

ETHICAL AND LEGAL ISSUES IN REPRODUCTIVE HEALTH

The duty to make abortion law transparent: A Malawi case study

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Synopsis: This article uses a case study to analyze the status of implementation of abortion law in Malawi through the concept of transparency duties.

ABSTRACT

Despite adopting a progressive legal and policy framework informed by internationally recognized human rights norms and values, Malawi has not complied with the obligation to explain its abortion law in accordance with legal and human rights standards. In 1930, the colonial government adopted a Penal Code derived from English criminal law, containing provisions regulating access to abortion, but has not undertaken measures to explain when abortion is lawful. What constitutes legal abortion has never been clarified for health providers and potential clients. Consequently, eligible girls and women fail to access safe and legal abortion. The Malawi Law Commission, following its review of the colonial abortion law, has proposed liberal changes which, if implemented, would expand access to safe abortion. However, the immediate step the government ought to take is to clarify the current abortion law, and not to wait for a new law expected to materialize in the indeterminate future.

1 INTRODUCTION

Unsafe abortion continues to be a major public health challenge in Malawi. The first nationwide cross-sectional survey on the magnitude of unsafe abortion found that in 2009 an estimated 67,300 abortions occurred [1] and 18,700 women were treated in health facilities for abortion-related complications.[2] Of these women, 15,000 needed uterine evacuation procedures requiring the government to spend an estimated US\$314,000 in total.[3] A follow-up study in 2015 established that 141,000 women induced abortion, giving an abortion rate of 38 per 1000 women of reproductive age.[4] 53,600 women were treated for complications in 2015, thereby significantly increasing the cost of care since 2009. Abortion-related complications contribute to up to 18% of the maternal mortality ratio in Malawi.[5]

In its report on the review of the abortion law currently in force, the Malawi Law Commission (Law Commission) acknowledged that restrictive abortion law contributes to the problems of unsafe abortion, including serious complications such as loss of the uterus, permanent disability, and death, because it drives women and girls to seek clandestine abortions by unskilled providers.[6] The Law Commission has proposed a more liberal law to provide for expanded access to safe abortion. Arguably, it is also better aligned to internationally recognized human rights norms. The Law Commission's proposal is to be discussed in Parliament at an unknown future date.

The current law deters access to abortion and makes an exception only when the performance of an abortion is necessary to preserve the life of the pregnant girl or woman. However, despite abortion being legally available within these limited circumstances, Malawi has never explained its exception from the legal prohibition, so that abortion is not meaningfully available for girls and women who qualify under the exception.

Malawi's provisions regulating access to abortion received through the 1930 colonial Penal Code are drafted in a manner that is not immediately transparent, and do not offer precise guidance as to what constitutes legal abortion. Furthermore, the language of the provisions reflects the medical knowledge of the 1800s in Europe and is out of touch with modern medical standards. However, this should not prevent Malawi from translating the abortion provisions into clear terms and implementing them in accordance with current medical standards.

Since adopting a democratic constitution in 1995, Malawi has progressively developed an enabling legal and policy framework that ought to guide the implementation of abortion services. The Constitution of Malawi [7] recognizes various human rights, including women's rights, the right to life, the right to dignity, and the right to equality. The 2013 Gender Equality

Act [8] recognizes the right to adequate sexual and reproductive health, including the right of access to sexual and reproductive health services, and the right to choose the number of children and when to bear those children (sec. 19). In addition to these national laws, Malawi has ratified various treaties, including the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol). Article 14(2) of the Maputo Protocol requires states to undertake appropriate measures to provide access to abortion "in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus." [9]

Following its endorsement of the International Conference on Population and Development's Program of Action, Malawi developed its first reproductive health policy in 1995. The third and latest version of the policy [10] states that service providers in both the public and private sectors shall, within the confines of the law, provide abortion or refer for abortion clients requiring or requesting the service. Malawi also assented to the Maputo Plan of Action, which calls for the provision of abortion "to the fullest extent of the law", and has since reflected this in its reproductive health policies.

In describing the importance to reproductive rights of the Global Abortion Policies Database [11]—a repository of abortion laws and policies of UN Member States launched in 2017—Erdman and Johnson [12] emphasize that knowledge of abortion laws and policies is critical to ensuring access to safe abortion and to holding governments accountable for realizing access to safe abortion. Applying this insight to the context of Malawi, this article shows that even when abortion is restricted, and the provisions drafted in unclear language, access to safe abortion is nevertheless realizable in accordance with the law if only the government would fulfil its duty to explain the abortion law, guided by the national legal and policy framework, and prevailing medical standards.

In the present article, we use a case study to discuss the obligations of the government and the implications on the realization of the right of girls and women to access safe and legal abortion. The guiding questions for this case study are: What constitutes lawful abortion in Malawi? What are the obligations of the government relating to provision of legal abortion within the confines of the current law? What steps could be taken to hold the government accountable in implementing abortion law?

2 THE CONCEPT OF TRANSPARENCY DUTIES

Jane (pseudonym), a 13-year-old adolescent, was discovered by her parents to be pregnant. It was established that an older man was responsible for the pregnancy. Under the laws of Malawi, it is an offence to have sexual intercourse with a girl younger than 16 years (the man has since been prosecuted and convicted). The pregnancy was therefore a result of a sexual crime committed against Jane. Her parents took her to a public health facility for assessment and intervention. A medical officer at the facility confirmed that Jane was 18 weeks pregnant and, in their opinion, this was a medically high-risk pregnancy. Concerned about Jane's health, but also her interrupted schooling and the financial implications of them raising her child, the parents, with Jane's approval, asked for termination of the pregnancy. Though expressing sympathy for Jane's predicament, the medical officer advised them that it would be illegal under the laws of Malawi to terminate the pregnancy.

Jane was forced to carry a medically high-risk pregnancy to term because of the failure of the state to ensure that the abortion law is fully transparent both to potential clients and to healthcare providers. Lack of transparency and the uncertainty this creates around the question of when it is legal to provide abortion has a chilling effect on healthcare providers who, as in the case of Jane, would rather interpret the law conservatively and restrictively for fear of prosecution.[12] Lack of transparency sustains the illusion that all abortion is unlawful, forcing eligible girls and women to carry medically risky pregnancies to term or, indeed, to seek clandestine and unsafe abortions. The burden of interpreting the law should not be on individual healthcare providers. It is the duty of the government to ensure that the provisions of the law are translated into language that is clear and transparent for healthcare providers to implement.

This article draws upon the concept of so-called transparency duties, described as the constellation of duties of the state, arising from obligations under national and international law, to ensure that access to legal abortion is realized in accordance with the law.[13,14] These duties include disseminating information about lawful abortion to the public and healthcare providers, and putting in place clear guidelines and procedures for the implementation of legal abortion.

The language of the abortion provisions in Malawi's Penal Code, as explored below, does not provide guidance to healthcare providers or potential clients on what constitutes lawful abortion, who can provide safe abortion, and what methods and medical standards should be followed. The policy directive that abortion should be provided within the confines of the law begs the question of the meaning of "within the confines of the law", which has not been

interpreted in any other policy document or guidelines. Legal rights to access abortion services are unrealizable without the government's deliberate effort to undertake measures to clarify the law on abortion.

Healthcare providers and institutions, and health rights advocates in Malawi, have common interests in ensuring that the law is clear, notwithstanding the different personal views about abortion various stakeholders might hold. We also presuppose that clarifying the law would inevitably involve juridical interpretation to determine what constitutes lawful abortion. Without the authority of the court to provide the legal foundation, and the support of the Ministry of Justice, including the office of the Attorney General, it might be challenging to achieve consensus around what constitutes lawful abortion. Indeed, this has been the experience in Tanzania and Uganda where, having issued standards and guidelines on access to safe abortion, the Ministry of Health in the respective countries later withdrew them because of disagreements amongst stakeholders about the legality of the guidelines.[15]

3 WHAT CONSTITUTES LAWFUL ABORTION

The question of what constitutes lawful abortion is fundamental and undergirds any discussion on the transparency duties of the state. It is a question that has not been answered in Malawi since the enactment of the 1930 Penal Code. It is necessary to address this question to understand the meaning of providing abortion “within the confines of the existing law”, as stated in policy documents.

The major provision on abortion is Section 149 of the Penal Code, which states that: “Any person who, with intent to procure a 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 whatever, shall be guilty of a felony and shall be liable to imprisonment for fourteen years”.

Section 150 of the Penal Code of Malawi prohibits a pregnant girl or woman procuring her own abortion. The offence committed under this section is a felony attracting a penalty of up to 7 years imprisonment. Nonetheless, the law allows the termination of pregnancy when it is necessary to save the life of the girl or woman. Section 243 of the Penal Code stipulates that: “A person is not criminally responsible for performing, in good faith and with reasonable care and skill, a surgical operation upon any person for his benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time, and to all the circumstances of the case.” Application

of these provisions would require the state to create an enabling framework to translate them into clear language for the guidance of healthcare providers and the public.

Even in England it had become apparent that the abortion provisions in the Offences Against the Person Act 1861 (the 1861 Act) were not transparent and clear for the guidance of healthcare providers. A wide variation of opinions, therefore, prevailed amongst obstetricians and medical doctors about the lawfulness of abortion. Some thought it was impermissible even to save the life of the pregnant girl or woman, while others were of the view that abortion could be performed in the interests of the health of the girl or woman.[16] The Abortion Law Reform Association (ALRA), which had been formed in 1936 in England to campaign for abortion legislation, found an opportunity to have the law clarified when members discovered a case in which a 14-year-old girl was gang-raped resulting in her pregnancy. Dr Joan Malleson, a medical practitioner and supporter of ALRA, requested that Dr Bourne, a prominent gynecologist, perform the abortion.[17]

Following the procedure, Dr Bourne was charged with the offence under Section 58 of the 1861 Act, the provision from which Section 149 of the Penal Code of Malawi derives.[18] In his defense, Dr Bourne claimed that he had acted in good faith and for the preservation of the life of the girl. In determining the matter, the Court addressed both the application and meaning of the words “for the preservation of the mother’s life” in the Infant Life (Preservation) Act 1929, from which Section 243 of the Penal Code of Malawi derives, which Dr Bourne relied on in defense of his actions. These words, however, were not in Section 58 of the 1861 Act. The Court held that the expression that a person would not be liable if his actions were done in good faith for the preservation of the girl’s or woman’s life, even if not expressly stated in Section 58 of the 1861 Act, were nevertheless applicable to abortion because of the word “unlawful” in the 1861 Act.[18] That is, the 1861 Act prohibited only the offence of “unlawfully” undertaking abortion. The Court therefore clarified that abortion was lawful when it was performed in good faith with the view to preserve the life of the patient.

Having clarified the application to abortion of the words “for the preservation of the mother’s life”, the Court addressed what these words meant. In the Court’s opinion, “The law is not that the doctor has got to wait until the unfortunate woman is in peril of immediate death and then at the last moment snatch her from the jaws of death”. [18] Rather, these words were to be construed in a reasonable sense. The Court went on to issue a direction to the jury that it should consider that a doctor acted to preserve the life of the mother “if the doctor is of the opinion, on reasonable grounds and with adequate knowledge, that the probable

consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck”.[18]

The determination by a court of law that Dr Bourne did not commit an offence for performing the abortion clarified two things that would be useful for Malawi’s quest to clarify and implement its abortion law. First, there is a distinction between lawful and unlawful abortion. Abortion is lawful when it is performed to preserve the life of the pregnant girl or woman. Second, the words “preservation of life” should not be construed as meaning the point of imminent danger of death. Rather, it should be understood to include mental and physical health. In the case of Jane, as in the case of Dr Bourne’s patient, factors including physical and psychological health, which point to the quality of life, should be considered in determining the lawfulness of abortion. However, it is incumbent upon the state to provide clear guidance for health providers so that there is no uncertainty about the meaning of preservation of the life of the pregnant girl or woman. Most importantly, over and above any guidance that may be had from the case of Bourne, Malawi’s interpretation of the abortion law ought to be guided supremely by constitutional and human rights norms and values.

4 GUIDANCE FROM THE MAPUTO PROTOCOL AND CEDAW

Article 14 (2) (c) of the Maputo Protocol obligates states to take appropriate medical measures to provide abortion in cases of sexual assault, incest, and when the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the fetus. In interpreting the Article, the African Commission on Human and Peoples’ Rights (the African Commission)—the treaty-monitoring body of the Maputo Protocol—explained several important conditions for the fulfilment of this right, including that women should be informed of the services available to them, women should not be criminalized for having benefited from services reserved for them such as abortion care, and health personnel should not fear prosecution nor disciplinary reprisals for providing services such as lawful abortion care.[19] These conditions can be realized only if the state were to put in place a guiding framework to ensure transparency of abortion law.

Malawi is also a party to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). In its concluding observations on the seventh periodic report of Malawi, the Committee on CEDAW (the Committee) expressed its concern about the criminalization of abortion and its impact on the maternal mortality ratio. Amongst other recommendations, it urged Malawi to ensure the legal and practical availability of abortion at least in cases in which the life or health of the pregnant girl or woman is at risk.[20] (para. 34–

35) Without a guiding framework for implementing abortion law transparently, access to safe abortion cannot be made meaningfully available to eligible girls and women.

In 2017, the Committee on CEDAW issued an inquiry report on the operation of the abortion law in Northern Ireland.[21] The same 1861 law, which only prescribes punishment for the offence of “unlawful” abortion, which was at issue in the Bourne case, is still in force in Northern Ireland because the liberal amendments made for Britain by the British Abortion Act 1967 do not apply there. Given the similarity between Malawi’s Penal Code and the 1861 law, what the Committee says about the Northern Irish 1861 law would guide what the Committee would say about the operation of the abortion law in Malawi. Moreover, given that both the UK and Malawi are parties to CEDAW, what the Committee explains are obligations of the Northern Irish government to clarify the abortion law under CEDAW would also apply to the government of Malawi.

In its inquiry report on Northern Ireland, the Committee raised concern about the lack of clarity as to when abortion can be performed legally.[21] (para. 67) It noted that the state guidance provided to healthcare providers was unclear and discouraged them from taking any steps to provide legal abortion to potential and eligible clients for fear of prosecution. The Committee also found that there were no means to communicate to healthcare providers and the public what constitutes lawful abortion. The Committee reiterated the obligations of states under CEDAW to achieve women’s equality by ensuring women’s access to sex-specific healthcare services such as abortion care, and other sex-specific services such as postabortion care.[21] (para. 54–57, 60) Failure to facilitate access to lawful abortion services discriminates against girls and women because the state is not accommodating their sex-specific healthcare needs, and thus violates their equal access to healthcare services.

Noteworthy is that Malawi’s abortion law permits access for those girls and women whose lives are endangered by pregnancy. Yet, such services are not transparently available to them, as in the case of Jane. All the while the government escapes accountability for violations of the rights of girls and women because of their failure to give effect to the law on lawful abortion.[12] This has serious health implications for girls and women whose pregnancies pose threats to their lives.

5 TOWARD CLARIFYING TRANSPARENCY DUTIES

The surest way to address the vagueness of the current abortion law is to repeal the colonial version and enact new and enabling legislation that is drafted in clear language, reflecting modern medical knowledge and practice, and aligned with human rights standards. The Global

Abortion Policies Database shows that several countries have taken that path, including South Africa, Ethiopia, Mozambique, and Rwanda.[11]

Although Malawi is on the unpredictable path of reform, the state cannot defer its transparency duties. After all, having a liberal law would not by itself guarantee automatic fulfilment of the duty of transparency, as the case of Masingure in Zimbabwe revealed.[22] Despite Zimbabwe having a liberal law that allows access to abortion on the grounds of rape, Mrs Masingure, who had become pregnant because of rape, failed to access safe abortion because the healthcare provider did not provide timely services due to uncertainties in the implementation procedures.

While health and human rights advocates continue to urge reform of the abortion law in Malawi through the political process that is already underway, the Ministry of Health should be held accountable for the implementation of the current abortion law. The Ministry of Health should develop and implement standards and guidelines for healthcare providers and the public on lawful abortion. It would be useful to seek judicial interpretation of the law to avoid disagreements among stakeholders about the legality of the standards and guidelines.[15] Strategic litigation would be useful not only to address ambiguities, but also to ensure that the standards and guidelines comply with the Constitution and international human rights law. The case of the Family Planning Association of Northern Ireland (FPANI) is instructive in this regard.[23] FPANI took a matter to court to compel the responsible department to issue guidance on abortion. The department issued such guidance, but the CEDAW Committee found that, even with this guidance, “the ambiguous NI legal and policy framework does not provide a clear pathway forward for care for women requiring an abortion.”[21] (para. 16)

It has been explained that the NI outcome of the transparency litigation was less than desirable because it did not pursue a human rights approach, suggesting that a litigation strategy should be based on constitutional and human rights principles. Otherwise, the outcome might not inspire the change necessary to ensure that the law is applied in a transparent manner and in accordance with human rights standards.[24]

The case of Jane could be instructive to explore how the local, and perhaps regional, courts could be engaged to clarify the abortion law for transparent implementation. Jane could sue the Ministry for failing to provide her with the option of legal abortion, or could pursue judicial review of government practice on implementation of the abortion law for non-compliance with the Constitution of Malawi and international human rights law, especially its obligations under CEDAW, as explained in the Northern Irish Inquiry Report. In terms of remedies, Jane could

seek damages for being forced to carry a pregnancy to term when termination was legally available but denied. She could also seek a declaratory judgment to clarify her rights to access safe abortion and the duties of the state to provide safe and legal abortion. Ultimately, the aim of strategic litigation would be to ensure that the state is held accountable to its transparency duties and that legal abortion should be available and accessible in accordance with the law.

6 CONCLUSION

Malawi is on the path to liberalize abortion law in some indeterminate future. This, however, should not overshadow the fact that the government has the immediate obligation to implement the current abortion law transparently in accordance with modern medical standards and in compliance with the reproductive rights of girls and women. These transparency obligations should not be deferred to some later date on the pretext of awaiting the enactment of more liberal abortion legislation. Failure to implement the abortion law to provide access to safe lawful procedures has immediate and ongoing consequences on the health and human rights of girls and women in Malawi. Due to the restrictive expression of the abortion law, it is precisely those girls and women, such as Jane, who have medically risky pregnancies, whose legal rights are violated, and whose lives and or health are put at risk because the government has not complied with its obligations to clarify the abortion law.

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Both authors contributed equally to the conception of the article. GDK wrote the first draft and both authors contributed to revisions.

CONFLICTS OF INTEREST

The authors have no conflicts of interest.

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