1

Introduction

Charles Ngwena, Ebenezer Durojaye, Satang Nabaneh & Nkatha Murungi

The legal, policy and practice landscape of abortion in the post-colonial period has been changing in many significant ways in the African region. At independence, African states initially maintained the *status quo* on abortion law, retaining laws that had been transplanted into African territories by the colonial state.[1] Colonial laws introduced the criminalisation of abortion to the African region. The only recognised exception to the criminalisation of abortion was saving the life of the pregnant woman in a narrow medical sense.[2] While some countries have held on to colonially inherited laws, an increasing number has instituted reforms but mainly to broaden the grounds for abortion. For example, at least half of African states now recognise 'health', albeit in varying degrees, as a ground for abortion.[3] Pregnancies resulting from sexual violence, coercion or incest and risk to foetal health or life are also increasingly recognised as grounds for abortion.[4]

The reform of abortion law has also been taking place at the regional level to buttress a seeming trend towards liberalisation of abortion on the continent. Most notably, in 2003 the African Union (AU) adopted the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol), to be the first human rights treaty to inscribe access to safe abortion as a human right in its substantive provisions.[5] The African Women's Protocol has been

1 CG Ngwena 'Access to abortion: legal developments in Africa from a reproductive and sexual health perspective' (2004) 19 *SA Public Law* 328, 335-339.
2 As above.
3 Guttmacher Institute 'Abortion in Africa' (2018), https://www.guttmacher.org/sites/default/files/factsheet/ib_aww-africa.pdf (accessed 22 October 2024).
4 As above.
5 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); CG Ngwena 'Inscribing abortion as a human right: Significance of the

ratified by more than three-quarters of African states. In article 14 it permits abortion on grounds of risk to the health or life of the pregnant woman, risk to the life of the foetus, sexual assault, rape and incest. In 2014 the African Commission on Human and Peoples' Rights (African Commission) adopted General Comment 2 to provide guidance on the interpretation of the abortion and contraception provisions of the African Women's Protocol.[6] In the regional policy sphere, the Maputo Plan of Action for Implementing the Continental Sexual and Reproductive Health and Rights Policy Framework 2016-2030 is the most significant initiative.[7] It represents regional consensus to implement strategies for removing legal, regulatory and policy barriers that hinder access to the realisation of sexual and reproductive health, including access to safe abortion. These issues are discussed further below.

African states are parties to United Nations (UN) treaties that provide support for the recognition of access to safe abortion as a human right. While abortion is not explicitly recognised as human right in provisions of UN human rights treaties, there is support for its recognition as a derivative or implied right.[8] This can be found in the interpretation and application of provisions of UN treaties by the treaty-monitoring bodies in General Comments, general recommendations, Concluding Observations and opinions expressed in communications under optional protocols.

Abortion laws across African countries are gradually becoming more liberal, although they vary significantly. Nearly half of African nations now recognise health as a legitimate basis for allowing abortion. However, a minority of countries continue to enforce colonial-era laws known for their strict restrictions on abortion. These include Angola, the Central African Republic, Congo (Brazzaville), the Democratic Republic of the

---

Protocol on the Rights of Women in Africa' (2010) 32 *Human Rights Quarterly* 783.

6 African Commission on Human and Peoples' Rights General Comment 2 on arts 14(1)(a), (b), (c) and (f) and arts 14(2) (a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted by the African Commission on 28 November 28 2014.

7 African Union Maputo Plan of Action 2016-2030 for the Operationalisation of Continental Policy Framework for Sexual and Reproductive Health and Rights, https://au.int/sites/default/files/documents/24099-poa_5-_revised_clean.pdf (accessed 22 October 2024).

8 JB Fine and others 'The role of international human norms in the liberalisation of abortion laws globally' (2017) 19 *Health and Human Rights* 69.

Congo (DRC), Egypt, Gabon, Guinea-Bissau, Madagascar, Malawi, Mali, Mauritania, Mauritius, The Gambia, Senegal, Somalia, Sudan, South Sudan, Tanzania and Uganda. While some countries have updated their outdated criminal laws, most have opted to maintain the *status quo.*

Despite the changing landscape, globally and regionally, the crime and punishment model remains the predominant approach for regulating abortion in African states. Criminalisation serves to accentuate the stigma attached to abortion. It renders women seeking abortion vulnerable not only to discriminatory laws and policies, but also informal discriminatory practices by those involved in implementing abortion rights, enforcing abortion laws or providing reproductive healthcare services.

Notwithstanding a discernible trend towards the liberalisation of abortion and the emergence of an enabling regional and global human rights framework, domestic reforms, on the whole, have not translated into tangible access to safe abortion. For the majority of African women, abortion services are frequently unavailable or inaccessible even where women meet the legal eligibility criteria. Statistics on unsafe related abortion mortality and morbidity speak to the unavailability and inaccessibility of safe abortion services. While there has been a global trend towards the reduction of unsafe abortion, the African region remains overburdened. The sub-Saharan region has the highest global incidence of unsafe abortion notwithstanding efforts to improve the safety of abortion and broaden access to post-abortion care. It is estimated that 77 per cent of abortion in the region are unsafe in contrast to 45 per cent of abortions globally.[9] According to Bankole and others, as of 2019, unsafe abortions were responsible for 185 deaths per 100 000 abortions resulting in 15 000 preventable deaths each year.[10]

In the African region itself, there are also sub-regional, country and inter-country disparities.

Against the backdrop of an unsafe abortion in African landscape, which seemingly is untouched by legal reforms of abortion law, it becomes necessary to look beyond the letter of current reforms in order to identify persistent barriers to access and suggest how the barriers may

9 A Bankole and others *From unsafe to safe abortion in sub-Saharan Africa: slow but steady progress* (Guttamacher Report 2020), https://www.guttmacher.org/report/from-unsafe-to-safe-abortion-in-subsaharan-africa (accessed 23 October 2024).

10 As above.

be overcome. As part of identifying barriers and exploring solutions, there is a need to question the very premises upon which criminal law has been historically constructed as the preferred tool for regulating abortion. Especially in light of women's rights to equality, which are constitutionally guaranteed, the onus is on the state to demonstrate that using highly intrusive and punitive criminal law is rational and proportionate to the state's legitimate goals. If the goal of criminalising abortion is to protect women from unsafe practices and/or to protect prenatal life, then current laws fail in both instances.

The statistics on unsafe abortion-related mortality and morbidity in the African region suggests that criminalisation has served to harm rather than protect the lives and health of women. Equally, criminalisation has not protected pre-natal life as women with unwanted pregnancies have continued to risk their lives by recourse of unsafe abortions in environments where access to safe abortion is inaccessible. Pre-natal life is better protected in tandem with, rather than in isolation from, the pregnant woman's constitutional right to equality and the equal exercise of other rights, including access to healthcare services. The protection of pre-natal life can be achieved through less restrictive means. Providing sex education and contraception, promoting safe motherhood such as by improving access to emergency obstetric care, assuring social support for pregnant women who would otherwise struggle with shouldering child care and eliminating discrimination and stigma against pregnant girls by allowing them to stay in school are less restrictive methods of protecting pre-natal life.

There certainly is a need to evaluate the architecture of abortion laws that was inherited by the African independent state to determine its relevance today. Abortion laws made their entry into the colonial state at a time when it was assumed that abortion would always be a surgical procedure performed by a medical practitioner at a healthcare facility. Moreover, on account of the patriarchally inspired European ecclesiastical origins of colonial abortion laws, it was assumed that pregnant women had no agency to decide about whether to have an abortion as the procedure was only permitted when her life was literally imperiled. Consequently, colonial abortion laws recognised a medical practitioner as the only person with competence to decide on whether the woman meets any eligibility criteria.

The assumptions in colonially inspired abortion laws are not tenable in the Africa in which we find ourselves today. The constitutional recognition of substantive gender equality in the post-colonial era calls for giving concrete expression to women's reproductive autonomy in reproductive decision making. Control over the choice and timing of motherhood is crucial to women's agency, welfare and, ultimately, their equality as individuals and an historical community. The struggle for reproductive autonomy in fact is a struggle for equal citizenship in a social environment in which there is structural inequality and gender discrimination.[11] The persistence of unsafe abortion in the African region attests to a lack of political will to subordinate the historical criminalisation of abortion to the greater goal of transforming the rhetoric of reproductive self-determination and gender equality into tangible realities and essential pillars of human development.

The constitutional rights of women apart, technologies for procuring abortion are no longer what they were at the time of colonisation. Surgical abortions that require the skills of doctors are now the exception. The advent of medical abortions that do not necessarily require attending a healthcare facility, hospitalisation or the performance of a procedure or prescription by a doctor has largely replaced surgical abortions.[12] Furthermore, doctors are not always required to perform abortions. Appropriately trained mid-level providers have the competence to safely perform abortions in early pregnancies as the experience of South Africa, for example, shows.[13] These technological developments call for a fundamental revision of the monopoly of doctors that is inscribed in the architecture of abortion laws that was inherited from or inspired by the colonial state in a region where doctors are highly scarce.

The persistence of significant levels of unsafe abortion in the African region, even in the face of significant reforms, underscores the fact that instituting effective reforms requires more than just a preoccupation with broadening the grounds of abortion. It also requires giving equal

11 CG Ngwena & RJ Cook 'Restoring Mai Mapingure's equal citizenship' in RJ Cook (ed) *Frontiers of gender equality: Transnational legal perspectives* (2023) 406-429.

12 LB Pizzarossa and others 'Self-managed abortion in Africa: The decriminalisation imperative in regional human rights standards' (2023) 25 *Health and Human Rights* 171.

13 CG Ngwena 'History and transformation of abortion law in South Africa' (1998) 30 *Acta Academica* 32.

attention to addressing a broader constellation of factors that enable or disable access to abortion services. These factors include

- administrative practices for determining eligibility or rendering abortion services, including certification procedures and third-party consent requirements;
- the range of healthcare professionals with recognised competence to perform abortion or prescribe medicines for abortion;
- provider attitudes;
- political commitment;
- judicial interpretation;
- a constitutional and human rights framework, including the framework for recognising the rights of women and adolescent girls to equality, reproductive autonomy and health;
- regulation of conscientious objection;
- administrative and judicial mechanisms for enforcing individual rights and state duties; prevailing cultural and religious norms;
- stigmatisation;
- domestic as well as regional and global health policies;
- prevailing cultural and religious discourses; and
- the role of civil society and human rights defenders in rendering the state accountable.

Instituting effective reforms requires formulating and implementing strategies for maximally utilising enabling factors and overcoming disabling factors. It also requires monitoring reforms.

The overall aim of this book is to critically evaluate the efficacy of the reforms in delivering accessible abortion services, and to suggest strategies for augmenting reforms with a view to promoting reproductive autonomy, reproductive health and gender equality for women and girls with unwanted pregnancies.

Normative framework for the realisation of the right to safe abortion services under the African human rights system

Unsafe abortion remains a serious challenge in many African countries. This is due to the fact that the majority of African countries still retain very restrictive laws on abortion. The World Health Organisation (WHO) has estimated that abortion accounts for about 13 percent of all maternal mortality in the region.[14] The African human rights system

14 World Health Organisation 'Abortion' www.who.news.room (accessed on 14 April 2025).

remains the most promising in terms of norms and standards to realise safe abortion services for women. Aside the important provisions of the African Women's Protocol is often regarded as one of the most radical and progressive human rights instruments on women's rights, especially on sexual and reproductive health and rights. Article 14 of the Women's Protocol contains very detailed provisions in relation to the sexual and reproductive health and rights of women and girls. It contains a number of firsts – the first human instrument to recognise the transmission of HIV as a human rights issue; and rights of women to seek abortion services on certain grounds.

Beyond the clarification provided by the African Commission in General Comment 2, it has been involved in advocacy activities in line with its promotional mandate urging African states to remove barriers to safe and legal abortion services. For instance, the Special Rapporteur on the Rights of Women is involved in the Campaign on Safe Abortion in Africa. In line with this, the Special Rapporteur has on some occasions issued press releases calling for the decriminalisation of abortion in Africa. On many occasions, the Special Rapporteur has engaged with state parties during mission visits to consider reforming laws and policies on abortion. In addition, the Commission's reasoning in General Comments 3 and 4 is an important consideration to address unsafe abortion. In General Comment 3 the African Commission has noted that states are obligated to prevent the loss of life, especially during childbirth or pregnancy.[15] Implicit in this is that states are to take appropriate measures to prevent deaths resulting from unsafe abortion. In General Comment 4, the Commission has noted that the involuntary sterilisation of women will amount to cruel, inhumane and degrading treatment.[16] Thus, one may argue that forcing a woman to carry a pregnancy to terms against her wishes would amount to cruel, inhumane and degrading treatment.[17]

This framework contains a number of important targets for African governments to address critical sexual and reproductive health issues. Priority 2.3 of the Plan aims to implement policies, strategies and action

15 African Commission on Human and Peoples' Rights General Comment 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4), 18 November 2015.
16 General Comment 4 of the African Commission.
17 *SKL v Peru* CCPR/C/85/D/1153/2003, Communication 1153/2003.

plans to reduce unintended pregnancies and unsafe abortion. One of the indicators for this target is that states should prepare a status of unsafe abortion. To ensure the full implementation of the Maputo Plan of Action, estimates of resources required are provided. It is noteworthy that the AU has given priority to policy and legal reforms in relation to abortion in the region. Unsafe abortion remains a hassle in most parts of the continent. Despite the progressive provisions of the African Women's Protocol, many African countries still retain restrictive laws and policies on abortion. It is hoped that African governments will take more seriously the need to address unsafe abortion in the region.

Summary of the chapters

Chapter 2 by Nabaneh focuses on South Africa's abortion law in action and explores the gap between law and practice and highlights some challenges that impede the effective implementation of the law. It argues that the lack of clear legal or policy guidelines on the practice of conscientious objection serves as the main obstacle to delivering abortion services, especially for marginalised and poor black women. By describing the South African experience of abortion law reform, this chapter illustrates how after 29 years of the liberalisation project, there is a growing movement of conservative mobilisation in South Africa that has close ties with ultra-conservative organisations in the Global North.

In chapter 3 Kanguade and Bande examine the complex situation with regard to abortion laws in Malawi. While the authors note that the country has made some progress with regard to laws and policies in relation to sexual and reproductive health and right,s such as the Gender Equality Act, myriad challenges exist in relation to safe abortion services. The chapter explores the potential of public interest litigation to contribute toward enforcing Malawi's legal obligations to provide eligible girls and women with legal abortion, grounded in principles of justice. It concludes that despite the outcome of the first initial abortion case in Malawi, the judiciary holds promise as a driving force for the realisation of legal rights to abortion.

Chapter 4 by Nkatha argues that while the abortion laws in Zambia have been described as liberal and only second to those of South Africa, the laws on abortion in the country remain largely ineffective. According to the author, this is because it operates in a regulatory environment that does not support women's access to comprehensive abortion care

nor women's holistic realisation of sexual and reproductive health rights. The author further notes that Zambia's legal framework on abortion thus perpetuates health and other human rights violations against women, including perpetuating inequality on account of sex, gender, age, occupation, geographical location, disability, health status and civil status. The chapter concludes by noting that women's experiences in Zambia evidence the need for a paradigm shift to address the needs of present-day Zambia

In chapter 5, Chingore-Munazvo and Bosch focus on legal reforms on abortion in Zimbabwe. The chapter is divided into two parts. The first part traces the evolution of abortion laws in Zimbabwe. The chapter begins by outlining the colonial history of abortion regulation through the common law, and the introduction of the 1977 Termination of Pregnancy Act. This legislative history is assessed against the backdrop of existing indigenous knowledge systems, practices and attitudes towards abortion. The second part provides an overview of the current landscape regarding incidences of unsafe abortion-related mortality and morbidity. It examines the impact of the African Women's Protocol on national conversations to reform the Termination of Pregnancy Act, and the case for abortion access based on Zimbabwe's constitutional provisions. The chapter concludes by offering some recommendations for the way forward.

In chapter 6, Were and Saoyo provide a critical review of the journey towards legal reforms in Kenya. The authors argue that the legislative landscape prior to 2010 resulted in the criminal prosecution of numerous women and medical providers labelled murderers. According to the authors, after the 2010 promulgation of a new Constitution, there was a policy reprieve as article 26(4) expanded the grounds for access to abortion. This was followed by a wave of goodwill seen through the passage of a plethora of policies by the Ministry of Health that gave a sense of hope. Notably, though, the criminal prosecution of medical practitioners, as well as women and girls, has continued despite these favourable laws on paper.

Chapter 7, by Gerrisi and Maffi traces the journey to the decriminalisation of abortion in Tunisia. The authors note that Tunisia remains a unique North-African and Arab country as it has legalised abortion on demand. It is further noted that the decision to decriminalise abortion was made under the post-colonial state's demographic policies to lower

the fatality rate rather than a result of women's struggles, although some women's organisations promoted the procedure. The chapter highlights that access to abortion care in the public sector has progressively become more troublesome after the demographic transition took place at the end of the 1990s. The 2011 revolution and the pandemic have contributed to making the situation even more complex, although the law was not changed and, officially, government facilities should continue to offer free abortions to all Tunisian citizens. The chapter concludes by providing useful recommendations for the way forward.

The focus of chapter 8 by Gbadamosi is on efforts at legal reforms on abortion in Nigeria. The author argues that restrictive legal frameworks on abortion in Nigeria have typically been enacted to control reproductive health and rights of women through the application of criminal law. The effects of Nigerian abortion law generate some human rights questions as they constitute a flagrant violation of women's rights provided under the Nigerian Constitution, regional and international human rights instruments. The chapter then critically examines abortion laws in Nigeria and barriers to abortion, and canvasses reforms of the restrictive Criminal Code and Penal Code provisions on abortion to pave the way for safe abortion. It concludes by offering some concrete recommendations for the country.

In chapter 9, Gebru argues that Ethiopia has made steady progress in ensuring access to safe abortion for women in the country. It is argued that some of the efforts made at increasing access to abortion services include developing and disseminating guidelines for abortion care, broadening eligibility criteria to allow more facilities to provide services, facilitating training on abortion for more skilled providers, and addressing many other matters concerning women's rights and well-being. The chapter then traces the historical background and provides a glance at the origins of abortion laws and policies before the recent law of 2005 in Ethiopia. It then describes the intent of the 2005 Abortion Law, its implementation, the positive impact it has, and some challenges encountered. It concludes with some actions and recommendations for moving the agenda forward.

Chapter 10 by Hunguana discusses the origin of abortion laws in Mozambique. The chapter begins the analysis by examining the regulation of abortion in the pre-colonial era. The author argues that, as in most other Africa countries, there was no codification of customary

law in relation to abortion. Thus, the author argues that it may be concluded that abortion was not criminalised in the pre-colonial era. It proceeds to critically analyse the regulation of abortion in the colonial era. The author argues that during this period, evidence exists that abortion was criminalised by virtue of the country being colonised by Portugal. According to the author, the only exception to the 1886 Penal Code was to save the life of the pregnant woman. This is followed by the discussion of the abortion laws in the post-colonial era. The author divides this period into three, from administrative regulation to ensure access to the use of human rights argument, and the 2014 reform of the Penal Code, which broadens the exception to abortion for women.

Chapter 11, by Ganle and Brookman-Amissah, centres on Ghana's progress in abortion laws, policies, and their real-world application. They highlight the link between strict laws and unsafe abortions, which harm women. The chapter traces Ghana's history with abortion, from before colonisation to current reforms. A key point is that good laws must translate to accessible services for women. The authors discuss the health system's role and the impact of international agreements. Ultimately, the chapter argues that even with slow progress, Ghana shows how addressing restrictive laws can improve safe abortion care."

Chapter 12, by Nabaneh, pays tribute to the significant contributions of Professor Charles Ngwena (1957-2025). The chapter specifically focuses on Ngwena's pivotal influence on how we understand abortion law and reform, especially in Africa. Through his critical analysis of human rights instruments such as the Maputo Protocol and national abortion laws, Ngwena shed light on the complexities of reproductive rights and the ongoing gap between legal frameworks and practical access for women. His nuanced interpretations and strong advocacy for social justice have sparked crucial dialogue and informed efforts to advance true equality and reproductive autonomy. This chapter reflects on the lasting impact of Ngwena's scholarship and its continued relevance in addressing today's human rights and health issues in Africa and beyond.