

Justice for People with Mental Disabilities in Uganda: A Proposal for Reform of Rules of Court



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1. Introduction

The Mental Disability Advocacy Centre (MDAC) has looked at the Rules of Courts¹ in Uganda, identified the gaps, and seeks to provide minimum standards or guidelines for developing model Rules of Courts. Implementing these minimum standards/guidelines will increase the extent to which people with mental disabilities gain effective access to courts, increase their level of participation in court processes, and achieve redress when they are victims of human rights violations. MDAC uses the term 'mental disability' to refer to people with intellectual, developmental, cognitive, and/or psycho-social disabilities.² It also draws on the core findings set out in two joint reports published by MDAC and Mental Health Uganda (MHU) in 2014 which document torture, ill-treatment, exploitation, violence and abuse of people with mental health issues in both psychiatric hospitals and community-based settings.³ These reports also document barriers to accessing justice for victims of human rights violations.

The present report also draws on targeted follow-up research conducted by MDAC on access to courts and reasonable accommodation for people with mental disabilities in Uganda.⁴ This research identified a number of barriers to accessing justice for people with mental disabilities, including a general lack of accessibility, and failure to provide procedural and reasonable accommodations as required by Article 13 of the UN Convention on the Rights of Persons with Disabilities (UN CRPD). Specific problems highlighted included court fees, the use of discriminatory and inappropriate language in the court processes, lengthy trials, complex technical rules for filing and proceeding with litigation, and a pervasive issue of stigma and stereotyping.

The purpose of this short paper is to initiate discussion with and among members of the Ugandan judiciary and legal practitioners on the need to reform rules of court to ensure that people with mental disabilities have access to justice on an equal basis with others.

¹ Including those of Tribunals and Commissions to the extent that they have an adjudicative mandate.

² People with intellectual disabilities generally have greater difficulty than most people with intellectual and adaptive functioning due to a long term condition that is present at birth or before the age of eighteen. Developmental disability includes intellectual disability, and also people identified as having developmental challenges including cerebral palsy, autism, spectrum disorder and foetal alcohol spectrum disorder. Cognitive disability refers to difficulties with learning and processing information and can be associated with acquired brain injury, stroke and dementias including Alzheimer's disease. People with psycho-social disabilities are those who experience mental health issues or mental illness, and/or who identify as mental health consumers, users of mental health services, survivors of psychiatry, or mad. These are not mutually exclusive groups. People with intellectual, developmental or cognitive disabilities may also identify, or be identified as, having psycho-social disabilities, or vice versa.

In the present report, the term "person/people with mental health issues" is also used to refer to people with psycho-social disabilities.

³ MDAC and MHU, *"They don't consider me as a person": Mental health and human rights in Ugandan communities*, (Budapest and Kampala: 2014, MDAC); and, MDAC and MHU, *Psychiatric hospitals in Uganda: A human rights investigation*, (Budapest and Kampala: 2014, MDAC), both available online at www.mdac.org/uganda [accessed 10 June 2015].

⁴ MDAC, *Access to Courts and Reasonable Accommodations for People with Mental Disabilities in Uganda* (Budapest: September 2015, MDAC).

We start by explaining the engagement of people with mental disabilities with the court systems in **Section 2**, and briefly highlight some of the specific barriers they are likely to face. **Section 3** gives an overview of the Ugandan court system and relevant rules of court, including in relation to filing claims, fees and the hearing of cases. **Section 4** provides a detailed description of the minimum standards that should be taken into account when reforming rules of court to increase access to justice, and **Section 5** provides a conclusion along with some general recommendations. A more detailed analysis of specific barriers to accessing justice flowing directly from rules of court currently in force is provided in the Annex.

Two preliminary remarks can also be made at this stage.

The first is that the reforms proposed herein have been designed to align with Uganda's international legal obligations following ratification of the UN Convention on the Rights of Persons with Disabilities (UN CRPD) in 2008. Article 13 of the CRPD sets out the obligation to provide "procedural and age-appropriate accommodations" to people with disabilities to ensure their effective access to justice on an equal basis with others, and also mandates the provision of training for those working in the administration of justice. These provisions should be read in conjunction with the general principles of the CRPD as set out in Article 3 (in particular the principles of non-discrimination, equality of opportunity and accessibility) and the general obligations set out in Article 4. The general obligations include the obligation to adopt appropriate legislation to give effect to Convention rights (Article 4(1)(b)), and also set out the obligation to "take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities" (Article 4(1)(c)).

The second remark is that the authors are aware that rules of court are only one aspect of broader reforms that will be necessary to give full effect to the rights of people with mental disabilities in Ugandan society. Whilst there has been notable progress in some areas since Uganda ratified the CRPD, including the wide protections against torture and ill-treatment set out in Prevention and Prohibition of Torture Act 2012, there is a need for high level commitment within the Government of Uganda to systematically tackle the barriers that many people with disabilities face to inclusion on a daily basis. As the country heads towards the first review of its implementation of the CRPD before the UN Committee on the Rights of Persons with Disabilities (CRPD Committee) in 2016, it is hoped that this contribution will be part of a broader process of turning rights into reality in close collaboration with civil society and people with disabilities themselves.

2. People with mental disabilities and the Courts in Uganda

People with mental disabilities engage with courts either as applicants, plaintiffs, respondents or defendants, or as accused persons, victims and witnesses. The rules of court impact on them differently depending on their role, the stage of the court process and whether it is a criminal or civil case.

Research from other countries such as Israel shows that people with mental disabilities are more likely to come into contact with the criminal justice system than other people in the general population,⁵ and this situation is likely to be replicated in Uganda despite the lack of official statistics.⁶

Frequently, people with mental disabilities are victims of human rights violations (including sexual exploitation), are perceived as easy targets, and are less likely to have their complaints investigated by the police.⁷ It is likely that many such cases never reach the courts for reasons such as:

- Crimes against people with mental disabilities are less likely to be reported.⁸
- People with mental disabilities fear of backlash from perpetrators (especially those who are family members and relatives) if they file a complaint.⁹
- Violence, restriction and coercive practices against people with mental disabilities are viewed as the norm.¹⁰
- Communities and service providers cover up the crimes, most often attempting to protect the victims with mental disabilities.

Consequently, rates of disclosure, reporting and investigation by the police are lower compared to individuals without disabilities. Negative stereotypes are also likely to result in people with mental disabilities being over-represented as suspects and defendants in the criminal justice system. Some of the reasons for this may include:

⁵ Bizchut, the Israel Human Rights Center for People with Disabilities, *The right of persons with intellectual, psychosocial and communication disabilities to access to justice: Accommodations in the criminal process* (2015), p. 4, available online at <http://bizchut.org.il/he/wp-content/uploads/2015/01/Booklet-The-right-of-persons-with-disabilities-to-access-to-justice.pdf> (accessed 10 June 2015).

⁶ It is impossible to provide detailed statistics on this point as the Government of Uganda does not collect sufficiently disaggregated criminal justice statistics. According to the Foundation for Human Rights Initiative in Uganda, there is a “general problem in the recognition of mental health issues in Uganda”, making the collection of statistics a significant challenge: Doreen Namyalo Kyazze, “What does the adoption of the ‘Mandela Rules’ mean for prisons and prisoners in Uganda?”, (Penal Reform International, 29 June 2015), available online at <http://www.penalreform.org/blog/what-does-the-adoption-of-the-mandela-rules/> [accessed 15 September 2015].

⁷ MDAC and MHU, *“They don’t consider me as a person”: Mental health and human rights in Ugandan communities*, *supra* note 3, at p. 24.

⁸ *Ibid.*

⁹ *Ibid.*, Chapter 3.

¹⁰ *Ibid.*

- They lack appropriate supports which makes them susceptible to being exploited and made accomplices to crimes by others.
- They may misjudge their own actions or have their intentions misunderstood by others.
- They may have impulsive and unpredictable behaviour and in some cases have behaviour disorders associated with aggressive behaviour.
- They may confess to crimes they did not commit due to lack of appropriate support and or being manipulated by police and prosecutors.¹¹

¹¹ This list of factors has been adapted from research conducted by Bizchut in Israel, *supra* note 5.

3. Administration of justice and rules of court

The administration of justice in Uganda is a constitutional mandate of judicial and quasi-judicial bodies. Judicial power is exercised by courts of judicature which consist of the Supreme Court, Court of Appeal/Constitutional Court, High Court and subordinate courts including *qhadis'* courts for marriage, divorce, inheritance of property and guardianship.¹² The Supreme Court, Court of Appeal and High Court are vested with both civil and criminal jurisdictions as courts of record. Subordinate courts established by Parliament include Magistrates Courts¹³ and Local Council Courts¹⁴ with limited civil and criminal jurisdictions.

In addition, there are specialised courts which include the Family and Children Court,¹⁵ Military Courts,¹⁶ and the Industrial Court.¹⁷ Quasi-judicial bodies include commissions and tribunals such as the Uganda Human Rights Commission¹⁸ and the Tax Appeals Tribunal.¹⁹ Uganda also embraces alternative dispute resolution mechanisms including arbitration, reconciliation and mediation aimed at administering justice without recourse to formal courts.²⁰

Each of these courts, commissions and tribunals have established rules setting out the procedure for institution and conduct of cases which must be complied with by all parties involved in a case. These procedural rules relate to the framing and filing of a claim or charge, layout of the courtroom, appearance of parties in court, hearing of a claim or

¹² The Constitution of Uganda, 1995, Article 129. The Supreme Court, Court of Appeal/Constitutional Court and High Court are superior courts of record. In terms of hierarchy, the Supreme Court is the highest appellate Court followed by the Court of Appeal, High Court and subordinate courts, in that order, from highest to lowest. *Qadhis'* courts refer to Muslim courts which adjudicate cases based on the Islamic creed. Although the Constitution makes provision for the establishment of these courts, none had been established by the time of writing this report.

¹³ Magistrates Courts are established under Section 3 of the Magistrates Courts Act, Chapter 16, Laws of Uganda (2000), with power to hear and determine cases of civil and criminal nature.

¹⁴ These are established under Section 3 of the Local Council Courts Act, 2006, at every village, parish, town, division and sub county level. These courts have power to hear and determine limited cases of civil and criminal nature.

¹⁵ The Family and Children Court is established under Section 13 of the Children Act, Chapter 59, Laws of Uganda (2000). Its power is to hear and determine criminal charges against a child and applications relating to child care and protection.

¹⁶ These are established under Part VIII of the Uganda Peoples' Defence Forces Act, 2005, to hear and determine criminal cases committed by persons subject to military law.

¹⁷ The Industrial Court is established under Section 7 of the Labour Disputes (Arbitration and Settlement) Act, 2006. The functions of the court are spelt out in Section 8 of the Act to include arbitration on labour disputes referred to it and to adjudicate upon questions of law and fact arising from references to the court by any other law.

¹⁸ This is established under Article 51 of the Constitution whose functions include dealing with violations of human rights alleged to have taken place on or after the coming into force of the Constitution.

¹⁹ Tribunals are established under Section 2 of the Tax Appeals Tribunal Act, Chapter 345, Laws of Uganda (2000) to review taxation decisions.

²⁰ See for instance, the Arbitration and Conciliation Act, Cap 4 which provides for domestic and international arbitration and conciliation. See also the Judicature (Commercial Court Division) (Mediation) Rules SI No 55 of 2007 and Order XII Rule 2 of the Civil Procedure Rules which provide for alternative dispute resolution.

charge, testifying in court, drawing and pronouncement of judgments, decrees, orders, convictions and sentences. The rules also provide for appeal processes and final determination of appeals. Some of these procedures are common to all courts and tribunals while others are specific.

Drawing on research conducted on access to courts for people with mental disabilities in Uganda, three areas of the various rules of court are considered in more detail: the filing of complaints/claims/defences, the payment of filing fees, and hearings.

1. Filing complaint/claim/defence

The Local Council Courts Regulations allow a person to institute a suit either orally or in writing to the chairperson of the village local council court.²¹ The Uganda Human Rights Commission Rules allow a person who is not represented by an advocate to also file a complaint orally or in writing.²² The Appeal Court and Supreme Court Rules do not provide for the suits or complaints to be initiated orally, probably because of its appellate jurisdiction.

These Rules require all court documents to be clear, easily legible and may be produced by printing, type lithography, stencil duplicating, photography, xerography, typewriting or written or any combination.²³ The Industrial Court Rules and the Tax Appeals Tribunal allow a person to file an application, implying that it must be in writing, although this not expressly stated.²⁴ Section 19 of the Civil Procedure Act provides that every suit shall be instituted in accordance with the Rules. Order IV Rule 1 of the Civil Procedure Rules states that every suit shall be commenced by presenting a plaint to the court and every such plaint shall comply with the rules contained in Order VI and VI.

2. Payment of filing fees

Apart from the Uganda Human Rights Commission Procedure Rules that expressly state that no fees shall be levied for filing a complaint,²⁵ all other Rules of Courts provide for a filing fee, qualifying the cases which fees may be waived or not paid.²⁶ The Industrial Court Rules are silent on court filing fees.

²¹ Regulation 29(1).

²² Rule 12(1) of the Human Rights Commission Rules.

²³ Court of Appeal Rules 14(2) and Supreme Court Rule 14(2).

²⁴ Industrial Court Rule 3(2) and 7(1) of the Tax Appeal Tribunal.

²⁵ Rule 30 of the Uganda Human Rights Procedure Rules.

²⁶ Regulation 65(1) of the Local Council Courts Rules, Rule 4 of the Judicature Rules for the Magistrates Court and High Court, Rule 103(1) of the Court of Appeal, Rule 99 of the Supreme Court and Rule 28 of the Tax Appeal Tribunal.

3. Hearings

Rules of some Courts expressly provide for hearings to be held in public,²⁷ while other Rules are silent.²⁸ The expressly stated exceptions to the requirement of public hearing include:

- Cases involving children, which must be ensure order and fairness to all parties and clarify to the parties that courts will concentrate on the substance of the issues before it and administer substantive justice without undue regard to technicalities;²⁹
- When court cannot conveniently contain every member of the public or the magistrate orders at any stage of the hearing that the public or particular person be denied access;³⁰
- When court space is small and does not permit, or failure of the members of public to conduct themselves in an orderly manner during the hearing, or when the presiding judge directs otherwise for the sake of national security or in the interests of justice.³¹

Other relevant aspects of related to the hearing of cases include:

- Court proceedings should be conducted in the English language. The Civil Procedure Act provides that English is the language of all courts, that evidence is to be recorded in English and that all applications must be in English.³² An exception to this can be found in respect of Local Council Courts.³³
- Evidence must be given on oath. This can be regarded more as a convention, although most Court Rules are silent on evidence being given on oath.³⁴ The Magistrates Courts Act, however, provides that every witness in a criminal matter in a Magistrates Court shall be examined upon oath.³⁵
- Cross examination of witnesses is provided in most Rules of Courts.³⁶
- Judgments/decisions are to be in writing.³⁷ An exception to this is in respect of the Industrial Courts, which are silent on the matter.

²⁷ Regulation 41(1)(a) of the Local Council Courts Rules, Section 40(1) of Civil Procedure Rules applied to the Magistrate Courts, Order XVIII Rule 4 of the Civil Procedure Rules which applies to the High Court, Rule 29(1) of the Courts of Appeal and Supreme Courts Rules.

²⁸ Human Rights Commission Rules, Industrial Courts Rules and Tax Appeal Tribunal Rules.

²⁹ Local Council Courts Rules, Regulation 41(1)(a).

³⁰ In Magistrates Court, under Section 40(1) of the Civil Procedure Rules.

³¹ Rule 29(1) of Court of Appeal Rules and Supreme Court Rules.

³² Section 88 of the Civil Procedure Act.

³³ Regulation 22(1) of the Local Council Courts Regulations 2007 provides that the proceedings of a court and the record of those proceedings shall be in the language widely spoken in the area of the Court's jurisdiction.

³⁴ Local Council Courts, High Courts, Appeal Court, Supreme Court, Human Rights Commission Procedures Rules and Tax Appealed Tribunal.

³⁵ Section 101(1) of the Magistrates Courts Act.

³⁶ Regulation 41(1)(g) of Local Council Courts Rules; Sections 136(1) of the Evidence Act relevant to the Magistrates and High Courts; Rule 11 of Industrial Court Rules; Rule 21(2) of the Human Rights Commission Rules; and Rule 22(2) of the Tax Appeal Tribunals Rules.

Strict adherence to these Rules of Procedures is likely to result in additional barriers to accessing justice for people with mental disabilities. It is also important to recognise that none of the rules currently in force expressly provide for reasonable or procedural accommodations to ensure equal and effective access to justice.

³⁷ Regulation 52(3) of Local Council Courts, section 136(1) of the Magistrates Court Act, Order XXI Rule 1 of the Civil Procedure Rules, Rule 33 of Court of Appeal and Supreme Court Rules, Rule 23(1) of the Human Rights Commission Tribunal Rules and Rule 25 of the Tax Appealed Tribunal.

4. Minimum substantive standards for rules of courts and tribunals

In addressing some of the gaps alluded to above, the following standards provide guidance on how the Rules of Courts can be amended in a way which facilitates and ensures that people with mental disabilities have equal and effective access to the courts. These standards are not conclusive, they are simply indicative and are intended to provide a roadmap for discussion with judicial officers, the wider legal community, and people with disabilities themselves.

a) Full recognition of legal capacity

Full recognition of the right to legal capacity means to recognise people with mental disabilities before the law (i.e. giving them legal standing to have rights) and give effect to their legal agency to act on those rights (i.e. recognition in law and practice of their actions).³⁸ This recognition of the right to exercise legal capacity applies to every aspects of life, including in the sphere of justice. It is the obligation of the Ugandan Government to ensure that Rules of Courts comply with this standard. Therefore, Rules of Courts that restrict or deny people with mental disabilities the right to initiate or participate in legal proceeding (with access to available supports when needed) on an equal basis with others fail to comply with this standard.

Rules of Courts should be guided by an understanding that access to support (that respect the will, choices and preferences) which people with mental disabilities may need to effectively access court processes and participate should be made available as required. The lack of or failure to provide support is not a justification for the Rules of Courts to deprive or restrict the legal capacity of people with mental disabilities in court processes. Also, effective safeguards should be integrated when access to support is provided to prevent abuse.

b) Recognise full capacity to testify

Recognising the full capacity of people with mental disabilities to testify is premised on the full recognition of the right to legal capacity. It is not sufficient for Rules of Courts to recognise that people with mental disabilities can give evidence in courts subject to the extent that they understand the questions put to them. The point here, rather, is that the form of questioning and taking testimony may require adjustments, in line with the principle in Article 13(1) of the CRPD as a form of procedural accommodation. In this

³⁸ Committee on the Rights of Persons with Disabilities, General Comment No. 1 (2014), paragraphs 8-9 and 12bis, available at <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/GC.aspx> [accessed on 20 June 2015]

sense, the presence of an actual or perceived impairment of any party to proceedings can never be a valid justification for denying evidence that may have probative value to the proceeding.³⁹ The currently wide discretion afforded to courts to exclude evidence given by people with mental disabilities is based on a discriminatory perception that they are incapable of giving credible and reliable evidence, and conflicts with international law.

c) Respect the principle of equality and non-discrimination

The Rules of Courts must respect the principles of equality and non-discrimination. This means that Rules should ensure that people with mental disabilities enjoy substantive equality and not just formal equality in relation to access to courts and participation in court processes. This requires a recognition that people with mental disabilities have the same and equal rights as people without disabilities and Ugandan government must take positive actions/measures to remove barriers and provide for necessary adjustments needed by people with mental disabilities to access courts and to fully participate in court processes.

To comply with the principle of non-discrimination Rules of Courts should not have any distinction, exclusion or restrictions on the basis of disability which in purpose or effect negatively impact on the recognition, enjoyment or exercise of their right to access to courts and to effective participation in court processes. This means that the Rules should neither discriminate on their face, interpretation nor implementation and should provide for reasonable and procedural accommodations where required.

The Ugandan Constitution guarantees equality before and under the law in all spheres and respects of life and equal protection of the law."⁴⁰ It prohibits discrimination on the basis of disabilities,⁴¹ and requires courts to administer justice to all people irrespective of their social or economic status.⁴² The UN Human Rights Committee has interpreted the guarantee of equality to apply to courts and tribunals and has said that this must also be respected whenever domestic law entrusts a judicial body with a judicial task.⁴³ The Human Rights Committee has further noted that:

Access to administration of justice must effectively be guaranteed in all such cases to ensure that no individual is deprived, in procedural terms, of his/her right to claim justice. The guarantee is violated if certain persons are barred from bringing suit against any other persons such as by reason of their race, colour, sex,

³⁹ In relevant rules from Australia, Section 13 of the Uniform Evidence Acts states that the presence of a "mental, intellectual or physical disability" is not sufficient to preclude a person from giving valid evidence.

⁴⁰ The Constitution of the Republic of Uganda, 1995, Article 21(1).

⁴¹ *Ibid.*, Article 21(2).

⁴² The Constitution of the Republic of Uganda, 1995, Article 126(2)(a).

⁴³ Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007), paragraph 7.

language, religion, political or other opinion, national or social origin, property, birth or other status.⁴⁴

“Other status” must now be understood as including the presence of an actual or perceived impairment or disability, particularly when interpreted in light of Article 3(b) (non-discrimination) and Article 4 (general obligations) of the CRPD, and Article 5 (equality and non-discrimination).

d) Guarantee and ensure a fair hearing

Rules of Courts should be aimed at ensuring a fair hearing for all people with mental disabilities. This requires the Rules of Courts to guarantee such persons adequate opportunity to prepare their case, present arguments and evidence, and to challenge or respond to opposing arguments or evidence. It also means that people with mental disabilities should be entitled to freely choose qualified people or legal representatives when needed at all stages of the proceedings to represent them; gain the assistance of an interpreter if they cannot understand or speak the language used in courts, and to enjoy a speedy trial.

Fairness of proceedings entails the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever court party and for whatever motive. A hearing is not fair if, for instance, the defendant in criminal proceedings is faced with the expression of a hostile attitude from the public or officers or the court.⁴⁵ In another sense, Rules of Courts must also be amended to ensure that reasonable and procedural accommodations are available *as of right* to people with mental disabilities to ensure that they have an opportunity to participate in the proceedings.⁴⁶ Article 5(4) of the CRPD also makes clear that the provision “specific measures” to persons with disabilities to enable them to exercise their rights “which are necessary to accelerate or achieve de facto equality shall not be considered discrimination”.

The Ugandan Constitution says that in the determination of civil rights and obligations, or in respect of any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.⁴⁷ This right to fair hearing is non-derogable,⁴⁸ thus not subject to any exception or limitation. The

⁴⁴ Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007), paragraph 9.

⁴⁵ Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007) paragraph 25.

⁴⁶ Article 2 of the CRPD states that “denial of reasonable accommodation” can also amount to “discrimination on the basis of disability”, and which is prohibited under Article 5. See also Section 4(e) – provide for reasonable accommodations, below.

⁴⁷ Constitution of the Republic of Uganda, 1995, Article 28(1).

⁴⁸ *Ibid.*, Article 44.

Human Rights Committee has emphasised that the right to a fair hearing applies to all courts and tribunals whether ordinary or specialised, civilian or military.⁴⁹

e) Provide for reasonable accommodations

Rules of Courts should recognise and provide for modifications and adjustments when needed by individuals with mental disabilities to access and participate in court processes without prejudicing the administration of justice. For example, Rules of Courts should be able to respond to the understandable forms of anxiety that of litigants with disabilities may experience in the court process. The forms of reasonable accommodations should be determined on an individual basis and the facts of each case. Modifications and adjustments should be available to both defendants and witnesses. The nature of the adjustments or motivations should be determined at the beginning of any legal process.

Rules of Courts should exercise some flexibility regarding reasonable accommodations since people with mental disabilities vary and have different needs. Court users with mental disabilities should be able to receive accommodations that respond to their particular impairments. Rules of Courts should not be limited to providing specific sets of accommodations but allows courts some discretion on an individual basis.⁵⁰ Providing reasonable accommodations does not entail substantial change in the procedure or the law. For example a persons with mental health issues who needs adjustment from a formal courtroom setting to a less formal setting to deal with any anxiety during cross examinations poses no substantive procedural rule or administration of justice challenge if she/he may do this in the judge's chambers, via video conference, behind a partition, without being required to testify from a witness stand, etc.⁵¹

f) Comply with general accessibility requirements

Rules of Court should also abide to accessibility standards provided by the CRPD. People with mental disability should enjoy access to court services that are open or provided to the general public in a manner that ensures their effective and equal access and respect their dignity.⁵² States' obligation include to provide access to all indoor or outdoor facilities which include courts and tribunals.⁵³ Rules of Courts should also have easy-to-read and understand format versions to ensure that its information and communications are accessibility. Rules of Courts should ensure that accessibility is provided before a person

⁴⁹ Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007), paragraph 22.

⁵⁰ Bizchut, *supra* note 5.

⁵¹ See, for example, "American with Disabilities Act – Frequently Asked Questions" (Michigan Courts), available online at <http://courts.mi.gov/Administration/SCAO/OfficesPrograms/Documents/access/ADA%20FAQ%20for%20Trial%20Courts.pdf> [accessed 30 September 2015].

⁵² CRPD Committee General Comment No 2, 22 May 2014, CRPD/C/GC/2.

⁵³ *Ibid.*, p. 6.

with mental disabilities engage in court processes. This includes things like having a court officer who is capable of assisting people with mental disabilities such as simplifying things to give them meaning, provide support e.g., emotional support. Rules of courts should also be supported by accessibility regulations, mindful that accessibility may also require professional inputs such as lawyers, legal aids, speech therapists, psychologists, treatment professionals, and social workers.

g) Provide for procedural accommodation

It is worth noting that current legal practice means that very few lawyers or judges adapt their questioning to ensure the effective participation of people with mental disabilities. Lawyers, especially during cross examination, often pose multiple, negative and leading questions which may confuse witnesses or create additional anxiety.⁵⁴ Such approaches are very likely to result in manifest unfairness to the person with a disability. Instead, Rules of Courts should foresee for procedural accommodations to be made for people with speech or communication impairments to allow them to provide evidence by augmentative and alternative methods, or with the aid of assistive technology,⁵⁵ or through interpreters. Court Rules should allow a witness to be assisted by a “support person”⁵⁶ or intermediary⁵⁷ of their choice. Other procedural adjustments could include allowing testimony to be given

⁵⁴ According to information provided by Ugandan lawyers at a training session on the human rights of people with mental disabilities in Kampala, August 2014.

⁵⁵ These could include recognising the validity of evidence given through non-verbal communication, such as signing, mime, facial expressions or body language; the use of objects, symbols or pictures in giving testimony; or through computer programmes such as Makaton. Section 31(2) of the Australian Uniform Evidence Acts provide that “A witness who cannot speak adequately may give evidence by any appropriate means.” A detailed analysis of the practical implementation of these rules can be found in: Australian Human Rights Commission, *Equal Before the Law: Towards Disability Justice Strategies*, (2014), in particular Chapter 3.3, available online at https://www.humanrights.gov.au/sites/default/files/document/publication/2014_Equal_Before_the_Law.pdf [accessed 30 September 2015]. In the UK, the Youth Justice and Criminal Evidence Act (England and Wales) provides for special measures directions to be given which allow for witnesses to be “provided with such device as the court considers appropriate with a view to enabling questions or answers to be communicated to or by the witness despite and disability or disorder or other impairment” (Part II Chapter I Section 30).

⁵⁶ This is an informal role which may be taken by a friend, family member, carer or other trusted individual, with the agreement of the court. The role of a support person can be to accompany the person to the court, or possibly to sit with them when they provide testimony but only for the purpose of providing moral support. At no stage must they interfere with the giving of evidence. An excellent guide on the role of supporter of has been developed in Scotland by a representative organisation of people with intellectual disabilities: ENABLE Scotland, *Being a witness: Helping people with learning disabilities who go to court – A guide for carers*, (Edinburgh: October 2006, Scottish Executive), available online at <http://www.gov.scot/Resource/Doc/152441/0040998.pdf> [accessed 30 September 2015].

⁵⁷ The Youth Justice and Criminal Evidence Act (England and Wales) 1999, for example, allows “vulnerable witnesses” (Part II Chapter I) to provide evidence by way of an intermediary whose role is to communicate with the witness, ask them questions, provide their replies, and “to explain such questions or answers so far as necessary to enable them to be understood” (Section 29(2)). A person acting as an intermediary must make a declaration that “he will faithfully perform his function as intermediary” (Section 29(5)).

in camera, judges removal of wigs and gowns, and allowing for alternatives to oral evidence such as via video-link.⁵⁸

h) Avoid derogatory language

The Rules of Courts should not use any derogatory, disparaging terms or degrading reference and should restrict court users from using the same. The CRPD Committee has emphasised States obligation to revise legislation and policies with a view to removing all such derogatory terms.⁵⁹ Ugandan legislation and court forms frequently use discriminatory terminology to refer to people with mental disabilities, including “persons of unsound mind”, “idiot”, “lunatic”, “mental infirmity” and “person suffering from mental derangement”,⁶⁰ all of which should now be abandoned in compliance with Articles 4 and 5 of the CRPD.

i) Guarantee the interests of all parties to proceedings

The Rules of Courts should ensure that the interest of all parties to proceedings are equally guaranteed. Therefore, the requirement to make court processes fully accessible and accommodative is not meant to give an advantage or ease the process for people with mental disabilities at the expense of the rights of other parties. For example, procedural requirements such as cross examination of a witness by the defense attorney cannot be waived. However, the cross examination can be suspended to ensure that it takes place in a suitable environment and time for the person with a disability since it is a crucial aspect in criminal proceedings. In addition, such cross examination may require to take place through an interpreter to ensure that the person being examined is able to understand the questions being put. The principle of equality of arms can guide in this process, since the essence of this is to make proceedings accessible and ensure full participation in the court processes without disability-based restrictions or limitations.

j) Respect the presumption of innocence

Rules of Courts must comply with this cardinal principle on fair hearing especially in relation to people with mental health issues. The Ugandan Constitution requires every

⁵⁸ Mark R Kebbell, Christopher Hatton and Shane, *Witnesses with intellectual disabilities in court: What questions are asked and what influence do they have?*, (December 2010), p. 31-2. See also Youth Justice and Criminal Evidence Act (England and Wales) 1999, Part II Chapter I Sections 23-30 for a number of procedural adjustments including the use of screens, live link, evidence *in camera*, video evidence and removal of wigs and gowns.

⁵⁹ CRPD Committee, Concluding Observation of the Committee, Azerbaijan, 12 May 2014, CRPD/C/AZE/CO/1.

⁶⁰ Mental Treatment Act 1938, Cap 279 of Laws of Uganda (2000), s. 1(f); Order XXXII Rule 15 of the Civil Procedure Rules; Regulation 30 of the Local Council Courts Regulations; Rule 16(2) of the Court of Appeal Rules; Section 117 of the Evidence Act.

person who is charged with a criminal offence to be presumed innocent until proven guilty or until that person has pleaded guilty.⁶¹

The Human Rights Committee has explained that defendants should normally not be shackled or kept in cages during trials or otherwise presented to the court in a manner indicating that they may be dangerous.⁶² This presumption should equally be available to accused persons with mental disabilities who may require supports in order for their presumption of innocence to be safeguarded against an easy proclamation of guilt.

⁶¹ Article 28(3)(a) of the Constitution of the Republic of Uganda, 1995.

⁶² Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007), paragraph 30.

5. Conclusions and general recommendations

As the Ugandan Government rapidly approaches its eighth year since ratification of the UN Convention on the Rights of Persons with Disabilities, and its first review before the relevant Treaty Body in 2016, it is submitted that now is the time for concrete changes to be made to ensure greater access to justice for all Ugandans with disabilities, including those with mental disabilities. Some of the recommendations and guidelines given above will provide a useful starting point, but they cannot replace a systematic review of all relevant laws and rules currently in force, the abolition of those which fall beneath international standards, and the adoption of new legislation and other measures.

The substance of the reforms will doubtless raise numerous challenges, both in their drafting and implementation. The core of the process, however, will be to challenge exclusionary attitudes towards people with mental disabilities on the basis of extending access to justice for all. Three general recommendations can be provided to strengthen the likelihood of success of such endeavours.

Firstly, in reforming current Rules of Courts, it is essential that the Ugandan Government closely consults with and actively involves people with mental disabilities themselves. This not only makes good policy sense, but is required by the CRPD itself.⁶³ Given the lack of official statistics of people with mental disabilities accessing justice and the limited awareness of judicial officers at present, their direct involvement in judicial reform efforts are essential. Effective involvement and consultation will also ensure that the Rules of Courts avoid derogatory terms, and will result in increased accessibility, and understanding of procedural, age-appropriate and reasonable accommodations.

Secondly, the application of new rules alone are unlikely to be sufficient. New rules where adopted must be rigorously monitored and assessed, to ensure that they are resulting in greater procedural and substantive justice for people with mental disabilities. One crucial aspect will be requiring the collection and dissemination of disaggregated data in the justice system, as required by Article 31 CRPD. Barriers to accessing justice courts should be removed gradually in a systematic manner, and continuously monitored.⁶⁴

Thirdly, there must be a specific effort to both tackle the attitudinal barriers that people with mental disabilities face on a daily basis in Uganda, including in the judiciary. A concerted effort will be required to train and create awareness of the human rights of people with disabilities, and to tackle stigma, including for judges, prosecutors, police and others involved in the administration of justice.

The Ugandan justice system has a crucial role to play in tackling the historic denial of rights faced by many with mental disabilities in the country. In undertaking some of the reforms described above, the rule of law is ultimately strengthened for all.

⁶³ CRPD, Article 4(3).

⁶⁴ CRPD Committee, General Comment No 2.

Annex

Analysis of specific rules of court

The table below highlights some of the problematic Rules of Courts that directly impact on people with mental disabilities and makes suggestions as to the changes required based on the substantive minimum standards discussed above.

1. Non-recognition and denial of legal capacity		
Current Rules	Required Changes	Reasons for change
<p><u>Order XXXII Rule 15 of the Civil Procedure Rules</u> states that “The provisions contained in Rules 1 to 14 of this Order {which allows for suits by minors to be instituted on their behalf by next friend or guardian ad litem when the minor is a defendant} so far as they are applicable, shall extend to persons adjudged to be of unsound mind, and to persons who though not so adjudged are found by the court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interest when suing or being sued.”</p>	<p>Should be repealed.</p> <p>It should fully recognise the right to legal capacity of all persons with disabilities, and their right to access support.</p> <p>Abolish derogatory terminology such as “unsound mind”, “incapable” and “mental infirmity”.</p>	<p>The rule fails to fully recognise the right to legal capacity for people with mental disabilities by treating them in the same way as minors.</p> <p>The rule contains a fault presumption that people with mental disabilities as incapable of protecting their interests when sued or being sued without exploring the provision supports that respect their will and preferences.</p> <p>The rule uses derogatory terminology which the CRPD Committee has called on States to stop using.</p>
<p><u>Regulation 30 of the Local Council Courts Regulations</u> states that “Every suit by a child or a person of unsound mind or any person suffering from any disability shall be instituted in the name of the child or the person with disability by the next of kin or next friend.”</p>	<p>Should be amended.</p> <p>The rule denies the right for people with disabilities to initiate suits in their own name.</p>	<p>The rule equates adults with disability or persons of unsound mind (undefined) with a child.</p> <p>It requires people with disabilities to initiate suits through a third party on a substitute basis, in conflict with Article 12 CRPD.</p>

Current Rules	Required Changes	Reasons for change
<p><u>Court of Appeal Rule 23(3)</u> states: "A person under disability may appear by advocate or by his or her committee, next friend or guardian ad litem, as the case may be."</p>	<p>Amend to consider the following:</p> <p>This rule should emphasise that a person with disability can freely choose (with access to supports when needed) whoever appears on their behalf. Safeguards should be in place to ensure that the person who appears with their will and preference.</p>	<p>The current rule fails to recognise the right to legal capacity for people with disabilities and instead subjects them to the substitute decision-making of a committee, next friend or guardian ad litem.</p>
<p><u>Court of Appeal Rule 23(4)</u> states: "Where a person has acted as next friend or guardian ad litem in the High Court for a person under disability, and the person under disability becomes respondent in an appeal to the court, the next friend or guardian ad litem may, if he or she desires to act in that capacity, lodge a consent to act and shall then be taken to be duly appointed."</p>	<p>Amend to consider the following:</p> <p>This rule should clearly state that a next friend or guardian ad litem should always be freely chosen by the person with disability and their appointment should never be automatic even in situations when they previously represented the person with disability in lower courts.</p>	<p>The current rule allows for substituted decision-making and fails to recognise and make provision for access to supports.</p>
<p><u>Court of Appeal Rule 23(5)</u> states: "In any other case, the court may appoint the guardian ad litem for the purpose of an appeal."</p>	<p>Amend to consider the following:</p> <p>A court must ensure that whoever it appoints as guardian ad litem for the purpose of an appeal must have been freely accepted by the person with disability and will act according to the will and preferences of the person with disability.</p>	<p>Courts also have an obligation not to limit the decision making-rights of people with disabilities, and to promote autonomous decision-making which respects their will, choices and preferences.</p>

Current Rules	Required Changes	Reasons for change
<u>Court of Appeal Rule 23(6)</u> states: "The court may, at any time, remove and replace any guardian ad litem however appointed."	Amend to consider the following: Any guardian ad litem appointed to replace a former guardian ad litem should be accepted by the person with disability and respect their will and preferences.	Support should never be forced on people with disabilities and should not allow for substituted decision making.
<u>Court of Appeal Rule 16(1)</u> states: "Any document may be signed on behalf of the person making it by any person entitled under rule 23 of these Rules to appear on his or her behalf".	Amend to consider the following: A person with a disability should sign or give their assent to legal documents in their own name, or through an authorised person that they have freely chosen.	The current rule denies legal capacity to people with disabilities.
<u>Court of Appeal Rule 16(2)</u> states: "In or in relation to criminal appeals, a document may be signed on behalf of an appellant who is alleged to be of unsound mind by a person entitled under rule 23 of these Rules to appear on his or her behalf or by any person in whose care he or she may be for the time being, including a medical officer, police officer or prison officer".	As above.	As above. It also allows a wide class of people to act on behalf of people with disabilities, potentially leaving them at risk of exploitation.
<u>Supreme Court Rules 16(1) & (2), 23(3), (4) & (5)</u> read in similar terms to the Court of Appeals Rules above.	Repeal and amend in line with Appeal Court Rules above.	As above.

Current Rules	Required Changes	Reasons for change
Human Rights Commission Rules are silent on complaints initiated by people with mental disabilities.	Human Rights Commission Rules should expressly recognise the rights of people with mental disabilities to institute complaints in their own names and to access supports in order to do so.	The lack of provision of reasonable or procedural accommodations to people with mental disabilities is likely to pose barriers to them accessing the right to complain to the Human Rights Commission.

2. Failure to recognise full capacity to testify

Current Rules	Required Changes	Reasons for change
<p>Section 117 of the Evidence Act states:</p> <p>“All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.</p> <p><i>Explanation.</i>—A lunatic is not incompetent to testify, unless he or she is prevented by his or her lunacy from understanding the questions put to him or her and giving rational answers to them.</p>	Amend the section to require that courts or tribunals take all reasonable efforts to provide accommodations, including adjustment to the relevant procedures, to enable persons with disabilities to fully participate in the court process on an equal basis with others.	<p>The current section fails to recognise and make provision for the support that people with disabilities may need to understand the court and effectively communicate with the courts.</p> <p>It also uses the word lunatic which is degrading and derogatory language.</p>

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