

Assessing the right to physical access to justice, for persons with disabilities

A mini-thesis submitted to the Law Faculty of the University of the Western Cape in partial fulfilment for the LL.M

Supervisor: Prof Benyam Dawit Mezmur

Ayesha Roomaney

2866354



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I would like to thank my parents, as well as my parent's in-law whose love and guidance are with me in whatever I pursue. I wish to thank my loving and supportive husband, whose patience during this process has been really appreciated. Lastly, I would like to thank my supervisor Professor Benyam Dawid Mezmur who made me believe I could achieve this and helped me along the way so much.

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KEY WORDS

Access to justice

Physical accessibility

Inaccessibility

Physical barriers

Persons with disabilities

Justice system

Denial of rights

Mobility impairments

Persons with disabilities

Convention on the Rights of Persons with Disabilities



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LIST OF ABBREVIATIONS

CEDAW-Convention on the Elimination of All Forms of Discrimination Against Women

CRC –Convention on the Rights of the Child

ICCPR - International Covenant on Civil and Political Rights

ICESCR- Intenational Covenant on Economic, Social and Cultural Rights

UDHR- Universal Declaration of Human Rights

UNCRPD- United Nations Convention on the Rights of Persons with Disabilities

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CHAPTER ONE

1. INTRODUCTION

1.1 Background

Access to justice for persons with disabilities is specifically safeguarded in a number of international conventions, standards and recommendations. The Rights of Persons with Disabilities to access to justice is explicitly referenced in Article 13 of the Convention on the Rights of Persons with Disabilities¹. Access to justice was first formally referenced in the Universal Declaration of Human Rights(UDHR)², which is a formative human rights document, the term access to justice was not however specifically used to label the right therein. The International Covenant on Civil and Political Rights (ICCPR) also sets forth this right in Article 14, which states that: “all persons should be equal before the courts and tribunals.”³ However in reality persons with disabilities, often lack access to justice and equal protection of the law. ⁴

Too often are persons with disabilities denied fair and equal access to justice. For many persons with disabilities, the justice system, or the way to the justice system, is not accessible. Some of the key issues people with disabilities face are: lack of physical access to courts, unfair treatment as victim, witness or offender, limited use of communication, and a lack of awareness about laws and services that apply to persons with disabilities.⁵

¹ Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106 (2007) [hereinafter CRPD].

² Universal Declaration of Human Rights, G.A. Res. 217 (III), U.N. Doc. A/RES/217(III), (Dec. 10, 1948) [hereinafter UDHR]. Article 7: “[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”

³ International Covenant on Civil and Political Rights, art. 14, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967) [hereinafter ICCPR].

⁴ Brooks J et al (2013) *Strengthening Judicial Integrity through Enhanced Access to Justice: Analysis of the national studies on the capacities of the judicial institutions to address the needs/demands of persons with disabilities, minorities and women.*

⁵ Future Policy.org, FuturePolicy.org is the successor of Policy Action on Climate Toolkit - PACT project, which was introduced in 2007 ‘Access to Justice’ (UN CRPD Article 13) available at <http://www.futurepolicy.org/5789.html> (accessed on 1 April 2014).

In any country, be it in Africa or elsewhere, persons with disabilities are frequently denied access to fair and equal treatment before courts, tribunals, law enforcement officials, and prison systems. Persons with disabilities are often unable to rise in the legal profession, judiciary, and other positions within the judicial system. In addition to this, they are also often unable to serve as witnesses or jurors, thus barring them from contributing to the functioning under the system in which they live.⁶

Persons with disabilities in South Africa are also affected by the lack of physical accessibility to access to justice, due to the fact that many courts across Africa are housed in old structures; this presents barriers for persons with mobility limitations such as stairs, narrow doorways, and inaccessible restrooms.⁷

The research paper will seek to set out the South African position regarding physical access to justice for persons with disabilities.

1.2 Problem statement

In order for persons with disabilities to enjoy all other human rights, the ability to access justice is of critical importance. If a person feels that they have been denied a right, or that they have been a victim of a crime, they may want to turn to the justice system, in order to seek a remedy. However, if the person with the disability is not accommodated by the justice system in terms of disability related needs, he or she is discriminated against. This will result in a denial of full access to the justice system, and a denial of the rights the person was evoking in the first place.⁸

Access to justice is a fundamental human right, and it has always been a concern to persons with disabilities. People, who are engaged in the negotiation of the Convention

⁶ Grant E & Neuhaus R, *'Liberty and Justice for all: The Convention on the Rights of Persons with Disabilities'* (2013) 19 *ILSA J Int'l & Comp L* 347.

⁷ Lord JE & Stein MA *'Prospects and practices for the Convention on the Rights of Persons with Disabilities'* *African Disability Rights Yearbook Volume 1 2013 page 110.*

⁸ Future Policy.org FuturePolicy.org is the successor of Policy Action on Climate Toolkit - PACT project, which was introduced in 2007' 'Access to Justice' (UN CRPD Article 13) available at <http://www.futurepolicy.org/5789.html> (accessed on 1 April 2014).

on the rights of persons with disabilities, understand the long history of denial of access to justice. Katherine Guernsey states that, "Article 13 seeks to respond to the historic exclusion, in many societies, of persons with disabilities from the justice system. For example, disabled persons are often denied the opportunity to serve as jurors, and those who are victims of crime are often unable to seek redress, either because the police or other officials do not know how to accommodate them, or because their experiences are discounted out of hand, or even because of explicit prohibitions on their participation as witnesses. Given that persons with disabilities are often at higher risk of being victims of violence, delegates to the AHC found the additional barriers faced by many in their access to justice particularly troubling".⁹ Anna Lawson has stated that, "there is an obvious connection between the exclusion of people with disabilities from the mainstream and their inability to access its physical environment or transport systems".¹⁰ The fundamental issue governing all other issues is the issue of valuing the lives of persons with disabilities. The lives of persons with disabilities are often not valued to the same degree as those of non-disabled persons, evidence suggests. If these rights are denied, the result is the civil death, of the person affected.¹¹ The links between establishing democratic governance, reducing poverty and securing access to justice are very strong. When access to justice for all citizens is absent, democratic governance is undermined. Access to justice is also closely linked to poverty reduction since being poor and marginalized means being

⁹ Guernsey K et al, *World Bank, Convention on the Rights of Persons with Disabilities: Its Implementation and Relevance for the World Bank*, SP Discussion Paper No. 0712, June 2007, at 13, available at <http://siteresources.worldbank.org/SOCIALPROTECTION/Resources/SP-Discussion-papers/Disability-DP/0712.pdf> (last visited Feb. 22, 2011).

¹⁰ Lawson A, *The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?*, 34 SYRACUSE J. INT'L. L. & COM. 563, 573 (2007).

¹¹ Lawson A, *The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?*, 34 SYRACUSE J. INT'L. L. & COM. 563, 573 (2007).

deprived of choices, opportunities, access to basic resources and a voice in decision-making.¹² The effectiveness of poverty reduction and democratic governance programmes is limited by a lack of access to justice, due to the fact that participation, transparency and accountability are limited.¹³

1.3 Research question

Is South Africa complying with its obligations under Article 13 of the Convention on the Rights of Persons with Disabilities¹⁴, in respect of physical access to justice for persons with disabilities?

1.4 Aims and rationale of the research paper

This research paper seeks to investigate a specific aspect of disability law, namely the right of disabled persons with regard to physical access to justice, which has been selected for the purpose of this study. Physical access to the institutions of the justice system has had many far reaching developments over the last decade, both nationally and internationally. The aim of this research paper is to determine whether South Africa is progressing in making the justice system physically accessible for persons with disabilities. The rationale behind focusing on South Africa is due to the fact that in 2004, in the *Esthe Muller v Department of Justice and Constitutional Development, and the Department of Public Works* case¹⁵, the two government departments committed to a plan to ensure that all court buildings throughout the country will be made accessible

¹² Access to Justice: Practice Note, United Nations Development Programme (Sept. 3, 2004), available at http://www.undp.org/governance/docs/Justice_PN_English.pdf (last visited April. 7, 2014).

¹³ Access to Justice: Practice Note, United Nations Development Programme (Sept. 3, 2004), at 3, http://www.undp.org/governance/docs/Justice_PN_English.pdf (last visited April. 7, 2014).

¹⁴ CRPD Article 13.

¹⁵ *Esthé Muller v DoJCD and Department of Public Works* (Equality Court, Germiston Magistrates' Court 01/03).

within five years. Specific actions are to be completed by specific dates according to the plan, and the departments will report on their progress to the equality court.¹⁶

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1.5 Literature Survey

Janet E. Lord, et al states that, a human right cannot be enjoyed by any person if they do not have access to it. There are many barriers that persons with disabilities currently face,

¹⁶ Lord JE, et al, *Human Rights Yes! Action and Advocacy on the rights of persons with disabilities* 2 ed (2012) ch 2 pages 3,4,11 and 12.

¹⁷ CRPD Article 13.

¹⁸ *Esthé Muller v DoJCD and Department of Public Works* (Equality Court, Germiston Magistrates' Court 01/03).

¹⁹ Lord JE, et al, *Human Rights Yes! Action and Advocacy on the rights of persons with disabilities* 2 ed (2012) ch 2 pages 3,4,11 and 12.

that prevent them from fully enjoying their human rights. Ensuring an accessible environment for disabled persons is of critical importance. This is due to the fact that it directly affects the enjoyment of a full range of human rights by people with disabilities. A lack of accessibility can prevent a person with a disability from fully enjoying any human right. Additionally, specific barriers to access can have a negative effect on the enjoyment of multiple human rights.

They further state that, accessibility is intended to inform and assist in the interpretation and implementation of all the human rights elaborated in the CRPD. The drafters of the CRPD intended Article 9 to be the common reference point for all issues of accessibility. If a person is seeking to implement Article 13 of the CRPD, an important starting point would be Article 9, when considering how to improve the accessibility of for example courthouses.²⁰

Janet E. Lord similarly states that, in Article 9 of the CRPD, state parties commit to identify and remove obstacles and barriers to access. Therefore she argues that a duty is thus imparted on state parties to ensure access through the removal of barriers. In that sense she states that, one can identify a clear duty to accord access.²¹

Esme Grant and Rhonda Neuhaus state that, although it is not directly stated by Article 13 of the Convention on the Rights of Persons with Disabilities (CRPD), what is of absolute importance to the success of the Treaty, is the inclusion of people with disabilities at all levels. They further state that, the result of not incorporating the perspective of persons with disabilities, are barriers to justice and failing mechanisms to achieve a justice system that is fair and accessible to all.²²

²⁰ Lord JE, et al, *Human Rights Yes! Action and Advocacy on the rights of persons with disabilities* 2ed (2012) chapter 2 pages 3,4,11 and 12.

²¹ Lord JE, *Accessibility and human rights fusion in the CRPD: Accessibility the scope and content of the accessibility principle and duty under the CRPD*. Presentation for the general day of discussion and accessibility. CRPD Committee, UN Geneva, October 07 2010.

²² Grant E & Neuhaus R, '*Liberty and Justice for all: The Convention on the Rights of Persons with Disabilities*' (2013) 19 ILSA J Int'l & Comp L 347.

Similarly, Janet E. Lord et al, states that in order for persons with disabilities to be fully included in society, they need access to justice; as long as these barriers to access to justice remain they will be unable to assume their full responsibilities as members of society or their rights. Therefore it is of utmost importance that these barriers are removed, so that persons with disabilities can enjoy the equal opportunity to perform their duties as witnesses, lawyers, and judges and, other participants in the administration of justice.²³

Stephanie Ortoleva, states that due to disabled persons facing barriers, they have often been denied access to fair and equal treatment before courts, tribunals, law enforcement officials, prison systems, and other bodies that make up the justice system in the country. There are numerous ways in which persons with disabilities are denied access to justice. She argues that one of the most obvious barriers to access to justice for persons with disabilities is the physical barriers to courts and other institutions of the justice system. The symbols of the justice system which are court houses are often inaccessible in many ways.²⁴

She, further states that, persons with disabilities have also been discriminated against in terms of attaining positions as lawyers, judges and other officials in the justice system. She argues that persons with disabilities are further prevented from assuming the societal responsibility of serving as jurors, and this too she argues is due to physical inaccessibility and attitudinal barriers in the courthouse, as well as other elements of the justice system.²⁵

Janet E Lord argues that the reason for the physical inaccessibility of persons with disabilities is due to the fact that many courts across Africa are housed in old structures; this presents barriers for persons with mobility limitations such as stairs, narrow doorway, and inaccessible restrooms. They further states that new structures that are financed by international development aid, that are at the design phase do not take accessibility into

²³ Lord JE et al *Human Rights Yes! Action and Advocacy on the rights of persons with disabilities* 2ed (2012) chapter 12 page 1.

²⁴ Ortoleva S *'Inaccessible Justice: Human Rights, Persons with Disabilities and the Legal System'* (2011) 17 ILSA J. Int'l & Comp. L. 281.

²⁵ As above.

account at all. This introduces barriers for disabled persons, and creates future redevelopment costs for beneficiary countries, is equally problematic.²⁶

Al Mudena Castro –Girona Martinez, proposes a solution to this inaccessibility faced by persons with disabilities. She states that physical inaccessibility must be based on universal design or design for all. This implies the need for actual adaptation of the judicial body, in order to offer people with disabilities full protection, through the creation of new spaces guaranteeing accessibility to justice. She further states that justice administration is required by people with disabilities before the proceedings, to adopt the set of measures, services and supports allowing them free of any discrimination, in order to have access to courts on an equal footing with others.²⁷

All the authors that I have mentioned above have emphatically stated the importance of physical accessibility, to the inclusion of persons with disabilities. They have emphasized the importance of physical accessibility of persons with disabilities before courts, law enforcement officials, prison systems, and other bodies that make up the justice system in the country.

The significance of this study is the fact that physical accessibility with regard to access to justice of disabled persons has not been adequately dealt with in terms of a South African perspective.

1.6 Methodology

The research will make use of primary and secondary sources. The primary sources will consist of the Convention, an analysis of case law and legislation. The secondary sources consist of journal articles and textbooks documenting and analyzing the primary sources.

²⁶ Lord JE & Stein MA 'Prospects and practices for the Convention on the Rights of Persons with Disabilities' African Disability Rights Yearbook Volume 1 2013 page 110.

²⁷ Martinez ACG, Notary of Barcelona, "Access to justice", available at http://www.era-comm.eu/UNCRPD/kiosk/speakers_contributions/412DV01/Martinez_pres.pdf (accessed on 1 April 2014).

CLARIFICATION OF CONCEPTS: ACCESSIBILITY AND ACCESS TO JUSTICE:

1.7 Accessibility:

Article 9 of the CRPD concerns accessibility.²⁸ There is no definition of accessibility provided in any documents. Accessibility has a number of meanings and therefore this is prima facie surprising. The omission of a meaning for accessibility can be justified by the fact that, at least in the context of discrimination and services, the expression “accessibility rights” is sufficiently clear to indicate the general concept that physically disabled people shall not be prevented from using, and attaining an equal benefit from, services exclusively because of a physical obstacle. What follows from this is that the term accessibility can be employed as referring to the right to use and obtain an equal benefit from, the provision of goods, services, facilities, and accommodations generally available to the public without discrimination because of physical disability.²⁹

Article 9 of the CRPD is an innovative provision that formulates, for the first time in a UN human rights agreement, a right to accessibility. Accessibility’ is not only a conventional right in itself but also a general principle of the CRPD. Therefore, the CRPD articles on accessibility in general, and Article 9 in particular, cannot be read in isolation, and therefore accessibility has to be applied when other rights in the CRPD are applied.³⁰

The CRPD is the first legally binding international convention to provide a more clear understanding of what the governments responsibilities are in terms of thoroughly addressing accessibility so that persons with disabilities live independently and participate fully in all aspects of life.³¹ The State is required by Article 9 of the CRPD to make sure that persons with disabilities are able to access a wide range of venues, facilities and

²⁸ CRPD Article 9 Accessibility.

²⁹ Fina, Cera & Palmisano, *The United Nations Convention on the Rights of Persons with Disabilities*, a Commentary ed, (2017) page 227.

³⁰ As above.

³¹ Human Rights Yes! Action and Advocacy on the Rights of Persons with Disabilities, Chapter 2 page 44.

services on an equal basis with others. Article 9 also provides that States must identify and eliminate obstacles and barriers to accessibility³²

1.8 Access to justice:

Article 13 of the CRPD refers to access to justice, it guarantees the right of persons with disabilities to effective access to justice on an equal basis with others, to effective access to justice at all phases of the administration of justice, to be direct and indirect participants, including being witnesses to receive procedural and age appropriate accommodations to facilitate their access to justice. States are also required by Article 13 to provide training to those working in the administration of justice in order to help ensure effective access to justice for people with disabilities.^{33 34}

The right to access justice at first glance might be thought to only refer to justice claims pursued through the formal legal system. Access to justice is defined by Lord et al as; ‘encompassing people’s effective access to the systems, procedures, information, and locations used in the administration of Justice’ Such a broad definition ensures that the conceptualisation of access to justice is framed to address a wide range of scenarios in which persons with disabilities, and others, make claims about their rights, seek to enforce their entitlements or claim justice.³⁵

There was no specific articulation of a general right to ‘access justice’ in the core text of any UN human rights treaty prior to the entry into force of the CRPD. The rights to an effective remedy and a fair trial might be considered as logical precursors to the broader right to access justice.

1.9 Chapter outline

Chapter one sets the background to the study, provides a problem statement, a research question, the aims and rationale of the research paper, a literature survey, as well as the

³² CRPD Article9.

³³ Human rights yes access to justice part 2 chapter 12 page 158.

³⁴ CRPD, Article 13(1) (2).

³⁵ Fina, Cera & Palmisano, The United Nations Convention on the Rights of Persons with Disabilities, Commentary ed, (2017) page 282.

methodology that will be used throughout this paper. This chapter will also contain a conceptual clarification of certain concepts that I will be referring to. Chapter two examines the international standards of the CRPD with regard to access to justice in particular, with reference to the ICCPR, ICESCR, CEDAW as well as the CRC. Chapter three sets out the South African position in order to determine whether South Africa is complying with its obligations under the CRPD. And Chapter four sets out the conclusion as well as make recommendations. Final Chapter concludes and offers some recommendations.

CHAPTER 2

2. EXAMINING THE INTERNATIONAL STANDARDS:

2.1 Introduction:

In this paper I will discuss access to justice as well as accessibility, under the CRPD³⁶ in particular. I will make reference to four international instruments and they are; the ICCPR³⁷, as well as the International Covenant on Economic Social and Cultural Rights (ICESCR)³⁸, the Elimination of all Forms of Discrimination against Women (CEDAW)³⁹ as well as the Convention on the Rights of the Child (CRC)⁴⁰. I will not be addressing regional instruments because I believe that it is a better decision to prioritize the CRPD than to develop an African Regional disability Protocol.

2.2 Physical Access to justice under the different international instruments:

The right of persons with disabilities to have meaningful and effective access to justice in all its phases is strongly supported by International Human Rights law, so that persons

³⁶ CRPD.

³⁷ ICCPR.

³⁸ ICESCR.

³⁹ CEDAW.

⁴⁰ CRC.

with disabilities may better enjoy their other human rights and fully assume their responsibilities as members of society.⁴¹

In some international instruments there is an express guarantee of the right of access to courts, such as the African Charter to Human and Peoples Rights⁴². Other international agreements do not contain such an express guarantee such as the ICCPR, guarantee the right to a “fair and public hearing”, which has been interpreted to include a right to a remedy. Many international covenants designed to promote specific substantive rights also require states to guarantee access to the courts as a means to enforce those rights.⁴³ Access to justice and human rights converge in a number of ways. First, access to justice is in itself a fundamental human right. Secondly, once the access to justice right is guaranteed then it is a means to protect and enjoy other rights. Thirdly, in order for the access to justice right to be truly enjoyed a number of other rights must also be protected. Such as the right to physical safety.⁴⁴ The right of access to justice is intrinsic to all human rights treaties.⁴⁵

A universal respect for, and observance of, human rights and fundamental freedoms without distinction is what the United Nations Charter affirms. Important standards for the protection of the rights of persons belonging to minorities including women and persons with disabilities are provided by the General UN human rights treaties. The rights guaranteed in all UN human rights conventions apply equally to all members of minority groups, including women and persons with disabilities.⁴⁶ This means that the CRC applies equally to all children and the CRPD applies equally to all disabled persons.

⁴¹ Lord JE et al *Human Rights Yes! Action and Advocacy on the rights of persons with disabilities* 2ed (2012) chapter 12 page 163.

⁴² Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

⁴³ Development Cooperation Ministry of Foreign Affairs (2012) – Access to Justice in Namibia: Proposals for Improving Public Access to Courts- ACCESS TO JUSTICE AS A HUMAN RIGHT, Page 1.

⁴⁴ Global Alliance Against Traffic in Women: 'The Right To Access Justice' available at <http://www.gaatw.org/atj/index.php?option=com> (accessed 03 November 2014).

⁴⁵ (2011)17 ILSA J. Int'l & Comp. L. 292.

⁴⁶ UNDP REGIONAL CENTRE FOR EUROPE AND THE CIS, *Strengthening judicial integrity through enhanced access to justice*, pg8.

The rights of persons with disabilities are to be exercised on an equal basis with others under all the international treaties. When persons with disabilities fully participate, this benefits society, because when they make their individual contributions, this enriches all spheres of life which is an essential part of individuals as well as societies well-being and progress for a society for all with or without disabilities. The foundation of the rights of persons with disabilities is the principle of the right to equality which is addressed throughout normative standards set out by international human rights. The need for all states to incorporate human rights standards into their national legislation has been increasingly recognized by contemporary international human rights law.⁴⁷ Even though Countries use different means in order to promote the full realization of economic, social and cultural rights of persons with disabilities, no country is exempt from the need for improved policies and laws for individuals with disabilities.⁴⁸

2.3 Access to justice under the CRPD:

The CRPD explicitly states that human rights and fundamental freedoms apply to all persons with disabilities. It provides that the aim of the CRPD is to ensure that all human rights and fundamental freedoms are promoted, protected⁴⁹ and fulfilled and that the inherent dignity of persons with disabilities are promoted and respected.⁵⁰

In February 2005 the Ad Hoc Committee conducted its fifth session, and whether a separate article was needed in order to guarantee equal access to justice was again discussed. Many delegations supported a proposal to draft a separate article on this issue, including Costa Rica, Mexico, Chile, the EU, Norway and Japan. Several delegations then met informally to draft Article 9 which states that: 'States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, facilitating their

⁴⁷Enable United Nations, Human Rights and Persons with Disabilities, available at www.un.org/esa/socdev/enable/rights/humanrights.html (accessed on 15 October 2014).

⁴⁸ As above.

⁴⁹ CRC Preamble paragraph (j).

⁵⁰ CRC Preiamble paragraph (a).

effective role as direct and indirect participants in all legal proceedings, including the investigative and other preliminary stages’.

During the final two sessions of the Ad Hoc Committee, this text was removed from Article 12 on equal recognition before the law and became Article 13 of the CRPD.

In recent years the concept of access to justice has attracted significant attention in human rights discourse. In order to realize human rights for many marginalized communities, access to justice is key, including for persons with disabilities. Throughout history social movements have sought to enunciate how this right should apply to them so that they can assert and enforce all other human rights. On the face of it the right to access justice might be thought to only refer to justice claims pursued through the formal legal system. However if we take a look at Janet. E. Lords broad definition of access to justice she defines access to justice as ‘encompassing people’s effective access to the systems, procedures, information, and locations used in the administration of justice’, then access to justice is framed to address a wide range of scenarios in which persons with disabilities and others make claims about their rights, seek to enforce their entitlement or claim justice. No human rights treaty prior to the entry into force of the CRPD provided any articulation of a general right to access to justice in its core text. However, the right to an effective remedy and a fair trial, encompasses a broader right to access to justice. Article 13 is now a specific right which emerged from the negotiation of the CRPD.⁵¹

Article 13 of the CRPD⁵² is very brief in that it only consists of two paragraphs; however, it provides a forewarning for domestic legal systems. It sets out access to justice by people with disabilities as a set of measures, services and support, allowing them to use the public justice services without any discrimination so that they may on an equal basis

⁵¹ Fina, Cera & Palmisano ed, (2017) page 281-282.

⁵² CRPD Article 13 (1) and 13(2).

with others effectively exercise their rights with others through the personal or technical supports required in order to secure the level of personal autonomy in this sphere.⁵³

The first paragraph of Article 13 is primarily focused on participation in the ‘legal system’ while including within this ‘all investigative and preliminary stages’. It also uses the terminology of persons with disabilities as ‘direct and indirect’ participants—which is not further defined in the text of the Article. Interestingly, the second paragraph of Article 13 takes a broader interpretation of the ‘administration of justice’ in its requirement to ensure training of police and prison staff.⁵⁴ These approaches will be discussed further below as they have been drawn on in the Concluding Observations and General Comments issued by CRPD Committee, as well as in the academic literature on this subject.

The CRPD helps to ascertain how states can respect, protect and fulfill the enjoyment of access to justice by persons with disabilities.⁵⁵

The CRPD is based upon the principles of respect for dignity, non-discrimination, participation and inclusion, respect for difference, equality of opportunity, accessibility, equality between men and women and respect for children. Article 3 of the CRPD sets out eight general principles, these principles provide state parties and stakeholders with guidance in order to achieve the purpose of the CRPD set out in Article 1.⁵⁶ These principles are the starting point for understanding and interpreting the rights of persons with disabilities, providing benchmarks against which each right is measured.⁵⁷

Respect for human dignity is of paramount importance because it is not only one of the principles of the CRPD but also one of its purposes, it emphasizes that people are already

⁵³ Guernsey K et al, *World Bank, Convention on the Rights of Persons with Disabilities: Its Implementation and Relevance for the World Bank*, SP Discussion Paper No. 0712, June 2007, at 13, available at <http://siteresources.worldbank.org/SOCIALPROTECTION/Resources/SP-Discussion-papers/Disability-DP/0712.pdf> (last visited July. 05, 2011).

⁵⁴ Fina, Cera & Palmisano ed, (2017) page 285.

⁵⁵ As above.

⁵⁶ Fina, Cera & Palmisano ed, (2017) page 120.

⁵⁷ Office of the High Commissioner for Human Rights 2010- Monitoring the Convention on the Rights of Persons with Disabilities 2010 (17).

born with dignity which must be respected. Respect for human dignity implies the respect for the integrity of each human being, because all people have this inherent dignity, all human beings are equal and right bearers and should not suffer forms of discrimination. Respect for dignity is denied when, for example, workers who are blind are forced by their employer to wear a shirt with the word “blind” printed on the back.⁵⁸

The principle of individual autonomy, is relevant for persons with disabilities as they do not have any equal opportunities in seeking self-realisation and inclusion in community and political life. With regards to the principle of independence this not only implies the right to make choices regarding their personal sphere in a free and conscious manner but also the right to take part actively in the social context they live. Under this principle, States Parties are required to promote the empowerment of persons with disabilities through social policies designed to develop their personal skills and to enhance their self-esteem and independence in conformity with Article 19 of the CRPD.⁵⁹

Another principle is non-discrimination it is a legal cornerstone of the Convention.⁶⁰ It is a fundamental and well established principle in International Human Rights law, it is closely intertwined with equality before the law and equal treatment, and it plays a vital role in the protection of human rights especially for the rights of persons with disabilities. It means that all rights are guaranteed to everyone without distinction, exclusion or restriction based on disability or on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, age, or any other status.⁶¹

Article 5 of the CRPD requires that positive action must be taken by states parties to remedy the disadvantage suffered by persons with disabilities in order to achieve de facto or substantive equality.⁶² Discrimination occurs, for example, when a woman is not

⁵⁸ Office of the High Commissioner for Human Rights 2010- Monitoring the Convention on the Rights of Persons with Disabilities 2010 (18).

⁵⁹ Fina, Cera & Palmisano ed, (2017) page 124.

⁶⁰ M Schulze: a handbook on Persons with Disabilities, Understanding the UN Convention on the Rights of Persons with Disabilities (2009) 30.

⁶¹ Office of the High Commissioner for Human Rights 2010- Monitoring the Convention on the Rights of Persons with Disabilities 2010 (19)

⁶² CRPD Article 5(4).

allowed to open a bank account on the' grounds that her disability would not allow her to manage her money.⁶³

In the case of *Tennessee v Lane* it was held that: 'The long history of unequal treatment of disabled persons in the administration of judicial services has persisted despite several state and federal legislative efforts to remedy the problem'.⁶⁴

It was also held in the case of *Galloway v Superior Court of District of Columbia*: 'Individuals with disabilities have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society'.⁶⁵

Among the many objectives of the CRPD is the full and effective participation and inclusion of persons with disabilities in social life. The preamble provides that persons with disabilities should have the opportunity to be actively involved in the decision making process about policies and programmes including those directly concerning them.⁶⁶

Article 5 of the CRC states that parents have the right and the responsibility to provide direction and guidance to their children, it further states that such guidance must however be 'appropriate', be directed to 'the exercise by the child of their rights', and be provided 'in a manner consistent with their evolving capacities. This unique provision in international law recognises that children aged between 0–18 years cannot all be treated exactly the same. As they acquire competencies, they require less guidance and direction

⁶³ Office of the High Commissioner for Human Rights 2010- Monitoring the Convention on the Rights of Persons with Disabilities 2010 (19-20).

⁶⁴ *Tennessee v Lane* 541 U.S. 509.124 S.Ct.1978 (2004).

⁶⁵ *Galloway v Superior Court of District of Columbia*, 816 F. Sup. 12 (D.C. 1993).

⁶⁶ CRPD Preamble paragraph (0).

and are increasingly able to take responsibility for their own decisions⁶⁷. Thereby allowing the child to participate and be included in the right to make decisions.

Equality means creating societal conditions that respect difference, address disadvantages and ensure that all women, men, girls and boys participate fully on equal terms. When a girl with a disability is taken out of school by her parents despite her good grades, her parents decide that it is useless to spend money on her education because of her disability then her right to equality is denied. Achieving equality sometimes requires additional measures.⁶⁸ The means for disabled persons to access or participate in public or private life are designed for able-bodied people; therefore disabled persons are often unable to access or participate in public or private life. The result is that persons with disabilities needs are overlooked. Therefore the prohibition against the discrimination against disabled people cannot be understood in negative terms only. It includes a positive duty to take steps to ensure the reasonable accommodation of disabled persons. Doing nothing in itself can constitute unfair discrimination on the grounds of disability. The right not to be unfairly discriminated against can only be experienced by positive action.⁶⁹

Reasonable accommodation,⁷⁰ requires an adjustment to standard practice or procedure in order to remove a particular disadvantage at which a specific person with a disability would otherwise be placed in their attempt to access justice.⁷¹ Persons with disabilities must be accommodated in court and other legal proceedings, such as administrative hearings, this relates to the fundamental right to be heard. At all stages of a judicial process access must be provided to all participants.⁷²

⁶⁷ Lansdown G, 2002, Unicef, Using the human rights framework to promote the rights of children with disabilities: working paper: an analysis between the synergies between CRC, CRDP and CEDAW page 15.

⁶⁸ Office of the High Commissioner for Human Rights 2010- Monitoring the Convention on the Rights of Persons with Disabilities 2010 (20).

⁶⁹ Ian Currie & Johan de Waal: The Bill of Rights Handbook, 6th ed. pages 234-235.

⁷⁰ CRPD Article 2.

⁷¹ Fina, Cera & Palmisano ed, (2017) page 292.

⁷² Lord JE et al *Human Rights Yes! Action and Advocacy on the rights of persons with disabilities 2ed* (2012) part 2 chapter 12 page 3.

Lettie Hazel Oortman brought a complaint to the Equality Court in 2010. The complainants' daughter, Chelsea was disabled and was a pupil at the St Thomas Aquinas Private school. The school had taken several steps to accommodate Chelsea, however all reasonable measures to enable her to have access to the classes, a toilet and a wash basin were not taken.⁷³A judgment in favor of Lettie Oortman was handed down in the Equality court against the St Thomas Aquinas private school. The Equality Court decided that the school was not only obliged to re-admit Chelsea Oortman, but that the school had to take reasonable measures to remove all obstacles to enable Chelsea to have access to all the class rooms and the toilets allocated to her by using a wheelchair.⁷⁴

Another principle is the full and effective participation and inclusion in society of persons with disabilities. Society in its public as well as in its private dimensions, is organized to enable all people to take part fully. Being fully included in society means that persons with disabilities are recognized and valued as equal participants. Their needs are understood as integral to the social and economic order and not seen as special. To achieve full inclusion, an accessible, barrier free physical environment is necessary. An example of full and effective participation and inclusion is that political election processes should not exclude persons with disabilities. It must be ensured that voting locations are accessible.⁷⁵

Accessibility in terms of the CRPD means that persons with disabilities have access on an equal basis with others to the physical environment, the purpose underlying this principle is the removal of barriers, not only physical ones that may hinder the full enjoyment of human rights by persons with disabilities.⁷⁶

⁷³Equality Court Case 1/2010 Lettie Hazel Oortman/St Thomas Aquinas Private School and Bernard Langton.

⁷⁴ Women, Children and People with Disabilities Report 2013 – Draft Initial report to the united nations on the implementation of the convention on the rights of persons with disabilities in South Africa (2013)[hereinafter [SA CRPD Initial Report)].

⁷⁵ Office of the High Commissioner for Human Rights 2010- Monitoring the Convention on the Rights of Persons with Disabilities 2010 (22).

⁷⁶ Fina, Cera & Palmisano ed, (2017) page 124.and 130.

Article 13(2)⁷⁷ requires that states should provide training to those who are working in the administration of justice in order to help ensure effective access to justice by persons with disabilities. Human rights commitments obliges States to promote, protect and fulfil human rights. In terms of promoting human rights, States through their actions have to support the upholding of rights. In terms of protecting human rights States have to ensure that no-one is denied their human rights. In terms of fulfilling human rights, States have to proactively engage in actions that strengthens peoples access to rights. States obligation to be proactive increases when there are structures of exclusion and segregation.⁷⁸

States must promote the right to access to justice by ensuring that police, judges, prison staff and other state actors do not interfere with the exercise and enjoyment of access to justice by people with disabilities. This right must also be protected by states, by ensuring that private attorneys, families and other non -state actors do not interfere with the exercise and enjoyment of the right. States also have an obligation to fulfill the right. This would entail taking action to ensure that people with disabilities are able to exercise the right.⁷⁹

In the case of Mr. F v Austria the author who is the alleged victim is deaf and he requires Australian Sign Language Interpreter (Auslan) to communicate with others. The author has been engaged in efforts to persuade the Sheriff and the Government of New South Wales to reconsider the position of the Government on the exclusion deaf persons who require Auslan from serving as jurors. The author alleges that the states parties has violated his rights under Articles 12, 13, 21 and 29 of the CRPD. With regard to the alleged violation of article 13 of the Covenant, the author claims that the domestic authorities' refusal to permit Auslan interpreting of courtroom proceedings and jury deliberations to enable him to participate in jury duty, should he be selected to do so, constitutes a

⁷⁷CRPD Article 13(2).

⁷⁸M Schulze Understanding the UN Convention on the Rights of Persons with Disabilities (2009) Pg. 22.

⁷⁹Lord JE et al *Human Rights Yes! Action and Advocacy on the rights of persons with disabilities* 2ed (2012) chapter 2 Page 162.

violation of his right to effective access to justice. He considers that the participation of jurors in the legal system should be understood as a component of the right to effectively access justice on an equal basis with others.⁸⁰

The states party provided that:” in order to qualify as a victim, an individual must in fact be affected by a relevant legal provision or action”. The State party considers that the author has not demonstrated a connection between any specific act or omission and a violation of his rights under articles 12, 13, 21 and 29 of the Convention. In particular, a possible perception by others of incompetence or incapacity with respect to the performance of jury duty does not fall within the scope of those articles and does not render the author a victim. Furthermore, the author’s status as an Australian citizen and his equality with others are not affected by the actions alleged. While jury duty is to be performed by citizens, and juries may be considered as representative of the community, the set of requirements for undertaking jury duty in New South Wales does not affect in any way the citizenship of the individuals concerned, or their right to participate in public and political life.⁸¹

An obligation of States Parties is to make sure that persons with disabilities have access to justice which is on an equal basis with others. What is essential for access to justice in many instances is the recognition of the right of legal capacity. Persons with disabilities must be recognized as persons before the law with equal standing in courts and tribunals in order to seek enforcement of their rights and obligations on an equal basis with others. Another obligation of States Parties is that they must make sure that persons with disabilities have access to legal representation on an equal basis with others. In many jurisdictions this has been recognized as a problem and solutions must be sought in order for it to be remedied, including by ensuring that persons who experience interference with their right to legal capacity have the opportunity to challenge such interference- on their own behalf or with legal representation – and to defend their rights in court.⁸²

⁸⁰ CRPD/C/14/D/21/2014 paragraphs: 2.1, 3.3, 8.3 and 8.5.

⁸¹ As above.

⁸² CRPD, Article 12 Equal recognition before the law (2014) 10.

Too often are persons with disabilities excluded from vital roles in the justice system as lawyers, judges, witnesses or members of a jury. Legal capacity must also be provided to persons with disabilities in order to testify on an equal basis with others. What is guaranteed by Article 12 of the Convention is support in the exercise of legal capacity, including the capacity to testify in judicial, administrative and other legal proceedings. The support provided could take different forms, including the recognition of different communication methods, to allow video testimony in certain circumstances, procedural accommodation, the provision of professional sign language interpretation and other assistive methods. The judiciary must also be made aware of their obligation to respect the legal capacity of persons with disabilities, including legal agency and standing. The Committee considers that, for a person to claim to be the victim of a violation of a right protected by the Convention, he or she must show either that an act or an omission of the State party concerned has already adversely affected his or her enjoyment of that right, or that such an effect is imminent, for example on the basis of existing law and/or judicial or administrative decision or practice.⁸³

In the case of *Tennessee v Lane* the respondent paraplegics filed an action for damages and equitable relief. They alleged that Tennessee and a number of its counties had denied them physical access to that State's courts in violation of Title II of the Americans with Disabilities Act of 1990⁸⁴, which provides: "No qualified individual with a disability shall, by reason of such disability, be excluded from participation or denied the benefits of the services, programs or activities of a public entity."⁸⁵ This provision can be likened to Article 13 of the CRPD which provides that: "States parties must ensure effective access to justice for persons with disabilities on an equal basis with others".⁸⁶ It was held that: "the duty to accommodate is perfectly consistent with the well-established due process principle that, within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard in its courts". It was also held that: "Ordinary

⁸³ As above.

⁸⁴ *Tennessee v Lane* 541 U.S. 509.124 S.Ct.1978 (2004).

⁸⁵ Americans with Disabilities Act 1990 (ADA).

⁸⁶ CRPD Article 13.

considerations of cost and convenience alone cannot justify a State's failure to provide individuals with a meaningful right of access to the courts".⁸⁷

2.4 Accessibility under the CRPD:

Article 9 of the CRPD concerns accessibility. Article 9 is concerned with removing barriers that prevent persons with disabilities from effectively enjoying their rights.⁸⁸

Particularly, what Article 9 necessitates is for states to ensure that a broad range of venues, facilities and services are accessible to people with disabilities which is on an equal basis with others.⁸⁹

It is very important that persons with disabilities are granted access to justice on an equal basis with others because denial of this right on an equal basis would amount to discrimination.

"Discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.⁹⁰

The CRPD makes it clear in Article 5 that all persons are equal before and under the law and that they are without discrimination entitled to equal protection and benefit of the law. Article 5 further provides that all discrimination on the basis of disabilities is prohibited and persons with disabilities are guaranteed equal and effective legal protection against discrimination on all grounds. State parties are obliged to take all appropriate steps to ensure that reasonable accommodation is provided in order to promote equality and eliminate discrimination⁹¹.

⁸⁷ Tennessee v Lane 541 U.S. 509.124 S.Ct.1978 (2004).

⁸⁸Ortoleva S Forgiven Sisters –report on violence.

⁸⁹ Lord JE et al *Human Rights Yes! Action and Advocacy on the rights of persons with disabilities* 2ed (2012) chapter 2 page 44.

⁹⁰ CRPD Article 2 definitions.

⁹¹ CRC Article 5.

Article 26 of the ICCPR⁹² provides that the law shall prohibit any discrimination and guarantee effective protection against discrimination. Disability is not expressly included in the grounds belonging to the Article; however, it can be included under other statuses.⁹³ Marianne Schulze provides that when looking strictly from a legal point of view the word other status which is found in Article 2 of the UDHR, Article 2 of the ICCPR as well as Article 2 of the ICESCR affords persons with disabilities the necessary protection from discrimination. She further states that “obviously this notion has proven wholly inadequate to say the least”. She further states that this is a lack of overt legal protection for persons with disabilities.⁹⁴

Article 9 includes other facilities and services open or provided to the public, both in urban and in rural areas, this ensures that accessibility is not only addressed in cities, but also for people with disabilities living in rural communities.⁹⁵

Accessibility is a key precondition for the effective and equal enjoyment of civil, political, economic, social and cultural rights by persons with disabilities.⁹⁶

The facility for disabled persons to exercise their accessibility rights is a precondition for their exercise of several other fundamental rights embodied in the CRPD. Article 9 was written in ambiguous language in order to reach an agreement between contracting states during drafting. This has allowed divergent readings of what is actually required by Article 9. Article 9 enhances a model of accessibility consistent with the general principles of the CRPD to increase respect for the independence and dignity of persons with disabilities.⁹⁷

Accessibility is contained in Article 3 of the CRPD as one of the guiding principles of the Convention, it is also a standalone provision in Article 9, and this reinforces the right of

⁹² ICCPR Article 26.

⁹³ Nations, International norms and standards relating to disability, available at www.un.org/esa/socdev/enable/rights/humanrights.html (accessed on 18 October 2014).

⁹⁴ M Schulze Understanding the CRPD (2009) 11.

⁹⁵ Lord JE et al *Human Rights Yes! Action and Advocacy on the rights of persons with disabilities* 2ed (2012) chapter 2 page 44.

⁹⁶ CRPD General Comment No.2 Accessibility, UN Doc. CRPD/C/GC/2, 11 April 2014 page.2. Paragraph 4.

⁹⁷ Fina, Cera & Palmisano ed, (2017) page 238.

disabled persons to accessibility. From this it arises that the CRPD articles on accessibility in general, and Article 9 in particular, cannot be read in isolation, all the rights in the Convention are indistinguishably linked to accessibility.⁹⁸

Article 9 has to be seen as a complementary provision and condition to all other provisions as well as a right in itself.⁹⁹

Article 3 and Article 9 taken together calls upon States as well as disabled people organizations and national human rights institutions among others, to engage in a wide variety of human rights actions in order to achieve the implementation of the Convention- from scoping exercises that examine accessibility obligations in law and policy, to law reform and law development, to human rights education that raises awareness among a wide variety of stakeholders about the implementation of accessibility organizations.¹⁰⁰

The obligations that States have with regard to accessibility include the obligation to respect by not engaging in any act, custom or practice that creates barriers to accessibility. The second obligation States have is the obligation to protect by ensuring that private actors do not create barriers or fail to remove barriers to access for persons with disabilities. The third obligation is the obligation to fulfil by affirming that States must take proactive action to ensure accessibility for persons with disabilities. Human rights law strongly supports accessibility for persons with disabilities¹⁰¹.

Article 4 of the CRPD sets forth the general obligations States Parties must undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability.¹⁰² The need to ground the CRPD obligations in national law, policy and programming in consultation with persons with disabilities is made clear by the general obligations set forth in Article 4. The duty of State Parties to ensure access to the physical environment, for persons with disabilities should be seen from the perspective of equality and non-

⁹⁸ Lord JE Accessibility and human rights fusion in the CRPD: assessing the scope and content of the accessibility principle and duty under the CRPD 2010 Page18.

⁹⁹M Schulze Understanding the UN Convention on the Rights of Persons with Disabilities (2009) Page 53.

¹⁰⁰CRPD Article 4(1).

¹⁰¹Lord JE et al *Human Rights Yes! Action and Advocacy on the rights of persons with disabilities*2ed (2012) chapter 2 page 45.

¹⁰²CRPD Article 4.

discrimination. If persons with disabilities are denied access to the physical environment this would constitute an act of disability based discrimination which is prohibited by Article 5 of the Convention.¹⁰³

Article 4(2) of the CRPD states that: With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law'.¹⁰⁴

The CESCR-Committee interprets the obligation to fulfil economic and social rights progressively, they provide that: 'the principal obligation of the result reflected in article 2 (1) is to take steps "with a view to achieving progressively the full realization of the rights recognized" in the Covenant. The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this sense the obligation differs significantly from that contained in article 2 of ICCPR which embodies an immediate obligation to respect and ensure all of the relevant rights. Nevertheless, the fact that realisation progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content.'¹⁰⁵

It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the reason for being, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Any deliberately retrogressive measures in that regard would need to be fully

¹⁰³CRPD General Comment No.2 Accessibility, UN Doc. CRPD/C/GC/2, 11 April 2014 page.10 paragraph 34.

¹⁰⁴ CRPD Article 4(2).

¹⁰⁵ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, E/1991/23, paragraph 9.

justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources'.¹⁰⁶

The distinction between the progressive realization of economic, social and cultural rights and the immediate implementation of civil and political rights was not intended to be a judgment on which a category of rights are more important. The distinction is intended to acknowledge which rights may practically be implemented immediately, and which may not because of resource constraints'.¹⁰⁷

With regard to economic, social and cultural rights, the CRPD reaffirms the obligation of States to progressively implement them, this has already been recognized in Article 2 of the ICESCR as well as Article 4 of the CRC. It must be recognition that the full realization of economic, social and cultural rights may be constrained by limited resources is balanced by the requirement that measures should be taken to the maximum of a State's available resources and, where needed, within the framework of international cooperation.¹⁰⁸

The Committee on the Rights of Persons with Disabilities has commented that when designing new buildings, the application of universal design is more economical than the subsequent removal of barriers from existing buildings. The Committee has stressed that: there can be no effective access to justice if the buildings in which law enforcement agencies and the judiciary are located are not physically accessible to persons with disabilities.¹⁰⁹

The Convention recognises that some measures will need to be introduced over time and which will be subject to longer term budgeting and planning. It will be important for the Committee to carefully monitor the obligations of States Parties to take immediate steps towards their fulfilment of their obligation. State Parties should act as promptly as possible in order to ensure the effectiveness of rights. Progressivity should not be interpreted by States as an excuse to postpone measures to ensure the effectiveness of

¹⁰⁶ As above.

¹⁰⁷ Fina, Cera & Palmisano ed, (2017) pages 147 and 149.

¹⁰⁸ Office of the High Commissioner for Human Rights 2010- Monitoring the Convention on the Rights of Persons with Disabilities 2010 (28).

¹⁰⁹ Holness W and S Rule 'Barriers to advocacy and litigation in the equality courts for persons with disabilities' (2014) 17 PER page 1921.

rights. The Committee may want to take into consideration the implications of Article 4 for the Article 9 duties as well as their reinforcement in the domestic legislative framework as well as through different other methods. A vital requirement of Article 4 is that it requires State Parties to consult with and involve persons with disabilities in developing and implementing legislation and policies and in decision-making processes, including in formulating accessibility standards concerning CRPD rights. Measures must be part of a complementary system of achieving equality and must be coherent and coordinated.¹¹⁰

Article 12(1) provides that: States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law. ¹¹¹Article 12 is pivotal to the CRPD's conception of social and legal inclusion. Signifying that persons with disabilities should be accorded the same rights as their nondisabled peers.¹¹²

In the General Comment number 1 on equal recognition before the law it states that: the ICCPR and the CRPD each specify that the right to equal recognition before the law is operative "everywhere". This is reinforced by article 4(2), of the ICCPR, which allows no derogation from this right, even in times of public emergency.¹¹³

Article 15 of CEDAW guarantees women's equality before the law and requires the recognition of women's legal capacity on an equal basis with men, including with regard to exercising their rights in the justice system.¹¹⁴

Article 12(2) provides that: States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. Article 12(2) not only recognises the legal capacity of all persons with disabilities, but Amita Dhanda

¹¹⁰Lord JE Accessibility and human rights fusion in the CRPD: assessing the scope and content of the accessibility principle and duty under the CRPD 2010 PG15.

¹¹¹ CRPD Article 12(1).

¹¹² Caivano N Conceptualizing capacity: interpreting Canada's qualified ratification of Article 12 of the UN disability rights convention (2014) Vol 4 *WJLS* pg. 97.

¹¹³ United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), General Comment No. 1: Equal Recognition before the Law, 19 May 2014, UNCRPD/GC/1-Introduction paragraph 5.

¹¹⁴ CRPD/GC/1-Introduction paragraph 6.

comments that it 'reconstituted the person in the person with disabilities' involving an 'interdependent conception of the human' which obliges States Parties to provide access to support, the element of interdependence, in exercising legal capacity.¹¹⁵

For persons with disabilities, the right to individual self-determination is particularly important because it represents the right to have more choice and control in their daily lives, something which advocacy aims to achieve, guided by principles of empowerment and equal citizenship. Persons with disabilities must be able to participate on an equal basis in decisions made which concern them, and in society as a whole.¹¹⁶ Equal access to justice is an important precondition for this kind of participation. There are similar provisions contained in the ICCPR, in Article 14 it states that all persons shall be equal before the courts and tribunals. Article 14 also provides that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.¹¹⁷

Article 16 provides that, everyone shall have the right to recognition everywhere as a person before the law.¹¹⁸ This is a key due process right in terms of both civil and criminal commitment. Disabled persons whether they are legally competent or incapacitated must not be treated as mere objects in any official proceedings.¹¹⁹

A right to equality before the law is also recognised by CEDAW. Article 15(1) reads as follows: States Parties shall accord to women equality with men before the law.¹²⁰ The CRPD reinforces Article 15(1) and (2) of CEDAW¹²¹ and States obligations to uphold the rights of women and girls with disabilities is reinforced by the CRPD, They do this by

¹¹⁵ Fina, Cera & Palmisano ed, (2017) page 267.

¹¹⁶ Quinn G & Degener T: the current use and future potential of United Nations human rights instruments in the context of disability 2002 page 56.

¹¹⁷ ICCPR Article 14(1).

¹¹⁸ ICCPR Article 16 j and h.

¹¹⁹ Quinn G & Degener T: the current use and future potential of United Nations human rights instruments in the context of disability 2002 page 56.

¹²⁰ CEDAW Article 15(1).

¹²¹ CEDAW Article 15(1) and (2).

taking specific measures to address the unique challenges which are present in exercising their rights on an equal basis with others.¹²²

The principles of equality and non-discrimination guarantee that those in equal circumstances are dealt with equally in law and practice. However, not every distinction or difference in treatment will amount to discrimination. In general international law, a violation of the principle of non-discrimination arises if equal cases are treated in a different manner, difference in treatment does not have an objective and reasonable justification, or there is no proportionality between the aim sought and the means employed. Article 5 of the CRPD provides broad mandates to achieve the equality of persons with disabilities and the eradication of all forms of discrimination on the basis of disability. After requiring States Parties to recognize that 'all persons are equal before and under the law' and thus entitled 'to the equal protection and equal benefit of the law', Article 5 calls them to promote equality and eliminate discrimination taking all appropriate steps to ensure that reasonable accommodation is provided.' Moreover, Article 5 establishes that any specific measures necessary to accelerate or achieve de facto equality of persons with disabilities may not be construed as discriminatory.¹²³

The practice of placing a woman with disability under guardianship violates Article 15 of CEDAW and Article 12 of the CRPD. Women with disabilities under guardianship are still being denied their legal personhood. The effect of this is that they are unable to take legal action without their guardian. By the exclusion of women and girls with disabilities the rights violations remain unexposed and as a result of this there is a stark lack of data on the situation of access to justice for women and girls with disabilities. This results in them being invisible and it compounds their vulnerability as their needs remain unaddressed and they are unable to participate in initiatives and strategies concerning reform of the justice system which impacts upon them.¹²⁴

¹²² IDA submission to the CEDAW Committees General Discussion on access to justice 54th session, 2013 page 7.

¹²³ Fina, Cera & Palmisano ed, (2017) page 160.

¹²⁴ IDA submission to the CEDAW Committees General Discussion on access to justice 54th session, 2013 page 3.

Both CEDAW and the CRPD are explicitly focused on challenging discrimination, and ensuring the full and equal enjoyment of all human rights and fundamental freedoms by women and people with disabilities respectively. They aim to remove the discriminations that prevent the realisation of rights as well as to impose obligations on States to ensure they are able to enjoy those rights on an equal basis with others. Women and people with disabilities must be recognised and afforded equal status and rights respectively with men and people without disabilities. Equally, girls and all children with disabilities must be afforded equal rights with boys and children without disabilities. CEDAW seeks to ensure that the barriers that prevent equality for women are removed for example, lack of access to the courts, it makes no explicit reference to disability issues, although, because its mandate is applicable to all women, it is, by implication, applicable to all women with disabilities.¹²⁵

In order for there to be effective access to justice as provided in Article 13 of the CRPD¹²⁶, the buildings in which law-enforcement agencies and the judiciary are located need to be physically accessible.¹²⁷

For persons with disabilities to be included in their respective local communities and for them to have an independent life as provided in Article 19 of the CRPD¹²⁸, there needs to be an accessible environment.¹²⁹

In order for people with disabilities to live independently and fully participate in all aspects of life, barriers and obstacles to accessibility need to be eliminated, therefore,

¹²⁵ UNICEF, ANALYSIS OF THE SYNERGIES BETWEEN CRC, CRPD AND CEDAW: Using the human rights framework to promote the rights of children with disabilities: Discussion Paper An analysis of the synergies between CRC, CRPD and CEDAW.

¹²⁶CRPD.

¹²⁷CRPD General Comment No.2 Accessibility, UN Doc. CRPD/C/GC/2, 11 April 2014 page.11 paragraph 37.

¹²⁸CRPD Article 19.

¹²⁹ CRPD General Comment No.2 Accessibility, UN Doc. CRPD/C/GC/2, 11 April 2014 page.11 paragraph 37.

International Human Rights Law is in strong support of accessibility for persons with disabilities.¹³⁰

In order to ensure the inclusion and participation of people with disabilities as full and equal members of society accessibility is fundamental. Discussion on how the right can fully be enjoyed must include considerations of access, regardless of the human right in question. This is so not just for some but for all persons with disabilities.¹³¹

The achievement of the CRPDs aims will only be achieved to the extent to which contracting states make an express commitment to enforce the CRPDs rules efficiently. Contracting states shall not assume that laws alone will bring about the changes that are indispensable for achieving greater substantive equality for persons with disabilities. In order to implement laws of direct accessibility this will require important financial resources, organization and time. This will definitely meet with resistance from the Contracting States who will claim that there is only 'limited resources' available. However, the cost of direct accessibility could, for instance, be offset against the costs in terms of lost profits' arising from the non-involvement of adult disabled people in working activities before they can make this claim.¹³²

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2.5 Conclusion:

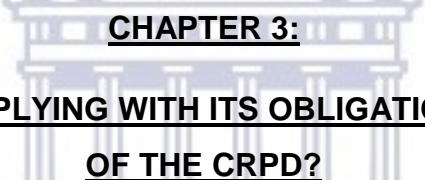
In this chapter access to justice as well as accessibility in terms of the CRPD was discussed, I also referred to a number of international instruments. Article 13 of the CRPD provides that persons with disabilities must have access to justice on an equal basis with others. In order for persons with disabilities to seek enforcement of their rights they must be recognised as persons before the law with equal standing in courts and tribunals. Legal capacity must also be provided to persons with disabilities in order to testify on an equal basis with others. Article 13(2) also provides that training must be provided to those

¹³⁰ Lord JE et al *Human Rights Yes! Action and Advocacy on the rights of persons with disabilities* 2ed (2012) chapter 12 page 161-163.

¹³¹ Lord JE Accessibility and human rights fusion in the CRPD: assessing the scope and content of the accessibility principle and duty under the CRPD 2010 Page 38.

¹³² Fina, Cera & Palmisano ed, (2017) page 281.

involved in the administration of justice. Barriers that prevent persons with disabilities from effectively enjoying their rights must be removed and this is what Article 9 'accessibility' is concerned with. In order for persons with disabilities to live independently and participate fully and equally in society accessibility is a prerequisite. States must ensure that facilities and services are accessible to people with disabilities which is on an equal basis with others, and denial of this right would amount to discrimination.



CHAPTER 3:
IS SOUTH AFRICAN COMPLYING WITH ITS OBLIGATIONS UNDER ARTICLE 13
OF THE CRPD?

3.1 Introduction:

In the previous chapter I examined the international standards of access to justice as well as accessibility of persons with disabilities. This chapter will be setting out the South African position with regards to access to justice and accessibility for persons with disabilities. There will be a discussion on the Constitution of the Republic of South Africa¹³³, first with regards to access to justice and then accessibility, as well as at the Promotion of Equality and Prevention of Unfair Discrimination Act¹³⁴, with regard to access to justice and accessibility. I will also refer to case law. Thereafter I will briefly discuss access to justice for women and children.

3.2 The Constitution of the Republic of South Africa:

¹³³ Constitution of the Republic of South Africa, Act 108 of 1996 [hereinafter South African Constitution].

¹³⁴ *South Africa: Promotion of Equality and Prevention of Unfair Discrimination Act* [hereinafter PEPUDA], 2000 [South Africa].

The supreme law of the Republic is the Constitution;¹³⁵ all obligations that the Constitution imposes must be fulfilled.¹³⁶ What the Constitution of South Africa seeks to ensure is an environment that is conducive to the full 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.¹³⁷ The principles of non-discrimination based on disability, gender or age¹³⁸, equality between men and women¹³⁹, equality of opportunities¹⁴⁰, accessibility, respect for diversity¹⁴¹ and full inclusion in society are specifically mentioned in the Constitution¹⁴². Discrimination on the basis of disability is outlawed by the Constitution and persons with disabilities are guaranteed the right to equality.¹⁴³

The South Africa Constitution provides the basis for progressively redressing the situation of persons with disabilities, which upholds the values of human dignity, equality, freedom and social justice. Decisions of the Constitutional Court have affirmed these principles, and are reaffirmed by South Africa's international obligations under binding treaties.¹⁴⁴

The South African Constitution provides for a Bill of Rights to ensure the protection of the right to equality and other fundamental rights.¹⁴⁵ In order to properly understand the bill of rights one needs to view equality as part of the Constitution as a whole, as well as a fundamental element of the Constitutions project of transforming South African society

¹³⁵ South African Constitution.

¹³⁶ Artz L and Smythie D, Bridges and barriers: a five year retrospective on the Domestic Violence Act Acta Juridica, 2005.

¹³⁷Women, Children and People with Disabilities, Draft initial report to the United Nations On the implementation of the Convention on the rights of the rights of persons with disabilities for public comment (2012), 5.

¹³⁸ Constitution of South Africa, Chapter 2 section 9(3).

¹³⁹ Constitution of South Africa, Chapter 2 section 9(1).

¹⁴⁰ Constitution of South Africa, Chapter 2 section 9(2).

¹⁴¹ Constitution of South Africa, Article 31, 31(1) (a) (b).

¹⁴² South African Constitution Chapter 2 section 9 (1), (2), (3) (4), (5).

¹⁴³ White paper on the Rights of Persons with Disabilities (9 December 2015).

¹⁴⁴ South African Human Rights Commission Report 2002- Towards a Barrier Free Society (2002) 17.

¹⁴⁵ The Constitutional dimensions of affirmative action in South Africa chapter 9 284.

and the country's political and legal systems.¹⁴⁶ Section 7 (2)¹⁴⁷, of the Constitution requires the state to respect, protect, promote and fulfill the rights in the Bill of Rights.¹⁴⁸

The theme of the Constitution is 'an open and democratic society based on human dignity, equality and freedom'¹⁴⁹. The Constitution was written with equality at its center, equality is the Constitution of South Africa's focus and its organizing principle, it is to be pursued in the building of a democratic and just society.¹⁵⁰

Many of the apartheid barriers present pre-1994 have been broken down. Nevertheless, many barriers still remain, particularly for persons with disabilities. The breaking down of many of these barriers requires more than just laws, it requires attitudinal shifts.¹⁵¹

Since 1994 major steps have been taken in order to ensure that persons with disabilities will not continue to be subjected to the discrimination, inequities and exclusion of the past. A very big task remains, however, in transforming the institutions, attitudes, practices, buildings, facilities and environments that continue to deny persons with disabilities their rights to dignity, equality and freedom. The responsibility to participate in and drive this process is on the South African Human Rights Commissions.¹⁵²

The CRPD was ratified in 2007¹⁵³ as well as its optional protocol, and by doing this it committed the country to respect and implement the rights of persons with disabilities.¹⁵⁴ The Constitution in section 39¹⁵⁵ provides that when interpreting the Bill of Rights a court, tribunal or forum- must consider international law.¹⁵⁶ Since its ratification South Africa had

¹⁴⁶ Ian Currie & Johan de Waal: The Bill of Rights Handbook, 6th ed (2013) page 1.

¹⁴⁷ South African Constitution, Chapter 2 section 7(2) (2).

¹⁴⁸ Suleman MZ & Elphick J 'Know your Constitution: People with disabilities-hidden, but not unheard' Daily Maverick 04 December 2013.

¹⁴⁹ The Constitutional dimensions of affirmative action in South Africa chapter 9 284.

¹⁵⁰ As above.

¹⁵¹ SAHRC, towards a barrier-free society: a report on accessibility and built environments, SAHRC Report November 2002 page 3.

¹⁵² SAHRC, towards a barrier-free society: a report on accessibility and built environments, SAHRC Report November 2002 page 5.

¹⁵³ Parliamentary Monitoring Group (2011) – South Africa's compliance with Un Conventions on Rights of Persons with Disabilities and Rights of the Child: input by Civil Society (2011) 1.

¹⁵⁴ White paper on the Rights of Persons with Disabilities (9 December 2015).

¹⁵⁵ South African Constitution, Chapter 2 Section 39.

¹⁵⁶ South African Constitution, Chapter 2 section 39 (1) (b).

not appropriately incorporated the Convention into its own legal framework, this had led to the Convention having a weakened effect in South Africa. A report had also not been submitted from South Africa to the CRPD.¹⁵⁷

Section 9 of the Constitution¹⁵⁸ the first right in the Bill of Rights, protects a right to equality.¹⁵⁹ Section 9 provides that the State may not unfairly discriminate directly or indirectly against anyone on one or more of the listed grounds.¹⁶⁰ This provides two guarantees, first that the law will protect and benefit people equally and secondly it provides a prohibition on unfair discrimination.¹⁶¹

Section 9 (2) of the Constitution¹⁶², read with the Promotion of Equality and Prevention of Unfair Discrimination Act, clearly places a complementary duty on the state to take active measures to promote the equality of people with disabilities.¹⁶³

Formal equality requires that all persons who are in the same situation should be provided that same treatment, and that people should not be treated differently because of arbitrary characteristics such as religion, race and gender. as long as there is consistency in treatment there will be no discrimination. What is required in terms of the formal application of equality is only equal application of the law without any further examination of the particular circumstances or context of the individual or group and, consequently, the content and the potential discriminatory impact of the law and/or policy under review.¹⁶⁴

Substantive equality ensures that laws or policies do not reinforce the subordination of groups who are already suffering social, political or economic disadvantage, and it requires that laws treat individuals as substantive equals, recognising and

¹⁵⁷ Parliamentary Monitoring Group (2011) – South Africa's compliance with Un Conventions on Rights of Persons with Disabilities and Rights of the Child: input by Civil Society (2011) 1.

¹⁵⁸ South African Constitution, Chapter 2 section 9 (1), (2), (3), (4), (5).

¹⁵⁹ Ian Currie & Johan de Waal: The Bill of Rights Handbook, 6th ed. page 211.

¹⁶⁰ The Constitutional dimensions of affirmative action in South Africa 291.

¹⁶¹ Ian Currie & Johan de Waal: The Bill of Rights Handbook, 6th ed. page 211.

¹⁶² South African Constitution, section 9 (2).

¹⁶³ Singh v Minister of Justice and Constitutional Development 2013 (3) SA 66 (EqC) paragraph 24.

¹⁶⁴ Equality constitutional adjudication in South Africa (Chapter 14 Vol 2) [2014] AHRLJ 30.

accommodating people's differences. Analysing the effects of laws, policies and practices on a disadvantaged individual or group. What substantive equality is concerned with is eliminating barriers which exclude certain groups from participation in the workplace or celebrating their different cultures and practices. This entails a move beyond consistency to substance, the substantive equality approach incorporates indirect discrimination in its analysis. For those who were discriminated under the past undemocratic regime indirect discrimination is rife in those societies due to the fact that they would not have had equal access to education, jobs, housing and medical care. Indirect discrimination is therefore important to incorporate in equality rights adjudication due to the fact that it gives recognition to the reality that not all people are on the same playing field.¹⁶⁵

Discrimination can either be direct or indirect, direct is when there is unfavorable or differential treatment on one or more of the specified grounds listed in section 9(3).¹⁶⁶ indirect is differentiation on a ground which is not listed in section 9(3)¹⁶⁷ but it is analogous to such ground.¹⁶⁸ It is not so easy to recognize indirect discrimination because it is a more veiled form of discrimination. Indirect discrimination is present when a rule exists and on the surface it seems totally neutral, but when the rule is applied the consequence thereof is that it has an adverse impact on certain individuals or groups of people.¹⁶⁹

An analogous ground is one that is 'based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner.'¹⁷⁰

The prohibition of unfair discrimination is based on the premise that all persons will be given equal dignity and respect regardless of their membership of particular groups. For equality to exist discrimination must not be unfair.¹⁷¹ Where discrimination is shown to

¹⁶⁵ As above.

¹⁶⁶ The Constitutional dimensions of affirmative action in South Africa chapter 9 291.

¹⁶⁷ South African Constitution, Chapter 2 section 9(3).

¹⁶⁸ *Harksen v Lane*, paragraph 46.

¹⁶⁹ The Constitutional dimensions of affirmative action in South Africa chapter 9 291.

¹⁷⁰ *Harksen v Lane*, paragraph 46.

¹⁷¹ The Constitutional dimensions of affirmative action in South Africa chapter 9 292-293.

have taken place on one or more of the prohibited grounds listed in subsection (3)¹⁷² is unfair unless it is established that the discrimination is fair.¹⁷³

In the case of *Harksen v Lane*¹⁷⁴ the Constitutional Court laid down the test for determining whether or not a certain act or legislative provision is unconstitutional for noncompliance with the equality clause.¹⁷⁵ The test is as follows: First, a determination will be made to determine if the provision differentiates between people or categories of people? If it does then a determination as to whether the differentiation bears a rational connection to a legitimate government purpose will need to be made. If there is no rational connection between a legitimate government purposes then there is a violation of section 9 of the Constitution¹⁷⁶ of South Africa. Even if it does bear a rational connection, it might still amount to discrimination. Secondly, a determination as to whether the differentiation amounts to unfair discrimination needs to be made. A two stage analysis is required, first, a determination as to whether the differentiation amount to “discrimination” must be made, if it is on a specified ground,¹⁷⁷ then discrimination is present. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.¹⁷⁸

If the differentiation does amounts to “discrimination”, what needs to be determined is whether it amounts to “unfair discrimination”. If it is found to have been on a specified ground,¹⁷⁹ then a presumption of unfairness is made. If on an unspecified ground, then the unfairness will have to be established by the complainant. The primary focus in terms

¹⁷² South African Constitution, Chapter 2 section 9 (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

¹⁷³ South African Constitution, and Chapter 2 section 9(5).

¹⁷⁴ *Harksen v Lane*.

¹⁷⁵ The Constitutional dimensions of affirmative action in South Africa chapter 9 296.

¹⁷⁶ South African Constitution.

¹⁷⁷ South African Constitution, Chapter 2 section 9 (3).

¹⁷⁸ Ian Currie & Johan de Waal: The Bill of Rights Handbook, 6th ed. page 216-217.

¹⁷⁹ South African Constitution, Chapter 2 section 9 (3).

of the test of unfairness is on the impact of the discrimination on the complainant and others in his or her situation.¹⁸⁰

If, at the end of this stage of the enquiry, it is found that the differentiation is not unfair, then there will be no violation of section 9 of the Constitution of South Africa¹⁸¹.

Next if the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause.¹⁸²

The first consideration when applying the test is whether there has been a violation to the right to equality before the law. The second consideration is whether there is unfair discrimination. If the right to equal treatment in section 9(1)¹⁸³ has been violated then there will be no need to determine whether there has been a violation of the right to non-discrimination. Section 9¹⁸⁴ identifies three ways in which a law or conduct might differentiate between people or categories of people. First there is mere differentiation which does not amount to discrimination even though it does treat some people differently to others. Mere differentiation must have a legitimate connection to a legitimate government purpose otherwise it will fall foul of section 9(1)¹⁸⁵. Second there is a differentiation which amounts to unfair discrimination. The differentiation will still violate the equality clause if it amounts to unfair discrimination regardless of whether there is a rational connection between a differentiation and a legitimate government purpose. Third, law or conducts that discriminates but does not do so unfairly, taking into account 'the impact of the discrimination on the complainant and others in his or her situation.'¹⁸⁶

Provision is made in the Constitution for affirmative action concerning people with disabilities, in that it allows for positive measures to be taken to promote the achievement

¹⁸⁰ Ian Currie & Johan de Waal: The Bill of Rights Handbook, 6th ed. page 216-217.

¹⁸¹ South African Constitution.

¹⁸² South African Constitution.

¹⁸³ South African Constitution.

¹⁸⁴ As above.

¹⁸⁵ *Harksen v Lane*, paragraph 46.

¹⁸⁶ Ian Currie & Johan de Waal: The Bill of Rights Handbook, 6th ed. pages 216-217.

of equality for categories of persons disadvantaged by unfair discrimination.¹⁸⁷ The preamble to the Constitution provides that: “We, the people of South Africa, adopt this Constitution so as to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; improve the quality of life of all citizens and free the potential of each person.”¹⁸⁸

In applying the principle of equal opportunities it entails positive obligations on States Parties of the CRPD as well as the adoption of all necessary measures to achieve de facto equality of persons with disabilities as provided in Article 5 (4)¹⁸⁹ of the CRPD.¹⁹⁰ ¹⁹¹ However, as long as such action is needed to correct discrimination, it is a case of legitimate differentiation under the Covenant.¹⁹² Affirmative action is also sometimes described as positive discrimination, positive action is taken in order to redress a history of discrimination in a manner that is limited in time and breath.¹⁹³¹⁹⁴

The preamble to the Constitution¹⁹⁵ provides that one of the founding values of our society is ‘human dignity.’¹⁹⁶ The Constitution of South Africa provides that everyone has the right to inherent dignity.¹⁹⁷ An underlying principle in all the articles of the CRPD is protecting and promoting the human rights of people with disabilities.¹⁹⁸

In the Bosch case it was held that, *“there is no price that can be attached to dignity or a threat to that dignity. There is no justification for the violation or potential violation of the*

¹⁸⁷ SAHRC, towards a barrier-free society: a report on accessibility and built environments, SAHRC Report November 2002 page 19.

¹⁸⁸ South African Constitution, Preamble.

¹⁸⁹ CRPD Article 5(4) Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.

¹⁹⁰ Fina, Cera & Palmisano ed, (2017) page 129.

¹⁹¹ ICCPR General Comment No. 18 pointed out that “the principle of equality sometimes requires that States parties take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination.

¹⁹² Fina, Cera & Palmisano ed, (2017) page 129.

¹⁹³ Fina, Cera & Palmisano ed, (2017) page 171.

¹⁹⁴ Fina, Cera & Palmisano ed, (2017) page 171. The principle of affirmative action is embedded in several international human rights treaties, such as the CERD (Article 1) and CEDAW (Article 4(1)).

¹⁹⁵ South African Constitution, founding provisions chapter 1(1) (a).

¹⁹⁶ White paper on the Rights of Persons with Disabilities (9 December 2015).

¹⁹⁷ South African Constitution, chapter 2 section 10.

¹⁹⁸ White paper on the Rights of Persons with Disabilities (9 December 2015).

disabled person's right to equality and maintenance of his dignity that was tendered or averred by the respondent."¹⁹⁹

The court placed great emphasis on the dignity of a person and this is in line with purpose of the CRPD, which includes the promotion of respect for the inherent dignity of people with disabilities.²⁰⁰

Disability is one of the most under litigated grounds of differentiation.²⁰¹ The Constitution in section 39 provides that when interpreting the Bill of Rights a court, tribunal or forum must consider international law.²⁰² The court when interpreting the provisions of section 9(3)²⁰³ against the backdrop of South Africa's international obligations held that, "The duty to advance and promote the position of disabled people are clearly mentioned in the CRPD. Section 39(1) (b)²⁰⁴ is one of the links to the CRPD and also to the provisions that requires international treaties to be enacted into international legislation before they become law in South Africa."²⁰⁵

In the case of *Singh v Minister of Justice and Constitutional Development*, Parvathi Singh the applicant stated that, "*the need to redress the legacy of discriminating against people with disabilities was not properly taken into account*".²⁰⁶ The court held that: 'the appointment committees did not take into account Parvathi Singh's disability and that it had a duty to advance and promote the position of disabled persons'.²⁰⁷ The court held further that the disability of Parvathi Singh had to be taken into account and given due weight.²⁰⁸

¹⁹⁹ Holness W and S Rule 'Barriers to advocacy and litigation in the equality courts for persons with disabilities' (2014) 17 PER.

²⁰⁰ As above.

²⁰¹ Ian Currie & Johan de Waal: The Bill of Rights Handbook, 6th ed. page 234.

²⁰² South African Constitution, Chapter 2 section 39 (1) (b).

²⁰³ South African Constitution, Chapter 2 section 9(3).

²⁰⁴ South African Constitution, Chapter 2 section 39(1) (b).

²⁰⁵ Ian Currie & Johan de Waal: The Bill of Rights Handbook, 6th ed. page 234.

²⁰⁶ *Singh v Minister of Justice and Constitutional Development* 2013 (3) SA 66 (EqC) paragraph 14.

²⁰⁷ *Singh v Minister of Justice and Constitutional Development* 2013 (3) SA 66 (EqC) paragraph 32.

²⁰⁸ *Singh v Minister of Justice and Constitutional Development* 2013 (3) SA 66 (EqC) paragraph 46.

In becoming a party to the CRPD, South Africa accepted the obligations and responsibilities contained therein. Section 231 (4) of the Constitution states that, “any international agreement becomes law in the Republic when it is enacted into law by national legislation”.²⁰⁹

The Constitution protects the right of persons with disabilities. The responsibility to ensure that, in each line function, concrete steps are taken to ensure that persons with disabilities are able to access the same fundamental rights and responsibilities as any other South African lies with Government departments and state bodies.²¹⁰

3.3 The Constitution and access to justice:

Section 34 of the Constitution²¹¹ gives effect to the right to access to courts; section 34 guarantees everyone that has a dispute to be able to bring the dispute to a court or tribunal to seek redress. This is in order to ensure protection against actions by the state and other persons which deny access to courts or other forums.²¹²

The Bill of Rights provides for equal access to justice through the right to access courts²¹³, the right to a fair trial²¹⁴, the right to appeal²¹⁵, the right to an interpreter during trial proceedings²¹⁶, and the right to legal representation²¹⁷ these rights apply to accused persons in criminal trials.

Section 34 of the South African Constitution²¹⁸ guarantees three distinct rights for a person involved in a dispute that can be resolved by law. First, it creates a right of access to a court or another tribunal or forum. Secondly, the tribunals or forums other than the

²⁰⁹ South African Constitution.

²¹⁰ Integrated National Disability Strategy, White Paper, Office of the President.

²¹¹ South African Constitution, Chapter 2 section (34).

²¹² Nyenti M ‘Access to justice in the South African social security system: Towards a conceptual culture’ (2013) 4 *De Jure*.

²¹³ South African Constitution, Chapter 2 (34).

²¹⁴ South African Constitution, Chapter 2 (35) (3) (a).

²¹⁵ South African Constitution, Chapter 2 (35) (3) (o).

²¹⁶ South African Constitution, Chapter 2 35(3) (k).

²¹⁷ South African Constitution, Chapter 2 (35) (3) (f).

²¹⁸ South African Constitution.

courts is required to be independent and impartial when they are resolving legal disputes. Thirdly, it is a due process guarantee, what is required is that that the legal disputes to which it applies must be decided in a fair and public hearing. In order to access this right the threshold enquiry that has to be met in order for this right to be accessed is that there must be a dispute capable of resolution by law²¹⁹. Once this is present the three components of section 34, which are access, independence and impartiality and fairness, are automatically applicable. Section 9 of the constitution provides that everyone is equal before the law and everyone has the right to equality before the law, and section 9(3) provides that the State may not unfairly discriminate against anyone and one of the grounds provided is disability.

In the case of *Road Accident Fund v Mdeyide* the court stated that, “*The fundamental right of access to courts is essential for constitutional democracy under the rule of law. In order to enforce one’s rights under the Constitution, legislation and the common law everyone must be able to have a dispute that can be resolved by the application of law, decided by a court. The right of access to courts is thus protected in the Constitution.*”²²⁰

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With regards to administrative justice members of the public and government officials must be equipped with appropriate skills and knowledge, in order to ensure the rights of persons with disabilities, and in order to remove the barriers that deny them their rights. Persons with disabilities also have the right to represent themselves in all matters which concern them.²²²

3.4 The Constitution and accessibility:

If accessibility is not provided to persons with disabilities the right to equality and access to justice are often not enjoyed. The CRPD recognises that accessibility is a key component to the fulfilment of other rights. The way that accessibility is to be facilitated is

²¹⁹ Ian Currie & Johan de Waal: *The Bill of Rights Handbook*, 6th ed. page 711.

²²⁰ *Road Accident Fund v Mdeyide* 2011 (2) SA 26 (CC) Paragraph 1.

²²¹ South African Constitution section 34.

²²² SAHRC, *towards a barrier-free society: a report on accessibility and built environments*, SAHRC Report November 2002 page 6.

by identifying and eliminating barriers to their transportation, to their assessing public services more generally, and to their being fully informed of their rights, due to the fact that such barriers exist to such access, this often stops persons with disabilities from enjoying their right to equality and access to justice. Persons with disabilities will not be able to enter the court building when courts are not accessible. The result of this is that access to justice as well as equality before the law will be rendered a nullity. What is required from access to justice is that physical as well as social barriers need to be dismantled to the right to equality.²²³ As referred to in chapter 2.²²⁴

When persons with disabilities are not able to access buildings, facilities and built spaces it means these individuals are denied opportunities, services and normal community life. When there is no sensitivity by government officials, employers, architects, property developers and other members of the public to disability issues, discrimination against people with disabilities is often overtly, perhaps unintentionally perpetuated. When environments are inaccessible then persons with disabilities rights to equality, dignity and freedom, amongst other fundamental human rights are denied. A major factor contributing to the ongoing exclusion of persons with disabilities is the lack of physical access, both to and within built environments.²²⁵

The result of thoughtless construction often results in physical barriers to access. They are promoted and reinforced by social and cultural factors.²²⁶

In the case of *Nyathi v Member of the Executive Council for the Department of Health* the applicant brought a claim against a hospital that he was admitted to for the pain caused by the stroke, and disability suffered as a result of the negligent and improper care administered to him at the hospital. The issues raised in this case are: whether section 3 of the State Liability Act, 20 of 1957 limits any of the rights in the Constitution and if so whether the limitation is reasonable and justifiable. The High Court held that: "It observed

²²³ Holness W and S Rule 'Barriers to advocacy and litigation in the equality courts for persons with disabilities' (2014) 17 PER.

²²⁴ Chapter 2 page 26.

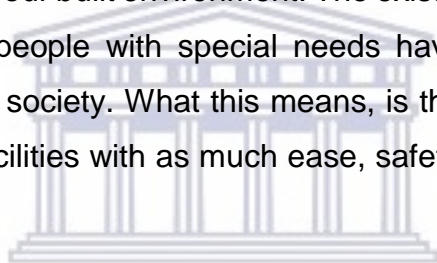
²²⁵ South African Human Rights Commission Report 2002- Towards a Barrier Free Society (2002) 7.

²²⁶ South African Human Rights Commission Report 2002- Towards a Barrier Free Society (2002) 7.

that the blanket ban in section 3 of the Act constitutes a material limitation of the right to access to courts and the consequent right to have the effects of successful access implemented.²²⁷ As the order of the High Court declared invalid a provision of an Act of Parliament, the applicant approached the Constitutional Court for confirmation of that order".²²⁸

The Constitutional Court held that, "The legislature is mandated to ensure the impartiality and efficiency of the courts and their accessibility via legislative measures."²²⁹ There is a clear positive duty imposed by the Constitution on the legislature to ensure the accessibility of courts for all citizens.

The South African Constitution, has implications for the outdated laws dealing with the planning and development of our built environment. The existing laws around accessibility must be updated because people with special needs have the right to be equitably integrated into all aspects of society. What this means, is that they must be able to use public buildings and other facilities with as much ease, safety and convenience as other citizens.²³⁰



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3.5 The Promotion of Equality and Prevention of Unfair Discrimination Act:

In the year 2000 PEPUDA²³¹ was promulgated in order to give effect to section 9 of the Constitution.²³² The act seeks to give effect to section 9²³³ read with item 23 (1) of Schedule 6²³⁴ to the Constitution of the Republic of South Africa, so as to prevent and prohibit unfair discrimination and harassment; to promote equality and eliminate unfair

²²⁷ Nyathi v Member of the Executive Council for the Department of Health, Gauteng and Another 2008 (5) SA 94 (CC) [hereinafter Nyathi v Member of Executive Council] Paragraph 24.

²²⁸ As above.

²²⁹ Nyathi v Member of the Executive Council, Paragraph 84.

²³⁰ South African Human Rights Commission Report 2002- Towards a Barrier Free Society (2002) 26.

²³¹ Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000.

²³² South African Constitution, Chapter 2 section 9(2).

²³³ South African Constitution.

²³⁴ South African Constitution, schedule 6 item 23(1) National legislation envisaged in sections 9(4), 32(2) and 33(3) of the new Constitution must be enacted within three years of the date on which the new Constitution took effect.

discrimination; to prevent and prohibit hate speech; and to provide for matters connected therewith.²³⁵

Section 9 (4) of the constitution of South Africa provides that national legislation must be enacted to prevent or prohibit unfair discrimination.²³⁶ PEPUDA is the national legislation contemplated in section 9 (4).²³⁷

The Act prohibits unfair discrimination on several grounds, namely, race, gender, disability, hate speech, harassment and dissemination and prohibition of unfair discriminatory information that unfairly discriminates.²³⁸

What the equality act seeks to do is effectively stamp out the scourge of discrimination in society. The only way that this can be achieved is by the establishment of courts appropriately able and willing to tackle the matter, therefore the courts have to be accessible. Complainants must be assisted and have reasonably inexpensive access to justice.²³⁹

South Africa has one of the most progressive, rights-based constitutions in the world. Yet South African citizens with disabilities are still confronted daily by barriers that prevent them from fully participating in society. People with disabilities continue to be systematically denied equitable access to their rights.²⁴⁰

3.6 The Promotion of Equality and Prevention of Unfair Discrimination Act with regards to access to justice and accessibility:

²³⁵ PEPUDA.

²³⁶ South African Constitution, Chapter 2 section 9 (4).

²³⁷ Ian Currie & Johan de Waal: The Bill of Rights Handbook, 6th ed. page 244.

²³⁸ PEPUDA, Chapter 4 16(a).

²³⁹ Pityana B, The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, CodicillusXLIV No/Nr 1, page 6-7.

²⁴⁰ SAHRC, towards a barrier-free society: a report on accessibility and built environments, SAHRC Report November 2002 page 35.

PEPUDA provides in subsection 9 that if there is a lack of accessibility for persons with disabilities it amounts to unfair discrimination.²⁴¹ The Act gives effect to the Constitutional provisions that prohibit unfair discrimination and guaranteeing equality before the law²⁴². The Act gives effect to the letter and spirit of the Constitution, particularly to the principles of equality²⁴³, fairness, social progress, justice, human dignity²⁴⁴ and freedom²⁴⁵. Positive measures to eliminate systemic discrimination and to promote equality with regard to race, gender and disability are provided for by the Act²⁴⁶.

The Act also provides that all persons, which comprises persons operating in the public and private domains are responsible for the promotion of equality.²⁴⁷ Positive measures are provided by the state to eradicate systemic discrimination and to promote equality with regard to race, gender and disability. This would include the involvement of the South African Human Rights Commission and the obligation of state departments to implement anti – discriminatory policy and practice within all state structures and programs.²⁴⁸ Any organization could therefore be prosecuted through the Equality Courts by any person with a disability, organization, non-profit organization, law firm or non-disabled person should that organizations buildings be illegal in terms of the National Buildings Regulations-Part S.²⁴⁹

With regards to traditional institutions PEPUDA in Chapter 5 (27) states that: ‘all persons, non-governmental organisations, community based organisations and traditional institutions must promote equality in their relationships with other bodies and in their public activities.’²⁵⁰

²⁴¹ Women, Children and People with Disabilities Report 2013 – Draft initial report to the united nations on the implementation of the convention on the rights of persons with disabilities in South Africa (2013) 12.

²⁴² South African Constitution, Chapter 2 section 9(2).

²⁴³ South African Constitution, Chapter 2 section 9(2).

²⁴⁴ South African Constitution, Article 10.

²⁴⁵ South African Constitution, Article 12(1) (a) (b) (d) (e) 12(2) (a) (b) (c).

²⁴⁶ PEPUDA, Chapter 2.

²⁴⁷ PEPUDA, chapter 5 (24).

²⁴⁸ South African Human Rights Commission Report 2002- Towards a Barrier Free Society (2002) 21.

²⁴⁹ Women, Children and People with Disabilities Report 2013 – Draft initial report to the united nations on the implementation of the convention on the rights of persons with disabilities in South Africa (2013) 12.

²⁵⁰ PEPUDA Chapter 5 section 27.

It is very hard for poor persons to access justice in rural areas, however, for disabled persons in these areas it is near impossible, as they are subjected to shocking prejudices and practices against them. Many people living in rural areas fall under the jurisdiction of traditional leaders and traditional courts, however, it was discovered that traditional leaders in the area had had no training on disabilities, had no knowledge of the Equality courts and some were even scared to work with disabled people. Disabled persons say that the main barriers to accessing justice in the traditional courts are negative attitudes, lack of patience, inaccessible buildings and having to be represented by a family member.²⁵¹

271 people from 10 KZN districts thus far have been trained about disabilities, human rights and the Promotion of Equality & Prevention of Unfair Discrimination Act. This training resulted in included participants taking action when the rights of others were violated, more people with disabilities representing themselves in various community structures and parents having increased confidence to claim their children's rights. A disabled person who has been accepted onto one traditional council said he now participates in court cases. Traditional leaders now also talk about disability in their meetings, which has improved the situation of being discriminated against on the basis of disability.²⁵²

The first case to come before the Equality Court in South Africa was a disability discrimination suit,²⁵³ which is a case that illustrates the lack of physical access to justice for persons with disabilities. Esthe Muller a South African lawyer and wheelchair user brought a case in 2003 under the PEPUDA Act against the Justice Department as well as the Department of Public Works and was supported by the South African Human Rights Commission. The case was brought due to the fact that she and other persons with disabilities were unable to access her local court building because of the presence of steps. The inaccessibility of the courthouse resulted in Ms. Muller having to be carried

²⁵¹ John V 'Traditional leaders scared of disabled people' Mail and Guardian 13 Nov 2015 11:48 page 1.

²⁵² As above.

²⁵³ Division for Social Policy Development, Department of Economic and Social Affairs, Toolkit on Disability for Africa, Access to Justice for Persons with Disabilities.

up the stairs in order to enter the courthouse and on another occasion the court had to postpone her case because she could not get into her room. Ms. Muller said that it was embarrassing for her client to have his lawyer carried into court and it was embarrassing for the courtroom. In September 2004 a final settlement was reached by the parties to the dispute.²⁵⁴

The two government departments admitted that they had failed to provide proper wheelchair access. They also admitted that their failure was a form of unfair discrimination against Ms. Muller and other people with similar accessibility needs, and they apologized for this. The plan that the government departments committed to is to ensure that all court buildings throughout the country will be made accessible within five years. At least one courtroom and one toilet in each building will have to be accessible to people with disabilities. What is required in terms of the plan is that specific actions are to be taken by specific dates, the department will then report on their progress to the equality court. In the meantime, inaccessible courthouses will need to find other ways to make sure that people with disabilities can access their facilities. For example, some have constructed temporary courtrooms, and in some instances judges and magistrates have moved their proceedings to more accessible spaces.²⁵⁵

Similarly, a total of five courts have been renovated between 2010 and April 2012, with a further fifty six courts due for renovation in the current financial year, following the Esther Muller settlement.²⁵⁶

Another case illustrating the lack of accessibility for persons with disabilities is the case of W B. Bosch. A complaint was filed by Mr. W B. Bosch a wheelchair user in 2005. Mr. Bosch was challenging the lack of access by persons with disabilities to the Kabega Park police station. What was required of the police station is that they needed to ensure accessibility, and also that the police officers were required to move to the ground floor

²⁵⁴ Lord JE et al *Human Rights Yes! Action and Advocacy on the rights of persons with disabilities* 2ed (2012) chapter 12 page 164.

²⁵⁵ As above.

²⁵⁶ Women, children & people with disabilities report 2013 – Baseline country report to the united nations on the implementation of the convention on the rights of persons with disabilities in South Africa (2013) 14.

until the renovations were conducted. Letters of apology and acknowledging their inappropriate attitude towards persons with disabilities were required to be written by the police commissioners²⁵⁷. A precedent was set to make all police stations accessible for persons with disabilities.²⁵⁸ One hundred and twenty nine police stations underwent renovations to improve accessibility between the period April 2010 and April 2012, with an additional 30 police stations for the 2012/13 financial year.²⁵⁹ The Act is a legislative step taken to promote the right to equality, eliminate discrimination, and provide access to justice for persons with disabilities, in line with the obligations of the South African state in terms of the CRPD.²⁶⁰

3.7 Women:

The evidence showing that women and girls with disabilities face barriers in most areas of life is very strong. The result of these barriers is that it creates situations of multiple and intersecting forms of discrimination against women and girls with disabilities, particularly, with regard to, access to justice and equal recognition before the law and their ability to participate politically.²⁶¹

Historically International and national laws and policies on disability have neglected aspects related to women and girls with disabilities. Due to this, laws and policies that address women have traditionally ignored disability. This has created a situation where woman with disabilities are considered invisible and this has perpetuated the situation of multiple and intersecting forms of discrimination against women and girls with disabilities.

²⁵⁷ Holness W and S Rule 'Barriers to advocacy and litigation in the equality courts for persons with disabilities' (2014) 17 PER.

²⁵⁸ Women, children & people with disabilities report 2013 – Baseline country report to the united nations on the implementation of the convention on the rights of persons with disabilities in South Africa (2013) 14.

²⁵⁹ Women, Children and People with Disabilities Report 2013 – Draft initial report to the United Nations on the implementation of the convention on the rights of persons with disabilities in South Africa (2012) 10-12.

²⁶⁰ Holness W and S Rule 'Barriers to advocacy and litigation in the equality courts for persons with disabilities' (2014) 17 PER page 1915.

²⁶¹ UN Committee on the Rights of Persons with Disabilities (CRPD), *General comment No. 3 (2016), Article 6: Women and girls with disabilities*, 2 September 2016, CRPD/C/GC/3 page 1 paragraph 2.

Women with disabilities are discriminated against on the grounds of gender and/or disability, or other possible grounds.²⁶²

The CRPD to date is the only core human rights treaty that expressly protects women with disabilities.²⁶³ The preamble to the CRPD provides that: ‘recognizing that women and girls with disabilities are often at greater risk, both within and outside the home, of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation’.²⁶⁴

Article 6 of the CRPD provides that: ‘States Parties recognise that women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms.’²⁶⁵

States Parties shall take all appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the CRPD.²⁶⁶

Barriers to accessing justice is what women with disabilities face, including with regard to exploitation, violence and abuse, due to harmful stereotypes, discrimination and lack of procedural and reasonable accommodations, which can lead to their credibility being doubted and their accusations being dismissed. Women with disabilities may be discouraged from pursuing justice due to procedures or enforcement attitudes. These can include: complicated or degrading reporting procedures; referral of victims to social services rather than legal remedies; dismissive attitudes by police or other enforcement agencies. What this can lead to is impunity and invisibility of the issue, resulting in violence lasting for long periods of time. Women with disabilities may also fear reporting

²⁶² UN Committee on the Rights of Persons with Disabilities (CRPD), *General comment No. 3 (2016), Article 6: Women and girls with disabilities*, 2 September 2016, CRPD/C/GC/3 page 1 paragraph 2

²⁶³ Fina, Cera & Palmisano ed, (2017) page 181.

²⁶⁴ CRPD Preamble paragraph (q).

²⁶⁵ CRPD Article 6(1).

²⁶⁶ CRPD Article 6(2).

violence, exploitation or abuse because they are concerned they may lose their support requirements from caregivers.²⁶⁷

3.8 Children:

The ratification of the CRC as well as the CRPD has facilitated the implementation of programmes towards the fulfilment of the rights of children, as well as people with disabilities in South Africa. However there are many gaps in the knowledge relating to the situation of children with disabilities, their family and community environment, the underlying causes of their situations, and the adequacy of efforts by government and non-government actors to fulfil their rights²⁶⁸

In order to ensure effective protection of their rights all children deserve special measures to be put into place. In particular children with disabilities are vulnerable to discrimination and violations of their rights. Disabled children are subjected to a combined disadvantage accruing to them, due to their impairment as well as their age, therefore they face double discrimination. Children with disabilities often fall through the gaps of legal protection due to the fact that the norms that apply to non-disabled children are inadequate to ensure that the rights of children with disabilities are upheld. There is no doubt that the rights of disabled children must be subject to specific safeguards as they are particularly vulnerable individuals.²⁶⁹

The preamble to the CRPD provides that: 'Recognizing that children with disabilities should have full enjoyment of all human rights and fundamental freedoms on an equal basis with other children, and recalling obligations to that end undertaken by States Parties to the Convention on the Rights of the Child'.²⁷⁰ Articles where children's rights

²⁶⁷ UN Committee on the Rights of Persons with Disabilities (CRPD), *General comment No. 3 (2016), Article 6: Women and girls with disabilities*, 2 September 2016, CRPD/C/GC/3 page 15 paragraph 52.

²⁶⁸ UNICEF, *Children with Disabilities in South Africa, A situation analysis 2001-2011* page 9.

²⁶⁹ Fina, Cera & Palmisano ed, (2017) page 196.

²⁷⁰ CRPD Preamble paragraph (r).

are referred to in the CRPD are: Article 7²⁷¹, Article 3(h) ²⁷² as well as General Principle 3(h) of the CRPD which shows that not only do disabled children have inherent capacity, like all other children, but they also have the ability to develop that capacity over time.²⁷³

Article 4(3)²⁷⁴, as well as Article 13(1)²⁷⁵ as discussed in chapter 2,²⁷⁶ which provides an explicit duty to provide age-appropriate accommodations, with a view to ensuring access to justice for children with disabilities on an equal basis with other children. In that regard, there should be a particular focus on those groups at greater risk of discrimination, such as children with high support needs.²⁷⁷

There are 384 Children's Courts in South Africa that adjudicate matters that deal with children's issues, which include the protection of children, which includes children with disabilities from maltreatment, abuse, neglect, degradation or exploitation. Civil society has produced evidence that during the consultative processes indicate that policy has largely not translated into implementation, and that very few children with disabilities, and in particular children with intellectual, communication and mental disabilities, have equal access to justice due to lack of reasonable accommodation measures that have been put in place²⁷⁸

With regards to age appropriate accommodations, the judicial processes and procedures associated with all crimes including those against children are governed by the criminal procedure second amendment Act 1995. It provides that intermediaries must be used in court in instances where children have to give evidence in court. A child with a disability under the age of 18 has an automatic right to give evidence via an intermediary, the same is not true for adults with disabilities, and it rests with the prosecutor to decide to make an

²⁷¹ CRPD Article 7.

²⁷² CRPD Article 3(h) Article 3(h) provides that: Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

²⁷³ Fina, Cera & Palmisano ed, (2017) page 198.

²⁷⁴ CRPD Article 4(3).

²⁷⁵ CRPD Article 13(1) as discussed in chapter 2 page 4.

²⁷⁷ UNICEF, Children with Disabilities in South Africa, A situation analysis 2001-2011 page 110.

²⁷⁸ SA CRPD 2013 Initial Report page 23.

application for evidence to be given via an intermediary. Obtaining such a report is costly and can delay criminal proceedings, placing it out of the reach of poor and rural communities²⁷⁹

Legal Aid South Africa (LASA) had assisted 16 858 children in conflict with the law through legal representation. LASA omitted to take into account whether any of the more than 20 000 children represented had a disability or not.²⁸⁰ This results in a situation where they are unable to plan or budget for any specific training for legal representatives to undergo in relation to representing the rights of children with disabilities. Therefore, it may be assumed that training of legal representatives on how to manage and represent a client who is a child with a disability is either addressed as part of general training or not addressed at all. Participation of children with disabilities as called for by Article 13 of the CRPD is therefore neglected as the accommodation and training are not addressed.²⁸¹

3.9 Examples of 'administrative and other measures':

In terms of Article 13(1) of the CRPD as discussed in chapter 2,²⁸² some initiatives that South Africa has come up with have been the creation of special courts. Government has created a range of institutions and mechanisms to improve access to justice however, full accessibility of the justice system has yet to be achieved. In South Africa there is a high instance of undiagnosed intellectual impairments and mental illness in impoverished and rural communities and this has compounded the lack of access to justice.²⁸³

With regards to article 13(2) of the CRPD as discussed in chapter 2, ²⁸⁴the training and the sensitisation of the South African Police Service personnel towards the rights of persons with disabilities had been prioritised by SAPS. Out of the 527 workshops that was held between 2010-2011 a total of 955 staff members attended, as well as an additional 196 SAPS managers participated in ten workshops during the same period.

²⁷⁹ SA CRPD 2013 Initial Report pages 23 and 24.

²⁸⁰ UNICEF, Children with Disabilities in South Africa, A situation analysis 2001-2011 page 110.

²⁸¹ As above.

²⁸² CRPD Article 13(1) as discussed in chapter 2 page 21.

²⁸³ SA CRPD Initial Report 2013 pages 23 and 24. Fina, Cera & Palmisano ed, (2017) page 202.

²⁸⁴ CRPD Article 13(2) as discussed in chapter 2 page 25.

Over 17,571 participants participated in a total of 249 disability related calendar events.²⁸⁵ The impact that the exposure and training has had has not been determined. Some police stations have placed community sign language interpreters on a voluntary on-call basis, however, this practice has not been institutionalised within the South African Police Service.²⁸⁶

A major challenge that deaf persons within the justice system are currently facing is the right to an appropriate sign language interpreter. This is due to low Education levels, the lack of knowledge of official sign language by a large number of deaf persons as well as the different dialects of South African Sign Language which is often related to the specific school that the person attended. These are compounded by the general lack of awareness among frontline staff in police stations, investigating officers, prosecutors, court staff and defence lawyers. Therefore no inquiry is made from the witnesses or accused beforehand which variation of South African Sign Language they use in order to arrange an appropriate interpreter. Those who are particularly vulnerable to not having access to justice are deaf persons residing in outlying magisterial districts.²⁸⁷

Compliance with even the flawed current regulatory framework has been historically low due to, among others lack of technical expertise, the lack of a regulatory framework which accredits accessibility advisors and auditors, and a lack of monitoring and enforcement capacity. Government has also prioritized the revamping of public buildings in order to meet the diverse needs of persons with disabilities. Currently there are 40,486 complexes/buildings under the custodianship of the Department of Public Works which include 709 police stations, 684 courts, 2822 defence force buildings, 188 correctional services facilities and 3,521 office blocks. The Department is in the process of verifying immovable assets under its custodianship.²⁸⁸

The South African Human Rights Commission(SAHRC) has noted that the legislation that govern the accessibility of the built environments must focus on improving the

²⁸⁵ SA CRPD Initial Report 2013 23 and 24.

²⁸⁶ SA CRPD Initial Report 2013 pages 23 and 24.

²⁸⁷ As above.

²⁸⁸ SA CRPD Initial Report 2013 page 14.

preconditions for equal participation and dignity and providing mechanisms for governance, administration and enforcement. They also provided that an urgent review of the South African legislative framework for accessibility and the built environment was required to reflect constitutional rights, ensure safe, healthy and convenient use for all, and include international standards for universal access. The SAHRC has also noted that review of legislation governing access to the built environment has been an open ended process. The disability sector has raised concerns regarding the pace as well as the extent of the review process.²⁸⁹

A total of 249 buildings have been made accessible from 208/2009- January 2012/2013 at a cost of 63.5 million and includes 159 police stations, 22 defense buildings, 51 correctional service centers, 13 offices, 2 training centres and 2 courts. There have also been discussions with National Treasury to increase fiscal allocation in the future to ensure the urgent remodeling of building where services are offered to the public.²⁹⁰

The gap between will and commitment, implementation and enforcement was clearly illustrated during the 2010 FIFA World Cup, where none of the stadia complied fully with FIFAS own norms for accessibility, despite participation by organizations of and for persons with disabilities in the planning phases. The South African Government acknowledges that priority has to be given to address the shortcomings that have been identified, through among others, the finalization of a Universal Access and Design Framework for the physical environment that sets minimum norms and standards for the accessibility in the built environment, the training of professionals in the infrastructure sector.²⁹¹

This relates to Article 9(2) (c) which reads as follows: to provide training for stakeholders on accessibility issues facing persons with disabilities.²⁹²

²⁸⁹ SA CRPD Initial Report 2013 page 14.

²⁹⁰ As above.

²⁹¹ As above.

²⁹² CRPD Article 9(2) (c).

As well as funding mechanisms to redress existing infrastructure as well as accreditation of accessibility auditors, in order to provide substance to commitment contained in the National Development Plan, which prioritizes the improvement of aesthetic and functional features of the built environment to create live able, vibrant and valued places that allow for access and inclusion of people with disabilities.²⁹³

3.10 Conclusion:

This chapter set out the South African position with regards to access to justice and accessibility. The starting point of the discussion centered around the Constitution of South Africa, first with regard to access to justice and then accessibility. The legislation that was discussed is the PEPUA Act, also with regards to access to justice and accessibility. Two vulnerable groups were briefly discussed namely women and children. Lastly, some initiatives South Africa has come up with in order to provide better access for persons with disabilities was discussed.

The basis for progressively redressing the situation of persons with disabilities is the Constitution of South Africa. The ratification of the CRPD in 2007 as well as its optional protocol, committed the country to respect and implement the rights of persons with disabilities. International law must be considered by a court, tribunal or forum when interpreting the Bill of Rights. What has led to the Convention having a weakened effect in South Africa is due to the fact that South Africa has not properly incorporated the CRPD into its own legal framework.

Section 9 of the Constitution protects a right to equality, Section 9 (2) of the Constitution, read with the Promotion of Equality and Prevention of Unfair Discrimination Act, clearly places a complementary duty on the state to take active measures to promote the equality of people with disabilities.

²⁹³ As above.

For equality to exist discrimination must not be unfair. Where discrimination is shown to have taken place on one or more of the prohibited grounds listed in section 9 (3) is unfair unless it is established that the discrimination is fair. In the case of Harksen v Lane the Constitutional Court laid down the test for determining whether or not a certain act or legislative provision is unconstitutional for noncompliance with the equality clause.

The court placed great emphasis on the dignity of a person and this is in line with purpose of the CRPD, which includes the promotion of respect for the inherent dignity of persons with disabilities.

Section 34 of the Constitution provides for the right to access to courts. With regards to administrative justice members of the public and government officials must be equipped with appropriate skills and knowledge, in order to ensure the rights of persons with disabilities, and in order to remove the barriers that deny them their rights.

If accessibility is not provided to persons with disabilities the right to equality and access to justice are often not enjoyed. The CRPD recognises that accessibility is a key component to the fulfilment of other rights.

PEPUDA was set up in the year 2000, The Act gives effect to the Constitutional provisions that prohibit unfair discrimination and guaranteeing equality before the law. What the equality act seeks to do is stop the discrimination in society. The only way that this can be achieved is by the establishment of courts appropriately able and willing to tackle the matter, therefore the courts have to be accessible. Complainants must be assisted and have reasonably inexpensive access to justice, the equality court does more than would ordinarily be the case.

Two cases that were brought to the equality court were the cases of Esthe Muller and W Bosch.

In terms of the Esthe Muller case the plan that the government departments committed to is to ensure that all court buildings throughout the country will be made accessible within five years. What is required in terms of the plan is that specific actions are to be

taken by specific dates, the department will then report on their progress to the equality court

With regards to the W Bosch case a precedent was set to make all police stations accessible for persons with disabilities. One hundred and twenty nine police stations underwent renovations to improve accessibility between the period April 2010 and April 2012, with an additional 30 police stations for the 2012/13 financial year.

In terms of the two vulnerable groups discussed namely, women and children with disabilities. Both these groups face multiple forms of discrimination as well as facing barriers in most areas of life which includes barriers to accessing justice on an equal basis with others.

Lastly, with regard to administrative and other measures, Government has created a range of institutions and mechanisms to improve access to justice however, full accessibility of the justice system has yet to be achieved.



CHAPTER 4

CONCLUSION AND RECOMMENDATIONS:

4.1. Introduction:

Fair and equal access to justice is too often denied to persons with disabilities. There is a frequent denial of access to fair and equal treatment before courts, tribunals, law enforcement officials, and prison systems for persons with disabilities, be it in South Africa or elsewhere.

What this research paper sought to investigate is whether South Africa is progressing in making the justice system physically accessible for persons with disabilities.

In 2007 South Africa ratified the CRPD as well as its optional protocol, and by doing this it committed the country to respect and implement the rights of all persons with disabilities.

The two Articles of the CRPD around which this research revolves are Article 9 relating to accessibility and Article 13 relating to access to justice. In terms of domestic law in South Africa, the focus was on the Constitution of South Africa as well as the PEPUA.

4.2 Conclusion:

Access to justice is a fundamental human right and has for a long time been a concern for persons with disabilities. The right of access to justice is intrinsic to all human rights treaties. In recent years the concept of access to justice has attracted significant attention in human rights discourse. In order to realize human rights for many marginalized communities, access to justice is key, including for persons with disabilities.

Article 9 is the common reference point for all issues of accessibility while the rights of persons with disabilities to access justice is provided in Article 13 of the CRPD. Article 13 of the CRPD provides that States should provide access to justice for persons with disabilities on an equal basis with others. Although the Convention in Article 13 makes an explicit reference to access to justice for persons with disabilities, in reality it is often the case that persons with disabilities lack access to justice on an equal basis with others.

They face many barriers to the justice system. The symbols of the justice system which are court houses are often inaccessible in many ways.

Persons with disabilities in South Africa are also affected by the lack of physical accessibility to access justice, due to the fact that many courts across the country are housed in old structures; this presents barriers for persons with mobility limitations such as stairs, narrow doorway, and inaccessible restrooms. As long as these barriers to access to justice remain, persons with disabilities will not be able to assume their full responsibilities as members of society.

Civil society has produced evidence that during the consultative processes indicate that policy has largely not translated into implementation, and that very few children with disabilities, and in particular children with intellectual, communication and mental disabilities, have equal access to justice due to lack of reasonable accommodation measures that have been put in place.

Woman with disabilities also face multiple forms of discrimination especially with regard to, access to justice and equal recognition before the law and the ability to participate politics.

International as well as national laws and policies on disability have neglected aspects related to women and girls with disabilities. Because of these laws and policies that address women have traditionally ignored disability. This has created a situation where woman with disabilities are considered invisible and this has perpetuated the situation of multiple and intersecting forms of discrimination against women and girls with disabilities.

It is extremely important that persons with disabilities are able to access the justice system on an equal basis with others.

Despite the fact that South Africa has ratified the CRPD persons with disabilities still continue to face obstacles with regards to access to justice. Barriers and impediments often involve combined forms of inaccessibility and other forms of discrimination.

Overarching barriers, are often compounded for those living in rural areas or in socio-economically disadvantaged situations, or for those facing multiple forms of discrimination

Article 13(2) also provides that States Parties need to have appropriate training for those who work in the field of administration of justice, including police and prison staff, in order to help ensure effective access to justice for persons with disabilities.

With regards to article 13(2) of the CRPD as discussed in chapter 2, the training and sensitisation of the South African Police Service personnel towards the rights of persons with disabilities has been prioritised by SAPS. Out of the 527 workshops that were held between 2010-2011 a total of 955 staff members attended, as well as an additional 196 SAPS managers participated in ten workshops during the same period. Over 17,571 participants participated in a total of 249 disability related calendar events. The impact that the exposure and training has had has not been determined. Some police stations have placed community sign language interpreters on a voluntary on-call basis, however, this practice has not been institutionalised within the South African Police Service.

In terms of the Esthe Muller case the plan that the government departments committed to is to ensure that all court buildings throughout the South Africa will be made accessible within five years. At least one courtroom and one toilet in each building will have to be accessible to persons with disabilities. What is required in terms of the plan is that specific actions are to be taken by specific dates, the department will then report on their progress to the equality court. In the meantime, inaccessible courthouses will need to find other ways to make sure that people with disabilities can access their facilities. A total of five courts have been renovated between 2010 and April 2012, with a further fifty six courts due for renovation in the current financial year, following the Esther Muller settlement.

With regards to the W Bosch case a precedent was set to make all police stations accessible for persons with disabilities. There are 1,138 police stations in South Africa only one hundred and twenty nine police stations underwent renovations to improve accessibility between the period April 2010 and April 2012, with an additional 30 police stations for the 2012/13 financial year. This is extremely low, Governments should place

a greater emphasis in complying with their duty to make all the police stations in South Africa accessible.

Some progress that South Africa has made thus far has been the creation of special courts. A range of institutions and mechanisms to improve access to justice has been created by Government, however, full accessibility of the justice system has yet to be achieved. In South Africa there is a high instance of undiagnosed intellectual impairments and mental illness in impoverished and rural communities and this has compounded the lack of access to justice. What is urgently required in South Africa is a system to stop wrongful criminal convictions due to the lack of assessment to distinguish between intellectual disability and criminal capacity.

Government has also prioritized the revamping of public buildings in order to meet the diverse needs of persons with disabilities. Currently there are 40,486 complexes/buildings under the custodianship of the Department of Public Works which include 709 police stations, 684 courts, 2822 defence force buildings, 188 correctional services facilities and 3,521 office blocks. The Department is in the process of verifying immovable assets under its custodianship.

A total of 249 buildings have been made accessible from 2008/2009- January 2012/2013 at a cost of 63.5 million and includes 159 police stations, 22 defense buildings, 51 correctional service centers, 13 offices , 2 training centres and 2 courts. There have also been discussions with National Treasury to increase fiscal allocation in the future to ensure the urgent remodelling of building where services are offered to the public.

Compliance with even the flawed current regulatory framework has been historically low due to, among others, lack of technical expertise, the lack of a regulatory framework which accredits accessibility advisors and auditors, and a lack of monitoring and enforcement capacity.

As a result the South African Government acknowledges that priority has to be given to address the shortcomings that have been identified, through among others, the finalization of a Universal Access and Design Framework for the physical environment that sets minimum norms and standards for the accessibility in the built environment, the training of professionals in the infrastructure sector.

South Africa has taken some steps in trying to comply with its obligation under the CRPD. However, as was made evident by this research, the steps taken thus far is not enough to ensure access to justice for persons with disabilities on an equal basis with others.

4.3 Recommendations:

The paper makes the following recommendations in order to remedy the denial of access to justice persons with disabilities face in South Africa:

South Africa should introduce into law policies and practices, requirements for the physical environment of all aspects of the administration of justice, including the physical accessibility of police stations, court houses and prisons.

With regards to children with disabilities there are many gaps in the knowledge relating to the situation of children with disabilities, initiatives need to be set up to educate people regarding access to justice for children with disabilities.

In order to ensure effective protection of the rights of all children with disabilities, special measures need to be put into place, such as reasonable accommodation measures that are child sensitive and not only in compliance with the CRPD but also in line with the UN Convention on the rights of the Child.

There should also be initiatives to educate people especially the law enforcement officials so that attitudinal barriers may be eliminated through them having sufficient knowledge regarding person with disabilities.

South Africa should also provide compulsory training of all actors in the administration of justice on the rights and needs of persons with disabilities and the barriers which they typically face in accessing justice.

People should also be educated regarding the barriers women with disabilities face in accessing the justice system, this may help in removing the attitudinal barriers woman with disabilities face.

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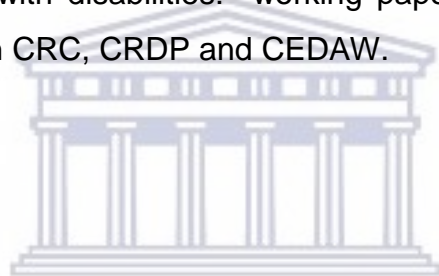
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