

CHAPTER 5

TERMINATION OF PREGNANCY OF PERSONS WITH MENTAL DISABILITIES ON MEDICAL ADVICE: A CASE STUDY OF SOUTH AFRICA

Ashwanee Budoo*
Rajendra Parsad Gunputh**

Summary

The South African Choice on Termination of Pregnancy Act 92 of 1996 provides for the termination of a pregnancy of a person with a severe mental disability in the event that the continued pregnancy would pose a risk to the life of the woman or the fetus. Such a termination of pregnancy can be proceeded with after obtaining the consent of the natural guardian, spouse, legal guardian or curator personae. The current article investigates whether the above does not violate the provisions of the Convention of the Rights of Persons with Disabilities since it does not take into consideration the standpoint of the woman whose pregnancy is being terminated. It assesses whether depriving the woman with a mental disability of the right to give her opinion is justified. It then concludes that section 5(4)(a) violates several human rights of a woman with a mental disability and suggests a way forward.

1 Introduction

Being the 'world's largest minority', it is estimated that worldwide there are about 1 billion persons living with a disability.¹ 'Recognising the need to promote and protect the human rights of all persons with disabilities (PWDs), including those who require more intensive support',² the Convention on the Rights of Persons with Disabilities (CRPD) was adopted in 2006. The CRPD's purpose is 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'.³ Included in the list of PWDs are people who have

* LLD Candidate and tutor at the Centre for Human Rights, University of Pretoria.

** Associate Professor in the law department at the University of Mauritius.

1 United Nations enable 'Factsheet on persons with disabilities', available at <http://www.un.org/disabilities/default.asp?id=18> (accessed 13 March 2014).

2 Para (j) of the Preamble to the CRPD.

3 Art 1, para 1 of the CRPD.

'mental ... impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'.⁴

The World Health Organisation (WHO) views mental disorders very broadly. Giving schizophrenia, depression and mental retardation as examples, it characterises mental disorders 'by some combination of abnormal thoughts, emotions, behaviour and relationship with others'.⁵ People with mental disabilities, who form part of the 'most marginalised and vulnerable groups',⁶ face challenges concerning their living conditions which include stigma and discrimination and reduced access to health services.⁷ South Africa, having ratified the CRPD on 30 November 2007,⁸ has the obligation to ensure that its domestic legislation promotes and protects the rights of PWDs. Article 25 of the CRPD protects the right to reproductive health of a PWD and this paper specifically concentrates on the termination of pregnancy of persons with mental disabilities.

According to Daftary and Desai, a medical termination of pregnancy is a 'wilful termination of a pregnancy before the age of viability of the foetus by a qualified medical practitioner under certain stipulated conditions'.⁹ It can be carried out by the use of pharmacological drugs.¹⁰ Practising a medical termination of pregnancy is considered to be 'safe and effective',¹¹ since the termination is practised by someone who has the required skills and is done in an environment which is compliant with minimal medical standards.¹² The Choice on Termination of Pregnancy Act (CTPA)¹³ is an example of how South Africa promotes medical termination of a pregnancy so that women are not subject to vulnerabilities such as death or that which accompanies unsafe abortions.

The CTPA replaced the Abortion and Sterilisation Act 2 of 1975 which 'severely curtailed access to abortion services by requiring a

4 Art 1, para 2 of the CRPD.

5 Website of the WHO, available at http://www.who.int/topics/mental_disorders/en/ (accessed 30 March 2014).

6 WHO 'Mental health and development: Targeting people with mental conditions as a vulnerable group' (2010) vii, available at http://whqlibdoc.who.int/publications/2010/9789241563949_eng.pdf (accessed 30 March 2014).

7 D Mechanic & J Tanner 'Vulnerable people, groups, and populations: Societal view' (2007) 26 *Health Affairs* 1220, available at <http://content.healthaffairs.org/content/26/5/1220.full> (accessed 30 March 2014).

8 United Nations Treaty Collection Databases, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=iv-15&chapter=4&lang=en (accessed 30 March 2014).

9 SN Daftary & SV Desai *Selected topics in obstetrics and gynaecology -4: For postgraduates and practitioners* (2008) 118.

10 WHO 'Safe abortion: Technical and policy guidance for health systems' (2012) iv, available at http://apps.who.int/iris/bitstream/10665/70914/1/9789241548434_eng.pdf (accessed 30 March 2014).

11 WHO (n 10 above) 42.

12 WHO (n 10 above) 18.

13 92 of 1996.

physician's, and in some cases a magistrate's, approval for abortion procedures'.¹⁴ The CTPA gave effect to the provisions of the African National Congress' Reconstruction and Development Programme of 1994 which stated, inter alia, that 'the national health system will ... give women the right to choose whether to have an early termination of [their] pregnancy'.¹⁵ The change in the political arena led to a better focus on the reproductive rights of women.¹⁶ Described as 'an expression of female autonomy' which abides by the fundamental rights protected by the Constitution,¹⁷ the CTPA provides 'every woman freedom of choice to have an early, safe and legal termination of pregnancy according to her individual beliefs' subject to certain conditions.¹⁸

Section 5(4)(a) of the CTPA provides that there can be termination of pregnancy for a person when she is 'severely mentally disabled to such an extent that she is completely incapable of understanding and appreciating the nature or consequences of a termination of her pregnancy'.

The procedure for such termination is provided for by section 5(5) of the CTPA which states that two medical practitioners or a medical practitioner and a registered midwife who has completed the prescribed training course can, after consultation with the natural guardian, spouse, legal guardian or curator personae, consent to the termination of pregnancy of a person with a mental disability. Such consent can be given in the following circumstances:¹⁹

- (a) [D]uring the period up to and including the 20th week of the gestation period of a pregnant woman referred to in subsection (4)(a) or (b) –
 - (i) the continued pregnancy would pose a risk of injury to the woman's physical or mental health; or
 - (ii) there exists a substantial risk that the fetus would suffer from a severe physical or mental abnormality; or
- (b) after the 20th week of the gestation period of a pregnant woman referred to in subsection (4)(a) or (b), the continued pregnancy –

14 S Guttmacher et al 'Abortion reform in South Africa: A case study of the 1996 Choice on Termination of Pregnancy Act' (1998) 24 *International Family Planning Perspectives* 191.
15 ANC 'A basic guide to the Reconstruction and Development Programme', available at <http://www.anc.org.za/show.php?id=234> (accessed 25 March 2014).
16 B Klugman & SJ Varkey 'From policy development to policy implementation: The South African Choice on Termination of Pregnancy Act' in B Klugman & D Budlender (eds) *Advocating for abortion access: Eleven country studies* (2001) 255.
17 C Pickles 'Termination-of-pregnancy rights and foetal interests in continued existence in South Africa: The Choice on Termination of Pregnancy Act 92 of 1996' (2012) 15 *PER* 403 427, available at <http://www.nwu.ac.za/sites/www.nwu.ac.za/files/files/p-per/issuepages/2012volume15no5/2012%2815%295Pickles.pdf> (accessed 25 March 2014).
18 F van Oosten 'The Choice on Termination of Pregnancy Act: Some comments' (1999) 116 *South African Law Journal* 60 62.
19 Sec 5(5) of the CTPA.

- (i) would endanger the woman's life;
- (ii) would result in a severe malformation of the fetus; or
- (iii) would pose a risk of injury to the fetus ...

It is to be noted that section 5 of the CTPA makes reference to a mental disability and not to an intellectual disability. The latter has been defined as 'a significantly reduced ability to understand new or complex information and to learn and apply new skills'.²⁰ The scope of the article is persons who have a severe mental disability which can be considered as temporary and can be controlled through medication.²¹ Thus, people whose mental capacity has been affected by illness like 'schizophrenia, depression, mental retardation and disorders due to drug abuse'²² are targeted during the course of this paper.

Further, the paper does not look into the issue of forceful sterilisation, but rather into forceful termination of pregnancy. Sterilisation has been defined as 'a process that renders an individual incapable of sexual reproduction'.²³ Forced sterilisation takes place 'when a person is sterilized after expressly refusing the procedure, without her knowledge or is not given an opportunity to provide consent'.²⁴ The current paper does not look into the issue of rendering a PWD incapable of sexual reproduction but instead into the termination of a current pregnancy with the person having the possibility of conceiving again in the future.

The present paper investigates whether the termination of a pregnancy of a woman with a mental disability, as provided for under the CTPA, violates the rights protected by the CRPD. Firstly, the model adopted will be explained. Then, the CRPD will be examined and the articles which are affected by such a termination of pregnancy will be analysed while making reference to the relevant sections of the Constitution of the Republic of South Africa, 1996 which give effect to the provisions of the CRPD. While reference will be made to the Constitution, it is to be noted that the current paper is limited to investigating the potential violations of the different provisions of the CRPD. It will further assess whether limiting the rights of a woman with mental disabilities to give consent concerning the termination of her pregnancy can be justified in an open and democratic society in terms of section 36 of the Constitution. Finally, there will be a

20 WHO's definition for intellectual disability, available at <http://www.euro.who.int/en/health-topics/noncommunicable-diseases/mental-health/news/news/2010/15/childrens-right-to-family-life/definition-intellectual-disability> (accessed 30 March 2014).

21 Intellectual Disability Rights Service – Criminal Justice Support Network 'A step-by-step guide to section 32 applications', available at http://www.idrs.org.au/s32/_guide/p040_4_2_IDandMI.php#.Uzlu3aiSwVY (accessed 30 March 2014).

22 WHO's definition for mental disorders, available at http://www.who.int/topics/mental_disorders/en/ (accessed 4 June 2014).

23 Mosby's Medical Dictionary 8th edition (2009).

24 Global Campaign to Stop Torture in Health Care 'Sterilization of women and girls with disabilities: A briefing paper' (2011) 1.

conclusion and recommendations to ensure that the rights of a woman with disabilities are not violated.

2 Approach adopted

There is not yet an agreed definition of disability and the debate about defining the term 'has been long-running and sometimes bitter'.²⁵ There are two different models to disability, namely the medical model and social model.²⁶ The models of disability reflect²⁷ the behaviour that people have towards disability.

2.1 The medical model

The medical model, the least preferred one, tends to regard PWDs as being 'imperfect'.²⁸ Disability is viewed as a problem which requires medical care: It identifies the disability which the person has and considers PWDs as objects for clinical intervention.²⁹ The case of *Purohit v The Gambia*³⁰ is an example of the application of the medical model. The Lunatics Detention Act in contention in the above case considered people living with mental disabilities as a special group of persons who should be given special treatment for them to be able to perform and live in society.

Ngwena, applying the medical model, considers PWDs as being unable to manifest themselves in the mainstream and to live independently.³¹ Under this model, PWDs are treated as persons living with impairments and words such as 'handicapped', 'incurable', 'suffering' and 'wheelchair bound' are used to refer to them.³² Crossley, while highlighting that under the medical model PWDs are considered as being impaired, pointed out that this model views PWDs as 'innately, biologically different and inferior'.³³ They therefore need to be 'cured' to overcome the challenges that they encounter in not forming part of the mainstream.³⁴

However, this model has been criticised since it creates dependency, marginalises PWDs from society and introduces barriers for PWDs to

25 S Moore *Social welfare alive* (2002) 401.

26 P Tassoni et al *Children's care, learning and development* (2005) 315.

27 As above.

28 As above.

29 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) 11.

30 *Purohit v The Gambia* (2003) AHRLR 96 (ACHPR 2003).

31 C Ngwena 'Deconstructing the definition of "disability" under the Employment Equity Act: Social deconstruction' (2006) 22 *South African Journal on Human Rights* 613.

32 Tassoni et al (n 26 above) 315.

33 M Crossley 'Disability kaleidoscope' (1999) 74 *Notre Dame Law Review* 649.

34 As above.

access their fundamental economic, social and political rights.³⁵ PWDs are not considered as right holders but instead as people living with an imperfection, thus focusing on the disability and not on the person.³⁶

Since it considers PWDs as being inferior compared to other persons, the medical model is considered to be 'oppressive' and out-dated.³⁷

2.2 The social model

The preamble to the CRPD outlines the foundation of the social model and recognises it as follows:³⁸

[T]hat disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others ...

Disability is therefore viewed as the relationship that PWDs have with the society and as 'an interaction between the person and the social environment'.³⁹ It is a new 'attitude' towards PWDs and it 'emphasises their rights to make choice[s] and be independent'.⁴⁰ It tackles the stigma and marginalisation that PWDs face in society due to their status of being disabled. It investigates the physical and social barriers that PWDs face in society.⁴¹

The social model is a 'tool' which contributes 'not just in a struggle for better services', 'but for full economic, social and political inclusion in society'.⁴²

2.3 Model adopted

For the purpose of this paper, the social model is adopted because it is the one which takes into consideration the human rights of persons with mental disabilities. The medical model considers a person with mental disabilities as someone who is imperfect and who cannot be a right holder.

35 South African Integrated National Disability Strategy White Paper (November 1997), available at <http://www.info.gov.za/whitepapers/1997/disability.htm> (accessed 5 November 2012).

36 Tassoni et al (n 26 above) 315.

37 As above.

38 Para (e) of the Preamble of the CRPD.

39 R. Traustadóttir 'Disability studies, the social model and legal developments' in OM Arnardóttir & G Quinn (eds) *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives* (2009) 16.

40 Tassoni et al (n 26 above) 315.

41 M Oliver *Social work with disabled people* (1983) 23.

42 AL Chappell 'Still out in the cold: People with learning difficulties and the social model of disability' in T Shakespeare (ed) *The disability reader: Social science perspectives* (1998) 211.

The medical model violates the human rights of PWDs since it categorises them as people who cannot exercise their rights effectively in society.

The social model focuses on the removal of barriers so that PWDs can live in society without any difficulty. It imposes an obligation on states to 'tackle socially created obstacles in order to ensure full respect for the dignity and equal rights of all persons'.⁴³

This paper will be based on the social model whereby a person with a mental disability is considered as someone who should be empowered in society and not as someone who should be marginalised and who cannot benefit from her human rights. The paper will take into consideration that there should be means to remove the barriers in society for women with mental disabilities to enjoy motherhood.

3 Possible violations of the provisions of the CRPD in the event of a forced termination

Section 5 of the CTPA can give rise to forced termination of pregnancies in the event the person with the mental disability wants to carry on with the pregnancy despite knowing the threats that it would pose to her life or to that of the fetus. The problem arising is whether such a termination of pregnancy does not violate the rights of women who have a mental disability since it is a forced one. A forced termination of pregnancy is when 'a woman wants to carry her pregnancy to term, but is required to terminate it against her will'.⁴⁴ In the event that the woman has expressed her willingness to keep the child but the medical advice is to terminate the pregnancy, section 5 of the CTPA poses a potential threat to several human rights of a woman living with a mental disability such as her right to reproductive choice, her right to free and informed consent, her right to dignity, and her right to equal recognition before the law.

3.1 The right to reproductive choice

Recognising that there are inequalities that arise when a woman is pregnant,⁴⁵ Millennium Development Goal (MDG) 5 provides that by 2015, universal access to reproductive health should be achieved.⁴⁶ The CRPD recognises the reproductive rights of PWDs in its article 23. The relevant parts of the article are as follows:

⁴³ Quinn & Degener (n 29 above) 10.

⁴⁴ Women's rights without frontiers 'What is a forced abortion?', available at http://www.womensrightswithoutfrontiers.org/index.php?nav=forced_abortion (accessed 20 March 2014).

⁴⁵ Target 5.B of the MDG 5.

⁴⁶ UN website, available at <http://www.un.org/millenniumgoals/maternal.shtml> (accessed 6 November 2012).

(1) States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others, so as to ensure that:

...

(b) The rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education are recognized, and the means necessary to enable them to exercise these rights are provided;

(c) Persons with disabilities, including children, retain their fertility on an equal basis with others.

It clearly stipulates that PWDs should not be discriminated against with regard to parenthood and that PWDs have the right to freely decide about the number of children they have. There is a rights-based approach to reproductive rights and governments must make sure it takes into consideration the 'unique needs of women'.⁴⁷ Addressing the 'unique needs' includes women living with disabilities. Furthermore, paragraph (n) of the Preamble to the CRPD recognises 'the importance for persons with disabilities of their individual autonomy and independence, including their freedom to make their own choices'. The state should therefore ensure that PWDs and other women who are pregnant are treated equally and PWDs should be able to enjoy the right to decide whether to have a child or not despite living with a mental disability.

The Constitution also provides for the right to reproductive choice. Article 12(2)(a) confers upon the persons in South Africa the right 'to make decisions concerning reproduction'. However, the reproductive rights of PWDs are often ignored, be it at the national or international level.

For a long time, feminists have struggled to enable women to 'make decisions about their bodies, sexuality and child bearing'.⁴⁸ Kallianes and Rubinfeld have highlighted the irony that exists concerning women with disabilities: despite the fact that women are perceived as sexual objects, women with disabilities are considered as 'asexual' or 'undesirable' as mothers.⁴⁹ Asch identifies the following as being constraints to reproductive freedom of women with disabilities:⁵⁰

It starts in exclusion from sex education classes and in parental silence about sexuality and motherhood ... inaccessibility of affordable gynaecological services; lack of safe contraception ... and the still-prevalent sterilizations.

47 BM Ahlberg & A Kulane 'Sexual and reproductive health and rights' in S Tamale (ed) *African sexualities: A reader* (2011) 313.

48 V Kallianes & P Rubinfeld 'Disabled women and reproductive rights' (1997) 12 *Disability and Society* 203.

49 Kallianes & Rubinfeld (n 48 above) 204.

50 A Asch 'Reproductive technology and disability' in N Taub & S Cohen (eds) *Reproductive laws for the 1990s: A briefing handbook* (1988) 87.

The right of a woman to decide whether she wants to terminate her pregnancy was firstly recognised in the case of *Roe v Wade* in 1973.⁵¹ Feminist theories present different options for the protection of women's rights⁵² and these extend to the right to reproductive choice. Feminist theorists consider choosing as a 'defining and unifying feature' of their principles and define choice as encompassing 'the positive right to bear and raise a child and the free choice not to abort'.⁵³

The reproductive health of women should be protected irrespective of whether they have a disability or not.

Section 27 of the Constitution of South Africa imposes an obligation on the state to provide access to reproductive health care services to everyone in its territory.⁵⁴ The WHO considers reproductive health to be achieved in a situation where:

[P]eople are able to have a responsible, 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.

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa expressly provides that women have the right to decide whether they want to have children or not.⁵⁵ A woman should be given the ability to decide when to have children as it is a fundamental component of her human rights and human dignity.⁵⁶

The UN Committee on Economic, Social and Cultural Rights' (CESCR) General Comment No 14⁵⁷ incorporates the right to reproductive choice as part of the right to health and includes the following:⁵⁸

[T]he right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation.

51 *Roe v Wade* 410 US 113 (1973).

52 LM Brown 'Feminist theory and the erosion of women's reproductive rights: The implication of fetal personhood laws and in vitro fertilization' (2005) 13 *Journal of Gender, Social Policy & the Law* 87 89.

53 L Sayce & R Perkins "'They should not breed": Feminism, disability and reproductive rights' (2002) 32 *Off Our Backs* 18 19.

54 Sec 27(1)(a) of the Constitution.

55 Art 14(1)(a).

56 MK Eriksson *Reproductive freedom: In the context of international human rights and humanitarian law* (2000) 10.

57 CESCR 'General Comment No 14: The right to the highest attainable standard of health (Art 12 of the Covenant)' 11 August 2000, E/C.12/2000/4.

58 Para 8 of General Comment No 14.

The above provision does not expressly make mention of PWDs but nevertheless it does encompass them.

Exercising one's right to reproductive choice also ensures that one is not subjected to inhumane and degrading treatment. Article 15 of the CRPD protects PWDs from inhuman and degrading treatment by providing that 'no one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment'.⁵⁹ Similarly, the Constitution provides that no one should be 'treated or punished in a cruel, inhuman or degrading way'.⁶⁰

Inhumane and degrading treatment has been defined in the case of *International Pen* by the African Commission as including 'not only actions which cause serious physical or psychological suffering, but which humiliate the individual or force him or her to act against his will or conscience'.⁶¹

If, during her examination, the PWD expressed her willingness to have a baby, she will be subject to psychological suffering because she has to go through the pain of abortion and the idea that she is not like other women who can decide whether they want to face the risk of any danger to their life or that of the fetus. By forcing her to have her pregnancy terminated, she is being humiliated.

Moreover, allowing a PWD to decide whether she wants to continue her pregnancy or not ensures that her right to form a family is protected. Article 23 of the CRPD imposes an obligation on states to ensure that there is no discrimination against PWDs concerning parenthood and to further ensure that '[t]he rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children ...' are protected. Being described as the 'fundamental and natural unit of society',⁶² states have an obligation to ensure that everyone has the right to form a family. However, women with disabilities are often perceived as too dependent and weak to make fit parents and serve as good role models. Not taking into consideration the right to reproductive choice of a woman with a disability, the state is impeding upon the PWD's right to form a family.

PWDs face an uphill battle when it comes to have their right to reproductive choice respected. For instance, not so long ago, forced sterilisation of persons forming part of vulnerable groups was widely practiced since they were considered as an inferior category of persons who

59 Art 15(1) of the CRPD.

60 Sec 12(1)(e) of the Constitution.

61 *International Pen (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998); see also *Doebbler v Sudan* (2003) AHRLR 153 (ACHPR 2003) paras 36 and 37.

62 Human Rights Education Associates 'The right to family', available at http://www.hrea.org/index.php?base_id=158 (accessed 30 March 2014).

gave birth to 'undesirable' children.⁶³ In 1927, the US Supreme Court decided in favour of a law which provided for the sterilisation of a woman who was 'feeble-minded'.⁶⁴ The Applicant contended the substantive law and argued that such an order violated her rights. However, the Court, while highlighting that 'three generations of imbeciles are enough',⁶⁵ stated the following:⁶⁶

It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.

However, in the contemporary world, forced sterilisation has been condemned by different human rights bodies. It has been considered as an act of violence against women and a form of torture and cruel and degrading treatment.⁶⁷

Moreover, a more human-rights approach to sterilisation was adopted in the case of *Eberhardy* where the contention was whether the guardians of a person with a mental disability can give consent to a permanent sterilisation.⁶⁸ The judges held that sterilisation procedures can be considered as 'the state's intrusion into the determination of whether or not a person who makes no choice shall be allowed to procreate'.⁶⁹ In *Eberhardy* the Court pointed out that instead of making orders for sterilisation, the state's interests lie in protecting persons with mental disabilities from being subjected to forced sterilisation.⁷⁰

In Canada, in 1928, Alberta adopted the Sexual Sterilization Act which recommended sterilisation as a means to have liberty from mental institutions. An amendment to the Sexual Sterilization Act in 1937 allowed for the forced sterilisation of persons with mental disabilities. The

63 P Paupenoe 'The progress of eugenic sterilization' (1934) 25 *The Journal of Heredity* 19 21.

64 *Buck v Bell* 274 US 200 (1927).

65 *Buck v Bell* (n 64 above) 207.

66 *Buck v Bell* (n 64 above) 209.

67 UN Committee on the Elimination of Discrimination Against Women 'General Recommendation No 19: Violence against women, article 16 (and article 5) of the Convention (Women and Health)' (1992) para 22; Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the UN Human Rights Council 'Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development' A/HRC/7/3 (2008) paras 38 and 39; UN Committee Against Torture 'General Comment No 2: Implementation of article 2 by States Parties' CAT/C/GC/2 (2008) para 22; Human Rights Committee 'General Comment No 28: Equality of rights between men and women' CCPR/C/21/Rev.1/Add.10 (2000) paras 11 and 20; UN Committee on the Rights of the Child 'General comment No 13: Article 19: The right of the child to freedom from all forms of violence' CRC/C/GC/13 (2011) 17 paras 16 and 21.

68 *The guardianship of Joan I. Eberhardy, Incompetent: Quintin Eberhardy and Mary Eberhardy, guardians v Circuit Court for Wood County* 307 Wisconsin Supreme Court (1981), available at <https://www.courtlistener.com/wis/9zJf/in-matter-of-guardianship-of-eberhardy/> (accessed 23 June 2014).

69 *Eberhardy* (n 68 above) 893.

70 *Eberhardy* (n 68 above) 896-897.

Sexual Sterilization Act was repealed in 1972 since it was morally and legally reprehensible. The CTPA can be similarly viewed because it treats persons with mental disabilities as an inferior category of people who cannot take care of their children.

In 2011, the European Court of Human Rights (ECtHR), in the case of *VC v Slovakia*, held that sterilisation interfered with one of the bodily functions of the woman and violated her right to reproductive choice.⁷¹ Drawing a parallel between forced sterilisation and forced termination of pregnancy, the latter also interferes with one's reproductive system. Therefore, deciding on behalf of the PWD whether she wants to terminate her pregnancy is a limitation of the right to reproductive choice.

The question which arises is whether this limitation is justified. Their rights should be limited to serve a particular purpose which is 'worthwhile and important in a constitutional democracy'.⁷² Application of section 5(4)(a) will ensure that a PWD's life or that of the fetus is not threatened. Empowering a woman with a mental disability by informing her of the danger that she or the fetus can encounter serves as a means through which the rights of the woman can be protected. Therefore, section 5 of the CTPA is baseless in an open and democratic society where everyone should be able to decide about whether to reproduce or not, even if that poses a danger to their life.

The right to reproductive choice, as discussed, is to ensure that women with disabilities are treated along the same lines as persons who are living without any disability concerning whether they want to have a termination of their pregnancy or not. Section 5(4)(a) of the CTPA thus denies women with disabilities their right to reproductive choice.

3.2 Right to free and informed consent

Article 25 of the CRPD states as follows:

States Parties shall require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, inter alia, raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care.

The CRPD imposes an obligation on South Africa to ensure that health professionals take into consideration the free and informed consent of the person who is being examined.

⁷¹ *VC v Slovakia* Application No: 18968/07 ECtHR (2011).

⁷² I Currie & J de Waal *The Bill of Rights Handbook* 5 ed (2005) 179.

The International Disability Caucus suggested the following definition for informed consent:⁷³

Informed decisions can be made only with knowledge of the purpose and nature, the consequences, and the risks of the treatment and rehabilitation supplied in plain language and other accessible formats.

As pointed out by the case of *Christian Lawyers Association v Minister of Health*, informed consent has 3 pillars namely knowledge, appreciation and consent.⁷⁴ A termination of pregnancy cannot therefore occur unless a woman has given her consent after having been educated about the issue at hand.

The CRPD Committee has expressed concern in relation to forced treatment in mental health services without one's free and informed consent.⁷⁵ The Committee specifically recommended that states⁷⁶ 'incorporate into the law the abolition of surgery and treatment without the full and informed consent of the patient, and ensure that national law especially respects women's rights under article 23 and 25 of the Convention'.

The Concluding Observation of the CRPD on the initial report of Argentina pointed out to the fact that legal guardians of persons with mental disabilities can give authorisation for an abortion on their behalf and this can lead to the choice of the person not being respected.⁷⁷ It recommended the following to the state:⁷⁸

[T]ake steps to provide the necessary support to women under guardianship or trusteeship to ensure that the women themselves are the ones who give their informed consent for a legal abortion or for sterilization.

Terminating the pregnancy of a PWD without her consent will have a very serious impact on her enjoyment of the rights enshrined in the Constitution. Her constitutional rights will not only be limited but will be waived. She will be in a situation where her personal will has no importance and she will be treated as an object which has to live its life according to the recommendations of other persons.

Therefore, a state has an obligation to ensure that there is full and informed consent before subjecting any woman, including one with a

73 International Disability Caucus 'Article 21? Health and informed consent'.

74 *Christian Lawyers Association v Minister of Health* 2005 (1) SA 509 (T) 515.

75 CRPD Committee *Concluding observations: Tunisia*, para 28, UN Doc CRPD/C/TUN/CO/1 (2011).

76 *Concluding observations: Tunisia* (n 75 above) para 29.

77 CRPD Committee *Concluding Observations on the Initial Report of Argentina as approved by the Committee at its eighth session* (17-28 September 2012) CRPD/C/ARG/CO/1 para 31.

78 *Concluding Observations on the Initial Report of Argentina* (n 77 above) para 32.

mental disability, to any medical intervention. Section 5 of the CTPA does not provide for the informed consent of the woman whose pregnancy is to be terminated and this contravenes article 25 of the CRPD.

3.3 Right to dignity

The right to dignity is recognised by both the CRPD and the Constitution. The CRPD makes reference to dignity in several of its provisions and one of the general principles of the CRPD is the 'respect for inherent dignity' of PWDs.⁷⁹

The CRPD has as its purpose the promotion of respect for the inherent dignity of PWDs.⁸⁰ Section 10 of the Constitution protects the right to dignity. It provides that 'everyone has inherent dignity and the right to have their dignity respected and protected'. The right to dignity is asserted in the Constitution 'to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings'.⁸¹ It is a 'value' which ensures that there is a proper interpretation of 'many, possibly all, other rights'.⁸² The case of *Makwanyane* gave considerable weight to the right to dignity and emphasised that the right to dignity is the cornerstone of the Constitution and is one of the values upon which the state is founded⁸³ and that 'this must be demonstrated by the State in everything that it does'.⁸⁴ The Constitution requires South Africa to 'acknowledge the value and worth of all individuals as members of our society'.⁸⁵ Coupled with the right to life, the right to dignity is considered as 'absolute' and as 'the source of all other rights'.⁸⁶

Although dignity is a term which does not have a precise definition,⁸⁷ 'it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society'.⁸⁸ Concerning PWDs, dignity implies that they are treated 'first as people and only then with people of particular characteristics' and that treatment should not be based 'on some idea about the person's disability'.⁸⁹

79 Art 3(a) of the CRPD.

80 Art 1 of the CRPD.

81 *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 35.

82 As above.

83 Sec 1(a) of the Constitution.

84 *S v Makwanyane* 1995 (3) SA 391 (CC) para 144.

85 *National Coalition for Gay and Lesbian Equality & Anor v The Minister of Justice & Others* 1999 (1) SA 6 (CC) para 28.

86 *Makwanyane* (n 84 above) paras 84 and 144.

87 *Egan v Canada* (1995) 29 CRR (2d) 79 106.

88 *The National Coalition for Gay and Lesbian Equality* (n 85 above) para 28.

89 LA Basser 'Human dignity' in MH Rioux et al (eds) *Critical perspectives on human rights and disability law* (2011) 36.

PWDs' right to dignity can be infringed if there is a recommendation for the termination of her pregnancy since it subjects her to different treatment due to her living with a disability. According to O'Sullivan and Bailey, 'denying a woman the freedom to make and act upon decisions concerning reproduction treats her as a means to an end and strips her of her dignity'.⁹⁰ Section 5(4)(a) of the CTPA provides for the termination of the pregnancy of a woman who has a severe mental disability. However, the section ignores that by categorising them as people who are unable to decide whether they can bear children, it is classifying them according to their disability and not recognising them as individuals who are entitled to enjoy motherhood. The section is therefore offensive to women who live with mental disabilities since it denies them access to their fundamental rights and freedoms.⁹¹

3.4 Right to equal recognition before the law

Article 12 of the CRPD provides for the right of PWDs to equal recognition before the law. It further imposes on states the obligation 'to ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law'. The right to equality is expressly protected by section 9 of the Constitution. Section 9(1) provides that 'everyone is equal before the law and has the right to equal protection and benefit of the law'. The right to equality 'includes the full and equal enjoyment of all rights and freedoms'.⁹² The Constitution strives to 'develop a society based on equality and respect by all for all'.⁹³

Concerning PWDs, their right to equality is 'inherent in their humanity, which means that they possess the same rights and obligations as other citizens'.⁹⁴ The case of *Shtukaturov v Russia* is an application of the wording of article 12 of the CRPD where the ECtHR held that even if a person is placed under guardianship, his will has to be taken into consideration when the subject matter potentially violates his fundamental rights and freedoms.⁹⁵ Therefore, persons with mental disabilities are all

90 M O'Sullivan & C Bailey 'Reproductive rights' (1998) 16-15, available at http://www1.chr.up.ac.za/chr_old/centre_publications/constitlaw/pdf/16-Reproductive%20Rights.pdf (accessed 30 March 2014).

91 I Grobbelaar-du Plessis & T Van Reenen 'Introduction to aspects of disability law in Africa' in I Grobbelaar-du Plessis & T van Reenen (eds) *Aspects of disability law in Africa* (2012) xvi.

92 Sec 9(2) of the Constitution.

93 *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC) para 59.

94 J Lecomte, West Montreal and Lisette-Dupras Readaption Centres, Quebec and Céline Mercier, University of Montreal, Quebec 'The emergence of the human rights of persons with intellectual disabilities in international law: The cases of the Montreal Declaration on International Disabilities and the United Nations Convention on the Rights of Persons with Disabilities' in F Owen & D Griffiths (eds) *Challenges to the human rights of people with intellectual disabilities* (2009) 52.

95 *Shtukaturov v Russia* Application No: 44009/05 ECtHR (27 March 2008).

human beings who should be afforded the same opportunity as others. The law should not view PWDs differently on the basis of their disability.⁹⁶ Such a step would include affording the PWD the opportunity to consent to the termination of their pregnancy.

Furthermore, General Comment 1 of the CRPD Committee expands upon article 12 of the CRPD.⁹⁷ Paragraph 31 of the CRPD General Comment recognises that women with disabilities 'are often denied control of their reproductive health and decision-making'. The CRPD General Comment raises concerns about PWDs being denied their legal capacity because of the 'unsoundness' of their mind.⁹⁸ The CRPD Committee, while making reference to the CRPD, clarifies that 'perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity'. Section 5(4)(a) of the CTPA is a reflection of removing the legal capacity of PWDs on the basis of them having 'impaired decision-making skills ... because of a cognitive or psychosocial disability'.⁹⁹ This practice has been considered as being discriminatory towards PWDs.¹⁰⁰

Discrimination on the basis of disability is defined by the CRPD as follows:¹⁰¹

[A]ny distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

The CRPD considers non-discrimination as one of its principles.¹⁰² The Preamble mentions that all human beings, without discrimination on the basis of their disability, must be guaranteed the full enjoyment of all their human rights and fundamental freedoms.¹⁰³ It further recognises that 'discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person'.¹⁰⁴ The CRPD also acknowledges that there are aggravated forms of discrimination against PWDs on the basis of sex amongst others.¹⁰⁵ The CRPD imposes an obligation on states parties 'to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with

96 As above.

97 Committee on the Rights of Persons with Disabilities 'General Comment 14 – Article 12: Equal recognition before the law' (2014) CRPD/C/GC1 adopted during the eleventh session (31 March-11 April 2014).

98 Para 12 of the CRPD General Comment.

99 Para 13 of the CRPD General Comment.

100 As above.

101 Art 2 of the CRPD.

102 Art 3(b) of the CRPD.

103 Para (c) of the Preamble of the CRPD.

104 Para (h) of the Preamble of the CRPD.

105 Para (p) of the Preamble of the CRPD.

disabilities'.¹⁰⁶ Article 5 expressly provides that there should be prohibition of 'all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds'.¹⁰⁷ There should be 'reasonable accommodation' to prevent any form of discrimination against PWDs.¹⁰⁸ The CRPD further recognises the vulnerability of women with disabilities and has a specific provision relating to their protection.¹⁰⁹

The right to equality as enshrined in the UDHR ensures that everyone benefits from their human rights in the same manner.¹¹⁰ Article 5 of the CRPD protects the right to equality of PWDs. It provides that PWDs are entitled to 'equal protection and equal benefit of the law'. Similar to human dignity, achievement of equality is one of the founding provisions of the Constitution of South Africa.¹¹¹ Furthermore, the Bill of Rights 'affirms the democratic values of human dignity, equality and freedom'.¹¹²

The Constitution provides for non-discrimination in its section 9. Section 9(3) of the Constitution protects PWDs from discrimination as follows:

The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

Disability is listed as a ground on which there should not be discrimination. This provision has been applied in the case of *Western Cape Forum for Intellectual Disability v Government of the RSA*¹¹³ where it was held that the state education policy and practice constituted unfair discrimination under section 9(3) of the Constitution as the funding and provisions of schools accommodating children with disabilities was inferior to that of children with no disabilities.

To ensure that the best interests of the PWD is protected, section 5(4)(a) of the CTPA does provide for the consent of two medical practitioners or that of a medical practitioner and that of a midwife who

¹⁰⁶ Art 4(b) of the CRPD.

¹⁰⁷ Art 5(2) of the CRPD.

¹⁰⁸ Art 5(3) of the CRPD.

¹⁰⁹ Art 6 of the CRPD: '(1) States Parties recognize that women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms. (2) States Parties shall take all appropriate measures to enjoy the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the present Convention.'

¹¹⁰ Art 1 of the UDHR.

¹¹¹ Sec 1(a) of the Constitution.

¹¹² Sec 7(1) of the Constitution.

¹¹³ *Western Cape Forum for Intellectual Disability v Government of the RSA* 2011 (5) SA 87 (WCC).

has completed the prescribed training course in relation to the termination of the pregnancy of a person who is severely mentally disabled.¹¹⁴ Nevertheless, two different persons may have different opinions and this is an example of the incapacity to provide for 'a rational explanation as to why similarly placed persons are treated in a substantially different way'. There is therefore unequal treatment since the same category of persons can be treated differently. Since the act does not define who a person with a severe mental disability is, it is arbitrary and not of general application.¹¹⁵

Recommending a termination of pregnancy for a PWD will constitute a violation of her right to equal recognition before the law and subsequently the right to be protected from discrimination. That recommendation will be made on behalf of the PWD only based on the fact that the PWD has a mental disability and does not have the mental capacity to make reasonable decisions. If she was without the mental disability, she would not be deprived from having a child. The CRPD clearly stipulates that women with disabilities are more vulnerable to discrimination.

4 Conclusion and recommendations

It has been observed that section 5 of the CTPA violates several provisions of the CRPD. These violations could be justified in terms of section 36 of the Constitution but as analysed in the paper, limiting the right of a woman with a mental disability to decide whether she wants to terminate her pregnancy or not is not justified since it does not fulfil the conditions listed in section 36 of the Constitution. The major recommendation is to have certain amendments made to section 5 of the CTPA so that it does not continue to violate the rights of persons with mental disabilities. The amendments, if implemented will ensure that South Africa abides by its general obligations under the CRPD, one of which is '[t]o take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities'.¹¹⁶

The first problem identified with section 5 of the CTPA is that it does not offer the woman with the mental disability the choice whether she wants to keep the child or not. It is thereby recommended that the section should be amended to provide for a procedure whereby the views of the woman is considered while terminating her pregnancy. By doing so, the right to reproductive choice of the woman will be respected. The authors acknowledge that it can be challenging for a woman with a severe mental

114 Art 5(4) of the CTPA.

115 Sec 36(1) of the Constitution.

116 Art 4(1)(b) of the CRPD.

disability to freely make a decision as to whether she wants to continue with her pregnancy or not. It is therefore further recommended that this section incorporates the principles of free and informed consent. This will ensure that the persons who are terminating the pregnancy at least explain to the woman with the mental disability all the aspects of the termination and its implication. By not providing for this option in the current law, the right to reproductive choice and the right to give free and informed consent for the termination of the pregnancy is completely overlooked.

Another argument advanced for the termination of the pregnancy of a person who has a mental disability is that she will not be in a position to understand the gravity of the situation since her life or that of the fetus might be at risk. It is being proposed that section 5 of the CTPA is amended to include the conduct of a social enquiry report in the event a person with a mental disability has refused to terminate her pregnancy after having been fully informed about what the pregnancy entails. The social enquiry should give details about the family background of the person and about whether the PWD has the capacity to make rational decisions. This process will give effect to the provisions of the CRPD which emphasise reasonable accommodation which has been defined as follows:¹¹⁷

[N]ecessary 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

The exploration of other avenues concerning the ability of the PWD to make the right informed decision would give effect to the principle of reasonable accommodation.

It has also been noted that the Act does not clearly define what a severe mental disability is. The WHO, while defining mental disorders, gave examples of that type of disability. However, the list can be considered as non-exhaustive. As discussed above, a mental illness is temporary and can be cured. The medical practitioner can prescribe medicines to reduce the severity of the mental disability and this would thus empower the woman to make a decision concerning the termination. In the same line of thought, the act does not make reference to intellectual disabilities which is life-long and cannot be dissipated. The question which arises is whether while conducting the examination, the medical practitioners make a distinction between mental and intellectual disability. Most of the times, mental disabilities and intellectual disabilities are confused and people with intellectual disabilities also fall within the rubric of persons targeted by section 5 of the CTPA. It is recommended that the CTPA gives a precise ambit within which section 5 should operate so that it does not impede upon the rights of persons with intellectual disabilities.

117 Art 2 of the CRPD.