CHAPTER 2

SEXUAL AND REPRODUCTIVE RIGHTS OF WOMEN WITH DISABILITIES: IMPLEMENTING INTERNATIONAL HUMAN RIGHTS STANDARDS IN LESOTHO

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Summary

Lesotho is party to a number of international human rights instruments including those which provide for equality and non-discrimination of women as well as those that guarantee the rights of persons with disabilities. This article discusses how Lesotho may fulfil its international human rights obligations to realise sexual and reproductive rights of women with disabilities. It explores the international legal framework on sexual and reproductive rights; in particular the standards and obligations contained in the UN Convention on the Rights of Persons with Disabilities (CRPD). It assesses the extent to which the legal and policy frameworks in Lesotho adhere to international standards and argues that alignment of the national legal framework with international standards is the starting point towards fulfilment of the state's obligation to ensure that women with disabilities enjoy sexual and reproductive rights.

1 Introduction

The World Programme of Action of 1982 recognises women and girls with disabilities as a marginalised group.[1] History reflects that women all over the world have for a long time been discriminated against simply because of being women and that such discrimination continues to exist.[2]

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1 World Programme of Action concerning Disabled Persons, Report of the Secretary General, 15 September 1982, A/RES/37/351/Add.1, para II/2/45, 30.

2 United Nations Convention on Elimination of All forms of Discrimination Against Women (CEDAW), adopted by United Nations General Assembly (UNGA) on 18 December 1979, Preamble, para 6.

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Similarly, persons with disabilities have suffered from discrimination and marginalisation based on their disabilities. This resulted in women with disabilities suffering multiple discrimination based on their sex as women and secondly on account of their status as persons with disabilities.[3] This notwithstanding, most national laws and policies, to date fail to address the injustices suffered by women with disabilities in their entirety. Laws and policies that address gender fail to address prejudices suffered by women and girls with disabilities, and those that address disability have forgotten gender.[4] As a result, women with disabilities are less likely to exercise or even access education and information about sexual and reproductive rights.[5] Furthermore, women with disabilities who have children sometimes face rejection and scorn by both members of their families and the communities in which they live.[6]

Developments at the international level such as participation of women with disabilities in the International Year of Disabled Persons in 1981, the UN Decade of Disabled Persons 1983-1992, and in the World Conferences on Women culminated in the adoption of instruments such as World Programme of Action 1982,[7] Standard Rules on the Equalization of Opportunities for Persons with Disabilities 1993.[8] The United Nations also adopted the Convention on Elimination of all Forms of Discrimination against Women (CEDAW) 1979[9] and Convention on the Rights of Persons with Disabilities (CRPD) 2006.[10] These instruments have led to a confirmation of women with disabilities as rights-bearers and important members of society.[11] However, of the international instruments adopted, the CRPD is the only one which has a legally binding provision that outlaws discrimination on the basis of both gender and disability.[12]

Lesotho has joined the move of viewing women with disabilities as rights-bearers by ratifying a number of international human rights

3 SAD Kamga 'The rights of women with disabilities in Africa: Does the Protocol on the Rights of Women in Africa offer any hope?' 2011 Centre for Women Policy Studies *Barbara Faye Waxman Fudicia Papers on women and girls with disabilities.* See also E Mandipa 'A critical analysis of the legal and institutional frameworks for the realisation of the rights of persons with disabilities in Zimbabwe' 2013 (1) *African Disability Rights Yearbook* 73.

4 CRPD Committee, Draft General Comment No 3: Article 6 'Women with disabilities' UN Doc CRPD/C/14/R.1 (22 May 2015) para 2.

5 WHO 2009 'Promoting sexual and reproductive health for people with disabilities' *WHO/UNFPA Guidance Note* 1. See also Centre for Reproductive Rights 'Reproductive rights and women with disabilities: A human rights framework' *Briefing Paper* 1.

6 Centre for Reproductive Rights *Briefing Paper* 1 (n 5 above).

7 World Programme of Action concerning Disabled Persons, 1982 (n 1 above).

8 Standard Rules on the Equalization of Persons with Disabilities, adopted by the United Nations General Assembly, forty-eighth session, resolution 48/96, annex, of 20 December 1993.

9 CEDAW (n 2 above).

10 United Nations Convention on the Rights of Persons with Disabilities, adopted by UNGA on 13 December 2006 (CRPD).

11 Mandipa (n 3 above) 73.

12 Draft General Comment No 3 (n 4 above) para 3.

instruments including CEDAW and the CRPD.[13] Amongst rights recognised in these instruments are sexual and reproductive rights of all, including women with disabilities.[14] Sexual and reproductive rights are broadly defined as basic human rights to which every human being is entitled and include having a safe and satisfying sexual life, and being able to decide over one's body without coercion, violence or discrimination. World Health Organisation (WHO) has adopted several definitions of sexual health but the most current defines sexual health as:

> [A] state of physical, emotional, mental and social well-being in relation to sexuality. It is not merely the absence of disease, dysfunction or infirmity. Sexual health requires a positive and respectful approach to sexuality and sexual relationships, as well as the possibility of having pleasurable and safe sexual experiences, free of coercion, discrimination and violence. For sexual health to be attained and maintained, the sexual rights of a*ll persons* must be respected, protected and fulfilled.[15]

In its Draft General Comment on women with disabilities under article 6, the Committee on the Rights of Persons with Disabilities (CRPD Committee) which is a body established under the CRPD to oversee implementation of its provisions, has identified violation of sexual and reproductive rights of women and girls with disabilities as one of the three main areas of concern, which states parties have to focus on when implementing the CRPD at the national level.[16] There has not been extensive research on sexual and reproductive rights of women and girls with disabilities in Lesotho. Available literature which is very limited, can be divided into two: being studies that focus on sexual and reproductive rights of women in the context of gender based violence and HIV on the one hand and studies that focus on persons with disabilities in general on the other. Lesotho National Federation of the Disabled (LNFOD),[17] together with other research partners has undertaken various research projects on persons with disabilities generally but none on sexual and reproductive rights of women with disabilities. Relevant to this article are a study on the living conditions

13 Lesotho ratified the CEDAW on 22 August 1995 and acceded to the CRPD on 2 December 2008.

14 For instance art 12(2) of CEDAW creates a positive obligation for states to lay a foundation for women's reproductive choice. See also the statement of the UN Committee on elimination of all forms of discrimination against women (CEDAW Committee) at its fifty-seventh session 10-28 February 2014 in which states parties are urged to ensure the full respect, protection and fulfilment of sexual and reproductive rights, in line with human rights obligations available on www.astra.org.pl/…/243-cedaw-statement (accessed 14 August 2014). Article 25 of CRPD provides for Persons with disabilities' right to health on an equal basis with others, 'including in the area of sexual and reproductive health and population-based public health programs'.

15 WHO 2006 'Defining sexual health' http://www.who.int/reproductivehealth/topics/sexual/Health/sh_definitions/en/ (accessed 29 March 2015).

16 CRPD Committee Draft General Comment No 3 (n 4 above) para 5.

17 An umbrella body of organisations of persons with disabilities (DPOs).

of persons with disabilities,[18] baseline study on disability mainstreaming[19] and the situational assessment study on HIV/Aids and people with disabilities.

The objective of this article is to consolidate findings in previous research done. It uses data from other similarly placed countries to fill the gap on implementation of Lesotho's obligations towards sexual and reproductive rights of women with disabilities. In this regard, the article uses the UN Economic and Social Council definition of implementation which is:

> [M]oving from a legal commitment, that is, acceptance of an international human rights obligation by ratification of, or accession to, a treaty, to realization by the adoption of appropriate measures and ultimately the enjoyment by all of the rights enshrined under the related obligation.[20]

To achieve the objective of filling the gap on implementation of Lesotho's obligations towards sexual and reproductive rights of women with disabilities, the article reviews the national legal and policy frameworks of Lesotho and the extent to which they are compliant with the provisions of CRPD relating to sexual and reproductive rights of women with disabilities. It is divided into three sections. Section one gives background information on Lesotho and the status of women with disabilities in Lesotho. Section two discusses sexual and reproductive rights of women with disabilities as contained in various international human rights instruments and makes an assessment of the legal and policy frameworks of Lesotho against the standards contained in the international human rights instruments. Section three concludes the article by summarising states' obligations towards sexual and reproductive rights of women with disabilities as contained in the CRPD and makes recommendations on how to overcome challenges which inhibit their full implementation in Lesotho.

1.1 About Lesotho

Lesotho is a small mountainous country located in Southern Africa totally surrounded by the Republic of South Africa. Being one of the least developed economies in the Southern African Development Community (SADC) region, its economy is dependent on sale of water, wool, mohair

18 Y Kamaleri & AH Eide 'Living conditions among people with disabilities in Lesotho: A national representative study' *SINTEF Technology and Society Global Health and Welfare* (Living Conditions Study).

19 Communities of practice in disability advocacy for mainstreaming (COPDAM) Baseline Study: Lesotho 2013 Report (Disability Baseline Study 2013).

20 UN Economic and Social Council 'Report of the High Commissioner on Human Rights on implementation of economic, social and cultural rights' UN Doc E/2009/90, para 3.

and most recently diamonds.[21] According to the 2006 Population and Housing Census, the population of Lesotho was about 1 880 661 while the most recent estimates calculate the figure to be slightly over two million.[22] As at 2012, Lesotho had a Human Development Index (HDI) value of 0.461 and was ranked 158th out of 187 countries on the HDI.[23] According to the 2006 Population and Housing Census, 51,4 per cent of the total population is female.[24] Seventy-seven per cent of the total population resides in rural areas while 23 per cent resides in urban areas.[25] The unemployment rate in Lesotho is very high as the Integrated Labour Force Survey conducted by the Bureau of Statistics (BOS) in 2008 indicated that 22,7 per cent of the economically active population is unemployed, out of which 14,6 per cent are females.[26] Although these are not the most recent statistics, what they indicate however is that women constitute the highest number of the poor and unemployed in Lesotho, a factor which affects their ability to exercise most of the basic human rights.

Studies to determine the population of persons with disabilities in Lesotho were conducted for the first time after the turn of the Millennium.[27] According to studies undertaken by the Ministry of Education in 2002 and the then Ministry of Health and Social Welfare in 2008, between 4,2 and 5,2 per cent of the population has one form of disability or another.[28] At the time of the 2006 Population and Housing Census, the figure was 3,7 per cent, 2,1 per cent of which were males, while 1,6 per cent constituted females.[29]

1.2 Women with disabilities and the barriers they face in Lesotho

Women with disabilities constitute about 1,6 per cent of the population of Lesotho (about 32 000 people),[30] yet despite these significant figures, their rights are often overlooked, neglected and violated. In Lesotho and many

21 T Masimba 'Lesotho's economy catches flu – from big brother's sneeze' *African Renewal Online* December 2011 www.un.org/africarenewal/…/Lesotho's (accessed 14 August 2014).
22 Statistics http://countryeconomy.com/demography/population/lesotho (accessed 16 February 2015). See also World Population Review 2014 'Lesotho Population 2014' www.worldpopulationreview.com/countries/lesotho-population (accessed 16 February 2015).
23 UNDP 2014 Lesotho – Human Development Reports http://www.hdr.unpd.org/sites/all/themes/…LSO (accessed 14 August 2014).
24 World Population Review 2014 (n 22 above).
25 As above.
26 Lesotho Integrated Labour Force Survey 2008 www.bos.gov.ls/…/2008_ILFS_report (accessed 14 August 2014).
27 Living Conditions Study (n 18 above) 14.
28 World Population Review 2014 (n 22 above).
29 As above.
30 Living Conditions Study (n 18 above).

other countries, they face barriers to information and services required for fulfilment of sexual and reproductive needs.[31] It is important to note that challenges which they face in accessing sexual and reproductive health rights are not raised by the disabilities themselves but are precipitated by historic as well as current barriers imposed by the environment in which they live.[32] Whereas all persons with disabilities in Lesotho face challenges in their fight for equality, the plight of women with disabilities is made worse by the fact that they face the double disadvantage of disability and womanhood. They suffer the scourge of discrimination as women, and isolation and exclusion within their families, in public services and within the society because of their disabilities.[33] As a result, most women with disabilities in Lesotho live lives characterised by poverty, illiteracy and joblessness.

According to a 2013 baseline study on disability, the barriers which inhibit persons with disabilities from exercising their rights, including sexual and reproductive rights can be categorised into physical and institutional, communicational as well as attitudinal barriers.[34] Physical barriers are caused by the infrastructure such as inaccessible healthcare buildings, lack of disability – friendly transportation facilities as well as absence and or inaccessibility of roads to some healthcare centres.[35] Institutional barriers on the other hand include laws and policies that do not accommodate the needs of women with disabilities,[36] as well as absence of laws or non-implementation of laws that regulate and guard against practices such as forced or coerced sterilisation,[37] forced abortion and forced marriages. Persons with disabilities are at higher risk of HIV and other sexually transmitted infections (STIs) yet they are often left out in prevention and treatment programmes.

According to the situational assessment study, as at 2011, about 27,5 per cent of persons with disabilities had not heard about HIV/Aids and its modes of transmission.[38] This is attributed to communicational barriers in as much as most information materials on sexual and reproductive health

31 WHO 2009 (n 5 above). See also LNFOD 2011 'Situational assessment analysis study of HIV/Aids and persons with disabilities in Lesotho' (HIV Situational Assessment Study 2011) 11 which reflects that while persons with disabilities are more exposed to HIV/Aids risk factors, they are often excluded from prevention and treatment programmes.
32 Living Conditions Study (n 18 above) 16.
33 As above.
34 Disability Baseline Study 2013 (n 19 above) 7.
35 Disability Baseline Study 2013 (n 19 above) 8.
36 As above.
37 Women and Law in Southern Africa, Research and Education Trust (WILSA) & Community of Women living with HIV (CW) 2014 'Forced sterilization of women living with HIV: Lesotho case study' Unpublished research report (Study on forced sterilization of women living with HIV) 1.
38 HIV Situational Assessment Study (n 31 above) 33.

including HIV are not accessible to persons with hearing and visual impairments.[39] Non-recognition of sign-language as an official language and failure to provide such in essential services such as healthcare institutions and police stations also negatively affects the ability of women with hearing impairment to access information that is vital to their sexual and reproductive rights including obtaining relevant information or reporting sexual offences in privacy.[40]

Attitudinal barriers imposed by the non-disabled members of society are often influenced by stereotypical beliefs about women and persons with disabilities as well as sentiments. As a result of these beliefs and sentiments, women with disabilities are dehumanised, called mocking names or viewed as objects of charity.[41] Amongst the barriers associated with attitudes, are that women with disabilities are denied the right to take part in making important decisions about their lives including establishment of sexual relationships, deciding who to marry and found a family with, whether or not to have children and the number and spacing of children if they decide to have them.[42]

Research on forced sterilisation of women living with HIV has unearthed a practice of forced, coerced and uniformed consent to sterilisation of women living with HIV in Lesotho.[43] In some of the cases parents, relatives and caregivers impose their own decisions relating to sterilisation of women whom they view as vulnerable or as being burdens to the families. Although this study did not focus on women with disabilities, the practice of forced or coerced sterilisation has implications on sexual and reproductive rights of women with disabilities whether living with or without HIV.

Attitudinal barriers also result in women with disabilities being subjected to physical, emotional and sexual abuse as well as other forms of gender based violence which also increases the risk of HIV and other STIs.[44] The belief that persons with disabilities are asexual is entrenched in most Basotho including healthcare professionals which affects access of persons with disabilities to information relating to sexual health, family planning, treatment of STIs and access to HIV/AIDS counselling and testing services.[45] Because of these beliefs, where a woman with a disability has fallen pregnant and attempts to access prenatal services she is not given services of the same quality as other non-disabled women.

39 As above.
40 L Chipatiso et al 'The Gender-based violence indicators study: Lesotho' *Gender Links* (GBV indicators study) (2015).
41 Disability Baseline Study 2013 (n 19 above).
42 WHO 2009 (n 31 above) 3 illustrates the general problem and the Living Conditions Study (n 18 above) 16 reflects the same in Lesotho.
43 Study on Forced Sterilization of Women Living with HIV 2014 (n 37 above).
44 HIV Situational Assessment Study 2011 (n 31 above).
45 As above.

The effects of these barriers include overlooking, denying or violating sexual and reproductive rights which result in high maternal and infant mortality ratios which according to United Nations Children's Fund (UNICEF) remain unacceptably high in sub-Saharan Africa.[46] As at 2013, Lesotho had very high maternal mortality ratio of 490 deaths out of every 100 000 live births ranking at an almost similar level with Malawi which has the ratio of 510 and Zimbabwe which is 470 while other countries in the region had lower ratio such as Swaziland at 310, Botswana 170, South Africa 140 and Namibia 130.[47] In Lesotho, the bulk of these deaths occur in rural areas where women have limited access to quality sexual and reproductive health services.[48]

The Living Conditions study also found that incidents of infant mortality amongst women with disabilities aged 15 years and above, at the time of research were 53 per cent higher compared to women without disability of the same age.[49] Although due to limited information the Living Conditions study could not explain the difference of infant mortality between women with disabilities and those without disabilities, one can attribute this difference to the fact that the bulk of deaths occur in rural areas where there are limited resources and that a large number of persons with disabilities live in the rural areas.[50] Therefore women with disabilities who reside in rural areas are at a higher risk of maternal and infant mortality because of lack of healthcare facilities that accommodate their needs.

The foregoing discussion has illustrated a dire status of sexual and reproductive health rights of women with disabilities in Lesotho. Based on this, below is a discussion of how things ought to be in terms of international human rights standards on sexual and reproductive rights of women in general and women with disabilities in particular. These standards are used in the article as a yardstick against which Lesotho's laws and policies are measured.

2 Using international human rights standards on sexual and reproductive rights of women with disabilities to assess national laws and policies

By definition, sexual and reproductive health rights carry with them a number of freedoms including:

- Equality and non-discrimination;

46 UNICEF http://www.unicef.org (accessed 14 September 2015).
47 World Population Review 2014 (n 22 above).
48 As above.
49 Living Conditions Study (n 18 above) 53.
50 Living conditions Study (n 18 above) 16.

- Right to marry and found a family;
- Right to reproductive healthcare;
- Right to give informed consent to all medical procedures; and
- Freedom from sexual abuse and exploitation.

2.1 Equality and non-discrimination

2.1.1 International standards on equality and non-discrimination

Equality is a basic human rights principle on the basis of which freedom from discrimination is guaranteed as the most fundamental human right that lays a foundation for enjoyment of all other human rights,[51] hence this article dwells more on discussion of equality and non-discrimination than other rights, as it forms a foundation for implementation of the other rights and freedoms that relate to sexual and reproductive rights. Principles of equality and non-discrimination are enshrined in both international human rights instruments and in customary international law. The right to freedom from discrimination is provided for in virtually all human rights instruments as a guiding principle for implementation of all other human rights.[52] Under customary international law, the obligation not to discriminate has attained the status of a peremptory norm from which no derogation is allowed.[53] State's acceptance of equality as a *grund norm* in relation to women with disabilities is reflected in several binding and non-binding instruments such as the *Declaration on the Rights of Persons with Disabilities*,[54] *The Standard Rules on Equalisation of Opportunities for Persons*

51 Universal Declaration of Human Rights (Universal Declaration) 1948 article 1 which provides that 'all human are born free and equal in dignity and in rights'.

52 For instance, art 2 of Universal Declaration on Human Rights (Universal Declaration) 1948, arts 2 and 26 of International Covenant on Civil and Political Rights (CCPR) 1966, art 2(2) of the International Covenant on Economic, Social and Cultural Rights (CESCR) 1966, art 2 of the Convention on the Rights of the Child (CRC) 1989 and art 2 of the African Charter on Human and Peoples' Rights (African Charter) 1981 all prohibit discrimination on several grounds such as sex or 'other status'. The term 'other status' has been interpreted to include disability. However its inclusiveness has been discarded by other disability academics and activists in that it does not make the injustices that persons with disabilities suffer visible and therefore makes it less likely for governments to address them. Over and above the general prohibition of discrimination, CEDAW and the Protocol to the African Charter on the Rights of Women in Africa (African Women's Protocol) 2003 prohibit discrimination against women in particular. In its art 23(b), the African Women's Protocol specifically prohibits discrimination against women with disabilities on the grounds of their disability.

53 N Lerner *Group rights and discrimination in international law* (2003) 2.

54 Declaration on the Rights of Persons with Disabilities 1957 art 10 provides that 'disabled persons, whatever their origin, nature and seriousness of their handicaps and disabilities have the same fundamental rights as their fellow citizens'. It goes on to protect persons with disabilities against all exploitation, regulation and treatment of a discriminatory nature.

with Disabilities (Standard Rules),[55] and *Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care* (MI Principles).[56] With specific reference to women and girls with disabilities, the Beijing Declaration provides that:

> [States] are determined to intensify efforts to ensure equal enjoyment of all human rights and fundamental freedoms for all women and girls who face multiple barriers to their empowerment and advancement because of such factors as … disability,[57]

… while the Beijing Platform for Action urges states to:

> strengthen and encourage implementation of the recommendations contained in the standard rules on equalisation of opportunities for persons with disabilities, paying special attention to ensure non-discrimination and equal enjoyment of all human rights and fundamental freedoms by women and girls with disabilities including their access to information and services in the field of violence against women …[58]

CRPD, which is the first and by far the only binding international instrument that focuses entirely on protection of the rights of persons with disabilities is premised on the principles of equality and non-discrimination. It recognises that persons with disabilities face difficult conditions because of being subjected to multiple and aggravated forms of discrimination on the basis of 'race, colour, sex, language, religion, political or other opinion …'[59] It emphasises the need for gender mainstreaming[60] and articulates its purposes as 'to promote, protect and ensure the full and *equal* enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity'.[61] It also stipulates that equality between women and men shall be considered as one of the core principles of the Convention,[62] and demands that state parties combat sex-based stereotypes, prejudices and harmful practises related to persons with disabilities.[63]

Article 6 of CRPD contains state parties' obligation to ensure gender equality for women and girls with disabilities. In its Draft General

55 United Nations Standard Rules on Equalisation of Opportunities for Persons with Disabilities provide that the needs of each and every individual are of equal importance and that all resources must be employed in such a way as to ensure that every individual has equal opportunity for participation.
56 Principles for the Protection of Persons with Mental Illness and Improvement of Mental Health. Adopted by the UN General Assembly in 1991, principle 1(4) provides that there shall be no discrimination on the grounds of mental illness.
57 Fourth World conference on Women, Beijing 1995 *Declaration* para 32.
58 Fourth World conference on Women, Beijing 1995 Action for Equality, Development and Peace *Platform for Action.*
59 CRPD, Preamble, para (p).
60 CRPD, Preamble, para (s).
61 CRPD, art 1(1) (emphasis added).
62 CRPD, art 3(g).
63 CRPD, art 8(b).

Comment on article 6, the CRPD Committee, notes that women and girls with disabilities are often confronted with intersectional discrimination. That is, several forms of discrimination based on various layers of identity which may intersect and produce new forms of discrimination which are unique and cannot be correctly understood by describing them as double or triple discrimination.[64] This multiple and intersectional discrimination may be direct or indirect discrimination, in the form of denial of reasonable accommodation or structural or systemic discrimination.[65] That is, a woman or girl with disability may be subjected to intersectional discrimination in a situation where some of her rights such as the right to non-discrimination, freedom from torture and ill-treatment, protection of personal integrity, right to legal capacity, right to family, right to health and others are violated as a result of the intersection of more than one of her identities being her sex, age, disability, social class, the perception that she is innocent, weak, passive, unable or unlikely to speak out, or unlikely to be believed by others to be the object of a sexual assault.[66]

The challenge that faces women and girls with disabilities is that most international and national legal frameworks focus on single dimension discrimination on the basis of which courts provide remedies that do not take into account the magnitude of the discrimination suffered.[67] Hence article 6 read with other provisions of CRPD requires states parties to adopt a twin-track approach: gender mainstreaming in disability laws and policies as well as disability mainstreaming in gender laws and policies.[68]

When interpreting the right to health as contained in article 12 of CEDAW, the CEDAW Committee, which is a committee established under CEDAW to oversee its implementation emphasised that 'special attention should be given to the health needs and rights of women belonging to disadvantaged and vulnerable groups such as … women with physical or mental disabilities'.[69] The need for 'special attention' to be given to women with disabilities is also reiterated in the 1993 Vienna Declaration and Program of Action which asserts that 'special attention' must be given in order to eliminate discrimination and to ensure equal enjoyment of all human rights and fundamental freedoms by persons with disabilities.[70] The CRPD refers to this as the principle of reasonable

64 Draft General Comment No 3 (n 4 above) para 8.
65 Draft General Comment No 3 (n 4 above) para 20.
66 As above.
67 Draft General Comment No 3 (n 4 above) para 9.
68 Draft General Comment No 3 (n 4 above) para 14.
69 UN Committee on the Elimination of Discrimination Against Women (CEDAW Committee) General Recommendation No 24: Article 12 of the Convention (Women and Health) 1999, UN Doc A/54/38/Rev.1, chap 1 http://www.refworld.org/docid/453882a73.html (accessed 29 March 2015).
70 Vienna Declaration and Programme of Action 1993.

accommodation.[71] It defines 'reasonable accommodation' and the extent to which it has to be provided as:

> 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 …[72]

In setting forth the duty for reasonable accommodation in the area of sexual and reproductive rights, article 9 of CRPD mandates state parties to ensure to all persons with disabilities, access on an equal basis with others, to the physical environment, transportation, information and communication, including information and communications technology and systems as well as other facilities and services that are open or provided to the public. States' obligations contained in this article are further elaborated by the CRPD Committee General Comment No 2[73] wherein it stated that accessibility is a precondition for persons with disabilities to live independently and participate fully and equally in society. That is, Lesotho as a state party, has a duty to ensure that clinics, hospitals and other healthcare facilities are designed or redesigned in a manner that make them easily accessible to women who have any form of disabilities and failure to do so amounts to discrimination on the basis of disability. Appropriate measures in this regard include ensuring that buildings have ramps for independent access by a woman on a wheelchair and that there are no obstacles that inhibit access by a woman who has visual impairment and uses a cane. Because of the mountainous terrain in Lesotho that makes most places inaccessible on foot, it is also essential to ensure that the budget for the Ministry of Health includes enough emergency vehicles to transport expectant mothers to health centres at the time of delivery and that the said vehicles accommodate women with any form of disability.

The same obligation is imposed in relation to offering reproductive health information in a language and or manner understood by all women. For instance, offering of printed information by Braille and oral information by Sign Language for the benefit of women with vision and hearing impairments respectively or allowing women with visual impairments to handle and feel products essential for sexual and reproductive health such as condoms.[74]

71 J Lord & R Brown 'The role of reasonable accommodation in securing substantive equality for persons with disabilities: The UN Convention on the Rights of Persons with Disabilities' (2010) SSRN http://ssrn.com/abstract=1618903 (accessed 14 September 2015).

72 CRPD, art 2.

73 CRPD Committee, General Comment No 2 UN Doc CRPD/C/GC/2 (2014).

74 NE Groce et al 'Guidelines for inclusion of individuals with disability in HIV outreach efforts' *The World Bank Global AIDS Program* (2008) 11.

2.1.2 National standards on equality and non-discrimination

Currently there is no disability specific law in Lesotho. However, efforts for its enactment are in the pipeline as there is a Disability Equity Bill. The purpose of the Disability Equity Bill is stipulated as to establish a Disability Advisory Council (DAC) and to provide for equalisation of opportunities for and recognition of rights of persons with disabilities.[75] Implementation of the CRPD is amongst the functions of the DAC.[76] Enactment of this Bill into a law would therefore be one of the greatest steps towards fulfilment of freedom from discrimination for persons with disabilities in Lesotho.

The 1993 Constitution of Lesotho and other Acts of Parliament namely: the Building Controls Act 1995, Sexual Offences Act 2003, Youth Council Act 2008, Education Act 2010, Penal Code Act 2010, Children's Protection and Welfare Act 2011 and National Assembly Elections Amendment Act 2011, have provisions that directly address non-discrimination on the basis of disability while some indirectly address the issue as discussed below.

The Constitution guarantees freedom from discrimination as a fundamental human right in sections 4 and 18. Section 4 provides that:

> [E]very person in Lesotho is entitled, whatever his race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status to fundamental human rights and freedoms.

Discrimination in this context is defined in section 18(3) as:

> [A]ffording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

The non-discrimination provisions of the Constitution and their interrelation with Lesotho's international human rights obligation not to discriminate were discussed in the case of *Fuma v Commander Lesotho Defence Force* (LDF),[77] by the Constitutional Court of Lesotho. Fuma, a member of the LDF was retired on medical grounds in terms of section 24 of LDF Act 1994 by the medical board having reached a conclusion that he is legally blind because of *inter alia* HIV. Fuma contended that the board's decision to retire him was discriminatory on the basis of his HIV status because there were still other officers in the army who were visually

75 Government of Lesotho Disability Equity Bill 2014.
76 Disability Equity Bill, sec 6.
77 *Fuma v Commander LDF (Fuma)* LSHC 68. Judgment of 10 October 2013.

impaired but instead of being retired; they were given other duties in the institution that befitted their condition. He stated that the only factor that influenced the medical board's decision to retire him was his HIV status. In deciding the case, the Court held that:

> [The Court] primarily takes a view that the unreservedly ratified United Nations Convention on the Rights of Persons with Disabilities stands not only as an aspirational instrument in the matter but that by default, it technically assumes the effect of municipal law in the country.[78]

The court went further to consider other international human rights instruments and concluded that the Applicant had been discriminated against on the basis of his disability as well as HIV status. The court did not only condemn discrimination against the applicant as a violation of the CRPD but went further to determine the status of the CRPD in Lesotho by holding that it 'assumes the effect of municipal law in the country'.[79]

Despite the Court having read disability into the phrase 'other status' in section 18 of the Constitution, it is imperative to note that neither section 4 nor section 18 lists disability as a prohibited ground of discrimination. This omission, it is argued, is detrimental to protection of persons with disabilities from discrimination.[80] It fails to facilitate for the implementation of the general principles contained in article 3 of the CRPD which include respect for the inherent dignity and acceptance of persons with disabilities as part of humanity and human diversity.[81]

The only provision in the Constitution which refers to persons with disabilities is section 33 which provides for rehabilitation, training and social resettlement of persons with disabilities as part of Directive Principles of State Policy (DPSPs). Ngwena argues that laws that focus on rehabilitation of persons with disabilities and not adjustments of the environments which impose barriers to their enjoyment of human rights reinforce the outdated medical model of disability by categorising disability as a social welfare issue.[82] In this regard, Zimbabwe is one of a few countries in the SADC region which Lesotho can learn from. The 2013 Zimbabwean Constitution has a provision on disability which recognises the rights of persons with disabilities, in particular the right to be treated with respect and dignity.[83] It mandates the state to assist persons with

78 *Fuma* (n 77 above) para 22.
79 Section 2 of the Constitution places the constitution above all laws, including international law. Therefore, it is unwarranted to assume that *Fuma*'s case provides conclusive evidence of applicability of the CRPD in Lesotho in the absence of an Act of Parliament that domesticates the CRPD.
80 G Quinn & T Degener *Human Rights and disability: The current use and future potential of United Nations human rights instruments in the context of disability* (2002) 10.
81 CRPD, art 3(a) & (d).
82 C Ngwena 'Deconstructing the definition of disability under the Employment Equity Act: Social deconstruction' (2006) 22 *South African Journal of Human Rights* 620.
83 The Constitution of Zimbabwe (Amendment No 20) Act of 2013, sec 22(1).

disabilities to achieve their full potential and to minimise the disadvantages suffered by them.[84] It sets out activities that the state and all institutions and agencies of government must do to achieve equality[85] and to take appropriate measures to ensure persons with disabilities equal access to public buildings and amenities.[86]

Apart from the Constitution, the other pieces of legislation mentioned earlier also have provisions aimed at eliminating discrimination against persons with disabilities. For instance, the Buildings Control Act provides for physical access for persons with disabilities, in all public buildings.[87] This provision gives 'special attention' to the rights of women with physical disabilities and ensures that they have access to public buildings including healthcare facilities as is mandated by article 9 of CRPD. The challenge with this Act however, is highlighted by the Lesotho Disability Baseline Study in which it is remarked that this section is not complied with in as much as many public buildings, including the Government Complex (where most government offices are located) remain inaccessible.[88] The same is true for a number of healthcare facilities such as clinics and hospitals.

The Sexual Offences Act makes it a criminal offence to engage in a sexual act with a person who has a form of disability that makes it impossible for him or her to consent to the said sexual act. This Act is discussed in detail under freedom from sexual abuse and exploitation. The Youth Council Act of 2008 mandates that youths with disability must be represented in the Youth Council, while the National Assembly Elections Amendment Act 2011 mandates political parties to ensure persons with disabilities equal participation within their political parties. Education Act 2010 provides for inclusive education of children with disabilities in line with the principle of reasonable accommodation in article 9 of CRPD. One of the guiding principles in the Children's Protection and Welfare Act (CPWA) is non-discrimination.[89] Furthermore, the CPWA has a provision which specifically prohibits discrimination of children on the basis of their disability.[90] It provides further that a child with disability has a right to dignity, special care, medical treatment and the like[91] The challenge however is with its implementation which has been criticised in that the Ministry of Social Development, under its Children's Unit, does not have specific programmes for children with disabilities, as a result of which children with disabilities are often referred to the Disability Unit

84 Constitution of Zimbabwe, sec 22(2).
85 Constitution of Zimbabwe, sec 22(3).
86 Constitution of Zimbabwe, sec 22(4).
87 Buildings Control Act 1995, sec 19.
88 Disability Baseline Study 2013 (n 19 above).
89 Children's Protection and Welfare Act (CPWA) 2011 sec 6.
90 As above.
91 CPWA, sec 13.

thus failing to include them in mainstream children's programmes in violation of the CRPD.[92]

While the national laws discussed above, generally prohibit discrimination, none adopts a twin track approach as mandated by CRPD by specifically prohibiting discrimination against women with disabilities as a group because of their particular vulnerability to discrimination, abuse and exploitation. This omission in wthe legal framework has been noted by the CEDAW Committee in its concluding observations on Lesotho's combined initial, second, third and forth report to CEDAW.[93] The Committee urged the state to have a specific provision in the Constitution which prohibits discrimination against women as defined in article 1 of CEDAW and that the challenges facing women with disabilities should be given particular attention.[94]

Over and above the laws discussed above, Lesotho also has a number of policies geared towards both gender equality and equality for persons with disabilities. The major policy document on disability is the *National Disability and Rehabilitation Policy of 2011(Disability Policy).* The objectives of this policy are stated as, amongst others, to create an environment in which persons with disabilities can realise their full potential while being included in the mainstream society. In particular it provides for inclusion of persons with disabilities in education, health, employment and social services. The overarching objective of inclusion in the Disability Policy is thus guided by the principle of non-discrimination and acceptance of disability as one form of human diversity. There is also a *National Strategic Development Plan (NSDP) 2012/2013-2016/2017.* The NSDP approaches disability as a cross-cutting issue and sets out access to quality healthcare services and prevention of causes leading to disability through provision of quality health services.[95] The two policies can therefore guide the proposed Disability Equity Bill as they are aligned with the principle of non-discrimination as stipulated in CRPD as illustrated above. What remains crucial is implementation of the policies in practice, in particular de-stigmatisation of disability.

92 Disability Baseline Study (n 19 above).
93 CEDAW Committee Concluding Observations adopted at the Committee's 50th Session on 21 October 2011.
94 As above.
95 National Strategic Development Plan (NSDP) 2012/2013-2016/2017 sec 6.3.

2.2 The right to marry and found a family

2.2.1 International standards on the right to marry and found a family

International human rights instruments recognise the rights of two consenting people to marry and found a family. For instance, article 16 of Universal Declaration provides that:

> (1) Men and women of full age, without any limitation due to race, nationality or religion have the right to marry and found a family.
>
> (2) Marriage shall be entered into with the free and full consent of the intending spouses.
>
> (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 22(3) of CCPR provides for similar rights. This article was interpreted by the Human Rights Committee (HRC) in its General Comment No 19 to 'imply in principle, the possibility to procreate and live together'.[96] The HRC also emphasises equality of spouses prior, during and at the time of dissolution of marriage.

Article 16 of CEDAW provides for parties' right to marry and equality of spouses within the marriage and at its dissolution. In its General Comment on this article, the CEDAW Committee revisited the general comments by other treaty bodies such as the HRC General Comment No 28 and No 19.[97] The CEDAW Committee re-emphasised equality and non-discrimination as far as the right to marry is concerned and the state parties' obligation to ensure formal as well as substantive equality.[98]

The African Charter does not specifically provide for the right to marry but provides for protection of the family as the natural unit and basis of society.[99] Likewise, the African Women's Protocol provides for free and full consent of intending spouses as well as equal rights of spouses during, and at the time of dissolution of marriage but does not specifically provide for the right to marry and found a family and prohibition of discrimination and or barriers to exercise such right.

96 CCPR General Comment No 19: Article 23 (The family) Protection of the family, the right to marriage and equality of spouses 27 July 1990, para 5 UN Doc HRI/Gen/1/Rev.6 at 149 (2003).

97 UN committee on Elimination of Discrimination Against Women (CEDAW) CEDAW General Comment No 24: Article 12 of the Convention (Women and Health), 1999 UN Doc A/54/38/Rev.1 chap 1 para 7.

98 As above, para 8.

99 African Charter, art 18.

With specific reference to persons with disabilities, principle 5 of the ICPD Program of Action provides that:

> Governments should take effective action to eliminate all forms of coercion and discrimination in policies and practices … assistance should be given to persons with disabilities in the exercise of their family … rights and responsibilities.

The CRPD provides extensively for the rights of persons with disabilities to marry and found a family. It particularly urges states parties to take effective and appropriate measures to eliminate discrimination against persons with disabilities 'so as to ensure that the right of all persons with disabilities, who are of marriageable age to marry and found a family on the basis of free and full consent of the intending spouses, is recognised'.[100] In addressing this issue of legal capacity, article 12 of CRPD mandates states to recognise that persons with disabilities enjoy legal capacity on an equal basis with others.[101] That is, to have rights and to act on the basis of such rights without discrimination on the basis of disability. In General Comment No 1, the Committee reaffirmed that the existence of an impairment must never be a ground for denying legal capacity or any of the rights contained in article 12. That is, persons with disability have the right to marry and national laws that purport to deny them same on the basis of lack of legal capacity violate article 12 of CRPD.

It follows therefore that as far as the right to marry and found a family is concerned, the underlying principle in international law is that states may neither restrict adults from marrying nor sanction marriages without consent of any of the spouses. As interpreted by the HRC, the right to marry carries with it, the right of the spouses to choose to procreate. That is, where a woman with disability has decided to marry the question relating to children remains the decision of the woman and her husband. Where the couple has made a decision to have children, the state then has an obligation to fulfil the couple's right to reproductive healthcare as discussed in the next section.

2.2.2 National standards on the right to marry and found a family

At the national level, the Constitution of Lesotho does not provide for the right to marry and found a family but provides for the right to respect for private and family life.[102] Marriage in Lesotho is regulated by both Sesotho Customary Law and Marriage Act of 1974. Neither of the two systems have provisions affirming or denying persons with disabilities the right to marry and found a family. Of relevance to the disability discourse is section 29 of Marriage Act which provides that 'no insane person who is

100 CRPD, art 23(1)(a).
101 CRPD Committee General Comment No 1 (2014).
102 Lesotho Constitution 1993, sec 11(1).

incapable of giving consent to marriage may marry'. The section uses the terms 'insane person' and 'capacity to give consent'. The question that comes to one's mind is compatibility of this section with article 12 of CRPD and CRPD Committee General Comment No 1 which are clear that denial of legal capacity on the grounds of disability constitute discrimination. By denying persons with psychosocial disability the right to marry on the basis of lack of legal capacity, section 29 of the Marriage Act therefore violates article 12 of CRPD.

With the exception of section 29, the laws do not place any barriers to women with disabilities' right to marry. However, in practice women with disabilities experience problems arising from attitudes of members of their families and the society. These attitudes are influenced by the belief that women with disabilities are asexual and therefore unable to marry and or have and raise children.[103] As a result of these misconceived beliefs, generally women with disabilities, as compared to non-disabled women and men with disabilities are more likely to be unmarried, married later or divorced earlier.[104] A similar situation in Lesotho can be inferred from the findings of the Living Conditions Study which made an enquiry as to the extent to which persons with disabilities participate in family activities and decision making in relation to activities such as weddings, funerals, child-welcoming ceremonies, conflict resolution within families and others. The study reflects that 58 per cent of persons with disabilities are excluded from these activities and decision making in the families including decisions about their own lives.[105]

2.3 The right to reproductive health

2.3.1 International standards on the right to reproductive health

As illustrated in the definition of sexual and reproductive rights, reproductive healthcare is a component of the right to health.[106] The right to health was first articulated in article 25 of the Universal Declaration which provides for the right to adequate standard of living including amongst others health and medical care. It was later provided for in article 12 of CESCR which provides for 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'. The UN Committee on Economic, Social and Cultural Rights (CESCR Committee) when interpreting article 12 warned that CESCR does not confine itself to the definition of health as contained in the WHO

103 Kamga (n 2 above).
104 E Naidu et al 'On the margins: Violence against women with disabilities' *Centre for the study of violence and reconciliation* (2005) 4 http://www.csvr.org.za/docs/gender/onthemargins.pdf (accessed 15 August 2014).
105 Living Conditions Study (n 18 above) 9.
106 WHO 2006 'Defining sexual health' (n 15 above).

constitution.[107] It went further that the right to health must not be understood as a right to be healthy but it should be understood that it carries with it freedoms and entitlements including the right to control one's health and body, as well as sexual and reproductive freedom.[108] The CESCR committee emphasised that the right to health contains the following interrelated essential elements: availability, accessibility, acceptability as well as quality.

Succinct reference to the right to reproductive healthcare is made in both CEDAW and African Women's Protocol. In CEDAW, states undertake to ensure that family education includes proper understanding of maternity as a social function,[109] and to ensure that women receive appropriate services in connection with pregnancy, confinement and post-natal period.[110] CEDAW specifically urges states to ensure the right to family planning information, counselling and services,[111] as well as a woman's right to determine the number and spacing of her children.[112] When interpreting this article, the CEDAW Committee in its General Recommendation on Disabled Women requests states to report on measures taken to ensure that women with disabilities have equal access to health services.[113] In another General Recommendation on Health the CEDAW Committee mandates states to 'take appropriate measures to ensure that health services are sensitive to the needs of women with disabilities and are respectful of their human rights and dignity'.[114]

Article 14 of the African Women's Protocol provides that 'states parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted.'[115] The African Women's Protocol is the first human rights instrument to explicitly address women's reproductive rights and HIV.[116] When interpreting this article, in its General Comment No 1 the African Commission on Human and Peoples' Rights (African Commission) observed that women and girls face a

107 UN Committee on Economic Social and Cultural Rights (CESCR), General Comment No 14: 'The right to highest attainable standard of health (Art 12 of the Covenant)' E/C.12/2000/4 (11 August 2000) http://www.refworld.org/docid/45388838d0.html (accessed 17 August 2014) (General Comment No 14) para 4.
108 General Comment No 14 (above) para 9.
109 CEDAW, art 5(b).
110 CEDAW, art 12(2).
111 CEDAW, art 10 (h).
112 CEDAW, art 16(1)(e).
113 CEDAW, General Recommendation 18, Disabled Women (Tenth Session, 1991) UN.Doc.A/46/38 available on http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Recommendations.aspx (accessed 17 August 2014).
114 CEDAW General Comment No 24 (n 97 above) para 25.
115 African Women's Protocol, art 14(1).
116 African Commission on Human and Peoples Rights, General Comment No 1 on article 14(1)(d) and (e) of the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa, adopted at the African Commission's 52nd session from 9-22 October 2012 para 6.

disproportionate risk of HIV infection in sub-Saharan Africa, as they make up 59 per cent of people living with HIV in the region.[117] The African Commission noted further that this disparity is occasioned by a number of societal issues including social barriers that inhibit access to healthcare, gender inequalities as well as discrimination against women and girls.[118] In General Comment No 2 on the same article, the African Commission noted that the right to health includes women's freedom to decide on maternity, the number and spacing of births and the right to choose contraception method. It noted that this article mandates states parties to remove impediments to health services such as ideology or belief-based barriers.[119]

At the sub-regional level, article 9 of the SADC Protocol on Gender and Development provides that states parties shall in accordance with the SADC Protocol on Health and other international human rights instruments to which SADC members are parties, adopt legislation and related measures that take into account their particular vulnerabilities, to protect persons with disabilities.

Non-binding consensus documents and resolutions which relate to Sexual and Reproductive health include the Program of Action adopted at the 1994 International Conference on Population and Development (ICPD) in which the world agreed that 'population is not just about counting people but making sure that every person counts'.[120] The ICPD was set out amongst others to 'provide universal access to family planning and sexual and reproductive health services and reproductive rights'.[121] Furthermore, the Fourth World Conference on Women held a year later in Beijing adopted a Declaration and Platform for Action which identified women and health as well as human rights of women as two of the twelve critical areas of concern.[122] Although not binding in nature, these instruments provide guidelines as to how states may fulfil their obligations under the binding international human rights instruments and are also persuasive in courts of law.

2.3.2 National standards on the right to reproductive health

At the national level, protection of health is contained in section 27 of the Constitution of Lesotho. However, it is not recognised as a fundamental human right but as one of the Directive Principles of State Policy

117 As above
118 As above.
119 African Commission GC No 2, para 25.
120 See also the opening statement of Mr Babatunde Osotimehin Executive Director of United Nations Population Fund (UNFPA) Addis Ababa, 3 October 2013 www.uneca.org/.../opening-statement (accessed 6 August 2014).
121 https://www.unfpa.org./public/icpd (accessed 6 August 2014).
122 Beijing Declaration 1995 (n 51 above) and Beijing Platform for Action 1995 (n 52 above).

(DPSPs).[123] Section 25 of the Constitution declares economic, social and cultural rights (categorised as DPSPs in the Constitution) non-justiciable in the courts of law. Section 25 was interpreted in the case of *Baits'okoli v MCC and Others*[124] in which both the Constitutional Court and the Court of Appeal of Lesotho affirmed the non-justiciability of DPSPs. It follows from the Court's ruling in the *Baits'okuli case* that in as much as section 27 provides for protection of health, the government cannot through a civil suit be called to account for failure to protect health as mandated in the international human rights instruments. Neither international human rights instruments nor section 27 of the Constitution can be relied upon in courts of law to compel the government to fulfil the right to reproductive health under the legal system of Lesotho.

CPWA provides that a child has 'a right to sexual and reproductive health information and education appropriate to his age'. The CPWA should thus be commended for providing for sexual and reproductive health education which, according to the CPWA needs to be provided to all children regardless of their disability.

Lesotho has the National Disability and Rehabilitation Policy (NDRP) 2011 which is aimed at promoting inclusion of people with disabilities in education, health, accessibility, employment, and social services.[125] There is also the National Strategic Development Plan (NSDP) 2005/15 in which disability has been adopted as a cross cutting issue. One of the strategic objectives in this plan as far as disability is concerned is to ensure that people with disabilities access quality health services and that causes leading to disability are prevented through provision of quality health services. The National Reproductive Health Policy 2008 considers special needs of different target populations and the need to abide by conventions guarding against discrimination on the basis of amongst others, disability. That is despite the shortfalls identified in the legal framework, the policy framework complies with the provisions of article 9 of CRPD which requires reasonable accommodation of persons with disabilities.

The challenge however remains with implementation of these policies to eradicate the barriers that inhibit women with disabilities from accessing reproductive health services. The failure to implement constitutes violation of the CRPD and other international human rights instruments referred to above. The effects of the violation of this right include high rates of maternal and infant mortality which are occasioned by neglect and low quality of healthcare services include having an undesired number of

123 Constitution of Lesotho 1993, sec 27.
124 *Baits'okoli v MCC & Others (Baits'okoli case)* (2004) AHRLR 195 (Lesotho Court of Appeal 2004).
125 LP Leshota 'Reading the National Disability and Rehabilitation Policy in the light of Foucault's technologies of power' (2013) 2 *African Journal of Disability* 7.

children because of lack of knowledge about family planning and susceptibility to HIV/AIDS and other STIs due to lack of knowledge about modes of transmission and prevention. Women with disabilities are even at greater risk as they have less access to public health information and care during the prenatal stage of pregnancy which is likely to result in a greater risk of long-term complications.[126]

2.4 The right to give informed consent to all medical procedures

2.4.1 International standards on the right to give informed consent to medical procedures

Many international human rights instruments contain provisions that guarantee all human beings autonomy over their own bodies. For instance, the basic premise of human rights protection under the Universal Declaration which influenced many other international human rights instruments is that 'all human beings are born free and equal in dignity and rights'.[127] Imposition of medical treatment on people without consent has been categorised as an infringement on one's dignity, the worse form of which amounts to torture.[128] Article 5 of the Universal Declaration bans torture and inhuman or degrading treatment.

The right to freedom from torture is also protected by article 7 of CCPR which explicitly bans torture and inhuman or degrading treatment including scientific experimentation without one's consent. In interpreting article 7 of CCPR, the Human Rights Committee emphasised that this article carries with it, the duty to protect individuals against forced abortion as well as forced sterilisation.[129]

The right to health is provided for in article 12 of CESCR. This article was interpreted by the Committee on Economic Social and Cultural Rights (Committee on ESCR), which is a body established to monitor implementation of CECSR in its General Comment No 14 of 2000,[130] to be closely related to and also include the right to privacy, quality care as

126 NE Groce 2011 'Disability and the Millennium Development Goals: A review of the MDG process and strategies for inclusion of disability issues in Millennium Development Goal efforts' *United Nations Publications* 25.

127 Universal Declaration, art 1.

128 CEDAW Committee General Recommendation No 19 (11th Session, 1992) *Violence against women.* See also UN General Assembly (2010) *Report of the Special Rapporteur on torture, and other cruel, inhuman or degrading treatment or punishment* A/HRC/13/39/Add.5 www2.ohchr.org/english/bodies/hrcouncil/docs/13session/AHCR (accessed 15 September 2015).

129 Human Rights Committee, General Comment No 28 'Equality of rights between men and women (article 3)' UN Doc CCPR/C/21/Rev.1/Add.10 (2000) para 11.

130 ECSCR, General Comment No 14 'The right to the highest attainable standard of health (art 12)' (22nd Session, August 2000) (UN Doc E/C.12/2000/4) paras 3 & 8.

well as freedom from discrimination, torture and cruel, inhumane or degrading treatment.[131] According to this general comment therefore while in the custody of healthcare givers, patients have a right to be treated with respect which included amongst others, the right to be informed about and be given a chance to consent to or refuse any medical treatment.

CEDAW provides for the rights of women to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.[132] It further requires involvement of both spouses in sexual and reproductive health issues and their right to be informed in order to make informed choices about the reproductive rights.[133]

Article 3 of African Women's Protocol provides for the right of all women to dignity which is inherent in all human beings and to the recognition and protection of their human and legal rights. In article 4 of the Protocol, states parties undertake to ensure that every woman shall be entitled to respect for her life and the integrity and security of her person and to ensure that all forms of exploitation, cruel and inhuman or degrading treatment or punishment are prohibited. In relation to health and reproductive rights, the Protocol mandates state parties to ensure that women's right to health, including sexual and reproductive rights are respected and promoted.[134] The Protocol elaborates further that this guarantee includes the right for a woman to control her own fertility,[135] the right to decide whether to have children, the number of children and the spacing of children,[136] the right to freely choose any method of contraception[137] as well as the right to have family planning education.[138] Read together, all the rights contained in the Protocol favour the right to give informed consent to any medical treatment and disfavour forced sterilisation or abortions.

The Beijing Platform for Action and the ICPD Program of Action reiterates the reproductive health rights of women. The ICPD Program of Action further illustrates this issue by pointing out that, reproductive health implies that people are able to have a satisfying and safe sex life, and that they have the capability to reproduce and the freedom to decide if, when and how often to do so.

131 L Beletsky et al 'Advancing human rights in patient care: The law in seven transitional countries' *Open Society Foundations* (2013). See also Open Society Institute 'Health and Human Rights: a resource guide' *Open Society Foundation* (2013). See also *WHO* The right to health available www.who.int/mediacentre/factsheets/fs323/en/ (accessed 15 September 2015).
132 CEDAW, art 16(1).
133 As above.
134 African Women's Protocol, art 14.
135 African Women's Protocol, art 14(1)(a).
136 Africa Women's Protocol, art 14(1)(b).
137 Africa Women's Protocol, art 14(1)(c).
138 Africa Women's Protocol, art 14(1)(f).

Article 3 of the CRPD lays down the general principles of CRPD which include amongst others respect for the inherent dignity and individual autonomy – including the freedom to make one's own choices and independence of his or her person. Article 14 protects the right to personal liberty thus outlawing forced institutionalisation of women with disabilities. The CRPD also guarantees the right to freedom from torture and inhuman or degrading treatment or punishment including medical or scientific experimentation without one's consent,[139] freedom from exploitation, violence and abuse[140] as well as integrity of the person.[141] As far as consenting to medical treatment is concerned the CRPD mandates states parties 'to require health professionals to provide care of the same quality to persons with disabilities as others, including on the basis of free and informed consent …'[142]

Common and explicit in all the above international human rights instruments is the right of women to be informed of and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of regulation or control of their fertility with due regard to their dignity and integrity and free from discrimination, coercion and violence.[143]

While the international human rights instruments are clear on the right to give informed consent, the challenges faced by women and girls with intellectual and psychosocial disabilities cannot be ignored. 'Incapacity' is often used in laws and in practice as a valid justification to violate the rights of women and girls with intellectual and psychosocial disabilities. These violations include focus on sexual and menstrual suppression and forced or coerced abortions and sterilisation.[144] Often doctors, parents and guardians substitute their own decisions for women and girls with disabilities.[145] As illustrated under the right to marry and found a family, article 12 of CRPD is clear that denial of legal capacity on the ground of disability amounts to discrimination. Therefore, laws that give doctors, parents or guardians the right to substitute their own decisions for people with disabilities violate article 12.[146] Conversely from substituted decision making, article 12 provides for supported decision making.[147] Hence

139 CRPD, art 15.
140 CRPD, art 16.
141 CRPD, art 17.
142 CRPD, art 25(d).
143 Global Commission on HIV/AIDS and the Law (GHL) *Risks, rights and health* (2012) 65.
144 C Frohmader 'Submission to the National Inquiry into Equal Recognition before the Law and Legal Capacity for People with Disabilities' *Women With Disabilities Australia* (2014) 5.
145 As above.
146 World Network of users and survivors of psychiatry 'Implementation manual for the united national convention on the rights of persons with disabilities' (2008) art 12.
147 CRPD, art 12(4).

arbitrary control of a woman's fertility, despite of her disability is a violation of multiple provisions of the CRPD.[148]

2.4.2 National standards on the right to give informed consent to medical procedure

Lesotho does not have a specific law on informed consent to procedures such as sterilisation. However the Constitution protects a number of rights which are violated when medical treatment is imposed without one's consent. For instance, section 6 of the Constitution provides for the right to personal liberty which includes amongst others, the right not to be detained save as may be authorised by law. This section thus protects women with disabilities from compulsory institutionalisation for purposes of medical treatment without their consent. Section 8 provides for the right to freedom from torture or inhuman or degrading treatment thus protecting against arbitrary imposition of medical treatment in a manner that is degrading to the woman with disability. Section 11 provides for the right to respect for private and family life; thus guaranteeing amongst others, individual autonomy over one's own body and would be violated by arbitrary control of a woman's sexuality and fertility. Sections 18 and 19 of the Constitution protect freedom from discrimination as well as equality before the law. Furthermore, at common law, all competent adults can consent to or refuse medical treatment.[149] If consent is not established, there may be legal consequences for health professionals who administered the treatment without consent.[150]

The international and national standards concerning the right to give informed consent to medical treatment notwithstanding, due to the barriers imposed by societal beliefs about sexuality and disability, many women with psychosocial disabilities are subjected to control by the state, health professionals and relatives.[151] Their sexuality is controlled by amongst others, compulsory institutionalisation, forced abortions as well as sterilisation.[152] Although there is no research that proves forced sterilisation of women with disabilities in Lesotho, the research on forced sterilisation of women living with HIV raises a possibility of the same being done on other marginalised women including women with disabilities. Research in other jurisdictions which has revealed forced sterilisation of women with disabilities, in particular those with psychosocial disability also mandates legal safeguards against this practice.

148 ICW in Focus 'Forced sterilization of women living with HIV must stop now' 2014. Available at the Global Coalition of Women and AIDS.
149 S Fovargue & J Miola 'One step forward, two steps back? The GMC, the common law and informed consent' 2010 36 *Journal of Medical Ethics* 494.
150 As above.
151 P Block 'Sexuality, parenthood and cognitive disability' (2002) 20 *Journal of Sexuality and Disability* 8.
152 As above.

2.5 Freedom from sexual abuse and exploitation

2.5.1 International standards on freedom from sexual abuse and exploitation

In protecting the sexual and reproductive health rights of women in general and women with disabilities in particular, the international human rights instruments discussed in the preceding sections of this article also denounce sexual violence, abuse and exploitation as a cruel and inhuman treatment and a form of torture.[153] In this regard sexual abuse is defined as 'the actual or threatened physical intrusion of a physical nature, whether by force or under unequal coercive condition',[154] while sexual exploitation is defined as 'any actual or attempted abuse of a position of vulnerability, differential power, or trust for sexual purposes, including, but not limited to profiting monetarily, socially or politically from the sexual exploitation of another'.[155] These two acts are also categorised as violence against women which is defined in the Declaration on Elimination of Violence against Women as:

> [A]ny act of gender-based violence that results in, or is likely to result in physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.[156]

While gender based violence in the form of sexual abuse and exploitation can be suffered by both sexes, because of being subordinated to men, it disproportionately affects women and girls. Women and girls with disabilities are at an even greater risk[157] as perpetrators take advantage because a woman will not be able to run away if she has physical disability, nor scream if she has hearing and speech impairment while a women with visual disability may not be able to identify the rapist.[158] According to Kotze, vulnerability of women and girls with disabilities to sexual abuse

153 Yakin Ertürk 2010 'Integration of the Human Rights of Women and the Gender Perspectives: Violence against women' in *Fifteen years of thee United Nations Special Rapporteur on Violence Against Women, its Causes and Consequences (1994-2009) – Critical Review.* Available on http:www.ohchr.org/…/Issues/women/… (accessed 15 September 2015) See also UN General Assembly 'Special Rapporteur on Violence Against Women, its causes and consequences: Integration of the human rights of women and the gender perspectives: Violence against women, intersections of violence against women and HIV/AIDS' E/CN.4/2005/72 (2005). See also CEDAW Committee General Recommendation No 19 (n 107 above). See also UN General Assembly *Report of the Special Rapporteur on torture, and other cruel, inhuman or degrading treatment or punishment* (2010) (n 107 above).

154 UN Secretary General's Bulletin on protection from sexual exploitation and abuse (PSE) (ST/GB/SGB/2003/13) www.un.org/en/pseatask (accessed 14 September 2015).

155 As above.

156 Declaration on Elimination of Violence Against Women (DEDAW) 1993, art 1.

157 CRPD, Preamble, para (q).

158 Kamga (n 3 above).

and rape is also aggravated by a myth so called 'virgin cure'.[159] The misconception is that having sexual intercourse with a virgin provides a cure for AIDS. This myth is coupled with yet another misconception that women with disabilities are not sexually active and therefore presumably virgins provide motivation for rapists to target women and girls with disabilities with the hope that they shall be cured from HIV/AIDS.[160] This exposes women with disabilities to the risk of HIV infection. Because the link between violence and HIV is not acknowledged in many jurisdictions Lesotho included, survivors of violence fail to get timely health services to reduce the risk of infection.[161] Furthermore, due to fear of stigmatisation, cases of sexual abuse and exploitation are under-reported.[162] Because people living with HIV already face stigma discrimination in many societies,[163] people with disabilities who are infected with the virus face stigmatisation, discrimination and exclusion from the society. According to the HIV Situational Assessment Study, persons with disabilities in Lesotho who live with HIV or are diagnosed with other STIs do not disclose their status to their sexual partners due to fear of stigma and discrimination. This undermines national efforts to combat HIV.

In order to protect women with disabilities from sexual abuse and exploitation, the CRPD mandates states parties to take appropriate measures including legislative, administrative and other measures to protect persons with disabilities both within and outside the home from all forms of exploitation, violence and abuse including gender based violence.[164] States also undertake to prevent all forms of exploitation and abuse by amongst others providing age and gender sensitive assistance and support to all persons with disabilities and their families by amongst others providing information on how to avoid, recognise and report instances of exploitation, violence and abuse.[165] In the same vein, the SADC Protocol on Gender and Development mandates states parties to ensure that perpetrators of gender based violence, rape, femicide, sexual harassment, female genital mutilation and all other forms of gender based violence are tried by courts of competent jurisdiction.[166]

2.5.2 National standards on freedom from sexual abuse and exploitation

At the national level, section 8 of the Constitution provides for freedom from torture and inhuman and degrading treatment or punishment. Over

159 H Kotze 'A situation analysis of the stat and status of disability rights and issues in Southern Africa' OSISA Project on disability rights and Law Schools (2010) 4.
160 As above.
161 GCHL (n 123 above) 64.
162 Chipatiso (n 40 above).
163 Groce (n 74 above).
164 CRPD, art 16(1).
165 CRPD, art 16(2).
166 SADC Protocol on Gender and Development art 20.

and above the constitutional protection, the Sexual Offences Act 2003 criminalises all sexual conduct which takes place under coercive circumstances.[167] The Sexual Offences Act defines 'coercive circumstances' to include *inter alia* circumstances in which the complainant is affected by 'physical disability, mental incapacity, sensory disability, medical disability, intellectual disability, or other disability, whether permanent or temporary'.[168] The Act also criminalises commitment of a sexual act in relation to or in the presence of a person with disability.[169] In so doing it distinguishes between consensual and non-consensual sexual conduct in relation to persons with disabilities by defining a person with disability for its purposes as:

> [A] person affected by any disability of a physical, intellectual, sensory, medical or mental nature or other disability irrespective of its cause, whether temporary or permanent, *to the extent that a person is unable to appreciate the nature of a sexual act, or is unable to resist the commission of such an act, or is unwilling to communicate his unwillingness to participate in such an act.* (emphasis added)

As an administrative measure, there has also been established within the Lesotho Mounted Police Service, Child and Gender Protection Unit (CGPU) whose main aim is to deal with cases involving children and victims of gender based violence. This is a general unit that does not exclusively deal with persons with disabilities. However some people with disabilities face barrier including accessibility of CGPU offices as well as communication with the police officers stationed therein all of whom are not trained in sign language. As a result, a woman with a hearing disability will have to rely on third parties, friends or relatives to report the offence at the police station. The danger of reliance on a third party is that the story may end up being distorted or not adequately captured.

3 Conclusions and recommendations

The discussion in this article has established that women with disabilities in Lesotho suffer double discrimination based on sex and disability, and that their access to public services including healthcare services is inhibited by physical, communicational and attitudinal barriers. These barriers are insulated by the legal system itself, which does not fully implement the provisions of international human rights instruments to which Lesotho is a party, in particular the CRPD, CEDAW, African Women's Protocol and SADC Protocol on Gender and Development. While the international human rights instruments are indicative of the fact that the international community is moving towards a more robust recognition of both human

167 Sexual Offences Act sec 3.
168 Sexual Offences Act, sec 2(f)(i).
169 Sexual Offences Act, sec 15.

rights of persons with disabilities and sexual and reproductive rights of all women,[170] this intersection is however not given full attention in the legal system of Lesotho.

The specific obligations contained in the CRPD include ensuring that women with disabilities access services related to their sexual and reproductive rights on equal basis with other women, on the basis of non-discrimination and in accordance with the principle of reasonable accommodation.[171] While the Constitution of Lesotho provides for the right to freedom from discrimination and equality before the law,[172] it does not include disability as a prohibited ground for discrimination thus not fully acknowledging the fact that people with disabilities in Lesotho disproportionately face discrimination based on multiple and intersectional grounds. Furthermore, absence of disability specific law and disability mainstreaming policy makes it impractical to implement the principle of reasonable accommodation, this is because the specific needs of women with disabilities are not adequately captured in the national sexual and reproductive health policies and programmes and disability policies do not cater for gender mainstreaming.

The CRPD further mandates states parties to take all measures to eliminate discrimination against persons with disabilities in all matters relating to marriage,[173] and to recognise the right of all persons with disabilities to marry on the basis of free and full consent.[174] The legal system of Lesotho being the Sesotho Customary Law and the Marriage Act, 1979 do not impose any barriers against persons with disabilities who wish to marry, the requirement of legal capacity as a basis for exercise of this right does not comply with article 12 of CRPD. Further barriers are imposed by attitudes of families and the society which deny persons with disabilities the right to participate in decisions relating to important aspects of their lives including marriage.[175] This thus leaves the government with the obligation to root out such attitudes by amongst others raising awareness that people with disabilities are as valuable members of the society as everyone else.

The CRPD emphasises equality, non discrimination and reasonable accommodation of persons with disabilities in accessing reproductive health services.[176] The legal system of Lesotho does not fully implement this obligation. The Constitution does not recognise the protection of healthcare as a fundamental human right, the violation of which can be

170 Centre for Reproductive Rights discussion paper (n 5 above).
171 CRPD, art 9.
172 Constitution 1993, secs 4, 18 & 19.
173 CRPD, art 23(1).
174 CRPD, art 23(1)(a).
175 Living Conditions Study (n 18 above).
176 CRPD, art 25 read with art 9.

vindicated in a court of law.[177] Furthermore due to absence of disability specific laws and disability mainstreaming policy, the current Reproductive Health Policy does not fully accommodate the specific needs of women with disabilities including dissemination of related information in a manner accessible to all women regardless of the type of their disability.

Regarding medical procedures related to sexual and reproductive rights such as control of women's fertility, the CRPD provides for the right to give informed consent to medical procedures and disfavours substituted decision making for women with psychosocial disabilities.[178] There is no specific law in Lesotho which provides guidelines in this regard and therefore Common Law is relied upon. Although there is no research that indicates that women with disabilities in Lesotho are subjected to forced control of their fertility through institutionalisation and sterilisation, the research conducted by WILSA and CW-Lesotho has however unearthed the practice amongst women living with HIV, thus reflecting that there might be a possibility of the same being done in relation to women with disabilities.

While guaranteeing the sexual and reproductive rights of women with disabilities in positive terms, CRPD also takes cognisance of the particular vulnerability of women and girls with disabilities to exploitation, violence and abuse.[179] It therefore mandates states parties to protect women and girls with disabilities from all forms of exploitation, violence and abuse including of a sexual nature.[180] The legal framework of Lesotho through the Sexual offences Act 2003 complies with this obligation.[181] However, the problem lies with implementation of the Act in as much as inaccessibility of police stations and courts of law, communicational barriers as well as the rules of criminal procedure and evidence affects access to justice by women with disabilities who have fallen victims of sexual abuse and exploitation.

On the basis of the foregoing conclusion, this article makes the following recommendations:

- that the Constitution of Lesotho be amended to include disability as a prohibited ground of discrimination and that health, including sexual and reproductive health be protected as fundamental human rights of all people in Lesotho;
- that the already existing disability friendly laws such as Buildings Control Act 1995, Education Act 2010, Children's Protection and Welfare Act

177 Constitution sec 25.
178 CRPD, art 25.
179 CRPD, Preamble, para (q).
180 CRPD, art 16.
181 Sexual Offences Act, 2003, sec 3.

2011 be implemented so as to ensure reasonable accommodation of persons with disabilities;

- that government speeds up the process of adopting a Disability Mainstreaming Policy and enacting Disability Equity Bill with the aim of ensuring equality, reasonable accommodation and also providing guidelines on implementation of other obligations such as ensuring informed consent to marriage, medical procedures and supported decision making of women with psychosocial disabilities;
- that the government adopt other measures such as equitable allocation of available resources to cater for the basic needs of women and girls with disabilities, involve organisation of persons with disabilities in programme designs, their monitoring and evaluation, so as to ensure that their specific needs are fully accommodated in all national programmes including those related to sexual and reproductive health; and
- that government promotes more research on persons with disabilities, their needs, expectations and expertise; how they can be addressed, accommodated, utilised and included in the legal and policy frameworks.