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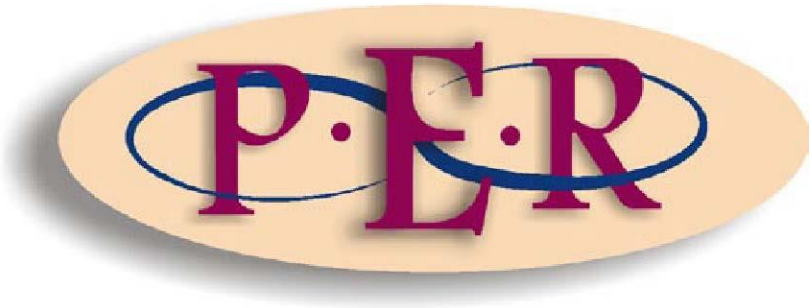

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BARRIERS TO ADVOCACY AND LITIGATION IN THE EQUALITY COURTS FOR PERSONS WITH DISABILITIES

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> This invisibility of disabled people as subjects of human rights and equality law is an inevitable consequence of their separation from the mainstream: a separation caused by their inability to access mainstream facilities due to physical and social barriers. Even if their exclusion and humiliation are noticed, those who conceive of disability primarily in a medical or individual sense are unlikely to recognize such marginalization as involving any form of violation of human rights. It is likely to be attributed to the disabled person's impairment rather than to an inadequate social response to it.[1]
>
> Legal awareness is the foundation for fighting injustice. The poor and other disadvantaged people cannot seek remedies for injustice when they do not know what their rights and entitlements are under the law. Information on remedies for injustice must be intelligible to the public and knowledge provided to them must serve their practical purposes.[2]

1 Introduction

The right of access to justice is indivisible, interdependent and interconnected with all other human rights of persons with disabilities.[3] One of those rights is the right to equality and to be treated as equal before and under the law.[4] This equality by necessity also requires the recognition that prohibition of discrimination on the basis

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1 Lawson 2007 *Syracuse J Int'l L & Com* 563-619.

2 UNDP 2004 http://www.undp.org/governance/docs/Justice_PN_English.pdf.

3 Sheika Hissa al Thani 2006 http://www.un.org/esa/socdev/enable/rapporteur.htm. See also the *Vienna Declaration and Program of Action's* (1993) refrain that human rights are "indivisible, interdependent and interrelated" (para 63) (World Conference on Human Rights 1993 http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)A.CONF.157.23.En).

4 A 5(1) of the *Convention on the Rights of Persons with Disabilities* (2007) (CRPD) provides: "State parties recognises that all persons are equal before and under the law and are entitled, without any discrimination, to equal protection and equal benefit of the law."

of disability is essential to persons with disabilities.[5] The *Convention on the Rights of Persons with Disabilities* (the CRPD) recognises that equal and effective legal protection against discrimination is required if this prohibition is to be asserted.[6] Reasonable accommodation of their needs is deemed as the standard to ensure the elimination of discrimination and the promotion of equality.[7] The rights to equality and access to justice are often not realisable without accessibility being provided to persons with disabilities. The CRPD therefore recognises the centrality of accessibility to the fulfilment of their other rights. Accessibility is to be facilitated by identifying and eliminating barriers to their transportation, to their accessing public services more generally, and to their being fully informed of their rights.[8] It is the existence of barriers to such access that often confounds their enjoying their rights to equality and their access to justice.

The effective implementation of the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 (PEPUDA or the *Equality Act*)[9] as a legislative measure aimed at eliminating discrimination on the basis of disability[10] by any persons and

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5 See Rioux 1994 *CJLJ* 127-147 for the difference between assimilationalist (participative and inclusive) and pluralist (accommodative) claims for equality of well-being.

6 A 5(2) of the CRPD.

7 A 5(3) of the CRPD. See also the definition of "reasonable accommodation" in a 2 of the CRPD: "necessary and appropriate modifications and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the equal enjoyment or exercise on an equal basis with others of all human rights and human freedoms".

8 A 9 of the CRPD. See also Committee on the Rights of Persons with Disabilities *General Comment 2: Article 9 - Accessibility* (2014) CRPD/C/GC/2 (*General Comment 2)*.

9 The *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 (PEPUDA), was promulgated before the CRPD in 2003 whilst the CRPD and the *Optional Protocol to the Convention on the Rights of Persons with Disabilities* (2007) were ratified by the South African Government on 3 April and 3 May 2008, respectively. PEPUDA is a legislative measure, contemplated by the general principles in a 4 of the CRPD, to implement the rights granted by the CRPD to equality and access to justice (a 4(1)(a)). It is also a legislative measure aimed at modifying or abolishing existing practices, laws, regulations and customs that constitute discrimination against persons with disabilities (a 4(1)(b)). It is a measure aimed at eliminating discrimination on the basis of disability by any person, organisation or private enterprise (a 4(1)(e)). A 5(2) requires the provision of equal and effective legal protection against discrimination, and a 13 requires the provision of access to justice. The *Equality Act* finds its constitutional imperative in s 9(2) and (4) of the *Constitution of the Republic of South Africa*, 1996 (the Constitution), which requires that Parliament enact national legislation to prevent or prohibit unfair discrimination.

10 This paper does not focus on another legislative measure, the *Employment Equity Act* 55 of 1998, which is aimed at eliminating labour policies and practices that unfairly discriminate on the basis of disability, and provides positive measures, including affirmative action, to advance persons with disabilities in the workplace. See Ngwena 2004 *Stellenbosch LR* 534-561.

the fulfilment of the South African state's obligations of the CRPD to ensure access to justice for persons with disabilities is dependent on two fundamental tools: advocacy and litigation.

Advocacy entails making persons aware not just of their right to equality but also of the mechanisms that are available to them to ensure that they receive the respect due to them, that their right to equality is fulfilled and promoted, and to challenge acts of discrimination against themselves and on behalf of others affected by prejudice, disadvantage and inequality. The importance of awareness raising and advocacy cannot be underrated and has been explicitly recognised by the CRPD,[11] which requires an undertaking from states that they will adopt measures *inter alia* to raise awareness throughout society regarding persons with disabilities, to foster respect for their rights, and to combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on gender and sex. Advocacy (and also law reform) should also address the affirmation of the right of persons with disabilities to recognition as persons before the law, which requires that states recognise that their legal capacity must be enjoyed on an equal basis with others in all aspects of life.[12] Notions of capacity or incapacity not only feed into the public's and the state's recognition of the autonomy and agency of persons with disability, but can also create legal barriers to their accessing justice.[13]

The other tool is litigation. Whilst accepting the limits of the law, and in particular anti-discrimination claims, in bringing about social justice through changing social norms, litigation remains one of the traditional ways to recognise a person's equal worth before the law and to give content to states' obligations to promote and protect the rights of all persons to human dignity. Litigation can "test the willingness of the judicial system" to award declaratory or injunctive relief to litigants who have

11 A 8 of the CRPD.
12 A 12 of the CRPD.
13 A discussion on legal capacity and the obligations on states to ensure that this requirement is fulfilled, as well as the South African law reform efforts in this regard in the form of the *Draft Assisted Decision-making Bill for Adults* (2012) fall outside the scope of this paper. See also a discussion on the *Draft Assisted Decision-making Bill* in Holness 2014 *SAJHR.* See further Dhanda 2007 *Syracuse J Int'l & Comp L* 429.

been disadvantaged in the past.[14] Of the many tools available to ensuring that all persons attain equality before the law,[15] ensuring accessible justice mechanisms in terms of article 13 is perhaps the most useful. If all are treated the same before the law and granted equal access to legal remedies, we will be closer to bringing about a just and free society for all who live in it.

The way that the law treats those subject to it is also an indicator not just of the status of the affected persons but also of the country's commitment to democracy and social justice.

The relationship between litigation and advocacy is mutually beneficial. Outcomes in judgments can be used in capacity building or awareness-raising activities[16] to challenge and hopefully to change social norms of difference. This requires engagement with the media as well. As Lewis[17] notes, litigation is the only legal arena that puts the victim, usually considered as "helpless and passive", in charge of proceedings. Van Marle[18] contends that we must be careful not to harm the respect or the dignity (and imaginary domain) of individuals by defining and approaching them as "vulnerable", "most needy" and so on. These kinds of labels are disempowering, not only to categories of persons such as women, but also to persons with disabilities, as it pertains to their agency to bring matters in their own interest. Self-advocacy and the ability and requisite knowledge to bring a discrimination claim is highly reliant on agency. The empowering aspect of litigation not only positively impacts on the parties to the litigation but also on similarly situated persons.

Unfortunately, the empowering nature of a successful discrimination claim requires that the court system itself is accessible for the claimant to bring the claim in the

14 Lewis 2011 *EHRLR* 713.
15 It has been shown that compliance with the obligations of states to the CRPD, much as with many other international law obligations, requires the use of a multitude of tools, including monitoring under a 33(2) and (3), law and policy reform under a 4(1)(b), systems development, media sensitisation under a 8(2)(c) and awareness-raising throughout society under a 32(2) of the CRPD, amongst others (Lewis 2011 *EHRLR* 706).
16 Lewis 2011 *EHRLR* 714.
17 Lewis 2011 *EHRLR* 714.
18 Van Marle 2002 *Stellenbosch LR* 307.

first place. Where courts are not accessible, claimants will not be able to enter the arena. This will render access to justice and equality before the law a nullity. Accessibility therefore requires the dismantling of both physical and social barriers to the right to equality. It is the dismantling of these barriers, often in the form of social norms, that this article speaks to.

The goal of equality for persons with disability has been described as follows:

> The goal is to achieve a barrier-free society for persons with disabilities which accommodates a wide spectrum of individual abilities and not a society which simply expects all to conform to one hypothetical, typically fictional 'normalcy' standard before they 'fit in'. Equality seeks to attain an environment whose old barriers have been removed and where new barriers are prevented before they are created, in which persons with disabilities are fully included as of right, free from stereotype or other impediment, with full respect for their dignity and worth as individuals, and with full, effective and timely accommodation.[19]

These various tools in the arsenal of persons with disabilities and their organisations, however, cannot be seen in a vacuum and by necessity require the participation of those affected by the rights violations to refine access to crucial mechanisms by using the tools themselves and being part of the process of developing their use. The participation of persons with disabilities in how government legislates and formulates and implements policies and programmes that affect them as well as in monitoring the effectiveness of these laws and policies is vital, and indeed a requirement of the CRPD in terms of articles 4(3) and 33(3).[20]

The efficacy of these two tools – advocacy and litigation - is premised on two presumptions: firstly, that self-advocacy and the ability and knowledge to bring anti-discrimination claims are reliant on a person's agency; and secondly, that the empowering nature of litigation requires an accessible justice system. Despite the designation of all Magistrates' Courts in South Africa as Equality Courts,[21] there is

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19 Lepofsky 1996 *NJCL* 287.

20 The Committee on the Rights of Persons with Disabilities has recognised the need for participation in *General Comment 2* para 35.

21 S 16(1)(a) of PEPUDA requires that every High Court be designated as an equality court for the area of its jurisdiction. S 16(1)(c) provides that one or more magistrate's courts are to be designated as equality courts by notice in the *Government Gazette.* See Kruger 2011 http://www.equalrightstrust.org/ertdocumentbank/ERR7_kruger.pdf.

scant research on the impact of litigation in the Equality Courts and advocacy initiatives to realise the rights of persons with disabilities in South Africa.

This article will focus on the impact of the advocacy initiatives of CREATE (Community Based Rehabilitation Education and Training for Empowerment), a KwaZulu-Natal NGO, to promote the rights of persons with disabilities and the utilisation of the Equality Court to realise the right of access to justice.[22] The impact of the advocacy efforts is gleaned from the reports of nine workshops held during 2011-2012 aimed at human rights forum members who are members of the community of persons with disabilities, including activists, government officials and other stakeholders, on utilising PEPUDA and the Equality Court for discrimination claims. A shadow report to the Committee on the Rights of Persons with Disabilities in 2010 and continuous monitoring of state obligations in terms of the CRPD are also considered.[23] The mandate of the human rights forums is to raise awareness of human rights within their districts, and to receive complaints of violations of the rights of persons within the disability community through referral to appropriate resources.[24]

The aim of the workshops was to engender attitudes towards persons with disabilities that would allow the members of the forums to effectively assist persons with disabilities in a non-discriminatory manner. This article is in essence an identification of the barriers facing the practical implementation of PEPUDA and the CRPD by the state from the perspective of disabled persons' organisations (DPOs). It is also a critique of the state's efforts to ensure the accessibility of Courts, as mandated by the Act and the Convention.

Participants in nine workshops in KwaZulu-Natal identified three barriers for persons with disabilities to access justice in the Equality Courts. Firstly, some Equality Courts are geographically (and financially) inaccessible. Secondly, the negative and insensitive attitudes of frontline workers impact on the ability of persons with

22 Rule and Zuma 2011 *ESR Review* 15-18.
23 See CREATE 2011 http://www.create-cbr.co.za/index.php?option=com_content&view=article&id=12&Itemid=16.
24 Rule and Zuma 2011 *ESR Review* 15.

disabilities to bring equality claims to and access the services of the Equality Court. These barriers also constitute discrimination and flout article 13 of the CRPD, which requires the provision of support for persons with disabilities to access the justice system. Thirdly, cultural norms and fears impede access to courts and the agency of persons with disabilities to bring these claims. Examples of this are the requirement that traditional leaders provide "permission" to persons with disabilities to sue, and a similar requirement of permission from the in-laws of women with disabilities. This contravenes the state's obligation to alter social norms regarding persons with disabilities under article 8 of the CRPD.

First, we ask if the promise of the *Equality Act* and its courts to persons with disabilities has been delivered, with particular emphasis on physical access to buildings and the inaccessibility of the courts generally. It is within this context that the CREATE workshops were initiated. Second, we provide a brief explanation of the advantages of advocacy and litigation to promote the rights of equality and access to justice of persons with disabilities. Third, we will analyse the three barriers identified above that inhibit advocacy and litigation, with regard to the factors of availability, affordability, adequacy and the sensitivity of legal assistance to persons with disabilities within the Equality Court framework.[25] We will discuss the implication of these barriers for the state's obligations in terms of articles 5, 8, 12 and especially article 13 of the CRPD. Fourth, recommendations are made on overcoming these barriers.

2 The promise of the Equality Act and its courts

In this part of the article, we will describe the potential of the relevant provisions of the *Equality Act* and the proceedings of the Equality Courts to fight discrimination against persons with disabilities. Thereafter we will analyse three cases brought before the Equality Courts on the basis of disability discrimination. Lastly, we argue that the gains made in the Equality Courts are limited in scope, and we make recommendations in that regard.

[25] Women's Legal and Human Rights Bureau 2010 http://www.ohchr.org/Documents/HRBodies/CEDAW/AccesstoJustice/WomensLegalAndHumanRightsBureau.pdf.

The promulgation of PEPUDA ushered in an era of promise – a promise to promote equality and to prevent unfair discrimination in the post-apartheid legal landscape.[26] The mechanisms for promoting equality for persons with disabilities included the establishment of the Equality Courts[27] to promote access to justice for the bringing of anti-discrimination cases, the prohibition of unfair discrimination on the basis of disability,[28] as well as special measures to promote disability equality.[29] The Act also caters for claims of unfair discrimination on the basis of gender and provides a list of prohibited grounds[30] that is not exhaustive.[31]

2.1 Unfair discrimination claims on the basis of disability

The provision for the prohibition of unfair discrimination on the basis of disability includes examples of situations that are *prima facie* discriminatory, including: denying or taking away any facilities which disabled persons need to be able to function in society (such as wheelchair access ramps); violating the codes of the South African Bureau of Standard which govern the measures and facilities which must be provided for persons with disabilities; failing to accommodate the needs of disabled persons; or failing to remove obstacles that stop disabled persons from

26 Bohler-Muller 2006 *SAJHR* 381.

27 S 16(a) of PEPUDA.

28 Ss 6 and 9 of PEPUDA.

29 S 28 of PEPUDA. The special measures in terms of PEPUDA aim to promote the accountability of state officials and organisations in fulfilling their responsibility to promote gender equality. For instance, the South African Human Rights Commission is required to include in its reports an assessment of the extent to which unfair discrimination on the basis of disability persists, the effects thereof, and draft recommendations on how to address these problems. Unfortunately s 28 has not yet come into effect because the government still has not done the costing for the promotional section of PEPUDA, despite its assent to the Act in 2000 and the commencement of the greater part of the Act in 2003. See SAHRC 2009 http://www.info.gov.za/view/DownloadFileAction?id=111467.

30 "Prohibited grounds" in terms of the definitional clause, s 1 of PEPUDA, include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, religion, conscience, belief, culture, language and birth. Unfair discrimination based on unlisted grounds (those that cause or perpetuate systemic disadvantage, undermine human dignity or adversely affect the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a listed ground) is also prohibited.

31 See for example arguments for the inclusion of socio-economic status as a prohibited ground in Liebenberg and O'Sullivan 2001 *Acta Juridica* 70-103; Reddy 2002 *TSAR* 674. Also see the list of suggested grounds in other jurisdictions, such as breastfeeding, the possession of a criminal record or an irrelevant criminal record or an irrelevant medical record, parenthood, physical appearance, same-sex partnership status, source of income or status as a recipient of social welfare payments or as a member of a trade union in Kok 2008 *SAJHR* 462.

enjoying equal opportunities.[32] These are primarily minimum design obligations relating to certain buildings. Kok[33] indicates that these provisions institute design obligations for ramps, lifts, doors, toilet facilities, auditoria and halls, parking facilities and so on. Schedule 1 to the Act includes an illustrative list of unfair practices in certain sectors.[34] According to Kok,[35] this list appears to be a range of examples of possible discriminatory practices considered by the legislative drafters. He suggests that the examples "will be very helpful to unimaginative lawyers who may have instituted actions on behalf of their clients arising from situations similar to those listed in the schedule."[36] As will be discussed below, very few of these examples have in fact been litigated in the Equality Courts to date.

The Act therefore is a legislative step taken to promote the right to equality, eliminate discrimination, and provide access to justice for persons with disabilities, in line with the obligations of the South African state in terms of the CRPD. For clarity's sake, access to justice, in terms of article 13 of the CRPD, requires state parties to respect, protect and fulfil the enjoyment of the right of access to justice for persons with disabilities as follows. Firstly, states must provide effective access to justice on an equal basis with others; secondly, they must provide effective access to justice at all phases of the administration of justice, including preliminary and initial investigative stages; thirdly, they must enable persons with disabilities to be both direct and indirect participants in proceedings, including witnesses and complainants; fourthly, they must ensure that persons with disabilities receive procedural and age-appropriate accommodations to facilitate their access to justice; and fifthly, they must ensure that persons with disabilities are assisted before and during legal proceedings by adequately trained officials of the justice administration. The accessibility of the *Equality Act* and Equality Courts to litigants with disabilities will therefore be tested against these obligations.

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32 Kok 2001 *TSAR* 305.
33 Kok 2001 *TSAR* 299.
34 This includes labour and employment, education, health care services and benefits, housing, accommodation, land and property, insurance services, pensions, partnerships, professions and bodies, the provision of goods, services and facilities, and clubs, sport and associations.
35 Kok 2001 *TSAR* 309.
36 Kok 2001 *TSAR* 309.

It must be borne in mind that one of the defects of anti-discrimination laws is that the provisions are generally enforced by a complaints-driven process and the complainant must initiate the procedure.[37] What this means is that if the complainant does not perceive that she has been discriminated against,[38] or fears intimidation or harassment when complaining, she will not approach a court and the disadvantage will remain. The limits of court-driven adjudication have been expressed as follows:

> … laws will not enforce themselves. Human beings must execute them, and there must be some motive setting the individual in motion to do this above and beyond the abstract content of the rule and its conformity to an ideal justice or an ideal of social interest.[39]

These limits can be countered if complainants are aware of their rights and the remedies available to them when violations occur, and rely on accessible courts, through trained staff that are sensitised to the needs of persons with disabilities. Only then can the laws be executed and enforced. Some commentators are of the view that courts are not suited to solving the kind of problems (often structural)[40] encountered in instances of discrimination.[41] Fortunately PEPUDA embraces a substantive notion of equality, although its ease of enforcement is debatable.[42]

2.2 The Equality Courts and their proceedings

The Equality Courts are well intended to remove barriers to access to justice for the poor as there is no cost involved and the plaintiff does not require legal representation.[43] The courts have been deemed suitable to South Africa's historical

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37 Kok 2008 *SAJHR* 447.
38 Kok 2008 *SAJHR* 447.
39 Pound 1917 *ABAJ* 69.
40 Fredman 2005 *SAJHR* 168.
41 Fuller 1978 *Harvard LR* 353-409. See also Kok 2008 *SAJHR* 447, citing Freedman 1998 *SALJ* 251 arguing that the adjudicative model "is designed to deal with discrete wrongs and not with systemic inequality", which means that it is unlikely that success in a structural discrimination case will have a wider or radiating effect or change.
42 S 1(1)(ix) of PEPUDA.
43 The presiding officer is obliged, in terms of Regulation 10(5)(e) to the *Equality Act*, to inform an unrepresented party at the directions hearing of her right to legal representation at own expense or, if she is not in a position to afford legal representation, that she may apply for legal aid and that she may approach institutions like the South African Human Rights Commission, the Commission for Gender Equality and a variety of non-governmental organisations for legal representation.

context.[44] Some commentators, however, caution that because of the complexity of equality claims, legal representation may be necessary for some litigants, especially women, and call on the state to provide free legal representation.[45] Where free legal aid exists, such as the Legal Aid South Africa Justice Centres, representation in civil cases such as Equality Court cases is rare due to resource constraints and prioritisation resulting from these constraints.[46] It is especially necessary to provide representation to unrepresented indigent litigants when the respondents are better resourced and represented, resulting in an imbalance of power between the parties.[47] For persons with disabilities, access to legal representation is vital. Gibson[48] argues that access to justice is meaningless without the right to free legal aid, especially for persons with disabilities, because of their lack of knowledge of the legal system and the likelihood that they suffer from extreme poverty. Measures relating to support for the promotion of awareness, education, accessibility and access to justice are to be found in section 9 (equality) and 34 (access to justice) of the *Constitution*; section 2(d) and (e) (equality, education, awareness-raising[49] of the *Equality Act*; and articles 8[50] (awareness-raising), 9 (accessibility)[51] and 13 (access to justice) of the CRPD.

The guiding principles of the Act include requiring that proceedings are expeditious and informal, and that both restorative and corrective measures are employed in

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44 Kaersvang 2008 *Journal of the International Institute* 4-9.

45 Fredman and Sullivan 2001 *Acta Juridica* 101.

46 Keehn 2010 https://escholarship.org/uc/item/1ms61553#page-1.

47 Bohler-Muller 2006 *SAJHR* 386.

48 Gibson 2010 *AJHR* 131.

49 S 2(e) of PEPUDA lists as one of its objects to provide for measures to educate the public and raise public awareness on the importance of promoting equality and overcoming unfair discrimination, hate speech and harassment.

50 A 8(1) of the CRPD requires that state parties undertake to adopt immediate, effective and appropriate measures to raise awareness throughout society, including at the family level, regarding persons with disabilities and to foster respect for the rights and dignity of persons with disabilities; to combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life; and to promote awareness of the capabilities and contributions of persons with disabilities. A 8(2) includes a list of measures to this end.

51 A 9 of the CRPD stipulates that "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 communication, including information and communication technologies and systems, and to other facilities and services open or provided to the public, both in urban and rural areas".

conjunction with deterrent measures.[52] It also requires the courts to utilise rules of procedure and criteria that facilitate participation.[53] The participation of persons with disability and the reasonable accommodation and ease of access are therefore guaranteed. Importantly, the drafters recognised that in applying the Act, the following must be taken into account:

> The existence of systemic discrimination and inequality, particularly in respect of race, gender and disability in all spheres of life as a result of past and present unfair discrimination, brought about by colonialism, the apartheid system and patriarchy; and the need to take measures *at all levels* to eliminate such discrimination and inequalities.[54]

The effects of these three legacies – colonialism, the apartheid system and patriarchy – are also felt by persons with disabilities. Patriarchy in particular has played and continues to play a disempowering role for women with disabilities, as will be seen, particularly in accessing the justice system.

Generous standing provisions[55] mean that the court in the abstract is open to all persons to institute proceedings. Ground-breaking remedies, in an open-ended list, are extensive, incorporating corrective, restitutive and deterrent measures, and go beyond the individual parties.[56] The systemic remedies have been hailed as imaginative.[57] These remedies include audits, special measures and interdicts, as well as reports to the court or another institution as to the progress made in implementing the remedies.[58] The order to make all courts accessible to persons with disabilities in the *Muller* case that will be discussed below is an excellent example of a systemic remedy.

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52 S 4(1)(a) to (c) of PEPUDA.
53 S 4(1)(d) of PEPUDA.
54 S 4(2)(a) and (b) of PEPUDA.
55 S 20(1)(a) to (f) of PEPUDA.
56 This includes interim and final declaratory orders, payment of damages to the complainant or in the form of an award to an appropriate organisation; implementation of special measures to address the discrimination; directives to the respondent to provide progress reports to the court or another institution regarding the implementation of the order; unconditional apologies and so on. See s 21(2)(a) to (p) of PEPUDA.
57 Allen 2010 *U Tas LR* 106.
58 See for example *Mkhize v Edgemead High School* (EqC) Blue Downs. The order included an unconditional apology, payment to another body, an audit of the respondent's policies and practices, and that the respondents attend a diversity and racial sensitisation training programme. The court ordered the South African Human Rights Commission to monitor the order's implementation. Lane 2005 http://www.csvr.org.za/wits/papers/paprctp5.htm.

2.3 Disability discrimination cases in the Equality Courts to date

The question then is how successful the Equality Courts have been to date in dealing with anti-discrimination cases on the basis of disability. There have been strides made in removing physical access barriers to persons with disabilities. Three cases have been successful to date. These are the *Muller*, *Bosch* and *St Thomas of Aquinas School* cases. The outcome in these three cases will be outlined.

An equality claim was brought by Ms Muller, a lawyer and wheelchair user, against the Department of Justice and Constitutional Development and the Department of Public Works because of the inaccessibility of courthouses.[59] On one occasion Ms Muller had to be carried down a flight of stairs to enter the courthouse, and on another occasion the court had to postpone her cases because she could not get into the court room. A settlement was reached in 2004 in terms of which the two departments admitted that they had failed to provide proper wheelchair access and that the lack of accessibility was a form of unfair discrimination against Ms Muller and other persons with similar needs.

In 2005, a complaint was filed by Mr Bosch, a wheelchair user, challenging the lack of access by persons with disabilities to the first floor of the Park police station.[60] Mr Bosch had a query about his fire-arm licence and visited the police station at Kabega Park. The police station was at that time under construction. His query was resolved by an officer at a container, but whilst there he noticed that the police station's licence payment office was to be constructed on the first floor and that it would be inaccessible to wheel-chair users and other mobility-impaired persons, as no lifts or ramps would be installed. Mr Bosch proceeded to lodge his concerns with the police station and wrote numerous letters raising the future problem of access to persons with disabilities to the police station. The Community Policing Forum echoed Mr Bosch's complaint but to no avail. In court Mr Bosch contended that the stairs would allow persons with crutches to access the first floor with great difficulty and

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59 *E Muller v Department of Justice and Department of Public Works* (EqC) unreported case number 01/2003.

60 *WH Bosch v Minister of Safety and Security* (EqC) unreported case number 25/2005 Port Elizabeth (*Bosch* case).

assistance by able-bodied persons. This would, he testified, create discomfort and humiliation to the person being assisted by a stranger and consequently would infringe her dignity.

The Equality Court agreed and articulated the inclusive approach of the Act to persons with disabilities, which is:

> that they are treated on equal footing with other groups [and that] through positive steps society must take steps to ensure that such people can participate as fully as possible in all aspects of life and are not prevented from doing so because opportunities and resources are denied them.[61]

This approach is in line with the CRPD, but it must be noted that at the time this case (and incidentally the *Muller* case) was heard, the CRPD had not yet been adopted by the United Nations, and that it was ratified by South Africa only in 2007.[62] The court emphasised the value of dignity and rebuked the respondent for the way in which Mr Bosch and by association persons with disabilities were being treated:

> There is no price that can be attached to dignity or a threat to that dignity. There is no justification for the violation or the potential violation of the disabled person's right to equality and maintenance of his dignity that was tendered or averred by the Respondent. The Respondent was unyielding and uncompromising, that disabled people just have to be assisted and receive their receipts on the ground floor without a justification or a time limit when the opportunity to be inclusive of them was there, at renovation stage, they did not make organised or rational plans for inclusion. Thus the court finds the discrimination is unfair.[63]

The emphasis on dignity is congruent with the purpose of the CRPD, which includes the promotion of respect for the inherent dignity of persons with disabilities.[64] The police station was required to ensure accessibility for persons with disabilities and the elderly to the building. Further, the court ordered that until the renovations were conducted the police officers were required to move to the ground floors. The police commissioners were also required to write letters of apology acknowledging their

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61 *Bosch* case 8.

62 The CRPD was adopted by the United Nations on 13 December 2006. South Africa ratified both the CRPD and its Optional Protocol on 30 November 2007. The CRPD entered into force on 3 May 2008.

63 *Bosch* case 8.

64 A 1 of the CRPD.

inappropriate attitude towards persons with disabilities. This court order, as did the court in the *Muller* case, gives effect to the requirements of accessibility in the CRPD, which includes *inter alia* that the state provides appropriate measures to ensure that persons with disabilities can access, on an equal basis with others, facilities and services open or provided to the public.[65] Since then, the Committee on the Rights of Persons with Disabilities has commented that the application of a universal design for buildings from the outset, in other words when designing new buildings, is more economical than the subsequent removal of barriers from existing buildings.[66] More importantly, the Committee[67] has stressed that:

> There can be no effective access to justice if the buildings in which law-enforcement agencies and the judiciary are located are not physically accessible, or if the services, information and communication they provide are not accessible to persons with disabilities.

The case has been hailed as setting "an important precedent for enforcing the rights of people with disabilities in an accessible forum and with meaningful remedies. It remains to be seen if institutional deficiencies in the operation of the Equality Courts will frustrate hopes for further disability adjudication".[68]

In the third case, in December 2010, the Witbank Equality Court ordered the St Thomas Aquinas Private School in Witbank to re-admit a girl learner who had been denied re-admission due to her physical disabilities.[69] Due to the fact that Witbank area and the surrounding areas do not have a school for children with disabilities, the St Thomas Aquinas Private School accepted her with full knowledge of her physical impairments.

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65 A 9(1) of the CRPD. See Department of Women, Children and Persons with Disabilities *First Country Report* 13 para 53, which notes that out of 1135 police stations nations-wide, the number of police stations that have accessible counters are 371; accessible toilets 627; ramps 606, and parking bays for persons with disabilities 415.

66 *General Comment 2* para 15. Note that the obligation to provide new facilities or infrastructure designed for accessibility in line with universal design is that it must be implemented gradually. Yet the Committee stressed that states must establish time frames for this gradual implementation, and that adequate resources must be allocated to remove barriers in the meantime (para 24).

67 *General Comment 2* para 37.

68 Bhabha 2009 *SAJHR* 245.

69 *LH Oortman v St Thomas Aquinas Private School* (EqC) unreported case number 1/2010 Witbank.

Initially, in an effort to create an enabling environment for the learner, the school arranged that all her classrooms should be on ground level, provided her with a bursary and access to a toilet, breathing apparatus, a wheelchair, and a special table for use in class. She was also provided with transport during school and sport functions, and the school also regulated her access to the tuck shop by allowing her to go first. However, despite all these laudable efforts, the learner still experienced challenges at the school. These were that all the classrooms as well as the toilet allocated to her had a high step which prevented her from entering the rooms in the wheelchair; the toilet was also always locked and was not a special one designed for persons with disabilities; the washbasins were also too high for her to reach to be able to wash her hands; the library was situated on the first floor and the learner had to climb many steps to access it; and some of the teachers were allegedly not always helpful with the wheelchair. Some of them were also impatient with her and were not trained to work with learners with disabilities.

When the school failed to make additional alterations to the school environment to enable her to learn, her mother took her out of the school and provided her with home schooling. Her mother later decided that she wanted her to be taken back to school but the school principal refused to re-admit her, claiming that she had been failing her grades. She then approached the Commission for Gender Equality to litigate the case on her behalf. This case was important because it would help sensitise the owners of buildings and those responsible for them to the fact that their buildings had to comply with the building regulations and be accessible to persons with disabilities.[70]

The court found the school's actions to amount to unfair discrimination against learners with physical disabilities. Besides ordering the school to re-admit the

[70] In the *Viera* case, unreported Johannesburg Equality Court, Gauteng, cited in SAHRC 2006 http://www.pmg.org.za/docs/2006/061016sahrc1.pdf, a father of a student at a tertiary institution brought a claim against the university for not providing ramps to the buildings that his son had to access with his wheelchair, as he is quadriplegic. During a postponement for a joinder application, the ramps were built and the matter was dismissed for being moot. This case is still important because it points to the fact that the threat of litigation, or perhaps the embarrassment of litigation, can galvanise action on the part of the respondent. This case was taken to the Equality Court by the South African Human Rights Commission when they were contacted by the father.

learner, the court also ordered the school to take reasonable steps to remove all obstacles to enable the learner to have access to all the classrooms and the toilet allocated to her when using her wheelchair. The reasonable steps that were to be taken included building ramps at the classes she had to attend as well as to the toilets she would use, and build a washbasin for persons with disabilities in that toilet. The door to the toilet was not to be locked. All of this was not only to the benefit of the learner but for other persons living with disabilities as well. In addition, the school principal was ordered to investigate the alleged strained relationship between the learner and her teachers and to take the necessary steps to solve the problems that had led to the alleged breakdown. Lastly, the teachers were to be given the necessary training and gain experience in working with learners with disabilities. The CRPD's measures to promote accessibility to the physical environment, transportation and information and communications apply specifically to schools.[71]

2.4 The unmet promise of the Equality Courts for persons with disabilities

These three cases show how not only public buildings such as court houses and police stations must be accessible to persons with physical disabilities, but also private buildings such as the school in the *St Thomas of Aquinas Private School* case, and in a fourth case, the *Sekati* case – a block of flats.[72] Ms Sekati filed an unfair discrimination complaint in the Equality Court against the block of apartments where she resided, for it not being accessible to wheelchair users. The court ordered that the landlord install wheelchair ramps based on a finding of unfair discrimination on the basis of disability. Reference to the CRPD is useful here, in that article 9 requires that state parties take appropriate measures to ensure that *private* entities that offer facilities and services which are open to or provided to the public take into account all aspects of accessibility for persons with disabilities.[73]

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71 A 9(1) of the CRPD. See also *General Comment 2* para 39.

72 See *Sekati* case (unreported) Gauteng cited in SAHRC 2006 http://www.pmg.org.za/docs/2006/061016sahrc1.pdf.

73 A 9(2) of the CRPD. *General Comment* 2 para 13 has emphasised that: "The focus is no longer on legal personality and the public or private nature of those who own buildings, transport infrastructure, vehicles, information and communication, and services. As long as goods, products and services are open or provided to the public, they must be accessible to all,

These cases are important victories for the rights of persons with disability to equality, dignity and reasonable accommodation.[74] Of these cases, the most visible catalyst for change was the settlement order agreed to by the parties in the *Muller* case. The recalcitrant departments agreed to formulate and implement a plan to make all court buildings accessible to persons with disabilities within three years of the order – thus by 2007 – including one court room and one toilet to be accessible to persons with disabilities in each court building. This has resulted in an increased budget allocation to make courts specifically more accessible to persons with disabilities. For example, the Deputy Minister of Justice and Constitutional Development[75] in December 2012 issued a statement indicating the progress made in the Mpumalanga province in making courts accessible:

> [Out of a total of 37 courts] 17 courts have completed phase 1 accessibility, meaning they have a ramp, grab rails, signage, and toilets for people with disabilities. A further 8 courts are in phase two accessibility, meaning that the court rooms themselves have been converted, as well as service points in the court building such as cash halls and holding cells. A total of 21 courts have disabled friendly parking facilities. The department has prioritised 12 courts for both phase 1 and phase 1 accessibility during the 2013/14 financial year." In addition, lifts for people with disability have been installed at Magistrate Courts at Nelspruit, Witbank, and Middelburg. Two sign language interpreters have also been employed. Justice material is also being produced in braille. Recently, during child protection week in June 1500 booklets explaining the Domestic Violence Act were distributed.

This is undoubtedly a move in the right direction.[76] It is important that the legal principles and victories attained in these cases are used for political advocacy not

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regardless of whether they are owned and/or provided by a public authority or a private enterprise."

74 For an analysis of successful anti-discrimination litigation in South America regarding accessibility to a public library, the right to vote, the right to travel with a helper or guide dog on an airplane, denial of health insurance and sign language on television stations, see Cisternas Reyes "Standard Rules on Equality" 419-450.

75 The Department has engaged a programme to the cost of R10 000 to make building accessible and R2 million to provide awareness booklets in Braille. Department of Justice and Constitutional Development 2012 http://www.justice.gov.za/m_statements/2012/20121204_dm-pwd.html.

76 See also the (former) Department of Women, Children and Persons with Disabilities 2013 http://www.pmg.org.za/print/report/20130220-department-women-children-people-disabilities-country-report-un-conve which reported that a total of 249 buildings have been made accessible from 2008/09-January 2012/13 at a cost of USD 63,5 million, and includes 159 police stations, 22 Defence buildings, 51 Correctional Services Centres, 13 Offices, 2 Training Centres, and 2 Courts. The latest version of the First Country Report dated 27 June 2014 reports that for phase 1 of the accessibility of buildings project, 366 out of 684 court buildings have facilities for persons with disabilities on ground level (toilets, parking and ramps), whilst phase 2 will target

only to raise awareness of the state's and private actors' obligations to ensure accessibility for persons with disabilities to public and private spaces, but also to remind government of the gains made and their continued obligation. For example, the Canadian Hearing Society participated in a coalition intervention in the Canadian case of *Eldridge v British Columbia*[77] and has continued to emphasise the legal principles from the case in its educational and political activities:

> CHS continues to educate all levels of government on the extremely important issues of accessibility for persons with disabilities, including those who are deaf, deafened and hard of hearing… We use legal developments such as the Supreme Court of Canada's decision in *Eldridge* and the Tax Court of Canada's landmark policy to educate the public that individuals continue to shoulder the responsibility to fight for their rights if a school, hospital, business or government department does not provide access. It is costly in money and human dignity to take every violation before the Human Rights Commission on a case-by-case-basis.[78]

DPOs in South Africa as well as Chapter 9 institutions such as the South African Human Rights Commission (SAHRC)[79] should heed this example and ensure that media sensitisation and advocacy provides spaces for the public, government and persons with disabilities to continue to advance the equality of persons with disabilities on a basis equal with others.[80] The role of the Chapter 9 institutions, including the Commission for Gender Equality (CGE) and the SAHRC, in bringing some of these cases to the Equality Court must be acknowledged.[81]

The continuing role that the SAHRC plays in monitoring the implementation of the *Equality Act*, and particularly its role in the monitoring of disability rights, including at the international law level, will remain vital. The SAHRC has established a section 5 committee on the CRPD under its Treaty Monitoring Unit to monitor the

318 court buildings. Department of Women, Children and Persons with Disabilities *First Country Report* para 58-59.

77 *Eldridge v British* Columbia [1997] 3 SCR 624.

78 Armstrong 2003 *JLE* 80.

79 The SAHRC was established by Chapter 9 of the 1996 *Constitution* as an independent and impartial institution to promote respect for human rights and a culture of human rights. The SAHRC derives additional legal mandate from the *South African Human Rights Commission Act* 14 of 2003; the *Promotion of Access to Information Act* 2 of 2000 (PAIA); and the *Equality Act*.

80 *General Comment* 2 para 35 notes the role of various stakeholders in awareness-raising, including the media, persons with disabilities, their representative organisations, technical experts, and both the public and the private sectors.

81 S 20(1)(f) of PEPUDA provides that proceedings may be instituted by the SAHRC or the CGE.

implementation of the CRPD.[82] The unit has developed a Disability Toolkit which contains manuals and other support materials for caregivers, businesses, trainers and other relevant stakeholders.[83] It is aimed at spreading awareness about issues affecting persons with disabilities.

The former Ministry on Women, Children and Persons with Disabilities, which was tasked until May 2014 with oversight and the monitoring of the rights of persons with disabilities within government has not yet provided its country report to the United Nations Committee on the CRPD. The SAHRC had requested the Ministry to finalise its country report.[84] The first draft country report to the UN, released on 26 November 2012, was published for public comment. The final draft was published on 13 February 2013 and was due to be presented to the United Nations in 2014.[85] A newer version dated 27 June 2014 is substantially shorter than the initial draft and has not yet been adopted by Parliament.[86] Some of the comments in the Final Country Report on the Implementation of the Convention of the Rights of Persons with Disabilities will be discussed as they relate to the barriers discussed below. The relegation by President Zuma in the new cabinet reshuffle of the functions of persons with disabilities (and children) to the Department of Social Development and the reconstitution of the Department as the Department of Women under the Presidency[87] has sent a message about the lack of efficiency of the previous configuration of the former Ministry, but has left persons with disabilities without a line ministry. A Presidential Working Group on Disability has been established and

82 SAHRC 2009 http://www2.ohchr.org/english/issues/disability/docs/SouthAfrica_Human_Rights_Commission.pdf.

83 The toolkit contains information on the use of the Equality Court to advance and protect the rights of those living with disability, a basic template for media engagement (community radio) on the same, a concise definition of disability as well as a disability glossary and a bibliography of useful internet resources on disability. SAHRC 2009 http://www2.ohchr.org/english/issues/disability/docs/SouthAfrica_Human_Rights_Commission.pdf.

84 SAHRC date unknown www.nhri.ohchr.org/EN/ICC/AnnualMeeting/25/Statementspresentations/Monitoring%20under%20CRPD%20-%20South%20Africa.doc.

85 PMG 2013 http://www.pmg.org.za/report/20130220-department-women-children-people-disabilities-country-report-un-conve.

86 The latest version of the First Country Report dated 27 June 2014 does not refer to these gains. The newer version is substantially shorter at 55 pages, compared to 98 pages of the initial draft. Department of Women, Children and Persons with Disabilities *First Country Report*.

87 Zuma 2014 http://www.gov.za/speeches/view.php?sid=45691.

the call for nominations of members has been issued.[88] Whether this new configuration will be effective in promoting and protecting the rights of persons with disabilities remains to be seen.

It is noteworthy, however, that the Equality Court cases and the promises of increased budgetary allocation to courts and materials have dealt with the challenges that face persons with physical and sensory disabilities only. The accessibility of public and private buildings, services and facilities to persons who need developmental or psychosocial services is also important and will often require more complex measures than installing a ramp or a lift. Accessibility may not just require that official documents are provided in Braille or larger font, or that sign language interpreters are provided to public service users, for example. It may also require that justice personnel are trained and sensitised to the needs of persons requiring augmentative communication and to those with learning and intellectual disabilities, not just in materials and facilities, but also in the attitudes of staff in dealing with and assisting complainants in court.[89] It will also require advocacy efforts to enable persons with disabilities and their support structures to see the value of litigation as a tool to give content to the agency of persons with disabilities. These examples point to the need to bring changes to the social norms underpinning our society.

Despite some of these strides made in litigation before the courts for the rights of persons with disabilities, the courts are still faced with many challenges that impede access to justice. These are challenges that are faced by all potential litigants, not only persons with disabilities. Firstly, the accessibility of courts generally is problematic. The SAHRC has reported that security guards at the Equality Courts are not always aware of the existence of the Equality Court within the ether of the magistrate's or high court buildings they are guarding.[90] This is often the first "person" that a potential litigant will encounter at a court and most likely the person

88 SA Government News Agency 2014 http://www.sanews.gov.za/south-africa/presidency-works-towards-better-sa. In his State of the Nation Address President Zuma indicated that the Working Group would enable the Presidency to monitor the work of government departments and society "in creating a better life for persons with disability".

89 *General Comment 2* para 7.

90 SAHRC 2006 http://www.pmg.org.za/docs/2006/061016sahrc1.pdf 13.

requested to provide directions. The awareness of the Equality Court sitting in each division must therefore extend further than the staff of the court to contracted staff providing security services, and also requires that the Equality Courts are specifically sign-posted, with information pamphlets or kiosks being provided at the entrance to the building for the litigants as promised by the Department of Justice and Constitutional Development in the *Muller* case. Most court buildings are rabbit warrens and finding a helpful official is rare. In fact the CRPD requires that states, in order to promote accessibility, must provide forms of live assistance and intermediaries, including not only readers and sign language interpreters but also guides to facilitate access to facilities open to the public.[91] It also obliges states to provide "other forms" of assistance that will enhance the right of access to information for persons with disabilities. Such other forms of assistance or "live assistance" could be read to mean that access must be facilitated also by information officers, clerks and even clerks of the various courts in the court building, as well as security guards.[92]

Accessibility for illiterate litigants is also problematic. The level of service provided to illiterate litigants depends on the training that the clerk of the court has received.[93] The Equality Courts were envisioned as being accessible to lay litigants, including illiterate litigants, and conceivably those with intellectual, visual, hearing impairments or communication impairments, and much emphasis was placed on the role of the clerk of the court in facilitating ease of access for litigants.[94] This role is crucial, and therefore unless the clerks have the requisite training and are sensitive to the different access needs of persons with various disabilities the courts will remain inaccessible. Article 13(2) of the CRPD obliges states to provide training to all officials involved in the administration of justice (and also enforcement officers such

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91 A 9(2)(e) of the CRPD. See also *General Comment 2* para 29 (on the need for human and animal assistance for persons with disabilities to enjoy accessibility, including personal assistance, sign language interpretation, tactile sign language interpretation or guide dogs).

92 *General Comment 2* para 20 (movement and orientation in buildings require adequate signage, accessible information and communication or support services: including signage in Braille and easy-to-read and understand forms, live assistance and intermediaries, including guides, readers and professional sign-language interpreters).

93 SAHRC 2006 http://www.pmg.org.za/docs/2006/061016sahrc1.pdf 14.

94 A 9(2)(f) of the CRPD.

as the police and correctional services) to ensure effective access to justice for persons with disabilities.[95] Such training requires not only the reasonable accommodation of disability within the court proceedings themselves, but also the facilitation of access to the proceedings in the first place. This training therefore requires sensitivity to issues of social and physical barriers to accessing justice. We are foreshadowing some of the implications of the second barrier, the prejudicial attitudes of frontline workers, which will be discussed below.

Kruger[96] comments on the designation of all magistrate's courts in South Africa as equality courts as of 28 August 2009 and notes that the impression that equality courts are readily accessible is countered by the lack of data on how many presiding officers are trained to act as such, which training is a pre-requisite of the Act. Kruger remarks that the reasons for the paucity of complaints to the Equality Courts since their inception is not clear. She notes that the existence of the courts may not have been sufficiently publicised or that the limitations of litigation in addressing inequality are accepted by complainants. Ultimately, though, her survey of claims of racism in equality courts for the period 2003-2007 indicates that the "small number of complaints limits the opportunities of these courts to establish themselves as meaningful catalysts of social change".[97] The challenges with implementation of the Act and particularly the current "track of under-funding and closing Equality Courts because of low levels of use" will likely guarantee the failure of the courts to provide access to justice for the victims of discrimination.[98] The inconsistency in the availability and quality of the service provided by the Court, as well as the overburdening of existing criminal and civil cases hampering the equality court functions[99] further adds to the low levels of use. The Draft First Country Report on

95 *General Comment 2* para 19 (training for service providers must be provided).
96 Kruger 2011 http://www.equalrightstrust.org/ertdocumentbank/ERR7_kruger.pdf. See also De Vos 2009 http://constitutionallyspeaking.co.za/why-are-equality-courts-closing-down.
97 Kruger 2011 http://www.equalrightstrust.org/ertdocumentbank/ERR7_kruger.pdf 39.
98 Kaersvang 2008 *Journal of the International Institute* 9.
99 Naylor 2009 http://www.constitutionnet.org/files/Nikki_%20Nov%202009.pdf.

the CRPD[100] noted that obstacles to persons with disabilities using the law to protect and pursue their interests on an equal basis with others include:

> …persistent harmful traditional beliefs, ingrained stigmatisation and consequent discrimination on the one hand, and the inter-sectionality of disability and poverty on the other, the *inability to afford legal fees, lack of information in the use of equality courts, accessibility of equality courts, communication barriers, lack of a disability-sensitive judiciary and court staff, inaccessible buildings and transport*… (emphasis added).

The newer version of the First Country Report makes no reference whatsoever to the Equality Courts and their role in providing access to justice for persons with disabilities.[101] These obstacles to justice are unlikely to be removed if government and civil society do not provide more effective platforms to raise awareness and educate vulnerable groups, including women, persons with disabilities and Lesbian Gay, Bisexual, Transsexual and Intersex (LGBTI) groups about the mechanisms available to them through PEPUDA.[102] A discussion on the lack of disability sensitivity by frontline workers such as clerks of the courts, presiding officers in the Equality Courts and public servants will follow as part of the discussion of the second barrier (below).

It is therefore within this context of the potential of the *Equality Act* and the Equality Courts to bring meaningful changes to the lives of persons with disabilities that CREATE initiated workshops to educate and advocate persons with disabilities on how to utilise the Act to bring discrimination claims in the Equality courts within the districts of KwaZulu-Natal. The next discussion is a brief outline of the CREATE workshops.

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100 Department of Women, Children and Persons with Disabilities 2013 http://www.pmg.org.za/print/report/20130220-department-women-children-people-disabilities-country-report-un-conve para 51.

101 Department of Women, Children and Persons with Disabilities *First Country Report*.

102 Office on the Status of Women 2003 http://www.info.gov.za/otherdocs/2000/gender.pdf. The framework points to the problem with the implementation of laws requiring rights and remedies awareness: "Drawing from experiences in other parts of the world, South Africa has adopted sophisticated rights-based legislation with explicit reference to gender equality. An important challenge remains in making these rights accessible to all women by the provision of information and the development of the knowledge and skills that women require to avail themselves of the mechanisms inherent in the legal remedies."

3 Barriers to advocacy and litigation identified in the CREATE workshops

In this part of the article we outline some of the social barriers that persons with disabilities face as they surfaced during the CREATE workshops in KwaZulu-Natal. Then we critically discuss the three barriers to litigation and advocacy identified by participants to the workshops.

3.1 The CREATE workshops

The General Household Survey of 2011 reported that in that year the percentage of persons in South Africa over the age of 5 with disabilities was 5.2%.[103] 4.6% of the inhabitants of KwaZulu-Natal over the age of 5 are reported to have disabilities. This equates to approximately 472 295 people with disabilities in the province with additional numbers for children with disabilities under the age of 5. A 2009 evaluation of disability rights advocacy work in KwaZulu-Natal found that people with disabilities experienced the following barriers: disempowerment, discrimination and a lack of disability awareness, the lack of motivation of people with disabilities, distance and lack of funding for transport to meet one another, the lack of commitment of service providers, and politics, nepotism and fraud[104]. In addition, specific violations of the rights to education, physical integrity, living independently in the community and the rights of children with disabilities were identified in 2010 in the Umgungundlovu district of KwaZulu-Natal in a shadow report to the UN Committee on the Rights of Persons with Disabilities.[105]

As a response to this situation CREATE, a disability advocacy and training NGO in KwaZulu-Natal, engaged in 2011 and 2012 in a project to train human rights activists, with funding from the Foundation for Human Rights and the Embassy of Finland. The aim of the project was to increase the realisation of the rights of people with disabilities through training 200 human rights activists (in 10 human rights

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103 Statistics South Africa 2012 "General Household Survey 2011 Statistical Release P0318" cited in Day and Gray 2013 http://www.hst.org.za/sites/default/files/Chapter17_Indicators.pdf.

104 Kerry *Evaluation Report*.

105 Umgungundlovu Disability Forum 2010 http://www.create-cbr.co.za/images/stories/umgungundlovu_shadow_report.pdf.

forums) in the province of KwaZulu-Natal on the rights of people with disabilities and how to address violations of these rights. Another aim of the project was to litigate cases on the violations of the rights of women and children with disabilities in order to set precedents that would encourage respect for the rights of these people.

The advocacy workshops were divided into two modules. The first module of four days provided training to address the general lack of knowledge, even amongst people with disabilities, government and other service providers who should be engaged in delivering disability rights, and amongst civil society.[106] The content of the first module included information on the South African *Constitution*, the CRPD, the Millennium Development Goals and various national and provincial objectives. The second module, also of four days duration, provided training to address the violation of the equality rights of people with disabilities, including the need for referral to engage in litigation.[107] Specifically, the human rights activists were taught about the *Equality Act* and how to take cases to the Equality Court. It was anticipated that the workshops might result in discrimination claims being brought before the Equality Courts, but only one matter was referred to a court and the litigation is still pending - before the Labour Court, as that was the appropriate forum for the case.

The evaluation report[108] to the project notes the challenges to the implementation of the project, specifically in the socio-cultural and political context of the KwaZulu-Natal province:

> In many areas of KZN, politics plays an important role in difficulties with people accessing their human rights, as these rights are seen to be imposed by the ruling party, thus politicising any training or discussions about them. Culture also plays a significant role in defining what a woman (with or without disabilities) can say and do. Traditional leaders are also not always oriented to human rights. These political and cultural contexts severely hampered what could be achieved through this relatively short advocacy project.[109]

106 199 persons were trained in the first module.
107 271 persons were trained in the second module.
108 The Evaluation Report was drafted by Claire Kerry, an independent evaluator in May 2013 for the Finish Embassy (copy with the authors).
109 Kerry *Evaluation Report* 8.

This context, then, is also a backdrop to the social barriers that frustrate attempts at promoting equality and non-discrimination against persons with disabilities, and in particular women with disabilities in KwaZulu-Natal. It is also within this context that the barriers to access to justice were identified by participants in the workshops.

3.2 Financial and geographic inaccessibility of Equality Courts

> What is the use of being able to manoeuvre a wheelchair perfectly, if the physical environment does not allow you to go to the places you want to go? What is the use of learning to read Braille, if nothing or very little of what you want to read is available in Braille?[110]

Whilst the provision of personal mobility aids such as wheelchairs, and the ability to read Braille can transform the daily life of a person with a disability, the use of these aids is dependent, as described by the participant above, on the removal of the existing socio-economic and environmental barriers. Article 20 of the CRPD requires state parties to take effective measures to ensure personal mobility with the greatest possible independence for persons with disabilities. Article 19(c) of the CRPD requires state parties to make community services and facilities for the general population available on an equal basis to persons with disabilities, and that these services and facilities are responsive to their needs. If these two articles are read with articles 9 (accessibility) and 13 (access to justice) it becomes clear that physical accessibility and informational accessibility to Equality Courts must be facilitated by the state.

Both Richmond and Greytown are listed in the Department of Justice and Constitutional Development's brochure on the *Equality Act* as places where the Magistrate's Courts sit as Equality Courts.[111] However, this is not happening, as participants to the workshops noted when they attempted to access these courts. The geographic accessibility of the courts is therefore stunted by the closure or failure to operate of some Equality Courts, at least in KwaZulu-Natal. The expense and time it takes to attend to another court sitting as an Equality Court renders the promise of freely accessible Equality Courts an illusion. The closing down or under-

110 Lindqvist "Standard Rules in the Disability Field" 63.

111 Department of Justice and Constitutional Development 2011 http://www.justice.gov.za/EQCact/docs/2011eqc-a5-booklet.pdf.

utilisation of courts with low levels of use is not acceptable. Equality Courts must be monitored and non-functional courts must be investigated. The role of the SAHRC not just in monitoring the situation of these courts but also in making recommendations to the Department of Justice and Constitutional Development for increased utilisation and improved accessibility for persons with disabilities will be a continuing mandate. Greater accountability is required of the Department, the Equality Courts and the SAHRC to ensure the use and accessibility of the courts.

A recurring theme in the many discussions of the evaluation was the problem with transport for people with disabilities. Many people depend on minibus taxis for transport. Participants reported that when taxi drivers see a person with a disability waiting at the stop, they drive on to the next stop, because they are unwilling to take the time to load a wheelchair. People in wheelchairs are often charged double fare, and people who are Deaf sometimes get overcharged because they cannot argue about the fare. This barrier had been recognised in the Draft First Country Report on the CRPD:[112]

> The minibus taxi industry provides the widest service network in the country but has been implicated with unsafe modes of travel. If persons using wheelchairs are mobile enough to use them, they are often required to pay an additional sum for the space the wheelchair takes up. The representatives of the minibus taxi industry have begun engagements with the Department of Transport to address universal access problems.

The newer version of the First Country Report notes that the "Accessible Public Transport Strategy" has been "accepted" through workshops and presentation to stakeholders.[113] This strategy is to include funding for the recapitalisation of mini-bus taxis.[114]

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112 Department of Women, Children and Persons with Disabilities 2013 http://www.pmg.org.za/print/report/20130220-department-women-children-people-disabilities-country-report-un-conve para 106.

113 Department of Women, Children and Persons with Disabilities *First Country Report* para 39.

114 Department of Women, Children and Persons with Disabilities *First Country Report* para 38(d).

The high cost of transport would also impact on the decision to embark on litigation. For example, one participant commented: "They asked how many years a case would take, since going up and down to Pietermaritzburg will be expensive".[115]

The bringing of the claim of discrimination itself is free but this does not take into account the transport costs and the opportunity costs of leave from employment for family members or assistants that may accompany persons with disabilities. If transport to and from court is a barrier for persons with disabilities, unless measures to overcome the barrier are instituted, courts will remain inaccessible. One way to address this problem would be for the Equality Court to have a discretionary fund to pay the transport costs of indigent complainants who have used their own funds initially to lodge a case with the Equality Court. Public transport also needs to be more accessible and initially it may require state subsidies to compensate semi-public transport, such as taxi services, for making the possible mobility changes to their vehicles. It will require concerted efforts to raise awareness of the fact that persons with disabilities require transport to be provided on a basis equal with others.[116]

The issue of accessibility to the actual court buildings, wherever they may be situated, obliges the state to respond to the requirements of article 9 of the CRPD: specifically to identify and eliminate obstacles to accessing buildings, and the provision of roads and transportation.[117] Courts must be financially and geographically accessible to potential claimants with disabilities. The physical accessibility of the court building itself is not enough.

3.3 Insensitive attitudes of frontline workers

The participants noted that the negative and insensitive attitudes of frontline workers are pervasive and impact on the ability of persons with disabilities to bring equality claims to and access the services of the Equality Court. The reference to

115 Kerry *Evaluation Report* 43.

116 *General Comment 2* para 6 (physical inaccessibility of public transport for children is exclusionary); and para 7 (lack of accessibility of transportation also affects the rights to access health care and seek employment).

117 A 9(1)(a) of the CRPD.

"frontline workers" is intended to include the clerks of the court at the Equality Courts, the security guards at the courts, as well as civil servants within local government designated to assist with disability issues (in other words disability focal persons), and traditional leaders. These attitudes, inasmuch as they are barriers to access, constitute discrimination and flout article 13 of the CRPD, which requires the provision of support for persons with disabilities to access the justice system. Such prejudicial attitudes are evident in excerpts from the statements of participants in the workshops. The training of the participants in human rights in general and PEPUDA in particular created concern for some government officials:

> Some government officials were not happy that we taught the members of the community about this Act (PEPUDA), especially people with disabilities. They felt that most of the government officials still need more training on disability issues. They felt that for one mistake, people with disabilities will take them to court. The facilitator explained that if they do disability mainstreaming and inform support groups for parents of children with disabilities, DPOs, and other sectors about the development activities that are taking place in the municipality, there will be no reason for them to challenge them in court. The political leaders still were not convinced and felt that the information needed to start with them at the senior level. The facilitator asked them if the office of the OSDP had not trained them on CRPD. Some said they did the training. The facilitator asked what they had done with the information. Most of them said they had done nothing, they were too busy with other programmes.[118]

Even at the level of the implementation of disability rights programmes, it therefore appears that other social needs or programmes are more important to the responsible office bearers in KwaZulu-Natal. The attitudes of the civil servants filter through to the people they are meant to help. Their irritation suggests that they misunderstand the potential for litigation by persons with disabilities to assert their right to equality on an equal basis with others. Recently, in further advocacy work with one particular human rights forum in KwaZulu-Natal and the traditional leaders from the area, similar sentiments were expressed by the traditional leaders:

> He [a human rights forum member] came back with a lot of good information but as the leader I was offended because I was supposed to be the one that presents the information. In future the organisations need to train the leaders first.[119]

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118 Kerry *Evaluation Report* 42.

119 Focus group with traditional leaders in uThungulu District held in September 2013.

A sense of bureaucratic entitlement and entrenched hierarchical ordering is further embedded in the way in which the civil servants and traditional leaders perceived their role in the scheme of the provision of state services by the civil servants, or the protection afforded to the community by the traditional leaders. As alluded to earlier, public perceptions of persons with disabilities are clouded by pervasive stereotypes and assumptions about their ability to participate in the community, in educational settings and in the workplace.[120] These perceptions can give rise to pity and paternalism instead of equal recognition.

It may be useful to point out that disability and the role, status and position of persons with disabilities in society can be understood in two ways: in terms of the medical model or the social model.[121] The latter is supported by the human rights approach to issues pertaining to the equality rights of persons with disabilities. These models of understanding may explain public perceptions and stereotypes of persons with disabilities and may influence government policies, programmes and laws and the treatment of persons with disabilities within communities.

The medical model seeks to "cure" the individual by removing difference and "normalising" the person with a disability. A human rights analysis based on a social understanding of disability, on the other hand, sees the individual not as "diseased or wrong, but different". This difference does not need to be fixed but rather recognised as "an inherent diversity" which necessitates adjustment to the difference to best accommodate the individual's needs. Whilst the human rights approach recognises the inherent value and dignity in an individual and promotes maintaining her rights precisely as one would for a non-disabled women, the best interest and medical model approach can deem her rights to be superfluous as she is "damaged".[122]

Where officials indicate an unwillingness to prioritise their obligations within their functions to ensure the promotion and protection of the rights of persons with disabilities, as indicated in the passages quoted above, it is clear that the officials

120 Armstrong 2003 *JLE* 34.
121 For a discussion of the two models see Bhabha 2009 *SAJHR* 223.
122 Rioux and Zubrow "Social Disability" 148-189.

rely on the medical model understanding of disability and are reluctant to acknowledge persons with disabilities as equal bearers of rights in relation to others. Where "other" programmes are prioritised over those that deal with the rights of persons with disabilities, this sends a message that persons with disabilities must wait in line until the benevolent official is able to assist. These attitudes smack of paternalism.

What is also clear from the excerpts above is that officials and traditional leaders are threatened by the training on the *Equality Act* and the utilisation of the courts for potential discrimination complaints. This may be an advantage, as it may induce the officials to be accountable for their actions (or inactions), if only through their fear of litigation. The empowerment of disability activists with knowledge of what can be done to protect their rights through the *Equality Act* has been illustrated to be beneficial in challenging the negative attitudes of officials. Thus it is recommended that similar training be given to further groups of persons with disabilities whilst also providing them with support as they face and address discriminatory attitudes.

However, it is also in the interest of promoting equality to provide training on disability rights to all staff of the courts that might deal with persons with disabilities and not only the Equality Court clerks and judicial officers,[123] but also security personnel and others who enable access to the courts.[124] The role of the clerks of the court and any other "frontline" personnel that complainants with disabilities first approach cannot be gainsaid. Kruger[125] comments that clerks of the court

> play a pivotal role and … their functions extend beyond mere administration in relation to equality court matters. If these officials lack the necessary skills, the functioning of the equality court system is jeopardised, since their functions are to advise prospective litigants, to assist illiterate litigants in completing the forms and to ensure that court files are in order and brought to the attention of the presiding officer within the applicable time frames.

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123 For a discussion of the training of judicial officers in terms of the *Equality Act* and a commentary on the outdated *Judicial Services Commission's Benchbook for Equality Courts 2002,* which is the basis of the relevant judicial training, see Kruger *Racism and Law* 211-220.

124 Note that the Regulations to the *Equality Act* require equality court clerks to provide assistance to disabled, illiterate and unrepresented litigants. In terms of regulation 5 the clerk of the equality court is supposed to assist unrepresented complainants. Kok 2008 *SAJHR* 471 refers to this role as "pseudo-paralegal".

125 Kruger *Racism and Law* 254.

This need to train, educate and raise awareness is underscored by the CRPD's requirements firstly that the state undertake to adopt immediate, effective and appropriate measures to combat the stereotypes and prejudices relating to persons with disabilities,[126] and secondly that the state promote appropriate training for those working in the field of administration of justice to ensure effective access to justice for persons with disabilities.[127]

Civil servants at local government level, such as focal point persons for disability, are mandated as functionaries of the state to implement programmes, policies and legislation within their respective departments.[128] This was originally under the Office on the Status of Persons with Disabilities, established in 1997 within the Presidency. This mechanism for oversight was replaced by the former Ministry on Women, Children and Persons with Disabilities, effective from May 2009 until May 2014.[129] In 2009 the SAHRC reported that the hierarchical level of focal point persons within departments varied to a great extent, from Senior Management level to many on the periphery of decision-making and funding.[130] This means that disability rights issues were not prioritised and that whatever training had taken place had not taken root in the psyche of the decision-makers.

In the Draft First Country Report the government acknowledged that although awareness-raising in line with article 8 of the CRPD has featured "high on the national agenda over the last 4 years" there have been weaknesses in coordination, implementation, monitoring and evaluation which had detracted from its

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126 A 8(1)(b) of the CRPD. See also *General Comment 2* para 7 (persons with intellectual and psychosocial disabilities face barriers when attempting to access services, as a result of the prejudice of and the lack of adequate training of service providers).

127 A 13(2) of the CRPD.

128 SAHRC 2009 http://www2.ohchr.org/english/issues/disability/docs/SouthAfrica_Human_Rights_Commission.pdf.

129 The main functions of the Department of Women, Children and Persons with Disabilities included to: facilitate policy implementation towards the empowerment, advancement and socio-economic development of persons with disabilities; mainstream disability considerations into government policies, governance processes and programmes; facilitate, coordinate, oversee and report on the national rights of persons with disabilities programme - as well as those programmes that are part of South African regional, continental and international initiatives. Department of Women Children and Persons with Disabilities 2013 http://www.dwcpd.gov.za.

130 SAHRC 2009 http://www2.ohchr.org/english/issues/disability/docs/SouthAfrica_Human_Rights_Commission.pdf.

effectiveness with respect to the rights of persons with disabilities.[131] The report further indicated that:

> South African society at large, unless directly affected by disability, remains in the main ignorant of the rights of persons with disabilities, and in particular the reasonable accommodation measures required to give effect to these rights. This is mirrored in the public service across all 3 spheres of government, where ignorance and stereotypes detract from public services in general being accessible and user-friendly to persons with disabilities.[132]

The stereotypical assumptions within the public service therefore continue, and this is despite workshops and awareness-raising at national, provincial and local government:

> Workshops and sessions to introduce the CRPD were for example conducted in all national and provincial government departments, with over 60 district and local municipalities in six provinces, as well as organisations of and for persons with disabilities between 2008 and 2011. There is however little evidence that these workshop targeted the participants at these workshops sufficiently. A high turn-over of staff in the public sector furthermore detracted from continuity and impact.[133]

In the newer version of the First Country Report, the Department of Women, Children and Persons with Disabilities does not refer to these obstacles and instead provides a list of workshops that have been provided.[134] There is no critical reflection on whether or not these workshops have been successful and there is no mention of workshops specifically aimed at introducing the application of the CRPD. Unfortunately, the high turn-over of staff is not the only reason that the impact of the awareness-raising of the CRPD specifically may not have been successful. The continuing lack of prioritisation of policies and programmes for persons with disabilities will scupper any efforts at advocating the implementation of the CRPD within government services.

3.4 The impact of cultural and gender norms

Participants reported that there are gender and cultural norms within communities that impede access to courts and the agency of persons with disabilities to bring

131 Department of Women, Children and Persons with Disabilities *First Country Report* 10 para 57
132 Department of Women, Children and Persons with Disabilities *First Country Report* 10 para 59
133 Department of Women, Children and Persons with Disabilities *First Country Report* 10 para 62
134 Department of Women, Children and Persons with Disabilities *First Country Report* 8 para 28.

discrimination claims, for example the requirement that traditional leaders provide "permission" to persons with disabilities to sue, and a similar requirement of permission from the in-laws of women with disabilities. African women with disabilities are most likely to be poor, destitute, malnourished and illiterate.[135] This deep-rooted poverty is a disabling environment for women to assert their rights and freedoms on an equal basis with others. Women with disabilities are also at higher risk of abuse than able-bodied women.[136] When considering that women with disabilities in South Africa comprise 52 per cent of the total number of persons with disabilities and 5,2 per cent of women of the total population, it is clear that the effects of discrimination against women with disabilities can be far reaching.[137]

The multiple levels of discrimination that women with disabilities face within the home further impede their agency and autonomy. The advocacy organisation Women Enabled[138] notes that:

> More than 80% of women with disabilities in rural areas of many countries have no independent means of livelihood, and are thus totally dependent on others for their very existence. The myriad of issues that confront women with disabilities are significantly more pronounced than for women in general, due to inaccessible environments and lack of services, lack of information, awareness, education, income, and contact resulting in extreme isolation and invisibility. Given how greatly women with disabilities are affected by the double discrimination and gender and disability stereotyping they face because of both gender and disability, they deserve to be heard.

In KwaZulu-Natal at least, this social-economic vulnerability and burden of child care has a direct correlation with the ability to advocate and litigate. For example, a participant in CREATE's training noted that even if women with children with disabilities attend training, they may find it difficult to advocate on their own or others' behalf:

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135 *Integrated National Disability Strategy White Paper* (1977).

136 Grobbelaar-Du Plessis 2007 *SAPL* 407.

137 Census 2001 statistics showed that 52 per cent of the total number of persons with disabilities in South Africa were women (1 173 939 women with a disability). More detailed data on disability from Census 2011 is not yet available. Statistics South Africa 2005 http://www.statssa.gov.za/Publications/Report-03-02-44/Report-03-02-44.pdf.

138 Women Enabled 2013 http://www.womenenabled.org/pdfs/Women%20Enabled%20Stephanie%20Ortoleva%20submission%20CRPD%20Committee%20General%20Discussion%20Women%20with%20Disabilities%20and%20Access%20to%20Justice%202013%20February%2015,%202013%20Final.pdf.

> It is very difficult in rural areas, where they are far from resources. They have no support from their husbands, no support from their in-laws, society is judging them, the church and the traditional leaders too. The political leaders only come to them at election time, once they have put their X you don't see them again. She is with the child 24 hours a day, she has to carry the child when she does the household activities like fetching wood. How is she going to share the information from the workshop? What can she do?[139]

The implication of these barriers against access to justice has been elucidated by another advocacy group, Advocacy for Inclusion,[140] in their submission on the CRPD that:

> Women with disabilities face multiple disadvantages and barriers to accessing justice. The intersection of discrimination and prejudice faced by women with disabilities in their daily lives and in judicial processes both as women and as people with disabilities creates extra barriers. Women with disabilities need greater supports to access justice outside of court and throughout court proceedings. This includes: education to recognise and know their rights; information, resources and support to fulfill their rights and responsibilities such as parenting and finding safety from a violent situation; support and reasonable accommodations throughout legal systems and court proceedings to engage them in the process and have their perspective promoted and recognised.

Within this context, the support from family members, often care-givers and dependents of the woman with a disability, is vital not only within the home and the community but also in providing fertile ground and the physical and psychological support that will allow women with disabilities to fulfil their rights to dignity and equality. Unfortunately, a participant indicated that often such support is absent:

> In one district, a young woman with a disability applied for a job, which she did not get due to discrimination. The Forum members assisted her, and she was eventually given the job. However, she did this without the support of her parents, who preferred that she stay at home so that they could look after her. While living and working in town, she was raped. The case was reported to the police, but was not taken further, because the girl did not want her parents to know, seeing they had not wanted her to go to work in the first place.[141]

The lack of gender equality therefore impedes any steps taken towards achieving or retaining equality on the basis of disability. Thus the struggle for the rights of women requires a shift in gender norms. This challenge has muted the response of

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139 Kerry *Evaluation Report* 46.

140 Advocacy for Inclusion 2013 http://www.ohchr.org/Documents/HRBodies/CEDAW/AccesstoJustice/AdvocacyForInclusion.pdf.

141 Kerry *Evaluation Report* 45.

some women to the training. Women are often very busy in rural households, doing household work like fetching water and collecting wood, which leaves them little time for participation in community activities.[142] If a woman does have a formal job, she is often discriminated against in the workplace.

Women still hold back. In one municipality a woman had a brilliant idea for a project, but the chairperson (a man) did not support the idea, so the woman said that she wouldn't try to do the project.[143]

In the context of the gender norms in rural KwaZulu-Natal as described above, it can be seen that access to justice is more complicated for women with disabilities and that greater support may be required for (particularly rural) women with disabilities to bring cases to the equality courts.

In the more rural areas of KZN traditional leaders hold a great deal of power, for example to allocate land for housing. Individual traditional leaders are not always in agreement with all the human rights laid out in the *Constitution*. There is the potential for conflict between traditional laws and what is perceived by some to be the "western laws" of the new South Africa. This outlook also filters into attitudes towards disability issues.

> The challenge we still have is traditional leaders. Some traditional leaders discriminate against people with disabilities. We are not happy with the way they handle things in the traditional courts. We know that we can help people with disabilities to take them to the Equality Court, but we are scared that the traditional leaders will evict them. Are there any laws that will protect people with disabilities and other community members from being evicted by traditional leaders?[144]

Another participant noted:

> The other concern we have is the traditional courts. Something must be done. Most of the traditional courts are not accessible to people with disabilities, and some traditional leaders do not treat people with disabilities as human beings.[145]

142 See Grobbelaar-Du Plessis 2007 *SAPL* 405 for a discussion of intersections of discrimination.
143 Kerry *Evaluation Report* 44.
144 Kerry *Evaluation Report* 42.
145 Kerry *Evaluation Report* 42.

Normality, it has been argued, is a culturally construed notion, that is in essence ethnocentric.[146] Cultural norms are ascribed to persons based on whether or not they meet the norm of normality within the community. Traditional leaders are therefore central to providing space for the development of social norms that advance the right to equality of the members of the community. CREATE has recognised the need to provide training to traditional leadership and their structures to ensure that harmful social, gender and cultural norms are challenged and eliminated. In recent months CREATE has researched traditional leaders' understanding of disability and the *Equality Act* and then provided training to forty traditional leaders. Subsequent to the training, in one community the traditional leaders used their traditional cultural practices in a creative and deeply meaningful manner to apologise for the negative ways in which they have treated persons with disabilities. Firstly, the traditional leaders engaged in a cultural practice to apologise to the ancestors for the way in which they had treated persons with disabilities. The traditional leaders also requested a district cleansing ceremony from the traditional council. Royal family members also apologised to the disabled facilitator of the training for expecting her to kneel, which was difficult and painful with her disability. Cultural norms can therefore be used to support persons with disabilities. These practices are in line with the creative remedies that an Equality Court could order in terms of the *Equality Act* and promote the spirit of the preamble of the Act.[147] The preamble specifically points to its endeavour to promote human relations that are caring and compassionate, guided by the principles *inter alia* of equality, fairness, and human dignity.

Traditional leaders are organs of state and as a result the state and not only DPOs have an obligation to attend to harmful cultural and gender norms that impede access to justice. The state must therefore take positive measures to raise awareness and ensure that these norms are challenged, thus facilitating access to justice. The recent experiences of CREATE have demonstrated that any training and interventions with traditional leaders in particular need to take into account cultural

146 Devlieger "Why Disabled?" 94.
147 S 21(2) of PEPUDA.

practices and enable the traditional leaders to transform these practices so that rights are respected.

4 Concluding remarks

Litigation as a strategy for social change,[148] argues Armstrong,[149] must be accompanied by "a clearly articulated vision, political lobbying and advocacy at the personal and community levels. Persons with disabilities must work in many ways to dismantle the barriers that prevent their full participation in society". The challenges to the implementation of the *Equality Act*, and the barriers preventing potential litigants from bringing discrimination before the Equality Courts must be addressed. The growing jurisprudence of physical accessibility cases before the Equality Courts indicates a willingness by the judiciary to give effect to the equality rights of persons with disabilities. However, litigants are unlikely to bring claims of systemic discrimination before Equality Courts unless these social and physical barriers to accessing justice are addressed. There is also scope for claims to be brought by persons with sensory, developmental and psychosocial disabilities, and engagement in such litigation must be advocated. It bears repeating, however, that the most important obstacle against effective Equality Courts is the lack of public awareness regarding the Act and the Courts.[150]

Despite the efforts of the Portfolio Committee on Justice and Constitutional Development to involve stakeholders such as Legal Aid South Africa, the South African Police Services, health and social workers and teachers in raising awareness regarding the Act,[151] the uptake by complainants with disabilities has remained low. Even where information drives and the training of civil servants have been implemented, the success of these interventions relies on the civil servants' taking disability rights seriously and implementing it in their daily lives. As is clear from the

148 See Ngwena and Pretorius 2012 *SAJHR* 81-115.

149 Armstrong 2003 *JLE* 90.

150 Kruger *Racism and Law* 256 citing Lane 2005 http://www.csvr.org.za/papers/paprctp5.htm and Seedat 2005 http://www.idasa.org.za/index.asp?page=output_details.asp%3FRID%3D771%26oplang%3Den%26PID%3D44%26OTID%3D2.

151 Kruger *Racism and Law* 257 citing Portfolio Committee on Justice and Constitutional Development *Report* 661; Nongogo 2007 http://www.pmg.org.za/viewminute.php?id=8330.

discussion on the second and third barriers, the implementation of training in KwaZulu-Natal remains at the behest of traditional leaders and civil servants that too often feel constrained to implement programmes for other vulnerable groups, to the detriment of the issues facing persons with disabilities. Yet, the SAHRC calls for training programmes for "relevant government officials and service providers who interact with women and children with disabilities who are victims of exploitation, abuse and violence".[152] This would include traditional leaders and the frontline workers referred to in the discussion of the second barrier. Training for training's sake, however, is not sufficient. There must be accountability for the training received, with progress reports on how these officials have implemented the disability training they have received.

We submit then that it remains important to challenge the pervasive attitudes of frontline workers such as clerks of the court and officials tasked at municipal, regional or provincial level to implement policies and programmes and provide services to persons with disabilities aimed at eliminating discrimination on the basis of disability, as well as community leaders such as traditional leaders, as they undermine the ability of litigants to bring cases, and impede access to justice. This can be tackled only through appropriate training of officials in their duties and their obligations in terms of the *Equality Act* and the CRPD, and of course through the monitoring of the implementation of this training by the body providing the training. As indicated in the Draft First Country Report on the CRPD, where awareness-raising activities focus predominantly on workshops for public servants and persons with disabilities, and awareness campaigns are linked to commemorative days only, such as disability awareness month in November and the International Day of Persons with Disabilities annually, evidence of the effectiveness of the activities will remain "anecdotal, inconsistent and un-measurable".[153] However, the 2014 version of the First Country Report does not reflect on the nature and efficacy of awareness-raising activities conducted by the government. It is disconcerting that what appeared to be

152 SAHRC 2012 http://www.sahrc.org.za/home/index.php?ipkArticleID=154.

153 Department of Women, Children and Persons with Disabilities 2013 http://www.pmg.org.za/print/report/20130220-department-women-children-people-disabilities-country-report-un-conve 10 paras 60-61.

a comprehensive self-critical initial report has been shorn of critical reflection in the substantially shortened 2014 version.

The Draft First Country Report recommended that areas of intervention to ensure that access to justice is equalised for persons with disabilities should include the structured training of officials across the justice system on reasonable accommodation measures.[154] Unfortunately, the 2014 version of the First Country Report does not refer to the need for the training of judicial officials.[155] If structured training is to have an impact on the utilisation of the Equality Courts, if indeed this need is recognised at a later stage, this training, as well as any awareness-raising activities for public servants, should be independently monitored and evaluated for efficacy.

The financial and geographic inaccessibility of the Equality Courts in KwaZulu-Natal disproportionality affects persons with disabilities, who find it difficult to utilise the mechanisms made available through the *Equality Act*, particularly with regard to bringing anti-discrimination cases. This can be addressed only through budgetary allocation and rigorous review and monitoring of the constitution, establishment, efficacy and impact of the Equality Courts. The SAHRC has embarked on this process, but the government department responsible for disability, as well as the Department of Justice and Constitutional Development should lead this process. The victory in the *Muller* and other cases must be utilised by DPOs as a tool for political advocacy and media sensitisation to the obligations the CRPD and the *Equality Act* place on both private and state actors to make buildings physically accessible to persons with disabilities.

The social, gender and cultural norms that are in themselves barriers and create further barriers to the dignity and equality of persons with disabilities must be dismantled. This will require awareness-raising at community level, engagement with all actors within these communities, and specific training for traditional leaders, with

[154] Department of Women, Children and Persons with Disabilities 2013 http://www.pmg.org.za/print/report/20130220-department-women-children-people-disabilities-country-report-un-conve 24 para 136.

[155] However, the report does refer to the need for training *inter alia* of health professionals, social service professionals and other civil servants. Department of Women, Children and Persons with Disabilities *First Country Report* para 176(l) and 271.

particular emphasis on gender and disability sensitisation. The *Equality Act* is geared towards making legal assistance and indeed legal remedies to persons with disabilities easily available and affordable. The adequacy and sensitivity of legal assistance to persons with disabilities, however, needs to be addressed.

The implication of the operation of these three barriers to access to justice for persons with disabilities in KwaZulu-Natal is evident if we test the state's compliance with article 13 of the CRPD for this province's inhabitants.

Firstly, has the state ensured effective access to justice on equal basis with others? No, there are still physical, environmental, geographical, economic, informational, social, gender and cultural barriers to access to justice for persons with disabilities.

Secondly, has the state ensured effective access to justice at all phases of the administration of justice, including preliminary and initial investigative stages? No, unless the barriers discussed in this article are removed, persons with disabilities in KwaZulu-Natal are unable to even access the court system in the first place. This will require awareness raising, training, improved accessibility and the monitoring of the state's obligations in this regard.

Thirdly, has the state ensured that persons with disabilities can be both direct and indirect participants in proceedings, including as witnesses and complainants? No, unless these barriers to initiating complaints are removed through awareness raising, advocacy and the monitoring of the state's obligations in this regard, and through media sensitisation.

Fourthly, has the state ensured that persons with disabilities receive procedural and age appropriate accommodations to facilitate their access to justice? Here the state fares better. Yes, in theory the *Equality Act* and its Equality Court proceedings are flexible and can accommodate persons with disabilities once they are complainants and witnesses. The extent to which this has happened, however, has not yet been the subject of research or review.

Lastly, has the state ensured that persons with disabilities are assisted before and during legal proceedings by adequately trained officials of the justice administration?

Not as far as we are aware. If there has been disability sensitive training of officials, it has been inadequate or not monitored. Continued training for the justice officials and the monitoring of the implementation of the training in the way in which persons with disabilities are treated when they encounter the justice system, particularly the Equality Courts, are needed.

Interestingly, when article 13 of the CRPD was drafted by the Ad Hoc Committee, South Africa raised the issue of the need for accessible communication to facilitate access to justice for persons with disabilities.[156] Flynn argues for state-operated advocacy which will "enable persons with disabilities to communicate and express their views in order to access justice more effectively".[157] She argues for the recognition of a legal entitlement to an independent, state-appointed advocate to individuals who require advocacy support in order to assert and enforce their rights, like the Personal Ombud system in Sweden. Whilst a discussion of state-appointed advocacy is outside the scope of this article, it is important to note that state-appointed advocacy is envisioned to be complementary to self-advocacy by persons with disabilities and community advocacy such as the CREATE project. Research is needed into the viability of state-appointed advocates who are required to be independent in the performance of their functions to support persons with disabilities in asserting and to enforce enforcing their rights.

In essence, South African society needs to reconceptualise persons with disabilities, and the state must dismantle the barriers, social, economic and political, that disadvantage persons with disabilities:

> To understand the full operation of discrimination on disabled people's lives, we need to extend our understanding of that process to include the socio economic and political forces which shape not only our attitudes towards disability, but also the very meaning of that term. In a very real sense our society disables individuals by constructing a disabled identity into which individuals are fitted.[158]

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156 Rehabilitation International 2006 http://www.un.org/esa/socdev/enable/rights/ahc7sum18jan.htm 12.

157 Flynn 2013 *Int'l J Hum Rts* 500.

158 Gooding *Disabling Laws, Enabling Acts* 9.

The socio-economic freedoms or barriers a person faces will inevitably benefit or disadvantage their ability to function properly,[159] and of course this will impede their access to justice, where further barriers are to be encountered.[160] South Africa's Equality Courts and its court personnel by and large do not comply with the requirements of articles 9 and 13 of the CRPD. The success of advocacy efforts on the part of DPOs such as CREATE, which are aimed at promoting the utilisation of the Equality Courts and ultimately at ensuring that more litigation is brought by persons with disabilities to achieve their right to equality on an equal basis with others is reliant on the Equality Court justice system's being accessible both financially and geographically, absent gender and cultural discrimination, and its being staffed with disability-sensitive justice personnel and public servants. If the social and physical barriers to accessing the legal system and the Equality Courts specifically are not removed, the promise of the *Equality Act* and Equality Courts will not be realised for persons with disabilities, and their access to justice will remain illusory.

159 Penny 2002 *JLE* 85.

160 Lepofsky 1996 *NJCL* 263 eloquently states that "Equality seeks to attain an environment whose old barriers have been removed and where new barriers are prevented before they are created, in which persons with disabilities are fully included as of right, free from stereotype or other impediment, with full respect for their dignity and worth as individuals and with full, effective and timely accommodation."

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LIST OF ABBREVIATIONS

ABAJ	American Bar Association Journal
AJHR	Australian Journal of Human Rights
CGE	Commission for Gender Equality

CJLJ	Canadian Journal of Law and Jurisprudence
CREATE	Community Based Rehabilitation Education and Training for Empowerment
CRPD	Convention on the Rights of Persons with Disabilities
DPO'S	Disabled Peoples' Organisations
DWCPWD	Department of Women, Children and Persons with Disabilities
EHRLR	European Human Rights Law Review
Harvard LR	Harvard Law Review
Int'l J Hum Rts	International Journal of Human Rights
JLE	Journal of Law and Equality
LGBTI	Lesbian Gay Bisexual Transsexual and Intersex
NJCL	National Journal of Constitutional Law
PAIA	Promotion of Access to Information Act
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
PMG	Parliamentary Monitoring Group
SAHRC	South African Human Rights Commission
SAJHR	South African Journal for Human Rights
SALJ	South African Law Journal
SAPL	South African Public Law
Stellenbosch LR	Stellenbosch Law Review
Syracuse J Int'l L & Com	Syracuse Journal of Law and Commerce
Syracuse J Int'l & Comp L	Syracuse Journal on International and Comparative Law
TSAR	Tydskrif vir Suid-Afrikaanse Reg
U Tas LR	University of Tasmania Law Review
UNDP	United Nations Development Programme

BARRIERS TO ADVOCACY AND LITIGATION IN THE EQUALITY COURTS FOR PERSONS WITH DISABILITIES

W Holness*

S Rule**

SUMMARY

The effective implementation of the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 (PEPUDA) and the fulfilment of the South African state's obligations in terms of the *Convention on the Rights of Persons with Disabilities* (CRPD) are dependent on two fundamental tools, advocacy and litigation. This article discusses the outcome of three cases in the Equality Courts and how these cases promote accessibility and access to justice for persons with disabilities. The authors then consider the impact of CREATE, a KwaZulu-Natal NGO's advocacy initiatives to promote the rights of persons with disabilities and the utilisation of the Equality Court to realise those rights. Participants of ten workshops in KwaZulu-Natal identified three barriers to access to justice in accessing the Equality Courts. Firstly, some Equality Courts are geographically (and financially) inaccessible. Secondly, the negative and insensitive attitudes of front-line workers impact on the ability of persons with disabilities to bring equality claims to and access the services of the Equality Court. These barriers constitute discrimination and flout articles 9 and 13 of the CRPD, which require the provision of support for persons with disabilities to access the justice system and the promotion of accessibility to the physical environment, and the provision to them of transportation, information and other services. Thirdly, cultural norms and fears impede access to courts and the agency of persons with disabilities to bring these claims, for example the requirement that traditional leaders provide "permission" to persons with disabilities to sue and a

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similar requirement of permission from the in-laws of women with disabilities. The article analyses the three barriers identified as inhibiting advocacy and litigation, and explains the implication of these barriers for the state's obligations in terms of articles 5, 8, 9, 12 and 13 of the CRPD. Recommendations are made on overcoming these barriers.

KEYWORDS: Disability; equality; accessibility; access to justice; advocacy; litigation; Equality Courts; *Convention on the Rights of Persons with Disabilities.*