Human Rights and African Abortion Laws

A Handbook for Judges

By Prof. Charles Ngwena

ipas HEALTH ACCESS RIGHTS AFRICA ALLIANCE

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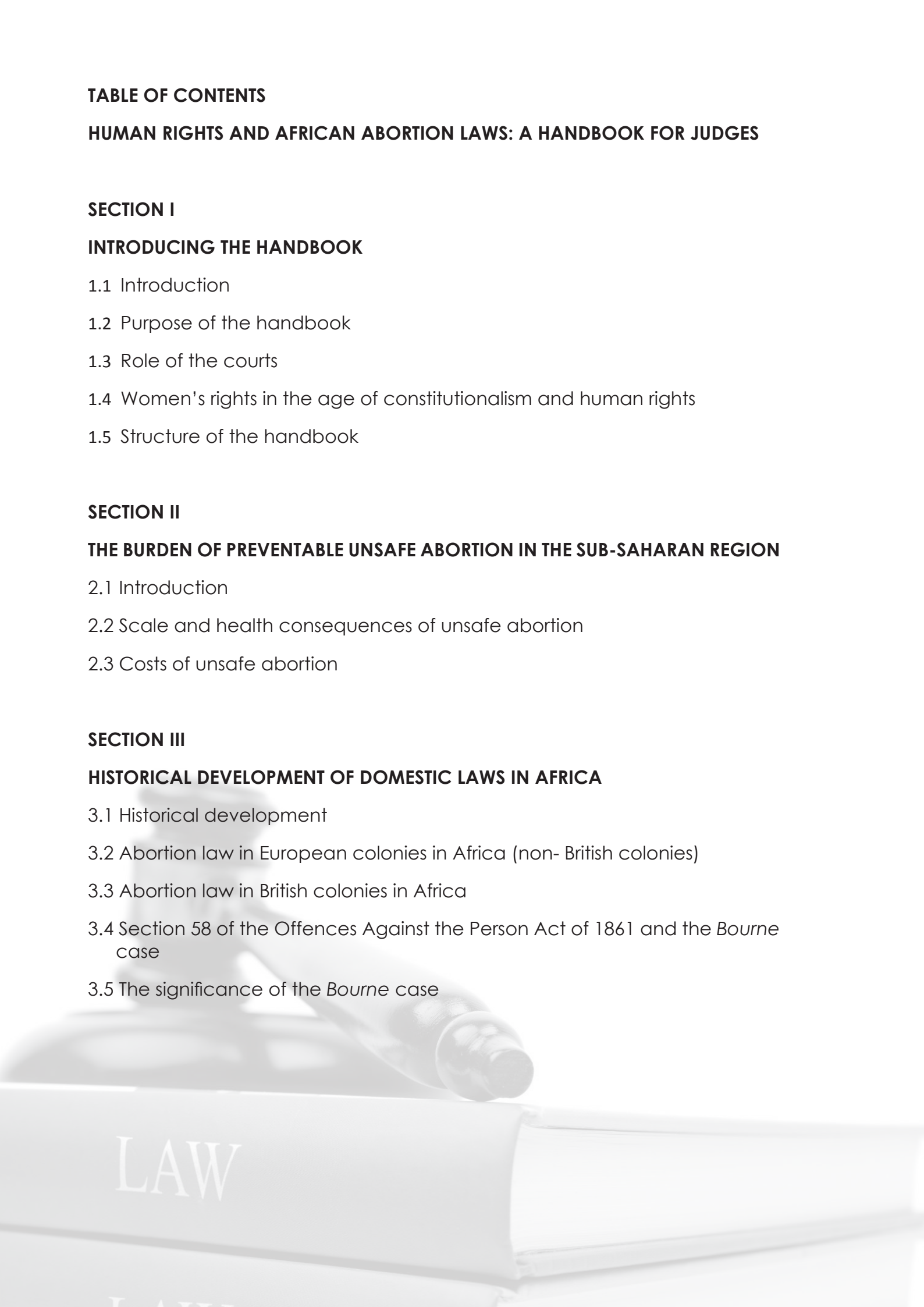
TABLE OF CONTENTS

HUMAN RIGHTS AND AFRICAN ABORTION LAWS: A HANDBOOK FOR JUDGES

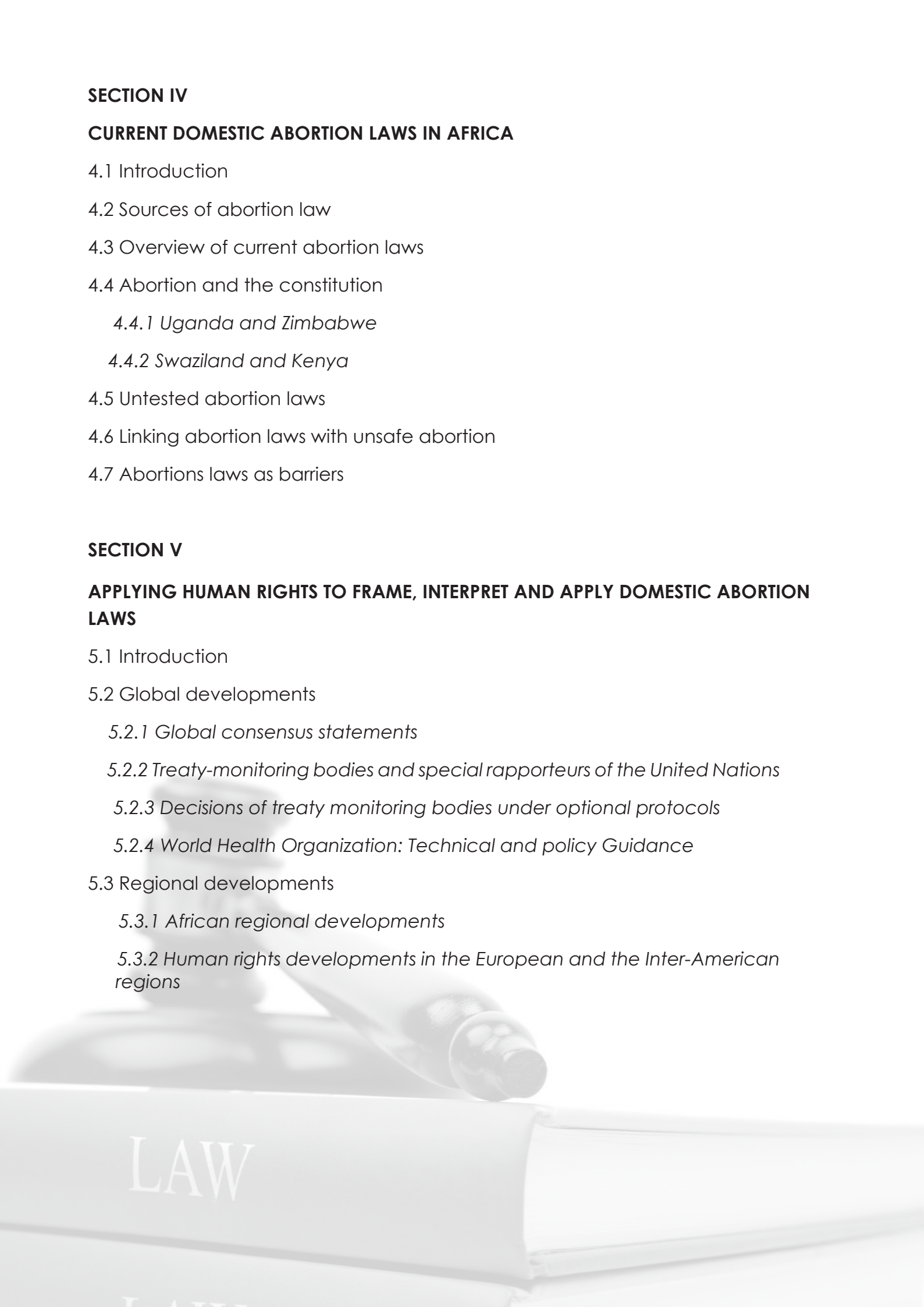


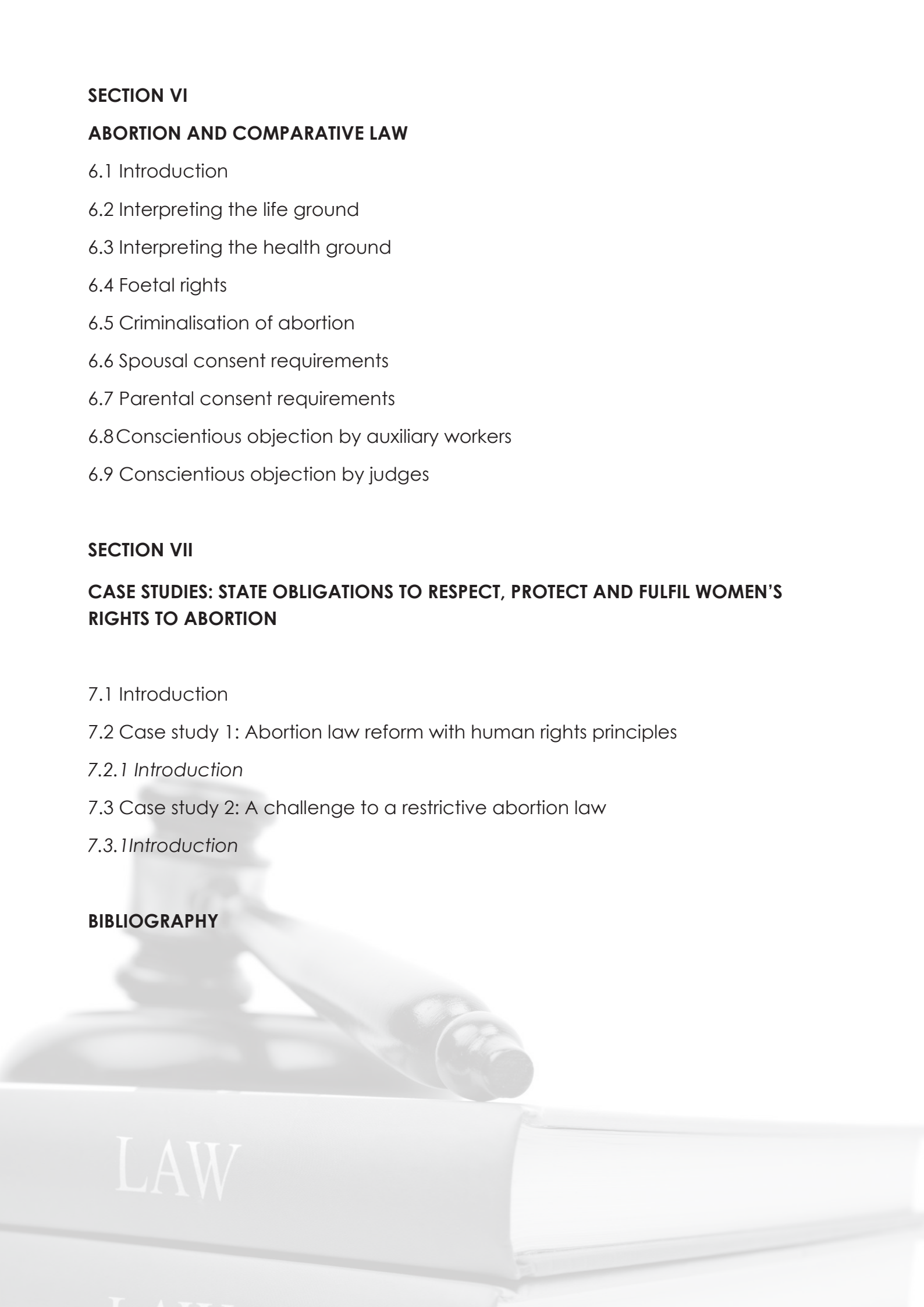
SECTION IV

CURRENT DOMESTIC ABORTION LAWS IN AFRICA

SECTION V

APPLYING HUMAN RIGHTS TO FRAME, INTERPRET AND APPLY DOMESTIC ABORTION LAWS





LAW

PREFACE

In Africa, societies have often used the occasion of a woman's pregnancy to suspend her human rights. In some countries, the legislature and the courts continue to limit women's rights based on their reproductive health status. All women are entitled to their inherent human rights, which include and are not limited to the rights to dignity, liberty, equality, health and bodily integrity. These rights constitute reproductive health rights of women and are enshrined in the Universal Declaration on Human Rights, global and regional human rights treaties and national Constitutions across the continent.

Governments have a duty to provide safe abortion to the full extent of the law to ensure the reproductive health rights of a woman. The advancement in technology in methods of safe abortion care services has provided safer options through which health care providers can attend to women in need of these services at all levels of health care settings.

Unsafe abortion is one of the main causes of maternal mortality and morbidity globally. In Africa, of the 6.4 million abortions carried out in 2008, only 3 percent were performed under safe conditions. The World Health Organization (WHO) estimates that in the year 2008, 29,000 women died from complications of unsafe abortion, consisting a full 13 percent of maternal deaths in the region. In some individual countries, unsafe abortion accounts for up to 30 to 40 percent of maternal mortality. Unsafe abortions occur primarily in countries with restrictive abortion laws or practice regimes. The legal status of abortion has little influence on abortion levels, but is associated with the safety of the procedure. Global and regional human rights bodies have given increasing attention to abortion and its link to women's health and human rights. They have called on States to remove barriers to safe abortion services which includes implementing existing abortion laws and decriminalizing abortion in certain circumstances. Human rights authorities have required that laws, even when restrictive, may be interpreted broadly and implemented to their fullest extent in order to promote and protect women's health and rights.

Courts across the world have recognized their role in interpreting laws on abortion whilst recognizing the landmark case of R v. Bourne. Judges must recognize domestic law as a barrier to the realization of sexual and reproductive health rights, and the laws contribution to unsafe abortions. To the extent the law allows, judicial officers should seek to clarify abortion as a legal health care procedure, consistent with global and regional human rights standards.

This handbook seeks to provide guidance on a human rights approach to abortion. Judicial officers can use it as a guide to interpret and apply domestic abortion laws, taking into account global and regional human rights standards. Moreover the handbook seeks to counter the recourse to unsafe abortion and raise awareness

about the human rights obligations associated with abortion among stakeholders, including judges who are charged with interpreting and applying domestic abortion laws.

Ipas is grateful to Prof. Charles Ngwena, LLB, LLM (Wales), LLD (Free State), Barrister-at-Law, a Professor of Law in the Centre for Human Rights, University of Pretoria, South Africa. Prof. Ngwena was instrumental in the genesis of and authoring of this handbook. We also want to extend our sincere appreciation to the various advocates, healthcare providers and policy makers who have informed our thinking, participated in our trainings and supported our work.

Ipas Africa Alliance for women's reproductive health and rights

SECTION I

INTRODUCING THE HANDBOOK

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INTRODUCING THE HANDBOOK

1.1 Introduction

Historically, abortion has been underpinned by controversy and it remains so. Moral consensus on abortion is hard to achieve. At the same time, in the age of human rights, organs of state , including legislatures and the judiciary, cannot point to the lack of political, moral and religious consensus on abortion to justify their failure to address the injustices women suffer on account of unsafe abortion. When national authorities fail to implement abortion laws to respect, protect and fulfil women's human rights, including reproductive rights, women with unwanted pregnancies often resort to unsafe abortion. Unsafe abortion exerts an unacceptable toll on the lives and health of women.[1] Women have the right to protect their reproductive health by exercising their rights to effective access to legal and safe abortion services.

The incidence of unsafe abortion in Africa is well documented.[2] African women bear a disproportionate burden of the risks of unsafe abortion. This is due to African states' widespread and persistent failure to provide an enabling legal, regulatory, policy and programmatic environment to ensure that every woman who meets the eligibility criteria for legal abortion has unimpeded access to safe and quality services. In addition, abortion laws and practices fail to recognise that abortion is an inseparable part of women's reproductive health as well as an important human rights concern. Many abortion laws are vaguely worded or have never been officially interpreted or implemented. Furthermore, women are frequently unable to access legal services even in jurisdictions where a legal right to abortion is clearly recognised.

Because states have failed to fulfil women's legal entitlements to abortion, the historical criminalisation of abortion has a chilling effect. Criminalisation of abortion impedes the ability of women to obtain safe abortion services and defeats public health and human rights. Healthcare providers are therefore deterred and indeed unable to provide lawful services, as is their duty, for fear of criminal prosecution. Because states fail to provide access to legal abortion services, each year thousands of African women seek unsafe abortions with deleterious consequences for their lives and health. In particular, poor women with little or no education and economic means, and adolescents, are disproportionately adversely affected.

In many jurisdictions, there is a widespread assumption that abortion is illegal (rather than restricted). States generally fail to make the critical distinction between what is *restricted* and what is *illegal*. States are unlikely to establish services in an effective and equitable manner where there is a pervading assumption that abortion is illegal, even where it is permitted under the law. Due to criminalisation and stigmatization of abortion in many countries, women are unable to access lawful abortion services even in instances where the law recognises circumstances that allow access to safe

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

2 See Section II of the *Handbook*.

services. Domestic laws currently serve as one of the major barriers to safe abortion services in Africa. This should not be the case.

The World Health Organization has highlighted how abortion laws can facilitate (rather than impede) access to safe abortion services if implemented in ways that respect, protect and fulfil women's human rights.[3] In recent years, human rights treaty-monitoring bodies at the United Nations and at regional levels have been reinforcing the same message. In an unprecedented development, the African Commission on Human and Peoples' Rights adopted General Comments on Article 14 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa during the 56th Ordinary Session in May 2014. The aim of the General Comment is to clarify states' obligations in respect to abortion,[4] and reinforce the commitment of the African human rights system to treat access to safe abortion as a human right.

1.2 Purpose of this handbook

To counter needless recourse to unsafe abortion, this handbook seeks to raise awareness about the human rights obligations associated with abortion among stakeholders, including judicial officers who are charged with interpreting and applying domestic abortion laws. Recognising domestic law as a barrier to the realisation of abortion rights and as a contributor to unsafe abortion, this handbook seeks to promote understanding among judicial officers that abortion is a legal health care procedure. More specifically, this handbook provides guidance on a human rights approach to abortion. Judicial officers can use it as a guide to interpret and apply domestic abortion laws, taking into account global and regional human rights standards. To this end, this handbook includes:

1. An overview of unsafe abortion as a major public health and human rights issue in Africa;
2. A historical background of abortion laws in Africa;
3. An explanation of key United Nations and regional treaties' relevance and application to access to safe abortion;
4. An explanation of key international and regional treaties-interpretive guidance on abortion (General Comments, General Recommendations, Concluding Observations, decisions of treaty-monitoring bodies, reports of Special Rapporteurs and consensus statements);
5. Comparative jurisprudence on abortion from other regions, including the European and Inter-American regions;
6. Comparative jurisprudence from leading decisions on abortion from selected domestic jurisdictions (Canada, Colombia, Germany, Nepal, South Africa, the United Kingdom and the United States);

3 World Health Organization *Safe Abortion: Technical and Policy Guidance for Health Systems* Geneva: World Health Organization (2012) 87-103.

4 African Commission on Human and Peoples' Rights *General Comments 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 at the 55th Ordinary Session of the African Commission on Human and Peoples' Rights at Luanda, Angola, 28 April -12 May 2014.

7. Case studies to illustrate the application of human rights to abortion in domestic law; and
8. Guidance on sources and key documents on abortion, including key references for further reading.

1.3 The role of the courts

Given the constitutional principle of separation of powers and the role of the courts, we assume domestic courts have a duty to give tangible meaning to the legal right to abortion. Courts do not serve just as institutions with a constitutional duty to interpret and apply the law. Indeed, in the age of constitutionalism and human rights, they also serve as custodians of rights and protectors of human rights and freedoms. As a historically disadvantaged and politically subordinated social group, women have unique vulnerabilities, yet states have historically denied women their rights. Courts can be instrumental in alleviating women's vulnerabilities and disadvantages by upholding the legal entitlements of rights-holders.

1.4 Women's rights in the age of constitutionalism and human rights

In the age of constitutionalism and human rights, courts must take women's rights seriously in line with their judicial obligations. Women's rights are 'claim rights'[5] that give rise to correlative duties which are enforceable. When states fail to implement legal entitlements, or take steps to impede legal entitlements, they seriously undermine the capacities of women to assert and realize their human rights.

The state bears a constitutional and human rights responsibility to ensure that rights guaranteed to citizens in domestic constitutions, legislation and in ratified human rights treaties are not mere tokens. Rights-holders, especially vulnerable and historically disadvantaged groups such as women, must be able to benefit from their rights in practice. The state should take effective steps to ensure that women are aware of their reproductive rights, including the right to abortion. Furthermore, it is incumbent on the state to take effective steps, including institutional steps, to establish an enabling environment in which rights-holders can realise the rights that are guaranteed. For rights to be meaningful in any democracy, rights-holders should have the means with which to realise their rights. At a minimum, they should have information about their rights as well as knowledge about how to exercise these rights. Courts are well positioned both constitutionally and institutionally to promote the effective realisation of women's rights, including holding the executive accountable where there has been a violation by commission or omission.

For abortion rights to be meaningful to women, the state must fulfil corresponding duties regardless of the moral controversy of abortion. Democracies and democratic institutions must respect pluralism when they commit to constitutionalism and human rights. In *Taking Rights Seriously*, Dworkin emphasised that it is precisely when a

5 WN Hohfeld 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23/1 *Yale Law Journal* 16 at 27.

political society is divided that the concept of rights, and more particularly rights against the state, has its most natural use.[6]

1.5 Structure of the handbook

This handbook is divided into eight sections. Users of the handbook can read the sections progressively to incrementally build their knowledge about the interpretation and application of abortion laws in Africa. Users may alternatively refer to applicable sections as are they are needed in their work

Section I is the introduction. Section II is an overview of unsafe abortion in Africa and its effects on women's lives and reproductive health. Section III provides a historical background to the development of abortion laws in Africa. It highlights the colonial origins of domestic laws on abortion. Section IV is an overview of current domestic abortion laws in Africa. It summarises the main trends in the development of abortion in independent African states, including the main reforms. It ends by listing the main barriers associated with current abortion laws in Africa.

Section V introduces a human rights approach to the interpretation and application of domestic abortion laws. It summarises the key human rights developments at global and regional levels. Section VI is an overview of court decisions on abortion from selected countries, and their relevance as potential persuasive authorities for countries with no comparable precedents. Featured are selected decisions from courts of Canada, Colombia, Germany, Nepal, South Africa and the United Kingdom. Section VII introduces a case study approach to the interpretation and application of abortion law using a human rights approach. Section VIII is the final section. It contains guidance on sources and key documents on abortion, including key references for further reading.

6 R Dworkin *Taking Rights Seriously* London: Gerald Duckworth & Co Ltd (1977) 184.

SECTION II

THE BURDEN OF PREVENTABLE UNSAFE ABORTION IN THE SUB-SAHARAN REGION

SECTION II

THE BURDEN OF PREVENTABLE UNSAFE ABORTION IN THE SUB-SAHARAN REGION

2.1 Introduction

In May 2014, the African Commission on Human and Peoples' Rights adopted the General Comments on Provisions of Article 14 of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa. The comments address family planning and contraception and abortion, [7] and provide interpretive guidance on the overall and specific obligations of states to promote the effective domestication and implementation of referenced human rights laws and agreements[8]. Significantly, as part of the background to the General Comments, the African Commission recognised abortion as a leading cause of death and illness among women in Africa. It noted that:

Most maternal deaths are directly due to the five following conditions: post-partum haemorrhage, pre-eclampsia, obstructed delivery, puerperal sepsis and complications resulting from an abortion done in unhealthy conditions. The rate of this type of abortion has been higher in Africa than in other regions of the world for decades, thus contributing to more than half of the maternal deaths recorded globally as a result of unsafe abortions. [9]

The African Commission also noted the association between unsafe abortion and the legal regulation of abortion at the domestic level and stated:

Only a very low percentage of abortions practiced in Africa are safely conducted[…] unsafe abortions remain a factor in preventable mortality[…]It has been demonstrated that in a context where national laws allow therapeutic abortion when it proves necessary, and where health services are available, accessible, acceptable and of good quality, the prevalence as well as the complications arising from unsafe abortions are generally lower than in countries where the legal conditions for abortion are restricted.[10]

In its latest report on the global and regional estimates of the incidence of abortion, the World Health Organization reiterated that, "although unsafe abortions are preventable, they continue to pose undue risks to women's health and lives".[11] The report shows that deaths, illness and disability due to unsafe abortion remain a persistent danger, especially in developing countries. WHO defines "unsafe abortion" as a procedure for terminating an unintended pregnancy carried out

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7 African Commission on Human and Peoples' Rights *General Comments on Article 14(1)(a), (b), (c) and (f) and Article 14(2)(a) and (c)* (note 4 above).

8 ibid

9 African Commission on Human and Peoples' Rights *General Comments on Article 14(1)(a), (b), (c) and (f) and Article 14(2)(a) and (c)*, note 4 above, para 18.

10 African Commission on Human and Peoples' Rights *General Comments 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* (note 4 above) para 19.

11 World Health Organization *Unsafe Abortion: Global and Regional Estimates of the Incidence of Unsafe Abortion and Associated Mortality in 2008* (note 1 above) 1.

either by persons lacking the necessary skills, or in an environment that does not conform to minimal medical standards, or both.[12]

Abortion can be a very safe health-care service. When a health-care provider with appropriate skill uses a WHO-recommended method for abortion, complications are rare. The World Health Organization recommends a method called vacuum aspiration for early surgical abortion and drugs called misoprostol with mifepristone or misoprostol alone for medical abortion. For later-term pregnancies, providers can use medical abortion or a surgical method called dilation and evacuation (D&E) to end a pregnancy. A range of health-care providers, including nurses, midwives, and clinical officers can safely provide early surgical and medical abortion.[13]

2.2 Scale and health consequences of unsafe abortion

Sub-Saharan Africa bears a disproportionate burden of unsafe abortion. Unsafe abortion causes preventable deaths, illness and disabilities of many African women, especially those who are poor and marginalised. On the one hand, the global incidence of mortality from unsafe abortion has been declining. Worldwide, unsafe abortions have declined from 69 000 in 1990 and 56 000 in 2003 to 47 000 in 2008.[14] On the other hand, as a proportion of global maternal mortality, unsafe-abortion-related deaths have hardly declined, remaining close to 13 percent. Furthermore, there are growing disparities between regions in reducing maternal mortality from unsafe abortion, and Africa lags significantly behind all other regions.

Unsafe abortion in Africa accounts for 62 percent of the global unsafe-abortion-related mortality.[15] In actual numbers, 29 000 women die each year from unsafe-abortion-related causes in Africa. Such a disproportionate regional burden of unsafe abortion partially explains why sub-Saharan Africa is least positioned to meet the Millennium Development Goal 5A to reduce maternal mortality by three-quarters by 2015.[16]

Millions of women who survive unsafe abortions suffer serious health consequences. Many survivors of unsafe abortion experience major illnesses and disabilities, some of which are permanent. Complications from unsafe abortion include haemorrhage, sepsis, peritonitis, and trauma to the cervix, vagina, uterus and abdominal organs.[17] Five million women worldwide are hospitalized for complications from unsafe abortion each year.[18] Long-term complications include chronic pelvic pain or pelvic inflammatory disease, chronic infections, and secondary infertility.

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12 World Health Organization *The Prevention and Management of Unsafe Abortion*. Report of a Technical Working Group. Geneva: World Health Organization (1992).

13 World Health Organization *Safe Abortion: Technical and Policy Guidance for Health Systems* (note 3 above) 87.

14 World Health Organization *Unsafe Abortion: Global and Regional Estimates of the Incidence of Unsafe Abortion and associated mortality in 2008* (note 1 above) 1.

15 World Health Organization Unsafe *Abortion: Global and Regional Estimates of the Incidence of Unsafe Abortion and Associated Mortality in 2008* (note 1 above) 1.

16 United Nations Resolution adopted by the General Assembly 55/2 United Nations Millennium Declaration. Adopted 18 September 2000. Available at http://www.un.org/millennium/declaration/ares552e.htm (accessed August 7, 2014).

17 DA Grimes et al 'Unsafe Abortion: The preventable pandemic' (2006) 368 *Lancet* 1908, 1910.

18 S Singh 'Hospital Admissions Resulting from Unsafe Abortion: Estimates from 13 Developing Countries' (2006) 369 *Lancet* 1887.

2.3 Costs of unsafe abortion

Unsafe abortion results in a variety of additional social, economic and other costs. Women who experience unsafe abortion suffer major physical, emotional and financial costs. Their families are also affected. In addition, for developing countries, the cost of treating the complications from unsafe abortion places an enormous strain on scarce healthcare resources, including resources for maternity and emergency obstetric services.[19]

19 M Vlassoff et al 'Estimates of Health Systems Costs in Africa and Latin America' (2009) 35 *International Perspectives on Sexual and Reproductive Health* 114.

SECTION III

HISTORICAL DEVELOPMENT OF DOMESTIC LAWS IN AFRICA

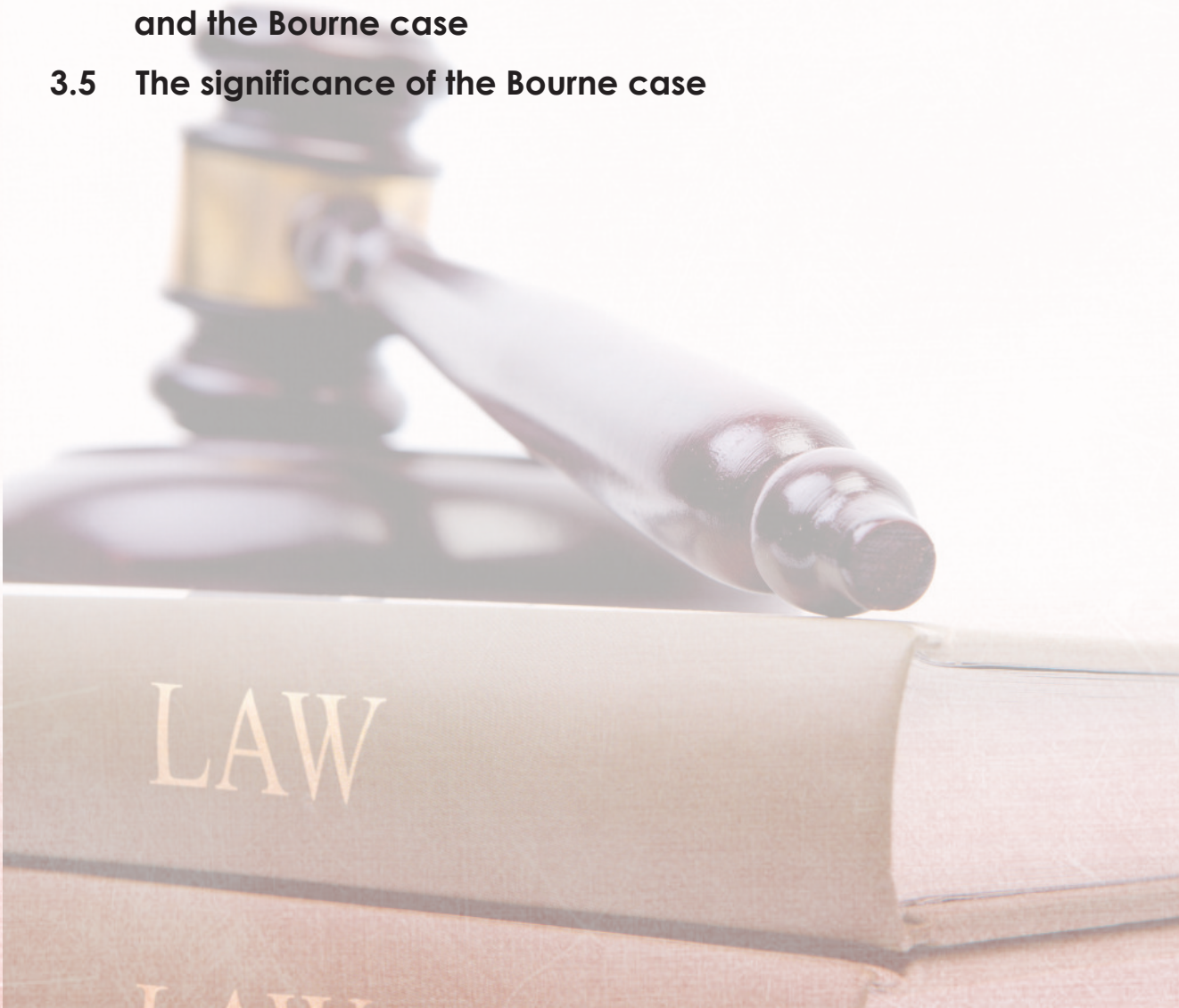
3.1 Historical development

3.2 Abortion law in European colonies in Africa (non- British colonies)

3.3 Abortion law in British colonies in Africa

3.4 Section 58 of the Offences Against the Person Act of 1861 and the Bourne case

3.5 The significance of the Bourne case



SECTION III

HISTORICAL DEVELOPMENT OF DOMESTIC LAWS IN AFRICA

3.1 Historical development

Domestic law has a crucial role to play in fostering an enabling environment in which women can access safe abortion services. In its General Comments, as highlighted in Section I, the African Commission on Human and Peoples' Rights noted that where law permits abortion and services are accessible, unsafe abortion is commensurately reduced.[20]

In every African country, abortion is regulated by law. Historically, African abortion laws have been highly restrictive, and are rooted in laws European governments developed in the 18th century and transplanted to colonial states.[21] These laws are long since defunct in their countries of origin. A common feature of colonial abortion laws was criminalisation of abortion, whether the laws originated from Belgium, France, Italy, Spain or Portugal. At the beginning, criminalisation of abortion was subject to only one narrow exception—the defence of necessity to save the life of the pregnant woman.

3.2 Abortion law in European colonies in Africa (other than British colonies)

When European colonising countries (apart from Britain) developed abortion laws they were influenced by the Napoleonic Penal Code of France.[22] Belgium, France, Italy, and Portugal's laws were all influenced by this code, and they transplanted these laws to their colonies in Africa. At first the Napoleonic Penal Code was interpreted to criminalise abortion absolutely, without any defense. However, the Code was amended in 1939 to more clearly recognise the defense of therapeutic abortion.[23] The colonial states followed this approach in their penal codes.

3.3 British colonies

For Britain and the British colonies, the initial major historical landmark in the development of abortion law was the English Offences Against the Person Act of 1861, which was transplanted, alongside its interpretation by the courts, to British colonies.[24] The main abortion provision - Section 58 of the 1861 Act— made it an offence for a woman to "unlawfully" procure an abortion. Section 59 of the Act

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20 African Commission on Human and Peoples' Rights *General Comments 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* (note 4 above) para 19.

21 CG Ngwena 'Access to Abortion: Legal Developments in Africa from a Reproductive and Sexuality rights Perspective' (2004) 19 *SA Public Law* 328-350.

22 BM Knoppers, I Brault and E Sloss 'Abortion law in Francophone countries' (1990) 34(4*) American Journal of Comparative Law* 889.

23 Knoppers et al (note 22 above) 893.

24 RJ Cook & BM Dickens 'Abortion Laws in African Commonwealth Countries' (1981) 25 *Journal of African Law* 60.

punished a person who supplied the woman with the means for unlawfully procuring an abortion. Section 58 stated:

Every woman being with child who, with intent to procure her own miscarriage, shall *unlawfully* administer to herself any poison or other noxious thing, or shall *unlawfully* use any instrument or other means whatsoever with the like intent, and whosoever, with the intent to procure the miscarriage of any woman, whether she be or be not with child, shall *unlawfully* administer to her or cause to be taken by her any poison or other noxious thing, or shall *unlawfully* use any instrument or other means whatsoever with the like intent, shall be guilty of a felony and being convicted thereof shall be liable to imprisonment for life.[25]

Because the 1861 Act qualified the ban on procuring an abortion by using the adjective "unlawfully", courts generally understood that not all abortions were unlawful and that the Act implicitly contemplated circumstances in which abortion could be "lawfully" procured. At the same time, beyond abortion to save the life of the pregnant woman, courts were unclear whether abortion could also be lawfully performed for other reasons. In the absence of legislative intervention, a court clarified this position in the case of *Bourne* in 1938.[26]

3.4 Section 58 of the Offences Against the Person Act of 1861 in the *Bourne* case

In 1938 trial judge Justice McNaughten clarified the therapeutic exception in his direction to a jury in *Rex .v Bourne*. The case involved a doctor who had obtained parental consent to perform an abortion on a 14-year-old girl who had been raped. The doctor was charged with unlawfully procuring an abortion contrary to the 1861 Act. His defence was that the abortion was not unlawful and that he had intended to save the girl from greater harm that would follow from continuing with the pregnancy. The doctor claimed that he had provided the abortion so that the girl would not become a mother at such a tender age and give birth to a child conceived from rape. Experts testified that the minor child would be mentally devastated if she was required to continue with the pregnancy. Justice McNaughten agreed and acquitted the doctor. In directing the jury, he said:

…If the doctor is of the opinion, on reasonable grounds and with adequate knowledge, that the probable consequences of continuance with the pregnancy will be to make the woman a physical or mental wreck, the jury are entitled to take the view that the doctor who under those circumstances and in that honest belief operates, is operating for the purposes of saving the life of the mother.

3.5 The significance of the *Bourne* case

The *Bourne* case, and more specifically Justice McNaughten's direction to the jury, became a landmark ruling in the development of abortion law in several respects as he:

25 Emphasis added to highlight the notion of unlawfulness as an essential element of section 58 of the Offences Against the Person Act.

26 *R v Bourne* [1938] 3 ALL ER 615, [1939] 1 KB 687, Crown Court of England and Wales.

- Clarified the defence of therapeutic exception for the first time;
- extended the exception beyond the narrow confines of immediate necessity to save the life of the pregnant woman;
- Considered the woman's physical and mental health, as experienced by her, to broaden the notion of the threat to the life of the pregnant woman;
- Refused to separate the threat to the pregnant woman's life from the threat to her health as the two are intertwined;
- Mitigated the rigours of an abortion law that appeared to only countenance abortion in the narrowest of exceptions; and
- Effectively reformed the abortion law not just in Britain but also in British colonies, including colonies in Africa.

The Offences Against the Person Act of 1861 Act and the ruling in *Bourne* cumulatively influenced the development of abortion in the British colonies in Africa and elsewhere.

The ruling in *Bourne* was followed in the same year (1938) by the West African Court of Appeal (WACA) in *R v Edgal, Idike and Ojugwu*.[27] The West African Court of Appeal had appellate jurisdiction over the Gold Coast (now Ghana), Nigeria, Sierra Leone and Gambia. In 1959, the East African Court of Appeal (EACA), which had appellate jurisdiction over Kenya, Uganda, and Tanganyika (now Tanzania), followed suit in the *Bansel* case.[28]

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27 *R v Edgal, Idike and Ojugwu* (1938) WACA 133, decision of the West African Court of Appeal. This court, which is now defunct, served as an appellate court with civil and criminal jurisdiction; B Ibhawoh *Imperial Justice: Africans in Empire's Court*. Oxford: Oxford University Press (2013) 35-36. The *Egdal* case concerns an appeal to the West African Court of Appeal against conviction by three appellants for contravening section 230 of the Criminal Code of Nigeria. The section stated that: "Any person who unlawfully supplies to or procures for any person anything whatever, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman, whether she is or is not with child, is guilty of a felony, and is liable to imprisonment for three years". A point of law which arose was whether the appellants had 'unlawfully' supplied a woman substances intended to procure abortion. Section 230, itself, did not explain what constitutes "unlawfully". In determining the appeal and upholding the convictions, in the absence of its own precedents, the court applied the ruling in the *Bourne* case to determine the meaning of 'unlawfully' in section 230 of the Criminal Code of Nigeria.

28 Mehar Singh Bansel v R (1959) EALR 813, decision of the East African Court of Appeal This court, which is now defunct, served as an appellate court in civil and criminal matters: Ibhawoh (note 27 above). The Bansel case concerns an appeal against conviction for manslaughter. The appellant, a surgeon, had performed a dilatation and curettage operation to termination a pregnancy. The patient had died following the operation. Part of the prosecution case was that the woman had died following an illegal abortion. At trial, the trial judge had directed the assessors the effect that an operation to terminate a pregnancy could only be lawful if it was done for the purpose of "saving the patient's life or preventing severe prejudice to her health". One of the appellant's grounds of appeal was that the trial judge has misdirected the assessors of the relevance of abortion to the case. The East African Court of Appeal, citing the Bourne case, held that there had been no misdirection and that in fact the trial judge had "carefully and correctly" directed the jury on what constitutes an illegal abortion. The court upheld the conviction partly on the ground that the received law on abortion (that is received through the courts implicit approval of the ruling in Bourne) had been correctly applied.

Most British colonies adopted statutes to reflect the development of English law on abortion as part of broader provisions of their penal codes. The provisions served to proscribe abortion, but also provided a defense to a charge of unlawfully procuring an abortion. For example, in Malawi (then Nyasaland), sections 149 and 243 of the Penal Code have been carried over from colonial times. Section 149 of the Malawian Penal Code, which is modelled after Section 58 of the 1861 Act, states:

Any person who, with intent to procure a miscarriage of a woman, whether she is or 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 whatsoever, shall be guilty of a felony and shall be liable to imprisonment for fourteen years.

The main defence to a charge of unlawfully procuring an abortion is contained in Section 243 of the Penal Code, which 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 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.

A few British colonies, however, regulated abortion entirely by common law. Lesotho, Swaziland, South Africa and Zimbabwe (then Rhodesia) fall into this category.[29] Abortion law was regulated through unwritten law with the implicit understanding that colonial states had received the English common law, or were amenable to receiving such law.

Even in the post-colonial era, courts can treat cases like *Bourne* as a persuasive authority. For example, in the Zambian case *People v Gulshan, Smith and Finlayson*,[30] the High Court of Zambia followed *Bourne* as a persuasive authority. A similar judicial development occurred in South Africa where *Bourne* was followed by South African courts in two cases.[31]

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29 CG Ngwena 'An Appraisal of Abortion Laws in Southern Africa from a Reproductive Health Rights Perspective' (2004) 32(4) *Journal of Law, Medicine and Ethics* 708, 710-712.

30 *People v Gulshan, Smith and Finlayson* (1971) High Court of Zambia (Criminal) HP 11/1971. The case concerns three doctors who were charged under the Zambian Penal Code for unlawfully procuring an abortion. This was before the enactment of the Zambian Termination of Pregnancy Act of 1972. In their defence, the doctors submitted that they had performed the abortion at the woman's request on the ground that the woman was not mentally in a position to accept the pregnancy and carry it to term. The trial judge purportedly followed the *Bourne* ruling in summarizing the law on abortion and the circumstances in which abortion is lawful under the Zambian Penal Code. The judge said that "abortion is lawful where it is done in good faith and with reasonable grounds and adequate knowledge to save the life and prevent grave permanent injury to the physical or mental health of the mother". The doctors were acquitted. It is important, though to note that by treating saving the life of the pregnant woman and preventing injury to her physical or mental health conjunctively rather than disjunctively, the Zambian High Court did not strictly speaking follow the ruling in Bourne diligently. The ruling in Bourne requires the two risks to be averted – the risk to the pregnant woman's life, and the risk to her physical or mental health - to be treated as alternative justifications for performing an abortion.

31 *S v King* (1971) 2 P H 103 (T); *S v Van Druten* (1971). Unreported. For a summary of the judgment see SA Strauss, *Doctor, Patient and the Law* Pretoria: Van Schaik (1984) 219-224.

SECTION IV

CURRENT DOMESTIC ABORTION LAWS IN AFRICA

4.1 Introduction

4.2 Sources of abortion law

4.3 Overview of current abortion laws

4.4 Abortion and the constitution

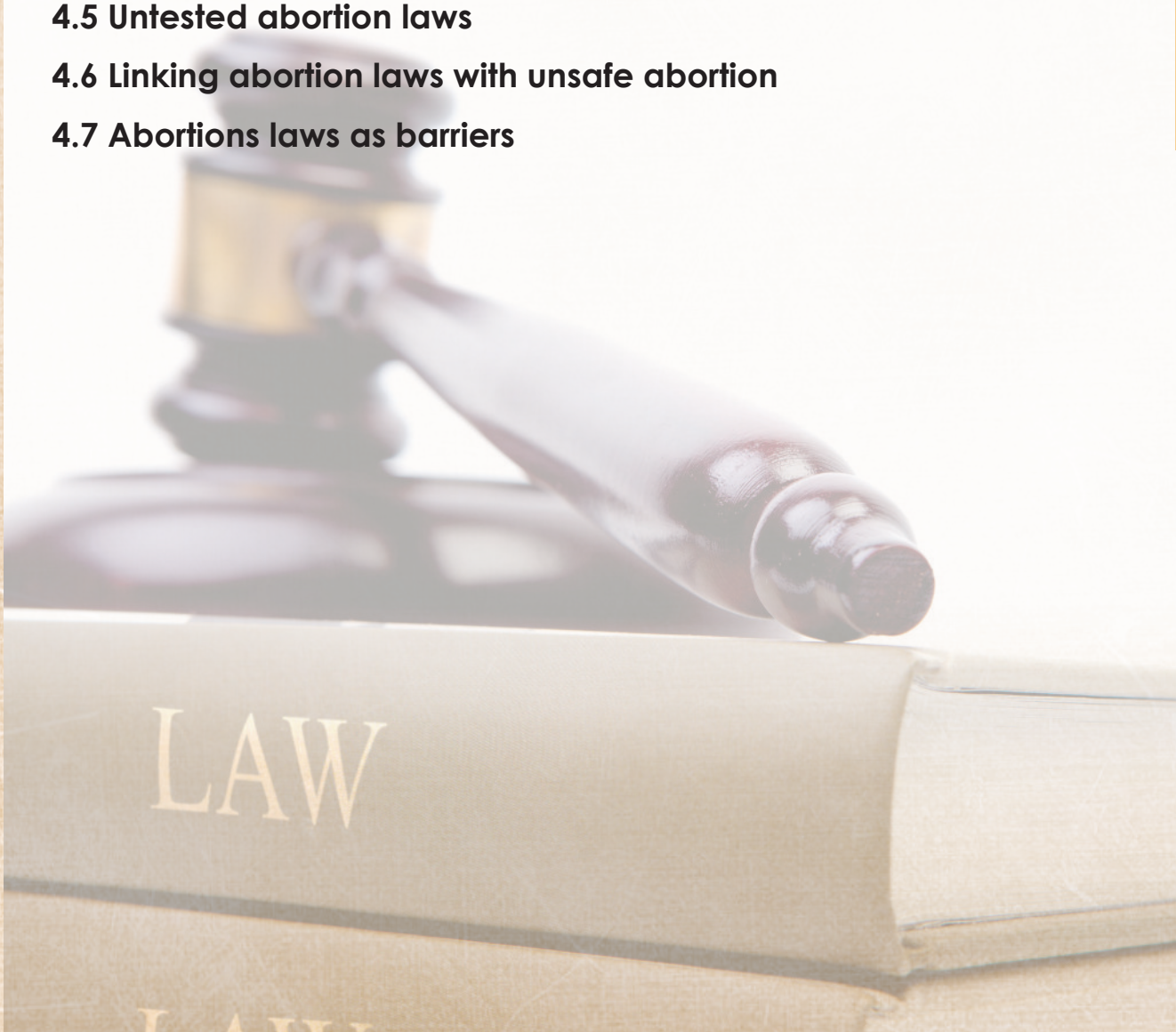
4.4.1 Uganda and Zimbabwe

4.4.2 Swaziland and Kenya

4.5 Untested abortion laws

4.6 Linking abortion laws with unsafe abortion

4.7 Abortions laws as barriers



SECTION IV

CURRENT DOMESTIC ABORTION LAWS IN AFRICA

4.1 Introduction

Though all abortion laws in Africa began as colonial bequests, in the post-independence era we can see a steadily increasing diversity in their architecture. Some countries have retained colonial abortion laws. Others have introduced reforms of a varied nature.

4.2 Sources of abortion law

When we take stock of current domestic abortion laws, we must appreciate that laws on abortion are often found in more than one source. In the majority of African countries, abortion laws are contained in provisions of the penal codes. In a minority of countries, abortion law is found in abortion-specific legislation. Abortion law can also be contained in regulations and court decisions. The constitution is also a source of abortion law because of its status as supreme law. Furthermore, as this section will highlight, since the advent of modern human rights in the post-World War II era, international human rights law has become another important source for interpreting domestic law depending on the legal traditions of the given state, the status of international law under its constitution, and domestic judicial practices.

4.3 Overview of current abortion laws

Several African states have retained colonially inherited abortion laws in their penal codes. The countries that fall into this category are: Angola, Central African Republic, Congo (Brazzaville), Côte d'Ivoire, Democratic Republic of Congo, Egypt, Gabon, Guinea-Bissau, Kenya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Sao-Tome and Principe, Senegal, Somalia, Sudan, South Sudan, Tanzania, and Uganda. At the same time, an increasing number of African countries have liberalized abortion grounds beyond saving the life of the pregnant woman.

The most liberal reforms have in Cape Verde,[32] South Africa,[33] Tunisia,[34] and Zambia.[35] The laws of Cape Verde, South Africa, and Tunisia permit abortion on request in the first trimester, but all four countries explicitly permit abortion for socio-economic reasons. Ethiopia reformed its law in 2004[36] and, while not as

32 Law of December 31, 1986, of Cape Verde.
33 Choice on Termination of Pregnancy Act No. 92 of 1996 as amended by the Choice on Termination of Pregnancy Act No. 1 of 2008 of South Africa.
34 Law No. 65-25 of July 1965 as amended of Tunisia.
35 Termination of Pregnancy Act of 1972 of Zambia.
36 Criminal Code of Ethiopia of 2005, Article 551.

extensive as those of Cape Verde, South Africa, Tunisia, and Zambia, the law was substantially liberalized to permit abortion for minors and women who suffer from mental disabilities.

Apart from laws that expressly permit abortion on request or for social reasons, close to half of the African Union's fifty-four member states now permit abortion on the ground of the woman's health.[37] Governments increasingly recognise rape, incest, and danger to foetal health or life as grounds for abortion. Though we find a trend toward liberalization, domestic law reforms in Africa have, on the whole, not translated into tangible access to safe abortion services for two reasons: First, the majority of women cannot get abortion services because of factors such as distance, cost of services, or ignorance about location of facilities. Second, government officials and other key stakeholders are largely unaware of the abortion law, which means that abortions remain administratively inaccessible to women.

4.4 Abortions and the constitution

In the majority of African states, the constitution does not address abortion directly. The Constitutions of Uganda and Zimbabwe, Swaziland and Kenya are the exceptions.

4.4.1 Uganda and Zimbabwe

The Penal Code Act of Uganda addresses abortion directly. Sections 141-143 proscribe abortion when it is "unlawfully" procured and Section 224 permits abortion for therapeutic reasons.[38] The Constitution of Uganda also addresses abortion: Article 22(2) of provides that "[n]o person has the right to terminate the life of an unborn child except as may be authorised by law".[39] While the Constitution does not speak directly to abortion, it regulates abortion by inference. Article 22(2) can be understood as serving a dual purpose. On the one hand, it serves to protect foetal life. At the same time, it serves to recognise the constitutionality of the law that permits abortion. It recognises foetal life as a constitutionally protected interest under a right to life provision while also giving constitutional legitimacy to legislative instruments and common law that permit abortion.

The Zimbabwean Termination of Pregnancy Act of 1977, which was retained at independence in 1980, permits abortion on the grounds that: (i) continuation of the pregnancy would endanger the life of the woman (ii) continuation of the pregnancy would constitute a serious threat of permanent impairment to the woman's physical health; (iii) there is a serious risk that the child to be born will suffer from a physical or mental defect as to be permanently, seriously handicapped; and (iv) that the pregnancy is the result of unlawful sexual intercourse such as

37 Center for Reproductive Rights, *World's Abortion Laws Map 2013 Update*, http://reproductiverights.org/sites/crr.civicactions.net/files/documents/AbortionMap_Factsheet_2013.pdf (accessed August 7, 2014)

38 Penal Code Act of 1950.

39 Constitution of the Republic of Uganda, 1995.

rape, incest, or sexual intercourse with a minor. When Zimbabwe adopted a new constitution in 2013, in its right to life provision, it added a sub-provision that has implications for the regulation of abortion. Section 48 of the Constitution of Zimbabwe of 2013 guarantees "every person the right to life." Section 48(3) provides that: "An Act of Parliament must protect the lives of unborn children, and that the Act must provide that pregnancy may be terminated only in accordance with than law." Other than recognizing that the state has a constitutional interest in protecting foetal life, it is not readily apparent as to what Section 48(3) adds to the regulation of abortion because Zimbabwe already has legislation that specifically regulates abortion.

4.4.2 Swaziland and Kenya

Swaziland and Kenya have recently reformed abortion law through their constitutions. Prior to constitutional reform, the law on abortion in Swaziland was governed by Swazi Common Law, which is a colonial inheritance from English Common Law. Section 15(5) of the Constitution of Swaziland of 2005 reformed the Common Law to permit abortion when pregnancy threatens the life of the woman, when it constitutes a serious threat to the health of the pregnant woman, when there is a risk of serious and irreparable foetal malformations, when pregnancy is a result of rape, incest or sexual intercourse with a mentally disabled female, or when permitted by Parliament.

Prior to constitutional reform, Kenyan abortion law was found in the Kenyan Penal Code,[40] (analogous to the English Offences Against the Person Act discussed earlier), and in Kenyan common law (largely received from English common law). Article 26(4) of the Constitution of Kenya of 2010 expressly permits abortion in cases of an emergency, when the life or health of the pregnant woman is at risk, or if permitted by any other law.

Even in countries where abortion rights are inscribed in the constitution, there has generally been no tangible implementation of what is constitutionally guaranteed. The Kenya Human Rights Commission made this observation with respect to the Kenyan constitutional provisions on abortion, for example.[41] A particular problem with the Kenyan constitutional reform of abortion is that the provisions of the Kenyan Penal Code have thus far been retained and not reformed line with the Constitution. Consequently, rather than clarifying the law in a progressive direction, the continued retention of the abortion provisions of the Kenyan Penal Code creates uncertainty about the law and undermines the promise and efficacy of the Constitution.

4.5 Untested abortion laws

In the majority of African states, courts have not been asked to interpret or apply abortion law, and the constitutionality of abortion has only been tested in only one country. Apart from South Africa, the courts in African countries have not

40 See especially sections 158, 159 and 240 of the Kenyan Penal Code.

41 Kenya National Commission on Human Rights *A Report of the Public Inquiry into Violations of Sexual and Reproductive Health Rights in Kenya* Nairobi: Kenya National Human Rights Commission (2012) para 4.6.2 commenting on the lack of implementation of Kenyan constitutional abortion reforms.

been asked to see whether any presumed interpretation or application would be consistent with a domestic constitution as supreme law. The constitutionality of the South African Choice on Termination of Pregnancy Act of 1996 has been tested in two cases.[42]

In Christian Lawyers Association of South Africa v Minister of Health and Others, a South African High Court upheld the constitutionality of the South African Choice on Termination of Pregnancy Act of 1996.43 The Christian Lawyers Association argued that permitting abortion under the Choice on Termination of Pregnancy Act was contrary to Section 11 of the South African Constitution of 1996, which guarantees everyone a right to life.

In a second cast—Christian Lawyers Association v National Minister of Health—a South African High Court upheld the constitutionality of Section 5 of the Termination of Pregnancy Act, which permits a minor who has the capacity to give informed consent to terminate a pregnancy without parental approval or consultation.44 The Christian Lawyers Association argued that such permission was contrary to Section 28 of the South African Constitution, which guarantees children's rights, including the rights to parental care.

African domestic laws have not yet been tested to determine whether they are consistent with the human rights obligations arising from global or regional human rights treaties. In this respect, Africa differs from other regions, especially Latin America and Europe. In recent years, the United Nations' (UN) treaty monitoring bodies have decided on abortion-related cases from Latin American countries which were submitted under optional protocols.45 The Inter-American Commission on Human Rights adjudicated a claim that argued that the domestic law permitting abortion is incompatible with protecting foetal rights under the Inter-American human rights system.46 In Europe, considerable abortion jurisprudence has been developed under the regional human rights system fostered by the European Convention on Human Rights, initially by the European Commission of Human Rights and then by the European Court of Human rights.47 For these reasons, it is useful to look at jurisprudential developments in other regions.

4.6 Linking abortion laws with unsafe abortion

I have seen so much misery at the Kenyatta National Hospital … where women with abortion related problems have died and others have lost uteruses. There is no doubt that existing laws are colonial and too strict in modern society.[48]

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42 *Christian Lawyers Association of South Africa and Others v Minister of Health and Others* 1998 (4) SA 1113 (T), decision of the High Court; *Christian Lawyers Association v National Minister of Health and Others* 2004 (10) BCLR 1086 (T), decision of the High Court.

43 *Christian Lawyers Association of South Africa and Others v Minister of Health and Others* (1998) (note 42 above). See the discussion in Section VI of the *Handbook*.

44 *Christian Lawyers Association v National Minister of Health and Others* (2004) (note 42 above). See the discussion in Section VI of the *Handbook.*

45 See the discussion in Section V of the *Handbook*.

46 See the discussion in Section V of the *Handbook*.

47 See the discussion in Section V of the *Handbook*.

48 Statement made in 1999 by Professor Julius Meme (Permanent Secretary in the Kenyan Ministry of Health from 1992-1998) and quoted in T Bennet 'Abortion and human rights in Sub-Saharan Africa' (2000) 3(2) *Initiative in Reproductive Health Policy* 2.

Research shows that criminalisation of abortion does not deter women from seeking an abortion. Women with unwanted pregnancies are likely to have an abortion regardless of whether it is permitted under the law.[49] Therefore, domestic law on abortion may determine whether women will experience safe abortions or unsafe abortions. Laws can enable access to safe abortion or provide the incentive for unsafe abortion. Evidence shows that where the law does not restrict access to safe abortion, rates of mortality and morbidity from unsafe abortion are drastically lower than in more restrictive settings.[50]

According to the World Health Organization, almost all mortality and morbidity from unsafe abortion occurs in countries where abortion is highly restricted in law or in practice, as shaped by regulations, policies and day-to-day practices.[51] Consequently, laws against abortion do not reduce the incidence of abortion but provide an incentive for unsafe abortion. Laws that facilitate safe abortion do not increase the incidence of abortion, but do serve to allow safe abortions that would have otherwise been unsafe.

On a day-to-day basis, women's ability to access safe abortion is affected by domestic laws, how the laws are interpreted and administered in practice, and how the woman's health-care provider perceives the laws.[52] Where governments do not clearly explain legal provisions for abortion, or where health-care professionals and women seeking service cannot understand ambiguously worded law, women cannot access services.[53] Governments create barriers to safe services when they regulate abortion through legal means, and consequently provide an incentive for recourse to unsafe abortion.

The historic criminalisation of abortion has a chilling effect on women and health providers. Providers and women may erroneously believe that abortion is illegal in all circumstances or fear prosecution, which deters them from seeking and providing safe abortion, This is particularly the case where government has not taken steps to implement lawful access to safe abortion.

4.7 Abortions laws as barriers

Women face many different barriers that stem from legal and administrative regulation of abortion. Women also face barriers to safe services when governments fail to properly regulate abortion or implement existing laws. Such barriers take many forms including the following:

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49 G Sedgh et al 'Induced Abortion. Incidence and Trends Worldwide from 1995 to 2008' (2012) 379 *Lancet* 625.

50 Guttmacher Institute *Abortion Worldwide: A Decade of Uneven Progress* New York: Guttmacher Institute (2009) 25-29; M Berer 'National Laws and Unsafe Abortion: The Parameters of Change' (2004) 12 *Reproductive Health Matters* 1.

51 World Health Organization *Safe Abortion: Technical and Policy Guidance for Health Systems* (note 3 above) 87.

52 RJ Cook, BM Dickens and M Fathalla *Reproductive Health and Human Rights: Integrating Medicine, Ethics, and Law* Oxford: Oxford University Press (2003) 345.

53 Cook et al (note 52 above) 345.

1. Restrictive interpretation of the legal grounds that classify abortion as completely illegal rather than restricted
2. Government failure to implement the existing law
3. Government failure to educate key stakeholders about the law, including legislators, judges, law enforcement officers and policy-makers
4. Provider censoring, withholding or intentionally misrepresenting abortion-related information
5. Requirements of third-party authorisation from one or more healthcare professionals, or a hospital administrator or committee, court or police
6. Requirements of authorisation from or notification of parent or guardian or a woman's partner or spouse
7. Restrictions on the range of healthcare professionals that can provide safe abortion services, for example, only allowing doctors to do the procedure
8. Restrictions on the type of facilities that can provide abortion services, for example, only doctors at certain in-patient facilities
9. Restrictions on available methods of abortion, including surgical and medical methods, through, for example lack of regulatory approval for essential medicines
10. Government failure to regulate the exercise of conscientious objection by healthcare professionals, for example by not requiring providers who raise an objection to refer women seeking abortion services to other healthcare professionals or facilities
11. Mandatory waiting periods between request for and provision of abortion services
12. Requirements that women seeking treatment for complications from illegal abortion should provide the names of persons responsible for procuring the abortion as a condition for rendering treatment
13. Unnecessary or prohibitive time limits on the gestation of pregnancy for which abortion can be performed
14. Failing to provide abortion to certain groups of women
15. Charging high user fees that especially prejudice poor women and adolescents; and
16. Failure to assure or respect privacy and confidentiality[54]

54 The list of barriers is taken mostly from: World Health Organization *Safe Abortion: Technical and Policy Guidance for Health Systems* (note 3 above) 94.

SECTION V

APPLYING HUMAN RIGHTS TO FRAME, INTERPRET AND APPLY DOMESTIC ABORTION LAWS

SECTION V

APPLYING HUMAN RIGHTS TO FRAME, INTERPRET AND APPLY DOMESTIC ABORTION LAWS

5.1 Introduction

Worldwide, governments and human rights authorities are more aware of the links between high rates of unsafe abortion and criminalisation of abortion. They are more aware that criminalisation harms women's health, lives, human dignity, reproductive health and self-determination. Moreover, there is a growing global consensus that unsafe abortion is not just a compelling public health issue but also a compelling human rights issue. There is consensus among human rights organizations that women's reproductive health is a human right, and that women are entitled to the highest standard of attainable physical and mental health on an equal basis with men. This consensus is reflected at the global as well as African level. The World Health Organization has said:

UN treaty monitoring bodies, regional and national courts have given increasing attention to the issue of abortion during the past decades, including maternal mortality due to unsafe abortion, criminalisation of abortion, and restrictive legislation that leads women to obtain illegal and unsafe abortions. Increasingly, they have called upon states to provide comprehensive sexual and reproductive information and services to women and adolescents, eliminate regulatory and administrative barriers that impede women's access to safe abortion services and provide treatment for abortion complications. If they do not do so, states may not meet their treaty and constitutional obligations to respect, protect and fulfil the right to life, the right to non-discrimination, the right to the highest attainable standard of health, the right to be free from cruel, inhuman and degrading treatment and the right to privacy, confidentiality, information and education.[55]

5.2 Global developments

5.2.1 Global consensus statements

At the International Conference on Population and Development (ICPD) in 1994,[56] as well as at the Fourth World Conference on Women in Beijing 1995,[57] the global community agreed to frame reproductive health as a human right. Reproductive health was framed in holistic terms in synergy with the definition of health under the Constitution of the World Health Organization. It was agreed that:

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55 World Health Organization *Safe Abortion: Technical and Policy Guidance for Health Systems* (note 3 above) 88.

56 United Nations *Programme of Action Adopted at the International Conference on Population and Development, Cairo, 5-13 September 1994* New York: United Nations, Department for Economic and Social Information and Policy Analysis, ST/ESA/SER.A/149 para 7.2 (ICPD).

57 United Nations, *Platform for Action and Beijing Declaration, Fourth World Conference on Women, Beijing, China, 4-15 September 1995* (1995) paras 96-97 (Beijing Declaration).

Reproductive health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes… reproductive rights embrace certain human rights that are already recognised in national laws, international human rights documents and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents.[58]

Apart from this milestone development, under ICPD and the Beijing Declaration there was also global consensus on the need to address the impact of unsafe abortion as a major public health concern.[59] Human rights treaty monitoring bodies and Special Rapporteurs have reinforced the consensus to recognise women's reproductive health as a human right, and the threat posed by unsafe abortion.

5.2.2 Treaty-monitoring bodies and Special Rapporteurs of the United Nations

Treaty-monitoring bodies serve to monitor implementation of the human rights treaties with a particular focus on ascertaining whether states are complying with the duties to respect, protect and fulfil the human rights obligations under the treaties that they have signed and ratified. Each of the UN treaties has a committee comprised of independent experts who are nominated by States Parties and serve for a fixed or renewable term as members of treaty-monitoring bodies.[60]Special Rapporteurs are independent human rights experts that report and advise on human rights from a thematic (such as the right to health) or a country-specific perspective. Special Rapporteurs report to the Human Rights

58 ICPD (note 56 above) paras 8.25 and 12.17; Beijing Declaration (note 57 above) paras 95-96.

59 ICPD (note 56 above) paras 8.25 and 12.17; Beijing Declaration (note 57 above) para 98.

60 **Human Rights Committee** monitors implementation of the International Covenant on Civil and Political Rights (1966) and its optional protocols**; Committee on Economic, Social and Cultural Rights** monitors implementation of the International Covenant on Economic, Social and Cultural Rights (1966);**Committee on the Elimination of Racial Discrimination** monitors implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (1965);**Committee on the Elimination of Discrimination against Women** monitors implementation of the Convention on the Elimination of All Forms of Discrimination against Women (1979) and its optional protocol (1999); **Committee against Torture** monitors implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (1984);**Committee on the Rights of the Child** monitors implementation of the Convention on the Rights of the Child (1989) and its optional protocols (2000);**Committee on Migrant Workers** monitors implementation of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990);**Committee on the Rights of Persons with Disabilities** monitors implementation of the International Convention on the Rights of Persons with Disabilities (2006); **Committee on Enforced Disappearances** monitors implementation of the International Convention for the Protection of All Persons from Enforced Disappearance established pursuant to the Optional Protocol of the Convention against Torture visits places of detention in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.

Council.[61] They may also report to the General Assembly depending on their mandate.

Through documents that interpret human rights treaties, including numerous statements made in General Comments, General Recommendations, Concluding Observations, and reports, United Nations treaty-monitoring bodies and Special Rapporteurs, have associated laws that impede access to safe abortion with maternal mortality and morbidity. These authorities have recognised that laws that restrict abortion may violate women's human rights, including the rights to life, health, equality and non-discrimination, liberty and security of the person, human dignity, privacy, freedom of conscience, and the right to be free from inhuman or degrading treatment.[62] The following are selected statements in extracted and paraphrased form:

- **CEDAW Committee** has said that states' parties refusal to provide certain lawful reproductive health services for women constitutes discrimination and that, "when possible legislation criminalizing abortion should be amended in order to withdraw punitive measures imposed on women who undergo abortion."[63]
- **CEDAW Committee** has said that states "should ensure that measures are taken to prevent coercion in regard to fertility and reproduction, and to ensure that women are not forced to seek unsafe medical procedures such as illegal abortion because of lack of appropriate services in regard to control fertility."[64]
- **The Committee on Economic, Social and Cultural Rights** has said that states "are under an obligation to respect the right to health, by inter alia, refraining from denying or limiting access for all persons [….] to preventive, curative and palliative health services; abstaining from enforcing discriminatory practices as a state policy; and abstaining from imposing discriminatory practices relating to women's health status and needs".[65]
- **The Committee on the Rights of the Child** has said that states "should take measures to reduce maternal morbidity and mortality in adolescent girls,

61 The Human Rights Council is the main intergovernmental body of the UN that is responsible for promoting and protecting human rights globally, including addressing and making recommendations in respect of gross or systematic violations of human rights. The Office of the UN High Commissioner for Human Rights serves as it secretariat.

62 Ipas *Maternal Mortality, Unwanted Pregnancy and Abortion as Addressed by International Human Rights Bodies Part One, Part Two and Part Three*, Chapel Hill: Ipas (2012); C Zampas & JM Gher 'Abortion as a Human Rights-International and Regional Standards' (2008) 8 *Human Rights Law Review* 249; RJ Cook & BM Dickens 'Human Rights Dynamics of Abortion Law Reform' (2003) 25 *Human Rights Quarterly* 1.

63 United Nations Committee on the Elimination of Discrimination against Women (CEDAW Committee) *General Recommendation No 24: Article 12 of the Convention (Women and Health)* A54/38/Rev 1 (1999) paras 11 and 31(c)

64 CEDAW Committee *General Recommendation No 19: Violence against Women* A/47/38 (1992) para 24(m).

65 United Nations Committee on Economic, Social and Cultural Rights (Committee of ESCR) *General Comment 14: The Right to the Highest Attainable Standard of Health* (Article 12 of the International Covenant on Economic, Social and Cultural Rights), 22d Sess., U.N. Doc. E/CN.12/2000/4 (2000) para 34.

particularly caused by early pregnancy and unsafe abortions practices." It has urged states to "develop and implement programmes that provide access to sexual and reproductive health services, including family planning, contraception and safe abortion services where abortion is not against the law."[66]

- **The Human Rights Committee** requires states to "give information on any measures taken by the state to help women prevent unwanted pregnancies, and to ensure that they do not have to undergo life-threatening clandestine abortions"[67] when reporting on Article 6 of the International Covenant on Civil and Political Rights (guaranteeing the right to life), When assessing whether the state has complied with Article 7 (guaranteeing a right to be free from torture, or cruel or degrading treatment), the Committee "needs to know whether the state party gives access to safe abortion to women who have become pregnant as a result of rape."[68] According to Article 17 (guaranteeing the right to privacy) states parties must provide information about the impact of any laws and practices that may interfere with women's right to enjoy privacy "including legal rights and protections regarding sexual life and reproductive functions, including protection against rape, or where states impose a legal duty upon doctors and other health personnel to report cases of women who have undergone abortion." [69]

- **The Committee Against Torture** has said that when domestic law severely restricts access to safe abortion, women are compelled by circumstances to resort to illegal abortions, which imperil their physical and mental health in ways that constitute "cruel and inhuman treatment."[70]

- **A Special Rapporteur** on the independence of judges and lawyers described the criminalisation of abortion, including in cases of threat to the health or life of the pregnant woman, as constituting discrimination by women's access to justice.[71]

- **A Special Rapporteur Report** on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health highlighted the adverse impact of criminalisation of abortion on women's health and lives and called for decriminalisation of abortion.[72]

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66 United Nations Committee on the Rights of the Child (Committee on CRC) *General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, CRC/GC/2003/4 (2003) para 31.

67 United Nations Human Rights Committee *General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)* CCPR/C/21/Rev.1/Add.10 (2000) para 10.

68 United Nations Human Rights Committee *General Comment No.* 28 (note 67 above, para 11.

69 United Nations Human Rights Committee *General Comment No. 28* (note 67 above, para 20.

70 United Nations Committee Against (Torture CAT Committee) *Conclusions and Recommendations of the Committee Against Torture: Peru*, Thirty-sixth Session, 1-19 May 2006, para 23. See also *Concluding observations of the Committee against Torture: Nicaragua*, Forty-second Session, 27 April to 15 May 2009, CAT/C/NIC/CO/1, para 16*; Conclusions and Recommendations of the Committee Against Torture: Paraguay* Committee against Torture, Forty-seventh session 31 October–25 November 2011 CAT/C/PRY/CO/4-6, para 22.

71 G Knaul *Report of the Special Rapporteur on the independence of judges and lawyers on women's access to justice* A/66/289 (2011) para 74.

72 A Grover *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, Interim Report A/66/254 (2011).

5.2.3 Decisions of treaty monitoring bodies under optional protocols

In recent years, UN treaty-monitoring bodies have developed human rights-related abortion jurisprudence in three cases: *KL v Peru*,[73] *LC v Peru*[74] and *LMR v Argentina*.[75] The *Human Rights Committee decided the KL and LMR cases*. The *LC* case was decided by the CEDAW Committee in the context of communications under respective Optional Protocols. The Human Rights Committee and the 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), respectively, which have been so widely ratified by African states that courts may consider these decisions as standard-setting.[76] In a strict legal sense, treaty monitoring bodies' decisions constitute "views" rather than binding judicial decisions. However, because of their quasi-judicial nature they have persuasive value, especially when the decisions are well-considered.

- ***KL v Peru* (Human Rights Committee, 2005)**

In *KL v Peru,* the Human Rights Committee found that Peru violated its obligations under the ICCPR when hospital authorities denied abortion to a 17-year-old girl who was pregnant with a foetus that had been diagnosed as affected with anencephaly (congenital absence of all or a major part of the brain). The complainant was denied an abortion although she was eligible under Peruvian law. This was notwithstanding that the Peruvian Criminal Code permitted abortion on the grounds of risk to maternal health or maternal life.[77] The hospital denied KL's request because, in the circumstances, abortion would be unlawful as it would be harmful to the foetus. In the result, the complainant bore a child who, as medically predicted, did not live long on account of severe congenital abnormalities. The child only survived for four days during which the complainant was obliged to breastfeed. The complainant was traumatized by the entire experience to the point of suffering clinical depression. A communication was brought on her behalf before the Human Rights Committee alleging violation of her rights under the ICCPR.

The Committee found that Peru violated Article 2 (right to an effective remedy), Article 7 (right to be free from inhuman and degrading treatment), Article 17 (right to privacy) and Article 24 (right to special protection as a minor) under the ICCPR. Importantly, the Committee found that though Peruvian law permitted abortion in given exceptions, there was no domestic administrative structure, short of constitutional litigation, to allow the plaintiff to challenge the decision to deny her an abortion.

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73 *KL v Peru*, Communication No. 1153/2003, adopted 24 October 2005, U.N. GAOR, Human Rights Committee, 85th Session, U.N. Doc. CCPR/C/85/D/1153/2003, (2005).

74 *LC v Peru*, Communication No. 22/2009, CEDAW/C/50/D/22/2009, Committee on the Elimination of Discrimination against Women (2011).

75 *LMR v Argentina*, Communication No. 1608/2007, CCPR/C/101/D/168/2007, Human Rights Committee (2011).

76 F Viljoen *International Human Rights Law in Africa* Oxford: Oxford University Press (2012) 97, 120.

77 Article 119 of the Criminal Code of Peru permitted abortion when it was 'the only way of saving the life of the pregnant woman or avoiding serious and permanent damage to her health': *KL v Peru* (note 73 above) para 2.3.

- ***LC v Peru* (CEDAW Committee, 2011)**

In *LC v Peru*, the CEDAW Committee found Peru in breach of its obligations under CEDAW when it denied abortion to a 13-year-old girl who had become pregnant following rape. On discovering that she was pregnant, the girl had attempted suicide. As in *KL v Peru*, the complainant met the grounds for abortion under the Peruvian Criminal Code. The Committee held that Peru violated several provisions of CEDAW and most notably Article 12 which guarantees women a right to equal and non-discriminatory access to healthcare. The Committee highlighted that Article 12 of CEDAW imposes an obligation on states to "respect, protect and fulfil" women's right to healthcare.

The CEDAW Committee recommended that Peru take steps to implement the law and establish a procedure to enable women seeking abortion to realise their entitlement to abortion in a timely manner under Peruvian law. These steps include conducting education and training in the health care sector to sensitize health-care 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 such as abortion services. Citing a decision of the European Court of Human Rights, the Committee emphasised that, when an state has chosen to regulate abortion by prescribing the circumstances in which abortion is permitted, it must also provide a regulatory framework that allows women seeking abortion to effectively realise their rights.[78] The court said:

… 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 professional that must perform it. It is essential for the 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 is a right to appeal.[79]

- ***LMR v Argentina* (Human Rights Committee, 2011)**

In *LMR v Argentina* the complainant was 19 years of age. She had an intellectual disability and her mental age was 8-10 years. She had become pregnant following a suspected rape, and was denied abortion despite being eligible under the law. The Argentinean Criminal Code permits abortion on the ground of danger to the life or health of the pregnant woman, or if the pregnancy results from rape or indecent assault. The complainant had been required by hospital authorities to first obtain judicial authorization for abortion. A juvenile court refused the authorization and its decision was confirmed by a higher court. On appeal to the Argentinean Supreme Court, the complainant was successful. The Supreme Court ruled that judicial authorization was not necessary once a permitted ground was met. Notwithstanding, the complainant was unable to find a public facility willing to perform an abortion, mainly because opponents

78 *LC v Peru* (note 71 above) para 8.17, citing the decision of the European Court of Human Rights in *Tysiac v Poland*, Application No. 5410/03, ECHR 2007-IV (2007) paras 116-118.

79 *LC v Peru* (note 71 above) para 8.17.

of legal abortion were pressuring health facilities not to provide the service. In any event, the public hospital authorities said the now 20-week pregnancy was too advanced for a safe termination. In the end, with the support of women's organizations, the complainant was, through her mother, able to arrange for a clandestine abortion.

The Human Rights Committee found violations of the Articles 2(3) (right to an effective remedy) taken together with Articles 3 (right to equal enjoyment of rights), 7 (right to be free from inhuman and degrading treatment) and 17 (right to privacy) of the ICCPR. In reaching its conclusion on Article 2(3) especially, the Committee noted that despite meeting the criteria for legal abortion, the complainant had to appear before three courts, which had the effect of prolonging the gestation period by several weeks, which became the reason why the hospital ultimately declined to perform the abortion and the complainant had to resort to a clandestine procedure. These facts, according to the Committee, highlighted that Argentina did not have an administrative framework for providing an effective remedy to women seeking abortion.

5.2.4 World Health Organization: Technical and policy guidance

The World Health Organization (WHO) is a specialised agency of the United Nations and serves as the global health authority. The WHO's principal objective is "the attainment by all people of the highest possible level of health".[80] As a public health response to the global persistence of unsafe abortion, the WHO has developed guidance on safe abortion: *Safe Abortion: Technical and Policy Guidance for Health Systems*.[81] The Guidance recognises that one of the reasons for the persistence of unsafe abortion is that safe services are frequently unavailable even when they are lawful.[82]

The WHO's Guidance represents international best practice. It has been extrapolated from human rights standards developed by United Nations and regional treaty-monitoring bodies and national courts. Courts and other authorities with a duty to fulfil human rights and constitutional obligations will find the WHO's Guidance useful. The Guidance clarifies the nature and extent of states' human rights obligations with regard to access to safe abortion. It explains the practical or administrative steps the state must take to regulate abortion while complying with human rights. The WHO's Guidance, which focuses on how to develop and implement abortion laws in ways that respect, protect and fulfil women's human rights and ultimately ensure that abortion services which are lawful are 'accessible in practice',[83] is useful to national authorities in two main ways.

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80 Article 1 of the Constitution of the World Health Organisation of 1948 as amended. The Constitution was adopted by the International Health Conference held in New York from 19 June to 22 July 1946, signed on 22 July 1946 by the representatives of 61 States (*Off. Rec. Wld Hlth Org*., Volume 2, 100), and entered into force on 7 April 1948.

81 World Health Organization *Safe Abortion: Technical and Policy Guidance for Health Systems* (note 3 above). The first edition was published in 2003.

82 World Health Organization *Safe Abortion: Technical and Policy Guidance for Health Systems* (note 3 above) 87.

83 World Health Organization *Safe Abortion: Technical and Policy Guidance for Health Systems* (note 3 above) 98.

Firstly, the Guidance can assist policymakers, legislators, healthcare providers, judicial officers and other stakeholders who have a responsibility to interpret and apply abortion law. As noted in Sections II and III of this handbook, virtually all countries in Africa permit abortion on the ground of threat to the life of the pregnant woman, and close to half of the African Union's fifty-four member states now permit abortion on the ground of the woman's health. Rape, incest, and risk to foetal health or life, are also increasingly recognised as grounds for abortion. However, with a few exceptions, domestic laws reforms in Africa are rarely accompanied by guidelines to assist stakeholders on how to interpret and apply the grounds of abortion. The WHO Guidance attempts to fill this gap.

For example, in connection with the interpretation and application of "health" as a ground for abortion, the WHO Guidance says:

In many countries, the law does not specify the aspects of health that are concerned but merely states that abortion is permitted to avert risk of injury to the woman's health. Since all countries that are members of WHO accept its constitutional description of health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity", this description of complete health is implied in the interpretation of laws that allow abortion to protect women's health.[84]

Using WHO's definition of health,[85] the Guidance highlights that when interpreting "health" as a ground for abortion, the concept of health is to be understood holistically and should include physical as well as mental health. It should also include conditions that aggravate pregnancy and conditions that are aggravated by pregnancy.[86] Cognisant that the concept of mental health may not be well understood by those with a professional duty to determine the eligibility of women to abortion, by way of an example only, the Guidance explains that the mental suffering or psychological distress experienced by a woman as a result of a coerced sexual act, or the diagnosis of severe foetal impairment, should be understood as falling within the ambit of the woman's health.[87]

Secondly, the WHO Guidance provides a human rights-based approach to the implementation of abortion law that can help health-care providers offer equitable access to safe abortion. The Guidance highlights the need for an enabling regulatory and policy environment, and helps stakeholders ensure that "every woman who is legally eligible has ready access to good-quality abortion services."[88]

Even where abortion law is restrictive, the WHO Guidance stresses that laws must be interpreted and applied to promote and protect women's health.[89] It highlights that states have an obligation to ensure that abortion law is implemented,

84 World Health Organization *Safe Abortion: Technical and Policy Guidance for Health Systems* (note 3 above) 92. Footnote omitted.

85

86 World Health Organization *Safe Abortion: Technical and Policy Guidance for Health Systems* (note 3 above) 92.

87 World Health Organization *Safe Abortion: Technical and Policy Guidance for Health Systems* (note 3 above) 92.

88 World Health Organization *Safe Abortion: Technical and Policy Guidance for Health Systems* (note 3 above) 87.

89 World Health Organization *Safe Abortion: Technical and Policy Guidance for Health Systems* (note 3 above) 87.

and to put in place institutional and administrative safeguards for the woman seeking abortion. The safeguards should include mechanisms for independent administrative review of decisions, allowing the views of the woman seeking abortion to be taken into account, and timely resolution of the review process.[90]

5.3 Regional developments

5.3.1 African regional developments

In Africa, there have been landmark developments at regional treaty and policy levels which have enhanced the status of abortion as a human right. In 2003, the African Union went further than its regional and global counterparts in the recognition of abortion as a human rights issue. It adopted the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, commonly referred to as the Maputo Protocol.[91] The Maputo Protocol is a supplement to the African Charter on Human and Peoples' Rights, and came into force in 2005.[92] The Protocol, which has been ratified by more than two-thirds of the members of the African Union, [93] seeks to strengthen the protection of women's rights, including sexual and reproductive rights, under the African Charter-based system.

- **Maputo Protocol**

The Maputo Protocol commits the African Union to promoting gender equality as a human right and eliminating all forms of discrimination against women in Africa. It breaks new ground because it is the first human rights treaty to explicitly recognise abortion as a discrete human right.[94] Article 14(2)(c) of the Maputo Protocol guarantees a right to abortion where pregnancy poses a risk to the life or health of the woman or to the life of the foetus, or where pregnancy is a result of sexual assault, rape or incest, as part of broader sexual and reproductive rights. Article 14 provides that:

> 14 (1) States parties shall ensure that the right to health of women, including sexual and reproductive health, is respected and promoted. This includes:

90 World Health Organization *Safe Abortion: Technical and Policy Guidance for Health Systems* (note 3 above) 98.

91 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted 11 July 2003, (entered into force 25 November 2005), 2nd Ordinary Session of the Assembly of the African Union, AHG/Res. 240 (XXXI) (Maputo Protocol).

92 African Charter on Human and Peoples' Rights, adopted 27 June 1981, entered into force 21 October 1986, OAU Doc. CAB/LEG/67/3 Rev. 5, 1520 U.N.T.S. 217 (African Charter).

93 Angola, Benin, Burkina Faso, Cameroon, Cape Verde, Côte d'Ivoire, Comoros, Congo, Djibouti, Democratic Republic of Congo, Equatorial Guinea, Gabon, Gambia, Ghana, Guinea-Bissau, Guinea, Kenya, Libya, Lesotho, Liberia, Mali, Malawi, Mozambique, Mauritania, Namibia, Nigeria, Rwanda, South Africa, Senegal, Seychelles, Swaziland, Tanzania, Togo, Uganda, Zambia and Zimbabwe: African Commission on People's and Human Rights 'Status of ratification/accession to OAU/AU human rights treaties', available at <http://www.achpr.org/english/_info/index_ratification_en.html> (accessed on 3 June 2014).

94 CG Ngwena 'Inscribing Abortion as a Human Right: Significance of the Protocol on the Rights of Women in Africa' (2010) 32 *Human Rights Quarterly* 783.

(a) The right to control their fertility;

(b) The right to decide whether to have children, the number of children and the spacing of children;

(c) The right to choose any method of contraception;

(d) …

(e) …

(g) The right to have family planning education;

(2) States parties shall take all appropriate measures to:

(a) Provide adequate, affordable and accessible health services, including information, education and communication programmes to women especially those in rural areas; and

(b)….

(**c) Protect the reproductive rights of women by authorizing medical 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.**[95]

States are required to take all appropriate measures to fulfil the rights guaranteed by the Protocol.[96] But despite the unprecedented affirmation of abortion as a human right, in most African states, including ratifying states, Article 14(2)(c) has not yet been implemented in national courts.

- **General Comments on family planning, contraception and abortion provisions of the Maputo Protocol**

In another milestone development, the African Commission on Human and Peoples' Rights, which has an interpretive mandate under the African Charter,[97]adopted General Comments on the family planning, contraception and abortion provisions of Article 14 of the Maputo Protocol.[98] Like the abortion provisions of the Maputo Protocol, the General Comments that specifically address abortion are unprecedented in the history of the development of human rights jurisprudence. The General Comments, which derive their interpretive approaches partly from international standards for complying with state obligations, serve to clarify the nature and extent of the normative content of ratifying state obligations.

95 Emphasis added. Here we presume the drafters intended "medical abortion" to mean safe abortion, rather than abortion using only pills or medicinal products.

96 Article 26 of the Maputo Protocol.

97 Article 45(1)(b) of the African Charter.

98 African Commission on Human and Peoples' Rights *General Comments on Article 14(1)(a), (b), (c) and (f) and Article 14(2)(a) and (c)* (note 1 above).

The General Comments also raise public awareness about unsafe abortion and the role of legal and healthcare systems in reducing it. Even for states that have not yet ratified the Maputo Protocol, or that have placed reservations on the abortion provisions of the Protocol, the General Comments are a source of information, education and guidance to lawyers and judges. The General Comments can also be used by civil society and human rights advocates to render the state accountable for failure to implement its treaty obligations effectively, not just under the Maputo Protocol but also under other treaties whose provisions impliedly support women's rights to access to safe abortion.

- **Regional policy**

The African Union has also adopted several policy initiatives to address unsafe abortion. The most significant development is the 2006 adoption of the Maputo Plan of Action for the Operationalization of the Continental Policy Framework for Sexual and Reproductive Health and Rights.[99] The Maputo Plan of Action expresses the consensus of African Ministers of Health[100] to promote universal access to comprehensive sexual and reproductive health services in Africa.[101]

In the Maputo Plan of Action, African Ministers of Health recognise the crucial role of effective implementation of abortion law as a tool for reducing unsafe abortions. To this end, the Plan of Action requires African states to: enact policies and legal frameworks to reduce the incidence of unsafe abortion; train healthcare providers in the provision of comprehensive safe abortion services that are lawful and to the "fullest extent of the law"; and to educate "communities on available safe abortion services as allowed by national laws."[102] Regional consensus agreements, such as the Maputo Plan of Action, are a useful supplement to formal jurisprudence when national authorities develop, interpret and apply domestic abortion laws to ensure that women have tangible access to lawful services.

5.3.2 Human rights developments in the European and the Inter-American regions

Jurisprudence from other regions can serve as persuasive authority in Africa at both the regional and domestic levels. Articles 60 and 61 of the African Charter specifically recommend African national courts draw lessons from other regions

99 African 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). The initial timeframe for the Maputo Plan of Action was the period 2007-2010. In July 2010, to reinforce its commitment towards the implementation of the Maputo Plan of Action, the African Union (AU) Heads of State, at the 15th Ordinary Summit of the African Union held in Kampala, Uganda, extended the life of the plan to 2015 coincide with the review of Millennium Development Goals. See also: Campaign for the Accelerated Reduction of Maternal Mortality in Africa (CARMMA, 2009). CARMMA is an initiative of the African Union with the support of United Nations agencies to reduce maternal mortality. It was launched in 2009 by AU Ministers of Health. It is built on the Maputo Plan of Action Available at http://pages.au.int/carmma/about (accessed on August 10, 2014).

100 Maputo Plan of Action (note 99 above) para 1.

101 Maputo Plan of Action (note 99 above) para 16.

102 Maputo Plan of Action (note 99 above) 13-14.

and human rights instruments in the process of developing regional human rights norms and standards. The human rights jurisprudence on abortion that the European Court of Human Rights has been developing under the European Convention on Human Rights is a potential source of persuasive standards for the African region.[103]

- **Jurisprudence from the European regional human rights system**

African judges can turn to recent abortion-related jurisprudence of the European Court of Human Rights to develop standards for the implementation of abortions laws where laws permit abortion, even if restrictively. African domestic courts have not implemented abortion laws in general.[104] In four ground-breaking cases—*Tysiac v Poland*,[105] *A, B and C v Ireland*,[106] *RR v Poland*[107] and *P and S v Poland*[108]— the European Court highlighted that, given the historical criminalisation of abortion, once the state has decided to permit lawful abortion, even if in a restrictive manner, it has a positive duty to put in place adequate and accessible procedural and institutional mechanisms and safeguards to allow women seeking abortion to effectively exercise their legal entitlements.

In *Tysiac*, the European Court said:

> The Court further notes that the legal prohibition on abortion, taken together with the risk of their incurring criminal responsibility under … the Criminal Code, can well have a chilling effect on doctors when deciding whether the requirements of legal abortion are met in an individual case. The provisions regulating the availability of lawful abortion should be formulated in such a way as to alleviate this effect. Once the legislature decides to allow abortion, it must not structure its legal framework in a way which would limit the real possibilities to obtain it.[109]

The European Court's decisions under the European Convention also provide persuasive authority for mediating the conflict between a woman's right to abortion and any foetal right claim, including a foetal right to life claim.

In *Paton v United Kingdom,*[110] a claim was brought by a husband before the European Commission of Human Rights to prevent his wife from having an abortion, on the ground that the abortion would violate a right to life of the foetus under Article 2 of the European Convention which guarantees "everyone" a right to life. The Commission rejected the claim for two main reasons. First, the

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103 European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* 4 Nov. 1950, 213 UNTS 221, Europ. T.S. No. 5 (*entered into force* 3 Sept. 1953).

104 CG Ngwena 'Developing Regional Abortion Jurisprudence: Comparative Lessons for African Charter Organs' (2013) 31 *Netherlands Quarterly of Human Rights* 9-40.

105 *Tysiac v Poland* (note 78 above).

106 *A, B and C v Ireland*, Eur. Ct. H.R., [2010] ECHR 2032.

107 *RR v Poland*, Eur. Ct. H.R., Application No. 27617/04 (2011).

108 *P and S v Poland*, Eur. Ct. H.R., Application No. 57375/08 (2012).

109 *Tysiac v Poland* (note 78 above) para 116.

110 *Paton v United Kingdom*, Application No 8416/78, 19 European Commission of Human Rights, Dec. & Rep. 244 (1980). For similar holdings, see also H v Norway, Application No. 17004/90, 73 European Commission on Human Rights , Dec. Rep. 155 (1992) *Boso v Italy*, Application No. 50490/99, 2002-VII European Court of Human Rights 99; and *Vo v France*, Application No. 53924/00, 2004-VIII, European Court of Human Rights.

Commission was of the view that "everyone" under Article 2 anticipated actual persons and did not include prenatal life. The second reason why the claim failed was that, even if it were conceded that a foetus has a right to life, any such right could not be understood as absolute as to render subordinate the rights of the pregnant woman.

The *Paton* case also provides African courts with persuasive authority for addressing third-party authorization. Under *Paton*, third parties such as a husband are not legally recognised as having a right to be consulted about, much less having a right to veto, the abortion. The decision to terminate the pregnancy is one for the woman alone.

- **Jurisprudence from the inter-American regional human rights system**

Jurisprudence developed under the inter-American system, like its European counterpart, is also a source of persuasive authority in the interpretation and application of abortion laws in Africa. In the *Baby Boy* case,[111] the Inter-American Commission on Human Rights held that the right to life guaranteed under Article 4(1) of the American Convention on Human Rights is not incompatible with domestic laws that permit abortion.[112] Article 4(1) says:

> Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

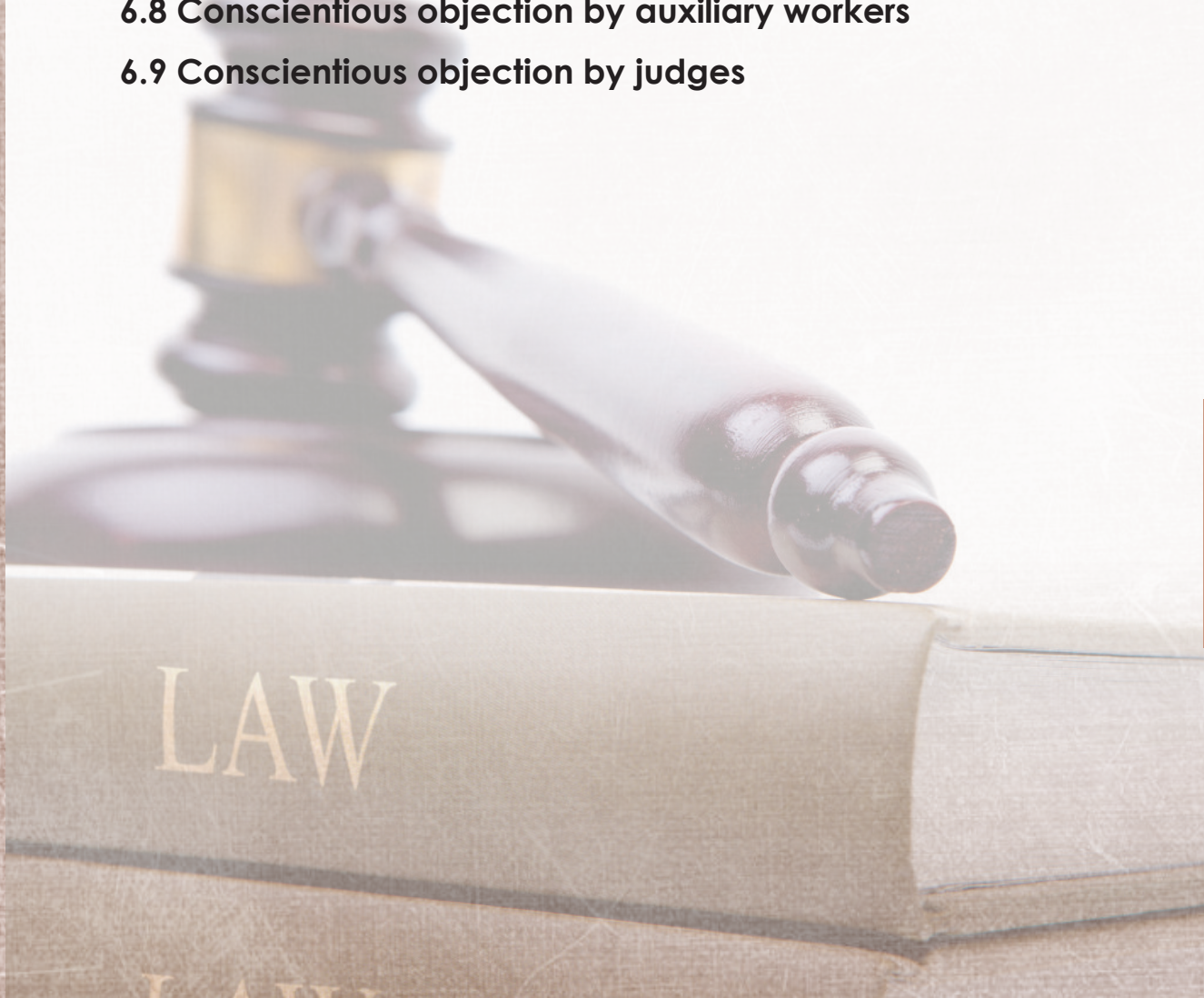
The Inter-American Commission was of the view that to interpret Article 4(1) as absolutely prohibiting abortion would be erroneous. According to the Commission, the words, "in general," were intended to reflect a compromise between constituencies that were advocating for absolute protection of the right to life from the moment of conception, and those who were advocating for an approach that accommodates abortion.

111 *Baby Boy Case* 2141, Inter-American Commission on Human Rights 25/OEA/ser.L./V./II.54. Doc. 9 rev.1 (1981).

112 American Convention on Human Rights, O.A.S. Treaty Series No 36, 1144 U/N.T.S. 123, adopted 22 November 1969, entered into force 18 July 1978.

SECTION VI

ABORTION AND COMPARATIVE LAW



SECTION VI

ABORTION AND COMPARATIVE LAW

6.1 Introduction

National courts' decisions also comprise human rights standards that inform the interpretation and application of domestic law. Over the years, national courts have contributed to the development of abortion law in ways that respect, protect and fulfil the human rights of women. Some jurisprudential developments, such as those from the United Kingdom, were written to interpret legislation and contribute to the common law of abortion. The *Bourne* case, discussed in Section III of this handbook, is one illustration.

Other leading jurisprudential developments, such as those from Canada, Colombia, Germany, Nepal, South Africa and the United States, have been part of the constitutionalisation of abortion. Because provisions of domestic constitutions often mirror provisions found in human rights treaties, it is easy to appreciate the importance of drawing human rights lessons from the constitutional decisions of national courts.

This section summarises the human rights significance of jurisprudence from law emanating from selected countries, namely, Canada, Colombia, Germany, Nepal, South Africa, the United Kingdom and the United States. The summaries are arranged according to the questions that domestic courts have addressed and reflect human rights principles that African judges can use when addressing similar questions. The cases for each issue are presented in chronological order, and address the following questions:

1. Does threat to the life of the pregnant woman as a ground for abortion include her physical and mental health?
2. Does health as a ground for abortion include physical and mental health?
3. Can the state restrict abortion in order to protect the life of a foetus? Does a foetus have constitutional rights and how can any such rights can be balanced with the rights of the pregnant woman?
4. Is criminalisation of abortion necessary?
5. Can a third party, such as a husband, prevent a woman from having an abortion?
6. Can adolescents consent to abortion without parental approval?
7. Can a worker who has no direct involvement in providing treatment for the termination of pregnancy exercise a right to conscientious objection?
8. Can judges claim a right to conscientious objection to abortion?

6.2 Does threat to the life of the pregnant woman as a ground for abortion include her physical and mental health?

- R v Bourne **(1938, Crown Court of England and Wales)**[113]

Facts:

Mr Bourne, a well-known surgeon, had performed an abortion on a 14-year-old girl who had become pregnant following rape. He was criminally charged with "unlawfully" procuring an abortion under Section 58 of the Offences against the Person Act of 1861. His defence was that the abortion was not unlawful and that requiring the girl to continue with the pregnancy was more harmful to the girl than terminating it. Medical evidence was adduced to show that requiring the girl to continue with the pregnancy would be mentally devastating. In directing the jury, Justice McNaughten said:

…if the doctor is of the opinion, on reasonable grounds and with adequate knowledge, that the probable consequences of continuance with the pregnancy will be to make the woman a physical or mental wreck, the jury are entitled to take the view that the doctor who, who under those circumstances and in that honest belief, operates, is operating for the purposes of saving the life of the mother.

Issues:

1. Was Mr Bourne guilty of unlawfully procuring an abortion under Section 58 of the Offences Against the Person Act?
2. Did Mr Bourne's defence—to alleviate the mental suffering of the pregnant girl— come within the intention of the Act, which was understood to see saving the life of the pregnant woman as the only defence?

Decision:

Mr Bourne was acquitted.

Holding:

1. As discussed in Section III of this handbook, the holding in *Bourne* lies in the direction given to the jury by Justice McNaughten in 1938 in the *Bourne* case when interpreting and applying Section 58 of the Offences Against the Person Act of 1861.

Significance:

1. Where there are no guidelines or precedents, *Bourne* is useful for clarifying what can constitute a threat to the life of the pregnant as a ground for abortion.

113 *R v Bourne* (note 26 above).

2. In jurisdictions where threat to the life of the pregnant woman is the main ground for abortion and "health" is not clearly provided as a ground for abortion, the *Bourne* case can be followed in order to read health into the "life" ground.

3. The *Bourne* case can also be seen to include rape in the "life" ground, since in this case, the severe mental suffering caused by the pregnancy resulting from rape was considered a threat to her life.

6.3 Does health as a ground for abortion, include physical and mental health?

- R v Bourne **(1938) Crown Court of England and Wales**

The *Bourne* case can also help to clarify the meaning of "health" as a ground for abortion where there is no explanation in a given statute or guidelines. Several statutes list threat to the "health" of the pregnant woman as a ground for abortion but without indicating whether the reference is to physical health and/or mental health. *Bourne* illustrates a judicial understanding of health as a holistic concept which includes not just physical health but also mental health, which can be at risk at the time of the pregnancy or in the future as a foreseeable result of the continued pregnancy.

6.4 Can the State restrict abortion in order to protect the life of a foetus? Does a foetus have constitutional rights and how any such rights can be balanced with the rights of the pregnant woman?

Opponents of legal abortion may challenge the constitutionality of a less restrictive abortion law on the ground that it violates the right to life of a foetus. In *Christian Lawyers Association of South Africa and Others v Minister of Health* (1998),[114] for example, the constitutionality of the South African Choice on Termination of Pregnancy Act was challenged on the ground that it violated the a constitutional right to life of the foetus. African constitutions that protect foetal life, such as those of Kenya (Article 26(4)), Swaziland (Section 15) and Uganda (Article 22(2)) may require clarification by the courts.[115]

A number of court decisions highlight that while the state can regulate abortion, it cannot do so in a way that disproportionately limits the rights of the pregnant woman to make decisions about her wellbeing, including protecting her life, health and reproductive self-determination.

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114 *Christian Lawyers Association of South Africa and Others v Minister of Health and Others (*1998) (note 42 above).

115 See Section IV para 4.4 (above).

- ***Roe v Wade* (1973, Supreme Court of the United States)**[116]

Facts:

Roe concerns a case a brought before the Supreme Court of the United States challenging the constitutionality of state (Texas) law that made it a crime to obtain an abortion except on medical advice to save the life of the mother.

Issues:

1. Are state laws that criminalise abortion except when upon medical advice to save the life of the pregnant woman unduly restrictive as to constitute a violation of fundamental rights guaranteed to women under the Constitution of the United States?

2. Does the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States protect the right to privacy, including the right to obtain an abortion?

3. May states limit abortion by law?

Decision:

The Supreme Court struck down this state law as unconstitutional.

Holding:

1. State law that only permits abortion when it is therapeutically recommended is unconstitutional because it violates the Due Process Clause of the Fourteenth Amendment.

2. The Due Process Clause protects the right to privacy, including a woman's right to terminate her pregnancy in consultation with her doctor.

3. State law cannot absolutely deny the woman a right to terminate pregnancy. At the same time, the right to privacy is not absolute. At some stage during the pregnancy, "the state interests as to protection of health, medical standards, and prenatal life, become dominant."

4. The state has a legitimate interest in protecting the pregnant woman's health as well as foetal life. Balancing the rights of the pregnant woman and the legitimate interests of the state requires the state to take into account the gestation of the pregnancy.

5. In the first trimester, the decision to terminate a pregnancy must be left to the judgment of the pregnant woman and her doctor. During the first trimester, women can have an abortion for any reason. In the second trimester, any limitation must be justified by the state interest in protecting the pregnant woman's health and the reasons must be "reasonably related" to the woman's health. In the third trimester, states may limit abortion to protect the life and health of the pregnant woman as well as unborn life to the point of even prohibiting abortion.

116 *Roe v Wade* 410 US 113 (1973).

6. Over the course of the pregnancy, there is an incremental increase in the states' legitimate interest in regulating pregnancy. Incremental state regulation protects the health of the pregnant woman and also protects the foetus. The foetus or unborn life is not protected at the beginning but only at the point of *viability*. The point of viability is when the foetus is deemed capable of surviving outside a woman's womb with or without artificial assistance. Viability justifies limiting abortion except when it is necessary to protect the health and the life of the pregnant woman.

Significance:

1. *Roe* is significant for inferring an implied constitutional right to privacy to permit as well as limiting abortion using a "trimester framework."
2. According to the standard laid in *Roe*, there is an incremental increase in state regulation over the course of the pregnancy.
3. It is significant that the state interest in protecting foetal life manifests only in the last trimester.
4. By aligning a woman's decision to terminate a pregnancy with a constitutional right to privacy, the Supreme Court approaches abortion with an emphasis on the right to reproductive self-determination or autonomy.

- **BVerfG (1975, West German Federal Constitutional Court)[117]**

Facts:

The case concerns the constitutionality of amendments to the German Penal Code that broaden the grounds for abortion. The Federal Parliament of West Germany enacted the Abortion Reform Act to liberalise abortion law under the German Penal Code. The new law permitted abortion in the first 12 weeks with the woman's consent. Prior to abortion, the pregnant woman was required to seek counselling. After 12 weeks, the new law permitted abortion on the ground of medical necessity and foetal anomalies. Members of Parliament as well as five German states petitioned the Federal Constitutional Court to review the constitutionality of the new law.

Issue:

The issue was the constitutionality of provisions of the German Penal Code, which permitted abortion on request in the first 12 weeks of pregnancy after counselling and after 12 weeks on the grounds of medical necessity and foetal anomalies. German Basic Law provides the rights to dignity (Article 1) and life (Article 2).

Decision:

The Federal Constitutional Court struck down the amendment as unconstitutional. This was because the amendment violated Article 1 of the Basic Law, which guarantees the inviolability of human dignity, and Article 2, which guarantees the right to life to "everyone." The rights guaranteed by these articles include "the unborn human being."

117 *BVerfG*, February 15, 1975, 39 BVerfg 1.

Holding:

1. Life developing in the pregnant woman's womb is an independent legal interest protected by Basic Law. Where there is human life, there is also human dignity.

2. The state has a constitutional obligation to protect foetal life.

3. In principle, protection of foetal life takes precedence over the pregnant woman's right to self-determination for the entire period of pregnancy. However, abortion is not punishable in exceptional circumstances such as severe foetal anomalies; threat to the pregnant woman's life or health; rape or incest or a "general situation of need" (or "social indication"). In providing these exceptions, the court made a distinction between "normal" burdens, which the pregnant woman is expected to carry and "extraordinary" burdens, which she is not expected to carry.

4. The situations in which abortion is permitted serve as "exemptions of pregnancy termination from punishment." They are limited to burdens "which demand such a degree of sacrifice of [a woman's] own existential values that one could no longer expect her to go through with the pregnancy."

5. The legislature has a constitutional duty to define abortion as a crime if other measures are inadequate for protection of unborn life and to determine the exemptions from punishment.

Significance:

1. In practice, the decision of the Federal Constitutional Court was a pragmatic one. It recognised the right to life of a foetus, but also it allowed abortion, including in a "general situation of need."

2. In response to the decision, the legislature codified the following as the grounds for abortion: threat to the health or life of the pregnant woman; foetal anomalies; rape or incest; and general situation of need.

3. The approach of the German Court differed from the approach of the Supreme Court of the United States in *Roe* since it rejected the incremental protection of the foetus based on different gestation stages (the trimester approach).

- ***BVerfG* (1993) Federal Constitutional Court of Germany[118]**

Facts:

The case arose from an attempt by the German Parliament to amend abortion law following the unification of East and West Germany so as to harmonise abortion law. In the former East Germany abortion could be obtained on request in the first 12 weeks of pregnancy. The German Penal Code was amended to allow

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

abortion on request if the women went through mandatory counselling and a three-day waiting period. Abortion in these circumstances would not constitute an offence.

Issue:

The issue before the German Constitutional Court was the same as that before the West German Federal Court in the 1975 case (*BVerfG*, 1975): whether the amended law was constitutional under German Basic Law, which provides the rights to dignity (Article 1) and life (Article 2).

Decision:

The Court struck down the portions of the amendment as unconstitutional, specifically the provisions that stated that abortion was not crime, on the grounds that they did not protect the foetal right to life under Article 2 of the Basic Law.

Holding:

1. The court reiterated that the state has a duty to protect foetal life and that the legislature was expected to use criminal law to indicate the obligation of the pregnant woman.

2. The court also reiterated that the pregnant woman is not expected to be placed under unreasonable demands in order to protect foetal life and that the law must permit abortion on grounds of threat to the health or life of the pregnant woman; foetal anomalies; rape or incest; and general situation of need.

3. The legislature could use counselling to persuade pregnant women to carry to term if counselling is effective and could even dispense with the threat of criminal punishment.

Significance:

1. The Constitutional Court reiterated the decision of the 1975 case, upholding the duty of the state to protect foetal life and the conditional or exceptional nature of a woman's right to abortion. It also recognised that criminal law sanctions were not the best approach to protecting foetal life and that non-criminal measures such as social welfare and economic support of women who wish to carry the pregnancy to term are more effective. The court leaned more towards mandatory counselling as a condition for allowing abortions on social indication.

- **Christian Lawyers' Association of South Africa v Minister of Health (1998, High Court of South Africa)**[119]

Facts:

This is an action brought by an organization representing Christian lawyers to challenge the constitutionality of the South African Choice on Termination of Pregnancy Act of 1996. The Choice on Termination of Pregnancy Act radically reformed South African

119 *Christian Lawyers Association of South Africa and Others v Minister of Health and Others (*1998) (note 42 above).

abortion law. It permits abortion on request in the first 12 weeks of pregnancy. From the 13th to the 20th week of pregnancy, the grounds for abortion are: risk to the physical or mental health of the pregnant woman; substantial risk of foetal anomalies; social or economic circumstances of the pregnant woman; and rape or incest. After the 20th week, the grounds for abortion are: risk to the life of the pregnant woman; risk of severe foetal anomalies; and risk of injury to foetus. The applicants argued that the 1996 Act was unequal on the ground that it violated the right to life of a foetus. They relied on Section 11 of the Constitution, which guarantees "everyone" the right to life.

Issue:

The main issue was whether the foetus was a bearer of rights under the South African Constitution. The issue was whether Section 11 of the Constitution, which guaranteed "everyone" the right to life, applies to a foetus.

Decision:

Justice McCreath held that a foetus is not a bearer of constitutional rights and that Section 11 applies only to persons after birth. The court upheld the constitutional validity of the Choice on Termination of Pregnancy Act.

Holding:

1. A foetus does not have legal personhood under Section 11 of the Constitution, which guarantees a right to life. Under South African Common Law as developed in the *nasciturus* rule, a foetus enjoys, at best, contingent legal personhood. It enjoys a right to sue for loss or injuries suffered while *in utero*. This right can only be exercised after being born alive.

2. Recognizing the right to life of a foetus under Section 11 would render abortion illegal in all circumstances, even when the life of the pregnant woman is at risk, when pregnancy is a result of rape or incest, or when there is a risk of severe foetal anomalies.

3. Recognizing a foetal constitutional right to life would have an adverse impact on the pregnant woman's constitutional rights, including the rights to equality (Section 9), dignity (Section 10), security and control over one's body, including right to make decision concerning reproduction (Section 12(2)), privacy (Section 14), freedom of religion, belief and opinion (Section 15) and access to health care including reproductive health care (Section 27).

Significance:

While the approach in *Christian Lawyers Association of South Africa v Minister of Health* is not jurisprudentially the same as that adopted in *Roe v Wade* or *BVerfG* (1975) and *BVerfG* (1993), the outcome is similar. All of these cases approach abortion in terms of balancing any rights or interests of a foetus against their adverse impact on the constitutional rights of the pregnant woman.

- **Case C-355/2006 (2006) Constitutional Court of Colombia**[120]

Facts:

This was a petition brought before the Constitutional Court of Colombia to challenge

the constitutionality of provisions of the Colombian Criminal Code which criminalised abortion in all cases, performed with or without the consent of the woman. The petitioner argued that the provisions violated several provisions of the Constitution of Colombia of 1991, namely the rights to dignity (Article 1); life (Article 11); bodily integrity (Article 12); equality and liberty (Article 13); free development of the individual (Article 16); reproductive autonomy (42); and health (Article 49). The petitioner also argued that the provisions of the Criminal Code violated the states' obligations under international human rights law and Article 93 of the Constitution. The petitioner argued that the provisions of the Criminal Code disproportionately and unreasonably limited the rights and liberties of a pregnant woman, including when she is below 14 years of age.

Issue:

The main issue was whether the provisions of the Colombian Criminal Code in question were constitutional.

Decision:

The Constitutional Court held that the provisions of the Criminal Code in issue were unconstitutional.

Holding:

1. Abortion is constitutionally permitted in the following three circumstances: 1) when pregnancy poses a risk to the life, or the physical or mental health of the pregnant woman as certified by a physician: 2) when the foetus has a serious malformation that makes its life nonviable as certified by a doctor; and 3) when pregnancy is the outcome of rape, incest, unwanted artificial insemination or unwanted implantation of a fertilized ovule which have been reported to the police or judicial authorities.

2. The Court recognised that the state had a legitimate interest in protecting foetal life. At the same time, it did not recognise the foetus as a bearer of constitutional rights. It drew a distinction between a *legal* right to life, which can only be claimed by persons actually born, and a constitutional *value* of life, which can be protected before a foetus has been born.

3. When the legislature chooses to protect foetal life through criminalisation of abortion, it must do so having taken into account other protected values, including the rights guaranteed to women by the Constitution and under international human rights instruments. In this regard, the Court observed that criminalizing abortion without exception would violate the right to life guaranteed by Article 6 of the Covenant on Civil and Political Rights, and the right to health guaranteed by Article 12 of the Convention on the Elimination of All Forms of Discrimination against Women and Article 12 of the Covenant on Economic, Social and Cultural Rights.

120 *Case C-355/2006* (2006) Constitutional Court of Colombia.

To criminalise abortion is every instance would constitutionally value foetal life at the expense of all the fundamental rights of a pregnant woman, including her rights to dignity, the free development of personality, health, life, equality and physical integrity. Women cannot be treated as mere "reproductive instrument for the human race" as they have constitutional agency.

4. The legislature has a constitutional duty to indicate, in clear terms, the circumstances in which abortion is permitted in accordance with the constitutional imperatives.

5. The court also clarified that the right to conscientious objection is a right exercised by an individual and not by an institution such as a hospital, and that where the right is properly invoked, the objecting health-care professional has a duty to immediately refer to woman to a non-objecting health-care professional

Significance:

1. The decision of the Colombian Constitutional Court is significant because it used international human rights instruments as well the provisions of the Constitution to determine the constitutionality of domestic abortion law.
2. The decision highlights that regardless of whether a foetus is recognised as having constitutional rights or a constitutional value of life, foetal life cannot be protected in isolation from the constitutional and human rights of the pregnant woman. Using criminalisation of abortion to protect foetal life will not pass constitutional muster if it disproportionately adversely impacts of the rights of the pregnant woman.
3. The decision also highlights that where abortion has been historically criminalised, the state, though the legislature, had a duty to clarify the circumstances in which abortion is permitted.

- Lakshmi Dhikta v Nepal **(2009, Supreme Court of Nepal)**[121]

Facts:

The case concerns a mother of five who was forced by lack economic means to continue with a sixth pregnancy. She sought to terminate the pregnancy but was not able to pay for safe abortion services at a state health facility. The services cost 1130 Nepalese rupees (about 20 USD). She was otherwise eligible for abortion under Nepalese law. Section 28(b) of the National Code permitted abortion on request in the first 12 weeks of pregnancy. The applicant brought an action before the Supreme Court of Nepal. She argued that denial of access to safe abortion services on the ground that she could not afford the fees constituted a violation of rights guaranteed to her under the Interim Constitution of Nepal. She relied on rights guaranteed by the Constitution, including the right to live in dignity (Article 12); the right to basic health services free of cost from the state (Article 16(2); the right to reproductive health; and the right not to be discriminated against or be subjected to physical, mental or any other form of violence (Article 20).

121 *Lakshmi Dhikta v Nepal* Writ No WO-0757, 2067 (2009) (Supreme Court of Nepal).

Issue:

The main issue was whether failure to provide the applicant with abortion services that were economically accessible constituted a violation of her constitutional rights under the Interim Constitution of Nepal.

Decision:

The court found that the applicant's constitutional rights had been violated as the applicant had been denied access to services she was entitled to on account of her inability to pay.

Holding:

1. The right to abortion is part of the realisation of reproductive health and rights, which can only be achieved if abortion services are accessible and affordable. A right guaranteed by law — in this instance, a right to accessible and affordable abortion services — should be enjoyed under conditions of equality. It should not be limited to certain categories of persons or class as that would offend equality and justice.

2. The legal framework established that a foetus is able to exist only because of the pregnant woman. If the court were to grant the foetus rights that conflict with those of the pregnant woman, it would be treating the foetus as superior to the mother and this would have an adverse impact on the pregnant woman. A foetus cannot be given more importance than the physical and mental health of the pregnant woman.

3. The Constitution does not recognise the rights of a child until it is born. Because the foetus is dependent on the pregnant woman, the court cannot recognise it as having separate personality. Even if the court were to recognise foetal interest, that interest cannot prevail over the pregnant woman's interests.

4. The government legally recognised the right to abortion to ensure that a woman could have freedom from unwanted pregnancy. This enables her free will to ensure her livelihood and frees her from having to take on an inappropriate burden to exercise her right to self-determination.

5. As the foetus develops and the pregnancy progresses, abortion becomes more difficult and the risks to the woman's health increase. For this reason, the law limits the right to abortion. Also, when the foetus has reached viability and capacity to survive independently, it is appropriate to limit abortion and protect the foetus.

Significance:

1. The decision of the Supreme Court of Nepal highlights that merely guaranteeing a right to abortion without also providing equitable access to abortion services is discriminatory against poor women.

2. The Nepalese decision is also significant because the court aligned itself with the judicial trend of recognizing that even if a foetus has a right to life, that right is subordinate to the rights of the pregnant woman, especially her right to life and health.

3. On whether the foetus has constitutional rights, the court took into account jurisprudence from other countries. Among other decisions, the Supreme Court of Nepal cited the decision of the Supreme Court of the United States in *Roe v Wade* and the decision of a South African High Court in *Christian Lawyers Association of South Africa v Minister of Health*.

6.5 Is criminalisation of abortion necessary?

Nearly every country has law that restricts abortion, but Canada is an exception.

- R v Morgentaler **(1988, Supreme Court of Canada)**[122]

Facts:

Three doctors challenged the constitutionality of Section 251 of the Canadian Criminal Code, which permitted abortion when performed at accredited hospitals and with the approval of a committee of doctors (the hospital's Therapeutic Abortion Committee) that abortion was necessary for the preservation of the pregnant woman's physical or mental health.

Issue:

The main issue was whether the restrictions imposed on women's choice by Section 251 of the Criminal Code constituted a violation of Section 7 of the Canadian Charter of Rights and Fundamental Freedoms (Canadian Charter) which, inter alia, guarantees a right to liberty and security of the person.

Decision:

By a majority, the Supreme Court of Canada held that Section 251 of the Criminal Code violated Section 7 of the Canadian Charter

Holding:

1. The majority of the court found that requiring a pregnant woman to carry a pregnancy to term regardless of her choice—as informed by her priorities and aspirations—was a clear infringement of the right to security of the person. Chief Justice Dickson said that: "Forcing a woman, by threat of sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and a violation of security of the person."

2. Chief Justice Dickson and Justice Wilson (as part of the majority) also found that the certification requirements of the Criminal Code were excessive and burdensome on providers of services as well as on the women who need services. The requirements deterred smaller hospitals from providing abortion services and discouraged women from applying for certification. The requirements thus failed to comply with the principles of justice.

122 *R v Morgentaler* [1988] 44 DLR 4th 385, Supreme Court of Canada.

Significance:

1. Like *Roe v Wade, Morgentaler* illustrates that a constitutional provision that does not directly regulate abortion, such as Section 7 of the Canadian Charter,

   may support a woman's right to abortion.

2. The decision highlights the crucial importance of taking into account the pregnant woman's right to reproductive self-determination as a fundamental constitutional right when determining any eligibility for abortion.

3. The decision also highlights that excessive or burdensome certification requirements can render null a woman's right to abortion.

6.6 Can a third party, such as a husband, prevent a woman from having an abortion?

From time to time, third parties (spouses and partners) have attempted to obtain injunctive relief to stop their partners from having an abortion. The most publicised case is an English case, *Paton v Trustees of the British Pregnancy Advisory Service*.

- Paton v Trustees of the British Pregnancy Advisory Service **(1979, Queens Bench Division of the High Court, England and Wales)**[123]

Facts:

The applicant applied for an injunction to prevent his wife from having an abortion for which she was eligible under the Abortion Act of 1967.

Issue:

The issue was whether a husband had a recognised legal interest and right to veto an abortion.

Decision:

The court found that the husband had no legally recognised interest of right to stop a lawful abortion under the 1967 Act.

Holding:

1. The performance of abortion under the 1967 Act only required the consent of the pregnant woman.

2. The court said that the Act does not give a father a right to be consulted before an abortion can be performed. A husband had no right in law or in equity to stop his wife or to stop the doctors from carrying out the abortion.

Significance:

123 *Paton v Trustees of the British Pregnancy Advisory Service* [1979] QB 276 (Queens Bench Division of the High Court, England and Wales).

1. If third parties, such as spouses or partners, can veto an abortion, a woman who has the capacity to consent effectively would have no right to abortion. The pregnant woman would be a reproductive instrument without agency to decide for herself in matters concerning her own body and welfare. By allow third parties to veto a woman's abortion, the government would violate her rights to human dignity, liberty and security of the person, privacy, and equality.

6.7 Can adolescents consent to abortion without parental approval?

Adolescent pregnancy is a reality everywhere. Both adult women and teenage girls seek abortions. The question is whether a person who is classified as a minor under domestic law can obtain an abortion without parental/guardian approval and consent. This issue was addressed in *Christian Lawyers Association v National Minister of Health* (2004).

- ***Christian Lawyers Association v National Minister of Health* (2004, High Court of South Africa)**[124]

Facts:

The South African Choice on Termination of Pregnancy Act (1996) addresses whether minors can obtain an abortion on their own. Section 5(1) of the Act requires that termination of pregnancy be performed subject to the "informed consent of the woman" save for women who are "severely mentally disabled" or in a state of "continuous unconsciousness" (Section 5(4) of the Act). Section 5(3) of the Act says: "In the case of a pregnant minor, a medical practitioner or a registered midwife, as the case may be, shall advise such minor to consult with her parents, guardian, family members or friends before the pregnancy is terminated; provided that the termination of the pregnancy shall not be denied because such minor chooses not to consult them."[125] The applicants sought to declare provisions of Section 5 unconstitutional to the extent that they permit minors to obtain an abortion without parental consent. They argued that a girl below 18 years is not capable of giving informed consent as required in Section 5(1) of the Act and that she is not capable of making the decision whether or not to have a termination of her pregnancy which serves her best interest without the assistance and/or guidance of her parents/guardian and/or counsellor. In the applicant's view, a minor is not in a position to appreciate the need for and value of parental care and support.

Issue:

The issue was whether Section 5(3) was unconstitutional to the extent it allows minors who have the capacity to give informed consent without their parents.

Decision:

The court upheld the constitutionality of Section 5(3) of the Choice on Termination of Pregnancy Act.

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124 *Christian Lawyers Association v National Minister of Health* (2004) (note 42 above).

125 The references to a 'registered midwife' in section 5(3) now includes registered nurse in the light of amendments to the Choice of Termination Act of 1996 by the Choice on Termination of Pregnancy Act of 2008 to also permit also registered nurses to perform abortions in the first 12 weeks of pregnancy.

Holding:

1. A minor's ability to give informed consent depends on the particular individual in position and circumstance of each and every woman. In enacting the Choice on Termination of Pregnancy Act, the legislature assumed that some woman below and above the age of 18 will be incapable of giving informed consent. For these women, the legislature requires parental or some other assistance in giving the informed consent.

2. In enacting the Choice on Termination of Pregnancy Act, the legislature also recognised that some women above and below the age of 18 are capable of giving informed consent, and for these women the legislature requires no assistance. As to whether a particular individual, irrespective of age, is capable of giving such consent, the legislature has left the determination of the "factual position" to the health care professionals who provide abortion services. The court cannot find that this legislative choice is so unreasonable or otherwise flawed that the court should intervene in what is essentially a legislative function. Women or children under the age of 18 are not unprotected as long as they are incapable of giving informed consent. The legislature made provisions to encourage all women below the age of 18 to seek parental support and guidance when seeking to exercise the right to reproductive choice

3. The court recognised that allowing minors with capacity to give consent without parental intervention upholds their right to self-determination. Minors' right to self-determination is implicitly affirmed by several provisions of the South African Constitution, including Section 10, which guarantees 'everyone; a right to "inherent dignity and the right to have their dignity respected and protected"; Section 12(2) which guarantees "everyone" the right to bodily and psychological integrity which includes the right "to make decisions concerning reproduction" and to "the security and control over their body"; Section 14, which states that "everyone has the right to privacy"; and Section 27(1)(a) which guarantees "everyone" the right to access "reproductive health care."

Significance:

1. The South African court aligned its decision with human rights jurisprudence that recognises the principle of the evolving capacities of the minor.[126] Chronological age does not determine capacity to consent to a medical intervention or the capacity to understand the nature of the procedure and its implications.

2. Importantly, the court demonstrated the importance of a holistic approach to constitutional interpretation. The court saw the capacity of minors to consent to sexual and reproductive services in the context of several constitutional provisions that affirm their right to self-determination.

126 RJ Cook & BM Dickens 'Recognizing Adolescents' Evolving Capacities to Exercise Choice in Reproductive Care' (2000) 70 *International Journal of Gynecology & Obstetrics* 13.

6.8 Can a worker who has no direct involvement in providing treatment for the termination of pregnancy exercise a right to conscientious objection?

Human rights authorities universally recognise the right to conscientious objection to abortion by personnel involved in the performance of abortion procedures. The right

does not, however, apply to everyone who has a connection with abortion procedures but only to those closely involved with the performance of the procedures.

- ***Janaway v Salford Area Health Authority*** **(1988, House of Lords, United Kingdom)**[127]

Facts:

An administrative assistant refused to type a doctor's letter of referral for an abortion on the ground of conscientious objection. The abortion was lawful under the Abortion Act of 1967 of England and Wales. She was dismissed from employment. She brought an action challenging the dismissal. Section 4(1) of the 1967 Act permitted the right to conscientious objection. It provided that no person shall be under any duty "to participate in any treatment authorized by this Act to which he has a conscientious objection."

Issue:

The issue was whether under Section 4(1) – the conscience clause – an employee can invoke her right to conscientious objection by refusing to type a referral letter.

Decision:

The court held that the right to conscientious objection did not apply to an administrative assistant, who on religious grounds, refused to type a letter of referral for abortion under the Abortion Act of 1967. Typing a referral letter was marginal to the actual procedure of abortion.

Holding:

The court found that the conscience clause of the 1967 Act does not apply to "any" procedures that associated with abortion but only procedures that are directly or closely connected with the actual performance of abortion procedures.

Significance:

1. If the court widened the scope of conscientious objection beyond procedures that are immediate and integral to the performance of abortion, conscientious objection would be both administratively and constitutionally unworkable. Conscientious objection cannot apply to all procedures that are preparatory to abortion or associated with post-abortion care, otherwise the right to abortion would be held hostage to a potentially limitless number of third parties.

2. If the court widened the scope of conscientious objection to include all personnel who have a connection with abortion procedures, it would

127 *Janaway v Salford Area Health Authority* [1988] 3 All ER 1079 (HL).

fundamentally undermine the organization and provision of health services by the state. Ultimately the right to abortion would be illusory.

6.9 Can judicial officers claim a right to conscientious objection to abortion?

Most of the cases on conscientious objection to abortion that have come before courts in different jurisdictions have been about the application of conscientious objection in the context of provision of health-care services. However, in one case — Case T-388 — the main question which arose before the Constitutional Court of Colombia was whether judicial officers could also claim a right to conscientious objection and refuse to adjudicate a case concerning a claim to exercise a right to abortion.

- ***Case T-388/09* (2009, Constitutional Court of Colombia)**[128]

Facts:

A woman applied for the immediate protection of fundamental rights — *tutela* action — to enforce her constitutional right to access abortion services under the Constitution of Colombia. The applicant was eligible for a legal abortion.[129] However, she did not receive an abortion because she was told she had to first obtain judicial authorisation. At first instance, the presiding judge had ruled that he could not hear the case because of his convictions as a Christian who believed that a foetus was a person from the moment of conception and that abortion was tantamount to killing. The judge invoked conscientious objection relying on Article 18 of the Constitution of Colombia, which guarantees a right to freedom of conscience. At second instance, a judge took a different view. She ordered the health facility to provide abortion care to the applicant.

Decision:

The Constitutional Court upheld the decision of the second instance court.

Holding:

The court went much further than resolving whether a judge could exercise a right to conscientious objection to abortion. It also reiterated principles that apply to interpretation and application of conscientious objection in the health care context.

Judges cannot exercise the right to conscience to recuse themselves from hearing a case in which an applicant seeks to enforce a right, which is legitimate and valid under the Constitution. Judges who voluntarily accept judicial have a duty under the Colombian Constitution. Judges who conscientiously object to enforcing the rights and duties in the Colombian Constitution violate the essential goals of the state, which include "guarantee[ing] the effectiveness of the rights and duties stipulated by the Constitution" and "protect[ing] all persons residing in Colombia in their life, dignity, property, beliefs and other rights and freedoms and ensuring the fulfilment of the social duties of the state and individuals."

The court conceded that judges are entitled to personal convictions, but emphasised that they must fulfil their primary duty to apply the Constitution, as

128 Case T-388/09, Constitutional Court of Colombia.

129 In *Case T-355/06* (2006), the Colombian Constitutional Court laid down the criteria for entitlement to abortion under the Constitution of Colombia.

that was the only way to build a state based on the rule of law. The court said that conscientious objection to enforcing the rights and duties in the Constitution by judges hindered the administration of justice. Furthermore, it seriously, arbitrarily and disproportionately restricted the enjoyment of constitutional rights. Judges must adequately protect fundamental rights without causing additional harm especially where expeditious protection is necessary to avoid further violation of a fundamental right. Failure to do so, such as in a case where a woman is seeking an abortion, causes irreversible harm.

The court restated the principles that govern the application of conscientious objection in the health care sector, saying that:

a. The right to conscience is an individual right that can be invoked by a natural person individually but not by legal persons or collectively;

b. Conscientious objection is not absolute and should be exercised in a manner that does not violate the pregnant woman's fundamental rights, including her rights to health and timely lawful access to abortion;

c. Health-care professionals who invoke the right to conscientious objection have a duty to refer the pregnant woman to a healthcare professional who is willing to provide abortion services;

d. Where a health-care professional invokes the right to conscientious objection, they should do so in writing explaining why performing abortion is against their individual convictions; and

e. State organs responsible for providing healthcare have a constitutional duty to ensure that there is an adequate pool of abortion providers. A woman seeking abortion services must not be left without access to needed services as a result of healthcare professionals who invoke the right to conscientious objection.

Significance:

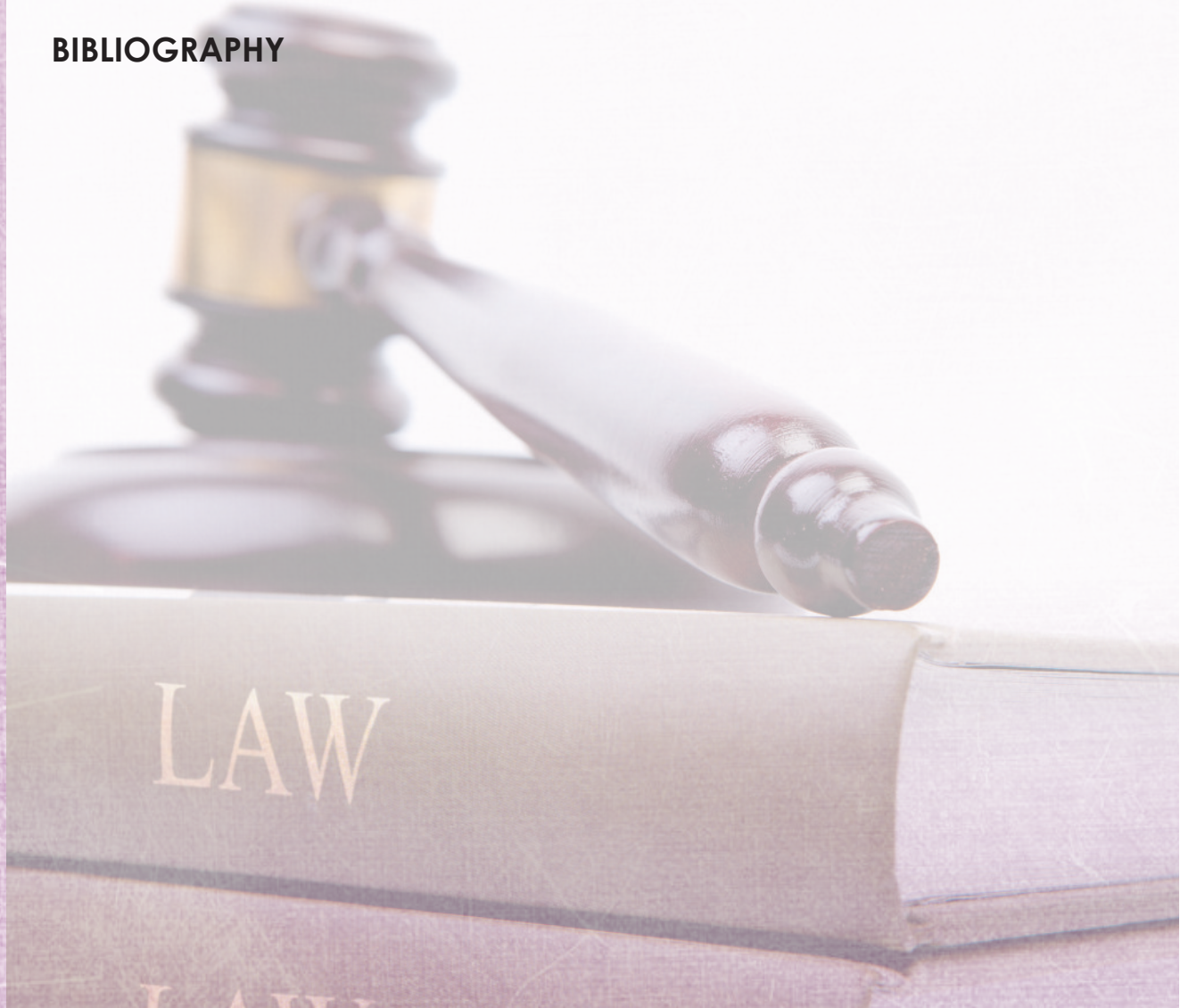
1. The decision of the Constitutional Court of Colombia highlights that the right to conscientious objection to abortion applies only to the personal convictions of health-care personnel who are directly involved with the performance of abortion procedures.

2. The decision also highlights that even where health-care professionals have the right to exercise conscientious abortion, they still owe a duty to refer to the woman seeking abortion.

3. Furthermore, the decision highlights state obligations to ensure adequate personnel and services. When conscientious objection is exercised, women seeking abortion must not be left without services.

SECTION VII

CASE STUDIES: STATE OBLIGATIONS TO RESPECT, PROTECT AND FULFIL WOMEN'S RIGHTS TO ABORTION



SECTION VII

CASE STUDIES: STATE OBLIGATIONS TO RESPECT, PROTECT AND FULFIL WOMEN'S RIGHT TO ABORTION

7.1 Introduction

This final section serves as an opportunity for readers to apply human rights law to hypothetical case studies.

Two main case studies have been created. Each case study begins with a statement of the hypothetical facts and ends with a question for the reader. In each case study, the reader can *identify* and *apply* the relevant human rights principles to achieve an outcome that advances the respect, protection and fulfilment of the reproductive human rights of women. There may be two or more correct responses.

In each case study, the reader may identify several sub-issues. We designed the case studies to allow the reader to explore as many facets of the intersection between abortion and human rights law as possible. We attempted to reflect the main contemporary critical issues that often arise at the domestic level in Africa. This is not to suggest that every critical issue is necessarily covered or that the issues are static. There will be issues peculiar to individual African countries that the scenarios may not specifically address. Furthermore, critical issues do not remain the same for all time as they are influenced by the shifting sands of public opinion, domestic politics and wider global influences. What is critical today may change over time.

The first case study is built around a call for reform of domestic abortion law that has the support of the state. However, the state is seeking advice about the details of the draft law it is proposing. The second case study focuses on challenging restrictive grounds for abortion. We recommend the reader explore the case studies in order because the second is an opportunity to consolidate knowledge gained from the first.

7.2 Case study 1: Abortion law reform with human rights principles

7.2.1 Introduction

In Section II of this handbook, we highlighted the heavy burden of unsafe abortion-related mortality and morbidity. In Section III we noted the colonial origins of domestic laws on abortion in Africa, while in Section IV we provided an overview of the architecture of current domestic abortion laws in the Africa region. We noted that the architecture is varied, and that some African countries retained colonial laws while others reformed their laws. In Section V we introduced a human rights dimension to abortion. We highlighted that on account of post-World War II human rights developments; human rights principles are now an integral part of the regulation of abortion, even more so for states that have ratified UN and regional human rights treaties that bear on women's reproductive health. In Section VI we provided a compendium of summaries of cases from selected jurisdiction with the

aim showing that best practices in human rights are not solely the efforts of global and regional treaty processes, but also the outcome of jurisprudence that has been developed at the domestic level by national courts.

This case study is designed to provide readers with an opportunity to use human rights principles to reform domestic law that is still trapped in its colonial origins. In responding to the issues that arise, it is useful to remember that:

- Women are holders of human rights.
- Unsafe abortion prevents women from realizing their human rights, which implicates not just several human rights that are enshrined in UN and regional human rights treaties and constitutional rights.
- States have a duty to respect, protect and fulfil human rights of women, including rights relating to their reproductive health, in ways that are effective.
- Human rights jurisprudence developed under UN and regional treaties and global and regional soft laws are a source of best human rights practices on abortion.
- The status of international law at the domestic level is influenced by international law norms, whether a particular state follows dualism or monism, and by the legal culture of a given country.

Facts:

Read the following facts and address the issues listed below:

Laguma, a former British colony, is an African state and a member of the African Union. It has ratified the following United Nations treaties: the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Social, Economic and Cultural Rights (ICESCR); the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW); and the Convention on the Rights of the Child (CRC). At the regional level, Laguma has ratified the following treaties: the African Charter on Human and Peoples' Rights (African Charter); the African Charter on the Rights and Welfare of the Child (African Children's Charter); and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol).

The Constitution of Laguma contains a Bill of Rights which is modelled after the International Covenant on Civil and Political Rights (ICCPR). It prescribes 18 years as the age of majority. Article 10 of the Constitution of Laguma provides that provisions of ratified treaties can only take direct effect after Parliament adopted legislation incorporating the treaty provisions into domestic law. For each of the treaties that Laguma has ratified, legislation has been adopted to facilitate incorporation.

Abortion is criminalised under Section 210(1) of the Penal Code of Laguma. However, this is subject to the following exception in Section 210(2) of the Penal Code:

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.

Furthermore, regulation in the form of delegated legislation prescribes that abortions which meet the criteria in Section 210(2) of the Penal Code can only be performed by a medical practitioner in a hospital certified by the Ministry of Health to carry out abortions.

Unsafe abortion is a significant cause of maternal mortality in Laguma. It is accounts for 22% maternal mortality according to the statistics of the Laguma Ministry of Health. Most women who die from unsafe abortion-related illness are poor, have little education and live rural areas where health facilities and providers are scarce, especially doctors.

Issues to address using human rights principles:

The Government of Laguma decided to reform its abortion law to bring it into line with the Maputo Protocol. The President has assigned the task of formulating draft legislation to the Minister of Health (the Minister). The Minister seeks your opinion on the structure, substance and underpinning human rights principles of the draft law. More specifically, the Minister is seeking an opinion which addresses the following issues:

a. What should be the grounds for abortion under the draft law?

b. How should the grounds for abortion be drafted?

c. How should the grounds for abortion be interpreted and applied by the courts and understood by health care providers and women?

d. Who may perform abortion? In answering this question, consider whether only doctors should be permitted to perform abortions.

e. Where can abortions be performed? In answering this question, consider the position of surgical abortions as well as medical abortions that only require a prescription.

f. For abortions on the grounds of rape or incest will the criminal justice system be involved, and if so how?

g. Will married women be required to first seek the consent of their husbands before seeking abortion?

h. Can girls who are below 18 years access abortion services without parental consent?

i. Can a health care professional with competence to perform abortion refuse to offer services on the ground of conscientious objection? If so, are there any circumstances in which the right to conscientious objection cannot be exercised?

j. Will abortion services be available to women who are unable to pay for services?

k. How will eligibility for abortion be determined? Short of instituting legal action in a court, can a woman who is denied abortion on the ground that she falls outside the eligibility criteria challenge the decision administratively?

l. Can health care professionals be required to provide information to the Laguma Ministry of Health about personal details of women who are provided with abortion services?

m. Can the government require health-care professionals who offer care for complications from unsafe abortion to report to the police the personal details of women who received treatment for the harmful effects of abortions which were performed outside the formal health care facilities by untrained persons?

n. Must the government develop and implement guidelines to supplement the proposed law?

o. Does the government have a duty to raise awareness about the new law and to educate women and communities about the dangers of unsafe abortion and the availability of lawful safe abortion services?

7.3 Case study 2: A challenge to a restrictive abortion law

7.3.1 Introduction

Although there has been a steadily growing trend towards liberalization of abortion, as noted in Section IV, many African states still have highly restrictive abortions laws. Furthermore, although more than two-thirds of African states have ratified the Maputo Protocol, as noted in Section IV, many of the ratifying states have not reformed their laws to comply with their obligations under the Protocol.
In this case study, we focus on using human rights principles and jurisprudence to challenge restrictive grounds for abortion. We also explore the need for an administrative mechanism for women to appeal their refusal of request for abortion.

Read the following facts and address the issues listed below:

Facts:

Mayo is a member state of the African Union. It is one of the few wealthy African countries with very high living standards. Mayo is a former colony of France. It has ratified the following United Nations treaties: the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Social, Economic and Cultural Rights (ICESCR); the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW); the Convention on the Rights of the Child (CRC); and the Convention against Torture (CAT). At the regional level, Laguma has ratified the following treaties: the African Charter on Human and Peoples' Rights (African Charter); the African Charter on the Rights and Welfare of the Child (African Children's Charter); and the Protocol to the African Charter on Human and People's

Rights on the Rights of Women in Africa (Maputo Protocol). Mayo follows the Monist tradition in respect of treaties it has ratified. Mayo's Constitution and Bill of Rights are modelled after the African Charter. In addition, in its right to life and integrity of the person clause, the Constitution of Mayo provides that "life begins at conception."

Following ratification of the Maputo Protocol in 2010, Mayo reviewed its law on abortion which until then recognised "saving the life of the pregnant woman" as the only permissible ground for abortion. Section 2 of new law — the Abortion Act of Mayo — provides as follows:

GROUNDS FOR TERMINATING PREGNANCY

1. Pregnancy may be terminated only by a medical practitioner if the medical practitioner is of the opinion that:

a. The continued pregnancy poses a risk to the life of the pregnant woman;

b. The continued pregnancy poses a grave danger to the health of the pregnant woman;

c. There is a substantial risk that the child will be born with severe abnormalities as to be irreparably handicapped; or

d. The pregnancy resulted from rape or incest and has not exceeded the sixteenth week.

Ravayi is married but estranged from her husband, John. Although John has been trying to reconcile with her, Ravayi has been adamant for years that she would like a divorce. Five months ago, John paid her a visit saying that he wanted to discuss a divorce settlement with Ravayi. During the visit, John demanded to have sex with her. When Ravayi refused, he forced himself on her. Although Ravayi reported the incident to police, nothing was done because under the Penal Code of Mayo marital rape is not an offence. Ravayi has discovered that she is pregnant. Moreover, she has tested positive to HIV, but does not have any symptoms of AIDS-related illness. She is devastated by news of the pregnancy.

Ravayi does not want the baby because of the child might be HIV-positive and that she fears she will be unable to look after the child if she succumbs to AIDS in the future. Furthermore, she does not want to continue with a pregnancy that was conceived from the rape knowing that she will not grow to love a child born in such circumstances. She has told John that she will approach Dr X for an abortion. Dr X is a gynaecologist-obstetrician. He is also the superintendent of the state health facility that Ravayi approached. According to a directive from the Ministry of Health of Mayo, decisions about eligibility for abortion are made by the superintendent of the health facility. There are no provisions for administrative appeal. John has said that if Ravayi does not want to keep a baby born out of the pregnancy, he would gladly take custody of it. He has informed Dr X about his willingness to take custody once a baby is born.

Mayo guarantees universal access to antiretroviral therapy to pregnant mothers and their babies. Its antiretroviral therapy compares with the best countries in the world. Ravayi has approached Dr X for an abortion, but he turned her down. She has been

told by Dr X that she does not qualify for an abortion because she does not satisfy any of the grounds under the new law in the light of the following: antiretroviral therapy substantially reduces the chances of the baby contracting HIV; Ravayi and her baby will, in any event, be guaranteed the best available antiretroviral treatment; marital rape is not a crime under the Penal Code; and Ravayi's husband has offered to look after the baby after its born. Ravayi is now twenty weeks pregnant due to the fact that so far her attempts to obtain an abortion have been unsuccessful. She could not challenge Dr X's decision through an administrative channel. She was informed that Dr X's decision was final.

Issues to address using human rights principles:

Advise Ravayi whether she can challenge the provisions of Section 2 of the Abortion Act of Mayo and whether the decision to refuse her abortion constitutes a violation of the following human rights:

a. health
b. gender equality
c. human dignity
d. freedom from inhuman or degrading treatment
e. administrative justice

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