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

Charles G Ngwena

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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

Charles G Ngwena*

Abstract

If applied in isolation from the fundamental rights of women seeking abortion services, the right to conscientious objection can render any given rights to abortion illusory, including the rights to health, life, equality and dignity that are attendant to abortion. A transformative understanding of human rights requires that the right to conscientious objection to abortion be construed in a manner that is subject to the correlative duties which are imposed on the conscientious objector, as well as the state, in order to accommodate women's reproductive health rights. In recent years, the Colombian Constitutional Court has been giving a judicial lead on the development of a right to conscientious objection that accommodates women's fundamental rights. This article reflects on one of the court's decisions and draws lessons for the African region.

INTRODUCTION

In the early years of independence, the use of foreign cases as persuasive authorities by domestic courts in the African region tended to be confined to a north-to-south flow of precedents from former European colonizing countries.[1] This is not surprising, as almost all the modern jurisprudence that was inherited by newly independent states would have been "received law" with origins in colonizing countries located in the global north.[2] However, with the advent of wide-ranging legal reforms in the post-independence era, not least the adoption of modern constitutions with supremacy over other laws, including laws historically tethered to received laws,[3] the African legal landscape is much changed. African courts can do

* LLB, LLM (Wales), LLD (Free State). Professor, Centre for Human Rights, Faculty of Law, University of Pretoria.

1 W Menski *Comparative Law in Global Context: The Legal Systems of Asia and Africa* (2nd ed, 2006, Cambridge University Press).

2 F Banda *Women, Law and Human Rights: An African Perspective* (2005, Hart Publishing) at 13–15.

3 D Omar "Constitutional development: The African experience" in V Jackson and

well to search far and wide for persuasive precedents, including precedents from countries with which they have no colonial ties.

The rise of constitutionalism across the world[4] and the globalization of modern human rights[5] are opening doors to the emergence of a normative legal value system that has cross-cultural appeal and calls for inter-jurisdictional exchanges of jurisprudence.[6] Ratification of human rights treaties at the United Nations and regional levels gives African domestic courts a persuasive rationale to engage in more searching "comparativism".[7] Without ignoring the histories and constitutional arrangements of their own jurisdictions, African courts have much to gain from diligently exploring how courts in other parts of the world are interpreting domestic laws in areas that intersect with comparable constitutional and human norms. The advent of constitutional courts in some African countries underscores a new regional awakening about the need for domestic courts with specialized constitutional competence to develop and apply jurisprudence optimally for the respect, protection and fulfilment of rights guaranteed by domestic bills of rights that, in turn, are modelled on universal human rights.[8]

For the African region, south-to-south jurisprudential flows, which can become an important part of the jurisprudential pathways that feed into the development of jurisprudence in the region, have been a route less travelled. Against the backdrop of the desirability of savouring precedents from as wide a field of countries as possible, this article examines the decision of the Constitutional Court of Colombia in *Case T-388/09*.[9] It critically evaluates the contribution that this decision can make towards promoting an understanding of a right to conscientious objection to abortion which accommodates the human rights of women to abortion in the African region.

In recent years, the Colombian Constitutional Court, which was created under the Colombian Constitution of 1991 to mark a period of transition to a democratic order in which fundamental rights are protected, has been demonstrating increasing receptiveness to vindicating women's rights.[10] Indeed, it

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M Tushnet (eds) *Defining the Field of Comparative Constitutional Law* (2002, Praeger) 175 at 180–82.

4 B Ackerman "The rise of world constitutionalism" (1997) 83 *Virginia Law Review* 771.

5 A An-Na'im (ed) *Human Rights Under African Constitutions: Realizing the Promise for Ourselves* (2003, University of Pennsylvania Press); H Klug *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (2000, Cambridge University Press).

6 H Botha "Comparative law and constitutional adjudication: A South African perspective" (2007) *Jahrbuch des Öffentlichen Rechts der Gegenwart* 569.

7 L Wienrib "Constitutional conceptions and constitutional comparativism" in Jackson and Tushnet (eds) *Defining the Field of Comparative Constitutional Law*, above at note 3, 3 at 3–4.

8 Klug *Constituting Democracy*, above at note 5.

9 Decision of the Colombian Constitutional Court: *Case T-388/09* (2009).

10 M Morgan "Emancipatory equality: Gender jurisprudence under the Colombian Constitution" in B Baines and R Rubio-Marin (eds) *The Gender of Constitutional*

has been consolidating its position as a leading domestic court in the development of constitutional jurisprudence that promotes gender equality in ways that align with modern conceptions of women's international human rights, including conceptions inspired by the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[11] Amongst other reproductive health rights areas, the Colombian Constitutional Court has been demonstrating global leadership in abortion.

The focus of this article, *Case T-388/09*, is a decision that assumed the legality of abortion under domestic law as laid down in *Case C-355/06*.[12] In *Case C-355/06*, the Colombian court made a ground-breaking decision of transnational significance when it ruled that the prohibition of abortion in all circumstances was unconstitutional under the Colombian Penal Code. The jurisprudential significance of *Case C-355/06* lies not only in the judicial liberalization of abortion using constitutional law jurisprudence; it also lies in the establishment of a right to abortion using an approach grounded in human rights imperatives.[13] Using a human rights sensitive approach, the court framed abortion as an integral part of realizing reproductive autonomy. It treated women seeking abortion as moral agents and not as sacrificial reproductive instruments at the service of humanity, thus breaking from gender stereotypes that underpin and sustain the historical criminalization of abortion worldwide.[14] The court innovatively rejected an approach that frames abortion in dichotomous terms and as a clash between women's rights and foetal rights.[15] While conceding that the state had a legitimate interest in protecting foetal life, it said that the interest did not flow from a constitutional right to life as such.[16] Rather, it flowed from a "constitutional value of life"

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Jurisprudence (2005, Cambridge University Press) 75; R Rubio-Marín and M Morgan "Constitutional domestication of international gender norms: Categorizations, illustrations and reflections from the nearside of the bridge" in K Knop (ed) *Gender and Human Rights* (2004, Oxford University Press) 114 at 119–21 and 139–42.

11 CEDAW, GA res 34/180, adopted 18 December 1979 and entered into force 3 September 1981; Rubio-Marín and Morgan, id at 120 and 139–42; Morgan, id at 75.

12 Decision of the Colombian Constitutional Court: *Case T-355/06* (2006); R Cook "Excerpts of the Constitutional Court's ruling that liberalized abortion in Colombia" (2007) 15 *Reproductive Health Matters* 160. Prior to *Case C-355/06*, the Colombian Constitutional Court's position was that the prohibition of abortion under the Colombian Penal Code, even in cases of rape, was compatible with the Colombian Constitution; see decisions of the Colombian Constitutional Court in *Case C-133/94* (1994) and *Case C-013/97* (1997).

13 Cook, id at 160–62.

14 R Cook and S Cusack *Gender Stereotyping: Transnational Legal Perspectives* (2010, University of Pennsylvania Press) at 85–87; R Siegel "Reasoning from the body: A historical perspective on abortion regulations and questions of equal protection" (1992) 44 *Stanford Law Review* 261 at 277.

15 L Tribe *Abortion: The Clash of Absolutes* (1990, WW Norton & Co).

16 The preamble to the Colombian Constitution mentions "life" as one of the values that the Colombian Constitution seeks to protect. Art 2 recognizes that the state exists in

which does not derive the same level or degree of protection as that granted to a pregnant woman.[17]

In establishing women's rights to abortion in *Case C-355/06*, the court looked beyond the rights to dignity, free development of the personality, health, life and physical integrity guaranteed by the Colombian Constitution. It also drew from international human rights treaties, including the International Covenant on Economic, Social and Cultural Rights (CESCR)[18] and CEDAW. Furthermore, it went beyond merely enunciating the right to abortion, to articulating the corresponding state duties for implementing such a right, including making abortion services available and accessible throughout the country's public health sector. By tethering individual rights to positive state obligations, the court highlighted the transformative and intertwined nature of domestic constitutional duties and human rights. Aligning itself with the philosophy of the indivisibility of human rights underpinning the CESCR, it conceived constitutionally guaranteed fundamental rights as not only obligations of restraint on the part of the state, but also positive obligations that implicate state dispersal of resources necessary to fulfil the rights.[19]

In *Case T-388/09*, the Colombian Constitutional Court addressed the intersection between a right to abortion and a right to conscientious objection to abortion. It sought to determine whether, under Colombian law, judicial officers could invoke the right to conscientious objection to justify recusing themselves from hearing a case in which an injunction was being sought to compel a health facility to provide an abortion to a woman who was legally entitled to abortion services under domestic law. It held that the right to conscientious objection to abortion applies only to personnel directly involved in the performance of a procedure for terminating a pregnancy. More specifically, the court held that the right does not extend to judicial officers hearing a case that pertains to abortion. In reaching this conclusion, the court also took the opportunity to address the broader parameters of the rights and obligations attendant to conscientious objection invoked within the healthcare sector. It is these broader aspects that this article focuses on when drawing lessons for the development of human rights standards in the African region.

Case T-388/09 is an important contribution towards jurisprudence with transnational appeal. It sites the right to conscientious objection within a framework that is ultimately grounded in human rights. The decision

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order to protect the life of the people in Colombia; art 11 says that the right to life is inviolable.

17 *Case T-355/06*, above note 12, para 5.

18 GA res 2200A (XXI), adopted 16 December 1966 and entered into force 3 January 1976.

19 S Fredman *Human Rights Transformed: Positive Rights and Positive Duties* (2008, Oxford University Press).

should appeal to African domestic courts and African regional treaty bodies as they do not have precedents of their own on the right to conscientious objection, but are obliged to interpret and apply laws that recognize women's rights to abortion as well as attendant rights such as the rights to health, life, equality and human dignity. State obligations arising from the regional human rights system that is built around the African Charter on Human and Peoples' Rights (African Charter),[20] including obligations arising from the rights to equality and equal protection of the law,[21] life and integrity of the person,[22] and health,[23] which are implicated in abortion,[24] are good reasons for African human rights treaty bodies to develop jurisprudence of their own on the right to conscientious objection. Furthermore, the fact that the Protocol to the African Charter on the Rights of Women in Africa (Maputo Protocol), which explicitly recognizes women's rights to abortion as human rights,[25] implicitly requires African Charter treaty bodies as well as states to develop human rights standards for implementing access to abortion, including standards for regulating the right to conscientious objection, is a compelling reason for the development of regional jurisprudence on conscientious objection. The right to conscientious objection to abortion assumes the existence of a legal duty to provide abortion services. For this reason, it serves well to begin by appreciating the nature of African abortion laws, and the extent to which they require the provision of abortion services.

AN OVERVIEW OF AFRICAN ABORTION LAWS AND THE MISRECOGNITION OF WOMEN

Historically, virtually all member states of the African Union have regulated abortion through a crime and punishment model that has been indifferent to women's reproductive health, lives, dignity and agency.[26] African abortion laws are a colonial bequest whose imprint remains visible today in the design laws of many African countries as well as in the toll of unsafe abortion related illnesses, disabilities and deaths. The laws that were transplanted to African colonies were replicas of laws in the colonizing countries. Whether the laws originated from the codified laws of Belgium, France, Italy, Spain or

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20 Adopted 27 June 1981, entered into force 21 October 1986: OAU doc CAB/LEG/67/3 rev 5, 1520 UNTS 217.

21 Id, arts 2 and 3.

22 Id, art 4.

23 Id, art 16.

24 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 at 811–12.

25 Art 14(2)(c) of the Maputo Protocol, AHG/res 240 (XXXI), adopted 11 July 2003 and entered into force 25 November 2005.

26 C Ngwena "Access to legal abortion: Developments in Africa from a reproductive and sexual health rights perspective" (2004) 19 *South African Public Law* 328.

Portugal or the common or statutory law of England, characteristically, they all criminalized abortion and were overly restrictive.[27]

Though the underlying rationale for criminalizing abortion was ostensibly ecclesiastical (to protect unborn life and mark abortion as a mortal sin)[28] criminalization also served a broader political economy. Abortion laws that were transplanted to the colonies were animated by a philosophy which was profusely gendered. Women were "misrecognized"[29] and motherhood was implicitly prescribed as a principal vocation. Women's equality and reproductive autonomy were not accommodated.[30] Abortion was stigmatized as an illegitimate health need, leaving little room for acknowledging a woman's reproductive agency, except when her life was literally so imperilled by pregnancy as to be physically unable to continue with a pregnancy.[31] Promoting women's access to abortion, as part of realizing reproductive healthcare, was thus alien to the objects of criminalization. Ultimately, criminalization of abortion was a manifestation of law not as a neutral, free-floating value but of law grounded in patriarchy.[32] Criminalization served to perpetuate dominant cultural traditions about human reproduction.[33] It marked women's bodies as physiological and women's social role as gendered. In colonial abortion polity, women were over-determined and officially subordinated to an institutionalized androcentric confluence of interests at the service of imported masculine Catholic and Protestant theologies and patriarchal secular authorities.[34]

In colonial dispensations in which the pervading public assumption was that abortion was illegal, determining the parameters of the right to conscientious objection became redundant. However, the post-independence era has witnessed a changing legal landscape, with the advent of the constitutionalization of individual rights and human rights. Furthermore, the region has experienced abortion law reforms at the domestic as well as regional levels. These developments call for clarification and, equally significant, implementation of individual rights and professional responsibilities attendant to the

27 Id at 335–38.

28 R Cook and B Dickens "Human rights dynamics of abortion law reform" (2003) 25 *Human Rights Quarterly* 1 at 8–9.

29 N Fraser *Justice Interruptus: Critical Reflections on the 'Postsocialist' Condition* (1997, Routledge) at 11–39.

30 R Cook and S Howard "Accommodating women's differences under the Women's Anti-Discrimination Convention" (2007) 56 *Emory Law Journal* 1039 at 1070–83.

31 Siegel "Reasoning from the body", above at note 14 at 365; Cook and Howard "Accommodating women's differences", id at 1048–51.

32 C Smart *Feminism and the Power of Law* (1989, Routledge) at 88.

33 R Cook et al *Reproductive Health and Human Rights: Integrating Medicine, Ethics, and Law* (2003, Clarendon Press) at 213.

34 Cook and Dickens "Human rights dynamics", above at note 28 at 8–9; E Vuola "Thinking otherwise: Dussel, liberation theology and feminism" in L Alcoff and E Mendieta (eds) *Thinking From The Underside of History: Enrique Dussel's Philosophy of Liberation* (2000, Rowman & Littlefield) 149 at 166.

regulation of abortion in the African region, in a manner than could not have been remotely conceived at the time when abortion laws first made their entry into the region.

On the one hand, the African region ranks as a region with one of the world's most restrictive abortion laws, alongside Latin America. Several African countries have not taken any formal steps towards reform, and have simply retained colonially spawned abortion laws.[35] Furthermore, where there has been domestic reform, it has tended to be incremental, in contrast, for example, to the more radical reforms in former colonizing countries. Cape Verde,[36] South Africa,[37] Tunisia[38] and Zambia[39] are the only countries in the region that recognize mere request or socio-economic circumstances as grounds for abortion. On the other hand, in the last three decades or more, an increasing number of African states have reformed highly restrictive laws ostensibly to provide women with safe abortion choices and, thereby, eradicate mortality and morbidity related to unsafe abortions.[40] Besides, several countries now recognize rape, incest or foetal malformations as grounds for abortion, over and above the ground of saving the life of the pregnant woman. An even more significant development is that approximately half of the countries in the African region now recognize a threat to the pregnant woman's health as a ground for abortion.[41]

Domestic reforms aside, a unique development in the African region has been the recognition of abortion as a human right under the African Charter based human rights system. In 2003, the African Union adopted the Maputo Protocol to supplement and augment the protection of women's rights under the African Charter, which was perceived as providing inadequate protection.[42] The protocol was adopted to emphasize the need to promote gender equality, and protect women's right to substantive equality and

35 Countries falling into this category are: Angola, Central African Republic, Congo (Brazzaville), Côte d'Ivoire, Democratic Republic of Congo, Egypt, Gabon, Guinea-Bissau, Libya, Madagascar, Malawi, Mauritania, São Tomé and Príncipe, Senegal, Somalia, Tanzania and Uganda: Center for Reproductive Rights *World's Abortion Laws Map 2013*, available at: <http://www.womenonwaves.org/en/page/4541/abortion-laws-map-center-for-reproductive-rights> (last accessed 29 January 2014).

36 Law of 31 December 1986 of Cape Verde.

37 South African Choice on Termination of Pregnancy Act 92 of 1996, as amended.

38 Tunisian Law No 65-25 of 1965, as amended.

39 Zambian Termination of Pregnancy Act of 1972.

40 E Brookman-Amissah and J Moyo "Abortion law reform in sub-Saharan Africa: No turning back" (2004) 12 *Reproductive Health Matters* 227; R Boland and L Katzive "Developments in laws on induced abortion: 1998–2007" (2008) 34 *International Family Law Planning Perspectives* 110 at 115–16.

41 Center for Reproductive Rights *World's Abortion Laws*, above at note 35.

42 Maputo Protocol, above at note 25; R Murray *Human Rights in Africa: From OAU to the African Union* (2004, Cambridge University Press); Banda *Women, Law and Human Rights*, above at note 2 at 66–82; F Viljoen *International Human Rights Law in Africa* (2nd ed, 2012, Oxford University Press) at 50–59.

non-discrimination against the historical backdrop of a region with persistent gender based discrimination.[43] The region's abiding patriarchal legal cultures, customs and traditions in many spheres of life, including the reproductive sphere, have served to subordinate, impoverish and diminish the personhood of women. The Maputo Protocol, which came into force in 2005, was widely welcomed as an historic event and a huge step forward in the promotion of women's equality rights in the African region.[44]

The Maputo Protocol became the first international treaty to recognize abortion as a human right with corresponding duties on the state.[45] It situates abortion as a human right within a broader compass of rights intended to respect, protect and fulfil sexual and reproductive rights. Article 14(2)(c) of the protocol recognizes a right to abortion in cases where the pregnancy poses a risk to the life or health of the pregnant woman, or the life of the foetus, or where the pregnancy results from sexual assault, rape or incest. Article 26 of the protocol explicitly tethers state obligations to individual rights, enjoining state parties to adopt all necessary measures, including budgetary measures, to fulfil the rights guaranteed by the protocol. Thus, state obligations arising from article 14(2)(c) require implementation at the state level, not just in terms of recognizing the grounds for abortion, but also providing the requisite infrastructure, including health information and health care services for the fulfilment of abortion rights guaranteed by the protocol.

However, despite reforms at the domestic and regional levels, African abortion laws have, on the whole, remained inaccessible to women with unwanted pregnancies, as have abortion services. Equally, reforms have not filtered through to healthcare professionals who are deterred from providing even lawful services for fear of prosecution.[46] There has been very little effective implementation of the law itself. Only a miniscule number of countries have developed and implemented guidelines and protocols to clarify the rights and obligations in legal abortion, not just to women seeking abortion, but also to healthcare professionals who have the competence and responsibility to provide abortion services.[47]

A major failing of African abortion law reforms is that they have not served to clarify the law or create new rights and services that empower women, in

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43 Banda, ibid; Viljoen ibid.

44 Ibid.

45 Ngwena "Inscribing abortion as a human right", above at note 24.

46 B Johnson et al "Reducing unplanned pregnancy and abortion in Zimbabwe through postabortion contraception" (2002) 33 *Studies in Family Planning* 195 at 195.

47 Ethiopia, Ghana and Zambia are the main examples in this regard. Their guidelines are respectively: Family Health Department *Technical and Procedural Guidelines for Safe Abortion Services in Ethiopia* (2006, Family Health Department); Republic of Ghana *Prevention and Management of Unsafe Abortion: Comprehensive Care Services, Standards and Protocols* (2006, Republic of Ghana); and Ministry of Health *Standards and Guidelines for Reducing Unsafe Morbidity and Mortality in Zambia* (2009, Ministry of Health).

particular poor women and those who live in rural areas.[48] Instead, the laws have remained a barrier even after liberalization. The region has the highest incidence of unsafe abortion even in countries where abortion has been substantially liberalized.[49] Each year, an estimated 6.2 million women have unsafe abortions.[50] This is largely a result of illegal abortions that are performed outside the formal health sector by unskilled persons and / or in unhygienic conditions. While unsafe abortion accounts for the deaths of 47,000 women globally, 29,000 of these women (62 per cent) are from the African region, especially sub-Saharan Africa.[51] While it is equitable access to abortion services that ultimately makes decisive progress towards eradicating mortality and morbidity related to unsafe abortion, the chilling effect of the criminalization of abortion, and its sustenance by abortion law reforms that have not been implemented, are major incentives for unsafe abortion.

Against a backdrop of dysfunctional abortion laws, a discourse on the right to conscientious objection should be understood as part of raising awareness about the need to transform African abortion regimes in ways that accommodate women's fundamental rights. Once African countries start earnestly implementing abortion laws, the issue of conscientious abortion is likely to come to the fore, as the experience of South Africa shows.[52]

Conscientious objection and the South African Choice on Termination of Pregnancy Act

South Africa's Choice on Termination of Pregnancy Act 92 of 1996 (CTOPA) was introduced with a view to achieving a paradigm shift in the regulation of abortion: a shift from an historically embedded crime and punishment model to a human rights inspired reproductive health model that puts women's reproductive needs at the centre.[53] The preamble to CTOPA succinctly captures the radical orientation of the act when, as a way of encapsulating the ultimate legislative intent, it says that the act repeals the "restrictive and inaccessible" provisions of the Abortion and Sterilization Act 2 of 1975 (the predecessor to CTOPA) and "promotes reproductive rights and extends freedom of choice by affording every woman the right to choose whether to have an early, safe and legal termination of pregnancy according to her individual beliefs".

As can be expected, not all South Africans, including healthcare professionals, welcomed CTOPA. Hitherto, abortion had been a privilege bestowed

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48 R Cook and B Dickens "Abortion laws in African Commonwealth countries" (1981) 25 *Journal of African Law* 60 at 65.

49 World Health Organization *Unsafe Abortion: Global and Regional Estimates of the Incidence of Unsafe Abortion and Associated Mortality in 2008* (2011, World Health Organization) at 27.

50 Id at 1.

51 Id at 28.

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

53 Id "The history and transformation of abortion law in South Africa" (1998) 30 *Acta Academica* 32.

by an absolutely sovereign Parliament operating within a broader polity that had given sanctity to authoritarianism, racism, sexism and other marginalizing norms.[54] The recognition of abortion rights under CTOPA was part of transforming the country's past. CTOPA draws its impulse from a constitution that is transformative[55] and contemplates substantive equality[56] through responding to diverse legacies of inequality, including inequalities relating to gender and reproductive health. Section 12(2) of the South African Constitution, which guarantees everyone a right to bodily and psychological integrity, also guarantees a "right to make decisions concerning reproduction", thus unambiguously recognizing reproductive autonomy. Section 27 (1) of that constitution reinforces reproductive autonomy through guaranteeing everyone a right of access to healthcare services, including "reproductive healthcare services". Historically, black women, in particular, have been at the receiving end of intersecting vectors of inequality. The confluence of apartheid, the paterfamilial traditions of Roman-Dutch law, and an essentialized notion of African customary law produced a profusely racialized and gendered economy that infantilized black women in accentuated proportions, not least in the reproductive and sexual sphere.[57]

The provisions of CTOPA that drew the most opposition were predictably those that constituted a radical break from the Abortion and Sterilization Act. In the main, these were provisions relating to: availability of abortion on request in the first trimester;[58] recognition of socio-economic circumstances as one of the grounds for abortion in the second trimester;[59] recognition that minors who have the capacity to consent to abortion can do so without requiring parental authorization;[60] and recognition that, in the first trimester, it is not just doctors who can perform an abortion but also midwives and nurses who have undergone prescribed training.[61]

The nature of opposition by South African healthcare professionals varied markedly. It ranged from legitimate advocacy against CTOPA, including

54 Id at 37–41.

55 K Klare "Legal culture and transformative constitutionalism" (1998) 14 *South African Journal on Human Rights* 146.

56 C Albertyn and B Goldblatt "Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality" (1998) 14 *South African Journal on Human Rights* 248; C Ngwena "Accessing abortion services under the Choice on Termination of Pregnancy Act: Realizing substantive equality" (2000) 25 *Journal for Juridical Science* 19 at 24–30.

57 A Haroz "South Africa's 1996 Choice on Termination of Pregnancy Act: Expanding choice and international human rights to black South African women" (1997) 30 *Vanderbilt Journal of Transnational Law* 863 at 873–76.

58 The CTOPA, sec 2(1)(a)f.

59 Id, sec 2(1)(b)(iv).

60 Id, sec 5(3).

61 Id, sec 2(2) as amended by the Choice on Termination of Pregnancy Amendment Act 1 of 2008.

litigation to challenge its constitutional validity,[62] to open hostility and harassment directed at women seeking abortion services and fellow healthcare professionals willing to perform abortions.[63] Some of the opposition manifested itself in invocations of the right to conscientious objection. In this connection, some healthcare professionals, mainly doctors but also midwives and nurses, wished to disassociate themselves from procedures closely connected with abortion procedures.[64] Others wished to extend the ambit of disassociation much further to cover procedures that are not necessarily closely associated with abortion procedures. For example, it was reported that in the Western Cape (one of the country's provinces) 14 per cent of doctors who were opposed to abortion would not attend women seeking abortion services even in emergencies.[65] At the same time, there were also reports that some healthcare workers were being coerced into assisting with procedures for the termination of pregnancy against their will.[66] Thus, on both sides of the abortion divide, there was a need to clarify the rights and obligations arising from the right to conscientious objection to abortion. A major impediment to clarifying the right to conscientious objection was that it had not been directly addressed by CTOPA. Furthermore, there was no guidance, for example, to indicate to healthcare professionals whether there was a duty of referral, so that women seeking abortion services are not simply turned away without any information about other healthcare professionals and healthcare facilities that would be willing to perform an abortion.[67]

CTOPA was enacted without an express provision regulating conscientious objection.[68] However, this was not an oversight on the part of government which promoted the bill leading to the act. The initial draft bill contained a conscientious objection clause. The draft clause recognized the right to conscientious objection, subject to stipulated conditions. In the draft bill, the right to conscientious objection could not be invoked if attending to the

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62 *Christian Lawyers' Association of South Africa v Minister of Health* 1998 (4) SA 1113 (T), where the constitutional validity of CTOPA was upheld; *Christian Lawyers' Association v National Minister of Health* 2004 (10) BCLR 1086 (T), which upheld the constitutional validity of sec 5(3) of CTOPA which, inter alia, permits a minor, who has the capacity to give informed consent, to terminate a pregnancy without parental approval or consultation. See also: *Doctors for Life International v The Speaker of Parliament and Others* (2006) 12 BCLR 1399 (CC), where the Choice on Termination of Pregnancy Act 38 of 2004, which had been "passed" with a view to enhancing accessibility to abortion services, was successfully challenged as constitutionally invalid.

63 Ngwena "Conscientious objection and legal abortion", above at note 52 at 4.

64 Ibid.

65 MC Engelbrecht et al "The operation of the Choice on Termination of Pregnancy Act: Some empirical findings" (2000) 23 *Curationis* 4 at 6.

66 Reproductive Health Alliance *Public Hearings on the Implementation of the 1996 Choice on Termination of Pregnancy Act* (2000, Reproductive Health Alliance) at 11.

67 Engelbrecht et al "The operation of the Choice on Termination of Pregnancy Act ", above at note 65.

68 Ngwena "Conscientious objection and legal abortion", above at note 52 at 9.

pregnant woman was necessary to "save the life or to prevent serious injury to the health of the woman or to alleviate pain".[69] Furthermore, the clause imposed a duty of referral to another healthcare professional in those cases where the right was properly invoked. However, because of mounting threats from opponents to take the bill before the Constitutional Court to challenge, among other clauses, the conscientious objection clause for being unduly restrictive of the rights of conscientious objectors, the African National Congress-led government feared that, so soon after assuming office, part of its transformative flagship legislation would be held hostage to constitutional litigation before it saw the light of day, thus depriving women of much needed relief from the continuing toll of unsafe abortion.[70] Therefore, it decided to drop the clause from the bill altogether. It left the matter to be implicitly governed by section 15 of the South African Constitution, which guarantees freedom of conscience.[71] Notwithstanding the government's rationale, the absence of any protocols or guidelines addressing conscientious objection undermined CTOPA's efficacy.

Conscientious objection clauses in other African countries: Some examples

South Africa's CTOPA is not unique in not having a clause that addresses conscientious objection. Most African abortions laws are contained in provisions of penal codes which proscribe abortion subject to implied or express exceptions, but without specifically addressing conscientious objection. It is exceptional for domestic laws to contain a specific conscientious objection clause. The Zambian Termination of Pregnancy Act of 1972 is one of the exceptions. The Zambian act is modelled on the British Abortion Act of 1967. Section 4(1) of the Zambian act provides that "no person shall be under any duty, whether by contract or any statutory or other requirements, to participate in any treatment authorized by this Act to which he has a conscientious objection". This is qualified by section 4(2) of the act which says that the exercise of the right to conscientious objection "shall not affect any duty to participate in treatment which is necessary to save the life or to prevent grave permanent injury to the physical or mental health of the pregnant woman".

Though the conscientious objection clause in the Zambian act falls short of comprehensive guidelines, at least it conveys that the right to conscientious objection is relative rather than absolute, and that it should be juxtaposed with the duty to protect the life and health of the woman seeking

69 Debates of the National Assembly *Hansard* (November 1996) col 4780.

70 During the operation of the Abortion and Sterilization Act, only an average of between 800 and 1,200 mainly white, middle class women "qualified" for legal abortion each year. In contrast, each year an estimated 44,000 mainly black, poor women had recourse to unsafe abortion, resulting in the deaths of 425 women: S Strauss *Doctor, Patient and the Law* (2nd ed, 1984, JL van Schaik (Pty) Ltd) at 218.

71 Debates of the National Assembly, above at note 69, col 4780.

abortion. The clause is supplemented by guidelines that attend to the broader aspects of conscientious objection.[72] The guidelines require that the pregnant woman be referred to an alternative healthcare provider.[73] The guidelines also limit the scope of the right to conscientious objection by stating that it can only be invoked by an individual but not a group or an institution, and that it applies only to the actual procedure and the person performing the abortion and not to "broader services" or "support personnel".[74] However, countries such as Zambia that have developed guidelines for the implementation of abortion law and services are the exception to the rule in the African region.

The Zimbabwean Termination of Pregnancy Act of 1972 provides a contrasting conscience clause. Section 10 of this act says: "[n]otwithstanding any law or agreement to the contrary, no medical practitioner or nurse or person employed in any other capacity at a designated institution shall be obliged to participate or assist in the termination of a pregnancy."

The Zimbabwean act's clause is different in three main ways. First, it makes no attempt to convey any correlative obligations. Secondly, it does not limit the scope of the protected acts to the actual procedure for the termination of pregnancy, but extends the protected acts to acts of assisting the performance of abortion. Thirdly, and most oddly, it includes within the scope of protected personnel, persons who are not employed as healthcare professionals. The draconian nature of the Zimbabwean act's clause suggests a clause that operates as a constitutional and human rights outlaw, well outside the bounds of what would be permissible not just under the treaties that Zimbabwe has ratified[75] but also under its own constitution.[76] The clause sends a message that healthcare professionals can invoke conscientious objection as a hermetically sealed right in disregard of the health and lives of women seeking abortion. The right to conscientious objection should not give healthcare professionals virtually unfettered discretion to limit women's reproductive rights, nor should it extend to those who assist in the performance of abortion as the Zimbabwean act's clause clearly does.

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72 Ministry of Health *Standards and Guidelines*, above at note 47.

73 Id at 9.

74 Id at 9.

75 Of the United Nation treaties, Zimbabwe has ratified the International Covenant on Civil and Political Rights (adopted by GA res 2200A (XXI) on 16 December 1966 and entered into force 23 March 1976), CESCR and CEDAW. Of the regional treaties, it has ratified the African Charter.

76 Rights in the Bill of Rights of the Constitution of Zimbabwe Amendment Act No 20 of 2013 that can potentially support a right to abortion include the following: life (sec 48); liberty (sec 49); dignity (sec 51); freedom from cruel, inhuman and degrading treatment (sec 53); equality and non-discrimination (sec 56); privacy (sec 57); and freedom of conscience (sec 60).

CONSCIENTIOUS OBJECTION AND THE COLOMBIAN CONSTITUTIONAL COURT: FACTS, DECISION AND APPRAISAL OF *CASE T-388/09*

Facts

Case T-388/09 concerned a claim for immediate protection of fundamental rights (a "*tutela*" action)[77] that was brought to enforce a pregnant woman's constitutional right to access abortion services under the Colombian Constitution. The case proceeded on the footing that the pregnant woman had met the constitutional grounds for abortion as laid down by the Colombian Constitutional Court in *Case T-355/06* (which was discussed in the introduction to this article). Following a prenatal diagnosis that revealed foetal malformations, a hospital board and a gynaecologist had determined that it was necessary to terminate the pregnancy. Nevertheless, the complainant was not granted access to abortion services. She was first required to obtain judicial authorization for an abortion.

Before the case reached the Colombian Constitutional Court, it came before a court of first instance. The presiding judge ruled that he could not hear the case because of a conflict of interest between, on the one hand, his judicial duty to hear the case impartially and administer justice and, on the other, his personal convictions as a Christian that a foetus was a person from the moment of conception and that its life should be protected. Judicially sanctioning abortion would, therefore, place him in a position where he would violate a biblical injunction which says that "one should not kill".[78] Ultimately, the judge invoked the right to conscientious objection. Relying on article 18 of the Constitution of Columbia, which grants everyone a right to freedom of conscience, the judge recused himself and transferred the case to another judge - a second penal circuit judge.

The second penal circuit judge took a different view. She held that the first instance judge had misapplied the right to conscientious objection and had erred in applying the notion of a judicial conflict of interest subjectively. The judge proceeded to hear the case, finding in the complainant's favour. She ordered the health facility to terminate the pregnancy within 48 hours as well as provide any pertinent care, including psychological care.

Decision of the Colombian Constitutional Court

The Colombian Constitutional Court upheld the decision of the second penal circuit judge. The court held that judicial officers could not exercise the constitutional right to conscience to recuse themselves from hearing a case in

77 The right to immediate protection of fundamental rights is guaranteed by art 86 of the Colombian Constitution. It is guaranteed to everyone, may be filed before judges at all times and at all places, and must the determined within ten days: Morgan "Emancipatory equality", above at note 10 at 76.

78 Exodus 20:13.

which an applicant seeks to enforce a right which is legitimate and valid under the constitution. It was incumbent on judicial officers who voluntarily accept judicial appointments to act in consonance with the duty incumbent upon the state under the Colombian Constitution. According to the court, for judicial officers who serve the public to object conscientiously to enforcing the rights and duties in the Colombian Constitution would be tantamount to violating the essential goals of the state, including the goals to "guarantee the effectiveness of the rights and duties stipulated by Constitution" and to "protect all persons residing in Colombia in their life, dignity, property, beliefs and other rights and freedoms and ensuring the fulfilment of the social duties of the state and individuals".[79]

The court conceded that judicial officers were entitled to personal convictions, but emphasized that they could not abdicate from their primary duty to apply the constitution, as that was the only way to build a state based on the rule of law.[80] The court said that conscientious objection by judicial officers to enforcing the rights and duties in the constitution had the effect of hindering the administration of justice. Furthermore, it had the effect of seriously, arbitrarily and disproportionately restricting the enjoyment of constitutional rights.[81] It was important to ensure that judicial officers adequately protect fundamental rights without causing additional harm, especially where expeditious protection is necessary to avoid further violation of a fundamental right.[82] Failure to do so, such as in a case where a woman is seeking an abortion, causes irreversible harm.[83]

Apart from specifically pronouncing on the question of whether judicial officers could exercise the right to conscientious objection to abortion, the court also took the opportunity to reiterate principles that it had developed in earlier decisions on the application of conscientious objection to abortion. The principles, which were principally directed at the regulation of conscientious objection in the health sector, had been enunciated in a number of cases, but mainly in *Case T-355/06*,[84] the landmark case on the constitutionalization of abortion, and *Case T-209/08*,[85] a case in which the right to conscientious objection by healthcare professionals was directly in issue.

In *Case T-355/06*, the court underlined the state's constitutional duty to create an enabling environment for women seeking abortion through the provision of adequate information and the availability of accessible abortion

79 *Case T-388/09*, above at note 9, paras 5.3 and 5.4; arts 2 and 6 of the Constitution of Colombia.

80 *Case* id at para 5.3.

81 Ibid.

82 Ibid.

83 Ibid.

84 Above at note 12.

85 Decision of Colombian Constitutional Court: *Case T-209/08* (2008); R Cook et al "Healthcare responsibilities and conscientious objection" (2009) 104 *International Journal of Gynecology and Obstetrics* 249 at 250–52.

services throughout the country. It also specifically addressed conscientious objection, as part of enunciating a constitutional right to abortion. It highlighted that the exercise of a right to conscientious objection is subject to a number of conditions to ensure that pregnant woman have timely access to abortion in conditions of quality and safety and do not face "additional barriers" in accessing abortion services. It was essential for their fundamental rights to life, sexual and reproductive health, personal integrity and human dignity to be adequately protected. Where the patient is immediately and easily referred to other healthcare professionals who can perform an abortion, courts will uphold the right to conscientious objection. However, in a situation where the healthcare professional is the only one available to provide care, the woman's rights to life and health should take precedence over the right to conscience. In *Case T-388/09*, the court reiterated these principles.

Case T-209/08 concerned a 13-year-old girl who became pregnant following rape, but was denied abortion by six successive health facilities partly for reasons of conscience. She was compelled to carry the pregnancy to term. Relying on the ruling in *Case T-355/06*, she successfully brought an action before the Colombian Constitutional Court alleging a breach of her constitutional rights. In *Case T-209/08*, much more than in *Case T-355/06*, the Colombian Constitutional Court elaborately delineated the parameters of conscientious objection to abortion. In essence, the court said that: (1) the right to conscience is an individual right that can be invoked by a natural person individually but not by legal persons or collectively; (2) conscientious objection is not absolute and should be exercised in a manner that does not violate the pregnant woman's fundamental rights, including her rights to health and timely lawful access to abortion; (3) healthcare professionals who invoke the right to conscientious objection have a duty to refer the pregnant woman to a healthcare professional who is willing to provide abortion services; (4) where a healthcare professional invokes the right to conscientious objection, they should do so in writing, explaining why performing an abortion is against their individual convictions; and (5) state organs responsible for providing healthcare have a constitutional duty to ensure that there is an adequate pool of abortion service providers so that women seeking abortion services are not left without access to services they need as a result of healthcare professionals invoking the right to conscientious objection and withholding services.

Over and above reiterating these principles, the court also highlighted that, in any event, conscientious objection to abortion is a right that can only be exercised by healthcare personnel "directly involved in performing a procedure necessary to terminate the pregnancy".[86] Even in the healthcare sector itself, it is not a right that extends to all personnel. The right does not, for example, extend to personnel who perform administrative or only

86 *Case T-388/09*, above at note 9, para 5.1.

preparatory tasks, or provide care during the patient's recovery. Equally, the right cannot be invoked by personnel who take the patient's history, manage the institution's files, receive new patients or clean facilities.

Against this backdrop, in *Case T-388/09* the court upheld the order granted by the second penal circuit judge. Using a structural interdict, it also ordered state organs, including state health providers, to comply with the decision and immediately design and implement campaigns promoting sexual and reproductive rights awareness to ensure that women can freely and effectively exercise their rights through increased awareness of the decision of the Colombian Court in *Case T-355/06* and *Case T-388/09*. In addition, it ordered health facilities to ensure that they have adequate personnel to meet the health service needs of women seeking abortion.

Appraisal

The right to conscience serves to respect and protect the right of individuals to differ in thought, belief and opinion for religious, political, philosophical, humanitarian or other reasons. It is an antithesis of totalitarianism, and an affirmation that we live in a plural society in which moral diversity is cherished. It constitutes an integral part of how a plural democracy is realized. Ultimately, the right to conscience seeks to protect the practice associated with conscience. It would serve precious little to respect abstract thoughts, beliefs and opinions, but fail to accommodate the practices that are manifestations of those thoughts, beliefs and opinions.[87]

The moral controversy that surrounds abortion incites polarities even among judicial officers who have the responsibility to interpret and apply the law, as *Case T-388/09* shows. The right to conscientious objection to abortion, upon which the judge who presided over the first instance court purportedly relied, derives from article 18 of the Colombian Constitution which guarantees the right to freedom of conscience. The inclusion of a conscience clause in the Colombian Constitution is not exceptional. Rather, it serves to underscore the globalization and domestication of a fundamental right that has settled recognition as a human right. Virtually all modern constitutions, including African domestic constitutions, guarantee a right to conscience. Equally, regional human rights instruments, including the African Charter,[88] all contain conscience clauses. The inspiration for recognizing freedom of conscience as a fundamental right at domestic and regional levels has

87 L Hammer "Abortion objection in the United Kingdom within the framework of the European Convention on Human Rights and Fundamental Freedoms" (1999) 6 *European Human Rights Law Review* 564.

88 African Charter, art 8. See also art 9 of the European Convention on Human Rights and Fundamental Freedoms, adopted 4 November 1950 and entered into force 3 September 1950: UNTS No 5; and art 12 of the American Convention on Human Rights, adopted 22 November 1969 and entered into force 18 July 1978: OAS Treaty Series No 36, 1144 UNTS 123.

come from United Nations human rights instruments. When the Universal Declaration of Human Rights was adopted, it had a conscience clause that guaranteed everyone freedom of conscience.[89] Article 18 of the International Covenant on Civil and Political Rights (CCPR)[90] guarantees the same right, but uses a more elaborate formulation.

The Human Rights Committee described the right to conscience in the CCPR as "far-reaching and profound" to underscore its inalienable and non-derogable nature.[91] At the same time, the committee was careful to circumscribe its normative scope. It said that, while article 18 does not impose any limitations on freedom of thought, conscience, religion or belief, the "manifestation" of thought, conscience, religion or belief is subject to limitations.[92] Article 18(3) permits limitations that are prescribed by law *and* are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others. The committee also observed that, although the right to "conscientious objection" is not expressly mentioned in article 18, it should nonetheless be understood as a derivative right.[93] Using the example of conscientious objection to conscription into military service that requires use of lethal force, it highlighted the need to protect conscientious objectors from unfair discrimination and coercion in employment and other spheres. The committee underlined the need to accommodate conscientious objectors through non-discriminatory alternatives.[94]

The right to conscientious objection is not peculiar to law but is also recognized by moral ethics and professional codes of ethics in a diverse range of sectors.[95] As a legal right, it obtains where an individual otherwise has a duty to comply with a legally sanctioned obligation, such as being conscripted into active military service, taking a religious oath before legal proceedings or performing a certain healthcare procedure such as an abortion, but feels the duty is unethical. If performing the duty affronts the individual's genuinely held beliefs in a critical way, whether the beliefs are moral, religious or non-religious, political or non-political, refusing to comply with the duty can be legally justified. Recognition of the right to conscientious objection serves to absolve the conscientious objector from performing the legal duty.

The philosophical and jurisprudential challenge with the right to conscientious objection does not lie with whether such a right exists, as the right is well established. Indeed, the Colombian Court underlined the importance

89 Universal Declaration of Human Rights, art 18: GA res 217A (III), UN doc A/810 at 71 (1948).

90 Above at note 75.

91 Human Rights Committee *General Comment No 22: CCPR, art 18 on freedom of thought, conscience or religion* (30 July 1993): CCPR/C/Rev. 1/Add.4, para 1.

92 Id, paras 3 and 8.

93 Id, para 11.

94 Ibid.

95 B Dickens and R Cook "The scope and limits of conscientious objection" (2000) 7 *International Journal of Gynecology & Obstetrics* 71 at 71–72.

of ensuring protection of the right to conscience in order to protect individual dignity and convictions, whether they are political, religious or moral.[96] Furthermore, the challenge with conscientious objection does not lie with proving whether a conviction is sincerely held. Though the onus of establishing that a conviction is sincerely held is on the person asserting the conviction, it is not burdensome, especially as it is a right that is already presumed in a plural democracy in which there are diverse social, philosophical and religious traditions.[97] There is no requirement that freedom of conscience must be based on a particular moral or religious form. In its *General Comment 22*, the Human Rights Committee said that the guarantee of freedom of conscience protects "theistic, non-theistic and atheistic beliefs".[98] Indeed, the onus is on the state or party seeking to limit the right to provide a cogent justification which is "directly related and proportionate" to the purpose of the limitation.[99]

Rather, the philosophical and jurisprudential challenge with the right to conscientious objection lies in ensuring that it is not exercised at the expense of women seeking abortion. It is submitted that, in essence, it is essential to ensure three main conditions. First, conscience can only be invoked where the duty required of the conscientious objector falls within the scope of protected duties. Secondly, conscience should not be exercised at the expense of the rights of others. Thirdly, conscience can only be invoked to protect "personal" freedom of conscience of a natural person as an individual.

The duty in question must be within the scope of conscientious objection

In the abortion context, the right to conscientious objection is intended to protect the personal convictions of personnel who *actually* perform an abortion procedure rather than those who merely assist or facilitate such a procedure.[100] *Case T-388/09* is an instance where the invocation of the right to conscientious objection fell well outside these parameters. The person who invoked the right in this case could not remotely be described as being closely involved with performing an abortion. Indeed, as the Colombian Constitutional Court stated, recalling its previous decision, it is only healthcare personnel who are "directly" involved with performing an abortion who can invoke the right and not, for example, personnel who perform preparatory tasks or provide post-abortion care.[101] In this respect, the decision of the court is in line with the approach of other jurisdictions.

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96 *Case T-388/09*, above at note 9, para 5.1.

97 Human Rights Committee *General Comment No 22*, above at note 91, para 8.

98 Id, para 2.

99 Id, para 8.

100 Dickens and Cook "The scope and limits of conscientious objection", above at note 95 at 72 and 74–76.

101 *Case T-388/09*, above at note 9, para 5.1, recalling *Case T-209/08*, above at note 85.

For example, in an English case, *Janaway v Salford Area Health Authority* (*Janaway*),[102] it was held that the right to conscientious objection did not cover refusal by an administrative assistant, on religious grounds, to type a letter of referral for an abortion under the Abortion Act of 1967. This was because typing a referral letter was marginal to the actual procedure of abortion. *Janaway* highlighted that the conscience clause of the Abortion Act[103] should not be understood as including, within its protective ambit, "any" procedure that is associated with abortion.

It is easy to see why widening the scope of conscientious objection beyond procedures that are immediate and integral to the performance of abortion would be both administratively and constitutionally unworkable. Including all procedures that are preparatory to abortion or associated with post-abortion care would render the right to abortion hostage to a potentially limitless number of third parties.[104] It would mean, for example, that the porter who is instructed to transport the patient to theatre for an abortion could also object on the grounds of conscience and so could the factory worker who participates in the manufacture of surgical equipment that is used in the surgical termination of pregnancy. The list of personnel who could object would be virtually endless, so as to undermine fundamentally the organization and provision of health services by the state. Ultimately it would render it illusory to talk about a right to abortion services.

In any event, under a constitution with democratic legitimacy, judicial officers have a duty to interpret and apply the law, including vindicating legal rights such as abortion rights.[105] It is trite that permitting judicial officers to treat the interpretation and enforcement of constitutionally guaranteed rights as an à la carte menu would undermine access to justice in a manner that is serious and arbitrary.[106] It would render particularly vulnerable the fundamental rights of individuals who belong to historically marginalized groups and whose fundamental rights have been historically denied by dominant political and religious discourses.[107]

Reciprocal accommodation of fundamental rights

Though *Case T-388/09* did not concern a right to conscientious objection arising directly from a healthcare provision context, the Colombian Constitutional Court devoted a significant, or even greater, portion of its judgment to addressing the attendant duties of individual healthcare professionals, healthcare institutions and the state. The court was mindful of the fact that invocations of conscientious objection to abortion are more likely to arise in healthcare contexts than in other contexts. It delineated the constitutional

102 [1988] 3 All ER 1079 (HL).
103 Abortion Act of 1967, sec 4(1).
104 Ngwena "Conscientious objection and legal abortion", above at note 52 at 15.
105 Morgan "Emancipatory equality", above at note 10 at 75.
106 *Case T-388/09*, above at note 9, para 5.2.
107 Ibid.

rights and duties attendant to conscientious objection, conscious of the historical criminalization and stigmatization of abortion in the healthcare sector. Alluding to strongly religious opposition to abortion by the Catholic Church and its constituencies in Colombia, the court noted that the recognition of fundamental rights under the Colombian Constitution has not always been well received by all sectors of Colombian society, and that there are sectors of society which oppose abortion and wish to impose their absolute view on society.[108]

The obligations articulated by the court as incumbent upon healthcare professionals who invoke the right to conscientious objection must, therefore, be understood as ensuring that the fundamental right to conscientious objection is not exercised absolutely, but in a manner that accommodates the rights of women seeking abortion services, and is ultimately tethered to the achievement of substantive equality. It is particularly significant that the court put emphasis on ensuring that referral is effective not only in terms of expeditious referral, but also in terms of the actual availability of an alternative healthcare provider willing to perform abortions. Time is of the essence for women seeking an abortion. Abortions are safer in the first trimester. Delays in referral or referrals that do not translate into tangible alternative access can substantially erode or deny altogether women's rights to abortion. Denial of timely access to safe, legal abortion renders poor women especially vulnerable to unsafe abortions outside the formal healthcare sector.[109]

In any event, it is a widely accepted principle that conscientious objection cannot be invoked in an emergency or where there is no alternative healthcare provider, as failure to render treatment would pose a risk to the life of the pregnant women or would seriously endanger her health. Section 4(2) of the Zambian Termination of Pregnancy Act (described above), which says that conscientious objection does not apply where abortion is necessary to save the life, or to prevent grave permanent injury to the health, of the pregnant woman, is a legislative implementation of this principle. The Colombian court captured this principle by saying that conscientious objection should not be exercised where there is only one health care provider and the provision of abortion care is necessary to protect life and health.[110] Conscientious objection, according to the court, does not obtain where failure to provide care that is needed by the pregnant woman causes direct and irreversible harm.[111] Refusal to provide healthcare that is necessary to avert such risks amounts to abandonment and, of course, negligence.[112]

Furthermore, the Colombian Constitutional Court was careful to ensure that the burden of accommodating women's right to access abortion services

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108 Id, para 5.3.

109 S Singh et al *Abortion Worldwide: A Decade of Uneven Progress* (2009, Alan Guttmacher Institute) at 5 and 27–39.

110 *Case T-388/09,* above at note 9, para 5.1.

111 Ibid.

112 Dickens and Cook "The scope and limits of conscientious objection", above at note 95 at 73.

does not fall solely on the shoulders of the conscientious objector, but is shared with the state. The state must ensure that healthcare services are organized in such a way that ensures the adequate availability of abortion services. There must be sufficient healthcare professionals willing to perform abortions, such that the invocation of the right to conscientious objection is exercised in a context where the woman seeking abortion has a meaningful alternative. The state's duty to provide non-discriminatory alternatives to healthcare professionals who invoke conscientious objection is discharged in tandem with its duty to ensure that the healthcare system has adequate and accessible abortion services.

The duty of immediate referral incumbent on the healthcare professional and the duty of the state to ensure the adequate provision of accessible abortion services, including an adequate pool of healthcare professionals who are willing and have a duty to perform abortions, are instructive obligations for the African region. These obligations do not only signify an important amplification of the constitutional obligations attendant to the right to conscientious objection in a way that promotes substantive equality for women domestically. Equally significant, the obligations serve as the domestication of equality and non-discrimination norms that have been articulated by the Committee on CEDAW, especially in its *General Recommendation No 24*.[113] As part of clarifying the normative content of article 12 of CEDAW, which guarantees women a right to health on the basis of equality, the committee said it is discriminatory for the state to refuse to provide health services that only women need.[114] It also said that, where conscientious objection is invoked, women must be referred to alternative providers.[115]

The CEDAW Committee's statement is also an implicit recognition that fulfilling women's right to health is vulnerable to gender biased social and political environments in which there is pre-existing structural inequality for some groups. The jurisprudential significance of CEDAW's statement is that the right to conscientious objection does not override, but rather is subject to, the duty to accommodate women's reproductive rights and to provide access to healthcare. The duty to accommodate women's reproductive health ultimately draws its impulse from substantive equality as a transformative notion of equality that is a counter-narrative to formal equality.[116] Substantive equality seeks to erase systemic forms of domination and material advantage that are associated with race, gender, disability and other vectors of inequality.[117] The test for whether health services meet a substantive equality

113 Committee on CEDAW *General Recommendation No 24: Art 12 of the Convention (Women and Health)* (1999): A54/38/rev 1, chap 1.

114 Id, para 11.

115 Ibid.

116 Cook and Howard "Accommodating women's differences", above at note 30 at 1040–48.

117 C Albertyn "Substantive equality and transformation in South Africa" (2007) 23 *South African Journal on Human Rights* 253.

standard is not whether the services treat men and women in identical ways according to a universally abstract standard, but whether they respond adequately to the particular needs of men as men and women as women in a context in which sex and gender differences are valued equally.[118]

The Colombian Constitutional Court's implicit commitment to substantive equality is evident not only in its insistence on accommodating women's reproductive health rights. It is also evident in the order made by the court that state organs with competences and responsibilities in the areas impacted by the decision, should not only take cognisance of it, but should implement it in a transparent way so that the rights and duties enunciated by the court become real. The order, which was framed as a structural interdict, required the respective organs of state to report to the court within a given period stating how they have complied with the decision. The emphasis placed by the court on ensuring that the rights and obligations attendant to conscientious objection should not only be reflected in sexual and reproductive programmes but should also become known to stakeholders, including women, is significant. It highlights the court's awareness that the tangibility of rights partly depends on whether they are implemented in a transparent way, and whether right-holders have knowledge of their rights. The Committee on Economic, Social and Cultural Rights, in its interpretation of the normative content of article 12 of the CESCR (the right to health) underscored the importance of awareness of rights and attendant services as one of the standards for determining whether healthcare services meet the requirement of accessibility.[119] The approach of the Colombian court also complements the approach of the European Court of Human Rights[120] and United Nations treaty monitoring bodies[121] in requiring state parties that regulate abortion in a manner that recognizes abortion rights to put in place tangible frameworks for realizing any such rights.

Case T-388/09 frames the right to conscientious objection within a democratic polity that frowns upon majoritarianism, and is committed to respecting diversity and protecting political minorities and historically marginalized groups such as women in religiously and patriarchally dominated polities. The court highlighted that, within a polity which is committed to constitutionalism, the right to conscience, whether in the context of military

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118 Cook and Howard "Accommodating women's differences", above at note 30 at 1040–41.

119 Committee on Economic, Social and Cultural Rights *General Comment No 14: The right to the Highest Attainable Standard of Health (Art 12 of the Covenant)* (11 August 2000): E/C12/2000/4, para 12(b).

120 *Tysiac v Poland* (appln no 5410/03) [2007] 45 EHRR 42; *A, B and C v Ireland* (appln no 25579/05) [2010] ECHR 2032; *RR v Poland* (appln no 27617/04) ECHR (2011).

121 *KL v Peru* (comm no 1153/2003), adopted 24 October 2005, UN GAOR, Human Rights Committee 85th session: UN doc CCPR/C/85/D/1153/2003 (2005); *LC v Peru* (comm no 22/2009): CEDAW/C/50/D/22/2009, Committee on the Elimination of Discrimination against Women (2011); and *LMR v Argentina* (comm no. 1608/2007): CCPR/C/101/D/168/2007, Human Rights Committee (2011).

service, education, employment or healthcare provision, must necessarily take into cognisance the essential character of the Colombian state as a plural democracy committed to promoting diversity.[122] Ultimately, the global importance of *Case T-388/09* lies in its contribution towards developing judicial standards that recognize the right to conscientious objection, but subject to accommodating the fundamental rights of women seeking access to abortion, including their rights to health and life. The decision sought to ensure that the right to conscientious objection is not exercised in a manner that adversely and disproportionately impacts on the fundamental rights of women so as to render illusory any recognition of abortion rights under domestic law.

Rebecca Cook and Susannah Howard have argued that "accommodating women's differences in the abortion context requires learning how to reframe law and policies to construct an inclusive standard of equality that values sex and gender distinctions".[123] The decision of the Colombian Constitutional Court in *Case T-388/09* is an important contribution towards redressing an historical imbalance and developing abortion laws that do not seek to discipline, but rather accommodate, women. In the African region, as suggested earlier, conscientious objection has not come to the fore, mainly on account of the lack of any meaningful implementation of abortion laws in the first place. Nonetheless, clarification of the attendant rights and obligations is no less needed, not least because the region has entered a period of liberalization of abortion laws, and has recognized abortion as a human right at the highest regional level. It is precisely after liberalization that conscientious objection can become yet another barrier to accessing abortion services. It is then that healthcare professionals who are strongly opposed to abortion are likely to attempt to claw back lost ground, often with the support of conservative religious institutions or groups, through abuse of the right to conscientious objection.[124] This is confirmed, for example, by the South African experience with the implementation of CTOPA that was described earlier.

It might be argued that the duty of referral is tantamount to coercing, by constitutional fiat, conscientious objectors to agree with the rightness of abortion. In defence of pluralism, Nicholas Rescher has argued against the idea of viewing achieving consensus as a desideratum in a liberal society.[125] However, subjecting the right to conscientious objection to accommodate the fundamental rights of women poses no such danger. *Case T-388/09* should not be remotely understood as an attempt to sanctify moral consensus through requiring dogmatic or absolute uniformity about the rightness of abortion.[126] It is not a totalitarian attempt to negate the right to conscientious objection. On the contrary, *Case T-388/09* constitutes a robust defence of pluralism and a

122 *Case T-388/09*, above at note 9, para 5.1.
123 Cook and Howard "Accommodating women's differences", above at note 30 at 1040.
124 Id at 1085–87.
125 N Rescher *Pluralism: Against the Demand for Consensus* (1993, Oxford University Press) at 2.
126 Id at 2–3.

rejection of dogmatic absolutism. It leaves intact different and opposing substantive moral positions about the rightness of abortion. However, while *Case T-388/09* does not seek to require substantive consensus on abortion as a desideratum, it seeks and, indeed, requires a different kind of consensus: a Rawlsian "overlapping consensus" that is aimed at mutually accommodating rights and obligations in a liberal democracy.[127]

The Rawlsian overlapping consensus implicit in the approach of the court in *Case T-388/09* is that pluralism and liberalism require people who have different and incommensurable comprehensive religious, political, moral or other beliefs to agree on the imperative of reaching consensus on a mutual accommodation of fundamental rights as a cardinal principle of justice and an integral part of organizing the basic structure of society, including its legal system.[128] As the court highlighted, to achieve a minimum level of social cohesion in a plural society, it is essential for conscientious objectors not to act in conformity with their own conscience in a way that disregards whether their actions have a disproportionately adverse effect on the exercise of the fundamental rights that are guaranteed to others.[129] An overlapping consensus puts diversity at the centre as something natural and rational in substantive morality, and yet subscribes to "restrained dissonance" as a way of achieving harmony in a diverse society, so that differences can be accommodated constructively without giving way to unbridgeable conflict.[130] Within this overlapping consensus, which in practice translates into a mutual reasonable accommodation, there is relational mutual respect for autonomy within a framework that is conducive to a peaceful and productive communal order.[131]

Protection of an individual's personal convictions

It was correct for the Colombian Constitutional Court to reiterate that freedom of conscience cannot be claimed by a group or by an institution. This is because, as the court observed, it is a right grounded in the most intimate and deeply-rooted convictions. Freedom of conscience is an individual rather than collective right, which requires a claimant to assert their individual convictions regardless of whether the convictions are shared by others. Although theistic and non-theistic beliefs are often shared with others and are not necessarily individualistic, the philosophy behind recognizing freedom of conscience is about recognizing agency and self-will precisely to ensure that individual autonomy is not subordinated to the authority of a group or a corporate body.[132] It would, therefore, be a contradiction in terms to recognize conscientious objection as a collective right. Furthermore, it goes without

127 J Rawls *Political Liberalism* (2005, Columbia University Press) at 131–72.
128 Ibid.
129 *Case T-388/09*, above at note 9, para 5.1.
130 Rescher *Pluralism*, above at note 125 at 3–4.
131 Ibid.
132 M Nussbaum *Women and Human Development: The Capabilities Approach* (2000, Cambridge University Press) at 188–89.

saying that inanimate institutions and legal persons do not have "personal" convictions.[133]

CONCLUSION

Case T-388/09 is ultimately about recognizing an overlapping consensus of the imperative of mutual co-existence in a liberal and heterogeneous society. It seeks to promote a transformative interpretation of human rights which ensures that the right to conscientious objection is not realized as an immunized interest. In plural democracies that acknowledge diversity, women's rights to abortion, which have been historically denied, should not suffer yet another denial, through invocations of overbearing rights to conscientious objection. When faced with an interface between the right to conscientious objection and the right to abortion, African domestic courts and institutions can do well to look, among other juridical resources, to the Colombian decision for the development of constitutional and human rights standards that are aimed at accommodating the fundamental rights of conscientious objectors with the equally fundamental rights of women seeking abortion. African regional treaty bodies have the same need. However belated, reform of the African regional human rights system to include a court with advisory and contentious jurisdictions,[134] indicates acceptance by African states that judicial interpretation has a crucial role to play in the authoritative interpretation and application of human rights protections under the African Charter system.

The Colombian decision is an important juridical resource and advocacy tool for human rights practitioners, civil society and non-governmental organisations that seek to promote women's sexual and reproductive health, including access to abortion as a human right. In *Case T-388/09*, the Colombian Constitutional Court adopted a judicial approach that is gender sensitive and transcended a classical liberal interpretation of rights by avoiding the trap of enunciating abortion rights in a manner which reduces them to a mere rhetorical flourish.[135] Application of abortion rights requires judicial awareness that rights holders will often be unable to realize the rights in the same way for the reason that they have different capabilities and are

133 Dickens and Cook "The scope and limits of conscientious objection", above at note 95 at 72.

134 Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights, adopted 10 June 1998 and entered into force 25 June 2004: OAU doc OAU/LEG/MIN/AFCH/PROT(I) rev 2. Once operational, a new court (the African Court of Justice and Human Rights) will supplant the African court as part of a merger between the African Court and the Court of Justice of the African Union: art 2 of the Protocol on the Statute of the African Court of Justice and Human Rights Merging the African Court on Human and Peoples' Rights, adopted 1 July 2008: Assembly/AU/Dec. 196 (XI).

135 N Lacey "Feminist legal theory and the rights of women" in Knop (ed) *Gender and Human Rights*, above at note 10, 13 at 40–41.

differently situated, particularly in an environment in which gender inequalities are embedded.[136] Thus, imposition of state duties to provide adequate information and material resources to facilitate equitable access to healthcare services becomes a more meaningful way of vindicating abortion rights as not just tangible human rights but also human capabilities.[137]

Abortion has a long history of being at the receiving end of moral censure by patriarchal political and religious authorities. Women remain a political minority. Unless closely interrogated, the right to conscientious objection to abortion can easily come to deny the very heterogeneity it seeks to acknowledge. Instead, it can become a Trojan horse for popular patriarchal and religious prejudices that deny women's reproductive agency and accentuate the historical marginalization and stigmatization of reproductive healthcare services which only women need. How health care professionals understand and exercise the right to conscientious objection has implications for the realization of the reproductive rights of women seeking abortion services.

136 Ibid.

137 A Sen "Elements of a theory of human rights" (2004) 32 *Philosophy and Public Affairs* 315 at 330–33; Nussbaum *Women and Human Development*, above at note 132.