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USING HUMAN RIGHTS TO REALISE ACCESS TO SAFE, LEGAL ABORTION IN UGANDA

The State's Obligation to Implement National Abortion Law

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USING HUMAN RIGHTS TO REALISE ACCESS TO SAFE, LEGAL ABORTION IN UGANDA

The State's Obligation to Implement National Abortion Law

EXECUTIVE SUMMARY

As is the case with many other countries in the Africa region, Ugandan abortion law recognises that abortion is lawful in given circumstances. Article 22(2) of the Ugandan Constitution in particular, provides that: “No person has the right to terminate the life of an unborn child except as may be authorised by law”. On its part, section 224 of the Penal Code provides for therapeutic abortion.

However, access to safe abortion services even within the boundaries of the law, continues to be a challenge. In 2008, the Ugandan Ministry of Health estimated that unsafe abortion-related mortality constituted up to 26 percent of maternal mortality and that for every woman who died from unsafe abortion, many more women suffered severe and permanent injuries.

This paper explores a human rights framework for implementing domestic abortion law in a way that maximises access to safe, legal abortion in Uganda. The paper analyses the explicit and implicit provisions of the main laws that regulate abortion in Uganda, including the Constitution (article 22(2)); the Penal Code (sections 141-143; 224); common law; and the country's reservations on article 14(2)(c) of the Protocol to the African Charter on the Rights of Women in Africa.

The human rights framework considers the association of unsafe abortion with high levels of maternal mortality and morbidity as justification for linking failure by the State to discharge the duty to provide health services, including reproductive services, with violations of the right to life and other justiciable rights under the Ugandan Constitution. Hence, the right to equality and non-discrimination; life; personal liberty; human dignity and protection from inhuman treatment; privacy; protection of freedom of conscience; and full and equal dignity of women, including freedom from laws, cultures and traditions that undermine the status of women – all of which are guaranteed by the Constitution and are more justiciable – can be used to assert a pregnant woman’s right to abortion.

The jurisprudence emanating from the UN treaty-monitoring bodies and the European Court of Human Rights mandates that where abortion is permitted under domestic law, even if in a very restrictive form, the State has a corresponding duty to ensure that any rights that are conferred on women are actually amenable to effective realisation.

The jurisprudence on transparency highlights that, even where there are permitted exceptions, criminalisation of abortion is, itself, a barrier that endangers public health through illegal abortions that in many settings are frequently unsafe. The State must, therefore, make conscious efforts to implement any exceptions and thus facilitate access to safe abortions.

For the public health rationale to be realised and deter unsafe abortions, Ugandan abortion laws must ultimately translate into services that are accessible to all women. In addition, the call for transparency assumes willingness and capacity on the part of civil society to litigate, if necessary, to hold the state accountable for failure to effectively implement abortion laws and thus vindicate abortion rights.

There is no evidence that Uganda's National Policy treats abortion as a reproductive health need which is to be interpreted and applied according to the holistic definition of reproductive health in ICPD and the technical guidance on safe abortion provided by WHO. The public health rationale for transparency crucially depends on availability and accessibility of services which are woefully lacking in Uganda.

As with all human rights, especially, in contested areas such as abortion, civil society should play its role in championing neglected rights. It should hold the state accountable where there is failure to render abortion services transparent in ways that make a difference to women seeking safe abortion. Even where litigation is unsuccessful, nonetheless, it can succeed in raising public consciousness about how national authorities deny human rights though failure to implement rights already guaranteed and, in the process, foreground or reinforce transformative political struggles.

INTRODUCTION

“**A**lthough legal grounds alone may not reflect the way in which the law is applied, nor the quality of services offered, a clear pattern was found in more than 160 countries indicating that where legislation allows abortion on broad indications, there is a lower incidence of unsafe abortion and much lower mortality from unsafe abortions, as compared to legislation that greatly restricts abortion.”

BERER, M
(2004)

INTRODUCTION

Domestic abortion law that recognises that abortion is lawful in given circumstances but in practice is inaccessible to women with unwanted pregnancies compromises, or even nullifies, any legal rights conferred on women. Inaccessible abortion law is undeniably part of the explanation for the persistence of high levels of unsafe abortion-related mortality and morbidity in the African region. Ugandan abortion law is no exception. While, ultimately, it is accessibility of safe abortion services which is the key determinant in efforts to reduce unsafe abortion, it should not escape notice that, on account of the historical criminalisation of abortion, the law serves as an important gateway to the provision of services.¹ It is not just the letter of the law that matters. The manner in which abortion law is implemented (or lack of it) has an important bearing on accessibility of abortion services. It has the capacity to enable or disable access to safe abortion, irrespective of whether the substantive law is liberal or highly restrictive. The main objective of this paper is to develop an approach for implementing domestic abortion law using human rights in a way that seeks to maximise accessibility of abortion law. The focus is on implementation of domestic abortion law which the State, in this instance Uganda, has already promulgated or adopted.

1 M Berer 'National Laws and Unsafe Abortion: The Parameters of Change' (2004) 12 *Reproductive Health Matters* 1-8; S Singh *et al* *Abortion Worldwide: A Decade of Uneven Progress* (2009) 25-9; J Benson *et al* 'Reduction in abortion-related mortality following policy reform: evidence from Romania, South Africa and Bangladesh' (2011) 8 *Reproductive Health* 39, available at www.reproductive-health-journal.com/content/pdf/1742-4755-8-39.pdf (accessed 10 October 2013).

It is important to clarify, at the outset, the scope of this paper. It is not the primary purpose of the paper to propose reform of the substantive law of abortion in Uganda. Advocating for reform of the substantive law of abortion to broaden the grounds for abortion is frequently a cardinal, if not essential, consideration when devising ways of broadening access to safe abortion. This is so especially in jurisdictions that have a history of highly restrictive abortion law and practice which are commensurately associated with high levels of unsafe abortion and where misconceptions about the ‘illegality’ of abortion are widely shared as is the position with the majority of African countries, including Uganda.² But notwithstanding the importance of substantive reform, the focus of this paper is much more limited. It seeks to highlight that, irrespective of whether domestic abortion law is liberal or highly restrictive, once the State regulates abortion to permit it in given circumstances, it has an implicit human rights obligation to implement abortion law in a manner that is *effective* in order to render any legal rights tangible and amenable to all citizens, not least women seeking abortion. This is important not least because women seeking abortion constitute a historically marginalised and stigmatised social group. They are vulnerable to being denied their legitimate entitlements by legal and health systems that, by omission or intent, fail to implement effectively the entitlements. In this way, the paper seeks to contribute towards promotion of maximal realisation of access to safe, legal abortion for women with unwanted pregnancies within the ambit of what is substantively permitted by existing Ugandan laws. It advocates for the effective implementation of existing abortion laws in ways that encompass emerging human rights precepts.

“Even where abortion has been decriminalised or the grounds for abortion have been broadened, the historical criminalisation and stigmatisation of abortion can continue to serve as veritable barriers.”

NGWENA, CG (2012)

2 CG Ngwena ‘Access to Legal Abortion: Legal Developments in African from a Reproductive and Sexual Rights Perspective’ (2004) 19 *SA Public Law* 328, 344-348.

Against this backdrop, the paper does not so much seek to challenge the substantive validity of the main laws that regulate abortion law in Uganda. Rather, it seeks to put a gloss on the laws so that they are clearer and are implemented in a manner that is tangible and accessible to women with unwanted pregnancies as well as health care professionals with competence to provide abortion services. The main laws that regulate abortion in Uganda can be summarised as: provisions of the Constitution of Uganda but mainly article 22(2) which speaks closely to abortion and provides that ‘no person has the right to terminate the life of an unborn child except as may be authorised by law’;³ provisions of the Penal Code Act of Uganda (Penal Code), especially sections 141-143 which proscribe abortion when it is ‘unlawfully’ procured read conjunctively with section 224 of the Penal Code which permits abortion for therapeutic reasons;⁴ and the common law of abortion in Uganda which has historically served as a gloss on the provisions of the penal code.⁵ The paper does not seek to contest the validity of Uganda’s reservations on article 14(2)(c) of the Protocol to the African Charter on the Rights of Women in Africa,⁶ save to highlight that State reservations entered by Uganda cannot, in any event, be construed as serving to restrict substantive domestic law on abortion as contained explicitly and implicitly, in the Constitution, the Penal Code and common law.⁷

3 Constitution of the Republic of Uganda of 1995.

4 Penal Code Act of 1950.

5 See the discussion in Section IV of this paper.

6 Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, adopted 11 July 2003, (entered into force 25 November 2005), 2nd Ordinary Session of the Assembly of the African Union, AHG/Res. 240 (XXXI) (Women’s Protocol).

7 For a view in support of this proposition, see: Center for Reproductive Rights A Technical Guide to Understanding the Legal and Policy Framework on Termination of Pregnancy in Uganda (2012) 10.

In the context of this paper, it should be stressed that accepting the substantive validity of the laws that regulate abortion in Uganda does not preclude clarifying the laws so that they are understood not in isolation but contextually in a manner that complements the broader provisions of the Ugandan Constitution and its human rights obligations. Ultimately, the paper develops a human rights framework for implicating as well as delineating the duty of the State to implement abortion laws effectively through highlighting mainly the procedural requirements that are mandated by human rights. It draws particularly from jurisprudence that has emerged in recent years from the treaty monitoring bodies of the United Nations as well as the European Court of Human Rights. In respect of the UN treaty monitoring bodies, the paper will discuss the juridical import of following cases: *K.L. v Peru*,⁸ *L.M.R. v Argentina*,⁹ and *L.C. v Peru*.¹⁰ In respect of the European Court of Human Rights, it will similarly examine the following cases: *Tysiac v Poland*,¹¹ *A, B and C v Ireland*,¹² *R.R. v Poland*,¹³ and *P and S v Poland*.¹⁴ In constructing a human rights framework for implementing domestic abortion law, the paper will submit that emerging jurisprudence from UN treaty monitoring bodies as well as the European Court of Human Rights can serve as persuasive jurisprudence in Uganda. The jurisprudence can be used as to institute a framework that renders abortion law more accessible.

8 *K.L. v Peru*, Communication No. 1153/2003, adopted 24 October 2005, U.N. GAOR, Human Rights Committee, 85th Session, U.N. Doc. CCPR/C/85/D/1153/2003, (2005).

9 *L.M.R. v Argentina*, Communication No. 1608/2007, CCPR/C/101/D/168/2007, Human Rights Committee (2011).

10 *L.C. v Peru*, Communication No. 22/2009, CEDAW/C/50/D/22/2009, Committee on the Elimination of Discrimination against Women (2011).

11 *Tysiac v Poland* Application No. 5410/03, ECHR 2007-IV (2007) European Court of Human Rights.

12 *A, B and C v Ireland* Application No. 25579/05 (2010), [2010] ECHR 2032 European Court of Human Rights (2010).

13 *R.R. v Poland* Application No. 27617/04, European Court of Human Rights (2011).

14 *P and S v Poland* Application No. 57375/08, European Court of Human Rights (2012).

The paper has four main sections and a concluding section. Section I, the present section, provides an overview of scope of the paper. Section II is a summary of the magnitude of unsafe abortion. It highlights that unsafe abortion-related mortality and morbidity is a particular bane for women in sub-Saharan Africa including Uganda, especially poor women who live in rural areas. Furthermore, Section II serves as a public health rationale and, ultimately, a human rights rationale for impressing upon the magnitude of unsafe abortion and the human rights imperative of requiring the State to, at the very least, ensure that women are given fair opportunities to exercise their legal entitlements to protect their lives, reproductive health and reproductive autonomy through access to abortion laws which are effective as to remove the incentive for unsafe abortion.

**CENTER FOR
REPRODUCTIVE
RIGHTS**

“Abstion is legal in Uganda when done to preserve the life or mental or physical health of the pregnant woman, understood to include cases of sexual violence. However, unclear and often confusing abortion laws and policies mean that many people are not aware that abortions can be legally obtained in these circumstances.

Section III is an overview of Ugandan abortion laws. It explains, in outline, Ugandan abortion law. It highlights that while abortion is restricted, it is concomitantly permitted by the Constitution, statutory law and common law. However, because the circumstances in which abortion is permitted are not clearly stated, they warrant clarification on the part of the State. Section III emphasises the importance of not treating article 22 of the Constitution as the only constitutional provision relevant to abortion. It is submitted that the constitutional regime for abortion in Uganda should be acknowledged and framed more holistically and contextually, taking into account other provisions of the Constitution that have a bearing on abortion, albeit by extrapolation and Uganda's human rights obligations. The section ends by underlining the importance of rendering the domestic law tangible and effective so that it does not continue to be surrounded by a cloud of uncertainty about what the law means and how it should be applied in practice. Uncertainty about the law serves to deter not just women from accessing services but also health care professionals from providing services.¹⁵

Ugandan law allows abortion under some circumstances, but laws and policies on abortion are unclear and are often interpreted inconsistently, making it difficult for women and the medical community to understand what is legally permitted.

- The Ugandan Constitution states that abortion is permitted if the procedure is authorized by law.
- According to the 2006 National Policy Guidelines and Service Standards for Sexual and Reproductive Health and Rights, pregnancy termination is permissible in cases of fetal anomaly, rape and incest, or if the woman has HIV.
- However, because interpretations of the law are ambiguous, medical providers may be reluctant to perform an abortion for any reason for fear of legal consequences.

**GUTTMACHER
INSTITUTE**

¹⁵ Guttmacher Institute 'Abortion in Uganda' (January 2013), available at <http://www.guttmacher.org/pubs/FB-Abortion-in-Uganda.html> (accessed 10 October 2013).

Section IV develops a human rights framework for the implementation of Ugandan domestic abortion. Principally, this section draws from the jurisprudence of the United Nations treaty monitoring bodies and the European Court of Human Rights. In addition, Section IV draws from global and regional consensus statements or guidance as well as domestic policies. At a global level, the Programme of Action adopted at the International Conference on Population and Development,¹⁶ and the Platform for Action and Beijing Declaration adopted at the Fourth World Conference on Women¹⁷ provide extremely important soft law backdrops for reading into domestic laws and health systems a State duty to provide access to abortion to the fullest extent of the law through, among other measures instituting an administrative framework for ensuring that laws and services which are lawful are in fact accessible in practice and not mere paper entitlements. The technical and policy guidance issues by WHO reinforces this duty.¹⁸ At a regional level, the most significant consensus statement is the African Union's *Maputo Plan of Action for the Operationalisation of the Continental Policy Framework for Sexual and Reproductive Health 2007-2010* (2006).¹⁹ At a domestic policy level, Section IV draws support from Uganda's own national policy and standards for sexual and reproductive health and rights.²⁰ Section V is the conclusion.

16 United Nations Population and Development, Programme of Action Adopted at the International Conference on Population and Development, Cairo, 5-13 September 1994 (1994) (ICPD).

17 United Nations, Platform for Action and Beijing Declaration, Fourth World Conference on Women, Beijing, China, 4-15 September 1995 (1995) (Beijing Declaration).

18 World Health Organisation Safe Abortion: Technical and Policy Guidance for Health Systems (2012).

19 African Union Maputo Plan of Action for the Operationalisation of the Continental Policy Framework for Sexual and Reproductive Health 2007-2010 (2006) (Maputo Plan of Action). In 2011, the Maputo Plan of Action was extended to 2015: The African Union Commission 'Plan of Action on Sexual and Reproductive Health and Rights (Maputo Plan of Action)', available at <http://pages.au.int/carmma/publications/plan-action-sexual-and-reproductive-health-and-rights-maputo-plan-action> (accessed 10 October 2013).

20 Ministry of Health The National Policy Guidelines and Service Standards for Sexual and Reproductive Health and Rights (2012).

THE INCIDENCE OF UNSAFE ABORTION

The African region is overrepresented in the incidence of unsafe abortion-related mortality. Its regional incidence has hardly declined, remaining close to 13 percent. More tellingly, close to 62 percent of the women who die from unsafe abortion or 29 000 (out of the 47 000) are from the African region.

WORLD HEALTH
ORGANISATION,
2011

INCIDENCE OF UNSAFE ABORTION

The latest authoritative estimates on the global and regional incidence of unsafe abortion-related mortality were published by the World Health Organisation in 2011.²¹ The estimates confirm that the African region, especially sub-Saharan Africa, of which Uganda is part, remains overburdened with unsafe abortion. Globally, there has been a trend towards the reduction of unsafe abortion-related mortality, from 69 000 in 1990 and 56 000 in 2003 to 47 000 in 2008. However, this welcome decline masks regional disparities. The African region is overrepresented in the incidence of unsafe abortion-related mortality. Its regional incidence has hardly declined, remaining close to 13 percent. More tellingly, close to 62 percent of the women who die from unsafe abortion or 29 000 (out of the 47 000) are from the African region.²²

Within the African region itself, there are sub-regional disparities in the incidence of unsafe abortion and attendant morbidity and mortality. According to WHO, the Eastern Africa region, of which Uganda is part, has the highest incidence of unsafe abortion-related mortality with 18 percent, while Southern Africa has the lowest incidence with 9 percent.²³ Middle Africa, Northern Africa and Western Africa regions occupy an intermediate position (12 percent in each region) in the African regional estimates of unsafe-abortion-related mortality. The statistics on the prevalence of abortion in Uganda suggest that it is significantly higher than the Eastern Africa average of 18 percent. A 'Fact Sheet' on abortion in Uganda compiled by the Guttmacher Institute in January 2013, observes that in 2008, the Ugandan Ministry of Health estimated that unsafe abortion-related mortality constituted 26 percent of maternal mortality and that for every woman who dies from unsafe abortion, many more women suffer severe and permanent injuries.²⁴

21 World Health Organisation *Unsafe Abortion: Global and Regional Estimates of the Incidence of Unsafe Abortion and Associated Mortality in 2008* (2011).

22 *Ibid* 18-19, 28.

23 The terminology to describe Africa's regions as Eastern Africa, Middle Africa, Northern Africa, Southern Africa and Western Africa here comes from the World Health Organisation: *World Health Organisation Unsafe Abortion: Global and Regional Estimates of the Incidence of Unsafe Abortion and Associated Mortality in 2008* (note 21 above) 30.

24 Guttmacher Institute 'Abortion in Uganda'.

There is a structural inequality dimension to the phenomenon of unsafe abortion. Though women from all socioeconomic backgrounds have abortions, in Uganda, as in many other parts of Africa, it is predominantly poor rural women who bear the disproportionate burden of unsafe abortion-related mortality and morbidity.²⁵ These are women who predominantly rely on State provision of health services to meet their health needs, including reproductive health needs. It is poor rural women with little education who are least positioned to know that the law permits abortion in given circumstances or afford safe abortion services. Women who have the financial means are better placed to circumvent any barriers posed by abortion law and practice and mainly through accessing safe abortion services that are provided in the private sector even if such services are offered in clandestine environments.²⁶ Adolescents are also particularly vulnerable to unsafe abortion on account of barriers that they are likely to face when attempting to access services on their own without the knowledge or consent of their parents or guardians. In the age of the universality of human rights, such inequities should be allowed to persist in the design or implementation of reproductive health services.

²⁵ Ibid; Guttmacher Institute *Abortion Worldwide: A Decade of Uneven Progress* (2009) 6.

²⁶ Guttmacher Institute 'Abortion in Uganda'

The interpretive guidance of the Committee on Economic and Social Rights (Committee on ESCR) in relation to Article 12 (right to health) under the Covenant on Economic and Social Rights General Comment 14²⁷, and that of the Committee on CEDAW on Article 12 (right to health) of CEDAW in General Recommendation 24 respectively²⁸ is particularly relevant to the formulation of best practices for reproductive health services at the domestic level. The Committee on ESCR and the Committee on CEDAW have illuminated the content of the State obligation to render health services ‘accessible’ in Concluding Observations in a way which highlights that equality in access to health services requires the State to also provide populations who need a particular health service with the requisite information. In a human rights sense, health services are accessible if they are available and are accessible physically, economically, and in terms of being known by women who need them (information accessibility).

27 Committee on ESCR General Comment No 14, Right to the Highest Attainable Standard of Health (2000).

28 Committee on CEDAW General Recommendation No 24: Article 12 of the Convention (Women and Health) (1999).

OVERVIEW OF ABORTION LAW OF UGANDA

No person has the right to terminate the life of an unborn child except as may be authorised by law

ARTICLE 22(2)
CONSTITUTION

OVERVIEW OF ABORTION LAW OF UGANDA

A) CONSTITUTION

The Constitution of 1995 is the supreme law of Uganda. Article 22(2) of the Ugandan Constitution is a starting point. It provides that: ‘No person has the right to terminate the life of an unborn child except as may be authorised by law’. While not speaking exclusively to abortion, it is obviously inclusive of abortion. Article 22(2) is the closest the Ugandan Constitution comes to directly regulating abortion. Article 22(2) does not, itself, indicate substantively the circumstances in which abortion is ‘authorised’. Rather, it merely serves a legitimising or mandating role of giving constitutional legitimacy to legislative instruments and common law that regulate abortion but without providing explicit substantive content as a yardstick. It is submitted that because the Constitution constitutes supreme law, any ‘authorising’ law must necessarily be consonant with the constitutional values and rights in order to enjoy constitutional legitimacy. In this sense, any authorising law must not seek to restrict constitutional rights that are already implicitly guaranteed to women or have that effect. Equally, it must not seek exceed the constitutional mandate or have that effect. Because article 22(2) does not enunciate the substantive constitutional parameters of the right to abortion, other provisions of the Constitution must necessarily be read in or implied in order to clarify the constitutional parameters of abortion.

In the age of constitutionalism and human rights, reading into the Ugandan Constitution abortion rights and corresponding State duties that are not enumerated can be understood not so much as reforming the substantive law of abortion but, instead, affirming or clarifying what is already contained in a constitution but has not been spelt out. Indeed, it serves well to note that for the preponderance of jurisdictions, abortion is rarely something that is expressly regulated in a constitution. It is the exception rather than the rule for a domestic constitution to address abortion directly.* While article 22(2) of the Ugandan Constitution is the main domestic supreme law provision governing abortion, it serves well to note that abortion is already something that some jurisdictions have constitutionalised even in the absence of an express constitutional provision on abortion.²⁹ Following the lead given by the Supreme Court of the United States in *Roe v Wade*,³⁰ in a number of jurisdictions abortion is understood as an unenumerated, even if contested, fundamental right which is read into a constitution by the courts.**

***The main exceptions to the rule in the African region are Kenya and Swaziland. Article 26(4) of the Kenyan Constitution of 2010 which permits abortion on the grounds of: emergency medical treatment; danger to the life or health of the pregnant woman or if abortion is permitted by any other written law. Section 15(5) of the Constitution of Swaziland of 2005 permits abortion when pregnancy threatens the life of the woman or when it constitutes a serious threat to the health of the pregnant woman, or when there is a risk of serious and irreparable foetal malformations or when pregnancy is a result of rape, incest or sexual intercourse with a mentally disabled female, or when permitted by Parliament.**

**KENYA &
SWAZILAND**

²⁹ RB Siegel 'The Constitutionalisation of Abortion' in M Rosenfeld & A Sajos (eds) *The Oxford Handbook of Comparative Law* (2012) 1057-1078, available at <http://ssrn.com/abstract=2137590>.

³⁰ *Roe v Wade* 410 US 113 (1973).

The constitutionalisation of abortion has its origins in women movements and transnational struggles for equal citizenship.³¹ Ultimately, constitutionalisation of abortion depends on the historical, cultural and legal traditions of a given country that change with time rather than remain static.³² But whatever the underlying traditions of a given country, in its constitutionally unenumerated form, abortion is, in substance, a composite rather than discrete right. It draws sustenance from disparate provisions of a constitution whose common characteristic is not that they address abortion directly but that they are amenable to being interpreted as having a constitutional bearing on abortion. This was the approach adopted, for example, by a South African High Court in *Christian Lawyers' Association of South Africa v Minister of Health*.³³

****** In *Roe v Wade* 410 US 113 (1973), the Supreme Court of the United States held that the right to privacy guaranteed by the Fourteenth Amendment of the American Constitution encompassed a woman's right to decide whether to terminate her pregnancy. The decision highlighted that, as part the constitutional right to privacy, the State has a duty to respect the decision of the pregnant woman and her doctor to terminate pregnancy anytime before the foetus was viable. The decision of the Supreme Court of the United States can be contrasted with that of the West German Federal Court in *BVerfG*, February 25, 1975, 39 *BVerfGE* 1 where it was held that under German Basic Law the State had a duty to protect 'uborn life' except where requiring the woman to continue with the pregnancy would impose extraordinary burdens on her: Siegel (note 30) 1058.

**ROE V WADE 410
US 113 (1973) &
39 BVerfGE 1**

³¹ Siegel (note 30 above) 1058.

³² See, for example, the contrasting approaches of the Supreme Court of the United States and the German Constitutional Court: Note 31 above.

³³ *Christian Lawyers' Association of South Africa and Others v Minister of Health and Others* 1998 (11) BCLR 1434 (T); C Ngwenya 'The History and Transformation of Abortion Law in South Africa' (1998) 30 *Acta Academica* 32, 50-60.

South Africa is the only African jurisdiction where the constitutionality of abortion has been tested in the courts. In *Christian Lawyers' Association of South Africa*, following radical reform of South African abortion law, it had been argued by the applicants that life begins at conception and that South African Choice of Termination of Pregnancy Act of 1996, which permits abortion, including on the ground of the pregnant woman's request, was unconstitutional because it violated the right to life of a foetus. It was part of the applicants' argument that section 11 of the South African Constitution, which guarantees a right to life to 'everyone', implicitly includes foetal life. The court rejected this argument and upheld the validity of the Choice on Termination of Pregnancy Act partly on the ground that, even if a foetus could be recognised as the bearer of a constitutional right to life, any such right could not be regarded as absolute. Any foetal rights would need to be balanced against the constitutional rights guaranteed to the pregnant woman, including her rights to: equality; life, human dignity, bodily and psychological integrity including the right to make decisions concerning reproduction; and access to health services, including reproductive health services.

**ARTICLE 22(2)
CONSTITUTION OF
UGANDA**

**Constitution of the Republic of Uganda,
Article 22 (Protection of right to life):**

22 (2) No person has the right to terminate the life of an unborn child except as may be authorised by law.

Uganda has no history of the constitutionalisation of abortion save article 22(2) of its Constitution. The immediate juridical import of conceding that a right to abortion can flow from disparate provisions of the constitution for the effective implementation of abortion law is two-fold. First and foremost, it means that it is not just article 22(2) which is relevant to extrapolating a fundamental rights relating to abortion, but also other constitutional provisions. Therefore, provisions of the Ugandan Constitution which can be used to assert a pregnant female's right to abortion or to shape its normative content include the rights to: equality

and non discrimination,³⁴ life,³⁵ personal liberty,³⁶ human dignity and protection from inhuman treatment,³⁷ privacy,³⁸ protection of freedom of conscience,³⁹ and full and equal dignity of women, including freedom from laws, cultures and traditions that undermine the status of women.⁴⁰ It also follows that it is not just the Ugandan Penal Code or its common law that can provide the content of domestic abortion law.

**ARTICLE 33
CONSTITUTION OF
UGANDA**

**Constitution of the Republic of Uganda, Article
33 (Rights of women):**

33 (6) **Laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status, are prohibited by this Constitution.**

Constitutional provisions that are amenable to supporting a right to abortion or shaping its normative content need not be confined to constitutional rights that are clearly intended to be justiciable. Provisions that impose State duties through the mechanisms of constitutional directive principles of State policy are also by inference pertinent. As effective access to reproductive services including access to abortion services ultimately depends on availability of services article directive principles of State policy of the Ugandan Constitution that speak to access to health services are particularly relevant.* For example, the Ugandan Constitution does not include a right to health in the part of the Bill of Rights which contains fundamental rights that are clearly intended to be justiciable. Nonetheless, in the Chapter on National Objectives and Directives Principles of State policy, the State is under an obligation to ensure that all Ugandans enjoy

34 Article 21 of the Constitution of Uganda.

35 Article 22 of the Constitution of Uganda.

36 Article 23 of the Constitution of Uganda.

37 Article 24 of the Constitution of Uganda.

38 Article 27 of the Constitution of Uganda.

39 Article 29 of the Constitution of Uganda.

40 Article 33 of the Constitution of Uganda.

rights and opportunities access to health services.⁴¹ Furthermore, the State is enjoined to take all practical measures to ensure the provision of basic medical services to the population of Uganda.⁴²

***Note that in Centre for Health Human Rights and Development et al v Attorney General of Uganda, Constitutional Petition No 16 of 2011 (2012), the Constitutional Court of Uganda refused to treat as justiciable a claim that the state failure to provide necessary health services had led to preventable maternal deaths, saying that such a claim raised a 'political' as opposed to a justiciable question. The restrictive approach of the Ugandan Constitutional Court in this case can be contrasted with the expansive approach of courts in India comparable cases. Indian courts have accepted that State directives of policy relating to provision of health services can indirectly found claims under a constitutionally guaranteed right to life. See, for example: Laxmi Mandal v Deen Dayal Harinagar Hospital et al, W.P.(C) No. 8853 of 2008, High Court of Dehli (2010) ; RJ Cook 'Human Rights and Maternal Health: Exploring the Effectiveness of the Alyne Decision' Global Health Law (Spring 2013) 103, 106.**

**CEHURD &
OTHERS
V
ATTORNEY
GENERAL**

The association of unsafe abortion with high levels of maternal mortality and morbidity justifies linking failure by the State to discharge the duty to provide health services, including reproductive services, with violations of the more justiciable rights under the Ugandan Constitution such as the right to life. In General Comments, General Recommendations and Concluding Observations, United Nations treaty monitoring bodies have linked unsafe abortion-related mortality that due to highly restrictive abortions to violations of the rights to health and life.⁴³ This implies

41 Objective XIV of the Constitution of Uganda.

42 Objective XX of the Constitution of Uganda.

43 RJ Cook & BM Dickens 'Human Rights Dynamics of Abortion Law Reform' (2003) 25 Human Rights Quarterly 1; C Zampas & JM Gher 'Abortion as a Human Right: International and Regional Standards' (2008) 8 Human Rights Law Journal 249; CG Ngwena 'Inscribing Abortion as a Human Right: Significance of the Protocol on the Rights of Women in Africa' (2010) 32 Human Rights Quarterly 783, 787-797.

that such rights, which also manifest in the Constitution of Uganda as justiciable rights (right to life) or as state directives (the right to health) can be used to support as well as clarify the notion of a fundamental right to access to safe abortion.

Furthermore, given the focus of this paper on effective implementation of abortion law, it is important to take into cognizance provisions of the Constitution that, in an administrative sense, can assist women who are aggrieved by an administrative decision to deny them abortion. Article 42 of the Constitution provides that: ‘Any person appearing before any administrative official or body has a right to be treated justly and fairly and shall have a right to apply to a court of law in respect of any administrative decision taken against him or her’. As will be submitted in the next section, article 42 is an important constitutional edifice for impressing upon the duty of the State to implement abortion law effectively, though among other mechanisms, ensuring that, litigation aside, there are accessible and timely administrative procedures for rendering the State accountable to women who are denied abortion.

The second implication of reading in other constitutional clauses other than article 22(2) for the clarifying and implementing of abortion law is that it creates a synergic bridgehead between constitutional rights and international human rights. In terms of constitutional provisions that have an implicit bearing on abortion, the tenor of the provisions of the Ugandan Constitution, especially, provisions of its Bill of Rights is, on the whole, quite progressive, notwithstanding the marginalisation of socioeconomic rights. As Section IV will seek to argue, reading in provisions of the Bill of Rights and directive principles paves the way for creating synergy between constitutional rights and international human rights. In turn, such synergy can serve to accentuate the persuasive nature jurisprudence emerging from UN treaty bodies and the European Court on Human Rights on the obligations of the State to implement abortion law effectively at the domestic level.

The provisions of the Ugandan Penal Code on abortion are also shared by other African jurisdictions that have retained colonial abortion law such as Malawi, Somalia, Sudan, South Sudan and Tanzania.

B) PENAL CODE

The legislative provisions of the Penal Code of Uganda that have the most direct application to abortion, namely, sections 141-143, which proscribe ‘unlawfully’ procured abortion and section 224 provides for therapeutic abortion are colonial bequests. They have been retained from the law that Uganda inherited from Britain. As such, the provisions have a colonial jurisprudential history.⁴⁴ The legislative provisions should be understood in its historical context rather than in isolation from it. The colonial provenance of the abortion provisions of the Ugandan Penal Code are the English Offences Against the Person Act of 1861 and its accompanying common law as developed by English courts principally in the case of *R v Bourne*.⁴⁵ The provisions of the Ugandan Penal Code on abortion are also shared by other African jurisdictions that have retained colonial abortion law such as Malawi, Somalia, Sudan, South Sudan and Tanzania.

Historically, African abortion laws have been singularly highly restrictive, being replicas of the laws of the colonizing countries. Whether the law was inherited from the codified laws of Belgium, France, Italy, Spain or Portugal or from the common law or statutory law of England as with Uganda, a common feature of colonial abortion laws is that they all criminalised abortion. Saving the life of the pregnant woman was expressly or implicitly the only recognized exception. This exception, which became known as the therapeutic exception, was initially understood very restrictively as to amount to what is required to satisfy the defense of necessity to save human life when faced with a criminal charge. By proscribing abortion that is ‘unlawfully’ procured, sections 141-143 of the Ugandan Penal Code replicated what was found in the English Offences Against the Person Act. Furthermore by providing a therapeutic defence to a charge of unlawfully procuring abortion in section 224, the Ugandan Penal Code codified or at least attempted to codify common law jurisprudence developed by English Courts, principally in the *Bourne* case, to underline that the word ‘unlawfully’ in the 1861 Act implied that there were circumstances in which abortion was lawful and also to indicate, to a point, the scope of the therapeutic defence.

44 Ngwena ‘Access to Legal Abortion’ 335-338.

45 *R v Bourne* | King’s Bench 687 (1938) Central Criminal Court, London.

On the eve of Uganda's independence in 1962, abortion law stood as it was during the colonial era, with no official guidance on how to apply the therapeutic exception save to a limited extent in Anglophone Africa following a ruling in 1938 by an English court in the Bourne case.

In 1938, Bourne equated threat to the life of the pregnant women with a serious threat to her physical or mental health.

In this way, Bourne judicially broadened the compass of the therapeutic exception beyond an immediate threat to the pregnant woman's life to also cover threat to her physical or mental health. However, the guiding effect of Bourne was limited. The efficacy of the Bourne ruling was undermined by the fact that, even in the jurisdictions in which it was formally received by colonial courts, such as the regional jurisdictions of West Africa⁴⁶ and East Africa,⁴⁷ colonial states, including Uganda, did not take more practical steps to implement the ruling. This omission left women seeking abortion largely ignorant of the circumstances in which abortion is lawful. It also served to deter healthcare professionals with competence to render abortion services for fear of attracting prosecution. It is this legacy of lack of clear implementation of abortion law that has persisted in Uganda and in other African countries with a comparable colonial history.

46 R v Edgal, Idike and Ojugwu (1938) WACA 133, decision of the West African Court of Appeal. This court, which is now defunct, served as an appellate court for British colonies in West Africa with civil and criminal jurisdiction over the Gold Coast (now Ghana), Nigeria, Sierra Leone and Gambia.

47 Mehar Singh Bansel v R (1959) EALR 813, decision of the East African Court of Appeal. This court, which is now defunct, served as an appellate court in civil and criminal matters for Kenya, Tanzania and Uganda.

Above all, it is important to appreciate that colonial abortion jurisprudence was developed primarily to serve a crime and punishment model for regulating of abortion during an era when maternity was regarded as a principal vocation for women and the notion that when women have a right to make decisions about reproductive health was alien in the patriarchal context in which abortion laws were conceived and adopted. Women's equality and reproductive autonomy were not accommodated.⁴⁸ Abortion was, instead, stigmatised as an illegitimate health need, leaving little room for acknowledging women's reproductive agency. Promoting women's access to abortion, as part of realising reproductive healthcare, was thus totally alien to the objects of criminalisation.

**PROTOCOL TO
THE AFRICAN
CHARTER ON
THE RIGHTS OF
WOMEN**

Article 14(2)(c) of the Protocol to the African Charter on the Rights of Women enjoins States Parties to take appropriate measures “to protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.”

Thus, the context in which the abortion provisions of the Ugandan Penal Code were adopted was well before the age of constitutionalism and human rights. Certainly, the penal provisions inscribed well before the adoption of the Constitution of 1995 by Uganda. Given the status of the Constitution as supreme law, it would be anomalous, in the extreme, if colonial abortion law were to be immunized from constitutional values and rights were outlined at the beginning of this section. Equally, it would trivialize Uganda's commitment to international human rights if legislative instruments that were developed well before ratification of international instruments were to be immunised from responsiveness to human rights values and rights. The tail should not be allowed to wag the dog!

⁴⁸ R Cook & S Howard 'Accommodating Women's Difference under the Women's Antidiscrimination Convention' (2007) 56 Emory Law Journal 1039, 1070-83.

EMERGING JURISPRUDENCE FROM UN TREATY MONITORING BODIES & THE EUROPEAN CONVENTION ON HUMAN RIGHTS

This section is largely adapted from a chapter in a book that is forthcoming: CG Ngwena 'Reforming African Abortions Laws and Practice: The Place of Transparency', forthcoming in RJ Cook et al *Abortion law in Transnational Perspective: Cases and Controversies*

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EMERGING JURISPRUDENCE FROM UN TREATY MONITORING BODIES & THE EUROPEAN CONVENTION ON HUMAN RIGHTS

(A) EMERGING JURISPRUDENCE

In essence, the jurisprudence emanating from the UN treaty monitoring bodies and the European Court of Human Rights imposes certain procedural obligations on the State. It mandates that where abortion is permitted under domestic law, even if in a very restrictive form, the State has a corresponding duty to ensure that any rights that are conferred on women are actually amenable to effective realisation. These duties can be described as duties of transparency or procedural duties,⁴⁹ to highlight that their focus is not so much on advocating for reform of the substantive law but on implementing the law in a way that renders it clearer and more accessible to the users in an administrative sense.

In three cases, *KL v Peru*, *LC v Peru* and *LMR v Argentina*, UN treaty monitoring bodies have held that states are accountable for failure to implement abortion laws. The *KL* and *LMR* cases were decided by the Human Rights Committee, while the *LC* case was decided by the CEDAW Committee in the context of communications alleging state violations of human rights under respective Optional Protocols. The Human Rights Committee and the CEDAW Committee are the treaty monitoring bodies of the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of All Forms of Discrimination

49 RJ Cook et al 'Achieving Transparency in Implementing Abortion Laws' (2007) 99 *International Journal of Gynecology and Obstetrics* 157; CG Ngwena 'State Obligations to Implement African Abortion Law: Employing Human Rights in a Changing Landscape' (2012) 119 *International Journal of Gynecology and Obstetrics* 198; CG Ngwena 'Reforming African Abortion Law to Achieve Transparency: Arguments from Equality' (2013) 21 *African Journal of International and Comparative Law* 398. It is important to highlight that the term 'transparency' is not a legal term of art but merely a descriptive one: CG Ngwena 'Reforming African Abortions Laws and Practice: The Place of Transparency'.

against Women (CEDAW), respectively, which have been so widely ratified by African states, including by Uganda, as to justify taking cognizance of these decisions as persuasive and standard-setting.

In KL, the Human Rights Committee found Peru in violation of its obligations under the ICCPR, when hospital authorities denied abortion to a 17-year-old girl who was pregnant with a fetus that was affected with anencephaly. The complainant was denied abortion regardless of medical and social evidence confirming that continuing with the pregnancy would seriously harm KL's health, and of Article 119 of the Peruvian Criminal Code, which permitted abortion if it was the only way of saving the life of the pregnant woman or avoiding serious and permanent damage to her health. As a result, the complainant was compelled to carry the pregnancy to term. She gave birth to a baby with anencephaly that survived for only four days, during which she was obliged to breastfeed. She was severely traumatized by the experience. The Committee found the conduct of Peru to constitute violations of Article 2 (right to an effective remedy), Article 7 (right to be free from inhuman and degrading treatment), Article 17 (right to privacy) and Article 24 (right to special protection as a minor) under the ICCPR. An important finding underpinning the Committee's decision is that, though Peruvian law permitted abortion in given exceptions, there was no domestic administrative structure, short of constitutional litigation, to allow the complainant to challenge the decision to deny her abortion.

PERU BEFORE
THE HUMAN
RIGHTS
COMMITTEE

Among the reasons the CEDAW Committee gave in *LC* for finding several violations under CEDAW, including violation of Article 12 which guarantees women equal and nondiscriminatory access to healthcare, is that, although the Peruvian Criminal Code permitted therapeutic abortion, the complainant had been left without access to an effective procedure to establish her entitlement. The Committee noted that, because of the absence of laws and regulations for implementing the permitted exceptions under the Penal Code, access to abortion was determined arbitrarily, with each hospital authority determining its own legal grounds, procedure and time-frame. It highlighted that Article 12 of CEDAW imposes an obligation on states to ‘respect, protect and fulfil’ women’s right to healthcare. This duty includes ensuring that legislation, executive action and policy all respect the three-fold obligations. As part of addressing implementation, the Committee recommended that Peru establish a procedure to enable women seeking abortion to realize their entitlements timely under Peruvian law, including conducting education and training in the healthcare sector to sensitize healthcare professionals to respond positively to the reproductive health needs of women, and adopting guidelines or protocols to ensure the availability and accessibility of healthcare services, including abortion services.

In the LC case, the CEDAW Committee found Peru to be in breach of its state obligations under CEDAW, partly because the state had failed to provide the complainant with effective access to exercise her right under domestic abortion law. The complainant was a 13-year-old girl who became pregnant following repeated sexual abuse by a 34-year-old man. On discovering that she was pregnant, she became severely depressed and attempted suicide by jumping from a building. She suffered severe injuries, including paralysis of her lower and upper limbs. Although she required emergency surgery, hospital authorities did not render treatment because they took the view that treatment would harm the fetus. When she requested abortion through her mother, she was refused. This was notwithstanding that Article 119 of the Peruvian Criminal Code, as mentioned above, permits abortion to save the life of the pregnant woman or to prevent serious and permanent damage to her health. It took 42 days for the hospital authorities to respond to her request, and decline it. The complainant lodged an appeal, but while awaiting a response from the hospital authorities, she miscarried spontaneously. It was only then that she was rendered treatment for the injuries she had sustained. Even then, the hospital authorities indicated that they would have declined the appeal as their initial decision was final and not appealable. Although the complainant was operated upon, her health had, by then, deteriorated. She was unable to derive the benefit she would have derived had the treatment she required been rendered timely, including acceding to her request for abortion.

PERU BEFORE
THE CEDAW
COMMITTEE

The *LMR* case concerns a complainant who was 19 years of age, but had a mental age of about 10 years. She had become pregnant following a suspected rape. She requested abortion through her mother, but was refused. This was so regardless of article 86(2) of the Argentinean Criminal Code, which permits abortion on the ground of danger to the life or health of the pregnant woman, or if the pregnancy results from rape or indecent assault. Despite evidently falling within the exceptions, especially the latter exception, the complainant was required to first obtain judicial authorization for abortion. A juvenile court refused the authorization and its decision was confirmed by a higher court. On appeal to the Supreme Court, the complainant was successful. The Supreme Court ruled that judicial authorization was not necessary once a permitted ground was met. Notwithstanding, the complainant was unable to find a public facility willing to perform an abortion, mainly on account of public pressure opposed to abortion that was being brought upon health facilities. In any event, the public hospital authorities said the pregnancy, whose gestation was at this stage around 20 weeks, was now too advanced for a safe termination. In the end, with the support of women's organisations, the complainant was, through her mother, able to arrange for a clandestine abortion.

In LMR, the Human Rights Committee found violation of the Article 2(3) (right to an effective remedy) taken together with Articles 3 (right to equal enjoyment of rights), 7 (right to be free from inhuman and degrading treatment) and 17 (right to privacy). In reaching its conclusion on Article 2(3) especially, the Committee noted that despite meeting the criteria for legal abortion, the complainant had to appear before three courts, which had the effect of prolonging by several weeks the gestation period, which became the reason why the hospital ultimately declined to perform the abortion and the complainant had to resort to a clandestine procedure. These facts, according to the Committee, highlighted that Argentina did not have an administrative framework for providing women seeking abortion under domestic law with an effective remedy.

LMR
V
ARGENTINA

As indicated in the introduction, there is also jurisprudence on transparency from the European Court on Human Rights. The essence of the European Court's new jurisprudence as apparent from its decisions in *Tysiac v Poland*, *A, B and C v Ireland*, *RR v Poland* and *P and S v Poland* is that, where national authorities rely on criminal regulation of abortion but permit certain exceptions, the regulatory measures must meet two main procedural requirements. First, the state must take positive steps to ensure that the circumstances in which abortion is permitted are articulated in a way that is reasonably clear not just to women seeking abortion services, but also to healthcare professionals who provide or at least have the competence and responsibility to provide abortion services. Second, national authorities must take positive steps to establish an accessible and timely administrative procedure for allowing women who are aggrieved by a decision refusing them abortion to contest the decision. The administrative procedure must comply with the requirements of fairness and administrative justice, not least by affording the women an opportunity to be heard, and giving written reasons. Significantly, the European Court has said that it does not consider litigation, including constitutional litigation, as a primary or regular route to follow for women seeking to challenge decisions denying them abortion. This is because such litigation is burdensome to women, not least poor women. Litigation is fraught with complexity and delay that clearly militate against time being of the essence for women seeking to terminate pregnancies.

Once a legislature decides to allow abortion, it must not structure its legal framework in a way that effectively undermines the real possibilities of exercising the rights permitted under the law can be understood as serving the objective of securing equality under the law, a right that is amply guaranteed by article 21(1) of the Ugandan Constitution.

B) NORMATIVE SIGNIFICANCE

The jurisprudence on transparency can be understood as serving multiple normative purposes. Some purposes appeal to procedural or administrative justice. Others purposes implicate more substantive principles of justice as to gesture towards substantive equality. Some purposes are more general and are aimed at securing the equal and effective exercise of rights in general in a liberal democracy in the age of human rights or constitutionalism and provision of remedies in the event of breach. Some justifications implicate transparency as a principle that serves public health. They highlight that, even where there are permitted exceptions, criminalisation of abortion is, itself, a barrier that endangers public health through illegal abortions that in many settings are frequently unsafe. The State must, therefore, make conscious efforts to implement any exceptions and thus facilitate access to safe abortions.

At a general level, the insistence by UN treaty monitoring bodies in their decisions in *KL v Peru*, *LC v Peru* and *LMR v Argentina*, which is also echoed in the jurisprudence of the European Court, that once a legislature decides to allow abortion, it must not structure its legal framework in a way that effectively undermines the real possibilities of exercising the rights permitted under the law can be understood as serving the objective of securing equality under the law, a right that is amply guaranteed by article 21(1) of the Ugandan Constitution. The duty of the State to raise awareness about the legality of abortion among women and healthcare providers espoused most elaborately in *LC v Peru*, and the duty to take *positive* steps to ensure that women seeking abortion have access to administrative procedures that facilitate timely review of any decisions which runs through all the transparency cases can both be understood as aligning transparency with administrative justice as a modality for securing equality under the law and ensuring that legal rights are not illusory for all rights holders, and not necessary women seeking abortion alone.

Thus the use of transparency to require operationalization of abortion laws is a form of administrative or procedural justice that need not be limited to rights pertinent to abortion as it obtains for all rights in general. It appeals to a conception of justice that seeks to require the state to fulfill the rights and discharge its duties so that citizens who rely on the rights are treated equally. In a plural democracy, at the very least, it should be possible to agree that equality under the law is a shared consensus, and that effective and accessible administrative justice is an adjunct to securing equality. The guarantee of the right just and fair treatment in administrative decision by article 42 of the Ugandan Constitution is an adjunct to reinforcing equality before and under the law. It gives a practical edge to how citizens, including women, aggrieved by the decisions of hospital administrators can hold the State and its organs accountable.

The rationale for transparency is enhanced in respect of rights that are morally contested, as abortion rights. In abortion, there is an established history of denial of rights guaranteed by the law. Even in the aftermath of reform, there might be uncertainty about the permitted legal parameters, or arbitrariness or illicit opposition on the part of healthcare providers who decide whether a woman seeking abortion is eligible as is borne out by the cases decided by the UN treaty monitoring bodies and the European Court. In such a context, requiring the state to clarify abortion law and institute administrative justice guarantees is part of tangibly specifying the content of a fair system of social cooperation among equal citizens. Requiring the State to take into account the views of women seeking abortion, highlighting that time is of the essence for women seeking access to safe abortion, and allowing a right of administrative appeal, cumulatively serve to enhance democratic participation in healthcare decision-making. It ensures that transparency is not a unilateral gesture in the gift of paternalistic national authorities. Rather, it envisages the active participation of women.

Transparency also serves as an adjunct to antidiscrimination approaches. Taking equality seriously means taking steps to protect the equality rights of a vulnerable social group by countering discriminatory and obstructive barriers that are unconstitutional or superfluous and have the effect of delaying or ultimately thwarting the exercise of legal rights, and thus perpetuating the status quo. The historical criminalization of abortion and its moral stigmatisation render women seeking abortion not just a marginalized political minority but also a vulnerable one. Women seeking abortion are vulnerable to being denied access to lawful services even after domestic liberalisation of the law. This is easily the case where influential political or religious majorities and their adherents among healthcare providers opposed to abortion are determined to frustrate the legitimate exercise of abortion rights regardless of the law as is implicit in the cases emanating from both Latin America and the European Court.

In a substantive equality sense, the requirement of transparency constitutes affirmation of a class of persons and a health service that have been historically marginalized and stigmatised. By taking into account the peculiar information and procedural needs of women who wish to realise their abortion rights, the substantive equality of a social group is advanced through empowering women or giving them ‘capabilities’ to overcome some of the socioeconomic disadvantages that serve as barriers to accessing safe, legal abortion.⁵⁰ In *LC v Peru*, especially, one of the objectives of the CEDAW Committee’s approach to transparency was giving women seeking abortion capabilities through the provision of requisite legal, administrative and health information.

Transparency serves public health in environments which have a high burden of unsafe abortion as the African region and Uganda. Where national authorities concede that abortion is lawful especially through broadening the grounds for abortion, but refrain from clarifying the circumstances in which abortion is permitted so as to allay uncertainties among women seeking abortion or providers of abortions services, they may be assisting in providing incentives for unsafe abortion. Equally, refraining from establishing administrative gateways to lawful abortions services is also an incentive for unsafe abortion for poor women especially.

⁵⁰ MC Nussbaum Women and Human Development: The Capabilities Approach (2000).

For the public health rationale to be realised and deter unsafe abortions, Ugandan abortion laws must ultimately translate into services that are accessible to all women, especially poor women and those who live in rural areas. Crucially, there must be a critical mass of willing healthcare professionals with recognized competence to provide abortion services.

B) APPLICATION TO UGANDA

Transparency is predicated on an assumption that commitment to constitutionalism by all relevant organs of state, including the judiciary and the executive will be forthcoming. Ultimately, political will is required among organs of state that are closely involved in its administrative implementation, especially ministries of health and ministries of justice. For the public health rationale to be realised and deter unsafe abortions, Ugandan abortion laws must ultimately translate into services that are accessible to all women, especially poor women and those who live in rural areas. Crucially, there must be a critical mass of willing healthcare professionals with recognized competence to provide abortion services. Furthermore, the call for transparency assumes willingness and capacity on the part of civil society to litigate, if necessary, to hold the state accountable for failure to effectively implement abortion laws and thus vindicate abortion rights. Each of these premises needs to be weighed carefully and factored in as part of contextualising and indigenising transparency in Uganda.

There are reasons for being sanguine about indigenising transparency in Uganda. Despite having a checkered history in constitutionalism, Uganda is part of the family of African States which have been transitioning towards commitment to democratic governance since the 1990s, especially, as one of the outcomes of the end of the Cold War.⁵¹ This transition has been accompanied by domestic constitutional reforms and the adoption of modern Bills of Rights that seek to respect, protect and fulfill human rights, including rights to equality and administrative justice among other fundamental rights. The largely progressive Bill of Rights of the Ugandan Constitution of 1995 bears testimony to this fact. The transition of the African region from the Organization of African Unity to the establishment of the African Union in 2000 is also another hopeful sign. It means that Uganda is an integral part of a region that is committed to democracy and the promotion of ‘democratic principles and institutions’ that are founded, *inter alia*, upon the promotion and protection of human rights.⁵²

⁵¹ R Murray Human Rights in Africa (2004) 73-115.

⁵² Constitutive Act of the African Union of 2000, articles 3(g) and 3(h).

Appropriating, therefore, transparency to Uganda as supplementary juridical value and principle in fulfilling equality under the law and a right to administrative justice in the provision of abortion services, is not something that would require legal reform. Rather, it is tantamount to enforcing existing state duties through affirming what is already accepted under Uganda's Constitution as well as its human rights obligations. However, when examining Uganda's flagship policy on sexual and reproductive health, there is reason to be concerned about whether there is sufficient political goodwill and commitment among executive organs to render abortion law and practice that promotes transparency. Uganda's policy in this regard - *National Policy Guidelines and Service Standards for Sexual and Reproductive Health and Rights*⁵³ - was developed by the Ugandan Ministry of Health. It evinces a contradictory commitment towards abortion. Certainly, it does not substantively reflect the values of implementing a holistic notion of reproductive health and rights in ways that comport with human rights as espoused by Programme of Action adopted at the International Conference on Population and Development,⁵⁴ and the Platform for Action and Beijing Declaration adopted at the Fourth World Conference on Women.⁵⁵

53 The National Policy Guidelines and Service Standards for Sexual and Reproductive Health and Rights (National Policy).

54 Programme of Action Adopted at the International Conference on Population and Development (ICPD).

55 Platform for Action and Beijing Declaration, Fourth World Conference on Women (Beijing Declaration).

ICPD has acquired the status of soft law, and supplied contemporary human rights discourses with an essential conceptual framework for recognising, formulating and validating individual reproductive rights claims in ways that are amenable to rendering states accountable for failure to respect, protect and fulfil such rights.⁵⁶ It represents a paradigm shift in the conceptualisation of the rationale for family planning. More specifically, ICPD shifted the family planning rationale from a focus on economic and utilitarian goals of population reduction. The shift was to a focus on reproductive health as a human rights concept. It did so in ways which put women's self-determination rather than State population policies at the centre. Significantly, ICPD situated reproductive health in mainstream human rights jurisprudence in ways that connect with the holistic concept of health in the Constitution of the World Health Organisation.⁵⁷ WHO's definition of 'health' puts equal emphasis on psychosocial health as it does on physical health.

The definition of reproductive health, which was formulated under ICPD and further expanded under the Beijing Declaration, says:

**BEIJING
DECLARATION**

Reproductive health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes. Reproductive health therefore implies that people are able to have a satisfying safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so. Implicit in this last condition are the right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility...

⁵⁶ RJ Cook, BM Dickens & MH Fathalla *Reproductive Health and Human Rights* (2003) 4, 11-12; RJ Cook & BM Dickens 'Human Rights Dynamics of Abortion Law Reform' (2003) 25 *Human Rights Quarterly* 1 at 4-5, 12-13; W Nowicka 'Sexual and Reproductive rights and Human Rights: Controversial and Contested' (2011) 19 *Reproductive Health Matters* 119.

⁵⁷ Constitution of the World Health Organisation (1948) Cook et al (note 70 above) 11-12.

An important accomplishment of ICPD in the conceptualisation of reproductive health as a human right was in transcending the notion of rights as giving rise only to obligations of restraint on the State which, on its own, often amounts to rendering rights mere abstractions for the poor and for vulnerable groups, especially.⁵⁸ Instead the human right to reproductive health was conceived as an empowerment tool for giving women ‘capabilities’ in a gendered society in which women’s health needs have been historically excluded or marginalised.⁵⁹ ICPD resonates with the values and goals of transparency in requiring the State to empower women so that they can be in a position where they are aware of their human rights entitlements and can exercise them in a way that impacts positively on their health. ICPD recognised abortion as a major public health danger. The Beijing Declaration requires States to review their laws and to implement abortion law to the fullest extent in order to eliminate unsafe abortion.

58 MJ Roseman & L Reichenbach & ‘Global Reproductive Health and Rights: Reflecting on ICPD’ in L Reichenbach & MJ Roseman & (eds) *Reproductive Health and Rights: The Way Forward* (2009) 9.

59 Nussbaum 96-101. A Sen ‘Elements of a Theory of Human Rights’ 32 *Philosophy & Public Affairs* (2005) 315, 328-338

But while Uganda's National Policy appears, on the face of it, to subscribe to ICPD, it falls woefully short in a number of crucial areas, especially in the specific area of abortion. In the main, the National Policy's standards on abortion have the following shortcomings:⁶⁰

- National Policy commendably appropriates the definition of reproductive health adopted under ICPD. However, there is no evidence that it treats abortion as a reproductive health need which is to be interpreted and applied according to the holistic definition of reproductive health in ICPD and the technical guidance on safe abortion provided by WHO.⁶¹
- The law relating to abortion is not interpreted or applied in any discernible way. There is no mention at all of the relevant legislation, common law, the Constitution or human rights. Misconceptions about the illegality of abortion are not addressed.
- It is stated that women can obtain services for termination of pregnancy for the following conditions: severe maternal illnesses threatening the health of a pregnant woman such as severe cardiac disease, renal disease, severe pre-eclampsia and eclampsia; severe foetal abnormalities which are not compatible with extra-uterine life, e.g. molar pregnancy and anencephaly; cancer of the cervix; HIV-positive status in a pregnant woman who requests termination; rape, incest and defilement. It is apparent that National Policy is giving abortion law a restrictive interpretation. Furthermore, no explanation is given to support the policy's approach to the interpretation of abortion law.

60 The summary of the shortcoming asserting here is primarily directed to para 4.12 of the The National Policy Guidelines and Service Standards for Sexual and Reproductive Health and Rights.

61 World Health Organisation Safe Abortion: Technical and Policy Guidance for Health Systems 87-103

***WHO** in its technical and policy guidance observes that the barriers include: prohibiting access to information on legal abortion services or failing to provide public information on the legal status of abortion; requiring third-party authorization from one or more medical professionals or a hospital committee, court or police, parent or guardian or a woman's partner or spouse; restricting available methods of abortions through, for example, lack of regulatory approval for essential medicines; restricting the range of health care providers and facilities that can provide services; failing to assure referral in cases of conscientious objection; requiring mandatory waiting periods; censoring, withholding or intentionally misrepresenting health-related information; excluding coverage for abortion services under health insurance, or failing to eliminate or reduce service fees for poor women and adolescents; failing to guarantee confidentiality and privacy; requiring women to provide names of practitioners before providing them with treatment for complications from illegal abortion; and restrictive interpretation of legal grounds: World Health Organisation Safe Abortion: Technical and Policy Guidance for Health Systems (note 18 above) 94

- There is no explanation of how women seeking abortion will be able to implement their wishes or their grievance remedial options where their request is refused so that the requirements of just and fair administration are met.
- The guidelines and standards on abortion do not go beyond attempting to address eligibility. There is no indication of awareness of the most common barriers to accessing abortion and how to overcome the barriers.* For, example, there is no indication about how women seeking abortion on the grounds of rape are to be treated, how conscientious objection to providing abortions services is to be applied, or how to deal with a request for abortion from a minor.
- There is no evidence in the policy that the State, as enjoined by the Maputo Plan of Action undertakes to educate communities about the circumstances in which abortions is lawful and the availability of abortion services as a strategy for reducing unsafe abortion.⁶²
- The policy appears to be the sole effort of the Ministry of Health. There is no evidence that other organs of State such as ministries of justice or the office of attorney-general are actively involved in implementing procedures and frameworks for giving concrete expression to transparency

In short, the significant and numerous gaps in Uganda's National Policy are not helpful to the creation of an enabling environment for accessible abortion law. Far from addressing transparency, the National Policy adds significantly to misconceptions about what the actual domestic law on abortion is. Its unwarranted restrictive approach underlines the need for stakeholders in Uganda to undertake a comprehensive review of the infrastructure for implementing abortion law in ways that clarify abortion law and are responsive to constitutional and human right norms.

62 Maputo Plan of Action para 4.3.2a

CONCLUSION

The public health rationale for transparency crucially depends on availability and accessibility of services which are woefully lacking in Uganda, partly because of failure to develop healthcare system that also allow mid-level health care professionals to provide abortion services.

CONCLUSION

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Uganda, like many of its African counterparts, has retained a crime and punishment approach to the regulation of abortion which was bequeathed by the colonial state. The arguments for transparency in this paper are a way appropriating to Uganda a pragmatic jurisprudential strategy for achieving access to abortion within a largely constraining legal environment that has yet to concede radical reform of abortion law as Cape Verde, South Africa and Tunisia have done. Transparency is by no means intended to replace the struggles for the ultimate decriminalisation of abortion so that women's reproductive agency is respected. The call for transparency is a way of constructing a legal and administrative pathway for giving women capabilities within legal systems that largely continue to criminalise abortion long after colonial rule. It is a strategy for countering a double discourse of domestic laws that give with one hand but take away with the other, even the small concessions made to women.

It bears stressing that transparency is not a substitute for reforming African healthcare systems in ways that assure access to abortion services on the basis on need. The public health rationale for transparency crucially depends on availability and accessibility of services which are woefully lacking in Uganda, partly because of failure to develop healthcare system that also allow mid-level health care professionals to provide abortion services. Thus, on its own, transparency cannot deter unsafe abortion. Implementing abortion laws in ways that are responsive to the information, procedural equality and administrative justice needs of women, would be a pyrrhic victory if, in the end, abortion services are not available or are accessible in ways that cater for the needs of women from all socioeconomic backgrounds. Transparency will be to no avail if abortion services cannot be assured. Though technologies and procedures for performing abortion have become more affordable as to be within the reach of African healthcare

systems, a persistent obstacle is that the majority of domestic laws assume that only doctors have the competence to perform abortion. The call for transparency in the African region needs to go, hand in hand, with measures to render abortion services accessible, through, for example, conceding that where doctors are highly scarce, appropriately trained mid-level providers can safely perform abortions, using procedures such as manual vacuum aspiration in the first trimester, as South Africa has demonstrated.⁶³

As with all human rights, especially, in contested areas such as abortion, civil society should play its role in championing neglected rights. It should hold the state accountable where there is failure to render abortion services transparent in ways that make a difference to women seeking safe abortion. Simply cherishing rights in the abstract does little to change the status quo. Women's struggles in the African region, in contradistinction to the Latin American region, have thus far avoided constitutionalising abortion through litigation even in the face of the Woman's Protocol which recognizes abortion as a fundamental right and has been widely ratified. This is not to suggest that litigation assures success as it might even engender a backlash from patriarchal authorities and constituencies. Rather, it is to highlight that when addressing the human rights of a political minority such as women and a stigmatised need such as abortion, part of sensitising the Ugandan human rights system, including civil society, about the place of transparency in vindicating reproductive agency can come from litigation. Even where litigation is unsuccessful, nonetheless, it can succeed in raising public consciousness about how national authorities deny human rights though failure to implement rights already guaranteed and, in the process, foreground or reinforce transformative political struggles.

63 K Dickson-Tetteh & DL Billings 'Abortion Care Services Provided by Registered Midwives in South Africa' (2002) 28 *International Planning Perspectives* 144

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