

Global and regional responses to unsafe abortion: the place of state transparency obligations in the African region

Charles Ngweni, LLB, LL.M, LL.D, Barrister-at-Law
Professor
Centre for Human Rights
Faculty of Law
University of Pretoria, South Africa
E-mail: charlesngweni@gmail.com

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Overview

- to introduce the concept of **transparency** and its rationale as a human rights value and a positive state duty
- to highlight the value of transparency in facilitating the realisation of women's access to safe abortion and thereby serve to protect health and life in the African region
- to give an overview of the development of **African abortion laws** and their link with unsafe abortions
- to highlight the abortion provisions of the **African Protocol on the Rights of Women (Maputo Protocol)** and their significance for access to safe abortion
- to highlight the significance of the African Union's major policy framework and plan of Action on sexual and reproductive health but with a focus on abortion - and the **African Union's African Union, Maputo Plan of Action for the Operationalisation of the Continental Policy Framework for Sexual and Reproductive Health and Rights (2006) (Maputo Plan of Action)**
- to discuss the development and application of the duty of transparency by **United Nations Treaty Monitoring bodies (TMBs)** with a view to highlighting the enabling features of transparency on women's access to safe abortion.
- to acknowledge, the synergies between transparency as an emerging human rights concept with other complimentary global guidelines especially the **World Health Organization's guidance on safe abortion - Safe Abortion: Technical and Policy Guidance for Health Systems (2012) (WHO Guidance)**
- to draw **practical lessons** for the African region from developments on transparency as a human rights value and state duty.

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Introducing the concept of transparency as a human rights duty: What is it?

- an **emerging human rights concept** which is increasingly recognised by TMBs of the UN in the context of women's rights to safe abortion.
- human rights duty on the state to take **positive measures to implement the laws already recognised by the state**
- The following quotation illustrates application of transparency in the context of abortion: by a TMB
The Committee considers that, since the State party has legalized therapeutic abortion, it must establish an appropriate legal framework that allows women to exercise their right to it under conditions that guarantee the necessary legal security, both for those who have recourse to abortion and for the health professionals who must perform it. It is essential for this legal framework to include a mechanism for rapid decision-making, with a view to limiting to the extent possible risks to the health of the pregnant mother, that her opinion be taken into account, that the decision be well-founded and that there be a right to appeal [Para 8.17 of the views of the Committee on CEDAW in L.C. v Peru (2011)]. Emphasis added. Footnote omitted.
- Transparency can be understood as requiring the state to:
 1. **establish a practical framework for accessing safe abortion**
 2. **promote knowledge about the legality of abortion** among both the women seeking abortion and the health care workers who have a legal duty to provide abortion services and the **availability of safe abortion services**
 3. **establish a framework that recognises that time is of the essence for women seeking abortion**
 4. **take the views of the woman seeking abortion into account** when deciding whether the woman meets the legal criteria
 5. **provide women with an administrative right of appeal** against a decision refusing abortion
- An integral part of the now accepted tripartite set of state duties that apply to all human rights, namely, **duties to respect, to protect, and to fulfil** human rights. The emphasis in transparency is on the duty to fulfil.

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An overview of the historical development of African abortion laws

- African abortion laws are largely a colonial inheritance of highly restrictive laws already in place at the time independence. **Saving the life of the pregnant woman was the only permissible ground.** This ground was also known as the **therapeutic defence or defence of necessity**
- Former British Colonies: Derived their laws mainly from the **Offences Against the Person Act of 1861**
- Former Belgian, French, Italian, Portuguese and Spanish colonies: Derived their laws from respective penal codes colonizing countries whose abortion laws had been in turn been shaped mainly by the **French Penal Code**
- Reforms during the colonial era were very limited. **R v Bourne**, a decision of an English court in 1938, was the main reform. Bourne, which only applied to British colonies prepared to follow it, had the effect of extending the grounds for abortion to cover the **mental or physical health of the pregnant woman**
- Reforms in the post-independence can be summarized as follows:
 1. Cape Verde, South Africa, Tunisia and Zambia: the only countries that explicitly recognize **socioeconomic circumstances OR mere request** as a ground for abortion. Ethiopia, following the 2005 reforms, can also be added to the list in respect of minors and women who suffer from mental disabilities
 2. The proportion of countries that have broadened the grounds of abortion beyond saving the life of the woman has grown considerably. Close to 50% of African States now recognize a **threat to the health of the pregnant woman** as a ground for abortion. Swaziland, Kenya, Rwanda, and Lesotho are countries that have joined this group in recent years
 3. An increasing number of countries now recognize **rape, incest, fetal health or fetal life** as abortion grounds
 4. **Several African states have retained colonial laws.** Angola, Central African Republic, Congo (Brazzaville), Côte d'Ivoire, Democratic Republic of Congo, Egypt, Gabon, Guinea-Bissau, Madagascar, Malawi, Mali, Mauritania, Mauritius, Sao-Tome & Principe, Senegal, Somalia, Sudan, South Sudan, Tanzania and Uganda
 5. At the same time, **reforms to liberalise abortion or initiatives to liberalise abortion laws are underway** in some countries including Malawi, Mozambique, Senegal, Sierra Leone, and Tanzania

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African regional developments: the Maputo Protocol

- Adopted in 2002 in Maputo and came into force in 2005 as a supplement to the African Charter to **promote and strengthen the protection of women's rights**
- Ratified by at least 2/3 of the members of the AU
- Article 14 of the Protocol explicitly recognizes **SRH** as a human right
- Article 14(2)(c) explicitly recognizes a right to abortion. It requires States to permit abortion on the following grounds: **health of the pregnant woman, threat to the life of the fetus, rape, incest and sexual assault**
- For the first time in human rights history, Protocol accords abortion the status of an **enumerated substantive right** at the regional level.
- Protocol advances **global consensus on combating unsafe abortion** through an enabling legal environment in a way that far exceeds the consensus reached at ICPD
- Promotes the legitimacy of liberalizing domestic abortion laws** by providing abortion grounds that serve not just as a minimum threshold
- Serves as a source of peremptory state obligations** to provide access to safe, legal abortion at the domestic level as part of respecting, protecting and fulfilling SRH.
- Therefore, the Protocol can serve as a tool for: 1) **reform of domestic laws through harmonization**; 2) **state accountability**; 3) **access to justice and eradication of impunity in the criminalisation of abortion, and redress**; and 4) **litigation and legal advocacy** aimed at raising awareness about abortion as a human rights and broadening access to safe abortion

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Current limitations/challenges with African domestic and regional abortion laws

- Failure of permitted exceptions to the criminalization of abortion in African abortion laws to translate into tangible rights of access to safe abortion - The African region's high unsafe-abortion-related mortality is testimony
- Tunisia, South Africa and the Cape Verde remain exceptions to the rule in terms of tangible implementation of access to safe abortion services.
- Frequently laws remain in penal codes without being supplemented by official explanation to guide the public as well as professionals who have a duty to provide reproductive health services.
- Ignorance about the legality of abortion among health care service providers leading to a general assumption that abortion is rarely lawful.
- Ignorance and lack of awareness about legality of abortion and the availability and safe abortion services among women, especially poor and rural women leading to general assumption that abortion is rarely lawful.
- Unavailability of accessible safe services
- Abuse of conscientious objection in the absence of clear guidance.
- Failure to harmonize domestic laws with the Protocol among ratifying states. Rwanda, which initially ratified the Protocol with reservations, has been the only country to harmonize its laws in response to the Protocol

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Maputo Plan of Action

- the Maputo Plan of Action for the Operationalisation of the Continental Policy Framework for Sexual and Reproductive Health and Rights (Maputo Plan of Action) Africa's own regional plan for the realization of sexual and reproductive health
- A plan that was developed against the backdrop of ICPD and Programme of Action (1994); FWGW and Platform for Action (1995); ICPD +5 (1995); WHO's Safe Abortion: Technical and Policy Guidelines for Health Systems (2003); Millennium Development Goals (2000)
- Initially adopted in 2006 by the AU Ministers of Health as regional SRH plan of Action to run from 2007-2010 but extended to 2014
- Reducing unsafe abortion is one of the key SRH strategies under the Maputo Plan of Action, which seeks
- to achieve universal access to comprehensive sexual and reproductive health services by 2015 so as to complement regionally MDG goals
- Members States undertake to reduce the incidence of unsafe abortion through: **to enact policies and laws to reduce unsafe abortion, including reviewing highly restrictive laws, providing abortion services to 'the fullest extent of the law, educate communities about the availability of safe abortion services as allowed by domestic laws.**
- As its ICPD counterpart affirms sexual and reproductive rights as human rights
- Seeks to foster a progressive development of the application of human rights to sexual health and reproductive health
- Compromised by: prevalence of restrictive abortion regimes; lack of effective implementation of abortion laws; lack of accessible resources for safe abortion

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ROLE OF UN TMBs: THE BACKGROUND

- Independent bodies that oversee the implementation of UN human rights treaties.
- Perform a number of functions, including: considering periodic reports, engaging states on how they are discharging states obligations, issuing Concluding Observations, General Comments and General Recommendations; and considering individual complaints in respect of states parties that have recognised the competence of the TMB.
- TMBs have engaged with abortion in Concluding Observations, General Recommendations, General Comments, and in communications of individual complaints.
- This presentation focuses on the decisions of TMBs in respect of individual complaints submitted to them alleging violations of human rights by states that recognise the competence of the TMBs under Optional Protocols
- The presentation focuses on three cases that have directly addressed abortion:
 1. *K.L. v Peru* (2005), decided by the Human Rights Committee
 2. *L.C. v Peru* (2011), decided by the Committee on the Elimination of Discrimination against Women
 3. *L.M.R v Argentina* (2011), decided by the Human Rights Committee

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K.L. v Peru

- Communication arose from Peru and was brought before the Human Rights Committee under the ICCPR.
- 17-year-old girl old pregnant with a foetus that had been diagnosed to be suffering from anencephaly. There was clear medical and social evidence that continuing with the pregnancy would be harmful to K.L.'s health.
- K.L. requested abortion but was denied on the ground that abortion would be unlawful as it would harm the foetus.
- Denial was in the face of Article 19 of the Peruvian Penal Code which explicitly permits abortion when it is 'the only way of saving the life of the pregnant woman or avoiding serious and permanent damage to her health'.
- K.L. was forced to carry the pregnancy to term. She gave birth to a baby with anencephaly. The baby survived for four days during which K.L. was obliged to breastfeed. She was severely traumatized.

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K.L. cont/: the claim and the decision

- Before the Human Rights Committee, K.L. argued that denial of abortion constituted violations of the following provisions under the ICCPR:
 - Article 2 (right to an effective remedy);
 - Article 3 (right to equality and non-discrimination);
 - Article 6 (right to life);
 - Article 7 (right to be free from cruel, inhuman and degrading treatment);
 - Article 17 (right to privacy);
 - Article 24 (right to special protection as a minor); and Article 26 (right to equal protection under the law).
- Committee held that denial of abortion constituted violations of Articles 2, 7, 17 and 24 of the ICCPR.
- It dismissed claims under Articles 3 and 26 on the ground that the claims had not been substantiated.
- Committee refrained from determining whether there had been a violation of Article 6 on the ground that as the Committee had found a violation of Article 7, it was unnecessary to consider whether Article 6 had been violated.

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K.L. cont/

- Findings of violation of human rights was based on the following reasons:
 1. The Peruvian legal system had failed to render Peruvian abortion law procedurally accessible to K.L.
 2. K.L. had no realistic prospect of challenging denial of abortion short of constitutional litigation. There was no legal or administrative infrastructure for challenging the denial of abortion.
 3. The Peruvian legal system had failed to translate the Peruvian Penal Code into a legal or administrative framework that would have facilitated K.L. in vindicating her right to abortion.
 4. Though Peruvian law permitted someone in K.L.'s position to have abortion, nonetheless, she was refused abortion by hospital authorities and left without any effective remedies.
- The Committee said that because Peru had no administrative remedy which would enable a pregnancy to be terminated on therapeutic grounds, nor any judicial remedy functioning with the speed and efficiency required to enable a woman to require the authorities to guarantee her a right to lawful abortion within the permitted period by virtue of the special circumstances obtaining in such cases, a remedy which has no chance of being successful cannot count as such and does not need to be exhausted for the purposes of the Optional Protocol.
- The inference to draw from *K.L.* is that when domestic authorities regulate abortion by proscribing abortion subject to certain exceptions, as was the case with Peruvian abortion law, the state has an obligation to implement the law so that it is accessible to women seeking abortion. More specifically, the state has a duty to take positive steps and implement legal and administrative procedures that provide women who are denied abortion with a timely opportunity to challenge the denial and vindicate their rights.

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L.C. v Peru: the facts

- A 13-year-old girl became pregnant following repeated sexual abuse by a 34-year-old man. She became severely depressed and attempted suicide by jumping from a building causing her severe injuries, including damage to the spine
- Required emergency surgery to prevent her injuries and disability from worsening, but hospital authorities decided to postpone the surgery for the reason that she was pregnant and that surgery would be harmful to the foetus.
- Requested hospital authorities to grant her permission to have an abortion, but the request was declined. This was notwithstanding that Article 19 of the Peruvian Penal Code permits abortion to save the life of the pregnant woman or to prevent serious and permanent damage to her health.
- It took hospital authorities 42 days to respond to and decline the abortion request. The reason given for denying the abortion request was that the pregnancy did not constitute a danger to L.C.'s life.
- L.C. appealed to the hospital authorities against the decision to refuse her abortion. In support of her appeal, she submitted a medical report confirming that continuing with the pregnancy posed a grave risk to her physical and mental health. However, prior to the appeal being considered, L.C. miscarried spontaneously. It was only then that L.C. was operated upon, and this was almost three and half months after it had been established that L.C. needed spinal surgery. Even then, the hospital authorities indicated that they would have declined the appeal as their initial decision denying abortion was 'not subject to appeal'.
- Although she was operated upon, the delay in receiving emergency surgical care as well as psychological care, and lack of financial resources to afford rehabilitation care worsened her condition to the point of being paralysed from the neck down and only able to partially move her hands.
- L.C. brought an action before the CEDAW Committee under the Optional Protocol alleging violations of several provisions of CEDAW.

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LC cont/: the claim under CEDAW

- LC's main argument was that denial of a therapeutic abortion by the hospital authorities violated the following provisions of CEDAW, in particular her right to health, dignity and freedom from discrimination in accessing healthcare services. She relied on the following provisions of CEDAW:
 - Article 1** which defines 'discrimination against women' in terms of substantive equality;
 - Article 2(c)** which requires states to establish legal protection of the rights of women on an equal basis with men and to ensure the effective protection of women against any act of discrimination;
 - Article 5** which requires states to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
 - Article 3** which requires states to take in all fields, all appropriate measures, including legislation, to ensure the full development and enhancement of women, and enjoyment of human rights and fundamental freedoms on a basis of equality with men;
 - Article 5** which, inter alia, requires states to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;
 - Article 12** which guarantees a right to be free from discrimination when accessing healthcare services; and
 - Article 16(Xe)** which guarantees women the rights to decide freely and responsibly the number and spacing of children and to have access to the information, education and means to enable them to exercise these rights.

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LC cont/: findings on admissibility

- The CEDAW Committee found the communication to be admissible.
- It found that L.C. had exhausted local remedies when she requested abortion from the hospital authorities, but was turned down and informed that the decision was not subject to appeal.
- Over and above observing that the hospital procedures for requesting abortion were **too long and unsatisfactory**, the Committee was also of the view that L.C. could not have been expected to embark on litigation to vindicate her rights. This is because the procedures for judicial review were unpredictable and certainly slow as not to hold out to L.C. a realistic prospect of securing a 'preventative, independent and enforceable decision' that would meet her needs to terminate the pregnancy and have access to medical care.
- Likewise, the Committee took the view that civil action for compensation for damages, which, if successful, yields retrospective compensation, would not have been an effective remedy as it would not have redressed the harm that LC was seeking to prevent.

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LC cont/: findings on substantive merits, including transparency

- Regarding the substantive merits, the CEDAW Committee found the conduct of the state to constitute violations of Articles 1, 2(c), 2(f), 3, 5 and 12 of CEDAW.
- It found that LC had been denied the medical care she needed only because she was pregnant and that hospital authorities had made the rendition of any medical treatment conditional upon L.C. carrying the pregnancy to term. The Committee said that it was discriminatory to refuse to legally provide a reproductive health service that is needed by women. It found that it was discriminatory for the state hospital authorities to deny LC both abortion as well as the emergency surgery that she needed to repair the injuries she had sustained when she jumped from a building.
- The Committee highlighted that **Article 12 of CEDAW** imposed a duty on the state to 'respect, protect and fulfil' women's right to health care.
- The Committee noted that although Article 19 of the Peruvian Penal Code permitted therapeutic abortion on the ground of avoiding serious and permanent harm to the health of the pregnant woman, a ground that LC patently satisfied, especially in the light of her attempted suicide, nonetheless, LC was left without 'access to an effective and accessible procedure' to establish her legal entitlement.
- The Committee found that LC had been denied abortion and necessary emergency care due to considerations to protect the foetus that she was carrying. It said that the decision to postpone the surgery had been 'influenced by the stereotype that protection of the foetus should prevail over the health of the mother'. Over and above violating Article 12, the committee found this stereotypic conduct to also constitute a violation of Article 5 of CEDAW.

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LC cont/: findings on substantive merits, including transparency

- Failure by the Peruvian legal and health systems to establish and implement procedures by which the rights conferred by Article 19 of the Peruvian Penal Code could be effectively and timely realized by women seeking legal abortion also meant that the state had failed to establish legal protection of the rights of women in accordance with Articles 2(c) and 2(f) of CEDAW.
- The absence of laws and regulations governing access to therapeutic abortion under Article 19 of the Peruvian Penal Code had resulted in unenviable practice. Each hospital authority determined arbitrarily the requirements that were necessary to meet the legal grounds, the procedure to be followed, the time frame for a decision and the importance attached to the views of the pregnant woman.
- Drawing in part from the jurisprudence of the European Court of Human Rights, the Committee highlighted that once a state has decided to permit abortion in certain circumstances, it has a duty to establish a framework that allows women seeking abortion to realise their legal entitlements. It said:

... once State party has legalized therapeutic abortion, it must establish an appropriate legal framework that allows women to exercise their right to it under conditions that guarantee the necessary legal security, both for those who have recourse to abortion and for the health professionals that must perform it. It is essential for this legal framework to include a mechanism for rapid decision-making, with a view to limiting to the extent possible risks to the health of the pregnant woman, that her opinion be taken into account, that the decision be well founded and that there is a right to appeal.

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LC cont/:remedies

- By way of remedies, the Committee made a number of recommendations to the Peruvian state.
- Over and above recommending **adequate compensation for material loss, pain and suffering and rehabilitation measures** for LC, the Committee also made recommendations that were designed to reform both the procedural as well as substantive aspects of domestic abortion law.
 - Procedurally, it recommended that Peru **establish a mechanism** to enable women seeking to realise their legal entitlements to abortion under the Peruvian law.
 - Furthermore, more generally, the Committee recommended that the Peruvian health care system, through **education and training**, be sensitized towards responding positively to the reproductive health needs of women, especially adolescent women and victims of sexual violence.
 - It recommended the **adoption of guidelines or protocols** to ensure the availability and accessibility of health care services.
 - Substantively, the Committee said that Peru should review its abortion law with a view to decriminalizing abortion when pregnancy results from rape or sexual abuse.

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L.M.R. v Argentina: the facts

- L.M.R. was 19 years old. She was a person with an intellectual disability. Her mental age that was between 8 and 10 years. She had become pregnant following a suspected rape.
- Through her mother, L.M.R. requested abortion but was turned down notwithstanding that under Article 86(2) of the Argentinean Criminal Code abortion is permitted as an exception to the rule if: (1) performed in order to avoid endangering the mother's life or health and if this danger cannot be prevented by other means; or (2) if the pregnancy results from rape or indecent assault of a woman with a mental disability.
- L.M.R.'s initial request was turned down by hospital authorities when the hospital was issued with an injunction by a Juvenile Court to prevent the abortion on the ground that abortion would harm an 'innocent victim' – the foetus. At the time, L.M.R. was 14 and half weeks pregnant.
- The decision of the juvenile court was confirmed by the Civil Court on appeal. On further appeal to the Supreme Court L.M.R. succeeded in overturning the decision.
- The Supreme Court held that L.M.R. was entitled to termination under Argentinean Criminal Code and that **judicial authorization was not required**.
- But despite the favourable ruling, L.M.R. could not find a health facility willing to terminate her pregnancy. The hospital to which she had requested termination came under intense public pressure not to carry out the termination. In any event, the hospital said that the pregnancy was too advanced for termination as it would endanger L.M.R.'s health. By now L.M.R. was nearly 20 and half weeks pregnant. With the support of women's organizations L.M.R. was able, in the end, to arrange for a safe clandestine termination in a private health care facility.

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L.M.R. v Argentina: the claim and the decision, including the finding on lack of transparency

- LMR alleged that the conduct of the Argentinean constituted violations of the following provisions of the ICCPR: Articles 2, which, inter alia, guarantees a right to have an effective remedy before a competent domestic authority; Article 3 which guarantees equality and non-discrimination; Article 7, which guarantees a right to be free from cruel, inhuman and degrading treatment; Article 17, which guarantees a right to privacy; and Article 18, which, guarantees a right to freedom of religion and belief.
- The Human Rights Committee found the conduct of the Argentinean state to constitute violation of Articles 2(3) in relations to Articles 3, 7, and 17.
- In reaching its conclusion on Article 2(3) of the ICCPR, the Committee noted that although the Argentinean Criminal Code conferred LMR with legal entitlement to abortion, she was unable to realise her entitlement. Instead she had to appear before three courts causing delay which had the effect of prolonging, by several weeks, the gestation period which became the reason why the hospital ultimately declined to perform the abortion which also became the reason why LMR turned to clandestine abortion. **These facts highlighted that Argentina did not have a mechanism for providing LMR with an effective remedy.**
- In respect of Article 3, although the Committee did not expressly articulate the reasoning behind its positive finding of a violation, it can be surmised that the Committee implicitly accepted LMR's argument that failure to accede to a request for a procedure – abortion – that was solely needed by women without any legitimate justification under the law, constituted unfair sex-based discrimination.
- Regarding Article 7, the Committee found that forcing L.M.R. to ensure pregnancy that was a result of rape, together with her status as a minor and someone with a disability contributed to mental suffering that though not constituting torture, nonetheless, amounted to cruel and inhuman treatment.
- On account of the fact that the Argentinean Criminal Code did not require judicial authorization for abortion once a ground for abortion was met, the Committee found that requiring LMR for first obtain permission of the courts prior to abortion constituted an unlawful interference with a her right to privacy under Article 17 of the ICCPR.

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Lessons for African Human Rights Systems (African regional human rights system under the African Charter on Human and Peoples' Rights and domestic human rights systems)

- The cases that have been considered by TMBs can be described as laying down 'transparency' duties for the reason that are designed to render the law clear, readily intelligible to, and challengeable by, women seeking abortion.
- Where abortion is permitted under domestic law, even in a very restricted form, the state has a corresponding duty to ensure that any attendant rights are amenable to effective realisation by women seeking abortion.
- Civil society can use transparency duties to require states to reform abortion law and practices
- Rendering abortion laws accessible entails doing two main duties:
 - 1) a duty to raise awareness among women and healthcare providers about the legality or permissibility of abortion;
 - 2) a duty to take positive steps to ensure that women seeking abortion have access to administrative procedures that facilitate timely review of decisions to refuse abortion.
- The jurisprudence on transparency is not unique to UN TMBs. In recent years, The European Court of Human Rights has also been developing a jurisprudence on transparency in abortion laws and notably in *Tysiac v. Poland*, Eur. Ct. H.R., 45 EHRR 42 (2007). See also: *A. B and C v. Ireland*, Eur. Ct. H.R., [2010] ECHR 2032; *RR v. Poland*, Eur. Ct. H.R., Application No. 27617/04 (2011); *P and S v. Poland*, Eur. Ct. H.R., Application No. 57375/08 (2012). In *LC v Peru*, the CEDAW Committee drew from some of the jurisprudence of the European Court of Human Rights. There is also a decision of a domestic court that supports transparency: *Family Planning Association of Northern Ireland v. Minister of Health, Social Services and Public Services* [2005] NIQA 39, a decision of the Court of Appeal of Northern Ireland.

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Lessons cont/

- The human rights rationale for transparency is to promote the tangible realisation of abortion rights that are guaranteed under domestic abortion laws so that abortions rights do not remain merely as paper rights.
- The requirement of transparency comes from a realisation that laws that criminalise abortion subject to exceptions but without simultaneously articulating clearly the grounds for lawful abortion under the exceptions, as has been the main historical trend in the African region, have a chilling effect.
- African abortion laws tend to unduly deter healthcare providers from providing health services to women even where abortion is lawful. The laws create misperceptions among women seeking abortion and the general public that abortion is criminal conduct at all times. The general failure by the legislative and executive arms of governments in the African region to translate any given abortion rights into rights that are visible and tangible has served as a veritable barrier to the implementation of safe abortion services.
- As a juridical value and human rights interest, transparency can be understood as a way of situating abortion law in both procedural as well as substantive equality. Procedural equality is a way of ensuring equality under the law. Substantive equality, on the other hand, is a way of grounding abortion law in actual lives lived and injuries suffered by women.
- Substantive equality seeks to ensure that abortion law is woman-centered and adequately responsive to the needs of a social group whose reproductive needs have historically been criminalised and stigmatised by society and health systems. In this sense, the duty of transparency becomes a transformative way of thinking about human rights not just as claims that impose duties of restraint on the state, but also claims that impose positive obligations aimed at enabling the effective realisation of rights.

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Lessons cont/

- The human rights duty on transparency in abortion laws has synergies with the African Union's *Maputo Plan of Action*. (*Maputo Plan of Action for the Operationalisation of the Continental Policy Framework for Sexual and Reproductive Health and Rights* (2008)) Reducing unsafe abortion is one of the plan's key strategies. To this end, the Maputo Plan of Action, inter alia, requires governments to enact policies and legal frameworks to reduce unsafe abortion. From a transparency standpoint, it is significant that, over and above requiring governments to train health care providers in the provision of comprehensive safe abortion services where domestic laws allow, and to provide safe abortion services to the 'fullest extent of the law', the Maputo Plan of Action also requires governments to educate communities about the availability of safe abortions services as allowed by domestic laws.
- Equally, the human rights duty to ensure transparency in abortion laws has rapport with WHO's *guidance on safe abortion (Safe Abortion: Technical and Policy Guidance for Health Systems* (2012)). At the global level, the WHO's technical and policy guidance on safe abortion has provided governments with guidelines on how to implement abortion laws in ways that respect, protect and fulfill women's human rights partly through ensuring that abortion services which are permitted under domestic law are in fact 'accessible in practice'. WHO's guidelines implore states to provide information that clarifies the legal grounds for abortion as permitted under domestic laws. The guidelines also require states to adopt administrative frameworks and procedures for implementing access to legal abortion, including frameworks and procedures that accommodate views of the women seeking abortion and provide timely independent review of administrative decision

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