

PART A: ARTICLES

DEVELOPING REGIONAL ABORTION JURISPRUDENCE: COMPARATIVE LESSONS FOR AFRICAN CHARTER ORGANS

CHARLES G. NGWENA*

Abstract

This article is constructed around an appraisal of the decision of the European Court of Human Rights in A, B and C v. Ireland. It seeks to extrapolate comparative lessons for African Charter organs for the development of regional jurisprudence on abortion. It is argued that the A, B and C decision offers positive as well as negative lessons. The positive lessons lie in the holding of the European Court that at a procedural level, domestic abortion laws must be transparent in the sense of being formulated clearly and providing an administrative mechanism for review so as to enable women seeking abortion to exercise their rights effectively. The negative lessons lie in the continued reluctance of the European Court to resolutely affirm abortion rights as substantive rights.

Keywords: abortion; equality; gender; human rights; margin of appreciation; transparency

1. INTRODUCTION

On 16 December 2010, the European Court of Human Rights (European Court) ruled on abortion in the case of *A, B and C v. Ireland*.¹ This article is constructed around an appraisal of the *A, B and C* case. It seeks to extrapolate comparative lessons for the African human rights systems from the approach adopted by the European Court when adjudicating abortion-related complaints under the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention).²

* LLB, LLM (Wales), LLD (Free State), Professor, Centre for Human Rights, University of Pretoria, South Africa. I am exceedingly grateful to Rebecca Cook, Bernard Dickens, Ebenezer Durojaye, Joanna Erdman, Laura Katzive, Daniel Mekonnen and Frans Viljoen for their comments on an earlier draft of this article. I am also exceedingly grateful to the anonymous reviewers of this article for their comments.

¹ ECtHR, *A, B and C v. Ireland*, 16 December 2010 (Appl.No. 25579/05).

² European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 221, ETS No. 5.

In the area of abortion, there are good reasons why organs of the African Charter on Human and Peoples' Rights-based system may wish to learn from the jurisprudence of the European Court.

The two main organs responsible for the protection and promotion of human rights under the African regional human rights system are the African Court on Human and Peoples' Rights (African Court)³ and the African Commission on Human and Peoples' Rights (African Commission). Compared to its European counterpart, the African Court is still relatively young.⁴ As a treaty organ, it is a later addition to a human rights system that was initially conceived without a supranational court.⁵ The African Court was established to complement and augment the protective role of the African Commission under the regional human rights system that was established by the African Charter on Human and Peoples' Rights (African Charter).⁶ It has contentious jurisdiction to adjudicate complaints arising from the African Charter, African Charter-based instruments and other relevant instruments ratified by the States concerned.⁷ The African Court also has advisory jurisdiction to provide an opinion on any legal matter relating to the African Charter or any other relevant human rights instrument.⁸ The African Court has no jurisprudence of its own on abortion or even on women's rights generally. Likewise, the African Commission, whose protective function the African Court seeks to augment, cannot, as yet, easily fill this gap because it has, so far, not developed jurisprudence that addresses women's rights generally or abortion specifically. The European Court, on the other hand, has long been operational.⁹ It has built an enormous body of jurisprudence across a range of fundamental rights.¹⁰ Abortion is one of the areas in which it has developed jurisprudence.

The adoption of the Protocol to the African Charter on the Rights of Women in Africa (Women's Protocol)¹¹ is another reason for African Charter organs to avail

³ Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights, adopted 10 June 1998, OAU Doc. OAU/LEG/MIN/AFCH/PROT(I) Rev.2.

⁴ The African Court issued its very first judgment in 2009 in *Michelot Yogogomabye v. Republic of Senegal*, 15 December 2009 (Appl.No. 001/2008), available at: [www.african-court.org/...](http://www.african-court.org/)

⁵ Viljoen, F., *International Human Rights in Africa*, Oxford University Press, Oxford, 2007, at p. 420.

⁶ African Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 Rev. 5, 1520 UNTS 217. The mandate of the African Commission under the African Charter is to promote and protect human rights (Arts. 30 and 45 of the African Charter).

⁷ Art. 3 Protocol on the Establishment of an African Court.

⁸ Art. 4(1) Protocol on the Establishment of an African Court.

⁹ The European Court was established under the original Art. 19 of the 1950 European Convention.

¹⁰ See for example: Van Dijk et al. (eds.), *Theory and Practice of the European Convention on Human Rights*, Intersentia, Oxford/Antwerpen, 2006; Ovey, C. and White, R.C., *The European Convention on Human Rights*, Oxford University Press, Oxford, 2006; Harris et al., *Law of the European Convention on Human Rights*, Oxford University Press, Oxford, 2009.

¹¹ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted 11 July 2003, OAU Doc. AHG/Res. 240 (XXXI) (hereinafter Women's Protocol); Ngwena, C.G., 'Inscribing Abortion as a Human Right: Significance of the Protocol on the Rights of Women in Africa', *Human Rights Quarterly*, Vol. 32, No. 4, 2010, pp. 783-864.

themselves of comparative abortion jurisprudence. Article 14(2)(c) of the Women's Protocol addresses abortion directly. It requires States Parties to take all appropriate measures to 'protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus'. Although the European Convention does not address abortion directly, its jurisprudence on abortion is, nonetheless, of potential use. The African Charter and, by extension, the Women's Protocol recognise other international human rights treaties, including regional treaties, as potential sources of interpretive guidance.¹²

The desirability of African Charter organs taking stock of comparative abortion jurisprudence is further underscored by the fact that unsafe abortion, which is linked to highly restrictive laws and/or inaccessible abortion services, has a pernicious presence on the African continent.¹³ Ninety-nine percent of unsafe abortions occur in the developing world.¹⁴ Unsafe abortion is responsible for 13 percent of global maternal mortality.¹⁵ An estimated 47,000 women lose their lives each year to unsafe abortion.¹⁶ Africa is disproportionately affected, with unsafe abortions accounting for about 29,000 deaths each year, a proportion constituting about 62 percent of the global total.¹⁷ Certainly, unsafe abortion stands in the way of thousands of African women enjoying not just human rights in general but life itself. Treaty organs which are located in a region where unsafe abortions are a major threat to public health have need to develop jurisprudence that has the potential to be life-impacting for millions of women.

This article seeks to argue that the decision of the European Court in *A, B and C v. Ireland* offers lessons for the African Charter organs, both positively and negatively. The positive lessons lie in the holding by the European Court that Article 8 of the European Convention, which has been used to adjudicate abortion-related rights under the Convention, imposes on the State a negative as well as a positive duty. The European Court has said that there is not only a negative duty not to interfere adversely with the right to privacy, but more pertinently, there is also a positive duty to render the right to privacy accessible and effective in practice. In the context of

¹² Arts. 61 and 62 African Charter; Preamble to the Women's Protocol.

¹³ According to World Health Organisation 'unsafe abortion' means 'a procedure for terminating an unintended pregnancy either by individuals without the necessary skills or in an environment that does not conform to minimum medical standards or both.' World Health Organisation, *The Prevention and Management of Unsafe Abortion: Report of Technical Working Group*, World Health Organisation, Geneva, 1992. On the well-established link between highly restrictive laws and unsafe abortion, see: Guttmacher Institute, *Abortion Worldwide: A Decade of Uneven Progress* 25–29, 2009; Berer, M., 'National Laws and Unsafe Abortion: The Parameters of Change', *Reproductive Health Matters*, Vol. 12, No. 24, 2004, pp. 1–8.

¹⁴ World Health Organisation, *Unsafe Abortion: Global and Regional Estimates of the Incidence of Unsafe Abortion and Associated Mortality in 2008*, World Health Organisation, Geneva, 2011, p. 1.

¹⁵ *Ibidem* at p. 27.

¹⁶ *Idem*.

¹⁷ *Ibidem* at p. 28.

abortion, this entails rendering abortion law transparent in the sense of formulating it clearly and providing accessible administrative mechanisms for enabling women seeking abortion to exercise their rights effectively. The negative lessons from *A, B and C* lie in the continued reluctance of the European Court to affirm abortion rights as substantive rights under the European Convention.

It might appear somewhat anomalous to seek to develop a comparative human rights discourse around two regional treaties that, though sharing some similarities, are ultimately different as are the African Charter and the European Convention. For this reason, it serves well to highlight, at the outset, that the analytical rationale of the comparative exercise in this article is not an attempt to erase the substantive and procedural differences between the African human rights system and its European counterpart or to ignore their very different political histories. Rather, it is to underscore that a comparative study can serve varied analytical purposes as comparative studies on constitutionalism and constitutional adjudication have demonstrated.¹⁸ Where the systems under comparison share common features in terms of underpinning juridical assumptions and intended juridical outcomes, approaches and principles developed in one juridical system can be transplanted to the other as applicable lessons learnt.¹⁹ Comparing juridical systems that share similar human rights goals promotes shared understandings that transcend local history, culture and geography.²⁰ However, the value of comparativism not only subsists in drawing instructive lessons from jurisdictions or regions that are similar as there is also analytical value in comparing what is dissimilar.

Comparing what is dissimilar, as Henk Botha has argued, can serve to facilitate a deeper reflection on, and elucidation of, juridical norms that are unique to a particular system and thus point towards a different interpretive destination than what is mandated in other systems.²¹ Furthermore, in those areas where there is room for fashioning a new approach in the absence of a compelling precedent, even a dissimilar jurisdiction can provide room for acquainting the interpreter with competing constitutional visions.²² Vivian Curran has argued that contrasting one jurisdiction with another, even where the jurisdictions are dissimilar, can shed light on whether associations that one assumes to be necessary for democracy are correlated by logical necessity, or whether the association is historically contingent.²³

¹⁸ Botha, H., 'Comparative Law and Constitutional Adjudication: A South African Perspective', *Jahrbuch Des Öffentlichen Rechts Der Gegenwart*, Vol. 55, 2007, pp. 569–598.

¹⁹ *Ibidem* at pp. 578–579; Jackson, V.C. and Tushnet M., 'Introduction' in: Jackson, V.C. and Tushnet, M., (eds.), *Defining the Field of Comparative Constitutional Law*, Praeger, Westport/London, 2002, pp. xi–xxi, at pp. xii–xiii; Syrett, K., *Law, Legitimacy and the Rationing of Health Care: A Contextual and Comparative Perspective*, Cambridge University Press, Cambridge, 2007, at p. 12.

²⁰ Botha, *op.cit.*, note 18, at pp. 572–573.

²¹ *Ibidem* at p. 578.

²² Curran, V.C., 'Dealing in Difference: Comparative Law's Potential for Broadening Legal Perspectives', *American Journal of Comparative Law*, Vol. 46, No. 4, 1998, pp. 657–668, at p. 660.

²³ *Idem*.

In any event, comparisons between different juridical systems facilitate learning about the successes as well as failures of other jurisdictions in a given field. Drawing comparisons with the European human rights system provides the African human rights system with an opportunity and possibility to affirm what it has in common with other human rights systems, and to articulate that which sets it apart.²⁴ In this study, the comparisons between the African human rights system and its European counterpart proceed on these convergent and divergent aims of comparative discourse. Therefore, taking stock of the abortion jurisprudence of the European Court allows African human rights organs to discover not only what is similar or analogous and, thus a potentially persuasive authority that can be followed, but also what is dissimilar and, consequently, ought to be distinguished and not followed.

2. THE FACTS OF *A, B AND C*

A, B and C arose from an application brought by three women – A, B and C – against Ireland. All three applicants were resident in Ireland and had travelled to the United Kingdom to have abortions. Applicants A and B had a common complaint. It was that the legal restriction on abortion on the grounds of health and/or well-being under Irish law that principally arose from the provisions of Article 40.3.3 of the Irish Constitution, read with sections 58 and 59 of the Offences Against the Person Act of 1861, had the effect of denying the applicants abortions in the jurisdiction in which they lived. Consequently, they felt compelled to seek abortions in another jurisdiction so as to protect their health and/or well-being.

When applicant A discovered that she was pregnant, she already had four children. She was a single mother, unemployed and living in poverty. Furthermore, A was also recovering from alcoholism and depression as a result of which her four children had been taken into foster care. In the year preceding her fifth pregnancy, A had remained sober with a view to regaining custody of her children. She believed that bearing and raising another child posed a risk of post-natal depression as well as a recrudescence of her alcoholism. She travelled to the United Kingdom to have an abortion as she believed her circumstances did not meet the requirements of Irish law.

B became pregnant unintentionally. She was not ready to become a mother and rear a child. She travelled to the United Kingdom to have an abortion because she did not consider her circumstances to qualify for abortion under domestic law. Both A and B argued that the highly restrictive nature of Irish abortion law was an infringement of fundamental rights guaranteed to them by Articles 3 (right not to be subjected to inhuman treatment), 8 (right to privacy), 13 (right to effective remedy before a national authority) and 14 (right to non-discrimination) of the European Convention.

²⁴ Botha *op.cit.* note 18, at p. 598.

Article 40.3.3 of the Irish Constitution, which is the outcome of a series of amendments to the Irish Constitution that were adopted following referenda,²⁵ provides that:

The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.

This subsection shall not limit freedom to travel between the State and another State.

This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another State.²⁶

The Irish Supreme Court has interpreted Article 40.3.3 narrowly to mean that only a threat to the *life* of the pregnant woman can serve as a ground for abortion. It has concomitantly ruled out health and, by implication, social circumstances as possible grounds. In the leading case of *Attorney General v. X and Others*,²⁷ the Irish Supreme Court held that:

[...] the proper test to be applied is that if it is established as a matter of probability that there is a real and substantial risk to the life, *as distinct from the health*, of the mother, which can only be avoided by termination of her pregnancy, such termination is permissible, having regard to the true interpretation of Article [40.3.3] of the Constitution.²⁸

Apart from Article 40.3.3, sections 58 and 59 of the Irish Offences Against the Person Act of 1861 also constitute abortion law. The sections render procuring or administering an abortion or assisting with the procurement of an abortion a serious criminal offence for which the maximum penalty is imprisonment for life. Sections 58 and 59, which are a colonial bequest from England, are necessarily subordinate to Article 40.3.3 of the Irish Constitution. Prior to the adoption of Article 40.3.3, sections 58 and 59 were the main provisions regulating abortion. The sections now serve to supplement the Constitution by underlining the criminalisation of abortion. Furthermore, by implication, Article 40.3.3 also rules out the possibility of Irish courts following, as a persuasive authority, the expansive interpretation that was given by an English court to the counterparts of sections 58 and 59 in 1938 in *R v. Bourne*.²⁹ The *Bourne* case had the effect of judicially expanding the scope of the defence of

²⁵ *A, B and C v. Ireland*, *supra* note 1, at paras. 36 and 46–49.

²⁶ Art. 40.3.3 Constitution of the Republic of Ireland.

²⁷ *Attorney General v. X and Others* [1992] 1 IR 1.

²⁸ *Ibidem*, at para. 37 (emphasis added).

²⁹ *R v. Bourne*, 1 Kings Bench 687 (1938). In *Bourne*, Justice MacNaughten said that abortion under the provisions of the English Offences Against the Person Act (the equivalent of the Irish Offences Against the Person Act) was not unlawful if, in the opinion of the doctor, 'the probable consequence of continuance with the pregnancy will be to make the woman a physical or mental wreck'.

therapeutic exception beyond the narrow exception of immediately saving the life of the woman as to also include preserving the physical and/or mental well-being of the woman as grounds for abortion. It influenced the law not just in England but also in the English colonies, including Ireland, that were receptive to developments in English common law.³⁰

Applicant C's complaint, albeit different from that of A and B, was also against the backdrop of the restrictive provisions of domestic abortion law. C had been treated for cancer that had subsequently gone into remission. She discovered that she was pregnant at a time that she was undergoing follow-up tests for cancer. The tests were medically contradicted during pregnancy. C became fearful of the dangers that the pregnancy posed to her health and life. In the light of her medical history, she was uncertain about whether the pregnancy constituted a threat to her life. Although she consulted doctors, she was not able to obtain clear advice about whether she qualified for abortion under Irish law. To protect her health and life, she travelled to the United Kingdom to have an abortion.

C's complaint was that, because Irish abortion law lacked sufficient clarity, she was compelled to seek abortion in another jurisdiction. Principally, she argued that Article 40.3.3 of the Irish Constitution and the judicial interpretation thereof by the Irish Supreme Court had not been implemented by domestic legislation or some other official guidelines. Consequently, there was failure by the State to provide her with sufficient legal guidance about whether she was eligible for abortion under Irish law on the ground that her pregnancy taken together with a medical history of cancer constituted a threat to her life. Thus, she was left uncertain about her legal right to abortion under domestic law. Furthermore, C argued that, short of instituting constitutional litigation to ascertain whether she met the grounds for abortion under domestic law, the Irish legal framework did not have administrative procedures in place for determining eligibility for abortion in a manner that allowed her to exercise her fundamental rights in a timely manner. In addition to basing her complaint on Articles 3, 8, 13, and 14 (in common with applicants A and B), applicant C also alleged infringement of Article 2 (right to life) of the European Convention.

3. THE DECISION OF THE EUROPEAN COURT

The European Court principally determined the substantive rights relied upon by the applicants through the application of the right to privacy guaranteed by Article 8 of the European Convention. The Court followed its previous approach as well as that of the old European Commission in not only treating State interference with a woman's

³⁰ Cook, R.J. and Dickens, B.M., 'Abortion Laws in African Commonwealth Countries', *Journal of African Law*, Vol. 25, No. 2, 1981, pp. 60–79, at pp. 61–62; Cook, R.J. and Dickens, B.M., 'Human Rights Dynamics of Abortion Law Reform', *Human Rights Quarterly*, Vol. 25, No. 1, 2003, pp. 1–59, at p. 8.

decision to seek abortion as a *prima facie* infringement of rights that Article 8 implicitly contemplates, but also in treating Article 8 as the main provision pertinent to any claims for abortion under the Convention.³¹ Article 8 provides that:

- (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
- (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or economic well-being of the country, for the preservation of order or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

According to the Court, Article 8 is broad in its compass of private life as to include a woman's decision about whether to have a child.³² The Court proceeded on the basis that A had travelled to the United Kingdom to have an abortion on the grounds of health and well-being and, in the case of B, on the ground of well-being or for social reasons. The Court also proceeded on the basis that A and B had met the preliminary condition of admissibility in terms of exhausting domestic remedies. This was because in the light of Article 40.3.3 of the Irish Constitution and the judicial interpretation thereof, which rule out health and well-being short of a threat to the life of the pregnant woman as grounds for abortion, the applicants did not have to attempt to exhaust a domestic remedy as there was no effective domestic remedy to exhaust in the first place.³³ It would have been fruitless for A and B to first institute constitutional litigation before approaching the European Court.³⁴

The Court found that, *prima facie*, Irish abortion law adversely interfered with the right to privacy of A and B guaranteed by Article 8(1) as Irish law did not countenance abortion on the grounds of health or well-being. At the same, time, by a majority of eleven to six,³⁵ the Court ruled that it was a justifiable interference. According to the Court, the interference was in accordance with the law and was necessary in a democratic society for the achievement of a legitimate aim as contemplated by Article 8(2).³⁶ Furthermore, the Court said that, because abortion is underpinned by moral controversy and there was no consensus among Contracting Parties about when life begins and whether a foetus has fundamental rights, a broad margin of

³¹ On the application of Art. 8 in abortion cases, see for example: EComHR, *Brüggeman and Scheuten v. Germany*, 12 July 1977 (Appl.No. 6959/75), 10 DR 100 (1977); EComHR, *Paton v. United Kingdom*, 13 May 1980 (Appl.No. 27693/95) 19 DR 244 (1980); ECtHR, *Tysiá v. Poland*, 20 March 2007 (Appl. No. 5410/03).

³² *A, B and C v. Ireland*, *supra* note 1, at para. 212. References by the European Court to case law in this quote have been omitted.

³³ *Ibidem* at paras. 149–152.

³⁴ *Idem*.

³⁵ Judges Rozakis, Tulkens, Fura, Hirvelä, Maliverni and Poalelungi dissenting.

³⁶ *A, B and C v. Ireland*, *supra* note 1, at paras. 216–242.

appreciation would be accorded to the Irish State to determine the appropriate balance between the constitutional protection of unborn life under domestic law and the countervailing right to privacy of the applicants under Article 8.³⁷

In reaching its conclusion on the application of the margin of appreciation, the Court took into account that the protection of unborn life is something that engenders profound moral views among Irish people as evidenced in the protection of unborn life under Article 40.3.3 of the Irish Constitution and the referenda on abortion.³⁸ The Court impressed upon the desirability of allowing national authorities, rather than an international court, to have the final say in those areas where morality pulls in different and opposing directions. Recalling its earlier approach on how the Court should deal with issues that are underpinned by moral controversy, the Court said:

The Court recalls that it is not possible to find in the legal and social orders of the Contracting States a uniform European conception of morals, including on the question of when life begins. By reason of their “direct and continuous contact with the vital forces of their countries”, State authorities are in principle in a better position than the international judge to give an opinion on the “exact content of the requirements of morals” in their country, as well as on the necessity of a restriction intended to meet them [...].³⁹

The Court also took into account that while Article 40.3.3 prohibits abortion on the grounds of health and well-being, at the same time, women seeking abortion on these grounds can lawfully travel abroad to have abortions.⁴⁰ Furthermore, it observed that women seeking abortion can lawfully access appropriate information about abortion as well as access abortion-related health care and, in particular, post-abortion care.⁴¹

Under Irish domestic law, the right of women to travel to other jurisdictions to have abortions and the right to obtain information about abortion services that are lawfully available in other jurisdictions are primarily mandated by the Irish Constitution.⁴² The impetus for the constitutional guarantee to obtain or disseminate information about abortion services in other jurisdictions under the Irish Constitution came from the decision of the European Court in *Open Door Counselling and Dublin Well Women v. Ireland*.⁴³ In that case, the Court held that denial under Irish law of the freedom to disseminate information about abortion services lawfully available in

³⁷ *Ibidem* at paras. 232–238.

³⁸ *Ibidem* at para. 222.

³⁹ *Ibidem* at para. 233. The European Court drew from its earlier pronouncements in the following cases: ECtHR, *Handyside v. United Kingdom*, 7 December 1976 (Appl.No. 5493/72), at para. 48; ECtHR, *Müller and Others v. Switzerland*, 24 May 1988 (Appl.No. 10757/84), at para. 35; ECtHR, *Open Door Counselling and Dublin Well Women v. Ireland*, 29 October 1992 (Appl.No. 14234/88), at paras. 68; and ECtHR, *Vo v. France*, 8 July 2004 (Appl.No. 53924/00), at para. 82.

⁴⁰ *A, B and C v. Ireland*, *supra* note 1, at para. 239.

⁴¹ *Idem*.

⁴² Art. 40.3.3 Constitution of the Republic of Ireland.

⁴³ *Open Door Counselling and Dublin Well Women v. Ireland*, *supra* note 39.

other jurisdictions constituted an infringement of the freedom to impart or receive information under Article 10 of the European Convention.

Regarding domestic provision of abortion care, and in particular post-abortion care, the European Court noted that Ireland had established the Crisis Pregnancy Agency (CPA) through a statutory instrument.⁴⁴ The main function of the CPA is to address and manage crises in pregnancy, including, *inter alia*, providing counselling and medical services after abortion irrespective of whether the abortion was carried out in accordance with Irish law.⁴⁵ Under the CPA guidelines, doctors are reminded that they cannot refuse to offer care on the basis of moral disapproval and that in those instances where they have a conscientious objection, they should provide the woman with the names of doctors that can provide care.⁴⁶

In respect of applicant C's complaint, the European Court held that an unjustifiable breach of Article 8 had been established on account of a failure by Ireland to discharge its implicit positive obligations under Article 8 of the European Convention. In the opinion of the Court, the uncertainty generated by the lack of legislative implementation of Article 40.3.3 of the Irish Constitution, especially the lack of effective and accessible procedures for establishing a right to abortion, fell short of discharging the positive obligation Ireland has under Article 8 so to ensure that a right that is guaranteed in theory is, in fact, enjoyed in practice.⁴⁷ Following its approach in previous cases, the Court said that although Article 8 of the Convention primarily imposes a negative obligation by protecting individuals from arbitrary interference by the State, it also imposes positive obligations on the State to ensure the effective respect of a right to privacy, including, in this instance, a right to decide about abortion.⁴⁸

The Court was of the opinion that it was not expected of C to first institute constitutional litigation in order to vindicate her right to abortion as part of exhausting local remedies.⁴⁹ Furthermore, while it was for the State to establish the most appropriate means for complying with its positive obligations as part of its margin of appreciation, the Court did not regard the ordinary process of medical consultation to determine whether an abortion may be lawfully performed on the ground of risk to the woman's health as sufficient or effective means of discharging its obligations.⁵⁰ However, the Court found applicant C's claim that her right to

⁴⁴ Crisis Pregnancy Agency (Establishment) Order 2001 (S.I. No. 446 of 2001).

⁴⁵ *A, B and C v. Ireland*, *supra* note 1, at para. 77.

⁴⁶ *Ibidem* at para. 80.

⁴⁷ *Ibidem* at para. 264.

⁴⁸ *Ibidem* at paras. 244–246. Previous cases where the European Court has held that Art. 8 of the Convention imposes positive obligations, include: ECtHR, *Airey v. Ireland*, 9 October 1979 (Appl. No. 6289/73), at para. 33; ECtHR, *McGinley and Egan v. United Kingdom* 9 June 1998, (Appl.No. 10/1997/794/995–996), at para. 102; ECtHR, *Roche v. United Kingdom* 25 October 2005 (Appl. No. 32555/96), at para. 162; *Tysiac v. Poland*, *supra* note 31, at para. 110. *Tysiac v. Poland* directly addresses abortion on this point and is discussed in the next section.

⁴⁹ *A, B and C v. Ireland*, *supra* note 1, at para. 258.

⁵⁰ *Ibidem* at para. 255.

life under Article 2 of the Convention had been breached on account of failure to implement Article 40.3.3 of the Irish Constitution to be manifestly ill-founded and, thus, inadmissible principally for the reason that Irish law did not prevent her from travelling abroad to have an abortion.⁵¹

The Court rejected the complaint by all three applicants that the restrictive nature of Irish abortion law and its effects of compelling the applicants to travel to another jurisdiction to have abortions constituted degrading treatment contrary to Article 3 of the Convention. On the one hand, it conceded that travelling to other jurisdictions was not only physically, psychologically and financially burdensome, but it was also stigmatising.⁵² On the other hand, the Court did not consider the attendant burdens and the stigma severe enough as to meet the threshold required by Article 3.⁵³ In the words of the Court, the facts alleged by the applicants 'did not disclose a level of severity falling within the scope of Article 3 of the Convention'.⁵⁴ It concluded that the complaint under Article 3 was manifestly ill-founded.⁵⁵

In respect of reliance upon Article 13 of the Convention by all the applicants, the Court followed its practice of treating a complaint based on the right to an effective remedy before a national authority as essentially an auxiliary complaint which underscores the State's duty to respect, protect and fulfil human rights at the domestic level that does not give rise to a stand-alone claim but, instead, stands or falls with some other more substantive ground(s) relied upon by an applicant.⁵⁶ Furthermore, regarding the claim by all three applicants that the restrictive nature of Irish abortion law was an instance of sex discrimination contrary to Article 14 of the European Convention, the Court refrained from considering its merits for the reason that the applicant's claims could be determined under Article 8 and it was not necessary to examine a separate claim under Article 14.⁵⁷ In this connection as well, the Court followed its established practice of treating a claim under Article 14 as an ancillary or accessory claim that has no independent existence but is dependent on the prior implication of another fundamental right under the Convention.⁵⁸ The practice of the

⁵¹ *Ibidem* at para. 158.

⁵² *Ibidem* at paras. 126–128 and 163.

⁵³ *Ibidem* at para. 164.

⁵⁴ *Idem*.

⁵⁵ *Ibidem* at para. 165.

⁵⁶ See for example *Tysiac v. Poland*, *supra* note 31, at para. 135; Boerefijn, I., 'International Human Rights in National Law', in: Krause, C. and Scheinin, M. (eds.), *International Protection of Human Rights: A Textbook*, Abo Akademi Institute for Human Rights, Turku, 2009, pp. 577–599, at p. 584.

⁵⁷ *A, B and C v. Ireland*, *supra* note 1, at para. 270.

⁵⁸ *Open Door Counselling and Dublin Well Woman v. Ireland*, *supra* note 39, at para. 83; *Tysiac v. Poland*, *supra* note. 31, at para. 144; ECtHR, *Haas v. The Netherlands*, 13 January 2004 (App.No. 36983/97), at para. 41; Besson, S., 'Gender Discrimination Under EU and ECHR Law: Never Shall the Twain Meet?', *Human Rights Law Review*, Vol. 8, No. 4, 2008, pp. 647–683, at pp. 654–655; Van Dijk et al, *op.cit.*, note 10, at pp. 1028–1034; Ovey and White, *op.cit.*, note 10, at p. 413; Harris et al, *op.cit.*, note 10, at p. 580.

Court is that once it has found a violation of an article that Article 14 is considered subsidiary to, it desists from substantively enquiring into Article 14.

4. LESSONS FOR AFRICAN CHARTER ORGANS

4.1. RENDERING ABORTION LAWS TRANSPARENT AND ABORTION DECISIONS SUBJECT TO ADMINISTRATIVE REVIEW

At a more general level, *A, B and C* maintains that the fundamental rights that are guaranteed under an international human rights instrument require effective implementation if they are to confer on individuals something more tangible than mere paper rights. *A, B and C* is instructive about the importance of not thwarting the realisation of fundamental rights guaranteed under a regional human rights instrument through domestic laws that lack transparency and administrative justice. The protection of abortion rights in provisions of domestic constitutions, legislation or some other formal framework is of little avail if, at the same time, the provisions do not contain a reasonably clear statement about which rights are protected as to leave women who are seeking abortions or health care professionals who are involved in the day-to-day implementation of abortion services quite unclear about their rights and obligations.

More pertinently, this case tells us that the human rights adequacy of domestic abortion laws can be tested not merely through interrogating the substantive grounds for abortion, but also through interrogating the procedural content of abortion law. Where national authorities rely on criminalisation as the main instrument for regulating conduct that impacts adversely on a fundamental right, as has been the overwhelming global experience with abortion, the regulatory measure must meet two main interrelated procedural requirements. Firstly, its formulation must be reasonably clear, and secondly, there must be an accessible procedure for reviewing timely decisions about eligibility for abortion. Unless the legal grounds for abortion are stipulated with sufficient clarity and, in addition, there is an accessible administrative procedure, short of litigation, for determining eligibility in cases of doubt or disagreement, then the chilling effect of the criminalisation of abortion tends to thwart the exercise of a right to abortion even where abortion is permitted under domestic law.

The holding by the European Court that, in respect of applicant C, Irish abortion law was in breach of positive obligations imposed by Article 8 of the European Convention follows its decision in *Tysiac v. Poland*.⁵⁹ In that case, against the backdrop of domestic law that criminalised abortion and yet simultaneously provided exceptions to the general rule, the European Court held that failure by the Polish State to provide

⁵⁹ *Supra* note 31.

an accessible administrative mechanism for determining eligibility for abortion under domestic law, including a procedure for deciding where there is disagreement between doctors and women or between doctors about whether a ground for abortion has been met, constituted a breach of the positive obligation under Article 8 of the Convention. Addressing the importance of formulating abortion law clearly as well as providing, as a safeguard, an accessible administrative mechanism for determining eligibility for abortion in cases of doubt and disagreement, the Court in *Tysiack* said:

A need for such safeguards becomes all the more relevant in a situation where a disagreement arises as to whether the preconditions for a legal abortion are satisfied in a given case, either between the pregnant woman and her doctors, or between the doctors themselves. In the Court's view, in such situations, the applicable legal provisions must, first and foremost, ensure clarity of the pregnant woman's legal position.⁶⁰

Underlining the importance of formulating abortion law that is clear, the Court stated:

[...] the legal prohibition on abortion, taken together with the risk of incurring criminal responsibility [...] can well have a chilling effect on doctors when deciding whether the requirements of legal abortion are met in an individual case. The provisions regulating the availability of lawful abortion should be formulated in such a way as to alleviate this effect. Once the legislature decides to allow abortion, it must not structure its legal framework in a way which would limit real possibilities to obtain it.⁶¹

Thus, the finding in *A, B and C* by the European Court that there is a duty to formulate abortion laws clearly is not new but a reiteration of the finding it made in *Tysiack*. The finding comes out of a recognition by the Court that whenever a domestic State chooses to regulate abortion through criminalisation, it has to bear in mind that criminalisation exerts a deterrent effect to the point of frustrating not just the exercise of rights by women to access services that they are otherwise entitled to, but also the discharge by health care providers of the duty to provide abortion services within the ambit permitted by domestic law.⁶² Even where abortion is restricted, rather than totally proscribed, in the absence of clear guidelines, the cumulative effect of the criminalisation and its historical stigmatisation operate to deter women from seeking lawful abortions. In equal measure, fear of prosecution and professional disciplinary measures incline providers of abortion services towards erring on the cautious side and treating abortion as illegal rather than merely restricted even if there are no actual prosecutions or there is no invocation of disciplinary sanctions against health care professionals.

⁶⁰ *Ibidem* at para. 116.

⁶¹ *Idem*.

⁶² Berer, M., 'Criminalisation, Sexual and Reproductive Rights, Public Health and Justice', *Reproductive Health Matters*, Vol. 17, No. 34, 2007, pp. 4–9.

It is submitted that the State's duty to provide a mechanism for administrative review of decisions about abortion should be understood as an integral, rather than a separate, requirement of transparency. In *Tysiac*, much more than in *A, B and C* where the choice of an appropriate mechanism for review was relegated almost entirely to the State's discretion, the Court was quite emphatic and prescriptive about some of the essential characteristics of an administrative mechanism that would meet the procedural requirements of Article 8 of the Convention. At a minimum, the woman should be afforded an opportunity to be heard in person. Her views must be considered by a competent body.⁶³ Where abortion is denied, written reasons must be given.⁶⁴ Furthermore, the review procedures must be sensitive to time being of the essence in abortion so that women are able to know about the outcome in a timely manner, and are not, therefore, placed into a situation whereby they must risk their health and lives by holding out for a late abortion as the remaining option.⁶⁵

A, B and C is instructive for the African region not least because, as a consequence of inheriting readymade colonial laws which regulate abortion through the crime and punishment model, many African domestic systems fail to provide guidance on how the law applies in practice or provide any administrative procedure for timely review of decisions that refuse abortion requests.⁶⁶ Historically, African jurisdictions have, on the whole, regulated abortion through penal codes and legislation that in broad language or in a terse manner contain statements that proscribe abortion and prescribe attendant penalties subject to narrow express or implied exceptions.⁶⁷ Furthermore, historically, saving the life of the pregnant woman has been the main exception in tandem with the early development of abortion laws in the colonising countries.⁶⁸ Though in the last decade or so an increasing number of African jurisdictions have liberalised abortion through reforms that broaden the grounds of abortion,⁶⁹ there has been a general failure to complement the reforms with guidelines that render abortion laws clear to women seeking abortion and to providers of abortion services.

Should the opportunity to adjudicate or provide an advisory opinion on abortion rights arise for the African Court, a persuasive interpretive lesson for the Court as well as for advocates of abortion rights or women's rights in general, is that where abortion is criminalised, as is the predominant norm in the African region, there is a glaring need for requiring domestic abortion laws to meet the requirements of transparency. It is submitted that part of determining whether domestic abortion

⁶³ *Tysiac v. Poland*, *supra* note 31, at para. 117.

⁶⁴ *Idem*.

⁶⁵ *Ibidem* at para. 118.

⁶⁶ Ngwena, *loc. cit.*, note 11, at pp. 828–832.

⁶⁷ *Idem*.

⁶⁸ *Idem*.

⁶⁹ Brookman-Amisshah, E. and Banda Moyo, J., 'Abortion Law Reform in Sub-Saharan Africa: No Turning Back', *Reproductive Health Matters*, Vol. 12, No. 24, 2004, pp. 227–234; Boland, R. and Katzive, L., 'Developments in Laws on Induced Abortion 1998–2007', *International Family Planning Perspectives*, Vol. 34, No. 3, 2008, pp. 110–120.

law is in compliance with the State obligations under the African Charter-based instruments lies in determining whether the law is sufficiently clear to women seeking abortion and to providers of abortion services. Furthermore, it is also relevant to determine whether the law is supported by an administrative mechanism that allows women to challenge decisions that refuse abortion expeditiously.

Though the African Charter does not contain an explicit guarantee of the right to privacy, which has been the primary, if not exclusive, route through which the European Court has vindicated abortion rights, the Charter, nonetheless, contains provisions that can equally be implicitly construed as supporting abortion rights as unenumerated fundamental rights.⁷⁰ Among such provisions of the African Charter are the rights to equality and non-discrimination,⁷¹ life,⁷² human dignity and freedom from degrading treatment,⁷³ and health.⁷⁴ Monitoring bodies under United Nations human rights treaties have, from time to time, treated the counterparts of these rights as supporting rights to abortion as fundamental human rights and as incidences of the broader rights that are explicitly protected.⁷⁵ Furthermore, as highlighted earlier, the effect of Article 14(2)(c) of the Women's Protocol, which explicitly guarantees rights to abortion, is to provide the African region with an additional and more direct source of abortion rights but only for communications emanating from jurisdictions that have ratified the Protocol.⁷⁶ Whether a communication seeking to vindicate a right to abortion is based on an unenumerated right or on an explicit guarantee in Article 14 of the Protocol, the *A, B and C* case can serve as a persuasive authority. It stands for the proposition that it would be insufficient for a domestic State seeking to persuade the Court that it has complied with its treaty obligations to merely say that it has domestic provisions in the form of a constitution and/or legislation that regulate abortion. If the

⁷⁰ Ngwena, *loc.cit.*, note 11, at pp. 811–812.

⁷¹ Arts. 3 and 18 African Charter.

⁷² *Ibidem*, Art. 4.

⁷³ *Ibidem*, Art. 5.

⁷⁴ *Ibidem*, Art. 16.

⁷⁵ See especially: *K.L. v. Peru*, 22 November 2005, Communication No. 1153/2003, UN Doc. CCPR/C/85/D/1153/2003 where the Human Rights Committee held that Peruvian law that denied access to legal abortion to an adolescent girl carrying a foetus suffering from anencephaly constituted violations of her rights under Arts. 2, 7, 17 and 24 of the International Covenant on Civil and Political Rights (ICCPR); *L.C. v. Peru*, 4 November 2011, Communication No. 22/2009, UN Doc. CEDAW/C/50/D/2009, where the Committee on the Elimination of Discrimination against Women found that Peruvian law that did not provide access to abortion to an adolescent girl who as a result of becoming pregnant had attempted suicide and broken her spine constituted violations of Arts. 2, 3, 5 and 12 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); *L.M.R. v. Argentina*, 28 April 2011, Communication No. 1608/2007, UN Doc. CCPR/C/101/D/168/2007, where the Human Rights Committee found that Argentinian law and practice which denied abortion to a mentally disabled woman constituted a violation of Arts. 2(3), 7, and 17 ICCPR.

⁷⁶ The Women's Protocol has been ratified by 32 countries: African Union 'List of Countries Which have Signed, Ratified/Acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa', *available at*: au.int/en/sites/default/files/RightsOf%20of%20Women_0.pdf.

domestic provisions leave many questions unanswered about entitlement to abortion, or if there is no accessible administrative mechanism for allowing women to know how a decision to refuse abortion has been made and to challenge the decision, then the State will be in breach of its obligations to render any abortion rights transparent.

Rendering African abortion laws clear and subject to review procedures that do not entail instituting formal litigation is particularly important given the endemic nature of unsafe, illegal abortions in the African region and the relative inaccessibility of constitutional litigation for women seeking to vindicate abortion rights. Abortion regimes on the African continent must be cognisant of the fact that women seeking abortions, especially those that are poor or are still of minority age, are very vulnerable to having recourse to unsafe, illegal abortions and that delays in accessing legal abortions are an incentive for recourse to unsafe abortion. Time is of the essence when making decisions about abortion. The European Court highlighted this point in *Tysiá* when it said that:

[...] the Court observes that the very nature of the issues involved in decisions to terminate a pregnancy is such that the time factor is of critical importance. The procedures should therefore ensure that such decisions are timely so as to limit or prevent damage to a woman's health which might be occasioned by a late abortion. Procedures in which decisions concerning the availability of lawful abortion are reviewed *post factum* cannot fulfil such a function.⁷⁷

To expect women to become involved in the considerable expense as well as the often lengthy process of litigation to determine whether they qualify for an abortion defeats the point about the desirability of access to early, safe abortions. In *A, B and C*, the Court also explained the importance of an accessible administrative procedure on the basis of the undesirability of using courts as administrative chambers to make case-by-case determinations of eligibility for abortion. Implicitly appealing to a separation of powers between the judicial role of the courts and the legislative and administrative roles of those that pass and administer abortion laws respectively, the Court stated:

The Court does not consider that the constitutional courts are the appropriate fora for the primary determination as to whether a woman qualifies for an abortion which is lawfully available in a State. In particular, this process would amount to requiring constitutional courts to set down on a case by case basis the legal criteria by which the relevant risk to a woman's life would be measured, and further, to resolve evidence, largely of a medical nature, whether a woman had established that qualifying risk.⁷⁸

The persistence of unsafe, illegal abortions in many African jurisdictions, including those that have liberalised abortion law, is partly explicable on the absence of clear guidelines about the legal grounds for abortion and the belief among women seeking

⁷⁷ *Tysiá v. Poland*, *supra* note 31, at para. 118 (emphasis added).

⁷⁸ *A, B and C v. Ireland*, *supra* note 1, at para. 258.

abortion and health care providers that abortion is illegal save in the narrowest of circumstances of saving the pregnant woman's life. Kenya provides a useful case study not only about the lack of transparency in African abortion laws, but also on the constitutionalisation of abortion that has the potential to replicate the flaw that was found in Irish Law by the European Court in *A, B and C* unless Kenyan authorities take pre-emptive procedural steps.

4.1.1. Kenyan abortion law

Until recently, when Kenya adopted a new constitution that contains specific abortion provisions,⁷⁹ abortion in the colonial and post-colonial periods had been regulated primarily by a combination of sections 158, 159 and 240 of the Kenyan Penal Code. Sections 158 and 159 are analogous to sections 58 and 59 of the English Offences Against the Person Act of 1861 that was described earlier as a colonial bequest to Ireland in Section 2 (above). Sections 158 and 159 proscribe 'unlawful' procurement of abortion and prescribe the punishments. Section 240, on the other hand, indicates when abortion is permitted. Section 240, which should now be read subject to Article 26 of the Kenyan Constitution, is typical of abortion law that is both opaque and lacking in implementation as to leave women seeking abortion as well as health care providers confused about the legality of abortion. Section 240 provides that:

A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for his benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time and to all circumstances of the case.

Section 240 was implicitly intended to be a gloss on sections 158 and 159 and to reflect the development of abortion in England, including the liberalisation of abortion law in the *Bourne* case.⁸⁰ However, Kenyan authorities did not take any steps to clarify section 240 so as to provide guidance about the circumstances that constitute 'preservation of the mother's life'. Even more starkly, though during the colonial era the decision of the East African Court of Appeal in 1959 in *Mehar Singh Bansel v R*⁸¹ had the effect of receiving into Kenyan common law the judicially expanded defence of therapeutic benefit that was laid down under English common law in *Bourne*, section 240 remained the only visible instrument for regulating abortion. Furthermore, Kenya did not put in place any administrative procedure for determining entitlement to abortion. As a consequence, for women seeking abortion, section 240 of the Kenyan Penal Code has served not so much to facilitate access, but, instead, to foster a general climate of the illegality of abortion. It has created a climate in which the

⁷⁹ Constitution of Kenya of 2010.

⁸⁰ *R v. Bourne*, *supra* note 29.

⁸¹ *Mehar Singh Bansel v. R.* (1959) East African Law Reports 813.

public and women seeking abortion generally believe that abortion is illegal in all circumstances.⁸² Health care practitioners are deterred from providing abortions that they believe are lawful for fear of prosecution not least because many providers of abortion services have experienced police harassment.⁸³

In a country with as high an incidence of unsafe, illegal abortions as Kenya, it would not be unreasonable to surmise that the climate of uncertainty fostered by section 240 and its chilling effects have been catalysts for the persistence of unsafe abortions. It is estimated that each year 300,000 women resort to unsafe, illegal abortions and that 30 percent of Kenyan maternal mortality, which is 560 in every 100,000 live births, is attributable to unsafe abortion.⁸⁴ Recent constitutional reforms are unlikely to impact positively unless they are complemented by effective implementation.

Kenya adopted a new Constitution in 2010. Article 26 of the new Constitution contains provisions that recognise abortion rights. However, unless Article 26 is implemented to provide guidance to women and health care providers, the position on certainty about abortion grounds will hardly improve. Indeed, the position may become even more clouded and more vulnerable to manipulation by health care providers opposed to abortion, not least because Article 26 juxtaposes recognition of a right to abortion with recognition of a foetal right to life. Article 26 provides that:

- (1) Every person has the right to life.
- (2) The life of a person begins at conception.
- (3) A person shall not be deprived of life intentionally, except to the extent authorized by this Constitution or other written law.
- (4) Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency medical treatment, or the life or health of the mother is in danger, or if permitted by any other written law.

Explicitly pitting the right to life of a foetus against the abortion rights of the woman in constitutional provisions is tantamount to contradictory reform. It can be a very deliberate and powerful way of sending mixed signals about the legality of abortion and substantively undermining any given abortion rights as the Irish Constitution demonstrates. The constitutionalisation of foetal rights in the Kenyan Constitution is not happenstance but, instead, a way of pacifying constituencies, especially the Catholic Church, that campaigned against liberalisation of abortion during the drafting of the Constitution.⁸⁵

⁸² Guttmacher Institute, 'Unsafe Abortion in Kenya', Guttmacher Institute, New York, 2008, at p. 1; Center for Reproductive Rights, *In Harm's Way: Impact of Kenya's Restrictive Abortion Law*, Center for Reproductive Rights, New York, 2010, at pp. 16–17.

⁸³ Center for Reproductive Rights, *ibidem*, at pp. 23–26.

⁸⁴ Guttmacher Institute, *loc.cit.*, note 82, at p. 3.

⁸⁵ 'Catholic Bishops Warn Kenyan Constitution Would Allow Abortion on Demand', available at: www.catholicnewsagency.com/news/us-backed-kenyan-constitution-would-allow-abortion-on-demand-catholic-bishops-warn/.

Though Article 26 of the Kenyan Constitution is far more generous than Article 40.3.3 of the Irish Constitution and the interpretation thereof by the Irish Supreme Court in that it clearly recognises the woman's health as a ground for abortion, nonetheless, it cannot be overlooked that given judges and/or health providers who are ideologically opposed to abortion, Article 26 is amenable to a restrictive interpretation. By saying that 'Life begins at conception' and that 'Abortion is not permitted unless [...]', Article 26 can be understood as an attempt to equate the pregnant woman's constitutional rights with those of a foetus. Also, by saying that 'Abortion is not permitted unless [...]', Article 26 effectively constitutionalises the historical legitimacy of criminalising abortion as the normative framework for regulating abortion such that permitting abortion is the exception to the rule. Article 26 at least raises the question whether the health or the life of the foetus can be grounds for abortion, and if so, in what precise circumstances.

The implicit tenor of Article 26 of the Kenyan Constitution, it would seem, is not to effect radical reform of abortion law or promote women's agency within a paradigm that recognises reproductive health as a human right but, instead, to effect an incremental reform through the route of medicalisation of abortion grounds. Over and above cordoning foetal rights in the most conspicuous manner and implicitly ruling out abortion on request, it is significant that Article 26 does not explicitly recognise socio-economic reasons as a ground for abortion. Eligibility for abortion under Article 26 is contingent upon meeting certain medicalised grounds with health care professionals recognised as the gatekeepers to access to abortion rather than the women seeking abortion. At a health care level, it is health care professionals who will determine whether the constitutionally permitted grounds are met.

The availability of criteria of what constitutes a danger to the life or health of the pregnant woman is, therefore, crucial when determining whether Article 26 effectively broadens the grounds for abortion under Kenyan law as to substantially improve on the abortion regime under section 240 of the Kenyan Penal Code which was generally understood as only recognising saving the life of the pregnant woman as the permitted ground. It is particularly crucial to determine what constitutes 'health' and how danger to the woman's health is to be assessed. Will health be understood in a narrow medical sense as to require physical pathology, in which case the health ground will not be as enabling as first appears? Or, will health be understood more expansively and more holistically in accordance with the expectations of the preamble to the Constitution of the World Health Organisation which defines health as not merely the absence of disease or infirmity but instead as a state of complete physical, mental and social well-being?⁸⁶ Will a distinction be drawn between physical and mental health and will mental

⁸⁶ Constitution of the World Health Organisation, adopted by the International Health Conference held in New York from 19 to 22 July 1946, signed by representatives of 61 states, entered into force on 7 April 1948, *available at*: www.apps.who.int/gb/bd/PDF/bd47/EN/constitution-en.pdf. A holistic definition of health which approximates that of the Constitution of the World Health Organisation would be more consistent with the 'right to the highest attainable standard of health, which includes

health require certification by psychiatrists? What about foetal health or life as grounds for abortion? All these are questions that have the potential to render the abortion provisions of Article 26 of the Kenyan Constitution quite uncertain and susceptible to contention, especially against the backdrop of the constitutionalisation of foetal rights.

The need for transparency in abortion laws is not something that only the European Court has highlighted. In 2004, in an application for judicial review, the Court of Appeal of Northern Ireland held that the Department of Health, Social Services and Public Safety of Northern Ireland had failed in its statutory duty to provide health services when the regulation of abortion under the Offences Against the Person Act of 1861 left women seeking abortion as well as providers of abortion services uncertain about the legality of abortion and without access to services they were otherwise entitled to.⁸⁷ On account of the inaccessibility of abortion services in Northern Ireland, each year thousands of women were compelled to travel to the British mainland to have abortions at great personal and financial cost. According to the Court of Appeal, injustice was also visited on women who were denied post-abortion care after returning from the mainland.

Where abortion law raises or is apt to raise many unanswered questions about the lawful grounds for abortion, the way to eradicate or remove uncertainty, as Rebecca Cook and Susannah Howard have suggested, is to provide illustrations of the practical implementation of each of the permitted grounds for abortion, but without needing to be exhaustive.⁸⁸ For example, where the preservation of life is a permitted ground, then providing examples of the types of conditions or illnesses that meet the life ground is essential,⁸⁹ and the need is even greater if *life* is the only permissible ground as the case of *A, B and C* highlights. Because health can be understood both narrowly as well as expansively, where it is a permitted ground of abortion, it is vitally important to give illustrations of its application and the criteria for determining risk to the health of the woman. Grounds such as rape and incest will need clarification by way of whether they will require the involvement of third parties such as law enforcement agencies or findings by other courts before the woman can meet the ground or whether it is sufficient for the woman's claim to be believed.⁹⁰

Cook and Howard have highlighted that transparency is not just about clarifying grounds for abortion but also other attendant aspects, including the competence of adolescents to access abortion.⁹¹ Even patently liberal abortion law can lend itself to

the right to health care services, including reproductive health care' that is guaranteed by Art. 43(1) (a) of the Constitution of Kenya.

⁸⁷ *Family Planning Association of Northern Ireland v. Minister of Health, Social Services and Public Safety* [2005] Northern Ireland Law Reports 188 (Civ); Cook, R.J. and Howard, S., 'Accommodating Women's Differences Under the Women's Anti-Discrimination Convention', *Emory Law Journal*, Vol. 56, No. 4, 2007, pp. 1039–1091, at pp. 1066–1068.

⁸⁸ *Ibidem* at p. 1069.

⁸⁹ *Idem*.

⁹⁰ *Idem*.

⁹¹ *Ibidem* at pp. 1069–1070.

arbitrary and unfair application and become dysfunctional if it overlooks the provision of clear guidance on adolescent access. The importance of clarifying competence of adolescents to consent to abortion procedures stems from their historical vulnerability to age discrimination in the provision of sexual and reproductive health services that assumes a lack of capacity to consent autonomously.⁹²

4.2. ABORTION RIGHTS AS HIGHLY ATTENUATED RESIDUAL RIGHTS IN THE GIFT OF NATIONAL AUTHORITIES

Notwithstanding the progressive implications of *A, B and C* in terms of rendering abortion law and practice responsive to the information needs of women seeking abortion through the States' duty to respect, protect and fulfil procedural rights, the development of regional human rights standards cannot be adequately achieved without attending to the substantive aspects of abortion. In the final analysis, the European Court only succeeded, as it had done before, in finding abortion as a negative, residual and highly vulnerable human right.⁹³ It did not confront, head on, the main human rights problem with the historical criminalisation of abortion. Indeed, the Court expediently avoided substantively engaging with the historical criminalisation of abortion. Cook and Howard have aptly summarised the main problem with the historical regulation of abortion by States as:

[...] societies' inability to accommodate women's biological differences and to redress the social discrimination women face based on those differences. That is, states have not adequately addressed how differences in women's physiology have been used over centuries to justify discrimination against women, neglect of health services that only women need, and discriminatory state enforcement of traditional roles for women as mothers and self-sacrificing caregivers. Accommodating differences in the abortion context requires learning how to reframe law and policies to construct an inclusive standard of equality that values sex and gender distinctions.⁹⁴

Merely guaranteeing procedural justice does nothing to subject to a human rights lens the substantive values and philosophies that underpin domestic abortion laws to see whether the values and the philosophies accommodate women. Valuable as they are, if procedural guarantees become the sole or main instrument through which a supranational court supervises domestic regulation of abortion in order to guarantee common human rights standards, then, as *A, B and C* itself shows, they are

⁹² Cook, R.J. and Dickens, B.M., 'Recognising Adolescents' "Evolving Capacities" to Exercise Choice in Reproductive Health Care', *International Journal of Gynecology & Obstetrics*, Vol. 70, No. 1, 2000, pp. 13–21.

⁹³ Ngwena, *loc.cit.*, note 11, at pp. 798–808; Wicks, E., 'A, B, C v. Ireland: Abortion Law Under the European Convention on Human Rights', *Human Rights Law Review*, Vol. 11, No. 3, 2011, pp. 556–566, at p. 565.

⁹⁴ Cook and Howard, *loc.cit.*, note 80, at p. 1040.

sure to miss out on accommodating women, and redressing the social discrimination experienced by women on account of biology and gender.⁹⁵

Thus, procedural guarantees are important ancillary aids, but not sufficient substantive tools for situating abortion as a reproductive right that accommodates women. On their own, procedural guarantees only manage to yield abortion rights that are at the discretion of national authorities with the exception of where the pregnancy constitutes a substantial threat to the *life* of the pregnant woman. In short, *A, B and C* falls well short of treating abortion as a positive substantive fundamental right, and, instead, treats it as a residual right that confers rights that happen to survive State regulation of abortion. It is a right that remains once national authorities have ring-fenced proscriptions against abortion. The abortion right that was guaranteed to C by the European Court is what survived once Ireland had ring-fenced foetal rights through the mechanism of the foetal constitutional guarantee in Article 40.3.3 of its Constitution. While conceding that the right to privacy in Article 8 of the European Convention applies to a woman's decision whether to terminate a pregnancy, at the same time, the Court gave the right quite short berth, and, certainly, nothing comparable to the relatively generous berth given to the right to privacy by the US Supreme Court in *Roe v. Wade*.⁹⁶

As alluded to earlier, a claim under Article 14 of the European Convention is treated as an accessory claim by the European Court.⁹⁷ The outcome, though, is that this practice has the effect of shielding the European Court from having to respond to substantive equality arguments. In *A, B and C*, as described earlier, the Court expressed its reluctance to adjudicate abortion rights using the right to non-discrimination in preference to the right to privacy. The Court found it unnecessary to determine the complaints using Article 14 as article 8 was sufficient. It was as if whether the applicants relied on Article 8 or Article 14 would, in the end, make no difference to the outcome of the Court's determination. In a way, this is true given the unduly deferential approach the Court adopted when giving the Irish State a very wide margin of appreciation. It is clear that it would not have mattered as to which fundamental right the applicants were relying upon when it came to determining the question of abortion as a substantive issue. The Court simply deferred this question to national authorities.

With equality out of the picture, the Court absolved itself from having to scrutinise the implications of the protection given to a foetus by the constitutionalisation of the foetal right to life under the Irish Constitution and the criminalisation of abortion under the Irish Offences Against the Person Act to see whether the protection strikes

⁹⁵ *Idem*.

⁹⁶ *Roe v. Wade* 410 US 113 (1973); Wicks, *loc.cit.*, note 86, at pp. 560–561.

⁹⁷ Note that the position is different for the Contracting Parties that have ratified Protocol 12 to the European Convention on Human Rights. Art. 1 of Protocol 12 introduced in 2005 an independent equality and non-discrimination right. The majority of Contracting Parties, including Ireland, have yet to ratify Protocol 12: Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted 4 November 2000, ETS No. 177.

the appropriate balance in an open democracy where women ought to enjoy equal citizenship. The Court did not have to consider whether, apart from being motivated by reverence and concerns for the welfare of unborn life, the Constitution and the Act were, at the same time, statements of normative judgment about the role of women in Irish society and, thus, ought to be implicated as incidences of unfair discrimination.⁹⁸

Reva Siegel emphasises the fact that the act of carrying a pregnancy to term and bearing a child is not simply a physiological process that can only take place in a woman's body, but is, on the contrary, also a social process that occurs in, and is regulated by, cultural norms.⁹⁹ Using an instrument of public power to compel motherhood, as the Irish Constitution does, except when it is probable that a woman might not survive the pregnancy, is not merely about protecting foetal life, but is also about gender scripting.¹⁰⁰ It is, according to Rebecca Cook and Simone Cusack, a normative scripting of a social role that stems from a generalised patriarchal view that all women should become mothers regardless of their individual reproductive health, emotional circumstances or priorities.¹⁰¹

Compelling women to become mothers against their will is a harmful rather than benevolent stereotype. It operates to deny women agency and to create gender hierarchies.¹⁰² When women are denied procreative freedom, they are denied control over their identity in the most drastic way. They are virtually denied control over self-embodiment and formative processes and their life projects and cast as procreative containers.¹⁰³ When women are denied abortion and compelled to become mothers by the State, it is obvious that it is they who must bear the primary burden of pregnancy and child-rearing and sacrifice their own needs and wishes to serve the interests of the State. This is not to suggest that the State ought not to have any interest in protecting foetal life, but it is to highlight the gender oppressive nature of invoking State power to use the biological capacities of women as the primary means to an end. It is to further highlight the wrongfulness of using women as reproductive instruments to achieve an objective that can be more effectively achieved using less restrictive means.

Part of the enduring legacy of feminism in contemporary discourses on equality is that it has allowed us to imagine equality as substantive equality rather than merely formal equality not just in respect of women but also for other historically

⁹⁸ Siegel, R., 'Reasoning from the Body: An Historical Perspective on Abortion Regulations and Questions of Equal Protection', *Stanford Law Review*, Vol. 44, No. 2, 1992, pp. 261–381, at pp. 265–266.

⁹⁹ Siegel, *ibidem* at p. 267.

¹⁰⁰ Siegel, *ibidem* at p. 277; Cook, R.J. and Cusack, S., *Gender Stereotyping: Transnational Legal Perspectives*, University of Pennsylvania Press, Philadelphia, 2010, at p. 22.

¹⁰¹ Cook and Cusack, *op.cit.*, note 100, at p. 11.

¹⁰² *Ibidem* at p. 20.

¹⁰³ Cohen, J.L., 'Democracy, Difference and the Right of Privacy', in: Benhabib, S. (ed.), *Democracy and Difference: Contesting the Boundaries of the Political*, Princeton University Press, Princeton, 1996, pp. 187–217, at p. 207.

marginalised groups.¹⁰⁴ Substantive equality comes from understandings of equality that see inequality as something that is systemic and embedded in the socio-economic matrix of society rather than the result of individuals acting in an aberrant manner.¹⁰⁵ Substantive equality has a transformative aim in that it seeks to be responsive to structural inequality by *restructuring* social relations and *redistributing* resources. In the specific circumstances of women, substantive equality achieves transformation not only by implicating patriarchy as a biased social institution and a structural power that, historically, has created and sustained the social, political and economic dominance of men by assuring the subordination of women. Equally significant, substantive equality also looks at structural rather than merely individual remedies so as to achieve more lasting outcomes that accept and accommodate women as equal citizens. Accepting and accommodating women requires a political willingness to redress distribution of power not only in the public sphere but also in the private sphere.

If the Court had allowed itself the privilege to consider whether equality had been violated, then one of the questions it ought to have been asking itself is whether the regulation of abortion using an instrument such as Article 40.3.3 of the Irish Constitution contributes to women's equality, or instead contributes towards the creation and maintenance of women as an underclass with subordinate gender status.¹⁰⁶ It would have been clear to the Court that abortion law that compels women to travel to another jurisdiction to protect their health and well-being, not because the jurisdiction does not command the capacity and resources to deliver requisite services but, instead, is a result of the criminalisation of health services that only women need, is a manifestation of the maintenance of women as an underclass with subordinate gender status. It is an instance of indirect discrimination.

In support of the Court's reasoning on margin of appreciation, it can be argued that *A, B and C* is compliant with a 'harm reduction' human rights approach.¹⁰⁷ It can be argued that the right of women resident in Ireland to access information about abortion services available in other jurisdictions, as well as the right to travel to those

¹⁰⁴ Jaggar, A., 'Introduction', in: Jaggar, A., (ed.), *Living with Contradictions: Controversies in Feminist Social Ethics*, Westview Press, Boulder, 1994, pp. 1–17, at p. 11; Littleton, C., 'Reconstructing Sexual Equality', *California Law Review*, Vol. 75, No. 4, 1987, pp. 1279–1337.

¹⁰⁵ Albertyn, C., 'Substantive Equality and Transformative Equality in South Africa', *South African Journal on Human Rights*, Vol. 23, No. 2, 2007, pp. 253–276, at pp. 253–254; Fredman, S., *Discrimination Law*, Oxford University Press, Oxford, 2002, at pp. 11–14.

¹⁰⁶ In feminist discourse, this is asking the 'woman question': Bartlett, C., 'Feminist Legal Methods', *Harvard Law Review*, Vol. 103, No. 4, 1990, pp. 829–888, at p. 837; Cook, R.J., 'International Protection of Women's Reproductive Rights', *New York University Journal of International Law and Politics*, Vol. 24, No. 2, 1992, pp. 645–727, at pp. 672–674.

¹⁰⁷ The argument underpinning the use of the concept 'harm reduction' here is that there is a nexus between reducing harm and human rights, and that what reduces harm can be used as good evidence for the effectiveness or acceptability of a particular human rights approach and *vice versa*: Erdman, J.N., 'Access to Information on Safe Abortion: A Harm Reduction and Human Rights Approach', *Harvard Journal of Law and Gender*, Vol. 34, No. 2, 2011, pp. 413–462, at p. 414–417.

jurisdictions to have abortions, were good reasons for the European Court to regard Irish abortion law as compliant with international human rights law despite its highly restrictive nature.¹⁰⁸ Thus, while highly restrictive of abortion, the Irish jurisdiction concomitantly provided safety valves. Indeed, there was no evidence before the Court that women in Ireland were dying from unsafe abortion. But this approach would only serve us well for as long as our premise is that abortion laws only violate human rights if they lead to death and disability of women that are denied access to safe, legal abortion. Where the human rights injustice of restrictive domestic laws stems not only from the association of such laws with harm to health and life, but also from the denial of women's human dignity and moral agency, and from the stigmatisation and discrimination of women, a harm-reduction approach is not sufficient to vindicate the human rights of women who are compelled to travel to other jurisdictions to obtain abortions.¹⁰⁹

The lesson for the African Court and the African Commission is that using human rights guarantees to address structural inequality that emanates from the historical criminalisation of abortion is not an option. Gender ought to be a category of judicial analysis whenever the Court is asked to scrutinise domestic law for regional human rights compliance. The African Charter compels taking cognisance of gender when it requires the State to ensure equality,¹¹⁰ human dignity¹¹¹ and 'the elimination of every discrimination against women'.¹¹² Under the African Charter, treating equality and non-discrimination as accessory rights would be obviously unwarranted. The Women's Protocol is even clearer about the place of equality and the centrality of gender.

As alluded to earlier, the Women's Protocol is, as of yet, the strongest human rights instrument on women's rights for the African regional human rights system. Apart from explicitly recognising the right of women to seek abortion on grounds of sexual assault, rape, incest, threat to the pregnant woman's health or life, or threat to the life of the foetus,¹¹³ the Protocol is, in any event, organised around gender as to render it unnecessary to debate about the place of equality in juridical analysis. The definition of discrimination under the Protocol mirrors its counterpart under the Convention on the Elimination of All Forms of Discrimination against Women in envisaging substantive equality.¹¹⁴ Under the Women's Protocol, the right to

¹⁰⁸ *Ibidem* at p. 460.

¹⁰⁹ *Ibidem* at pp. 461–642; Fegan, E.V. and Rebouche, R., 'Northern Ireland's Abortion Law: The Morality of Silence and the Censure of Agency', *Feminist Legal Studies*, Vol. 11, No. 3, 2003, pp. 221–254.

¹¹⁰ Art. 3 African Charter.

¹¹¹ *Ibidem*, Art. 5.

¹¹² *Ibidem*, Art. 18(3).

¹¹³ Art. 14(2)(c) Women's Protocol.

¹¹⁴ Art. 1(f) Women's Protocol defines discrimination against women as 'any distinction, exclusion or restriction or any differential treatment based on sex whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life'. This definition is substantially

abortion is posited as correlative to the duty of the State to ensure the right to health of women, including sexual and reproductive health.¹¹⁵ States Parties are required to adopt all necessary measures, including budgetary resources to ensure the full and effective implementation of the rights guaranteed by the Protocol.¹¹⁶ In discharging their obligations, States Parties must ensure provision of adequate, affordable, and accessible health services, including information, education, and communication programmes, especially to women in rural areas.¹¹⁷

Ultimately, the Women's Protocol envisages a design and implementation of abortion law that is responsive not just to transparency as a component of procedural justice, but equally significant, to the imperatives of substantive justice, including gender justice. As part of substantive justice, there must also be accessibility of services in a manner that is analogous to the notion of accessibility under General Comment 14 of the Committee on Economic, Social and Cultural Rights¹¹⁸ and General Recommendation 24 of the CEDAW Committee.¹¹⁹ The Protocol envisages an abortion regime that is sensitive not just to women, but also to the most vulnerable women of which rural women are. In the African region the geographical distribution of public services in general, and not just health services, is highly skewed in favour of urban areas.¹²⁰ A disproportionate burden of poverty is borne by the rural population, especially rural women and children. The Women's Protocol signals quite resonantly that the protection of sexual and reproductive health rights, including abortion, cannot be conceived as primarily duties of restraint. Sexual and reproductive rights cannot be vindicated merely as incidences of the right to privacy and without engaging in substantive equality analysis that in the end requires the discharge of positive State duties, especially the commitment of State resources.

4.3. MARGIN OF APPRECIATION AS EXPEDIENT RHETORIC

A, B and C can be construed as an instance of an expedient rather than principled or human rights-sensitive application of the doctrine of the margin of appreciation. It will be recalled that the majority of the Court deferred to the Irish State on the question of whether women are entitled to abortion on the ground of health or well-being because

similar to the definition of discrimination in Art. 1 CEDAW. What is crucial in determining discrimination is the impact of the discriminatory norm on the lives of women.

¹¹⁵ Art. 14(1) Women's Protocol; Ngwena, *loc.cit.*, note 11, at pp. 810–811.

¹¹⁶ Art. 26(2) Women's Protocol.

¹¹⁷ *Ibidem*, Art. 14(2)(a).

¹¹⁸ Committee on Economic, Social and Cultural Rights, General Comment 14: The Right to the Highest Standard of Health, UN Doc. E/C. 12/2000/4 (2000), at para. 12.

¹¹⁹ CEDAW Committee, General Recommendation 24: Women and Health, UN Doc. A/54/38/Rev.1 (2004).

¹²⁰ Van Rensburg, H.J. and Ngwena, C., 'Health and Health Care in South Africa Against an African Background', in: Cokerham, W. (ed.), *The Blackwell Companion to Medical Sociology*, Blackwell, Oxford, 2001, pp. 365–391.

national authorities were in a better position than the Court to determine a morally dichotomous issue in accordance with the discretion that is envisaged for national authorities by Article 8(2) of the European Convention. The fact that there was no agreement among Contracting Parties about the moral and legal status of the foetus was, according to the Court, an important reason for leaving the matter of determining substantive abortion rights to national authorities. The argument, though, is not that there is no place for the doctrine of the margin of appreciation in supranational human rights adjudication, but that the Court applied the doctrine in a manner that is unduly deferential to national authorities. The Court's approach in *A, B and C* to the margin of appreciation has serious negative implications for the development of common human rights standards, especially standards for guaranteeing equal rights to historically disadvantaged and marginalised social groups such as women and for ensuring that the rights of political minorities are not at the mercy of the popular will of the majority.

The doctrine of the margin of appreciation is a judicial principle that is not explicitly prescribed by the provisions of the European Convention but has been developed by the Court itself.¹²¹ Part of the challenge with trying to measure the integrity of the Court's jurisprudence on the margin of appreciation is that it is evolving and flexible rather than settled jurisprudence. Unless the margin of appreciation is applied in tandem with transparent and consistent principles for determining when it is appropriate to defer to national authorities, it can become highly susceptible to judicial pragmatism where principle and consistency can take second place to shoring up sovereignty and homogenised local morality. As a result, the universality of human rights is compromised and vent is given to human rights relativism.¹²² If the doctrine of the margin of appreciation is applied in such a way as to be oblivious to the serious adverse impact that domestic law, which draws its impulse from monolithic values, can have on the human rights of political minorities and local pluralism, then the doctrine can, as Antony Lester argued, become the source of a 'variable geometry of human rights' that erodes the very essence of human rights.¹²³ In this way, the doctrine can be used to give legitimacy to the political and cultural values of dominant groups at the expense of political minorities.

In its most immediate international law sense, the European Court has used the margin of appreciation as an analogue of the principle of subsidiarity.¹²⁴ The international law logic in the notion of subsidiarity is that within a regional human rights

¹²¹ Arai-Takahashi, Y., *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Intersentia, Antwerpen, 2002, at pp. 2–5.

¹²² Lester, A., 'Universality Versus Subsidiarity: A Reply', *European Human Rights Law Review*, Vol. 1, No. 1, 1998, pp. 73–81; Benvenisti, E., 'Margin of Appreciation, Consensus and Universal Standards', *New York University Journal of International Law and Politics*, Vol. 31, No. 4, 1999, pp. 843–854.

¹²³ Lester, *loc.cit.*, note 122, at p. 76.

¹²⁴ Carozza, P.G., 'Subsidiarity as a Structural Principle of International Law', *American Journal of International Law*, Vol. 98, No. 1, 2003, pp. 38–97, at p. 40; Viljoen, *op.cit.*, note 4, at pp. 18–19; Arai-Takahashi, *op.cit.*, note 114, at pp. 3–5; Benvenisti, *loc.cit.*, note 122, at p. 846.

framework, there must be a juridical mechanism for mediating between supranational harmonisation and local pluralism or difference.¹²⁵ The rationale is that, for the supranational centre to hold and engender the good faith and continued co-operation of Contracting States in a framework where international human rights co-exist with and supplement national law rather than eclipse it, a certain degree of latitude or devolution in matters relating to the balancing of individual rights and public interest must be conceded to national authorities but for as long as the minimum threshold of international law guarantees is not compromised.¹²⁶ In this way, the Convention's standards can be understood as the lowest common denominator in a democratic framework where Contracting Parties have diverse cultures and legal traditions.¹²⁷ The margin of appreciation becomes a subsidiarity modality for achieving checks and balances and for ensuring that the supranational centre does not become a monolithic State that suppresses and usurps the autonomy of Contracting Parties.¹²⁸

When conceived as an integral part of subsidiarity, the margin of appreciation, as was stated by the Court in the *Handyside* case,¹²⁹ and reiterated in *A, B and C*,¹³⁰ recognises that national authorities are, in certain cases, better placed than a supranational body to determine the balance between upholding a fundamental right and protecting public interest. Indeed, provisions such as Article 8(2) are, themselves, sufficiently good authority for the proposition that the European Convention does not condone an unfettered judicially developed doctrine of the margin of appreciation. Instead, it envisages that the doctrine will be invoked as an exception to the general rule of upholding fundamental rights. National authorities are permitted to interfere with the rights only if the interference is in accordance with the law, and is necessary in a democratic society in respect of protecting interests such as national security, public safety, economic well-being, health or morals. In this way, the margin of appreciation can be understood as a form of tenable ethical decentralisation rather than human rights relativism.¹³¹ It can be understood as a form of decentralisation that allows for the mediation of the tension in international human rights between a vision of substantively universal values for protecting human dignity and the imperative of concomitantly respecting diversity and freedom of human cultures so that the universalism of human rights does not translate into normatively requiring oppressive and gratuitous homogeneity or uniformity.¹³²

¹²⁵ Carozza, *loc.cit.*, note 124, at p. 40.

¹²⁶ Arai-Takahashi, *op.cit.*, note 121, at p. 3; Viljoen, *op.cit.*, note 4, at pp. 18–19.

¹²⁷ Arai-Takahashi, *op.cit.*, note 121, at p. 3.

¹²⁸ Carozza, *loc.cit.*, note 124, at p. 45.

¹²⁹ *Handyside v. United Kingdom*, *supra* note 39, at para. 48.

¹³⁰ *A, B and C v. Ireland*, *supra* note 1, at para. 223. On abortion, see also *Open Door Counselling and Dublin Well Women v. Ireland*, *supra* note 39, at para. 68.

¹³¹ Sweeney, J.A., 'Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-cold War Era', *International & Comparative Law Quarterly*, Vol. 54, No. 2, 2005, pp. 459–474.

¹³² Carozza, *loc.cit.*, note 124, at p. 38.

But the inherent danger with invoking the margin of appreciation is that it is built on an assumption that when limiting fundamental rights, national authorities will do so in a manner that protects the minimum human guarantees that are offered by the Convention. Deferring to national authorities works well where the domestic legal and political system has credible *and* sufficient democratic safeguards, including judicial processes, for mediating conflict between majorities and minorities to assure, especially, the protection of political minorities from the tyranny of the majorities.¹³³ In the case of abortion, domestic law has historically inclined towards partiality rather than fairness when restricting women's freedoms. If the margin of appreciation is to remain loyal to the project of protecting human rights beyond the State, then it must also transcend an inequitable and iniquitous past by requiring safeguards that ensure that the voices of women are not silenced before it can be invoked.

For the doctrine of appreciation *not* to become an instrument for legitimising oppression at the domestic level, the democratic processes at the local level must be capable of ensuring that there is effective *recognition* of distinct voices and perspectives of all constituencies and not merely the popular majority.¹³⁴ Furthermore, recognition must not merely be procedural but also substantive for the reason that in a participatory democracy, ethical norms are dialogic. Privileging the State as the guarantor of the correct assessment of the balance between protecting individual rights and protecting public interest detracts from human rights where the State exercises its privilege partially to protect dominant groups or moral majorities in a stratified society. It facilitates monopoly of decision-making by dominant social groups. In the end, it legitimises an oppressive hierarchy and the *misrecognition* of political minorities.

In any event, it is disconcerting that the Court applied the margin of appreciation even if denying women abortion on the grounds of health and well-being was contrary to the laws of the overwhelming majority of Contracting Parties.¹³⁵ The trend among Contracting Parties was clearly towards liberalisation of abortion law. Out of 47 Contracting Parties, 40 permit abortion on the grounds of health and well-being, 35 on the ground of well-being and 30 upon request.¹³⁶ As the Court itself observed, this constituted a 'consensus among a substantial majority of the Contracting States' towards allowing abortion on grounds broader than those countenanced by Irish

¹³³ Benvenisti, *loc.cit.*, note 122, at p. 846.

¹³⁴ I use 'recognition' in the same way that Nancy Fraser has employed it to mean conceding to individual members of a social group the status of full partners in social interaction. Its antonym 'misrecognition' is what occurs when the status of full partnership is denied and individuals are subordinated in the sense of being prevented from parity in participation with peers not through fortuitous cultural representations, but instead through institutionalised exclusionary norms: Fraser, N., 'Rethinking Recognition', *New Left Review*, Vol. 3, May-June, 2000, pp. 107-120, at pp. 113-114; Fraser, N., *Justice Interruptus: Critical Reflections On The 'Postsocialist' Condition*, Routledge, New York, 1997, at pp. 11-23.

¹³⁵ *A, B and C v. Ireland*, *supra* note 1, at para. 235.

¹³⁶ *Idem*.

domestic law.¹³⁷ Applying, therefore, the doctrine of the margin of appreciation in a way that countermands a clear consensus among Contracting Parties suggests not just a conservative, but a regressive approach by a supranational court that seeks to harmonise domestic laws and guarantee equal protection regardless of national boundaries.

In its dissent, the minority of the Court was emphatic that the majority had erred when it disregarded the fact that there was a European consensus in favour of allowing abortion on the grounds of health and well-being. According to the minority, the balance of jurisprudence under the Convention pointed towards applying the margin of appreciation restrictively where such consensus was demonstrated.¹³⁸ That way, according to the minority, the Court would achieve a harmonious application of the human rights guaranteed by the Convention, cutting across national boundaries, and allowing individuals in Member States to enjoy equal protection.¹³⁹

In short, it is difficult to treat the Court's application of the margin of appreciation in *A, B and C* as an instructive expression of subsidiarity. *A, B and C* is far from being a model of the 'marvellous richness of diversity' espoused by Paul Mahoney.¹⁴⁰ The decision cannot be understood as tenable judicial incrementalism and awareness of political boundaries on the part of the Court given that the preponderant majority of Contracting Parties already guaranteed to their residents the abortion rights that the applicants were asking for.¹⁴¹ Rather, the decision is more of an expression of cultural relativism with the margin of appreciation as a tool for the subtle oppression of women.

If we were to accept Michael Walzer's thesis that morality has both 'thin' and 'thick' conceptions,¹⁴² we may wish to equate the right to privacy in Article 8 as a matter of thin morality, but abortion, itself, as a matter that belongs to thick morality and is better decided by national authorities rather than a supranational court. In this way, we might be persuaded to treat the decision of the European Court as not so much about choosing between moral relativism and universalism, but rather an instance of the application of ethical decentralisation of a matter that is particular, complex and open to ideological diversity. Thus, abortion cannot easily be decided using the indeterminate and open-textured nature of the provisions of an international treaty

¹³⁷ *Idem.*

¹³⁸ *A, B and C v. Ireland*, *supra* note 1, at para. 5 of the dissenting opinion.

¹³⁹ *Idem.*

¹⁴⁰ Mahoney, P. 'Marvellous Richness of Diversity or Cultural Relativism', *Human Rights Law Review*, Vol. 19, No. 1, 1998, pp. 1–6.

¹⁴¹ Helfer, L.R. and Slaughter, A., 'Toward a Theory of Effective Supranational Adjudication' *Yale Law Journal*, Vol. 107, No. 2, 1998, pp. 273–392, at p. 314.

¹⁴² Michael Walzer draws a distinction between 'minimalist' moral principles which he calls 'thin' morality and 'maximalist' moral principles which he calls 'thick' morality. Walzer's thesis is that 'thin' morality is universal, gives rise to almost intuitive agreement, and applies across cultures and national boundaries. 'Thick' morality, on the other hand, is particularistic, gives rise to fundamental disagreement, and only applies within a given culture: Walzer, M., *Thick and Thin: Moral Argument at Home and Abroad*, Notre Dame Press, Notre Dame, 1994, at pp. 1–19.

that is underpinned by subsidiarity.¹⁴³ But even if we could be disposed towards finding purchase in Walzer's minimal and maximal meanings of morality, we would still require thick morality to be the outcome of egalitarian dialogue at the domestic level so as to assure the recognition of heterogeneous communities. If, as urged by James Sweeney, we are to treat the margin of appreciation as a modality for decentralising decision-making in respect of matters pertaining to thick morality where uniformity is not required in order to give expression to local particularities,¹⁴⁴ we would still require democratic safeguards so that thick morality does not become a proxy for achieving local ethical homogenisation through a majoritarian subordination of women's human rights to patriarchal and religious interests.

The lesson for the African Court is that the approach of the European Court in *A, B and C* on the margin of appreciation detracts from its mandate to protect human rights to the extent that it is unduly deferential to national authorities. As part of developing a human rights-sensitive approach to the application of the doctrine of the margin of appreciation and the principle of proportionality, the African Court can turn to its own African Commission. In *Prince v. South Africa*,¹⁴⁵ the African Commission hinted towards a more sparing approach to the application of the doctrine of the margin of appreciation. While conceding the principle of subsidiarity as the rationale for the application of the doctrine of margin of appreciation, the African Commission said that it would be averse to a construction of the doctrine that in practice is tantamount to ousting its mandate to monitor and oversee the implementation of the African Charter.¹⁴⁶

The African Commission has developed more promising markers in this regard in the broader context of applying the general limitation clause of the African Charter – Article 27(2). Article 27(2) provides that: 'The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest'. Section 27(2) envisages proportionality as the test for determining the balance between individual rights and countervailing public interests. In *Media Rights Agenda and Others v. Nigeria*, the African Commission gave proportionality a much stricter test and more coherent application than what comes through from the cursory and highly deferential approach of the European Court in *A, B and C*. It said that 'limitation of rights must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained'.¹⁴⁷ The African Commission has required limitation to first take into account the existence of any least restrictive alternative.¹⁴⁸ Equally significant, that Commission has said that a limitation of a right that is guaranteed under the African Charter must not

¹⁴³ Sweeney, *loc.cit.*, note 131, at pp. 471–473; Mahoney, *loc.cit.*, note 140, at p. 4.

¹⁴⁴ Sweeney, *loc.cit.*, note 131, at p. 470.

¹⁴⁵ *Prince v. South Africa* (2005) AHRLR 105 (ACHPR 2004).

¹⁴⁶ *Ibidem* at paras. 51–53.

¹⁴⁷ *Media Rights Agenda and Others v. Nigeria* (2000) AHRLR 262 (ACHPR 1998), at para. 69.

¹⁴⁸ *Ibidem* at para. 75.

have the effect of rendering the right illusory.¹⁴⁹ It is submitted that recognising, as the Irish Constitution does, a right to abortion only when the pregnant woman may not survive the pregnancy renders the notion of a right to decide whether to have a child specious and patently illusory as the choice becomes not so much whether to have a child, but, instead, whether to live or die.

5. CONCLUSION

An instructive lesson from *A, B and C* for the African human rights system is that the duty to render abortion law and practice transparent and subject to administrative review can be posited in terms of the obligation to fulfil the procedural component of human rights at the domestic level. This duty is heightened where abortion law is highly restrictive or believed to be uncertain. It is open to women seeking abortion or other interested parties such as non-governmental organisations that are committed to promoting women's rights, and eradicating unsafe, illegal abortions to take domestic jurisdictions to task where transparency is lacking. The lesson for African jurisdictions is that regulating abortion is more than just prescribing proscriptions and exceptions. There is also a duty to render domestic abortion laws human rights compliant through the institution of procedural and administrative mechanisms that allow women seeking abortion to realise their rights effectively. The jurisprudence on procedural guarantees that has been developed by the European Court in this regard should commend itself to the African region as persuasive jurisprudence.

At a substantive level, however, the comparative lessons from the European Court confirm divergent systems. They confirm differences rather than similarities between the African and European human rights systems. While the jurisprudence under the European Convention as interpreted by the Court in cases such as *A, B and C* is predicated on implicit and subtle assumptions that women can be legitimately expected to become mothers and child-rearers by national authorities, even if it is against their health and well-being unless they can travel to other jurisdictions for abortion services at their own cost, the African human rights system has been moving towards a radically different destination, not least with the adoption of the Women's Protocol which inscribes abortion as a human right. In this sense, *A, B and C* serves the African human rights organs as a case-study for facilitating a deeper reflection on the unique features of the African Charter human rights system.

¹⁴⁹ *Ibidem* at para. 70.