\)

In addition to section 35(3)(k), ‘section 35(4) states that whenever information is to be given to a person, that information must be given in a language that the person understands’.\(^\text{30}\) Once information is not given to an offender with SHI in a language in which he understands then there will be encroachment on the rights of an offender. For example in *Kruse* the Court discovered that not every offender with SHI is able to communicate through sign language interpreter. The Court held that in appropriate cases family members should be allowed to assist such an offender to understand and be able to communicate effectively.\(^\text{31}\)

Constitutional entitlements are founded on the recognition that effective communication is imperative for a fair trial.\(^\text{32}\) ‘Evidence obtained in a manner that violates any right (including the above rights) in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice’.\(^\text{33}\)

\(^{28}\) *R v Lee Kun* (1916) 1 KB 337 para 341, quoted in *Pachcourie v Additional Magistrate*, at 991 C – F and in *Mackessack and Others v Assistant Magistrate, Empangeni and Others* 1963(1) 892 (N), para 895 G – H.

\(^{29}\) *Kruse v S*, para 4.1.

\(^{30}\) Constitution of South Africa 1996, s 35 (4).

\(^{31}\) *Kruse v S*, para 18.

\(^{32}\) *Kruse v S*, para 4.

\(^{33}\) Constitution of South Africa 1996, s 35 (5).
3.3. Legislation which may be relevant to offenders with SHI

3.3.1. Promotion of Equality and Prevention of Unfair Discrimination Act

The Promotion of Equality and Prevention of Unfair Discrimination Act gives effect to section 9 of the Constitution so as to prevent and prohibit unfair discrimination and harassment. The Act further promotes equality and eliminates unfair discrimination in order to prevent and prohibit hate speech and to provide for matters connected therewith.

Unlike other legislation, the Act makes provision for persons with disabilities. The Act provides for the prohibition of unfair discrimination on the ground of disability and also provides special measures that facilitate the eradication of unfair discrimination in order to promote equality with regard to race, gender and disability. Even though the Act mentions nothing with regards to offenders it bears relevance in the criminal justice system. Section 6 of the Act provides ‘that neither the State nor any person may unfairly discriminate against any person’. Section 9 makes it explicit ‘that subject to section 6, no person may unfairly discriminate against any person on the ground of disability’. Section 6 includes persons with disabilities e.g. offenders with SHI as they are also persons with disabilities.

Section 9 further provides that ‘unfair discrimination includes denying or removing from any person who has a disability, any supporting or enabling facility necessary for their functioning in society’. This means that denying any form of support to ensure effective communication to offenders with SHI during an arrest, court proceeding or incarceration results in unfair discrimination because effective communication is necessary for such offender to function in the criminal justice system. Confiscating or depriving them of devices or services to facilitate effective communication may constitute unfair discrimination.

The section also extends to failures ‘to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to

35 PEPUDA 2000, long title.
36 PEPUDA 2000, s 9.
37 PEPUDA 2000, s 28.
38 PEPUDA 2000, s 6.
39 PEPUDA 2000, s 6.
40 PEPUDA 2000, s 9 (a).
reasonably accommodate their needs'. There are no laws crafted in a manner that speaks to challenges faced by these offenders in the criminal justice system. Obstacles remain therefore. This constitutes discrimination towards these persons and this is prohibited by the provision. The Act does not only highlight what constitutes unfair discrimination on a ground of disability, but it also refers to measures to be implemented in order to promote equality. Even though these measures do not directly deal with challenges experienced by offender with SHI, these measures may be of relevance or assistance when drafting laws that directly deal with unfair discrimination faced by offenders with SHI in the criminal justice system.

3.3.2. The Criminal Procedure Act 51 of 1977

As mentioned in Chapter 1, the Criminal Procedure Act provides that the expression ‘viva voce’ shall, in the case of a deaf and dumb witness, be deemed to include gesture-language and, in the case of a witness under the age of eighteen years, be deemed to include demonstrations, gestures or any other form of non-verbal expression.

The Act does not specifically make any further provision for accused persons with SHI.

3.3.3. Magistrates’ Courts Act and Uniform Rules of Court

The Magistrates’ Courts Act and Uniforms Rules of Court do not mention persons with disabilities. The Magistrates Court Act (MCA), confers ‘a duty on the court in criminal cases to request an interpreter at state expense if it appears that an accused does not understand the court language’. The Uniform Rules of Court provides that

where evidence in any proceedings is given in any language with which the court or a party or his representative is not sufficiently conversant, such


41 PEPUDA 2000, s 9 (b).
43 CPA 1977, s 161.
44 The Magistrates’ Courts Act (MCA) 32 of 1944.
46 MCA 1944, s 6(2).
evidence shall be interpreted by a competent interpreter, sworn to interpret faithfully and to the best of his ability in the language concerned.\textsuperscript{47}

Though the emphasis on understanding and the role that language plays was considered by the legislator and this principle may be applied to offenders with SHI, it seems that their plight was not specifically considered. The oversight by the legislator speaks volumes to the position of such offender in the criminal justice system.

3.3.4. South African Correctional Services Act\textsuperscript{48}

The Correctional Services Act defines

disability as a physical or mental condition which prevents a prisoner from operating in an environment developed for persons without such impairment and includes deafness; dumbness; paraplegia; quadriplegia; non-certifiable mental conditions; and blindness or extreme impairment of vision.\textsuperscript{49}

In this definition offenders with SHI are expressly included.

Despite the profound discrimination towards people with disability in prisons, the Act does not provide for persons with disabilities despite its definition clause. The Correctional Services Act should be the core legislation that protects offenders with SHI in correctional centres, however, it is evident from the Act that it does not make provision for inmates with disability, specifically offender with SHI, therefore a provision that will speak to the challenges of offenders with SHI in prison should be crafted.

3.3.5. The Child Justice Act\textsuperscript{50}

Though this thesis does not deal with offenders who are minors it is worth considering the above Act for the purpose of comprehensive discussion. The Child Justice Act脂uses a right-based approach in creating a procedural framework dealing with children in conflict with the

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\textsuperscript{47} Uniform Rules 2009, rule 61(1).
\textsuperscript{48} Correctional Services Act (CSA) 111 of 2004.
\textsuperscript{49} CSA 2004, s 1.
\textsuperscript{50} Child Justice Act (CJA) 75 of 2008.
law, whilst recognising their accountability’. A comprehensive system dealing with children in conflict with the law was introduced by the Act, which represents a crucial break with the traditional criminal justice system. Despite this it makes no provision for child offenders with disabilities (including child offender with SHI).

Furthermore, the Child Justice Act makes no provision for child offenders to have access to an interpreter during court proceedings. However when courts are called upon to address issues of child offenders, ‘courts have often acknowledged that young offenders should be afforded special treatment’. Such treatment may arguably include access to measures which would enhance a child’s understanding of proceedings.

3.4. White Papers

The 2005 and 2015 White Papers on the Rights of Persons with Disabilities are two White papers that will be discussed in detail. The 2015 White Paper on the Rights of Persons with Disabilities was approved by the Cabinet for public information. The White Paper is in line with the Constitution and a number of international instruments. It provides which source should be consulted should an offender with disabilities be affected. Sources include the ‘Convention on the Rights of Persons with Disabilities and its Optional Protocol, Vienna Declaration and Programme of Action, the Copenhagen Declaration and Programme of Action and the recently adopted Sustainable Development Goals which reaffirm the human rights of persons with disabilities’.

‘The 2015 White Paper was created to be a call of action for government, civil society and the private sector and also to ensure the socio-economic inclusion of persons with

52 S v CKM & Others 2013 (2) SACR 303 (GNP), para 7.
54 S v Adams 1971 4 SA 125 (C) para 126; S v Lehnberg 1975 4 SA para 553 (A) 561 see also Terblanche SS ‘The Child Justice Act: A detailed consideration of section 68 as a point of departure with respect to the sentencing of young offenders’ (2012) 15 PERJ 5 436.
57 WRPD (2016) 7.
disabilities’. The White Paper focuses more on accelerating change and restoring with a full inclusion, incorporation and equality for persons with disabilities in South Africa. Regarding liberty and security, the 2015 White Paper makes reference to the 2005 White Paper on Corrections in South Africa as a source to be consulted when dealing with offenders with disabilities. The aforementioned White Paper will be discussed next.

The 2005 White Paper on Corrections was not intended to be the ultimate solution for all challenges that confronted the South African correctional system, but it does reflect a dynamic approach to align correction with the transformation objectives of the country. The White Paper recognises offenders with disabilities, and it makes provision for such offenders based only on liberty and security.

The 2005 White Paper states that ‘correctional institutions should be designed to cater for the needs of offenders with disabilities and should be consistent with the national policy framework on persons with disabilities’. The White Paper also states that the policy (White Paper on Corrections) reflects both the equality of rights of disabled offenders and the particular needs that offenders with disabilities have.

The White Paper further encourages ‘provisions of appropriate facilities which must not be limited to physical accommodation needs, but must include the provision of appropriate facilities for the enhancement of rehabilitation amongst these offenders’. It may be argued that this includes giving offenders with SHI access to hearing aids or interpreters so that they can have effective communication that enhances their rehabilitation.

With regards to courts and court proceeding, the 2015 White Paper suggests that there should be a need for courts ‘to make a greater commitment to consider the individual circumstances of each offender, which in this instance the courts, should consider imposing non-custodial
sentences for offenders with disabilities’. This implies that it is accepted that some prisons cannot accommodate persons with disabilities. This is a short-coming that also affects offenders with SHI in incarceration.

3.5. Case law

There are few reported cases that dealt with offenders with SHI in the criminal justice system. One case was decided pre – 1994 and a recent case that was decided in 2018. These cases emphasised the significant challenges of an accused with SHI being able to understanding and to communicate.

3.5.1. *Pachcourie v Additional Magistrate, Ladysmith and another*\(^{67}\)

The Court dealt with a witness that could not speak nor hear, but testified using gestures with the help of an interpreter who knew him well. The Court on review was satisfied that the interpreter may interpret only if he (the interpreter) is properly qualified and competent’.\(^{69}\) The Court held that the presence of the deaf mute accused in terms of section 156(1) of Act 56 of 1955, means more than physical presence: the accused had to be present both in mind and body’.\(^{70}\) It is of importance that the accused person hears and understands the significance of evidence that was led during his trial.\(^{71}\) Due to improper interpretation to the accused, the court found that the trial was not properly held.\(^{72}\) The accused was unable to appreciate or understand the significance of the trial.\(^{73}\)

The *Pachcourie* case introduced a prerequisite that should be considered by the courts to identify whether an offender with SHI is able to stand trial; witnesses are required to give their evidence in the presence of the accused.\(^{74}\) This requirement grants an accused with SHI an opportunity of getting information in a language that he or she understands.\(^{75}\) However,

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66 WRPD (2016) 158.
67 *Pachcourie v Additional Magistrate, Ladysmith* 1978 (3) SA para 986.
69 *Pachcourie v Additional Magistrate, Ladysmith*, 88.
70 *Pachcourie v Additional Magistrate, Ladysmith*, 89.
71 *Pachcourie v Additional Magistrate, Ladysmith*, 90.
72 *Pachcourie v Additional Magistrate, Ladysmith*, 89 para (c).
73 *Pachcourie v Additional Magistrate, Ladysmith*, para 987.
74 *Pachcourie v Additional Magistrate, Ladysmith*, 89.
75 Constitution of South Africa 1996, s 35 (4).
courts should use other options to enable offenders with SHI to understand court proceedings. This should also include assistance of family members as reiterated in the *Kruse case*.

3.5.2. *Kruse v S*\(^{76}\)

The *Kruse* case dealt with an accused with SHI who was charged with murder. When the accused first appeared at court, the magistrate was informed that he was deaf and would require assistance from a sign language interpreter (“SLI”).

During the trial the Magistrate was convinced that the accused could write and read.\(^{77}\) The magistrate did not allow the accused to be assisted by family in order to communicate effectively.\(^{78}\) During the interpretation the accused could not hear and understand the questions.\(^{79}\)

The appeal court concluded that the accused did not have full and proper access to what was being said in court, and his own voice was stifled due to the lack of an appropriately skilled interpreter and the magistrate’s refusal to allow his son to assist him in testifying.\(^{80}\) The Court held that the accused was reduced to a “passive and powerless spectator at his own trial, which rolled on like a juggernaut, trampling his constitutional rights in the process”.\(^{81}\)

3.5.3. *Geidel v Bosman, NO and Another*\(^{82}\)

In the *Geidel* case it was stated that an opinion of the magistrate with regards to the accused being familiar with the language of the witness is required in terms of section 6(2) of the Magistrate Act 32 of 1944.\(^{83}\) ‘The presiding officer is obliged to appoint a competent interpreter in terms of section 6(2) of the Magistrates’ Courts Act 32 of 1944’.\(^{84}\) It becomes

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\(^{76}\) *Kruse v S* (A100/2018) [2018] ZAWCHC 105; 2018 (2) SACR 644 (WCC).

\(^{77}\) *Kruse v S*, para 12.

\(^{78}\) *Kruse v S*, para 18.

\(^{79}\) *Kruse v S*, para 21.

\(^{80}\) *Kruse v S*, para 20.

\(^{81}\) *Kruse v S*, para 20.

\(^{82}\) *Geidel v Bosman N.O and Another* 1963 (4) SA 253 (T).

\(^{83}\) *Geidel v Bosman N.O and Another*, para 256 F – 257 H.

\(^{84}\) *Kruse v S*, para 3.
an incaution once the presiding officer fails to assign a competent interpreter, if this indiscretion occurs proceedings will be set aside.\textsuperscript{85}

Section 6(2) may be relied upon to encourage the provision of interpreters for offenders with SHI so that these offenders can be conversant with the language of the witness.

3.6. Conclusion

In identifying, discussing and analysing South African domestic law it is evident that South Africa still does not have specific and adequate legislation pertaining to the rights of people with disabilities\textsuperscript{86} in the criminal justice system. It is clear that South Africa has few domestic laws and policies that can be referred to in dealing with offenders with SHI. South Africa should take an initiative to craft laws that speak directly to the challenges faced by offender with SHI in the criminal justice system. These laws should not only deal with challenges faced by adult male offenders with SHI but also deal with challenges faced by women and children with SHI in the South African criminal justice system.

The 2015 White Paper was the first good step towards addressing and recognising the rights of persons with disabilities in South Africa. The country worked towards recognising, promoting and protecting rights of persons with disabilities, however a lot more still needs to be done in the South African criminal justice system, especially in dealing with offenders that are more vulnerable, which are persons with SHI. Further, a delay in drafting legislation leaves vulnerable offenders with SHI without a remedy to their challenges. The Constitution guarantees to them the right to dignity and equality. To truly uphold these rights of offenders with SHI requires special measures to ensure that they understand and the proceedings which they are subjected to. Moreover it is equally important that they are understood.

\textsuperscript{85} \textit{S v Abrahams} 1997 (2) SACR 47 (C).
CHAPTER FOUR
OFFENDERS WITH SPEECH AND/OR HEARING IMPAIRMENT (SHI): GIVING VOLUNTARY STATEMENTS; UNDERSTANDING COURT PROCEEDINGS; AND DURING INCARCERATION

4.1. Introduction

In Chapter 2 and 3 of this dissertation attempts were made to trace the international and domestic legal frameworks which may protect the rights of persons with disabilities who are in conflict with the law. While it is clear from these chapters that such persons are entitled to protection, it is even more evident that their plight requires special attention. This is particularly so for offenders with SHI. Their plight is overlooked and their challenges are not widely known. For this reason this chapter will focus on at least three instances where offenders with SHI face barriers which may violate their rights. These instances include giving voluntary statements during the pre-trial stage; the accused’s giving and understanding of testimonies during the trial and convicted offenders. Though there are a variety of barriers which offenders with SHI may face, a discussion of all their challenges in the criminal justice system is beyond the scope of this thesis.

To contextualise the discussion of the challenges which may occur at the junctures indicated above, the rights which generally apply to offenders at that particular stage will be described first. This will be followed by a consideration of how these rights may be specifically affected when an offender has SHI.

4.2. Voluntary statement during the pre-trial stage

4.2.1. What is a voluntary statement?

In order to discuss the challenges faced by SHI persons when giving or attempting to give voluntary statements, it is necessary to explain what a voluntary statement is and the rights applicable to it. To this end a brief explanation will be provided below.
A voluntary statement is one that was made in circumstances free from duress, coercion or inducement and it can also be an admission or a confession. Lord Justice-general Thompson in *Chalmers v H.M Advocate* defined ‘a voluntary statement as one which is given freely, not in response to pressure and inducement and not elicited by cross-examination’. Consequently, according to Schwikkard and Van der Merwe ‘before a statement is admitted into evidence in court, the general rule is that it must be established that the statement was made freely and voluntarily by the accused whilst in sound and sober senses and without being unduly influenced’. The requirement that the statement must be made ‘freely and voluntary’ is separate from the requirement that the statement must be ‘without undue influence’, these two requirements each have distinct meanings and will be discussed next.

Freely and voluntarily made statements are assigned ‘to its common law meaning that a statement must not be induced by a threat or promise emanating from a person in authority’. It is not of much importance whether or not a statement was made voluntarily because in practice the determination of whether the statement was made without undue influence and with sober senses was included.

A voluntary statement is admitted into evidence if it is proven that the accused is of sound and sober sense, this means that the accused must have understood what he was saying. If the accused cannot appreciate what he or she is saying, then the statement made by him will not be a voluntary statement.

‘Even if a statement is found to have been made voluntarily, it will be excluded if it was induced as a consequence of undue influence’. The test for undue influence was established in *S v Mpetha and Others*.  

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89 *Chalmers v H.M Advocate* 1954 J.C. 66. 
91 S v Radebe and Another 1968 (4) SA 410 (A); S v Lebone 1965 (2) SA 837 (A). 
92 R v Wong Kam - ming 1980 AC 247 (PC); S v Blom 1992 (1) SACR 649 (E). 
93 S v Radebe and Another 1968 (4) SA 410 (A); Rex v Kuzwayo 1949 (3) SA para 761. 
94 Schwikkard and Van der Merwe (2016) para 362. 
95 Rex v Blyth 1940 AD 355; R v Mtabela 1958 (1) SA264 (A); R v Ramsamy 1954 (2) SA 491 (A). 
96 S v Pietersen and Others 1987 (4) SA 98 (C). 
97 S v Mpetha and Others (2) 1983 (1) SA 576 (C) para 585.
The Court held that the object of an inquiry into the existence of undue influence was to determine whether the accused exercised his will freely and that the inquiry was a subjective one. The subjective inquiry requires undue influence to have been operative on the accused’s mind when he made the statement.  

The failure to advise an accused of his right to legal representation or a legal interpreter from time of arrest may be a factor taken into consideration in determining whether there is undue influence. The risk of violation seems to exist in respect of SHI accused.

A distinction needs to be drawn between a statement obtained as a result of undue influence and a statement obtained in breach of constitutional provisions. The test to be applied in determining the presence of undue influence is subjective and the test as to whether a constitutional guarantee has been violated must be objective. For example whether the absence of a legal representation or legal interpreter amounts to undue influence will be subjectively determined, but whether or not the accused was advised of his right to legal representation or legal interpretation in accordance with (section 35 of the Constitution) is an objective question in fact.

4.2.2. Rights applicable to a person making a voluntary statement

Section 35(1) states that everyone who is arrested for allegedly committing an offence has the right—

(a) to remain silent;
(b) to be informed promptly—
(i) of the right to remain silent; and
(ii) of the consequences of not remaining silent;
(c) not to be compelled to make any confession or admission that could be used in evidence against that person;

98 S v Mkwanazi 1966 (1) SA 736 (A) and S v Mpetha and Others (2) 1983 (1) SA 576 (C) para 585.
99 S v Januarie an Andere 1991 (2) SACR 682 (SE); S v Mbambeli and Others 1993 (2) SACR 388 (E).
100 Schwikkard and Van der Merwe (2016) 365.
101 Schwikkard and Van der Merwe (2016) 365.
102 S v Mkhize 2011 (1) SACR 554 (KZD); S v Saloman and Others 2014 (1) SACR 93 (WCC).
However, section 35(1)(b) should be read with section 35(4) which provides:\textsuperscript{103}

Whenever this section (section 35) requires information to be given to a person, that information must be given in a language that the person understands.

Section 35(1)(a) and (b) will be discussed below as these rights are relevant when a person makes a voluntary statement.

4.2.2.1. The Right to remain silent (section 35(1)(a)) and to be informed of the right and the consequences (section 35(1)(b))

The right to remain silent enshrined in section 35(1)(a) can be described as the absence of a legal obligation to speak.\textsuperscript{104} The right is closely linked to the right against self-incrimination and the presumption of innocence.\textsuperscript{105} The right is specified in relation to both pre-trial and trial procedures (s 35(3)\textsuperscript{106} which will be discussed later in this chapter). Moseneke J emphasised the distinction between pre-trial silence and trial silence and stated that ‘the objective of the right to silence during trial is to secure a fair trial, whereas the protection of the right to pre-trial silence seeks to oust compulsion to speak’.\textsuperscript{107}

Contrarily to Moseneke, Yacoob J ‘stated that trial and pre-trial silence are not different, as the purpose of the right to remain silent is to ensure that people are protected from self-incrimination in the process of police interrogation’.\textsuperscript{108} A crucial purpose to ensure a fair trial is granting the right to remain silent according to Yacoob J. The judge believes that this is ‘not limited to ensure fairness for the accused, but it is much broader in such a way that the court must ensure that the trial is fair and that the process balances the interests of the accused with that of society at large and administration of justice’.\textsuperscript{109} For the purpose of this thesis Yacoob’s interpretation of the right to silence is preferred.

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\textsuperscript{103} Steyler (1998) 110.
\textsuperscript{104} S v Thebus\textsuperscript{2003} (2) SACR 319 (CC) [55]; R v Esposito (1985) 49 CR (3d) 193 (Ont,CA).
\textsuperscript{105} S v Thebus\textsuperscript{2003}(2) SACR 319 (CC) [55]; S v Manamela 2000 (3) SA 1 (CC); Osman v Attorney-General Transvaal 1998 (4) SA 1224 (CC).
\textsuperscript{106} Schwikkard (2013) 758.
\textsuperscript{107} S v Thebus, 95.
\textsuperscript{108} S v Thebus, 107.
\textsuperscript{109} S v Thebus, 107.
\end{flushleft}
The right to remain silent can be exercised most effectively in conjunction with other pre-trial rights, such as the right to access to a lawyer\textsuperscript{110} and the right to informed of the reason for detention.\textsuperscript{111} In \emph{S v Melani}\textsuperscript{112} Froneman J observed that in every real sense the right to a lawyer is an important obligation that procedurally provides the right to remain silent and the right to be protected against self-incrimination.\textsuperscript{113}

The failure to recognise the importance of informing an accused of his right to consult with a legal advisor during the pre-trial stage has the effect of depriving persons, especially the uneducated, the unsophisticated and the poor, of the protection of their right to remain silent and not to incriminate themselves.\textsuperscript{114}

Informing the accused about his right to remain silent includes that the accused person is informed about his right not to make a voluntary statement. In this regards if the accused is informed about this right he or she is at risk of self-incrimination. This right assists offenders with SHI to be cautioned of their right and it further protects these offenders from self-incrimination.

Every arrested accused person is entitled to be informed of first, the right to remain silent and secondly of the consequences of not remaining silent.\textsuperscript{115} This is also emphasised under section 35(1)(b). Informing the accused about his right to remain silent and the consequences of not remaining silent should be done in all cases irrespective of whether or not the accused may be aware of the rights.\textsuperscript{116}

In \emph{Miranda v Arizona}\textsuperscript{117} the court stated that where a person is in custody for interrogation, that person must ‘be informed in clear and unequivocal terms that he has the right to remain

\begin{thebibliography}{9}
\bibitem{110} Constitution of South Africa 1996, s 35 (2) (c).
\bibitem{111} Constitution of South Africa 1996, s 35 (2) (a).
\bibitem{112} \emph{S v Melani} 1996 2 BCLR 174 (E) 187E – G.
\bibitem{113} \emph{S v Melani}, 176.
\bibitem{114} \emph{S v Agnew} 1996 2 SACR 535 (C) para 540h – I, See also \emph{S v Mathebula} 1997 1 BCLR 123 (W) para 132G – H.
\bibitem{115} \emph{Miranda v Arizona} 384 US 436 473 (1966).
\bibitem{116} \emph{Miranda v Arizona}.
\bibitem{117} \emph{Miranda v Arizona}.
\end{thebibliography}
silent’. The warning should be accompanied by an explanation that ‘anything that the accused says will be used against him in court.’ The Court articulated that it is only through an awareness of the consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, the warning may serve to make the accused more acutely aware that he is faced with a phase of an adversary system and that he is not in the presence of persons acting solely in his interest.

Any cooperation with the police by the accused should be voluntary and any information about the right should be properly communicated to an accused, as the particular circumstances of each case may demand that the police make it clear that the conduct also constitutes a statement. This may be challenging where an offender with SHI is concerned.

Incriminating evidence is used in court as a principle result or consequence of not remaining silent. ‘The aim of informing an accused of the consequences of not remaining silent is to ensure an informed intelligent choice’. In S v Melani the court held that an accused should be explicitly informed about the consequences of making a pointing out, because that could be used against him as evidence in court. It is important that the accused person is made aware of the consequences of making a voluntary statement. Once the accused is made aware that he stands a chance of incriminating himself and also knows that the statement will be used as evidence against him in court, the accused may be able to make an intelligible decision as to whether to go on with the voluntary statement or not.

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118 Miranda v Arizona, 469.
119 Miranda v Arizona, 469.
120 Miranda v Arizona, 469.
121 Miranda v Arizona, 469.
124 Miranda v Arizona, para 469.
125 S v Melani, para 644C.
126 S v Melani, 183.
4.2.2.2. Right not to be compelled to make a statement (section 35(1)(c)) and right to be informed in an understandable language (section 35(4)).

Section 35(1)(c) states that ‘everyone who is arrested for allegedly committing an offence has the right not to be compelled to make any confession or admission that could be used in evidence against that person’.\(^{127}\) Once an accused person is not informed of his right not to make a voluntary statement and the consequences of making such a statement, then the accused will not be aware/know of his right under section 35(1)(b). The accused stands a chance of unknowingly waiving his right not to be compelled to make a voluntary statement.

According to *Naidenov v Minister of Home Affairs*\(^{128}\) the above ‘provision is to ensure effective communication in a language in which the accused understands although imperfectly’.\(^{129}\) However even though there is no duty to convey the information in a preferred language of the accused, the police officer must establish whether the language was indeed understood by the accused.\(^{130}\) Furthermore, where there is reason to doubt whether the accused has in fact understood, attempts should be made to achieve comprehension or understanding.\(^{131}\) Section 35(4) is one of the steps that should be taken in order for the accused person to protect and exercise his right under section 35(1)(c). The accused person should make a voluntary statement after he or she has been informed of his right not to make the statement and the consequences of making the statement, in a language in which he or she understands. Once these steps are not followed then the accused person is at risk of getting his or her constitutional rights infringed.

4.2.3. Person affected by speech and or hearing impairment

The rights described above apply to all persons in conflict with the law. Persons with SHI may, however, require different protection depending on their abilities. In the South African criminal justice system there are at least two types of offenders with speech and or hearing impairment (SHI). Thus it must be recognised that first, there are offenders with SHI who can

\(^{127}\) Constitution of South Africa 1996, s 35 (1) (c).
\(^{128}\) *Naidenov v Minister of Home Affairs* 1995 7 BCLR 891 (T) para 898.
\(^{129}\) *Naidenov v Minister of Home Affairs*, para 898.
\(^{130}\) Steyler (1998) 119.
\(^{131}\) CfS v Kondile1995 1 SACR 397 (SE).
communicate through a sign language interpreter\textsuperscript{132} and secondly those with SHI and cannot communicate through a sign language interpreter. It is generally assumed that persons with SHI understands sign language and is able to communicate through a sign language interpreter.\textsuperscript{133} However, this is not correct as not every person with SHI can communicate through a sign language interpreter and understand sign language.

4.2.3.1. Offenders with SHI that can communicate through a sign language interpreter

Some offenders with SHI can communicate through a sign language interpreter as an effective method of communication. Sign language interpretation gives these offenders a complete and simultaneous translation of the discussion.\textsuperscript{134} These offenders can be informed of their right to silence, which entails the right not to make a voluntary statement and the consequences of not remaining silent. Despite being informed of their rights, these offenders still need to clearly understand the contents of what is communicated to them before they make a voluntary statement.

In \textit{Ex parte Bell}\textsuperscript{135} the court stated that, special requirements had to be satisfied in order for an affidavit deposed to by a hearing impaired person to be considered as an accurate reflection of his intention.\textsuperscript{136} What was necessary according to the court was not just an acknowledgement by the Commissioner of Oaths or Justice of the Peace that the hearing impaired person knows and understands the contents of the affidavit. The Court emphasised that it should be evident that the court a quo appropriately explained to the accused in an appropriate and understandable manner and that such accused wholly understood what was communicated to him or her.\textsuperscript{137} Furthermore the court elaborated that ‘there should be a testimony that the matter had been properly explained to the person with SHI by someone who was in a position to explain to the person and after being so explained to him it should appear that the person

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fully understood the matter and consented thereto’.\textsuperscript{138} Even though some of these offenders can communicate through a sign language interpreter and stand a chance of being protected under section 35(4), they still face the risks of their rights being infringed during a voluntary statement process, as most police stations in South Africa do not have interpreters stationed at their offices.

4.2.3.2. Offenders with SHI that cannot communicate through sign language interpreter

Offenders with SHI are also sometimes unable to communicate through a sign language interpreter during a voluntary statement process. These offenders might have never had any formal training in sign language or may have started experiencing hearing loss, which gradually led them to lose their hearing and speech abilities.\textsuperscript{139} In the \textit{Kruse} case the court did not focus on pre-trial voluntary statement per se but the court assists in identifying the risk of infringing the rights of offenders with SHI who cannot communicate through a sign language interpreter. This does not become a problem during trial only but in pre-trial as well, especially during the voluntary statement process. Police are generally not trained in this regard as was pointed out in chapter 1.

In \textit{Kruse} case when the trial was set to commence a sign language interpreter was called to interpret for the accused but the accused informed the magistrate that he did not understand sign language well and could not follow the sign language interpreter.\textsuperscript{140} When the magistrate herself observed the accused’s concern, she discovered that the accused and the sign language interpreter could not understand each other.\textsuperscript{141} Sometimes even if a police officer calls a sign language interpreter to communicate with an offender as he makes a voluntary statement, the offender might still be unable to understand. This leads to major risks of infringement on an offenders right as well. Measures such as calling on the assistance of the accused family or friends to assist ought then to be explored.

\begin{footnotes}
\item [138] \textit{Ex parte van Dyk} 1939 C.P.D, para 202.
\item [139] \textit{Kruse v S}, para 12.
\item [140] \textit{Kruse v S}, para 11.
\item [141] \textit{Kruse v S}, para 11.
\end{footnotes}
4.2.4. Risk of infringement on the rights of offenders with SHI

4.2.4.1. Risk of not understanding the right to (remain silent and not self-incriminate)

During police investigation, many offenders with SHI have found it difficult to give police statements.\textsuperscript{142} Some police officers view people with communication disabilities as unreliable in providing an adequate statement.\textsuperscript{143} Notwithstanding this, police officers tend to offer offenders with disabilities an opportunity to provide a statement.\textsuperscript{144} On the face of it this seems positive, however, sometimes offenders who are statement-givers and are SHI are also unable to make statements themselves.\textsuperscript{145} Police officers have further acknowledged that, insofar as adequate skills go, they feel ill-equipped to take statements from those with severe communication disability’.\textsuperscript{146} As a result they do not provide offenders with SHI with correct services and support needed for effective statements.\textsuperscript{147} The result of this is that statements sometimes do not mirror the facts as understood by the statement-givers.\textsuperscript{148} This is problematic because these statements are used in court.\textsuperscript{149} If an offender with SHI makes a voluntary statement without understanding his rights, he may make a statement without knowing the consequences of doing so. He stands a risk of incriminating himself.

4.2.4.2. The Risks an offender with SHI faces when not properly informed

Offenders with SHI might not always be coerced by police officers, but the ‘failure to recognise the importance of informing an accused of his right to consult with a legal advisor or interpreter, for example during the pre-trial stage may have the effect of depriving him of the protection of their right to remain silent and not to incriminate himself’.\textsuperscript{150} The risk is heightened especially with regard to the poor and uneducated offender who has SHI. Since an offender is not promptly informed of his right to remain silent, which can be exercised most

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\textsuperscript{142} Dagut and Morgan (2003) 30.
\textsuperscript{143} Bornman (2016) 3.
\textsuperscript{144} Combrinck & Meer (2013) 15.
\textsuperscript{145} Dagut and Morgan (2003) 30. See also table 3 in Bornman (2016) 10.
\textsuperscript{146} Hesselink and Booyens (2003) 175. See also Henshaw and Thomas (2012) 628. See also Bornman (2016) 13.
\textsuperscript{147} Hesselink and Booyens (2003) 175. See also Henshaw and Thomas (2012) 628.
\textsuperscript{148} Dagut and Morgan (2003) 30. See also Bornman (2016) 2.
\textsuperscript{149} Dagut and Morgan (2003) 30. See also Kruse v S, para 19.
\textsuperscript{150} S v Agnew 1996 2 SACR 535 (C) para 540h – I, See also S v Mathebula 1997 1 BCLR 123 (W) para 132G – H.
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effectively in conjunction with other pre-trial rights, such as the right to access to a lawyer\(^{151}\) (or an interpreter) and the right to informed of the reason for an arrest,\(^{152}\) the offender stands a chance of having other fair trial rights violated.

4.2.4.3. The risk of not informing an offender in an understandable language

In terms of language, police officers do not have an obligation to convey information in a preferred language of the accused. Despite that, police officers must establish whether the language is indeed understood by the accused\(^{153}\) and the accused should clearly know the consequences of not being silent as enshrined in section 35(1). Attempts should be made to achieve understanding.\(^{154}\) This may involve services of an interpreter or any other third person who can assist both the offender and officials in the criminal justice system. It may even involve the use of technology or other assistive devices.

4.2.4.4. Risk of Interpretive mistakes that impact negatively on offenders with SHI

Sometimes even with the assistance of an interpreter there is still a possibility of mistakes which may impact negatively on an offender’s rights. In a real example involving an interpreter who had to translate from English to Afrikaans in order to demonstrate a point, the interpreter was asked to pose the question to the witness, as to what did he had in his hand? (“Wat het hy in sy hand gehad”). The interpreter then asked ‘wat het hy aan gehad?’ This means what did the person wear. While this is a simple example it illustrates the scope for error in much less complicated situations than when dealing with offenders with SHI. This perhaps justifies more stringent measures to guard against mistakes where SHI are involved and the risk of making mistakes is higher.

\(^{151}\) Constitution of South Africa 1996, s 35 (2) (c).
\(^{152}\) Constitution of South Africa 1996, s 35 (2) (a).
\(^{154}\) Cf S v Kondile 1995 1 SACR 397 (SE).
4.2.5. Risk of infringement for an offender with SHI who cannot communicate through an interpreter

4.2.5.1. The Risk of infringing on the right to a fair trial for offenders with SHI

Despite the current focus on voluntary statements during the pre-trial, the *Kruse* case may be instructive at this juncture. In the *Kruse* case the accused with SHI was unable to communicate through a qualified interpreter during the trial. The case focused on fair trial and risk of infringement with regards to an offender with SHI and cannot communicate through an interpreter. The court stated that the right to a fair trial poses particular challenges where a court is dealing with an accused whose hearing and/or speech is impaired, for there is a grave danger that the accused will be excluded from meaningful participation in the trial. Therefore the court reiterated that It must be borne in mind that

In an un-interpreted trial, a speech and or hearing impaired defendant’s right to be heard in his own defence is significantly impaired, i.e., identification by the SHI defendant of factual misstatements is highly improbable and the opportunity for effective confrontation is correspondingly diminished. Furthermore, participation in defensive strategy through communication with counsel during the trial phase is critically impaired. In effect, SHI defendants are functionally excluded from un-interpreted trials.

The Court further highlighted that besides a meaningful participation of the accused with SHI in the trial, state authority can also be insensitive and prejudicial towards the offender’s disability, because of the offenders inability to write and use sign language in order to communicate effectively. Some judicial officers fail to respect every offender that is unable to communicate, as evident from the judges’ behaviour towards the accused in *Kruse v S* case.

The court laid down grounds which should be followed in cases where there is an offender with SHI that cannot communicate through an interpreter. The presiding officer must satisfy him or herself on proper grounds that the accused is able to hear and understand the

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155 *Kruse v S*, para 11.
159 Constitution of South Africa 1996, s 10.

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proceedings at all times and to make him or herself understood.\textsuperscript{160} Further the presiding officer should not simply accept the word of a legal representative and also not take into account his or her own assessment of the situation, but instead an expert assessment should be undertaken into the extent of the accused’s impairment.\textsuperscript{161} These grounds should be followed in order for state officials to limit the risk of infringement of the accuser’s right to a fair trial. The Court, however, omitted to state what ought to be done if it is established that the accused cannot be assisted even with the help of an interpreter. This illustrates the need for legislative guidance.

4.3. What does it mean to understand and have effective communication in a fair trial?

The principle that the accused should understand court proceedings has long been entrenched in South African law.\textsuperscript{162} Courts and laws have discussed the significance of understanding the nature of a court proceeding by accused persons, as incapacity to understand court proceedings usually restricts accused persons from participating in the trial. This means that the court has to ascertain whether the accused person is able to comprehend and effectively communicate to make a proper defence.\textsuperscript{163}

Courts have further stated that ‘effective communication imposes a duty on the state to provide competent interpreters’ (as discussed below).\textsuperscript{164} Effective communication is essential throughout every stage of criminal proceedings, from apprehension to sentencing.\textsuperscript{165}

A fair trial requires not only the physical presence of an accused person in court, but also the ability of that person to understand the proceedings.\textsuperscript{166} It is widely accepted that the ability of an accused person to understand and be understood are fundamental requirements for a fair trial.\textsuperscript{167}

\textsuperscript{160} Kruse v S, para 7.
\textsuperscript{161} Kruse v S, para 8.
\textsuperscript{162} Cassim F The right to meaningful and informed participation in the criminal process (LLM thesis, University of South Africa, 2009) chapter 6.
\textsuperscript{163} Kesavarajah v R (1994) 123 ALR para 463.
\textsuperscript{164} S v Ndala 1996 (2) SACR 218 (C).
\textsuperscript{165} Denmark JC Deafness and Mental Health (1994) 114.
\textsuperscript{166} Rex v Lee Kun 1916 (1) K.B. 337, para 340 – 43.
\textsuperscript{167} Kruse v S, para 5 See also F Cassim ‘The right to meaningful and informed participation in the criminal process’ (2009) (Thesis available online at UNISA Institutional Repository).
In *S v Dlali*\(^{168}\) the Court restated the criterion for fitness to stand trial is whether or not the accused is ‘by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence.’\(^{169}\) The court held that the standard of determining whether the accused is fit enough to stand trial, is based on whether or not at the time of consideration the person lacked fitness to stand trial.\(^{170}\)

Further consideration that the accused lacks fitness to stand trial was also discussed by *Kesavarajah v R*\(^{171}\) where the majority held that

> The defendant (accused) needs to understand what it is that he is charged with ... He needs to understand generally the nature of the proceedings ... He needs to be able to follow the course of proceedings so as to understand what is going on in court in a general sense, though he need not, of course, understand the meaning of various court formalities.

The principle to understand court proceedings is linked to one’s presence.\(^{172}\) The court should have an obligation to assist an accused to understand or take assessments in determination of whether an accused is capable of understanding court proceedings.\(^{173}\) A fair trial includes allowing the accused to be present when being tried, allowing them to further adduce (and challenge) evidence and be tried in a language in which they understand, as further discussed below.

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169 Criminal Procedure Act 51 of 1977, s 77 (1).
170 *S v Dlali*, para 18.

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4.3.1. Rights applicable to effective communication and understanding of offenders with SHI during court proceedings

Effective communication is imperative for a fair trial.\textsuperscript{174} Many of the rights guaranteed in s 35(3) depend on effective communication by and with the accused.\textsuperscript{175}

The Constitution states ‘that every accused person has a right to a fair trial, which includes: The right to be present when being tried’,\textsuperscript{176} the right to adduce and challenge evidence,\textsuperscript{177} the right to be tried in a language which the accused person understand or, if that is not practicable, to have the proceedings interpreted in that language\textsuperscript{178} and the right to have required information given to an accused in a language that the accused understands.\textsuperscript{179}

4.3.1.1. The right to be present when being tried (section 35(3)(e)) and the right to adduce and challenge evidence (section 35(3)(i))

An accused’s presence at trial is seen as a prerequisite for the effective exercise of active defence rights.\textsuperscript{180} The physical presence of an accused person is of value only if he or she is also present at communicative levels.\textsuperscript{181} The communication aspect is guaranteed by the right to an interpreter.\textsuperscript{182} The presence of the accused is a fundamental component of a fair trial, as the failure to comply with this right may result in the setting aside of the proceedings.\textsuperscript{183}

In the case of \textit{Pachcourie v Additional Magistrate},\textsuperscript{184} which dealt with the position of a hearing impaired person, the Court held that in order for the accused to be considered present, such accused should not only be present in body but must also be present in mind.\textsuperscript{185} ‘The accused must be able to hear and understand the import of the evidence being led at his

\begin{itemize}
\item \textsuperscript{174} \textit{Kruse v S}, para 4.
\item \textsuperscript{175} \textit{Kruse v S}, para 4.
\item \textsuperscript{176} Constitution of South Africa 1996, 35 (3) (e).
\item \textsuperscript{177} Constitution of South Africa 1996, 35 (3) (i).
\item \textsuperscript{178} Constitution of South Africa 1996, 35 (3) (k).
\item \textsuperscript{179} Constitution of South Africa 1996, 35 (4).
\item \textsuperscript{181} Steyler (1998) 294.
\item \textsuperscript{182} Constitution of South Africa 1996, s 35 (3) (k).
\item \textsuperscript{183} \textit{S v Eyden} 1982 4 SA 141 (T).
\item \textsuperscript{184} \textit{Pachcourie v Additional Magistrate, Ladysmith} 1978(3) SA 986 (N).
\item \textsuperscript{185} Holness and Rule (2018) 41.
\end{itemize}
However due to improper interpretation the court concluded and found that the trial was not handled properly. As a result the hearing impaired person could not appreciate or understand the import of the trial.\textsuperscript{187}

In the \textit{Pachcourie}\textsuperscript{188} case it can be inferred that presence as a principle does not only entail being of sound mind or being present physically, but it includes that the accused should appreciate and understand the importance of evidence being led in the trial. The purpose of the principle is for him to hear the case being made against him and also be granted an opportunity to answer what he or she hears.\textsuperscript{189} Furthermore in other jurisdictions where the ‘right to be present is not explicitly mentioned in the Constitution, courts have deduced it from the right to adduce and challenge evidence’.\textsuperscript{190} Hence this seems to be a common right.

The right to adduce and challenge evidence lies at the heart of the criminal trial, namely establishing the truth about the guilt or innocence of an accused’.\textsuperscript{191} The right further includes the right to testify and enable defence witnesses to go to court and get support or assistance.\textsuperscript{192}

The courts have repeatedly held that a duty rests on a presiding officer to assist the unrepresented accused in exercising his or her right to adduce evidence.\textsuperscript{193} The right to adduce evidence also requires the provision of a qualified and properly sworn in interpreter where appropriate.\textsuperscript{194} This is closely linked to the accused right to be tried in a language he or she understands.\textsuperscript{195} Offenders with SHI may have a chance of understanding and engaging in court proceedings, as they communicate effectively through a qualified and properly sworn interpreter. This strengthens the position of these offenders.

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\textsuperscript{186} Holness and Rule (2018) 41. \\
\textsuperscript{187} \textit{Pachcourie v Additional Magistrate, Ladysmith} 1978(3) SA 986 (N). \\
\textsuperscript{188} \textit{Pachcourie v Additional Magistrate, Ladysmith} 1978(3) SA 986 (N). \\
\textsuperscript{189} \textit{Kruse v S}, para 4.1. \\
\textsuperscript{190} \textit{Colozza v Italy} 12 Feb 1985 Series A no 89 para 27 See also Schwikkard (2013) 790. \\
\textsuperscript{191} \textit{Chamber v Mississippi} 410 US 284 294 (1973). \\
\textsuperscript{192} \textit{Pennington v Minister of Justice} 1995 (3) BCLR 270 (C). \\
\textsuperscript{193} \textit{S v Sinsodi} 1997 (1) SACR 169 (C), \textit{S v Dyani} 2004 (2) SACR 365 (E). \\
\textsuperscript{194} Schwikkard (2013) 794. \\
\textsuperscript{195} \textit{S v Saidi} 2007 (2) SACR 637 (C); \textit{S v Manzini} 2007 (2) SACR 107 (W).
\end{footnotesize}
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4.3.1.2. The right to be tried in a language that the accused understand (section 35(3)(k)) and the right to be informed in a language in which accused person understands (section 35(4)).

Section 35(3)(k) has two distinct rights; the right to be tried in a language that the accused person understands and if this is not practicable, then the accused has a right to have proceedings interpreted in a language that he or she understands.

The right to be tried and given information in a language that the accused understands is essential in order for the accused to exercise his or her s 35 constitutional right to participate in the trial. The right only comes into play when an accused cannot understand the languages in which the court usually conducts its proceedings. This relates to a language the accused understands, not the language in which the accused prefers, therefore the accused exercises a communication right not a language right. Hence this is a right which offenders with SHI may rely upon. The court needs to comply with the duty to conduct the proceeding in a language the accused understands only if the duty can be executed in practice.

If it is impracticable for the court to conduct the proceedings in the language which the accused understands, the accused is entitled to an interpreter due to the high level of linguistic understanding required in court proceedings. The test is whether the accused has the same opportunity to understand and be understood as if they are conversant in the language being employed in the proceedings. Interpretation should be continuous, precise, impartial, competent and contemporaneous. Interpretation should also not be in a language in which the accused partially understands. The aforementioned principles must also be applied to accused with SHI.

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196 S v Manzini 2007 (2) SACR 107 (W).
197 Schwikkard (2013) 800.
199 Mhethwa v De Bruin NO 1998 (3); S v Damoyi 2004 (1) SACR 126 (C) [17].
201 Schwikkard (2013) 800.
203 R v Tran, para 36.
204 S v Ngubane 1995 1 SACR 384 (T) 385f; S v Ndala 1996 2 SACR 218 (C) para 221b.
205 S v Ngubane, 385f; Naidenov v Minister of Home Affairs 1995 7 BCLR 891 (T) para 898.
The right to effective communication imposes a duty on the state to provide interpreters of competence and integrity. Interpreters should swear under oath to interpret faithfully and to the best of their abilities. Legal representation should also be appointed for the accused so that he or she (the accused) can communicate and be informed of his rights.

The right to be tried in a language that the accused understands is not only applicable in court proceeding but also applicable to pre-trial proceedings under section 35(1), as well as incarceration (detention) under section 35(2), which will be discussed later in this Chapter.

4.3.2. Offenders with speech and or hearing impairment during court proceedings

As discussed in the previous section, there are at least two kinds of offenders with SHI in the criminal justice system. These are offenders with SHI who can communicate through a sign language interpreter and offenders with SHI who cannot communicate through a sign language interpreter. These offenders all face risks of their constitutionally guaranteed rights being infringed upon during court proceedings. These risks will be discussed next.

4.3.3. Risk of infringing rights of offenders with SHI during court proceedings

Offenders with SHI face significant difficulties when they need to testify in court. During trials, miscommunication and communication failure between interpreters and these offenders can occur. This may result in these offenders being unable to understand court proceedings and to follow instructions from court officials. There are controversies ‘around the legal test for competency to testify, as well as whether individuals with a severe communication disability have the ability to testify in court’. The following risks of infringement were identified and discussed in the Kruse case.

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206 Matemane v Magistrate, Alberton 1991 4 SA 613 (W) para 6191; S v Ndala 1996 2 SACR 218 (C) para 222h.
207 S v Ndala, 221-222; S v Saidi 2007 (2) SACR 637 (C).
208 S v Pienaar 2000 (2) SACR 143 (NC).
211 Bornman (2016) 4.

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4.3.3.1. Risk of infringing the right to be present during court proceedings

Given the often rapid and interactive nature of communication during court proceedings an offender with SHI may not always be afforded a proper and timeous opportunity to consider what had been said. In the *Kruse* case it was identified that when a witness testified, her cross-examination ensued immediately without an adjournment to afford the offender with SHI an opportunity to consider her evidence and instruct counsel accordingly. This meant that the offender was practically excluded from important parts of the trial. It is evident from this case that there is a high risk of infringing the right of an offender with SHI to be present in the sense described earlier.

4.3.3.2. Risk of infringing the right to adduce evidence during court proceedings

Court interpreters are required to simultaneously translate and record what was being said. In the *Kruse* case it was noted that the simultaneous written record and translation was a difficult task because it carried a high risk that parts of the evidence will be missed, or the ‘subtleties of communication will be lost’. This was identified when the interpreter frequently complained that she could not keep up with the proceedings and also her notes were not an accurate verbatim transcript of the testimony. This meant that even though offenders with SHI may have access to statements of state witnesses, he or she will not be able to challenge the evidence due to the aforementioned issues. In this regard offenders with SHI are at risk of getting their right to adduce and challenge evidence infringed.

4.3.3.3. Risk of infringing the right to have the trial in interpreted in a language that an offender with SHI understands

Interpretation during a court proceeding can also be sub-standard because it can be inconsistent, inaccurate, incompetent and not contemporaneous. In the *Kruse* case the offender with SHI was deprived of the benefit of contemporaneous interpretation, which required that interpretation of dialogue be conveyed to the accused immediately once the

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212 *S v Kruse*, para 15.3.
213 *S v Kruse*, para 15.3.
214 *S v Kruse*, para 15.1.
215 *S v Kruse*, para 15.1.
216 *S v Kruse*, para 15.1.
217 *S v Ngubane* 1995 (1) SACR 384 (T).
person has spoken. Due to the lapse of time between the giving of the testimony and the offender’s access to the contents however, it is likely that there was limited opportunity to detect errors and instruct his counsel to raise issues in cross-examination.\(^{218}\) In this regard the offenders with SHI face the risk of not being given an opportunity to understand and to be understood in the proceedings. Due to this restriction an offender with SHI does not benefit from the interpretation. This results in a risk of infringing the offender’s right to have the trial interpreted in a language which he understands.

4.4. Offenders with speech and or hearing impairment: during incarceration.

The State is responsible for the well-being of all inmates\(^ {219}\) and to also make sure that understanding and effective communication within the correctional services system is possible. As mentioned in Chapter 3 there are not many legislative provisions which relate to the effective communication of prisoners with SHI.\(^ {220}\) The Correctional Service Act provides it ‘has to be assumed that the accommodation and other amenities for prisoners with disabilities are to be of the same standard as for prisoners who do not have these disabilities’.\(^ {221}\) Further as far as practicably possible, inmates should know their rights and enjoy the amenities that they are entitled to.\(^ {222}\) The limited express provision pertaining to inmates with disabilities makes it difficult for them to know their rights and to enjoy amenities which they are entitled to.

4.4.1. Constitutional Rights applicable to detained and sentenced inmates

4.4.1.1. The right to be informed promptly of the reason for being detained (section 35(a)) and effective communication

The Constitution ‘provides that everyone who is detained, including every sentenced prisoner, has the right to be informed promptly of the reason for being detained.’\(^ {223}\) This right is the

\(^{218}\) S v Kruse, para 15.3.


\(^{221}\) Bruyns (2017) 463. See also Muntingh (2006) 46.

\(^{222}\) CSA 2004, s 16 (3).

\(^{223}\) Constitution of South Africa 1996, s 35 (2) (a).
The first constitutional guaranteed right that detained and sentenced prisoners are entitled to. This perhaps promotes the importance of the right.

‘The reason for detention should be given to the detainee clearly; the detainee should not have to deduce from the conduct of the arrestor what the possible reason could be.’\textsuperscript{224} As the aim is to inform a detainee, communication should be in a simple and non-technical language which can be understood by the detainee.\textsuperscript{225} The test for determining whether a detainee has been informed properly should be a practical one. McClachlin J’s words in \textit{R v Evans}\textsuperscript{226}

It is the substance of what the accused can reasonably be supposed to have understood, rather than the formalism of the precise words used, which must govern. The question is whether what the accused was told, viewed reasonably in all the circumstances of the case, was sufficient to permit him to make a reasonable decision to decline to submit to arrest, or alternatively, to exercise his right to counsel.

\textit{Evans} affirms that there should be an emphasis on the accused’s understanding of what he is subjected to. It is also necessary that he gives an indication of such understanding. For an accused with SHI this may mean using sign language or other hand gestures. An accused with SHI, who is handcuffed, will thus not be able to indicate whether or not he understands the reason for their arrest or detention. The right to be informed and to understand the reason for his arrest may thus be violated.

4.4.1.2. The right to conditions of detention that are consistent with human dignity (section 35(2)(e))

The Constitution makes provision for ‘everyone who is detained, including every sentenced prisoner, the right to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment’\textsuperscript{227}

\textsuperscript{224} \textit{Fox, Campbell and Hartley v United Kingdom} 30 Aug 1990 Series A no 182; \textit{Murray v United Kingdom} 28 Oct 1994 Series A no 300-A.

\textsuperscript{225} \textit{Fox, Campbell and Hartley v United Kingdom}, para 40.

\textsuperscript{226} \textit{R v Evans} (1991) 63 CCC (3d) para 303.

\textsuperscript{227} Constitution of South Arica 1996, s 35 (2) (e).
‘It is submitted that section 35(2)(e) the Constitution should be understood against the background of section 10 of the Constitution, which provides that everyone has inherent dignity and the right to have their dignity respected and protected’. 228 Prisoners right to dignity was established in common law and cited in the judgment of Corbett JA in *Goldberg v Minister of Prisons*229

Fundamentally a convicted and sentenced prisoner retains all the basic rights and liberties of an ordinary citizen except those taken away from him by law, expressly or by implication, or necessarily inconsistent with the circumstances in which he as a prisoner, is placed. Despite the prisoner having to submit to the discipline of prison life and rules and regulations which prescribe how he must conduct himself and how he is to be treated while in prison. Nevertheless there are substantial basic rights which he cannot be denied, if he is denied them, and then he is entitled to legal redress.

The Court held that the failure to take individual circumstances into account undermines the applicant’s right to dignity.230 In determining whether detention is consistent with human dignity, a distinction between comforts and necessities should be drawn.231 In *Minister of Justice v Hofmeyer*232 the court held that the ‘line of demarcation between the two concepts is so blurred and acutely depended upon the particular circumstances of the case’.233 In this regard if a detainee has a SHI, that increases vulnerability. This means that depending on the circumstances that the detainee finds himself, for example the detainee with SHI might find himself not having access to hearing aids or tools that will assist him to communicate effectively. The failure of the Correctional Service to take the circumstances of the detainee into account will undermine his right to dignity.

Although section 35(2)(e) should be understood against the background of the right to dignity. ‘Detainees are entitled to live in conditions that compare favourably with those under which people live outside of prison’.234 This means that conditions in prison must be conducive to

229 Goldberg and Others v Minister of Prisons and Others 1979 (1) SA 12 (A).
230 Goldberg and Others v Minister of Prisons and Others, 262.
231 Strydom v Minister of Correctional Services 1999 (3) BLCR 342 (W).
232 Minister of Justice v Hofmeyer 1993 (3) SA 131 (A) para 141H – 142A.
233 Minister of Justice v Hofmeyer, 22.
the needs of SHI inmates. It is well known that prisons are overcrowded, marred by violence and basic amenities must often be competed for. In this environment a SHI detainee may face complete negation of his rights. Arguably, SHI should therefore not be detained where the aforementioned conditions prevail. There should be improvements in the availability of interpreters to improve communication and also availability of assistive devices etc.

It has been argued ‘that the fact that many people live in absolute squalor does not permit the state to detain them under similar conditions’. 235 In *Van Biljon v Minister of Correctional Services* 236 the judge made ‘it clear that in determining what is adequate, regard must be had to what the state can afford’. 237 In *Strydom v Minister of Correctional Service* 238 the court reiterated that if anything to go by, ‘adequate’ amounts to much more than basic prison facilities. It has been argued that the position is less clear when considering adequate accommodation that enables understanding and effective communication 239 however, as mentioned above improvement is required and ought to include (though not limited) the mentioned amenities and support.

4.4.2. Risk of infringing the rights offenders with SHI in incarceration

There is no documented evidence of abuse and violence against SHI persons in prisons. However it is possible for these persons to be more vulnerable to violence and abuse due to their disability. Abuse and violence are prevalent in overcrowded prisons and offenders with SHI may be more vulnerable than those who can complain and negotiate for their safety.

4.4.3. Risk of infringing an offender’s right to be informed in a language which one understands

Due to financial constraints there are limited amounts of sign language interpreters. 240 The result of this may be that offenders with SHI are detained without being informed of prison regulations and instructions. Furthermore, the correctional services system is silent when it comes to accommodating offenders with SHI and cannot communicate through sign language.
interpreters.\textsuperscript{241} As a result of this offenders are not informed to understand, which leads an absence of effective communication and decision making from offenders with SHI. Offenders with SHI are at a disadvantage\textsuperscript{242} of not being informed to understand, therefore there is a high risk of section 35(2)(e) being infringed.

4.4.4. Risk of infringing the right to conditions of detention that are consistent with human dignity

In most prisons, financial constraints affect and limit the availability of sign language interpreters and assistive devices that can meet the needs of inmates within the South Africa the correctional service system. As a result, there is the sharing of assistive devices, which can cause extreme hardship for prisoners.\textsuperscript{243} In this regard prisoners are often left without the ability to be mobile when another inmate is using the assistive device and are forced to adapt to life without necessary accommodations.\textsuperscript{244}

Once the correctional services system fails to take into account circumstances faced by offenders with SHI then there is a high risk that an accused right to dignity\textsuperscript{245} will be infringed. Hearing devices are not comforts but a necessity for some offenders with SHI to understand and communicate effectively; therefore there is a high risk of adequate accommodation being restricted for offenders with SHI.\textsuperscript{246}

4.5. Conclusion

South African law lacks sufficient protections for offenders with SHI. This is evident during statement taking most police officers cannot inform accused of their rights. Furthermore, the right to a fair trial includes that an offender with SHI should understand and be understood during trial. To show that offenders with SHI understand the nature of the proceedings, they

\textsuperscript{241} Miller and Vernon (2005) 418. See also Leigh IW and Andrews JF \textit{Deaf people and society; Psychological, sociological and Educational Perspectives} 2 ed (2017) 202.
\textsuperscript{243} Bruyns (2017) 464.
\textsuperscript{244} Bruyns (2017) 464.
\textsuperscript{245} Goldberg and Others v Minister of Prisons and Others 1979 (1) SA 12 (A).
\textsuperscript{246} Strydom v Minister of Correctional Services 1999 (3) BLCR 342 (W).
need to be present physically and the emphasis must be on their understanding and to be understood. If they do not understand it is the courts duty to interpret so that an accused understands.

Furthermore, despite having different kinds of offenders with SHI, these offenders equally face risks of infringement with regards to their constitutional guaranteed rights. These risks of infringement have been discussed above in order to limit challenges faced by offenders with SHI in court proceedings. Judicial officers must be sensitive to the fact that there is great diversity within the hearing impaired population. Expert assessments should be undertaken in order to ascertain the nature and extent of the offender’s impairment and communication skills.247

247 S v Kruse, para 22.
CHAPTER FIVE
CONCLUSION AND RECOMMENDATIONS

5.1. Conclusion

Speech and Hearing Impairment leads to many challenges such as ‘educational disadvantage’, social exclusion and even risks of constitutional violations. These are not novel challenges, yet progress in addressing them has not been significant.

International legal frameworks such as the GCIV\(^1\), the GNCIII\(^2\), the ICCPR\(^3\) and the Rome Statute\(^4\) has provided for sign language interpretation in and out of court. These International legal frameworks have provided for ‘free assistance of an interpreter in case one cannot understand or speak the language used in court’\(^5\). This includes ‘prompt access to legal and other appropriate assistance for juvenile offender as well,\(^6\) for example, assistance of an interpreter if the child cannot understand or speak the language used’\(^7\). This involves one being questioned in a language, other than their mother tongue or home language.

The African Protocol is the only Regional legal framework that takes appropriate and effective measures to facilitate enjoyment by persons with disabilities, this has been on basis of equality including: facilitating provision of assisters, including interpreters, guides, auxiliary and augmentative supporters and caregivers. The Protocol further respects the rights, will and preferences of persons with disabilities\(^8\).

International and Regional legal frameworks do not speak directly to the actual challenges faced by offenders with SHI in the criminal justice system. Legal framework mentioned above could be used to address gaps within the law and also assist in drafting laws that deal with challenges faced by offenders with SHI.

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5. ICCPR 1966, article 14 (2) (f).
6. CRC 1989, article 37 (d).
7. CRC 1989, article 40 (2) (b) (vi).
8. Protocol to the African Charter, article 16 (2) (d).

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Domestic law and the Constitution does not make direct provision for sign language interpretation. However ‘section 35(4) provides that when information is given, such information to be given to a person in a language that the person understands’. As evident in the _Kruse_ case, the Court discovered that not every offender with SHI is able to communicate through sign language interpreter. The Magistrates Court Act and the Uniform Rules of Court further impose duties on courts in criminal cases that upon identifying the inability of the accused to understand the courts instruction and language an interpreter should be requested at state expense. “This includes a competent interpreter, sworn to interpret faithfully and to the best of his ability in the language concerned”.

The WPRPD focuses on the lack of access to justice across the value chain of the justice system, caused by communication barriers between appointed South African Sign Language interpreters and the hearing-impaired persons. The paper further highlights that communication barriers are experienced by hearing impaired persons who do not have sufficient proficiency in South African Sign Language.

Domestic law does not have specific legislation pertaining to the rights of persons with disabilities in the criminal justice system. The country has few domestic laws and policies that can be referred to in dealing with challenges faced by offenders with SHI. Despite the 2015 White Paper being the first step, a lot more still needs to be done to remedy challenges faced by offenders with SHI.

International, Regional and Domestic provisions should confer the right to the services of competent interpreters specifically upon persons with SHI. These provisions do not address challenges faced by offenders with SHI. Consequently these offenders continue to experience

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10 _Kruse v S_ (A100/2018) [2018] ZAWHC 105; 2018 (2) SACR 644 (WCC).
11 MCA 1944, s 6 (2).
12 Uniform Rules, rule 61 (1).
13 WRPD (2016) 66.
14 WRPD (2016) 66.
challenges and face risks of getting their rights infringed, during voluntary statement taking, court proceedings and in incarceration.

5.2. Recommendations

There are few measures that can make these inevitable limitations reasonable. These include proper application of a test to determine fitness to stand trial as expressed in *Kruse*, the availability of interpreters where it may improve communication sufficiently, availability of assistive devices especially during incarceration and suitable training for criminal justice system officials. All the aforementioned above may require laws specifically dealing with the plight of SHI in the Criminal Justice System.

Police officers should be trained or encouraged as to how to inform offenders with SHI of their right to an interpreter. Article 13 and 14 of the ICESCR clearly states that education shall be a measure that enables ‘all persons to participate effectively in a free society, promote understanding and further the activities of the United Nations for the maintenance of peace’.  

The ‘failure to recognise the importance of informing/educating an accused of his right to consult with a legal advisor during the pre-trial stage deprives such person, especially the uneducated, the unsophisticated and the poor, of the protection of their rights’.  

Educational programmes should be created to educate SHI people about their rights in court procedures, such as how to use interpreters and legal terminology. This should include Interdisciplinary training and general role plays that involve all stakeholders in order to ensure full access to justice for vulnerable and neglected offender with SHI in our society.

Police officers should not only be trained to inform offenders with SHI of their right to call interpreters but also take initiatives to call an interpreter or caregiver/ family member of those who don’t understand sign language during a statement taking and court proceedings. Through this these offenders will be assisted in order to understand court proceedings and to

16 ICESCR, article 13.
17 *S v Agnew* 1996 2 SACR 535 (C) para 540h – I, See also *S v Mathebula* 1997 1 BCLR 123 (W) para 132G – H.
follow instructions from court officials\(^{20}\) even though there is controversy around the legal test for competency to testify. Judicial officers can provide an exception that the accused can be assisted by family members in order for offenders with SHI to be able to communicate effectively and stand trial.\(^{21}\) This may provide assurance of fairness and understanding.

Expert assessments should also be undertaken in order to ascertain the nature and extent of the offender’s impairment and communication skills.\(^{22}\) In case of SHI offenders, a court must also be alive to the fact that special measures may be necessary to respect, protect, promote and fulfill SHI offender’s right to a fair trial.\(^{23}\) This will prevent courts from escaping their duties to deal with matters affecting offenders with SHI. Furthermore clearer policies and procedures should be created in order to determine interpreters’ competence and integrity.\(^{24}\) This includes Interpreters being required to swear under oath to interpret faithfully and to the best of their abilities.\(^{25}\)

Furthermore due to resource limitations that absolutely negates rights of SHI offenders. Offenders with SHI should be offered free hearing aids, interpreters or interpreters at state expense without being limited due to financial constraints.\(^{26}\) The Correctional Services Act 111 of 1998 should be amended to make provision for the special treatment of prisoners with disabilities, instead of able bodied persons. Furthermore special treatment should be provided to all inmates despite them having a disability.\(^{27}\) This should be done without depending on the circumstances of each detainee, but a detainee should have unlimited access to hearing aid tools.

In summation of the above recommendations, there is still a need for laws and regulations that deal directly with challenges faced by offenders with SHI in the criminal justice system.

\(^{20}\) Dagut and Morgan (2003) 30. See also Kruse v S, para 11.

\(^{21}\) Kruse v S, para 18.

\(^{22}\) Kruse v S, para 22.

\(^{23}\) Kruse v S, para 23.

\(^{24}\) Matemane v Magistrate, Alberton 1991 4 SA 613 (W) para 6191; S v Ndala, para 222h.

\(^{25}\) S v Ndala, 221-222; S v Saidi 2007 (2) SACR 637 (C) The court held that the interpreter should be sworn in.

\(^{26}\) Bruyns (2017) 464

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