2 Conscientious objection in the African context

The issue of conscientious objection is a complex one, as it involves conflicting rights: the right of women to access safe and legal abortions and the right of healthcare providers to refuse to provide abortion services based on their religious or moral beliefs. This disagreement around abortion raises important questions about how the law should handle the issue of freedom of conscience. Conscientious objection is a practice that is widely exercised around the world, and many countries have laws and regulations that explicitly protect it, according to the World Health Organisation (WHO).[1] However, there are also countries such as Finland and Sweden that do not allow medical professionals to refuse to provide abortion care on the grounds of conscientious objection.[2] The Global Doctors for Choice, in their White Paper on the prevalence and impact of conscientious objection, have found that healthcare providers' refusal to provide abortion services is increasing.[3] This book works on the premise that there is an implied right to conscientious objection, which must be understood within the broader context of freedom of conscience.

In this chapter, I delve into the implied right to conscientious objection, as informed by UN and regional human rights norms. The African context is specifically examined, with attention given to the changing abortion landscape and notable legal and policy reforms. The chapter also scrutinises conscience clauses in African countries, exploring the extent of their scope and limitations.

1 See generally, World Health Organisation (WHO) 'Global abortion policies database' https://abortion-policies.srhr.org/ (accessed 2 January 2023).

2 A Heino et al 'Conscientious objection and induced abortion in Europe' (2013) 18 *European Journal of Contraceptive Reproductive Health Care* 231. See, W Chavkin et al 'Conscientious objection and refusal to provide reproductive healthcare: A White Paper examining prevalence, health consequences, and policy responses' (2013) 123 *International Federation of Gynaecology and Obstetrics* S41.

3 See Chavkin et al (n 2) S44.

1 The implied right to conscientious objection

The implied right to conscientious objection allows healthcare providers to refuse to participate in medical procedures, such as abortion, based on their personal beliefs or conscience. This right is not explicitly stated in most legal frameworks but is often interpreted as an extension of the right to freedom of thought, conscience, and religion. At the heart of conscientious objection lies the individual's moral compass, their sense of right and wrong, and the freedom to act in accordance with these beliefs. This freedom is considered a cornerstone of democratic and pluralistic societies, where the diverse range of religious and moral convictions is respected.[4] International and regional human rights instruments enshrine the fundamental right to freedom of conscience. Article 18 of the Universal Declaration of Human Rights (UDHR) asserts that '[e]veryone has the right to freedom of thought, conscience and religion: this right includes freedom to … manifest his religion or belief in teaching, practice, worship and observance'. This principle is reflected in article 18(1) of the International Covenant on Civil and Political Rights (ICCPR), underscoring the importance of this right as a fundamental aspect of human dignity and autonomy.

The right to exercise conscientious objection has existed before the decriminalisation of abortion laws.[5] It was historically associated with compulsory military service, where individuals could refuse to participate in war based on their freedom of thought, conscience, and religion.[6] In 1993, the Human Rights Committee adopted General Comment 22 on article 18 of the ICCPR to help state parties implement their international obligations related to freedom of conscience, thought, and religion.[7] General Comment 22 acknowledges that although the right to conscientious objection is not explicitly stated in the Covenant, it can be inferred in article 18 as the use of lethal force can seriously conflict with an individual's freedom of conscience and their right to manifest their religion or belief.[8] The Human Rights Committee has affirmed that

4 Council of Europe 'Women's access to lawful medical care: The problem of unregulated use of conscientious objection' Doc 12347 (2010) para 11.

5 BM Dickens 'The rights to conscience' in R Cook et al (eds) *Abortion law in transnational perspective: Cases and controversies* (2014) 210.

6 See Human Rights Council 'Conscientious objection to military service: Analytical report of the Office of the United Nations High Commissioner for Human Rights' A/HRC/35/4 (2017) https://undocs.org/A/HRC/35/4 (accessed 15 February 2019).

7 Human Rights Committee, General Comment 22: Art 18 on freedom of thought, conscience or religion, 30 July 1993, UN Doc CCPR/C/Rev.1/Add.4 (1993).

8 General Comment 22, para 11.

the right to conscientious objection is an essential aspect of the freedom of thought, conscience, and religion. This was demonstrated in the case of *Jeong et al v Republic of Korea*,[9] where the Committee found that the country's non-recognition of conscientious objection and absence of an alternative to compulsory military service violated article 18 of the ICCPR.[10] The Committee emphasised that conscientious objection to military service is inherent to the freedom of thought, conscience, and religion.[11] The recognition of the right to conscientious objection by the Committee was limited to individual claims regarding the right to refuse to perform military service. This implies that individuals should be allowed to demonstrate their beliefs and also have the right not to be compelled to act against their conscience.

In *Yeo-Bum Yoon and Myung-Jin Choi v Republic of Korea*,[12] the Committee further notes that the right to freely practice one's religion or belief does not necessarily include the right to reject all legal obligations. However, it does offer a degree of protection in line with article 18, paragraph 3, which safeguards against being compelled to act against a sincerely held religious belief. Article 18(3) of the ICCPR states that individuals have the freedom to express and demonstrate their religion or beliefs, but this freedom may be limited only by laws that are necessary to protect public safety, order, health, or morals, or the rights and freedoms of others. This places limitation on the manifestation of one's religion or belief as this may affect other people, as well as the state. This echoes article 29(2) of the Universal Declaration of Human Rights (UDHR), which emphasises that while individuals have the right to exercise their rights and freedoms, those rights may be subject to limitations that are established by law. These limitations should only be implemented for the purpose of promoting respect for the rights and freedoms of others and upholding moral values, public order, and the general welfare in a democratic society. In light of article 18(3) of the ICCPR and article 29(2) of the UDHR, it can be inferred that the exercise of conscientious objection is not an absolute right. The freedom to express one's religion or belief can be subject to limitations prescribed by law for the protection of public safety, order, health, morals, or the rights and freedoms of others.

9 UN Human Rights Committee, Views: Communications No 1642-1741/2007, 27 April 2011, UN Doc CCPR/C/101/D/1642-1741/2007 (2011).

10 HRC (n 9) para 7.2.

11 HRC (n 9) para 7.3. See *Atasoy and Sarkut v Turkey* (19 June 2012) UN Human Rights Committee, CCPR/C/104/D/1853-1854/2008 (2012) para 16.

12 UN Human Rights Committee (23 January 2007) CCPR/C/88/D/1321-1322/2004 (2007) para 8.3.

The African human rights system recognises freedom of conscience through article 8 of the African Charter on Human and Peoples' Rights (African Charter).[13] The interpretation of article 8 by the African Commission on Human and Peoples' Rights (African Commission) has predominantly centred on the importance of the right to freedom of worship as evident in various cases.[14] The recent decision by the African Court of Human and Peoples' Rights (African Court) in the case of *African Commission v Kenya*[15] pertains to the right to freedom of religion. The Court found that the Kenyan government had violated the Ogiek's right to freedom of worship by forcibly evicting them from their ancestral lands. The Court found that the government's actions had prevented the Ogiek from practicing their religion freely, as they could no longer access their sacred sites or traditional places of worship.[16]

Other regional human rights systems also acknowledge an individual's right to freedom of religion, conscience, and thought. For instance, the European Convention for the Protection of Human Rights and Fundamental Freedoms, in article 9, guarantees the right to freedom of thought, conscience, and religion, subject to limitations prescribed by law and necessary in a democratic society for the protection of public safety, health, or the rights and freedoms of others.[17] Despite the recognition of conscientious objection as a fundamental right, the exercise of this right is not absolute, as confirmed by the European Court of Human Rights in several cases relating to reproductive healthcare.[18]

The Inter-American human rights system, in its American Convention on Human Rights, also provides for freedom of thought, conscience, and religion, subject to limitations under article 12.[19] While neither the

13 OAU, African Charter on Human and Peoples' Rights, 27 June 1981, OAU Doc CAB/LEG/67/3/Rev 5, ILM 58 (1982), entered into force 21 October 1986.

14 See for example, *Amnesty International v Sudan* Communications 48/90, 50/91, 89/93; and *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, 276/2003 (ACHPR 2010).

15 *African Commission on Human and Peoples' Rights v Republic of Kenya* ACtHPR, Application No 006/2012 (2017).

16 *African Commission on Human and Peoples' Rights v Republic of Kenya* (n 15) paras 166-167.

17 European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 221, Eur TS 5 (entered into force 3 September 1953).

18 See *Pichon & Sajous v France* ECHR (2 October 2001), App No 49853/99; *RR v Poland* ECHR App No 27617/04 (2011).

19 American Convention on Human Rights (adopted 22 November 1969) OASTS No 36, OAS Off Rec OEA/Ser.L/V/II.23, doc 21, rev 6 (entered into force 18 July 1978).

International American Commission on Human Rights (IACHR)[20] nor the Inter-American Court has explicitly addressed conscientious objection in the context of reproductive healthcare, the fact that the exercise of this right is not absolute underscores the need for a careful balancing of competing rights, particularly in situations where conscientious objection may potentially impede the realisation of other fundamental human rights.[21]

2 The evolving abortion landscape in Africa

2.1 Protecting women's reproductive rights in Africa

There has been an increasingly prevalent shift towards the liberalisation of abortion laws globally, with the African region being no exception to this trend. This trend has been largely driven by efforts to broaden the eligibility criteria for abortion services. In recent years, there has been an increasing recognition of abortion as a human right by various United Nations (UN) treaty-monitoring bodies. This recognition is reflected in their concluding observations, general comments, recommendations, and decisions on communications brought under UN treaties' optional protocols.

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) is unique as it expressly recognises abortion as a right.[22] Article 14(2) of the Protocol obligates states to permit abortion where pregnancy poses a risk to the life or health of the woman or to the life of the foetus, or where pregnancy is a result of sexual assault, rape, or incest. Furthermore, article 26 of the Protocol direct states to adopt budgetary measures in order to fulfil the rights provided in the Protocol.

20 The IACHR had made several pronouncements regarding the limitation of the right to conscientious objection within the military service. See for example *Cristian Daniel Sahli Vera v Chile* Case 12219, Inter-Am Comm'n HR, Report No 43/05, OEA/Ser.L/V/II.124 doc 5 (2005).

21 A 2012 ruling might be applicable though it did not address healthcare professionals' right to exercise conscientious objection. see *Artavia Murillo v Costa Rica* Judgment, Inter-American Court (ser C) No 257 (2012).

22 C Ngwena 'Inscribing abortion as a human right: Significance of the Protocol on the Rights of Women in Africa' (2010) 32 *Human Rights Quarterly* 783.

As of August 2023, 43 out of the 55 African states have ratified the Maputo Protocol.[23] This is an indication of the favourable reception that the Protocol enjoys in the continent as the foremost legal instrument on women's rights.[24] However, it is important to note that some African countries such as Cameroon,[25] The Gambia,[26] Kenya,[27] Rwanda[28]

23 The latest country to ratify is South Sudan in June 2023, see https://au.int/en/pressreleases/20230607/south-sudan-becomes-44th-country-ratify-protocol-womens-rights#:~:text=The%20Republic%20of%20South%20Sudan,AU)%20to%20ratify%20the%20Treaty (accessed 8 June 2023). There are 13 countries (Botswana, Burundi, Central African Republic, Chad, Egypt, Eritrea, Madagascar, Morocco, Niger, Sahrawi Arab Democratic Republic, Somalia, South Sudan, and Sudan) which have not ratified. See, African Union 'Ratification table: Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLE%27S%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20WOMEN%20IN%20AFRICA.pdf (accessed 27 November 2019).

24 F Viljoen *International human rights law in Africa* 2nd ed (2012) 50-59.

25 Reasoning for the reservation: 'The acceptance of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in African should in no way be construed as endorsement, encouragement or promotion of homosexuality, abortion (except therapeutic abortion), genital mutilation, prostitution or any other practice which is not consistent with universal or African ethical and moral values, and which could be wrongly understood as arising from the rights of women to respect as a person or to free development of her personality. Any interpretation of the present Protocol justifying such practices cannot be applied against the Government of Cameroon.'

26 The Gambia made blanket reservations that were lifted in 2006. See S Nabaneh 'The impact of the African Charter and the Maputo Protocol in The Gambia' in V Ayeni (ed) *The impact of the African Charter and Maputo Protocol in selected African States* (2016) 77.

27 Kenya also entered the following reservations: 'The Government of the Republic of Kenya does not consider as binding upon itself the provisions of Article 10(3) and Article 14(2)(c) which is inconsistent with the provisions of the Laws on health and reproductive rights.'

28 Rwanda lifted its reservations in 2012 to allow women to access abortion services when the pregnancy is as a result of rape, incest, or forced marriage and where continued pregnancy endangers health. See Center for Reproductive Rights (CRR) 'Rwandan Government takes critical step in recognizing women's fundamental human rights' (14 August 2014) https://reproductiverights.org/press-room/rwandan-government-takes-critical-step-in-recognizing-women%E2%80%99s-fundamental-human-rights (accessed 20 August 2019); Government of Rwanda '11th, 12th and 13th periodic reports of the Republic of Rwanda on the implementation status of the African Charter on Human and Peoples Rights and initial report on the implementation status of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2017) para 78 https://www.achpr.org/states/statereport?id=111 (accessed 20 August 2019).

and Uganda,[29] entered reservations to the provision on abortion upon ratification of the Protocol.[30] While both the African Charter and the Protocol are silent on reservations, article 19 of the Vienna Convention on the Laws of Treaties (Vienna Convention)[31] allows states to enter into a reservation to a treaty.[32] Article 2(1)(d) of the Vienna Convention defines a reservation as:

> [A] unilateral statement, however phrased or named, made by a state when signing, ratifying, accepting, approving, or acceding to a treaty, whereby it purports *to exclude or modify the legal effect of certain provisions* of the treaty in their application to that state.[33]

The effects of state reservations made to the Maputo Protocol can be discussed in two ways. First, where domestic law offers women more rights than the Protocol or, for that matter, rights equal to those found in the Protocol, it means that such reservation does not substantively limit those rights. Article 31 of the Protocol provides that:

> [N]one of the provisions of the present Protocol shall affect more favourable provisions for the realisation of the rights of women contained in the national legislation of States Parties or in any other regional, continental or international conventions, treaties or agreements applicable in these States Parties.

South Africa made an interpretative declaration on article 31 of the Charter.[34] The declaration reads:

> It is understood that the provisions contained in article 31 may result in an interpretation that the level of protection afforded by the South African Bill of

29 Uganda's reservation on article 14(2)(c) of the Protocol reads: 'Article 14(2)(c) of the Protocol is interpreted in a way of conferring an individual right to abortion or mandating a state party to provide access thereto. The state is not bound by this clause unless permitted by domestic legislation expressly providing for abortion.'

30 African Commission on Human and Peoples' Rights 'Status of implementation of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa by Justice Lucy Asuagbor Commissioner, Special Rapporteur on the Rights of Women in Africa' (2016) 3 http://www.peaceau.org/uploads/special-rapporteur-on-rights-of-women-in-africa-presentation-for-csw-implementation.pdf (accessed 10 January 2019).

31 Article 19 of the Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331.

32 J Dugard *International law: A South African perspective* 4th ed (2011) 417-422.

33 Article 2(1)(d) of the Vienna Convention (emphasis added).

34 While the Vienna Convention does not expressly provide for, or define, interpretative declarations, John Dugard has argued that in some instances, an interpretative declaration may constitute reservation. See Dugard (n 29) 418.

> Rights is less favourable than the level of protection offered by the Protocol, as the Protocol contains no express limitations to the rights contained therein, while the South African Bill of Rights does inherently provide for the potential limitations of rights under certain circumstances. The South African Bill of Rights should not be interpreted to offer less favourable protection of human rights than the Protocol, which does not expressly provide for such limitations.

South Africa's declaration was made on the premise that since the Bill of Rights contained a limitation clause while the Protocol does not, an assumption might be made that the Protocol has more favourable provisions. In making this interpretative declaration, South Africa boldly proclaimed that its Bill of Rights offered more favourable human rights protection for women in South Africa than the Protocol offered, especially in the case of abortion.[35] South Africa also made a reservation on article 6(h) of the Protocol to protect children's citizenship rights, using a similar line of reasoning.[36]

Secondly, it is important to note that even though a state may make reservations to a treaty, it is still obligated to adhere to the provisions to which it has not made reservations. This should not be seen as a limitation to draw upon the protections afforded by other international and regional human rights treaties to which the state is a party. It is crucial to prioritise the implementation of the Maputo Protocol as this will have a significant impact on the lives of women, despite reservations made by some states during the ratification process.

Consequently, the African Commission has taken steps to provide interpretive guidance by elaborating on specific rights while assisting states to fulfil their obligations under the Maputo Protocol. Article 45(1)(b) of the African Charter empowers the African Commission to establish principles and rules to address human rights issues. To this end, the African Commission first adopted a General Comment in 2012 on article 14(1)(d) and (e) of the Protocol, clarifying provisions related to the protection of women's rights against sexually transmitted infections,

35 See also S Nabaneh 'A purposive interpretation of article 14(2)(c) of the African Women's Protocol to include abortion on request and for socio-economic reasons' LLM thesis, University of Pretoria, 2012 (on file with the author).

36 The statement of reservation on article 6(h) of the Protocol reads: 'South Africa enters a reservation on this Article, which subjugated the equal rights of men and women with respect to the nationality of their children to national legislation and national security interests, on the basis that it may remove inherent rights of citizenship and nationality from children.'

including HIV/AIDS.[37] It stresses the importance of states providing access to comprehensive education and information that dispels myths and misunderstandings surrounding sexual and reproductive health. This should include addressing gender roles and stereotypes, and challenging traditional concepts of masculinity and femininity.[38]

On 28 November 2014, the Commission adopted General Comment 2 on reproductive health rights under Article 14(1)(a), (b), (c) and (f) and Article 14(2)(a) and (c) of the Protocol.[39] By specifically addressing the issue of abortion, General Comment 2 serves as a significant soft law instrument consolidating international best practices on the obligation of states to respect, promote, protect and fulfil the rights related to the sexual and reproductive health of women and girls in the African region. As a valuable benchmark, it provides guidance on measures to be taken to ensure access to safe abortion, making it a crucial tool for promoting and protecting sexual and reproductive rights.

The incidence rate of unsafe abortions in the African region is alarmingly high, with estimates indicating 26 per 1 000 for married women and 36 per 1 000 for unmarried women during 2010 to 2014.[40] Furthermore, women from sub-Saharan Africa had the highest incidence of deaths from unsafe abortions, accounting for 62 per cent of the total deaths (29 000 out of 47 000) in 2008.[41] To address this pressing issue, the African Union (AU) adopted the Revised Maputo Plan of Action 2016-2030, which reaffirms the importance of sexual and reproductive health and rights.[42] This Plan of Action recognises the unfinished business in this area as articulated in Agenda 2063 and the Sustainable Development Goals (SDGs).[43]

37 African Commission on Human and Peoples' Rights, General Comments on article 14(1)(d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2012).

38 M Geldenhuys et al 'The African Women's Rights Protocol and HIV: Delineating the African Commission's General Comment on articles 14(1)(d) and (e) of the Protocol' (2014) 14 *African Human Rights Law Journal* 681.

39 African Commission on Human and Peoples' Rights 'General Comment 2 on article 14(1)(a), (b), (c) and (f) and Article 14(2)(a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights' (2014).

40 G Sedgh et al 'Abortion incidence between 1990 and 2014: global, regional, and subregional levels and trends' (2016) 388 *Lancet* 258.

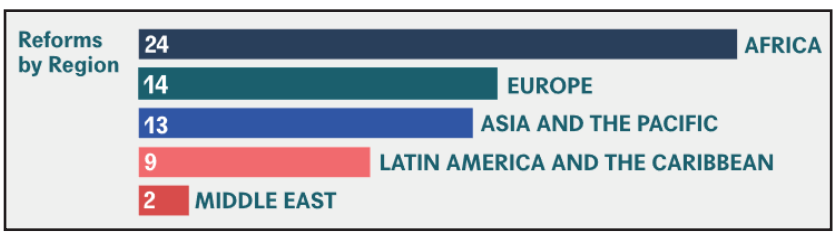
41 World Health Organization (WHO) 'Unsafe abortion: Global and regional estimates of the incidence of unsafe abortion and associated mortality in 2008' (2011) 28.

42 African Union Commission *Maputo Plan of Action 2016-2030 for the Operationalisation of the Continental Policy Framework for Sexual and Reproductive Health and Rights* (2016) 2.

43 General Assembly Resolution 'Transforming our world: the 2030 Agenda for Sustainable Development' A/RES/70/1 (2015).

2.2 Towards liberalising African abortion laws: An overview

The history of abortion laws in Africa can be traced back to European laws from the 18th century that were imposed on colonial states.[44] These laws, which criminalised abortion were later adopted in the penal codes of colonised states as colonial legacies. As a result, restrictive abortion laws have been the norm in Africa for several decades, with few exceptions. However, there has been a growing trend towards the liberalisation of abortion laws in Africa, with many countries expanding abortion grounds beyond just saving the life of the pregnant woman. This trend is reflected in the map below.



Source: Center for Reproductive Rights

Several African countries have adopted liberal abortion laws, such as South Africa, Cape Verde,[45] Zambia,[46] Tunisia and Mozambique. The South African Choice on Termination of Pregnancy Act is a notable example of a liberal abortion law in Africa. The Act, which came into effect in 1997, grants women the right to choose whether to have a safe and legal abortion, based on their individual beliefs. The Preamble acknowledges the state's responsibility to provide reproductive health services to all and ensures that women can exercise their right to choose without fear of harm.[47] The Act was designed to correct the past injustices of the restrictive abortion grounds of the 1975 Abortion and Sterilization Act, which only permitted abortion in cases of a serious threat to the life or health of the pregnant woman, foetal malformation, or pregnancy resulting from unlawful carnal intercourse.[48] This had a disproportionate impact on poor black women, who were unable to access safe and legal abortion services, leading to

44 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.

45 Law of 31 December 1986 of Cape Verde.

46 Zambian Termination of Pregnancy Act of 1972.

47 Preamble, para 5.

48 Act 2 of 1975. See SM Klausen *Abortion under apartheid: Nationalism, sexuality, and women's reproductive rights in South Africa* (2015).

illegal abortion.[49] Section 2 of the Act, permits abortion on demand up to 12 weeks of pregnancy and on various grounds between 13 to 20 weeks of gestation, including physical or mental health, foetal anomaly, rape, incest, and socio-economic circumstances. After 20 weeks, a woman may only terminate her pregnancy if it poses a serious risk to her life or health, or if the foetus will be severely malformed. The Act does not require consent from a woman's spouse or parental consent for minors.

Tunisia is unique as a Muslim majority country that allows for abortion on demand since 1973.[50] Mozambique has taken a step forward in protecting the reproductive rights of women by revising its Penal Code in 2014.[51] This revision has broadened the circumstances under which abortion is not considered a crime, providing women with more autonomy over their own bodies. Specifically, the revised code allows for abortion on demand up to 12 weeks of gestation, and up to 16 weeks in cases where the pregnancy results from rape or incest. Abortion is also permitted up to 24 weeks in cases of foetal malformation and without a gestational age limit if the pregnant woman's life is in danger, she suffers from a chronic-degenerative disease, or if the foetus is inviable. This progressive legislation recognises and prioritises the physical, psychological, and mental well-being of pregnant women.[52]

In 2004, Ethiopia implemented a series of reforms to its Penal Code in order to align it with the country's Constitution, which was enacted a decade earlier.[53] While abortion remained restricted as outlined in article 551 of the Penal Code, the reforms introduced several important exemptions that significantly expanded access to abortion services. These exemptions were in line with the Maputo Protocol, and allowed for termination of pregnancy in cases where the continued pregnancy endangered the life or physical health of the pregnant woman, in cases of rape or incest, if the woman is a minor or mentally unfit to bring up a child, or if the foetus has an 'incurable and serious deformity'.[54] Importantly, the

49 R Hodes 'The culture of illegal abortion in South Africa' (2016) 42 *Journal of Southern African Studies* 80.

50 I Maffi & L Tonnessen 'Editorial: The limits of the law: Abortion in the Middle East and North Africa' (2019) 21 *Health and Human Rights* 1.

51 M Frederico et al 'Factors influencing abortion decision-making processes among young women (2018) 15 *International Journal of Environmental Research and Public Health* 329.

52 Further amendments in 2019 were considered to have a negative impact on perceptions about the legality of abortion.

53 D Bridgman-Packer & S Kidanemariam 'The implementation of safe abortion services in Ethiopia' (2018) 143 *International Journal of Gynaecology & Obstetrics* 19.

54 Article 551 of the 2005 Revised Penal Code of Ethiopia.

revised Penal Code also stated that 'the mere statement by the woman is adequate to prove that her pregnancy is the result of rape or incest', which helps to protect women who may be too afraid or ashamed to seek medical attention following a sexual assault.[55] Following the revision of the Penal Code, the Ethiopian Ministry of Health issued technical and procedural guidelines for safe abortion services in June 2006, in accordance with article 552(1) of the Revised Criminal Code. Taking cues from South Africa's example, these guidelines allowed midwives and public health nurses to perform abortions in addition to those already authorised to do so. This helped to expand access to safe and legal abortion services across the country, particularly in rural and underserved areas where trained medical professionals may be scarce.

The Constitution of Kenya, 2010 represents a significant shift in the country's approach to reproductive rights. Article 43 guarantees the right to the highest attainable standard of health, which includes reproductive health, while article 26(4) expands the grounds under which a safe abortion can be performed. Now, medical providers can perform an abortion where there is danger to the life or health of the mother, in cases where emergency treatment is needed, or as allowed by any other written law. This progressive stance is in stark contrast to the previous restrictions under section 240 of the Penal Code. This has been affirmed by the High Court in the case of in *Federation of Women Lawyers (FIDA – Kenya) v Attorney General*,[56] although generally, the ambiguity of the constitutional provisions regarding abortion mean that the legality of abortion remains unclear. In March 2022, the Kenyan High Court made a landmark decision in *PAK v Attorney General*,[57] holding that medically necessary abortion is a fundamental constitutional right. The court's decision took into account various legal frameworks, including Kenya's constitutional provisions, national criminal laws, and international commitments, to demonstrate how ambiguous abortion policy can lead to harmful criminalisation of patients and providers. Essentially, the ruling shows how unclear laws around abortion can have serious consequences for those seeking or providing necessary medical care.

Moreover, the promulgation of the Health Act, 2017 further expanded the grounds on who can perform abortions. Clinical officers, nurses, and midwives are now authorised to perform this vital service, thus increasing access to safe and legal abortions.[58] These legal and policy changes are

55 Article 552(2) of the 2005 Revised Penal Code of Ethiopia.

56 [2019] eKLR Petition 266 of 2015.

57 [2022] KEHC 262 (KLR) Petition E009 of 2020.

58 Section 6(2) of the Kenyan Health Act, 2017.

crucial in ensuring that women in Kenya can exercise their reproductive rights and access safe abortion services without fear of prosecution.

In recent years, there have been significant developments in Francophone Africa regarding access to safe and legal abortion. The Democratic Republic of the Congo (DRC) made history in 2018 when it became the first Francophone African country to introduce radical reforms to broaden access to abortion.[59] This was achieved through the publication of the Maputo Protocol in the official gazette, which paved the way for the endorsement of standards and guidelines for implementing the Protocol's directives by the Ministry of Public Health in 2020.[60]

In a similar vein, the Parliament of Benin made a ground-breaking decision in October 2021 to decriminalise abortion under most circumstances. Women are now able to access abortion services when a pregnancy is likely to cause them 'material, educational, professional, or moral distress'.[61] This significant step marks a departure from the restrictive laws and attitudes towards abortion that have traditionally been prevalent in many African countries.

These developments reflect a growing recognition of the importance of reproductive rights and access to safe abortion in ensuring women's health and autonomy. These developments reflect a growing recognition of the importance of reproductive rights and access to safe abortion in ensuring women's health and autonomy despite implementation challenges. However, this incremental and progressive shift is in sharp contrast to the recent United States (US) Supreme Court decision in *Dobbs v Jackson Women's Health Organization*.[62] In this decision, the Court upheld a Mississippi State law that bans abortion after 15 weeks of pregnancy. The Court also ruled that the US Constitution does not 'prohibit the citizens of each State from regulating or prohibiting abortion'.[63] This decision effectively overturns *Roe v Wade*,[64] the landmark 1973 decision that established a constitutional right to abortion.

59 Safe Engage & APHRC 'Policy change for women's rights: A case study of the domestication of the Maputo Protocol in the Democratic Republic of Congo' (2021).

60 Safe Engage & APHRC (n 56) 8.

61 S Johnson 'Benin passed one of Africa's most liberal abortion laws. Why are women still dying?' *The Guardian* 28 February 2023 https://www.theguardian.com/global-development/2023/feb/28/benin-africa-liberal-abortion-laws-women-still-dying (accessed 1 March 2023).

62 142 S Ct 2228, 2242 (2022)

63 *Dobbs* (n 62) 79.

64 410 US 113 (1973). See also *Planned Parenthood v Casey* 505 US 833 (1992).

In contrast, significantly, close to 50 per cent of African states now recognise health as a ground for abortion. Only a minority of states have retained colonial-era laws, which historically, have been highly restrictive of abortion. This group includes, Angola, Central African Republic, Congo (Brazzaville), Democratic Republic of Congo, Egypt, Gabon, Guinea-Bissau, Madagascar, Malawi, Mali, Mauritania, Mauritius, The Gambia, Senegal, Somalia, Sudan, South Sudan, Tanzania, and Uganda. Some have amended their old criminal rules, but the majority protect the status quo.

According to the Guttmacher Institute's 2020 estimates, the majority of women of reproductive age in Africa live in countries with highly restrictive abortion laws.[65] Unfortunately, this means that most of the abortion laws of the state parties to the Maputo Protocol are not in line with its provisions. The slow progress in achieving access to safe abortion services in the African region can be attributed to a range of factors that disable access to abortion services beyond just broadening the grounds of abortion, including conscientious objection.

3 Conscience clauses in African countries

Conscientious objection is a contentious issue in the provision of abortion services globally, and the African region is no exception. Conscience clauses, relating to specific rules and regulations around vary by country and jurisdiction. In the context of African abortion laws, most domestic laws do not directly address this issue, resulting in a lack of regulation, leaving healthcare providers to interpret and apply their own beliefs in their practice. This trend is not unique to Africa and is common in many other regions worldwide.[66] In South Africa which will be discussed in depth in the next chapter, the Choice on Termination of Pregnancy Act does not directly address conscientious objection.

While most African countries do not directly address conscientious objection in their laws, there are a few exceptions to this rule. One such exception is the Zambian Termination of Pregnancy Act of 1972, which permits a limited scope of the exercise of conscientious objection.[67] However, the Act notes that the exercise of conscientious objection

65 Guttmacher Institute 'Factsheet: Abortion in Africa' (2020) https://www.guttmacher.org/sites/default/files/factsheet/abortion-subsaharan-africa.pdf (accessed 10 June 2022).

66 OR Gustavo 'Abortion and conscientious objection: Rethinking conflicting rights in the Mexican Context' (2017) 29 *Global Bioethics* 5.

67 See the Zambia Termination of Pregnancy Act, 1972.

should not extend to practitioners' obligation to participate in any necessary treatment to save the life or prevent grave permanent injury to the physical or mental health of a pregnant woman. The Ministry of Health's Standards and Guidelines on abortion have further clarified this issue.[68] Nevertheless, it has been argued that the practice of conscientious objection remains largely unregulated as there is no requirement to record one's refusal.[69]

The Zimbabwean Termination of Pregnancy Act of 1972 stands in sharp contrast to the Zambian Termination of Pregnancy Act of the same year, particularly with regards to the exercise of conscientious objection. Section 10 of the Zimbabwean Act explicitly states that no healthcare worker, including any person employed in any capacity at a designated institution, shall be obliged to participate or assist in the termination of a pregnancy, regardless of any contrary laws or agreements. This approach disregards international and regional human rights standards, which recognise conscientious objection as a right that should not impede access to essential healthcare services, including abortion.

In 2014, the Kenyan Ministry of Health issued guidelines on the management of post-abortion care, which outlined the responsibilities of healthcare providers in providing post-abortion care to patients, regardless of the circumstances under which the abortion was carried out.[70] The guidelines require that healthcare providers provide post-abortion care services to all patients, regardless of their personal beliefs, and that conscientious objection should not impede access to these services.

4 Conclusion

Africa has seen significant developments in its abortion laws, with a trend towards more liberal frameworks that recognise women's reproductive rights. However, the implementation of these laws has been slow, with women facing numerous barriers to accessing safe abortion services. One of the key obstacles is the exercise of conscientious objection, which is not adequately addressed in most African countries. Despite constitutional protections for conscientious objection, it can conflict

68 C Ngwena 'Conscientious objection to abortion and accommodating women's reproductive health rights: Reflections on a decision of the Constitutional Court of Colombia from an African regional human rights perspective' (2014) 58 *Journal of African Law* 193.

69 E Freeman & E Coast 'Conscientious objection to abortion: Zambian healthcare practitioners' beliefs and practices' (2019) 221 *Journal of Social Science and Medicine* 106.

70 Ministry of Public Health and Sanitation & Ministry of Medical Services 'National Guidelines for Quality Obstetrics and Perinatal Care' (2012).

with other fundamental rights such as equality, dignity, and freedom of expression, leading to clashes between individual rights. In South Africa, despite having progressive laws and policies on abortion, the exercise of conscientious objection by healthcare providers presents a significant challenge to the effective implementation of the law. The next chapter will delve into the legal and policy landscape of abortion in South Africa.