

Taking Women's Rights Seriously: Using Human Rights to Require State Implementation of Domestic Abortion Laws in African Countries with Reference to Uganda

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Abstract

This article is constructed around the premise that women's rights to safe abortion give rise to obligations that the state has a positive duty to implement. Using Uganda as a case study, it frames failure by a state to implement its abortion laws in ways that render the rights tangible and accessible to women as a violation of human rights. The article develops a normative human rights framework for imposing on a state the obligation to take positive steps to implement abortion laws that the state, itself, has adopted. The framework does not depend on requiring the state first to reform its substantive laws or broaden the grounds for abortion. Rather, it focuses on the implementation of existing domestic laws. The article draws its remedial juridical responses partly from conceptions of women-centred rights to procedural justice, equality and health, and partly from jurisprudence developed in recent years by United Nations treaty-monitoring bodies and the European Court of Human Rights.

INTRODUCTION

A woman's decision whether or not to terminate an unwanted pregnancy remains the subject of regulation by the state in ways that are profusely gendered, punitive and stigmatizing. Globally, there has been a trend towards not so much decriminalizing but liberalizing abortion through broadening the grounds for eligibility.¹ This trend should be welcomed, but without abandoning a critical gaze not just on the propriety of state regulation of abortion but also on effective implementation of what is permitted under domestic laws. Liberalization often comes with ambivalence. On the one hand, reformed laws might seem to recognize women with unwanted pregnancies as moral agents with decisional autonomy and deserving of protection from the need to resort, by default of access to lawful providers, to "backstreet" abortion providers. On the other hand, laws often come tethered to erstwhile criminalizing regimes that perpetuate the stigmatization of women seeking abortion by continuing to place

them under a perennial shadow of suspicion and criminality, even when they meet the legal grounds.² In some jurisdictions, liberalization has been tempered by “pushbacks”, with the state clawing back on reforms, using strategies such as mandatory waiting periods, mandatory directive counselling and invocations of the right to conscientious objection that are indifferent to the rights of women.³ In others, it is not so much “pushbacks” that undermine women's rights, but a lack of any meaningful implementation of abortion laws that places women seeking access to safe abortion in the same position they would have had prior to reform. Jurisdictions in the African region typify the latter shortcoming.

In virtually all African states, abortion is restricted rather than illegal. Close to 50 per cent of states now recognize health as a ground for abortion.⁴ In 2003, the African region took a global lead in inscribing abortion as a human right.⁵ The African Union adopted the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol).⁶ More than two-thirds of African states have ratified the Maputo Protocol.⁷ Article 14 mandates states to permit abortion where pregnancy poses a risk to the life or health of the woman or to the life of the foetus, or where pregnancy is a result of sexual assault, rape or incest.⁸ However, the permitted exceptions remain largely unimplemented. African women are rarely able to realise what is legally permitted, as can be inferred from the high prevalence of unsafe abortions in the region.⁹ African states that have taken positive and tangible steps to implement abortion law, such as Ethiopia and South Africa, are exceptions.¹⁰ Partly in response to this malaise, in 2014 the African Commission on Human and Peoples’ Rights (African Commission) adopted General Comment No 2.¹¹ General Comment No 2 underlines the duty of states to take positive steps to enable women to realise the right to safe abortion guaranteed by article 14 of the protocol.¹²

The law is an important gateway to safe abortion.¹³ However, when seeking reform of abortion law to mitigate its effects as a barrier to safe abortion, the focus should not just be on expanding the substantive grounds for abortion. The implementation of abortion law should also be a crucial area for reform. Even where the grounds for abortion are enabling, it matters whether or not there is an effective framework for facilitating the realisation of the grounds, especially by women who lack access to socio-economic power or knowledge to exercise their reproductive autonomy and legal rights. Domestic abortion law, which recognizes that abortion is lawful but in practice remains inaccessible to women, renders any legal rights formally conceded by the state a mere token. Given the historical criminalization of abortion, lack of effective implementation contributes to uncertainty about the law. It fosters erroneous assumptions about the illegality of abortion among women seeking abortion, health care professionals with competence and responsibilities to provide reproductive health services, and the general public.¹⁴ Furthermore, it accentuates the stigmatization of abortion through a double discourse in which laws that permit abortion are juxtaposed with state practices that deny abortion. Ultimately, failure to implement rights that are already conceded denies women essential healthcare and is a catalyst in creating an environment conducive to unsafe abortion.

This article is a human rights response to the lack of implementation of abortion laws by African states. It uses Uganda as a case study. The focus on Uganda is not because it is unique, but on account of its similarities with many other African states, which render it an instructive case study. The historical development of Uganda's abortion law, especially its colonial provenance, mirrors that of several other African states.¹⁵ Ugandan abortion law has remained manifestly unimplemented long after independence, causing it to become one of the veritable barriers to safe abortion in Uganda.¹⁶

The article frames failure by the state to implement its own domestic abortion laws as a violation of constitutional and human rights law. It develops a women-centred remedial human rights framework, premised around transformative notions of interrelated and mutually supporting women's rights but with a focus on the rights to procedural justice, equality and health. Though advocating for expanding the grounds for abortion has been a crucial transnational strategy in promoting access to abortion, this article does not depend on such a strategy. Instead, it focuses on the implementation of existing domestic laws. Against this background, the article does not so much seek to challenge the substantive validity of laws that regulate abortion in Uganda. Rather, it seeks to put a gloss on the laws so that they are understood as not only permitting abortion in given circumstances but also as importing, on the part of the state, a positive duty to implement what is permitted in ways that are tangible to women with unwanted pregnancies as well as to health care professionals with the competence to provide abortion services.

Ugandan laws that are closely connected with the domestic regulation of abortion can be summarized as: provisions of the Ugandan Constitution (the Constitution),¹⁷ particularly article 22(2) that provides that “no person has the right to terminate the life of an unborn child except as may be authorised by law”; provisions of the Penal Code Act of Uganda (Penal Code), especially sections 141–43 that proscribe abortion when it is “unlawfully” procured and section 224 that permits abortion for therapeutic reasons;¹⁸ and the common law of abortion in Uganda, which has historically served as a judicial gloss on provisions of the Penal Code.¹⁹ Broader provisions of the Constitution should also be factored in. Furthermore, international treaties, especially ratified treaties, should be treated as an additional constituent element of the domestic law on abortion, even if they are not directly enforceable. In this regard, it serves well to note that Uganda ratified the Maputo Protocol, but placed reservations on the abortion provisions contained in article 14(2)(c). However, it is argued that the reservations cannot be construed as serving to restrict the substantive domestic law on abortion contained in the Constitution, the Penal Code and common law,²⁰ or precluding drawing human rights standards from other treaties that Uganda has ratified without reservations, including the African Charter on Human and Peoples’ Rights (African Charter).²¹ The same argument applies to provisions of the Maputo Protocol on which Uganda did not place reservations.

The premise in this article, of accepting the substantive validity of the laws that regulate abortion in Uganda, does not preclude interrogating domestic laws so that they are understood not in isolation but contextually, in a manner that complements the broader provisions of the Constitution and Uganda's international human rights obligations. In developing a framework for implicating as well as delineating the normative content of the state's duty to take positive measures to implement domestic abortion laws effectively, the article ultimately appeals to the human rights notion of the “duty to fulfil”.²² It shifts the emphasis of how we measure the efficacy of rights from their mere proclamation to effective implementation and realisation by rights-holders. Abortion-related cases decided in recent years by UN treaty-monitoring bodies under optional protocols as well as by the European Court of Human Rights (European Court) serve as juridical adjuncts and persuasive authorities. In respect of the UN treaty-monitoring bodies, the article derives support from the cases of *KL v Peru*,²³ *LC v Peru*²⁴ and *LMR v Argentina*.²⁵ Likewise, it derives support from the European Court decisions in the cases of *Tysiack v Poland*,²⁶ *A, B and C v Ireland*,²⁷ *RR v Poland*²⁸ and *P and S v Poland*.²⁹

The article has five main sections. After this introduction is a summary of the magnitude of unsafe abortion in the African region and Uganda in particular. There then follows an overview of Ugandan abortion laws. This highlights the importance of *not* treating article 22(2) of the Constitution as the sole constitutional provision relevant to abortion. It argues that the constitutional regime for abortion in Uganda should be acknowledged and framed more holistically and contextually, taking into account other provisions of the Constitution and Uganda's human rights obligations that have a bearing on abortion. The next section develops a remedial juridical framework for the implementation of domestic abortion law, underpinned mainly by the human rights to procedural justice, equality and health. It draws principally from the emerging jurisprudence of the UN treaty-monitoring bodies and the European Court. This part of the article argues that, in any event, the reservations Uganda has placed on article 14 should not be understood as barring Ugandan national authorities from developing human rights standards using the Maputo Protocol, including General Comment No 2, as well as other treaties which Uganda ratified without reservations. This section also draws from soft law. The conclusion argues that, in the final analysis, failure to implement abortion laws is more than just administrative malaise but is also symptomatic of the gendered nature of state regulation of abortion. It emphasizes that the call in this article for the effective implementation of abortion law does not seek to replace the struggles for the ultimate decriminalization of abortion as part of achieving equal citizenship for women.

INCIDENCE AND PHENOMENON OF UNSAFE ABORTION IN THE AFRICAN REGION AND UGANDA

Estimates of the global and regional incidence of unsafe abortion-related mortality published by the World Health Organization (WHO) confirm that unsafe abortion remains a persistent public health danger.³⁰ There has been a global trend towards the reduction of unsafe abortion-related mortality, from 69,000 in 1990 and 56,000 in 2003, to 47,000 in 2008.³¹ However, this welcome decline masks regional disparities. The African region is overrepresented in the burden of unsafe abortion-related mortality. Its regional incidence has hardly declined, remaining close to 14 per cent of total maternal mortality.³² Almost 62 per cent of women who die from unsafe abortions (29,000 out of the 47,000) are from the African region.³³

Within the African region itself, there are also sub-regional disparities in the incidence of unsafe abortion and attendant morbidity and mortality. Eastern Africa, of which Uganda is part, has the highest incidence of unsafe abortion-related mortality at 18 per cent, while Southern Africa has the lowest with 9 per cent.³⁴ Furthermore, the prevalence of unsafe abortion-related mortality in Uganda is significantly higher than the Eastern African average of 18 per cent. Even allowing for a lack of precise data on the incidence of induced abortion in Uganda, unsafe abortion has been clearly implicated as a leading cause of maternal mortality and morbidity.³⁵ The Ugandan Ministry of Health estimates unsafe abortion-related mortality in Uganda at 26 per cent of maternal mortality.³⁶ For every woman who dies from an unsafe abortion, many more women suffer severe and permanent injuries. Unsafe abortion-related complications account for more than half of admissions in some public health facilities.³⁷

To a point, Uganda is somewhat exceptional in exhibiting a significantly higher prevalence of unsafe abortion than its regional counterparts. However, this should not detract from

underscoring that the socio-economic dimensions to the phenomenon of unsafe abortion in the country mirror those of other African states. These dimensions implicate poverty, a lack of education, geographical location and age as the main compounding vectors of inequality in access to safe abortion. Although Ugandan women from all socioeconomic backgrounds have abortions, it is predominantly women who are poor, young or live in rural areas who disproportionately bear the burden of unsafe abortion.³⁸ These are women who predominantly rely on the state health service to meet their health needs. Poor women, the majority of whom live in rural areas and have little or no education, are least positioned to know about what the law permits or to afford abortion services offered by the private sector, whether legally or otherwise. In contrast, women with financial means are better placed to circumvent any barriers posed by abortion law and practice.³⁹ They possess the knowledge and command the financial means to access safe abortion services in the private sector, even if such services are offered in clandestine environments.⁴⁰

UGANDA'S ABORTION LAWS

In Uganda's modern history, the country's courts have yet to be asked to interpret abortion and render an authoritative statement of the law. Against this backdrop, the exposition of Uganda's abortion law is a combination of what can be elicited from the Constitution and its statutory laws, common law and international human rights obligations. It is more helpful to conceive Uganda's abortion law in terms of intersecting “laws” rather than a single law.

Constitution in comparative perspective

The Constitution is the country's supreme law.⁴¹ It addresses abortion primarily through article 22 (the right to life clause), which contains a constitutional prohibition against terminating the life of an “unborn child”. Article 22(2) provides that “[n]o person has the right to terminate the life of an unborn child except as may be authorised by law”. This article should be understood as serving a dual purpose: to protect foetal life while concomitantly recognizing the constitutionality of the law that permits abortion. On the one hand, article 22(2) treats foetal life as a constitutionally protected interest under a right to life provision. On the other hand, it gives constitutional legitimacy to legislative instruments and common law that permit abortion. It is submitted that the constitutionalization of abortion by article 22(2) need not be understood as a dramatic intervention to curtail abortion. Instead, it is more suggestive of the constitutionalization of a compromise. This is an approach which is substantively shared with many other jurisdictions where a constitutional duty to protect unborn life coexists with recognition of women as citizens with the decisional autonomy to terminate a pregnancy.⁴²

Article 22(2) reflects a political compromise forged during the making of the post-independence constitution. The deliberations of the Ugandan Constituent Assembly, which proposed and debated draft clauses of the Constitution prior to its adoption, show that, although abortion was considered by the drafters of the Constitution, they could not reach a consensus on the subject.⁴³ Predictably, opinion was divided between those favouring a highly restrictive approach and those favouring a more liberal approach permitting abortion on the grounds of: unlawful sexual intercourse such as rape and incest; a threat to the health or life of the pregnant woman; and foetal health.⁴⁴ As a way forward, the Constituent Assembly adopted a clause that, on the one hand, protects foetal life but, on the other,

implicitly mandates abortion if permitted by law. Ultimately, the assembly's view was that a constitution is not the place for addressing abortion or articulating exceptions to the criminalization of abortion and that it was more appropriate to leave the formulation of substantive law to Parliament.⁴⁵

Against this backdrop, article 22(2) should be understood as intended to restrict rather than proscribe abortion. In substance, this makes Uganda unexceptional save for the fact of inscribing foetal life as a protected constitutional interest in the provisions of a constitution.⁴⁶ No jurisdiction has ever been able to reach consensus on abortion, given the underpinning moral controversy.⁴⁷ Despite its location in a provision that guarantees the right to life, article 22(2) cannot be construed as importing the notion of an absolute right to foetal life. Parliament and, indeed, the courts are implicitly given significant leeway to develop abortion law in ways that take into account the fundamental rights of pregnant women. Furthermore, in the age of constitutionalism and human rights, reading into the Constitution abortion rights and corresponding state duties is a permissible canon of constitutional interpretation. Reading in such rights and duties can be understood not so much as reforming the substantive law of abortion but, instead, as affirming or clarifying what is already contained in a constitution, albeit not explicitly articulated.

Because the Constitution is supreme, to pass constitutional muster, any “authorizing” law under article 22(2) must necessarily conform to constitutional values and rights. Any authorizing law must not restrict or seek to restrict constitutional rights already expressly or implicitly guaranteed to women. Equally, it must not exceed or seek to exceed the constitutional mandate. Because article 22(2) does not enunciate the substantive constitutional parameters of the right to abortion, other provisions of the Constitution must necessarily be taken into account in order to clarify them. It is trite that a constitution's provisions must be read holistically in order to capture not just the letter but also the purpose or spirit of a constitution as supreme law.

Article 22(2) of the Constitution aside, Uganda has no history of constitutionalizing abortion. When interrogating the constitutionality of abortion, it therefore serves well to consider how other jurisdictions have developed and applied constitutional principles for regulating abortion, even in the absence of an express constitutional provision on the subject. Comparative jurisprudence from the United States, Germany, Colombia and South Africa shows that, notwithstanding the persistence of the intractability of the moral and political conflict engendered by abortion, the last four decades or so have seen women's decisional autonomy, however contested, steadily accepted by domestic courts.⁴⁸ While cognisant of the tension between recognizing women's reproductive autonomy and protecting foetal life, courts in liberal democracies have found a way to develop constitutional frameworks that integrate opposing normative perspectives to eschew overburdening women or requiring them to serve as mere reproductive instruments.⁴⁹

In *Roe v Wade (Roe)*,⁵⁰ the US Supreme Court held that the right to privacy guaranteed by the 14th amendment of the US Constitution encompassed a woman's right to decide whether to terminate her pregnancy. The decision highlighted that, as part of the constitutional right to privacy, the state has a duty to respect the decision of a pregnant woman and her doctor to terminate a pregnancy at any time before the foetus is viable. At the same time as curtailing the woman's reproductive autonomy in order to protect her own health and the prenatal life as the pregnancy grows using a “trimester” framework, the court recognized the physical and emotional harm that would be visited on women if they are denied choice.

In contrast to *Roe's* trimesterized approach, in 1975 the German Constitutional Court held that, under the provisions of the German Basic Law which guarantees the rights to dignity and life, the state has a duty to protect foetal life.⁵¹ Furthermore, protection of foetal life takes precedence over the pregnant woman's right to self-determination for the entirety of the pregnancy. Significantly however, the court still permitted abortion. It said that, though still a crime, abortion was not punishable in exceptional circumstances such as in the case of severe foetal anomalies, a threat to the pregnant woman's life or health, rape or incest or, even more significantly, a "general social situation" of need.⁵² The court explained the exceptions on the ground that, although a pregnant woman is expected to protect the foetus and carry it to term, she is not required to carry "extraordinary" burdens.⁵³ In 1993, the court went further and framed the duty to protect foetal life in a manner that conceded the constitutional legitimacy of recognizing women's greater decisional autonomy. It recognized that compelling women to carry a pregnancy to term through the sanction of criminal law was not the best approach to protecting foetal life and that non-criminal measures, such as economic support for women who wish to carry a pregnancy to term, were preferable.⁵⁴

In *Case C-355/06*, the Colombian Constitutional Court ruled that it was unconstitutional to prohibit abortion in all circumstances under the Colombian Penal Code.⁵⁵ The court declared that abortion should be permitted when pregnancy poses a risk to the woman's life or physical or mental health, when there are serious foetal malformations that render the foetus unviable, or when pregnancy is the result of rape, incest, unwanted artificial insemination or unwanted implantation of a fertilized ovule. While conceding that the state has a legitimate interest in protecting foetal life, it said that the interest did not flow from a constitutional right to life but from a "constitutional value of life", which does not derive the same level of protection as that granted to a pregnant woman.⁵⁶ The court emphasized that the interest should not be understood as subordinating the pregnant woman to the foetus to render her a mere "reproductive instrument".⁵⁷ It said that, when the legislature chooses to protect foetal life through the criminalization of abortion, it must do so having taken into account the fundamental rights guaranteed to women by the domestic constitution and international human rights instruments, including their rights to life, health and equality.⁵⁸

Thus far, South Africa is the only African jurisdiction where the constitutionality of abortion has been judicially tested, albeit at the level of a first instance rather than appellate court. In *Christian Lawyers' Association of South Africa v Minister of Health*, it was argued before the High Court that the Choice on Termination of Pregnancy Act 92 of 1996, which had reformed domestic abortion law, was unconstitutional.⁵⁹ Among other grounds, this act permits abortion at the pregnant woman's request.⁶⁰ It was argued that the act violated section 11 of the South African Constitution, which guarantees a right to life to "everyone", as life begins at conception. The court rejected this argument. It held that the constitution only conferred fundamental rights on persons, not on prenatal life. Furthermore, it held that, even if a foetus could be recognized as having a constitutional right to life, any such right would not be regarded as absolute. Any foetal rights would need to be balanced against the constitutional rights guaranteed to the pregnant woman, including her rights to: equality; life, human dignity, bodily and psychological integrity including the right to make decisions concerning reproduction; and access to health services, including reproductive health services.⁶¹

Comparative jurisprudence can, therefore, be appropriated to yield persuasive precedents for constructing an enabling constitutional framework that serves as a template for designing legislation to recognize a woman's right to access to safe abortion in Uganda. While there are

significant jurisprudential differences among the decisions of the courts of the United States, Germany, Colombia and South Africa, the outcomes are largely similar. Any rights or interests accorded to the foetus or the state are relative and are weighed against the constitutional rights of the pregnant woman. Regardless of the constitutional status accorded to the life of a foetus, the jurisprudence tells us that foetal life cannot be protected in isolation from the fundamental rights of the pregnant woman. Furthermore, the cases tell us that, whatever the constitutional framing, where protecting foetal life will disproportionately impact on the rights of the pregnant woman, abortion will be permitted.

Another comparative lesson to draw for Uganda, especially from Colombian and South African jurisprudence, is that a constitutional right to abortion is better understood as flowing from disparate constitutional provisions. Therefore, it is not just article 22(2) which is relevant when extrapolating a fundamental rights approach to abortion, but also other constitutional provisions. Provisions of the Ugandan Constitution which can be used to assert a pregnant woman's right to abortion as well as shape its normative content include the rights to: equality and non-discrimination;⁶² life;⁶³ personal liberty;⁶⁴ human dignity and protection from inhuman treatment;⁶⁵ privacy;⁶⁶ protection of freedom of conscience;⁶⁷ the full and equal dignity of women, including freedom from laws, cultures and traditions that undermine the status of women;⁶⁸ and administrative justice.⁶⁹ In this sense, in its constitutionally unenumerated form, a substantive right to abortion is better understood as a composite rather than discrete right. It draws sustenance from disparate provisions of the Bill of Rights that, while not addressing abortion directly, are amenable to being interpreted as having a constitutional bearing on abortion. The approach of the Colombian Constitutional Court in particular underscores that drawing on other pertinent constitutional rights when interpreting and applying abortion rights also serves to build a synergic bridgehead with international human rights.⁷⁰ Article 45 of the Ugandan Constitution, which provides that fundamental rights not specifically articulated in the Constitution shall not be regarded as excluded, is an enabling provision in this way.

As part of building synergy between constitutional rights and fundamental rights, it serves well to highlight that the association between unsafe abortion and high levels of maternal mortality and morbidity highlighted above justifies linking a failure by the state to discharge the duty to provide health services, including reproductive services, with violations of the more justiciable rights under the Ugandan Constitution such as the right to life. In their general comments, general recommendations and concluding observations, UN treaty-monitoring bodies have linked unsafe mortality due to highly restrictive abortions to violations of the rights to health and life.⁷¹ Closer to home, the African Commission's General Comment No 2 underlines that unsafe abortion is a significant cause of “preventable” maternal mortality in the African region and that states have an obligation to take positive measures to reduce unsafe abortion, including providing accessible requisite health services in order to meet women's health needs.⁷²

Constitutional provisions that are amenable to supporting a right to abortion and informing its normative content under the Constitution need not be confined to constitutional rights that are clearly intended to be justiciable. Constitutional directive principles of state policy that speak to access to health services are particularly relevant, as effective access to safe abortion ultimately depends on the availability of health services. It can be noted that, while the Ugandan Constitution does not include a right to health among the provisions that are clearly intended to be justiciable, in the chapter on national objectives and directive principles of state policy, the state is obliged to ensure that all Ugandans enjoy rights and opportunities

pertaining to access to health services.⁷³ Furthermore, the state is enjoined to take all practical measures to ensure the provision of basic medical services to the population of Uganda.⁷⁴ Indeed, the Constitution requires the legislature to adopt legislation to give “full” effect to directive principles.⁷⁵ Therefore, even in the face of judicial reluctance to treat directive principles as justiciable,⁷⁶ directive principles cannot be dismissed as inconsequential constitutional artefacts. At the very least, they serve to provide a context within which justiciable rights under the Constitution, including the right to life, can be meaningfully understood. In this sense, directive principles support, as well as clarify, the normative content of a fundamental right to access to safe abortion that derives from justiciable rights.

While nevertheless valuable, comparative law has its limits even if it succeeds in mustering persuasive authority. Abortion law and practice are shaped by more than formal constitutional rules. While constitutional frameworks formally open the gateway to legal abortion, they do not reveal the informal rules and practices that serve as veritable barriers against what is constitutionally guaranteed.⁷⁷ The constitutional frameworks of the United States, Germany, Colombia and South Africa that permit abortion do not tell us whether, in practice, women in these jurisdictions enjoy access to abortion services. In the United States, for example, women experience barriers occasioned by state “pushbacks”, such as mandatory waiting periods and counselling.⁷⁸ They also encounter a health care system that is highly privatized and largely expects women, including poor women, to pay for abortion services.⁷⁹ *Roe*, itself, has been at the receiving end of a conservative and religious backlash which has seen the US Supreme Court claw back on the trimester approach, replacing it with an “undue burden” standard, thereby legitimizing state “pushbacks”.⁸⁰ To avoid merely securing token rights, abortion advocacy should go beyond merely reciting potentially persuasive precedents. Ultimately, the human rights spotlight should be on implementing abortion laws that emphasize access to permitted practices.

Penal Code and common law

The provisions of Uganda's Penal Code with the most direct application to abortion are sections 141–43, which, respectively, proscribe “unlawfully” attempting to procure an abortion, procuring an abortion, and supplying substances for the procurement of an abortion, and section 224 which provides for therapeutic abortion. Section 141 states: “[a]ny person who, with intent to procure the miscarriage of a woman whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means, commits a felony and is liable to imprisonment for fourteen years.”

Section 141 does not punish the woman herself but any person who attempts to procure an abortion whether or not the woman is pregnant. Sections 142 and 143 are drafted in similar language save for the person who is the object of punishment. Section 142 punishes the woman herself for procuring an abortion, while section 143 punishes the person who supplies what is used (such as drugs or equipment) to procure an abortion. Section 224, on the other hand, provides a defence to a charge of unlawfully procuring an abortion. It says: “[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 or her 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 the circumstances of the case.”

These sections have been retained from the law Uganda inherited from Britain and the provisions have a history in colonial jurisprudence.⁸¹ The colonial origins of the abortion provisions of the Penal Code lie in the English Offences Against the Person Act of 1861 and received common law as developed by English courts, principally in the case of *R v Bourne* (*Bourne*).⁸² The provisions of the Ugandan Penal Code on abortion are also shared by other African jurisdictions that have retained colonial abortion law, such as Malawi, Nigeria, Somalia, Sudan, South Sudan and Tanzania.

Historically, African abortion laws have mirrored the laws of the colonizing countries. Whether the law was inherited from the codified laws of Belgium, France, Italy, Spain or Portugal, or from the common or statutory law of England as with Uganda, a common feature of colonial abortion laws is that they all criminalized abortion. Saving the life of the pregnant woman was expressly or implicitly the only recognized exception. By proscribing abortion that is “unlawfully” procured, sections 141–43 of the Ugandan Penal Code replicated what was found in the English Offences Against the Person Act. Furthermore, by providing in section 224 a therapeutic defence to a charge of unlawfully procuring abortion, the Penal Code codified or at least attempted to codify the common law jurisprudence developed by English courts to underline that the word “unlawfully” in the 1861 act envisaged circumstances in which abortion was lawful and also to indicate, to a point, the scope of the therapeutic defence.

On the eve of Uganda's independence in 1962, abortion law stood as it had been during the colonial era, with no official guidance on how to apply the therapeutic exception, save to a limited extent in Anglophone Africa following the ruling in 1938 by an English court in *Bourne*. *Bourne* concerned a 14-year-old girl who had been raped and become pregnant. A surgeon, who performed an abortion upon request and with the consent of the girl's parents, had been charged with unlawfully procuring an abortion under the Offences Against the Person Act of 1861. Justice Macnaughten, the trial judge, directed the jury to the effect that performing an abortion to preserve not only the pregnant woman's life, but also her physical or mental health, was within the contemplations of lawful abortion under the 1861 act.

Bourne judicially broadened the compass of the therapeutic exception beyond an immediate threat to the pregnant woman's life, also to cover a threat to her physical or mental health. The ruling in *Bourne* found its way to British colonies, including colonies in Africa.⁸³ Shortly after *Bourne* was decided, the West African Court of Appeal, which had appellate jurisdiction over the then Gold Coast (now Ghana), Nigeria, Sierra Leone and Gambia, unanimously followed it as the law on abortion.⁸⁴ In 1959, the East African Court of Appeal, which had appellate jurisdiction over Kenya, Uganda and the then Tanganyika, followed suit in *Bansel*.⁸⁵ However, the guiding effect of *Bourne* was limited; the efficacy of the ruling was undermined by the fact that, even in the jurisdictions in which it was formally received by colonial courts, such as the regional jurisdictions of West Africa and East Africa, colonial states, including Uganda, took no practical steps to implement it.

Thus, the provisions of the Penal Code, and in particular the exceptions to the criminalization of abortion, have remained unimplemented. Furthermore, even on their own terms, the provisions of the Penal Code have become quite dated. At the time that section 242 of the Penal Code, which provides a therapeutic defence, was adopted, the medical understanding was that abortion could only be procured surgically. Medical abortion, which is widely used today in early pregnancy, was unknown. In any event, the Penal Code or common law must be compatible with the Constitution. However, the adoption of guidelines on safe abortion by

the Ugandan Ministry of Health in April of 2015,⁸⁶ discussed in the next section, promises to be a positive step towards clarifying abortion laws.

DEVELOPING A REMEDIAL HUMAN RIGHTS FRAMEWORK

As highlighted in the previous section, colonial abortion laws were developed primarily to serve a crime and punishment model derived from the patriarchal religiosities of 18th century Europe. This was well before the age of constitutionalism and human rights, and women's equality and reproductive health were not accommodated. Given the status of the Ugandan Constitution as supreme law, it would be anomalous, in the extreme, if colonially spawned abortion laws were to be immunized from constitutional values and rights. Furthermore, it would also render Uganda's commitment to international human rights mere tokenism. The tail should not be allowed to wag the dog! By the same token, given Uganda's ratification of international human rights treaties, it serves well to have recourse to human rights jurisprudence as an informing and interpretive juridical resource.

This section draws pertinent lessons from abortion-related jurisprudence emerging from UN treaty-monitoring bodies and the European Court. It also argues that, notwithstanding Uganda's reservations on article 14 of the Maputo Protocol, Ugandan national authorities, including the courts, can also draw from the jurisprudence contained in those provisions of the protocol on which Uganda has not placed reservations, as well as other treaties.

Emerging jurisprudence from UN treaty-monitoring bodies and the European Court

The jurisprudence emanating from UN treaty-monitoring bodies and the European Court mandates that, where abortion is permitted under domestic law, even if in a very restrictive form, the state has a corresponding duty to ensure that any rights that are conferred on women are tangibly amenable to effective realisation. This duty can be described as a duty of transparency or a procedural duty.⁸⁷ Its immediate juridical purpose is not so much to require the state to amend its substantive law but, instead, to institute procedures and an administrative infrastructure for implementing the law that are clearer and more accessible to the intended beneficiaries and other users.

UN treaty-monitoring bodies have developed and applied abortion rights-related procedural duties in three cases: *KL v Peru (KL)*,⁸⁸ *LC v Peru (LC)*⁸⁹ and *LMR v Argentina (LMR)*.⁹⁰ *KL* and *LMR* were decided by the Human Rights Committee, while *LC* was decided by the Committee on the Elimination of Discrimination Against Women (CEDAW Committee) under respective optional protocols. The Human Rights Committee and CEDAW Committee are the treaty-monitoring bodies of the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)⁹¹ respectively, which have been so widely ratified by African states, including Uganda, as to justify taking cognisance of these decisions as potentially persuasive and standard-setting.⁹²

In *KL*, the Human Rights Committee found Peru in violation of its obligations under the ICCPR. A 17-year-old girl who was pregnant with a foetus affected with anencephaly had been denied an abortion by hospital authorities. This was regardless of medical and social evidence confirming that continuing with the pregnancy would seriously harm *KL*'s health.

More to the point, the request for an abortion otherwise met the eligibility grounds under article 119 of the Peruvian Criminal Code, which permitted abortion if it was the only way of saving the life of the pregnant woman or avoiding serious and permanent damage to her health. The committee found Peru to have violated article 2 (the right to an effective remedy), article 7 (the right to be free from inhuman and degrading treatment), article 17 (the right to privacy) and article 24 (the right to special protection as a minor) of the ICCPR. The committee highlighted that, although Peruvian law permitted abortion, there was no domestic administrative structure, short of constitutional litigation, to allow the complainant to realise her right.

LC was the CEDAW Committee's first decision on abortion under CEDAW's optional protocol.⁹³ A 13-year-old girl had become pregnant following sexual abuse. On discovering that she was pregnant, she had attempted suicide by jumping from a building, causing her to suffer severe injuries. Although she required emergency surgery, hospital authorities did not render treatment because they took the view that treatment would harm the foetus. When she requested an abortion, she was refused despite being eligible under the Peruvian Criminal Code. Finding the state in violation, the committee observed that the complainant had been left without access to an effective procedure to establish her entitlement. It noted that, because of the absence of laws and regulations for implementing the permitted exceptions under the Peruvian Penal Code, access to abortion was determined arbitrarily, with each hospital authority determining its own legal grounds and procedures.⁹⁴ The committee highlighted that article 12 of CEDAW requires states to “respect, protect and fulfil” women's right to healthcare including in its legislation, executive action and policy.⁹⁵ It recommended that Peru establish a procedure to enable women seeking abortion to realize their entitlements in a timely way under Peruvian law, including conducting education and training in the healthcare sector to sensitize healthcare professionals to respond positively to the reproductive health needs of women, and adopting guidelines or protocols to ensure the availability and accessibility of healthcare services, including abortion services.⁹⁶

In *LMR*, a 19-year-old girl with an intellectual disability and medically certified as having a mental age of about ten years, had become pregnant following a rape. Through her mother, she requested an abortion. She was refused, despite falling within the exceptions permitted by article 86(2) of the Argentinean Criminal Code. Instead, she was required to obtain permission from the courts. The Human Rights Committee found Argentina to be in violation of article 2(3) (the right to an effective remedy) taken together with articles 3 (the right to equal enjoyment of rights), 7 (the right to be free from inhuman and degrading treatment) and 17 (the right to privacy). It noted that, despite meeting the criteria for legal abortion, the complainant had to appear before three courts, which had the effect of prolonging by several weeks the gestation period.⁹⁷ The delay occasioned by the requirement to obtain judicial authorization became the reason why the hospital ultimately declined to perform the abortion and the complainant had to resort to a clandestine procedure.⁹⁸ According to the committee, these facts highlighted that Argentina did not have the administrative framework to provide an effective remedy for women seeking abortion under domestic law.

The jurisprudence of the European Court is yet another important resource when conceiving legal reform and litigation strategies at the national and regional African levels.⁹⁹ In its decisions in *Tysiac v Poland (Tysiac)*,¹⁰⁰ *A, B and C v Ireland*,¹⁰¹ *RR v Poland*¹⁰² and *P and S v Poland*,¹⁰³ the European Court has enunciated that, where national authorities rely on criminal regulation of abortion but permit certain exceptions, they must take positive administrative steps to ensure that the circumstances in which abortion is permitted are

articulated in a way that is reasonably clear, not just to women seeking abortion services, but also to healthcare professionals. Furthermore, they must establish an accessible and timely administrative procedure for allowing women who are aggrieved by a decision refusing them abortion to contest the decision. In *Tysiack*, the European Court said that, once the legislature decides to allow abortion, it must not structure its legal framework in a way that would impede access to abortion.¹⁰⁴ It underscored that the principles of legality and the rule of law in a democracy require measures impacting on fundamental rights to be subject to an administrative review procedure before an independent body.¹⁰⁵

Uganda's reservations on article 14 of the Maputo Protocol

Uganda ratified the Maputo Protocol in 2010 but placed reservations on article 14. In respect of article 14(2)(c), it said that “unless permitted by domestic legislation expressly providing for abortion” it is not bound by this clause, which the Ugandan state interprets as “conferring an individual right to abortion or mandating a State Party to provide access thereto”.¹⁰⁶ Article 14(2)(c) recognizes a threat to the pregnant woman's life, health (including physical and mental), rape, incest and threat to the life of the foetus as grounds for abortion. Three arguments can be advanced to support the proposition that the reservations placed by Uganda on article 14 are of little effect in immunizing Ugandan abortion laws from the grounds permitted by article 14 or from other pertinent human rights standards.

First, the reservations did not serve to restrict grounds for abortion that are already conceded in domestic law, including the provisions of the Penal Code and reception of the ruling in *Bourne* into Ugandan common law.¹⁰⁷ Indeed, Uganda expressly indicated that it was not placing reservations on what was “permitted by domestic legislation”, which should be taken to mean provisions of the Penal Code at the time. By implication, therefore, Uganda also retained *Bourne*. The judicially expansive notion of saving the life of the pregnant woman as a ground for abortion, which was applied in *Bourne*, includes preservation of the pregnant woman's physical or mental health. It approximates the grounds for abortion provided under article 14 of the protocol that permits abortion, inter alia, where there is a threat to the pregnant woman's life and health. It can also apply to the grounds of rape, incest or even a threat to the life of the foetus. Psychological distress arising from coerced or forced sexual acts and diagnosis of severe foetal impairment should be understood as relevant when assessing the effects of pregnancy on the woman's health.¹⁰⁸ In short, the expansive interpretation in *Bourne* is sufficiently broad to encompass the grounds permitted by article 14. Uganda need not have placed the reservations unless it intended to introduce more restrictive law.

The second argument is that Uganda's reservations apply only to article 14 of the Maputo Protocol. They cannot be taken as also applying to its other provisions. The protocol contains several other provisions that also impact on state obligations to respect, protect and fulfil a woman's reproductive health and can be relied upon to support a woman's decision to have an abortion in conditions of safety. Leaving aside article 14, provisions of the protocol that are amenable to providing support for a right to abortion include: article 2 which guarantees equality and non-discrimination; article 3 which guarantees a right to human dignity; and article 4 which guarantees the right to life, integrity and security of person.¹⁰⁹

The third argument, which has similarities with the second, is that Uganda's reservations cannot serve to preclude the application of provisions of other treaties that it has ratified without reservations. Of particular relevance in this regard are the International Covenant on

Economic, Social and Cultural rights,¹¹⁰ CEDAW and the African Charter. The expansive interpretation of the right to health by treaty-monitoring bodies, especially the Committee on Economic, Social and Cultural Rights (ESCR Committee), the CEDAW Committee and the African Commission provide Ugandan national authorities with resources of normative human rights standards from which to draw, especially when addressing issues of access to safe abortion. The ESCR Committee's General Comment No 14 can be used as a yardstick for ensuring that any legislation and, perforce, policy or programme intended to implement the exceptions to the prohibition in article 22(2) of the Constitution meets the requirement of holistic accessibility. Similarly, the CEDAW Committee's General Recommendation 24 is an invaluable source of guidance, not least because of its responsiveness to women's health needs, including reproductive health needs, in ways that speak to substantive equality and are cognisant of intersectionalities, including rural status, age, disability and economic means, so that "sex" is not the only equality consideration.¹¹¹ In *Purohit v The Gambia*, the African Commission interpreted the right to health in article 16 of the African Charter expansively, to accord it the status of a foundational value and right on which the enjoyment of the other rights guaranteed by the African Charter depends.¹¹²

The import of the second and third arguments is that it would also be appropriate to draw interpretive guidance from the African Commission's General Comment No 2, notwithstanding Uganda's reservations on article 14 of the Maputo Protocol. The utility of General Comment No 2 is in making available to Uganda regionally-grown soft law that consolidates international best practice in respect of the state obligation to respect, protect, promote and fulfil rights guaranteed under a treaty, and it specifically addresses abortion. When framing the normative duties for sexual and reproductive health as human rights, General Comment No 2 employs the standard of the "availability, accessibility, acceptability and good quality" of requisite health services as developed by the ESCR Committee in its General Comment No 14.¹¹³ As Uganda already sits with abortion laws that have not been effectively implemented, the obligations to promote and fulfil fundamental rights are particularly instructive for national authorities. In the specific context of abortion, more than just adopting laws, it is incumbent upon the state, for example, to take steps to eliminate stigmatization and discrimination related to abortion services, sensitize and educate communities about the legality of abortion and the availability of safe abortion services, train health care professionals in the provision of accessible services, and allocate sufficient available resources.¹¹⁴

Normative foundations of procedural duties¹¹⁵

The jurisprudence on procedural duties emerging from UN treaty-monitoring bodies and the European Court can be understood to serve multiple purposes that apply no less to Uganda. Some purposes appeal to procedural or administrative justice and others to more substantive principles of justice as a gesture towards substantive equality.¹¹⁶ Some purposes are more general, aimed at securing the equal and effective exercise of rights in general and the provision of remedies in the event of breach.¹¹⁷ Some justifications serve public health in ways that are synergic with the right to health.¹¹⁸

At a general level, procedural duties that require clarification of abortion laws and their operationalization can be understood to be implementing administrative or procedural justice. Drawing from the empirical work of psychologists, Brems and Lavrysen have highlighted that, as a human right, administrative justice has a value independent from the immediate need to achieve a particular outcome for the aggrieved person.¹¹⁹ This is particularly so where

the issues involved crucially impact on the rights-holder's perceptions about whether justice is being served.¹²⁰ Abortion would be a case in point. Abortion law and practice have historically denied women's agency. Even in the aftermath of reform, abortion may still be opposed in ways that deliberately undermine women's human rights, even by healthcare professionals who have the administrative duty to decide impartially whether a woman seeking an abortion is eligible. Procedural justice allows women to have a sense of substantive participation in a decision that affects their lives in crucial ways.¹²¹

If implemented in a way that assures women that decision-makers are neutral rather than arbitrary or biased arbiters, procedural duties can serve to legitimize healthcare systems.¹²² They are conducive to building trust in healthcare systems and preventing women from being alienated even if, in the end, the law itself is perceived to be substantively unfair, such as when it is highly restrictive of abortion. Requiring the state to take into account the views of women seeking abortion, to have regard to time being of essence for women seeking access to safe abortion and to provide a right of administrative appeal, serves to enhance democratic participation in healthcare decision-making. Requirements that the state clarifies the rights and duties attendant to legal abortion and institutes administrative justice guarantees are one way of tangibly specifying the content of a fair system of social co-operation amongst equal citizens.

Against this backdrop, article 42 of the Ugandan Constitution can be used as an important constitutional structure for recognizing the legal standing of abortion-rights holders and their entitlement to procedural justice. It provides: “[a]ny person appearing before any administrative official or body has a right to be treated justly and fairly and shall have a right to apply to a court of law in respect of any administrative decision taken against him or her”. Allied to this right is the state's duty to provide women with an opportunity to correct a decision that is incorrect or unfair. Abortion advocacy in the African region rarely associates the right to administrative justice with abortion. It serves well to underscore how article 42 can intersect with abortion rights. By implication, article 42 reinforces the state's duty to implement abortion law effectively through, among other mechanisms, ensuring that, litigation aside, there are accessible and timely administrative procedures for rendering the state accountable to women who are denied abortion.

Procedural justice is not limited to rights pertinent to abortion, as it obtains for all rights in general. It appeals to a conception of justice that seeks to require the state to fulfil the rights and discharge its duties so that citizens who rely on the rights are treated equally. In this sense, procedural justice serves the value of and right to equality under the law. In a plural democracy, as Rawls argued, equality under the law reflects a shared consensus about ensuring fairness between citizens who are free and equal.¹²³ From a Rawlsian perspective, the right to effective and accessible administrative justice is an adjunct to securing equality. The guarantee of the right to just and fair treatment in an administrative decision under article 42 of the Constitution is an adjunct to reinforcing equality before and under the law. It gives a practical edge to how citizens, including women aggrieved by the decisions of hospital administrators, can hold the state and its organs accountable. Procedural duties ensure that all rights-holders are treated in the same way. In this sense, they reinforce the realisation of the right to equality under the law that is guaranteed by article 21(1) of the Constitution.

In serving to achieve equality under the law, procedural duties are necessarily adjuncts to antidiscrimination approaches. The antidiscrimination clause in the Constitution lists “sex” as one of the protected groups.¹²⁴ Taking equality seriously means taking steps to protect the

equality rights of a vulnerable social group by countering discriminatory and obstructive barriers that are unconstitutional or superfluous and have the effect of delaying or ultimately thwarting the exercise of legal rights, thus perpetuating the status quo. The historical criminalization of abortion and its moral stigmatization render women seeking abortion not just a marginalized political minority but also a vulnerable one. Laws that are disproportionately inaccessible to women constitute indirect discrimination. Women seeking abortion are vulnerable to being denied access to lawful services even after domestic liberalization of the law.

More than just serve to realise procedural equality, it is also possible to see procedural duties as adjuncts to a substantive equality in a gendered polity. Requiring the state to implement abortion law in ways that render the legal rights of women accessible substantively affirms women as women: as a social group with reproductive health needs that have been historically marginalized and stigmatized. In this sense, it is possible to build synergy between article 42 on administrative justice and article 33 of the Constitution that specifically requires women to be accorded “full and equal dignity with men” taking into account the constitutional need to redress laws, cultures or traditions that undermine the status of women. By taking into account the peculiar information and procedural needs of women who wish to exercise abortion rights, the substantive equality of women is advanced through giving them recognition as women and according them “capabilities” to overcome some of the socioeconomic disadvantages that serve as barriers to accessing safe, legal abortion.¹²⁵ In *LC v Peru*,¹²⁶ the CEDAW Committee advanced this rationale to a point, by requiring the state to provide requisite legal, administrative and health information to women seeking safe abortion.

In environments where there is a high burden of unsafe abortion, associated with abortions that are performed outside the formal health sector by unskilled providers, as in the African region, procedural duties also serve a public health rationale. Where national authorities concede that abortion is lawful, but refrain from clarifying the circumstances in which abortion is permitted so as to allay uncertainties amongst women seeking abortion or providers of abortions services, they may be assisting in providing incentives for unsafe abortion. Equally, refraining from establishing administrative gateways to lawful abortion services is also an incentive for unsafe abortion, especially for poor women. Implementing abortion law through practices that are responsive to procedural justice can assist health systems to develop reproductive health services that are user-friendly and engender the co-operation of women rather than their alienation from the formal healthcare sector. In this way, procedural duties are adjuncts to the right to health.

If taken seriously, procedural justice can serve an overarching purpose of mitigating abortion-related stigma and its deleterious effects. Cook has highlighted that abortion-related stigma and the criminalization of abortion reinforce each other in ways that are harmful to women, not just quantitatively but also qualitatively.¹²⁷ When the exceptions to criminalization are not meaningfully implemented, abortion-related stigma is accentuated in all its manifestations. Failure to implement perpetuates the de facto criminalization of the permitted exceptions. It creates a conducive climate for gender-based prejudice towards women seeking safe abortions, including by health care professionals with the constitutional duty to provide abortion services.¹²⁸ When exceptions to criminalization are not implemented, women seeking abortion services experience discrimination, subordination and blemish. The ground is also rendered fertile for the *mis*application of abortion rules and practices by opponents of abortion within as well as outside the health care system, causing women to remain not just

socially, but also legally, subordinated and tainted.¹²⁹ The cases decided by UN treaty-monitoring bodies and the European Court that were discussed earlier are illustrative. Remedially, procedural justice serves as a juridical tool for not only requiring health care systems to be receptive to the provision of abortion, but also unapologetically recognizing women seeking abortion as *untainted* rights-holders.

Operationalizing implementation

Appropriating to Uganda the procedural duties developed by UN treaty-monitoring bodies and the European Court as persuasive juridical values and principles for rendering abortion laws effective does not necessarily require domestic legal reform. As argued earlier, the provisions of the Uganda Constitution are, by implication, already receptive to the imperative of the effective realisation of fundamental rights. However, given the outdated nature of the Ugandan Penal Code and the manifest failure to operationalize *Bourne*, it would be naive to assume that merely reminding the state of its constitutional and human rights obligations will suffice. This section identifies four main areas in which to expend implementation efforts.

One area of focus is legislation. It would achieve little to call for implementation when the substance of abortion law itself remains relatively unclear to the main stakeholders, including women and health care professionals. It seems warranted, therefore, for Uganda to adopt a legislative instrument that, as a clarification measure, aligns legislation with constitutional and international human rights obligations. This is not because legislation is a panacea. Rather, it is because abortion is a contested area. As Bergallo has highlighted, in societies where there is weak enforcement of formal rules, “incompleteness” of rules creates an environment that is conducive to opponents of abortion exploiting the void by instituting “informal rules” to subvert what is lawfully permitted.¹³⁰

A second area of focus is the adoption of standards and guidelines responsive to the procedural and administrative justice needs of women seeking abortion. When there is unequal distribution of knowledge about the legality of abortion, the law has a chilling effect. Ample opportunities are created for unconstitutional opposition to abortion, including by healthcare professionals who are opposed to abortion. Women from the lower socio-economic strata who do not know what is legally permitted or do not have the means to access services in the private sector are the main casualties of the lacuna in implementation. Health care professionals who are competent to provide services are deterred by the fear of criminalization. Standards and guidelines that clarify abortion law using plain and accessible language can serve to demystify abortion law and remove the incentives for exploitation in areas where knowledge or access to accurate information is unequally distributed. In its technical and policy guidance on unsafe abortion, the WHO observes that barriers to safe abortion include laws or practices that prohibit access to information on legal abortion services, fail to provide public information on the legal status of abortion or adopt a restrictive interpretation of legal grounds.¹³¹

Uganda has taken a significant step towards clarifying domestic abortion law through the medium of non-statutory guidelines. In April 2015, the Ugandan Ministry of Health adopted standards and guidelines on unsafe abortion: “Reducing morbidity and mortality from unsafe abortion: Standards and guidelines”.¹³² These standards and guidelines are a step forward in a number of respects. They are not the sole effort of the Ugandan Ministry of Health; the Ministry of Justice and Constitutional Affairs was also involved.¹³³ It is apt to confer on the guidelines broader legitimacy among organs of state and additional official imprimatur. The

Ministry of Justice and Constitutional Affairs is the organ associated with domestic law-making. Equally significant for engendering wider purchase and co-operation is that the guidelines were formulated with the participation of the Association of Obstetricians and Gynaecologists, non-governmental organizations and civil society.¹³⁴

The standards and guidelines improve on guidelines published by the Ugandan Ministry of Health in 2012,¹³⁵ correcting patent official misconceptions about the exceptions to criminalization of abortion. The 2012 guidelines had interpreted the exceptions unduly restrictively, recognizing only severe medical conditions of a physical nature as permitted grounds for abortion, as well as implicitly ruling out abortion for psychosocial reasons.¹³⁶ The new guidelines acknowledge that abortion is lawful to preserve the life and more significantly the “health” of the pregnant woman.¹³⁷ Furthermore, they align with the guidance provided by the WHO in understanding health holistically to include psychosocial health.¹³⁸ By the same token, they align with the holistic definition of reproductive health adopted at the International Conference on Population and Development and the Fourth World Conference on Women.¹³⁹ The standard for measuring service provision under the new guidelines is “availability, accessibility, acceptability and appropriate quality”.¹⁴⁰ It clearly bears the imprint of international best practice.

To a point, the new guidelines also complement the regional consensus on unsafe abortion as contained in the Maputo Plan of Action.¹⁴¹ As with the Maputo Plan of Action, the guidelines highlight the importance of raising awareness about the availability of safe abortion and training health care professionals to ensure the availability of services.¹⁴² What is missing, however, in the new guidelines is comprehensive practical guidance for health care providers. There is a need, for example, to streamline the guidelines to show providers precisely how to perform uterine evacuation with vacuum extraction and with medication. In this regard, Uganda can draw lessons from the comprehensive guidelines developed in Ethiopia and Ghana, which more readily translate into protocols for providing abortion services.¹⁴³ Another significant gap in the Ugandan guidelines is that they are not time-bound. They are not, for example, tethered to a national plan of action for conducting national training to ensure that health providers are appropriately trained and ready to provide services. They risk becoming an abstract statement of intent.

A third area of focus is state accountability. As experience in other jurisdictions shows, mere proceduralization is manifestly insufficient.¹⁴⁴ Merely adopting standards and guidelines does not ensure that the guidelines will be implemented or will not be resisted. There must be an accessible and expeditious administrative infrastructure for realising legal entitlements. Significantly, the European Court has said that it does not consider litigation, including constitutional litigation, as a primary or regular route for women seeking to challenge decisions denying them abortion.¹⁴⁵ This is because such litigation is burdensome to women, not least poor women. Litigation is fraught with complexity and delays that militate against time being of the essence for women seeking to terminate pregnancies.¹⁴⁶ The Ugandan standards and guidelines provide no explanation as to how women seeking abortion will readily have recourse to remedial options if and when they are denied abortion.

Especially in environments where women are largely poor and lacking in knowledge about their legal entitlements or fearful about exercising their legal rights, it is essential to facilitate accountability through regular monitoring, so that evidence is regularly gathered by stakeholders, including civil society, to determine whether the state is fulfilling abortion rights. The health care sector mirrors society in its propensity to violate women's

reproductive rights through systemically embedded laws, policies, practices and values that draw from harmful stereotypes.¹⁴⁷ Where there is evidence of systemic violations of human rights in the health care system, including the systemic perpetuation of stereotypes harmful to women seeking abortion that serve to deny abortions, it should not be left to individual women to complain. Recourse must be had to public interest litigation. Public interest litigation can be strategic in publicizing human rights violations and securing redress in ways that address how the health care system, as a key sector in fulfilling abortion rights, can serve women better.

A fourth area of focus is the lifting of reservations on article 14. Though not directly connected with implementation, lifting the reservations would nonetheless be hugely symbolic in sending a key political message to stakeholders that the state recognizes access to safe abortion as a human right and is committed to fulfilling its obligations. It is incumbent upon civil society to advocate for the lifting of the reservations.

CONCLUSION

When women's rights are not implemented, they lose their emancipatory potential. Upholding women's rights to safe abortion poses destabilizing questions to law, culture and politics in post-independence Africa, where states attest commitment to constitutionalism and human rights, yet persist in the systemic subordination of women.¹⁴⁸ In gendered political economies, failure to implement abortion rights is far from being mere benign neglect. Rather, it is symptomatic of embedded androcentric conceptions of law that serve to maintain the status quo through affirming and yet simultaneously nullifying the promise of women's rights. In this sense, the failure can be understood as part of the genealogies of the modern tactics of state power: formally to recognize and yet concomitantly to delegitimize women's constitutional agency in areas contested by cultural and religious patriarchies.¹⁴⁹ Though shorn of centrally organized oppression, such failure is an example of the persistence of the misrecognition and status subordination of African women within gendered political economies.¹⁵⁰ Indeed, it is possible to understand Uganda's stance in ratifying the Maputo Protocol while placing reservations on article 14 as emblematic of statecraft in post-independence Africa that is deeply anchored in ambivalence about the legitimacy of women's sexual and reproductive rights and, ultimately, women's equal citizenship.¹⁵¹

In this article, the argument for requiring the state to take positive steps to implement its domestic abortion law is a deliberate advocacy strategy. It is a way of appropriating to Uganda, and African states in general, a pragmatic jurisprudential strategy for working within a largely conservative political environment that has yet to concede radical reform of abortion law and is unlikely to do so in the near future. This argument is not intended to replace the struggles for the ultimate decriminalization of abortion so that women's reproductive agency is respected. Furthermore, it is not intended to undermine the argument for redistributive justice so that abortion services are available and accessible to all women who need them, to prevent lack of means from becoming an obstacle. Rather, the call for the effective implementation of abortion law is a juridical modality for constructing a legal and administrative pathway for giving women capabilities within legal systems that largely continue to criminalize abortion long after colonial rule. It is a strategy for countering a double discourse of domestic laws that give with one hand but take away with the other, even the small concessions made to women.

In the age of constitutionalism and human rights, women's rights ought to be taken seriously precisely because they come with obligations. To use Hohfeld's terminology, women's rights are “claim rights” which give rise to correlative duties that are enforceable.¹⁵² At the same time, claim rights are premised around a strong conception of human agency.¹⁵³ Inaction or impediments that are posed by the state in the implementation of legal entitlement, or constraints that are the outcome of varying economic, social or cultural circumstances of rights-holders, can thwart the “capabilities” for asserting and realising rights.¹⁵⁴ Rights that have been historically denied to a politically subordinated social group should not be conceived in a formal sense only, devoid of social, political and economic context. They should also be conceived contextually to ensure that capabilities to realise the rights are substantively of equal value to all rights-holders.¹⁵⁵ Claim rights lose their status as affirmative claims and become “privileges” or “powers” if they can only be effectively enjoyed by individuals or social groups whose socio-economic status or circumstances predispose them towards knowledge about those rights and the means to realise them.¹⁵⁶

For abortion rights to be meaningful, corresponding duties incumbent on the state must be fulfilled, regardless of whether abortion engenders moral controversy and contestation by cultural or religious opponents. Commitment to pluralism ought to be a permanent feature of the public culture of a liberal democracy.¹⁵⁷ In *Taking Rights Seriously*, Dworkin underscored that it is precisely when a political society is divided that the concept of rights, and more particularly rights against the state, has its most natural use.¹⁵⁸ The institution of rights, according to Dworkin, is critical because it represents the majority's promise to minorities that their dignity and equality will be respected.¹⁵⁹ Rights to abortion have been historically denied as part of a cultural and religious production of patriarchal values that refuses to recognize women as moral subjects.¹⁶⁰ This misrecognition manifests itself not only through a state sanctioned matrix of sex- and gender-scripting conceptions of law and jurisprudence,¹⁶¹ but also through deliberate failure by the state to implement rights that are important to women.

Arguments for the implementation of abortion laws in this article assume a commitment to constitutionalism by all relevant organs of state. Ultimately, political will is required among organs of state closely involved in the administrative implementation of abortion law, especially ministries of health and ministries of justice. Crucially, there must be a critical mass of willing healthcare professionals with a recognized competence to provide abortion services. Furthermore, the call for the implementation of domestic abortion laws assumes a willingness and capacity on the part of civil society to litigate strategically, if necessary, to hold the state accountable. Needless to say, the call also assumes a readiness and willingness on the part of domestic courts to give rights a tangible meaning.

NOTES

¹RBoland and LKatzive “Developments in laws on induced abortion: 1998–2007” (2008) 34/3International Family Planning Perspectives 110.

2RJ Cook “Stigmatized meanings of criminal abortion law” in RJ Cook et al (eds) *Abortion Law in Transnational Perspective: Cases and Controversies* (2014, Pennsylvania University Press) 347 at 351.

3LFiner and JBFine “Abortion law around the world: Progress and pushback” (2013) 103/4American Journal of Public Health 585.

⁴Centre for Reproductive Rights “The world's abortion laws map 2014”, available at: <<http://www.reproductiverights.org/document/the-worlds-abortion-laws-map/>> (last accessed 16 June 2015); CGNgwena “Access to legal abortion: Developments in Africa from a reproductive and sexual health rights perspective” (2004) 19 SA Public Law 328.

⁵CGNgwena “Inscribing abortion as a human right: Significance of the Protocol on the Rights of Women in Africa” (2010) 32/4 Human Rights Quarterly 783.

⁶Adopted 11 July 2003 (entered into force 25 November 2005), 2nd ordinary session of the Assembly of the African Union, AHG/Res 240 (XXXI).

⁷African Commission on Human and Peoples’ Rights “Ratification table: Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa”, available at: <<http://www.achpr.org/instruments/women-protocol/ratification/>> (last accessed 17 June 2015).

⁸Maputo Protocol, art 14(2)(c).

⁹See the discussions below under “Incidence and phenomenon of unsafe abortion in the African region and Uganda” and “Abortion laws of Uganda”.

¹⁰Guttmacher Institute *Making Abortion Services Accessible in the Wake of Legal Reforms: A Framework and Six Case Studies* (2012, Guttmacher Institute); GSedgh et al. “Induced abortion: Incidence and trends worldwide from 1995–2008” (2012) 379 Lancet 625 at 626.

¹¹African Commission “General Comment No 2 on article 14(1)(a), (b), (c) and (f) and article 14(2)(a) and (c) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa”, adopted 28 November 2014, available at: <http://www.achpr.org/files/instruments/general-comments-rights-women/achpr_instr_general_comment2_rights_of_women_in_africa_eng.pdf> (last accessed 16 June 2015). See discussion under “Developing a remedial human rights framework” below.

¹²CGNgwena et al. “Human rights advances in women's reproductive health in Africa” (2015) 129 International Journal of Gynecology and Obstetrics 184.

¹³MBerer “National laws and unsafe abortion: The parameters of change” (2004) 12 Reproductive Health Matters 1; S Singh et al *Abortion Worldwide: A Decade of Uneven Progress* (2009, Guttmacher Institute) at 25–29.

¹⁴DAGrimes et al. “Unsafe abortion: The preventable pandemic” (2006) 368 Lancet 1908 at 1913–14.

¹⁵See the discussion below under “Uganda's abortion laws”.

¹⁶Human Rights Network-Uganda *Reviewing Chapter Four of the 1995 Constitution: Towards the Progressive Reform of Human Rights and Democratic Freedoms in Uganda* (2013, Human Rights Network-Uganda) at 13; Center for Reproductive Rights *A Technical Guide to Understanding the Legal and Policy Framework on Termination of Pregnancy in Uganda* (2012, Center for Reproductive Rights) at 6; Center for Reproductive Rights *The Stakes are High: The Tragic Impact of Unsafe Abortion and Inadequate Access to Contraception in Uganda* (2013, Center for Reproductive Rights) at 34.

¹⁷Constitution of the Republic of Uganda, 1995.

¹⁸Penal Code Act of 1950. It can be noted that sec 212 of the Penal Code punishes a person who “when a woman is about to be delivered of a child, prevents a child from being born alive”. This provision falls outside the purview of this article as it is better understood as criminalizing infanticide and not abortion.

¹⁹See the discussion below under “Developing a remedial human rights framework”.

²⁰*Ibid.*

²¹Adopted 27 June 1981, entered into force 21 October 1986, OAU doc CAB/LEG/67/3 rev 5, 1520 UNTS 217. See the discussion below under “Developing a remedial human rights framework”.

²²M Scheinin “Characteristics of human rights norms” in C Krause and M Scheinin (eds) *International Protection of Human Rights: A Textbook* (2012, Abo Akademi University Institute for Human Rights) 19 at 27–29.

²³Comm no 1153/2003 (24 October 2005) UN GAOR, Human Rights Committee, 85th session, UN doc CCPR/C/85/D/1153/2003 (2005).

²⁴Comm no 22/2009 (25 November 2011) Committee on the Elimination of Discrimination against Women, UN doc CEDAW/C/50/D/22/2009.

²⁵Comm no 1608/2007, UN doc CCPR/C/101/D/168/2007, Human Rights Committee (2011).

²⁶Appln no 5410/03, ECHR 2007-IV (2007) European Court.

²⁷Appln no 25579/05, [2010] ECHR 2032 European Court.

²⁸Appln no 27617/04, European Court (2011).

²⁹Appln no 57375/08, European Court (2012).

³⁰WHO *Unsafe Abortion: Global and Regional Estimates of the Incidence of Unsafe Abortion and Associated Mortality in 2008* (2011, WHO).

³¹Id at 27.

³²Id at 28.

³³[Ibid.](#)

³⁴The Middle Africa, Northern Africa and Western Africa regions occupy intermediate positions (12 per cent in each region): *ibid.* The description of Africa’s regions as Eastern, Middle, Northern, Southern and Western Africa aligns the discussion with the terminology used in *id* at 30.

³⁵SSingh et al. “The incidence of induced abortion in Uganda” (2005) 31/4International Family Planning Perspectives 183.

³⁶Ministry of Health “Reducing morbidity and mortality from unsafe abortion in Uganda: Standards and guidelines” (2015) at 1; Guttmacher Institute “Abortion in Uganda” (fact sheet, January 2013).

³⁷Singh et al “The incidence of induced abortion”, above at note 35 at 183.

³⁸Id at 187; Guttmacher Institute “Abortion in Uganda” above at note 36; Singh et al *Abortion Worldwide*, above at note 13 at 6.

³⁹Singh et al “The incidence of induced abortion”, above at note 35 at 187; Guttmacher Institute “Abortion in Uganda”, above at note 36; Singh et al *Abortion Worldwide*, above at note 13 at 6.

⁴⁰Guttmacher Institute “Abortion in Uganda”, above at note 36; Singh et al *Abortion Worldwide*, above at note 13 at 26–28.

⁴¹The Constitution, art 2.

⁴²RB Siegel “The constitutionalisation of abortion” in Cook et al (eds) *Abortion Law*, above at note 2, 13 at 16.

⁴³“Motion: Consideration of the Draft Constitution of Uganda” *Proceedings of the Constituent Assembly* (official report, contents of 12 September 1994) at 2035–38.

⁴⁴[Ibid.](#)

⁴⁵Id at 2035–37.

⁴⁶Siegel “The constitutionalisation of abortion”, above at note 42 at 16. The vast majority of African constitutions do not enumerate abortion or foetal rights. The Ugandan Constitution aside, the other main exceptions are: art 26(4) of the Kenyan Constitution of 2010; sec 15(5) of the Constitution of Swaziland of 2005; and sec 48(3) of the Constitution of Zimbabwe of 2013. Significantly, these three constitutions all envisage circumstances in which abortion is permitted.

⁴⁷SAMMcLean “Abortion law: Is consensual reform possible?” (1990) 17/1 *Journal of Law and Society* 106.

⁴⁸Siegel “The constitutionalisation of abortion”, above at note 42 at 13.

⁴⁹[Ibid.](#)

⁵⁰410 US 113 (1973).

⁵¹*BVerfG*, 15 February 1975, 39 *BVerfG* 1, translated in REJonas and JDGorby “West German abortion decision: A contrast to *Roe v Wade*” (1975–76) 9 *John Marshall Journal of Practice and Procedure* 605.

⁵²Jonas and Gorby, id at 648.

⁵³[Ibid.](#)

⁵⁴*BVerfG*, 28 May 1993, 2 *BVerfGE* 2/90.

⁵⁵*Case C-355/06* (2006), as translated and excerpted in Women's Link Worldwide “C-356/2006: Excerpts of the Constitutional Court's ruling that liberalised abortion in Colombia” (2007); RJCook “Excerpts of the Constitutional Court's ruling that liberalized abortion in Colombia” (2007) 15/29 *Reproductive Health Matters* 160 at 160–62.

⁵⁶Women's Link Worldwide, id at 20–21.

⁵⁷Id at 36.

⁵⁸Id at 25–32.

⁵⁹1998 (11) BCLR 1434 (T).

⁶⁰CNgwena “The history and transformation of abortion law in South Africa” (1998) 30/3 *Acta Academica* 32 at 50–60.

⁶¹*Christian Lawyers' Association*, above at note 59 at 1442–43.

⁶²The Constitution, art 21.

⁶³Id, art 22.

⁶⁴Id, art 23.

⁶⁵Id, art 24.

⁶⁶Id, art 27.

⁶⁷Id, art 29.

⁶⁸Id, art 33.

⁶⁹Id, art 42.

⁷⁰CGNgwena “Conscientious objection to abortion and accommodating women's reproductive rights: Reflections on a decision of the Colombian Constitutional Court from an African regional human rights perspective” (2013) 58/2Journal of African Law 183 at 184–87.

⁷¹RJCook and BMDickens “Human rights dynamics of abortion law reform” (2003) 25/1Human Rights Quarterly 1; CZampas and JMGher “Abortion as a human right: International and regional standards” (2008) 8/2Human Rights Law Review 249; Ngwena “Inscribing abortion”, above at note 5 at 787–97.

⁷²African Commission “General Comment No 2”, above at note 11, paras 19–22.

⁷³The Constitution, objective XIV.

⁷⁴Id, objective XX.

⁷⁵Id, art 8A.

⁷⁶In *Centre for Health, Human Rights and Development and Others v Attorney General of Uganda*, constitutional petition no 16 of 2011 (2012), the Constitutional Court of Uganda refused to treat as justiciable a claim that the state's failure to provide necessary health services had led to preventable maternal deaths, saying that such a claim raised a “political” as opposed to a justiciable question. The restrictive approach of the Ugandan Constitutional Court can be contrasted with the expansive approach of courts in India: *Laxmi Mandal v Deen Dayal Harinagar Hospital*, WP(C) No 8853 of 2008, High Court of Delhi (2010); see also RJCook “Human rights and maternal health: Exploring the effectiveness of the *Alyne* decision” (2013) 41/1The Journal of Law, Medicine & Ethics 103 at 106; O Afulukwe-Eruchalu “Accountability for non-fulfilment of human rights obligations: A key strategy for reducing maternal mortality in sub-Saharan Africa” in CG Ngwena and ET Durojaye (eds) *Strengthening the Protection of Sexual and Reproductive Health and Rights in the African Region through Human Rights* (2014, Pretoria University Law Press) 79 at 144–46.

⁷⁷R Rebouché “A functionalist approach to comparative abortion law” in Cook et al (eds) *Abortion Law*, above at note 2, 98; P Bergallo “The struggle against informal rules on abortion in Argentina” in Cook et al, id, 143.

⁷⁸Finer and Fine “Abortion law around the world”, above at note 3.

⁷⁹Rebouché “A functionalist approach”, above at note 77 at 103.

⁸⁰In *Planned Parenthood of Southeastern Pennsylvania v Casey* 505 US 833 (1992), the US Supreme Court countenanced state regulation of abortion for the purpose of foetal life protection even before the viability stage, provided the regulation does not impose an “undue burden” on the pregnant woman.

⁸¹Ngwena “Access to legal abortion”, above at note 4 at 335–38.

⁸²[1939] I KB 687.

⁸³RJ Cook and BM Dickens *Abortion Laws in Commonwealth Countries* (1979, WHO) at 13–14.

⁸⁴*R v Edgal, Idike and Ojugwu* (1938) WACA 133, decision of the West African Court of Appeal (now defunct) that served as an appellate court with civil and criminal jurisdiction; B Ibhawoh *Imperial Justice: Africans in Empire's Court* (2013, Oxford University Press) at 35–36.

⁸⁵*Mehar Singh Bansel v R* (1959) EALR 813, decision of the East African Court of Appeal (now defunct) that served as an appellate court in civil and criminal matters; Ibhawoh, *ibid*.

⁸⁶Ministry of Health “Reducing morbidity and mortality”, above at note 36.

⁸⁷CG Ngwena “Reforming African abortion laws and practice: The place of transparency” in Cook et al (eds) *Abortion Law*, above at note 2, 166 at 167–68; JN Erdman “The procedural turn: Abortion at the European Court of Human Rights” in Cook et al, *id*, 121.

⁸⁸Above at note 23.

⁸⁹Above at note 24.

⁹⁰Above at note 25.

⁹¹GA res 34/180, 34 UN GAOR supp (no 46) at 193, UN doc A/34/46, adopted 18 December 1979, entered into force 3 September 1981.

⁹²F Viljoen *International Human Rights Law in Africa* (2nd ed, 2012, Oxford University Press) at 97 and 120.

⁹³CG Ngwena “A commentary on *LC v Peru*: The CEDAW Committee's first decision on abortion” (2013) 57/2 *Journal of African Law* 310.

⁹⁴*LC v Peru*, above at note 24, para 8.16.

⁹⁵*Id*, para 8.11.

⁹⁶*Id*, para 12(b)(ii).

⁹⁷*LMR v Argentina*, above at note 25, para 9.4.

⁹⁸*Ibid*.

⁹⁹C Zampas and J Todd-Gher “Abortion and the European Convention on Human Rights: A lens for abortion advocacy in Africa” in Ngwena and Durojaye (eds) *Strengthening the Protection*, above at note 76, 79.

¹⁰⁰Above at note 26.

¹⁰¹Above at note 27.

¹⁰²Above at note 28.

¹⁰³Above at note 29.

¹⁰⁴*Tysiac*, above at note 26, paras 116–17.

¹⁰⁵*Ibid*.

¹⁰⁶Republic of Uganda “Instrument of ratification: Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa” (2010) (draft copy on file with the author).

¹⁰⁷See earlier discussion under “Uganda's abortion laws”.

¹⁰⁸WHO *Safe Abortion: Technical and Policy Guidance for Health Systems* (2012, WHO) at 92.

¹⁰⁹Ngwena “Inscribing abortion”, above at note 5 at 812; Cook and Dickens “Human rights dynamics”, above at note 71 at 22–49.

¹¹⁰GA res 2200A (XXI), adopted 16 December 1966, entered into force 3 January 1976.

¹¹¹See especially CEDAW Committee *General Recommendation No 24: Article 12 of the Convention (Women and Health)* 1999, A54/38/Rev 1, chap 1.

¹¹²*Purohit v The Gambia* (2003) African Human Rights Law Reports 96 (comm 241/2001), para 80; Ngwena “Inscribing abortion”, above at note 5 at 812.

¹¹³Above at note 11, paras 6 and 42.

¹¹⁴*Id.*, paras 41–50.

¹¹⁵This section of the article draws substantially from Ngwena “Reforming African abortion laws”, above at note 87 at 177–81.

¹¹⁶*Id.* at 177.

¹¹⁷*Ibid.*

¹¹⁸*Ibid.*

¹¹⁹EBrems and LLavrysen “Procedural justice in human rights adjudication: The European Court of Human Rights” (2013) 35/1 Human Rights Quarterly 176 at 177. The works of psychologists from which Brems and Lavrysen draw include: J Thibaut and L Walker *Procedural Justice: A Psychological Analysis* (1975, Lawrence Erlbaum Associates); and EA Lind and TR Tyler *The Social Psychology of Procedural Justice* (1988, Plenum Press).

¹²⁰Brems and Lavrysen, *id.* at 179 and 184.

¹²¹*Id.* at 180.

¹²²*Id.* at 178.

¹²³J Rawls *Political Liberalism* (2005, Columbia University Press) at 139.

¹²⁴The Constitution, art 21(2).

¹²⁵See M Nussbaum *Women and Human Development: The Capabilities Approach* (2000, Cambridge University Press).

¹²⁶Above at note 24; Ngwena “A commentary”, above at note 93 at 323.

¹²⁷Cook “Stigmatized meanings”, above at note 2 at 349.

¹²⁸*Ibid.*

¹²⁹*Id.* at 349, 359 and 360; Bergallo “The struggle”, above at note 77 at 144–46.

¹³⁰Bergallo, *id.* at 144.

¹³¹WHO *Safe Abortion*, above at note 108 at 94.

¹³²Above at note 36.

¹³³Id at vi.

¹³⁴[Ibid.](#)

¹³⁵Ministry of Health “The national policy guidelines and service standards for sexual and reproductive health and rights” (2012).

¹³⁶Id at 4.12.

¹³⁷Ministry of Health “Reducing morbidity and mortality”, above at note 36 at 4.

¹³⁸[Ibid.](#)

¹³⁹Id at x; United Nations Population and Development “Programme of action adopted at the International Conference on Population and Development, Cairo, 5–13 September 1994”, para 7.2; UN “Platform for action and Beijing declaration, fourth World Conference on Women, Beijing, China, 4–15 September 1995”, para 94.

¹⁴⁰Ministry of Health “Reducing morbidity and mortality”, above at note 36 at 7–9.

¹⁴¹African Union “Maputo plan of action for the operationalization of the continental policy framework for sexual and reproductive health and rights 2007–2010” (2006) (Maputo Plan of Action). In 2011, the Maputo Plan of Action was extended to 2015: The African Union Commission “Plan of action on sexual and reproductive health and rights (Maputo Plan of Action)”, available at: <http://pages.au.int/carmma/publications/plan-action-sexual-and-reproductive-health-and-rights-maputo-plan-action> (last accessed 3 February 2014).

¹⁴²Maputo Plan of Action, id, para 4.3.2a; Ministry of Health “Reducing morbidity and mortality”, above at note 36 at 7–9.

¹⁴³Family Health Department “Technical and procedural guidelines for safe abortion services in Ethiopia” (2006); Ghana Health Service *Prevention and Management of Unsafe Abortion: Comprehensive Abortion Services* (3rd ed, 2012, Ghana Health Service).

¹⁴⁴Bergallo “The struggle”, above at note 77.

¹⁴⁵*A, B and C v Ireland*, above at note 27, para 258.

¹⁴⁶*Tysiac v Poland*, above at note 26, para 118; *A, B and C v Ireland*, id, para 259.

¹⁴⁷SCusack and RJCook “Stereotyping women in the health sector: Lessons from CEDAW” (2009) 47 *Washington & Lee Journal of Civil Rights & Social Justice* 47.

¹⁴⁸This point is inspired by IMarcus “‘The woman question’ in post-socialist legal education” (2014) 36/3 *Human Rights Quarterly* 507 at 565.

¹⁴⁹The concept of “modern tactics of state power” is borrowed from LM Alcoff “Power / knowledges in the colonial unconscious: A dialogue between Dussel and Foucault” in LM Alcoff and E Mendieta (eds) *Thinking from the Underside of History: Enrique Dussel's Philosophy of Liberation* (2000, Rowman and Littlefield) 249 at 254.

¹⁵⁰On “status subordination” and “misrecognition”, see NFraser “Rethinking recognition” (2000) 3 *New Left Review* 107.

¹⁵¹PMcFadden “Becoming postcolonial: African women changing the meaning of citizenship” (2005) 6/1*Meridians, Feminism, Race, Transformation* 1 at 5.

¹⁵²WNHohfeld “Some fundamental legal conceptions as applied in judicial reasoning” (1913) 23/1*Yale Law Journal* 16 at 27.

¹⁵³N Lacey “Feminist legal theory and the rights of women” in K Knop (ed) *Gender and Human Rights* (2004, Oxford University Press) 13 at 31–32.

¹⁵⁴See Nussbaum *Women and Human Development*, above at note 125.

¹⁵⁵Lacey “Feminist legal theory”, above at note 153 at 40–41; Nussbaum, *id* at 124.

¹⁵⁶Hohfeld “Some fundamental legal conceptions”, above at note 152 at 16.

¹⁵⁷Rawls *Political Liberalism*, above at note 123 at 135.

¹⁵⁸R Dworkin *Taking Rights Seriously* (1977, Gerald Duckworth & Co Ltd) at 184.

¹⁵⁹*Id* at 205.

¹⁶⁰RSiegel “Reasoning from the body: A historical perspective on abortion regulations and questions of equal protection” (1992) 44/2*Stanford Law Review* 261; E Vuola “Thinking otherwise: Dussel, liberation theology, and feminism” in Alcoff and Mendieta (eds) *Thinking from the Underside*, above at note 149, 149 at 161–66.

¹⁶¹RJ Cook and S Cusack *Gender Stereotyping: Transnational Legal Perspectives* (2010, University of Pennsylvania Press) at 85–89; Fraser “Rethinking recognition”, above at note 150.