

From Exclusion to Equality: Advancing Access to Justice for Persons with Disabilities in Lesotho

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An Opportune Moment: Realizing the Rights of Persons with Disabilities in Africa

ICJ's study of nine sub-Saharan African States' implementation of the Convention of Persons with Disabilities

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**From Exclusion to Equality:
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for Persons with Disabilities
in Lesotho**

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Executive Summary

In Lesotho, persons with disabilities have historically encountered significant discrimination in accessing justice. Discriminatory laws, policies and practices serve to deny them legal capacity, necessary accommodations and supports. Weaknesses in the country's statutory laws and the absence of procedural rules to guide justice actors are further drivers of discrimination. While these impediments to securing rights and accessing justice for persons with disabilities persist, there have been some positive indicators of serious moves on the part of State legislative and judicial authorities to address the situation.

A turning point came from the High Court in its 2019 *Koali Moshoeshoe* judgment,¹ with the Court striking down restrictions on the testimonial competence of persons with intellectual and/psychosocial disabilities. The broader effect was the court's more general affirmation of the inherent legal capacity of persons with disabilities. This landmark case results from persistent and deliberative advocacy strategies developed and implemented by organizations of persons with disabilities, which included employing strategic litigation as one of the key tools to push for legal reform. As a result of such advocacy, and building on the High Court's judgment, Lesotho's parliament enacted the Disability Equity Act² in 2021, following which the Chief Justice issued the Disability and Equity (Procedure) Rules³ in 2023.

Taken together, these measures have been hailed as a historic moment by disability advocacy groups, as they establish a robust domestic legal framework to make real the provisions of the UN Convention on the Rights of Persons with Disabilities (CRPD) for persons with disabilities. While these reforms are incomplete, other countries in the African region and beyond would do well to look to this model of good practices for other African jurisdictions.

Nonetheless, challenges remain within the Lesotho legal framework that require ongoing reform, as well as in the practical implementation of the legal frameworks.

This report examines the processes behind the legal reforms in Lesotho, highlighting the role of sustained advocacy by civil society, particularly disability groups, human rights defenders, and the legal profession and the ongoing challenges to ensure effective access to justice for persons with disabilities.

Prior to the enactment of the Disability Equity Act in 2021, Lesotho's Constitutional, statutory and administrative legal framework did not specifically recognize and incorporate the right of persons with disabilities to access to justice or provide for tailored accommodations and supports to facilitate the effective exercise of that right.

- **Constitution:** The Constitution of Lesotho does not explicitly guarantee access to justice for persons with disabilities. It also does not list disability as a

¹ *Koali Moshoeshoe and Others vs DPP and Others*, in the High Court of Lesotho, Constitutional Case 14/2017, judgement of 16 May 2019.

² Persons with Disability Equity Act No.2 of 2021.

³ Chief Justice of Lesotho, Disability and Equity (Procedure) Rules (Procedure Rules), 2023, Legal Notice No.55 of 2023.

prohibited ground of discrimination. Moreover, certain provisions of the Constitution restrict the legal capacity of persons with intellectual and/or psychosocial disabilities.

- **Penal Code:** The Penal Code of 2010 empowers courts to declare accused persons deemed to be of “unsound mind” as “insane,” resulting in the loss of their legal capacity for purposes of criminal responsibility.
- **Criminal Procedure and Evidence Act (CPEA):** The CPEA imposed restrictions on the testimonial competence of persons with disabilities, excluding those with intellectual and/or psychosocial disabilities from giving evidence before courts. The Act also allows for the special verdict of “guilty but insane,” which results in the deprivation of legal capacity of persons with intellectual/and psychosocial disabilities to stand trial and to defend themselves against criminal charges.
- **Sexual Offences Act:** Prohibits consensual sexual activity involving persons with disabilities, denying the rights to sexual autonomy and legal capacity.

While human rights advocates, particularly organizations of persons with disabilities, had been pressing for legal reform and the enactment of a disability-specific law since Lesotho acceded to the CRPD in 2008, OPDs specifically identify the judgment in *Koali Moshoeshoe* as a significant milestone in Lesotho’s legal reform process.

By declaring Section 219 of the CPEA unconstitutional, the High Court, sitting as the Constitutional Court, struck down a long-standing provision that denied persons with intellectual and/or psychosocial disabilities the legal capacity to testify in court. Notwithstanding this important and necessary step, the direct effect of judgment is limited, partly because the Court opted not to address the broader issues of legal capacity, access to justice, or the need for accommodation and support. It also failed to expressly direct the legislature to reform the law. However, the judgment's far-reaching impact is manifest, for example, in the shifting attitudes of justice actors within the justice system, prompting the recognition of the rights and capacities of persons with disabilities. Building on this momentum, organizations of persons with disabilities intensified advocacy efforts, which ultimately led to the enactment of the Disability Equity Act in 2021.

The Disability Equity Act represents another landmark development in Lesotho, recognizing and incorporating into operative law the rights of persons with disabilities. The Act includes a provision on access to justice and more generally marks a shift from a charity-based or medicalized approach to disability towards a human rights-based approach to disability. It also contains a specific provision legislating for the testimonial competence of persons with disabilities in line with the decision in *Kaoli*.

The Act was elaborated with the participation, through a consultative process, with organizations of persons with disabilities. Nevertheless, the final Act only partly reflects the feedback of OPDs and leaves out essential elements in its provisions. Notably, for example, the Act contains no provision on legal capacity, despite its provision in the CRPD as a core and indispensable right. This omission limits the Act’s potential to transform the legal landscape regarding restrictions on the participation of persons with intellectual and/or psychosocial disabilities in legal proceedings.

Despite this shortcoming, the Act introduced an innovative approach, under Section 32(1), by mandating the Chief Justice to issue court rules to ensure accommodation and support for persons with disabilities. These rules should provide an important instrumentality to bolster the access to justice for persons with disabilities and provide an avenue for OPDs to continue their advocacy towards ensuring access to justice. Crucially, this approach moves beyond merely placing obligations in primary legislation and embeds specific accommodations and support into enforceable court rules that justice actors are required to apply. This brings the legal guarantees in the Act a step closer to realizing equal access to justice in practice.

In fulfillment of his mandate under Section 32(1) of the Persons with Disability Equity Act, Chief Justice Sakoane Sakoane took proactive leadership in the development of the Disability and Equity (Procedure) Rules, adopted in 2023. The process was highly participatory, including sustained consultations with organizations of persons with disabilities. These included, among others, the Lesotho National Federation of Organizations of the Disabled (LNFOD) and the ICJ. The process reflected a largely collaborative approach, thereby enhancing prospects for the practical implementation of the rules and notably improving the content of the Procedure Rules.

The Procedure Rules apply to all persons with disabilities at all stages and levels of judicial proceedings, including proceedings in customary law courts. Key guarantees provided for by the rules include:

- **Identification and removal of barriers:** Courts are required to proactively identify and remove barriers to access to justice for persons with disabilities;
- **Provision of accommodation and support:** Courts must ensure the undertaking of individualized accommodation and support needs assessments that center on the individual's input rather than solely on medical evidence. Courts must ensure the provision of accommodation and support, including through diverse communication methods such as intermediaries, plain language, Braille, sign language, and assistive technologies;
- **Accessibility of processes:** Court processes should include pre-trial orientation visits and breaks during testimony, which are currently provided for witnesses only, and take various measures to ensure courtroom accessibility. Court processes should ensure the protection of witnesses with disabilities from harassment and undue embarrassment;
- **Expedited processes:** Court processes should allow for expedited case handling to minimize delays in matters involving persons with disabilities; and
- **Training of justice actors:** Justice actors, including judges, must undertake training and capacity building to ensure they can provide effective access to justice for persons with disabilities.

The mandating of a proactively initiated individualized needs assessment framework is one of the notable strengths of the Procedure Rules. This approach focuses on enabling the participation of persons with disabilities, rather than testing legal capacity in an all-or-nothing medicalized assessment, which serves to exclude a large number of individuals from participation. Instead, it places responsibility on judicial

officers to evaluate and determine how to support the participation of persons with disabilities and integrates support provision into the assessment process itself.

Some provisions of the Procedure Rules will need to be construed carefully so as to comply with the CRPD, as well as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (African Disability Protocol or ADP). Examples include extending orientation visits and break beyond just witnesses and ensuring that the use of written statements of victims with disabilities in lieu of examination-in-chief is optional rather than mandatory. It is also critical to ensure that such statements are only used pursuant to the consent of persons with disabilities, and that they are not used as an excuse to avoid providing the necessary accommodation and support to persons with disabilities to participate on an equal basis.

Translating the guarantees in the Procedure Rules into practice will require increased and adequate resourcing, institutional commitment, and targeted capacity building. All efforts to implement the Rules should centre on the experiences of persons with disabilities and involve OPDs and other stakeholders.

Notwithstanding all of the highly consequential projects, the ICJ has found that two years after the enactment of the Procedure Rules, significant barriers continue to hinder their effective application, including:

- **Lack of adequate funding:** The judiciary faces chronic underfunding that has created challenges that affect the administration of justice across the country, and with implications on its ability to provide accommodations and support such as intermediaries, sign language interpretation, training for justice personnel, and necessary infrastructure and facilities.
- **Shortage of human resources:** No intermediaries or sign language interpreters have been formally appointed under the Procedure Rules, leaving organizations of persons with disabilities to fill the gap on a voluntary basis.
- **Unavailability of alternative communication methods:** Courts lack the capacity to make available accessible formats such as Braille, screen readers, and video-based communications, as well as protective measures like CCTV or one-way mirrors.
- **Physical inaccessibility of court premises:** Many courts remain physically inaccessible to persons with disabilities due to dysfunctional or absent lifts, and no adaptations have been made to courtrooms.
- **Low awareness and lack of training among justice actors:** Judicial officers, court staff, police, and prosecutors have not received systematic training on the rights of persons with disabilities or the Procedure Rules. Limited awareness-raising efforts and trainings have been led almost entirely by organizations of persons with disabilities.

Without decisive government action and commitment from the judiciary to address these gaps, the procedural guarantees and support measures envisioned in the Procedure Rules risk remaining aspirational, instead of reaching their transformative potential.

Recommendations

Pursuant to the observations and findings in this report, the ICJ offers the following recommendations:

- **To the Legislature:**

1. Amend the Penal Code and CPEA to remove discriminatory provisions and explicitly recognize the full legal capacity of persons with disabilities in all areas of law.
2. Amend the Disability Equity Act to explicitly affirm the full legal capacity of persons with disabilities, to align the Act with the CRPD and ADP.
3. Undertake a comprehensive review of all pertinent laws, including the Constitution and the Sexual Offences Act (2003), with a view to amending them, where necessary, to ensure consistency with the CRPD and ADP regarding the recognition of the full legal capacity of persons with disabilities.
4. Amend the Disability Equity Act to include an explicit recognition of the right to access to justice for persons with disabilities and a corresponding obligation on the State to guarantee such access on an equal basis with others.
5. Institutionalize inclusive legislative drafting processes to ensure stakeholder feedback is systematically considered and reflected in final laws.
6. Allocate adequate and sustained budgetary resources to the judiciary in line with the constitution and the Administration of the Judiciary Act to cover the implementation of the Procedure Rules, provision of accommodations and assistive technologies in court proceedings, infrastructure improvements to ensure accessible court facilities, establishment and training of specialized posts such as sign language interpreters and justice intermediaries, and capacity-building initiatives for judicial personnel.

- **To the Executive**

1. Develop and implement a sustainable program for the recruitment, training, and appointment of qualified intermediaries and sign language interpreters for the courts, ensuring their availability across all districts.

- **To the Judiciary:**

1. Issue guidance to courts to interpret and construe the provisions of the Penal Code and the CPED and ensure the provision of accommodations and support as mandated by the Procedure Rules.
2. Provide regular and mandatory training to judges, magistrates, and court staff on the recognition of the legal capacity of persons with disabilities and the application of the CRPD and ADP standards in judicial practice.
3. Interpret and apply Section 32 of the Disability Equity Act consistently with the CRPD and ADP, ensuring that persons with disabilities enjoy their right to access to justice on an equal basis with others

4. Interpret and implement the Procedure Rules consistently with international human rights law, particularly the CRPD and ADP, by extending accommodations currently limited to witnesses to all persons with disabilities in judicial proceedings.
5. Maintain ongoing dialogue with OPDs to address outstanding concerns and incorporate lessons learned from implementation into future revisions of the Procedure Rules.
6. Strengthen the administration of justice to ensure it is effective, fair, and compliant with constitutional and international legal standards, including the provision of accommodations and supports required under the Procedure Rules.
7. Facilitate the effective deployment of intermediaries and sign language interpreters within courts, coordinating with relevant government programs and organizations of persons with disabilities.
8. Identify and deploy the necessary communication tools and special measures and ensure their effective use in court proceedings to facilitate full participation of persons with disabilities.
9. Plan and implement formal, judiciary-led capacity-building programs for judges, magistrates, prosecutors, and law enforcement officials on the Procedure Rules and disability rights.

I. Introduction

The justice system in Lesotho has long failed to properly discharge its role in securing the human rights and needs of persons with disabilities. According to the Lesotho National Federation of Organizations of the Disabled (LNFOD), the leading NGO in the country in the field, there is a “consistent pattern” of disability discrimination in respect of access to justice, which has heightened the vulnerability of persons with disabilities.⁴ The barriers to access to justice for persons with disabilities are numerous. One such barrier, historically, has been the operation of laws and legal practices serving to deny persons with disabilities the right to legal capacity and preventing them, for example, from standing trial or serving as witnesses in legal proceedings.⁵

More generally, the absence of any procedural rules specifically designed to meet their needs has left justice actors without rules or guidance in situations where they were confronted with individuals with disabilities. This has impeded the possibility of the full participation of persons with disabilities in the justice system. Prior to the enactment of the Disability Equity Act in 2021 and the Disability and Equity (Procedure) Rules in 2023, the participation of persons with disabilities in the justice system was rightly described as “ineffective”.⁶

There has, however, been some forward movement. The first step was the 2019 Lesotho High Court ruling in *Koali Moshoeshe and Others v DPP and others*,⁷ which found in favour of organizations of persons with disabilities, declaring that a law restricting the testimonial competence of persons with disabilities was unconstitutional and therefore invalid.

Following on from this judgment, LNFOD recommended that, more generally, a “disability specific law should be enacted” which “responds to legal challenges that are faced by people with disabilities when accessing justice in Lesotho.”⁸ Advocacy by LNFOD was instrumental in achieving the enactment of the Disability Equity Act in 2021, containing a specific provision, Section 32, in respect of access to justice, which reads as follows:

⁴ Lesotho National Federation of Organization of the Disabled (LNFOD), Review of Existing Laws and Policies in Lesotho to Determine Harmony with United Nations Convention on the Rights of Persons with Disabilities, 2015, http://www.lnfod.org.ls/uploads/1/2/2/5/12251792/lnfod_legal_and_policy_review_report.pdf; Also see, LNFOD, Access to Justice for People with Disabilities in Lesotho: A Comprehensive Study on Provisions which may be used to argue for Accommodations for People with Disabilities in the Justice System, May 2019, available at: http://www.lnfod.org.ls/uploads/1/2/2/5/12251792/lnfod_final_research_report_-_may_2019.pdf.

⁵ LNFOD, Review of Existing Laws and Policies in Lesotho to Determine Harmony with United Nations Convention on the Rights of Persons with Disabilities, Ibid.

⁶ LNFOD, Access to Justice for People with Disabilities in Lesotho, supra note 4, p.1.

⁷ *Koali Moshoeshe and Others vs DPP and Others*, supra note 1.

⁸ LNFOD, Access to Justice for People with Disabilities in Lesotho, supra note 4, p.40.

“(1) The Chief Justice shall make rules for the provision of accessible format methods and any other legal services and procedures which take into account the needs of a person with disability who attends court proceedings.

(2) A person with disability, who is denied bail, shall be held in custody in a facility which is modified in accordance with the rules made by the Chief Justice or any other relevant law.

(3) A person with disability shall be competent and compellable to give evidence in a criminal and civil case in any court in Lesotho or before a magistrate on a preparatory examination.

(4) A person with disability shall be assisted in every possible manner to effectively, directly and indirectly participate in all legal proceedings and other preliminary stages of administration of the judicial justice process.”

Following from this, and after repeated engagements with the ICJ and LNFOD, in terms of Section 32(1) of the Act, the Chief Justice of Lesotho issued the Disability and Equity (Procedure) Rules in 2023 (herein after “Procedure Rules”).

These developments have been celebrated as a “turning point” by LNFOD and an “historic moment” which “opens up new opportunities” for persons with disabilities to enforce their rights.⁹ As Diana Msipa, a disability rights expert interviewed by the ICJ for this research, has noted, “together, as a package, *Kaoli*, the Act and the Court Rules create a strong legal framework for access to justice in Lesotho. The lesson for other African countries is that these reforms must not be taken piecemeal.”¹⁰

The *Kaoli* decision reinforced and broadened the question already raised by organizations of persons with disabilities as to whether longstanding practices and laws in Lesotho discriminated against persons with disabilities.

The Disability Equity Act, in turn, provides a broader framework ensuring the rights of persons with disabilities and represents Lesotho’s effort to establish under its domestic law its commitments in terms of the Convention on the Rights of Persons with Disabilities (CRPD). The Procedure Rules specifically address barriers hindering effective access to justice and provide for procedural accommodations and supports to help ensure persons with disabilities can access justice on an equal basis with others.

The challenges faced in Lesotho and efforts made to address them should be understood in their context. Around the world, persons with disabilities face significant challenges in accessing justice. These obstacles stem, in part, from gaps

⁹ Nkhasi Sefuthi, ‘The passing of the Persons with Disabilities Equity Bill by Senate,’ *Disability Lesotho E-newsletter*, Issue 12 Vol 7, November 2020, available at: http://www.infod.org.ls/uploads/1/2/2/5/12251792/disability_lesotho_nov_2020.pdf.

¹⁰ Interview with Dianah Msipa (PhD), Disability Rights Expert at the Centre for Human Rights, University of Pretoria, 30 October 2024.

in national legal frameworks, where laws fail to adequately protect the rights of persons with disabilities.

Against this global backdrop, the ICJ has found that in many African countries, legal systems entrench legal processes and tend to maintain procedures that either disregard persons with disabilities entirely or actively discriminate against them.¹¹ This is particularly so in respect of persons with intellectual and/or psychosocial disabilities.¹² In this light, the legal developments in Lesotho stand out: “to date, Lesotho is the only southern African country that has taken the bold step towards implementing the CRPD by altering the legal position on testimonial competence.”¹³

Lesotho is also unique in having adopted specific subsidiary legislation – the Procedure Rules – designed to provide instructions to justice actors to ensure the provision of procedural accommodations and support for persons with disabilities so that the recognition of their legal capacity may actually lead to their effective participation.¹⁴

Despite these advances, the ICJ finds significant challenges remain. As this report shows, the infrastructure of many courts and the content of legislation continue to create barriers for persons with disabilities in accessing justice. In some cases, the procedural rules lack the necessary specificity; in others, existing protections are not implemented in practice. As a result, persons with disabilities continue to face challenges in accessing justice.¹⁵

Many of these challenges are evident throughout the African region and also in many other countries globally. Given this context, the ICJ in this report examines how the reforms in Lesotho came about and documents the process by which they were achieved. The objective is to identify and consider outstanding challenges relating to

¹¹ ICJ, ‘An Opportune Moment: Realizing the Rights of Persons with Disabilities in Africa: ICJ’s study of nine sub-Saharan African States’ implementation of the Convention on the Rights of Persons with Disabilities,’ May 2025, available at: <https://www.icj.org/wp-content/uploads/2025/05/An-Opportune-Moment-Realizing-the-Rights-of-Persons-with-Disabilities-in-Africa.pdf>. Also see, “Toolkit on Disability for Africa: Access to Justice for Persons with Disabilities,” UN Division for Social Policy Development (DSPD) – Department of Economic and Social Affairs, February 2017, available at: <https://www.un.org/esa/socdev/documents/disability/Toolkit/Access-to-justice.pdf>.

¹² ICJ, ‘An Opportune Moment: Realizing the Rights of Persons with Disabilities in Africa, Ibid; Also see, ICJ, “Access to Justice for Persons with Disabilities in Kenya: Progress and Challenges,” July 2025, available at: <https://www.icj.org/wp-content/uploads/2025/07/Access-to-Justice-for-Persons-with-Disabilities-in-Kenya.pdf>.

¹³ Dianah Msipa, Recognizing the Testimonial Competence of Persons with Intellectual and Psychosocial Disabilities in Southern Africa (2022) 10 *African Disability Rights Yearbook* 244. Also see, “Promoting Equal Access to Justice for Persons with Disabilities in Africa: Guidance Note”, Centre for Human Rights – University of Pretoria, December 2024, available at: https://www.chr.up.ac.za/images/researchunits/dru/files/Guidance_Note_on_access_to_justice_for_persons_with_disabilities_in_Africa_Final.pdf.

¹⁴ Centre for Human Rights (University of Pretoria), ‘Centre collaborates with ICJ to host judicial workshop on access to justice for persons with disabilities in Lesotho,’ 19 October 2022, available at: <https://www.chr.up.ac.za/dru-news/3150-centre-collaborates-with-icj-to-host-judicial-workshop-on-access-to-justice-for-persons-with-disabilities-in-lesotho>.

¹⁵ Thabo Ramahloko, Compliance Management as an Assistive Tool for Courts to facilitate Access to Justice for People with Disabilities: An Overview of the Situation in Lesotho, 23 May 2024, available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4839034.

access to justice for persons with disabilities in Lesotho, as well as to provide an example of good practice which may be followed in other jurisdictions.

This report draws on ICJ's experience in advocating for the elaboration and implementation of the Procedure Rules and its longstanding engagement with the Lesotho judiciary and OPDs. Moreover, interviews of key stakeholders were conducted with judges, magistrates, judicial officers, lawyers, members of organizations of persons with disabilities, and disability rights experts in respect of both the process by which the Procedure Rules were developed and their efficacy in practice.

The report is organized into ten sections, beginning with this introduction.

Section II explores Lesotho's obligations under international law to ensure the right to access to justice for persons with disabilities, particularly focusing on the CRPD and ADP.

Section III examines legal frameworks in Lesotho before the adoption of the Disability Equity Act, highlighting legislative barriers to accessing justice.

Section IV discusses the landmark *Koali Moshoeshoe* judgment, a breakthrough in recognizing the rights of persons with disabilities to participate in judicial proceedings and a catalyst for legal reform in Lesotho.

Section V highlights the process of development of the Disability Equity Act, which, while recognizing the right to access justice, does not fully address other key issues directly relevant to ensuring access to justice for persons with disabilities.

Section VI examines, in particular, the Act's omission of a provision on legal capacity – a gap that has significant negative consequences for persons with intellectual and/or psychosocial disabilities.

Section VII analyzes Lesotho's innovative approach of mandating the Chief Justice to establish procedural accommodations and support frameworks through court rules, focusing on the process of drafting and enactment of the Procedure Rules.

Section VIII outlines the key provisions of the Procedure Rules and highlights some areas where the Rules could be improved.

Section IX examines the implementation of the Procedure Rules, identifying ongoing challenges in ensuring access to justice for persons with disabilities in Lesotho.

The report concludes with Section X, which sets out the key findings and recommendations.

Political and Legal System of Lesotho

The Kingdom of Lesotho (formerly Basutoland) is a landlocked, mountainous country in Southern Africa, entirely surrounded by the Republic of South Africa. It covers an estimated land area of about 30, 000 square kilometers and is divided into ten administrative districts, which are further subdivided into constituencies.¹⁶

Lesotho is a constitutional monarchy with a multi-party-political system.¹⁷ The King serves as Head of State, while executive authority is vested in him and exercised through the Prime Minister. The Parliament is bicameral, comprising the Senate (Upper House) and the National Assembly (Lower House).¹⁸

The judiciary is established under section 118 of the Constitution and is composed of the Court of Appeal as the apex court, the High Court, and subordinate courts. Lesotho follows a common law system, under which decisions of superior courts are binding on lower courts.¹⁹ The Constitution, as the supreme law of the land, provides that any law inconsistent with its provisions is void to the extent of the inconsistency.²⁰

II. Lesotho's duty under international law to guarantee access to justice for persons with disabilities

Lesotho is a State party to a number of universal human rights treaties including: the International Convention on the Elimination of All Forms of Racial Discrimination (1971), the International Covenant on Civil and Political Rights (1992), the International Covenant on Economic, Social and Cultural Rights (1992), the Convention on the Rights of the Child (1992), the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2003), the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Pornography (2003), the Convention on the Elimination of All Forms of Discrimination against Women (1995), the Convention against Torture and Other Cruel Inhumane or Degrading Treatment or Punishment (2001), the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (2005), the Convention for the Protection of All Persons from Enforced Disappearance (2013), and the CRPD (2008).²¹

Lesotho is also a State party to African regional human rights instruments: the African Charter on Human and Peoples' Rights (1992), the African Charter on the Rights and Welfare of the Child (1999), the Protocol to the African Charter on Human and

¹⁶ 'Common core document forming part of the reports of States parties: Lesotho,' HRI/CORE/LSO/2023, 22 May 2024, §§ 3 and 4.

¹⁷ Constitution of Lesotho, 1993, Sections 44 and 54.

¹⁸ Ibid, §§ 61-64.

¹⁹ Buhle Angelo Dube, 'The Law and Legal Research in Lesotho,' *GlobalLex*, available at: <https://www.nyulawglobal.org/globalex/lesotho1.html>, last accessed on 17 September 2025.

²⁰ Constitution of Lesotho, Section 2.

²¹ For the ratification status of UN human rights treaties by Lesotho, see https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=97&Lang=EN.

Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (2003), and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) (2004).

Most recently, in 2024, Lesotho signed the African Disability Protocol, although it has yet to ratify it.²² The Protocol, which entered into force on 3 May 2024,²³ is the first regional human rights instrument in Africa specifically dedicated to the rights of persons with disabilities. It complements the CRPD by reinforcing its principles and the rights it guarantees within the African context, while also responding to issues and concerns unique to the region.²⁴ It also addresses gaps and shortcomings in existing regional human rights instruments, such as the African Charter on Human and Peoples' Rights, which largely reflect outdated medical or charity-based approaches to disability and make only limited references to disability rights.²⁵ The Protocol, therefore, closes a long-standing gap in Africa's human rights framework by establishing a binding instrument that firmly embeds disability rights in the continent's human rights architecture.

Lesotho follows a "dualist" legal tradition, requiring treaties to be incorporated into its domestic law through an Act of Parliament before they can have direct applicability.²⁶ Historically, the judiciary in Lesotho has been somewhat hesitant to rely on international law that had not been incorporated into the law of Lesotho.²⁷ However, in the past two decades, there has been a notable shift, with courts increasingly referencing international human rights law as an interpretive aid, seeking to align domestic law with international standards even in the absence of formal incorporation.²⁸ In the 2005 case of *Molefi Ts'epe v the Independent Electoral Commission and Others*, the Court of Appeal referred to several human rights treaties to which Lesotho is party, as well as jurisprudence of the UN Human Rights Committee, the treaty body responsible for the International Covenant on Civil and

²² African Commission on Human and Peoples' Rights, 'Report of the Promotion Mission to the Kingdom of Lesotho,' 29 February 2024, available at: <https://achpr.au.int/en/documents/2025-02-23/promotion-mission-lesotho>, § 21; Masenono Letsie, 'Signing of the African Disability Protocol: Rescue for Women and Girls with Disabilities in Lesotho?' *Disability Lesotho E-newsletter*, Issue 21 Vol 9, February 2024, available at: http://www.infod.org.ls/uploads/1/2/2/5/12251792/disability_lesotho_issue_21_vol_9_feb_2024.pdf.

²³ African Commission "Press Release on the entry into force of the Protocol to the African Charter on Human and Peoples' Rights relating to the Rights of Persons with Disabilities in Africa," 9 June 2024, available at: <https://achpr.au.int/en/news/press-releases/2024-06-09/entry-force-protocol-persons-disabilities>, accessed on 16 September 2025.

²⁴ Kwadwo Appiagyei-Atua, 'A Comparative Analysis of the United Nations Convention on the Rights of Persons with Disability and the African Draft Protocol on the Rights of Persons with Disabilities' (2018) 21 *Law, Democracy & Development* 153; Paul Ochieng Juma, 'Ratification of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa: An Overview of the Implications' (2024) 12 *African Disability Rights Yearbook*.

²⁵ Dianah Msipa and Paul Juma, 'The African Disability Protocol: Toward a Social and Human Rights Approach to Disability in the African Human Rights System', *Handbook of Disability* (Springer Nature Singapore 2023).

²⁶ 'Common core document forming part of the reports of States parties, supra note 16, paras. 82 and 94.

²⁷ Buhle Angelo Dube, supra note 19.

²⁸ Ibid.

Political Rights, while interpreting constitutional provisions on equality and non-discrimination.²⁹

Regarding the CRPD, Lesotho adopted the Disability Equity Act in 2021, incorporating the treaty into its domestic law. However, as early as 2013, the High Court in *Fuma v Lesotho Defence Forces and Others* upheld that the Convention effectively forms part of domestic law and should guide the interpretation of national legal provisions.³⁰ The Court specifically asserted that:

“The unreservedly ratified United Nations Convention on the Rights of [Persons] with Disability stands not only as an inspirational instrument in the matter, but that by default it technically assumes the effect of the Municipal Law in the country.”³¹

This development was reflected in Lesotho’s Common Core Document submitted as part of its periodic reports to the UN human rights treaty bodies. The State of Lesotho, in the document, acknowledges that:

“where domestic law is silent on a legal issue or inconsistent, or non-protective of an individual’s human rights, resort may be made to international human rights standards for purposes of interpretation and protection...”³²

[it is within the] proper nature of the judicial process for national courts to have regard to international human rights norms, whether or not incorporated into domestic law, to resolve ambiguity or uncertainty in national constitutions and legislations.”³³

Lesotho acceded to the CRPD in December 2008, thereby assuming binding international obligations to respect, protect, and fulfill the rights of persons with disabilities. As noted above, Lesotho also signed the ADP in 2024, although it has not yet ratified it. While full legal obligations under the ADP come into effect upon ratification, Lesotho, as a signatory, is required to refrain from acts that would undermine the Protocol’s object and purpose.³⁴ This report, therefore, draws on both the CRPD and ADP as key international laws to assess Lesotho’s progress in advancing access to justice for persons with disabilities.

The right to access justice is intrinsically linked to the right to equality before courts and tribunals, the right to an effective remedy and to the right to a fair trial, and, more generally, to the right to equal protection of the law and to non-discrimination

²⁹ *Molefi Ts’epe v The Independent Electoral Commission*, (CIV.APN/135/2005) [2005] LSHC 96 (27 April 2005), §§ 16-22.

³⁰ *Thabo Fuma v Lesotho Defence Force and Others*, CONST/8/2011 [2013] LSHC 68, § 22.

³¹ *Ibid.*

³² Common core document forming part of the reports of States parties, *supra* note 16, 22 May 2024, § 94.

³³ *Ibid.*, § 95.

³⁴ Article 18 of the Vienna Convention on the Law of Treaties, Concluded at Vienna on 23 May 1969.

guaranteed under core international human rights instruments to which Lesotho is a party.³⁵ These include:

- The International Covenant on Civil and Political Rights ((Articles 2(3), 3, 14 and 26);
- The International Convention on the Elimination of All Forms of Racial Discrimination (Articles 5 (a) and 6);
- The Convention on the Elimination of All Forms of Discrimination against Women (Article 15);
- The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Articles 13 and 14);
- The Convention on the Rights of the Child (Articles 2, 37(d), and 40);
- The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Articles 1, 7, 16, 17, 18, 19, 24, 26(c), and 83);
- African Charter on Human and Peoples' Rights ((Articles 2, 3 and 7);
- African Charter on the Rights and Welfare of the Child (Articles 3 and 17); and
- The Protocol to the African Charter on Human and Peoples Rights on the rights of Women in Africa (Articles 2, 3, 8, and 25).

As a State party to the CRPD, Lesotho is obliged to ensure that persons with disabilities have effective access to justice on an equal basis with others. Article 13(1) of the CRPD provides that:

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

The ADP, like the CRPD, guarantees the right to access justice.³⁶ It also requires the provision of gender-appropriate accommodations and underscores the obligation of States parties to make customary law processes inclusive, while ensuring that such processes are not used to deny persons with disabilities their right to access to justice.³⁷

The CRPD Committee, in its first General Comment interpreting the scope of obligations under the treaty, emphasized the obligation of States parties to review and reform discriminatory provisions that restrict legal capacity and, consequently, access to justice based on disability.³⁸ In its concluding observations to State parties, the Committee has consistently emphasized the need to repeal or review laws that

³⁵ Eilionóir Flynn, 'Access to Justice' in Ilias Bantekas, Michael Ashley Stein and Dimitris Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (Oxford University Press 2018) 384.

³⁶ Article 13 of the ADP.

³⁷ Ibid, Article 13 (2).

³⁸ The Committee on the Rights of Persons with Disabilities (The CRPD Committee), General Comment No.1 (2014), Article 12: Equal Recognition before the Law, CRPD/C/GC/1, 19 May 2014, § 7.

limit the effective participation of persons with disabilities in judicial processes.³⁹ More specifically, the Committee has called on States to legally recognize that persons with intellectual and/or psychosocial disabilities have the right to participate in all legal proceedings on an equal basis with others.⁴⁰

Lesotho, therefore, has a duty to amend or repeal discriminatory laws that restrict the participation of persons with disabilities in justice systems and to adopt legislative frameworks that guarantee equal access to justice.⁴¹ Lesotho's initial report to the CRPD Committee –⁴² submitted in 2025 despite being due in 2011 – acknowledges a shifting normative landscape in the country towards recognizing the full legal capacity of persons with disabilities and their right to participate in judicial proceedings on an equal basis with others.⁴³ The report highlights constitutional guarantees, provisions under the Persons with Disabilities Equity Act, and landmark cases such as *Koali* and *Fuma*, while also noting the need to strengthen implementation of the Procedure Rules.⁴⁴ However, it does not explicitly acknowledge that several laws, including the Constitution, the Penal Code, and the Sexual Offences Act, continue to restrict the legal capacity of persons with disabilities and, in some cases, their legal standing to stand trial or to defend themselves against criminal charges.

The CRPD specifically requires States Parties to provide procedural and age-appropriate accommodations to enable the direct and indirect participation of persons with disabilities in judicial proceedings.⁴⁵ According to The International Principles and Guidelines on Access to Justice for Persons with Disabilities, developed through a broad consultative process under the leadership of the former UN Special Rapporteur on the Rights of Persons with Disabilities, procedural accommodations include:

“all necessary and appropriate modifications and adjustments in the context of access to justice, where needed in a particular case, to ensure the participation of persons with disabilities on an equal basis with others.”⁴⁶

Such accommodations include, among others: procedural adjustments and modifications; the provision of intermediaries or facilitators; and the provision of

³⁹ For instance, see The CRPD Committee, Concluding observations on the initial report of Seychelles, CRPD/C/SYC/CO/1, 16 April 2018, §§ 26 and 27; Concluding observations on the initial report of South Africa, CRPD/C/ZAF/CO/1, 23 October 2018, § 25; Concluding observations on the initial report of Angola, CRPD/C/AGO/CO/1, 12 April 2023, § 22; and Concluding observations on the initial report of Mauritania, CRPD/C/MRT/CO/1, 4 October 2023, § 26.

⁴⁰ For instance, see the CRPD Committee, Concluding observations on the combined initial and second periodic reports of Malawi, CRPD/MWI/CO/1-2, 5 October 2023, § 28.

⁴¹ CRPD, Articles 4 (1) and 5.

⁴² 'Initial Report Submitted by Lesotho under Article 35 of the Convention,' CRPD/C/LSO/1, 21 February 2025, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&CountryID=97.

⁴³ Ibid, §§ 47-50.

⁴⁴ Ibid.

⁴⁵ Article 13 (1) of the CRPD.

⁴⁶ International Principles and Guidelines on Access to Justice for Persons with Disabilities, 2020, available at: <https://www.ohchr.org/en/special-procedures/sr-disability/international-principles-and-guidelines-access-justice-persons-disabilities>.

alternative and augmentative means of information and communication that support persons with disabilities.⁴⁷ These accommodations are necessary for persons with disabilities involved in judicial processes, whether they are complainants, defendants, witnesses or participating in other capacities.

The obligation of States to ensure access to justice for persons with disabilities is intrinsically linked with other rights protected under the CRPD and so must be broadly construed.⁴⁸ Consequently, States must also ensure the enjoyment of equal recognition before the law,⁴⁹ equality and non-discrimination,⁵⁰ and liberty and security of the person.⁵¹ Additionally, States must take measures to guarantee accessibility⁵² and provide reasonable accommodations⁵³ for persons with disabilities.

The UN Special Rapporteur on the rights of persons with disabilities, established in 2014 through Human Rights Council resolution 26/20, is an independent expert appointed by the Council to address the human rights situation of persons with disabilities worldwide. Catalina Devandas Aguilar, the first mandate holder (2014-2020), led the consultative process that resulted in the development of the *International Principles and Guidelines on Access to Justice for Persons with Disabilities*, which was jointly adopted in 2020 by the Special Rapporteur, the CRPD Committee, and the Special Envoy of the UN Secretary-General on Disability and Accessibility.⁵⁴ The ICJ participated in this process and has formally endorsed the Principles and Guidelines.⁵⁵ The Principles and Guidelines “are intended to assist States and other actors to design, develop, modify and implement justice systems that provide equal access to justice for all persons with disabilities, regardless of their roles in the process, in accordance with the Convention on the Rights of Persons with Disabilities.”⁵⁶

III. Domestic Law prior to the adoption of the Disability Equity Act

Before the coming into force of the Disability Equity Act in 2021, Lesotho lacked laws and regulations and an overall legal framework that applied specific recognition of

⁴⁷ Ibid, Principle 3; the CRPD Committee, General Comment No.6 on Equality and Non-Discrimination, CRPD/C/GC/6, 26 April 2018, § 51.

⁴⁸ International Principles and Guidelines on Access to Justice for Persons with Disabilities, supra note 46.

⁴⁹ Article 12 of the CRPD and Article 7 of the ADP.

⁵⁰ Article 5 of the CRPD and Articles 5 and 6 of the ADP.

⁵¹ Article 14 of the CRPD and Article 9 of the ADP.

⁵² Article 9 of the CRPD and Article 15 of the ADP.

⁵³ Article 5 (3) of the CRPD.

⁵⁴ OHCHR, ‘UN Experts Launch Ground-Breaking Guidance on Access to Justice for Persons with Disabilities’, 28 August 2020, available at: <https://www.ohchr.org/en/press-releases/2020/08/un-experts-launch-ground-breaking-guidance-access-justice-people?LangID=E&NewsID=26193>.

⁵⁵ International Principles and Guidelines on Access to Justice for Persons with Disabilities, supra note 46, p.5; ICJ, ‘Groundbreaking new UN guidance on access to justice for persons with disabilities,’ 28 August 2020, available at: <https://www.icj.org/a2jpwd/>.

⁵⁶ International Principles and Guidelines on Access to Justice for Persons with Disabilities, supra note 49, p.6.

the rights to access justice for persons with disabilities or provided specific procedural accommodations and support frameworks tailored to their needs. Instead, the existing laws contained provisions that often conflicted with international law standards concerning the rights of persons with disabilities, often depriving them of legal capacity and access to justice. While some provisions within the existing law address discrimination based on disability and there were also some legal provisions that arguably support the obligatory provision of accommodations in the justice system,⁵⁷ the laws as a whole were not developed in alignment with the human rights of persons with disabilities.

The 1993 Constitution of Lesotho includes a specific provision on disability. Section 33 mandates that the government develop policies to support persons with disabilities through “rehabilitation, training and social resettlement.”⁵⁸ It requires the establishment of training facilities, which can include both public or private specialized institutions, and promotes the employment of persons with disabilities by encouraging employers to hire them.⁵⁹ However, this provision focuses on rehabilitation and social assistance, aligning with a charity or welfare-based approach. This approach views persons with disabilities as recipients of assistance rather than rights-holders, which contradicts the human rights-based approach required under the CRPD and the ADP.⁶⁰

The Constitution does not have a provision guaranteeing the right to access to justice in general or the right to effective remedies for human rights violations, nor does it recognize this right for persons with disabilities. However, it guarantees other human rights and fundamental freedoms, including the right to equality before the law and to the equal protection of the law,⁶¹ freedom from discrimination,⁶² and the right to a fair trial.⁶³

While the Constitution does not explicitly include disability as a prohibited ground of discrimination, which is a notable limitation, disability squarely falls under the category of “other status”, which is included in the section defining discrimination.⁶⁴ This status ground was affirmed by the High Court of Lesotho in its 2013 judgment

⁵⁷ LNFOD, Access to Justice for People with Disabilities in Lesotho, supra note 4, p.7.

⁵⁸ The Constitution of Lesotho, Section 33 reads:

“Rehabilitation, training and social resettlement of disabled persons
With a view to ensuring the rehabilitation, training and social resettlement of disabled persons, Lesotho shall adopt policies designed to –
(a) Provide for training facilities, including specialized institutions public or private; and
(b) Place disabled person in employment and encourage employers to admit disabled persons to employment.”

⁵⁹, Section 33 (a) and (b).

⁶⁰ CRPD Committee, General Comment No.6 (2018) on equality and non-discrimination, CRPD/C/GC/G, 26 April 2018, §§ 8 and 9.

⁶¹ Constitution of Lesotho, Sections 4 (1) (o) and 19.

⁶² Ibid, Sections 4 (1) (n) and 18.

⁶³ Ibid, Sections 4 (1) (h) and 12.

⁶⁴ LNFOD, Review of Existing Laws and Policies in Lesotho to Determine Harmony with United Nations Convention on the Rights of Persons with Disabilities, supra note 4, pp.26-27; LNFOD, ‘Game changer for people with disabilities: The adoption of the Convention on the Rights of Persons with Disabilities,’ *Lesotho Disability E-newsletter*, Issue 30, November 2014, http://www.lnfod.org.ls/uploads/1/2/2/5/12251792/disability_lesotho_november_2014.pdf.

of *Thabo Fuma v the Commander, Lesotho Defence Force and others*,⁶⁵ consistent with the approach of international treaty bodies.

However, the Committee on the Rights of Persons with Disabilities (CRPD Committee) has indicated that States parties should amend their constitutions or basic laws to explicitly prohibit discrimination on the basis of disability.⁶⁶ In that regard, the so-called "Omnibus Bill," containing draft amendments to the Lesotho Constitution, should explicitly affirm the prohibition of discrimination against persons with disabilities.⁶⁷

Section 19 of the Constitution recognizes the right to equality, providing that "every person shall be entitled to equality before the law and the equal protection of the law." This entails that equal protection of the law – and by extension, legal capacity – is a universal attribute to every person, including persons with disabilities.

Despite these protections, the Constitution also contains provisions that serve to restrict the legal capacity of persons with intellectual and/or psychosocial disabilities in certain contexts. For example, individuals with intellectual and/or psychosocial disabilities are classified as "of unsound mind," which accordingly results in their denial of the legal capacity to register to vote or be nominated and run for a parliamentary election.⁶⁸ This denial of legal capacity was further reinforced by the National Assembly Electoral Act of 2011.⁶⁹

⁶⁵ *Thabo Fuma v The Commander, Lesotho Defence Force and Others* (CONST 8 of 2011) [2013] LSHC 68 (10 October 2013), available at: <https://lesotholii.org/akn/ls/judgment/lshc/2013/68/eng@2013-10-10>, §§ 39-40.

⁶⁶ For example, see CRPD Committee, Concluding observations on the initial report of India, CRPD/C/IND/CO/1, 29 October 2019, §§ 12-13; and Concluding observations on the initial report of Bangladesh, CRPD/C/BGD/CO/1, 11 October 2022, §§ 11-12.

⁶⁷ Hoolo 'Nyane and Masebelu Makhobole, 'Expert Report on Constitutional Reforms (Incorporating Public Consultations and Written Submissions),' October 2019, available at: <https://www.gov.ls/wp-content/uploads/2019/11/EXPERT-REPORT-OF-CONSTITUTIONAL-REFORMSFINAL-23-OCT-19.pdf>, p.7.

⁶⁸ The Constitution of Lesotho, Sections 57 (3)(c) and 59 (1)(c):

"Section 57 – Elections to National Assembly

(3) No person shall be qualified to be registered as an elector in elections to the National Assembly who, at the date of his application to be registered –

(c) is, under any law in force in Lesotho, adjudged or otherwise declared to be of unsound mind.

Section 59 – Disqualifications for membership of Parliament

(1) No person shall be qualified to be nominated as a Senator by the King acting in accordance with the advice of the Council of State or designated by a Principal Chief as a Senator in his place and no person shall be qualified to be elected as a member of the National Assembly if, at the date of his nomination or designation or, as the case may be, at the date of nomination, he –

(c) is under any law in Lesotho, adjudged or otherwise declared to be of unsound mind."

⁶⁹ National Assembly Electoral Act, 2011, Section 5 (2) (d). However, the Persons with Disability Equity Act entitle persons with disability the right to vote and voted for.

"Section 30 - Voting:

(1) A person with disability shall be entitled to register for voting in national and local government elections and to be voted for.

(2) A person with disabilities is entitled, at his request, to be assisted by a person of their choice, in voting in national and local government elections

In addition, Section 58 of the Constitution provides the ability to speak as a requirement for nomination as a Senator or election as a member of the National Assembly.⁷⁰ Depending on how it is interpreted, this may effectively deprive legal capacity and exclude Deaf or non-verbal persons from participating in national assemblies.⁷¹

Lesotho's laws also contain a range of discriminatory provisions that are of direct relevance in the context of legal capacity and access to justice. Lesotho's Penal Code of 2010, which was adopted after Lesotho acceded to the CRPD (2 December 2008), and its CPEA contain discriminatory provisions that undermine the legal capacity of persons with intellectual and/or psychosocial disabilities in the criminal justice system. Section 19 of the Penal Code presumes every person to be of sound mind but makes an exception for those who are deemed to have a "mental disorder" at the time of committing an offence.⁷² In such cases, courts can enter a verdict of "insanity" and order the person's detention under Section 172 of the CPEA.⁷³ This section allows courts to declare an accused person "insane" or "mentally incapacitated" and commit them to prison as long as the executive sees fit (the "King's pleasure") or issue any other appropriate order which the court deems fit.⁷⁴

(3) A person who undertakes to render assistance under subsection (1), shall do so in strict compliance and confidence with the instruction of the voter and shall bind himself, in the prescribed form to comply with this section.

(4) A ballot paper at polling stations shall be made available in any other accessible format methods."

⁷⁰ The Constitution of Lesotho, Section 58 (1)(b) and (2)(c). This same provision also implies that persons with certain disabilities may be incapable of reading and writing.

⁷¹ Section 30 of the Persons with Disabilities Equity Act recognizes the right of individuals with disabilities to vote and to be voted for in elections.

⁷² The Penal Code Act No.6 of 2010, Section 19 – Insanity:

(1) For the purposes of subsection (2), every person is presumed to be of sound mind and to have been of sound mind, until the contrary is proved.

(2) No person shall be convicted of a criminal offence if he or she proves on the balance of probabilities that at the time of the commission of the offence he or she was suffering from mental disorder of such a nature that he or she was substantially unable to appreciate the wrongfulness of his or her actions or that he or she was unable to conduct himself or herself in accordance with the requirements of the law.

(3) Where proof of mental disorder is established, the court shall return a verdict of insanity and order the detention of the person in terms of section 172 of the Criminal Procedure and Evidence Act 1981."

⁷³ Ibid, Section 19 (3).

⁷⁴ Criminal Procedure and Evidence Act No.9 of 1981 (CPEA), Section 172 - Trial of insane person:

(1) If on the arraignment or during the trial or at the preparatory examination of any person charged with any offence, it appears to the judicial officer presiding at such trial or preparatory examination that such person is insane or mentally incapacitated the court before which the trial or preparatory examination is being held shall enquire into the question of such person's sanity.

(2) If the court finds the person charged with an offence insane or mentally incapacitated pursuant to sub-section (1), the judicial officer presiding at the trial or preparatory examination shall record such verdict or finding, and shall issue an order committing such person to some prison pending the satisfaction of the King's pleasure or the court may make any order which it deems fit.

(3) When in any criminal proceeding, any act or omission is charged against any person as an offence, and it is given in evidence on the trial of such person for that offence that he was insane so as not to be responsible, according to law, for his action at the time when the act was done or the omission made, then, if it appears to the court before which such person is tried that he

Additionally, the CPED provides that if, during a trial, it is proven that the accused committed the act or omission but was “insane” at the time of commission of the act, the court must return a special verdict of “guilty but insane”.⁷⁵ This exempts the accused from criminal responsibility due to “insanity”, but the court can order the accused to be detained in prison at the “King's pleasure”.⁷⁶

These provisions of the Penal Code and the CPEA deprive persons with intellectual and/or psychosocial disabilities of their legal capacity to stand trial, violating their right to freedom from discrimination and permitting forced institutionalization. Institutionalization based on disability infringes on the rights to liberty and security of persons with disabilities guaranteed under Article 14 of the CRPD and Article 9 of the ADP. As the CRPD Committee has emphasized in its Guidelines on the Right to Liberty and Security of Persons with Disabilities, declaring individuals unfit to stand trial or not criminally responsible and/or depriving them of liberty on the basis of disability violates Article 14 of the CRPD, since such practices deprive individuals of the due process rights and legal safeguards afforded to all other persons.⁷⁷ The Committee has therefore called on States with such provisions to reform their criminal and procedural laws to eliminate the use of declarations of incapacity to participate in legal proceedings or to be held criminally responsible.⁷⁸

The CPEA also imposes restrictions on the testimonial competence of individuals with intellectual and/or psychosocial disabilities. Section 219 provides that:

“No person appearing or proved to be afflicted with idiocy, lunacy, or inability or laboring under any imbecility of mind arising from intoxication or otherwise whereby he is deprived of the proper use of reason, shall be competent to give evidence while so afflicted or disabled.”

While generally all individuals are competent and compellable to testify in criminal cases,⁷⁹ Section 219, on its face, discriminates against persons with intellectual and/or psychosocial disabilities by excluding them from testifying in any legal proceedings. It thereby denies them legal capacity and restricts their ability to vindicate their rights when violated. However, in 2019, the Constitutional Division of the High Court of Lesotho ruled Section 219 of the CPEA unconstitutional in the

did the act or made the omission charged, but was insane at the time when he did the act or made the omission —

- (a) the court shall return a special verdict or finding to the effect that the accused is guilty of the act or omission charged against him, but was insane at the time when he did the act or made the omission, and
- (b) the judicial officer presiding at the trial shall thereupon order the accused to be kept in custody in some prison pending the signification of the King's pleasure.

⁷⁵ Ibid, Section 172 (3).

⁷⁶ Ibid.

⁷⁷ The CRP Committee, Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities: The Right to Liberty and Security of Persons with Disabilities, 2015, § 16.

⁷⁸ The CRPD Committee, 'Guidelines on Deinstitutionalization, including in Emergencies', CRPD/C/5, 10 October 2022, § 56.

⁷⁹ CPEA, Section 215.

landmark case of *Koali Moshoeshoe and Others v DPP and others* (discussed in section IV below), thereby rendering the provision null and void.

The Sexual Offences Act, 2003, also restricts the legal capacity of persons with disabilities. The Act prohibits any person from engaging in a sexual act with or in the presence of persons with disabilities, regardless of whether the person with a disability has consented.⁸⁰ The provision applies to a person with any form of disability. This provision is reinforced in the Penal Code of 2010, which also criminalizes sexual acts involving persons with disabilities.⁸¹

Lesotho submitted a what is known as a UN “Common Core Document” in 2024, which is basic information used by all UN human rights treaty bodies supervising the implementation of obligations under their respective treaties. In this Document, Lesotho presented the provisions of the Sexual Offences Act 2003 as measures that protect and promote the rights of persons with disabilities.⁸² In reality, however, they conflict with the CRPD and the ADP, as they rest on the assumption that persons with disability inherently lack the capacity to consent, thereby denying them the legal capacity to exercise sexual autonomy.

The laws in Lesotho have failed to provide for the necessary procedural accommodations and support for persons with disabilities required for them to participate in legal processes on an equal basis. While the Constitution guarantees free interpreter services in criminal trials for an accused person,⁸³ which may be interpreted to include sign language interpretation for accused persons with disabilities, no other broader support measures are recognized. Both the CPEA⁸⁴ and the Sexual Offences Act of 2003⁸⁵ allow criminal proceedings to be held *in camera* when necessary to protect witnesses or other individuals in situations of vulnerability and requiring protection. Although these provisions were not specifically designed for persons with disabilities and apply only in limited situations, they may help address some challenges – such as the requirement to give evidence in open court – that may otherwise amount to barriers to equal access to justice. Overall, these laws do not

⁸⁰ Sexual Offences Act No.3 of 2003, Section 15:

- (1) A person who commits a sexual act –
 - a. In relation to; or
 - b. In the presence of,a disable person commits an offence.
- (2) A person who commits any act with the intent to invite or persuade a disable person to allow any person to commit a sexual act in relation to that disable person commits an offence.

⁸¹ The Penal Code of 2010, Section 52 partly reads as follows:

- (1) A person who has unlawful sexual act with another person or causes another person to commit an unlawful sexual act, commits an offence.
- (2) A sexual act is unlawful if committed under the following circumstances –
 - (f) the complainant is affected by –
 - (i) physical disability, mental incapacity, sensory disability, medical disability, intellectual disability, or other disability, whether permanent or temporary.

⁸² ‘Common core document forming part of the reports of States parties, supra note 16, para. 158.

⁸³ The Constitution of Lesotho, Section 12 (2) (f).

⁸⁴ CPEA, Section 173 (5).

⁸⁵ Sexual Offences Act No.3 of 2003, Section 23 (1).

provide any other procedural accommodations and support for persons with disabilities who are complainants, defendants, or witnesses in legal proceedings.

IV. *Koali Moshoeshoe and Others v DPP and others*: A catalyst for legal reform

The case of *Koali Moshoeshoe* concerns a 37-year-old man with an intellectual disability who, in 2016, reported to the police that he had been sexually assaulted by a woman.⁸⁶ Upon completing their investigations, the police referred the case to court for prosecution. However, the public prosecution declined to proceed with the matter on the grounds that Moshoeshoe has been “declared incompetent” to give evidence and testify due to his intellectual disability, as outlined in Section 219 of the CREA.⁸⁷

As noted above, Section 219 of the CPEA removes the legal capacity of persons with intellectual and/or psychosocial disabilities to stand as witnesses and give evidence in a criminal trial. LNFOD and the Lesotho Society of Mentally Handicapped Persons (LSMHP) became parties to the case along with *Koali*’s parents and family to challenge the constitutionality of this provision.⁸⁸ In the proceedings, *Koali Moshoeshoe* was named as the first applicant; his parents and family, together with the LSMHP, constituted the second applicant; and LNFOD appeared as the third applicant.

The applicants petitioned the High Court of Lesotho to declare Section 219 of the CPEA inconsistent with Sections 18 and 19 of the Constitution of Lesotho.⁸⁹ These sections of the Constitution guarantee the right to equality before the law and to equal protection under the law, and freedom from discrimination.⁹⁰

In its judgment delivered in May 2019, the Constitutional Division of the High Court of Lesotho declared Section 219 of the CPEA unconstitutional and therefore “null and

⁸⁶ *Koali Moshoeshoe and Others vs DPP and Others*, supra note 1, para.4.

⁸⁷ Ibid, paras.5 and 11.

⁸⁸ LNFOD, Access to Justice for People with Disabilities in Lesotho: supra note 4, pp.32-33.

⁸⁹ *Koali Moshoeshoe and Others vs DPP and Others*, supra note 1, para.3.

⁹⁰ Section 18 (in part) and 19 of the Constitution of Lesotho provide as follows:

Section 18. Freedom from Discrimination

- (1) Subject to the provisions of subsections (4) and (5) no law shall make any provision that is discriminatory either of itself or in its effect.
- (2) Subject to the provisions of subsection (6), no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.
- (3) In this section, the expression “discriminatory” means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.
- (4) ...

Section 19. Right to equality before the law and the equal protection of the law

Every person shall be entitled to equality before the law and to the equal protection of the law.

void”.⁹¹ It reasoned that Section 219 of the Act contradicts Sections 18 and 19 of the Constitution, as it undermines human dignity.⁹² In coming to this conclusion, the Court noted that:

“The effect of Section 219 of the Criminal Procedure and Evidence Act is to render a victim of abuse, exploitation, humiliation and exploitation to all kinds of vulnerable treatment the worst kinds being sexual, financial and through other obnoxious methods. The victims of all these are human beings and deserve all protection and equality under law. Even if the insolent or disrespectful words are removed from Section 219, the negative effect to the disabled remains poignant and this quite obnoxious and must be removed from our statute books.”⁹³

The Court further emphasized that persons with disabilities are entitled to equal treatment and a fair hearing when appearing in court.⁹⁴ It underscored its role as the “Upper Guardian” of “all children and the disabled,” stressing that it is the Court’s “sacred and fundamental duty to guarantee that all persons appearing before courts of law as suspect, accused, victims or witness have a fair hearing – otherwise justice stands imperiled and jeopardized.”⁹⁵ On this basis, Section 219 of the CPEA was found to be discriminatory, as it excludes persons with disabilities from participating in legal proceedings and thereby denies them the equal protection of the law.

The Court also ordered the Director of Public Prosecutions to exercise powers under the law and to prosecute the suspected perpetrator.⁹⁶ However, in an interview for this report, Mafumane Makhele, Program Coordinator at Intellectual Disability and Autism Lesotho (IDAL), confirmed that in the more than six years since the judgment was handed down, the case has not proceeded further. This is because, although organizations of persons with disabilities approached *Koali* Moshoeshoe and his family to pursue the case again, he declined to give his consent, stating that he did not wish to proceed any further.⁹⁷

Nevertheless, the High Court’s decision sets a precedent which will be binding in respect of future prosecutions in these circumstances. The High Court struck down a long-standing provision that had categorically denied persons with intellectual and/or psychosocial disabilities the legal capacity to testify in court. The Court thereby affirmed the right of persons with disabilities to participate in court proceedings and adduce evidence as witnesses. In doing so, the court overturned existing precedent to the effect that evidence from individuals with intellectual and/or psychosocial disabilities would not be considered admissible.⁹⁸

⁹¹ *Koali Moshoeshoe and Others vs DPP and Others*, supra note 1, para.19.

⁹² Ibid, paras.12 and 13.

⁹³ Ibid, para.18.

⁹⁴ Ibid, paras.10, 17, and 18.

⁹⁵ Ibid, para.18.

⁹⁶ Ibid, para.1.

⁹⁷ Interview with Mafumane Makhele, Program Coordinator at Intellectual Disability and Autism Lesotho, 13 May 2025.

⁹⁸ Nkhasi Sefuthi, ‘Facilitating access to justice for Persons with Intellectual or Psychosocial disabilities through strategic litigation in Lesotho,’ *Disability Lesotho E-newsletter*, Issue 4 Vol 4, March 2017, available at: http://www.infod.org.ls/uploads/1/2/2/5/12251792/disability_lesotho_mar_2017.pdf.

One impact of the judgement was its apparent significant role in shifting some attitudes toward the legal capacity of persons with intellectual and/or psychosocial disabilities to participate in legal processes and proceedings. Although not explicitly stated in the judgment, *Koali* Moshoeshoe's lawyer in the case has observed that the judgment effectively affirmed that persons with disabilities are entitled to equality and possess the legal capacity to testify in court on an equal basis with others, provided the necessary accommodations and support are made available.⁹⁹ Reflecting on this shift, Lepeli Moeketsi, a human rights lawyer interviewed by the ICJ, explained how perceptions changed following the judgment:

"Before Section 219 was repealed, the prevailing attitude was 'what evidence are we going to get from such people?' [referring to persons with intellectual and/or psychosocial disabilities]. But after the provision was repealed, people acknowledged they had been wrong and now understand that the key issue is ensuring proper accommodations in legal processes."¹⁰⁰

Mafumane Makhele, from the IDAL, which advocates for the rights of children and persons with intellectual disabilities in Lesotho, also explained to the ICJ the significant attitudinal shift brought about by the judgment:

"Since the *Koali* judgment, police officers investigating cases involving persons with disabilities, prosecutors, and magistrates now call on us [IDAL] to assist in taking statements; it is a really big achievement."¹⁰¹

The judgment also served as a catalyst for strengthening advocacy efforts by organizations of persons with disabilities in Lesotho, which leveraged its significance to push for broader legal reforms. As Nkhasi Sefuthi, the former Executive Director of LNFOD, explained:

"We were doing a project on access to justice for persons with disabilities. We came across this guy who wanted to put his case in court, and there was this restriction that persons with mental disabilities are not allowed because of a lack of competence and capacity to stand before the court. We had to support him to challenge the law. The issue of *Kaoli* is just part of the advocacy that began earlier than that."¹⁰²

The outcome of the judgement, therefore, resonated with long-standing demands of many advocates within the disability rights movement in Lesotho. It also encouraged, empowered and legitimized further advocacy efforts of OPDs on access to justice for persons with disabilities. It has appeared to bolster confidence in the judicial system

⁹⁹ Interview with Dr. Itumeleng Shale, former lawyer in the *Koali* case and current Judge of the High Court of Lesotho, 27 January 2025.

¹⁰⁰ Interview with Lepeli Moeketsi, Advocate and Human Rights Lawyer at the Seinoli Legal Centre, 30 January 2025.

¹⁰¹ Interview with Mafumane Makhele, Program Coordinator at Intellectual Disability and Autism Lesotho, 13 May 2025.

¹⁰² Interview with Nkhasi Sefuthi: first on 28 January 2025, when he was serving as the Executive Director of LNFOD, and a follow-up interview on 11 July 2025 in his current capacity as the Director General of the Lesotho Persons with Disability Advisory Council. In both interviews, Mr. Sefuthi spoke in his personal capacity.

on the part of OPDs and motivated them to consider strategic litigation as a possible avenue for realizing their rights.

On the other hand, the judgment by itself has had limitations in its overall effect, since in striking down the discriminatory provision, the court left it for the legislature and the executive to determine how to give practical effect to its ruling. While the *Koali* judgment marked a highly consequential step forward, in the absence of further action by the legislature at the time, its practical impact on improving access to justice for persons with intellectual and/or psychosocial disabilities in the two years that followed – between 2019 and the enactment of the Disability Equity Act in 2021 – was limited.¹⁰³ One lawyer expressed disappointment in these limitations in the following terms:

“The Court only declared the provisions unconstitutional without going further to direct how Parliament or the relevant legislative body should proceed or tell us what the right way of doing it. The Court ought to have gone further.”¹⁰⁴

The absence of disability-specific legislation in Lesotho to regulate or mandate the provision of necessary accommodations and support for persons with disabilities in the justice system has persisted.¹⁰⁵ In the absence of disability specific legislation and correlative procedural rules substantially addressing the protection of the rights of persons with disabilities, this void risked remaining unaddressed, hindering the full realization of the right to access justice.¹⁰⁶

Nevertheless, according to the OPD representative Nkhasi Sefuthi, immediately after the judgment, LNFOD stepped in to fill this gap by providing training to judges, magistrates, prosecutors, and other justice actors on the concept of accommodation and support for persons with disabilities.¹⁰⁷ The trainings were aimed at building the capacity of justice actors to apply accommodations in line with the needs of persons with disabilities, especially after Section 219 was struck down.¹⁰⁸

Organizations of persons with disabilities seized the momentum generated by the *Koali* judgment to intensify their advocacy for the enactment of the Disability Equity Bill, which was then under legislative review. As a result of these efforts, the Bill was enacted in 2021, two years after the High Court's judgment. The version of the Bill ultimately adopted as law included a vital provision recognizing the right to access

¹⁰³ Makatleho Molotsi, ‘Lessons from *Koali Moshoeshe v DPP and Others*’ case,’ *Disability Lesotho Newsletter*, Issue 8 Vol 7, July 2020, available at: http://www.infod.org.ls/uploads/1/2/2/5/12251792/disability_lesotho_july_2020.pdf.

¹⁰⁴ Interview with Starford Sharite, Deputy Registrar at the High Court of Lesotho, 23 June 2025.

¹⁰⁵ Dianah Msipa, ‘Recognising the Testimonial Competence of Persons with Intellectual and Psychosocial Disabilities in Southern Africa: Lessons from Lesotho’ (2022) 10 African Disability Rights Yearbook 243, 249–250.

¹⁰⁶ Interview with Dianah Msipa (PhD), Disability Rights Expert at the Centre for Human Rights, University of Pretoria, 30 October 2024.

¹⁰⁷ Follow-up interview with Nkhasi Sefuthi, Director General of the Lesotho Persons with Disability Advisory Council, 11 July 2025.

¹⁰⁸ Ibid.

justice, also explicitly mandating the Chief Justice to enact rules for the provision of accommodations and support for persons with disabilities when accessing justice.

Another critique, offered by Dianah Msipa, highlights the *Koali* judgement's narrow focus on the testimonial competence of persons with intellectual and/or psychosocial disabilities while overlooking the broader and more foundational issue of legal capacity.¹⁰⁹ Although the case appeared to concern a procedural matter – whether a person could testify – Msipa emphasizes that testimonial competence is intrinsically linked to the right to legal capacity, which includes both the ability to hold rights and to act on them.¹¹⁰ By failing to address this, Msipa argues, the Court missed an opportunity to affirm a core aspect of equal access to justice for persons with disabilities.¹¹¹

Another key limitation of the *Koali* judgment lies in the High Court's omission to expressly grapple in the judgement with the CRPD and the Committee's jurisprudence. The CRPD affirms the equal recognition of persons with disabilities before the law, their full legal capacity, their right of access to justice on an equal basis with others, and the obligation of States to provide necessary accommodations and support to ensure effective access to justice.¹¹² By striking down Section 219 of the CPEA without grounding its reasoning at least in part on these international legal obligations, the Court missed an opportunity to more fully clarify how justice actors should adapt procedures to enable the meaningful participation of persons with disabilities in justice processes. This omission is particularly notable given the growing trend within Lesotho's jurisprudence, as noted above, to reference international human rights instruments when interpreting constitutional and statutory provisions.

V. The Disability Equity Act

Since Lesotho acceded to the CRPD in 2008, a number of organizations concerned with the rights of persons with disabilities have advocated for the reform of discriminatory laws¹¹³ and the adoption of comprehensive disability rights legislation.¹¹⁴ LNFOD has been at the forefront of these efforts, pushing for a law specifically protecting the rights of persons with disability.¹¹⁵

¹⁰⁹ Msipa (n 69) 248–249.

¹¹⁰ *ibid.*

¹¹¹ Dianah Msipa, 'Moshoeshoe v. DPP: A Missed Opportunity for Persons with Intellectual and Psychosocial Disabilities in Lesotho?' (2021) 13 Drexel Law Review 909.

¹¹² Articles 5 (3), 12, and 13 of the CRPD.

¹¹³ LNFOD, 'Review of Existing Laws and Policies in Lesotho to Determine Harmony with United Nations Convention on the Rights of Persons with Disabilities,' 2015, http://www.lnfod.org.ls/uploads/1/2/2/5/12251792/lnfod_legal_and_policy_review_report.pdf. Also see, LNFOD, 'Game changer for people with disabilities: The adoption of the Convention on the Rights of Persons with Disabilities', *Lesotho Disability E-newsletter*, Issue 30, November 2014, available at: http://www.lnfod.org.ls/uploads/1/2/2/5/12251792/disability_lesotho_november_2014.pdf.

¹¹⁴ 'LNFOD applauds government's efforts to protect people with disabilities', *Disability Lesotho E-newsletter*, Issue 8, February 2013, available at: http://www.lnfod.org.ls/uploads/1/2/2/5/12251792/disability_lesotho_feb_2013_1.pdf; Also,

¹¹⁵ Interview with Nkhasi Sefuthi, Executive Director of LNFOD, 28 January 2025.

The government, particularly the Ministry of Health and Social Welfare, began to respond seriously to these advocacy efforts, beginning in 2011 when it adopted the National Disability and Rehabilitation Policy.¹¹⁶ This policy outlined the measures the government intends to take to address disability issues, including “review of all relevant legislation to ensure that laws are responsive to the needs of PWDs [persons with disabilities].”¹¹⁷ In 2013, the government took another significant step by allocating funds in its national budget for the 2013/2014 fiscal year to specifically address issues related to persons with disabilities, including funding for the development of a Disability Equity Act.¹¹⁸

Following concerted advocacy from OPDs,¹¹⁹ the Ministry of Social Development drafted an initial version of the Disability Equity Bill towards the end of 2014.¹²⁰ The Bill comprised protections for various rights for persons with disabilities in accordance with the CRPD, including the right to access to justice.¹²¹

Despite initial hopes that the Parliament would expedite the adoption of the Bill, the enactment process was remarkably slow, described as proceeding “at the tortoise’s pace”.¹²² In all, it took eight years of lengthy processes before Lesotho’s Parliament finally adopted the Persons with Disability Equity Act in 2021.

The drafting process included consultations with organizations of persons with disabilities. For instance, in 2017, the then director of LNFOD noted that the organization was provided with the draft bill to review before the Bill was submitted to the Cabinet and Parliament, aiming to ensure that “what has been agreed upon is

¹¹⁶ Government of the Kingdom of Lesotho Ministry of Health and Social Welfare, National Disability and Rehabilitation Policy: Mainstreaming Persons with Disabilities into Society, 2011, available at: http://www.infod.org.ls/uploads/1/2/2/5/12251792/national_disability_and_rehabilitation_policy_2011.pdf. Also see, Nkhasi Sefuthi, ‘Disability inclusion is long overdue’, *Disability Lesotho E-newsletter*, Issue 24, May 2014, available at: http://www.infod.org.ls/uploads/1/2/2/5/12251792/disability_lesotho_may.pdf.

¹¹⁷ National Disability and Rehabilitation Policy: Mainstreaming Persons with Disabilities into Society, *ibid*, p.20.

¹¹⁸ ‘LNFOD applauds government’s efforts to protect people with disabilities’, *Disability Lesotho E-newsletter*, Issue 8, February 2013, available at: http://www.infod.org.ls/uploads/1/2/2/5/12251792/disability_lesotho_feb_2013_1.pdf.

¹¹⁹ LNFOD, *Disability Lesotho E-newsletter*, Issue 14, July 2013, available at: http://www.infod.org.ls/uploads/1/2/2/5/12251792/disability_lesotho_july_2013.pdf; Issue 16, September 2013, available at: http://www.infod.org.ls/uploads/1/2/2/5/12251792/disability_lesotho_september_2013.pdf; and Nkhasi Sefuthi, ‘Disability inclusion is long overdue’, *Disability Lesotho E-newsletter*, Issue 24, May 2014, available at: http://www.infod.org.ls/uploads/1/2/2/5/12251792/disability_lesotho_may.pdf.

¹²⁰ Nkhasi Sefuthi, ‘Disability equity bill in place’, *Disability Lesotho E-newsletter*, Issue 1 Vol.2, December 2014, available at: http://www.infod.org.ls/uploads/1/2/2/5/12251792/disability_lesotho_dec_2014.pdf.

¹²¹ Maja Matshoha-Makhoali, ‘A call for the enactment of the Disability Equity Bill by the 9th Parliament of Lesotho’, *Disability Lesotho E-newsletter*, Issue 6 Vol.2, May 2015, available at: http://www.infod.org.ls/uploads/1/2/2/5/12251792/disability_lesotho_may_2015.pdf.

¹²² Nkhasi Sefuthi, ‘At the tortoise’s pace’, *Disability Lesotho E-newsletter*, Issue 4 Vol.3, March 2016, available at: http://www.infod.org.ls/uploads/1/2/2/5/12251792/disability_lesotho_mar_2016.pdf. Also see *Disability Lesotho E-newsletter*, Issue 5 Vol.3, April 2016, available at: http://www.infod.org.ls/uploads/1/2/2/5/12251792/disability_lesotho_april_2016.pdf; and Issue 11 Vol.3, October 2016, available at: http://www.infod.org.ls/uploads/1/2/2/5/12251792/disability_lesotho_oct_2016.pdf.

in order” and that the Bill complied with standards set out in the CRPD.¹²³ Once the Bill was tabled before Parliament in 2018, the parliamentary portfolio committee also conducted consultative meetings across the country to solicit the views of people with disabilities and the wider community.¹²⁴ By 2018, it was also acknowledged that while a few provisions of the Bill remained inconsistent with the CRPD, significant improvements had been made, observers noting that the Bill now addressed several rights of persons with disabilities, giving the impression that the drafters had made a genuine effort to align the text with the CRPD.¹²⁵

Despite the fact that the parliamentary committee had nationwide consultations that highlighted, among other issues, the importance of incorporating the CRPD in full, the final version of the Bill did not reflect this demand.¹²⁶ Also, in 2020, when the Senate legislative committee had completed its review of the proposed amendments and submitted its report to the Senate, LNFOD welcomed the progress but noted that it had not yet received the report and was therefore unable to assess whether its concerns had been meaningfully addressed.¹²⁷ As a result, the final Act adopted did not fully address all obligations under the CRPD. As will be discussed below, leaders of organizations of persons with disabilities expressed frustration to the ICJ, noting that the government representatives tasked with drafting the Bill often lacked a full understanding of the concept of disability and the specific concerns raised by these organizations in respect of particular rights. These include, for example, the legal capacity of persons with intellectual and/or psychosocial disabilities to stand trial in criminal cases.¹²⁸

Consistent with the CRPD, the Disability Equity Act marks a paradigm shift in Lesotho, as it is founded on the human rights model of disability, as is evident, for example, from the definition of disability in the Act, which draws significantly on the CRPD.¹²⁹

¹²³ Nkhasi Sefuthi, 'Making Disability Equity Bill Work for Persons with Disabilities,' *Disability Lesotho E-Newsletter*, Issue 10 Vol.4, September 2017, available at: http://www.infod.org.ls/uploads/1/2/2/5/12251792/disability_lesotho_september_2017.pdf.

¹²⁴ Nkhasi Sefuthi, Second reading of Persons with disabilities Equity Bill in the Parliament of Lesotho, *Disability Lesotho*, Issue 10 Vol 6, September 2019, available at: http://www.infod.org.ls/uploads/1/2/2/5/12251792/disability_lesotho_sept_2019.pdf.

¹²⁵ Nkhasi Sefuthi, 'Moving on to the Parliament of Lesotho,' *Disability Lesotho*, Issue 8 Vol.5, July 2018, available at: http://www.infod.org.ls/uploads/1/2/2/5/12251792/disability_lesotho_july_2018.pdf.

¹²⁶ Nkhasi Sefuthi, Second reading of Persons with disabilities Equity Bill in the Parliament of Lesotho, *Disability Lesotho*, Issue 10 Vol 6, September 2019, available at: http://www.infod.org.ls/uploads/1/2/2/5/12251792/disability_lesotho_sept_2019.pdf.

¹²⁷ Nkhasi Sefuthi, Progress towards enactment of the Persons with Disability Equity Bill, *Disability Lesotho*, Issue 11 Vol.7, October 2020, available at: http://www.infod.org.ls/uploads/1/2/2/5/12251792/disability_lesotho_oct_2020.pdf.

¹²⁸ Interview with Nkhasi Sefuthi, Executive Director of LNFOD, 28 January 2025.

¹²⁹ Section 3 of the Disability Equity Act defines disability as:

“the result of the interaction of the person with impairments and the environment with various barriers which hinder a person with the impairment to participate in societal activities on an equal basis with other persons.”

This contrasts with the previously embedded charity or medical model¹³⁰ found in Lesotho's legislation, including its Constitution.¹³¹

The practical effect of the enactment of the Act has been manifest since the Act came into force. As an OPD representative, who was involved in the consultations relating to the drafting of the Act, explained:

"Before the enactment of the Act, the rights of persons with disabilities, most of them, were not enforceable in courts of law. They were regarded as just policy issues or development issues which must be addressed by implementing programs or designing interventions to address the problems that had been identified ... Persons with disabilities were actually struggling to access their rights... there was no law which was preventing discrimination against persons with disabilities...

Now that we have the law, what has changed is that this law empowers individuals with disabilities themselves to claim their rights through the enforcement of this law. They can go to courts; they can engage with policymakers on the implementation of this law. So, meaning that individuals with disabilities now have the right which they did not have before."¹³²

In terms of substantive guarantees, the Act protects a number of rights for persons with disabilities, including access to education,¹³³ healthcare,¹³⁴ and employment.¹³⁵ It also ensures the right to live independently,¹³⁶ accessibility and mobility,¹³⁷ participation in recreational and sports activities,¹³⁸ and participation in political life, specifically related to exercising the voting right.¹³⁹

Section 32 of the Act pertains, in particular, to "access to justice".¹⁴⁰ The Section does not contain an affirmative statement of a right to access to justice or a generalized obligation of the State to ensure the provision of access to justice to persons with disabilities on an equal basis. The ICJ's research for this report reveals that earlier drafts of the Bill did contain such an explicit provision, but it was notably omitted

¹³⁰ The medical model of disability views disability primarily as a problem within the individual, caused by physical, mental or sensory impairments, and the focus is on diagnosis, treatment, and rehabilitation to "fix" or "cure" the individual to fit into society. In contrast, the human rights model of disability views disability as a social construct, emphasizing that barriers in society (physical, attitudinal, legal) interact with impairments to disable people. It is therefore not impairments alone that constitute a disability. In contrast to the medical model, the human rights model proposes changing societal structures and barriers to ensure full inclusion and equal rights for persons with disabilities. See CRPD Committee, General Comment No.6 (2018) on equality and non-discrimination, CRPD/C/GC/G, 26 April 2018, §§ 8 and 9.

¹³¹ Section 33 of the Constitution of Lesotho.

¹³² Interview with Nkhasi Sefuthi, Executive Director of LNFOD, 28 January 2025.

¹³³ Sections 23 and 24 of the Disability Equity Act.

¹³⁴ Ibid, Section 25.

¹³⁵ Ibid, Section 22.

¹³⁶ Ibid, Section 21.

¹³⁷ Ibid, Sections 26, 27 and 28.

¹³⁸ Ibid, Section 29.

¹³⁹ Ibid, Sections 30 and 31.

¹⁴⁰ The provision is cited in full above, Section I (p.12).

from the final version of the Act. As a member of an OPD who was involved in the consultation process noted to the ICJ, there is some uncertainty about how this omission occurred. It may reflect a lack of full understanding of disability issues on the part of the drafters, though it is also possible that this was just a more practical mistake in drafting.¹⁴¹

Section 32, which is split into four sub-sections, deals variously with:

- The Chief Justice's obligation to make rules pertaining to access to justice for persons with disabilities in respect of "court proceedings";
- The accessibility of detention facilities for persons with disabilities denied bail;
- The competence and compellability of persons with disabilities to give evidence in civil and criminal proceedings; and
- The obligation of justice actors to assist persons with disabilities "in every possible manner" to ensure they can "effectively" participate in "all legal proceedings and other preliminary stages" of justice processes.

Therefore, while the Act does not affirmatively provide for the right to access to justice for persons with disabilities, and does not contain a provision on legal capacity, read together, the obligations designated in the Act on authorities in effect imply the following:

- A recognition of the legal capacity of persons with disabilities to give evidence at every stage of legal proceedings and processes;¹⁴²
- A recognition of the right to procedural accommodations in such proceedings and processes; and
- The responsibility of the judiciary, in particular, in giving effect to these rights in the context of court proceedings and processes.

As discussed in more detail further below, the Act takes the innovative step of not only empowering but also obligating the Chief Justice to issue court rules to enhance access to justice for persons with disabilities. It is pursuant to this mandate that the Chief Justice enacted the Procedure Rules in 2023.

VI. Absence of a provision on the legal capacity of persons with disabilities in the Disability Equity Act

Before proceeding to explore the Procedure Rules in detail, it is essential to highlight the absence of a provision in the Disability Equity Act on the legal capacity of persons with disabilities, a highly consequential omission.

As previously noted, the Lesotho Penal Code and the CPEA contain discriminatory provisions that serve to deny the legal capacity of persons with intellectual and/or

¹⁴¹ Follow-up interview with Nkhasi Sefuthi, Director General of the Lesotho Persons with Disability Advisory Council, 11 July 2025.

¹⁴² Following the judgment in *Koali*, the Act explicitly reaffirms the testimonial competence of persons with disabilities. This is undoubtedly a lasting impact of the judgment, and the provision appears to have been included precisely to give effect to the High Court's order in *Koali*.

psychosocial disabilities to stand criminal trial.¹⁴³ These laws allow courts to declare a defendant “insane” and mandate their detention if they are deemed to have a “mental disorder.”¹⁴⁴ Courts can also declare an accused person “insane” or “mentally incapacitated”¹⁴⁵ or render a special verdict of “guilty but insane”¹⁴⁶ and order the institutionalization of the individual pending the “King’s pleasure”. These laws serve not only to deny legal capacity but also to violate other human rights of individuals during criminal proceedings, particularly the right to a fair trial, and may result in the arbitrary deprivation of liberty.

The provisions of the Penal Code and the CPED also remain formally in force, as they have not been repealed, amended or subject to court challenges.

Lesotho’s Parliament, in elaborating the Disability Equity Act in order to give effect to the CRPD, should also have addressed these deficiencies. They were obliged to include a provision affirming the legal capacity of persons with intellectual and/or psychosocial disabilities to participate in civil and criminal proceedings and processes on an equal basis with others. The failure to do so leaves a compliance gap with Lesotho’s obligations under the CRPD.

As noted earlier, the limited understanding of government representatives during the drafting process of the Disability Equity Act led to disagreements with organizations of persons with disabilities on some key points, leading to the exclusion of some critical provisions, including one on legal capacity, from the final law. According to LNFOD, certain OPDs recommended including a provision on legal capacity, but the proposal was met with resistance during the drafting process. As one OPD member involved in the consultation explains:

“The law [Disability Equity Act] fails to explicitly address the issue of the legal capacity of persons with disabilities. This was one of the issues that was highly disputed during the development of the law. Those drafting the Act did not believe that persons with mental disabilities can stand trial, that their evidence is credible and all those things. There was really a robust discussion. The problem was the issue of power. There was a power imbalance during the discussions. We would make submissions and discuss but, in the end, it was the government that would decide. They did not know much about these issues. Their understanding was limited, and they left a lot of issues that were quite important out as a result.”¹⁴⁷

Ultimately therefore:

¹⁴³ Penal Code Act No.6 of 2010, Section 19 (3); and CPEA, Section 172.

¹⁴⁴ Ibid.

¹⁴⁵ CPEA, Section 172 (2).

¹⁴⁶ Ibid.

¹⁴⁷ Interview with Nkhasi Sefuthi, Executive Director of LNFOD, 28 January 2025.

“The law [Disability Equity Act] is good, but it is not as good as we wanted it to be. But at least there is something on the table that we can talk about and that we can build on what we have already achieved.”¹⁴⁸

As noted earlier, section 32 of the Disability Equity Act expressly recognizes the competence of persons with disabilities to give evidence in legal proceedings, with necessary accommodations. However, its scope appears limited to participation as witnesses in court and does not explicitly affirm full legal capacity across all aspects of life, or indeed in respect of participation in justice processes in other roles, as required by the CRPD and the ADP. While the provision reflects a step toward recognizing legal capacity, its narrow focus – likely influenced by the *Kaoli* decision – limited the significant opportunity presented in drafting Section 32.

Both the CRPD and ADP affirm the right of persons with disabilities to equal recognition before the law.¹⁴⁹ A key aspect of this right is the ability to enjoy legal capacity on an equal basis with others in all areas of life.¹⁵⁰ The CRPD Committee has clearly distinguished between legal capacity and mental capacity, noting that mental capacity refers to an individual’s decision-making abilities, which vary based on personal, social, and environmental factors.¹⁵¹ Legal capacity, on the other hand, is an objective right granted to all individuals. Both the CRPD and ADP prohibit restricting legal capacity based on mental capacity, as doing so discriminates against persons with intellectual and/or psychosocial disabilities and violates their right to equal recognition before the law.

In the criminal justice context, the right to legal capacity includes the competence of persons with disabilities to participate in all legal proceedings and to be held accountable for one’s actions and decisions. Declaring a person unfit to stand trial or legally non-responsible for a criminal act due to disability unduly restricts these rights by automatically deeming the person incapable of standing trial.¹⁵²

The CRPD Committee, through its jurisprudence, clearly establishes that declaring a person unfit to plead and placing them in custody without allowing them to plead not guilty violates their right to legal capacity on an equal basis with others. As examples:

- In *Marlon James Noble v. Australia*, the Committee found that Australia had violated the author’s right to legal capacity by deeming him unfit to plead due to his intellectual and/or psychosocial disability, as determined by a psychiatric assessment.¹⁵³

¹⁴⁸ Ibid.

¹⁴⁹ Article 12 of the CRPD and Article 7(2)(a) of the ADP.

¹⁵⁰ Ibid, Article 12 (2).

¹⁵¹ The CRPD Committee, General Comment No.1 (2014), Article 12: Equal Recognition before the Law, CRPD/C/GC/1, 19 May 2014, § 13.

¹⁵² The CRP Committee, Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities: The Right to Liberty and Security of Persons with Disabilities, 2015, § 16; and ‘Guidelines on Deinstitutionalization, including in Emergencies’, CRPD/C/5, 10 October 2022, § 56.

¹⁵³ The CRPD Committee, *Marlon James Noble v. Australia*, Communication No. 7/2012, CRPD/C/16/D/7/2012, 10 October 2016, §§ 8.5 and 8.6.

- Similarly, in *Doolan v. Australia*, the Committee emphasized that a person's disability must never be used as a basis for denying their legal capacity.¹⁵⁴

The CRPD Committee has also addressed this issue in its *Guidelines on the Right to Liberty and Security of Persons with Disabilities*¹⁵⁵ and its *Guidelines on Deinstitutionalization, Including in Emergencies*,¹⁵⁶ calling on States to eliminate declarations of unfitness to stand trial or non-responsibility in their criminal justice systems. It has also made similar recommendations in its concluding observations.¹⁵⁷

Lesotho must therefore act to repeal or amend the provisions of the Penal Code and the CPEA that restrict the legal capacity of persons with disabilities to bring it into compliance with its international legal obligations and the Court's holding in *Kaoli*.

Indeed, given the application of the right to legal capacity to both civil and criminal contexts, the Lesotho government should also conduct an audit of its laws and policies in order to ensure that no legal provisions deny the right to legal capacity of persons with disabilities on the basis of their disabilities.

VII. The Making of the Procedure Rules

Under the CRPD and ADP, Lesotho is required to remove barriers to access to justice and guarantee the provision of procedural, gender-appropriate and age-appropriate accommodations to ensure effective access to justice for persons with disabilities.¹⁵⁸ Regarding procedural accommodations, the CRPD Committee has often emphasized the need to legally guarantee the provision of these accommodations in all judicial proceedings.¹⁵⁹ The Committee has more specifically recommended that legal instruments explicitly define the duty of the judiciary to provide procedural accommodations for persons with disabilities, in line with Article 13 of the Convention.¹⁶⁰

In this context, the obligation placed on the Chief Justice of Lesotho to enact Court Rules in terms of the Persons with Disability Equity Act provides an opportunity for

¹⁵⁴ The CRPD Committee, *Doolan v. Australia*, Communication, No. 18/2013, CRPD/C/22/D/18/2013, 17 October 2019, § 8.6. Also see *Leo v. Australia*, Communication No. 17/2013, CRPD/C/22/D/17/2013, 18 October 2019, § 8.6.

¹⁵⁵ The CRPD Committee, 'Guidelines on Article 14', supra note 152, § 16.

¹⁵⁶ The CRPD Committee, 'Guidelines on Deinstitutionalization', supra note 152, § 56.

¹⁵⁷ For example, see, The CRPD Committee, Concluding Observations on the Initial Report of Kenya, CRPD/C/KEN/CO/1, 30 September 2015, § 28; Concluding observations on the initial report of Japan, CRPD/C/JPN/CO/1, 7 October 2022, § 30; Concluding Observations on the Initial Report of Andorra, CRPD/C/AND/CO/1, 9 October 2023, § 28; Concluding observations on the combined second and third periodic reports of Argentina, CRPD/C/ARG/CO/2-3, 7 December 2023, § 26; and Concluding observations on the initial report of Burkina Faso, CRPD/C/BFA/CO/1, 30 September 2024, § 27.

¹⁵⁸ Article 13 (1) of the CRPD and Article 13 (1) of the ADP.

¹⁵⁹ For instance, see The CRPD Committee, Concluding observations on the initial report of El Salvador, CRPD/C/SLV/CO/1, 8 October 2013, § 30; Concluding observations on the initial report of Haiti, CRPD/C/HTI/CO/1, 13 April 2018, § 25; and Concluding observations on the combined second and third periodic reports of Germany, CRPD/C/DEU/CO/2-3, 3 October 2023, § 28.

¹⁶⁰ For instance, see The CRPD Committee, Concluding observations on the initial report of Kenya, CRPD/C/KEN/CO/1, 30 September 2015, § 26; and Concluding observations on the initial report of Uganda, CRPD/C/UGA/CO/1, 12 May 2016, § 25.

the Chief Justice to contribute to the alignment of Lesotho's legal framework with the CRPD.

The Disability and Equity (Procedure) Rules were adopted in 2023. However, according to LNFOD, advocacy for inclusive court rules and procedures to enhance access to justice for persons with disabilities began as early as 2016 through engagements with the office of the Chief Justice.¹⁶¹ These efforts were initiated following a study conducted by LNFOD in 2015, which examined the extent to which persons with disabilities in Lesotho could access justice and justice sector services in line with Article 13 of the CRPD.¹⁶²

Advocacy by LNFOD and other organizations gained momentum, particularly following the *Koali* decision,¹⁶³ which included repeated sensitization meetings and workshops with the judiciary. They focused on Lesotho's CRPD obligations, including in respect of legal capacity and access to justice. A particular focus in these workshops was exploring practical solutions to actual problems encountered by judicial officers in ensuring access to justice for persons with disabilities in their courts.

The adoption of the Disability Equity (Procedure) Rules was also expedited by the proactive leadership and commitment of the Chief Justice of Lesotho, Sakoane Sakoane, in fulfilling his mandate under Section 32 (1) of the Disability Equity Act. The ICJ has held multiple engagements with the Lesotho Judiciary in support of this process. During one such engagement, the Chief Justice expressed interest in the ICJ convening a workshop to train the judiciary and advise on international best practices for ensuring access to justice for persons with disabilities.¹⁶⁴

In response, the ICJ, in collaboration with the Centre for Human Rights of the University of Pretoria, organized a judicial workshop in October 2022 in Maseru.¹⁶⁵ The workshop brought together judges and magistrates, and experts on the rights of persons with disabilities from Lesotho, Kenya, South Africa, Zambia, and Zimbabwe, with the aim of raising awareness about the right of persons with disabilities to access to justice and to discuss ways to ensure their effective participation in legal proceedings.¹⁶⁶ There, Chief Justice Sakoane Sakoane, underscored the need for

¹⁶¹ Nkhasi Sefuthi, 'Removing barriers facing People with disabilities in terms of access to justice,' *Disability Lesotho E-newsletter*, Issue 10 Vol.3, September 2016, available at: http://www.lnfod.org.ls/uploads/1/2/2/5/12251792/disability_lesotho_sept_2016.pdf.

¹⁶² Ibid.

¹⁶³ *Disability Lesotho E-newsletter*, Issue 15, Vol 9, July 2023, p.10, available at: http://www.lnfod.org.ls/uploads/1/2/2/5/12251792/disability_lesotho_jul_2023_issue_15_vol_9.pdf.

¹⁶⁴ 'ICJ Comments on Lesotho Judiciary: Rules of Procedure in Matters Involving Persons with Disabilities,' (submission made to the Lesotho Judiciary), 10 February 2023, § 6 (on file with the ICJ).

¹⁶⁵ Centre for Human Rights (University of Pretoria), 'Centre collaborates with ICJ to host judicial workshop on access to justice for persons with disabilities in Lesotho,' 19 October 2022, available at: <https://www.chr.up.ac.za/dru-news/3150-centre-collaborates-with-icj-to-host-judicial-workshop-on-access-to-justice-for-persons-with-disabilities-in-lesotho>.

¹⁶⁶ Interview with Dianah Msipa (PhD), Disability Rights Expert at the Centre for Human Rights, University of Pretoria, 30 October 2024 (Dr. Msipa was one of the experts who participated during the workshop organized by the ICJ in collaboration with the Centre for Human Rights, University of Pretoria); Also see, ICJ, 'Comments on Lesotho Judiciary: Rules of Procedure in Matters Involving Persons with Disabilities,' [submission made to the Lesotho Judiciary], 10 February 2023, § 6 (on file with the ICJ).

judicial processes and procedures to be reformed to ensure the full and effective participation of persons with disabilities in the justice system:

“The administration and enforcement of the Persons with Disability Equity Act, 2021, calls for reforms of judicial processes and procedures. This entails a change in judicial mindset and cultivation of a disability sensitive culture.”¹⁶⁷

The Chief Justice committed to establishing a committee to draft the Court Rules in accordance with Section 32 (1) of the Persons with Disability Equity Act.¹⁶⁸ It is important to highlight that, beyond this statutory mandate, the Chief Justice holds a broader constitutional mandate to make rules governing the practice and procedure in the High Court of Lesotho.¹⁶⁹ The High Court Act, 1978, also empowers the Chief Justice to make rules of court to regulate and prescribe the procedure to be followed in all causes and matters before courts.¹⁷⁰

In an interview for this report, Starford Sharite, who was an Assistant Registrar at the High Court of Lesotho when the Procedure Rules were developed, explained the process typically followed when the Chief Justice intends to develop a legal instrument such as court rules. While the law formally vests this authority solely in the Chief Justice, in practice, he often involves others, such as judges, the Chief Magistrate, the Registrar, and the Assistant Registrar, at the early stages of drafting.¹⁷¹ The Chief Justice often seeks the opinion of the Assistant Registrar and may ask for research to support the drafting process.¹⁷²

According to Starford Sharite, following on from the Workshop organized by the ICJ and further consultations with LNFOD and other organizations of persons with disabilities, he was tasked with conducting research, after which Chief Justice Sakoane developed the first draft of the Procedure Rules.¹⁷³ He indicated that the research process was thorough and drew on international experience, but noted the scarcity of comprehensive legislation on the subject from other countries.¹⁷⁴ Despite this limitation, the draft was prepared and then circulated to judges, organizations of persons with disabilities, civil society, and relevant government stakeholders for comments before being finalized.¹⁷⁵

Comments provided by LNFOD¹⁷⁶ and a written submission by the ICJ played a role in shaping the final version of the Disability Equity (Procedure) Rules.¹⁷⁷ The Chief

¹⁶⁷ Remarks by the Honorable Chief Justice S.P. Sakoane at the ICJ Judicial Workshops: Access to Justice for Persons with Disabilities in Lesotho & LGBTI Rights, 11th – 12th October 2022 (on file with the ICJ).

¹⁶⁸ Centre for Human Rights (University of Pretoria), *supra* note 164.

¹⁶⁹ Article 31 (a) of the Constitution of Lesotho.

¹⁷⁰ High Court Act, Act 5 of 1978, Section 16.

¹⁷¹ Interview with Mr. Starford Sharite, Deputy Registrar at the High Court of Lesotho, 23 June 2025.

¹⁷² *Ibid.*

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

¹⁷⁶ Copy of on file with the ICJ.

¹⁷⁷ Interview with Starford Sharite, Deputy Registrar at the High Court of Lesotho, 23 June 2025; Interview with Nkhasi Sefuthi, Executive Director of LNFOD, 28 January 2025; and Interview with Dianah Msipa (PhD), Disability Rights Expert at the Centre for Human Rights, University of Pretoria, 30 October

Justice's collaborative approach – marked by engagement with organizations of persons with disabilities and other stakeholders during the drafting process is a best practice for such rulemaking and should continue in the implementation of the Rules.

The final draft of the Disability Equity (Procedure) Rules was submitted to the Parliament Counsel and was published in Government Gazette No. 39 on 26 May 2023.

Overall, since the Rules are intended to guide both judicial officers and justice actors within the legal system more broadly, it was critical that the Chief Justice was front and centre of the process that led to the Rules development. This, it is hoped, will also provide a sense of ownership of the Rules by the judiciary and a better understanding of their importance and context within the broader framework of Lesotho's obligations in terms of the CRPD.¹⁷⁸ While enshrining human rights protections in primary legislation is indispensable, legislation must still be effectively enforced in practice. According to Dianah Msipa:

"The provisions of access to justice in the Act are progressive. The idea of mandating the Chief Justice to produce the Rules is, in itself, an innovative approach. It's important for the practical implementation of the right to access justice. Because sometimes merely placing a legal obligation in a piece of legislation might not really translate to implementation on the ground. But when you have things like accommodations which are placed within court rules and justice personnel are required to use these court rules, it takes it a step closer towards implementation."¹⁷⁹

VIII. Key aspects of the Procedure Rules

The Procedure Rules comprise 20 provisions and are issued by the Chief Justice under the authority delegated by the legislature through the Disability Equity Act. Accordingly, these Rules carry the force of law.¹⁸⁰ The Procedure Rules adopt a human rights-based approach to disability with the clearly stated objective of ensuring that:

"The rights of persons with disabilities in the judicial processes are recognized, fully promoted, protected and ensured through appropriate support and procedural accommodations in compliance with the Disability Equity Act No. 23 of 2021 and the United Nations Convention on the Rights of Persons with Disability."¹⁸¹

2024. The ICJ submitted its comments and recommendations on the draft rules in 2023; ICJ Comments on Lesotho Judiciary: Rules of Procedure in Matters Involving Persons with Disabilities [submission made to the Lesotho Judiciary], 10 February 2023 (on file with the ICJ).

¹⁷⁸ Interview with Marealeboha Mamello Makau, Lecturer at the Faculty of Law, National University of Lesotho, 17 December 2024.

¹⁷⁹ Interview with Dianah Msipa (PhD), Disability Rights Expert at the Centre for Human Rights, University of Pretoria, 30 October 2024.

¹⁸⁰ Buhle Angelo Dube, *supra* note 19.

¹⁸¹ Rule 2 (b) of the Procedure Rules.

The reference to the CRPD is important, effectively requiring that the Rules be construed in accordance with the CRPD. More generally, justice actors are implored to adopt a “purposive” interpretation of the Procedure Rules geared towards upholding the “interests of persons with disabilities”, ensuring their “maximum accommodation” and “effective participation” in legal proceedings and processes.¹⁸²

Additionally, the Procedure Rules explicitly affirm that they are designed to ensure persons with disabilities full and effective access to judicial processes on an equal basis with others.¹⁸³ The Rules are also directed to judicial officers, legal practitioners, and court officials involved in proceedings, outlining how to accommodate and support persons with disabilities in judicial processes.¹⁸⁴ This clarifies the responsibility of all justice actors involved in the administration of justice to respect and protect the right to access to justice for persons with disabilities in the discharge of their duties.

The Procedure Rules apply to all persons with disabilities involved in judicial processes, whether directly or indirectly, including as accused persons, litigants, or witnesses.¹⁸⁵ As such, the Rules are applicable in both criminal and civil judicial proceedings and processes. They also extend to all stages of judicial proceedings, covering pre-trial, trial and post-trial processes.¹⁸⁶ Additionally, the Rules apply to all levels of courts, including customary courts at the lowest tier of Lesotho’s judicial system, which also serve as courts of first instance for matters falling under customary law, where customary laws are applied.¹⁸⁷

In accordance with Section 32 (3) of the Disability Equity Act and following on from the decision in *Kaoli*, the Procedure Rules specifically reaffirm the competence and compellability of persons with disabilities to testify in legal proceedings.¹⁸⁸ Unlike *Kaoli*, but consistently with Section 32(4) of the Act, the Rules state the responsibility to provide “appropriate support and accommodations” to persons with disabilities to ensure their effective participation in judicial proceedings.¹⁸⁹

Before outlining specific accommodations and support measures, the Procedure Rules establish a general framework requiring courts to take “all necessary steps” to proactively identify and address any factors that may create barriers to access to justice for the participation of a person with disability in justice processes.¹⁹⁰ This duty applies whenever a case involves a person with a disability in any capacity and carries a responsibility for judicial officers to remain vigilant about the possibility of

¹⁸² Rule 4 (a).

¹⁸³ Rule 2(a).

¹⁸⁴ Rule 2 (c).

¹⁸⁵ Rule 2 (a).

¹⁸⁶ Rule 3.

¹⁸⁷ Interview with Justice Molefi Evaristus Makara, Judge at the High Court of Lesotho, 27 January 2025. For more on customary courts in Lesotho, see Buhle Angelo Dube, *supra* note 19.

¹⁸⁸ Rule 6 (1).

¹⁸⁹ Rule 6 (2).

¹⁹⁰ Rule 5.

the participation of a person with a disability in all legal proceedings and throughout such proceedings. Examples of such barriers listed in the Procedure Rules include:

- Complex or otherwise inaccessible legal procedures,
- multiple depositions,
- use of inappropriate and inaccessible language,
- delays and repeated adjournments,
- testifying more than once,
- prolonged or protracted court proceedings,
- aggressive or demeaning cross-examinations,
- lack of adequate support services,
- communication challenges; and
- inaccessible courtrooms.¹⁹¹

To determine the specific accommodations and support an individual with disability may need to overcome these barriers and participate fully and effectively, the Procedure Rules require courts to conduct an individualized “accommodation and support needs assessment.”¹⁹² This assessment must consider evidence presented by the individual with a disability about their accommodation and support needs, which may then be supplemented by a range of other evidence, including but not limited to evidence provided by an intermediary and medical evidence.¹⁹³

The Rules also make it clear that it is the court that is the ultimate decision maker in such an assessment¹⁹⁴ and that when a court determines “the credibility and reliability of the witness, as well as the weight to accord such testimony,” it may do so “only after he has given such testimony with the appropriate support and accommodation.”¹⁹⁵

This framework reflects a human rights-based approach under the CRPD, consistent with the right to legal capacity, in a number of respects:

- First, it requires that the needs of each individual with a disability be identified and addressed on an individualized, case-by-case basis.
- Second, it approaches the entire assessment as aimed at providing appropriate support and accommodation, not as a test for determining legal capacity to participate or a basis for exclusion from participation.
- Third, it directly contemplates the provision of support to a person with a disability during the process of making an assessment.
- Fourth, it centers an individual’s own input in the process of determining their support needs and does not privilege medical assessments, which too often become the exclusive basis for such assessment.

¹⁹¹ Ibid.

¹⁹² Rule 7 (1).

¹⁹³ Rule 7 (2) and (3).

¹⁹⁴ Rule 7(4).

¹⁹⁵ Rule 7(6).

- Fifth, it clarifies that the responsibility to both make such assessments and ensure the provision of such support lies with judicial officers, an important clarification to secure the protection of the rights of persons with disabilities.

In addition to any procedural accommodations and support provided through an individualized assessment, the Procedure Rules specify procedural accommodations that will be available to persons with disabilities when they interact with the justice system. These include the recognition of diverse communication methods in legal proceedings. In this regard, the Procedure Rules allow for communication through qualified intermediaries or interpreters, as needed.¹⁹⁶ Regarding intermediaries, the Procedure Rules mandate Courts to appoint one when necessary.¹⁹⁷ The Procedure Rules defined “Intermediary” as “a person appointed by the court through whom a person with disability gives evidence.”¹⁹⁸

As affirmed in the International Principles and Guidelines on Access to Justice for Persons with Disabilities, it is the obligation of States to establish, fund, and implement a program of independent intermediaries.¹⁹⁹ These programs must ensure that intermediaries are properly trained to provide essential communication assistance to persons with disabilities.²⁰⁰ The Procedure Rules provide for a significant role for intermediaries, which may be appointed by a Court. However, the Rules do not indicate how many intermediaries should be appointed, how they will be compensated, what training they will receive or what their specific role is beyond assisting persons with disabilities to participate and communicate effectively.

Also, consistently with the Disability Equity Act,²⁰¹ the Procedure Rules construe “communication” broadly to include the use of plain language, sign language, display of text, Braille, tactile communication, large print, accessible multimedia, as well as written, audio, human-reader and augmentative and alternative methods.²⁰² This entails a duty placed on the judiciary to ensure the availability of these alternative communication methods as necessary in all judicial processes involving persons with disabilities.

The Procedure Rules empower judicial officers to initiate meetings with persons with disabilities to explain the court process and help them understand the procedure and sitting arrangements during the proceedings.²⁰³

Regarding witnesses with disabilities, the Procedure Rules permit such persons to take a pre-trial courthouse visit, accompanied by a person of their choice, to familiarize themselves with the court environment.²⁰⁴ When taking testimonies,

¹⁹⁶ Rule 7(5) and 12 (2).

¹⁹⁷ Rule 12 (2).

¹⁹⁸ Rule 4 (b).

¹⁹⁹ International Principles and Guidelines on Access to Justice for Persons with Disabilities, *supra* note 46, Principle 3.

²⁰⁰ *Ibid.*

²⁰¹ Section 3 of the Disability Equity Act.

²⁰² Rule 4 (b) of the Procedure Rule.

²⁰³ Rule 11.

²⁰⁴ Rule 10.

courts are also required to ensure clear communication for witnesses with disabilities by guiding them on how to respond, seeking clarification on questions posed, or allowing reasonable periods of relief and breaks while testifying.²⁰⁵ In addition, courts are mandated to control the examination and cross-examination of persons with disabilities by:

- ensuring questions are simple and comprehensible,
- protecting witnesses from harassment and undue embarrassment,
- protecting their dignity,
- disallowing improper or misleading questions,
- permitting narrative responses; and
- minimizing repetitive questioning.²⁰⁶

It is important to note that these guarantees – particularly, pre-trial courthouse visits and periods of relief or breaks while testifying – are framed in the Procedure Rules to apply only to witnesses. While some measures may be role-specific, orientation visits and breaks address functional needs that can arise for any participant with a disability, including accused persons or victims in non-witness capacities. Restricting these accommodations to witnesses risks undermining fair trial rights and access to justice for these individuals. Best practice, consistent with the CRPD and ADP, would extend such accommodations to all persons with disabilities involved in judicial proceedings.

The Procedure Rules also emphasize that cases involving persons with disabilities should “receive high priority” and be disposed of as “expeditiously as possible, minimizing unnecessary delays and adjournments to avoid repeated appearances in the court”.²⁰⁷ Court schedules should, in this respect, be adjusted “wherever necessary and possible” to allow the testimony of a person with disability to be recorded on consecutive days without delays.²⁰⁸

The Rules also provide that where a victim of crime is a person with a disability, their statement may be considered as testimony in lieu of examination-in-chief.²⁰⁹ However, this measure should in fact be optional and implemented only with the genuine intent and effect of removing a barrier that would otherwise make oral testimony inaccessible. The implementation of the provision should also be based on the individual’s informed choice. To align with the CRPD and APD, the individual with a disability must retain the right to testify orally if they prefer and the credibility of their statement should not diminish because of the format of its delivery. If, instead, this Rule is applied by default to persons with disabilities rather than allowing for such an option as an accommodation, it risks depriving them of the right to participate in judicial proceedings on an equal basis with others, effectively undermining their right to access to justice under the guise of “help.” It may also, if applied in this manner,

²⁰⁵ Rules 15 and 17.

²⁰⁶ Rule 16.

²⁰⁷ Rule 18 (1).

²⁰⁸ Rule 18 (2).

²⁰⁹ Rule 18 (3).

serve as an excuse to avoid providing the necessary accommodation and support that would enable full oral testimony.

The Procedure Rules also permit recording witness testimony in Braille, ensuring the person is not reliant on others to read their testimony.²¹⁰ Similarly, Courts may implement measures to facilitate the use of amplification devices, document magnifiers, and video or audio guides when recording the evidence of witnesses with disabilities.²¹¹

The Procedure Rules require the judiciary to ensure the accessibility of courtrooms for a person with disability.²¹² Measures are required to be taken to ensure wheelchair access to the court premises, courtroom, and witness box.²¹³ The testimony of witnesses with disabilities may also be taken from any other place other than the witness stand.²¹⁴

For survivors of sexual or gender-based violence, courts must ensure that they are not exposed to the accused while giving evidence, while also ensuring that the accused can hear the testimony and communicate with their defense lawyer.²¹⁵

More generally, for all persons with disabilities who are alleged victims of crime or other wrongful acts, the Procedure Rules allow courts, either on their own initiative or upon request by the victim, prosecutor, or counsel, to implement special measures so that the victim cannot see the accused while testifying, while ensuring the accused can hear the testimony and communicate with their lawyer.²¹⁶ These may include using testimonial aids like screens, one-way mirrors, curtains, or other devices to be placed in the courtroom.²¹⁷

Finally, the Procedure Rules require the Chief Justice to ensure that judicial officers and court officials receive capacity-building training to understand the rights of persons with disabilities and the provisions of the Procedure Rules in order to enable them to facilitate the effective participation of persons with disabilities in all judicial proceedings and processes.²¹⁸ This measure engages binding obligations under Article 13 (2) of the CRPD, Article 13 (3) of the ADP, and Principle 10 of the International Principles and Guidelines on Access to Justice for Persons with Disabilities, all of which require States parties to conduct targeted awareness-raising and training for all justice sector actors focusing on the rights of persons with disabilities, particularly in relation to access to justice. Notably, the fact that the judiciary – led by the Chief Justice – had undertaken capacity building training during the drafting of the Rules contributed to their alignment with international standards. The continuation of such capacity-building initiatives, as mandated by the Rules, will

²¹⁰ Rule 18 (4).

²¹¹ Ibid.

²¹² Rule 13 (1).

²¹³ Rule 18 (4)(e).

²¹⁴ Rule 13 (2).

²¹⁵ Rule 13 (3).

²¹⁶ Rule 14 (1).

²¹⁷ Ibid.

²¹⁸ Rule 20.

be critical to their effective implementation and to ensuring equal access to justice for persons with disabilities in practice.

The table below summarizes the key safeguards established in the Procedure Rules.

	Rule(s)	Description
1. Purpose and application	Rules 2 and 3	<ul style="list-style-type: none"> ▪ The Rules aim to ensure effective access to judicial processes for persons with disabilities, promoting their full and equal participation in the justice system. ▪ The Rules provide guidance to judicial officers, legal practitioners, court officials and other participants on accommodating and supporting persons with disabilities. ▪ The Rules apply to pre-trial, trial, and post-trial processes, involving both direct and indirect participants.
2. Interpretation and guidance	Rule 4 (a)	<ul style="list-style-type: none"> ▪ The Rules are to be construed purposively to uphold the interests of persons with disabilities, providing guidance to judicial officers, legal practitioners, and court officials on accommodations and support.
3. Elimination of barriers	Rule 5	<ul style="list-style-type: none"> ▪ The Rules mandate courts to take steps to eliminate, mitigate, or minimize barriers that persons with disabilities may face in accessing and participating in judicial processes (including inaccessibility of courtrooms and lack of appropriate support services).
4. Competence and compellability	Rule 6	<ul style="list-style-type: none"> ▪ The Rules affirm that persons with disabilities are competent and compellable to give evidence in criminal and civil cases in any court in Lesotho or before a magistrate on a preparatory examination.
5. Accommodation and support needs assessment	Rule 7	<ul style="list-style-type: none"> ▪ The Rules require courts to make an assessment aimed at determining the accommodations and support a person with a disability requires for effective participation in judicial proceedings.
6. Pre-trial visit to the courthouse and meeting with judicial officers	Rules 10 and 11	<ul style="list-style-type: none"> ▪ The Rules require that witnesses with disabilities be allowed a pre-trial courthouse tour accompanied by a person of their choice to familiarize themselves with the layout. ▪ The Rules empower judicial officers to, on their own initiative or upon application,

		meet with a person with a disability to explain court procedures and seating arrangements.
7. Accessibility of court environment and procedures.	Rules 12 - 18	<ul style="list-style-type: none"> ▪ The Rules entitle persons with disabilities to get assistance from interpreters, translators, intermediaries, or other support persons. ▪ The Rules require that courtrooms be accessible. ▪ The Rules mandate courts to ensure persons with disabilities understand the manner of testifying and allow frequent breaks during testimony. ▪ The Rules allow for the use of testimonial aids such as screens, one-way mirrors, curtains, or other devices to prevent exposure of a victim to an accused while testifying. ▪ The Rules require courts to dispose of cases involving persons with disabilities expeditiously as a matter of priority.
8. Detention and custody	Rules 9 and 19	<ul style="list-style-type: none"> ▪ The Rules require that persons with disabilities who are arrested for an alleged offense be either detained in an accessible detention facility or be immediately released, if the interests of justice so require, subject to reasonable conditions or without conditions. ▪ The Rules require that correctional facilities where a person with disability is to serve a sentence, if convicted, are accessible and provide for the necessary accommodation and support.
9. Capacity building training	Rule 20	<ul style="list-style-type: none"> ▪ The Rules require the Chief Justice to take steps to ensure that judicial officers and court staff are trained on disability rights and the Procedure Rules.

IX. Implementing the Procedure Rules

Translating the Rules into practice is essential to ensure that they are enforceable and impactful in achieving equal access to justice for persons with disabilities. This section sets out some of the key challenges in implementing the Procedure Rules since their enactment, including:

- Lack of adequate funding for those with cost implications.
- Lack of adequate human resources.

- Unavailability of accessible communications methods.
- Physical inaccessibility of courts; and
- Lack of awareness among justice actors and programs to train them.

Lack of adequate funding

One major challenge in implementing the Procedure Rules has been that Parliament has not allocated adequate funding for the implementation of those Rules with budgetary implications. Implementing the Rules effectively will require the government to provide significant human, financial, technological and other resources in various settings, including in courts and at police stations. Without these resources, the Rules on the provision of the accommodations will not be capable of improving access to justice for persons with disabilities.

In a 2023 interview, Chief Justice Sakoane Sakoane indicated that the government should provide funds to implement the safeguards outlined in the Procedure Rules, such as for the training of sign language interpreters.²¹⁹ Other judges interviewed by the ICJ for this research reinforced the conclusion that there was a lack of adequate resources to implement the Rules.²²⁰ This concern was also echoed by experts and lawyers.²²¹

Broadly speaking, the Constitution of Lesotho mandates the government to “accord such assistance as the courts may require to enable them to protect their independence, dignity and effectiveness, subject to this Constitution and any other law.”²²² In practice, the funds of the judiciary are drawn from money appropriated by Parliament for this purpose, as provided under the Administration of the Judiciary Act.²²³ This indicates that while the government is responsible for providing assistance to the courts, Parliament has the responsibility to allocate the budgetary resources necessary to support the judiciary.

Underfunding and understaffing of the Lesotho judiciary have created challenges that affect the administration of justice across the country. The Chief Justice highlighted these issues in his remarks at the official opening of the High Court in 2024, where he noted the judiciary’s progressively shrinking budget and the lack of capital investment in court infrastructure.²²⁴ This has led to neglected infrastructure at the

²¹⁹ ‘Chief Justice Sakoane Sakoane Speaks on the Importance of Disability and Equity (Procedure) Rules of 2023,’ *Disability Lesotho E-newsletter*, Issue 15, Vol 9, July 2023, available at: http://www.infod.org.ls/uploads/1/2/2/5/12251792/disability_lesotho_jul_2023_issue_15_vol_9.pdf.

²²⁰ Interview with Justice Molefi Evaristus Makara, Judge at the High Court of Lesotho, 27 January 2025; and Interview with Dr. Itumeleng Shale, Judge at the High Court of Lesotho, 27 January 2025.

²²¹ Interview with Marealeboha Mamello Makau, Lecturer at the Faculty of Law, National University of Lesotho, 17 December 2024; and Interview with a Legal Researcher within the Judiciary of Lesotho, 23 December 2024.

²²² The Constitution of Lesotho, Section 118 (3).

²²³ Administration of the Judiciary Act, Act 16 of 2011, Section 17.

²²⁴ Remarks by His Lordship the Honourable Chief Justice Sakoane Peter Sakoane, at the Ceremonial Opening of the High Court on 1st February 2024,” available at: <http://www.judiciary.gov.ls/wp-content/uploads/2024/02/High-Court-Official-Opening-Speech-2024.docx>. Also see, “Root of Courts’ Failure Exposed,” *Public Eye*, 03 April 2024, available at: <https://publiceyenews.com/2024/03/04/root-of-courts-failure-exposed/>; and Chris Himsworth, “The Cost of Separating Powers,” *AfricLaw*, 1 June 2021, available at: <https://africlaw.com/2021/06/01/the-cost-of-separating-powers/>.

High Court and left many Magistrates' Courts and other lower courts across the country facing infrastructural and operational difficulties.²²⁵ Budgetary constraints had also delayed the timely appointment of judges and hindered the judiciary's ability to cover essential operational expenses.²²⁶ These challenges, which the Chief Justice warned have rendered some courts dysfunctional,²²⁷ directly undermine the overall capacity of the judiciary to function efficiently. Addressing this issue is essential not only to ensure general access to justice but also to ensure that courts can provide the accommodations and supports required under the Procedure Rules for persons with disabilities.

Lack of human resources

Among the barriers that persons with disabilities continue to face in accessing justice in Lesotho is the lack of qualified intermediaries. The provision of intermediaries for persons with disabilities is a system formally introduced to Lesotho's judicial system for the first time by the Procedure Rules. Previously, this type of accommodation was only available in the children's courts, where the Children's Protection and Welfare Act of 2011 mandates courts to appoint a qualified intermediary to assist children in giving evidence in proceedings involving them.²²⁸ Even in that context, the service remains extremely limited, as only a single court-appointed intermediary was reported to be available to serve all five district children's courts across the country.²²⁹

Organizations of persons with disabilities have made efforts to train and utilize the intermediary appointed for children to also provide support to persons with disabilities. However, as noted by Nkhasi Sefuthi, former Executive Director of LNFOD, the intermediary was overstretched, highlighting the need to recruit additional personnel.²³⁰ Since the *Koali* judgment removed certain legal barriers, there has been an increasing demand for accommodations to ensure that persons with disabilities can participate effectively in court proceedings. Since then, LNFOD has been advocating that dedicated intermediaries for persons with disabilities should be appointed, including by providing training to social workers to allow them to fulfil this role.²³¹

The consequence is that courts continue to rely on organizations of persons with disabilities, particularly LNFOD, to fill this gap on a voluntary basis.²³²

²²⁵ Remarks by His Lordship the Honourable Chief Justice Sakoane Peter Sakoane, at the Ceremonial Opening of the High Court on 1st February 2024," § 6.

²²⁶ Chris Himsworth, "The Cost of Separating Powers," *AfricLaw*, 1 June 2021, available at: <https://africlaw.com/2021/06/01/the-cost-of-separating-powers/>; Majirata Latela, 'Judiciary too broke to appoint new judges,' *the Reporter*, 28 April 2021, available at: <https://www.thereporter.co.ls/2021/04/28/judiciary-too-broke-to-appoint-new-judges/>; Mohalenyane Phakela, 'M 1.3 Million LEC Dept Cripples Courts,' 27 February 2021, *Lesotho Times*, available at: <https://lestimes.com/m1-3-million-lec-debt-cripples-courts/>.

²²⁷ Remarks by His Lordship the Honourable Chief Justice Sakoane Peter Sakoane, at the Ceremonial Opening of the High Court on 1st February 2024," § 6.2.

²²⁸ Children's Protection and Welfare Act, 2011, Section 146.

²²⁹ Interview with Her Worship Rant'so, Magistrate at the Maseru Magistrates Court, 28 January 2025.

²³⁰ Interview with Nkhasi Sefuthi, Executive Director of LNFOD, 28 January 2025.

²³¹ Ibid.

²³² Ibid.

LNFOOD collaborates with the judiciary to provide intermediaries, or at least individuals that can try to perform the role that should be performed by intermediaries.²³³ For instance, in 2019, under a project funded by the Open Society Initiative for Southern Africa, LNFOOD trained Mafumane Mkhele from the Intellectual Disability Association of Lesotho (IDAL). She has since been working closely with the police, prosecution and courts to facilitate effective communication with persons with intellectual and/or psychosocial disabilities.²³⁴ In this capacity, she has supported the justice system, particularly in various sexual abuse cases, ensuring that testimony from persons with disabilities is accurately recorded.²³⁵

Mafumane Mkhele explained to the ICJ that following the *Koali* judgement, “there has been a strong demand from justice sector actors” for intermediary services. She noted that IDAL has been working closely with the police to facilitate communication with persons with intellectual and/or psychosocial disabilities, including in taking their statements.²³⁶ In some districts, the organization had also been called upon to serve as intermediaries in Magistrates’ Courts, although this practice is not yet consistent across the county. She notes that she is therefore currently the only person from IDAL performing this role, responding to requests from the police or courts whenever called upon. She further noted that the service is supported by LNFOOD, and that “the police or courts do not cover costs or provide funds” for the work.²³⁷

Similarly, there is a total lack of government-provided sign language interpreters for court proceedings. While the Procedure Rules acknowledge the importance of qualified sign language interpreters, courts rely on LNFOOD to provide these services in the absence of government-appointed personnel.²³⁸

While the support of organizations of persons with disabilities is crucial in bridging these gaps, it remains the obligation of the State to establish and implement a sustainable program for training and appointing qualified intermediaries and sign language interpreters.²³⁹ As an expert interviewed for this research told the ICJ:

“Primarily, it is the responsibility of [the authorities]. The NGOs can come in, maybe to provide technical expertise. But the entity that has to foot the bill, to budget, is the government. Because all other people who come to access justice at the courts, they are not asked to bring their own intermediary, their own interpreter to the court.

²³³ Ibid.

²³⁴ Lerato M. Ramoholi, ‘Recognizing the Role of Intermediaries in Promoting Access to Justice for Persons with Mental Disabilities,’ *Disability Lesotho Newsletter*, Issue 11 Vol 7, October 2020, available at: http://www.lnfod.org.ls/uploads/1/2/2/5/12251792/disability_lesotho_oct_2020.pdf.

²³⁵ Interview with Mafumane Makhele, Program Coordinator at Intellectual Disability and Autism Lesotho, 13 May 2025.

²³⁶ Ibid

²³⁷ Ibid.

²³⁸ Ibid; This is also confirmed during interviews with magistrates and judges for this research. Also see, LNFOOD, ‘Access to Justice for Persons with Disabilities in Lesotho: Training for Magistrates and Prosecutors, 12-14 July 2023 (Activity Report), available at: http://www.lnfod.org.ls/uploads/1/2/2/5/12251792/activity_report_access_to_justice_training_2023.pdf, 9.

²³⁹ International Principles and Guidelines on Access to Justice for Persons with Disabilities, *supra* note 46.

The government is the primary responsibility bearer by providing funds and the judiciary establishing relevant positions and providing adequate training and support to those people.²⁴⁰

Unavailability of alternative communications methods

Another significant deficiency is the unavailability of alternative communication methods, such as Braille materials, tactile communication, screen reader technologies, and voice or video-based communications. Interviews with magistrates and judges confirmed that these support systems are simply not accessible or in use within the judicial system. Most courts in Lesotho also lack a CCTV setup or one-way mirrors, which are recognized by the Procedure Rules as special measures that can be used to protect victims or witnesses with disabilities from being exposed to the accused while testifying. At the magistrates' courts level, there appear to be plans to use CCTV setups designed for child courts to witness and victims with disabilities.²⁴¹ However, relying solely on these facilities is insufficient, as such equipment should be available at all levels of courts to properly accommodate persons with disabilities.

Physical inaccessibility of courts

The physical inaccessibility of court environments in Lesotho continues to pose challenges for persons with disabilities. While some courts, such as the Maseru High Court and Magistrate's Court, have ramps that allow wheelchair access to the ground floor, the upper floors remain inaccessible due to non-functional elevators or the absence of such facilities altogether. As a result, courtrooms located on those floors cannot be reached by persons with physical disabilities or those using wheelchairs. To mitigate this challenge, magistrates and judges have indicated that they often elect not to convene court hearings in the upstairs courtrooms.²⁴² In addition, no measures have been taken to adapt courtrooms and witness stands to ensure full physical accessibility for persons with disabilities, despite the Procedure Rules mandating such adaptations.

Lack of awareness among justice actors and training for them

Several of the procedural accommodations and support measures specified in the Procedure Rules are straightforward to implement and do not require special measures or significant resources. These include, as examples, allowing pre-trial courthouse tours; providing assistance and guidance on court procedures or while giving evidence; and prioritizing cases involving persons with disabilities and ensuring their expeditious disposition. In the absence of CCTV arrangements or one-way mirrors, witness testimonies may also, as an alternative measure, be given from behind a curtain. These accommodations do not necessarily require significant resources, but do require awareness and commitment from judicial officers and other

²⁴⁰ Interview with Marealeboha Mamello Makau, Lecturer at the Faculty of Law, National University of Lesotho, 17 December 2024.

²⁴¹ Interview with Her Worship Rant'so, Magistrate at the Maseru Magistrates Court, 28 January 2025.

²⁴² Interview with Dr. Itumeleng Shale, Judge at the High Court of Lesotho, 27 January 2025; and Interview with a Magistrate at the Magistrates Courts in Lesotho, 30 January 2025.

justice sector actors. As one staff member in the judiciary explained, effective implementation depends on awareness and action at every stage of the judicial process:

“It is the court staff that are supposed to see that the Rules are implemented from the most basic level. When an application is filed at the registry, it first comes across the court clerks. They need to be capacitated. When it leaves their hands, it goes to the allocating office. People working in that office need to be made aware of the Rules. It leaves there, before it comes into the hands of the judges, it goes to the judges’ clerks and researchers. They too need to be conscientized.”²⁴³

Despite this evident need and the enthusiasm shown by the Chief Justice for the enactment of the Rules, the judiciary has not yet taken steps to introduce tailored capacity-building programs for judges and justice actors on the Procedure Rules or the right of persons with disabilities to access justice more generally. The limited training and awareness efforts to date have been led by organizations of persons with disabilities. LNFOD, for example, has provided some capacity building support to the police on understanding and applying the Procedure Rules in their investigative work, and to the prosecutors and magistrates on their role in ensuring compliance with the Rules during legal processes and proceedings.²⁴⁴

According to Nkhasi Sefuthi, the former Executive Director of LNFOD, there is a general willingness and enthusiasm among judges, magistrates, and lawyers to implement the Rules, but also reveal a persistently low level of awareness about disability rights and the Rules themselves.²⁴⁵ This gap remains a key barrier to effective implementation of the Procedure Rules. At the same time, Sefuthi emphasized that the adoption of the Rules has already brought about important positive changes, while also exposing persistent challenges:

“Generally, if they are well applied in courts, [the Rules] support the equal participation of persons with disabilities. The problem we have faced has been in terms of the awareness of magistrates and judges on the applicability of the rules and perhaps also on the historical background on the treatment of persons with disabilities. They have been excluded for a long time. No one actually believed that persons with disabilities could participate in court because people were of the view that courts are very strict, and the laws are quite stringent, and they cannot be modified in any way – they should be applied as they are. There is still that mentality within some legal practitioners, judges and magistrates – this poses a barrier to full inclusion. But there are those that are really applying the court rules well in their courts – they are even inviting us here in LNFOD to advise and support the court about the best way they can involve persons with disabilities.... we work together with the courts to remove

²⁴³ Interview with a Judicial Officer within the Judiciary of Lesotho, 23 December 2024.

²⁴⁴ Interview with Nkhasi Sefuthi, Executive Director of LNFOD, 28 January 2025.

²⁴⁵ Ibid.

barriers to persons with disabilities ... the courts have been working with us very well ever since the adoption of these Rules.”²⁴⁶

X. Conclusion and Recommendations

A number of Lesotho’s recent legal reforms on ensuring the rights of persons with disabilities serve, both substantively and procedurally, as an example of good practice for States in the African region as well as elsewhere in the world. The reforms’ evolutionary path has ultimately produced a relatively coherent, though still incomplete, package: the 2019 *Koali Moshoeshoe* High Court judgment, the enactment of the Disability Equity Act (2021), and the introduction of Procedure Rules (2023). Importantly, these legal reforms were advanced in a consultative manner and reflect the outcome of sustained advocacy by organizations of persons with disabilities. As other African States seek to comply with their obligations in terms of the CRPD and ADP, their lawmakers and policymakers can draw valuable lessons from Lesotho’s experience.

In respect of Lesotho, despite these significant achievements, this report highlights various weaknesses in the content of legal reforms and their implementation. Therefore, the ICJ draws the following key concluding observations and recommendations to the attention of the Lesotho parliament, the Ministry of Justice, the Chief Justice, members of the judiciary, and civil society:

a. Denial of legal capacity in the criminal justice system

Key observations:

- Section 19 of the Penal Code (2010) and Section 172 of the CPEA (1981) retain provisions allowing courts to declare persons deemed to be “of unsound mind” as “insane,” impose verdicts of “guilty but insane” or “unfit to stand trial,” and authorize detention “at the King’s pleasure,” effectively removing legal capacity and criminal responsibility.
- The Disability Equity Act, while protecting certain human rights, omits a clear provision affirming the full legal capacity of persons with disabilities in all aspects of life. A provision of this kind is needed to counteract the legal restrictions embedded in the offending sections of the Penal Code and CPEA.
- These provisions and omissions are incompatible with the CRPD and ADP, perpetuate discriminatory treatment, and undermine the dignity and autonomy of persons with disabilities.

The ICJ makes the following recommendations:

- To the Legislature:

²⁴⁶ Ibid.

- Amend the Penal Code and CPEA so as to remove discriminatory provisions and explicitly recognize the full legal capacity of persons with disabilities in all areas of law.
 - Amend the Disability Equity Act to explicitly affirm the full legal capacity of persons with disabilities, so as to align the Act with the CRPD and ADP.
 - Undertake a comprehensive review of all pertinent laws, including the Constitution and the Sexual Offences Act (2003), with a view to amending them, where necessary, to ensure consistency with the CRPD and ADP regarding the recognition of the full legal capacity of persons with disabilities.
 - Allocate adequate funding and resources to support the process of legal reform, implementation and capacity-building required to realize these commitments.
- To the Judiciary – the Chief Justice:
 - Issue guidance to courts to interpret and construe the provisions of the Penal Code and the CPEA in a manner consistent with Lesotho’s international legal obligations and ensure the provision of accommodations and support as mandated by the Procedure Rules.
 - Provide regular and mandatory training to judges, magistrates, and court staff on the recognition of the legal capacity of persons with disabilities and the application of the CRPD and ADP standards in judicial practices.

b. Development of the Disability Equity Act

Key observations and findings:

- While the drafting process of the Act was highly participatory, involving OPDs and other stakeholders, not all important contributions - particularly on the right to legal capacity - were incorporated into the final text, as a consequence of which the Act was not wholly compliant with the CRPD and the ADP. This omission limits the Act’s potential to address entrenched legal restrictions on the participation of persons with disabilities in legal proceedings.
- Section 32 of the Act, which addresses “access to justice,” does not explicitly establish the right to access to justice and a general State obligation to guarantee this right and provide effective remedies. Earlier drafts of the Act reportedly contained such a provision, but it was omitted from the final version, potentially serving to limit the scope of the State’s duty.

The ICJ makes the following recommendations:

- To the Legislature:
 - Amend the Disability Equity Act to include an explicit recognition of the right to access to justice for persons with disabilities and a corresponding obligation on the State to guarantee such access on an equal basis with others.

- Institutionalize inclusive legislative drafting processes to ensure stakeholder feedback is systematically considered and reflected in final laws.
- To the Judiciary – judges, magistrates and judicial officers:
 - Interpret and apply Section 32 of the Disability Equity Act consistently with the CRPD and ADP, ensuring that persons with disabilities enjoy their right to access to justice on an equal basis with others.

c. Development of the Procedure Rules

Key observations and findings:

- The Procedure Rules were developed under the mandate of the Chief Justice, in terms of Section 32 of the Disability Equity Act, who proactively engaged OPDs and other stakeholders.
- This largely inclusive process generally led to strong alignment with international standards.

The ICJ makes the following recommendations:

- To the Judiciary – the Chief Justice:
 - Maintain ongoing dialogue with OPDs to address outstanding concerns and incorporate lessons learned from implementation into future revisions of the Rules.
 - Interpret and implement the Procedure Rules consistently with international human rights law, particularly the CRPD and ADP, by extending accommodations currently limited to witnesses to all persons with disabilities in judicial proceedings. Measures such as pre-trial visits, clear communication, breaks, and protections against harassment should apply to other participants, including accused persons or victims with disabilities, to ensure dignity, fairness, and equal access to justice.

d. Gaps in implementation

i. Lack of adequate funding to the judiciary:

Key observations:

- Persistent underfunding of the judiciary in general has been identified by the Chief Justice, judges, magistrates, lawyers, and experts as a major challenge to the effective functioning of courts.
- The judiciary has faced a progressively shrinking budget, limited investment in court infrastructure, delays in judicial appointments, and difficulties in meeting operational expenses. These challenges directly affect its capacity to function efficiently, ensure general access to justice, and provide the accommodations and supports required under the Procedure Rules.

The ICJ makes the following recommendations:

- To the Parliament:
 - Ensure adequate and sustained budgetary allocations to the judiciary in line with the Constitution and the Administration of the Judiciary Act. This includes providing sufficient funding to implement the Procedure Rules, covering accommodations, assistive technologies, infrastructure improvements, and both the establishment and training of specialized posts such as interpreters and intermediaries.
- To the Judiciary – to the Chief Justice:
 - Strengthen the administration of justice to ensure it is effective, fair, and compliant with constitutional and international legal standards, including the provision of accommodations and supports required under the Procedure Rules.

ii. Lack of human resources

Key observations:

- The Procedure Rules introduce, for the first time in Lesotho’s judicial system, the provision of qualified intermediaries for persons with disabilities, a role previously available only in children’s courts under the Children’s Protection and Welfare Act of 2011.
- Even within the children’s court system, intermediary services remain extremely limited, with only a single court-appointed intermediary serving all five district children’s courts.
- No intermediaries have been formally appointed to perform the role envisaged under the Procedure Rules, despite two years having passed since their enactment.
- Courts, therefore, exclusively continue to rely on the voluntary support of organizations of persons with disabilities, particularly LNFOOD and the Intellectual Disability Association of Lesotho (IDAL).
- There is a lack of government-appointed sign language interpreters, despite recognition of their importance in the Procedure Rules. This gap is also currently filled by OPDs.

The ICJ makes the following recommendations:

- To the Parliament:
 - Allocate sufficient and sustained budgetary resources to support the recruitment, training, and appointment of qualified intermediaries and sign language interpreters for the courts.
- To the Executive/Ministry of Justice:
 - Develop and implement a sustainable program for the recruitment, training, and appointment of qualified intermediaries and sign language interpreters for the courts, ensuring their availability across all districts.

- To the Judiciary – the Judicial Service Commission:
 - Facilitate the effective deployment of intermediaries and sign language interpreters within courts, coordinating with relevant government programs and organizations of persons with disabilities.

iii. Lack of alternative communication methods

Key observation:

- Courts lack alternative communication methods, including Braille, tactile aids, screen readers, as well as special measures like CCTV or one-way mirrors, unduly limiting the potential for full participation of persons with disabilities.

The ICJ makes the following recommendations:

- To the Parliament:
 - Allocate sufficient budgetary resources to enable the procurement and maintenance of assistive technologies and special measures across the justice system.
- To the Judiciary – the Judicial Administrator:
 - Identify and deploy the necessary communication tools and special measures and ensure their effective use in court proceedings to facilitate full participation of persons with disabilities.

iv. Physical inaccessibility of courts

Key observation:

- Many court buildings remain physically inaccessible, with non-functional or absent elevators and no adaptations to courtrooms or witness stands, limiting the participation of persons with disabilities.

The ICJ makes the following recommendation to the Parliament:

- Allocate adequate budgetary resources to support infrastructure upgrades to ensure all court facilities are fully accessible to persons with disabilities.

v. Awareness creation and capacity building training

Key observations:

- Court staff at all levels, judges, magistrates, prosecutors, and law enforcement officials often remain unaware of the content of the Procedure Rules and the rights of persons with disabilities. Although organizations like LNFOD have provided limited capacity-building trainings, there is no formal, judiciary-led training program on the Rules or disability rights more generally.

The ICJ makes the following recommendations:

- To the Parliament:
 - Allocate adequate budgetary resources to support the judiciary to conduct capacity-building trainings effectively.
- To the Judiciary - the Judicial Service Commission:
 - Plan and implement formal, judiciary-led capacity-building programs for judges, magistrates, prosecutors, and law enforcement officials on the Procedure Rules and disability rights.

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September 2025

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