

BEYOND SYMBOLISM AND RHETORIC: THE ROLE OF THE LEGAL COMMUNITY IN ADVANCING ACCESS TO JUSTICE AND DEVELOPMENT FOR PERSONS WITH DISABILITIES

Chipo Nkhata,¹ Johnson Jasson² and Annabel Raw³

Introduction: Accessible Justice for Sustainable Development

People with disabilities in Southern Africa face exclusion and discrimination in many areas of life. Disability is a development issue. It is both a cause and result of poverty; research shows that people with disabilities and their families are more likely to experience socio-economic disadvantages.⁴ Unfortunately, the justice system is a microcosm of these forms of discrimination and exclusion.

The language of the Sustainable Development Goals (SDGs)⁵ make repeated reference to the ideas of equality and non-discrimination, acknowledging the vital link between equal inclusion and the sustainability of development. Sustainable Development Goal 16 aims to promote just, peaceful and inclusive societies. Targets under Goal 16 speak to promoting “equal access to justice for all” and the objective to promote and enforce non-discriminatory laws and policies.⁶ Goal 10 requires reduced inequality within nations. Targets of this goal include empowering and promoting the social, economic and political inclusion of all, irrespective of disability or other status, and ensuring equal opportunity and reducing inequalities of outcome, including by eliminating discriminatory laws, policies and practices.⁷

Although the concept of “access to justice” has no single accepted meaning, a number of elements can be identified as relevant in determining the extent to which a justice system is accessible. Some of these are:

- a) A conducive legal framework;
- b) A population that has sufficient legal knowledge;
- c) Readily available legal advice and representation;
- d) The presence of and access to justice institutions;
- e) legal procedures; and
- f) Enforceable solutions.⁸

1 Lecturer, School of Law, University of Zambia, legal practitioner; LL.M (Human Rights Law) (University of Cape Town).

2 Practicing Advocate with a disability based in Dar Es Salaam, Tanzania; LL.B (University of Dar Es Salaam).

3 Health Rights Lawyer at the Southern Africa Litigation Centre; B.A. (Law) (University of Pretoria), (Hons.)(University of Witwatersrand), LL.B (University of South Africa), LL.M (Lund University).

4 World Report on Disability World Health Organisation and the World Bank (2011).

5 A/RES/70/1 (21 October 2015).

6 *Id* targets 16.3 and 16.b.

7 *Id* targets 10.2 and 10.3.

8 “Access to Justice, Equality under the Law and Women’s Rights: Participants Training Packet” ABA Rule of Law Initiative (2014) 9.

In this paper, we argue that the legal community has an obligation and an opportunity to guarantee dignity and equality to persons with disabilities. Lawyers and judges should take practically meaningful steps to improve the justice systems of our region and, in this way, contribute to sustainable development. We begin by examining national, regional and international commitments in Southern Africa to non-discrimination against persons with disabilities and the obligation on lawyers and the judiciary to promote access to justice. We proceed to consider some examples of access-to-justice restrictions and opportunities in the region. We look specifically at physical access to courts and legal proceedings, legal capacity restrictions, restrictive rules and practices of courts, the provision of pro bono legal services, challenges faced by lawyers with disabilities, and how support institutions can be held to account. We aim to outline things the legal community should be doing to advance access to justice for persons with disabilities.

Non-Discrimination against Persons with Disabilities

The human rights of persons with disabilities within Southern Africa are recognised and affirmed in constitutions, international treaties and regional human rights laws. Public and private actors are legally obliged not to discriminate against persons with disabilities and to uphold their human rights to equality before the law and to human dignity.

International and regional law

The United Nations Convention on the Rights of Persons with Disabilities (CRPD) enjoys significant recognition in Southern Africa. The CRPD has been ratified or acceded to by all States in the Southern Africa Development Community (SADC) except for Botswana. Respect for inherent dignity, individual autonomy and non-discrimination are amongst the foundational principles in the CRPD.⁹

Article 1 of the CRPD, which describes the purpose of the Convention, states that:

“Persons with disabilities **include** those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”¹⁰

This understanding of “persons with disabilities” is open-ended, and should not be used as a limiting principle for what is understood as a “disability”. This expansive meaning is signalled through the use of the word “include”. Furthermore, the provision acknowledges a social model of disability. This understanding of disability does not frame it as a medical condition measured against social standards of “normalcy”, but rather as representing the interaction between people living with impairments and environments that includes physical, attitude, communication and social barriers that prevent their equal participation in society.

The African Charter on Human and Peoples’ Rights (Banjul Charter)¹¹ does not list disability as

9 CRPD, article 3.

10 Emphasis added.

11 Organisation of African Unity (OAU), African Charter on Human and Peoples’ Rights (“Banjul Charter”) CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

explicit grounds of prohibited discrimination, but frames the prohibition against discrimination broadly and in open-ended language.¹² It recognises the equality of “every individual” before the law¹³ and links the recognition of every individual’s legal status to the right to respect for a person’s inherent human dignity.¹⁴ Article 18(4) makes express mention of the right to “special measures” for persons with disabilities “in keeping with their physical or moral needs”.¹⁵ The African Commission on Human and Peoples’ Rights (ACHPR) has applied the prohibition against discrimination and the right to equality before the law to persons with disabilities in a case concerning persons with mental disabilities in the Gambia.¹⁶ In February 2016, the African Commission adopted a Draft Protocol to the Banjul Charter on the Rights of Persons with Disabilities in Africa.¹⁷ The Draft Protocol details the rights of persons with disabilities, contextualising to Africa provisions from the CRPD. It will now be subjected to the treaty-making process of the African Union, opening it to ratification by Member States.

Constitutional and legislative protections

In some Southern Africa countries, the rights of persons with disabilities are expressly protected in the constitution. For example, the non-discrimination provisions of constitutions in South Africa,¹⁸ Swaziland,¹⁹ and Zimbabwe²⁰ expressly include disability as a prohibited grounds of discrimination. In Zambia, the definition of “discrimination” in the Constitution, includes disability as a grounds of discrimination.²¹ Special protections in the provision of services and to advance the interests of persons with disabilities are explicitly guaranteed in the constitutions of the Democratic Republic of the Congo²² and the Seychelles.²³

In contrast, some constitutions in Southern Africa do not recognise disability as an *explicit* prohibited ground of discrimination. However, the language of their non-discrimination provisions are typically open-ended, allowing room for courts to interpret the prohibition on discrimination as inclusive of other grounds, including disability. For example, in Botswana, the Constitution does

12 *Id* article 2, “Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status” (emphasis added).

13 *Id* article 3.

14 *Id* article 5.

15 The linking of disability rights with the rights of the “aged” in this provision has been criticised as a problematic conflation of issues. See H Combrinck “Disability rights in the African regional human rights system during 2011-2012” (2013) 1 *African Disability Rights Yearbook* 361.

16 *Purohit and Another v The Gambia* AHRLR 96 (ACHPR 2003).

17 “Draft Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa” ACHPR (2016) available at: http://www.achpr.org/files/news/2016/04/d216/disability_protocol.pdf (last accessed: 24 November 2016).

18 Constitution of South Africa, 1996, section 9.

19 Constitution of Swaziland, 2005, sections 14(3) “a person of whatever...disability shall be entitled to the fundamental rights and freedoms of the individual” and section 20 “All persons are equal before and under the law...a person shall not be discriminated against on the grounds of...disability.”

20 Constitution of Zimbabwe, 2013, sections 22, 56, and 83.

21 Constitution of Zambia, as amended (Act 2 of 2016), article 266.

22 Constitution of the Democratic Republic of Congo, 2006, articles 45 (access to education) and 49.

23 Constitution of Seychelles, 1993, article 36: “The State recognises the right of...the disabled to special protection and... undertakes...to make reasonable provision for improving the quality of life and for the welfare and maintenance of the... disabled...[and] to promote programmes specifically aimed at achieving the greatest possible development of the disabled.”

not include disability as a listed prohibited ground of discrimination but courts have repeatedly affirmed that the grounds of discrimination are open-ended. The Botswana Court of Appeal has particularly referred to persons with disabilities as an example of a category of persons against whom discrimination would be unjust and inhuman, who “*should have been* included in the definition” of discrimination.²⁴ In Tanzania, the Constitution also does not explicitly prohibit discrimination on the basis of disability. However, there is a coming referendum on a proposed new Constitution which prohibits discrimination on the basis of disability in article 52.²⁵ This was the result of concerted efforts by disability movement pressure groups after failure to have it mentioned in the Constitution when such opportunity arose during the 1990 constitutional amendment process.

Despite the non-explicit nature of the constitutional protection of persons with disabilities from discrimination in these constitutions, other provisions establish a supportive interpretive framework. For example, section 15 of the Botswana Constitution embodies *substantive* notions of equality and the Namibian Constitution under section 23 embraces the principle of affirmative action.²⁶ These constitutional principles make room for “reasonable accommodations” for persons with disabilities in light of their varied and different needs in order to achieve meaningful equality.²⁷

The Legal Community’s Obligation to Promote Access to Justice

“States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.”²⁸

It cannot be denied that persons with disabilities have legal rights to equality, freedom from discrimination, access to justice, and human dignity. It is also clear that domestic legislatures help further protect the rights of persons with disabilities through laws focused on the particular needs of these citizens. These constitutional and legislative obligations extend to the courts and legal profession.

Many constitutions in Southern Africa impose legal obligations on all spheres of government, including the judiciary. A number of constitutions further recognise the binding nature of constitutional obligations on individuals and even corporate entities. Section 2(2) of the Zimbabwe Constitution states, for example:

24 *Attorney General v Dow* (1992) BLR 119 (CA) 147 (emphasis added).

25 The draft Constitution is available in Kiswahili at <http://www.sheria.go.tz> (last accessed: 14 November 2016).

26 Constitution of Namibia, 1990, section 23(2) “Nothing contained in Article 10 hereof shall prevent Parliament from enacting legislation providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices, or for the implementation of policies and programmes aimed at redressing social, economic or educational imbalances in the Namibian society arising out of past discriminatory laws or practices, or for achieving a balanced structuring of the public service, the police force, the defence force, and the prison service.”

27 See CRPD, article 2 “‘reasonable accommodation’ means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms”.

28 CRPD, article 13(1).

“The obligations imposed by this Constitution are binding on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them.”

By further example, in Zambia, the Constitution mandates that, in exercising judicial authority, the courts shall be guided by the principle that “justice shall be done to all, without discrimination”.²⁹ In Swaziland, section 30 of the Constitution guarantees persons with disabilities the right to “respect and human dignity” and mandates that “the government and society shall take appropriate measures to ensure” their achievement of their physical and mental potential.³⁰

In Lesotho, the Law Society Rules (2012) state that the Law Society and its members “shall at all times assist and protect the courts to ensure their independence, impartiality, dignity, *accessibility* and effectiveness.”³¹

The judiciary and lawyers, as officers of the courts, may function as gate-keepers to the justice process. In recognising that human rights obligations toward persons with disabilities apply to the judiciary and legal practitioners as individuals, we need to think, in practical terms, what we can do as a legal community to promote access to justice. We offer some ideas below.

Physical Access to Courts and Proceedings

“To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas.”³²

Physical obstructions and inadequate accommodations to ensure people with disabilities are able to access court buildings, legal information, and legal proceedings are significant barriers for persons with disabilities to access justice. For example, persons with mobility constraints, or visual or hearing impairment may have difficulty getting into and around court buildings, participating in court proceedings and finding out necessary information. Provisions in law and policy, applicable to civil and criminal proceedings, can however support the role that the legal community can play in overcoming these barriers.

In Lesotho, the Buildings Control Act requires that all public buildings accommodate physical access for persons with disabilities.³³ In Mozambique, the Constitution obliges the State to promote priority treatment of disabled citizens by both public and private services and to promote easy access to public places.³⁴ National laws further require the construction, amendment and/or maintenance of structures allowing for persons with physical disabilities to access premises.³⁵

29 Constitution of Zambia, as amended (Act 2 of 2016) article 118(2)(a).

30 Emphasis added.

31 Law Society Rules (Lesotho Legal Notice No. 50 of 2012) rule 15(4) (emphasis added).

32 CRPD, article 9(1).

33 Building Control Act (No. 8 of 1995) section 19(2).

34 Constitution of Mozambique, 2004, section 125.

35 Decree No. 53/2008 (Laws of Mozambique).

In Namibia, the role of the Ministry of Justice in advancing access to justice for persons with disabilities is meaningfully framed in the National Policy on Disability, a schedule to the National Disability Council Act.³⁶ In section 4.3.11 of the National Policy, it is noted that the Ministry has:

“a vital role of ensuring that disabled people are given advice about the Namibian legal system generally and information on how to seek and qualify for legal aid. This information should also be readily available to people with sensory loss. For example, for those who are blind or partially sighted information should be available in Braille and in large prints respectively. This information should also be made available to deaf and hard of hearing people, especially when requiring legal assistance. Furthermore, trained sign language interpreters should be made available in courts for deaf people who use this form of communication.”

In addition, fair trial rights for persons who are criminally accused typically require that accused persons be tried in a *language* they understand. For example, the Malawi Constitution states that every accused person has the right:

“to be tried in a language which he or she understands or, failing this, to have the proceedings interpreted to him or her, at the expense of the State, into a language which he or she understands”.³⁷

Unlike Malawi’s constitutional right to legal representation, the enjoyment of the right to be tried in a language one understands at State expense is not qualified by the requirement that the State fund the right’s realisation only when “in the interests of justice”.³⁸

The CRPD defines “language” as including “spoken and signed language and other forms of non-spoken languages.” The CRPD defines “communication” as including:

“languages, display of text, Braille, tactile communication, large print, accessible multimedia as well as written, audio, plain-language, human–reader and augmentative and alternative modes, means and formats of communication, including accessible information and communication technology”.³⁹

Legal provisions that provide for communication accessibility should be interpreted broadly when applied to persons with disabilities. Legal practitioners and the courts have an obligation to consider a wide variety of communication tools and aids to guarantee effective access to justice for persons with physical and mental disabilities.

Lawyers and judges who use judicial buildings and who engage in court proceedings every day are well-placed to verify that accessible structures and resources are put in place, to monitor their maintenance in consultation with persons with disabilities, and to ensure that where parties require accommodations, that these are sensitively, timeously and meaningfully sought. There is a need to make members of the legal profession and the judiciary conscientious of their role in this regard.

36 No. 26 of 2004.

37 Constitution of Malawi, 1994, section 42(2)(f)(ix).

38 *Id* section 42(2)(f)(v).

39 CRPD, section 2.

Legal Capacity and Restrictive Rules and Practices in Litigation

“[P]ersons with disabilities have the right to recognition everywhere as persons before the law.”⁴⁰

State parties to the CRPD undertake to recognise that persons with disabilities “enjoy legal capacity on an equal basis with others in all aspects of life”⁴¹ and to “take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.”⁴² However, in many countries in the region, persons with disabilities are denied testimonial capacity; this is particularly true of persons with mental and intellectual disabilities. In addition, legislation and rules of court often limit any form of legal capacity for persons with disabilities. This prevents them from accessing justice independently, regardless of their capacity to give informed consent to legal practitioners to pursue their legal interests. For example, in Botswana, the High Court Rules state that:

“A person under disability may not bring, or make a claim in, any proceedings except by his guardian, and may not defend, make a counter-claim or intervene in any proceedings, or appear in any proceedings under a judgment or order, notice of which has been served on him except by his guardian *ad litem*.”⁴³

“Person under disability” is defined to include persons with both mental and physical disabilities.⁴⁴

In States like South Africa⁴⁵ and Zimbabwe,⁴⁶ the criminal procedure rules mandate a court to enquire into the mental state of a witness whose competence to give evidence is brought into question. It has been argued that the approaches in the two countries to the assessment of testimonial competence is deficient “because it treats incompetence as inherent in the individual thereby overlooking the impact of the environment on the competence and credibility of a witness.”⁴⁷

The constitutionality of these kinds of provisions are questionable on many bases, including provisions guaranteeing equality before the law, the right to a remedy, and the rights guaranteed to all accused persons. Courts themselves have frequently stated that justice should not be hindered by undue technicalities in procedure, particularly when parties seek to assert fundamental rights. In Zambia, this is stated in the Constitution as an obligation on the courts that “justice shall be administered without undue regard to procedural technicalities.”⁴⁸ Further order 3 rule 2 of the

40 CRPD, article 12(1).

41 *Id* article 12(2).

42 *Id* article 12(3).

43 Rules of the High Court (Statutory Instrument No. 1 of 2011) order 7, section 2(1).

44 *Id* order 7, section 1 “‘patient’ means a person who, by reason of age, infirmity, disability or mental disorder, is incapable of managing and administering his property and affairs; ‘person under disability’ means a person who is under the age of 21 years or a patient”.

45 *S v Kato* (2004) ZASCA 109 (interpreting Criminal Procedure Act, 51 of 1977, section 194).

46 *S v Ndiweni* S-149-89 (interpreting Criminal Procedure and Evidence Act, Chap 9:07 of the Laws of Zimbabwe, section 246).

47 D Msipa “How assessments of testimonial competence perpetuate inequality and discrimination for persons with intellectual disabilities: An analysis of the approach taken in South Africa and Zimbabwe” (2015) 3 *African Disability Rights Yearbook* 63, 69.

48 Constitution of Zambia, as amended (Act 2 of 2016) article 118(2)(e).

High Court rules of Zambia⁴⁹ empowers the courts to make any order in the interest of justice. It can be argued that the power of courts to adjust rules and procedures to ensure the equitable administration of justice, including reasonable accommodations for persons with disabilities, is founded in the courts' inherent jurisdiction to determine their own procedure and in the premise of the court's independence in administering justice.

In the light of these powers and obligations, courts should realise the right to legal capacity by adapting procedures appropriately to ensure that environmental factors do not interfere with persons with disabilities' ability to exercise that capacity. Instead of assuming, for example, that a person with a disability is incapable of giving evidence or understanding legal proceedings, simple efforts such as allowing for support persons to accompany witnesses or being flexible as to the manner in which witnesses communicate evidence, can enable persons with disabilities to enjoy their rights to access courts and to exercise legal capacity without undermining the fair administration of justice.

In some States, particular legislative provisions have been enacted to ensure the availability of reasonable accommodations in judicial proceedings for persons with disabilities. For example, in Zambia, the Persons with Disabilities Act,⁵⁰ requires that in realising the right to legal capacity on an equal basis with others:

“(2) The Judicature shall take necessary means to ensure that persons with disabilities have equal and effective protection and equal benefit of the law without discrimination.

(3) Where a person with disability is a party in any legal proceedings, the adjudicating body shall take into account the condition of the person with disability and provide procedural and other appropriate facilities to enable the person with disability to access justice and participate effectively in proceedings.”⁵¹

In Namibia, in terms of the Criminal Procedure Amendment Act,⁵² provision is made for courts, on application by any party, to make special arrangements for “vulnerable witnesses”, including relocating the trial to a different location, rearranging the furniture in the court room, directing that certain persons sit or stand in certain locations, allow for a “support person” to accompany the witness while giving evidence, and to take “any other steps” to facilitate a vulnerable witness to give evidence.⁵³ “Vulnerable witnesses” is defined to include persons “who as a result of some mental or physical disability” could possibly be intimidated by the accused or another person, or “for any other reason will suffer undue stress while giving evidence, or who as a result of such disability, background, possibility or other reason will be unable to give full and proper evidence.”⁵⁴

While inherent jurisdiction of the courts to regulate their own procedure should empower the courts to make these types of accommodations in the absence of particular legislative and regulatory frameworks, the existence of available procedures for accommodations for persons with disabilities

49 Rules passed pursuant to High Court Act (Chapter 27 of the Laws of Zambia) and Subordinate Court Act (Chapter 28 of the Laws of Zambia).

50 No. 6 of 2012.

51 *Id* section 8(2) and (3).

52 No. 24 of 2003.

53 *Id* section 158A.

54 *Id* section 158A(3)(d).

ensures that such procedural accommodations are more readily accessible and navigable by courts and legal practitioners. Ensuring that procedural regulations, practice directives and rules are developed, can avoid the burden of case-by-case innovation that would otherwise fall on litigants and courts. Even so, the need for particular procedural accommodations should be determined by a support person to the litigant or witness with disabilities; working either with or without the help of a professional. Ideally, this support person would be independent but would work closely with the legal representative of the litigant or witness with disability as well as the courts to ensure that the necessary accommodation are made.

Pro-Bono Legal Services

The provision of pro bono services for persons with disabilities cannot be overemphasised. To ensure effective access to justice, the legal profession and justice institutions need to make a deliberate effort to provide legal advice, legal support and legal representation to persons with disabilities and ensure that these services enable persons with disabilities to use justice institutions to obtain remedies. It is important to note that:

“pro bono legal services go beyond legal representation in court. They empower the indigent to know their legal and other rights and assert them. This equally enables lawyers to use the law as an instrument of social order and justice, and to identify themselves with the people.”⁵⁵

The practice of lawyers offering pro bono legal services is not novel in the region. In some jurisdictions, legal practitioners are required to provide mandatory pro bono services to renew annual registrations. Furthermore, many law societies and bar associations in developing countries aspire to use the law to contribute to the development of their nations. For example, one of the objectives of the Law Association of Zambia is to “contribute effectively to the development of law as an instrument of justice and social change.”⁵⁶

For many lawyers, providing legal services to persons with disabilities can be an affront to our own ignorance – an uncomfortable prospect for persons versed in a profession steeped in habit and tradition and established precedent. There are valuable sources of knowledge to overcome this ignorance. First, persons with disabilities themselves are the most knowledgeable advocates for their needs. Service organisations, community-based organisations and non-governmental organisations working with persons with disabilities may also offer useful guidance to lawyers wishing to learn more about appropriate client services. Furthermore, a number of law schools in the region have disability rights projects where expertise is being developed. For example, the University of Pretoria’s Centre for Human Rights is coordinating the Disability Rights Law Schools Project in Africa. This project brings together faculties from many law schools, including the University of Botswana, the University of Zambia, Midlands State University in Zimbabwe, Eduardo Mondlane University in Mozambique, Chancellor College in Malawi, the University of Dodoma in Tanzania, and the University of Namibia. These law schools are seeking to deepen understandings and research on disability issues, to develop disability advocates and to conduct

55 Chipo Mushota Nkhata “The Benefits of Developing a Pro bono Culture; A Call for Enhanced Effort in the Provision of Free Legal Services in Zambia” paper presented at the Law Association of Zambia Annual Law Conference (2014) 3.

56 Law Association of Zambia Act, Chapter 31 of the Laws of Zambia, section 4.

outreach. They can be an important source of information and prospect for collaboration for lawyers in private practice.

The practice of pro bono legal services should be inculcated in law students, legal practitioners, and the legal community more broadly to improve effective access to justice by persons with disabilities.

Challenges Facing Lawyers with Disabilities

There has been a practice in some countries for lawyers with disabilities to assume a leading role in facilitating other persons with disabilities to access court and other bodies dispensing justice. This is well documented in Tanzania where two firms of advocates run by lawyers with disabilities are known to frequently represent persons with disabilities. Such interventions are in addition to other legal aid providers.

However, lawyers with disabilities encounter numerous challenges in discharging their daily activities. One of the major challenges and obstacles is the incursion of extra expenses to accomplish daily tasks. Persons with disabilities typically need special devices or the assistance of fellow human beings, all of which raises operating costs. Generally, to do the same assignment as an able-bodied lawyer, lawyers with disabilities need additional income. It follows that with the same level of income, a disabled lawyer may be able to do far fewer things, and may be seriously deprived of the capabilities that he or she is able to provide. Further, lawyers with disabilities have other continuous needs, such as lifelong medicines, hearing aids, accompanying assistants, or skin lotion.

Lawyers with physical disabilities may also have to pay for adaptations to the offices, higher rent offices on generally accessible ground floors, or individualised cars. These can be necessities which would be considered a luxury for a non-disabled lawyer. Further, lawyers with disabilities often have to pay more for some basic daily needs. For instance, people with limited mobility may have to use the nearest shops, rather than the cheapest shops.

Therefore, lawyers with disabilities have higher operating costs that make their legal practice less competitive than their colleagues in the market. It is therefore suggested that in a bid to increase the level of persons with disabilities' participation in the justice system and access to justice, the legal community should consider devising measures to remove obstacles which make it difficult for them to practice law. The measures envisaged may include, but are not limited to, waiving practicing fees and registration fees together with other contributions to the bar and other statutory bodies. This could lead to just and favourable conditions of work for lawyers with disabilities, which in turn may promote equal opportunities and equal income for work of equal value compared with their able-bodied colleagues. In turn, lawyers with disabilities will be in a better position to offer assistance to persons with disabilities in the community.

Holding Support Institutions to Account

In some Southern African jurisdictions, specific bodies are established under law to advance the rights of persons with disabilities. For example, the Zimbabwe Disabled Persons Act⁵⁷ establishes the National Disability Board. The Board's functions include the formulation and development of measures and policies to ensure persons with disabilities have "full access" to social services, are able to lead independent lives, and to prevent discrimination against persons with disabilities.⁵⁸ To fulfil its functions, the Board has broad powers "to do all things that are necessary or convenient to be done for...the performance of its functions".⁵⁹ Its powers include issuing adjustment orders to ensure persons with disabilities have access to premises and services ordinarily provided to members of the public.⁶⁰ The orders take the form of a direction to the owner of a building or to a service provider to ensure reasonable access to the building and services for persons with disabilities.⁶¹ Non-compliance with adjustment orders is a criminal offence under the Act.⁶²

The legal community is in a good position to ensure these bodies remain informed about restrictions to accessing justice for persons with disabilities, and that they are held accountable to performing their statutory functions with respect to access to justice.

Conclusion: Beyond Symbolism and Rhetoric

In South Africa's Constitutional Court building, design elements were thoughtfully incorporated in an effort to create an inclusive and inviting atmosphere for persons with disabilities who use the building. On the 8 metre high timber doors, engravings representing the 27 rights in the Bill of Rights include sign language symbols amongst the eleven official languages. The handle of the door is marked with braille. Ramps are included directly alongside stairs into and inside of the building.

Stacey Vorster, the art curator of the Court, acknowledges the importance of these gestures for persons with disabilities but questions whether these "triumphalist symbolic moments" translate to meaningful access, inclusion and dignity for persons with disabilities.⁶³ She points out that while there are ramps to access the entrance of the court building, there is no prioritised access to the building for staff with disabilities and questions whether the materials and construction of the available ramps actually serve bodies with different abilities. She gives the further example of how the railing in the judges' chambers was not designed for persons with visual impairment. Only through the use of these rails by Justice Yacoob (a judge of the Court between 1998 and 2013 who is blind) was it understood that the rails needed to be adjusted. Access is not a realistic prospect for persons with disabilities without their inclusion in the process.

57 Cap. 17:01 of the Laws of Zimbabwe.

58 *Id* section 5(1).

59 *Id* section 5(2).

60 *Id* section 7.

61 It is noted that the Board may not issue an adjustment order to public healthcare institutions or educational institutions without the consent of the relevant Minister responsible for the institution, however no such exclusion is made with respect to judicial institutions or legal bodies. Disabled Persons Act, section 7(7).

62 Disabled Persons Act, section 7(10).

63 Interview, 11 October 2016, Johannesburg, South Africa.

Vorster questions further to what extent the design of the building accommodates persons with invisible disabilities, persons whose physical and mental disabilities are not immediately perceptible. For example, the Court building was symbolically built on the grounds of a notorious prison from the apartheid and colonial era and incorporates design and art features of the prison in the new court building to acknowledge the historical context of South Africa's constitutional democracy and its transition from an oppressive past. And yet for survivors of political persecution and violence, entering the site can be an intimidating and re-traumatising experience. How do people with mental and intellectual disabilities experience these features when using the building? Even in these most well-intended gestures of the aesthetics of a space for justice, the human rights of persons with disabilities may be neglected.

Ensuring access to justice for persons with disabilities requires us to move beyond symbolism and rhetoric and to invite change into our habits of thought and practices as a legal community. The inclusion of persons with disabilities in the judiciary, in legal practice and scholarship, and as clients, is indispensable to creating systems of justice regionally that give substance to our commitments to equality before the law. Humbling our assumptions about communication, about the unequal effects of our environments and actions on peoples' capacities to participate, and about what people with disabilities need, are important first steps in the right direction. As discrimination in all areas of life continue to drive the relationship between disability and poverty, the promise of the law and legal process to enforce fundamental rights is vital for persons with disabilities to break this cycle. Access to justice for persons with disabilities is in this way not only a fundamental right to which the legal community must contribute, but is also a vital contribution to sustainable development.