
**MOSHOESHOE V. DPP: A MISSED OPPORTUNITY FOR
PERSONS WITH INTELLECTUAL AND PSYCHOSOCIAL
DISABILITIES IN LESOTHO?**

*Dianah Msipa**

ABSTRACT

In 2017, the Constitutional Division of the High Court of Lesotho delivered a landmark judgment in Moshoeshoe v. Director of Public Prosecutions. The court ruled that section 219 of the Criminal Procedure and Evidence Act, which effectively declared persons with intellectual and psychosocial disabilities incompetent to testify in criminal courts, was inconsistent with the right to equality before the law and the right to freedom from discrimination enshrined in the Lesotho Constitution. Consequently, the provision was declared unconstitutional. Although the court arrived at a welcome and correct decision, it missed an opportunity to address the seminal and often contentious rights to legal capacity and access to justice that are inextricably linked to testimonial competence. The court focused on the undesirable outdated and derogatory language used in section 219 to the exclusion of these rights. The court therefore missed the golden opportunity presented by Moshoeshoe to adequately address the rights to legal capacity and access to justice of persons with intellectual and psychosocial disabilities in Lesotho. Using the social model of disability as a conceptual framework, this Article examines the nexus between testimonial competence, legal capacity, and access to justice, which the court neglected to consider in its judgment.

* Dianah Msipa is the acting program manager in the Disability Rights Unit at the Centre for Human Rights, University of Pretoria in South Africa. She may be contacted by email at dianahmsipa@gmail.com.

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INTRODUCTION

Disability rights activists in Lesotho¹ have hailed the landmark decision in *Moshoeshoe v. Director of Public Prosecutions*² as a victory for persons with intellectual and psychosocial disabilities in the country.³ In this seminal decision, the Constitutional Division of the High Court of

1. Lesotho is a small landlocked country in Southern Africa with a population of approximately 2.1 million people. Geographically, the country is completely encircled by the Republic of South Africa. Known formally as the Kingdom of Lesotho, its leadership consists of a ceremonial kingship with multiparty democracy and a prime minister. The laws in Lesotho are drawn from various sources including a constitution, legislation, common law, judicial precedent, and customary law. Itumeleng Shale, *UPDATE: The Law and Legal Research in Lesotho*, GLOBALEX, <https://www.nyulawglobal.org/globalex/Lesotho1.html> (July/Aug. 2019).

2. *Moshoeshoe v. Dir. of Pub. Prosecutions*, CC/14/2017 [2019] LSHC (Lesotho).

3. Cf. Makatleho Molotsi, *Lessons from Koali Moshoeshoe v. DPP and Others' Case, DISABILITY LESOTHO*, July 2020, http://www.infod.org.ls/uploads/1/2/2/5/12251792/disability_lesotho_july_2020.pdf (noting that the disability rights community in Lesotho views the case as a victory while drawing attention to a lack of practical change).

Lesotho declared unconstitutional a legislative provision that disqualified persons with intellectual and psychosocial disabilities from testifying in Lesotho criminal courts.⁴ Section 219 of the Criminal Procedure and Evidence Act effectively declared that persons with intellectual and psychosocial disabilities were not competent to testify in criminal courts.⁵ The court ruled that section 219 was inconsistent with the constitutional rights to freedom from discrimination and equality before the law enshrined in sections 18 and 19 of the Constitution of Lesotho, respectively.⁶ Following the court's declaration of unconstitutionality, section 219 is void in accordance with the Constitution.⁷ Consequently, there is now no legal impediment preventing persons with intellectual and psychosocial disabilities in Lesotho from testifying in criminal courts. Disability rights activists are therefore justified in welcoming this as a progressive development for persons with intellectual and psychosocial disabilities.

While it is conceded that *Moshoeshoe* is a step in the right direction, the focus of this Article is not on the positive aspects of *Moshoeshoe* but on the analysis that is missing from the court's judgment. On its face, the *Moshoeshoe* decision is significant only because it removes section 219's legal impediment and permits persons with intellectual and psychosocial disabilities to testify as witnesses in criminal courts. However, upon deeper reflection, it becomes evident that the implications of *Moshoeshoe* transcend testimonial competence and affect the rights to legal capacity and access to justice—a fact that the court did not recognize. Although the court arrived at the correct outcome, it missed a valuable opportunity to address the core issues that influence and are affected by the concept of testimonial competence. Using the social model of disability as a conceptual framework, this Article seeks to fill in the gaps in

4. *Moshoeshoe*, CC/14/2017 at ¶ 1.

5. Criminal Procedure and Evidence Act, 1981 (Act. No. 9/1981) § 219 (Lesotho).

6. *Moshoeshoe*, CC/14/2017 at ¶ 1.

7. CONSTITUTION OF LESOTHO 1993, ch. 1, § 2.

the *Moshoeshoe* judgment by exploring the nexus between testimonial competence, legal capacity, and access to justice. Reference will be made throughout this Article to the Convention on the Rights of Persons with Disabilities (CRPD), which is an international human rights instrument dealing specifically with the rights of persons with disabilities at a global level.⁸ Lesotho ratified the CRPD on December 2, 2008.⁹ Even though Lesotho has not yet domesticated the CRPD through an Act of Parliament, the country is still bound by its provisions.¹⁰ The Article will also refer to provisions from the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa ("African Disability Protocol"),¹¹ which is a regional instrument dealing specifically with the rights of persons with disabilities in Africa.

This Article is divided into four parts. Part I explains the conceptual framework for this Article, discussed in the context of various models of disability. Part II examines in detail the court's decision in *Moshoeshoe* and highlights the missing aspects. In Part III, this Article explores the nexus between

8. Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (Dec. 13, 2006).

9. *Ratification Status for Lesotho*, UN TREATY BODY DATABASE, https://tbinetinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=97 (last visited Mar. 21, 2021).

10. *Fuma v. Commander Lesotho Def. Force*, CC/8/2011 [2013] LSHC 68, at ¶ 22 (Lesotho); see also Shale, *supra* note 1.

11. See generally Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, *adopted* Jan. 29, 2018 [hereinafter African Disability Protocol], <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-persons-disabilities-africa>. The African Disability Protocol was adopted by the thirtieth ordinary session of the Assembly, held in Addis Ababa, Ethiopia on January 29, 2018. *Id.* at 25. Although the African Disability Protocol is not yet in force, this Article will refer to it because after its adoption by the African Union, it became part of the African human rights framework. Once it enters into force, it is likely to be the most influential regional instrument on the rights of persons with disabilities. The African Disability Protocol will enter into force thirty days after the deposit of the fifteenth instrument of ratification in accordance with its article 38. *Id.* art. 38. So far, nine African states have signed the African Disability Protocol, but none have ratified it. The nine states that have signed the African Disability Protocol are Angola, Burkina Faso, Cameroon, Central African Republic, Gabon, Mali, Rwanda, South Africa, and Togo. See *List of Countries Which Have Signed, Ratified/Accessed to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa*, AFR. UNION, <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-persons-disabilities-africa> (select PDF titled "Status List") (June 18, 2020).

testimonial competence and legal capacity, which the court did not address. Finally, Part IV addresses the relationship between testimonial competence and access to justice, which is also missing from the court's judgment. This Article concludes by summarizing the importance of the court's decision—and its oversights—for persons with intellectual and psychosocial disabilities in Lesotho.

I. MODELS OF DISABILITY

Disability is an evolving concept that has been understood differently at various stages throughout history.¹² One need only consider the models of disability that have been formulated over time to appreciate the varied ways in which disability has been understood. These models of disability serve to explain the perceived causes of disability.¹³ They influence perceptions and ideas about disability.¹⁴ This Part will first discuss some early models of disability, namely the moral/religious model and the medical model, before discussing in greater detail the social model, which constitutes the conceptual framework for this Article.

A. *Early Models of Disability*

The moral or religious model, which is perhaps the oldest model of disability, perceived disability as an act of God.¹⁵ There are different variations of this model.¹⁶ According to one variation, disability is a punishment from God for sins committed either by the person with a disability, his or her parents, or ancestors.¹⁷ Another variation perceives disability as a test of faith from God, which is passed through endurance,

12. See G.A. Res 61/106, *supra* note 8, pmbl. ¶ e.

13. Mamo Retief & Rantoa Letšosa, *Models of Disability: A Brief Overview*, 74 HTS. THEOLOGICAL STUD. 1, 1 (2018).

14. *Id.*

15. *Id.* at 2.

16. *Id.*

17. *Id.*

resilience, and piety.¹⁸ The failure to receive healing indicates that person has failed the test.¹⁹ Despite their differences, both variations of the moral/religious model perceive disability as an act of God.²⁰

In the mid-1800s, advancements in science and technology led scientists and medical professionals to have greater knowledge about the biology of impairments.²¹ This resulted in the formulation of the medical model of disability, which gradually replaced the moral/religious model of disability.²² According to the medical model, disability is a trait that is inherent in an individual with impairment.²³ A person with a hearing, visual, or speech impairment is considered to have a disability.²⁴ This model would later be replaced by the social model of disability.

B. *The Social Model of Disability*

In the 1960s and 1970s, a new model of disability known as the social model began to emerge.²⁵ Dissatisfied with how earlier models of disability failed to consider the impact of societal and environmental factors in disadvantaging and excluding persons with disabilities, the disability rights movement formulated the social model of disability.²⁶ According to the social model, having an impairment does not, in itself, make someone a “person with a disability.”²⁷ Rather, disability arises when a person with impairment interacts with an environment that fails to accommodate their needs.²⁸

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 2–3.

24. *Id.* at 3.

25. *Id.*

26. *Id.*

27. *Id.* at 3–4.

28. *Id.* at 3.

Consider, as an example, a person with a physical impairment who requires the use of a wheelchair. According to the social model, the impairment does not, in itself, result in any disadvantage.²⁹ However, if that person tries to access the fifth floor of a building that neither has a wheelchair ramp nor a lift, that is when they would face a disadvantage. The disadvantage is, therefore, the result of the interaction between the person with impairment and environmental barriers.³⁰

Both the CRPD and the African Disability Protocol are based on the social model of disability.³¹ The CRPD states that “disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.”³² Similarly, the African Disability Protocol states that persons with disabilities “include those who have . . . impairments which in interaction with environmental, attitudinal or other barriers hinder their full and effective participation in society on an equal basis with others.”³³ To demonstrate the influence of the social model, Section C below considers its impact on how intellectual and psychosocial disabilities are understood.

C. The Influence of the Social Model on Understanding Intellectual and Psychosocial Disabilities

The social model of disability has had a great influence on how intellectual and psychosocial disabilities are perceived. This influence is exemplified by the change in terminology used to refer to both types of disabilities. Both disabilities will now be examined in turn, starting with intellectual disabilities.

29. See *id.* at 3–4.

30. See *id.*

31. See G.A. Res. 61/106, *supra* note 8, pmb. ¶ e; see also African Disability Protocol, *supra* note 11, art. 1.

32. G.A. Res. 61/106, *supra* note 8, pmb. ¶ e.

33. African Disability Protocol, *supra* note 11, art. 1.

Intellectual disabilities are characterized by limitations in intellectual functioning and adaptive behavior that originate before the age of eighteen.³⁴ However, the term “intellectual disability” is relatively new.³⁵ Persons with intellectual disabilities have been referred to using different terms throughout history.³⁶ The terms that have been used over the last 200 years include “idiots,” “feebleminded,” “mentally deficient,” “mentally subnormal,” and “mentally retarded,” among others.³⁷ The pertinent question becomes: What has influenced the change in terminology?

To answer this question, it should be noted that the process of naming scientific constructs is not arbitrary.³⁸ It “is intended to “reflect to the greatest degree possible the general idea(s) underlying the construct.”³⁹ In other words, there are certain underlying assumptions concealed in language used to describe disability. For instance, the underlying assumption behind the aforementioned outdated terms is that the disability is innate in the individual with impairment.⁴⁰ In other words, “[t]o have mental retardation was to be defective. The loci of that defect was the mind. . . . The nature of the defect of the mind (mental deficiency) was inferior mental performance (mental subnormality) characterized by mental slowness (mental retardation).”⁴¹ The construct behind those terms was therefore in line with the outdated medical model of disability.⁴² This language is reminiscent of the language in section 219 of

34. ROBERT L. SCHALOCK ET AL., AAIDD AD HOC COMM. ON TERMINOLOGY & CLASSIFICATION, *INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 1* (11th ed. 2010).

35. Michael L. Wehmeyer et al., *The Intellectual Disability Construct and Its Relation to Human Functioning*, 46 *INTELL. & DEV'L DISABILITIES* 311, 313–14 (2008).

36. *Id.* at 312–13.

37. *Id.* at 313.

38. *Id.* at 312.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 314.

the Criminal Procedure and Evidence Act whose constitutionality was in question in *Moshoeshoe*.⁴³

In response to the social model of disability, the American Association on Intellectual and Developmental Disabilities' Terminology and Classification Committee introduced the term "intellectual disability" in 1992.⁴⁴ In line with the social model, the term "intellectual disability" refers to a state of functioning that is influenced by the external environment and "responds with interventions that focus on individual strengths and that emphasize the role of supports to improve human functioning."⁴⁵ Both the CRPD and the African Disability Protocol use the term "intellectual impairments," indicating a validation of the language and the underlying construct.⁴⁶

The social model has also influenced the naming of another type of disability known as "psychosocial disability."⁴⁷ The term "psychosocial disability" refers to disabilities that used to be, and in some places still are, known as "mental health issues"⁴⁸ The term is used by mental health consumers and caregivers to describe "the disability experience of people with impairments and participation restrictions related to mental health conditions."⁴⁹ Persons with psychosocial disabilities may include those with depression, post-traumatic stress disorder (PTSD), bi-polar disorder, and schizophrenia, among others.⁵⁰ In the past, persons with psychosocial disabilities were referred to using terms such as "mad," or "mentally disordered"; the

43. *Moshoeshoe v. Dir. of Pub. Prosecutions*, CC/14/2017 [2019] LSHC ¶¶ a, 5–6 (Lesotho).

44. James R. Thompson et al., *Conceptualizing Supports and the Support Needs of People with Intellectual Disability*, 47 INTELL. & DEV'L DISABILITIES 135, 135 (2009).

45. Wehmeyer et al., *supra* note 35, at 317.

46. See G.A. Res 61/106, *supra* note 8, art. 1; African Disability Protocol, *supra* note 11, art. 1.

47. NAT'L MENTAL HEALTH CONSUMER & CARER F., UNRAVELLING PSYCHOSOCIAL DISABILITY 7 (2011) [hereinafter NMHCCF], https://nmhccf.org.au/sites/default/files/docs/nmhccf_psychosocial_disability_booklet_web_version_27oct11.pdf.

48. See, e.g., *What Is Psychosocial Disability*, N.S.W. GOV'T, <https://www.health.nsw.gov.au/mentalhealth/psychosocial/foundations/Pages/psychosocial-what-is.aspx> (Jan. 20, 2020).

49. NMHCCF, *supra* note 47, at 16.

50. See *Types of Mental Health Conditions*, N.S.W. GOV'T, <https://www.health.nsw.gov.au/mentalhealth/psychosocial/foundations/Pages/types.aspx> (Feb. 24, 2020).

underlying assumption is that the disability is perceived as an innate condition, consistent with the diagnostic medical model of disability.⁵¹ With the coming into the force of the CRPD in 2008, disability scholars, activists, and advocates began to use the term “psychosocial disability” in line with the CRPD’s understanding of disability as a social construct.⁵² The World Network of Users and Survivors of Psychiatry defines a psychosocial disability as:

the interaction between psychological and social/cultural components of . . . disability. The psychological component refers to ways of thinking and processing . . . experiences and . . . perception of the world The social/cultural component refers to the societal and cultural limits for behavior that interact with those psychological differences . . . as well as the stigma that the society attaches to . . . [the] . . . label[]disabled.⁵³

The term “aligns with the social model of disability and acknowledges the socially constructed nature of disability.”⁵⁴ The disability arises “when someone with a mental health issue interacts with a social environment that presents barriers to their equality with others.”⁵⁵

The social model has therefore had a significant impact on how intellectual and psychosocial disabilities are perceived and

51. See Paul Deany, Program Manager, Disability Rts. Fund, *Psychosocial Disability: One of the Most Misunderstood Areas of Disability*, Speech at the Ninth Session of the Conference of States Parties to the Convention on the Rights of Persons with Disabilities (June 15, 2016), <https://disabilityrightsfund.org/our-impact/insights/psychosocial-disability/>.

52. Fleur Beaupert, *Freedom of Opinion and Expression: From the Perspective of Psychosocial Disability and Madness*, *LAWS*, Jan. 4, 2018, at 3; see also G.A. Res 61/106, *supra* note 8, pmbl. ¶ e.

53. WORLD NETWORK OF USERS & SURVIVORS OF PSYCHIATRY, IMPLEMENTATION MANUAL FOR THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES 9 (WORLD NETWORK OF USERS & SURVIVORS OF PSYCHIATRY 2008), https://www.researchgate.net/publication/238691170_WNUSP_Implementation_Manual_for_the_Convention_on_the_Rights_of_Persons_with_Disabilities.

54. Beaupert, *supra* note 52, at 4.

55. *What Is Psychosocial Disability*, *supra* note 48.

understood. This symbolizes the dwindling influence of the medical model as it gives way to the social model of disability. The shift from the medical to the social model has a significant impact on law and policy as discussed in Section D below.

D. The Significance of the Social Model of Disability for Law and Policy

By influencing the way disability is understood, the models of disability also inform and are replicated in laws, policies, and other interventions aimed at ending disability discrimination and exclusion.⁵⁶ The main difference between the early models of disability and the social model is that the former did not take into account the impact of societal and environmental factors, whereas the latter does.⁵⁷ The moral/religious model viewed disability as an act of God and did not take into account the role played by societal and environmental factors.⁵⁸ Similarly, the medical model viewed disability as innate in the individual with impairment and did not consider the impact of societal and environmental factors.⁵⁹ Because these models did not regard societal and environmental factors as part of the problem, they were also not considered as part of the solution. The appropriate intervention under the moral/religious model was prayer and divine healing.⁶⁰ Under the medical model, the appropriate intervention is a cure, where possible, or rehabilitation to adjust the individual with disability to their environment.⁶¹

In contrast, the social model takes account of the role played by societal and environmental factors.⁶² Understanding disability as the result of an interactional process between a

56. See, e.g., *What Is Stigma?*, N.S.W. GOV'T, <https://www.health.nsw.gov.au/mentalhealth/psychosocial/foundations/Pages/stigma-define.aspx> (Feb. 24, 2020).

57. See *supra* text accompanying notes 25–30.

58. Retief & Letšosa, *supra* note 13, at 2.

59. RHODA OLKIN, WHAT PSYCHOTHERAPISTS SHOULD KNOW ABOUT DISABILITY 26 (1999).

60. Retief & Letšosa, *supra* note 13, at 2.

61. OLKIN, *supra* note 59.

62. See discussion *supra* Section I.B.

person with impairment and an unaccommodating environment necessitates an intervention that takes account of both the person's needs arising from impairment as well as societal and environmental factors.

For instance, a person with mobility needs arising from physical disability and requiring the use of a wheelchair may be accommodated in the environment through a wheelchair ramp. This approach considers the individual's needs in addition to the environment in order to ensure that the interaction between the individual with impairment and the environment does not result in disadvantage. An accounting of both the person's needs and societal and environmental factors makes interventions that are based on the social model capable of effectively addressing the widespread exclusion of persons with disabilities in various spheres of life.⁶³ The social model of disability is therefore a powerful conceptual tool capable of guiding the formulation of laws and policies that respond appropriately to the needs of persons with disabilities. Because the models of disability shape the way disability is understood, they also influence law and policy as shown in Part II below.

II. THE COURT'S JUDGMENT IN *MOSHOESHOE*

The models of disability are quite pervasive and are often replicated in various legislative provisions concerning persons with disabilities. For instance, the medical model of disability is exemplified in section 219 of the Criminal Procedure and Evidence Act which is central to the reasoning in *Moshoeshoe*. By analyzing the court's judgment in *Moshoeshoe*, this Part will demonstrate the shortcomings of a medical model understanding of disability. It will also explore the issues neglected by the court using a social model framework. To put the discussion in context, the facts of *Moshoeshoe* will first be discussed.

63. Retief & Letsōsa, *supra* note 13, at 3.

Koali Moshoeshoe, an adult man with an intellectual disability, was sent by his mother to deliver some cash in the amount of 300 Lesotho maloti⁶⁴ to a fellow villager in August 2016.⁶⁵ As he was en route, Moshoeshoe passed by Hlomohang Mokebisa's house.⁶⁶ Mokebisa invited him in and offered him some soft porridge to eat.⁶⁷ After Moshoeshoe finished eating the porridge, Mokebisa instructed him to sit on her bed and she started to undress him.⁶⁸ Despite Moshoeshoe's indications that he did not wish to have sexual intercourse with her, Mokebisa forcefully undressed him and had sexual intercourse with him without his consent.⁶⁹ Thereafter, Moshoeshoe reported the matter to the police.⁷⁰ When the matter was referred to court, the prosecutor declined to prosecute on the basis that Moshoeshoe was not competent to testify due to his intellectual disability.⁷¹ The prosecutor based this decision on section 219 of the Criminal Procedure and Evidence Act.⁷² Section 219 states that "[n]o person appearing or proved to be afflicted with idiocy, lunacy or inability or labouring 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."⁷³ Because he was deemed incompetent, Moshoeshoe could not testify and his case could not move forward without his testimony.⁷⁴

In response, two disabled persons' organizations, the Lesotho Society of Mentally Handicapped Persons, Parents, and Families and the Lesotho National Federation of Organizations

64. The equivalent of 300 LSL is about 21.06 USD. *Currency Converter*, MSN, <https://www.msn.com/en-us/money/tools/currencyconverter> (last visited June 28, 2021).

65. *Moshoeshoe v. Dir. of Pub. Prosecutions*, CC/14/2017 [2019] LSHC ¶ 4 (Lesotho).

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *See id.*

71. *Id.* ¶ 5.

72. *Id.* (citing Criminal Procedure and Evidence Act, 1981 (Act. No. 9/1981) § 219 (Lesotho)).

73. Criminal Procedure and Evidence Act, 1981 (Act. No. 9/1981) § 219 (Lesotho).

74. *Moshoeshoe*, CC/14/2017 at ¶ 5.

of the Disabled joined the first applicant in challenging the constitutionality of section 219 of the Criminal Procedure and Evidence Act.⁷⁵ The Constitutional Division of the High Court of Lesotho ruled in their favor and declared that section 219 was inconsistent with the right to equality before the law and the right to freedom from discrimination enshrined in the Constitution of Lesotho.⁷⁶ Consequently, the court declared section 219 null and void in accordance with the Constitutional provision stating that the Constitution is the supreme law of the land and any other law that is inconsistent with it shall, to the extent of the inconsistency, be void.⁷⁷

In its judgment, the court raised concerns about two issues: the language used in section 219 and the negative effect of section 219.⁷⁸ Concerning the language used in the section, the court was of the opinion that the language is derogatory and is an affront to human dignity and to the court.⁷⁹ The court stated that “[d]ecency and respect to human dignity aside, words like ‘afflicted’, ‘lunacy’ [and] ‘imbecility’ are not pleasing to any reasonable court or man.”⁸⁰ Because of the language used, section 219 was found to be “totally inconsistent with rationale of the Constitution of Lesotho.”⁸¹

The court’s concern with the language used in section 219 was indeed justified. While the court was correct to state that this language was offensive, there is another reason why this terminology is inappropriate that went unnoticed by the court. The terms used in this provision, such as “idiocy,” “lunacy,” and “imbecility of mind,” are not value-neutral and are all indicative of the underlying assumptions about intellectual and

75. *Id.* at 1.

76. *Id.* ¶ 18–19. The right to equality before the law is enshrined in section 19 of the Constitution of Lesotho. The right to freedom from discrimination is enshrined in section 18 of the Constitution of Lesotho. CONSTITUTION OF LESOTHO 1993, ch. 2, §§ 18–19.

77. *Moshoeshoe*, CC/14/2017 at ¶¶ 8, 18 (citing CONSTITUTION OF LESOTHO 1993, ch. 1, § 2).

78. *Id.* ¶¶ 12–18.

79. *Id.* ¶ 13.

80. *Id.* (quoting Criminal Procedure and Evidence Act, 1981 (Act. No. 9/1981) § 219 (Lesotho)).

81. *Id.* ¶ 12 (emphasis omitted).

psychosocial disabilities.⁸² The underlying assumption behind this terminology is that disability is innate in the individual with impairment, which is a medical model paradigm.⁸³

The second concern raised by the court was the negative effect of section 219.⁸⁴ The court stated that even if “the insolent or disrespectful words are removed from section 219, the negative effect to the disabled remains poignant and this is quite obnoxious.”⁸⁵ The effect of section 219 was that it left persons with intellectual and psychosocial disabilities unprotected by the law.⁸⁶ The court stated that persons with disabilities “deserve all protection and equality under the law.”⁸⁷ Therefore, the court found that section 219 was inconsistent with section 19 of the Constitution, which protects the right to equality before the law.⁸⁸ Section 19 of the Constitution states that “[e]very person shall be entitled to equality before the law and to the equal protection of the law.”⁸⁹

Furthermore, section 219 was in effect discriminatory because it mandated differential treatment between persons with intellectual and psychosocial disabilities and all other persons.⁹⁰ Therefore, the court ruled that section 219 was inconsistent with the right to freedom from discrimination enshrined in section 18 of the Constitution.⁹¹ Section 18 provides that “no law shall make any provision that is discriminatory either of itself or in its effect.”⁹² The Constitution further clarifies that

82. See Criminal Procedure and Evidence Act, 1981 (Act. No. 9/1981) § 219 (Lesotho); see also Wehmeyer et al., *supra* note 35, at 313–14.

83. Wehmeyer et al., *supra* note 35, at 313–14.

84. *Moshoeshoe v. Dir. of Pub. Prosecutions*, CC/14/2017 [2019] LSHC ¶ 18 (Lesotho).

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* ¶¶ 9,19.

89. CONSTITUTION OF LESOTHO 1993, ch. 1, § 19.

90. Highlighting the discriminatory effect of section 219 on intellectually disabled individuals, the court noted that intellectually disabled complainants in *Moshoeshoe*’s position could not vindicate their rights in the courts because they were entirely barred from providing testimony by the statute. See *Moshoeshoe*, CC/14/2017 at ¶¶ 4–15.

91. *Id.* ¶ 19.

92. CONSTITUTION OF LESOTHO 1993, ch.1, § 18(1).

[i]n 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 description.⁹³

The court was indeed justified in raising concerns about the language used and its effect on persons with intellectual and psychosocial disabilities. However, the court neglected to address some core issues in its judgment. One of these issues is that of testimonial competence. At issue in *Moshoeshoe*, was the constitutionality of section 219 of the Criminal Procedure and Evidence Act.⁹⁴ Section 219 declares that persons with intellectual and psychosocial disabilities are not competent to testify.⁹⁵ Therefore, the concept of testimonial competence was central to this case, yet the court only mentioned it once.⁹⁶ The court did not apply its mind to the core issue of why the testimonial competence of persons with intellectual and psychosocial disabilities is often challenged.

In the law of evidence, testimonial competence refers to a person's ability or capacity to testify in court.⁹⁷ Only witnesses who are competent to testify may give evidence in court.⁹⁸ As a general rule, every person in Lesotho is competent to testify in

93. *Id.* § 18(3).

94. *Moshoeshoe*, CC/14/2017 at ¶¶ 5–10.

95. Criminal Procedure and Evidence Act, 1981 (Act. No. 9/1981) § 219 (Lesotho).

96. *Moshoeshoe*, CC/14/2017 at ¶ 5.

97. *Id.*

98. DAVID T. ZEFFERT & LEONARD HUBERT HOFFMAN, *THE SOUTH AFRICAN LAW OF EVIDENCE* 369 (4th ed. 1988).

court.⁹⁹ However, there are exceptions to this rule.¹⁰⁰ The law may expressly exclude certain people from testifying.¹⁰¹ The Criminal Procedure and Evidence Act states that “[e]very person not expressly excluded by this Act from giving evidence is competent and compellable to give evidence in a criminal case in any court in Lesotho or before a magistrate on a preparatory examination.”¹⁰² Persons with intellectual and psychosocial disabilities fell within the exception to the general rule because they were expressly excluded by section 219. The reason for this exclusion may become clear upon considering the manner in which these two disabilities are understood in the Criminal Procedure and Evidence Act.

Section 219 refers to persons with intellectual and psychosocial disabilities using language such as “idiocy,” “lunacy,” and “imbecility of mind.”¹⁰³ These terms are all indicative of the underlying understanding of disability as innate in the individual and appear to be in line with the outdated medical model of disability.¹⁰⁴ Section 219 was based on a misconception that persons with intellectual and psychosocial disabilities lack testimonial competence because of their disability. In other words, persons with disabilities’ incompetence or unreliability as witnesses was erroneously perceived by the drafters of the Criminal Procedure and Evidence Act as innate in the individual with impairment.¹⁰⁵ This is why the testimonial competence of persons with intellectual and psychosocial disabilities was, and continues, to be questioned.¹⁰⁶ The court in *Moshoeshoe* did not address these misconceptions. The medical model of disability is problematic

99. Criminal Procedure and Evidence Act, 1981 (Act. No. 9/1981) § 215 (Lesotho).

100. *See id.* § 216.

101. *Id.*

102. *Id.*

103. *Id.* § 219.

104. *See* Wehmeyer et al., *supra* note 35, at 313–14.

105. *See* Criminal Procedure and Evidence Act, (Act. No. 9/1981) § 219.

106. *See* Gisli H. Gudjonsson, Isabel C.H. Clare & Glynis Murphy, *Assessing the Capacity of People with Intellectual Disabilities To Be Witnesses in Court*, 30 PSYCH. MED. 307, 308 (2000).

because it does not recognize social and environmental factors as part of the problem and, therefore, does not consider them as part of the solution.¹⁰⁷ This is why section 219 responds by simply preventing persons with intellectual and psychosocial disabilities from testifying as opposed to requiring that they be supported to testify.

The effect of the decision in *Moshoeshoe* is that there is now no legal impediment to persons with intellectual and psychosocial disabilities testifying in the criminal courts in Lesotho. This is undoubtedly a welcome development; however, the fact that persons with intellectual and psychosocial disabilities have communication needs and will encounter challenges when testifying cannot be ignored. It is not adequate to simply allow them to testify without making provision for support. For persons with intellectual and psychosocial disabilities to effectively exercise their right to participate as witnesses in the courts, there is a need for a conceptual shift from the medical model to the social model of disability. Adopting a social model approach would enable the courts to have a broader perspective that takes into account the role of societal and environmental factors, both mitigating disadvantage and enabling the intellectually disabled to effectively participate as witnesses.¹⁰⁸ A social model perspective makes it possible for the courts to shift from asking the question, “is this person competent to testify?” to asking, “how can this person be supported to testify?”

The importance of providing support to persons with disabilities is implicit in the social-model-based right to legal capacity that is inextricably linked to the concept of testimonial competence. The court in *Moshoeshoe* omitted to address the nexus between testimonial competence and legal capacity. This omission resulted in the court missing the opportunity to address the role of support in giving testimony. The

107. See *supra* notes 21–24 and accompanying text.

108. See discussion *supra* Section I.B.

relationship between testimonial competence and the right to legal capacity is addressed in Part III below.

III. TESTIMONIAL COMPETENCE AND LEGAL CAPACITY

The court in *Moshoeshoe* correctly identified the link between testimonial competence and the right to equality before the law.¹⁰⁹ However, the court did not highlight the nexus between testimonial competence and the right to legal capacity. In the CRPD, the right to legal capacity is part of the right to “equal recognition before the law,” which is the equivalent of the right to “equality before the law” enshrined in the Lesotho Constitution.¹¹⁰ Article 12 of the CRPD is titled “equal recognition before the law,” which is the core right, and all the other rights enumerated in Article 12, such as legal capacity and support, are necessary for the realization of this core right.¹¹¹ The CRPD is, in fact, the first international human rights instrument that details the various components of the right to equal recognition before the law.¹¹² The two components of this right that are pertinent for the purposes of this Article are legal capacity¹¹³ and support.¹¹⁴ The significance of the right to legal capacity and support to testimonial competence are discussed in turn starting with legal capacity followed by support.

The CRPD provides that “[s]tates Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.”¹¹⁵ The CRPD itself, does not contain a definition for the term “legal capacity” because it was a hotly contested issue during the drafting of the CRPD.¹¹⁶ The

109. *Moshoeshoe v. Dir. of Pub. Prosecutions*, CC/14/2017 [2019] LSHC ¶ 10 (Lesotho).

110. G.A. Res 61/106, *supra* note 8, art. 12.

111. Anna Arstein-Kerslake, *A Call to Action: The Realization of Equal Recognition Under the Law for People with Disabilities in the EU*, 5 EUR. Y.B. DISABILITY L. 75, 84 (2014).

112. *Id.*

113. G.A. Res 61/106, *supra* note 8, art. 12(2).

114. *Id.* art. 12(3).

115. *Id.* art. 12(2); *see also* African Disability Protocol, *supra* note 11, art. 7(2)(a).

116. Amita Dhanda, *Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future*, 34 SYRACUSE J. INT'L L. & COM. 429, 439 (2007).

drafters made a distinction between legal capacity to hold rights and legal capacity to act.¹¹⁷ There was agreement about the fact that persons with disabilities are indeed persons before the law who are entitled to have rights (legal capacity to hold rights).¹¹⁸ There were, however, divergent views about whether all persons with disabilities had capacity to exercise those rights (legal capacity to act).¹¹⁹ The Committee on the Rights of Persons with Disabilities did, however, address the meaning of legal capacity in its first General Comment.¹²⁰ The Committee clarified that legal capacity means both the capacity to hold rights and the capacity to act in order to exercise those rights.¹²¹ The meaning of the term is the same in the African Disability Protocol.¹²² It is defined as “the ability to hold rights and duties and to exercise those rights and duties.”¹²³ Having rights is quite meaningless without the power or possibility to act in order to exercise those rights. Indeed,

[o]ne must have rights and be able to act, for having rights when one cannot act may undermine those rights and one cannot act without a recognized identity that enables one to hold rights in the first place. The unification of

117. *Id.* at 442.

118. *Id.* at 439.

119. *See id.*

120. *See generally* Comm. on the Rts. of Persons with Disabilities, General Comment 1: Article 12: Equal Recognition Before the Law, U.N. Doc. CRPD/C/GC/1 (2014) [hereinafter General Comment 1]. Each United Nations treaty, such as the CRPD, has a treaty body, which is a committee of independent experts tasked with monitoring the implementation of the relevant treaty. The Committee on the Rights of Persons with Disabilities is the CRPD treaty body. General comments are prepared by treaty bodies to provide an interpretation of a treaty provision or thematic issue. *See Human Rights Treaty Bodies*, OFF. UNITED NATIONS HIGH COMM’R HUM. RTS., <https://www2.ohchr.org/english/bodies/treaty/glossary.htm> (last visited Mar. 28, 2021).

121. General Comment 1, *supra* note 120, ¶ 13.

122. African Disability Protocol, *supra* note 11, art. 1.

123. *Id.*

both elements of identity and agency in article 12 is to be applauded.¹²⁴

Recognition of the right to legal capacity is, therefore, fundamental for persons with disabilities because it affects the enjoyment of various rights across different spheres of life, including most importantly for purposes of this Article, testimonial competence, health, property rights, and political and public participation.¹²⁵ If one is prohibited from acting as a witness in order to exercise their rights, as is the case when one is denied testimonial competence, then effectively, that person has been denied the right to legal capacity.¹²⁶ Therein lies the nexus between legal capacity and testimonial competence.

Though all persons with disabilities have historically been denied the right to equal recognition before the law, persons with intellectual and psychosocial disabilities in particular face violations of this right at a higher rate than other persons with disabilities.¹²⁷ Therefore, the court's omission of a discussion on legal capacity in *Moshoeshoe* is a lost opportunity to address a much-needed right for persons with intellectual and psychosocial disabilities.

The second component of the right to equal recognition before the law is the right to receive support. The CRPD provides that "States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity."¹²⁸ During the drafting of the CRPD, there were divergent views about how to

124. Dianah Msipa, *Survivors of Sexual Assault with Intellectual Disabilities: Accommodating Difference in the Courtroom* 50 (Aug. 2013) (LL.M thesis, McGill University) (on file with *Drexel Law Review*).

125. This list contains examples of rights that are affected by the denial of legal capacity. It is not an exhaustive list. See INCLUSION INT'L, *INDEPENDENT BUT NOT ALONE: A GLOBAL REPORT ON THE RIGHT TO DECIDE* 31–48 (2014), <https://inclusion-international.org/wp-content/uploads/2014/06/Independent-But-Not-Alone.pdf>.

126. See Msipa, *supra* note 124, at 46.

127. General Comment 1, *supra* note 120, ¶¶ 8–9.

128. G.A. Res. 61/106, *supra* note 8, art. 12(3); see also African Disability Protocol, *supra* note 11, art. 7(2)(c).

perceive the question of assistance and support.¹²⁹ On the one hand, there were drafters who thought that persons with severe disabilities who required assistance to exercise their rights should be denied the right to act and have a legal guardian exercise their rights on their behalf and in their best interests.¹³⁰ According to this view, a person who requires support to exercise legal capacity is seen as a person who lacks legal capacity.¹³¹ On the other hand, there were those who opined that persons with disabilities should not be denied legal capacity to act based on the fact that they require support.¹³² The latter opinion prevailed.¹³³ The CRPD acknowledges the right to legal capacity, and emphasizes “the need to promote and protect the human rights of all persons with disabilities, including those who require more intensive support.”¹³⁴ This is significant because it is effectively a re-formulation of the role of support. This is why Article 12 of the CRPD is regarded as “emblematic of the paradigm shift of the Convention.”¹³⁵

Competence to testify only becomes an issue when dealing with a person who requires more intensive support to exercise their legal capacity, as with some persons with intellectual and psychosocial disabilities.¹³⁶ However, in light of the paradigm shift in Article 12 of the CRPD, the provision of support is “necessary to enable one to exercise their legal capacity.”¹³⁷ Therefore, the fact that the court neglected to address the issue of support in *Moshoeshoe* is a missed opportunity for persons

129. Dhanda, *supra* note 116.

130. *See id.* at 439.

131. *See* Msipa, *supra* note 124, at 48–49.

132. Dhanda, *supra* note 116, at 439–40.

133. *Id.* at 456.

134. G.A. Res. 61/106, *supra* note 8, pmb. ¶ 10.

135. Gerard Quinn, Personhood and Legal Capacity: Perspectives on the Paradigm Shift of Article 12 CRPD, Address at Harvard Law School Project on Disability Conference 3 (Feb. 20, 2010) (transcript available at Harvard Law School Library).

136. *See* Robert D. Dinerstein, *Implementing Legal Capacity under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-Making*, 19 HUM. RTS. BRIEF 8, 10 (2012) (discussing supported decision-making).

137. Quinn, *supra* note 135, at 21.

with intellectual and psychosocial disabilities in Lesotho. Providing support to enable persons with intellectual and psychosocial disabilities to testify in court is also necessary for them to access justice.

IV. TESTIMONIAL COMPETENCE AND ACCESS TO JUSTICE

The court in *Moshoeshoe* neglected to address the nexus between testimonial competence and the right of persons with intellectual and psychosocial disabilities to access justice on an equal basis with others. This Part first highlights the link between testimonial competence and access to justice and concludes by discussing the related concept of accommodations.

There is a relationship between testimonial competence and access to justice. Put simply, access to justice is the ability to effectively access the “systems, procedures, information, and locations used in the administration of justice.”¹³⁸ The right of persons with disabilities to access justice is enumerated in both Article 13 of the CRPD and Article 13 of the African Disability Protocol.¹³⁹ The CRPD requires states to “ensure effective access to justice for persons with disabilities on an equal basis with others.”¹⁴⁰ Similarly, the African Disability Protocol requires states to “take measures to ensure that persons with disabilities have access to justice on an equal basis with others.”¹⁴¹ The inclusion of a substantive right of access to justice in the CRPD was in response to the “specific rights experience of persons with disability,” particularly, the numerous barriers disabled persons face in accessing justice.¹⁴²

138. Stephanie Ortoleva, *Inaccessible Justice: Human Rights, Persons with Disabilities and the Legal System*, 17 ILSA J. INT'L & COMPAR. L. 281, 284 (2011).

139. G.A. Res. 61/106, *supra* note 8, art. 13; African Disability Protocol, *supra* note 11, art. 13.

140. G.A. Res. 61/106, *supra* note 8, art. 13(1).

141. African Disability Protocol, *supra* note 11, art. 13(1).

142. Frédéric Mégret, *The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?*, 30 HUM. RTS. Q. 494, 494 (2008).

The link between testimonial competence and access to justice becomes apparent when one considers that a finding of incompetence means that a person cannot testify. This has consequences on a much deeper level, affecting the “most basic human right”: the right to access justice.¹⁴³ The right to access justice is crucial because it has a bearing on the enjoyment of other rights.¹⁴⁴ Cappelletti and Garth, two leading scholars on access to justice, effectively summarize the importance of this right by stating that “the possession of rights is meaningless without mechanisms for their effective vindication.”¹⁴⁵ Denying persons with intellectual and psychosocial disabilities testimonial competence is tantamount to denying them mechanisms through which to effectively vindicate their rights.

However, the right to access justice is not achieved by simply allowing persons with disabilities to testify, as the court in *Moshoeshoe* has done for persons with intellectual and psychosocial disabilities.¹⁴⁶ Persons with disabilities still face numerous barriers to accessing justice on an equal basis with others, and even though section 219’s legal impediment has been removed by the court in *Moshoeshoe*, other barriers remain in place.¹⁴⁷ Typically, persons with intellectual and psychosocial disabilities experience communication barriers that make their participation as witnesses in court challenging.¹⁴⁸ Both the CRPD and the African Disability Protocol prescribe the use of accommodations to overcome the barriers faced by persons with disabilities in accessing justice.¹⁴⁹ This makes the concept

143. Mauro Cappelletti & Bryant Garth, *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective*, 27 *BUFF. L. REV.* 181, 185 (1978).

144. *Id.* at 184–85.

145. *Id.*

146. *See supra* Part II.

147. Ortoleva, *supra* note 138, at 299.

148. SHARON PRIMOR & NA’AMA LERNER, *THE RIGHT OF PERSONS WITH INTELLECTUAL, PSYCHOSOCIAL AND COMMUNICATION DISABILITIES TO ACCESS TO JUSTICE: ACCOMMODATIONS IN THE CRIMINAL PROCESS* 5 (2013).

149. *See* G.A. Res. 61/106, *supra* note 8, art. 13(1); African Disability Protocol, *supra* note 11, art. 13(1).

of accommodations crucial to the realization of the right of access to justice. The concept is discussed in detail below.

A. Reasonable Accommodations: Responding to Individual Needs through the Environment

The concept of reasonable accommodations is a social model of intervention that responds to individual needs through the environment.¹⁵⁰ The phrase “reasonable accommodation” refers to any “necessary and appropriate modification and adjustments . . . where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”¹⁵¹ Therefore, any measure that alters or modifies the way things are usually done in order to enable persons with disabilities to participate effectively is an accommodation.¹⁵² The CRPD usually requires that accommodations be reasonable in that they must not impose a “disproportionate or undue burden.”¹⁵³

The notion of reasonable accommodations was in existence long before the adoption and the coming into force of the CRPD in 2006 and 2008, respectively.¹⁵⁴ The World Programme of Action Concerning Disabled Persons, which was adopted by the United Nations General Assembly in 1982, emphasized the importance of responding to the individual needs and circumstances of persons with disabilities.¹⁵⁵ It stated that:

150. See Robyn White & Dianah Msipa, *Implementing Article 13 of the Convention on the Rights of Persons with Disabilities in South Africa: Reasonable Accommodations for Persons with Communication Disabilities*, 6 AFR. DISABILITY RTS. Y.B. 99, 107 (2018).

151. G.A. Res. 61/106, *supra* note 8, art. 2; African Disability Protocol, *supra* note 11, art. 1.

152. See White & Msipa, *supra* note 150, at 103.

153. G.A. Res. 61/106, *supra* note 8, art. 2. See *infra* Section IV.B for a discussion on accommodations in the access to justice context.

154. Frédéric Mégret & Dianah Msipa, *Global Reasonable Accommodation: How the Convention on the Rights of Persons with Disabilities Changes the Way We Think About Equality*, 30 S. AFR. J. HUM. RTS. 252, 255 (2014).

155. *World Programme of Action Concerning Disabled Persons*, ¶ 25, U.N. Doc A/37 (1982).

[t]he principle of equal rights for the disabled and non-disabled implies that the needs of *each and every individual are of equal importance*, that these needs must be made the basis for the planning of societies, and that all resources must be employed in such a way as to ensure, for every individual, equal opportunity for participation.¹⁵⁶

A number of cases decided by international human rights bodies and courts indicate that the failure to accommodate disability may lead to rights violations.¹⁵⁷ Of note is the case *Hamilton v. Jamaica*.¹⁵⁸ The Human Rights Committee held that Jamaica's failure to detain a prisoner, whose legs were paralyzed, in a place that was adapted to meet his individual needs constituted a breach of the right to humane treatment provided for in the International Covenant on Civil and Political Rights.¹⁵⁹ The European Court of Human Rights came to a similar conclusion in *Price v. UK*¹⁶⁰ when it held that the United Kingdom's failure to detain Price, who was four-limb deficient, in facilities that were adapted to her individual needs amounted to degrading treatment in violation of the European Convention on Human Rights.¹⁶¹ Though these cases did not actually impose an obligation of reasonable accommodations in the context of disability, the findings in these cases demonstrate that a failure to accommodate may lead to a finding of rights violations.

Eventually, the requirement to provide reasonable accommodations became a duty and the denial of reasonable accommodations was considered a form of disability discrimination. This was first seen in General Comment No. 5

156. *Id.* (emphasis added).

157. Mégret & Msipa, *supra* note 154, at 256.

158. *Hamilton v. Jamaica* Communication, 616/1995 U.N. Doc. CCPR/C/66/D/616/1995 (1994).

159. *Id.*

160. *Price v. United Kingdom*, App. No. 33394/96, at 10 (July 10, 2001).

161. Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, 213 U.N.T.S. 221.

issued by the Committee on Economic, Social and Cultural Rights.¹⁶² The Committee held that although the International Covenant on Economic, Social and Cultural Rights (ICESCR) does not specifically name disability as one of the grounds upon which discrimination is prohibited, it is included in article 2(2)'s reference to "other status."¹⁶³ The Committee proceeded to recognize the importance of reasonable accommodation to the right of persons with disabilities to equality by clarifying that article 2(2) of ICESCR required that everyone, including persons with disabilities, enjoy the rights contained in ICESCR.¹⁶⁴ The Committee stated that discrimination on the basis of disability includes any distinction, exclusion, restriction or preference, or *denial of reasonable accommodation* based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights.¹⁶⁵

Similarly, the CRPD and the African Disability Protocol extend the definition of disability discrimination to include the denial of reasonable accommodations.¹⁶⁶ Furthermore, the CRPD requires states to "take all appropriate steps to ensure that reasonable accommodation is provided."¹⁶⁷ Therefore, the provision of accommodations is not a privilege for persons with disabilities, and neither is it optional for states. Persons with disabilities have a right to be accommodated and states have a duty to accommodate persons with disabilities.¹⁶⁸

The Committee on the Rights of Persons with Disabilities had occasion to consider disability discrimination and reasonable accommodations in its first individual petition. In *HM v.*

162. U.N. Comm. on Econ. & Cultural Rts., General Comment No. 5: Persons with Disabilities, U.N. Doc. E/1995/22 (1994).

163. *Id.* ¶ 5.

164. *See id.*

165. *Id.* ¶ 15 (emphasis added).

166. G.A. Res. 61/106, *supra* note 8, art. 2; African Disability Protocol, *supra* note 11, art. 1.

167. G.A. Res. 61/106, *supra* note 8, art. 5(3).

168. *See White & Msipa, supra* note 150, at 103.

Sweden,¹⁶⁹ HM had a condition known as Ehlers-Danlos Syndrome (EDS).¹⁷⁰ This condition made her joints excessively flexible and she experienced severe joint dislocation.¹⁷¹ As a result, she had neither walked nor stood in over eight years.¹⁷² It was also difficult for her to sit and lie down and she had been bed-ridden for the previous two years.¹⁷³ She also had hypersensitivity to medication, which prevented her from taking any medication.¹⁷⁴ Consequently, she relied heavily on rehabilitation in the form of hydrotherapy to prevent her condition from deteriorating further.¹⁷⁵ Specialists recommended hydrotherapy because it would strengthen her joints and muscles, improve blood circulation, and reduce pain.¹⁷⁶ However, she could not leave her house to attend rehabilitation due to the risk of injury involved in transporting her to a hospital.¹⁷⁷ The only option she had was to have a hydrotherapy pool installed at her house.¹⁷⁸

Accordingly, HM had applied for planning permission to extend her house so that she could build a hydrotherapy pool.¹⁷⁹ The Local Housing Committee denied her application because it would encroach onto land where building was prohibited by Sweden's Planning and Building Act.¹⁸⁰ In her individual complaint before the Committee on the Rights of Persons with Disabilities, HM argued that the refusal to grant her planning

169. *HM v. Sweden*, Communication 3/2011 U.N. Doc. CRPD/C/7/D/3/2011 (2012); see also Ilze Grobbelaar-Du Plessis & Annelize Nienaber, *Disability and Reasonable Accommodation: HM v. Sweden* Communication 3/2011 (Committee on the Rights of Persons with Disabilities), 30 S. AFR. J. HUM. RTS. 366, 367 (2014), for further discussion of *HM v. Sweden*.

170. *HM v. Sweden*, Communication 3/2011, at 3.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

permission amounted to discrimination and a violation of various other rights.¹⁸¹

Sweden's defense of its application denial was that the Planning Building Act applies equally to all persons, including persons with disabilities.¹⁸² Therefore, the refusal to grant planning permission was not on the basis of her disability, but was pursuant to legal provisions that applied equally to all.¹⁸³ HM argued that the refusal was discriminatory because the neutral application of the law had an indirect discriminatory effect in that it deprived her of the treatment she needed.¹⁸⁴

The Committee ultimately decided in HM's favor, stating that:

[A] law which is applied in a neutral manner may have a discriminatory effect when the *particular circumstances* of the individuals to whom it is applied are not taken into consideration. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention can be violated when States, without objective and reasonable justification, fail to treat differently persons whose situations are significantly different.¹⁸⁵

The modification or adjustment (i.e., accommodation) to the environment should be in response to the individual's needs.¹⁸⁶ The individual needs of persons with disabilities are as diverse as the types of disabilities themselves.¹⁸⁷ Indeed, it is the individual's needs, as determined by impairment, that influence the nature of intervention that is needed.¹⁸⁸ The type

181. *Id.* at 4.

182. *Id.* at 7.

183. *Id.*

184. *Id.* at 8.

185. *Id.* at 11 (emphasis added).

186. ANNA LAWSON, *DISABILITY AND EQUALITY LAW IN BRITAIN: THE ROLE OF REASONABLE ADJUSTMENT* 24 (2008).

187. *See id.*

188. *See id.*

of adjustment or modification required will, therefore, vary from case to case. This concept of accommodations is in line with the social model of disability because it requires a modification or adjustment to be made to the external environment in response to individual needs in order to ensure that persons with disabilities can participate on an equal basis with others in all aspects of life.¹⁸⁹ By focusing on individual needs, reasonable accommodation can be “effective in redressing the inequalities to which persons with disabilities have historically been subjected.”¹⁹⁰

B. Providing Accommodations in the Criminal Justice Context

Accommodations are necessary to enable persons with disabilities to participate in different spheres of life such as employment,¹⁹¹ education,¹⁹² liberty and security,¹⁹³ and access to justice.¹⁹⁴ The provision of reasonable accommodations is important for the enjoyment of other rights:

The right to education . . . would be meaningless for children with sensory impairments, such as blindness or deafness, without some provision for information and communication to be made accessible to them. . . . The right to work would be effectively nullified for many disabled people if employers were entitled to treat them in exactly the same way as their non-disabled colleagues without any obligation to consider adapting timetables, physical features or equipment to accommodate their needs.¹⁹⁵

189. G.A. Res. 61/106, *supra* note 8, art. 2.

190. Mégret & Msipa, *supra* note 154, at 263.

191. G.A. Res. 61/106, *supra* note 8, art. 27(1).

192. *Id.* art. 24(2)(c), 24(5).

193. *Id.* art. 14.

194. *Id.* art. 13(1).

195. LAWSON, *supra* note 186.

Similarly, in the criminal justice context, an opportunity to testify in court in the absence of accommodations would not mean much to persons with disabilities.

Generally, the CRPD and the African Disability Protocol require that accommodations sought must be “reasonable,” i.e., they should not impose a “disproportionate or undue burden” on the entity whose duty it is to provide accommodations.¹⁹⁶ Yet, in the access to justice context, accommodations are not required to be reasonable.¹⁹⁷ The only qualification imposed by the CRPD is that accommodations must be “procedural and age-appropriate.”¹⁹⁸ The African Disability Protocol also requires the provision of accommodations that are “procedural and age-appropriate” but it also adds a requirement for accommodations that are “gender-appropriate.”¹⁹⁹

In the criminal justice context, the purpose of providing accommodations to persons with disabilities is to “facilitate their effective role as direct and indirect participants.”²⁰⁰

Accommodations are not intended to relax the rules of criminal procedure in favor of persons with disabilities; they are intended to enable participation on an equitable basis.²⁰¹ Primor and Lerner, two experts on accommodations, state:

[t]he object of making proceedings accessible is not to ease the process for the person with disabilities nor improve his or her wellbeing during the police inquiry or trial. Rather, it is to enable him/her to participate fully in these processes without having restrictions or limitations placed due to the disability.²⁰²

196. G.A. Res. 61/106, *supra* note 8, art. 2; African Disability Protocol, *supra* note 11, art. 1.

197. G.A. Res. 61/106, *supra* note 8, art. 13(1); African Disability Protocol, *supra* note 11, art. 13(1).

198. G.A. Res. 61/106, *supra* note 8, art. 13(1).

199. African Disability Protocol, *supra* note 11, art. 13(1).

200. G.A. Res. 61/106, *supra* note 8, art. 13(1).

201. *See White & Msipa, supra* note 150, at 104.

202. PRIMOR & LERNER, *supra* note 148, at 7.

Various accommodations may be made in the criminal justice system. For purposes of this Article, they will be divided into two broad categories: accommodations to the environment and accommodations to a witness's communication.²⁰³

1. *Accommodations to the environment*

Accommodations to the environment involve making adjustments or modifications to the physical environment in which the person gives their evidence, as opposed to the actual manner in which their evidence is given.²⁰⁴ Unfamiliar and intimidating environments, such as police stations and courts, frequently raise levels of anxiety for witnesses, particularly witnesses with disabilities, which may cause the person to have difficulty concentrating, processing information, and responding to questions.²⁰⁵ Conversely, familiar and less intimidating environments can make a person feel less anxious and better able to communicate.²⁰⁶ Therefore, it is important to ensure that the environment in which the statement or testimony is given is as stress free as possible. Examples of accommodations that can be made to make the environment less intimidating include the following:

- i. Police can conduct their interviews or record witness statements outside the police station and in regular clothes without uniform.²⁰⁷
- ii. Allow a witness to have a support person present during police interview and at trial. The support person is there to provide moral and emotional support and can be a trusted friend or family member. They are not permitted to take

203. White & Msipa, *supra* note 150, at 107.

204. *Id.*

205. *Id.*

206. *Id.*

207. § 22(4), Investigation and Testimony Procedural Act (Accommodations for Persons with Mental or Intellectual Disabilities), 5765–2005, (Isr.), *translated in* PRIMOR & LERNER, *supra* note 148, at 15.

part in the proceedings beyond providing moral support to the witness.²⁰⁸

iii. Allow for witness preparation to familiarize the witness with the court layout and proceedings before the court date. This can ease the witness's anxiety at trial.²⁰⁹

iv. Permit the witness to testify in a separate room via closed-circuit television. This accommodation may be made for witnesses who may suffer trauma if they testify in front of the accused person.²¹⁰

v. Allow a witness who tires easily or is unable to concentrate for long periods of time to take frequent breaks.²¹¹

Accommodations to the environment may be simple, but the potential for enabling effective participation in court should not be underestimated.

2. *Accommodations to a witness's communication*

Witnesses with disabilities that affect communication may need a different type of accommodation. Accommodations having to do with a witness's communication are concerned with "the manner in which [the witness] understands the questions put to them and how they convey their account."²¹² These accommodations are usually required where peoples' disabilities impact their communication, which is often present in persons with intellectual disabilities, severe physical disabilities, or neurological conditions.²¹³ Examples of

208. *Id.* § 22(8).

209. Tasha A. Menaker & Robert J. Cramer, *The Victim as Witness: Strategies for Increasing Credibility Among Rape Victim-Witnesses in Court*, 20 J. FORENSIC PSYCH. PRAC. 424, 425 (2012).

210. White & Msipa, *supra* note 150, at 108.

211. *Id.*

212. *Id.*

213. *Id.*

accommodations having to do with communication include the following:

i. Where a witness has difficulty understanding and communicating the concept of dates, use temporal milestones that the witness can understand and can be verified by others. Examples of temporal milestones include public holidays, birthdays, etc. The court might ask the witness whether the event occurred before or after their birthday, public holiday, or other relevant temporal milestone.²¹⁴

ii. Where a witness has difficulty describing where an event took place, take the witness to the scene and have the witness point out exactly where the event took place. Research shows that questions regarding distance and relativity such as “where was the table in relation to where you were standing?” may be difficult for some persons with disabilities to understand and accurately respond to.²¹⁵

iii. For a witness with limited language ability, use anatomically correct dolls, pictures, or letter boards to help the witness communicate.²¹⁶

iv. Various types of Augmentative and Alternative Communication (AAC) may be used to accommodate a witness with difficulty communicating. Examples of AAC include “computerized aids, communication panels, photos, symbols, letters, or words.”²¹⁷

214. *Id.* at 109; *see, e.g.*, PRIMOR & LERNER, *supra* note 148, at 10.

215. *See, e.g.*, PRIMOR & LERNER, *supra* note 148, at 10.

216. *Id.*

217. *See, e.g.*, § 22(7), Investigation and Testimony Procedural Act (Accommodations for Persons with Mental or Intellectual Disabilities), 5765–2005, (Isr.), *translated in* PRIMOR & LERNER, *supra* note 148, at 15.

Although the different accommodations have been categorized by type, in reality, a witness may require more than one accommodation or both types of accommodations. The accommodations required are dependent on the specific needs of the individual; therefore, reasonable accommodations should be provided on a case-by-case basis.²¹⁸

The court's decision in *Moshoeshoe* is an important first step in ensuring the right of persons with intellectual and psychosocial disabilities to access justice because it removes the legal barrier to their participation as witnesses in court. But it is only that—a first step. Because of their communication needs, persons with intellectual and psychosocial disabilities are likely to require accommodations to enable them to participate effectively as witnesses in court. The court in *Moshoeshoe* neglected to address the nexus between testimonial competence and access to justice. Consequently, it did not address the crucial matter of accommodations necessary to enable effective participation in court. Once again, the court missed an opportunity to assert the right of persons with intellectual and psychosocial disabilities to access justice.

CONCLUSION

This Article sought to fill in the gaps from *Moshoeshoe* using the social model of disability as a conceptual framework. At first glance, the significance of *Moshoeshoe* lies in the fact that it declared section 219 of the Criminal Procedure and Evidence Act unconstitutional, thereby removing the legal barrier that had prevented persons with intellectual and psychosocial disabilities from testifying in court for decades. However, its real significance lies in the less obvious nexus among testimonial competence, legal capacity, and access to justice. Both the right to legal capacity and access to justice are of universal importance because they have a bearing on the enjoyment of other rights. *Moshoeshoe* therefore presented the

218. See, e.g., PRIMOR & LERNER, *supra* note 148, at 10.

court with a golden opportunity to assert rights that are crucial for unlocking a host of other rights. By failing to address the nexus between these rights, the court in *Moshoeshoe* missed a chance to bring rights home for persons with intellectual and psychosocial disabilities in Lesotho. In spite of these omissions, *Moshoeshoe* remains an important step in the right direction for persons with intellectual and psychosocial disabilities in Lesotho.