

# CHAPTER 8

## TOWARDS AN EFFECTIVE LITIGATION STRATEGY OF DISABILITY RIGHTS: THE ZAMBIA EXPERIENCE

*Likando Kalaluka\**

---

### Summary

*This article seeks to come up with effective strategies for litigating disability rights in Zambia. In doing so, it outlines the international and national legal frameworks that govern the rights of persons with disabilities. It also highlights the legal and attitudinal challenges that affect disability rights litigation in Zambia and other African countries, within the realities of poverty and general under-development associated with most African countries. Thereafter, the article uses the best practices, both in terms of court or tribunal decisions and constitutional or statutory provisions, from a selected number of African countries to come up with a broader litigation strategy for disability rights. The article also draws inspiration from the provisions of the Convention on the Rights of Persons with Disabilities and the African Charter on Human and Peoples' Rights.*

### 1 Introduction

This article examines how the Convention on the Rights of Persons with Disabilities<sup>1</sup> (CRPD) together with regional and national laws in Africa may shape litigation strategies for disability rights in Zambia. The adoption of the CRPD has triggered legislative reforms<sup>2</sup> in various countries. Increasingly, persons with disabilities are approaching courts at

\* LLM in International and Comparative Disability Law and Policy, National University of Ireland, Galway (2012); LLB (2001), University of Zambia; Legal Practitioner and Partner at Ellis & Co, Lusaka, Zambia.

1 United Nations General Council Resolution 61/106 (2006).

2 T Degener & G Quinn 'A Survey of international, comparative and regional disability law reform' International Disability Law Symposium, Disability Right Education Defense Fund, California, USA [http://dredf.org/international/degener\\_quinn.html](http://dredf.org/international/degener_quinn.html) (accessed 17 September 2013).

national, regional and international levels to secure the recognition and protection of their human rights.<sup>3</sup> The peculiar circumstances existing in Zambia and across Africa bring to the fore a number of challenges which impact on disability rights litigation, including poverty, culture, stigma and the existing legal framework.

The CRPD recognises that the majority of persons with disabilities live in conditions of poverty.<sup>4</sup> As such, they do not have the means to meet the legal and other attendant costs of litigation. Further, the lack of physical infrastructure such as accessible roads and buildings in Africa discourages persons with disabilities from moving from their homes and going to court for hearings.<sup>5</sup>

In Zambia, as in most African countries, persons with disabilities often suffer social exclusion and marginalisation arising from cultural prejudices and stigma that attach to their disabilities.<sup>6</sup> Consequently, they are often denied the basic human rights that are available to non-disabled persons. In most African countries, the courts are generally viewed as institutions that favour those who can afford the cost of litigation and the protracted nature of court proceedings.<sup>7</sup> Persons with disabilities consider the usually protracted litigation proceedings as merely exposing them to ridicule and scorn from members of their society. The technical nature of court proceedings discourages persons with disabilities from instituting court proceedings. In one Kenyan case,<sup>8</sup> the High Court dismissed a claim for discrimination on the ground of disability because the non-discrimination clause of the Kenyan Bill of Rights<sup>9</sup> did not expressly include disability as a prohibited ground. The court's reasoning was that while the statutory law<sup>10</sup> prohibited discrimination on the basis of disability, the prohibition could not be constitutionally enforced as disability was not expressly listed in the Bill of Rights.

This article appraises the Zambian legal framework with a view to developing an effective litigation strategy for protecting disability rights. In order to capture the best practices, it draws from the experiences of selected

3 P Harpur 'Time to be heard: How advocates can use the Convention on the Rights of Persons with Disabilities to drive change' (2011) 45 *Valparaiso University Law Review* 1271-1275.

4 CRPD, para (t) of the Preamble.

5 M Mannak 'South Africa: The plight of South Africa's disabled youths' *Radio Netherlands Worldwide* 26 July 2012 <http://allafrica.com/stories/201207270270.html> (accessed 27 July 2012).

6 Interview with W Waliuya, Human rights and education Advisor, Africa Development Department at Power International (Lusaka, Zambia, June 2012).

7 S Gloppen 'Public interest litigation, social rights and social policy' Arusha Conference, 'New frontiers of social policy', 12-15 December 2005. See also R Bowd 'Access to justice in Africa: Comparisons between Sierra Leone, Tanzania and Zambia' Institute for Security studies (Policy Brief no 13, October 2009).

8 *Duncan Otieno Waga v Attorney-General* [2013] eKLR.

9 Kenyan Constitution of 1969 as amended in 1997, arts 26-51, since repealed by Kenya's Constitution of 2010.

10 Kenyan Persons with Disabilities Act 14 of 2003.

African countries.<sup>11</sup> While the selected countries have diverse historical, cultural and legal backgrounds, nonetheless, they serve as jurisdictions from which comparative lessons can be drawn.

This article has six sections, including section one, the Introduction. Section two discusses the concept of disability rights litigation and the purposes it serves. The third section sets out the background of disability law in Zambia. It highlights the norms and values that influence how disability is perceived in Zambia. The section also explores the nature and extent of Zambia's obligations under regional and global treaties.

Section four discusses the challenges faced by persons with disabilities when seeking to litigate disability rights. Section five seeks to develop an effective litigation strategy for disability rights in Zambia drawing from the experiences of other countries. Section six is the conclusion.

## **2 Objects of disability rights litigation**

### **2.1 Concept of disability rights litigation**

This section will not attempt to come up with a universally accepted definition of disability rights litigation as the concept incorporates the term 'disability' which is evolving and culture-dependent.<sup>12</sup> However, for the purposes of this chapter, a working definition of 'disability rights litigation' will be given. The term 'disability rights litigation' refers to the entire process of prosecuting the rights of persons with disabilities before national or international courts or tribunals. This includes obtaining instructions to litigate, preparing briefs for trials, conducting trials and enforcing court decisions. Disability rights litigation emanates from society's failure to take appropriate measures to ensure that persons with disabilities are able to participate fully in society and to enjoy their fundamental human rights on an equal basis with others. Morris illustrates society's shortcomings which may actually lead to disability rights litigation as follows:

My impairment is the fact that I can't walk; my disability is the fact that the bus company only purchased inaccessible buses. Or, that my impairment is the fact that I can't speak; my disability is the fact that you won't take time and trouble to learn how to communicate with me.<sup>13</sup>

11 Botswana, Kenya, Malawi, Madagascar, Mozambique, South Africa and Zimbabwe.

12 R Traustadóttir 'Disability studies, the social model and legal developments' in O M Arnardóttir and G Quinn (eds) *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives* (2009) 4.

13 J Morris 'Impairment and disability: Constructing an ethics of care that promotes human rights' (2001) 16 *Hypatia* 13.

Disability rights litigation also encompasses seeking to enforce the duty of reasonable accommodation<sup>14</sup> by requiring the adoption of appropriate modifications and adjustments to ensure persons with disabilities enjoy or exercise all their human rights by persons with disabilities on an equal basis with others. The idea in disability rights litigation is not to ensure that persons with disabilities are treated equally with their non-disabled counterparts, but that necessary and appropriate measures and modifications should be undertaken so as to equalise opportunities for persons with disabilities to fully participate in society and to enjoy their rights.<sup>15</sup> Therefore, disability rights litigation seeks to realise equality and non-discrimination in a way that achieves substantive equality as opposed to mere formal equality. The CRPD provides that specific measures taken to accelerate or achieve de facto equality shall not be deemed to be discriminatory.<sup>16</sup>

The CRPD therefore, requires both public and private individuals and entities to adopt positive measures so as to ensure the full participation in society and enjoyment of the fundamental rights on an equal basis with others. Disability rights litigation is intended to enforce such a requirement.

## 2.2 Access to justice

Access to justice is both the 'means' and an 'end' of disability rights litigation.<sup>17</sup> It is a 'means' in that it is the vehicle which gives persons with disabilities an opportunity to enforce the protection of their fundamental human rights before an impartial and independent tribunal or court. On the other hand, access to justice is an 'end' where it is sought to avail individuals with the relevant procedures, institutions and processes that recognise, protect and enforce fundamental human rights.

The CRPD acknowledges the importance of access to justice by providing that state parties must ensure the effective access to justice for persons with disabilities on an equal basis with non-disabled persons.<sup>18</sup> It further provides that there is a need for procedural and age-appropriate accommodation before, during and after court proceedings so as to facilitate the effective participation of persons with disabilities in the justice system.<sup>19</sup> For there to be meaningful access to justice in Zambia, there is a need for measures to be put in place to ensure that persons with disabilities

14 CRPD, art 2.

15 T Degener & Y Koster-Dreese (eds) *Human rights and disabled persons: Essays and relevant human rights instruments* (1995) 56.

16 CRPD, art 5.

17 JE Lord *et al* 'Human rights. Yes! Action and advocacy on the rights of persons without disabilities' Human Rights Education Series, Topic Book 6, University of Minnesota Human Rights Resource Centre, 2007.

18 CRPD, art 13.

19 As above.

are not hindered either by physical infrastructure or by a lack of accommodative procedures or devices, from participating in the justice system.

In the same vein, the African Charter on Human and Peoples' Rights<sup>20</sup> (ACHPR) recognises the importance of access to justice by providing that all persons have the right to have their causes or claims heard by a court of competent jurisdiction.<sup>21</sup>

### **2.3 Fighting stigma and prejudicial perceptions**

The prevalence of stigma and the prejudicial perceptions of disability in Zambia cause persons with disabilities to grow up accepting marginalisation and exclusion from society as a necessary consequence of their disabilities.<sup>22</sup> Exclusion from mainstream society means that the majority of persons with disabilities develop low self-esteem. As a result, persons with disabilities who suffer human rights abuses may not consider themselves as deserving the dignity and respect afforded to others. Ultimately, they fail to appreciate the need to have their fundamental human rights and freedoms fully recognised and respected.

Instituting disability rights litigation has the potential to bring to the open the many challenges persons with disabilities face. When judicial precedents are set, persons with disabilities become aware of their rights.<sup>23</sup> Further, when courts issue appropriate orders condemning discrimination, marginalisation and inaccessible buildings or roads, it encourages society to embrace persons with disabilities as persons with rights equal to others. In the process, stigma and prejudicial perceptions will gradually be replaced with societal norms and values that accept disability as human diversity, leading to the full recognition and inclusion of persons with disabilities in all sectors of society.

### **2.4 Setting up legal precedents**

Securing legal precedents which are binding on lower courts is an important strategy. According to Waliuya, the Zambia Federation of Disability Organisations<sup>24</sup> (ZAFOD) came up with the Advancing Disability Equality Project<sup>25</sup> (ADEPt) with the primary aim of setting legal

20 African Charter on Human and Peoples' Rights, adopted on 27 June 1981, OAU Doc CAB/LEG/67/3 rev 5 21 ILM 58 1982 entered into force on 21 October 1986 (ACHPR).

21 ACHPR, art 7(1).

22 Waliuya (n 6 above).

23 As above.

24 An umbrella body of CSOs dealing with awareness and promotion of disability rights in Zambia.

25 Advancing Disability Equality Project, launched by ZAFOD in 2008.

precedents in matters involving violations of the rights of persons with disabilities. To achieve this objective, ZAFOD has retained a local law firm to provide legal advice and engage in litigation on behalf of indigent persons with disabilities who experience disability rights abuses. The legal fees for all such cases are paid by ZAFOD on behalf of persons with disabilities who are actual parties to the court proceedings. ZAFOD identifies common cases where disability rights are frequently abused and then forwards such cases to local law firms so that court proceedings may be instituted with a view of setting up precedents.

In *Sela Brotherton (suing as National Secretary of Zambia Federation of Disability Organisations) v Attorney-General & 16 Others*<sup>26</sup> court proceedings were instituted against several defendants seeking an order to compel adjustments to public and private buildings so as to make them accessible to persons with disabilities. Before the matter could proceed to trial, one of the defendants applied to dismiss the court proceedings on a point of law on the ground that the court proceedings were statute barred. It was also argued that the court proceedings were based on the previous Persons with Disabilities Act<sup>27</sup> which was enacted in 1996, while most of the defendants' buildings were constructed long before 1996 and as such, the law enacted in 1996 could not have retrospective effect and criminalise or render unlawful that which was lawful at the time of construction.

In opposing the application, it was argued that the plaintiff organisation only came into existence in 2009, which is barely a year before court proceedings were commenced and as such, could not be statute barred.<sup>28</sup> The plaintiff also argued that in any event the cause of action only arose in 2008 when the plaintiff carried out access audit exercises which exposed the inaccessible buildings of the defendants. Furthermore, the plaintiff contended that the provisions of the Act were enacted taking into account the need for the inclusion, and protection of the rights of persons with disabilities. The High Court of Zambia held that the provisions of the Act did not have retrospective effect. It cannot apply to buildings constructed long before it came into operation.

The court also found that the action was statute barred in that it was commenced over 14 years after the Act came into operation. It is submitted that the proceedings were not correctly decided. The court failed to take in to account the paradigm shift requiring the focus for change to move from persons with disabilities to the attitudinal and physical infrastructure. Furthermore, the court misdirected itself when it held that action premised under any statute can only be properly commenced if it is brought within

26 (2009) HP/1402.

27 Persons with Disabilities Act, Chap 65, now repealed by the Persons with Disabilities Act 6 of 2012.

28 Statute of Limitation of 1939 of the United Kingdom which applies in Zambia by virtue of sec 2 of the British Acts Extension Act, chap 10 of the laws of Zambia.

12 years of that statute coming into operation. It is noteworthy that the court proceedings set up a precedent that do not advance the rights of persons with disabilities. ZAFOD has since appealed<sup>29</sup> against the court's ruling but the appeal is still pending determination.

## 2.5 To guarantee the respect, protection and fulfilment of human rights

If a person alleges that any provision of the Bill of Rights in the Zambian Constitution<sup>30</sup> has been or is likely to be contravened in relation to him or her, he or she may apply to the High Court for appropriate remedies to protect the rights in issue.<sup>31</sup> Under the Zambian Constitution, the High Court has a wide discretion to issue such directives and make such orders as are necessary to prevent the infringement of human rights. An individual does not necessarily have to wait until his or her rights are actually infringed upon, before commencing court proceedings for protection.

A person whose rights have been infringed may also institute court proceedings seeking damages and other appropriate remedies. This is illustrated by the South African case of *Lettie Hazel Oortman v St Thomas Aquinas Private School & Bernard Langton*,<sup>32</sup> in which court proceedings were commenced on behalf of a child with a physical disability against a private school alleging that most of the school facilities were not fully accessible to her. In response, the private school submitted that it had taken steps to accommodate the child with disabilities but that the school buildings were too old to adequately accommodate her. The Equality Court held that the school unfairly discriminated against the child and ordered that the school undertake appropriate remedial adjustments.

## 2.6 Social policy reform

Disability rights litigation is also important in bringing about changes in social policy. This is illustrated by the South Africa case of *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa & Another*,<sup>33</sup> which was brought against the state for failure to provide direct funding for children with severe and profound intellectual disabilities. It was further argued by the applicant that while the state provided minimal funding for children with moderate to mild intellectual disabilities enrolled

29 *Sela Brotherton (Suing as National Secretary of Zambia Federation of Disability Organizations) v Attorney-General & 16 Others* SCZ/8/232/2013.

30 Constitution of Zambia chap 1 of the laws of Zambia.

31 Constitution of Zambia, art 28.

32 Equality Court Case 1/2010, 3 December 2010 <http://www.sahrc.org.za/home/21/files/MPL%20Judgement.pdf> (accessed on 16 July 2013).

33 2011 5 SA 87 (WCC).

in special schools, it neglected children with severe and profound disabilities not enrolled in special schools. It was argued, on behalf of the respondent, that due to the severity of the affected children's intellectual disabilities, no amount of education would be beneficial to them and that if the little funding that the state apportions towards the education of persons with such severe intellectual disabilities is considered in the light of social economic history of the country, it will be apparent that in fact the affected children's rights to education are not being infringed. It was also argued that the state was following government policy<sup>34</sup> which was aimed at achieving inclusive education by systematically moving away from segregation on the basis of the severity or otherwise of a child's intellectual disability.

The case was determined by the court's finding that the government policy was discriminatory as it actually singles out children with severe and profound intellectual disabilities for less favourable treatment. The court went further to order a 'structural interdict' setting out actual steps the state was to undertake to remedy the inequalities of the policy in issue.

## 2.7 Legal reforms

Oppressive national laws may also be challenged through disability rights litigation before national, regional and international courts. *Purohit & Moore v Gambia*<sup>35</sup> illustrates the challenge of domestic law under a regional treaty. In that communication, the applicants challenged the provisions of the Lunatics Detention Act<sup>36</sup> which provided for the compulsory detention of persons with mental and or intellectual disabilities into special institutions under Gambia's domestic law. The African Commission on Human and People's Rights (African Commission)<sup>37</sup> ruled that the said provisions of the Act were discriminatory and urged the Government of the Gambia to repeal the said Lunatics Detention Act. However, it is noteworthy that the impugned Lunatics Detention Act has not yet been repealed or amended<sup>38</sup> following the communication in the *Purohit* case.

## 3 Applicable legal framework and background

This section will discuss the existing legal framework in Zambia in so far as it affects disability rights and disability rights litigation.

34 Department of Education, Education White Paper 6 'Special needs education: Building an inclusive education and training system' (July 2001).

35 Comm No 241/2001 (2003).

36 Lunatics Detention Act of Gambia, 1917.

37 Established under art 30 of the ACHPR to promote human and people's rights and to ensure their protection in Africa.

38 Mental Health 'The Gambia, situational analysis' World Health Organisation (2013) [http://www.who.int/mental\\_health/policy/country/thegambia/en/](http://www.who.int/mental_health/policy/country/thegambia/en/) (accessed 16 July 2013).



### 3.1 International and regional legal framework

Zambia ratified the CRPD on 1 February 2010 to signify its acceptance to be bound by the terms and principles that make the CRPD the most progressive disability rights treaty.<sup>39</sup> While ratification of the CRPD does not allow for individual complaints alleging that rights under the CRPD have been violated, it nonetheless allows for a peer review mechanism whereby Zambia is required to submit periodic reports to the CRPD Committee for discussion by both the CRPD Committee and other state parties on how the disability rights are being implemented.<sup>40</sup> In order for the CRPD Committee to have the competence to hear individual complaints of disability rights violations, the state party in issue has to ratify the CRPD Optional Protocol.<sup>41</sup> Since Zambia is yet to ratify the CRPD Optional Protocol, the CRPD Committee has no competence to hear individual complaints of disability violations allegedly committed in Zambia.

At the African regional level, Zambia ratified<sup>42</sup> the ACHPR on 20 July 1987 and as such Zambia is bound to uphold and protect the rights enshrined in the ACHPR. The ACHPR provides for the recognition and protection of various human and people's rights<sup>43</sup> and with respect to disability rights, expressly provides that persons with disabilities have the right to special measures of protection in keeping up with their physical or moral needs.<sup>44</sup> While there are no detailed provisions as to the content and exact nature of the special measures of protection persons with disabilities have the right to, the fact that the ACHPR provides that in considering communications, the African Commission<sup>45</sup> shall draw inspiration and be guided by the various human rights instruments adopted under the auspices of the United Nations.<sup>46</sup> This means that the provisions of the CRPD may be called upon by the African Commission to establish the nature of special members persons with disabilities are entitled to in keeping up with the physical and moral needs.

39 United Nations Enable *Development and human rights for all: Convention and Optional Protocol signatures and ratifications* <http://www.un.org/disabilities/countries.asp?id=166> (accessed 22 July 2013).

40 United Nations Human Rights: Office of the High Commissioner for Human Rights *Committee on the Rights of Persons with Disabilities* <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx> (accessed 26 June 2013).

41 CRPD, Optional Protocol, art 1(2).

42 C Heyns (ed) *Human rights law in Africa* (1997) 7.

43 ACHPR, arts 1- 26.

44 ACHPR, art 18(4).

45 ACHPR. In terms of art 56, admission criteria for communications include the requirement that the complaints of human and people's rights violations are brought within a reasonable time after exhausting local remedies if any, unless the local remedies involve protracted procedures.

46 ACHPR, art 60.

Further, Zambia has signed but not yet ratified the African Charter on the Rights and Welfare of the Child (ACRWC)<sup>47</sup> which provides that:

Every child who is mentally or physically disabled shall have the right to special measures of protection in keeping with his [or her] physical and moral needs so as to ensure his [or her] dignity, promote his [or her] self-reliance and active participation in society.<sup>48</sup>

The ACRWC further obliges state parties to provide necessary and appropriate assistance and supports to the disabled children and to ensure that they have access to training and preparation for employment and recreation opportunities so as to ensure their fullest possible social integration and personal growth.<sup>49</sup>

Another regional initiative of relevance to Zambia is the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).<sup>50</sup> Zambia ratified the Maputo Protocol and as such she is bound by its provisions.<sup>51</sup> The Maputo Protocol explicitly provides for the rights of women with disabilities to dignity and freedom from discrimination<sup>52</sup> and requires state parties amongst others, to protect the rights of women with disabilities and to take legislative and administrative steps to prevent the exploitation and abuse of women with disabilities.

The legal effect of signing or ratifying these international or regional instruments in terms of everyday litigation before national courts received judicial pronouncement in the case of *Attorney-General v Roy Clark*<sup>53</sup> where the Supreme Court of Zambia held:

[I]n applying and construing our statutes, we can take into account international instruments to which Zambia is a signatory. However, these international instruments are only of persuasive value unless they are domesticated in the laws.

Therefore, the provisions of the international and regional instruments do not have the binding effect of the law before national courts in Zambia, but may be relied on to persuade the courts to determine matters before them in accordance with the spirit and text of such international or regional instruments. The influence of international instruments was also in issue

47 Eastern and Southern Africa 'The African Charter on the Rights and Welfare of the Child' (Unicef) [http://www.unicef.org/esaro/children\\_youth\\_5930.html](http://www.unicef.org/esaro/children_youth_5930.html) (accessed 30 June 2013). See Organisation of African Unity, Document CAB/LEG/24.9/49 (1990).

48 ACRWC, art 13(1).

49 ACRWC, art 13(2).

50 Adopted by the African Union on 11 July 2003, in Maputo Mozambique.

51 *The Maputo Protocol: A clear and present danger* 'The countries that have ratified it' (2011) <http://www.maputoprotocol.com/the-countries-that-have-ratified-it> (accessed 16 July 2013).

52 The Maputo Protocol, art 23.

53 (2008) ZR 38.

in the Botswana case of *Attorney-General v Dow*<sup>54</sup> where it was held that even though the provisions of an international convention are not domesticated to form part of national law, such provisions may still be useful in interpreting the national law so as to give effect to the human rights standards as contained in the convention, the provisions of which Botswana has agreed to be bound.

Therefore, even though international instruments are not domesticated, they form part of the international legal framework that shapes or influences disability rights litigation. The nature and effect of domestication will be discussed in more detail in the following sub-section.

### 3.2 National legal frameworks

Zambia's national legal framework for the promotion and protection of disability rights is mostly governed by the laws passed by Parliament<sup>55</sup> and legal precedents set by national courts. The legal framework of disability rights in Zambia is primarily anchored on the Constitution, which though not having express provisions as to the promotion and protection of disability rights in its Bill of Rights, remains the premise for disability rights protection. In *Brotherton NO v Electoral Commission of Zambia*,<sup>56</sup> the court found that persons with disabilities were discriminated against even though the Bill of Rights did not list disability as one of the prohibited grounds of discrimination. This decision contrasts with that of the Kenyan High Court in *Waga*<sup>57</sup> where on account of Kenya's previous Constitution not expressly listing the disability as a prohibited ground of discrimination, a case for discrimination was held not to have been established.

Besides the Constitution, there are two main statutes that govern disability rights in Zambia.<sup>58</sup> These are the Persons with Disabilities Act<sup>59</sup> and the Mental Disorders Act.<sup>60</sup> The Persons with Disabilities Act provides for the various rights of persons with disabilities and also seeks to promote their participation in civil, political, economic, social and cultural spheres on equal basis with others. This Act domesticates<sup>61</sup> some, though

54 Appeal Court 1994 6 BCLR 1.

55 Constitution of Zambia, art 62. Article 80 of the Zambia Constitution also bestows on Parliament the authority to confer the power, on any person or authority, to create statutory instruments which also have the force of law.

56 2011/HP/0818.

57 n 8, above.

58 Interview with Hope Ndhlovu-Chanda, Chief, Research and Planning, Zambian Human Rights Commission (Lusaka, Zambia 29 June 2012).

59 Persons with Disabilities Act 6 of 2012.

60 Mental Disorders Act, Chap 305 of the laws of Zambia.

61 Secs 2, 4, 5, 6, 7, 8, 9 and 10 of the Persons with Disabilities Act domesticates arts 1, 2, 4, 5, 12 and 23 of the CRPD. Also provisions relating to the right to education, health and rehabilitation, employment and accessibility are domesticated by the Act.

not all, rights protected under the CRPD.<sup>62</sup> According to Ndhlovu-Chanda,<sup>63</sup> while the non-express domestication of some rights may have a chilling effect on the full rights of persons with disabilities, it is hoped that this may not adversely affect their protection and recognition as the core rights to equality and non-discrimination and equal recognition before the law, have been domesticated.

The Mental Disorders Act provides for the care and support of persons it describes as suffering from 'mental disorders or defects' and also for the custody of the persons and for the administration of their estates. This Act does not do much to enhance the rights of persons with disabilities as it firstly refers to persons with mental disabilities in derogatory terms such as 'idiots' and 'imbeciles'.<sup>64</sup> Additionally the Act does not recognise the legal capacity of persons with intellectual or psychosocial disabilities and considers them incapable of managing their own affairs; instead, it provides for the administration of their estates and for their institutionalisation.<sup>65</sup> According to Waliuya,<sup>66</sup> the Mental Disorders Act is scheduled to be repealed by the enactment into law of the Mental Health Bill.<sup>67</sup> Prior to repeal, the Mental Disorders Act remains the law in Zambia. However, to the extent that it is inconsistent with the Persons with Disabilities Act, the provisions of the latter enactment will prevail.<sup>68</sup>

Additionally, by interpreting provisions of the Constitution and statutes, courts also shape the national legal framework for disability rights in Zambia. In *Brotherton*<sup>69</sup> the High Court of Zambia found that the Electoral Commission failed to provide reasonable accommodation and support services as required under the law thereby effectively shaping the requirements of a good electoral law.<sup>70</sup>

62 The Persons with Disabilities Act does not expressly domesticate the provisions of the CRPD relating to the rights of women and children with disabilities, the right to nationality, independent living and being included in the community, privacy and freedom of expression and opinion.

63 Ndhlovu-Chanda (n 58 above).

64 Sec 5.

65 Secs 5, 7 and 8.

66 Waliuya (n 6 above).

67 Zambia UK Health Workforce Alliance & Zambia Ministry of Health Conference 'Current Health Bills/Acts & restructuring of the Zambian health service within ministries' Maynard Theatre, The Kings Fund, 11 – 13 Cavendish Square, London, 8 May 2013 16 <http://www.zuhwa.com/wp-content/uploads/2013/05/Dr.-Simoongas-Presentation-.pdf> (accessed 6 July 2013). This Bill was first presented in Parliament for enactment in 2006 but has not been enacted into law yet. It seeks to provide for the respect, autonomy and self-determination of persons with mental disabilities.

68 Persons with Disabilities Act sec 3.

69 n 56 above.

70 The Electoral Act 12 of 2006, secs 18, 60, 28, 40 and 41.

## 4 Challenges of litigating disability rights in Zambia

### 4.1 Non-justiciable rights

According to Dube,<sup>71</sup> the greatest obstacle to disability rights litigation in Africa is the existence of constitutional provisions which usually classify disability rights under non-justiciable clauses. Such clauses usually fall within the Directive Principles of State Policy and as such they are not binding on the state and cannot be enforced. The Zambian Constitution provides<sup>72</sup> that provisions of the Directive Principles of State Policy are not justiciable and that they shall not, despite being referred to as rights, be legally enforceable in any court, tribunal or administrative institution or entity. Article 112(f), which is under the Directive Principles of State Policy, provides:

[T]he State shall endeavour to provide to persons with disabilities, the aged and other disadvantaged persons such social benefits and amenities as are suitable to their needs and are just and equitable.

Apart from the foregoing provision, the Zambian Constitution does not have any express provision relating to disability rights. This leaves the recognition and protection of disability rights at the broad discretion and interpretation of the general non-discrimination constitutional provisions<sup>73</sup> to the courts. The Zambian High Court in *Brotherton*<sup>74</sup> adopted a broad approach to the interpretation of the Constitution when it was called upon to consider whether the Electoral Commission of Zambia's failure to adhere to the rights falling under the Directive Principles of State Policy such as those relating to social and physical amenities suitable for needs of persons with disabilities to participate in national elections, amounted to discrimination against persons with disabilities' right to vote. The court held that discrimination was proved notwithstanding that the rights relating to the provision of accommodative supports for voters with disabilities fall within the non-justiciable provisions of the Constitution.

In that case, the court did not make any distinction between the right to vote as a civil and political right, and the right to be availed the appropriate amenities, infrastructure and resources which fall within the Directive Principles of State Policy. The court's approach not to

71 BA Dube 'Forced evictions and disability rights in Africa' (September 2008) [http://www.nyulawglobal.org/Globalex/Forced\\_Evictions\\_Disability\\_Rights\\_Africa.htm](http://www.nyulawglobal.org/Globalex/Forced_Evictions_Disability_Rights_Africa.htm) (accessed 28 July 2012).

72 Constitution of Zambia, art 111.

73 Constitution of Zambia, arts 11-26 inclusive.

74 n 56 above.

distinguish between the two sets of rights advances disability rights litigation and is commendable. However, the mere classification of disability-related rights as non-justiciable rights has a chilling effect on disability rights litigation as it stifles persons with disabilities' rights to access to justice.

#### 4.2 Disability not listed as a prohibited ground of discrimination

The Zambian Constitution<sup>75</sup> does not list disability as one of the prohibited grounds of discrimination. A question therefore arises as to whether courts in Zambia may entertain a claim for discrimination on the ground of disability in view of disability not being one of the grounds upon which discrimination is prohibited. In *Brotherton*, the High Court found that disability discrimination is still prohibited notwithstanding the non-express provision in the Constitution. In this case the petitioner claimed that the respondent had unlawfully discriminated against the persons with disabilities contrary to article 23 of the Constitution as read together with section 19 of the previous Persons with Disabilities Act. The court held:

The first allegation made is that the Respondent has discriminated against the organisation's members and persons with disabilities in general contrary to Article 23 of the Constitution as read with Section 19 of The Persons with Disabilities Act. The Article basically provides that a person shall not be discriminated in any manner by any person acting by virtue of any written law or performance of a function of any public office.<sup>76</sup>

In finding a case for discrimination, the court further reasoned that the respondent in carrying out its public functions is bound not to treat those seeking its services in a discriminatory manner notwithstanding the non-listing of disability as one of the prohibited grounds of discrimination in the Constitution. The position taken by the Zambian court is in line with the European Court of Human Rights<sup>77</sup> in *Glor v Switzerland*<sup>78</sup> where disability was not listed as a prohibited ground of discrimination in the European Convention on Human Rights (ECHR). In this case it was held that the list of grounds upon which discrimination is prohibited under article 14 of the ECHR is not exhaustive and that disability is to be included as a prohibited ground of discrimination.

75 Art 11, which provides that every person in Zambia is entitled to the fundamental rights and freedoms whatever his race, place of origin, political opinions, colour, creed, sex or marital status.

76 n 56 above.

77 Established under the European Convention on Human Rights (ECHR) Rome, 4 November 1950.

78 Application 13444 [2004] ECHR.

However, *Waga*<sup>79</sup> provides an interesting perspective with respect to rights which are provided for in national legislation but not expressly provided for in the Bill of Rights. In the latter case, the Kenyan High Court held that there could be no constitutional protection under section 22(1) of the Constitution because the right not to be discriminated against on the basis of disability is not expressly provided for in the Bill of Rights.<sup>80</sup> The court's refusal to find for the applicant was notwithstanding that the Persons with Disabilities Act prohibited discrimination on the basis of disability.<sup>81</sup> In arriving at its decision, the court relied on the Supreme Court's position in the case of *RM (suing through next friend JK) v Attorney-General*<sup>82</sup> where it was held:

In interpreting our Constitution we consider ourselves bound by its provisions in the matter before us namely s 82 and its limitations. Perhaps it is important to point out at the outset, that following the great momentum of gender equity in the 80's and 90's, s 82 of the Constitution was amended in 1997 and the prohibited category expanded to include "sex" ... At the moment one can only conclude that the exclusion was deliberate and we do not consider it the function of the Court to fill the gaps.<sup>83</sup>

The court consequently found that construing section 82 to include the ground of disability would be usurping constituent power of the people enshrined in the Constitution. This is also in contrast with the communication of the African Commission in *Purohit*<sup>84</sup> where a finding for discrimination was made even though the ACHPR<sup>85</sup> does not expressly list disability as a prohibited ground of discrimination. In its communication, the African Commission observed:

Articles 2 and 3 of the African Charter basically form the anti-discrimination and equal protection provisions of the African Charter. Article 2 lays down a principle that is essential to the spirit of the African Charter and is therefore necessary in eradicating discrimination in all its guises, while Article 3 is important because it guarantees fair and just treatment of individuals within a legal system of a given country. These provisions are non-derogable and therefore must be respected in all circumstances in order for anyone to enjoy all the other rights provided for under the African Charter.<sup>86</sup>

It follows that while the general jurisprudence appears to favour the position that the expressly listed grounds of prohibited discrimination are not exhaustive, the non-listing of disability as a prohibited ground of discrimination is not desirable as it leaves to the subjective discretion of the

79 n 8 above.

80 Kenyan Constitution, arts 26 to 51.

81 Kenyan Persons with Disability Act (n 10 above).

82 (2008) 1 KLR (G & F) 574.

83 At 606.

84 n 35 above.

85 The ACHPR, art 2.

86 *Purohit* para 49.

court or tribunal, which discretion may not always be exercised judiciously.

### 4.3 The incidence of poverty

The high poverty incidence levels in Africa also play a role in discouraging disability rights litigation. Zambia falls under the low and middle income countries<sup>87</sup> bracket which are characterised by poverty, general unemployment and poor physical infrastructure. According to Daniel Mont,<sup>88</sup> disability and poverty are so intricately interlinked that the problem of disability cannot be adequately addressed without dealing with the problem of poverty. The World Bank presents the linkage as follows:

Poverty causes disability through malnutrition, poor health care, and dangerous living conditions. Disability can cause poverty by preventing the full participation of disabled people in the economic and social life of their communities, especially if the proper supports and accommodations are not available. In fact, the qualitative evidence suggests that disabled people are significantly poorer in developing countries, and more so than [their] non-disabled counterpart[s].<sup>89</sup>

It follows therefore that poverty affects disability rights litigation as persons with disabilities living in poverty are least likely able to afford legal practitioners or to pay requisite court fees. Consequently, they are less inclined to institute disability rights litigation.

Further, professional lawyers are usually concentrated in urban areas.<sup>90</sup> Persons with disabilities living in rural areas have to travel long distances to access professional legal advice, the police or indeed a court. According to a *Radio Netherlands Worldwide* report,<sup>91</sup> a South African girl who uses a wheel chair had this to say:

Where I live, many pavements are in bad shape and there are not a lot of off-rumps. It's also dangerous so I can't go places on my own.<sup>92</sup>

It follows that even if persons with disabilities know their rights, there are other barriers that they need to navigate such as long distances and

87 The World Bank *How We Classify Countries* (2012) <http://data.worldbank.org/about/country-classifications> (accessed 17 July 2012).

88 D Mont 'Measuring disability prevalence' (March 2007) (SP Discussion Paper No 0706) 1 <http://siteresources.worldbank.org/DISABILITY/Resources/Data/MontPrevalence.pdf> (accessed 18 July 2013).

89 The World Bank *Data and statistics on disability* <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSOCIALPROTECTION/EXTDISABILITY/0,,contentMDK:21249181~menuPK:282717~pagePK:148956~piPK:216618~theSitePK:282699,00.html> (accessed 29 June 2012).

90 Ndhlovu-Chanda (n 58 above).

91 Mannak (n 5 above).

92 As above.



inaccessible roads and buildings that militate against persons with disabilities instituting court proceedings.

#### 4.4 Stigma and prejudicial attitudes

The stigma and prejudicial attitudes which society often harbours towards persons with disabilities serves to deter them from instituting disability rights litigation. This is because persons with disabilities are often perceived as second class citizens not entitled to enjoy human rights on an equal basis with others. One woman with a physical disability, when interviewed by the Human Rights Watch<sup>93</sup> in Uganda, had this to say:

At a community meeting, they didn't allow me to talk. It happens to all persons with disabilities. It is as if we weren't human ... On occasions when food is being given, sometimes persons with disabilities are given what others leave behind on their plates.<sup>94</sup>

Persons with disabilities who grow up in conditions of perpetual marginalisation are least likely to consider disability rights litigation as they feel they will not be allowed to articulate their claims in court and, or, are just intimidated to speak out.<sup>95</sup> It is noteworthy that in the South Africa case of *Hoffmann v South Africa Airways*,<sup>96</sup> the Constitutional Court of South Africa did make some positive observations when it considered how the courts ought to view stigma and prejudice in relation to the protection of fundamental rights. It held:

The constitutional right of the appellant not to be unfairly discriminated against cannot be determined by ill-informed public perception of persons with HIV. Nor can it be dictated by the policies of others ... not subject to our Constitution.<sup>97</sup>

While the court in *Hoffmann* was referring to society's prejudicial views targeted at persons with HIV, it is hereby submitted that the court's reasoning should equally apply to matters involving persons with disabilities. In Zambia, the position is worsened by the Mental Disorders Act which refers to persons with mental and intellectual disabilities in derogatory terms such as 'idiots' and 'imbeciles'.

So far the chapter has discussed the challenges facing disability rights litigation in Zambia and the discussion has shown how the existing legal framework, poverty, cultural values and attitudinal perceptions may discourage persons with disabilities from instituting disability rights

93 Human Rights Watch "As If We Weren't Human": Discrimination against women with disabilities in Northern Uganda' (2010).

94 At 3.

95 As above.

96 (2000) 11 BCLR 1235.

97 Para 36.

litigation. The following section will now conjoin the best practises discussed throughout this chapter with a view of devising effective disability rights litigation strategies.

## 5 Devising effective litigation strategies

The reason why persons with disabilities have little success before courts is partly to do with the lack of a strategic approach.<sup>98</sup> A court will entertain a case depending not only on its merits but also on the manner in which the claims are articulated and the strategies employed by the litigants. In order to achieve the objects of litigation, there is need to plan who will be the parties, nature of claims, choice of forum, procedure to be adopted and the applicable law. It is in this regard that this section will seek to devise effective litigation strategies for disability rights.

### 5.1 Ratification and domestication of the CRPD

The CRPD<sup>99</sup> obliges all state parties to adopt appropriate legislative, administrative and other measures to promote the full realisation of disability rights. Since Zambia adopts the dualist approach to domestication of international instruments, the CRPD and its Optional Protocol need to be domesticated to become part of national law. Domestication in this regard, involves the enactment of laws that incorporate the provisions and principles of the CRPD.<sup>100</sup> This is necessary to ensure that disability rights legislation is tailored to address the specific challenges that persons with disabilities face in each country. The need for domestication is further amplified by the fact that even a country that adopts a monist approach such as Madagascar, has enacted national legislation for the protection of the rights of persons with disabilities.<sup>101</sup>

Furthermore, it is imperative that dissatisfied litigants have the option of invoking international human rights instruments to seek redress after exhausting local remedies. Ratification of the CRPD's Optional Protocol<sup>102</sup> provides such an alternative avenue by allowing individuals to lodge communications of disability rights abuses to the Committee established under the CRPD.<sup>103</sup> Zambia should ratify and domesticate

98 MA Stein *et al* 'Cause lawyering for persons with disabilities' (2009-2010) 123 *Harvard Law Review* 1658.

99 CRPD, art 4(1).

100 L Gerntholtz *et al* 'Disability rights, HIV/AIDS in Eastern and Southern Africa: A review of international, regional and national commitments on disability rights in the context of HIV/AIDS in Eastern and Southern Africa' Final Report (August 2010) 17.

101 Loi No 97-044 Sur Les Personnes Handicapées, which provides for the implementation of the various disability rights in Madagascar.

102 CRPD Optional Protocol, art 1.

103 CRPD, art 34(1).

both the CRPD and its Optional Protocol in order to pave the way for the provisions of international instruments to become part of the national law.

## **5.2 Civil advocacy and disability rights awareness drive**

It is important for CSOs and society in general to raise disability rights awareness in the local communities through public meetings. This will contribute towards enabling persons with disabilities and members of society generally to acquire basic understanding of disability rights and also to dispel the stigma and attitudinal barriers that exclude persons with disabilities from participating fully in society.

Gloppen<sup>104</sup> recognises the importance of CSOs' involvement in the following terms:

It also seems clear that litigation efforts that are part of a broader mobilisation strategy are more likely to result in positive judgments and judgments that are implemented and cause changes in policy. Sometimes a single case may have a significant effect on jurisprudence and cause a change in public policy, but a systemic effect on social policy is more likely where there is an overall strategy, a set of cases building up jurisprudence in the field, and an organisational apparatus that is able to capitalise on the momentum caused by the legal process and sustain political pressure through mobilisation and debate.<sup>105</sup>

The foregoing observation presents a holistic approach to strategic litigation. It epitomises the broad mobilisation of human and other resources to facilitate not only the effective litigation in courts but also appropriate legal reform and enhances human rights awareness in society generally. According to Robb<sup>106</sup> there is an urgent need for concerted efforts by CSOs and society in general to ensure that stigma is stamped out to enable persons with disabilities to enjoy their human rights and to participate in society on an equal basis with others.

Furthermore, CSOs and society at large need to mobilise to speak out against wrongs committed against persons with disabilities and to condemn any acts which undermine the disability rights movements. In Mozambique, a journalist<sup>107</sup> was convicted of libel for reporting on a matter in which a disabled girl child was dismissed from a private school for complaining about the failure to construct an access ramp at the school

104 n 7 above.

105 At 27.

106 Interview with Annie Robb, Programme Manager, Ubuntu South Africa (Cape Town, Republic of South Africa, 26 June 2012). Annie Robb is also the Administrator of the Pan African Network of People with Psychosocial Disabilities.

107 Committee to Protect Journalists 'Mozambican journalist sentenced in criminal libel case' (2 August 2012) <http://cpj.org/africa/mozambique/> (accessed 6 August 2012).

as required by law.<sup>108</sup> Mobilisation of CSOs and society generally to condemn the said expulsion would not only enhance disability rights but would also spur on disability rights litigation.

It is recommended that in order to assist indigent persons with disabilities with meritorious cases suitable for disability rights litigation, CSOs should mobilise and raise money to meet the legal fees and other costs associated with litigation. CSOs should further advocate for the establishment of effective national legal aid systems, and also facilitate and initiate public interest litigation aimed at enhancing disability rights.

### 5.3 National human rights institutions (NHRIs)

In Zambia, the NHRI is known as the Human Rights Commission (HRC). It was established by article 125 of the Constitution<sup>109</sup> which provides that the functions, powers, composition and administrative procedures shall be prescribed by an Act of Parliament.<sup>110</sup> According to the Human Rights Commission Act,<sup>111</sup> the HRC has the authority to investigate any human rights violations and to issue summons or orders requiring the attendance of any authority before the HRC and the production of any document or record relevant to any investigation being carried out by the HRC.<sup>112</sup> According to Ndhlovu-Chanda,<sup>113</sup> the power to investigate human rights violations includes the power to investigate disability rights violations.

NHRIs are guided by the Paris Principles.<sup>114</sup> The Paris Principles provide the guidance and competences for institutions to effectively promote and protect human rights. They specifically require NHRIs to have a broad mandate for the protection of human rights and to be independent from the state. They require adequate funding from the state to enable NHRIs to carry out their mandate. Since NHRIs have the mandate to monitor the implementation of human rights laws,<sup>115</sup> they are an ideal strategic partner to both persons with disabilities and CSOs advancing disability rights. NHRIs are better placed to access public records and government institutions such as schools and hospitals. Usually, public records which would make vital evidence in disability rights litigation would not be readily available to litigants. However, NHRIs have the right to access to public records or buildings so as to fulfil their mandate to protect and promote human rights. A close working

108 Children's Rights Act, Mozambique 2008.

109 Article 125(2) provides that the Human Rights Commission shall be autonomous.

110 Constitution of Zambia, art 126.

111 Human Rights Commission Act, 1996.

112 Human Rights Commission Act, secs 9 & 10 (2).

113 Ndhlovu-Chanda (n 58 above).

114 United Nations General Assembly Resolution 48/134 (20 December 1993).

115 CRPD, art 33 (2).

relationship with NHRIs would therefore facilitate access to public records and institutions to collate evidence needed for disability rights litigation.

#### 5.4 CRPD national implementation and monitoring

The CRPD requires<sup>116</sup> state parties to designate one or more focal points within government and in accordance with their legal and administrative systems, to maintain and establish a frame work, including one or more independent mechanisms to promote, protect and monitor the implementation of the CRPD.

In designating one or more focal points within government, it is imperative that the terms of reference for such focal points are clearly spelt out. Waliuya<sup>117</sup> expressed concern over the fact that while the Zambian government has designated focal point officers in all government ministries, most of the focal points officers are not aware of their terms of reference or conversant with disability rights.

There is therefore a need to have focal point officers in all government ministries and departments who are conversant with their terms of reference and with basic knowledge of disability rights so that they can contribute positively to the development of disability rights policies and where necessary highlight policies that are not CRPD compliant. This will assist in implementation and coordination.

#### 5.5 Judicial activism and responsiveness

The extent to which the judicial system responds to social change, coupled with the activism of judicial officers, has a strong bearing on the extent to which disability rights may be effectively litigated upon. While it is difficult to come up with a universally accepted definition of judicial activism, it generally refers to the philosophy whereby judges interpret the law not necessarily according to the confines of already set precedents but in such a manner to reflect the contemporary conditions and values.<sup>118</sup> In this regard, owing to the novelty of the disability rights movement,<sup>119</sup> courts are required to be responsive to the social change by interpreting the law in accordance with current social trends. A good example of a court or tribunal which responds to social change or a paradigm shift in the area of disability rights, is the African Commission's bold interpretation of the ACHPR<sup>120</sup> in *Purohit*, as regards the requirement to exhaust local remedies

116 CRPD, art 33(1).

117 Waliuya (n 6 above).

118 EK Quansah & CM Fombad 'Judicial activism in Africa: Possible defence against authoritarian resurgence' 3 <http://www.ancl-radc.org.za/sites/default/files/Judicial%20Activism%20in%20Africa.pdf> (accessed 15 July 2013).

119 Degener & Quinn (n 2 above).

120 ACHPR, art 56(5).

before lodging a complaint. The brief facts of *Purohit* were that the applicants initiated communication to the African Commission on behalf of persons with psychosocial disabilities complaining that the Lunatics Detention Act discriminates against persons with psychosocial and intellectual disabilities. The Lunatics Detention Act provided for the involuntary detention of persons with psychosocial and intellectual disabilities and it was the applicants' contention that it infringed the rights of such persons to enjoy the best attainable state of mental health and their rights to special measures of protection in keeping with their physical and moral needs.

On the question of admissibility<sup>121</sup> of the complaint, the African Commission decided that since the affected persons were indigent and also, due to the non-effective legal aid system in Gambia, the affected persons cannot realistically be expected to avail themselves of the legal procedures of challenging their involuntary admission into mental health institutions. Had the African Commission interpreted the ACHPR narrowly, the communication would not have been admitted as the applicants had not exhausted any local remedies in that they did not challenge the impugned legislation before national courts in the Gambia.

It is therefore crucial that courts in Zambia are bold enough to respond to changing social and legal dynamics of society, in order to set the ground work for successful litigation of disability rights. In Zambia and Botswana, the courts exhibited boldness and high levels of judicial activism when it was held that even though the provisions of international instruments have not been domesticated to form part of national law, national law must be interpreted in a manner that embraces the purpose and provisions of international instruments to which Botswana and Zambia respectively, have agreed to be bound.<sup>122</sup>

## 5.6 Competent and affordable legal advice

Closely related to the responsiveness of the courts, is the need to have competent lawyers who specialise in disability rights cases or have the experience of working with discrimination and equality-related cases. The disability perspective to human rights presents a shift away from the traditional equality of treating all human beings equally.<sup>123</sup> Instead focus is now on substantial equality and dictates that society takes appropriate and necessary steps to equalise opportunities<sup>124</sup> for persons with disabilities. A lawyer when presented with the relevant facts of a case will be required to give competent advice as to the appropriate remedies to

121 As above.

122 See subsection 3(1) and pages 174 & 175.

123 Degener & Koster-Dreese (eds) (n 15 above).

124 As above.

seek, the right forum to commence proceedings, and the rightful process with which to institute proceedings.<sup>125</sup> Wrong advice with respect to any of the foregoing areas may result in court proceedings being dismissed either at the preliminary stage or in the judgment. Disability rights law is therefore a specialised area of law which requires competent lawyers to handle.

Waliuya<sup>126</sup> observed that the non-availability of lawyers specialised in disability rights has led to the failure of disability rights litigation in Zambian courts.<sup>127</sup> He stressed that most persons with disabilities have as a result lost confidence in the judicial system owing to the lack of competent lawyers specialised in disability rights litigation. He maintained that it is in this regard that ZAFOD has engaged in the capacity building exercise of involving lawyers seized with the conduct of disability rights abuse cases, in a number of workshops, conferences and negotiations for legal reforms.

Where competent and specialised disability rights lawyers<sup>128</sup> are available, persons with disabilities are faced with the prospects of high legal fees should they seek to commence court proceedings. As mentioned earlier, persons with disabilities are usually amongst the poorest and most marginalised people in their communities and as such they cannot afford legal fees and other costs of litigation. It is essential to provide legal aid services to indigent persons with disabilities to facilitate disability rights litigation.

To overcome the cost of litigation, CSOs should mobilise funds to meet the legal fees of persons with disabilities as they seek to enforce their rights. This would ensure that indigent persons with disabilities do not have to worry about raising funds to meet legal fees while ZAFOD's objective of obtaining court orders to set up precedents on disability rights is also achieved. Further, disability law should be part of all law schools' curriculum in universities and colleges in Zambia so that student lawyers receive the necessary training while lawyers already in practice should have disability law training as part of their continuous professional development. This will sensitise more lawyers in disability law.

## **5.7 Accessible court premises and infrastructure**

Physical access to court premises, including the road infrastructure, is a very crucial component of the litigation strategy of disability rights in Africa. Indeed the CRPD provides that in order for persons with

125 Gloppen (n 7 above).

126 Waliuya (n 6 above).

127 As above.

128 Ndhlovu-Chanda (n 58 above).

disabilities to live independently and to participate fully in their societies, state parties are required to take appropriate measures to ensure that persons with disabilities have access to the physical environment, transportation, information and communication technologies, and other facilities available to non-disabled persons.<sup>129</sup> In most Africa countries, there are poor road infrastructures, characterised by potholes and generally ungraded roads, whereby persons on wheel chairs have restricted movements outside their homes. The inaccessible roads and building infrastructures discourage persons with disabilities from undertaking the uncomfortable and often dehumanising journey to the court premises.

In Kenya, a High Court judge was taken round the court building by a litigant in a wheelchair demonstrating how difficult it was for persons with disabilities to access the court building without ramps.<sup>130</sup> This was in the case of *Paul Pkiach Anupa v Attorney-General & Others*<sup>131</sup> where the inaccessible court premises were challenged for denying the petitioner access to justice. Among the relief sought, is an order that the court buildings be made accessible. The Court held:

It is no doubt that mobility or accessibility of public buildings including court houses is one such effort in aiding access to justice for all Kenyans ... The current physical structure of the ... law courts is such that it is a hindrance to justice seekers owing to the physical barriers that make it a herculean task for persons with disabilities to access the courts.<sup>132</sup>

Lawyers with physical disabilities face the same difficulties. In the South African case of *Esthé Muller v the Department of Justice & Another*<sup>133</sup> an attorney with quadriplegia brought a case with respect to difficulties in accessing the court buildings. In her statement, she alluded to how sometimes she had to be carried up the stairs due to the inaccessible court rooms and stated: 'It's embarrassing for my client to have his lawyer carried into court. It's also embarrassing for me'.

The foregoing matter was resolved by way of a settlement agreement after the respondents agreed that their failure to make the court buildings accessible was a form of discrimination against the applicant. The Zambian Government should therefore take appropriate steps to modify and adjust all court rooms and buildings, and other physical infrastructure such as roads, to make them accessible to persons with disabilities. This should include making available all necessary support and services such as sign language interpreters, social workers and accommodative procedures aimed at ensuring that persons with disabilities have effective access to justice.

129 CRPD (n 1) art 9.

130 'Judge shown how disabled have it rough' *Daily Nation Newspaper* 3 August 2012.

131 Constitutional Petition 93/2011.

132 Paras 65 & 66.

133 Equality Court, Germiston Magistrates' Court, January 2003.



## **6 Conclusion**

Devising an effective national litigation strategy requires harmonising a range of activities that constitute, and result in, access to justice. These activities include constitutional and legal reforms, judicial activism and disability rights awareness drives among persons with disabilities and society at large. Perhaps the most significant of these activities, is the need to change the attitudinal and prejudicial perceptions the Zambian society often harbours against persons with disabilities. In terms of priority, the need to eradicate the deep entrenchment of prejudice and stigma against persons with disabilities outweighs the need for constitutional and other strategies for effective disability rights litigation. As long as society continues to view persons with disabilities with prejudice and stigma, constitutional and legal reforms will not effectively advance the cause of disability rights litigation and neither will judicial activism achieve its intended purpose. The implementation of all the good practices and laws in Zambia will not achieve much if disability rights are weighed-down by prejudice and stigma.

Indeed, the leitmotif of the CRPD is to achieve a shift in the manner people view persons with disabilities and also how they relate with disability issues that arise from human impairments. This is to be achieved by recognising that the primary problem with regard to the marginalisation and exclusion of persons with disabilities is not the human impairments. Rather, it is societal norms and values acting in concert with inaccessible physical infrastructure which, by design, exclude persons with disabilities from fully participating in society. Zambia will also need to adopt positive affirmation measures such as the provision of necessary support services so as to equalise opportunities to enable persons with disabilities to participate fully in society. Such positive affirmative measures include constitutional and legal reforms so as to enforce or compel compliance with the change envisioned by the CRPD.