

**NATIONAL UNIVERSITY
OF LESOTHO**

**INVESTIGATING THE IMPACT OF THE SOCIAL MODEL OF DISABILITY ON
ACCESS TO JUSTICE FOR PERSONS WITH DISABILITIES, AND SPECIAL NEEDS
IN PUBLIC INSTITUTIONS IN LESOTHO**

BY

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Table of Contents


DECLARATION	iii
DEDICATION	iv
ACKNOWLEDGEMENTS	v
ABSTRACT	vi
ACRONYMS	vii
CHAPTER ONE:	1
INTRODUCTION AND BACKGROUND	1
1. Introduction.....	1
1.1 The Social Model of Disability.....	1
1.2 Problem Statement	4
1.3 Objectives	5
1.4 Research Questions.....	5
1.5 Hypothesis.....	6
1.6 Literature Review.....	6
1.7 Methodology.....	9
1.8 Limitations of the Study.....	9
1.9 Chapter Outline	10
CHAPTER TWO: UNDERSTANDING THE SOCIAL MODEL OF DISABILITY AND ITS EFFICACY	11
2. Introduction.....	11
2.1 The Concept of the Social Model	11
2.1.2 Evolution of the Social Model	15
2.1.3 Benefits of the Social Model for PWDs-SNs	17
2.1.4 Limitations of the Social Model	19
2.1.5 Applying the Social Model Values in Lesotho	21
2.2 Situational Analysis of the Social Model of Disability in Lesotho	23
2.2.1 Situational Analysis of the Social Model of Disability in South Africa.....	26
2.2.2 Situational Analysis of the Social Model of Disability in Nigeria	29
2.3 Conclusion	32

CHAPTER THREE: IMPEDIMENTS OF THE EFFECTIVENESS OF ACCESS TO JUSTICE FOR PWDS-SNS IN COURTS OF LAW: A COMPARATIVE ANALYSIS	34
3. Introduction.....	34
3.1 Impediments of Access to Justice in Lesotho	34
3.1.1 Legal Frameworks on Access to Justice of PWDs-SNs in Lesotho	37
3.2 Impediments of Access to Justice in South Africa	39
3.2.1 Legal Frameworks of Access to Justice of PWDs-SNs in South Africa	41
3.3 Impediments of Access to Justice in Nigeria.....	44
3.3.1 Legal Frameworks of Access to Justice of PWDs-SNs in Nigeria.....	46
3.4 Conclusion	47
CHAPTER 4: SUMMARY, CONCLUSION AND RECOMMENDATIONS	48
4.1 Introduction.....	48
4.2 Summary	48
4.3 Conclusion	51
4.4 Recommendations.....	52
4.4.1 Accommodation Measures.....	52
BIBLIOGRAPHY.....	56
International Development Research Centre, ‘Background paper on women’s access to justice in the MENA region’ (2007) < http://www1.uwindsor.ca/law/rbahdi/system/files >	60

DECLARATION

I **LILAHLOANE EXINIAH ZZIWA**, solemnly declare that this mini dissertation has not been submitted for a qualification in any other institution of higher learning, nor published in any journal, textbook, or other media. The contents of this dissertation entirely reflect my original research, save for where the work or contributions of others have been accordingly acknowledged.

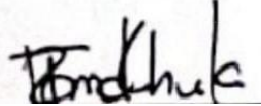
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Supervisor

DEDICATION

This work is dedicated to all marginalized groups such as persons with disabilities and special needs, as well as women and children. You are not alone in the struggle for equality. In short, I believe that law is an instrument for political, economic, and social change.

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ABSTRACT

Access to justice is a cardinal aspect of human rights which connotes equality of individuals and non-discrimination. There cannot be a just and equitable justice for all, properly so-called, without access to justice. Ideally, access to justice pre-supposes that all individual human beings should have the ability to obtain redresses and/or remedies through the instrumentality of the law, notwithstanding their circumstances of birth or social standing. However, in Lesotho as in much of the developing world, access to justice remains a difficulty for persons with disabilities and special needs. An array of factors ranging from societal attitudes and gaps in the law to governmental and institutional barriers are responsible for this situation.

This study investigates the impact of the social model of disability on access to justice for persons with disabilities and special needs in public institutions in Lesotho and examines the nature of the difficulties encountered by these underprivileged persons in accessing justice, such as obtaining a legal practitioner who is conversant in braille and sign language, amongst others.

Keywords: Social Model, Access, Justice, Disability, Human Rights.

ACRONYMS

ALDs:	Assistive Listening Devices
CBR:	Community-Based Rehabilitation
CCD:	Centre for Citizens with Disabilities
CRPD:	Convention on the Rights of Persons with Disabilities
CSOs:	Civil Society Organizations
DiSA:	Disability Info SA
DNN:	DiSA News Network
DRAC:	Nigeria is Disability Rights Advocacy Centre
AC-SA:	Accessible Cities South Africa
DPI:	Disabled Peoples' International
DPOs:	Disabled People's Organizations
DPSPs:	Principles of State Policy
DWYPD:	Department of Women, Youth, and Persons with Disabilities
IDRC:	International Development Research Centre
INEC:	Independent National Electoral Commission
IR:	Infrared systems
IVRC:	Ithuseng Vocational Rehabilitation Centre
HR:	Human Resource
JONAPWD:	Joint National Association of Persons with Disabilities
LCN:	Lesotho Council of NGOs
LNAPD:	Lesotho National Association of the Physically Disabled
LNFOD:	Lesotho National Federation of Organizations of the Disabled
LNLVIP:	Lesotho National League of the Visually Impaired Persons
NADL:	The National Association of the Deaf in Lesotho
NCPS:	National Crime Prevention Strategy
NCPWD:	National Commission for Persons with Disabilities
NDP:	National Development Plan
NGOs:	Non-governmental Organizations
NHRC:	National Human Rights Commission of Nigeria
NPC:	National Planning Commission

OD:	Organizational Development
OHCHR:	Office of the United Nations High Commissioner of Human Rights
OPDs:	Organizations of Persons with Disabilities
PWDs:	Persons with Disabilities
SAHRC:	The South African Human Rights Commission
SDGs:	Sustainable Development Goals
SMD:	Social Model of Disability
SNs:	Special Needs
UN:	United Nations
UNCRPD:	United Nations Convention on the Rights of Persons with Disabilities
UNDP:	United Nations Development Programme
UPIAS:	Union of Physically Impaired Against Segregation
WPRPD:	White Paper on the Rights of Persons with Disabilities
YTA:	Yes To Access

CHAPTER ONE:

INTRODUCTION AND BACKGROUND

1. Introduction

This chapter introduces the problem at hand including the aims and objectives of the study, the methodology, the literature review, and how the research is structured. The chapter deals with a general introduction to the topic which provides an understanding of the social model of disability and its efficacy specifically in the context of access to justice for PWDs-SNs.¹ Views of legal scholars and international instruments are also discussed.

1.1 The Social Model of Disability

The social model of disability is a way of thinking about disability that was created by disabled people.² In this model, disability is a thing that is societally created, not by the individual's mind or body.³ This is because PWDs- SNs encounter obstacles that hinder them from taking part in society on an equal basis as able-bodied persons.⁴ For instance, if a person is unable to access court premises because of their mobility impairment, it is not their inability to walk that is the issue, but rather their lack of accessibility to the court premises.

The social model identifies that the exclusion of PWDs-SNs from society is a consequence of hindrances or barriers to the person's ability to participate fully, rather than the result of the person's inherent inability to participate.⁵ This model frames the body of a disabled individual as something that needs not to be "fixed," discrediting the idea that "typical abilities" are superior thus mental or physical impairments should be remedied with the support of an external force.⁶ It

¹ A disability may be viewed from two angles – 'loss or limitation of opportunities' and 'functional limitation within the individual,' and while not disregarding the latter, the focus of this study is the former.

² Buder Sarah and Perry Rose, 'The Social Model of Disability Explained'(2023) *Social Creatures* 501 (c) (3).

³ Ibid.

⁴ Ibid.

⁵ UPIAS, 'Fundamental Principles of Disability' (1976) *Disability Alliance* 13.

⁶ Sara Goering, 'Rethinking disability: the social model of disability and chronic disease' (2015) 8 *Curr Rev Musculoskelet Med* 2, 134-138.

is worth noting from the model's perspective, therefore, that disability is viewed as a socially produced injustice that it is possible to challenge and eliminate through radical social change.⁷

The origin of this approach to disability can be traced to the 1960s, and this specific term emanated from the United Kingdom in the 1980s.⁸ The model is premised on distinguishing the terms disability and impairment.⁹ In this model, an impairment refers to the actual attributes that affect an individual, like the inability to walk independently.¹⁰ It undertakes to reconceive that disability refers to the limitations created by society when it fails to provide equitable structural and social support according to PWDs-SNs' structural needs.¹¹

This model essentially concerns an aspect of equality, thus the struggle for equality is often linked to the struggles of social marginalization.¹² Equal rights are meant to empower individuals with the ability to make decisions to live life to the fullest, as well as create equal opportunities for all.¹³ A related phrase often used by disability rights activists, as with other social activism, is "Nothing About Us Without Us."¹⁴ The model has been influential in shaping disability legislation and policy globally.¹⁵

In the context of the justice system, the model advocates the need to address the systemic obstacles that hinder PWDs-SNs from accessing justice on the same level as others.¹⁶ The model reiterates that PWDs-SNs are denied the exercise of their full potential on an equal basis as able-bodied people not as a result of their handicap, but as a consequence of legal, communicational, architectural, attitudinal, and other discriminatory barriers.¹⁷ This model of disability, put together with a rights-based approach: (i) describes limitations levied through the physical and social environment as infringements on individual's rights; and (ii) recognizes PWDs-SNs as holders of

⁷ Anna Lawson and Angharad E. Beckett, 'The social and human rights models of disability: towards a complementarity thesis' (2021) 25 *The International Journal of Human Rights* 2, 348-379.

⁸ Paley and John, 'The Cartesian melodrama in nursing' (2002) 3 *Nursing Philosophy* 3, 189-192.

⁹ Pam Thomas and Others, 'Defining Impairment within the Social Model of Disability' (1997) *Centre for Disability Studies* 1-3.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² James I. Charlton, *Nothing about us without us: disability oppression and empowerment* (University of California, Press 2000) 3.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ Morris J, 'Impairment and Disability: Constructing an Ethics of Care that Promotes Human Rights' (2009) 16 *Hypatia* 4, 1-16.

¹⁶ Victor Santiago Pineda, 'Understanding Disability in Theory, Justice, and Planning' (2019) *Building the Inclusive City* 23-45.

¹⁷ Rehabilitation International, "UN Convention on the Human Rights of People with Disabilities: Ad Hoc Committee Seventh Session – Daily Summaries" 24 January 2006.

rights who can, and should, determine the course of their lives to the same extent as any other member of society.¹⁸

Moreover, the model emphasizes the importance of accommodating the diverse needs of PWDs-SNs in the justice system, as well as providing accessibility to information, support, and communication services.¹⁹ The model has thus been adopted by many countries in their justice systems, such as the Republic of South Africa and Nigeria, to guarantee that PWDs-SNs have equal access to justice, are not discriminated against, and that their rights are protected.²⁰ These countries achieved this through the adoption of inclusive practices and policies that are accessible to PWDs-SNs²¹ such as courts providing assistive technology, sign language interpreters, and accessibility to facilities to ensure full participation of PWDs-SNs in legal proceedings.

This study concentrates on the role played by the Lesotho courts when adjudicating the disputes that deteriorate the human dignity and worth of PWDs-SNs. These circumstances should influence Lesotho's judiciary system to incorporate the social model of disability in its justice system, so as to enable a legal framework capable of protecting the rights of these marginalized persons. To this end, the Lesotho government has undertaken major steps to integrate the social model of disability into the country's justice system. Lesotho has further provided an enabling legal framework for the promotion of the right to access justice for PWDs-SNs.²²

The latest progress includes a) a recognition of the testimonial competence of all PWDs-SNs, inclusive of those with psychosocial and intellectual disabilities, resulting from the Constitutional Division of the Lesotho High Court declaration of section 219 of the Criminal Procedure and Evidence Act unconstitutional in *Moshoeshoe and others v. Director of Public Prosecutions*²³ decision; b) The enactment of the PWDs Equity Act, 2021 which contains a specific provision on access to justice for PWDs in article 32;²⁴ and c) The gazette of the Disability and Equity (Procedure) Rules, 2023 which outline the accommodation measures that must be accorded to PWDs in Lesotho judicial proceedings.²⁵

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Lisa Waddington and Mark Priestley, 'A human rights approach to disability assessment' (2021) 37 *Journal of International and Comparative Social Policy* 1, 1-15.

²¹ Ibid.

²² Dianah Msipa, Access to Justice for Persons with Disabilities in Lesotho: Training for Magistrates and Prosecutors. Activity report, 12 – 14 July 2023.

²³ CC/14/2017 [2019] LSHC.

²⁴ Dianah Msipa (n 22).

²⁵ Ibid.

The milestones referred to above are likely to facilitate an enabling legal framework for the protection of the right of PWDs-SNs to access justice through the accommodation provisions.²⁶ Notwithstanding, the accommodation provisions in the justice system still remain a technical and highly novel subject, which most justice personnel are still unfamiliar with.²⁷ The implications of such obstacles are notable, as lack of access to justice can escalate the disadvantages encountered by PWDs-SNs, leaving these vulnerable persons unable to protect their rights and at risk of constant abuse, inclusive of sexual or physical violence.

Equally, justice delayed is justice denied, thus timely access to justice is imperative. It is against the above backdrop that the current study intends to delve into the issues circumventing access to justice for PWDs-SNs in Lesotho. The paper places focus on the Lesotho justice system as it is in its current state and investigates the impediments encountered by PWDs-SNs in accessing justice. The barriers to accessing the justice system for these disabled persons are also discussed to identify tactics that could eliminate the obstacles and thus enhance access to justice for PWDs-SNs.

1.2 Problem Statement

Despite all instruments in existence together with the statutory laws, PWDs-SNs still face an alarming rate of social exclusion as well as a lack of access to justice. The social model identifies that the exclusion of PWDs-SNs from society is a consequence of hindrance or barriers to the person's ability to participate fully, rather than the result of the person's inherent inability to participate. In a similar vein, the model introduces disability as a type of socially-created oppression. The model is conceptualized as an idea embedded in the PWD's movement that requires a political repurposing of the notion of 'disability'. The term disability is used to define the socially created marginalization and unfavorable conditions which persons who have or are perceived to have impairments experienced.

Thus, in the model's perspective, disability is perceived as a socially produced injustice that is likely to be eliminated and challenged through radical social change. The implications of such obstacles are considerable, as a lack of access to justice can compound the difficulties encountered

²⁶ Office of the United Nations High Commissioner of Human Rights, United Nations Special Rapporteur on the rights of persons with disabilities 1996-2024.

²⁷ Ibid.

by PWDs-SNs, leaving these disadvantaged persons at risk of constant abuse and an inability to protect their rights, inclusive of sexual or physical violence. Correspondingly, justice delayed is justice denied, thus timely access to justice is imperative.

The case of *Pachcourie v. Additional Magistrate, Ladysmith, and Another*,²⁸ for instance, presents a demand for vigilance and judicial sensitivity in criminal proceedings where an accused with impaired hearing and speech is involved, as well as the duty of judicial officers to treat any person who comes before the court with all respect for their dignity.²⁹ In this case, the court set aside a conviction on review where it was practically impossible to communicate with the accused and where it was difficult for the interpreter to convey information to and from him.³⁰

A similar sentiment was also echoed in *Terry v. State case*,³¹ where the court rejected the decision of the *court a quo* that had failed to appoint an interpreter on behalf of a deaf accused, and held that physical confrontation of witnesses was merely pointless if the accused could not understand and hear the testimony. It considered the physical appearance of the deaf accused merely without an interpreter as “useless, bordering on the farcical.” Moreover, in the *S v. Ngubane case*,³² it was said that the right to a fair trial poses specific challenges where a court is dealing with an accused whose hearing and/or speech is impaired, for there is a grave danger that the accused will be excluded from meaningful participation in the trial.

1.3 Objectives

The aim of this study is to:

- Explore the impact of the social model of disability on access to justice for PWDs and special needs.
- Assess impediments for PWDs-SNs to accessing the justice system.
- Establish tactics that could eliminate the obstacles impeding access to justice for PWDs and special needs in Lesotho.

1.4 Research Questions

²⁸ 1978 (3) SA 986 (N) 991H.

²⁹ *Ibid.*, at 991 B -H.

³⁰ *Ibid.*

³¹ 21 Ala. 100, 102 (1925).

³² 995 (1) SACR 384 (T).

The research is guided by the following research questions:

- What is the situational analysis of the social model of disability, and how does it impact access to justice for PWDs and special needs in Lesotho as compared to other African countries?
- What factors affect the effectiveness of access to justice for PWDs and special needs in Lesotho's courts of law, and where are gaps to be filled in this area of study?

1.5 Hypothesis

- PWDs-SNs are likely to experience substantial hindrances in terms of access to justice as compared to able-bodied persons.
- Impediments and barriers to accessing justice systems involve combined forms of lack of accessibility, and other forms of discriminatory constraints.
- Negative societal attitudes and stigma can escalate difficulties faced by these individuals, leaving them powerless to protect their rights and at risk of ongoing abuse, inclusive of physical or sexual violence.

1.6 Literature Review

Ladan states that the term access to justice refers to a fair and equitable legal framework that protects human rights and ensures the delivery of justice, transparent judicial procedures, and administrative remedies, available to a person (natural or juristic) likely to be aggrieved or aggrieved by an issue.³³ Similarly, Ortoleva states that access to justice is a broad concept, encompassing peoples' effective access to the information, systems, procedures, and locations used in the administration of justice.³⁴ He highlights that people who feel mistreated or wronged in some way usually turn to their country's justice system for redress.³⁵

Beqiraj and others assert further that access to justice, as a core ingredient of the rule of law, enables people to have their voices heard and to exercise their legal rights deriving from

³³ Ladan, M.T, 'Access to Justice and the Justice Sector Reform in Nigeria' (2006) 11JD *International Institute for Justice and Development*10.

³⁴ Stephanie Ortoleva, 'Inaccessible Justice: Human Rights, Persons with Disabilities and the Legal System' (2011) 17 *ILSA Journal of International & Comparative Law* 2, 284.

³⁵ Ibid.

constitutions, statutes, the common law, or international instruments.³⁶ Access to justice is therefore an indispensable factor in the promotion of empowerment, securing access to equal human dignity, and achieving economic and social development.³⁷

The International Development Research Centre provides that access to justice includes intellectual, communicational, institutional, physical, social and economic accessibility.³⁸ The IDRC maintains that access to justice involves three key components, which are: substantive, procedural, and symbolic justice. While, on the one hand, substantive aspects of access to justice focus on the rights available to those who seek a remedy, procedural aspects, on the other hand, focus on the opportunities and barriers to getting one's claim into court or other dispute resolution setting.

Such barriers may be physical and structural legal processes, communicative and/or language barriers, information and advice barriers, prohibitive costs, uncertain outcomes, and court or tribunal setting being inappropriate.³⁹ Access to justice as defined in Ladan, Ortoleva, Beqiraj and others, as well as the IDRC is not in good faith since they did not make a specific reference to PWDs-SNs to incorporate these vulnerable individuals as holders of rights who can, and should, determine the course of their lives to the same extent as any other member of society.

Kutigi *et al*, argue that a cardinal aspect of human rights is access to justice which connotes non-discrimination and equality of persons.⁴⁰ They maintain that there can be no justice, properly so-called without access to justice. Access to justice ideally necessitates that people should be able to obtain redress and/or remedies through the instrumentality of the law, notwithstanding their social standing, or circumstances of birth.⁴¹ This study is inspired by the arguments in Kutigi *et al* who views access to justice as a cardinal aspect of human rights which connotes equality of individuals and non-discrimination. Thus, this particular study is directed at attempting to provide

³⁶ Beqiraj and Others, 'Access to justice for persons with disabilities: From international principles to practice' (2017) *International Bar Association* 10.

³⁷ *Ibid*.

³⁸ International Development Research Centre, 'Background paper on women's access to justice in the MENA region' (2007) <<http://www1.uwindsor.ca/law/rbahdi/system/files>> accessed 19 November 2023.

³⁹ *Ibid*.

⁴⁰ Halima Doma Kutigi and Others, 'Access to Justice for Persons Living with Disabilities in Nigeria: Issues, Challenges, and Prospects' (2017) 10 *ABU Journal of Private and Comparative Law* 2, p. 19-34.

⁴¹ *Ibid*.

⁴¹ *Ibid*.

guidelines on effective access of justice for PWDs-SNs, also provide some pertinent examples through case law, human rights reports and international human rights instruments, and analyses Lesotho's implementation of human rights obligations towards PWDs-SNs.

It can be submitted, therefore, that removal of barriers to effective participation is a prerequisite for ensuring access to justice on an equal basis with others. Further, some of the ways to overcome the barriers to effective participation are through the provision of accommodation in the justice system in Lesotho. Moreover, one can also submit that, much has been written about the inclusion of PWDs-SNs in society. Little, if any, research has been conducted on the accommodations for these persons in the justice system, and to grant their effectiveness on the accommodation provisions in the justice system in Lesotho as one of the hurdles toward the achievement of the SDGs. Therefore, more research needs to be undertaken to provide data that enables evidence-based interventions to address issues of access to justice for PWDs-SNs.

Notwithstanding the above, there has been significant progress in access to justice for PWDs-SNs in Lesotho in recent years. For example, Lesotho has established a robust legal framework to support the rights of PWDs-SNs. The Persons with Disability Equity Act⁴² is a cornerstone, ensuring equal opportunities and recognition of rights, it includes specific provisions for access to justice.⁴³ There are also training initiatives that are undertaken, for instance, a training workshop was held for prosecutors and magistrates in July 2023, to enhance their understanding of the accommodations needed for PWDs-SNs in judicial proceedings. The training aimed to bolster the practical application of the law and ensure that justice personnel are well-equipped to handle cases involving PWDs-SNs.⁴⁴

Furthermore, there are procedural rules: The Disability and Equity (Procedure) Rules,⁴⁵ outline the accommodations that must be provided to PWDs-SNs in judicial proceedings, the rules are designed to ensure that PWDs-SNs can participate fully and fairly in the justice system.⁴⁶ These steps collectively create an enabling environment for PWDs-SNs to access justice on an equal basis with others. The implementation of these accommodations, however, remains a work in progress, requiring continuous training and awareness among justice personnel.⁴⁷

⁴² 2021.

⁴³ Ibid.

⁴⁴ Dianah Msipa (n 22).

⁴⁵ 2023.

⁴⁶ Ibid.

⁴⁷ Ibid.

1.7 Methodology

The writer's research approach is grounded in qualitative methodology and focuses on gaining as much data as possible from a relatively small sample size.⁴⁸ It is a desk-based research that mainly examines existing qualitative data drawn from the literature regarding international solutions to overcome barriers to access to justice and best practices. The study draws on several international instruments and examines Goal 16 of the 2030 Sustainable Development Agenda (the 'Agenda') adopted by the UN General Assembly in September 2015.⁴⁹ For this research, researcher is also place reliance on primary sources of data such as legislation, constitutions, policy documents and reports. Secondary sources such as journal articles and textbooks is also relied on. The research does not involve animal or human experiments or interviews therefore, it does not involve ethical clearance.

The research uses the text analysis method as a type of data collection tool, which involves analyzing spoken or written language to identify themes and patterns. Qualitative text analysis involves interpretation and close reading of texts to identify recurring themes, patterns, and concepts, and it is useful for understanding public discourse, media messages, and cultural trends.

1.8 Limitations of the Study

The study has some limitations in that due to the period assigned to finalize the research it was not possible to conduct interviews. It could have been beneficial and more enlightening to hear the voices of PWDs-SNs. To also communicate with individuals and institutions that have concerns for these individuals for instance conducting meetings with them to get their views on the best strategies that can be used to integrate the social model of disability fully into the Lesotho justice system. The main objective is the enhancement of full participation of these marginalized individuals in the justice system and society as a whole.

⁴⁸ B. DiCicco-Bloom and B. F. Crabtree, 'The qualitative research interview: Making sense of qualitative research' (2006) *40 Medical Education* 4, 314.

⁴⁹ Bal Sokhi-Bulley, 'The Fundamental Rights Agency of the European Union: A New Panopticism' (2011) 11 *Human Rights Law Review* 683-706.

The research would also have benefited from the voices of PWDs-SNs or their representative organizations and their families, on how the challenges discussed herein affect them respectively. Moreover, the views of the relevant government ministries and stakeholders on the adoption and implementation of the CPRD, and its policies into Lesotho's domestic law on access to justice for all could have enlightened the research further. There was also a challenge in gathering material for this research, especially on the issues of situational analysis of the social model of disability and access to the justice system in Lesotho as one of the hurdles toward the achievement of the SDGs in Lesotho.

It seems that much has been written about the inclusion of PWDs-SNs in all spheres of society in Lesotho. Little, if any, research has been conducted on the impact of the social model of disability on access to justice for PWDs-SNs in Lesotho therefore, the current write-up is based on the general articles written by scholars across the African continent. Although there were challenges faced, the research herein was completed using literature that exists on the issues surrounding PWDs-SNs from stakeholders and institutions that have concerns for these individuals, inclusive of books and journals.

1.9 Chapter Outline

This study consists of four chapters.

The first chapter is introductory and deals with the general introduction to the topic which provides an understanding of the social model of disability and its efficacy, in particular in the context of access to justice for PWDs-SNs.

The second chapter looks into the social model of disability and how it impacts access to justice for PWDs and special needs. The chapter also provides a situational analysis of PWDs-SNs in Lesotho as compared to other African countries, and analyses the current legal and policy frameworks and how they can be improved to comply with the SDGs.

The third chapter is concerned mainly with factors that affect the effectiveness of access to justice for PWDs-SNs in Lesotho's courts of law. The chapter undertakes a comparative study between South Africa and Nigeria as some of the African states that have adopted the Banjul Charter and the CRPD, to determine the gaps to be filled in this area of study. Lastly, the fourth chapter entails a summary of the dissertation, as well as provide recommendations.

CHAPTER TWO: UNDERSTANDING THE SOCIAL MODEL OF DISABILITY AND ITS EFFICACY

2. Introduction

The previous chapter provided a brief introduction to the justice system challenges that Lesotho encountered concerning access to justice for PWDs-SNs. It discussed the benefits of the social model of disabilities for access to justice for PWDs-SNs, and strategies that the country had put in place to incorporate the model into Lesotho's justice system to enable a legal framework capable of protecting the rights of those marginalized persons. From the foregoing discussion, it was discussed that Lesotho has undertaken major steps to integrate the social model of disability into the country's justice system. Lesotho has further provided an enabling legal system for the promotion of the right to access justice for PWDs-SNs.

This chapter provides a more in-depth understanding of the social model of disability and its efficacy, and the essential elements that make it effective in accessing justice for PWDs-SNs. The chapter also provides a situational analysis of PWDs-SNs in Lesotho as compared to other African countries, and analyses the current legal and policy frameworks and how they can be improved to comply with the SDGs.

2.1 The Concept of the Social Model

The social model of disability is a way of thinking about disability that was created by disabled people.⁵⁰ In this model, disability is a thing that is created by society, and not a consequence of anything having to do with the individual's mind or body.⁵¹ Thus disability is seen as social obstacles that hinder PWDs-SNs from taking part in society on an equal basis as able-bodied persons.⁵² For instance, if a person is unable to access court premises because of their mobility impairment, it is not their inability to walk that is the issue, but rather the absence of means that enable their access to the court premises, such as ramps.

The social model identifies that the exclusion of PWDs-SNs from society is a consequence of hindrances or barriers to the person's ability to participate fully, rather than the result of the person's inherent inability to participate.⁵³ This model frames the body of a disabled individual as

⁵⁰ Sarah Buder and Rose Perry (n 2) 3.

⁵¹ Ibid.

⁵² Ibid.

⁵³ UPIAS (n 5)13.

something that needs not to be “fixed,” discrediting the idea that “typical abilities” are superior thus mental or physical impairments should be remedied with the support of an external force.⁵⁴ It is worth noting from the model’s perspective, therefore, that disability is viewed as a socially produced injustice that it is possible to challenge and eliminate through radical social change.

The model emphasizes the importance of accommodating the diverse needs of PWDs-SNs in the justice system, as well as providing accessibility of information, support, and communication services.⁵⁵ It is premised on distinguishing the terms disability and impairment.⁵⁶ In this model, an impairment refers to the actual attributes that affect an individual, like the incapability to walk independently. It undertakes to reconceive that disability refers to the limitations created by the world when it fails to provide equitable structural and social support according to PWDs-SNs’ structural needs.⁵⁷

This model is essentially concerned with an aspect of equality, thus the equality struggle is often linked to the fights of social marginalization.⁵⁸ Equal opportunities are meant to empower individuals with the capabilities to make decisions to live life to the fullest, as well as create equal opportunities for all.⁵⁹ Disability rights activists often use a related phrase, as with other social activism, that is “Nothing About Us Without Us.”⁶⁰

The model has been influential in shaping disability legislation and policy globally.⁶¹ In the context of the justice system, the model advocates for the need to address the systemic obstacles that hinder PWDs-SNs from accessing justice on the same level as others.⁶² The model reiterates that PWDs-SNs are denied the exercise of their full potential on an equal basis as able-bodied people not as a result of their handicap, but as a consequence of legal, communicational, architectural, attitudinal, and other discriminatory barriers.⁶³ This model of disability, put together with a rights-based approach: (i) describes limitations levied through the physical and social environment as infringements on individual’s rights; and (ii) recognizes PWDs-SNs as holders of

⁵⁴ Goering S (n 6) 134-138.

⁵⁵ Ibid.

⁵⁶ Pam Thomas and Others (n 9) 1-3.

⁵⁷ Ibid.

⁵⁸ James I. Charlton (n 12)3.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹J. Morris (n 15) 4, 1-16.

⁶² Victor Santiago Pineda (n 16) 23-45.

⁶³ Rehabilitation International (n 17).

rights who can, and should, determine the course of their lives to the same extent as any other member of society.⁶⁴

Hosking expounds further on this version of the social model with the following fundamental principles:

(a) disability is a social construct, not the inevitable consequence of impairment, (b) disability is best characterized as a complex interrelationship between impairment, individual response to impairment, and the social environment, and (c) the social disadvantage experienced by disabled people is caused by the physical, institutional and attitudinal (together, the ‘social’) environment which fails to meet the needs of people who do not match the social expectation of ‘normalcy’.⁶⁵

The social model proponents use the distinction between disability and impairment to reduce disabilities to a single social dimension and oppression and give a little weight to the role of mental and biological conditions in the lives of PWDs-SNs.⁶⁶ For example, they view disability as something societally created not innate in PWDs-SNs, and argued that PWDs-SNs are not disabled by their impairments but by the disabling barriers they face in society. This model challenges the traditional understanding of disability. Therefore, by highlighting derogatory attitudes and systemic hindrances, the model seeks to address the exclusion that makes it impossible or difficult for PWDS-SNs to achieve their valued functions.⁶⁷ This model advocates for a society that embraces diversity through the accommodation of individual needs, promotes inclusion, and dismantles barriers, recognizing that impairments alone do not necessarily lead to disability.

Similarly, the model associates an individual’s disadvantage with the combination of social setting and individual traits.⁶⁸ The model thus counsels everyone to perceive “disability” as a disadvantage created by the confluence of two factors such as (a) the surrounding environment and (b) an individual’s physical or mental traits, which are at least partially created by others.⁶⁹

⁶⁴ Ibid.

⁶⁵ D.L Hosking, ‘Critical Disability Theory’ (2008) The 4th Biennial Disability Studies Conference: *Lancaster University*, UK 7.

⁶⁶ Dimitris Anastasiou and James M. Kauffman, ‘The Social Model of Disability: Dichotomy between Impairment and Disability’ (2023) 38 *The Journal of Medicine and Philosophy* 4, 441- 459.

⁶⁷ Ibid.

⁶⁸ Adam Samaha, ‘What Good Is the Social Model of Disability?’ (2007) *University of Chicago Public Law & Legal Theory Working Paper* 166, 1-2.

⁶⁹ Ibid., 1-2.

These factors might be necessary before disadvantages take place. Even though once uncertain, the model is presently standard learning in studies of disability worldwide.⁷⁰

Moreover, Shakespeare outlines that the social model necessitates an understanding of most of the key dichotomies, the first being that an individual impairment is distinct from the social construction of disability that might surround that impairment, therefore, the social model identifies disability as a historically and culturally specific phenomenon.⁷¹ The model, additionally, distinguishes between disabled persons as an oppressed group and the abled-bodied persons as the contributors or causes to that oppression. Some social models of disability's political strengths, as highlighted by Shakespeare, include its ability to unite PWDs-SNs for political action and its practicality in recognizing public obstacles to justice,⁷² the model thus shifts the blame away from PWDs-SNs and to the community.

To quote Michael Oliver's words:

Hence, disability according to the social model is all the things that impose restrictions on disabled people; ranging from individual prejudice to institutional discrimination, from inaccessible public buildings to unusable transport systems, from segregated education to excluding work arrangements, and so on. Further, the consequences of this failure do not simply and randomly fall on individuals but systematically upon disabled people as a group who experience this failure to discrimination institutionalized throughout society.⁷³

In summary, the social model of disability shifts the focus from a person's impairments to the broader societal context, emphasizing the need to dismantle obstacles and create an inclusive and enabling environment for all. The model postulates that disability arises from the interaction between an individual's attributes and their environment, rather than solely from their medical condition. Simply put, the model emphasizes that barriers in the environment such as architectural, attitudinal, and communication barriers are the primary factors preventing PWDs-SNs from reaching their full potential.

⁷⁰ Michael Oliver, *The Politics of Disablement: A Sociological Approach* (St. Martin's Press 1990) 11.

⁷¹ Tom Shakespeare, *The Disability Studies Reader Fifth edition* (Taylor & Francis 2017) 95.

⁷² *Ibid.*, 195.

⁷³ Michael Oliver (n 64) 11.

2.1.2 Evolution of the Social Model

The social model of disability's history begins with the disability rights movement history.⁷⁴ Around 1970, numerous groups in North America, inclusive of sociologists, disability-focused political groups, and disabled individuals, began to deviate from the acceptable lens of the medical viewing of disability.⁷⁵ They began, instead, to discuss things such as accessibility, oppression, and civil rights. This change in discourse led to conceptualizations of disability that were rooted in social constructs.⁷⁶

The UK organization UPIAS, in 1975 alleged: "In our view, it is a society which disables physically impaired people. Disability is something imposed on top of our impairments by the way we are unnecessarily isolated and excluded from full participation in society."⁷⁷ This became acceptably known as a social definition or the social interpretation of disability.⁷⁸

Following the "social definition of disability" by the UPIAS, in 1983, Michael Oliver, the academic of the disabled coined the phrase social model of disability about these ideological developments.⁷⁹ Oliver paid attention to an individual model idea (of which the medical was a part) as against a social model, derived from the differentiation initially made between disability and impairment by the UPIAS.⁸⁰ He placed focus on the idea of an individual model as against a social model,⁸¹ thus Oliver's seminal 1990 book *The Politics of Disablement* is extensively cited as a most important moment in the adoption of the social model of disability.

The model was developed and extended by activists and academics in Australia, the US, the UK, and other states to incorporate all PWDs-SNs, inclusive of persons with intellectual disabilities, emotional, learning disabilities, mental health, or behavioural difficulties.⁸² This approach to disability's origin can be traced to the 1960s, and this term specifically emanated in the 1980s from the United Kingdom,⁸³ and was launched successfully in Western academia in

⁷⁴ Michael Oliver, 'The Social Model of Disability: Thirty Years On' (2013) 28 *Disability & Society* 7, 1024-1026.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Tony Baldwinson, 'The Union of the Physically Impaired Against Segregation (1972-1990)' (2019) *Disability Studies*.

⁷⁸ Judy Hunt, 'The Disabled People's Movement: A Radical History' (2019) *TBR Imprint* 107.

⁷⁹ Michael Oliver, *Social work with disabled people* (Palgrave Macmillan 2006).

⁸⁰ Ibid.

⁸¹ Michael Oliver, *The Individual and Social Models of Disability* (St. Martin's Press 1990)

⁸² Dan Goodley, 'Learning Difficulties, the Social Model of Disability and Impairment: Challenging epistemologies' (2001) 16 *Disability & Society* 2, 207-231.

⁸³ Paley and John (n 8)189-192.

1990,⁸⁴ and since the 1970s, its causality story has been a message of the rights movement of disability.⁸⁵

When disability was viewed under the medical model in the past, PWDs-SNs were often segregated and did not have control over their lives. The visually impaired persons might be sent to boarding schools with other blind individuals, while those with severe cognitive or physical disabilities were confined to sanitariums or even jails.⁸⁶ This model viewed disability as a defect that required curing or fixing. It focused on identifying the root cause and finding solutions to restore function. This approach to disability, however, led to impoverishment, stigmatization, and institutionalization. Later critics argued that costly interventions such as drugs or surgery overshadowed simpler practices like universal social inclusion and design.⁸⁷

The social model thus emerged as a powerful alternative to the prevailing medical model of disability. Attitudes began to change, around the turn of the twentieth century, and the legislators and advocates recognized that PWDs-SNs could lead independent lives with proper support.⁸⁸ The social model shifted the focus from personal deficits to environmental constraints, instead of placing attention solely on bodily function, it identified barriers such as physical exclusion, social isolation, and derogatory attitudes.⁸⁹ Community-based support programs replaced institutionalization, emphasizing productivity and empowerment.⁹⁰ For example, an individual with hearing loss now has options for amplification, communication methods such as sign language or spoken word, and educational accommodations.

Disability activists championed the social model and envisioned a world where inclusion and accessibility were the norm, and if societies were designed to accommodate PWDs-SNs, these individuals would not face restrictions in participating fully. The model thus highlights the importance of eliminating obstacles whether physical, systemic, or attitudinal to create an inclusive environment for every person.⁹¹ This is because the model recognizes that impairment is not solely

⁸⁴ Michael Oliver (n 64).

⁸⁵ UPIAS (n 5)13.

⁸⁶ Zosia Zaks, 'Changing the medical model of disability to the normalization model of disability: clarifying the past to create a new future direction (2023) *Disability & Society* 8.

⁸⁷ Ibid.

⁸⁸ Sara Goering (n 6) 134-138.

⁸⁹ Ibid.

⁹⁰ A. Rosa Raponi and Bonnie Kirsh, 'What Can Community Support Programs Do to Promote Productivity?: Perspectives of Service Users' (2004) *Canadian Journal of Community Mental Health* 81-91.

⁹¹ Ibid.

a person's condition but a complex interplay of personal factors and the world around them. Thus, by fostering inclusivity, we can build a more equitable and supportive society.

2.1.3 Benefits of the Social Model for PWDs-SNs

The social model of disability contests the notion that a person's impairments inherently lead to disability, and emphasizes societal responsibility in the removal of obstacles and promotion of equal participation for all.⁹² Contrary to the medical model, which aims to "fix" the person's impairments, the social model focuses mainly on transforming society to become more inclusive.⁹³ For example, instead of making a person physically able to climb stairs, the social model advocates for the creation of wheelchair-accessible ramps, making stair-climbing unnecessary. An individual remains disabled concerning stair climbing, but the disability becomes negligible when society adapts to their needs.

This model's simplicity assists in accounting for its jarring consequence on any conventional wisdom that represents disability as an individual tragedy. The model indeed, has been ascribed to inspirational change in many forms. For instance, Parts of the Americans with Disabilities Act⁹⁴ suggest that societal settings must be revised to enable personal attributes less disabling.⁹⁵ Reasonable accommodation for PWDs-SNs in the justice system is an example, just as is the qualified responsibility to make certain places and services accessible for these marginalized persons.

Even though the social model is quite helpful for identifying obstacles in the built environment, it also implicitly aims for a barrier-free utopia that is not possible to realize. Though Shakespeare links disability activism to other identity groups, he points out that the comparisons are limited.⁹⁶ For example, there is nothing intrinsically problematic about being gay, but then disabled persons face inherent limitations. Society needs to provide enabling resources to overcome these limitations rather than merely limiting discrimination if disabled persons are to be emancipated.⁹⁷ As a consequence, Shakespeare stresses more complex and sophisticated ways of theorizing disability, acknowledging that the social model is "indispensable" as well.

⁹² Anna Lawson and Angharad E. Beckett (n 7) 348-379.

⁹³ Ibid.

⁹⁴ 2000.

⁹⁵ Ibid.

⁹⁶ Tom Shakespeare (n 65) 195.

⁹⁷ Ibid., 195.

Such sociological clarification of disability may lay the basis for a social theory of disability. The social model, however, does not seek to bestow moral values or principles as a disability policy foundation. The model rather serves as a stepping-stone in the fight for anti-discrimination laws and civil rights reform in several countries.⁹⁸ In the meantime, the model has been recognized officially by the European Union as the foundation for its disability policy.⁹⁹ This disability rights-based approach was categorized as an instrument for stipulating equality and citizenship, within disability studies.¹⁰⁰ To claim anti-discrimination laws was logically a result of scrutinizing disability as an outcome of discrimination and inequality.

In the United States, where the social model of disability was conceptualized as the minority group model,¹⁰¹ the struggle for civil rights was also understood as a way to disclose the factual situation of PWDs-SNs as an oppressed minority group. The focus on rights was seen as an alternative to needs-based social policy that portrayed PWDs-SNs as dependent welfare recipients. Michael Oliver coined the ideology of dependency as a core instrument of the social construction of disability.¹⁰² An anti-discrimination law was thus seen as a remedy to a disability welfare approach. Thus, PWDs-SNs could be seen as citizens with equal rights as any other members of the society. For example, architectural constraints may perhaps be described as a type of discrimination, and segregated schools could be defined as apartheid.

Nevertheless, anti-discrimination laws can only be described as a partial solution to the problem. Even in barrier-free societies and other types of discrimination, individuals need economic, social, and cultural rights. Individuals need employment, shelter, education, or cultural participation. This is true for PWDs-SNs, and thus for all human beings. Since impairment, however, often leads to the need for assistance, PWDs-SNs indeed require over and above political and civil rights. While laws and welfare policies in the past have failed to empower and acknowledge PWDs-SNs as respectable citizens,¹⁰³ laws on personal budgets or services assistance proved that even classical social laws can provide control and choice to PWDs-SNs.¹⁰⁴

⁹⁸ Degener Theresia and Quinn Gerard, 'A Survey of International, Comparative and Regional Disability Law Reform' (2002) *Disability Rights Law and Policy* 3-128.

⁹⁹ European Union, *European Disability Strategy 2010–2020*.

¹⁰⁰ Michael Oliver, *Understanding Disability* (St. Martin's Press 1996) 63.

¹⁰¹ Lennard Davis, *The Disability Studies Reader* (Routledge 1997).

¹⁰² Michael Oliver (n 94) 63.

¹⁰³ Björn Hvinden, 'Redistributive and Regulatory Disability Provision: Incompatibility or Synergy?' (2009) *European Yearbook of Disability Law* 5-28.

¹⁰⁴ Theresia Degener, 'Personal assistance services and laws: A Commentary' (1991) *World Institute on Disability and Rehabilitation International* 15-20.

It is therefore illustrative that the universal independent living movement has constantly phrased its demands in terms of broader human rights, rather than in terms of pure anti-discrimination rights. The model serves as a tool to impart knowledge and show the situations of injustice experienced by PWDs-SNs. The model advocates that all citizens are equal before the law, and this sentence should be applied equally to everyone without exceptions. The social model is thus important, for it emphasizes the fact that PWDs-SNs are rights holders and that impairment should not be used as a justification for a restriction or denial of rights.¹⁰⁵

One can submit that the social model of disability reminds us that we can modify our environment to accommodate diversity, such as fitting a square peg into a round hole world. Thus, disability is not merely about a person's impairments; it's about the world that society creates. Similarly, disability today is understood as a complex interplay of environmental and personal factors. For instance, an individual with hearing loss may fit the medical model for hearing disability but may not personally be identified as disabled if their environment renders appropriate support for their needs.

2.1.4 Limitations of the Social Model

Notwithstanding the social model of disability's enthusiasm, cracks in the idealist hope for a completely accessible society full of variant human beings with equal opportunities grew by the 1990s.¹⁰⁶ Original disruption of the social model of the inhumanity of the medical model unearthed a seemingly intractable challenge: while most disabled individuals have spoken openly against medical care that seeks to normalize variant brains and bodies, some PWDs-SNs need, want, and can gain benefits from medical treatments in certain circumstances.¹⁰⁷ Not all the challenges faced by PWDs-SNs are a result of social conditions,¹⁰⁸ thus the role of healthcare, cures, and treatments in the lives of PWDs-SNs has become a contentious issue.¹⁰⁹

The model has been criticized further for the following reasons: (a) It centres the constraints of PWDs-SNs with physical impairments, which as a result has overlooked other types of inabilities, like mental health conditions; (b) it does not include other forms of impairment; and

¹⁰⁵ M Robinson, 'Foreword' (2003) *The human rights of persons with intellectual disabilities: Different but equal* vii.

¹⁰⁶ Zosia Zaks (n 80) 9.

¹⁰⁷ T. Shakespeare and N. Watson, 'The Social Model of Disability: An Outdated Ideology?' (2002) 2 *Research in Social Science and Disability* 9-28.

¹⁰⁸ *Ibid.*

¹⁰⁹ A. Anders, 'Foucault and 'the Right to Life': From Technologies of Normalization to Societies of Control' (2013) 33 *Disability Studies Quarterly* 3.

(c) it does not challenge the distinction between the abled-bodied and disabled individuals since it adheres to modernist binary thinking.¹¹⁰

Critics have also pointed out some of the weaknesses of the model, as the simplicity of the social model limits its viability as an academic account of disability.¹¹¹ Similarly, the social model neglects impairment as part of several disabled people's life experiences, in addition, it is hard to separate impairment from disability in researching daily life.¹¹² As explained by Palmer and Harley, by separating disability and impairment, the model has failed to account fully for the life experiences of PWDs-SNs.¹¹³

Moreover, critiques of the social model argue that it does not account for variations between PWDs-SNs, and it has been suggested that the model overlooks the different intersectionality forms of oppressed states.¹¹⁴ Intersectionality in this context, advocates that ableism does not independently act upon other oppressive states, such as sexism, racism, and homo-negativism. This critique would suggest that the model fails to understand the experiences of PWDs-SNs independently of other traits of the person, like race, sexual orientation, and gender.¹¹⁵

Furthermore, while the social model claims that society would have to change to accommodate PWDs-SNs, the intersectionality concept would suggest that this may not be sufficient. Society would rather need to take into account other prejudices as well, like sexism, racism, and homo-negativism, as PWDs-SNs may as well exude other traits that typically are socially oppressed.¹¹⁶ The model in this way, fails to account for variations in race, gender, or sexual orientation among PWDs-SNs.¹¹⁷

It is submitted that the social model has been both criticized and celebrated within academic discourse. While the model has been instrumental in empowering PWDs-SNs, it has been confronted with criticism for being an old-fashioned ideology. Other scholars argue that it further needs development to address contemporary problems. The model has successfully

¹¹⁰ Sofia Adam and Athanasios Koutsoklenis, 'Who needs the social model of disability?' (2023) *Frontiers in Sociology* 1-4.

¹¹¹ T. Shakespeare and N. Watson (n 101) 9-28.

¹¹² *Ibid.*, 9-28.

¹¹³ M. Palmer and D. Harley, 'Models and Measurement in Disability: An International Review' (2012) 27 *Health Policy and Planning* 357-364.

¹¹⁴ H. Fitzgerald, *Disability and physical education* (The handbook of physical education 2006) 752-766.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ H. Fitzgerald (n 108) 752-766.

challenged discrimination and driven political activism. It has at the same time, however, created tensions and conflict within disability studies, sociology, and discussions around the body. These tensions originate from varying applications and interpretations of the model.

In summary, while the model has been transformative, acknowledging its limitations and engaging with critical perspectives is essential for advancing advocacy and disability studies.

2.1.5 Applying the Social Model Values in Lesotho

Since the beginning of the twenty-first century, no disability issue has had such a vast magnitude as that of advocating for the integration of a social model to embrace diversity through the accommodation of PWDs-SNs in all spheres of life globally. Poor developing economies are the least equipped to adapt to the potential removal of barriers for PWDs-SNs in the justice system, even though most of them have played a very serious role in contributing to the oppression experienced by these vulnerable persons. Lesotho is amongst the poorest of the developing economies. This chapter concentrates on issues of utmost relevance to Lesotho, such as embracing diversity through accommodation of individual needs, promoting inclusion, and dismantling barriers for PWDs-SNs. Thus, Lesotho like any other developing economy is faced with the challenge of accommodating individuals with diverse needs.

Oppression and discrimination against PWDs-SNs certainly persist in Lesotho due to¹¹⁸ (a) a lack of understanding and awareness such as a lack of accurate knowledge about the causes of disabilities and the resulting characteristics; (b) beliefs about abilities and contributions like stereotypes regarding the nature and abilities of PWDs-SNs, which contribute to stigma and discrimination; (c) viewing disabilities as homogeneous, that is people often perceive disabilities as a single, homogenous group rather than recognizing the unique skills, abilities, interests, and needs of each individual; (d) superstitions, fear, and ignorance play a role in stigmatizing PWDs-SNs; Lastly, (e) disability oppression has deep historical roots, with some aspects stemming from ancient political, economic, and cultural systems, while others result from more recent developments.¹¹⁹

Incorporating the social model into the justice system in Lesotho is a decisive step toward ensuring equal and equitable access to justice for all, inclusive of PWDs-SNs. Significant strides

¹¹⁸ Michael Baffoe, 'Stigma, Discrimination & Marginalization: Gateways to Oppression of Persons with Disabilities in Ghana, West Africa' (2013) 3 *Journal of Educational and Social Research* 1.

¹¹⁹ Ibid.

in the creation of an enabling legal framework have already been made by Lesotho for the protection of disability rights. Recent developments include (a) Recognition of Testimonial Competence: The Constitutional Division of the High Court declared section 219 of the Criminal Procedure and Evidence Act unconstitutional, affirming the testimonial competence of all PWDs-SNs, inclusive of those with psychosocial and intellectual disabilities,¹²⁰ (b) Persons with Disability Equity Act, 2021: This Act contains a specific provision (Article 32) on access to justice for PWDs-SNs,¹²¹ (c) Disability and Equity (Procedure) Rules, 2023: These rules outline the accommodations that must be provided to persons with disabilities in judicial proceedings in Lesotho.¹²²

The milestones referred to above are likely to facilitate an enabling permissible framework for the safeguarding of the right of PWDs-SNs to access justice through the accommodation provisions.¹²³ Since the incorporation of the social model is not just a legal obligation but a fundamental step toward a more equitable and just society for all. Stakeholders with concern for PWDs-SNs in collaboration with the government of Lesotho, have also undertaken significant measures for the enhancement of access to justice for these vulnerable individuals.¹²⁴ For example, Lesotho has made commendable steps in the promotion of the right to education for PWDs-SNs through the adoption of the Inclusive Education Policy in 2018. As echoed by Zaks paying attention to the perspectives of PWDs-SNs is a principal tenet of the social model, and provides a net of sorts to capture complex disability encounters.¹²⁵ In Garland-Thomson's opinion, when PWDs-SNs share their experiences, even sore ones, new knowledge about them being human is generated and society is forced to take into consideration what is needed for a good life.¹²⁶

Furthermore, stakeholders focus on promoting and protecting human rights for PWDs-SNs, and their efforts are inclusive of advocating for the elevation and justiciability of socioeconomic rights to form part of the Bill of Rights in Lesotho's constitution.¹²⁷ The government of Lesotho

¹²⁰ Moshoeshoe and others v. Director of Public Prosecutions CC/14/2017 [2019] LSHC.

¹²¹ Dianah Msipa (n 22).

¹²² Ibid.

¹²³ Office of the United Nations High Commissioner of Human Rights (n 26).

¹²⁴ LNFOD, Policy Brief on effective implementation of inclusive Education in Lesotho for benefit of people with disabilities (2019) <<http://www.infod.org.ls/uploads>> accessed 21 May 2024.

¹²⁵ Zosia Zaks (n 80) 11.

¹²⁶ R Garland-Thomson, 'Feminist Disability Studies: A Review Essay (2005) 30 *Signs: Journal of Women in Culture and Society* 2, 1557-1587.

¹²⁷ Transformation Resource Centre, 'Human Rights and Access to Justice'(2021)< <https://www.bing.com/search>> accessed 21 May 2024.

has additionally recognized the importance of creating an enabling environment for PWDs-SNs. As a result, the National Disability Mainstreaming Plan aligns with international commitments, inclusive of the UNCRPD.¹²⁸ The plan's main objective is to realize the full potential of PWDs-SNs working and living in Lesotho.

While it is evident that significant progress has been made, continued collaboration among government and stakeholders, as well as effective implementation of policy, are essential to ensuring equitable access to justice for PWDs-SNs in Lesotho.

2.2 Situational Analysis of the Social Model of Disability in Lesotho

The situational analysis of the social model of disability in Lesotho reveals significant challenges faced by PWDs-SNs. For instance, response strategies have often overlooked the needs of this marginalized population, leaving them further vulnerable. The situation currently for PWDs-SNs is that they experience serious inequalities in terms of access to justice because of discriminatory policies and laws.¹²⁹ PWDs-SNs are therefore subjected to unconscious discrimination.¹³⁰ The Ministry of Social Development published a disability situational analysis report, highlighting living conditions and identifying gaps that need addressing, such as: (a) measures to improve the lives of PWDs-SNs by mainstreaming disability considerations across numerous sectors, (b) emphasizing the need for an inclusive approach that take into account both social and physical barriers, and (c) identifying obstacles related to legal protection, employment, education, justice, and decision-making processes.¹³¹

The Ministries of Justice and Correctional Services; Law and Constitutional Affairs; and Home Affairs are responsible for the welfare of detained PWDs-SNs, and as part of the justice system should be given capacity and awareness to mainstream disability. Whereas disability issues are inter-ministerial, government ministries are anticipated to play their roles respectively. Disability issues fall under the general mandate of the Ministry of Social Development at the central government level, and a Disability Services Department was established in 1991. The Disability Services Department's general objective is the improvement of the lives of PWDs-SNs through provisions of appropriate service. The Department was established in response to the cumulative

¹²⁸ United Nations, *Lesotho National Disability Mainstreaming Plan* (UN Publication, 2019).

¹²⁹ Dianah Msipa, 'Moshoeshoe V. DPP: A Missed Opportunity for Persons with Intellectual and Psychosocial Disabilities in Lesotho?' (2021) 13 *Drexel Law Review* 909-912.

¹³⁰ *Ibid.*

¹³¹ Lesotho National Disability Mainstreaming Plan 2021-2025 Report.

needs of PWDs-SNs, and it began with the provision of vocational rehabilitation and assistive devices, with the Ithuseng Vocational Rehabilitation Centre establishment in Maseru.¹³²

The Ministry of Communication Science and Technology lacks provisions that specifically speak to disability in their work plan nonetheless. For example, the Ministry can provide an overview of the plan's focus areas, and raise mainstream disability awareness through the promotion of communication services and accessibility of information. There are, however, disability target issues that the Ministry aims to evaluate itself, but then these goals are only Human Resource (HR) -based and have not yet been authorized and shared.¹³³ HR is, thus, the department that oversees employee welfare and mainly influences the other departments to recognize PWDs-SNs.¹³⁴

In the same way, the Gender and Youth, Sports and Recreation Ministry does not have programs focused on disability, and the preliminary concern is on equity and equality issues amongst men and women. PWDs-SNs issues are considered along the minority groups line which can face some form of gender-based violence or be discriminated against. There is also an absence of special consideration directed particularly to disability issues, not even in budgeting. Nevertheless, the Ministry has sustained close communication through working committees with the Lesotho National Federation of Organizations of the Disabled (LNFOD), where the attention is generally on empowerment and gender-based violence of PWDs-SNs.¹³⁵

For some time now, the Lesotho Council of Non-Governmental Organizations (LCN) has incorporated disability issues in its annual plans. In both 2011 and 2012, LCN had budgeted and planned for the commemoration of International Disability Day support. The budget support was premised in particular during International Disability Day on women with disabilities.¹³⁶ Disability issues otherwise have been mainstreamed in the Global Fund project in which LCN was a Principal Recipient. Additionally, LNFOD was a sub-recipient where they were advocating for HIV and AIDS preventative measures among PWDs-SNs.¹³⁷

¹³² Ibid.

¹³³ Government of the Kingdom of Lesotho, 'The National Disability and Rehabilitation Policy: Mainstreaming Persons with Disabilities into Society 2011' (2009) 1-23.

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Lesotho National Disability Mainstreaming Plan (n 125).

¹³⁷ Ibid.

LNFOOD is a parent body of the following four Disabled Persons Organizations: a) the Lesotho National Association of the Physically Disabled (LNAPD) which is responsible for the promotion of the socio-economic rights of persons with physical disability. It is also entrusted with ensuring access to public services for the physically disabled on an equal basis with other able-bodied persons through advocacy and lobbying to the service providers;¹³⁸ b) Lesotho National League of the Visually Impaired Persons (LNLVIP) was established mainly in Lesotho for the advocacy for visually impaired individuals, ensuring that they obtain access to education similar to any other able-bodied counterparts and live sustainable lives through different forms of income generation.

The organization, additionally, runs some programs meant to empower PWDs-SNs; these are focused mainly on mobility, economic empowerment, and human rights advocacy of PWDs-SNs;¹³⁹ Lastly; c) the National Association of the Deaf in Lesotho (NADL) advocates for the deaf community's rights and aims at promoting sign language in both private and public sectors so that the deaf community can receive quality services in the same way as able-bodied counterparts.

NADL advocates for the adoption of sign language as a recognizable profession, and within this organization are trained sign language interpreters, who often carry out pieces of training to volunteers on a six-month basis. The training is provided also to some government institutions like Rehabilitation Officers, Police, and those who work in courts on request.¹⁴⁰ It has been taken into account that LNFOOD is running two programs, through which LNAPD is involved, which are Community-Based Rehabilitation (CBR) and Organizational Development (OD), and the latter is contemplated to have an insufficient budget.

Although Disabled People's Organizations (DPOs) are perceived as routes of communication and agents of change at the community level, then they have limited capacity concerning human resources as the implementing bodies. However, OD has aided DPOs in developing branches at the community level by bringing together PWDs-SNs for ease of addressing their needs. The LNAPD, like other DPOs however, runs programs that are project-based and often lack sustainability. This has been discovered to emanate mostly from a lack of running work plans. Similarly, there is also a lack of support for some to develop proposals that can get them funding and sustainable support.

¹³⁸ Ibid.

¹³⁹ Government of the Kingdom of Lesotho (n 127).

¹⁴⁰ Ibid.

It is safe to argue that while access to justice has for quite some time been considered a significant component of good governance, democracy, and effective equitable development; it remains a luxury to many PWDs-SNs in Lesotho. The justice system's inadequacy to implement effective policies to accommodate PWDs-SNs results often in their denial of rights not only to access justice but then again to other rights for which they would ordinarily approach the system. The very same justice system has further failed to protect victims with disabilities and worse, the acquittal of perpetrators who have committed crimes against these vulnerable persons.

2.2.1 Situational Analysis of the Social Model of Disability in South Africa

The situational analysis of the social model of disability in South Africa provides valuable insights into the experiences of PWDs-SNs in the country. The analysis reveals that a significant number of these individuals face considerable obstacles in accessing justice systems.¹⁴¹ This situational analysis thus aims to bridge knowledge gaps and inform efforts by both non-governmental actors and government to fulfill PWDs-SNs rights and amplify the voices of these marginalized individuals, ensuring their inclusion and well-being in society.¹⁴²

To this end, the government of South Africa emphasizes a need for training on disability rights and appropriate accommodations and disability rights for all criminal justice personnel. This training will ensure that officials working within the justice system and courts are aware of PWDs-SNs' needs and are able to provide necessary accommodations.¹⁴³ The government of South Africa, in September 2020, introduced the National Strategic Framework on Reasonable Accommodation for Persons with Disabilities. The framework is aimed to guide the implementation of reasonable accommodation measures to support, uphold, and promote the rights of PWDs-SNs.¹⁴⁴ For example, it stresses participation and equitable access to services and programs.

In the same way, in 2012, the National Development Plan (NDP) was approved and envisions a country that, by 2030, has reduced inequality and eradicated poverty, a “country wherein all citizens have the capabilities to grasp the ever-broadening opportunities available.”

¹⁴¹ DSD, DWCPD and UNICEF, *Children with Disabilities in South Africa: A Situation Analysis: 2001-2011* (2012) Pretoria: Department of Social Development/Department of Women, Children and People with Disabilities/UNICEF.

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ Government of South Africa, *National Strategic Framework on Reasonable Accommodation for persons with disability*: September 2020.

The NDP recognizes that many PWDs-SNs are unable to develop to their full potential because of a range of hindrances, namely attitudinal, physical, communication, and information barriers, and stipulates that “Disability must be integrated into all facets of planning, recognizing that there is no one-size-fits-all approach.”

The White Paper on the Rights of Persons with Disabilities (WPRPD), approved in December 2015 by Cabinet, also notes that disability discrimination encompasses all types of unfair discrimination, whether indirect or direct, inclusive of reasonable accommodation denial and describes reasonable accommodation as “necessary and appropriate modification and adjustments, as well as assistive devices and technology, not imposing a situation, where needed in a particular case, to ensure persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”

Furthermore, South Africa has several bodies and organizations entrusted with addressing disability issues. For instance, Disability Info SA (DiSA) was established in 2015 to provide support services and free information for PWDs-SNs. They categorize disabilities into five impairment groups: (a) psychosocial, (b) physical, (c) intellectual, (d) sensory, and (e) neurological.¹⁴⁵ DiSA additionally provides the following services: (a) Information Desk- A one-stop service that offers assistance to PWDs-SNs and their families by providing data to help them confront the impediments presented by society; (b) Yes To Access (YTA)- An online reporting online platform that allows anybody to voluntarily report and identify obstacles to access, and acts of discrimination based on disability; (c) Accessible Cities South Africa (AC-SA)- A platform that advocates for inclusive environments and showcases partnerships working toward a truly accessible South Africa, and Lastly; (d) DiSA News Network (DNN)- Which educates, empowers, and entertains PWDs-SNs through many channels, inclusive of YouTube, Facebook, and interviews.¹⁴⁶

Similarly, the National Council for Persons with Disabilities (NCPD) has played an integral role in shaping South Africa into a country where PWDs-SNs have access to equal rights and opportunities.¹⁴⁷ Moreover, the Department of Women, Youth, and Persons with Disabilities (DWYPD) though not focused on disabilities exclusively, offers helplines for plenty of issues,

¹⁴⁵ SAHRC, Research Brief on Disability and Equality in South Africa 2013 – 2017.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

inclusive of those related to PWDs-SNs, who can, for example, SMS ‘help’ to 31531 when in need of emergency aid services.

Leach adds that political settlements in post-conflict democracies like South Africa with its accompanying constitutional reforms have altered the relationship between the State and citizens, creating a new order of state responsibilities and citizen entitlement resulting in different expectations about the judicial systems, law, and other dispute resolution mechanisms.¹⁴⁸ Thus, the post-apartheid government in South Africa introduced various measures to enhance access to justice for the most vulnerable individuals such as PWDs-SNs.

In general, as Shaw expressed, in the criminal justice system context in South Africa the structural setup of a system of criminal justice is vital and needs to be reflective of its ability to deter and prevent crimes.¹⁴⁹ Shaw then emphasized that to ensure the full potential of the system of criminal justice, “reform is a must and ought to be a national priority.”¹⁵⁰ He further pointed out that, if the criminal justice system is to effectively function, then “the system should consist of both proactive and reactive components.”¹⁵¹ In the context of PWDs-SNs, a proactive component is important not only for effective access to justice for PWDs-SNs but also for the longer reduction of abuse and violence for these vulnerable persons.

The state of PWDs-SNs in South Africa is not certain because of the country’s historically faulty policies. As recognized by the South African Human Rights Commission (SAHRC), “policies and practices adopted by the apartheid government served not only to ignore these rights but also to set up and maintain mechanisms which contributed to further abuse and discrimination.”¹⁵² However, the Bill of Rights introduction and strong justice institutions such as the Constitutional Court, provided mechanisms for addressing past imbalances and guaranteeing that the rights of all individuals including PWDs-SNs are protected. It is this desire to address the past inequality that has given a certain impetus for South Africa to create a policy framework on access to justice,¹⁵³ a framework that is mainly contained in the overarching National Crime

¹⁴⁸ Leach Noleen, ‘The Paralegal and the Right of Access to Justice in South Africa’ (2018) *University of the Western Cape*.

¹⁴⁹ Swan M, ‘Reforming South Africa’s criminal justice system’ (1997) *Institute for Security Studies*.

¹⁵⁰ *Ibid*.

¹⁵¹ *Ibid*.

¹⁵² SAHRC, ‘Disability Policy Paper #5’ (1997) <<http://www.sahrc.org.za>> accessed 14 March 2024.

¹⁵³ *Ibid*.

Prevention Strategy,¹⁵⁴ and the Disability policy, together supplemented by the Service Charter for Victims of Crime.¹⁵⁵

Additionally, the SAHRC is a constitutional body with a responsibility to protect and promote human rights in South Africa.¹⁵⁶ The SAHRC focuses on various areas, inclusive of disability rights organizations such as: (a) the National Planning Commission (NPC), which recently published a Disability Background Paper that provides insights into the status of disability in South Africa. The paper covers aspects such as legislation, prevalence, frameworks, disability programs within key departments, and the impact of COVID-19 on PWDs-SNs;¹⁵⁷ and (b) the Disability Data Initiative which aims to facilitate policy studies, inform debates, advocate for the rights of PWDs-SNs, and consider intersectional identities, such as older persons with disabilities or women with disabilities.¹⁵⁸ These organizations thus play a crucial role in advancing disability policies, rights, and services in South Africa. Notwithstanding, the South African disability policy landscape has seen both challenges and progress. While the country has made steps in disability policy, ongoing efforts are significant for the enhancement of opportunities, accessibility, and social integration for PWDs-SNs.

2.2.2 Situational Analysis of the Social Model of Disability in Nigeria

The situational analysis of the social model of disability in Nigeria provides insight into the current situation for PWDs-SNs in Nigeria, considering legal frameworks, donor support, and DPO priorities.¹⁵⁹ The Disability Inclusion Helpdesk Report No. 8 contextualizes available information and offers a practitioner's perspective on disability rights in Nigeria.¹⁶⁰ The 2006 census and 2012 Nigerian General household survey both reported a disability prevalence rate of 2 percent.¹⁶¹

¹⁵⁴ NCPS: Summary 4, 'Government of South Africa' (1996) <<http://www.info.gov.za>> accessed 15 March 2024.

¹⁵⁵ Service Charter for Victims of Crime in South Africa, 'The Consolidation of the Present Legal Framework Relating to the Rights of and Services Provided to Victims of Crime' (2024) *Justice and Constitutional Development*.

¹⁵⁶ Disability, 'The South African Human Rights Commission' (2022) <<https://www.sahrc.org.za>> accessed 16 March 2024.

¹⁵⁷ Presidency Republic of South Africa, Disability Background Paper: The Status of Disability in South Africa Report 2020.

¹⁵⁸ SAMRC, The Disability Data Report 2023: Data for Human Rights.

¹⁵⁹ Holden J, Clark A, and Abualghaib O, 'Situational analysis of disability in Nigeria Disability Inclusion Helpdesk Research Report No. 8' (2019) *London, UK: Disability Inclusion Helpdesk*.

¹⁶⁰ *Ibid*.

¹⁶¹ Leonard Cheshire, 'The Disability Data Portal' (2018) <<https://www.disabilitydataportal.com>> accessed 19 March 2024.

However, these numbers have faced scrutiny, with many experts suggesting this is an underestimation of the actual population of PWDs-SNs.¹⁶²

In Nigeria, as in much of the developing world in Africa, PWDs-SNs remain vulnerable groups in terms of just and equitable justice for all.¹⁶³ Disability issues are often viewed through a charity or welfare lens, which harms social inclusion.¹⁶⁴ There are also quite several organizations dedicated to promoting the well-being and rights of PWDs-SNs. For example, founded in 1992, the Joint National Association of Persons with Disabilities (JONAPWD) is an umbrella organization established to represent the interests of Nigerians with disabilities both locally and globally. The organization comprises six disabled groups: the physically disabled, the blind, the intellectually impaired, the deaf, those with spinal cord injuries, and leprosy victims. The JONAPWD serves as a link between OPDs in Nigeria and the international community.¹⁶⁵ Their mission is to attain a society where social justice, equity, and the rights of PWDs-SNs are guaranteed through advocacy, specific projects, and partnerships with relevant stakeholders,¹⁶⁶ and the JONAPWD is a full-fledged member of the international body called Disabled Peoples' International (DPI).¹⁶⁷

Some organizations in Nigeria focus on support for PWDs-SNs and disability rights. For example, (a) the Centre for Citizens with Disabilities (CCD), a recognized NGO working on disability matters in Nigeria, has sought to redefine society's perception of the plight of PWDs-SNs at least over the past fourteen years. Their mission includes the promotion of disability rights as well as development through training, advocacy, empowerment programs, research, and legal aid in collaboration with non-state actors and state;¹⁶⁸ (b) Cerebral Palsy Centre Morainbow Foundation supports persons with cerebral palsy, offering resources and services to enhance their well-being;¹⁶⁹ (c) Bethesda Home for the Blind pays attention to the needs of visually impaired and blind persons, providing education, rehabilitation, and vocational training, and; (d) Deaf

¹⁶² Haruna, 'The Problems of Living with Disability in Nigeria' (2017) 65 *Journal of Law, Policy and Globalisation*.

¹⁶³ Halima Doma Kutigi and others (n 40)19-34.

¹⁶⁴ Stephen James Thompson, 'Disability Inclusive Development Situational Analysis for Nigeria' (2020) *Institute of Development Studies* 5.

¹⁶⁵ Devex, 'Joint- National Association of Persons with Disabilities' (2024) <<https://www.devex.com>>accessed 20 May 2024.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

¹⁶⁸ Adebukola Adebayo, 'How organizations of Persons with Disabilities in Nigeria can support the inclusion of the most vulnerable to social protection programs' (2021) <<https://socialprotection.org>> accessed 19 May 2024.

¹⁶⁹ Ibid.

Women Aloud Initiative advocates and promotes empowerment and the rights of deaf women in Nigeria.¹⁷⁰

Another disability rights organization in Nigeria is Disability Rights Advocacy Centre (DRAC). DRAC plays a significant role in advocacy for the inclusion of PWDs-SNs empowerment in politics and offers guidance and support to the Independent National Electoral Commission (INEC) and political parties on the accommodation needs of PWDs-SNs.¹⁷¹ Moreover, the Leprosy Mission Nigeria is tasked to improve the lives of persons affected by leprosy and related disabilities, and Sightsavers focuses on the prevention of avoidable blindness and the promotion of the inclusion of PWDs-SNs in society.¹⁷² Similarly, Lotus Initiative for the Blind provides services and support to blind persons, inclusive of education, advocacy, and vocational training.¹⁷³

In addition, concerned Nigerians with disabilities, inclusive of organizations of persons with disabilities (OPDs), development partners, and civil society organizations (CSOs), have taken responsibility for drafting bills and advocating for their passage in the Nigerian parliament.¹⁷⁴ These efforts contribute to advancing disability rights and addressing the needs of PWDs-SNs in Nigeria thus making a positive impact on the lives of PWDs-SNs in Nigeria.¹⁷⁵

Nigeria also has a human rights commission, and the National Human Rights Commission of Nigeria (NHRC) addresses disability issues. For instance, in January 2023, Nigerian President Muhammadu Buhari signed into law the Discrimination Against Persons with Disabilities (Prohibition) Act.¹⁷⁶ The Act prohibits discrimination based on disability, and imposes sanctions, including fines and prison sentences, on those who contravene it.¹⁷⁷ The law also stipulates a five-year transitional period for modifying structures, public buildings, and automobiles to make them accessible and usable for PWDs-SNs.¹⁷⁸

¹⁷⁰ Ibid.

¹⁷¹ PolitiVos.com, 'Including People with Disabilities in Nigerian Politics' (2024) *Digital Advocacy and Political Campaign Platform*.

¹⁷² Ibid.

¹⁷³ Ibid.

¹⁷⁴ Raji Ade Oba, 'Nigerian Disability Rights Acts: 3 years after; Prospects and challenges' (2022) *Pulse.ng*

¹⁷⁵ Ibid.

¹⁷⁶ 2018.

¹⁷⁷ Anietie Ewang, 'Nigeria Passes Disability Rights Law' (2024) *Human Rights Watch*.

¹⁷⁸ Ibid.

The law further establishes a National Commission for Persons with Disabilities (NCPWD), responsible for ensuring that PWDs-SNs have access to education, housing, and healthcare.¹⁷⁹ It also empowers the commission to receive complaints of rights violations and support victims seeking legal redress. In addition, the NCPWD aims to create an inclusive society where the aspirations, privileges, development, rights, and equality of opportunities for PWDs-SNs are guaranteed.¹⁸⁰ They operate in line with the provisions of the Discrimination against Persons with Disabilities (Prohibition) Act.¹⁸¹

2.3 Conclusion

Despite criticisms levied against the social model, the model serves as a tool to impart knowledge and show the situations of injustice experienced by PWDs-SNs. The social model is thus important, for it emphasizes the fact that PWDs-SNs are rights holders and that impairment should not be used as a justification for a restriction or denial of rights.

One can thus submit that this reminds us that we can modify our environment to accommodate diversity. Thus, disability is not merely about a person's impairments; it's about the world society creates. In the same way, disability today is understood as a complex interplay of environmental and personal factors. For instance, an individual with hearing loss may fit the medical model for hearing disability but may not personally be identified as disabled if their environment renders appropriate support for their needs.

Moreover, to overcome the oppressive situation currently encountered by these marginalized persons in justice system in Lesotho. One can argue that the time is now for Lesotho to operationalize the LHRC just like its fellow counterparts, South Africa and Nigeria, with the expectation to enable full inclusivity of disability rights. The Commission will supplement pre-existing institutions that advance human rights and democracy, such as the Office of the Ombudsman, whose limited mandates have made it difficult to protect human rights fully in Lesotho.¹⁸²

¹⁷⁹ Chibike Amucheazi and Chidebe Matthew Nwankwo, 'Accessibility to infrastructure and disability rights in Nigeria: an analysis of the potential of the discrimination against persons with disability (prohibition) act 2018' (2020) 46 *Taylor & Francis* 4.

¹⁸⁰ Ibid.

¹⁸¹ 2018.

¹⁸² Itumeleng Shale, '10 NHRI: PART A. Introductory Commentary' (2010) < <https://www.pulp.up.ac.za> > accessed 01 February 2024.

Lesotho Human Rights Commission was formed in 2011, with a mandate to oversee the protection and promotion of human rights. The LHRC has been long awaited, and its establishment presents an opportunity to reform Lesotho's human rights culture.¹⁸³ The expectation of the commission is also to carry broad mandates listed under section 7 of the Human Rights Commission Act.¹⁸⁴ Amongst others: a) monitor the state of human rights throughout Lesotho; b) investigate violations of human rights, and if necessary, be responsible for instituting proceedings against such violations in the courts of law; c) monitor the human rights situation of PWDs-SNs.... g) Advocate for ratification, recommend domestication, of international and regional human rights instruments; and also, h) Promote and monitor the harmonization of national laws and practices with international and regional instruments to which Lesotho is a State Party...

In my opinion, the operationalization of the LHRC will enable Lesotho to achieve its aspirations of goal seventeen of the SDGs. The goal aspires that by 2030, all nations whether developed or developing like Lesotho, South Africa, and Nigeria, will have curbed inequalities in every aspect of society and safeguard the realization of the SDGs.

¹⁸³ Ibid.

¹⁸⁴ 2016.

CHAPTER THREE: IMPEDIMENTS OF THE EFFECTIVENESS OF ACCESS TO JUSTICE FOR PWDS-SNS IN COURTS OF LAW: A COMPARATIVE ANALYSIS

3. Introduction

The second chapter provided a more in-depth understanding of the social model of disability and its efficacy and the essential elements that make it effective in accessing justice for PWDs-SNs. It also provided a situational analysis of PWDs-SNs in Lesotho as compared to South Africa and Nigeria. The purpose of this comparison was to determine whether Lesotho can benefit from the best practices in other countries, and how these practices can be improved in Lesotho to comply with the SDGs.

The third chapter is concerned mainly with factors that impede the effectiveness of access to justice for PWDs-SNs in Lesotho's courts of law. The chapter undertakes a comparative study between South Africa and Nigeria as some of the African states that have adopted the Banjul Charter and the CRPD, to determine the gaps to be filled in this area of study.

3.1 Impediments of Access to Justice in Lesotho

Access to justice for PWDs-SNs in Lesotho is still a multifaceted issue, and ensuring effective access to justice for these vulnerable persons is an ongoing journey that needs continued awareness, education, and practical implementation.¹⁸⁵ For example, despite significant strides undertaken by the government of Lesotho to integrate the social model into the country's justice system, to provide an enabling legal framework for the promotion of the right to access justice for PWDs-SNs, this right remains still a desire for the majority of PWDs-SNs in Lesotho.

Lack of access to justice for PWDs-SNs in Lesotho stems from various challenges: (a) many PWDs-SNs are confronted with barriers because of limited access to education, which hampers their ability to effectively navigate legal processes;¹⁸⁶ (b) discrimination and high rates of unemployment among employers make it hard for PWDs-SNs to secure employment, particularly in skilled or professional fields;¹⁸⁷ (c) lack of accessible modes of communication or

¹⁸⁵ Reporter, 'Govt improves access to justice for disabled persons' (2023) <<https://www.thereporter.co.ls>> accessed 11 May 2024.

¹⁸⁶ UN (n 122).

¹⁸⁷ Ibid.

information further limits PWDs-SNs' ability to report crimes or participate actively in legal proceedings.¹⁸⁸

There are also inconsistencies between some of the laws of Lesotho and international human rights norms, and these discrepancies can hamper the effective implementation of access to justice and disability rights.¹⁸⁹ For example, in the case of *Mothejoa Metsing v. The Director of Public Prosecutions*.¹⁹⁰ It was stated:

“Lesotho is characteristically a dualist State. Tellingly, from the narrative made, about such a country, international law can only assume a status of law upon being domesticated through an Act of Parliament. The philosophy behind has already been stated. Understandably, a pre-condition is that the law concerned must be an international one and recognized as such.”¹⁹¹

In my opinion, Lesotho has made its stances clear when it comes to the inconsistencies between some of its laws and international human rights norms, and this factor impedes just and equitable justice for all.

Ensuring the separation of powers and an independent judiciary is crucial for a fair justice system.¹⁹² This refers to ensuring that each sphere of government does not encroach upon the functions of the others, which may deter policy implementations. Challenges, related to the separation of powers may affect PWDs-SNs' access to justice. For instance, the justice system plays a critical role in rectifying injustices and ensuring accountability. Therefore, striking the right balance between the branches of government, addressing potential overlaps or conflicts, ensuring that no single sphere dominates the others, safeguarding democratic governance, and preventing undue concentration of authority is a must to guarantee equitable justice for all.

Policies and laws play a decisive role in shaping access to justice thus, if the legislative branch fails to consider the rights and needs of PWDs-SNs, discriminatory laws may persist.¹⁹³ As a result, challenges related to the separation of powers may affect PWDs-SNs' participation in legal processes. Advocacy efforts are, therefore, vital to ensure that disability-related legislation such as the Disability and Equity Bill is inclusive and promotes equal access to justice.

¹⁸⁸ Ibid.

¹⁸⁹ African Governance Monitoring and Advocacy Project (AfriMAP), Lesotho justice sector and the rule of law Report 2013 ISBN:978-1-920489-85-4.

¹⁹⁰ (CC27 and 28/2018) [2018] LSHC 46.

¹⁹¹ Ibid., at para 110.

¹⁹² African Governance Monitoring and Advocacy Project (AfriMAP) (n 183).

¹⁹³ Ibid.

Moreover, instances of non-compliance with compensatory court orders can exacerbate hindrances faced by PWDs-SNs in accessing justice in Lesotho.¹⁹⁴ When court orders in favor of these marginalized persons are not enforced, it undermines their rights.¹⁹⁵ Courts undertake to play a critical role as the guardians of justice, thus their decisions are the foundations of a democratic society.¹⁹⁶ When the State organ, such as the government, or officials of a State fail to abide by orders of courts, it deteriorates the democratic structure, resulting in potential erosion and chaos of trust in the legal system.¹⁹⁷ As a consequence, an “effective remedy”¹⁹⁸ concept is essential. Courts may be required to exercise their supervisory jurisdiction to guarantee that PWDs-SNs’ constitutional rights are protected, and a breach of these rights necessitates an effective remedy.¹⁹⁹ Striking the right balance between separation of powers and ensuring an effective remedy can be a challenge nonetheless.

Similarly, access to comprehensive and clear legal information is essential for every person, inclusive of PWDs-SNs, thus, problems related to disseminating legal information can deter their ability to navigate the justice system.²⁰⁰ In addition, adequate funding is necessary to ensure that services and accommodations are provided to PWDs-SNs within the justice system.²⁰¹ For example, budgetary limitations may impact the implementation of necessary measures.

It is generally accepted that any judicial system’s effectiveness is assessed by its capacity to provide timely and appropriate justice to all parties in a dispute. Lord Woolf, consequently, identified several principles that every judicial system must meet to guarantee access to justice. He postulates that an ideal justice system should, in addition to other components:

- (a) be just in the result it delivers; (b) be fair in the way it treats litigants; (c) offer appropriate procedures at a reasonable cost; (d) deal with cases with reasonable speed; (e) be understandable to those who use it;

¹⁹⁴ *Southern Africa Litigation Centre v. Minister of Justice and Others* High Court of SA, 27740/2015.

¹⁹⁵ *Ibid.*

¹⁹⁶ Peter Vondoepp, *13 - The Judiciary: Courts, Judges and the Rule of Law* from Part IV - Countervailing Institutions (Cambridge University Press 2018).

¹⁹⁷ *Ibid.*

¹⁹⁸ The right of an individual whose human rights have been violated to legal remedy. Such a remedy must be binding, accessible, capable of bringing perpetrators to justice, make provisions for appropriate reparations, and deter further violations of the individual's rights. - Musila Godfrey, ‘Whistling Past the Graveyard: Amnesty and the Right to an Effective Remedy Under the African Charter: The Case of South Africa and Moçambique’ (2004) <<https://papers.ssrn.com>> accessed 1 April 2024.

¹⁹⁹ *Ibid.*

²⁰⁰ African Governance Monitoring and Advocacy Project (AfriMAP) (n 183).

²⁰¹ *Ibid.*

(f) be responsive to the needs of those who use it; (g) provide as much certainty as the nature of the particular case allows; and (h) be effective, adequately resourced and organized.²⁰²

Access to justice, from Woolf’s submission, is wide-ranging, and for PWDs-SNs, it should include physical, social, intellectual, economic, communication, and institutional accessibility, taking into consideration diverse needs within disability. Correspondingly, besides the same challenges with the justice mechanisms more generally encountered in Lesotho,²⁰³ obstacles that impede access to justice for PWDs-SNs in Lesotho have been recognized to be inclusive of physical barriers, poverty, cultural impediments, and illiteracy, among others.²⁰⁴

3.1.1 Legal Frameworks on Access to Justice of PWDs-SNs in Lesotho

There is no disability-specific law in Lesotho as the Disability Equity Bill (a law that promotes and protects the rights of disabled Basotho) is still a draft that has also not been tabled for debate in parliament yet.²⁰⁵ However, section 33 of the Constitution of Lesotho²⁰⁶ makes provisions for rehabilitation, training, and social resettlement of PWDs-SNs. It encourages the state to adopt policies designed to facilitate access to employment for PWDs-SNs. Although this provision leans more towards affirmative action in favor of PWDs-SNs, it is non-justiciable.

The disability rights enshrined under the principles of state policy (DPSPs), do not feature elsewhere in the Constitution. This means that currently, disability rights are only recognized as alternative rights under DPSPs, and aggrieved litigants are not considerable for judicial remedy when claiming violation of their rights. The Constitution of Lesotho, with its supremacy clause, places it above all other laws. In my opinion, it is clear that disability rights are not explicitly recognized as rights in the Constitution, but are framed as DPSPs, as a result rendering them unjusticiable.

²⁰² Lord Woolf, ‘Expert Evidence’ (1996) *Electronic Law Journals- Journal of Information Law & Technology* 1.

²⁰³ Ibid.

²⁰⁴ LNFOD Research Report, 2019.

²⁰⁵ World Bank Group, ‘Lesotho set to advance the rights of people with disabilities’ (2019)

<<https://blogs.worldbank.org>> accessed 20th March 2023.

²⁰⁶1993.

The other challenge is that section 25 of the Constitution clearly states that one cannot obtain a judicial remedy to enforce these DPSPs. For example, in the case of *Khathang Tema Baitsooli & Another v. Maseru City Council and Others*,²⁰⁷ the Court held that “the right of life” guaranteed under section 5 of the Constitution of Lesotho does not include a socio-economic right like “livelihood”. “Right to life” was limited to the physical (biological) existence.

It is common cause that Lesotho ratified CRPD but has, however, not yet domesticated it through an Act of Parliament. Treaties ratification imposes an obligation on the state to domesticate treaty provisions into domestic laws. But then in the absence of domestication, it may be argued that probably the country avoids obligations that come with the domestication of treaties as exemplified in the case of *Mothejoa Metsing v. The Director of Public Prosecutions*.²⁰⁸

Ideally, domestication of Treaties supports the rule of law and this was recognized by the Secretary General of the United States in the Millennium Report of 2000, where it was stated that support of the Rule of Law would be enhanced if countries ratify and domesticate international treaties and conventions.²⁰⁹ It can be opined that, basically, given the diverse body of treaty law that exists, which on paper is good and aspirational, and if ever it was implemented the potential it has would change the lives of PWDs-SNs, consequently, disability rights in Lesotho would not only be recognized as alternative rights under DPSPs but justiciable rights.

Furthermore, sections 18 and 19 of the Lesotho Constitution²¹⁰ are hailed for upholding a right to human dignity and life. For instance, under section 18 (1); “the expression “discrimination” means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by ...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.” However, the lack of domestication of international instruments such as the UNCRPD which is inspired to curb inequalities in every aspect of society still hampers equitable access to courts for PWDs-SNs.

²⁰⁷ (C. of A. (CIV) NO.4/05 CONST/C/1/2004) [2005] LSHC 74 (20 April 2005).

²⁰⁸ *Supra*.

²⁰⁹ Millennium Report of 2000 by Mr. Kofi Annan, Secretary-General of the United Nations (Doc. A/54/2000, 3 April 2000).

²¹⁰ 1993.

In summary, addressing the challenges faced by individuals with disabilities requires concerted efforts from government, organizations, and the community at large. Advocacy, policy implementation, and awareness campaigns are crucial steps toward a more inclusive and equitable society. It is evident that continued efforts are needed to address the factors hindering access to justice and ensure equal rights for all individuals, regardless of disability status. Notwithstanding, and despite persisting challenges, Lesotho's legal framework and ongoing efforts signal progress in ensuring equitable access to justice for PWDs-SNs.

It is thus safe to suggest that the Constitutional Division of the Lesotho High Court has played a critical role in upholding a just and equitable justice for all by recognizing the testimonial competence of all PWDs-SNs, inclusive of those with psychosocial and intellectual disabilities in criminal justice. Furthermore, the Persons with Disability Equity Act²¹¹ was enacted to ensure recognition and equal opportunities for the rights of PWDs-SNs. The Disability and Equity (Procedure) Rules²¹² were also established to ensure that PWDs-SNs can effectively participate in judicial proceedings. These rules mandate procedural and age-appropriate accommodations to assist PWDs-SNs during both pre-trial and post-trial legal processes, this is inclusive of guidance for legal practitioners, judicial officers, and court personnel on how to support PWDs-SNs.²¹³ Nonetheless, there are still practical encounters such as striking the right balance between government ministries and addressing obstacles faced by these vulnerable groups.

3.2 Impediments of Access to Justice in South Africa

Access to justice is a basic right, necessary for the protection of all persons. In South Africa, however, PWDs-SNs encounter numerous obstacles when seeking equal access to justice, just like in Lesotho. These hindrances affect their full participation in the criminal justice system, whether they are accused persons or complainants, and the challenges stem from factors that include, among others, inadequate and inconducive regulatory frameworks that fail to safeguard fundamental freedoms, which is a right for ensuring access to justice. These shortcomings in legal provisions can hamper equal access for PWDs-SNs.²¹⁴

²¹¹ Persons with Disability Equity Act (n 42)

²¹² Disability and Equity (Procedure) Rules (n 46)

²¹³ Ibid.

²¹⁴ Center for Human Rights and Ford Foundation, Position Paper Persons with Disabilities and Barriers to Equal Access to Justice in South Africa Report.

This is because Lesotho and South Africa's adversarial criminal justice systems, necessitate witnesses to appear in court in person and give oral testimony in front of the accused perpetrators.²¹⁵ For example, the South African Criminal Procedure Act²¹⁶ and the Lesotho Criminal Procedure and Evidence Act²¹⁷ necessitates witnesses to testify orally in court.²¹⁸ As a consequence, the requirement creates obstacles for individuals with communication disabilities since, as the term suggests, these individuals have difficulties with oral communication.

Lack of legal information and education for the enhancement of access to appropriate legal information and knowledge is another factor impeding effective access to courts for PWDs-SNs in both countries. The majority of these marginalized persons lack sufficient access to such resources, making it difficult for them to freely navigate the justice system.²¹⁹ Similarly, limited legal services for PWDs-SNs is another obstacle, as the availability of competent and qualified legal service providers is essential. For instance, Court documents are often not available in alternative formats like braille, and assistive devices such as Assistive Listening Devices (ALDs), wheelchairs, and Infrared (IR) systems, amongst others are commonly not provided in the courtrooms. The scarcity of accessibility of legal services, unfortunately, unduly impairs PWDs-SNs' ability to access courts.²²⁰

The lack/absence of justice institutions to provide non-discriminatory, fair, and user-friendly legal procedures.²²¹ But then existing systems in both Lesotho and South Africa often fall short of accommodating the needs of PWDs-SNs. Another challenge is the lack of legally enforceable solutions.²²² For example, when barriers curtail PWDs-SNs from seeking redress, their fundamental rights are usually compromised. Lack of support mechanisms and resources undoubtedly constraints equitable access for PWDs-SNs. For instance, both non-legal and legal support mechanisms play a critical role in the inclusivity of PWDs-SNs in the justice system. These comprise the availability of interpreters, communication channels, and other facilitative resources

²¹⁵ PM Bekker and others (Criminal procedure handbook 1994) 14.

²¹⁶ No. 51 of 1977.

²¹⁷ 1981.

²¹⁸ *Ibid.*, Section 161.

²¹⁹ *Ibid.*

²²⁰ *Ibid.*

²²¹ UNDP, The Global Programme For Strengthening the Rule of Law, Human Rights, Justice and Security for Sustainable Peace and Development Phase IV, 2022-2025.

²²² *Ibid.*

for effective participation for all in the justice system.²²³ Lastly, the a lack of a user-friendly environment that creates and protects fundamental freedoms and rights for PWDs-SNs. Regrettably, attitudinal and physical obstacles persist in both countries, hampering a just and equal justice for all.²²⁴

The UNCRPD recognizes the right to access justice for all persons, inclusive of PWDs-SNs. The CRPD, in Article 13, also recognizes the need for state parties such as the South African Government to ensure effective access to justice for PWDs-SNs. However, the Article does not define explicitly what “effective access to justice” entails or means. As such, failure to provide a concrete definition of “effective access to justice” subscribes to ineffective participation by these marginalized persons in the criminal justice system. Addressing these obstacles needs joint efforts from legal professionals, policymakers, and society as a whole to guarantee that justice truthfully becomes accessible to everybody, regardless of disability status. South Africa, in the same way as Lesotho, has favorable legal provisions, but their inclusivity for PWDs-SNs remains a concern.²²⁵

3.2.1 Legal Frameworks of Access to Justice of PWDs-SNs in South Africa

Section 9(1) of the Constitution of the Republic of South Africa,²²⁶ guarantees the right to equality before the law for every citizen. It stipulates that everyone is “equal before the law and has the right to equal protection and benefit of the law”.²²⁷ In addition, section 9(3) provides that the state may not unfairly discriminate directly or indirectly against anyone on one or more of the listed grounds, including disability.²²⁸ By implication, therefore, PWDs-SNs are entitled to the protection and full benefit of the law on an equal basis with others, at least in theory. Nevertheless, and in the same way, as in Lesotho, this is not the case practice. For example, persons with communication disabilities still have difficulties to navigate the judicial system.

²²³ Ibid.

²²⁴ W Holness and S Rule, ‘Barriers to Advocacy and Litigation in The Equality Courts for Persons with Disabilities’ (2014) 17 *PER / PEL* 5.

²²⁵ Ibid.

²²⁶ 1996.

²²⁷ Ibid.

²²⁸ I Grobbelaar-Du Plessis and S Van Eck, ‘Protection of disabled employees in South Africa: An analysis of the Constitution and Labour legislation’ (2011) *Aspects of Disability Law in Africa* 231.

Section 34 of the South African Constitution²²⁹ grants the right to access the courts for any abuse and violation of all basic human rights that diminish the dignity of a person, the resolution of which necessitates the application of the law.²³⁰ It is thus evident from the provisions of this section that PWDs-SNs in South Africa²³¹ have the entitlement to approach the judiciary for any abuse and violation of their rights, and that in itself guarantees them a right to equal dignity on the same basis as their abled counterparts. On the other hand, under the Lesotho Constitution, this right is non-justiciable as it features under the principles of state policy, meaning they do not create legally enforceable rights for these individuals.

It is a common course, as already stated, that lack of access to justice for PWDs-SNs and discrimination are strongly linked. To this end, the South African Constitution²³² and the Lesotho Constitution²³³ entitle every citizen to the right to equality before the law and equal protection of the law. PWDs-SNs are entitled to access to justice by default on the same basis as their able-bodied counterparts at least theoretically. In terms of the Constitution of South Africa, laws intended to protect categorized individuals such as these marginalized persons against all types of unjust discrimination in all spheres of life inclusive of the justice system, are to be enacted. Nonetheless, there is no disability-specific law in Lesotho as the Disability Equity Bill has been in a draft form, and has thus also not been tabled for debate in parliament.

It is submitted that, from both Lesotho and South Africa, for PWDs-SNs who are victims of abuse and violence, inter-governmental agency coordination and improved accessible information mechanisms that embrace diversity are of significant importance for the enhancement of effective access to the criminal justice system. But then the sad reality is that the situation confronted by PWDs-SNs is categorized by extremely high levels of discrimination and inequality. The impediments that exist as a result of poor legal and policy frameworks of access to justice for PWDs-SNs not only lead to further inequality and discrimination but also marginalization in terms of equal justice for all.

Section 24 of the Bill of Rights in the Constitution of South Africa jealously guards an individual's right to a healthy environment; in particular, "everyone has the right the right to an

²²⁹ 1996.

²³⁰ Constitution of the South African 1996.

²³¹ Statistics South Africa, 'General Households Survey' (2017) <<http://www.statssa.gov.za>>accessed 16 March 2024.

²³² Section 9(2).

²³³ Section 19.

environment that is not harmful to their health or well-being.” The provision necessitates a barrier-free environment for all citizens, including PWDs-SNs. Additionally, the UNCRPD in Article 9(1) obligates member states to embark on measures to ensure access for PWDs-SNs to physical environments. However, this right does not appear anywhere under sections of the Lesotho Constitution. Furthermore, the South African Disability Policy²³⁴ identifies that systematic disadvantages and deprivation faced by PWDs-SNs are a consequence of obstacles and restraining environments ranging from restrictive access to premises and inappropriate methods of communication.

In my opinion, ensuring inclusive access to justice involves addressing linguistic, physical, and informational obstacles, and recognizing and overcoming these obstacles is essential for ensuring equitable access to justice for PWDs-SNs in both Lesotho and South Africa. It also necessitates trust in the system, competent personnel, and a commitment to fair treatment for all. Likewise, Article 5 of the African Charter on Human and Peoples’ Rights²³⁵ describes respect for one’s dignity as inclusive of the recognition of their legal status. In deliberating the status of the right to dignity, the Constitutional Court in *Dawood v. Minister of Home Affairs*²³⁶ held that human dignity informs constitutional adjudication in many ways. It informs the interpretation of other rights and is central in analyzing justifiable limitations on rights. As a means of demonstrating respect for the dignity of persons with disabilities, the criminal justice system and all actors must treat persons with disabilities as entitled to and capable of enjoying their fundamental rights and freedoms on an equal basis with others. As contended by Chipu Mushota Nkhata:

[R]ather than making assumptions of a person’s capabilities based on their disability, laws, policies, and practice must create an environment where the agency of persons with disabilities is respected, promoted, and protected. Persons with disabilities must be accorded the dignity of living full adult lives on an equal basis as others as well as provided with the support they require to make decisions that support their will and preferences.²³⁷

As a consequence, it is safe to suggest that, all the facilitative interventions for the inclusivity of PWDs-SNs must be transformative to guarantee effective access to justice as

²³⁴ 2009.

²³⁵ 1981.

²³⁶ 2000 (3) SA 936 (CC).

²³⁷ MN Chipu, ‘Failure of stakeholders to recognize and protect legal capacity of persons with mental disabilities: Assessing views and approaches of women, men and public institutions in Zambia’ (2021) Unpublished.

envisaged in the CRPD. Thus, making the criminal justice system transformative and inclusive will address the historical exclusion of PWDs-SNs from the criminal justice system in both Lesotho as well as South Africa.²³⁸ It will also ensure that the human dignity of PWDs-SNs in all circumstances is respected and protected without any derogations or exceptions.²³⁹

The governments further recognize that barriers experienced by PWDs-SNs are inspired by physical, social, economic, attitudinal, and cultural factors. Thus, accommodations need to be provided to all PWDs-SNs interacting with the criminal justice system, including complainants, accused persons, or witnesses.²⁴⁰

3.3 Impediments of Access to Justice in Nigeria

PWDs-SNs in Nigeria, similar to Lesotho and South Africa, encounter significant difficulties when it comes to accessing courts. Some of the key impediments they encounter are the following: (a) PWDs-SNs often confront discrimination and stigma because of societal negative attitudes and misconceptions about disability.²⁴¹ These negative attitudes hamper their ability to access the judiciary on the same basis as their able-bodied counterparts. (b) Environmental barriers and constraints such as lack of ramps, inadequate infrastructure, and inaccessible courtrooms make it hard for PWDs-SNs to fully participate actively in legal proceedings.²⁴² (c) Lack of an inclusive legal framework. While Nigeria, Lesotho, and South Africa have ratified the UNCRPD, implementation remains a challenge. Even though the 1999 Nigerian Constitution guarantees freedom from discrimination, there is no sufficient direct effect on procedures to safeguard and protect PWDs-SNs' rights.²⁴³

Moreover (d) lack of favorable legal literacy and awareness. Many PWDs-SNs in Nigeria, as in both Lesotho and South Africa, lack awareness of their legal rights, making legal literacy programs necessary to empower them with knowledge about their entitlements.²⁴⁴ Equivalently, (e) access to legal aid services is crucial. Providing affordable or free legal assistance guarantees that PWDs-SNs

²³⁸ C Albertyn, 'Contested substantive equality in the South African Constitution: Beyond social inclusion towards systemic justice' (2018) 34 *South African Journal on Human Rights* 441.

²³⁹ Section 10 of the Constitution.

²⁴⁰ Government of South Africa (n 138).

²⁴¹ Obraori Nmabunwa and Peters Adiola, 'Access to Justice for Persons with Disabilities in Nigeria' (2023) 13 *Cranbrook Law Review* 1, 1- 12.

²⁴² Ibid.

²⁴³ Ibid.

²⁴⁴ Rosa Maria Martinez and Varalakshmi Vemuru, 'Social inclusion of persons with disabilities in Nigeria: Challenges and opportunities' (2020) *World Bank Group*.

can fully navigate the legal system effectively.²⁴⁵ Similarly, courts are required to be sensitive to the needs of PWDs-SNs. For example, lawyers, judges, and court staff should receive training on accommodations and disability rights. Analogously, there is also a need for the active involvement of civil society organizations to guarantee accountability and monitor the implementation of disability-inclusive justice.²⁴⁶

Despite these challenges, there have been positive developments. Nigeria recently passed The Discriminations Against Persons with Disabilities (Prohibition) Act,²⁴⁷ the law that prohibits discrimination and mandates modifications to public buildings and structures for accessibility.²⁴⁸ Additionally, advocacy and research continue to shed light on the issues experienced by PWDs-SNs in accessing justice. However, efforts towards a more equitable and inclusive justice system are a necessity to guarantee that all citizens, regardless of disability status, can effectively exercise their rights through justice system mechanisms.

Accessing the justice system is one of the seventeen SDGs of the UN. It is hoped that by 2030, all nations whether developed or developing like Nigeria, Lesotho, and South Africa would have curbed inequalities in every aspect of society and safeguard the realization of the SDGs.²⁴⁹ However, access to justice for PWDs-SNs seems to be restricted as a result of the interaction with the immediate environment and negative societal attitudes about disability on the one hand and their impairment on the other hand.

Correspondingly, the Preamble of the CRPD emphasizes the resolution of mainstream disability issues as an integral part of relevant development strategies, which has been incorporated in recent international commitments to sustainable development. The 2030 Sustainable Development Agenda (the ‘Agenda’) that the UN General Assembly unanimously adopted in September 2015 bears strong potential to contribute in practical ways to the protection of the rights of PWDs-SNs and the enhancement of their welfare. As a result, SDG 16 sets out to: “promote peaceful and inclusive societies for sustainable development, provide access to justice for all, and build effective, accountable, and inclusive institutions at all levels”.²⁵⁰

Despite the existence of several international and national legislations in these three countries, there are still many obstacles impeding access to the judiciary by PWDs-SNs at present. However,

²⁴⁵ Ibid.

²⁴⁶ Ibid.

²⁴⁷ 2018.

²⁴⁸ Anietie Ewang (n 171).

²⁴⁹ Ibid.

²⁵⁰ Bal Sokhi-Bulley (n 43) 683-706.

these hindrances are surmountable where the Discrimination Against Persons with Disabilities (Prohibition) Act and the Disability and Equity Bill are fully implemented, in the case of Nigeria and Lesotho.

3.3.1 Legal Frameworks of Access to Justice of PWDs-SNs in Nigeria

Besides the international standards stipulated in the African Charter on Human and Peoples Rights, the Nigerian Constitution²⁵¹ has plenty of provisions on access to courts. For instance, section 6(6)(b) vests adjudicatory authorities in the courts to determine any question of civil rights and obligations, whereas section 46(1) warrants accessibility of the High Courts for any individual who claims that his/her basic rights are being, has been or is likely to be infringed.

Moreover, a speedy trial right is warranted by section 36(1) which provides as follows: “In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.” Similarly, section 36 (4) stipulates that whenever any individual is charged with a criminal offense, he shall have entitlement to a fair hearing within a reasonable time by a tribunal or court.

It is worth noting that even though both the Constitutions of Nigeria and Lesotho guarantee the rights of every citizen against discrimination based on enumerated circumstances,²⁵² they fail to embrace disability as a foundation like the Constitution of South Africa does. Consequently, only those rights guaranteed to all citizens as basic rights apply to disabled citizens as well. This means that where a person is discriminated against based on disability, they cannot legally claim enforcement of such acts of discrimination as a right in court. This is problematic since, in both Nigeria and Lesotho, discrimination based on disability is very common. It is submitted, therefore, that the needs of PWDs-SNs and the other difficulties they experience daily, including access to justice, could be improved through the inclusion of disability in the list of protected bases in both the Nigerian and the Lesotho Constitution just like in South Africa.

²⁵¹ Nigerian Constitution 1999.

²⁵² Ibid., Section 42

3.4 Conclusion

It is therefore imperative to highlight that the positive developments recorded in the legal and policy framework of these three states have only increased visibility and advocacy by organizations representing PWDs-SNs while improving their public accessibility, particularly in government buildings with the growing awareness of the economic potential of including PWDs-SNs in society. In moving forward, and in order, to fully realize the SDGs, these states need continued efforts in several areas, for strengthening awareness campaigns and education programs, increasing funding for disability programs and services, building the capacity of the UNCRD, enhancing access to justice and enforcement mechanisms against discrimination, investing in inclusive education and healthcare systems and promoting private sector participation in creating accessible environments and employment opportunities. By addressing these challenges and continuing to build upon existing legislation and resources, these states can move closer to creating a society where PWD-SNs have equal opportunities to participate and thrive.

Domestic, regional, and international human rights laws thus, strongly support the rights of PWDs-SNs to have effective and meaningful access to justice in all its phases, not only as a right in itself but also to enable them to fully enjoy other human rights and assume their responsibilities as members of a community. Since PWDs-SNs are usually confronted with hindrances to participation in the justice system, they will neither be able to fully exercise their rights as citizens, nor assume their responsibilities fully as members of society. Subsequently, it is submitted that relevant authorities must enact disability laws that will empower PWDs-SNs to assert effectively their rights, inclusive of the right to access the justice system whether as complainants, witnesses, defendants, experts, policemen, lawyers, judges, or simply observers.

CHAPTER 4: SUMMARY, CONCLUSION AND RECOMMENDATIONS

4.1 Introduction

This study provided a situational analysis of PWDs-SNs in Lesotho as compared to other African countries, and analyzed the current legal and policy frameworks and how they can be improved to comply with the SDGs.

This study further undertook a comparative analysis of the countries that have integrated the social model of disability into their justice systems. It looked into the social model and concentrated on the impediments to the effectiveness of access to justice for PWDs-SNs in courts of law. A comparative discussion was done between Lesotho, the Republic of South Africa, and Nigeria as some of the African states that have adopted the Banjul Charter and the CRPD, to determine the gaps to be filled in this area of study.

This chapter summarizes the study, chapter by chapter, following its provision of an in-depth understanding of the social model of disability and its efficacy and the essential elements that make it effective in accessing justice for PWDs-SNs. The chapter also proffers recommendations as to how access to justice can enhance the accommodation of PWDs-SNs in Public Institutions in Lesotho as a means for achieving Goal 16 of the Sustainable Development Agenda, adopted in 2015.

4.2 Summary

The social model of disability is a way of thinking about disability that was created by disabled people. In this model, disability is a thing that is societally created, not by the individual's mind or body. This is because PWDs- SNs encounter obstacles that hinder them from taking part in society on an equal basis as able-bodied persons. For instance, if a person is unable to access court premises because of their mobility impairment, it is not their inability to walk that is the issue, but rather their lack of accessibility to the court premises.

The social model identifies that the exclusion of PWDs-SNs from society is a consequence of hindrances or barriers to the person's ability to participate fully, rather than the result of the person's inherent inability to participate. This model frames the body of a disabled individual as

something that needs not to be “fixed,” discrediting the idea that “typical abilities” are superior thus mental or physical impairments should be remedied with the support of an external force.

Despite all instruments in existence together with the statutory laws, PWDs-SNs still face an alarming rate of social exclusion as well as a lack of access to justice. The social model identifies that the exclusion of PWDs-SNs from society is a consequence of hindrance or barriers to the person’s ability to participate fully, rather than the result of the person’s inherent inability to participate. In a similar vein, the model introduces disability as a type of socially created oppression. Thus, in the model’s perspective, disability is perceived as a socially produced injustice that is likely to be eliminated and challenged through radical social change.

A key barrier here is how justice itself is administered in Common law countries such as Lesotho, South Africa, and Nigeria which is premised on an adversarial approach. Thus, PWDs-SNs who experience challenges in communicating or expressing themselves experience major difficulties in such a system, while legislative developments designed to support witnesses such as PWDs-SNs to give evidence are premised on individuals subscribing to an identity rooted in their vulnerability, something that is markedly at odds with disabled person’s claims for equal citizenship rights.

It has been noted in the second chapter that the social model of disability shifts the focus from a person's impairments to the broader societal context, emphasizing the need to dismantle obstacles and create an inclusive and enabling environment for all. The model postulates that disability arises from the interaction between an individual’s attributes and their environment, rather than solely from their medical condition. Simply put, the model emphasizes that barriers in the environment such as architectural, attitudinal, and communication barriers are the primary factors preventing PWDs-SNs from reaching their full potential.

The model thus serves as a tool to impart knowledge and show the situations of injustice experienced by PWDs-SNs. The model advocates that all citizens are equal before the law, and this sentence should be applied equally to everyone without exceptions. The social model is thus important, for it emphasizes the fact that PWDs-SNs are rights holders and that impairment should not be used as a justification for a restriction or denial of rights.

One can submit that the social model of disability reminds us that we can modify our environment to accommodate diversity, such as fitting a square peg into a round hole world. Thus, disability is not merely about a person’s impairments; it’s about the world society creates.

Similarly, disability today is understood as a complex interplay of environmental and personal factors. For instance, an individual with hearing loss may fit the medical model for hearing disability but may not personally be identified as disabled if their environment renders appropriate support for their needs.

Notwithstanding, the social model has been both criticized and celebrated within academic discourse. While the model has been instrumental in empowering PWDs-SNs, it has been confronted with criticism for being an old-fashioned ideology. Other scholars argue that it further needs development to address contemporary problems. The model has successfully challenged discrimination and driven political activism. It has at the same time, however, created tensions and conflict within disability studies, sociology, and discussions around the body. These tensions originate from varying applications and interpretations of the model. While the model has been transformative, acknowledging its limitations and engaging with critical perspectives is essential for advancing advocacy and disability studies. Therefore, the incorporation of the social model is a prerequisite for ensuring access to justice for these marginalized persons on the same basis as any other members of society.

This chapter further concentrated on the situational analysis of PWDs-SNs in Lesotho as compared to other African countries, such as South Africa and Nigeria, and analyzed the current legal and policy frameworks. The purpose of this comparison was to determine whether Lesotho can benefit from the best practices in other countries, and how these practices can be improved in Lesotho to comply with the SDGs. The chapter noted shortcomings in the policy frameworks of these countries and impediments to a just and equitable justice for all.

It was argued that accessing the justice system is one of the seventeen SDGs of the UN. It is hoped that by 2030, all nations whether developed or developing like Lesotho, South Africa, and Nigeria, will have curbed inequalities in every aspect of society and safeguarded the realization of the SDGs. However, access to justice for PWDs-SNs seems to be restricted as a consequence of the interaction with the immediate environment and negative societal attitudes about disability on the one hand and their impairment on the other hand.

It is therefore imperative to agree that the positive developments recorded in the policy framework of these three states have only increased visibility and advocacy by organizations representing PWDs-SNs while improving their public accessibility, particularly in government

buildings with the growing awareness of the economic potential of including PWDs-SNs in the society.

In moving forward to fully realize the SDGs, however, these states need continued efforts in several areas of strengthening awareness campaigns and education programs, increasing funding for disability programs and services, building the capacity of the UNCRD, enhancing access to justice and enforcement mechanisms against discrimination, investing in inclusive education and healthcare systems and promoting private sector participation in creating accessible environments and employment opportunities. By addressing these challenges and continuing to build upon existing legislation and resources, these states can move closer to creating a society where PWD-SNs have equal opportunities to participate and thrive.

Furthermore, this study was concerned mainly with factors that impede the effectiveness of access to justice for PWDs-SNs in Lesotho's courts of law. It undertook a comparative study between South Africa and Nigeria, to determine the gaps to be filled in this area of study. The chapter has further undertaken a comparative analysis of the legal frameworks on access to justice for PWDs-SNs in Lesotho, South Africa, and Nigeria. It was argued that addressing the challenges and ensuring effective access to courts for these vulnerable persons requires concerted efforts from governments, organizations, and the community at large. An ongoing journey that needs continued awareness, education, and practical implementation.

4.3 Conclusion

A strong connection has been found in the study between social exclusion and the enjoyment of the right to access the judiciary for PWDs-SNs. Shortcomings in the legal and policy frameworks of Lesotho, South Africa, and Nigeria and impediments to a just and equitable justice for all have been also noted to exacerbate barriers confronted by these marginalized persons.

Institutions such as the judiciary systems, which were created to grant equitable justice for all when PWDs-SNs become victims of crime are one such arena in which these barriers become readily apparent since they do not provide enough accommodation measures serving a purpose for the protection of legal rights for PWDs-SNs. As a result, unchecked and unpunished crimes that were perpetrated against disabled people commonly fail to reach the prosecution stage.

While each country has culturally or historically specific practices and situations that hamper access to justice for vulnerable groups, it is important to situate these countries' specific experiences within the wider global legal context to embrace diversity and remove obstacles often

associated with lack of access to justice for PWDs-SNs. The progress that has been made so far is quite encouraging, although much work remains to be done. Furthermore, there is an almost limitless variation in the degrees and types of disability that individuals can experience. Subsequently, there is a need to train advocates who not only understand the regulatory environment but also can interact comfortably and effectively with these marginalized persons.

It is submitted that truly if Lesotho aspires to improve access to the judiciary for PWDs-SNs, the country must integrate accommodation strategies and practices adopted by South Africa and Nigeria to cater to a balanced equal justice for all.

4.4 Recommendations

4.4.1 Accommodation Measures

PWD-SNs often find themselves marginalized by society and by the justice systems in Lesotho. The country can therefore improve access to justice by equipping advocates with training. Advocates must not only be knowledgeable concerning relevant regulations and laws but should also be able to interact effectively on a personal and professional level with PWDs-SNs. This, for instance, would involve being conversant in braille and sign language, amongst others. Compliance with the SDGs will increase the certainty that PWDs-SNs attain the opportunity to learn to advocate for themselves and other disabled individuals. Technologies are available that can help these countries accomplish these goals, such as assistive devices like braille. Law schools all around the globe have begun to embrace the goal of better advocacy, but improving access will need well-prepared advocates to answer the call. Training advocates to provide services to a population with diverse needs may be a more efficient and effective way to improve access to justice than by attempting to draft regulations and laws that somehow address all possible circumstances.

Legal representation is at the heart of effective access to justice. Therefore, additional efforts are a necessity to ensure access to quality representation and legal advice in practice, for both civil and criminal cases involving PWDs-SNs. Training for prosecutors, judges, and other judicial staff should put additional emphasis on topics covering the rights of all vulnerable groups, inclusive of the rights of victims of domestic violence, persons with mental and physical

disabilities, etc. In line with the framework of the SDGs, where governments have committed to ‘leave no one behind’, including concerning effective access to justice Goal 16.

Thus, for the system to be accessible and inclusive to all, inclusive of PWDs-SNs, the justice premises should provide universal access for physical accessibility, institutional capacity should be built for sign language skills, translating, braille, and adopting policies for concessionary legal fees for PWDs-SNs. Likewise, judicial statistics are essential to judicial reform, in line with the motto: ‘If you can’t measure it, you can’t improve it,’ to obtain accurate data on the number of PWDs-SNs who have constraints in exercising their judicial right due to lack of proper accommodation in the justice systems. Moreover, individuals with intellectual disability should be accommodated as well through the provision of caretakers, mentors, and legal representation in judicial proceedings.

4.4.2 Budget and Funding

Furthermore, the government of Lesothos’ budgets should put measures in place and programs inspired by international best practices, to ensure effective access to the judiciary for PWDs-SNs in remote areas and physical access to court buildings, and free legal aid cases should also be funded. Similarly, these states should allocate important budgetary resources to the tools and IT system. As demonstrated by international practices, such tools can be efficiently employed in cases within the jurisdiction of special courts such as commercial and administrative. It is worth noting that, insufficient human resources and financial allocations to justice institutions may generate shortcomings in the effective functioning of the justice system and seriously impair access to justice for PWDs-SNs.

Moreover, access to legal representation, whether at low cost or free, is rendered moot for individuals with a variety of disabilities, who are institutionalized without clear procedures for challenging confinement and proper judicial review. Additional efforts are needed to ensure access to quality representation and legal advice in practice, in such circumstances. Examples from international practice include independent inquiries assessing the level of the problem and identifying possible solutions. Lastly, for the Lesotho government to eliminate factors that impede access to Justice for PWDs-SNs, there is a need to strengthen the implementation in practice of the rights of marginalized groups, particularly the rights of PWDs-SNs, and take measures to move

away from the segregation model (in institutions) towards a system of supported decision-making and a participatory approach.

4.4.3 SMD Effective Implementation Measures

While it is widely acknowledged that the incorporation of the social model is not just a legal obligation but a fundamental step toward a more equitable and just society for all, -Lesotho must further provide:

- (i) Awareness and training. That is, justice personnel need training on the social model and the practical application of accommodations. Workshops and training sessions can raise awareness about disability rights and the importance of providing reasonable accommodations;²⁵³
- (ii) Engage with disability organizations, NGOs, and experts to develop best practices and guidelines, and collaborate with the LNFOD and other relevant stakeholders with concerns for PWDs-SNs;
- (iii) Ensure that courtrooms, legal documents, and communication channels are accessible for PWDs-SNs, and also provide accessible formats, sign language interpreters, and other necessary accommodations during legal proceedings.²⁵⁴

Moreover, sensitizes judges, magistrates, prosecutors, and legal professionals about disability rights and the social model, and fosters a culture of inclusion and understanding within the justice system. In addition, regularly assess the implementation of accommodations, including data collection on the effectiveness of accommodations, and address any challenges. Lastly, educate the public about disability rights and the importance of an inclusive justice system, and combat stigma and misconceptions related to disability.²⁵⁵

One can argue that today, abuse and violence against PWDs-SNs occur at rates 2 to 3 times higher than the general public, making them one of the most harmed groups in the country.²⁵⁶ Thus, it is crucial to raise awareness, advocate for policy changes, and create a safer environment for PWDs-

²⁵³ Government of the Kingdom of Lesotho (n 127) 1-23.

²⁵⁴ Ibid.

²⁵⁵ Ibid.

²⁵⁶ Amylee Mailhot Amborski *et al*, 'Sexual Violence Against Persons with Disabilities: A Meta-Analysis' (2022) 23 *Trauma, Violence, & Abuse* 4, 1330-1343.

SNs. There is a need for joint work to combat this unacknowledged crisis and ensure the well-being and dignity of all members of our society.

Furthermore, legal aids are needed for these marginalized societies countrywide. Both legal aid and law enforcers like police, prosecutors, and judges need to be conversant in braille and sign language, especially for law enforcers who are pointed as special officers. Similarly, the model advocates that the justice system should belong to everyone inclusive of PWDs-SNs. It can be submitted, therefore, that the incorporation of the social model is a prerequisite for ensuring access to justice for these marginalized persons on the same basis as any other members of the society.

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