

A CASE FOR PERSONS WITH DISABILITIES: USING DIGITAL COURTS TO PROMOTE THE RIGHT TO ACCESS TO JUSTICE AND THE RULE OF LAW

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Abstract

Access to justice is an essential human right and a cornerstone of the rule of law. The 2030 Agenda for Sustainable Development seeks to, amongst other things, promote the rule of law and ensure equal access to justice, promote peaceful and inclusive societies for sustainable development, provide access to justice for all, and build effective, accountable, and inclusive institutions. As a marginalised group, persons with disabilities are often spectators to their grievances when accessing justice, notwithstanding the strong protection afforded by the Convention on the Rights of Persons with Disabilities ('the CRPD'). Under the CRPD, the right to access justice requires justice to be accessible, practical, and without discrimination. Nevertheless, research indicates that persons with disabilities are most likely to be left out of the legal system as there are numerous barriers that prevent them from accessing justice. In 2020, while the world faced an outbreak of COVID-19 cases, courtrooms worldwide had to review their operational methods. Initially aimed at hearing cases remotely and prevent a backlog of cases, the question arises as to whether digital courts could not be adapted to promote the right to access to justice for persons with disabilities. Article 13 of the CRPD contains essential

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provisions on the right to access justice. If designed, tested, and implemented correctly, digital courts could alleviate the inequalities faced by persons with disabilities. In essence, digital courts have the potential to make justice accessible and less hostile whilst also improving the communication and information barriers to the right to access justice. However, the advantages should not outweigh the potential exclusionary risk that digital courtrooms could create. Such courtrooms should be carefully implemented in close consultation with persons with disabilities.

1 Introduction

As the COVID-19 pandemic struck heavily in 2020, the world had to adapt to what would now be known as ‘the new normal’. However, from the chaos emerged a new and revolutionary court system that allowed matters to be heard remotely, without the need for face-to-face hearings; introducing so-called ‘digital courts’.¹

Digital courts have transformed legal proceedings by making it possible to hear cases remotely and facilitating the entire process for all involved. They are arguably cheaper and more convenient for all concerned, reducing delays in hearing matters.² While most countries are slowly removing all restrictions imposed as a response to COVID-19,³ the question arises as to whether digital courts could not be used, improved, and adapted for persons with disabilities to give effect to their right to access justice, as set out by the United Nations Convention on the Rights of Persons with Disabilities (‘CRPD’). Persons with disabilities, as a marginalised group, face numerous challenges accessing justice as a result of, amongst others, physical barriers, a lack of access to information and communication, and attitudinal stigma.

This article will analyse the right to access to justice in relation to persons with disabilities, as set out in article 13 of the CRPD, to examine whether digital courts can be used to promote this right and, by extension, the rule of law, in accordance with Sustainable Development Goal No. 16 (‘SDG 16’), titled ‘Peace, Justice and Strong Institutions.’⁴ This article will first briefly discuss the relationship between the rule of law and the right to access to justice, followed by the concept of digital courts, before examining the relevant

1 JP Gauteng Division of the High Court ‘Directive 1 of 2020’; JP Gauteng Division of the High Court ‘Directive 1 of 2021’; JP Gauteng Division of the High Court ‘Revised Directive 1 of 2021’.

2 D Menashe ‘A critical analysis of online courts’ (2018) 39 *University of Pennsylvania Journal of International Law* at 926.

3 Government Notice R. 2190 *Government Gazette* of 22 June 2022.

4 CRPD art 13; Transforming our world: the 2030 Agenda for Sustainable Development, United Nations General Assembly (21 October 2015), UN Doc A/RES/70/1 (2015) at 25.

provisions of the CRPD. It will then discuss the most common barriers that persons with disabilities currently face when accessing justice and how digital courts could potentially remove those obstacles. Finally, it will consider how digital courts also have the potential to exclude persons with disabilities; arguing that it is necessary to ensure that this system is carefully designed to facilitate the inclusion of persons with disabilities, as opposed to supplementing their exclusion and segregation in society.

2 Access to justice: A cornerstone of the rule of law

2.1 The rule of law in context

The rule of law is an ancient concept that can be traced back to the 4th century BCE⁵ and is a foundational element of the South African constitutional dispensation.⁶ In its simplest form, the rule of law can be defined as a system whereby the relationships between the government and citizens, on the one hand, and between citizens, on the other, are governed by laws as opposed to men and are implemented accordingly.⁷ This concept has evolved over the years and today it incorporates essential values and principles that constitute the very basis of societies.⁸ It can be summarised as a concept according to which all people, institutions and entities – public and private, including the state – are answerable to laws.⁹ Such laws must be compatible with international human rights standards and publicly promulgated, enforced equally, and independently adjudicated.¹⁰ The rule of law necessitates the implementation of measures which guarantee the observance of the various principles by which it is governed, including; the supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in

5 R Stein 'What exactly is the rule of law?' (2019) 57 *University of Minnesota Law School* at 187; J Waldron 'The rule of law' in EN Zalta (ed) *The Stanford encyclopedia of philosophy* (2020) at 3.

6 Section 1(c) of the Constitution of the Republic of South Africa 1996 provides that the Republic of South Africa is one, sovereign, democratic state founded on the values of the supremacy of the constitution and the rule of law.

7 Public Law for everyone 'Lord Neuberger on the rule of law and access to justice' 16 October 2013 <https://publiclawforeveryone.com/2013/10/16/lord-neuberger-on-the-rule-of-law-and-access-to-justice/> (accessed 17 April 2022).

8 JKM Ohnesorge 'The rule of law' (2007) 3 *Annual Review of Law and Social Science* at 109.

9 The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Secretary-General (23 August 2004) UN Doc S/2004/616 (2004) at para 6.

10 As above.

decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.¹¹

In essence, the rule of law must be equally applied to everyone and adequately enforced to provide citizens with fundamental rights.¹² In effect, it is a mechanism which enacts and implements human rights: there can be no rule of law within societies if human rights are not respected.¹³ It plays an essential role in the promotion of economic, social and cultural rights, and provides a course for redress when those rights have been infringed.¹⁴

For the purposes of this article, the rule of law can broadly be summarised in the words of former United States Supreme Court justice, Justice Anthony Kennedy, at the annual meeting of the American Bar Association in 2006, as a system:

- (a) Whereby laws are known and equally binding to everyone;
- (b) Which affirms, respects, and preserves the dignity, equality and human rights of all citizens; and
- (c) Where all persons are advised of their rights, are empowered, and are entitled to seek redress of their grievances without fear.¹⁵

2.2 Relationship between the rule of law and the right to access justice

For a society to be based on the rule of law, access to justice must be fostered unequivocally.¹⁶ Indeed, access to justice is a foundational principle of the rule of law.¹⁷ For the law to prevail, it must be able to rectify wrongs and provide remedies whenever rights are violated.¹⁸ There is growing evidence that justice systems and the rule of law contribute to sustainable development and inclusive growth.¹⁹ The two concepts appear to be mutually inclusive, such that one cannot survive without the other. In truth, the rule of law and human rights have been considered paramount in attaining and

11 As above.

12 Stein (n 5) 344.

13 United Nations and the Rule of Law 'Rule of law and human rights' <https://www.un.org/ruleoflaw/rule-of-law-and-human-rights/> (accessed 17 April 2022).

14 As above.

15 C-Span 'Justice Kennedy Address' 5 August 2006 <https://www.c-span.org/video/?193757-1/justice-kennedy-address> (accessed 13 August 2022); Stein (no 5) at 345.

16 United Nations 'Access to justice critical in ensuring rule of law, speakers stress as Sixth Committee continues deliberations on Principle' 10 October 2014 <https://www.un.org/press/en/2014/gal3478.doc.htm> (accessed 1 May 2022).

17 CP Sabatino 'Access to justice: The people's principle' (2019) 43 *Generations: Journal of the American Society on Aging* at 6.

18 G Sharp 'The right of access to justice under the rule of law: Guaranteeing an effective remedy' 7 July 2016 <https://ciaj-icaj.ca/wp-content/uploads/page/2016/05/the-rule-of-law-and-the-right-to-effective-access.pdf> (accessed 1 May 2022).

19 Open Society Foundations 'Understanding effective access to justice, workshop background paper' at 2.

preserving world peace and achieving the Sustainable Development Goals of 2030.²⁰ According to the United Nations, promoting the rule of law and ensuring equal access to justice for all could be one of the ways to realise SDG 16, 'Peace, Justice and Strong Institutions'.²¹

The following section will dissect the relationship between the rule of law and access to justice to show that where access to justice is adequately implemented and adhered to, the rule of law is also enhanced.

2.3 The right to access justice

As a core human right, access to justice forms an integral part of the rule of law: everyone must be provided with appropriate mechanisms and remedies to enforce their rights, and they must be able to do so by having physical access to courts.²² The rule of law would be an empty ideal if courts were not readily accessible when seeking justice. Accessibility is thus crucial for enabling the public to seek redress where their rights have been violated.

In its narrowest form, the right to access justice is the ability to seek and obtain a remedy for one's grievances²³ and the right to litigate or defend a claim.²⁴ It is universally recognised under several human rights treaties as a vital human right.²⁵ It is not only a fundamental stand-alone right but also plays an essential role in

20 United Nations and the Rule of Law 'Sustainable Development Goal 16' <https://www.un.org/ruleoflaw/sdg-16/> (accessed 6 May 2022).

21 Transforming our world: the 2030 Agenda for Sustainable Development (n 4) para 35.

22 Stein (n 5) 196.

23 United States Institute of Peace 'Necessary condition: Access to justice' <https://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/rule-law/access-justice#:~:text=Access%20to%20justice%20involves%20normative,resolving%20personal%20and%20political%20disputes> (accessed 14 August 2022).

24 Alberta Civil Liberties Research Centre 'What is access to justice? Five different ways of considering access to justice' <https://www.aclrc.com/what-is-access-to-justice/> (accessed on 17 April 2022).

25 See the Universal Declaration of Human Rights arts 7, 8, 10 & 11 which provides for the right to equality and non-discrimination of the law; the right to an effective remedy by a competent tribunal; the right to a fair and public hearing by an independent and impartial tribunal; and the principles of a fair trial. The International Covenant on Civil and Political Rights ('ICCPR') art 2 similarly makes provision for the right to be provided with an effective remedy by a competent authority without discrimination, for any person whose right or freedoms have been violated. Art 14 ICCPR caters for the right to a fair trial, including equality before the courts; the right to a public hearing by a competent, independent and impartial tribunal established by law; the need for a judgment to be made public, except in some limited circumstances, listed therein; the principle of presumption of innocence; minimum guarantees in criminal cases, including the right to be informed promptly and in an understandable language the nature and cause of the charge against him, being provided with adequate time and facilities for the preparation of his defence, the right to be tried without undue delay, the right to legal assistance, the right to challenge evidence, the right to an interpreter, and prevention of self-incrimination. Art 14 ICCPR further sets down

protecting and promoting other human rights.²⁶ It encompasses various recognised principles, such as the right to a fair trial, having access to adequate and timely remedies, and the principle of equality before courts.²⁷

According to Lord Neuberger of Abbotsbury, former President of the United Kingdom Supreme Court, the right to justice generally consists of several components, including; accessible and properly administered courts, effective procedures and an effective legal process, effective execution of a claim, and affordable justice.²⁸ Guaranteeing the right to access justice is crucial to the rule of law and democratic governance and to reduce social and economic marginalisation.²⁹

From the above, it is clear that the rule of law and the right to access justice go hand-in-hand and that one cannot be adequately realised without the other. In conclusion, promoting and protecting the right to access to justice can equally enhance the rule of law and, by implication, the realisation of SDG 16.

How, then, can the new system of digital courts promote the right to access justice, especially as far as marginalised groups and, more significantly, persons with disabilities are concerned? The following section will introduce the concept of digital courts and their numerous advantages before analysing their viability under the provisions of the CRPD.

3 Digital Courts

As a result of the rapid spread of the highly contagious COVID-19 virus that forced courts to shut their doors to reduce its devastating effects, the world saw the emergence of a new type of court system

25 important provisions governing juvenile persons; the right to appeal; and the prohibition of double-jeopardy, amongst others. Art 26 ICCPR specifically deals with the issue of equality before the law and the right to equal protection of the law, irrespective of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. See also The Convention on the Elimination of All Forms of Discrimination against Women arts 2 & 15; The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts 13 & 14; The Convention on the Rights of the Child arts 12, 23, 37 & 40; the European Convention of Human Rights articles 6, 7 & 14; and the African Charter on Human and Peoples' Rights art 7.

26 Access to justice for children: Report of the United Nations High Commissioner for Human Rights (16 December 2013) UN Doc A/HRC/25/35 (2013) at para 3.

27 Equality and Human Rights Commission 'Following Grenfell: Access to justice' <https://www.equalityhumanrights.com/sites/default/files/following-grenfell-briefing-access-to-justice.pdf> (accessed on 17 April 2022).

28 As above.

29 Thematic report on the right to access to justice under article 13 of the Convention on the Rights of Persons with Disabilities, Office of the United Nations High Commissioner for Human Rights (27 December 2017), UN Doc A/HRC/37/25 (2017) at para 3.

to provide alternative ways of delivering court services.³⁰ In the interests of justice and to avoid the backlogging of cases, many countries resorted to conducting cases remotely through videoconferencing and telephonic conferences.³¹

Digital courts, remote courts, virtual courts, and online or electronic courts can generally be described as platforms where online technologies are used to shift all proceedings to an online platform.³² This entails the electronic submission of court files; an entirely digital and wireless courtroom, including electronic hearings and trials; access to video conferencing and transcripts, displaying court information and connectivity; remote appearances; electronic case management; managing and sharing information; and online scheduling.³³ Ultimately, all court-related processes are executed electronically and is accessible to all concerned on a virtual platform, including litigants, judges, and lawyers.³⁴

According to a study conducted in eight Nordic countries,³⁵ digital courts present various advantages for court proceedings and administration.³⁶ The digitalisation of court systems can make the handling of cases more efficient by providing a cheaper and speedier resolution process. It can also assist with administrative tasks such as case management, including the service of documents, when tasks can be performed electronically.³⁷ This, in turn, can contribute to increased legal certainty.³⁸ In addition, digital courts can generate savings in terms of the use of paper, cheaper services, and low transportation costs; provide more security as far as archiving, misfiling and theft is concerned; and increase transparency in court proceedings.³⁹

30 R Susskind 'The Future of Courts' <https://thepractice.law.harvard.edu/article/the-future-of-courts/> July 2020 (accessed 8 May 2022).

31 T Sourdin, B Li & DM McNamara 'Court innovations and access to justice in times of crisis' (2020) 9 *Health Policy and Technology* at 447.

32 British Columbia Ministry of Attorney General 'Court Digital Transformation Strategy 2019-23' at 6.

33 ADGM 'Digital Approach: Unique fully digital courts' <https://www.adgm.com/adgm-courts/digital-approach> (accessed 8 May 2022).

34 D Juvekar 'Can e-courts help speeding up justice delivery?' (17 January 2017) <https://www.businesstoday.in/opinion/columns/story/can-ecourts-help-speeding-up-justice-delivery-73854-2017-01-17> (accessed 9 July 2022).

35 The project investigated the court systems in eight Nordic countries and Baltic states, namely Denmark, Estonia, Finland, Iceland, Latvia, Lithuania, Norway and Sweden.

36 Nordic Council of Ministers 'Digitalization at the courts: A report on the state of digitalization at the courts in the Nordic countries and the Baltic states' <https://pub.norden.org/temanord2022-518/> (accessed 9 July 2022).

37 As above; LR Amofah 'Electronic Court Case Management System (For Law Court Complex)' (2016) at 1.

38 Nordic Co-Operation 'New report: Digitalization of courts strengthen the rule of law' <https://www.norden.org/en/news/new-report-digitalization-courts-strengthen-rule-law> (accessed 9 July 2022).

39 J Vilquin & E Bosio 'Improving court efficiency: the Republic of Korea's e-court experience' in World Bank (ed) *Doing Business 2014: Understanding Regulations for Small and Medium-Size Enterprises* at 68.

Digital courts can contribute greatly to the rule of law since they can substantially increase the availability of courts and justice.⁴⁰ They not only provide a 24/7 filing, application and registration system but are also more convenient and efficient by saving costs and providing full remote access to justice.⁴¹ Some features, such as accessing documents and information, may be available offline.⁴² Digital courts are particularly beneficial where geographical distance makes it difficult for parties to attend, allowing those concerned to fully participate via videoconferencing and reducing long waiting times and travel costs.⁴³

From the above, it can generally be concluded that digital courts present several advantages for accessing justice. The question then arises as to whether digital courts can be adapted and enhanced to the needs of persons with disabilities, and whether such changes could not be the solution to numerous barriers they face when accessing justice. The following section will focus on the right to access to justice concerning persons with disabilities to demonstrate how digital courts can promote their access to justice and simultaneously promote the rule of law.

4 The CRPD and the right to access justice.

4.1 Overview

For years, the notion of disability was seen as a medical construct requiring ‘a cure’ due to the incorrect belief that an impairment automatically limited one’s participation in society.⁴⁴ A revolutionary development in respect of disability rights was the coming into force of the CRPD, which is based on eight founding principles: (i) the respect for inherent dignity, individual autonomy and independence; (ii) non-discrimination; (iii) full and effective participation and inclusion in society; (iv) respect for differences and acceptance of persons with disabilities as part of human diversity and humanity; (v) equal opportunities; (iv) accessibility; (vii) equality; and (viii) respect for children with disabilities.⁴⁵ It also covers various civil, political, economic, social and cultural rights⁴⁶ and provides State Parties with the necessary steps to achieve the CRPD objectives.⁴⁷

40 As above.

41 As above.

42 British Columbia Ministry of Attorney General (n 32) 12.

43 As above.

44 P Harpur ‘Embracing the new disability rights paradigm: The importance of the CRPD’ (2012) 27 *Disability and Society* at 2.

45 CRPD art 3.

46 CRPD arts 5 to 30.

47 CRPD arts 4 & 31-35.

Ultimately, the object and purpose of the CRPD is to protect and promote the rights of persons with disabilities by seeking to realise the full and equal enjoyment of their rights and promoting their right to inherent dignity.⁴⁸ For purposes of this article, focus will be on the right to access justice, as set out in article 13.

4.2 Article 13 of the CRPD

The CRPD was the first international treaty to expressly address and make specific provisions for the right to access justice by restating and applying existing principles in various other treaties.⁴⁹ It contains important and innovative elements which seek to put persons with disabilities on an equal footing with others.⁵⁰

The CRPD aims to ensure the full and effective participation of persons with disabilities in courts, both as direct and indirect participants and as witnesses.⁵¹ It also emphasises that this right shall prevail at all stages of proceedings. This is in addition to the implementation of procedural and age-appropriate accommodations during the process to facilitate the participation of persons with disabilities.⁵² The CRPD further requires the appropriate training of all those involved in the administration of justice for the effective participation of all persons with disabilities.⁵³

It should also be noted that the wording of article 13 is mandatory, and there is, therefore, an obligation on all Member States to effectively take all necessary steps to ensure its implementation accordingly. The following sections will review the requirements of article 13.

4.2.1 Effective access to justice

Firstly, Article 13(1) of the CRPD requires the right to access justice to be 'effective'.⁵⁴ Fundamentally, the effectiveness of a justice system will generally depend on whether redress can be obtained in a

48 CRPD art 1.

49 E Flynn 'Article 13 Access to justice' in I Bantekas, M Ashley Stein & D Anastasiou (eds) *The UN Convention on the Rights of Persons with Disabilities: A Commentary* at 383.

50 P Weller 'The CRPD and the social model of health: new perspectives' (2011) 21 *Journal of Mental Health Northumbria University* at 74.

51 CRPD art 13(1).

52 CRPD art 13(1).

53 CRPD art 13(2).

54 Article 13(1) of the CRPD which reads as 'States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages'.

fair, proactive, cost-effective, and efficient manner.⁵⁵ Flynn suggests that under this limb of article 13 and for a justice system to be effective, persons with disabilities must be provided with legal representation and legal aid.⁵⁶

The prerequisites thereof can be gathered from the case of *Munir Al Adam v Saudi Arabia*,⁵⁷ where the Committee on the Rights of Persons with Disabilities ('CRPD Committee')⁵⁸ held in respect of a person whose hearing impairment was made permanent through torture while he was in detention in Saudi Arabia, that under article 13(1) of the CRPD, persons with disabilities are entitled to a fair trial; to be represented, and to not be subjected to any physical or undue psychological pressure from investigating authorities.⁵⁹ Similarly, under article 13, a person must be effectively assisted in capital punishment cases at all stages of proceedings.⁶⁰

Considering the case of *Munir Al Adam*, it can be generally concluded that, to be effective, access to justice must meet the usual criteria as set out by international law, such as the right to a fair trial;⁶¹ the principle of the presumption of innocence;⁶² the right to a public hearing by an independent and impartial tribunal;⁶³ the right to be told and explained the charges as early as possible and in an understandable language;⁶⁴ the right to defend a case;⁶⁵ the capacity to challenge evidence;⁶⁶ the right to have the assistance of an interpreter, if necessary;⁶⁷ the prohibition of self-incrimination;⁶⁸ and the right to appeal.⁶⁹

55 Open Society Foundations (n 19) 2.

56 Flynn (n 49) 390.

57 *Munir Al Adam v Saudi Arabia*, Communication 38/216, CRPD Committee (24 October 2018) UN Doc CRPD/C/20/D/38/2016.

58 The CRPD Committee is a body consisting of 12 independent experts, aimed at monitoring the implementation of the CRPD by States Parties. The seat of the CRPD Committee is in Geneva. See United Nations Department of Economic and Social Affairs Disability 'Committee on the Rights of Persons with Disabilities' <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/committee-on-the-rights-of-persons-with-disabilities-3.html> (accessed 14 August 2022).

59 *Munir Al Adam v Saudi Arabia* (n 57) para 11.4.

60 As above.

61 The Universal Declaration of Human Rights ('UDHR') art 10; International Covenant on Civil and Political Rights ('ICCPR') arts 2, 14, & 26; The Convention on the Rights of the Child ('CRC') art 12; European Convention of Human Rights ('ECHR') art 6(1).

62 UDHR art 11; ICCPR art 14(2); CRC art 40(2)(i); African Charter on Human and Peoples Rights ('ACHPR') art 7(2); ECHR art 6(2).

63 UDHR arts 8 and 11; ICCPR art 14(1); ACHPR art 7(4); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art 13; CRC arts 12(2), 37(d) & 40(2)(b)(iii); ECHR art 6(1).

64 ICCPR art 14(3); ECHR art 5(2); art 6(3)(a); CRC art 40(2)(b)(ii).

65 UDHR art 11; ICCPR art 14(3); ACHPR art 7(3); CRC art 37(d) & 40(2)(b)(ii); ECHR art 6(3)(b) & 6(3)(c).

66 UDHR art 8, 10, and 11; ICCPR art 14(3)(e); CRC art 40(2)(b)(iv); ECHR art 6(3)(d).

67 CRC art 40(2)(b)(vi); ECHR art 6(3)(e).

68 ICCPR art 14(3)(g); CRC art 40(2)(b)(iv); ECHR art 6.

69 CRC art 40(2)(b)(v); ACHPR art 7(1)

4.2.2 Equality

At the heart of the CRPD also lies the right to equality and protection from discrimination.⁷⁰ The requirement of non-discrimination is a founding principle of the CRPD under article 3, a general obligation of State Parties under article 4, and a stand-alone right under article 5 of the CRPD.⁷¹

The requirement of equality under article 13 encompasses the need for persons with disabilities to be placed on equal footing as persons without disabilities in legal proceedings.⁷² This means that persons with disabilities are entitled to the same rights governing legal proceedings as everyone else, including, for example, the right to a fair trial, the right to defend their case, or the right to be tried in person.⁷³ Beyond that, it also means that justice must be accessible and that reasonable accommodations ought to be made where necessary, such as frequent breaks where a disability so requires; making it possible for persons with disabilities to testify using sign language or other alternatives; or changing a courtroom's environment for persons with sensory impairments.⁷⁴ It also encompasses the right to access information and communication in alternative ways.⁷⁵

The requirement of equality under article 13 thus seeks to place persons with disabilities on an equal terms with others so that they can participate fully in legal proceedings without difficulty or obstacles.

4.2.3 Procedural and age-appropriate accommodations

Article 13 of the CRPD also obligates State Parties to make procedural and age-appropriate accommodations for persons with disabilities in the justice system. The concept of procedural accommodation is not to be confused with 'reasonable accommodation' as set out under article 2 of the CRPD.⁷⁶ Unlike the test for reasonable accommodation, which must satisfy the criteria of undue burden and

70 General Comment 6 on equality and non-discrimination, CRPD Committee (26 April 2018) UN Doc CRPD/C/GC/6 at paras 5 & 7.

71 CRPD arts 3(b), 4(b) & 4(e). Article 5 of the CRPD makes provision for the scope of non-discrimination, including equal protection and equal benefit of the law; the prohibition of discrimination and the provision of effective legal protection; the concept of reasonable accommodation; and the adoption of specific measures in view of making persons with disabilities equals in society.

72 Special Rapporteur on the rights of persons with disabilities *International Principles and Guidelines on Access to Justice for Persons with Disabilities* (2020) at 11.

73 Thematic report on the right to access to justice under article 13 of the CRPD (n 29) 6; Flynn (n 49) 391.

74 As above.

75 As above.

progressive realisation, the requirement of procedural and age-appropriate accommodations is broader. It is neither subject to the test of undue burden nor progressive realisation.⁷⁷

The requirement of procedural accommodation simply requires the implementation of steps which are necessary to facilitate access to justice, including through the provision of sign language interpretation; supplying information in accessible formats; delivering communication which considers the diversity of persons with disabilities, such as easy-to-read documents, braille, or video-link testimony; the implementation of existing legislation concerning access to justice; access to legal aid; and the provision of legal assistance and information in accessible formats.⁷⁸ Such accommodations must be provided free of charge and must be readily available.⁷⁹

Procedural accommodations must also be age-appropriate, meaning that courtrooms have to be adapted or other similar age-appropriate assistance must be provided where a case so requires.⁸⁰

4.2.4 Direct and indirect participation

Although not explicitly defined under the CRPD, direct participants, on the one hand, have been generally deemed to encompass those actively involved in the proceedings, such as the parties themselves, witnesses, victims, jurors, legal representatives, judges, magistrates, members of the tribunal, and court staff, among others.⁸¹ On the other hand, indirect participants will typically include those playing a more passive role in the proceedings, such as the court's staff members, members of the public, or reporters.⁸²

On several occasions, the CRPD Committee has reiterated that the failure of State Parties to include persons with disabilities in the justice system and to adapt the system accordingly amounts to a breach of article 13(1). For example, in *Gemma Beasley v Australia*⁸³

76 Article 2 of the CRPD defines 'reasonable accommodation' as 'necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms'.

77 Thematic report on the right to access to justice under article 13 of the CRPD (n 29) para 25.

78 Thematic report on the right to access to justice under article 13 of the CRPD (n 29) para 24; Flynn (n 49) 394.

79 As above.

80 Thematic report on the right to access to justice under article 13 of the CRPD (n 29) para 27.

81 Flynn (n 49) 397.

82 As above.

83 *Gemma Beasley v Australia*, Communication 011/2013, CRPD Committee (25 May 2016) UN Doc CRPD/C/15/D/11 (2013).

it was found that a failure to make accommodations for persons requiring Australian Sign Language to participate in jury duty breaches article 13(1).⁸⁴ The same could be inferred from the case of *AM v Australia*,⁸⁵ which was also based on a failure of the State Party to provide Australian Sign Language insofar as jury duty was concerned. However, in this matter, the CRPD Committee concluded that the communication was inadmissible since it considered the author's claim hypothetical and insufficient to meet the requirements of article 1(1) of the Optional Protocol to the Convention on the Rights of Persons with Disabilities.⁸⁶ A specific reference is made to witnesses under article 13(1), which implies that all necessary conditions required under article 13 equally applies to witnesses, making allowances for witnesses to understand and actively participate in proceedings.

4.2.5 All legal proceedings, including investigative and preliminary stages

Additionally, article 13(1) imposes a duty on State Parties to facilitate the right to access to justice in all legal proceedings, including at the investigative and preliminary stages. This requirement is particularly pertinent since research has demonstrated that persons with disabilities are more likely to experience violence than their peers without disabilities.⁸⁷ Similarly, victims with disabilities are more likely to be prejudiced at the preliminary stages of proceedings, especially when reporting crimes, due to the mistaken belief that they may not be competent witnesses and are unfit to testify.⁸⁸ Communication problems may equally affect victims and offenders at the preliminary stages, which may arise from their vulnerabilities.⁸⁹

Considering these barriers, article 13(1) of the CRPD requires constant support and assistance in the justice system for persons with disabilities to ensure fairness and equal treatment for all parties involved, at all times.⁹⁰ From the outset of the case, fairness must be maintained throughout the proceedings until the case is closed.

84 *Gemma Beasley v Australia* (n 83) para 8.9.

85 *AM v Australia*, Communication 12/2013, CRPD Committee (29 May 2015) UN Doc CRPD/C/13/D/12 (2013).

86 *AM v Australia* (n 85) para 8.7.

87 RM White et al 'Transformative equality: Court accommodation for South African citizens with severe communication disabilities' (2020) 9 *African Journal of Disability* at 2; World Health Organization 'WHO Global Disability Action Plan 2014-2021: Better Health for All People With Disability' at para 25.

88 N Archer & EA Hyrley 'A justice system failing for the autistic community' (2013) 4 *Journal of Intellectual Disabilities and Offending Behaviour* at 54; White et al (n 87) 2.

89 C Capri et al Intellectual disability rights and inclusive citizenship in South Africa: What can a scoping review tell us?' (2018) 7 *African Journal of Disability* at 396; White et al (n 87) 2.

Similarly, persons with disabilities must be afforded all the support they require to access justice promptly and efficiently.

4.2.6 Appropriate training for all workers

Finally, the CRPD Committee highlighted that attitudinal barriers negatively impact the right to access justice for people with disabilities.⁹¹ According to the Committee, these barriers emanate from the court staff's lack of awareness as it pertains to the rights and practices of persons with disabilities in the justice system, including police officers, prosecutors, and similar professionals working in the field.⁹²

To eliminate these barriers, article 13(2) places an additional obligation on State Parties to provide training programmes in relation to all legal proceedings and raise awareness accordingly.⁹³ This seeks to ensure that all officers dealing with persons with disabilities in the justice system are suited and qualified to do so in order to avoid any miscarriage of justice or discrimination that may result from ignorance.

5 Barriers to the right to access justice

Notwithstanding the strong protection envisaged by the CRPD, persons with disabilities experience many difficulties and barriers when exercising their right to access justice, whether in criminal proceedings or civil claims.⁹⁴ A lack of accessibility mainly concern obstacles like physical access to courts or information and communication, as well as attitudinal barriers⁹⁵ to be discussed below.

90 K L Salekin, J G Olley & K A Hedge 'Offenders with intellectual disability: Characteristics, prevalence, and issues in forensic assessment' (2010) 3 *Journal of Mental Health Research in Intellectual Disabilities* at 97; White et al (n 87) 2.

91 Flynn (n 49) 400.

92 As above.

93 Thematic report on the right to access to justice under article 13 of the CRPD (n 29) para 59; General comment 1, art 12: Equal Recognition before the law, CRPD Committee (19 May 2014), UN Doc CRPD/C/GC/1 (2014).

94 Thematic report on the right to access to justice under article 13 of the CRPD (n 29) para 4.

95 E Flynn *Disabled Justice? Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (2015) at 49.

5.1 Physical barriers

Accessibility is an underlying principle of the CRPD, as well as a central requirement to fully and effectively realise all the rights of persons with disabilities.⁹⁶ It represents the equal access and participation of persons with disabilities in any environment without barriers.⁹⁷ Under article 9 of the CRPD, environments include ‘buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces’.⁹⁸ According to article 13, these environments include the buildings where law-enforcement agencies and the judiciary are located.⁹⁹

Physical barriers can generally be described as physically entering certain areas, such as police stations or courts, which may be impossible or strenuous.¹⁰⁰ The most common barriers in this regard are generally the architectural features of certain buildings, such as steps and no ramps at a building’s entrance or the absence of lifts in multifloored buildings.¹⁰¹ They have also been extended to prisons and detention centres by the CRPD Committee in *X v Argentina*,¹⁰² where it found a State Party to be in breach of article 9 if it fails to remove barriers in the prison setting insofar as the bathroom, shower, recreation yard and nursing services were concerned.¹⁰³

These barriers prevent persons with disabilities from enjoying equal physical access or use of the justice system. Although there appear to be positive changes worldwide, the accessibility requirement remains confined to new buildings, with little progress insofar as detention facilities and their staff members are concerned.¹⁰⁴

96 General Comment 2, Article 9: Accessibility, CRPD Committee (22 May 2014) UN Doc CRPD/CGC/2 at para 4.

97 R Sestranetz & L Adams ‘Free movement of people with disabilities in southeast European: An inaccessible right?’ (2006) *Handicap International Regional Office for South East Europe* at 11.

98 CRPD art 9(1)(a).

99 General Comment 2 (n 96) para 37.

100 Thematic report on the right to access to justice under article 13 of the CRPD (n 29) para 20.

101 E Flynn et al ‘Final Report Access to Justice of Persons with Disabilities December 2019’ at 4.

102 *X v Argentina*, Communication 8/2012, CRPD Committee (18 June 2014), UN Doc CRPD/C/11/D/8 (2012).

103 *X v Argentina* (n 102) para 8.5.

104 Flynn et al (n 101) 10.

5.2 Lack of access to information

Access to information also significantly ensures full, equal, and effective participation in court proceedings.¹⁰⁵ Indeed, there can be no efficient access to justice if services, communication and information are inaccessible to persons with disabilities.¹⁰⁶ Court proceedings are formal and complex; without the appropriate information available, persons with disabilities can be left as ‘mere spectators’ to their grievances.¹⁰⁷ In effect, a lack of access to information inevitably leads to a significant gap in understanding legal proceedings and any communication or exchanges between judges, lawyers and other interlocutors.¹⁰⁸

Adequate access to information allows persons with disabilities to know and defend their rights.¹⁰⁹ Article 21 of the CRPD caters for the right to seek, receive and impart information and ideas on an equal basis with others through all forms of communication, and impose on State Parties an obligation to ensure that such freedom of choice is respected.¹¹⁰ State Parties should then act accordingly by accepting and facilitating the use of all means of accessibility, which includes modes and formats of communication by persons with disabilities in official interactions.¹¹¹

However, the right to access information is not consistently implemented as envisaged by the CRPD and many persons with disabilities remain unaware of their legal rights or how to seek redress under the law, resulting in prejudice.¹¹² These prejudices lead to many persons with disabilities being left uninformed of their rights and the appropriate route of redress when their rights are violated.¹¹³ These barriers usually emanate from a problem of illiteracy, a lack of awareness on the part of State Parties concerning the various modes of communication of persons with disabilities, a failure to make laws

105 E Varney ‘Disability and information technology: A comparative study in media regulation’ (2013) *Cambridge University Press, Cambridge Disability Law and Policy Series*; E Varney ‘Article 21 Freedom of Expression and Opinion, and Access to Information’ in I Bantekas, MA Stein & D Anastasiou (eds) *The Convention on the Rights of Persons with Disabilities: A commentary* (2018) at 392.

106 General Comment 2 (n 96) para 37.

107 Y Ghai & J Cotrell *Marginalized communities and access to justice* (2010) at 232.

108 Thematic report on the right to access to justice under article 13 of the CRPD (n 29) para 20.

109 Thematic report on the right to access to justice under article 13 of the CRPD (n 29) para 21.

110 CRPD art 21.

111 E Varney ‘Article 21 Freedom of Expression and Opinion, and Access to Information’ in Bantekas, Stein & Anastasiou (n 105) 595; *JH v Australia* Communication 35/2016, CRPD Committee (31 August 2018), UN Doc CRPD/C/20/D/35 (2016).

112 Ghai & Cotrell (n 107) 232.

113 Division for Social Policy Development & Department of Economic and Social Affairs ‘Toolkit on Disability for Africa: Access to justice for persons with disabilities’ at 3.

available, a failure to simplify or translate proceedings or to write or publish judgments, or a failure to provide information in accessible formats.¹¹⁴

In this context, the CRPD Committee has provided examples of how to ensure that persons with disabilities have the necessary access to information in proceedings, including: the provision of information in accessible formats, i.e. in braille, sign language, easy-to-read format, or video guides;¹¹⁵ by providing jurors with the format of communication of their choice to perform their duties;¹¹⁶ by translating judgments concerning the rights of persons with disabilities into easy-to-read formats;¹¹⁷ by creating an accessible governmental website;¹¹⁸ or by supplementing the legal knowledge or information on legal proceedings.¹¹⁹

5.3 Attitudinal barriers and lack of complaint mechanisms

As highlighted above, article 13 applies to court proceedings and preliminary investigations. It is, therefore, paramount that persons with disabilities are provided with the appropriate complaint mechanisms to protect their rights.¹²⁰ In this context, persons with disabilities usually deal with the administrative arm of government as alleged offenders, victims, or witnesses to a crime.¹²¹ However, several attitudinal barriers prevail, impeding the full and effective participation of persons with disabilities in the justice system.¹²²

For example, it is often automatically assumed that persons with disabilities will not meet the necessary standard of a competent witness when reporting a crime.¹²³ Communication barriers prevent victims from reporting crimes or seeking redress for a wrong, while others are not deemed credible.¹²⁴ Similarly, alleged offenders with

114 United Nations Development Programme 'The rule of law and access to justice: Overview, status and trends' (2013) at 45.

115 Flynn et al (n 101) 11.

116 See *JH v Australia* (n 111); *Gemma Beasley v Australia* (n 83); *AM v Australia* (n 85).

117 Thematic report on the right to access to justice under article 13 of the CRPD (n 29) para 22.

118 As above.

119 Flynn et al (n 101) 12.

120 Flynn et al (n 101) 21.

121 Royal Commission into Violence, Abuse, Neglect, and Exploitation of persons with disability 'Report Research: Police Responses to people with disability' October 2021 <https://disability.royalcommission.gov.au/system/files/2021-10/Research%20Report%20-%20Police%20responses%20to%20people%20with%20disability.pdf> (accessed 8 May 2022).

122 As above.

123 White et al (n 87) 2.

124 E Wright & C Edmonds 'Disability royal commission turns spotlight on women's stories of abuse and violence' *News* (Australia) 1 April 2022 at <https://www.abc.net.au/news/2022-04-02/disability-royal-commission-hobart-hearings-of-abuse-violence/100956366> (accessed 4 May 2022).

disabilities are also at risk of being exploited or influenced following their arrest.¹²⁵

The CRPD Committee has suggested several measures to remedy the situation, including the creation of accessible complaint mechanisms such as phone lines and e-services;¹²⁶ or by making information, communication and support services, such as hotlines, shelters, victim support services and counselling fully accessible to persons with disabilities.¹²⁷ Similarly, as envisaged by article 13(2), all concerned officers must be trained to support complaints and respect confidentiality.¹²⁸

6 Digital court for the effective enforcement of the right to access justice

6.1 Reconciling digital courts with the CRPD

As experienced during the COVID-19 pandemic, digital courts present various advantages concerning court proceedings but can also be highly beneficial to persons with disabilities. Although the CRPD does not make express reference to such types of proceedings, it is possible to reconcile the intention of the drafters of the CRPD in relation to the right to access justice with digital courts.

Firstly, article 9(2)(g) of the CRPD requires State Parties to promote access for persons with disabilities to new information and communication technologies.¹²⁹ This entails that all new objects, infrastructure, goods, products, and services must from the outset be readily accessible for persons with disabilities.¹³⁰ Secondly, article 9(2)(h) of the CRPD requires State Parties to promote the design, development, production and distribution of accessible information and communication technologies and systems at an early stage and to be readily available at minimum costs.¹³¹

125 White et al (n 87) 2.

126 Concluding observations on the combined second and third periodic reports of El Salvador, CRPD Committee (1 October 2019), UN Doc CRPD/C/SLV/CO/2-3 (2019) at para 33.

127 Flynn et al (n 101) 21.

128 As above.

129 Art 9(2)(g) of the CRPD provides that 'States Parties shall also take appropriate measures to promote access for persons with disabilities to new information and communications technologies and systems, including the Internet'.

130 General Comment 2 (n 96) para 24.

131 Article 9(2)(h) of the CRPD provides that 'State Parties shall also take appropriate measures to promote the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost'.

The broad definition of ‘communication’ under article 2 of the CRPD should also be noted, which includes a broad spectrum of means of communication, including, but not limited to, traditional types of communication (braille, etcetera), as well as alternative modes, means, and formats of communication.

It is submitted that article 2 and article 9, read together, indicate that digital courts seem to fall squarely within the ambit of the CRPD to qualify as ‘new information and communication technologies’. If used appropriately, they can also reduce and eliminate the barriers persons with disabilities currently face.¹³²

6.2 How can smart courts promote the right to access justice for persons with disabilities?

To illustrate the many advantages that digital courts can potentially bring to persons with disabilities, a simple example is extended: The case of *Boris Makarova v Lithuania* brought before the CRPD Committee in 2015.¹³³ The communication before the CRPD concerned a road accident on 12 June 2005 in Lithuania, which caused Boris Makarova’s wife to suffer multiple bodily injuries, including a head injury.¹³⁴ As of January 2006, she was diagnosed with a disability ratio of 60%, which had increased to 80% by January 2007.¹³⁵ According to Mr Makarova, his wife’s condition deteriorated until her death in November 2011.¹³⁶

Due to her condition, the victim could not visit the police station in person, which was communicated to the prosecutor through letters.¹³⁷ However, she was not informed of the defendant’s indictment in May 2006, violating her right to challenge the prosecutor’s decisions and conclusions.¹³⁸ Likewise, Ms Makarova could not take part in the court proceedings.¹³⁹ This was also communicated to the judge who had a duty under article 118 of the Constitution of Lithuania to ensure that the prosecutor defended the position of the victim. This obligation was ignored, thereby denying the victim her rights to legal assistance and equal protection under the law.¹⁴⁰

In May 2008, the defendant was found guilty of committing a traffic violation before the first district court of Vilnius and was given

132 See para 6.2.

133 *Makarova v Lithuania*, Communication 030/2015, CRPD Committee (7 October 2017) UN Doc CRPD/C/18/D/30/15.

134 *Makarova v Lithuania* (n 133) para 2.1.

135 As above.

136 *Makarova v Lithuania* (n 133) para 2.2.

137 *Makarova v Lithuania* (n 133) para 2.3.

138 As above.

139 *Makarova v Lithuania* (n 133) para 2.4.

140 *Makarova v Lithuania* (n 133) para 2.5.

a fine based on the judge's finding that the victim's disability was unrelated to the accident.¹⁴¹ According to Mr Makarova, the judgment was never communicated to the parties, and it was only in November 2008 that he became aware of the judgment after a personal visit to the court.¹⁴² However, given the delay, the period for appeal had lapsed.¹⁴³ He nonetheless appealed to the Regional Court of Vilnius, where his appeal was dismissed in December 2008 as he could not prove that he had missed the statutory deadline because of the problems with his health.¹⁴⁴ He also failed to appeal to the Supreme Court of Lithuania and other instances. In the circumstances, Mr Makarova sought for the CRPD Committee to intervene.¹⁴⁵

The CRPD Committee found that the concerned State Party had violated the right to access to justice under article 13 because the victim was unable to participate in the proceedings effectively and was not provided with legal representation, despite her request to that effect.¹⁴⁶ As a result, the Committee held that she was denied the opportunity to test the evidence before her, pose questions to witnesses, challenge the findings of expert examinations or testify by giving her account of the accident.¹⁴⁷ The CRPD Committee went on to conclude that having been the direct victim of the accident, she was a 'direct participant' for purposes of Article 13(1), and ought to have had been accommodated in a manner that enabled her participation in the proceedings, especially in light of her various requests to that effect.¹⁴⁸ The CRPD Committee ultimately found that the facts before it amounted to an *inter alia* breach of article 13 of the CRPD by Lithuania.¹⁴⁹

This case is possibly the best illustration of how digital courts could enhance the right to access justice for persons with disabilities. Had digital courts been an option for Mrs Makarova, it could have drastically aided her participation in the proceedings. Firstly, there would have been no need to be personally present in the courtroom, and this could have easily been made possible via the internet. Similarly, she would have been able to lodge and file the complaint and claim online. The concerned parties would also have had access to all the required documents online, including the verdict.

Similarly, in the case of *X v Argentina*,¹⁵⁰ the complainant alleged a breach of article 13 by Argentina because, as a prisoner in the Marco

141 *Makarova v Lithuania* (n 133) para 2.8.

142 *Makarova v Lithuania* (n 133) para 2.9.

143 As above.

144 As above.

145 As above.

146 *Makarova v Lithuania* (n 133) para 7.2.

147 As above.

148 *Makarova v Lithuania* (n 133) para 7.6.

149 *Makarova v Lithuania* (n 133) para 7.9.

150 *X v Argentina* (n 102).

Paz Federal Prison Complex II in San Martin, he was obliged to travel to and from the court where oral proceedings against him were taking place, despite suffering from a severe condition as a result of a surgery; only to be then denied entry at his hearing, forcing him to remain on a stretcher in an ambulance.¹⁵¹ Although the evidence, in this case was not admissible, this case serves as yet another example of how digital courts have the potential to reduce the barriers and alleviate the inequalities experienced by persons with disabilities insofar as access to justice is concerned.

Article 13, read with article 9 and article 5 of the CRPD, requires justice to be accessible to persons with disabilities on an equal scale as others. Digital courts have immense possibilities to offer as far as accessibility to courts are concerned, as will be discussed below.

6.1.2 Remote hearings

Digital courtrooms can be helpful for persons with disabilities who may not always have the required infrastructural facilities in conventional buildings, such as lifts or ramps.¹⁵² Digital courts provide the benefit of not having to travel to and from remote areas to attend court proceedings. Proceedings can be readily accessible in the comfort of one's home. Moreover, digital courts save time and costs.¹⁵³

Similar to closed circuit television and in camera proceedings, digital courts can also make proceedings less intimidating and hostile, allowing persons with disabilities to express themselves freely and give a competent and reliable account of their case.¹⁵⁴ For these reasons, remote hearings can also be generally deemed to fall within the purview of the 'procedural and age-appropriate accommodation' requirement of article 13. As discussed above,¹⁵⁵ the scope of this requirement includes, amongst other things, facilitating effective communication through alternative modes; the right to access information in accessible formats; and providing support and accommodation for effective participation.¹⁵⁶ Remote hearings can

151 *X v Argentina* (n 102) para 7.9.

152 Thematic report on the right to access to justice under article 13 of the CRPD (n 29) para 20.

153 R Sadley Bailey 'Advantages and disadvantages of virtual court hearing' 6 January 2021 <https://www.baileygreer.com/advantages-and-disadvantages-of-virtual-court-hearings/> (accessed on 8 May 2022); Justice Connect 'As remote courts become more common, these are the benefits and pitfalls' 16 September 2020 <https://justiceconnect.org.au/fairmatters/as-remote-courts-become-more-common-these-are-the-benefits-and-pitfalls/> (accessed 8 May 2022).

154 R White et al 'Court accommodations for persons with severe communication disabilities: A legal scoping review' (2021) 27 *Psychology, Public Policy, and Law* at 399.

155 See para 4.2.3 above for a complete description of the 'procedural and age-appropriate' requirement under art 13.

156 Flynn (n 49) 396.

also benefit children with disabilities who may participate fully in the proceedings without fear or pressure, thus meeting the criterion of ‘age-appropriate accommodation’.¹⁵⁷

6.1.3 *Communication and access to justice*

As identified above, a lack of accommodation to facilitate the communication of persons with disabilities remains a significant barrier for proper access to justice. New technologies have the potential to strengthen existing digital courts, especially as far as the ‘effective participation’ of persons with disabilities is concerned. This can enable persons with disabilities to directly and indirectly participate in proceedings.¹⁵⁸

For example, in *Lockrey v Australia*,¹⁵⁹ the complainant – a deaf person requiring real-time steno-captioning to communicate – was prevented from performing jury duty because of his additional needs. Despite several requests and complaints made to the concerned authorities, he was prevented from participating effectively and on an equal basis in jury duty, arguing that the concerned State Party had breached his right to access justice.¹⁶⁰ The CRPD Committee found that the State Party violated article 13 of the CRPD by failing to provide reasonable accommodations to the complainant and ensuring his effective and direct participation since jury duty forms an integral part of the Australian justice system.¹⁶¹

Today, multiple videoconferencing applications, such as Zoom, Microsoft Teams, Google Meet, and Skype, provide innovative ways to meet the accessibility requirements of article 9, including various options for virtual closed captioning during online meetings and webinars that generate subtitles for video conferencing. Likewise, intermediaries and interpreters can use video facilities to assist persons with disabilities during proceedings. Some may even opt for the ‘chat’ or ‘type’ option.

157 See Criminal Procedure Act 55 of 1977 secs 153(1) & 153(4) and Criminal Justice Act 75 of 2008 sec 65(3), which require proceedings involving children to be conducted behind closed doors and restricting the public and media from attending proceedings involving children.

158 See para 4.2.4 above for a complete explanation of the difference between direct and indirect participants.

159 *Lockrey v Australia*, Communication 013/2013, CRPD Committee (1 April 2016) UN Doc CRPD/C/15/D/13 (2013).

160 *Lockrey v Australia* (n 159) paras 3.1 to 3.5.

161 *Lockrey v Australia* (n 159) para 8.9.

Interestingly, persons using augmentative and alternative communication (AAC) to communicate via videoconferencing have reported that it was possible and relatively easy to do so, either by using the screen mirroring option, or by using a projector or purchasing a manufacturer's software.¹⁶² Although some courts have been reluctant to allow the use of AAC, others have successfully acknowledged and implemented it.¹⁶³ It is submitted that the digitalisation of courts can thus open new doors to the use of AAC in proceedings, although the whole process will need to be appropriately designed and tested first. If successful, it will help ensure that persons with communication disabilities are actively and equally involved in the justice system, albeit remotely.

The use of accessible information and communications technologies, primarily through digital courts or similar online portals and services, can improve access to justice and information.¹⁶⁴ Like any other electronically designed platform, digital courts can be enhanced to make information relate to court proceedings more readily available, for instance, by designing accessible and inclusive features, such as plain language, content and videos in sign language, captioned text, translation of judgments and similar documents into accessible read formats or documents in large print, as required by article 13(1).¹⁶⁵ With all the information they need readily available to them in a timely and accessible manner, persons with disabilities may be able to engage in legal proceedings on an equal basis with others.

6.1.4 Complaint mechanism

Digital court systems could equally enable persons with disabilities to have access to complaint mechanisms and investigation bodies.¹⁶⁶ This would not only facilitate the procedural aspects of the proceedings, but will also help ensure the elimination of any attitudinal barriers commonly faced by persons with disabilities. No longer having to appear in person to file a complaint would also alleviate the stringent burden of court proceedings, even at the preliminary stages.

162 AssistiveWare 'Considering all forms of communication' (26 April 2019) <https://www.assistiveware.com/learn-aac/more-than-a-device-considering-all-forms-of-communication> (accessed 9 May 2022); J Schubring 'Modeling AAC Virtually' (24 March 2020) <https://www.buildingaac.com/post/modeling-aac-virtually> (accessed 9 May 2022).

163 White et al (n 154) 24.

164 Thematic report on the right to access to justice under article 13 of the CRPD (n 29) para 21.

165 As above.

166 Thematic report on the right to access to justice under article 13 of the CRPD (n 29) para 43.

The services provided by digital courts can also be potentially widened to meet the needs of persons with disabilities. For instance, they can be used not only to initiate proceedings but also to lodge complaints at a preliminary stage. This would mean expanding the capacity of digital courts to include law enforcement agencies, such as the police. This would help ensure that the credibility bias which often prevails in the disability community is lessened, thereby facilitating the participation of persons with disabilities in legal proceedings, including at the investigative and preliminary stages. Moreover, this process can alleviate the attitudinal barriers faced by persons with disabilities by giving them an equal chance to seek redress when their rights have been infringed.

6.1.5 Training

As far as the requirement of article 13(2) is concerned, it is submitted that digital courts can benefit all staff and officers concerned equally. Research has shown that online training is as good as, if not better than, the traditional instructor-led, face-to-face training system.¹⁶⁷

It will benefit all officers and staff members to partake in online training concerning persons with disabilities to better understand their right to access justice. This would in turn abolish the prevailing attitudinal barriers affecting persons with disabilities. Indeed, the UN Rapporteur suggests that appropriate training and awareness raising can be a powerful tool to eliminate these barriers.¹⁶⁸ Mandatory regular training programmes should be delivered to all officers, public defenders, and professionals working in the justice system.¹⁶⁹

Much like digital courts, online training has gained considerable popularity during the COVID-19 pandemic and revolutionised the education and tutoring sector.¹⁷⁰ Digital courts could thus be used to meet all the criteria of Article 13. Essentially, the digitalisation of courts to accommodate persons with disabilities can incorporate a variety of services, ranging from lodging complaints, initiating proceedings, seeking legal assistance, remote hearings and training of

167 Continu 'In-person vs. online training: What does the research say?' (8 September 2021) <https://www.continu.com/blog/in-person-vs-online-training> (accessed 29 May 2022). See also SD Johnson, SR Aragon, N Shaik 'Comparative analysis of learner satisfaction and learning outcomes in online and face-to-face learning environments' (2000) 11 *Journal of Interactive Learning Research* at 29; C Neuhauser 'Learning style and effectiveness of online and face-to-face instruction' (2010) 16 *American Journal of Distance Education* at 99.

168 Thematic report on the right to access to justice under article 13 of the CRPD (n 29) para 59.

169 As above.

170 WebForum 'The COVID-19 pandemic has changed education forever. This is how' <https://www.weforum.org/agenda/2020/04/coronavirus-education-global-covid-19-online-digital-learning/> (accessed 9 May 2022).

all those concerned – the latter being a paramount condition to ensure the elimination of attitudinal barriers.

6.2 Inclusion, not exclusion

While digital platforms have the potential to reduce barriers experienced by persons with disabilities, they should be designed in such a way so as to not exclude persons with disabilities from society. Whilst digital technologies represent numerous advantages for persons with disabilities, they should not underestimate the potential risks of exclusion. Indeed, by confining persons with disabilities to their homes, the risk of exclusion in these cases is relatively easy to foresee. It could even be used as an ‘escape door’ to prevent concerned State Parties from undertaking their obligations as far as accessibility is concerned.

To avoid any prejudicial effects in this regard, persons with disabilities should be closely consulted in designing digital courts, as required under article 4 of the CRPD.¹⁷¹ In order to ensure that the accessibility and inclusion requirements are met, it is recommended that persons with disabilities be involved and consulted in the designing and testing process.¹⁷² This would ensure that the system is crafted to meet all of their needs, which may be otherwise overlooked.¹⁷³ This will also ensure that such a platform does not create more challenges and barriers for persons with disabilities.¹⁷⁴

In any event, State Parties must ensure that their citizens are suited to embrace the promise of digital courts and be sufficiently digitally literate before embarking on such a reform process. In truth, a lack of digital skills to navigate the digital world may result in exclusion in a similar fashion.¹⁷⁵ Finally, it must be ensured that all concerned have equal access to the system, especially regarding costs and internet access. If not, it may well result in exclusion and discrimination.

171 Article 4(3) of the CRPD provides that States Parties have a duty to closely consult with and actively involve persons with disabilities in the development and implementation of legislation and policies.

172 J Thurston ‘As courts go digital, will persons with disabilities have access to justice?’ (30 January 2020) <https://g3ict.org/blogs/as-courts-go-digital-will-persons-with-disabilities-have-access-to-justice> (accessed 14 August 2020).

173 McKinsey and Company ‘Accessible design means better design’ <https://www.mckinsey.com/business-functions/mckinsey-design/how-we-help-clients/design-blog/accessible-design-means-better-design> (accessed 9 May 2022)

174 Inclusion Hub ‘Making your website more accessible for people with physical disabilities’ J Howard (8 September 2021) <https://www.inclusionhub.com/articles/making-website-accessible-physical-disabilities> (accessed 10 May 2022)

175 R Sanders ‘Digital inclusion, exclusion and participation’ 9 April 2020 ‘[\(https://www.iriss.org.uk/resources/esss-outlines/digital-inclusion-exclusion-and-participation#:~:text=Digital%20literacy%20must%20be%20looked,world%20\(ONS%2C%202019\)](https://www.iriss.org.uk/resources/esss-outlines/digital-inclusion-exclusion-and-participation#:~:text=Digital%20literacy%20must%20be%20looked,world%20(ONS%2C%202019)) (accessed 9 May 2022).

Training and empowerment must therefore be considered before embarking on this new process.

7 Conclusion

SDG 16 aims to promote just, peaceful and inclusive societies.¹⁷⁶ To do so, one of its objectives is to promote the rule of law and ensure everyone's the right to access justice. SDG 16 illustrates the vital role of the rule of law in attaining this objective.¹⁷⁷

As a marginalised group, persons with disabilities are often left behind when accessing justice. This article has reviewed how digital courts, which have emerged from the COVID-19 pandemic, can potentially eliminate the many barriers faced by persons with disabilities as it pertains to access to justice.

Firstly, remote hearings can eliminate the physical barriers that may often prevent persons with disabilities from accessing law-enforcement agencies, buildings, and the judiciary. Secondly, online platforms, such as digital courts, can further be adapted to meet all the communication needs of persons with disabilities and, in the same vein, reinforce their right to access to information in alternative and accessible formats, including but not limited to, closed captions; subtitles plain language; content and videos in sign language; translation of judgments and other documents in easy-to-read formats or in large print. Thirdly, digital courts can make legal proceedings more effective for persons with disabilities by affording them an easy and accessible complaint mechanism through one simple click. They can also considerably reduce stress and fear, eliminating any attitudinal barriers that sadly prevail to this day. Finally, they can serve as an training platform, in line with article 13(2) CRPD.

Since digital courts also present an exclusionary risk insofar as persons with disabilities are concerned, they should be fully involved in the process. The costs implications and training thereof should also be closely monitored before embarking on such a process.

Ultimately, and if used correctly, digital courtrooms could potentially promote the right to access to justice for persons with disabilities and, by implication, the rule of law, in line with SDG 16. All the guidelines of the CRPD, especially those that relate to accessibility, equality, and non-discrimination, must prevail at all material times to ensure that the advantages outweigh the potential risks of exclusion.

176 Sustainable Development Goals 'Goal 16: Promote just, peaceful and inclusive societies' <https://www.un.org/sustainabledevelopment/peace-justice/> (accessed 14 August 2022).

177 Transforming our world: the 2030 Agenda for Sustainable Development (n 4) 25.