BARRIERS TO JUSTICE: VIOLATIONS OF THE RIGHTS OF DEAF AND HARD-OF-HEARING PEOPLE IN THE SOUTH AFRICAN JUSTICE SYSTEM

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ABSTRACT
This article discusses the violation of rights of disabled persons in the South African justice system. Its particular focus is the infringement of rights of deaf and hard-of-hearing people as a result of communication barriers in police stations and courts. While deaf and hard-of-hearing people comprise a small percentage of disabled individuals who come into contact with the justice system, the violations that occur are endemic and symptomatic of a disregard by justice officials of the rights and needs not only of deaf and hard-of-hearing persons, but of all disabled people. It is argued that a scheme comprising three components can guarantee the rights of deaf and hard-of-hearing people in South Africa’s justice system. The first and most fundamental component is a recognition by justice officials that the right of the deaf and hard-of-hearing to be treated fairly in the justice system is constitutionally required. The second component requires amended and augmented legislative provisions to flesh out the content of the constitutional rights. The third component is that practical guidelines should be disseminated among justice officials to direct their day-to-day interactions with deaf and hard-of-hearing people. Such a scheme can prevent future violations of rights of the disabled and enhance the goal of equality for all South Africa’s citizens.

I INTRODUCTION
A Deaf 1 minor is a complainant in a rape case. She is allocated a male white interpreter who does not understand her. It is decided that the complainant should give evidence in a separate room by way of CCTV and through an intermediary. A white intermediary is found who knows

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1 The convention of writing 'Deaf' with a capital 'D' is used to indicate persons who associate with the Deaf culture and use sign language as a first language. The use of a small 'd' denotes all persons whose hearing is totally impaired or with a hearing impairment so serious as to prohibit full understanding of oral communications when spoken in normal conversational tone. Black's Law Dictionary 6th edition (1990) cited in DM Smith 'Confronting Silence: The Constitution, Deaf Criminal Defendants, and The Right to Interpretation during Trial' (1994) 46 Maine LR 87. Although the subjects observed in the research on which this paper is based were all Deaf, this paper deals with the rights of all deaf and hard-of-hearing individuals in South Africa.
sign language. However, she cannot communicate with the child who uses a different dialect of sign language. A black Deaf relay interpreter\(^2\) is found who can communicate with the child. However, the magistrate claims that according to the law a relay interpreter cannot be used concurrently with an intermediary and the complainant must give evidence in the court and not in a separate room if the relay interpreter is to be used. Although a child’s mother objects to her daughter appearing in front of the alleged rapist, the complainant will give evidence in the court. When the court date arrives, the chief interpreter holds up the proceedings for over an hour as nobody knows how to swear in a Deaf relay interpreter.\(^3\)

This brief excerpt depicts a string of human rights violations. In this single instance of a much longer contact with the South African justice system, several rights of the Deaf minor were violated. Her rights to dignity\(^4\) and equality\(^5\) were impaired, she was temporarily denied the right to receive or impart information,\(^6\) to use the language of her choice\(^7\) and to access information\(^8\) and her right as a child to be protected from maltreatment and degradation\(^9\) was infringed.

This paper discusses the violation of the constitutional rights of disabled persons in the South African justice system. Its particular focus is the infringement of rights of deaf and hard-of-hearing people as a result of communication barriers in South Africa’s police stations and courts. Deaf and hard-of-hearing people comprise a small percentage of disabled individuals\(^10\) who come into contact with the South African justice system. However, our research suggests that the violations of their rights are endemic and symptomatic of a disregard by justice officials of the rights and needs of the deaf and hard-of-hearing and of all disabled people. By drawing attention to the experience of Deaf people in police stations and the courts, the importance of paying attention to the specific needs and circumstances of the disabled and of all people is emphasised.

Experiences of the Deaf in eight cases in magistrates’ courts in Gauteng, South Africa are discussed and three ‘barriers to justice’ are

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2 A ‘relay interpreter’ in the courtroom is an interpreter who is usually Deaf and who acts as a communication conduit between a hearing sign language interpreter and a Deaf witness. The relay interpreter translates the sign language variety of the Deaf witness into the sign language variety of the hearing interpreter, who then passes the message on to the Court, and vice versa.
3 Excerpt from field notes, Case 5, October 1999.
4 Section 10 of the Constitution of the Republic of South Africa Act 108 of 1996 (‘the Constitution’).
5 Section 9 of the Constitution.
6 Section 18(1)(b) of the Constitution.
7 Sections 30 and 31(1)(a) of the Constitution.
8 Section 32 of the Constitution.
9 Section 28(1)(d) of the Constitution.
10 We define a ‘disabled’ individual as one whom has a temporary or permanent mental or physical disability, including the blind, partially-sighted, deaf and hard-of-hearing.
identified. A theme common to all three barriers is communication hindrance or failure resulting in violations of the rights of the Deaf to, inter alia, equal protection and benefit of the law, freedom of expression, access to information and a fair trial. The paper then considers whether the communication failure leading to rights violations arises from inadequate provision for the protection of deaf and hard-of-hearing individuals in legislation and case law, or from a more alarming indifference to the rights of deaf and hard-of-hearing people. The American experience in this regard is discussed and a model for the protection of the rights of deaf and hard-of-hearing people is proposed for South Africa. The paper ends by suggesting practical measures that, if implemented in the South African justice system, would avert future violations of rights.

II THE RESEARCH

The research discussed in this paper involved participant observation in courts and interviews with interpreters. Participant observation occurred in eight cases involving Deaf people in magistrates’ courts in and around Gauteng. Annexure A contains an outline of each case. The cases were initially selected on the basis that a particular interpreter, known to the researcher, was to be involved in each of them. They are believed to be typical of the experience of Deaf people in the magistrates’ courts. A qualitative ethnographic methodology was selected in order to obtain an in-depth and textured window into the experiences of the Deaf in the justice system. The hearing researcher, who is able to communicate in sign language, worked closely with a Deaf research assistant throughout the fieldwork phase of the project. The second part of the research involved six telephonic or faxed in-depth interviews with court interpreters from different provinces, which focused on their experiences of interpreting for deaf and hard-of-hearing people in court.

The researcher and the research assistant were unable to maintain the roles of neutral observers to the events being played out before them. In many cases, one or both had to intervene to facilitate communication between sign language interpreters and Deaf subjects. In three cases, the research assistant acted as a relay interpreter, where communication between interpreter and the Deaf individual was difficult or impossible. In some cases, the researcher and research assistant were asked by court personnel to attend court hearings to assess the standard of interpreting. In all cases, the sign language and other communication skills of the researcher and research assistant were welcomed by court personnel. Without the intervention of the researcher and research assistant, the Deaf participants in the cases would have been prejudiced. This unanticipated active participation of the researcher and research assistant served to highlight and reinforce the observation that the inadequate provision of skilled interpreters and other hearing assistance
in the great majority of cases involving Deaf persons in the justice system is likely to result in communication breakdown and disadvantage.

III Barriers to Justice

Three ‘barriers to justice’ which the Deaf face in the South African justice system were identified by the research. Each barrier resulted in an infringement of rights. The first barrier arose during the giving of police statements by Deaf accused or complainants in the absence of skilled interpreters, where the Deaf statement-givers were unable to make the statement themselves or give it accurately because of the absence of a skilled interpreter. The effect of this was that statements that did not mirror the facts as understood by the statement-givers were produced and used before trial and in court. The second barrier was found in the courtroom, in the form of miscommunication and communication failure between interpreters and the Deaf, resulting in disadvantage to the Deaf. The third barrier arose because of incidents of misinterpretation of statutory provisions by court officials, which prejudice the rights of the Deaf. Each is considered in more detail below.

(a) Giving statements to the police

No Deaf person who gave a police statement in the observed cases was made aware by the police officer, with whom they interacted, of their right to the assistance of a trained and skilled interpreter when giving a police statement. Consequently, none of the observed accused or complainants requested the services of a trained interpreter who used their variety of sign language and none was made available.

Owing to the absence of trained interpreters, statements were made on behalf of the Deaf accused and complainants by a hearing relative or friend or by policemen, or were made by the Deaf person with the assistance of an untrained and often unskilled family member, teacher or social worker. For example, in Case 6, LM, a young black Deaf girl, who had laid a charge of rape against her uncle, was taken to the police station by two of her aunts after a doctor had confirmed that she had been raped. Because no interpreter was present, the aunts made a statement on LM’s behalf and did not inform LM of the content of the statement. LM informed the researcher that the statement was not read to her at any stage. Similarly, the statement of the minor accused of rape in Case 5 was made by his mother and a school nurse. The accused was not aware of the contents of the document that he signed. In Case 4, RR, who was accused of murder, played no part in making his statement. The police compiled it on the basis of a detective’s understanding of events and at no time was RR asked for his version.

11 This right, it is argued below, is not expressed in any statute, but arises from the Constitution.
Sign language interpreters interviewed in the research stated that they were only infrequently called to interpret at police stations when statements were being taken from Deaf people and that in the majority of cases, friends and relatives of the statement-giver, who have minimal signing skills, were used for interpreting. In the interpreters’ experience, reasons given by the police for not using interpreters included the inability to locate appropriate interpreters and budgetary constraints. However, an interpreter in Mpumulanga was aware of a case in which relatives of a Deaf person were requested by police to interpret when a statement was made, even after they had informed the police that they knew of a skilled interpreter in the area who could be called to assist.

It is a misconception that people close to Deaf individuals can communicate proficiently with the Deaf and therefore are competent to interpret for purposes of judicial proceedings. This is illustrated in Case 5, where a minor complainant in a rape case had made a police statement with the assistance of a social worker who was untrained to interpret the variety of sign language used by the minor. When the minor was called to give evidence, the lawyer of the alleged rapist raised the fact that there were material contradictions between the complainant’s statement and her testimony. There were indeed discrepancies between the statement and the complainant’s evidence in court, arising from miscommunication between the child and the untrained social worker/interpreter.

The high level of illiteracy in the South African Deaf community compounds the barrier faced by the Deaf when giving police statements. In the observed cases, the majority of deaf complainants or witnesses who were asked to sign the statements made on their behalf or through unskilled interpreters were unable to read what was placed before them. Without the presence of a skilled interpreter, the written word too was unintelligible. In Case 4, the accused, who had played no part in the composition of his police statement and who was unable to read the statement when it was placed before him for signature, indicated to the researcher that he had expressed his wish to make a new statement in court, but had been told by his legal representative that this was not necessary.

The research indicates, therefore, that Deaf persons who are required to make police statements are frequently victims of miscommunication, arising from, and leading to, rights violations including the right to a skilled interpreter and, as an accused person, to a fair trial. These

12 Not all teachers at Deaf schools are proficient in South African Sign Language ('SASL'). As a result, some teachers use a mode of communication that involves speaking and simultaneously producing signs that are equivalent to each spoken word. The signs that are used to reflect the spoken words are often different to SASL signs and are invented by hearing educators. And, unlike in SASL, facial expressions are not used as grammatical markers. Necessitated by the speed of speaking, signs are often dropped. As a result, the message that Deaf children receive at school is often incomplete and incomprehensible. Consequently some learners leave school with extremely low literacy levels.
violations at the time of initial contact with the justice system are followed by violations in the courtroom, discussed in the next section.

(b) Communication failure in the courtroom

Deaf people who make appearances in South African magistrates’ courts are hindered by communication difficulties. In all the observed cases, difficulties arose because of impediments in interpretation involving court-appointed sign language interpreters. Court officials appear to assume that the mere appointment of any sign language interpreter is enough to ensure that communication problems with Deaf people will be countered. This is not accurate. To enable the reader to comprehend the basis of this second identified ‘barrier to justice’, a brief overview of South African Sign Language (‘SASL’) will be presented.

According to the Deaf Federation of South Africa (‘DEAFSA’) there are approximately 500 000 users of SASL in South Africa.\(^{13}\) Although SASL is not one of the eleven official languages, sign language has status in the Constitution as one of the languages that must be promoted by the Pan South African Language Board and for whose ongoing development and use, favourable conditions must be created.\(^{14}\)

Some inappropriate treatment of the Deaf in the justice system arises from a failure to recognise the diversity within the Deaf population. One of the most prevalent myths about signed languages is that there is one universal sign language. In fact thousands of discrete ‘natural’ sign languages exist internationally, of which SASL is one. They are not necessarily mutually intelligible as each has its own set of hand shapes, vocabulary and grammar.\(^{15}\)

Natural sign languages are acquired by the Deaf through exposure to other signers, and not inevitably through schools.\(^{16}\) Natural sign languages have their own linguistic structure that is completely independent of that used in spoken or written languages. This is illustrated by an example set out in Annexure B where spoken English, signed English and SASL were used.

Each sign language has different varieties and dialects in the same way that spoken languages vary according to factors such as age, geographical region or ethnicity. Dialectal variation affects the pronunciation of signs and the vocabulary used. Thus, an older South African Deaf person may use a different sign language dialect that has different vocabulary items to a South African Deaf child. Similarly, a

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14 Section 6(5) of the Constitution.
15 Sign languages have fundamentally different structures to spoken languages as they convey concepts visually through a combination of manual signs, gestures and facial expressions. J Schein ‘At Home Among Strangers’ cited in Smith (note 1 above) 87. See also Annexure B.
16 See note 12 above.
South African black Deaf person will use different vocabulary to a South African white Deaf person. Each of the schools for Deaf children in South Africa has developed a dialect of SASL. The grammar of SASL is, however, not impinged upon by regional and other differences. The trial of the uncle of LM, who had allegedly raped her, was postponed at least twice because LM, who is black, was unable satisfactorily to communicate with the white Afrikaans speaking interpreter who had been allocated to her. In Case 5, five Deaf people appeared in court in respect of the same rape case – the accused, the child who had allegedly been raped and three witnesses. At first, one white Afrikaans female hearing interpreter was appointed for all five, each of whom clearly had divergent language requirements.

Many hearing people in South Africa who claim to be fluent in sign language do not understand and cannot use SASL. Usually they string signs together following the word order of their spoken language, and/or use fingerspelling, which is incomprehensible to many Deaf people. Even those Deaf people who are highly educated have great difficulty processing this form of signing as it violates the principles of visual-spatial languages such as SASL.

Sign language interpreters who appear in South African courts need, at minimum, to be proficient in both expressing and understanding SASL, which is used by the majority of South African Deaf. They also need to be familiar with and be able to express, legal and courtroom terminology to Deaf persons with varied skills from varied backgrounds. There is only a handful of interpreters in South Africa who have the necessary proficiency and skill. A hearing interpreter interviewed in Gauteng

17 Case 6.
18 Fingerspelling must be differentiated from natural sign language. Fingerspelling depends on using a different sign for every letter of the alphabet. The fingerspelled alphabet has been borrowed from written languages and is a form of spelling out words that occur in written languages. Fingerspelling is used only to translate words in spoken languages that do not have a signed equivalent in SASL. Thus names of people can be fingerspelled as well as technical words that may not have an equivalent sign. However, as fingerspelling depends on literacy levels and knowledge of the written language Deaf people without high levels of education cannot read fingerspelling adequately.
19 It is also a misconception that most deaf people can 'lip-read'. A study discussed by Smith (note 1 above) found that the best lip readers could fully understand only twenty six per cent of what was said to them. Lip reading is difficult for a number of reasons, including that many spoken sounds are not shown on the lips and speaking loudly or softly tends to distort lip movements.
20 The researcher knows of only six sign language interpreters in South Africa with the type of skills discussed in this paragraph. Only one sign language interpreting course is currently available in South Africa – at the University of the Free State. The course at the University of the Witwatersrand was discontinued at the end of 2002, owing to lack of student numbers. Financial and other barriers exist to interested persons obtaining training as sign language interpreters. The course at the University of the Witwatersrand spanned three years, and cost approximately R8 000 per student per annum.
stated that she finds it difficult to communicate the language of the court to poorly educated Deaf witnesses. In the observed cases, many of the court-appointed interpreters did not use SASL at all in the courtroom, and instead used signed spoken language, where signs are strung together following the order of spoken language. As explained above, such language differs from SASL and is often incomprehensible to the Deaf, even those with high educational levels. Where interpreters were able to use SASL in the observed cases, most often the dialect of SASL with which they were familiar did not match that of the person for whom they were interpreting. Needless to say, where the research assistant did not step in to act as relay interpreter, this resulted in incomplete and inaccurate relaying of the Deaf’s message to the Court and vice versa.

The use of Deaf relay interpreters21 in the courtroom alleviates communication barriers. Relay interpreters who are familiar with the dialect of SASL of the Deaf person appearing in court, as well as with the language used by the hearing interpreter, facilitate accurate communication between the Deaf witness and the Court. A hearing interpreter from Mpumulanga interviewed as part of the research stated that the assistance of a relay interpreter ‘makes interpreting easy’ and enables her ‘to get the whole information that, if I were interpreting alone, I would have missed’. A relay interpreter interviewee stated that relay interpreters, unlike hearing ones, are able to assess and identify communication problems. Often, hearing interpreters do not realise when Deaf witnesses do not understand them. In only one of the observed cases, after the intervention of the research team, was it arranged that a relay interpreter be present. In the other observed cases where relay interpretation was required, the research assistant, on an impromptu basis, played the role of relay interpreter. When relay interpreters are brought into the courts, there is often resistance on the part of court officials to their presence, and/or a lack of sensitivity to the special requirements that exist where relay interpretation is employed. In Case 4, an example of this insensitivity was apparent. The magistrate did not allow additional time for the primary and relay interpreters to communicate with the Deaf accused, with the result that the sign language being used by the parties had to be rushed, and there was a consequent loss of information.

Some court officials interviewed during the research expressed the opinion that the use of relay interpreters results in extra costs, both financial and in terms of time, which cannot be afforded. This opinion presupposes that such extra costs are disproportionate to the value which relay interpreting adds, while the research shows that the accuracy of communication is substantially increased by the intervention of a relay interpreter.

21 See note 2 above.
In a number of the observed cases, there was a perception by court officials that relay interpreters could not be sworn-in in the statutorily prescribed way, which requires direct communication without the presence of an interpreter. This hurdle is easily overcome by adopting a written swearing-in procedure, which is suitable as most relay interpreters are literate.

Aside from the need to match witnesses to interpreters who know the same dialect of SASL, the research suggests that it is also valuable to match the gender and culture of interpreter and witness, particularly in sensitive cases, such as those involving divorce or rape. Because of the shortage of trained interpreters, matches seldom occur in South African magistrates’ courts. A male interpreter interviewed in the course of the research stated that a match of genders results in easier interpreting. He gave, as an example, a rape case in which he was appointed as interpreter for the Deaf female complainant where the complainant felt uncomfortable about relaying her version of events through him. The appointment of a female interpreter, he thought, would have alleviated the complainant’s discomfort.

A further barrier to justice in the courtroom arises from the exclusion from the court record of the original testimony of the Deaf. This arises because proceedings are recorded with audio equipment, with the result that no record is kept of the sign language produced by the Deaf person and only the words of interpreter who conveys the Deaf’s message to the Court are recorded. This places Deaf persons at a disadvantage in the appeals process because the accuracy of the interpretation cannot be tested.

(c) Misinterpretation of statutory provisions relating to relay interpretation

The third barrier to justice arises when magistrates misinterpret s 170A of the Criminal Procedure Act 51 of 1977. In terms of s 170A(1), intermediaries must be appointed by Courts in circumstances where witnesses who are minors would be exposed to undue mental stress or suffering if they were made to testify in court. The minor and intermediary are positioned outside the courtroom and all examination of the minor is done via the intermediary. Misinterpretation of the provision by magistrates results in the exclusion of relay interpreters in cases where intermediaries are used, to the prejudice of the Deaf minors.

Section 170A(2)(a) states that

no examination, cross examination or re-examination of any witness in respect of whom a court has appointed an intermediary under subsection (1), except examination by the court, shall take place in any manner other than through that intermediary.

In Case 5, which is described at the beginning of this article, the magistrate interpreted s 170A(2)(a) to mean that either an intermediary
or a relay interpreter, but not both, could facilitate the process of the minor complainant giving evidence against her alleged rapist. Because the minor could not testify without the presence of the relay interpreter, she was forced to testify without an intermediary and in court in the presence of her alleged rapist.

The argument that s 170A(2)(a) does not allow relay interpreters where an intermediary is used misconstrues that section. The section demands that once a Court has decided that an intermediary shall be appointed, the witness should not be subject to direct questioning except by the Court. This does not, on any interpretation, affect the role of interpreters.

These are all examples of inappropriate treatment of the Deaf in magistrates’ courts and police stations in and around Gauteng, which leads to violations of rights. The communication failures in the observed cases are not unique to the courts and police stations of Gauteng and are, we believe, illustrative of a wider disregard of the specific needs and rights of the disabled, including the Deaf, by South African justice officials.

IV SOUTH AFRICAN LAW PROTECTING THE DEAF IN THEIR INTERACTIONS WITH THE JUSTICE SYSTEM

(a) The Constitution

The Constitution lays the foundations for equitable treatment of the deaf and hard-of-hearing in the South African justice system. The following rights, among others, may be relevant to deaf persons who find themselves in circumstances similar to those revealed by the research:

(a) the right to equality, and particularly the entitlement to equality before the law and equal protection and benefit of the law, and the right not to be unfairly discriminated against on the basis of disability;

(b) the right to freedom of expression, and specifically the freedom to receive or impart information or ideas;

(c) the right to use the language and participate in the culture of choice,


23 Section 9 of the Constitution.
24 Section 9(1) of the Constitution.
25 Sections 9(3) and (4) of the Constitution.
26 Section 16 of the Constitution.
27 Section 16(1)(b) of the Constitution.
28 Section 30 of the Constitution.
(d) the right of access to information held by the state and by any other person when required for the exercise or protection of rights;\textsuperscript{29} and

(e) rights relevant to arrested, detained and accused persons,\textsuperscript{30} including:

i. in the case of arrested persons, the right to remain silent,\textsuperscript{31} the right to be informed promptly of the right to remain silent and of the consequences of not remaining silent\textsuperscript{32} and the right not to be compelled to make any confession or admission that could be used in evidence against them;\textsuperscript{33}

ii. in the case of accused persons, the rights to be informed of the charge in sufficient detail so as to enable them to answer it,\textsuperscript{34} to be present when being tried,\textsuperscript{35} to adduce and challenge evidence,\textsuperscript{36} not to be compelled to give self-incriminating evidence\textsuperscript{37} and to be tried in a language that is understood or, if that is not practical, to have the proceedings interpreted;\textsuperscript{38}

iii. in the case of arrested, detained and accused persons, the right to have information conveyed to them in a language they can understand.\textsuperscript{39}

Apart from a reference to sign language,\textsuperscript{40} no express mention is made of deaf people or their needs in the Constitution and, as yet, there is no Constitutional Court jurisprudence regarding the interpretation of constitutional rights in the specific context of the deaf and hard-of-hearing in the justice system. In interpreting rights in the Bill of Rights that may be relevant to deaf and hard-of-hearing individuals in the justice system, recourse must then be had to principles of interpretation laid down by the Constitution and expounded by the Constitutional Court.

Section 39(1) of the Constitution advocates value-based interpretation by imposing on courts, tribunals and forums the duty to ‘promote the values that underlie an open and democratic society based on human dignity, equality and freedom’ when interpreting the Bill of Rights. The Constitutional Court has held that a purposive, value-based approach to interpreting the Bill of Rights is appropriate, which requires that the meaning of the right be ascertained in light of the values that underpin it

\textsuperscript{29} Section 32(1) of the Constitution.
\textsuperscript{30} Section 35 of the Constitution.
\textsuperscript{31} Section 35(1)(a) of the Constitution.
\textsuperscript{32} Section 35(1)(b) of the Constitution.
\textsuperscript{33} Section 35(1)(c) of the Constitution.
\textsuperscript{34} Section 35(3)(a) of the Constitution.
\textsuperscript{35} Section 35(3)(e) of the Constitution.
\textsuperscript{36} Section 35(3)(i) of the Constitution.
\textsuperscript{37} Section 35(3)(j) of the Constitution.
\textsuperscript{38} Section 35(3)(k) of the Constitution.
\textsuperscript{39} Section 35(4) of the Constitution.
\textsuperscript{40} In s 6(5)(a)(iii) of the Constitution.
and by reference to the interests it is meant to protect. While purposive interpretation does not always coincide with generous interpretation, where it is appropriate, rights in the Bill of Rights should be construed so as to secure the full measure of their protection for individuals.

A value-based, purposive approach to interpreting the above rights in the context of the deaf and hard-of-hearing in the justice system, requires us to view them in light of the values that underlie an open and democratic society based on freedom and equality. Under s 1 of the Constitution, these include the democratic values of dignity, the achievement of equality and the advancement of human rights and freedoms. The Preamble to the Constitution states that injustices of the past, which of course include unfair discrimination against and denial of opportunities for the disabled, are to be recognised, and that there is to be a move away from them by, among other things, the improvement of 'the quality of life of all citizens and [the freeing of] the potential of each person'. An acknowledgment of and respect for diversity is of particular importance in South African society. This is apparent in the recognition in the Constitution of different languages and the prohibition of discrimination on numerous grounds including disability. The protection of diversity and the recognition of the inherent dignity of all human beings are hallmarks of a free and open society. We are required to consider the purpose of rights in the Bill of Rights in their particular context, against the backdrop of the above values, and to ascribe to them meaning that is consistent.

The express mention of persons with disabilities in the context of the constitutional prohibition on discrimination highlights the importance of the principle of equality in the context of the disabled, who were previously severely disadvantaged and still are disadvantaged. The requirement of equality before the law, and of equal protection and benefit of the law, should thus be read to require that special attention be paid to the needs of the disabled, including the deaf, in the justice system, in order to redress the denial of access and other patterns of disadvantage of the past. The provisions of the recently enacted Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ('the Equality Act'), which give content to the constitutional right to equality, are consistent with this interpretation. People with disabilities are highlighted as a group in need of special attention to redress the

42 S v Makwanyane (ibid) para 10.
43 Section 6 of the Constitution.
44 Section 9(3) of the Constitution.
45 Prince v President of the Law Society of the Cape of Good Hope 2002 (2) SA 794 (CC) para 49.
46 Section 9(1) of the Constitution.
imbalances of the past, and specific mention is made of obligations of the State, including police stations and courts, to eliminate discrimination and to promote equality in respect of disabled persons.\textsuperscript{47}

No statute affords deaf persons the right to an interpreter when giving police statements. The constitutional right to equal protection and benefit of the law should be interpreted, however, to encompass the right of deaf accused and complainants to the services of a skilled and trained interpreter when giving police statements. Without this, the research reveals, they are undoubtedly placed at a disadvantage compared to hearing accused and complainants.

The right to freedom of expression, specifically the right to receive or impart information, and the right of access to information, when interpreted purposively in light of the values underlying the Bill of Rights, are violated when a deaf person is not told of his or her rights when giving police statements and is not able adequately to make his or her own police statement because of the absence of an interpreter. The rights are also violated where the deaf person is unable to understand or give information in court because of the absence of a suitable interpreter.

The right to use a language of choice, is, on any interpretation, violated when a person is forced to communicate other than in a language with which he or she is comfortable, such as where the only means of communication for a deaf person in a court is through an interpreter who is unable to speak his or her dialect of SASL.

The right of an accused to be present when being tried is undoubtedly violated where the accused is unable, because he or she is deaf or hard-of-hearing, to hear or understand the proceedings. Where reference is made in ss 35(3)(k) and 35(4) of the Constitution to arrested, detained and accused persons' rights to be communicated with in a language they understand, this must be understood to include sign language in the case of deaf persons.

Interpretation of rights along the lines developed above is consistent with the constitutional directive that the imbalances of the past must be redressed, and equality, dignity and human rights and freedoms for everyone must be achieved, especially among previously disadvantaged groups including the disabled. The role of the Constitution as a protector of the rights of deaf people in the justice system is discussed in more detail below.

(b) Legislation

Aside from the Constitution, South African law offers little protection to deaf people in general, and even less in their interactions with the justice system. The specific needs of deaf and hard-of-hearing people are all but

\textsuperscript{47} Section 28(3) of the Equality Act.
ignored in the extensive collection of statutes, case law, rules and practice in respect of South African court procedure.\textsuperscript{48}

The South African Police Standing Orders\textsuperscript{49} make reference to people with hearing disabilities who have been arrested and provide that steps must be taken as soon as reasonably possible to ascertain how the arrested person can be communicated with, and to arrange for an interpreter to facilitate communication. The extremely detailed statute providing for procedures and related matters in all criminal proceedings, the Criminal Procedure Act, refers specifically to deaf people only once, in inappropriate terms: Section 161 makes provision for the use of sign language (‘gesture-language’) by ‘deaf and dumb’ witnesses when giving evidence.\textsuperscript{50} No express mention is made of deaf or hard-of-hearing persons in any of the other major Acts, sets of Rules or Practice Notes relating to proceedings in the justice system\textsuperscript{51} and no Act specifically concerned with the needs of deaf and hard-of-hearing people who encounter the justice system is in force.\textsuperscript{52}

More attention is given to the role of interpreters who are to be engaged when a party, either hearing or deaf, does not speak the language of the court in which he or she is appearing. While the primary purpose of such provisions is not the protection of the deaf or hard-of-hearing, their inclusion in legislation does assist deaf and hard-of-hearing people who appear in court.

The Rules and Practice Directions of the Constitutional Court, the Rules of the High Court, the Magistrates’ Court Act, the Rules of the Land Claims Court and the Small Claims Court Act all make provision

\textsuperscript{48}Although there is extensive law on procedure in civil and criminal trials which theoretically applies equally to deaf and hearing South Africans, because of the nature of deaf and hard-of-hearing people’s disability, when express provision for their specific needs is not made in law, they are excluded from the benefit of much of the law.

\textsuperscript{49}Standing Order 361.8(1).

\textsuperscript{50}Section 161 provides that ‘(1) [a] witness at criminal proceedings shall, except where this Act or any other law expressly provides otherwise, give his evidence viva voce. (2) In this section the expression “viva voce” shall, in the case of a deaf and dumb witness, be deemed to include gesture-language. The use of the description ‘deaf and dumb’ is considered by deaf and hard-of-hearing people to be demeaning and inappropriate.

\textsuperscript{51}The Acts reviewed were the Supreme Court Act 59 of 1959, Magistrates’ Courts Act 32 of 1944, Small Claims Court Act 61 of 1984, Labour Appeal Court Sitting as Special Tribunal Act 30 of 1995, Short Process Courts and Mediation in Certain Civil Cases Act 103 of 1991, Special Investigating Units and Special Tribunals Act 74 of 1996, International Co-operation on Criminal Matters Act 75 of 1996. The Supreme Court Uniform Rules of Court and the Rules of the Magistrates’ Courts, Constitutional Court, Labour Court and Land Claims Court were considered. Practice directions of the High Court, Magistrates’ Courts and Constitutional Court were examined.

\textsuperscript{52}The Equality Act does make reference (in s 9) to ‘enabling facilities’ for disabled persons to facilitate their functioning in society and to the elimination of ‘obstacles’ that unfairly limit or restrict disabled persons from enjoying equal opportunities. These provisions could and should be interpreted to refer to the kinds of obstacles faced by deaf and hard-of-hearing people in the justice system, such as the lack of skilled interpreters, and to enabling facilities such as hearing devices. However, the specific needs of the deaf and hard-of-hearing in the justice system are not expressly provided for.
for interpreters to be engaged where necessary. In some fora, the Court is responsible for identifying when an interpreter is needed and for providing the interpreter, while in others, the onus is on the party requiring an interpreter to request one. There is a lack of uniformity among courts in respect of who bears the costs of the provision of an interpreter.

Constitutional Court Rule 12(4)(a) and Practice Direction 1 of 1995 state that argument may be addressed to the court in any official language and a party wishing to engage an interpreter ‘shall not be responsible for the provision of an interpreter’. A party using sign language would therefore have to have it interpreted for the court into an official language, but the Court will provide the interpreter, at no cost to the party. It is not clear whether a party is required to request an interpreter where it is considered that one is needed, or whether the Court will decide when an interpreter is required and will then initiate the process of obtaining one. High Court Uniform Rule of Court 61 provides that where evidence in any proceedings is given in a language which cannot be understood by the Court or a party to the case, ‘such evidence shall be interpreted by a competent interpreter’. The Court may, before a person is engaged as an interpreter, conduct enquiries to satisfy itself in respect of the proposed interpreter’s competence and integrity. The costs of an interpreter are costs in the cause, except where a party’s representative requests interpretation in one of the official languages, in which case the costs are to be borne by the party concerned. Where a party other than the Court requires an interpreter, it is not clear whether the Court must decide that an interpreter is necessary or whether a request in advance from the party requiring the interpreter is required.

Section 6(2) of the Magistrates’ Courts Act provides that an interpreter ‘shall be called by the court’, but only in criminal cases and only where the accused is not, in the opinion of the court, sufficiently conversant in a language being used by a witness. Section 112 of the same Act makes mention of a party in civil proceedings giving evidence through an interpreter, but does not specify the procedure for calling such interpreter.

Rule 51 of the Land Claims Court states that evidence or argument ‘must be interpreted by a competent interpreter’ if a member of the Court, a legal representative or an unrepresented party is not conversant in the language being used. A party requiring an interpreter is required to notify the Registrar of the Court thereof at least five days in advance of the hearing or to make arrangements for an interpreter themselves if the Registrar cannot make them. The costs are costs in the cause, unless a party has requested interpretation from an official language, in which case the requester bears the costs. The Small Claims Court Act gives the court a discretion to call an interpreter if it deems it necessary.\footnote{Section 5(2) of the Act states that ‘[i]f evidence is given in a language with which one of the parties is in the opinion of the court not sufficiently conversant, a competent interpreter may be called by the court to interpret that evidence’.}
four other Acts in which interpreters are mentioned, reference is made to them only in passing without specific reference to the circumstances in which an interpreter would be called, who initiates or facilitates the process, or who bears the costs.

(c) Case law

The requirements of the deaf and hard-of-hearing in court have been addressed in a small number of cases. In some reported cases, deaf individuals in court have been dealt with inappropriately or unfairly. Generally, however, in the few cases in which South African courts have applied themselves to the issue of the needs of deaf and hard-of-hearing individuals in the justice system, they have done so sensitively. In the cases observed in the research, court officials had little regard to precedents of this kind.

In the 1953 case of Ex parte Bell for example, the Orange Free State Provincial Division of the (then) Supreme Court, citing an earlier Cape Provincial Division case, held that special requirements had to be fulfilled in order for an affidavit deposed to by a 'deaf mute' to be considered by the Court accurately to reflect the deaf mute's intention. What is necessary is not just an acknowledgement by the Commissioner of Oaths or Justice of the Peace that the deaf person knows and understands the contents of the affidavit, but also proof that the matter was properly explained to them and that they fully understood it. An early judgment of the Transvaal Provincial Division also reflects sensitivity to the special requirements of deaf accused in court. Where a deaf accused was subsequently shown not to have fully heard the proceedings in his trial, Ransbottom J held that his conviction and sentence should be set aside and the case remitted to the magistrate for an enquiry into the deaf person's ability to hear. The magistrate was ordered to take appropriate steps to accommodate the needs of the accused after inquiring into his ability to hear, including providing an interpreter if necessary and trying the case de novo.


55 The cogency of evidence given by mentally normal deaf witnesses has been questioned, for example in R v Ranikolo 1954 (3) SA 255 (O). In the 1964 case of S v Maxamba 1964 (1) SA 645 (C), the Cape Provincial Division upheld a decision of a lower court that a deaf accused, who was mentally normal, but who could not understand the trial proceedings because of his deafness, should be dealt with in accordance with the Mental Disorders Act 1916, and that the accused should be committed to jail pending a decision about his mental health, instead of being tried. Similarly, in a 1955 case, a magistrate’s court held that a 'deaf mute' accused, who was described by a district surgeon as 'quick and intelligent' and able to use hand-signals, was mentally defective. This decision was overturned on review by the Eastern Districts Local Division in R v Lefja 1955 (2) SA 413 (E). See also In re Pupa 1959 (3) SA 480 (SR).

56 1953 (2) SA 702 (O) 704.

57 R v T 1957 (3) SA 14 (T) 16.
In Mackessack v Assistant Magistrate, Empangeni,\textsuperscript{58} the Natal Provincial Division interpreted s 6(2) of the Magistrates’ Court Act to impose a positive duty on judicial officers (the existence of which perhaps is not apparent from the words of the section itself). This duty required them to apply their minds and form an opinion on whether an accused is sufficiently conversant in the language in which evidence is given and, if in their opinion the accused is not, to call a competent interpreter. Carey J cited with approval an English decision\textsuperscript{59} that states that the right to a fair trial requires not only the physical presence of an accused in court, but also the ability by the accused to understand the proceedings. The same principle was emphasised again by the Natal Provincial Division in 1978 in Pachcourie v Additional Magistrate, Ladysmith,\textsuperscript{60} involving a deaf mute accused for whom a competent interpreter had not been provided. It was held that it is a fundamental principle of South African law, entrenched in the Criminal Procedure Act, that where a deaf accuses is unable to hear and understand proceedings because of the lack of a proper interpreter, he cannot be said to have been present at the trial. In the 1981 case of S v Matjhesa,\textsuperscript{61} it was held that there had been an incorrect application of the Criminal Procedure Act by a magistrate who committed a deaf mute accused to a state hospital because he could not communicate with the interpreter provided by the Court. In the recent case of S v Abrahams,\textsuperscript{62} the Cape Provincial Division considered the application of s 6(2) of the Magistrates’ Court Act. It held that where a deaf mute accused had been provided with an interpreter with whom he could not communicate, the court had failed in its duty under s 6(2) to appoint a competent interpreter. This amounted to a serious irregularity, severe enough to warrant the conviction and sentence of the accused being set aside.

Principles expounded in cases regarding court interpreters for hearing parties are applicable in cases involving deaf accused and witnesses. In an example of such a case, the Cape Provincial Division found there to be a ‘gross irregularity’ in proceedings where a competent interpreter had not been provided for an accused.\textsuperscript{63} In a 1991 decision,\textsuperscript{64} the Witwatersrand Local Division laid down guiding principles relating to the use of languages in court proceedings so as to clarify the rights and duties of litigants, accused, legal practitioners and judicial officers. The third and fourth principles laid down by the Court require interpreters to be engaged where different languages are used by parties to cases, and for

\textsuperscript{58} 1963 (1) SA 892 (N) 896.
\textsuperscript{59} Rex v Lee Kun 1916 (1) K.B. 337, 340–43.
\textsuperscript{60} 1978 (3) SA 986 (N) 990.
\textsuperscript{61} 1981 (3) SA 854 (O).
\textsuperscript{62} 1997 (2) SACR 47 (C).
\textsuperscript{63} S v Mafu 1978 (1) SA 454 (C).
\textsuperscript{64} Matemane v Magistrate Alberton 1991 (4) SA 613 (W).
interpreters to be experts in the languages being used and trained in the
procedures of the courtroom. After the coming into force of the interim
Constitution, the Transvaal Provincial Division held that the right of
an accused to a fair trial in terms of s 25(3)(i) of the interim Constitution
was violated by his not having had evidence interpreted for him into a
language which he understood simultaneously with the evidence being
given.

What is apparent from the above is that little attention is given in
South African statutory law to deaf or hard-of-hearing accused,
complainants and witnesses who appear in court other than in respect
of the appointment and use of interpreters, where provisions are
inconsistent. Case law has seldom dealt with the rights of the deaf in
court. Where it has, there has been some recognition of the special needs
of the deaf in court. The law has been applied so as to protect the deaf
and principles have been developed which go some way to protecting the
constitutionally enshrined rights of deaf and hard-of-hearing people.

The next sections of this article consider American law relating to the
needs of the deaf and heard-of-hearing in the justice system and consider
whether comprehensive statutory law is a prerequisite for the protection
of the rights of the deaf and hard-of-hearing in justice systems.

V The Protection of the Deaf in Courts - The American
Experience

A review of literature about experiences of the deaf in the American
justice system suggests that the magistrates' courts in Gauteng are not
unrivalled in their record of violations of the human rights of the Deaf.
Some of the more striking American examples include that of deaf
George Kiddy, arrested for a misdemeanour, who spent two days in jail
before being given access to an interpreter or being informed of his rights
to an attorney, to remain silent or to apply for bail. In another case a
father with hearing loss was refused appropriate hearing assistance by a
court in a custody hearing, with the result that he lost custody of his
daughter and did not see her for five years. The problems revealed in
the research discussed in this paper cannot, therefore, be explained away
as unavoidable 'third world' difficulties related only to resource
constraints and/or to a multilingual, multicultural society.

67 Kiddy v City of Oklahoma City 576 P.2d 298 (Okla. 1978) cited in JB Wood 'Protecting Deaf
166, 174.
68 The father subsequently sued the county and county district court and was awarded $400 000.
Popovich v Cuyahoga County Court of Common Pleas No 1995 CV 684 (E.D. Ohio, 1998) cited in
People (2000) 166.
In contrast to South Africa, however, the United States has in place extensive federal and state legislation which specifically provides for the needs of deaf individuals who come into contact with the justice system. In federal courts, deaf participants may rely upon the Bilingual, Hearing and Speech-Impaired Interpreter Act, 1979 ('the Interpreter Act') and deaf participants in state and local courts may have recourse to the Americans with Disabilities Act, 1990 ('the ADA') and s 504 of the Rehabilitation Act, 1973 ('the Rehabilitation Act') and the Regulations promulgated under it, as well as to state laws. 69 Deaf Americans in the justice system can also, of course, rely upon their constitutional rights to equal protection of the law and to due process. 70

The Interpreter Act, read with a directive of the Administrative Office of the United States Courts of 12 April 1996, requires appropriate communication aids to be provided, at state expense, to all deaf and hard-of-hearing people or people with communication difficulties who are participants in federal court proceedings. 71 Communication aids include qualified interpreters and assistive listening devices or systems. The court must give 'primary consideration' to the participant's choice of aid. In other words, it must allow the participant's choice of aid unless it can show that 'another equally effective means of communication is available, or that the use of the means chosen would result in a fundamental alteration in the nature of the court proceeding or in undue financial or administrative burden'. 72 The director of the Administrative Office of the United States Courts determines the qualifications of interpreters for court proceedings and each district court is obliged to maintain a list of interpreters whose services may be called upon. Presiding officers have a duty to assess the effectiveness of court-appointed interpreters and to dismiss them and obtain another, where they prove to be unsuitable. 'Court proceedings' are widely defined to include trials, hearings, ceremonies and other activities conducted by the court. 'Participants' include witnesses and jurors, but not spectators, although where deemed appropriate, a court can elect to provide

69 A discussion of the provisions of the numerous state laws relating to interpreters is beyond the scope of this paper, which merely attempts to provide a brief overview of legislation relevant to the deaf and hard-of-hearing which applies in federal courts and all state and local courts.

70 Smith (note 1 above) argues that the Sixth and Fourteenth Amendments should be interpreted to embody the right of a deaf accused to an interpreter at criminal proceedings, even though that right is not expressly conferred.

71 The wording of the Interpreter Act makes it applicable only to actions initiated by federal government. However, the Administrative Office of the United States Courts extended its ambit to all federal court proceedings in a memorandum of 12 April 1996. Legal Rights: The Guide for Deaf and Hard of Hearing People (note 68 above) 167.

communication aids for a spectator, for example for the deaf mother of a child who is giving evidence.\footnote{Legal Rights: The Guide for Deaf and Hard of Hearing People (note 68 above) 167–68.}

In state and local courts, all participants in proceedings, including attorneys, jurors and spectators, may rely upon the provisions of the ADA and s 504 of the Rehabilitation Act, which confer rights to equal opportunities to communicate effectively and to participate in court proceedings.\footnote{US Justice Department Regulations issued under the ADA and s 504 of the Rehabilitation Act cited in Legal Rights: The Guide for Deaf and Hard of Hearing People (note 68 above) 163–64.} Title II of the ADA requires that state and local governments ensure that people with disabilities, who are defined to include those with hearing impairments, are not excluded from government services, programmes or activities, which include the courts. Public entities are obliged to take ‘appropriate steps’ to ensure that ‘communications with applicants, participants and members of the public with disabilities are as effective as communications with others’.\footnote{Department of Justice Regulations in terms of Title II of the ADA, cited in J Fallahay American Judicature Society (2000) 5; 10.}

In order to fulfil this obligation, they are required to provide suitable auxiliary aids or services to afford disabled individuals an equal opportunity to participate in and enjoy the benefits of their services, programs or activities, at no cost to the participant requiring the aid. In the case of deaf and hard-of-hearing people in the justice system, therefore, justice officials must ensure that they can understand and communicate, and in so doing must provide aids such as sign language interpreters or electronic devices where necessary. In determining what type of aid or service is appropriate, courts must ‘give primary consideration’ to the request of the person requiring the aid or services.\footnote{Ibid 5.} There are limits to what is required of public entities under Title II because accessibility for the disabled is measured with reference to the availability of the service, programme or activity as a whole. Thus, for example, not every courtroom is required to have the full range of auxiliary aids that may be requested by a participant. It is sufficient if there is a single, convenient courtroom which can accommodate people with hearing disabilities, to which hearings can be moved if necessary.\footnote{Ibid 6.}

Deaf and hard-of-hearing people who encounter law enforcement agencies as accused or complainants, may rely upon Department of Justice Regulations under s 504 of the Rehabilitation Act. These require police departments that receive financial assistance from federal government, and that employ fifteen or more persons, to provide auxiliary aids to disabled persons ‘where a refusal to make such provision would discriminatorily impair or exclude the participation of such persons’.\footnote{28 C.F.R § 42.503(f) cited in Fallahay (note 75 above) 13.} It is the responsibility of the law enforcement agency to
determine what kind of aid is appropriate, and in the case of deaf persons who use sign language, to determine whether they use American Sign Language or another variety. Where a deaf person is arrested, the Miranda warning should be communicated to him or her on a printed form where a qualified interpreter is not immediately available to convey the warning. The form containing the Miranda warning should advise the deaf accused of his or her right to an interpreter provided by the law enforcement agency at its cost, and that interrogation will be postponed until an interpreter is appointed. 79 Law enforcement agencies also fall within the ambit of Title II of the ADA as they are services or programmes of state and local government. Accordingly, the provisions of Title II apply to police officers when receiving complaints, questioning witnesses and arresting and charging suspects. The Department of Justice has recognised the dangers inherent in family members and friends of deaf persons being used as interpreters, and asserts that qualified interpreters must be used. 80

The United States, therefore, has in place detailed statutory provisions relevant to deaf and hard-of-hearing persons who participate in the justice system. In addition to setting up general obligations and rights, the legislation provides specific guidelines for law enforcement and judicial personnel in respect of their interactions with deaf and hard-of-hearing individuals. This contrasts sharply with the position in South African law.

VI A MODEL FOR SOUTH AFRICA

In comparison to the United States, there is a dearth of South African legislation and common law relevant to deaf and hard-of-hearing persons who encounter the justice system. It may be argued that without ‘concrete’ law in the form of statutory provisions from which to obtain guidance, police officials and court personnel can hardly be expected to know what is appropriate conduct and action in regard to deaf and hard-of-hearing persons who enter the justice system. What may be required, therefore, to protect the rights of South African deaf and hard-of-hearing people is for comprehensive legislation containing firm and detailed guidelines for justice officials, to be enacted along the lines of the American Interpreter Act, ADA and Rehabilitation Act. Detailed statutes and regulations would provide justice officials with a framework to guide their interactions with the deaf, and increased knowledge and awareness would raise their confidence to enable them to deal with deaf persons appropriately.

The American National Association of the Deaf Law Centre is of the view, however, that despite the extensive legislation in the United States,

79 Department of Justice's analysis of the Regulation, Fallahay (note 75 above) 13. 80 Fallahay (note 75 above) 14.
American courts still deny equal access and due process to the deaf and hard-of-hearing. People interviewed for a recent study of deaf and hard-of-hearing people in the American court system undertaken by the American Judicature Society, expressed dissatisfaction with court processes and treatment received at the hands of court personnel. Examples given include the assignment of unsuitable interpreters, judges requesting sign language interpreters to refrain from using expansive body movements and facial expressions that are essential parts of sign language, and decisions being made for deaf parties by court personnel without their consent. Various explanations were given for non-compliance with the provisions of the Interpreter Act, the ADA and s 504 of the Rehabilitation Act. These include the claim that some judges are unfamiliar with the federal civil rights laws, the fact that many states have laws that clash with the federal laws and financial constraints.

It appears, therefore, that despite the existence of comprehensive legislation, the rights of the deaf in the United States are not necessarily sufficiently protected. How best then, can South African deaf and hard-of-hearing people who participate in the justice system, be protected, if not only by the promulgation of legislation to fill the gaps which exist in our law?

It is suggested that recognition by South African justice officials that the basis of the rights of the deaf are constitutional rather than statutory will afford the deaf and hard-of-hearing the best possible protection. Supplementary legislative provisions, which, for example, lay down when interpreters should be provided by courts, would undoubtedly improve the experiences of the deaf in the South African justice system. However, it is only when justice officials are educated about the rights applicable to the deaf and all disabled persons in the justice system, and are made aware that they are obliged to give effect to those rights, that the deaf and hard-of-hearing will be afforded sufficient protection.

The Constitution should be recognised as the basis for the protection of the deaf because of the fundamental differences between constitutions and statutes, which have significant implications in respect of their interpretation. The Constitution, unlike statutes, is, by its very nature, broad and general, so as to have the widest possible application. It ‘lays down principles of width and generality’ and ought to be interpreted to ‘give individuals the full measure of [their] fundamental rights and freedoms’. It defines the ‘minimum quantum of rights’ for every person.

81 Ibid 9.
82 Ibid 3-4.
83 Ibid.
84 Ibid 1; 9.
85 Lord Wilberforce in the Privy Council decision of Minister of Home Affairs v Collins MacDonald Fischer [1980] AC 319, 328F-H; [1979] 3 All ER 21; [1979] 2 WLR 889 (PC), cited with approval by the South African Constitutional Court in S v Zuma (note 41 above).
within its ambit. While statutes define present rights and obligations, constitutions provide 'a continuing framework for ... the unremitting protection of individual rights and liberties'. Statutes may be regarded as flexible and subject to regular change, but the Constitution is the solid, consistent foundation upon which all law must develop.

While statutes may be interpreted literally where their language is unambiguous, as argued above, the Constitution must be given a purposive value-based interpretation. The effect of differing approaches to interpretation is illustrated in an example from the American system given by Smith. In the Colorado Court of Appeals case of People v Hammons, a literal interpretation of the Colorado interpreter law resulted in prejudice for a deaf defendant, when a recognition of his constitutional rights would have avoided this. The defendant argued on appeal that his rights had been violated in the trial court because that court had refused to appoint a second American Sign Language interpreter, which he required in order to communicate with his attorney. The appeal court dismissed the appeal on the basis that the relevant statute, when interpreted literally, made no specific mention of provision of a second interpreter. Had the defendant's constitutional right to effective assistance of counsel been considered and applied, there may have been a very different outcome. If South African justice officials were tasked with considering rights of the deaf that they understand to be constitutionally and not statutorily based, they would be more likely to approach their application in a way that advances the rights of the deaf. No statute, or set of statutes, however comprehensive, can cater adequately for the diverse needs of all deaf people who encounter the justice system. Instead of limiting their duties to those expressly provided for in statute, justice officials, if aware of the constitutional rights afforded to deaf and hard-of-hearing people, are likely to attempt to give effect to those rights, which offer the widest possible protection under South African law. Statutes should be seen, according to Smith, as 'a source of procedure to implement ... rights, and not as a source of the rights themselves'. Another reason that deaf rights should be recognised as constitutional and not arising out of statute, is because the Deaf, Smith argues, do not want to be seen as in need of 'special' statutes to protect their rights, which further draw attention to their perceived disabled status. The recognition of the constitutional rights of deaf and hard-of-hearing individuals already in existence, would avert

86 Smith (note 1 above) 143–44.
89 Smith (note 1 above) 144.
90 Ibid 148.
the stigma that may attach to legislation promulgated particularly for the disabled.

It is not suggested by this argument that South African laws currently in existence relevant to the deaf and hard-of-hearing in the justice system are sufficient when read in addition to the constitutional rights and are not in need of reform. There are significant lacunae, for example in respect of the provision of trained, skilled and suitable interpreters and other communication devices, which cannot adequately be filled by a reliance on constitutional rights, however broadly those rights are interpreted. Without guidelines in legislation, justice officials may continue to behave inappropriately in their interactions with the deaf and hard-of-hearing, leading to violations of fundamental rights. It is proposed therefore, that Parliament enact legislative provisions (possibly as amendments to the Criminal Procedure Act) that flesh out the obligations of justice officials in the context of the disabled who enter their domains. In such provisions, the rights of the deaf and hard-of-hearing and the corresponding duties of the officials could be spelled out. Some of the common law principles developed by courts in the cases mentioned above should undoubtedly be incorporated, as could be provisions similar to those contained in the American legislation.

The amended and augmented legislative provisions need not paraphrase the relevant constitutional sections. However these ought to be elucidated, perhaps in the long title or objects section of the Act of which they form a part, to illustrate that deaf and hard-of-hearing people have extensive constitutional rights in the context of the justice system, and that it is the duty of all officials to acquaint themselves with these rights and to apply them, using the legislation as a framework.

The proposed scheme for securing the rights of deaf and hard-of-hearing people in South Africa’s courts would comprise of three components. The first would be a recognition that the rights of the deaf to be treated fairly in the justice system are constitutional rights. This recognition would in part occur through the second component of the scheme, amended and augmented legislative provisions, which would flesh out the content of the rights and emphasise that their basis is constitutional. The third component would be the formulation of detailed practical guidelines, as well as their dissemination among justice officials, to direct their day-to-day interactions with deaf people. The guidelines

91 The Constitutional Court in Dawood v Minister of Home Affairs 2000 (3) SA 936 (CC) para 46 recognised that government officials, who may be untrained in law and constitutional interpretation, could not be expected to exercise discretion in a manner consistent with the Bill of Rights in the absence of direct guidance on how this should be done.

92 Although the Equality Act fleshes out the right to equality and possibly provides some content to the rights of the disabled in the justice system, it does not contain the kind of concrete guidelines to steer justice officials in their interactions with the disabled which it is suggested are necessary.
could be published in booklet form or as part of a larger manual dealing with treatment of all disabled people in the justice system, which officials would have easy access to when undertaking their duties. Examples of guidelines of this kind for magistrates and other court personnel are already in existence, formulated by a magistrate and a former magistrate,\textsuperscript{93} drawing on experiences in their courtrooms and the requirements of the deaf in the justice system as articulated by DEAFSA.\textsuperscript{94} Additional guidelines should be formulated for police and other justice officials.

The following recommendations, if implemented in the justice system as a result of the reforms proposed above, would afford enhanced protection to the rights of deaf and hard-of-hearing individuals.

(a) Interpreters

- Relay interpreters should be engaged at all police stations, working in teams with hearing interpreters, to assist deaf and hard-of-hearing persons particularly with the giving of statements.
- Unskilled and/or untrained relatives and professionals should not be used as interpreters when police statements are taken.
- Teams of hearing interpreters and relay interpreters should be used in court.
- It takes time and resources to train hearing interpreters as they need to acquire the appropriate sign language skills in addition to interpreting skills. It is much faster to identify and train relay interpreters who already have the required language proficiency and will be able to work in a team with existing hearing interpreters. Both male and female relay interpreters must be identified and trained.
- Each court should have contact information for relay interpreters of both sexes who are fluent in the sign language used by the different communities in the court's area.
- Court officials must be made aware of the correct swearing-in procedure for relay interpreters. A hearing interpreter could be used to explain the contents of the form to the relay interpreter and the relay interpreter should be allowed to complete the form in writing when being sworn in.
- Separate interpreters are needed if a deaf accused and deaf complainant or witness appear in the same case.
- At present, there are few trained interpreters who also qualify as intermediaries, because the categories of person from whom a court

\textsuperscript{93} Elizabeth Baartman, formerly of the Southern Divorce Court, Cape Town and Helen Alman of the Wynberg Magistrates' Court in Cape Town.

\textsuperscript{94} E Baartman & H Alman 'Guidelines for Magistrates and Other Court Personnel' printed in R Morgan Barriers to Justice: Deaf People and The Courts (2001).
may appoint an intermediary are limited to specialised medical practitioners, family counsellors who meet specific criteria, child care workers with certain experience and qualifications, registered and experienced social workers, teachers (including former and retired ones) and psychologists. It is suggested that the category of intermediaries in the Criminal Procedure Act be broadened.

(b) Educating deaf people about court procedures and legal terminology

- A programme should be introduced to educate deaf and hard-of-hearing people about, among other things, their rights in the justice system, court procedures, how to use interpreters and legal terminology.
- Deaf persons familiar with judicial procedures such as relay interpreters should spend time explaining procedures, legal terminology and concepts and what is expected to deaf and hard-of-hearing people who are to appear in court. The Department of Justice in conjunction with DEAFSA could identify appropriate Deaf people and train them accordingly.

(c) Raising awareness among court officials regarding sign language and the experience of deafness

- Magistrates, prosecutors, lawyers providing legal aid and chief interpreters should be educated about SASL and its dialects, as well as the difference between SASL and sign supported English/Afrikaans/SeSotho etc.
- The terminology ‘deaf and mute’ and ‘deaf and dumb’ used by court officials and in pay scales for interpreters should be changed to ‘Deaf/ deaf’.
- Court officials must be required to inform deaf and hard-of-hearing people of their rights and must be sensitised to the problems that deaf and hard-of-hearing people encounter in the justice system and in broader society.

(d) Training court officials about sign language interpreters

- Court officials should be trained regarding the professional role of the sign language interpreter and how to use sign language interpreters correctly.
- Court officials should treat interpreters appropriately and respectfully, for example by slowing down when necessary, especially when names and words which need to be fingerspelled have to be communicated.

- Presiding officers must allow for lag time when a relay interpreter is used.
- Pre-trial interpreter consultations are necessary to enable interpreters to familiarise themselves with any written evidence that may need to be translated.
- Remuneration problems that sign language interpreters experience should be addressed.
- The justice system needs to ensure that sign language interpreters who appear in courts are proficient users of SASL rather than sign supported English/Afrikaans/SeSotho etc. This needs to be done in collaboration with DEAFSA and PANSALB.

VII CONCLUSION

The former national director of DEAFSA, who himself is Deaf, had the following vision for a justice system where Deaf people are treated equally to hearing people:

Firstly, every Deaf person irrespective of their level of functioning knows their rights, including the right to have a sign language interpreter. Depending on their functional level, they have the right to a backup relay interpreter. Secondly, all courts in South Africa need to know about the rights of Deaf people. These rights need to be written in the law, the general rights of access need to be narrowed down and specified. Thirdly, we need a pool of professional interpreters in each province and a pool of relay interpreters in each province to realise these fundamental rights. Additionally we need functional training of all interpreters in the present court system.  

It is hoped that the three-pronged scheme suggested in this article would go some way to realising this dream. Ideally, once the scheme was implemented, each time a deaf or hard-of-hearing person entered the justice system, the officials with whom they dealt would be equipped to conduct themselves appropriately. Acknowledgement that the rights of the deaf are constitutional would elevate protection above that afforded by application of statute. Enhanced statutory provisions would flesh out the content of the constitutional rights and fill gaps that exist in the law that are not given content by broad constitutional interpretation. And practical guidelines would give officials an easily accessible, concrete framework to guide their day-to-day interactions with the deaf and hard-of-hearing.

Finally, it is through research that we will be alerted to the failure of South African institutions to accommodate difference and to our failure to respond with sensitivity to all persons. This research can then form the basis of actions to move towards the goal expounded in the Constitution of improving "the quality of life of all citizens and [freeing] the potential of each person".  

96 Personal communication by researcher with Kobus Kellerman, 1999.
97 Preamble of the Constitution.
**ANNEXURE A**

**Magistrates’ Court Cases observed in Gauteng**

| Case 1 | Court: Kempton Park  
| Party: Accused – white Deaf male of Afrikaans background  
| Charge: Accused of illegally selling alphabet cards at Johannesburg International Airport.  
| Interpreter provided by Court: White Afrikaans female |

| Case 2 | Court: Vereeniging  
| Party: Accused – white Deaf male of Afrikaans background  
| Charge: Child abuse  
| Interpreter provided by Court: White Afrikaans female  
| No trained interpreter present when statement made to police |

| Case 3 | Court: Krugersdorp  
| Parties: Plaintiff – white Afrikaans hearing female;  
| Defendant – white Deaf male of English background  
| Matter: Failure to pay child maintenance after divorce  
| Interpreter provided by Court: White Afrikaans female  
| No interpreter in original divorce proceedings 16 years prior |

| Case 4 | Court: Benoni  
| Party: Accused – black Deaf male of Sesotho or Zulu background  
| Charge: Murder  
| Interpreter provided by Court: White Afrikaans female  
<p>| No interpreter present when statement made to police |</p>
<table>
<thead>
<tr>
<th>Case</th>
<th>Court</th>
<th>Parties</th>
<th>Complainant</th>
<th>Charge</th>
<th>Interpreter and Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>5</td>
<td>Roodepoort</td>
<td>Accused – black Deaf male minor of Sesotho or Zulu background</td>
<td>Complainant – black Deaf female minor of Sesotho or Zulu background</td>
<td>Rape</td>
<td>Interpreted by Court: white Afrikaans female, unable to speak language of either complainant or accused. No trained interpreter present when statement made to police by complainant.</td>
</tr>
<tr>
<td>6</td>
<td>Kempton Park</td>
<td>Accused – black hearing male</td>
<td>Complainant – black Deaf female minor of Sesotho or Zulu background</td>
<td>Rape</td>
<td>Interpreted by Court: white Afrikaans female, unable to speak language of complainant. No trained interpreter present when statement made to police by complainant.</td>
</tr>
<tr>
<td>7</td>
<td>Secunda</td>
<td>Accused – white Deaf male of Afrikaans background</td>
<td></td>
<td>Shoplifting</td>
<td>Interpreter provided by Court: white Afrikaans female, used signed Afrikaans. Accused unable to understand signed Afrikaans.</td>
</tr>
<tr>
<td>8</td>
<td>Johannesburg</td>
<td>Plaintiff – black deaf female of Sesotho or Zulu background</td>
<td>Defendant – black Deaf male of Sesotho or Zulu background</td>
<td>Divorce</td>
<td>Interpreted by Court: Single black female interpreter for both parties, used signed English.</td>
</tr>
</tbody>
</table>
ANNEXURE B

1. Housemother (spoken English): I’ll see you on the seventh of December.
   Lip movements: (to) (the)
2. Interpreter (signed English): I want to see you on seven (th) (of) December
3. Relay (SASL): DECEMBER SEVEN DECEMBER THIS D-E-C-E-M-B-E-R SEVEN YOU COME AGAIN MEET _ yes/no q
4. OK
5. LM: nods head affirmatively

SASL does not use structures such as articles (a, the) or prepositions (to, of) that are used in English. However in her rendition of what the housemother said in utterance 1: ‘I’ll see you on the seventh of December’ the interpreter mouths these words in brackets in utterance 2 ‘I want (to) see you on (the) seven(th) (of) December’ in the appropriate places in her signed utterance so that her signing conforms as closely as possible to the English sentence. She also signs the invented English sign (ON) which is not used in SASL. In utterance 3 (DECEMBER SEVEN DECEMBER THIS D-E-C-E-M-B-E-R SEVEN YOU COME AGAIN MEET), the relay interpreter, speaking SASL, starts his utterance by establishing the time reference (DECEMBER SEVEN). He uses a great deal of repetition to emphasise the precise date and foreground this important information concerning the next trial date (DECEMBER THIS). He uses his sign for DECEMBER in the first two instances. To ensure that he is understood by the child, who may use a different sign for DECEMBER, he then fingerspells the word D-E-C-E-M-B-E-R and repeats the date. Finally after establishing the time reference, he signs YOU COME AGAIN MEET, meaning you will come and meet me again here. The relay interpreter ends off with a yes-no question in utterance 4 that could be translated as ‘Is this ok with you?’ which he signs with the appropriate facial expression (raised eyebrows, head tilt back). LM responds by nodding affirmatively indicating that she has understood the question.