

**REMARKS BY THE HONOURABLE CHIEF JUSTICE S.P.
SAKOANE AT THE ICJ JUDICIAL WORKSHOPS:
ACCESS TO JUSTICE FOR PERSONS WITH DISABILITIES IN
LESOTHO & LGBTI RIGHTS
11TH – 12TH OCTOBER 2022**

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Honourable Judges

Your Worships Chief Magistrates and the Magistrates

Distinguished delegation of the International Commission of Jurists

1. We are gathered here to deliberate on two topics that focus on the struggle to recognize, accept, promote and defend rights of society's two vulnerable and marginalised groups. The first group is of persons known by the generic term LGBTIQ, namely lesbians, gays, bisexuals, transgender, intersex and queer people. The second group is that of persons with disabilities.
2. Like all discourses on human rights, the starting point is international human rights law and pronouncements of international, continental and regional bodies on matters affecting these two groups.

Persons with Disabilities

3. Permit me to start first with persons with disabilities as their recognition and protection is roundly accepted and has been codified by the **United Nations Convention on The Rights of Persons With Disabilities**. Article 12 thereof, provides for their equal protection before the law. This means that they enjoy the same legal capacity with other non-disabled persons. This a paradigm shift from substituted decision-making by others to supported decision-making. In substituted decision-making, a third person is a substitute decision-maker whereas in supported decision-making, the third person is only there to support making of decisions by a person with disability. The person with disability has full decision-making capacity and should be enabled and supported in that regard.
4. However, legal capacity does not equate to intellectual capacity. This marks the beginning, if not the end, of differences between the concepts of legal capacity and intellectual capacity. The former is a constant in the life of a person but the latter a variable. Whereas legal capacity is the absolute equalizer in socio-legal affairs, intellectual capacity is a relative to an individual. Its recognition and operability is individualised to the intellectual and verbal capacities of the person. Hence the necessity of assisted decision-making.
5. These conceptual differences are discussed by the Supreme Court of the United Kingdom in **A Local Authority v. JB**¹ in the context of a statute

¹ [2021] UKSC 52 (24 November 20221)

regulating the ability of persons with disabilities to choose whether or not to engage in sexual activity. The Supreme Court advances the following propositions:

- 5.1 The test for capacity applies to all decisions, whatever their character.
- 5.2 Capacity may fluctuate over time, so that a person may have capacity at one time but not at another.
- 5.3 The question is whether a person has capacity to make a specific decision at the time when it needs to be made. Ordinarily, this will involve a general forward-looking assessment made at the date of hearing. However, if there is evidence of fluctuating capacity then that will be an appropriate qualification of assessment.
- 5.4 As the assessment of capacity is decision-specific, the court is required to identify the correct formulation of the matter in respect of which it must evaluate whether a person is unable to make a decision for himself.
- 5.5 The correct formulation of the matter then leads to a requirement to identify the information relevant to the decision which includes information about the reasonable foreseeability consequences of deciding one way or another or failing to make the decision.

LGBTIQ'S

6. Whereas the **Convention on Rights of Persons with Disabilities** strives for their equality before the law, no similar convention has so far been

adopted by the United Nations for the LGBTIQs. Things started moving for the better in 2011 when the UN Human Rights Council adopted its first resolution on human rights, sexual orientation and gender identity. The High Commissioner for Human Rights published a report documenting violence and discrimination against this group. In his address to mark Human Rights on 10 December 2012², Ban Ki-moon, the Secretary General of the United Nations remarked:

“It is an outrage that so many countries continue to criminalise people simply for loving another human being of the same sex. In some cases, new discriminatory laws are being introduced. In others, these laws are not home-grown; they were inherited from former colonial powers. Laws rooted in the prejudices of the 19th century are fuelling 21st century hate. As long as the law treats certain individuals as contemptible, criminal, worthy only of punishment, broader society will have a licence to do the same.

These laws must go. We need to replace them with laws that provide adequate protection against discrimination, including on the basis of sexual orientation and gender identity. We also need a broad public education effort to help people to overcome hate and fear and accept one another for who they are.

When I meet with leaders from around the world I raise my voice for equality for the LGBT members of our human family. Many leaders say they wish they could do more, but they point to public opinion as a barrier to progress. People also cite religious beliefs and cultural sentiments.

I fully respect peoples’ rights to believe and to follow in their own lives whatever religious teachings they choose. This, too, is a human right. But there can be no excuse for violence or discrimination, ever.

I understand it can be difficult to stand up to public opinion. But just because a majority disapproves of certain individuals does not entitle the state to withhold their basic rights. Democracy is more than majority rule. It requires defending vulnerable minorities from hostile majorities. Governments have a duty to challenge prejudice, not to yield to it.”

7. Two years later on 22 May 2014, the **African Commission on Human and People’s Rights** woke up from its slumber and adopted **Resolution**

² Mail & Guardian January 11 to 17, 2013 p.21

274³. The resolution condemns violence and human rights violations against persons on the basis of real or imputed sexual orientation or gender identity. Mr. Justice Edwin Cameron, a respectable and respected openly gay judge, writes⁴ as follows on the plight of LGBTIQ community:

“For us in the LGBTI community, three large challenges remain.

First, silence and invisibility remain the great suppressants of progress. Unlike race and gender our defining condition is generally invisible.

Second, we continue to be inhibited by shame, because the very nature of our differentiation lies in sexual desire and sexual functioning – and so much shame still attends the subject of sex.

Third, the strength and depth of the history of our repression, often impelled by biblical teaching, remain enormous. It is particularly important to emphasise, on an occasion hosted by the Ujamaa Centre, the disgraceful and destructive role that those who call themselves men and women of the spirit, and of God, have played in persecuting LGBTI people.

Despite these continuing obstacles, the manifestation of particularly black LGBTI self-identification throughout Africa heralds irreversible change across our continent.

Why is this? The first is fear of change in circumstances of unstable transition.

The second is that LGBTI identify and practices challenge traditional gender roles and authority. Our lives and our loves defy received concepts of sexuality. This means we also challenge gender-based hierarchies. We defy the patriarchy that lies like a heavy hand across much of our world and our continent. The result is rage, insecurity and violence.”

8. In this Kingdom of Lesotho, the LGBTIQ community factually exists as part of society. This was attested to in 2016 by the People’s Matrix organisation and the Population Services International (PSI) in their studies. Their members did not then come out in the open as they are now doing. The reasons for their hiding were articulated thus⁵:

³ Mail & Guardian April 15 to 21 2016, p.22

⁴ Op.cit

⁵ Public Eye 19 August, 2016 p.16

“Living a charade is one of the injustices society has foisted on the gay community. They are forced into shameful silence; they are forced to conform to societal norms and expectations as well as family pressures which compels a lot of gay men to marry despite knowing that they are attracted to other men. To tally with conformity, they live double lives, have a family but have a life elsewhere where they find comfort.

“We have gays, MSM and those who are bisexual. The communities sexually connect somehow so there is need to break the silence. Gays are judged or stereotyped not realising that the forced silence is the key contributor of HIV infections.

With rejection comes fear and with it comes reluctance to disclose.”

What Are the Structural Barriers?

9. Article 5 of the **Convention on Rights of Persons with Disabilities** lays down the principle of reasonable accommodation which means:

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

10. This principle finds expression in section 3 of the **Persons with Disability Equity Act No.2 of 2021** which provides that:

“reasonable accommodation” means necessary and appropriate modification and adjustments to such places which provide a service to the members of the public which do not impose a disproportionate or undue burden when needed in a particular case, to ensure to a person with disability, the enjoyment or exercise of all human rights and fundamental freedoms on an equal basis.”

11. What this means for the judiciary is that courts should be physically accessible and court process disability-friendly. For example, we should have special ramps to ease movement, automatic doors and doors next to turnstiles, visual and audio augmentation devices, braille produced documentation and suitable designed parking for vehicles.

12. For persons with hearing impairment, courts should have sign language interpreters or written communication where sign language interpreter is not available.

Any Legal Barriers?

13. The Constitution of Lesotho, 1993 guarantees two important rights: the right to respect for private and family life (in section 11) and freedom from discrimination (in section 18). There is no local jurisprudence yet on what these rights mean for the LGBTIQ community. International jurisprudence⁶ on comparative constitutional and conventional provisions is that sexual orientation falls within the prohibited grounds of discrimination, be they be on grounds of “sex”, “other status” or an aspect of diversity. In a seminal judgment⁷, the Supreme Court of Belize struck down a law which criminalised homosexuality. It said that it could not act on the prevailing majority views in society or what is popularly accepted as moral. There must be demonstrated that some harm will be caused should the proscribed conduct be rendered unregulated.

Participation In Judicial Processes

14. The competency of persons with disabilities to participate in criminal trials is undermined by section 219 of the **Criminal Procedure and Evidence Act No.7 of 1981**. It reads as follows:

“No person appearing or proved to be afflicted with idiocy, lunacy or inability or labouring under any imbecility of mind arising from intoxication or otherwise whereby he is deprived of the proper use of

⁶ **Using the Courts to Protect Vulnerable People: Perspectives from the Judiciary and Legal Profession in Botswana, Malawi and Zambia** (SALC et al) 2015

⁷ *Orozco v. Attorney General (Commonwealth Lawyers Association and others, interested parties)* (2016) 41 BHRC 1

reason, shall be competent to give evidence while so afflicted or disabled.”

15. Section 219 of the **Criminal Procedure and Evidence Act, 1981** has been impliedly repealed by section 32 (2) and (4) of the **Persons with Disability Act No.2 of 2021**. The subsections read as follows:

- “(3) A person with disability shall be competent and compellable to give evidence in a criminal and civil case in any court in Lesotho or before a Magistrate on a preparatory examination.
- (4) A person with disability shall be assisted in every possible manner to effectively, directly and indirectly participate in all legal proceedings and other preliminary stages of administration of the judicial process.”

16. A person may be of unsound mind wholly or only partially in relation to one topic. If he has lucid intervals, he is competent to participate in connection with those topics on which his mind is sound. However, his evidence must be treated with necessary caution. In this sense, the rigour of section 219 is mitigated by the continuing assessment of the capacity of the person⁸.

17. The section also impacts on proof in sexual offences. Section 52 (2) (f), (i) of the **Penal Code, 2010** makes it an offence to have sexual relations with a complainant who is affected by “physical disability, mental incapacity, sensory disability, medical disability, intellectual disability, or other disability, whether permanent or temporary”.

⁸ **Swift's Law of Criminal Procedure** 2nd edition p.395

18. Questions of competency of the complainant arise. For example, if the court finds that complainant has a disability of a mental, intellectual or sensory nature, her evidence may not be competently receivable and proof of the offence to meet the threshold of proof beyond reasonable doubt undermined. The mitigating factor is that the complainant is not rendered incompetent by reason of deficiency in senses of perception or incapacity to express herself by ordinary means. What matters is that the complainant must be able to comprehend the oath and communicate through an interpreter.⁹
19. The questions of competency of a witness and the procedure to deal with it are distinct and must be dealt with separately¹⁰. Assessment of competency is a factual enquiry as to whether a witness can understand the oath and the nature of proceedings. This enquiry is made before the swearing in of the witness. It is conducted by way of a trial-within-a-trial as is the case with the voluntariness of a confession. The enquiry involves two aspects: (a) whether the witness suffers from a disability and (b) whether as a direct result, he is deprived of the proper understanding and use of reason¹¹.
20. If the enquiry yields a positive answer on both aspects, the witness is incompetent to testify. If the answer is negative on both aspects, the witness is competent to testify. The witness can then be sworn in or admonished to speak the truth. He can testify and be communicated with by sign language interpretation if deaf. But the fact that the witness is

⁹ Du Toit et al. (1997) Commentary On The Criminal Procedure Act (Juta) 23-26

¹⁰ Hoffman and Zeffert The South African Law Evidence 3rd edition p.1014

¹¹ Op.cit. 931

allowed to testify does not preclude the court from later declaring them incompetent based on the witness's subsequent answers and conduct.¹²

Treatment In Correctional Institutions

21. Persons with disabilities and LGBTIQs may find themselves in conflict with the law and be found guilty of criminal offences and sentenced to correctional institutions. As currently constructed, correctional institutions do not have special cells for them. According to Principle 9 of the **Yogyakarta Principles**¹³, the LGBTIQs must be treated with humanity. States are, therefore, obliged to:

“(a) Ensure that placement in detention avoids further marginalising persons on the basis of sexual orientation or gender identity or subjecting them to risk of violence, ill-treatment or physical, mental or sexual abuse;

.....

(c) Ensure, to the extent possible, that all prisoners participate in decisions regarding the place of detention appropriate to their sexual orientation and gender identity;

(d) Put protective measures in place for all prisoners vulnerable to violence or abuse on the basis of their sexual orientation, gender identity or gender expression and ensure, so far as is reasonably practicable, that such protective measures involve no greater restriction of their rights than is experienced by the general prison population;

(e) Undertake programmes of training and awareness-raising for prison personnel and all other officials in the public and private sector who are engaged in detention facilities, regarding international human rights standards and principles of equality and non-discrimination, including in relation to sexual orientation and gender identity.”

22. Section 3 2 (2) of the **Persons with Disability Equity Act, 2021** provides that

¹² Op.cit.931

¹³ September v. Subramoney NO [2019] 4 A11 SA 927 WCC

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

23. It is not apparent to me why Parliament saw it fit to confer such powers on the Chief Justice when construction of correctional facilities is the responsibility of the Executive and the Judiciary is not responsible for their welfare. The current **Prison Rules, 1957** provide that untried inmates shall, as far as possible be kept apart from convicted inmates. This calls for separate wings in correctional institutions with special cells. A collaborative effort between the Chief Justice and the correctional and political authorities is called for in operationalising section 32 (2).

Conclusion

24. The administration and enforcement of the **Persons with Disability Act, 2021** calls for reforms of judicial processes and procedures. This entails change in judicial mindset and cultivation of a disability sensitive culture. Just as there are special courts and procedures for children in the Children’s Court, there might as well be a need to have special correctional facilities for persons with disabilities.
25. As far as LGBTIQs are concerned, they might have to be provided cells separate from those habited by “straight” inmates. This also calls for changes in the mindset of correctional officers and cultivation of an LGBTIQ sensitive culture.