

# ACCESS TO SAFE ABORTION AS A HUMAN RIGHT IN THE AFRICAN REGION: LESSONS FROM EMERGING JURISPRUDENCE OF UN TREATY-MONITORING BODIES

CHARLES NGWENA\*

## ABSTRACT

Each year, unsafe abortion causes the death of thousands of women, rendering them seriously ill and disabling many more in the African region. Highly restrictive abortion law is a major causative factor. Among United Nations (UN) treaty-monitoring bodies, there is a growing, albeit incremental, recognition of access to safe abortion services as a human right. Against the backdrop of abortion regimes that impede access to safe abortion in the African region, this article takes critical stock of the contribution that UN treaty-monitoring bodies are making towards the development of jurisprudence that conceives access to abortion as a human right. Its main focus is on critically appraising three decisions made by UN treaty-monitoring bodies, namely, *KL v Peru*; *LMR v Argentina*; and *LC v Peru* under Optional Protocols and drawing lessons for the African region.

**Keywords:** abortion, citizenship, discrimination, equality, gender, health, human rights, women

## I INTRODUCTION

The latest estimates of the World Health Organisation (WHO) on the global and regional incidence of unsafe abortion underscore a reproductive health economy that is conspicuously weighted against women in the sub-Saharan region.<sup>1</sup> On the one hand, the estimates demonstrate a welcome decline in the number of women who die each year from unsafe abortion, from 69,000 in 1990 and 56,000 in 2003 to 47,000 in 2008.<sup>2</sup> On the other hand, as a proportion of global maternal mortality, unsafe abortion-related mortality has not correspondingly declined, remaining close to 13 per cent.<sup>3</sup> The Global South shoulders virtually the entire burden of unsafe abortion.<sup>4</sup> Moreover, the estimates show growing regional disparities. The African region is disproportionately burdened, accounting for 28 per cent of the global incidence of unsafe abortion and close to 62 per cent of unsafe abortion-related mortality. The estimates

\* Professor, Centre for Human Rights, Faculty of Law, University of Pretoria, South Africa. I am grateful to Daniel Mekonnen for his comments on an earlier draft of this article and to the two anonymous reviewers for their constructive and insightful comments.

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

2 Ibid 1.

3 Ibid 1, 27.

4 Ibid 1, 27–8.

translate into 6.2-million women having recourse to unsafe abortion, and 29,000 women dying each year in the African region.<sup>5</sup>

Control over the choice and timing of motherhood is crucial to women's agency, welfare and, ultimately, their equality as individuals and a class.<sup>6</sup> The struggle for reproductive autonomy is in fact a struggle for equal citizenship in a social environment in which there is structural inequality and gender discrimination.<sup>7</sup> The persistence of unsafe abortion in the African region attests to lack of political will to subordinate the historical criminalisation of abortion to the greater goal of transforming the rhetoric of reproductive self-determination and gender equality into tangible realities and essential pillars of human development. Since the colonial era, states in the African region have regulated abortion primarily through crime and punishment regimes. Indubitably, criminalisation has served to restrict and deter access to safe abortion as well as to detract from state obligations under treaties ratified by African states at the United Nations (UN) and regional levels.<sup>8</sup>

At the regional level, it is not so much a lack of acknowledgment of abortion as a human right that has served to silence abortion. Rather, it is the general lack of implementation of abortion as a human right by regional treaty bodies, including its official interpretation and application. Although the adoption of the Protocol to the African Charter on the Rights of Women in Africa<sup>9</sup> in 2003 signalled a paradigm shift in the regional regulation of abortion, the impact of the Protocol has yet to cascade to the domestic level. The Women's Protocol, which was adopted as a supplement to the African Charter on Human and Peoples' Rights,<sup>10</sup> seeks to augment the protection of women's rights, including sexual and reproductive rights, under the African Charter system.<sup>11</sup> It breaks new ground partly for being the first human rights treaty to explicitly recognise abortion as a human right. Article 14(2)(c) of the Women's Protocol guarantees a right to abortion where pregnancy poses a risk to the life or health of the woman or to the life of the foetus, or where pregnancy is a result of sexual assault, rape or incest. States parties are required to take all appropriate measures to fulfil the rights guaranteed by the Protocol.<sup>12</sup>

5 Ibid 18–9, 28.

6 RB Siegel 'Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression' (2007) 56 *Emory LJ* 815–42, 818.

7 N Fraser *Justice Interruptus: Critical Reflections on the Postsocialist Condition* (1997) 11.

8 CG Ngwenya 'Access to Abortion: Legal Developments in Africa from a Reproductive and Sexual Rights Perspective' (2004) 19 *SA Public Law* 328. See the discussion in part II below.

9 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted 11 July 2003, entered into force 25 November 2005, 2nd Ordinary Session of the Assembly of the African Union, AHG/Res 240 (XXXI) (Women's Protocol); CG Ngwenya 'Inscribing Abortion as a Human Right: Significance of the Protocol on the Rights of Women in Africa' (2010) 32 *Human Rights Quarterly* 783, 852–6.

10 African Charter on Human and Peoples' Rights, adopted 27 June 1981, entered into force 21 October 1986, OAU Doc CAB/LEG/67/3 Rev 5, 1520 UNTS 217 (African Charter).

11 F Banda *Women, Law and Human Rights: An African Perspective* (2005) 66–82; F Viljoen 'An Introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16 *Washington & Lee J of Civil Rights and Social Justice* 11.

12 Women's Protocol art 26.

But despite the unprecedented affirmation of abortion as a human right, the juridical impact of art 14(2)(c) in the African region has yet to be visible at the domestic level where it has the potential to effect a paradigm shift in the regulation of abortion by supplanting the crime and punishment approach with a reproductive health approach.

Part of the regional malaise surrounding abortion provisions of the Women's Protocol arises from the fact that neither of the main protective and adjudicatory organs of the African Charter – the African Commission on Human and Peoples' Rights<sup>13</sup> and the African Court on Human and Peoples Rights<sup>14</sup> – has, thus far, given life to art 14(2)(c) through interpretative guidance or application. The African Commission, which is mandated to protect and promote the human rights guaranteed by African Charter-based treaties,<sup>15</sup> has yet to engage with states parties that have ratified the Women's Protocol in any substantive or concerted way over compliance with their obligations under art 14(2)(c). To date, there has only been a single occasion where, in Concluding Observations, the African Commission has alluded to state obligations to prevent deaths and illness from unsafe abortion.<sup>16</sup> Also to date, there has only been one instance where a state that has ratified the Women's Protocol has reformed its domestic abortion law to align with art 14.<sup>17</sup> Seemingly, the preponderance of states

13 As part of its mandate to protect and promote human rights under the African Charter related instruments, the African Commission on Human and Peoples' Rights (African Commission) adjudicates on communications brought by states and individuals alleging violations of the Charter: arts 47 & 55 of the African Charter (note 10 above).

14 The African Court on Human and Peoples' Rights (African Court) has contentious jurisdiction to adjudicate on allegations of violations under the African Charter and any other related instruments: art 3 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court, adopted 10 June 1998, entered into force 25 January 2005, OAU Doc OAU/LEG/MIN/AFCH/PROT/(I) Rev 2 (Protocol on the Establishment of an African Court). In addition, the African Court has advisory jurisdiction to provide an opinion on any legal matter relating to the African Charter on any other relevant instrument: art 4(1) of the Protocol on the Establishment of an African Court. Once operational, 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).

15 African Charter (note 10 above) art 45.

16 African Commission 'Concluding Observations, Fourth Periodic Report of Nigeria at the 50th Ordinary Session of Nigeria, 24th October to 5th November 2011' (2011). In these Concluding Observations, the African Commission expressed concern that in its report to the Commission, Nigeria had not indicated the steps it had taken to comply with state obligation under the Women's Protocol that it had ratified (para 67). But while in para 93, the African Commission recommended that Nigeria should take steps to prevent unsafe abortion-related mortality, it did not make any reference to the country's obligations under art 14(2)(c) of the Women's Protocol.

17 Rwanda initially ratified the Women's Protocol, but with reservation to art 14(2)(c). In August of 2012, the Rwandan government lifted the reservation, and also amended its Penal Code to align with the grounds for abortion under art 14 (see press release 'Rwanda Takes Critical Steps Recognising Women's Human Rights' <<http://www.wgnrr.org/news/rwanda-mps-harmonise-legislation-abortion>>).

that have ratified the Protocol are not in a hurry to comply with art 14.<sup>18</sup> States that, prior to ratification, had abortion regimes that were incompatible with the Women's Protocol or at least raised questions about compatibility, have continued to retain them.<sup>19</sup> However, placing reservations to art 14 has been the rare exception rather than the rule.<sup>20</sup> The fact that states parties have so far overwhelmingly ratified the Protocol without entering a reservation on art 14, but without reforming domestic abortion regimes, suggests disconcerting indifference to treaty obligations by national authorities to the point of underscoring the perfunctory nature of ratification of the Protocol by the majority of ratifying states.<sup>21</sup>

Against a backdrop of the criminalisation of abortion, a high incidence of unsafe abortion, and dearth of jurisprudence on state accountability for impeding access to safe abortion in the African region, this article appraises the contribution that UN treaty-monitoring bodies are making in developing jurisprudence for rendering states accountable for impeding access to safe abortion. While the article acknowledges the importance of the contribution that treaty-monitoring bodies have been making in this connection in their General Comments, General Recommendations and Concluding Observations, this is not the primary focus of this article. Its main focus is to critically analyse three decisions in which UN treaty-monitoring bodies have

- 18 At the time of writing, the Women's Protocol has been ratified by 36 states, namely, Angola, Benin, Burkina Faso, Cameroon, Cape Verde, Côte d'Ivoire, Comoros, Congo, Djibouti, Democratic Republic of Congo, Equatorial Guinea, Gabon, Gambia, Ghana, Guinea-Bissau, Guinea, Kenya, Libya, Lesotho, Liberia, Mali, Malawi, Mozambique, Mauritania, Namibia, Nigeria, Rwanda, South Africa, Senegal, Seychelles, Swaziland, Tanzania, Togo, Uganda, Zambia and Zimbabwe: African Commission on People's and Human Rights 'Status of Ratification/accession to OAU/AU Human Rights Treaties' <<http://au.int/en/sites/default/files/Rights%20of%20Women.pdf>>.
- 19 Prime examples in this regard are Gambia, Nigeria, Malawi, Libya, Tanzania, and Uganda where saving the life of the pregnant woman is still understood as the only permissible ground for legal abortion under domestic law (see Center for Reproductive Rights 'World's Abortion Laws Map' 2013 <<http://worldabortionlaw.com/map/>>).
- 20 At the time of writing, the only states parties that have placed and maintained reservations to art 14(2)(c) are Kenya and Uganda (see Federation of Women's Lawyers Kenya 'Assessment of the Implementation of the Previous Concluding Observations on Kenya (CCPR/CO/83/KEN) at the Time of the Review of the Third Periodic Report' (2011) <[www2.ohchr.org/english/bodies/hrc/docs/ngos/FIDA\\_Kenya103.doc](http://www2.ohchr.org/english/bodies/hrc/docs/ngos/FIDA_Kenya103.doc)>); Center for Reproductive Health 'A Technical Guide to Understanding the Legal and Policy Framework of Termination of Pregnancy in Uganda' (2012) 9. However, for both countries, it is arguable that the reservations are to no avail as domestic abortion laws are wide enough to encompass grounds permitted under the Women's Protocol: art 26(4) of the Constitution of Kenya of 2010 explicitly permits abortion in cases of an emergency, when the life or health of the pregnant woman is at risk (which is broad enough to cover sexual violence), or if permitted by any other law. The Ugandan Penal Code s 224, which permits abortion to preserve the life of the pregnant woman, can be interpreted as also covering risk to physical and mental health of the pregnant woman, including risk emanating from sexual violence. This broader interpretation emanates from an English case, *R v Bourne* 1 King's Bench 687 (1938), which was received into Uganda as part of East African common law in *Meher Singh Bansel v R* (1959) EALR 813, a decision of the East African Court of Appeal, when Uganda was still a British colony (see Ngwena (note 9 above) 833).
- 21 Viljoen (note 11 above) 41–2.

specifically addressed abortion, namely, *KL v Peru*,<sup>22</sup> *LMR v Argentina*,<sup>23</sup> and *LC v Peru*.<sup>24</sup>

*KL v Peru* and *LMR v Argentina* were decided by the Human Rights Committee (HRC) while *LC v Peru* was decided by the Committee on the Elimination of Discrimination Against Women (CEDAW Committee). The communications followed allegations of human rights violations at the domestic level in states that accept that individuals may under the respective Optional Protocol submit a complaint to a treaty-monitoring body.<sup>25</sup> The HRC and the CEDAW Committee are treaty-monitoring bodies of the International Covenant on Civil and Political Rights (CCPR) and the Convention on the Elimination of All forms of Discrimination against Women (CEDAW), respectively.<sup>26</sup> Both the CCPR and the CEDAW enjoy wide ratifications among African states.<sup>27</sup>

This article appraises the decisions of the UN treaty-monitoring bodies from a perspective of the development of jurisprudence that recognises access to safe abortion and illuminates corresponding state obligations. It particularly reflects on the responsiveness of the decisions to the imperative of securing reproductive health and gender equality for women. It will be argued that the decisions of the treaty-monitoring bodies send out two main human rights messages on the normative conception of the junction between the regulation of abortion through criminal law and the protection of women's human rights, and reproductive health rights in particular.

One message is progressive. It is that, where abortion is permitted under domestic law, even if in a highly restricted form, women are, nonetheless, entitled to the fulfilment of what is permitted under the law. Consequently, national authorities have an obligation to take *positive* steps to ensure that abortion laws do not merely confer paper rights, but are in fact realisable in a procedural sense. The other message is divergent. It is that substantive rights to abortion are, in the main, rights that are principally in gift of national authorities save in very limited circumstances such as where a woman's life or her physical or mental health is critically at stake or where the pregnancy is a result of sexual violence. The divergent message is largely, though not wholly, tantamount to

22 *KL v Peru*, Communication No 1153/2003, adopted 24 October 2005, UN GAOR, HRC, 85th Session, UN Doc CCPR/C/85/D/1153/2003 (2005).

23 *LMR v Argentina*, Communication No 1608/2007, CCPR/C/101/D/168/2007, HRC (2011).

24 *LC v Peru*, Communication No 22/2009, CEDAW/C/50/D/22/2009 (2011).

25 In this instance, the communications were submitted, respectively, under the Optional Protocol to the International Covenant on Civil and Political Rights, GA RES 2200A (XXI), 21 UN GAOR Supp (No 16) 59, UN Doc A/6316 (1966), 999 UNTS 302, entered into force 23 March 1976; and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women A/RES/54/4 (1999).

26 International Covenant on Civil and Political Rights, 999 UNTS 171, adopted 16 December 1976, entered into force 23 March 1976; Convention on the Elimination of All Forms of Discrimination against Women, GA RES 34/180, 34 UN GAOR Supp (No 46) at 193, UN Doc A/34/46, entered into force 3 September 1981.

27 Around 95 per cent of African Union (AU) member states have ratified CCPR and CEDAW albeit with reservations among certain states (see F Viljoen *International Human Rights Law in Africa* (2007) 101–2, 127–9; Banda (note 11 above) 61–6, 93–7).

maintaining the status quo of the legitimacy of the criminalisation of abortion without interrogating its gender discriminatory impact.

In addition to the Introduction, this article has four parts. Part II elaborates on the phenomenon of unsafe abortion and its link with the criminalisation of abortion in the African region. To illuminate the link between criminalisation of abortion, unsafe abortion and gender inequality, and to illustrate the possibilities of reforming domestic abortion law in a manner that anchors abortion in reproductive agency and substantive equality, part II uses the history of abortion law in South Africa as a case study. The part ends with an overview of the architecture of African domestic abortion laws. Part III discusses the decisions of UN treaty-monitoring bodies in *KL v Peru*; *LMR v Argentina*; and *LC v Peru*. Part IV continues the discussion but within an analytical framework that draws primarily from an equality perspective. Part V is the Conclusion, which ultimately situates women's contestation of the criminalisation of abortion in deliberative democracy.

## II UNSAFE ABORTION IN THE AFRICAN REGION AND LINK WITH CRIMINALISATION OF ABORTION

Unsafe abortion has life-impacting implications for women. But while death is the most serious consequence, the toll from unsafe abortion reverberates beyond women's lives. Women who survive unsafe abortion frequently suffer from major illnesses and disability, including life-threatening haemorrhage, sepsis, peritonitis, trauma to the vagina, cervix, uterus and abdominal organs, chronic genital and reproductive tract infections and secondary infertility.<sup>28</sup> Many will require major surgical interventions, including hysterectomies, as treatment for life-threatening trauma, haemorrhage or infection.<sup>29</sup>

The underlying causes of unsafe abortion are multi-layered. Ultimately, they require a holistic response, especially ensuring adequate knowledge about and equitable access to contraception for preventing unwanted pregnancy.<sup>30</sup> At the same time, the causative role of highly restrictive law cannot be ignored.<sup>31</sup> When faced with unwanted pregnancy, women are likely to procure an abortion regardless of whether it is permitted by the domestic law.<sup>32</sup> Highly restrictive laws drive women to unsafe abortion services offered by unskilled providers. Women of sufficient economic means have historically been able to circumvent the rigours of the law, even in environments where the law is highly

28 D Grimes et al 'Unsafe Abortion: The Preventable Pandemic' (2006) 368 *Lancet* 1908, 1910–2.

29 Ibid 1911–2; E Brookman-Amisshah & JB Moyo 'Abortion Law Reform in Sub-Saharan Africa: No Turning Back' (2004) 12 *Reproductive Health Matters* 227, 228.

30 A Bankole, S Singh & T Haas 'Characteristics of Women who Obtained Induced Abortion Worldwide' (1999) 25 *Int Family Planning Perspectives* 68.

31 M Berer 'National Laws and Unsafe Abortion: The Parameters of Change' (2004) 12 *Reproductive Health Matters* 1; S Singh et al *Abortion Worldwide A Decade of Uneven Progress* (2009) 25; J Benson et al 'Reduction in Abortion-related Mortality following Policy Reform: Evidence from Romania, South Africa and Bangladesh' (2011) 8 *Reproductive Health* 39 <[www.reproductive-health-journal.com/content/pdf/1742-4755-8-39.pdf](http://www.reproductive-health-journal.com/content/pdf/1742-4755-8-39.pdf)>.

32 G Sedgh et al 'Induced Abortion: Estimated Rates and Trends Worldwide' (2007) 370 *Lancet* 1338.

restrictive by accessing safe but ‘illegal’ services in the private sector,<sup>33</sup> or by travelling to other jurisdictions where abortion services are accessible.<sup>34</sup> However, these are not realistic options for the majority of the continent’s women who live in abject poverty and rely on public health systems.

The history of abortion law in South Africa poignantly illustrates the impact of criminalisation of abortion as a veritable barrier to safe abortion for poor women, especially. Furthermore, the history underscores that though gender remains an indispensable and cardinal synecdoche for understanding and remedying the parity-impeding effects of criminalising abortion, other intersectional vectors of inequality are often at play in abortion including race, class, culture, age or minority status and geographical location.<sup>35</sup>

### (a) South African case study on criminalisation of abortion and inequality

Prior to the radical reform of abortion law by the Choice on Termination of Pregnancy Act of 1996 (CTOPA), South African abortion law was contained in the Abortion and Sterilization Act of 1975 (ASA). The ASA was gender subordinating in the extreme, scarcely conceding women’s reproductive agency, let alone the means of exercising agency. In addition, gender inequality was accentuated by race, class, culture and geographical location.<sup>36</sup>

Though the ASA permitted abortion in limited circumstances, for the majority of women, the exceptions were abstract possibilities that scarcely translated into meaningful access to abortion services. The grounds for abortion were inscribed and calibrated in highly restrictive language such that they mainly served to deter rather than facilitate abortion. The grounds were medicalised with doctors as the primary professional gatekeepers. Besides abortion grounds that were couched in highly restrictive language, the ASA came with certification procedures that were burdensome to women in the extreme.<sup>37</sup> Desirée Hansson and Diana Russell were prompted to describe the rape and incest grounds for abortion under the ASA as merely providing a ‘mythical’ option of abortion.<sup>38</sup>

On account of a legal order that drew from a larger apartheid polity and a colonial heritage, the ASA yielded even less possibilities for black African

33 E Jackson et al ‘A Strategic Assessment of Unsafe Abortion in Malawi’ (2011) 19 *Reproductive Health Matters* 133, 136–7.

34 SA Strauss *Doctor, Patient and the Law* (1991) 214; CG Ngwenya ‘History and Transformation of Abortion Law in South Africa’ (1998) 30 *Acta Academica* 32, 40.

35 On intersectionality, see, for example K Crenshaw ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’ (1989) *Univ of Chicago Legal Forum* 139. E Spelman *Inessential Woman Problems of Exclusion in Feminist Thought* (1988).

36 Ngwenya (note 34 above) 39–40 & 65–6; AE 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 J of Transnational Law* 863, 863.

37 Ngwenya (note 34 above) 38–9; Haroz (note 36 above) 880–2.

38 D Hansson & DEH Russell ‘Made to Fail: The Mythical Option of Legal Abortion for Survivors of Rape and Incest’ (1993) 9 *SAJHR* 500.



women. The ASA was situated not just in an overarching racist superstructure. It was also juxtaposed with a specious genus of legal pluralism that gave validity to customary law jurisprudence that was not merely gendered, but also nativising and infantilising.<sup>39</sup> In its gendered form, customary law was predicated on a hermetically sealed, univocal, monolithic notion of culture that was immunised from feminine contestation.<sup>40</sup>

When contrasted with their white counterparts, black women were a more marginalised ‘caste’, and black rural women even more so. Black African women living in rural areas emerged from customary law not only as racialised and inferiorised subjects, but also as doubly gendered and profusely tribalised subjects confined to a subordinate space where time stood infinitely still. Even within an already constraining racial dispensation, colonial polity refused to acknowledge black women as individuals who could attain adulthood, treating them, instead, as wards under the permanent tutelage of husbands or male relatives.<sup>41</sup> They came not only under the centralised, despotic and racialised surveillance of the state, but also the decentralised, despotic cultural surveillance of chiefs and rural males that could not see agency but, instead, conflated womanhood with motherhood and subordinate wifehood.

During the operation of the ASA, only 800 to 1,200 mainly white middle-class women qualified for legal abortion.<sup>42</sup> Not surprisingly, the bulk of abortions took place outside the law. According to estimates, during the operation of the ASA, 44,000 mainly black and poor women, had recourse to unsafe, illegal abortion each year.<sup>43</sup> An average of 425 women died from the effects of unsafe abortion and thousands more were rendered seriously ill or disabled.<sup>44</sup> Each year, the public health sector performed, on average, 33,000 hysterectomies to treat the complications of unsafe abortion.<sup>45</sup>

The CTOPA was enacted with a view to achieving a paradigm shift in the regulation of abortion – a shift from a historically embedded crime and punishment model to a reproductive health rights model. It underscores a commitment to a transformed universe of reproductive health and abortion in which reproductive autonomy, including abortion, is a fundamental right which must be fulfilled by the state.<sup>46</sup> The Preamble to the CTOPA is anchored in a philosophy of substantive equality. It goes well beyond the confines of decriminalisation of abortion as the only goal behind the Act. Instead, in

39 M Mamdani *Define and Rule* (2012); F Kaganas & C Murray ‘Law and Women’s Rights in South Africa: An Overview’ (1994) *Acta Juridica* 1.

40 M Chanock *Law Custom and Social Order* (1985) v; C Albertyn ‘The Stubborn Persistence of Patriarchy? Gender Equality and Cultural Diversity in South Africa’ (2009) 2 *Constitutional Court Review* 165, 167–8; S Benhabib ‘Cultural Complexity, Moral Interdependence, and Global Dialogical Community’ in MC Nussbaum & J Glover (eds) *Women Culture & Development* (1995) 235, 239–40.

41 P McFadden ‘Becoming Postcolonial: African Women Changing the Meaning of Citizenship’ (2005) 6 *Meridians: Feminism, Race, Transnationalism* 1, 7.

42 Strauss (note 34 above) 218.

43 South African Institute of Race Relations *South Africa Survey 1996/97* (1997) 492.

44 South African Institute of Race Relations *South Africa Survey 1995/96* (1996) 227–8.

45 *Ibid.*

46 Preamble to the CTOPA.



terms that are holistic, the CTOPA acknowledges reproductive health as a human right which is underpinned by the constitutional values of human dignity, the *achievement of equality*, security of the person, non-racialism, and non-sexism. By recognising that the state has a duty not only to permit reproductive autonomy, but also to provide the means with which to exercise reproductive autonomy, including the provision of requisite health services, the Preamble anchors the CTOPA in a philosophy that transcends classical liberalism. It accords women entitlement to parity-enabling state affirmative obligations that facilitate the acquisition of ‘capabilities’ without which reproductive health and reproductive rights cannot flourish.<sup>47</sup> In this way, the Preamble to the CTOPA captures the essence of the paradigm-changing normative values that were adopted under the Programme of Action at the International Conference on Population and Development,<sup>48</sup> and Platform for Action at the Fourth World Conference on Women<sup>49</sup> to mark the global emergence of reproductive health as a human right.

At the domestic level, the CTOPA draws its impulse from a constitution that is committed to substantive equality and the eradication of systemic inequalities.<sup>50</sup> Support for substantive equality in reproductive health, including access to safe abortion, does not only come from the equality clause of the Constitution – s 9 – and its interpretation by the courts.<sup>51</sup> It also comes from s 12(2) of the Constitution of the Republic of South Africa, 1996, which guarantees everyone a right to bodily and psychological integrity, and also a ‘right to make decisions concerning reproduction’, thus, unambiguously affirming reproductive autonomy.<sup>52</sup> Section 27(1) of the Constitution, reinforces the constitutionalisation of reproductive autonomy through guaranteeing everyone a right of access to healthcare services, which includes ‘reproductive healthcare services’.<sup>53</sup>

Among the enabling features of the CTOPA are quintessentially liberalised grounds for abortion. Particularly noteworthy is that abortion is permitted on request in the first three months of pregnancy without a requirement to justify the request.<sup>54</sup> Furthermore, in the second trimester of pregnancy, the socio-economic circumstances of the pregnant woman constitute grounds for abortion.<sup>55</sup> Another innovation is the recognition of the autonomy of minors who have capacity to consent to abortion, to do so without prior parental

47 MC Nussbaum *Women and Human Development: The Capabilities Approach* (2000) 4; N Lacey ‘Feminist Legal Theory and the Rights of Women’ in K Knop (ed) *Gender and Human Rights* (2004) 13, 40–1.

48 UN Population and Development *Programme of Action Adopted at the International Conference on Population and Development, Cairo, 5-13 September 1994* (1994).

49 UN *Platform for Action and Beijing Declaration, Fourth World Conference on Women, Beijing, China, 4-15 September 1995* (1995).

50 C Albertyn ‘Substantive Equality and Transformation in South Africa’ (2007) 23 *SAJHR* 253, 253.

51 *Christian Lawyers Association of South Africa v Minister of Health* 1998 (11) BCLR 1434 (T).

52 *Ibid.*

53 *Ibid.*

54 CTOPA s 2(1)(a).

55 *Ibid* s 2(1)(b)(iv).

approval or consultation.<sup>56</sup> In an implicit appreciation that scarcity of doctors would substantially impede access to services, the CTOPA also permits midwives and nurses who have undergone a prescribed training to perform first trimester abortions.<sup>57</sup>

Notwithstanding that the CTOPA is still beset with persistent implementation challenges, including service barriers,<sup>58</sup> it has substantially increased access to safe, legal abortion and, consequently, impacted positively on unsafe abortion-related morbidity and mortality.<sup>59</sup>

### **(b) African abortion laws: an overview**

Africa ranks alongside Latin America as one of the regions with the world's most restrictive abortion regimes.<sup>60</sup> However, it serves well to highlight that the African region epitomises not so much a region where abortion laws have been static and unyielding, but one where the majority of states have reformed domestic laws to broaden the grounds for abortion and yet failed to meaningfully implement the reforms. Though Cape Verde,<sup>61</sup> South Africa,<sup>62</sup> Tunisia<sup>63</sup> and Zambia<sup>64</sup> are the only countries that explicitly recognise socio-economic circumstances or mere request as grounds for abortion, there has been a discernible trend towards liberalisation of abortion laws in the region.

The proportion of countries that have reformed domestic abortion laws to permit abortion on grounds beyond saving the life of the pregnant woman has grown considerably in the last two decades or more.<sup>65</sup> Close to 50 per cent of African states now recognise a threat to the health of the pregnant woman as a ground for abortion.<sup>66</sup> Furthermore, a steadily increasing number of states now recognise rape, incest and foetal health or life as abortion grounds.<sup>67</sup> Among the countries that have instituted significant reforms in recent years though falling short of recognising mere request or socio-economic circumstances in respect of all females, is Ethiopia. In 2004, Ethiopia amended its Criminal Code to broaden the grounds for abortion in response to a high burden of

56 Ibid s 5(3).

57 Ibid s 2(2) as amended by the Choice on Termination of Pregnancy Act of 2008.

58 CG Ngwenya 'Accessing Abortion under the Choice on Termination of Pregnancy Act: Realising Substantive Equality' (2000) 25 *J for Juridical Science* 19, 33–9; PJ Orner et al 'Access to Safe Abortion: Building Choices for Women Living with HIV/AIDS' (2001) 14 *J of the Int AIDS Society* 54.

59 Grimes et al (note 28 above) 1913; R Jewkes et al 'The Impact of Age on the Epidemiology of Incomplete Abortion in South Africa after Legislative Change' (2005) 112 *British J of Obstetrics and Gynaecology* 355; Benson et al (note 31 above).

60 Center for Reproductive Rights (note 19 above).

61 Law of 31 December 1986 of Cape Verde permits abortion on request in the first trimester among other grounds.

62 CTOPA s 2(1)(a) (request) & s 2(1)(b)(iv) (socio-economic circumstances).

63 Among other grounds, the Tunisian Law No 65-25 of 1965, as amended, permits abortion on request in the first trimester.

64 Zambian Termination of Pregnancy Act of 1972 s 3(2).

65 Brookman-Amisshah & Moyo (note 29 above); R Boland & L Katzive 'Development in Laws on Induced Abortion: 1998–2007' (2008) 34 *Int Family Law Planning Perspectives* 110, 115–6.

66 Centre for Reproductive Rights (note 19 above).

67 Ibid.

unsafe abortion.<sup>68</sup> Article 551 of the revised Ethiopian Criminal Code extended the grounds to include risk to the health of the pregnant woman, risk to foetal health or life, foetal abnormalities, rape, incest, and cases where the pregnant female is unable to provide parental care on account of minority status or mental disability. Prior to the amendment, abortion was regulated by the Criminal Code of 1957 and ‘grave and permanent danger’ to the life or health of the pregnant woman were the only recognised grounds for abortion.<sup>69</sup>

Disconcertingly, on the ground, liberalisation of African abortion laws has been a pyrrhic victory for the majority of countries. Liberalisation has remained largely token, save for countries such as Cape Verde, South Africa and Tunisia that have instituted comprehensive legal and administrative reforms which are supported by implementation, including commitment of public healthcare resources. In Zambia, for example, despite recognition of abortion on socio-economic grounds, abortion remains inaccessible for the majority of women due to burdensome certification procedures, scarcity of abortion services in the public sector, and unaffordability of services in the private sector.<sup>70</sup> One of the major impediments to access to safe abortion is the requirement that eligibility for abortion be certified not just by the doctor who performs the abortion, but by two additional doctors.<sup>71</sup> Such a requirement constitutes a veritable barrier for women in an environment where doctors are highly scarce and women are highly dependent on the public health sector for the provision of health services.<sup>72</sup> As South Africa has done, African countries should be moving towards dispensing with certification requirements that are burdensome on poor women, especially. To assure availability of services in the face of scarcity of doctors, African countries should also be moving towards enlisting mid-level healthcare professionals as professionals who can be trained to competently and safely perform abortions in the first trimester.<sup>73</sup> The major deficiencies with African abortion laws are laws that have not been implemented and abortion services are generally unavailable or inaccessible.

Because of lack of implementation of the law, the historical criminalisation of abortion continues to exercise a chilling effect on both women seeking lawful abortion services and healthcare professionals with the competence and responsibility to provide services. Failure by state authorities such as ministries of health to raise awareness about lawfulness of abortion services and the location of services helps to sustain erroneous beliefs among women

68 Family Health Department *Technical and Procedural Guidelines for Safe Abortion in Ethiopia* (2006) 4.

69 T Wada ‘Abortion Law in Ethiopia: A Comparative Perspective’ (2008) 2 *Mizan LR* 1, 21. See also, arts 534 & 536 of the Criminal Code of Ethiopia of 1957.

70 P Simms ‘Abortion as a Public Health Problem in Zambia’ (1996) 18 *J of Public Health Medicine* 232–3.

71 *Zambian Termination of Pregnancy Act of 1972* s 3(1).

72 The HRC has observed that the requirement of three doctors as part of certification requirements under Zambian law is an unrealistic requirement (see Concluding Observations of the HRC: Zambia, UN Doc CCPR/C/ZMB/CO/3 (2007) para 18).

73 K Dickson-Tetteh & DL Billings ‘Abortion Care Services Provided by Registered Midwives in South Africa’ (2002) 28 *Int Family Planning Perspectives* 144.

seeking abortion that abortion is illegal in all circumstances and that access to abortion outside the formal health sector is the only realistic option. Equally, in the absence of guidelines or protocols, many healthcare professionals are apt to remain fearful of providing even lawful services.

In recent times, Swaziland<sup>74</sup> and Kenya<sup>75</sup> have taken the constitutional route to reforming their abortion laws. But even in these countries, where abortion rights have the imprimatur of the constitution, there has been no tangible implementation of what is constitutionally guaranteed.<sup>76</sup> Therefore, when making a case for a more responsive jurisprudence in the African region, it would be a mistake to posit the link between unsafe abortion and the law solely in terms of the outcome of restrictive grounds for abortion. In several jurisdictions, the legal grounds for abortion are in fact enabling but there is lack of implementation of what is permitted.

### III DECISIONS OF UN TREATY-MONITORING BODIES: *KL v PERU*, *LC v PERU*, AND *LMR v ARGENTINA*

The decisions of UN treaty-monitoring bodies are not judicial decisions. Rather, they are regarded as ‘views’, which are not binding in themselves.<sup>77</sup> Nonetheless, such decisions can be persuasive, especially taking into account that they are reached in a judicial spirit. The decisions constitute independent interpretation of the normative obligations of states under international treaties.<sup>78</sup> Where the decisions address novel human rights issues in historically contested areas such as abortion, they can serve to fill an existing gap in human rights jurisprudence. Where they are well reasoned, they have the potential to be standard-setting for judicial and quasi-judicial bodies at regional and domestic levels.<sup>79</sup> The decisions can provide civil society and human rights advocates with arguments for persuading national authorities to reform oppressive domestic laws and policies.

While focus in this part is on determining whether the decisions of the treaty-monitoring bodies in *KL v Peru*, *LMR v Argentina*, and *LC v Peru* substantively advance the framing of abortion as a human right, the conclusion considers ‘lawfare’ lessons that can be drawn from the cases. The cases have all emanated from Latin America. They are instructive partly because they demonstrate the appropriation of law as an instrument in the struggle by

74 Constitution of Swaziland of 2005 s 15(5) permits abortion when pregnancy threatens the life of the woman; when it constitutes a serious threat to the health of the pregnant woman; when there is a risk of serious and irreparable foetal malformations; when pregnancy is a result of rape, incest or sexual intercourse with a mentally disabled female; or when permitted by Parliament.

75 Note 20 above.

76 Kenya National Commission on Human Rights *A Report of the Public Inquiry into Violations of Sexual and Reproductive Health Rights in Kenya* (2012) para 4.6.2.

77 N Rodley ‘Civil and Political Rights’ in C Krause & M Scheinin (eds) *Int Protection of Human Rights A Textbook* (2012) 105, 129; HRC ‘General Comment No 33, The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights’ UN Doc CCPR/C/GC/33 para 11 (2008).

78 HRC Ibid para 11.

79 Viljoen (note 11 above) 120.

women and civil society to secure the realisation of abortion laws that are already guaranteed under domestic laws in the face of resistant domestic healthcare systems or even legal systems that are in thrall of Roman Catholic theologies strongly opposed to abortion. Though the African region represents more diverse religious polities, and certainly a less influential Roman Catholic Church, nonetheless, against a backdrop of malaise around the implementation of African abortion laws and the Women's Protocol, the cases provide lessons for African civil society on how to use law as an instrument for securing equal citizenship.

**(a) *KL v Peru***

*KL v Peru* is a communication that arose from Peru.<sup>80</sup> KL was 17 years old and pregnant with an anencephalic foetus. Medical and social evidence showed that continuing with the pregnancy would seriously endanger KL's health. Though she requested abortion, her request was denied on the ground that abortion would be unlawful because it would harm the foetus. However, this was in the face of art 119 of the Peruvian Penal Code which permitted abortion when it was 'the only way of saving the life of the pregnant woman or avoiding serious and permanent damage to her health'.<sup>81</sup> KL was forced to carry the pregnancy to term, giving birth to a baby with anencephaly that survived for only four days during which she was obliged to breastfeed. She was severely traumatised by the entire experience.

Before the HRC, KL argued that denial of abortion constituted violations of the following provisions under the CCPR: art 2 (right to an effective remedy); art 3 (right to equality and non-discrimination); art 6 (right to life); art 7 (right to be free from cruel, inhuman and degrading treatment); art 17 (right to privacy); art 24 (right to special protection as a minor); and art 26 (right to equal protection under the law). The HRC held that denial of abortion constituted violations of arts 2, 7, 17 and 24 of the CCPR.<sup>82</sup> However, it dismissed claims under arts 3 and 26 on the ground that the claims had not been substantiated.<sup>83</sup> Furthermore, the HRC refrained from determining whether there had been a violation of art 6. This was because the HRC had found a violation of art 7, and taken a view that it was unnecessary to consider whether art 6 had been violated.<sup>84</sup>

The approach of the HRC in *KL* advances the human rights of women seeking safe, legal abortion in a number of ways. The findings of violation of human rights were based partly on the fact that the Peruvian legal system had failed to render Peruvian abortion law procedurally accessible to KL. Short of recourse to constitutional litigation, she had no realistic alternative avenues for challenging the denial of abortion. Beyond the provisions of the

80 *KL v Peru* (note 22 above).

81 *Ibid* para 2.3.

82 *Ibid* para 7.

83 *Ibid* para 5.3.

84 *Ibid* para 6.3.

Peruvian Criminal Code, there was no domestic administrative infrastructure for challenging denial of abortion. The Peruvian legal system had failed to translate the Peruvian Penal Code into a legal or administrative framework that would have facilitated *KL* in vindicating her right to abortion. For these reasons, as part of determining the admissibility of the communication, the HRC said that there was no point in attempting to exhaust remedies as Peru was lacking in both administrative and judicial remedies that would enable a woman to require the authorities to fulfil her right to lawful abortion within the permitted period.<sup>85</sup>

Beyond the duty to implement transparent domestic abortion laws, *KL* also makes a contribution to the substantive development of abortion as a human right. It is significant that the HRC found a substantive violation of art 7 of the CCPR. The HRC said that it is not only physical pain that is relevant when determining violation of art 7 but also mental suffering, especially in the case of minors.<sup>86</sup> This finding, which cannot be confined to minors, sends out a message that denial of abortion in ways that cause the pregnant woman to suffer psychological distress can constitute cruel, inhuman and degrading treatment under international human rights law.

Furthermore, notwithstanding that the causes of action were not framed under the right to health, as the CCPR (as opposed to the CEDAW<sup>87</sup> or the CESC<sup>88</sup>) does not guarantee a right to health in any direct terms, *KL* supports a holistic definition of health for the purposes of determining eligibility for abortion under laws that recognise health as one of the grounds. The inference to draw from the HRC's finding of a violation of art 7 is that it is not only physical suffering that founds a right to abortion but also mental or psychological suffering. In this way, the HRC implicitly supported a holistic definition of health that is analogous, or at least complementary to, the expansive definition of health under the WHO constitution.<sup>89</sup> It will be recalled from part II of this article that, though nearly half of domestic abortion laws in the African region recognise health as a ground for abortion, rarely is guidance provided on what constitutes health.

But while commending the procedural and substantive rights *KL* advances, it serves well to also identify its weaknesses. It is regrettable that the majority of the HRC refrained from specifically determining the merits of violation of art 6 on the ground that this was unnecessary as the facts had already established a violation of art 7. Given that criminalisation of abortion is closely linked with the deaths of thousands of women each year, it was a missed opportunity for the HRC not to highlight that, in a human rights sense, criminalisation of abortion is responsible for the violation of the right to life that is guaranteed

85 Ibid para 5.2.

86 Ibid para 6.3.

87 CEDAW art 12.

88 CESC art 12.

89 Preamble to the Constitution of the WHO, adopted in 1946, entered into force in 1948. The Preamble states, inter alia, that 'health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity'.

by art 6. It is precisely on account of criminalisation that, each year, thousands of women are compelled to resort to unsafe clandestine abortions. This is because it is not only the deliberate taking of a person's life that violates art 6 under the CCPR.<sup>90</sup> Placing a person's life in grave danger, as had occurred in this instance when KL was denied abortion, notwithstanding clear medical and psychological evidence that continuing with the pregnancy would pose a serious risk to her life, also constituted a violation of the right to life.<sup>91</sup>

Furthermore, it is regrettable that the HRC dismissed, as inadmissible, the equality and non-discrimination claims under arts 3 and 26 of the CCPR, respectively. The HRC failed to conceive restrictive abortion law as an incident of unfair discrimination that denies health services that only women need along the lines of the gender-sensitive framework espoused by the HRC itself in General Comment 28<sup>92</sup> and the CEDAW Committee in General Recommendation 24.<sup>93</sup> The failure to judicially imagine criminalisation of abortion as unfair discrimination could be explained as a failure to adopt an approach that draws its impulse from substantive equality and has the capacity to question the legitimacy of laws that require women to bear children.

### (b) *LC v Peru*

*LC v Peru* is also a communication from Peru. Like KL, the cause of action was denial of abortion by domestic hospital authorities.<sup>94</sup> LC, a 13-year-old girl, became pregnant following repeated sexual abuse by a 34-year-old man. On discovering that she was pregnant, LC became severely depressed to the point of attempting suicide by jumping from a building. She sustained severe injuries, including damage to the spine, which caused paralysis of upper and lower limbs. Although she required emergency surgery to prevent her injuries from worsening and becoming permanently disabled, the hospital authorities decided at the eleventh hour to postpone the surgery. Significantly, the postponement was not prompted by LC's health, but by concern for the foetus. Purporting to rely on the law, the authorities took the view that surgery would be harmful to the foetus. Through her mother, LC requested the authorities to grant her permission to have an abortion, but the request was refused. The refusal was in the face of art 119 of the Peruvian Penal Code which, as described earlier, permits abortion 'to save the life of the pregnant woman or to prevent serious and permanent damage to her health'. Furthermore, it took hospital authorities 42 days to respond to and

90 HRC 'General Comment No 6 The Right to Life (article 6)' 16th session (1982) UN Doc HRI/GEN/1/Rev 1, 6 (1994).

91 Ibid.

92 HRC 'General Comment No 28 Equality of Rights between Men and Women (article 3)' UN Doc CCPR/C/21/Rev 1/Add 10 (2000) paras 10, 11.

93 The CEDAW Committee 'General Recommendation No 24: Article 12 of the Convention (Women and Health)' UN Doc A/54/38/Rev 1, chap 1 (1999) paras 11, 12; RJ Cook & S Howard 'Accommodating Women's Differences under the Women's Anti-Discrimination Convention' (2007) 56 *Emory LJ* 1039, 1074; Ngwenya (note 9 above) 796.

94 *LC v Peru* (note 24 above).



decline the request. The reason given for denying the abortion request was that the pregnancy did not constitute a danger to LC's life.

LC appealed to the hospital authorities against the decision to refuse her abortion. In support of her appeal, she submitted a medical report confirming that continuing with the pregnancy posed a grave risk to her physical and mental health. However, prior to the appeal being considered, LC miscarried spontaneously. It was only then that LC was operated upon. This was almost three and half months after it had been established that LC needed emergency spinal surgery. Even then, the hospital authorities indicated that they would have still declined the appeal as their initial decision denying abortion was 'not subject to appeal'.<sup>95</sup> Although she was operated upon, a combination of spinal injuries, delay in receiving emergency surgical care as well as psychological care, and lack of means to afford rehabilitative care, caused her health to deteriorate. She became quadriplegic and was only able to partially move her hands. She was confined to a wheelchair and totally dependent on her family for care. She could not attend school because of her physical care needs, including a catheter that needed changing five times a day. LC brought a communication before the CEDAW Committee alleging violations of several provisions of the CEDAW.

Her main argument was that denial by hospital authorities of both timely care to treat her spinal injuries, and a therapeutic abortion violated provisions of the CEDAW, in particular her right to health, dignity and freedom from discrimination in accessing healthcare services. At a more general level, she relied on art 1 of the CEDAW which defines discrimination in order to advance the overall substantive equality objective of the CEDAW through elimination of both *de jure* and *de facto* discrimination.<sup>96</sup> Under the CEDAW 'discrimination against women' means:

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>97</sup>

Over and above relying on art 1, LC relied on the following provisions of the CEDAW to frame more pointedly the violations in questions: art 2(c), which requires states to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other institutions the effective protection of women against any act of discrimination; art 2(f), which requires states to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; art 3, which

95 Ibid para 2.9.

96 The CEDAW Committee 'General Recommendation No 25: On Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination Against Women, on Temporary Special Measures' UN Doc A/59/38 (2004) para 4.

97 CEDAW art 1.

requires states to take in all fields, in particular the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and enhancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men; art 5, which inter alia, requires states to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices, and customary and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles for men and women; art 12, which guarantees a right to be free from discrimination when accessing healthcare services; and art 16(1)(e), which guarantees women the right to decide freely and responsibly the number and spacing of children and to have access to the information, education and means to enable them to exercise these rights.

As part of establishing the requirement of exhaustion of local remedies under the Optional Protocol, LC submitted that, beyond the hospital procedures she had utilised, the Peruvian domestic legal healthcare systems did not provide her with an administrative or judicial procedure allowing her claim to be heard promptly and objectively with the possibility of access to a judicial remedy that would provide her with timely access to the medical services she needed.<sup>98</sup> She argued that she could not have been expected to embark on constitutional litigation to ask the courts to review the decision of the hospital authorities as the procedure for judicial review – amparo – was protracted and uncertain.<sup>99</sup> Amparo was certainly not a procedure responsive to time being of the essence for someone seeking termination of pregnancy and access to appropriate treatment for her injuries, given the inordinate time it took to reach resolution.<sup>100</sup> Equally, she argued that pursuing the remedy of domestic civil action to recover damages was not a sufficient remedy since it would not have enabled her to achieve the objective of terminating her pregnancy.<sup>101</sup>

The CEDAW Committee found the communication to be admissible. It found that LC had exhausted local remedies when she requested abortion from the hospital authorities, but was turned down and informed that the decision was not subject to appeal. Over and above observing that the hospital procedures for requesting abortion were ‘too long and unsatisfactory’,<sup>102</sup> the CEDAW Committee was also of the view that LC could not have been expected to embark on litigation to vindicate her rights. This is because the procedures for judicial review were unpredictable and certainly slow as not to hold out to LC a realistic prospect of securing a ‘preventive, independent and

98 *LC v Peru* (note 24 above) para 5.7.

99 Amparo (meaning ‘to protect’) is a procedure for protecting individuals against state violations of constitutional rights (or threatened violations) that has been institutionalised in Latin American countries, including Peru: A Brewer-Carías *Constitutional Protection of Human Rights in Latin America A Comparative Study of Amparo Proceedings* (2008).

100 *LC v Peru* (note 24 above) para 5.7.

101 *Ibid* para 5.8.

102 *Ibid* para 8.4.

enforceable decision' that would meet her needs to terminate the pregnancy and have access to medical care.<sup>103</sup> Likewise, the CEDAW Committee took the view that civil action for compensation for damages, which, if successful, yields retrospective compensation, would not have been an effective remedy as it would not have redressed the harm that LC was seeking to prevent.<sup>104</sup>

Regarding the substantive merits, the CEDAW Committee found the conduct of the state to constitute violations of the CEDAW arts 1, 2(c), 2(f), 3, 5 and 12. It found that LC had been denied the medical care she needed only because she was pregnant and that hospital authorities had made the rendition of any medical treatment conditional upon LC carrying the pregnancy to term. Drawing from its own General Recommendation 24, the CEDAW Committee said that it was discriminatory to refuse to legally provide a reproductive health service that is therapeutically needed by women. It found that it was discriminatory for the state hospital authorities to deny LC both abortion as well as the emergency surgery that she needed to repair the injuries she had sustained when she jumped from a building. The CEDAW Committee highlighted that art 12 imposed a duty on the state to 'respect, protect and fulfil' women's right to health care.<sup>105</sup> The state had a human rights obligation to ensure that legislation, executive action and policy all respected the *three* obligations.<sup>106</sup>

The CEDAW Committee found that LC was eligible for abortion under art 119 of the Peruvian Penal Code but she had been left without 'access to an effective and accessible procedure' to establish her legal entitlement.<sup>107</sup> It found that LC had been denied not just abortion but also necessary emergency care. It said that the decision to postpone the surgery had been 'influenced by the stereotype that protection of the foetus should prevail over the health of the mother'.<sup>108</sup> Over and above violating art 12, the CEDAW Committee found the conduct to also constitute a violation of art 5 which specifically outlaws stereotyping women in a manner that detracts from equality.<sup>109</sup>

The manifest failure by the Peruvian legal and health systems to establish and implement procedures by which the rights conferred by art 119 of the Peruvian Penal Code could be effectively and timely realised by women seeking legal abortion also ineluctably meant that the state had failed to establish legal protection of the rights of women in accordance with the CEDAW arts 2(c) and 2(f). The CEDAW Committee noted that the lacuna in the provisions of laws and regulations for implementing access to therapeutic abortion under art 119 of the Peruvian Penal Code had given rise to unenviable inconsistent

103 Ibid.

104 Ibid.

105 Ibid para 8.11; the CEDAW Committee (note 93 above) paras 13–5. See also Committee on Economic, Social and Cultural Rights 'General Comment No 14: The Right to the Highest Attainable Standard of Health' E/C12/2000/4 (2000) paras 33–6.

106 *LC v Peru* (note 24 above) para 8.11.

107 Ibid para 8.15.

108 Ibid.

109 Ibid.

and aberrant practices.<sup>110</sup> Each hospital authority determined arbitrarily the requirements that were necessary to meet the legal grounds, the procedure to be followed, the time frame for a decision and the importance attached to the views of the pregnant woman.<sup>111</sup>

Drawing in part from the jurisprudence of the European Court of Human Rights, the CEDAW Committee highlighted that once a state has decided to permit abortion in certain circumstances, it has a concomitant duty to establish a framework that allows women seeking abortion to realise their legal entitlements.<sup>112</sup> It said the state must establish an appropriate legal framework that allows women to exercise their right to it under conditions that guarantee the necessary legal security, both for those who have recourse to abortion and for the healthcare professionals that must perform it.<sup>113</sup>

From the failure to accede to LC's request for abortion and access to timely medical care, as well as failure to implement a framework for realising her legal rights, the CEDAW Committee also found a violation of art 3 together with art 1. However, in the light of its positive findings of violations of arts 5 and 12, the Committee considered it unnecessary and somewhat redundant to determine whether art 16(1)(e) had also been violated as alleged by LC.<sup>114</sup>

By way of remedies, the CEDAW Committee recommended the grant of adequate compensation for material loss, pain and suffering and rehabilitation measures for LC. In addition, it made recommendations that were intended to reform both the procedural as well as substantive aspects of domestic abortion law.<sup>115</sup> Procedurally, it recommended that Peru establish a mechanism to enable women seeking to realise their legal entitlements to abortion under the Peruvian law.<sup>116</sup> More generally, the CEDAW Committee recommended that the Peruvian healthcare system be sensitised, through education and training, towards responding positively to the reproductive health needs of women, especially adolescent women and victims of sexual violence.<sup>117</sup> It recommended the adoption of guidelines or protocols to ensure the availability and accessibility of healthcare services.<sup>118</sup> It also said that Peru should review its abortion law with a view to decriminalising abortion when pregnancy results from rape or sexual abuse.<sup>119</sup>

LC shows, all too clearly that, in the absence of transparent implementation of the law, healthcare providers that are vehemently opposed to abortion can effectively frustrate law which has been liberalised to allow women falling within the permitted exceptions to access abortion services. It is clear from

110 Ibid para 8 16.

111 Ibid.

112 Ibid para 8 17. The CEDAW Committee cited the decision of the European Court of Human Rights in *Tysiac v Poland* Application No 5410/03, ECHR 2007-IV (2007) paras 116–8.

113 *LC v Peru* (note 24 above) para 8.17.

114 Ibid para 8 15.

115 Ibid para 12.

116 Ibid para 12(b)(i).

117 Ibid para 12(b)(ii).

118 Ibid.

119 Ibid para 12(b)(iii).

the attitude of the hospital authorities that preserving the life of the foetus took precedence over protecting the health of the pregnant woman or respecting her choices, as indeed, the CEDAW Committee observed. It is fitting, therefore, that the Committee found a violation of the CEDAW art 5 in order to implicate the conduct of the authorities as not a mere instance of wrongful denial of health care, but also discriminatory treatment that draws its impulse from a sex and gender role stereotype.<sup>120</sup> The conduct of hospital authorities in *LC* represents the extreme end of wrongful sex and gender stereotyping in which women have no agency but are, instead, normatively scripted to render societal physiological services as sacrificial and supererogatory reproductive instruments.<sup>121</sup>

It is significant that the CEDAW Committee went beyond merely recommending a remedy that was personal to LC, namely, damages for pain and suffering and for material loss and rehabilitation. It also recommend systemic remedies to prevent the same fate being visited upon other women in the future. It stressed not just the importance of establishing a legal and administrative framework that allows women to challenge timely decisions denying them abortion in the face of otherwise enabling law, but also the importance of educating and training healthcare providers so that they become acquainted with the reproductive and sexual health needs of women, including abortion, as well as their human rights obligations towards such women.

### (c) *LMR v Argentina*

LMR was 19 years old but with a mental age that was between eight and ten years on account of mental disability. She lived with her mother, attending a 'special school' and receiving mental health care. She became pregnant. It was suspected that she had been raped by an uncle. Through her mother, LMR requested abortion but was turned down. This was regardless of Argentinean Criminal Code art 86(2) which permits abortion, as an exception, if: (1) performed in order to avoid endangering the mother's life or health and if this danger cannot be prevented by other means; or (2) if the pregnancy results from rape or indecent assault of a woman with a mental disability. LMR based her request on the second exception though in fact both exceptions were applicable to her circumstances. It was not just a case of pregnancy resulting from sexual intercourse with a woman who could not have consented, but also pregnancy in a woman who, on account of her mental disability, could not be expected to assume the responsibilities of childbearing and childrearing on her own.

LMR's initial request was turned down by hospital authorities when the hospital was issued with an injunction by a Juvenile Court to prevent the abortion on the ground that abortion would harm an 'innocent victim'.<sup>122</sup> Barely disguising the influence of fundamentalist religious opposition to

120 Ibid para 8 15.

121 RJ Cook & S Cusack *Gender Stereotyping Transnational Legal Perspectives* (2010) 18–36 & 86–9.

122 *LMR v Argentina* (note 23 above) para 2.4.

abortion, the Juvenile Court said that LMR could not repair the injustice she had suffered (that is, the rape) ‘with another wrongful assault against a new innocent victim, i.e. the unborn child’.<sup>123</sup> At the time, LMR was 14 and a half weeks pregnant. On appeal, the decision of the Juvenile Court was confirmed by the Civil Court.

On further appeal to the Supreme Court, LMR succeeded in overturning the decision. The Supreme Court held that LMR was entitled to termination under the Argentinean Criminal Code and that judicial authorisation was not required. But despite the favourable ruling, LMR could not find a health facility willing to terminate her pregnancy due to publicity surrounding the case and pressure brought to bear on public health facilities by fundamentalist groups.<sup>124</sup> The hospital from which she had requested termination came under intense public pressure not to carry out the termination. In any event, the hospital said that the pregnancy was too advanced for termination as it would endanger LMR’s health. By now, LMR was nearly 20 and a half weeks pregnant. With the support of women’s organisations, LMR was able, in the end, to arrange for a clandestine termination in a private healthcare facility.

Before the HRC, LMR alleged that the conduct of the Argentinean authorities constituted violations of the following provisions of the CCPR: art 2, which, *inter alia*, guarantees a right to have an effective remedy before a competent domestic authority; art 3, which guarantees a right to equality and non-discrimination; art 7, which guarantees a right to be free from cruel, inhuman and degrading treatment; art 17, which guarantees a right to privacy; and art 18, which guarantees a right to freedom of religion and belief. The HRC found the conduct of the Argentinean state to constitute violation of art 2(3) in relation to arts 3, 7 and 17.

In reaching its conclusion on art 2(3) of the CCPR, the HRC noted that although the Argentinean Criminal Code conferred LMR with legal entitlement to abortion, she was unable to realise her entitlement without prior judicial approval. Instead, she had to appear before three courts, causing delay, which had the effect of prolonging, by several weeks, the gestation period, which became the reason why the hospital ultimately declined to perform the abortion, which also became the reason why LMR turned to clandestine abortion. These facts highlighted that Argentina did not have a mechanism for providing LMR with an effective remedy.<sup>125</sup> In respect of art 3, although the HRC did not expressly articulate the reasoning behind its positive finding of a violation, it can be surmised that the HRC implicitly accepted LMR’s argument that failure to accede to a request for a procedure – abortion – that was solely needed by women without any legitimate justification under the law, constituted unfair sex-based discrimination.<sup>126</sup>

123 *Ibid.*

124 *Ibid* para 3.6. See also paras 5.6, 2.9, 3.10, 7.4 & 8.7

125 *Ibid* para 9.4.

126 *Ibid* paras 3.5 & 8.5.

Regarding art 7, the HRC found that forcing LMR to endure pregnancy that was a result of rape, together with her status as a minor and someone with a disability accentuated her mental suffering to the point of constituting cruel and inhuman treatment.<sup>127</sup> Because the Argentinean Criminal Code did not require judicial authorisation for abortion once a ground for abortion was met, the HRC found that requiring LMR to first obtain permission of the courts prior to abortion constituted an unlawful interference with her right to privacy under CCPR art 17.<sup>128</sup> The requirement of prior judicial authorisation was an unconstitutional imposition by both the hospital authorities and the lower courts.

The approach of the HRC in *LMR* followed and consolidated its approach in *KL*. It did so in two main respects: firstly, by requiring domestic abortion laws and administrative procedures to guarantee equality *under* the law for women seeking abortion services so that they are not denied the rights already conferred on them by domestic laws; and secondly, by finding that mental suffering caused by wrongful denial of abortion constituted a recognisable harm under art 3 of the CCPR.

#### IV UNDERSTANDING *KL v PERU*, *LC v PERU*, AND *LMR v ARGENTINA* FROM AN EQUALITY PERSPECTIVE

##### (a) Equality under the law

At one level, *KL v Peru*, *LC v Peru*, and *LMR v Argentina* should be received as positive developments in both juridical and philosophical senses. Even if the decisions fall short of vindicating, more forthrightly, access to safe abortion as a human right that is tethered to reproductive agency, they still represent a step forward in what is, after all, a highly contested and stigmatised sphere.

From a human rights perspective, the common accent on procedural guarantees in *KL*, *LC*, and *LMR* can be understood as situating abortion law in equality *under* the law to counter the chilling effect of the historical criminalisation and stigmatisation of abortion so that women seeking abortion are treated as holders of rights rather than morally flawed seekers of privilege. The decisions require ‘transparency’ in, rather than substantive reform of, abortion law.<sup>129</sup> Though the decisions are novel in that they are the first occasions on which treaty-monitoring bodies have considered communications on abortion and required, by way of repairing human rights violations, procedural safeguards, the decisions are not so novel to abortion. Rather, they tread the same jurisprudential path as that treaded by the

127 Ibid para 9.2.

128 Ibid para 9.3.

129 Cook & Howard (note 93 above) 1066–70; Ngwena (note 9 above) 803–8.



European Court of Human Rights in a number of cases in recent years, and most elaborately in *Tysiact v Poland*.<sup>130</sup>

In *Tysiact*, the European Court of Human Rights highlighted that, given the historical criminalisation and stigmatisation of abortion, disagreements are bound to arise between women and health-care professionals and among such professionals.<sup>131</sup> It is, therefore, essential to put in place a clear and dependable framework for resolving disagreements in a manner that protects women's rights to administrative justice, including the rights to be heard and be provided with written reasons where request for an abortion is refused.<sup>132</sup> Equally, it is important for administrative procedures to be expeditious and take into account that time is of the essence for women seeking abortion. Late terminations come with increased health risks and should not be imposed on women on account of delays in conceding to women's legal entitlements.<sup>133</sup>

From a philosophical standpoint, the insistence on equality under the law in *KL*, *LC*, and *LMR*, goes beyond the issue of abortion. Ultimately, it is an instance of insistence on fair procedures as a constituent modality for protecting equal citizenship in a liberal democracy. The human rights concern is not so much with vindicating abortion rights per se, but, instead, fulfilling procedural equality in a liberal democracy committed to the Rule of Law in the face of failure by the executive arm of the state, especially, to implement what the legislature has already conferred.

Even if we share different views about the moral rightness or wrongness of abortion, as is undoubtedly the case, once our democratic institutions have recognised certain rights and certain duties in ways that are faithful to liberalism, a reasonable conception of justice should seek to not merely permit, but more significantly require the state to fulfil the rights and discharge its duties so that citizens who rely on the rights are treated equally. Requiring the state to institute procedural guarantees for women seeking abortion is part of specifying the content of a fair system of social cooperation among citizens who are entitled to equal citizenship.

130 *Tysiact* (note 112 above). See also three other decisions of the European Court of Human Rights that have followed *Tysiact* namely *A, B and C v Ireland* Application No 25579/05 (2010) [2010] ECHR 2032; *RR v Poland* Application No 27617/04 (2011); *P and S v Poland* Application No 573735/08 (2012). For a domestic decision on the duty to render abortion law transparent, see *Family Planning Association of Northern Ireland v Minister of Health, Social Services and Public Safety* [2004] NICA 39 where the Court of Appeal of Northern Ireland held that the state was in breach of its statutory duty to provide health services because the abortion law as contained in the Offences Against the Person Act of Northern Ireland of 1861 s 58 had not been implemented as to leave not just women uncertain about the lawfulness of abortion but also healthcare professionals. F Fletcher 'Abortion Needs or Abortion Rights? Claiming State Accountability for Women's Reproductive Welfare' (2005) 13 *Feminist Legal Studies* 123.

131 *Tysiact* (note 112 above) para 116.

132 *Ibid* para 117.

133 *Ibid* para 118.

### (b) Substantive equality

The juridical approaches adopted by the treaty-monitoring bodies *largely* refrained from recognising abortion as a substantive human right for vindicating women's reproductive agency. While insisting on equal treatment under the law, on the whole, the decisions refrained from substantively engaging with the legitimacy of criminalising women's decisions to terminate pregnancy, save in the instance of sexual violence,<sup>134</sup> or where the physical or mental health of the woman is critically at stake,<sup>135</sup> or denial of abortion satisfies a judicially calibrated threshold of inhuman and degrading treatment.<sup>136</sup> Most of all, the decisions are conspicuous for not drawing their main impulse from women's right to reproductive autonomy.

Ultimately, *KL*, *LC* and *LMR* conceive the right to abortion as primarily in the gift of national authorities, save where the authorities fail to implement effectively their own laws or assure procedural guarantees. Furthermore, save for *LC*, where the CEDAW Committee found a violation of the right to health services guaranteed by the CEDAW art 12, the decisions do not address state obligations to also provide abortion services that are accessible to all women, including indigent women. For these reasons, though progressive, *KL*, *LC*, and *LMR* are primarily in the mould of juridical incrementalism rather than a radical overhaul of the historical crime and punishment model for regulating abortion. Ultimately, their broad trajectory speaks more to a formal rather than substantive equality paradigm.

The criminalisation of abortion has its greatest impact on women, and yet *KL*, *LC*, and *LMR* do not use gender as a category of juridical analysis for substantively interrogating the human rights fairness and integrity of laws that, in the first place, criminalise abortion. Laws that compel motherhood affect women in crucial ways. It is women who are at the centre of the physical and emotional burdens of reproduction, and more specifically, carrying a foetus, bearing a child and nurturing it. It is women who forego career development and remunerated labour to bear the responsibilities of motherhood. Ultimately, criminalisation of abortion serves as a powerful catalyst for unsafe, illegal abortions for poor women, especially.

It is possible to interpret the HRC's abstinence about substantively interrogating the criminalisation of abortion as not so much as judicial oversight or indifference, but as an implicit application of the doctrine of the margin of appreciation. The doctrine requires a supranational tribunal to concede an appreciable degree of latitude to national authorities as part of adherence to a wider principle of subsidiarity, which acknowledges that the supranational framework co-exists with the national for the purposes of

134 *LC v Peru* (note 24 above) para 12(b)(iii).

135 *Ibid* para 8 15.

136 *KL v Peru* (note 22 above) para 6.3 citing HRC 'General Comment No 20: Prohibition of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (article 7)' UN Doc HRI/GEN/1/Rev 7, paras 2 & 5; *LMR v Argentina* (note 23 above) para 9.2 also citing HRC 'General Comment 20'.

supplanting the latter rather than eclipsing it.<sup>137</sup> The trouble is that the doctrine of the margin of appreciation is constructed around an assumption that when national authorities exercise sovereign discretion to limit fundamental rights, they will do so in a manner that protects minimum human rights guarantees. Deferring to the nation state works well for citizens where the domestic legal and political processes have sufficient and credible safeguards for mediating conflict between majorities and minorities, including in sexual and reproductive economies. In the abortion context, as the approach of the European Court of Human Rights has shown,<sup>138</sup> where the state is historically inclined towards restricting women's reproductive autonomy and has constitutionalised its bias, the doctrine of appreciation becomes not so much a principle of subsidiarity but an instrument for giving legitimacy to majoritarian rather than inclusive citizenship and politics. In any event, the African Commission, in its protective mandate has hinted towards a restrictive approach to the application of the doctrine of the margin of appreciation. Though the African Commission has conceded that the principle of subsidiarity is the rationale for the doctrine of the margin of appreciation, it has, at the same time, highlighted that the doctrine should be construed narrowly and certainly not in a manner that substantively is tantamount to ousting the African Commission's mandate to protect the rights guaranteed by the Charter.<sup>139</sup>

The point is that juridical approaches that assume the legitimacy of criminalising abortion reinforce patriarchal structural power. They reinforce traditional gender role assumptions and female subordination in reproductive decision-making. Ultimately, as Reval Siegel has argued, such approaches lack the critical capacity to discern gender bias in the legal and customary regulation of reproduction.<sup>140</sup> They lack the capacity to discern that the criminalisation of abortion is driven not merely by concern for the unborn, but by constitutionally illicit concerns that reflect normative judgments about the role of women.<sup>141</sup> In the end, gender-blind approaches to the criminalisation of abortion promote 'physiological naturalism' by treating women's capacity to bear children as a mere physiological process rather than concomitantly a process that takes place in a social context that is sanctioned by traditional and legal cultures.<sup>142</sup>

137 Viljoen (note 27 above) 18–9.

138 *A, B and C* (note 130 above) where the European Court upheld the human rights validity of Irish abortion law as contained in the Irish Constitution art 40.3.3, which protects foetal life. Article 40.3.3 has been interpreted by the Irish Supreme Court to permit abortion only when there is a 'real risk to the life, as distinct from the health, of the pregnant woman' (see *Attorney General v X* [1992] 1 IR 1 para 37).

139 *Prince v South Africa* (2005) AHRLR 105 (ACHPR 2004); CG Ngwenya 'Developing Regional Abortion Jurisprudence: Comparative Lessons for African Charter Organs' (2012) 31 *Netherlands Quarterly of Human Rights* 9, 39–40.

140 R Siegel 'Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection' (1992) 44 *Stanford LR* 261, 264–5.

141 *Ibid* 266.

142 *Ibid* 265 & 267.

Without acknowledging the patriarchal context from which the criminalisation of abortion and the erasure of women's agency draw their impulse and ultimately treat women's bodies as societal procreative assets, the exercise of state power to force women to bear children as a natalist modality is rendered not merely benign, but also warranted benevolence.<sup>143</sup> Such a gender-erasing approach creates a disabling environment for women in which abortion is stripped of its cultural, political and religious history. It creates an environment in which women are pre-social beings who begin life as gestating instruments at the service of society. Achieving substantive equality in the abortion context, as Rebecca Cook and Susana Howard argue, requires accommodating women's biological differences and redressing the social discrimination that women face as women.<sup>144</sup> Ultimately, accommodating difference in abortion requires a transformative paradigm for regulating abortion. It requires reframing the law in order to construct a standard that is inclusive and values sex and gender differences in substantively equal ways.<sup>145</sup>

## V CONCLUSION

African domestic abortion laws have rarely been implemented. Moreover, African regional jurisprudence on abortion has remained largely ensconced in a single moment of proclaiming abortion as a human right in a treaty – the Women's Protocol. Importing into state regulation of abortion a positive duty to implement what is permitted under the law, alleviates *some* of the disabilities women experience when attempting to terminate pregnancy safely. Where abortion has historically been criminalised, failure by the state and its organs to render abortion laws transparent, including clarifying the circumstances in which abortion is permitted, serves as an incentive for unsafe abortion. It leaves women seeking abortion, especially socio-economically deprived women, assuming that abortion is illegal in all circumstances and that unsafe abortion is their only realistic recourse. By the same token, laws that are not implemented serve to deter healthcare professionals from rendering abortion services for fear of attracting prosecution. The call by *KL*, *LC*, and *LMR* for abortion laws that provide procedural and administrative guarantees that are accessible to women is therefore an important jurisprudential contribution, and one that should commend itself to African abortion regimes which, on the whole, have remained unimplemented.

But as was argued, realising women's reproductive agency and promoting access to safe abortion in the African region requires commitment to not only procedural but also substantive equality. Merely guaranteeing procedural rights to abortion, as the treaty-monitoring bodies largely do, though jurisprudentially positive, is not enough to fully recognise women as women. Certainly, procedural guarantees give women some 'capabilities' for realising

143 Ibid 276–7.

144 Cook & Howard (note 93 above) 1040.

145 Ibid.

reproductive health,<sup>146</sup> and satisfy one of the ‘threshold conditions’ for placing women in positions where they can choose to utilise enabling laws.<sup>147</sup> However, on their own, they cannot redress the historical ‘misrecognition’ of women, which is structural and stems from patriarchal normative scripting of sex and gender roles for women as mothers and caregivers.<sup>148</sup>

In the age of human rights, taking rights seriously means, among other strategies, using litigation to render states accountable for human rights violations. However, women’s struggles for equal citizenship in the African region seem to have studiously eschewed constitutionalising abortion or having recourse to litigation. The virtual absence of abortion-related litigation in the African region shows that thus far, civil society has not appropriated litigation as an important strategy and adjunct to political discourse. This is in marked contrast to other comparable parts of the world where abortion has been constitutionalised mainly through litigation driven by women’s struggles for equal citizenship.<sup>149</sup> In Latin America, for example, abortion has increasingly been litigated and there is a steadily growing jurisprudence on abortion as a fundamental right.<sup>150</sup> Indeed, it is not coincidental that the cases that are the subject of this article have all emanated from the Latin American region. The failure by civil society to appropriate abortion-related litigation is also in marked contrast to other health and equality related issues such as HIV/AIDS where, as elsewhere, rights-based advocacy in the several African countries has enlisted domestic litigation as a key strategy for rendering the state accountable for failure to respect, protect and fulfil human rights.<sup>151</sup> Seemingly, the stigma and moral censure that attend abortion have been prohibitive enough to stay the hand of human rights advocacy.

A human rights cause such as the injustice of criminalisation of abortion, which affects not just women as individuals, but also women as a historical community is a ripe cause for litigation for the reason that it lends itself to the collective empowerment of a social group which has been collectively disadvantaged and marginalised. Though litigation does not assure success and might even engender a backlash, at the same time, it holds out a promise

146 Nussbaum (note 47 above) 78; A Sen *Development as Freedom* (1999) 18–20.

147 A Sen ‘Elements of a Theory of Human Rights’ (2004) 32 *Philosophy and Public Affairs* 315, 329.

148 Cook & Howard (note 93 above) 1040; Cook & Cusack (note 121 above) 86–8; Fraser (note 7 above) 11–39.

149 See generally, RB Siegel ‘The Constitutionalization of Abortion’ in M Rosenfeld & A Sajo (eds) *The Oxford Handbook of Comparative Constitutional Law* (2012) <[http://www.law.yale.edu/documents/pdf/Faculty/Siegel\\_ConstitutionalizationAbortion.pdf](http://www.law.yale.edu/documents/pdf/Faculty/Siegel_ConstitutionalizationAbortion.pdf)>.

150 The leading jurisdiction in this regard is Colombia. The Colombian Constitutional Court has adjudicated abortion in several cases, with Decision C-355/06 (2006) as the leading case on the constitutionalisation of abortion as well as constitutional domestication of international human rights gender norms: RJ Cook ‘Excerpts of the Constitutional Court’s Ruling that Liberalized Abortion in Colombia’ (2007) 15 *Reproductive Health Matters* 1–3; AE Yamin et al ‘Colombia: Judicial Protection of the Right to Health: An Elusive Promise’ in S Gloppen & AE Yamin (eds) *Litigating Health Rights Can Courts Bring More Justice to Health?* (2011) 103, 124.

151 Southern Africa Litigation Centre *Equal Rights for All Litigating Cases of HIV-related Discrimination* (2011); BM Meir & AE Yamin ‘Right to Health Litigation and HIV/AIDS Policy’ (2011) 39 *J of Law, Medicine and Ethics* 81.

to reconstruct law and render it emancipating. Litigation is particularly appropriate in a context such as sexual and reproductive self-determination. In this sphere, political discourse has historically been wanting in Benhabibian deliberative democracy.<sup>152</sup> Historically, the discourse has been governed by norms of inequality and asymmetry in which political minorities do not have an equal chance of initiating speech or questioning the assigned topic or shaping the rules of discourse procedure. Hegemonic political discourses borne out of structural inequality and deeply embedded patriarchal biases as to be manifestly lacking in inclusiveness and reciprocity cannot be relied upon to selflessly self-correct without contestation.

In any event, it may not even be successful litigation that is crucial to promoting access to safe abortion as a human right. As some feminist and critical race discourses<sup>153</sup> have argued, the question whether a rights-based discourse can make a positive impact must be evaluated contextually and historically.<sup>154</sup> A rights discourse which is framed in such a way that the claims of individuals are inextricably bound with collective claims, can impact positively on the recognition of a historical community, not least in securing symbolic victories that raise public consciousness about oppression and foreground or augment political activism, especially where a social group is starting from a position of manifest disadvantage and marginalisation.<sup>155</sup> It is not essential that the victories be necessarily legal in character for a rights-based discourse to impact positively on emancipatory struggles. Martha Minow has argued that it can be sufficient that rights-based strategies invest individuals and communities with 'rights consciousness' that allows them to imagine as well as act in the light of rights that have hitherto not been conceded by public authorities.<sup>156</sup> Minow's thesis is that rights should not be conceived of as necessarily limited and coterminous with positive law.<sup>157</sup>

In those jurisdictions where abortion is permitted on certain specified grounds but there has been no implementation or where domestic abortion law contradicts the constitution or a ratified treaty, it seems pointless

152 In her thesis on deliberative democracy and a dialogical community, Seyla Benhabib has posited the following as essential elements for a dialogue that involves all humanity: equal participation; equal right to suggest topics of conversation, introduce new points of view, question and criticise; equal right to challenge rules of conversation, especially where there is exclusion of some topics; and ultimately the right to universal respect and egalitarian reciprocity: S Benhabib 'Towards a Deliberative Model of Democratic Legitimacy' in S Benhabib (ed) *Democracy and Difference Contesting the Boundaries of the Political* (1996) 67, 70; Benhabib (note 40 above) 250–1.

153 On critical race discourse see R Delgado & J Stefani *Critical Race Theory An Introduction* (2001).

154 M Minow 'Interpreting Rights: An Essay for Robert Cover' (1987) 96 *Yale LJ* 1860, 1875–7; K Crenshaw 'Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law' (1988) 101 *Harvard LR* 1331, 1364–6.

155 P Gabel 'The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves' (1984) 62 *Texas LR* 1563, 1590.

156 Minow (note 154) 1867.

157 *Ibid.*

abstinence not to put the rights discourse to test on its own terms.<sup>158</sup> But even if the underpinning legal ethos does not profess a commitment to substantive equality or transformation, the very fact that law has a legitimating function is paradoxically why it ought to be enlisted as an adjunct to advocacy. Rebecca Cook and Simone Cusack remind us of the potential of law as an instrument for change when they argue that because law is privileged, it is precisely why it is worthwhile to appropriate it as one of the tools in naming injustices.<sup>159</sup>

In the final analysis, using litigation to contest abortion laws that are gender oppressive is much more than about seeking to protect reproductive health and realise reproductive agency. It is also about seeking to publicly contest the meaning of women's citizenship so as to give it a presence and status denied to it by the colonial and neo-colonial state. The moment of liberation from white oligarchic rule was an extraordinary moment of change. It was full of possibilities to transform deeply unjust political systems and construct an inclusive society that affirms the dignity of all not just in the sphere of race but also in all other personhoods. However, on the whole, African polities have shied away from inclusive transformation. African people have made spectacular gains in shaking the seemingly indomitable baobab and freeing themselves from the shackles of racist colonial governance and apartheid so as to become self-determining republican citizens. Regrettably though, the road to equal citizenship has been partial rather than even, gender biased rather than gender sensitive, with women, especially, occupying political and economic space at the margins of citizenship.

African nationalism was the driving force behind anti-colonial struggles on the African continent.<sup>160</sup> Though African men were the founders as well as the face of African nationalism, African women played no less a significant political role in liberating the continent.<sup>161</sup> In several countries, apart from their supporting domestic roles, many women suffered imprisonment or even worse for the cause of national independence. And yet, the 'post-colonial' period has been anything other than 'post' for the majority of African women.<sup>162</sup> The 'post-colonial' African state has been a profusely gendered

158 The outcome and aftermath of the decisions of the Constitutional Court of South Africa in *Minister of Health v Treatment Action Campaign* 2002 (10) BCLR 1033 are instances that illustrate that a rights discourse need not be in vain. In this case, the Constitutional Court effectively countermanded government policy that had excluded from accessing treatment at the expense of the state, 90 per cent of women who needed treatment for the prevention of mother-to-child transmission of HIV. On account of the decision, the South African government was forced to concede a change in policy and to implement universal access to treatment for the prevention of mother-to-child transmission of HIV at public facilities.

159 Cook & Cusack (note 121 above) 38; Crenshaw (note 154 above) 1366–9.

160 P Alter *Nationalism* (1985) 143–52.

161 P McFadden 'Nationalism and Gender Issues in South Africa' (1992) 1 *J of Gender Studies* 510, 511–2.

162 P McFadden 'Becoming Postcolonial: African Women Changing the Meaning of Citizenship' (2005) 6 *Meridians Feminism, Race, Transnationalism* 1, 5–6. On pitfalls of the term 'postcolonial' in respect of women, see A McClintock *Imperial Leather* (1995) 13–4. Anne McClintock says the term 'post-colonial' becomes particularly unstable where women do two-thirds of the world's work but earn a tenth of the world's income and own one per cent of the world's property (see McClintock *Ibid* 13).



state and a repository for male hopes, male aspirations and male privilege, with women's citizenship largely invisible and maidservant rather than substantively equal to male citizenship.<sup>163</sup> In fact, for the female underclass, the 'post-colonial' African state has been a neo-colonial state where, in many socio-economic spheres, old power relations, not least patriarchy, uncritically reproduce themselves with the same master dichotomies in which one social group is elevated and empowered and another is subordinated and disempowered, including in the sphere of sexual and reproductive health. The failure by the overwhelming number of African states to implement abortion laws effectively or to radically transform abortion laws is explicable as an expression of African patriarchy, which has not valued the lives, hopes and aspirations of women in the same way as those of men.

163 A McClintock 'Family Feuds: Gender, Nationalism and the Family' (1993) 44 *Feminist Review* 61, 77.