

# Incorporating Human Rights Principles in an Ever-Evolving Legal Environment

Dr Sonia Riyat, Assistant Professor

Department of Commerce & Management, Arka Jain University, Jamshedpur, Jharkhand, India

**ABSTRACT:** *Women in Africa are being overrun by filthy abortion techniques. It's partly due to abortion regimes' failure to translate any granted abortion rights into practical access to abortion services. Africa's abortion laws have a long history of being exceedingly restrictive. While abortion laws became more liberal in many jurisdictions following independence, there has been a shift toward greater liberalization in the post-independence period. The acknowledgement of abortion as just a human right in certain circumstances in Article 14 of the Procedure to the African Charter on Individual and Peoples' Rights just on Rights of Women in Africa, that has significantly speeded up the regional trend toward liberalization, has made a further participation to the regional trend toward liberalization. On the other hand, states are failing to enact abortion limits. The European Court of Human Rights and United Nations treaty institutions are drafting jurisprudence that could be used to hold African governments accountable for refusing to uphold domestic abortion laws in their countries.*

**KEYWORD:** *Abortion, Abortion Laws, Abortion Services, Human Rights, Liberalization.*

## 1. INTRODUCTION

Even in nations with limited resources, unsafe abortion is a leading cause of maternal death and morbidity. However, the latest estimates of the World Health Organization on the frequency of maternal death due to unsafe abortion show that unsafe abortion remains a chronic threat for women in the Global South in particular. There has been a welcome decrease in the number of fatalities worldwide due to unsafe abortions, from 69 000 in 1990 to 56 000 in 2003 to 47 000 in 2008. On the other hand, unsafe abortion-related fatalities have hardly decreased as a percentage of worldwide maternal mortality, staying close to 13% [1].

In addition, the projections indicate increasing regional inequalities, with Africa trailing behind. The African continent has a disproportionately high incidence of unsafe abortions and deaths associated with unsafe abortions, accounting for 28% of worldwide incidence and 62% of deaths associated with unsafe abortions (29 000 women). The fact that unsafe abortion is such a heavy cost in Sub-Saharan Africa explains in part why the region is least prepared to achieve MDG 5A, which calls for a 75 percent reduction in maternal death by 2015.

Unsafe abortion has many reasons, and only a comprehensive approach to sexual and reproductive health can address them all, including providing women with universal access to modern contraception. At the same time, it's essential to create a conducive atmosphere where safe abortion services are readily available and easily accessible[2].

Unwanted pregnancies force women to consider abortion as an option, no matter what the law says. Abortion legislation is a key entry point since it has the authority to allow or prevent women's access to safe reproductive options. A history of criminalizing abortion shows that it has acted as a significant motivator for unsafe, illegal abortions, underscoring the important role that abortion legislation plays in this. When abortion laws are liberalized, implemented, and accompanied with equal access to abortion providers in Africa, the incentives and repercussions of unsafe, illegal abortion are dramatically reduced, as shown by Tunisia and South Africa's experiences [3].

In order to prevent women from being sick, handicapped, or even murdered by unsafe abortion, it is essential to consider the well-established link between restrictive abortion laws and hazardous procedures. As a result, expanding the legal reasons for abortion is a key part of worldwide public health and human rights activism aimed at improving women's reproductive health and reducing unsafe abortion-related mortality and morbidity.

Human rights activism, however, must take a wider strategic approach in light of the worldwide trend toward abortion legalization. While criminalization persists, campaigning must recognize a shifting legal landscape without giving up on the objective of abortion reform or, eventually, legalization. Two recent legal changes are particularly relevant, which must be taken into consideration[4].

First and foremost, pro-life advocates must acknowledge that the abortion legal landscape is dynamic and ever-evolving. Many jurisdictions have now liberalized their abortion laws and expanded the grounds for abortion, in part because of the effectiveness of lobbying. As a result, when it comes to legal obstacles, it's no longer only the most stringent abortion grounds that are the biggest hurdle. Instead, the greater obstacle is likely to be the absence of efficient execution of exceptions to the criminalization of abortion allowed under domestic law [5].

New human rights possibilities, such as those provided by the European Court of Human Rights and United Nations treaty organizations, are opening up for holding governments responsible when domestic legislation fails to achieve safe, legal abortion. While unsafe abortion remains a significant public health and human rights issue in Africa, abortion advocates would do well to adopt and domesticate new jurisprudence as an auxiliary to creating a supportive legal climate.

### *1.1 The Landscape of Abortion Legislation in Africa:*

Africa, along with Latin America, has some of the strictest regulations when compared to other regions. The vast majority of national abortion regulations in the area do not expressly acknowledge socioeconomic conditions or requests as justifications. The exceptions to this rule include the abortion laws of Cape Verde, Ethiopia, South Africa, Tunisia, and Zambia. African countries, both domestically and regionally, represent a shifting legislative landscape when it comes to abortion, with a noticeable trend toward liberalization.

For the most part, Africa represents a continent where the majority of governments have failed to effectively execute abortion exceptions they have given themselves via internal reforms, rather than a region that has failed to liberalize abortion legislation. Women's reproductive health would unquestionably improve if abortion legislation changes in the African area were to be successful and implemented in a setting where services are available and accessible [6].

In the beginning, African abortion laws were influenced by the European colonial nations' crime and punishment paradigm for controlling abortion, which was introduced to the continent. At that time, the colonial administration wanted to reflect the strictness of colonizing nations' abortion laws, which linked abortion with damnation. As a result, abortion was elevated to the status of a capital offence.

In Anglophone Africa, for example, the sole allowed exception to the prohibition of abortion was the preservation of the pregnant woman's life, which became known as the therapeutic exception. Official advice was seldom provided on how the therapeutic exception should be used in practice, even with the therapeutic exemption. The Bourne decision from an English court in 1938 was the most instructive in this respect. By establishing a link between an unborn child's life and her physical or mental condition, the court in Bourne widened the scope of the therapeutic exception.

However, Bourne had only a limited directing influence. Only nations that adhere to the British common law heritage would find it convincing, which essentially meant only countries that were either British or former British colonies. Despite being formally accepted by colonial courts in places like Nigeria and Kenya, the Bourne ruling's effectiveness was undermined because states there failed to take concrete steps like legislation or regulations to implement the ruling, leaving not only women seeking abortion ignorant of or uncertain about the law, as well as healthcare professionals with the competence to provide abortion services[7].

After independence, progress has been painfully sluggish in changing existing abortion laws, particularly when compared to the enormous progress achieved in the former colonial nations. However, change has been taking place for at least the past two decades. A growing number of African nations have implemented changes that go beyond protecting the life of the pregnant mother when considering abortion as a viable option. Significantly, close to half of the 54 member nations of the African Union now legalize abortion when the woman's health is threatened by continuing the pregnancy, above and beyond the recognition of preserving the woman's life as a reason for legal abortion. Abortion is becoming more legal in cases including rape, incest, and risk to the health or life of the fetus.

The African region's domestic legislative changes, despite a clear regional liberalizing trend, have not translated into widespread access to safe abortion services, however. This isn't only due to the fact that abortion services are often unavailable or inaccessible for the majority of women due to reasons like distance, expense, or a lack of knowledge about where clinics are located. Because of this, states have introduced legal reforms that broaden the grounds for abortion, but fail to implement those grounds in ways that are transparent and effective enough to allow women seeking abortion to become aware of their legal rights and know how to realize them so that abortion is legal in a way that goes beyond theoretical abstractions.

Abortion law reforms are also having little effect because state authorities such as justice or health ministries have failed to inform healthcare professionals, who are competent and responsible for providing abortion services, about the legality of abortion and their legal responsibilities, for example through the adoption of implementation protocols or guidelines, with regard to the changes made to abortion law reforms[8].

Swaziland and Kenya are excellent examples of nations that have utilized their constitutions to liberalize abortion grounds, but these countries' execution of abortion legislation reform has not followed suit. According to Kenya's Constitution, Article 26(4), abortion is legal in an emergency, when a pregnant woman's life or health is in danger, or if another written legislation allows it. Article 26(4) concerns recently prompted the Kenya National Commission of Human Rights to make several recommendations to operationalize abortion rights and services, including recommending that the Ministry of Health develop and implement standards and guidelines for the provision of abortion services, promote public awareness about the constitutional legality of abortion and train and educate healthcare professionals ab. Ethiopia, which in 2005 changed its criminal code to expand the reasons for abortion, established and implemented guidelines to support those changes, remains an exception to the norm on the continent.

At the African regional level, we have a similar scenario of substantive abortion legislation liberalization without actual implementation. During the African Charter on Human and People's Rights' human rights system, the African Union approved the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, which gave the region's abortion legislation a major boost. As a result of the Women's Protocol, the world community officially recognized the existence of an international legal right to abortion.

Women's Protocol Article 14(2)(c) acknowledges that a danger to the pregnant woman's life is not the only legal basis for abortion. This protocol recognizes alternative grounds for abortion, but does not recognize socioeconomic factors or a simple request as grounds for abortion. It does, however, recognize that an abortion can be performed if there is an immediate danger to the pregnant woman's health or the life of the unborn child. Abortion may be justified when the pregnant woman's health is at risk, and this is especially true when health is seen holistically as the WHO's Constitution does[9].

There are obligations on the nations to respect, defend and fulfil sexual and reproductive health under Article 14 of the Women's Protocol. Abortion regulations in ratifying nations have yet to be implemented, despite the Protocol's ability to create a paradigm change by replacing the historical crime and punishment model with a reproductive health one that prioritizes women's health and human rights. However, until now, neither the African Charter's main adjudicatory bodies, the African Commission on Human and Peoples' Rights (African Commission) nor the African Court on Human and Peoples' Rights (African Court), have actively contributed to the Protocol's abortion provisions being put into practice.

The African Commission, which is mandated to promote and protect human rights under the African Charter-based treaties and the African Court, which has both contentious and advisory jurisdiction over African Charter instruments, including the Women's Protocol, have yet to issue guidance on the interpretation and application of unsafe abortion in Sub-Saharan Africa, despite this. The African Charter system eliminates the need for the African Commission and the African Court to promote the implementation of the Protocol's abortion restrictions and local abortion legislation in general. To help the African Commission promote and defend women's rights, the African Commission established the Special Rapporteur on Women's Rights in Africa. This office is well-positioned to perform a critical and interventionist role. It can direct the Commission to work more closely with African governments on sexual and reproductive health issues, such as raising awareness about the duty of the state to implement its own abortion laws and making sure that reports submitted to the Commission on state compliance with treaty obligations also address the steps taken by the state to implement its own abortion laws are taken into account.

## 2. DISCUSSION

There are two major procedural criteria that must be met when national authorities use criminal control of abortion but enable exceptions. This is the core of the new European Court abortion jurisprudence. Abortion should only be allowed under certain conditions, which must be clearly defined to both women seeking abortion services and healthcare professionals who offer or at the very least have the competence and duty to do so.

National authorities must also take proactive measures to provide an accessible and speedy administrative process for women who feel denied access to abortion to challenge the denial. To ensure fairness and administrative justice, the administrative process must provide women a chance to be heard and provide written explanations. Also of note, according to the European Court, women wishing to dispute decisions that refuse them abortions should not use litigation, including constitutional litigation, as their main or regular avenue. This is due to the litigation's inherent complexity and length, both of which work against women seeking abortions who are pressed for time. There have been three major instances in which the European Court has stated these principles, notably *Tysiacy vs. Poland* and the cases A, B, and C against Ireland and *RR vs. Poland*[10].

In the *Tysiacy v Poland* case, the European Court of Human Rights found that the Polish state violated Article 8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) when a woman was denied abortion under Polish domestic law, but was not given the opportunity to contest the denial administratively. Polish law accepted the applicant's request for an abortion on the basis of a danger to her health. Although she had medical proof to back her case, she was refused abortion because hospital officials believed she did not satisfy the statutory requirements [11].

It was decided by the European Court of Justice that Article 8(1) of the European Convention, which guarantees a woman's right to privacy, imposes on the state a duty to take positive steps to ensure the effective realization of any abortion rights that it guarantees, in addition to being broad enough to cover a woman's right to decide whether or not to have an abortion. As a result of abortion becoming criminalized, the Court emphasized the need of making explicit the conditions under which it is permissible, as well as safeguarding the legal rights of women seeking abortions who feel wronged when their request is denied.

The European Court followed its ruling in the *Tysiacy* case in cases A, B, and C. In the case of one of the complainants who had a medical condition but had been forced to travel to the UK to seek an abortion because she wasn't sure if she was eligible for one under Irish domestic law, the court found that Ireland had breached its obligations under Article 8(1) of the European Convention.

The Court found that Irish abortion law, which was derived from Article 40.3.3 of the Irish Constitution as interpreted by the Irish Supreme Court and criminalizes abortion except where pregnancy constitutes a "real and substantial risk to the life, as distinct from the health" of the pregnant woman, had generated uncertainty due to a lack of implementation, according to the Court. In the case of the complaint and healthcare providers, the Irish government had not taken any proactive measures to offer advice on the use of this exemption in healthcare services to women in her situation. The Court emphasized that the complainant was not required to bring a lawsuit first to protect her legal rights under Irish abortion legislation[12].

## 3. CONCLUSION

The exclusions to criminalization that do not come with processes for efficient execution are freedoms without "capabilities" for women seeking abortion, and therefore inevitably be regarded as breaches of the legal and human rights entitlements. To prevent women from resorting to unsafe abortions and healthcare providers from delivering other legal services out of fear of prosecution, it's important to end the historical criminalization of abortion now that we live in a human rights era. Abortion law implementation decisions made by the European Court and United Nations treaty monitoring bodies give African regional institutions like the African Commission, the African Court, and domestic courts and human rights institutions, as well as regional and national sexual and reproductive advocacy groups, new and important legal resources. Despite the fact that the rulings are not legally enforceable, they help close a void in African regional law. Africa's human rights culture can benefit from European Court and United Nations treaty monitoring body rulings, not least because of Africa's Charter, and by extension, African Charter-based treaties such as the Women's Protocol, which recognize other international and regional treaties as potential sources of interpretative authority, including African Charter rulings.

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