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'Taking women's rights seriously': Charles Ngwena on abortion law and practice in Africa

Satang Nabaneh

The lesson for African jurisdictions is that regulating abortion is more than just prescribing proscriptions and exceptions. There is also a duty to render domestic abortion laws human rights compliant through the institution of procedural and administrative mechanisms that allow women seeking abortion to realise their rights effectively.[1]

Abstract

This chapter honours the significant contributions of Professor Charles Ngwena, a scholar whose work has profoundly influenced the author and the broader field of human rights and health law. It specifically examines Ngwena's pivotal role in shaping our understanding of abortion law and reform, particularly in the African context. By critically analysing key legal instruments, such as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa and national abortion legislation, Ngwena illuminated the complexities of reproductive rights and the persistent gap between legal frameworks and practical access. His nuanced interpretations and advocacy for social justice have spurred critical dialogue and informed efforts to advance substantive equality and reproductive autonomy. This chapter reflects on the enduring impact of Ngwena's scholarship, underscoring its continued relevance in addressing contemporary challenges related to human rights and health in Africa and beyond.

1 C Ngwena 'Developing regional abortion jurisprudence: Comparative lessons for African Charter organs' (2013) 31 *Netherlands Quarterly of Human Rights* 40.

Preamble

My journey with Professor Charles Ngwena began in Pretoria in 2012 during a nerve-wracking moment presenting my mini-dissertation proposal on article 14(2)(c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) concerning abortion. At the time an admittedly proud Master's student, I had the audacity to suggest a gap in his already extensive research on the Protocol. I recall specifically arguing that while his work comprehensively covered the legal framework of the African Women's Protocol and even acknowledged its limitations regarding transformative potential due to the restricted grounds for abortion, it lacked a substantial examination of the limited scope itself. Specifically, I felt it needed a deeper analysis of the impact of excluding socio-economic grounds and abortion on request. He listened intently, his calm demeanour a stark contrast to my youthful spiritedness.

That recollection dawned on me that I had crossed what the Indians call the *Lakshman Rekha*. Where, however, one would have expected a thorough dressing down, or a dismissive shrug to my challenge, Prof Ngwena engaged with my challenge and offered critical insights and suggested avenues for further research. This initial interaction set the tone for our relationship: one of mutual respect and intellectual generosity. I immediately created a dedicated folder for his publications, a collection I cherish to this day and to which I have added over the years we have worked together.[2] This article is based on that collection. Our connection deepened when I received a doctoral scholarship through the Political Determinants of Sexual and Reproductive Health in Africa Project at the Centre for Law and Social Transformation (LawTransform), University of Bergen. Alongside Siri Gloppen, they became my supervisors for the project 'Power dynamics in the provision of legal abortion: A feminist perspective on nurses and conscientious objection in South Africa'.[3] These two academic giants were a blessing to me. They shaped me into

2 S Nabaneh 'Learning from an intellectual giant: A tribute to Professor Charles Ngwena' 5 February 2025, https://satangnabaneh.com/learning-from-an-intellectual-giant-a-tribute-to-professor-charles-ngwena/. (accessed 28 February 2025).

3 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 dissertation, University of Pretoria, 2012.

their 'likeness' and insisted that I push myself beyond the limits. Ngwena remains the person I engaged with the most in my work, and whose contributions significantly shaped my understanding.

1 Introduction

Reflecting the ethos of 'Taking women's rights seriously', this chapter pays tribute to Professor Charles Ngwena, whose scholarship has consistently championed not only the state's positive duties in abortion law implementation, but also the broader framework of women-centred rights to procedural justice, equality and health. Ngwena's scholarship stands as a beacon in the complex landscape of health law and human rights, particularly in the African context. His incisive analyses and unwavering commitment to social justice have left an indelible mark on our understanding of reproductive rights and the broader pursuit of equality. For me, and for many others navigating the intricacies of legal frameworks and their impact on marginalised communities, Ngwena's work has served both as a guide and an inspiration. His ability to dissect complex legal issues with clarity and compassion has profoundly shaped my own approach to research and advocacy.

This chapter pays tribute to Charles Ngwena by illuminating the enduring legacy of his scholarship, which has fundamentally reshaped our understanding of abortion law and reform, particularly in Africa. To this end, the chapter will begin by examining Ngwena's specific contributions to abortion law and reform, focusing on his analysis of historical development and its impact on domestic law reform in Africa. The third part focuses on his critical perspective on translating human rights treaties, particularly the African Women's Protocol, into tangible outcomes. Part 4 is an attempt to showcase his work on reforming abortion laws to achieve transparency, highlighting his normative theoretical framework grounded in substantive equality. Part 5 briefly explores our joint insights on emerging areas, with a focus on medical abortion and the influence of international aid. The concluding epilogue honours his legacy as an 'academic midwife', whose guidance brought forth a generation of intellectual leaders.

2 Ngwena's contribution to understanding abortion law and reform: Historical development

Ngwena's contributions illuminate the historical development of African abortion laws by tracing their roots to eighteenth century European legal frameworks, particularly those transplanted during colonialism.[4] He underscored how the strict criminalisation of abortion, with its narrow 'life-saving' exception, was a defining characteristic of these imported laws. Ngwena's analysis highlights the enduring influence of the Napoleonic Penal Code which, as he demonstrates, shaped the abortion laws imposed upon African colonies by European powers such as Belgium, France and Portugal. Unlike Britain's 1967 liberalisation of abortion laws, progress in Africa has been significantly slower, with restrictive laws largely persisting.[5] His work is crucial in understanding how this early, restrictive legal legacy continues to impact contemporary African abortion discourse.

In 2004 Ngwena conducted research on the availability of legal abortion across Africa, prior to the enactment of the African Women's Protocol. This research specifically addressed the high rate of unsafe abortions and included a detailed evaluation of abortion laws in Southern Africa.[6] A special focus was on the appraisal of abortion laws in Southern Africa.[7] Ngwena acknowledged that liberation of the abortion laws was on the premise 'that the Constitution recognises the right to

4 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. Drawing on his work, my examination of the legal effects of the 1938 British case of *R v Bourne* in The Gambia reveals no evidence that abortion began to be provided on the grounds established in that decision. This lack of implementation is primarily due to the fact that the health ground for abortion has never been tested for legality or reaffirmed in a Gambian court. See S Nabaneh 'The Gambia's political transition to democracy: Is abortion reform possible? (2019) 21(2) *Health and Human Rights* 169-179.

5 C Ngwena, D van Rensburg & M Engelbrecht 'Accessing termination of pregnancy by minors in the Free State: Identifying barriers and possible interventions' (2005) Centre for Health Systems Research and Development, University of the Free State. See also MC Engelbrech and others 'The operation of the Choice on Termination of Pregnancy Act: Some empirical findings' (2000) 23 *Curatonis* 4.

6 C Ngwena 'Protocol to the African Charter on the Rights of Women: Implications for access to abortion at the regional level' (2010) 110 *International Journal of Gynaecology and Obstetrics* 163-166.

7 See C Ngwena 'An appraisal of abortion laws in Southern Africa from a reproductive health rights perspective' (2004) 32 *Journal of Law, Medicines and Ethics'* 708-717.

make decisions concerning reproduction as part of the right to bodily and psychological integrity'.[8]

As a constitutional law scholar, he contended in 2003 that the failure of the South African Choice on Terminational of Pregnancy Act (CTOP Act) to address conscientious objection was a significant oversight.[9] He proposed principles to define its limits, arguing that the Act's silence leaves the Constitution as the sole guide. This lack of explicit guidance, he argued, creates uncertainty for both those claiming conscientious objection and women seeking abortion services.[10] He further asserted that the Constitution must compensate for the CTOP Act's omission.[11]

My doctoral and post-doctoral research directly extends and deepens Ngwena's initial analysis by examining the practical application of these constitutional principles within the lived experiences of healthcare providers (nurses and midwives).[12] Through a critical examination of the law on the ground, I sought to contribute to an understanding of the nature and scope of conscience, discretionary power, and the broader socio-cultural and political factors that influence nurses' exercise of conscientious objection in South Africa. By exploring these questions, I aim to provide insights into the challenges faced by healthcare providers and the impact of conscientious objection on women's access to safe and legal abortion care. Specifically, my work investigates how the constitutional vacuum identified by Ngwena manifests in the daily realities of nurses, and how the absence of clear legislative guidelines

8 Ngwena (n 7) 715. See also C Ngwena 'Access to health care as a fundamental right: The scope and limits of section 27 of the Constitution' (2000) 25 *Journal for Juridical Science* 19; C Ngwena 'Substantive equality in South African health care: The limits of law' (2000) 4 *Medical Law International* 2.

9 C Ngwena 'The history and transformation of abortion law in South Africa' (1998) 30 *Acta Academica* 8.

10 As above. See also C Ngwena 'Conscientious objection and legal abortion in South Africa: Delineating the parameters' (2003) 28 *Journal for Juridical Science* 1-18.

11 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.

12 S Nabaneh 'Power dynamics in the provision of legal abortion: A feminist perspective on nurses and conscientious objection in South Africa' LLD thesis, University of Pretoria, 2020. See also S Nabaneh 'Abortion and "conscientious objection" in South Africa: The need for regulation' in E Durojaye, G Mirugi-Mukundi & C Ngwena (eds) *Advancing sexual and reproductive health and rights in Africa: Constraints and ppportunities* (2021) 16-34.

shapes their professional decisions and ultimately affects women's reproductive autonomy.[13]

This work offers a unique socio-legal perspective on conscientious objection in abortion care that moves beyond traditional legal scholarship by incorporating feminist intellectual traditions and developing a critical African feminist perspective framework. This framework addresses critical gaps in the existing literature, allowing for a nuanced exploration of how power relations are shaped and maintained through legal norms, both formal and informal. This bridging of analytical perspectives provides a deeper understanding of the on-the-ground realities and ultimately widens the global discourse on conscientious objection and its impact on women's reproductive rights. Indeed, as Ngwena notes, *Choice and conscience: Lessons from South Africa for a global debate*, 'written from an African feminist perspective, offers fresh insights into our understanding of the intersection between politics, the mobilisation of discretionary power, and the exercise of conscientious objection to abortion by mid-level providers'.[14]

The uncertainties created by the CTOP Act's omissions, as Ngwena pointed out, directly also contribute to the complex realities faced by adolescents in the Free State, who often turn to unsafe abortions despite legal provisions. A study he jointly conducted in the Free State revealed that adolescent girls preferred 'backstreet' abortions due to peer influence. Adolescent decisions to pursue unsafe abortions are heavily influenced by their circumstances.[15] In South Africa, despite legal liberalisation, diverse and interconnected social and service-related factors drive this choice. These factors include negative social, cultural and religious perceptions surrounding abortion in their communities, as well as barriers to accessing safe abortion services.[16]

Ngwena further examined how African countries are progressively or retrogressively fulfilling their obligations to ensure safe abortion

13 See S Nabaneh *Choice and conscience: Lessons from South Africa for a global debate* (2023).
14 Nabaneh (n 13) iv.
15 Ngwena and others (n 5).
16 CG Ngwena 'Access to safe abortion as a human right in the African region: Lessons from emerging jurisprudence of United Nations treaty monitoring bodies' (2013) 29 *South African Journal on Human Rights* 409.

services at the domestic level.[17] In a collaborative research project, Ngwena and his former student, Mavundla, conducted a comparative analysis of abortion regimes in Swaziland and Ethiopia, highlighting the contrasting ways in which these nations have implemented liberalised abortion laws.[18] While both countries reformed their laws in 2005, Ethiopia has shown greater commitment to translating legal rights into practical access, whereas Swaziland lags behind. The authors emphasise that effective implementation is crucial, not only for providing clear guidance to service providers and ensuring women's access to abortion, but also as a fundamental human rights obligation on the state.

The denial of access to abortion following rape is not only a violation in its own right under the African Women's Protocol, but also a form of violence against women. At state level, there is a need for legislation, regulations and policies that specifically allow abortion in cases of rape. These should be crafted in ways that go beyond mere paper rights so as to offer tangible access. Ethiopia demonstrates that, given political commitment, this can be done. Swaziland can take a leaf from Ethiopia's book and implement its constitutional commitment on abortion in a manner that is transparent and tangible to service providers and, ultimately, to women seeking abortion.

Building on the principles central to the Ngwena legacy, his joint article with Cook examined how global legal trends are improving women's reproductive and sexual health services. They argue for (a) evidence-based policies, not personal beliefs; (b) legal transparency for medical certainty; and (c) government responsibility to ensure fair and non-discriminatory health care.[19]

17 Ngwena (n 4) 827-842. See C Ngwena 'Accessing abortion services under the Choice on Termination of Pregnancy Act: Realising substantive equality' (2000) 25 *Journal for Juridical Science* 19-44.

18 See S Mavundla & C Ngwena 'Access to legal abortion by rape victims as a reproductive health right: Case study of Swaziland and Ethiopia' in C Ngwena & E Durojaye *Strengthening the protection of sexual and reproductive health and rights in the African region through human rights* (2014) 61-78.

19 RJ Cook & C Ngwena 'Women's access to health care: The legal framework' (2006) 94 *International Journal of Gynaecology and Obstetrics* (2006) 216.

3 Translating human rights treaties: Ngwena's critical perspective

Since World War II, international law has increasingly focused on human rights protection. The 1948 Universal Declaration of Human Rights (Universal Declaration) established the fundamental principle of inherent human dignity and inalienable rights as the basis for freedom and justice. Building on this foundation, the 1966 International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights transformed human rights from mere declarations into binding treaty obligations for states. Subsequent United Nations (UN) treaties have further addressed the rights of specific marginalised groups, with the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) serving as a pivotal global instrument for women's rights. Regional human rights systems have mirrored this trend. Notably, in 2003 the African human rights system adopted the African Women's Protocol, an instrument that both reflected and expanded upon CEDAW's provisions for women's rights in Africa. To strengthen accountability, the African regional system, initially comprising only the African Commission on Human and Peoples' Rights (African Commission), was augmented by the African Court on Human and Peoples' Rights (African Court).

Ngwena advocates a more contextualised and nuanced interpretation of human rights treaties. He raises the following critical question: What is the real-world impact of these developments at the UN and African regional levels? How effectively do these human rights promises translate into tangible improvements in the daily lives of women, men and children, particularly in Africa?

Examining the African Women's Protocol in 2010, Ngwena acknowledged its 'ground-breaking' enumeration of abortion rights.[20] However, he maintained that the Protocol's circumscribed legal grounds for abortion ultimately limited its capacity for transformative impact.[21] Despite being a pioneering international treaty in recognising abortion as a human right, the Women's Protocol falls short by medicalising abortion grounds and implicitly granting healthcare professionals undue control

20 Ngwena (n 4) 811, 843.
21 As above.

over the process.[22] This approach, which disregards women's autonomy, reinforces patriarchal power at the expense of women's equality, dignity, and their right to make life-saving health decisions. However, its strength lies in its emphasis on states' obligations to respect, protect, promote and fulfil women's rights under the Protocol, and its alignment with the World Health Organisation (WHO)'s holistic definition of health.

From a sub-regional perspective, Ngwena also underscored that Southern African Development Community (SADC) nations, which are mainly parties to international human rights treaties, are obligated to ensure access to abortion as fundamental to women's physical, mental and socio-economic well-being.

Nevertheless, he also argued that the majority of SADC countries restrict abortion access to only the most stringent conditions, compounded by excessive administrative hurdles. These barriers, coupled with a severe lack of medical professionals, often render even legally permissible abortions practically unattainable. He called for the liberalisation of abortion laws across SADC, which also demands a robust commitment of resources to guarantee women's ability to exercise this fundamental right.[23]

In his article 'Access to safe abortion as a human right in the African region: Lessons from emerging jurisprudence of UN treaty monitoring bodies' Ngwena addressed the devastating impact of unsafe abortions in Africa, where restrictive laws significantly contribute to thousands of women's deaths and disabilities annually. While UN treaty-monitoring bodies are increasingly recognising safe abortion access as a human right, the African region's restrictive abortion regimes present a stark contrast. Ngwena critically examined this tension by appraising three key decisions: *KL v Peru*[24] and *LMR v Argentina*,[25] decided by the Human Rights Committee (HRC), and *LC v Peru*,[26] decided by the Committee on the Elimination of Discrimination Against Women

22 CG Ngwena 'Protocol to the African Charter on the Rights of Women: Implications for access to abortion at the regional level' (2010) 110 *International Journal of Gynaecology and Obstetrics* 163-166.

23 Ngwena (n 7).

24 *KL v Peru* Communication 1153/2003 adopted 24 October 2005, UN GAOR, HRC, 85th session, UN Doc CCPR/C/85/D/1153/2003 (2005).

25 *LMR v Argentina* Communication 1608/2007, CCPR/C/101/D/168/2007, HRC (2011).

26 *LC v Peru* Communication 22/2009, CEDAW/C/50/D/22/2009 (2011).

(CEDAW Committee). Through this analysis, he extracted valuable lessons for developing jurisprudence within the African region that firmly establishes safe abortion as a human right.[27]

Ngwena has convincingly argued that the African Women's Protocol's provision on abortion is a 'health issue that takes the form of a socio-economic right'.[28] This, he stated, requires state parties to both 'decriminalise abortion and incorporate abortion services within mainstream health services'.[29]

Following the adoption of the General Comment, Ngwena and others examined General Comment 2 of the African Commission in 2014, which focuses on measures to promote and protect sexual and reproductive rights of women and girls in the African region and particularly on access to safe abortion.[30] Beyond simply guiding state legislation, this General Comment educates various stakeholders, including healthcare providers and legal professionals, on relevant jurisprudence. The Protocol envisages an abortion regime that is sensitive not just to women, but also to the most vulnerable women, which are rural women.[31]

The African Court lacks its own jurisprudence on abortion and women's rights, and the African Commission has yet to develop sufficient jurisprudence to effectively address these issues. Ngwena's analysis critically further examined the European Court of Human Rights' ruling in *A, B, and C v Ireland*,[32] seeking to draw comparative lessons for African Charter bodies in the development of regional abortion jurisprudence.[33] He argued that the *A, B, and C* decision presents a mixed bag of positive and negative takeaways. On the positive side, the European Court's emphasis on procedural transparency – requiring clear domestic abortion laws and accessible administrative review mechanisms – offers valuable guidance for ensuring that women can effectively

27 C Ngwena 'Access to safe abortion as a human right in the African region: Lessons from emerging jurisprudence of UN treaty monitoring bodies' (2013 29 *South African Journal on Human Rights* 399-428.
28 Ngwena (n 4).
29 Ngwena (n 4) 853.
30 C Ngwena, E Brookman-Amissah & P Skuster 'Human rights advances in women's reproductive health in Africa' (2015) 129 *International Journal of Gynaecology and Obstetrics* 184.
31 Ngwena (n 1) 34.
32 *ECtHR, A, B and C v Ireland* 16 December 2010 Application 25579/05).
33 Ngwena (n 1).

exercise their rights. Conversely, the decision's continued reluctance to firmly establish abortion rights as substantive rights represents a significant negative lesson, highlighting the ongoing struggle to secure robust legal protections for reproductive autonomy.

The African region faces unique challenges regarding abortion access, largely due to inherited colonial laws that frame abortion as a crime. Consequently, many African legal systems lack practical guidance and administrative procedures for timely review of abortion requests. Historically, abortion has been regulated through penal codes, with broad prohibitions and limited exceptions, primarily to save the pregnant woman's life – a reflection of early colonial era laws.[34] While some African nations have liberalised abortion laws in recent years, expanding the grounds for termination, these reforms are often undermined by the absence of clear guidelines for both women seeking abortions and healthcare providers.[35]

Ngwena suggests that if the African Court were to adjudicate or provide an advisory opinion on abortion rights, it should strongly emphasise the need for transparent domestic abortion laws. This is particularly relevant in Africa, where criminalisation is widespread, and would be a valuable lesson for both the Court and women's rights advocates. He noted:[36]

> When women are denied abortion and compelled to become mothers by the state, it is obvious that it is they who must bear the primary burden of pregnancy and child-rearing and sacrifice their own needs and wishes to serve the interests of the state. This is not to suggest that the state ought not to have any interest in protecting foetal life, but it is to highlight the gender oppressive nature of invoking state power to use the biological capacities of women as the primary means to an end. It is to further highlight the wrongfulness of using women as reproductive instruments to achieve an objective that can be more effectively achieved using less restrictive means.

According to Ngwena, the African Women's Protocol indicates that relying solely on privacy rights is insufficient for protecting sexual and reproductive health, including abortion. It necessitates positive state duties, such as resource allocation, to ensure substantive equality.

34 Ngwena (n 4).
35 Ngwena (n 1) 21-22.
36 Ngwena (n 1) 31.

In their 2023 joint chapter, Ngwena and Cook examined how courts can dismantle the lingering colonial mindset through a reinterpretation of the Zimbabwe Supreme Court's *Mapinguire* decision.[37] They argued that the 2014 denial of medical services to Mai Mildred Mapinguire, a rape survivor, exemplifies the systemic subordination of women seeking abortion access, particularly within health care and the criminal justice systems. Their analysis reveals the deeply gendered nature of post-colonial Zimbabwe's abortion laws and practices.[38]

The chapter's core contribution is a rewritten judgment of the *Mapingure* decision, where the authors, acting as judges, dismantle the gendered harms of the 1977 Termination of Pregnancy Act. They highlight how the original ruling ignored structural discrimination, blaming Mai Mapinguire for failing to navigate a biased system. The rewritten judgment emphasises the 2013 Constitution's mandate for women's equal citizenship, acknowledging the intersectional discrimination faced by pregnant women. It orders remedies, including compensation, invalidation of the 1977 Act, and state action to transform discriminatory health practices. This rewritten decision demonstrates how substantive equality under the new Constitution can rectify the structural subordination of pregnant women in the health sector, offering gender-specific remedies that affirm women's agency.[39]

4 Reforming abortion laws to achieve transparency

One of Ngwena's most significant contributions lies in his development of a normative theoretical framework for transparency, grounded in transformative notions of equality, particularly as applied to abortion law. The debate surrounding abortion often becomes mired in irreconcilable moral positions. His core argument, however, proposes a way forward by shifting the focus to principles of justice in a constitutional democracy. Even amidst irreconcilable moral disagreements about abortion, democratic societies can and should reach a consensus on the just

37 *Mildred Mapinguire v Minister of Home Affairs, Minister of Health, Minister of Justice, Legal and Parliamentary Affairs* Judgment SC 22/13, Civil Appeal N SC 406/12 (24 March 2014).

38 C Ngwena & R Cook 'Restoring Mai Mapingure's equal citizenship' in R Cook *Frontiers of gender equality: Transnational legal perspectives* (2023) 406-429.

39 As above.

principles governing abortion law. When legal systems permit abortion under specific exceptions, these exceptions must be translated into tangible rights and duties. This is essential to uphold the very meaning of rights in a constitutional democracy, where rights are not merely abstract concepts but enforceable claims with corresponding state obligations.

This nuanced interpretation, which informs my own work, underscores that safe abortion access is a gender equality issue. Without control over her reproductive rights, a woman cannot fully and equally participate in society.[40] Ngwena noted:[41]

> 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, thus perpetuating the status quo.

Recognising the limitations of individual remedies, a more comprehensive approach is needed, one that focuses on structural change, which Ngwena captures in the following explanation:[42]

> Substantive equality has a transformative aim in that it seeks to be responsive to structural inequality by restructuring social relations and redistributing resources. In the specific circumstances of women, substantive equality achieves transformation not only by implicating patriarchy as a biased social institution and a structural power that, historically, has created and sustained the social, political and economic dominance of men by assuring the subordination of women. Equally significant, substantive equality also looks at structural rather than merely individual remedies so as to achieve more lasting outcomes that accept and accommodate women as equal citizens. Accepting and accommodating women requires a political willingness to redress distribution of power not only in the public sphere but also in the private sphere.

Ultimately, achieving substantive equality requires a fundamental shift in power dynamics and a sustained political commitment to address both the visible and invisible barriers to gender equality.

This is why, according to Ngwena, legal reforms within Africa have aimed to overturn a system where women were legally considered subordinate due to the influence of Roman-Dutch paternalistic

40 Nabaneh (n 13).
41 C Ngwena 'Taking women's rights seriously: Using human rights to require state implementation of domestic abortion laws in African countries with reference to Uganda' (2016) 60 *Journal of African Law* 133. See also C Ngwena *What is Africanness? Contesting nativism in race, culture and sexualities* (2018) 248-250.
42 Ngwena (n 1) 32.

traditions combined with the patriarchal nature of African customary law.[43] The premise of such an approach is to utilise relevant 'transcultural knowledge', while optimising the African gaze through non-enforcement of hegemonic and universalising knowledge emerging from a 'Eurocentric canon'.[44] As Ngwena reminds us,

> [s]temming the tide of unsafe abortion and saving the lives of women calls for transforming, at the domestic level, especially, the model for regulating abortion from crime and punishment to a reproductive health model. The crime and punishment model is a colonial bequest that the erstwhile colonising countries, themselves, have long discarded in order to preserve the health and lives of women.[45]

Ngwena argues that where abortion laws, when they exist, must be transparent. This is not simply about having laws on the books; it is about ensuring that they are known and accessible, a crucial step towards procedural fairness and equality. He sees transparency as a way to hold states accountable, ensuring that promised rights are not merely empty words. By shedding light on these laws, women are empowered to exercise their rights, overcoming the common obstacles they face. Essentially, Ngwena believes transparency is a fundamental duty of the state, a way to make rights real and claimable within a democracy. As he reminds us:[46]

> It is not just decriminalisation of abortion that is required, but, instead, making abortion an integral part of realising reproductive health as a human right that comes with capabilities for women. A meaningful right to abortion must come with raising awareness among women about unsafe abortion, educating women about their rights to abortion and providing equitable access to abortion services. 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. Emerging jurisprudence from United Nations treaty monitoring bodies shows that liberalisation of abortion law is not always followed by practical implementation and that abortion rights may exist only as paper rights. Therefore, over and above making abortion services available,

43 C Ngwena 'The history and transformation of abortion law in South Africa' (1998) 30 *Acta Academica* 32-68.
44 C Ngwena (2018) (n 41) 216-222.
45 C Ngwena 'Using human rights to combat unsafe abortion: What needs to be done?' *AfricLaw* 12 April 2012, https://africlaw.com/2012/04/24/using-human-rights-to-combat-unsafe-abortion-what-needs-to-be-done/ (accessed 28 February 2025).
46 As above.

> it is incumbent upon states to take positive steps to provide to both women and providers of abortion services, clear and enabling guidelines for implementing access to safe, legal abortion.

Ultimately, Ngwena's message is clear: Transparency is vital for ensuring that abortion rights, when legally granted, are truly accessible, even if it comes with certain limitations.

Thus, Ngwena observes that the majority opinion in *Dobbs v Jackson Women's Health Organisation*[47] delivers a profoundly negative lesson for the African region and African women. He argues that the decision's refusal to acknowledge women with unwanted pregnancies as gendered moral subjects with constitutional decision-making authority regarding abortion is a clear denial of their equality and human dignity. Moreover, he notes that African regional jurisprudence diverges from the *Roe v Wade* tradition, which framed abortion rights as a matter of privacy. He noted:[48]

> Gender equality is the juridical basis for the right to abortion under the Maputo Protocol. The judgement presents an opportunity for the African human rights system to affirm its differences with a jurisdiction that has moved to infantilize women and created an enabling constitutional environment for reinstituting the criminalization of abortion to appease moral majorities and the Christian Right.

The *Dobbs* decision, he argued, represented a significant step backward, especially when compared to the forward momentum of abortion law reforms in Africa. This contrast, as detailed in my forthcoming chapter, 'Post-Dobbs: Insights from African abortion laws and practice,' offers alternative pathways for a post-Dobbs America to explore in its struggle to navigate abortion rights.[49]

5 Looking to the future

As we consider the future of abortion access, several emerging areas are poised to play a pivotal role. Ngwena and I argued that achieving universal access to safe abortion necessitates the dismantling of

47 142 S Ct 2228, 2242 (2022).

48 C Ngwena '*Dobbs v Jackson Women's Health Organisation*: Comparative lessons for the African region' 1 July 2022, https://www.africanlawmatters.com/blog/dobbs-v-jackson-womens-health-organization-comparative-lessons-for-the-african-region (accessed 28 February 2025).

49 S Nabaneh 'Post-Dobbs: Insights from African abortion laws and practice' in R Rebouché & M Roseman (eds.) *Accessing Abortion* (forthcoming 2025).

restrictions on medical abortion, including the use of pills and tele-health support outside of traditional hospital settings.[50] We observed that medical abortion remains excessively regulated, ranging from outright bans to criminalising self-use, and restricted access through formal healthcare services. We asserted that expanding access to medical abortion, encompassing tele-health and self-managed options, is crucial. This shift away from formal healthcare systems towards community-based care necessitates a reconceptualisation of regulatory frameworks and pharmaceutical care to integrate the self-use of medical abortion pills. Furthermore, the COVID-19 pandemic underscored the critical importance of equitable internet access for facilitating medical abortion through tele-health services.

However, the future of abortion access is not solely determined by domestic policy. The influence of international aid on sexual and reproductive health is a particularly timely and critical issue. There is mounting evidence demonstrating the detrimental impact of foreign aid tied to anti-abortion agendas, which curtails sexual and reproductive rights globally.[51] Organisations from the Global North, presenting themselves as 'pro-family' and promoting 'traditional family values', have been funding local organisations in the Global South, fostering the growth of conservative movements against reproductive rights. This has led to the proliferation of crisis pregnancy centres, even in countries with liberal abortion regimes such as South Africa, where they spread misinformation and religious propaganda. Consequently, 'such neocolonial violations of reproductive rights must be replaced by a reproductive justice approach'. This approach, as we argued, is essential to 'support the rights and needs of all women'.[52]

This influence of foreign aid directly affects the emerging areas of medical abortion. Funding restrictions can prevent the establishment of tele-health services, limit access to medication, and undermine

50 S Nabaneh & C Ngwena 'Sexual health and rights: Intersections with reproductive justice, gender, and gender-based violence' *Health and Human Rights Journal*, https://www.handover-dialogues.org/site/assets/files/1181/discussion_paper_dialogue_hd4_v3.pdf.

51 As above.

52 See S Nabaneh and others 'Contester le genre et la colonialité: Une analyse des mobilisations conservatrices en Afrique du Sud, au Kenya et au Ghana/Contesting gender and coloniality: A lens on conservative mobilisation in Ghana, Kenya and South Africa' 4 (2023) 168 *Politique Africaine* 25-51.

community-based care models. Therefore, achieving the future of abortion access, we envision, requires not only addressing domestic regulations but also challenging the neo-colonial influence of international aid and promoting a reproductive justice framework that centres the needs and rights of all women.

Reproductive justice, as we emphasised, 'reflects an understanding of women's decisions and reproductive needs based on social circumstances and histories of oppression'.[53] The COVID-19 pandemic has only intensified the need to address these issues, highlighting the urgency of strengthening the movement for abortion rights. In essence, the pandemic laid bare the stark realities of existing inequalities and the critical need for a reproductive justice approach that acknowledges the interconnectedness of social, political and economic factors impacting women's health. While acknowledging the right of international funders to assist with healthcare obligations, we stressed that aid recipient states must prioritise their own self-determined goals and national plans. This autonomy is paramount, especially when considering the future of abortion access.

In this context, prioritising safe early abortions, rather than solely addressing complications from unsafe abortions, is paramount. Ultimately, securing the future of abortion access requires a multifaceted approach that dismantles restrictive foreign aid policies, champions reproductive justice, and empowers states to prioritise the health and rights of their citizens.

6 A stalwart has bowed out

This chapter, an attempt to capture the breadth of Charles Ngwena's work on abortion – a mere glimpse of his vast contributions to sexual and reproductive rights and disability law, race and common citizenships – highlights his profound impact on law and practice. I hope it shows how much I have benefited from his mentorship as my 'academic midwife' throughout the period of his supervision of my doctoral and post-doctoral endeavours. As a young feminist legal scholar, one of my most cherished memories is him telling me that I was one of his favourites at

53 Nabaneh & Ngwena (n 49) 4.

the 2023 Ngwena conference that I led in organising at the Centre for Human Rights at the University of Pretoria.[54]

Ngwena's scholarship was defined by its uncompromising rigour, visionary insight, deep compassion and unwavering courage. He grounded his work in a profound understanding of the realities faced by the most vulnerable. As Dr Tlaleng Mofokeng, the UN Special Rapporteur on the Right to Health, stated during the conference: 'We continue to do the work in your honour and we continue to do the work for generations to come. There are people who perhaps will never know your name, but your work will directly impact them and will lead them to a more substantively equitable world after all.'

Professor Charles Ngwena's influence on my life and career is immeasurable. He taught me not only how to be a rigorous scholar but also how to be a generous mentor and a thoughtful and ethical advocate for social justice. He instilled in me the importance of challenging assumptions, pushing boundaries, and always striving to make a difference. His legacy – oh, what a legacy – will continue to inspire me and countless others for years to come.

54 Centre for Human Rights 'Conference on Advancing Sexual and Reproductive Health and Rights in Africa in honour of Professor Charles Ngwena' 21 November 2023, https://www.chr.up.ac.za/news-archive/2023/3635-conference-on-advancing-sexual-and-reproductive-health-and-rights-in-africa-in-honour-of-professor-charles-ngwena (accessed 28 February 2025).

References

Cook, RJ & Ngwena, C 'Women's access to health care: The legal framework' (2006) 94 *International Journal of Gynaecology and Obstetrics* 216

Engelbrech, MC, Pelser, AJ, Ngwena, C & van Rensburg, H 'The operation of the Choice on Termination of Pregnancy Act: Some empirical findings' (2000) 23 *Curatonis* 4

Nabaneh, S 'Post-Dobbs: Insights from African abortion laws and practice' in R Rebouché, Rachel & M Roseman (eds) *Accessing Abortion* (NYU Press, forthcoming 2025)

Nabaneh, S 'Abortion and "conscientious objection' in South Africa: The need for regulation' in E Durojaye, G Mirugi-Mukundi & C Ngwena (eds) *Advancing sexual and reproductive health and rights in Africa: Constraints and opportunities* (Routledge 2021) 16

Nabaneh, S *Choice and conscience: Lessons from South Africa for a global debate* (PULP 2023)

Nabaneh, S, Andam, K, Odada, K, Eriksson, Å & Stevens, M 'Contester le genre et la colonialité: Une analyse des mobilisations conservatrices en Afrique du Sud, au Kenya et au Ghana/ Contesting Gender and Coloniality: A Lens on Conservative Mobilization in Ghana, Kenya and South Africa' 4 (2022) 168 *Politique Africaine* 25

Nabaneh, S 'Power dynamics in the provision of legal abortion: A feminist perspective on nurses and conscientious objection in South Africa' LLD thesis, University of Pretoria, 2020

S Nabaneh 'The Gambia's political transition to democracy: Is abortion reform possible? (2019) 21(2) *Health and Human Rights* 169

Nabaneh, S '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 dissertation, University of Pretoria, 2012

Ngwena, C & Cook, R 'Restoring Mai Mapingure's equal citizenship' in R Cook *Frontiers of gender equality: Transnational legal perspectives* (2023) 406

Ngwena, C 'Taking women's rights seriously: Using human rights to require state implementation of domestic abortion laws in African countries with reference to Uganda' (2016) 60 *Journal of African Law* 133

Ngwena C, Brookman-Amissah E & Skuster, P 'Human rights advances in women's reproductive health in Africa' (2015) 129 *International Journal of Gynaecology and Obstetrics* 184

Ngwena, C '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* 183

Ngwena, C 'Access to safe abortion as a human right in the African region: Lessons from emerging jurisprudence of UN treaty monitoring bodies (2013) 29 *South African Journal on Human Rights* 399

Ngwena, C 'State obligations to implement African abortion laws: Employing human rights in a changing legal landscape' (2012) 119 *International Journal of Gynaecology and Obstetrics* 198

Ngwena, C 'Protocol to the African Charter on the Rights of Women: Implications for access to abortion at the regional level' (2010) 110 *International Journal of Gynaecology and Obstetrics* 163

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

Ngwena, C, van Rensburg, D & Engelbrecht, M 'Accessing termination of pregnancy by minors in the Free State: Identifying barriers and possible interventions' (2005) Centre for Health Systems Research & Development: University of the Free State

Ngwena, C 'An appraisal of abortion laws in Southern Africa from a reproductive health rights perspective' (2004) *Journal of Law, Medicines and Ethics* 708

Ngwena, C 'Access to legal abortion: Legal developments in Africa from a reproductive and sexual health rights perspective' (2004) 19 *South African Public Law* 328

Ngwena, C 'Conscientious objection and legal abortion in South Africa: Delineating the parameters' (2003) 28 *Journal for Juridical Science* 1

Ngwena, C 'Accessing abortion services under the Choice on Termination of Pregnancy Act: Realising substantive equality' (2000) 25 *Journal for Juridical Science* 19

Ngwena, C 'Access to health care as a fundamental right: The scope and limits of section 27 of the Constitution' (2000) 25 *Journal for Juridical Science* 19

Ngwena, C 'Substantive equality in South African health care: The limits of law' (2000) 4 *Medical Law International* 2

Ngwena, C 'The history and transformation of abortion law in South Africa' (1998) 30 *Acta Academica* 32

Ngwena, C 'Health care decision-making and the competent minor: The limits of self-determination' (1996) 132 *Acta Juridica* 132