Journal of African Law, 57, 2 (2013), 310–324 © School of Oriental and African Studies, 2013.
doi:10.1017/S0021855313000107 First published online 12 August 2013

A Commentary on *LC v Peru*: The CEDAW Committee's First Decision on Abortion

Charles G Ngwena*

Abstract

In *LC v Peru*, the Committee on the Elimination of Discrimination against Women held that Peru was in breach of its obligations under the Convention on the Elimination of All Forms of Discrimination against Women when it denied a 13 year old girl emergency surgery as well as an abortion. This commentary discusses the human rights significance of *LC v Peru*, especially in relation to the advancement of abortion jurisprudence in the African region. It is submitted that *LC v Peru* makes an important contribution towards the development of abortion laws that are transparent and accountable to women, as well as responsive to equal protection under the law. The duty of states to operationalize *LC v Peru* in their domestic law is an innovative juridical resource for reforming abortion laws. This is particularly so in those regions, including the African region, where the continued criminalization of abortion serves as a significant incentive for unsafe, illegal abortion.

INTRODUCTION

On 17 October 2011, in *LC v Peru*,[1] the Committee on the Elimination of Discrimination against Women (the Committee) held that Peru was in breach of its obligations under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) when Peruvian hospital authorities denied a 13 year old girl emergency spinal surgery as well as an abortion. This was the first case to be decided by the Committee under the Optional Protocol to CEDAW (the Optional Protocol)[2] on a communication that, in the main, directly involved abortion. This commentary discusses the significance of *LC v Peru* for the development of human rights jurisprudence on abortion. It reflects on the human rights significance of the case in two main respects. First, at a general level, the commentary seeks to ascertain the contribution of *LC v Peru* towards the advancement of jurisprudence that recognizes abortion as a human right. Secondly, and more specifically, the commentary reflects on the significance of *LC v Peru* for the development of abortion jurisprudence in the African region.

* Professor, Center for Human Rights, University of Pretoria. Email: charlesngwena@gmail.com. The author sincerely wishes to thank the anonymous reviewer(s) of this commentary for the constructive comments received.

1 Comm no 22/2009, CEDAW/C/50/D/22/2009 (2011).

2 GA/RES/54/4, 15 October 1999.

https://doi.org/10.1017/S0021855313000107 Published online by Cambridge University Press

Taking cognizance of the Committee's first abortion decision has practical importance for the African region, not least because CEDAW is one of the most widely ratified treaties in the African region.[3] Furthermore, abortion is specifically recognized as a human right under the African regional human rights system. Article 14(2)(c) of the Protocol to the African Charter on the Rights of Women in Africa (the African Women's Protocol)[4] is the first international human rights treaty provision explicitly to confer such status on abortion. At the same time, as will be elaborated upon in this commentary, abortion laws in the African region, including article 14(2)(c), remain largely unoperationalized, with little or no regional or domestic jurisprudential markers to guide the application of the laws. Domestic laws on abortion, in particular, continue to serve as incentives for unsafe abortion in the African region.[5] Against this backdrop, this commentary will submit that the Committee's first decision on abortion provides African jurisdictions with important guidance on compliance with their state obligations under CEDAW and, by extension, under the Protocol on the Rights of Women. The decision is an important jurisprudential resource for guiding African human rights systems on the operationalization of abortion laws.

The commentary begins with a summary of the facts of *LC v Peru*.

THE FACTS

When she was 13 years old, LC was sexually abused by a 34 year old man and became pregnant. The thought of the pregnancy made her very depressed, causing her to attempt suicide by jumping from a building. The suicide attempt left her with severe spinal injuries that eventually caused paralysis of her arms and legs. Although her mother took her to hospital for emergency care and surgery was recommended and, indeed, scheduled, treatment was not immediately rendered. Upon learning about LC's attempted suicide and confirming her pregnancy, the hospital decided to postpone the surgery. The reason given was that surgery was contraindicated in pregnancy. Furthermore, although LC was experiencing depression, she was not given any medication, again for the reason that medication was contraindicated in pregnancy. After consulting LC, her mother requested the hospital to

3 F Viljoen *International Human Rights Law in Africa* (2007, Oxford University Press) at 127. The only African states that have not ratified CEDAW are Somalia, Sudan and South Sudan: "CEDAW: States Parties", available at: <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en> (last accessed 10 June 2013). While several states have ratified CEDAW with reservations, it is particularly significant that none of the reservations specifically relates to art 12 which guarantees the right to health and was a central issue in *LC v Peru*. Most reservations have been more immediately directed at immunizing Islamic family law that emanates from Sharia'h: id at 128.

4 AHG/Res. 240 (XXXI), adopted 11 July 2003, entered into force 25 November 2005.

5 D Grimes et al "Unsafe abortion: The preventable pandemic" (2006) 368 *The Lancet* 1908 at 1912–14.

https://doi.org/10.1017/S0021855313000107 Published online by Cambridge University Press

terminate the pregnancy so that she could be given the emergency care she needed. Under article 119 of the Peruvian Criminal Code, abortion is permitted "if performed by a doctor with the consent of the pregnant woman or her legal representative, if any, when it is the only way to save the life of the mother or to *avoid serious and permanent harm to her health*".[6] However, the hospital delayed responding to the request. It took 42 days for its medical board to respond to and deny the request on the ground that LC's life was not in danger.

LC's mother appealed against the decision to deny abortion. She requested the medical board to reconsider its decision and submitted, as supporting evidence, an independent medical report confirming that the pregnancy constituted a serious risk to LC's physical and mental health and that a therapeutic abortion was necessary and lawful under Peruvian law. By then, LC was 16 weeks pregnant. About a week later, while awaiting the response of the medical board, LC miscarried spontaneously. However, the medical board made it clear in its response that, even after the miscarriage, it would not reconsider its decision. This was because the initial decision "was not subject to appeal since those were decisions taken by various specialists who had evaluated the minor".[7] Following the miscarriage, and three and a half months after it was first established that LC needed emergency surgery, the hospital finally operated on LC's spinal injuries. LC required intensive care and rehabilitation following surgery. She stayed in a rehabilitation facility for two months, but could not continue with the treatment for lack of financial means.

Against this backdrop, a communication was submitted on behalf of LC to the Committee in accordance with article 2 of the Optional Protocol. The communication alleged state violations of articles 1,[8] 2(c) and (f),[9] 3,[10] 5,[11] 12[12] and 16(e)[13] of CEDAW. By the time that the communication was submitted, LC's

6 Emphasis added.

7 *LC v Peru*, above at note 1 at para 2.9.

8 Art 1 of CEDAW defines what constitutes "discrimination against women". The expansive nature of the definition captures both legal and factual discrimination: R Cook and S Howard "Accommodating women's differences under the women's anti-discrimination convention" (2007) 56 *Emory Law Journal* 1039 at 1042–48.

9 Art 2(c) guarantees a right to an effective remedy by requiring the state to guarantee women the right to exercise their right to be protected against discrimination before national tribunals and institutions, while art 2(f) requires the state to take measures to modify any existing laws, regulations, customs and practices that discriminate against women.

10 Art 3 requires the state to take measures that ensure the full development and advancement of women.

11 Art 5, inter alia, requires the state to take measures to eradicate social and cultural practices that subordinate women and are based on notions of gender superiority and inferiority or stereotyping.

12 Art 12 requires the state to guarantee women the right to health care services, including services related to reproductive decision-making.

13 Art 16(e) requires the state to guarantee women the right to decide about the number

https://doi.org/10.1017/S0021855313000107 Published online by Cambridge University Press

upper and lower limbs had become paralysed and her general condition had worsened. She was wheelchair-bound and unable to attend school. She required constant care and was wholly dependent on her family.

THE DECISION

First, the Committee considered whether the communication was admissible and concluded that it patently was. The state party had contended that there had been a failure to exhaust domestic remedies as required by article 4(1) of the Optional Protocol. It argued that, over and above requesting the hospital authorities to terminate the pregnancy, LC ought to have first instituted legal proceedings in order to exhaust remedies before the Peruvian courts. More specifically, the state party argued that LC ought to have instituted the constitutional remedy of *amparo* [to protect][14] as well as civil proceedings to recover damages for loss and injuries suffered. However the Committee rejected the argument for the reason that the Peruvian legal and administrative system had failed to provide LC with a mechanism that could be said to operate with sufficient speed and effectiveness as to be responsive to time being of the essence in a decision to terminate a pregnancy.[15] The Committee highlighted that hospital authorities had delayed unduly in responding to the request for an abortion. Furthermore, it observed that *amparo* proceedings were of an unpredictable duration, with vague deadlines so that it was improbable that they would have provided timely relief.[16] Equally, the Committee was of the view that, save for retroactive relief, recourse to legal proceedings to recover civil damages would not have provided effective relief, as LC's main wish was not to continue with the pregnancy in the first place.[17]

Regarding the merits, the Committee found that Peru had violated articles 2 (c) and (f), 3, 5 and 12 taken together with article 1 of CEDAW. In view of these findings, the Committee did not find it necessary to determine whether there

---

contd
and spacing of children and to have access to information, education and the means to realize this right.

14 *Amparo* is a procedure for protecting individuals against state violations of constitutional rights, or threats thereof, that has been institutionalized in most Latin American countries, including Peru: A Brewer-Carías *Constitutional Protection of Human Rights in Latin America: A Comparative Study of Amparo Proceedings* (2008, Cambridge University Press).

15 *LC v Peru*, above at note 1 at para 8.4.

16 The evidence was that, in practice, the remedy of *amparo* under the Peruvian legal system took 62–102 days to come to resolution. Taking into account prior delay by the hospital in responding to LC's request for an abortion, there would have been no point in *amparo* proceedings as it was likely that LC would have been 28 weeks pregnant by the time that *amparo* proceedings would have been resolved: *LC v Peru*, above at note 1, paras 2.15 and 8.4.

17 Id, para 8.4.

https://doi.org/10.1017/S0021855313000107 Published online by Cambridge University Press

had also been a violation of article 16(e). It found that there had been a manifest failure by Peru to provide an effective and accessible procedure to allow LC to exercise her entitlement to health services that her physical and mental conditions required, in violation of article 2 in conjunction with article 3 of CEDAW, which guarantee the right to an effective remedy. Drawing from the decision of the European Court of Human Rights (European Court) in *Tysiac v Poland* (*Tysiac*),[18] the Committee emphasized that, when a 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 realise their rights effectively.[19] The Committee 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."[20]

In the Committee's view, the absence of laws and regulations implementing access to lawful abortion under article 119 of the Peruvian Criminal Code had created a legal vacuum.[21] As a result, each hospital determined access to therapeutic abortion arbitrarily, without any prescribed time-frame and without attaching any importance to the health of the pregnant woman.[22] In this instance, LC was denied abortion without regard to the risk that the pregnancy posed to her health, including her mental health.[23] She was denied access to both emergency spinal surgery as well as a therapeutic abortion in violation of article 12 of CEDAW.[24] The Committee found that the decision to postpone emergency surgery was not prompted by the presence of an infection, as had ostensibly been claimed by the state party, but by considerations of protecting the foetus.[25] In this way, LC was denied the health services that she required because of a stereotypical assumption that the health of the foetus should prevail over the health of the pregnant woman, contrary to article 5 of CEDAW.[26]

---

18 Appln no 5410/03, ECHR 2007-IV (2007), paras 116–18.
19 *LC v Peru*, above note 1, para 8.17.
20 Id, para 8.17.
21 Id, para 8.13.
22 Id, para 8.16.
23 Id, para 8.14.
24 Id, para 8.15.
25 Id, paras 8.8 and 8.15.
26 Id, para 8.15.

https://doi.org/10.1017/S0021855313000107 Published online by Cambridge University Press

The Committee recommended that Peru repair the human rights violations first by compensating LC for the loss and injuries suffered, especially the injuries to her health, and secondly by addressing more systemic shortcomings in the country's legal and health infrastructure. In respect of the latter, the Committee recommended that Peru: review its laws in order to establish a mechanism for effective access to therapeutic abortion; take steps to ensure that the Peruvian health system knows and observes the state's obligations under CEDAW and their interpretation by General Recommendation No 24,[27] including educating and training health care providers and adopting guidelines and protocols for rendering services accessible to adolescent women seeking reproductive health services and for responding to the health needs of victims of sexual violence; review its laws with a view to decriminalizing abortion when pregnancy results from rape or sexual abuse; and review its restrictive interpretation of therapeutic abortion so as to complement both General Recommendation No 24 and the Beijing Declaration and Platform for Action.[28]

SIGNIFICANCE OF *LC v PERU* FOR THE ADVANCEMENT OF ABORTION JURISPRUDENCE

LC v Peru makes an important contribution towards the development of international jurisprudence under a global treaty that specifically requires states to protect women's reproductive rights in a manner that guarantees equality and non-discrimination. Albeit mainly in a procedural rather than substantive sense, *LC v Peru* recognizes that abortion is a human rights issue and not merely something that, on account of domestic political, moral and religious sensibilities, is peculiarly within the prerogative of the state, as suggested by the historical development of abortion laws. The main human rights significance of *LC v Peru* lies in the recognition that the state has an obligation to render domestic abortion law and practice transparent and accountable, so that any abortion rights that the state purports to confer can be meaningfully realized by women seeking an abortion. Any rights that are conferred on women by domestic law must be tangible rather than merely illusory. Once the state chooses to regulate abortion by prescribing the circumstances in which abortion is permitted, it must concomitantly establish an adequate legal and administrative framework for ensuring that women can seek to exercise a right of access to lawful abortion in a manner that is both capable of fulfilling the right and responsive to the need for clear, fair and timely procedures for

27 CEDAW Committee "General Recommendation No 24: Art 12 of the Convention (Women and Health)": A/54/38/REV.1 (1999).

28 Beijing Declaration and Platform for Action (Fourth World Conference on Women, 4–15 September 1995). Under para 106(k) of the Beijing Declaration, governments undertook to review domestic laws that criminalize abortion with a view to combating unsafe abortion and protecting and promoting reproductive health.

https://doi.org/10.1017/S0021855313000107 Published online by Cambridge University Press

resolving any dispute arising out of a request for a lawful abortion. To an extent, *LC v Peru* is also significant for highlighting that, where abortion is permitted on the ground of the pregnant woman's health, mental health is just as significant as physical health and the views of the pregnant woman should be taken into account rather than disregarded by the decision-making body. In both respects, *LC v Peru* provides human rights systems, including African human rights systems, with a potentially useful resource for developing both national and regional abortion jurisprudence with a view to promoting and protecting women's rights.

State duty to establish a responsive legal and administrative framework for accessing lawful abortion

Without question, abortion is morally dichotomous.[29] Consensus on abortion law reform is hard to achieve.[30] At the same time, in the age of human rights, the difficulty of reaching consensus on abortion law reform should not be a reason for leaving undisturbed the injustices that women suffer from the criminalization of abortion. Women are at the receiving end of the historical crime and punishment approach to regulating abortion. It is women who are at the centre of the physical and emotional burdens of reproduction and, more specifically, carrying a foetus, bearing a child and nurturing it. It is women who forego career development and remunerated labour to bear the responsibilities of motherhood. Unless human rights can be enjoyed equally between women and men and at a deeply personal and intimate level, including at the level where a woman can decide about whether to become a mother, then they will do little to disturb the patriarchal power that produces and reinforces gender inequality through structural inequality. Historically, as well as in contemporary times, the criminalization of abortion has served as a veritable source of gender oppression and discrimination by denying women meaningful choices about whether to become mothers and by stigmatizing abortion. Furthermore, it has served as a powerful catalyst for unsafe, illegal abortions.[31]

Ultimately, criminalization of abortion is intertwined with the "misrecognition" of women.[32] Its genesis lies in patriarchal theological doctrines that conceived deliberate termination of pregnancy as a mortal sin,[33] and stereotyped women as physiological and procreative beings.[34] The criminalization of a

29 L Tribe *Abortion: The Clash of Absolutes* (1990, WW Norton & Co).

30 S McLean "Abortion law: Is consensual reform possible?" (1990) 17 *Journal of Law and Society* 106.

31 *Abortion Worldwide: A Decade of Uneven Progress* (2009, Guttmacher Institute) at 25–29; M Berer "National laws and unsafe abortion: The parameters of change" (2004) 12 *Reproductive Health Matters* 1.

32 N Fraser *Justice Interruptus* (1997, Routledge) at 11–39.

33 R Cook and B Dickens "Human rights dynamics of abortion law reform" (2003) 25 *Human Rights Quarterly* 1 at 8–9.

34 R Siegel "Reasoning from the body: A historical perspective on abortion regulations and

https://doi.org/10.1017/S0021855313000107 Published online by Cambridge University Press

health service that only women need has the effect of compelling women to serve as reproductive instruments. In the South, especially, criminalization of abortion presents two unenviable choices to women with unwanted pregnancies: reluctantly becoming mothers or having recourse to illegal and frequently unsafe abortions with a consequent toll on life and health. The manner in which the therapeutic exception to the criminalization of abortion was conceived under 18th century European abortion laws (laws which were in turn transplanted to colonies, including colonies in the Americas and Africa) is telling of the gender-scripted role of women as reproductive instruments. Abortion was only permitted as an expression of the doctrine of necessity "to save the mother's life" which literally meant permitting abortion only when continuing with the pregnancy brought the woman dangerously close to losing her life.[35]

In many jurisdictions the rigours of the letter of abortion law have been relaxed through broadening the grounds of abortion to include risk to the pregnant woman's health, rape and incest, or risk to foetal health or life. However, as the facts of *LC v Peru* clearly show, the liberalization of grounds for abortion does not necessarily translate into access to abortion services, partly because, in practice, this can easily be undermined by the lack of an enabling legal and administrative infrastructure. In this sense, the injustice that is meted to women through the criminalization of abortion manifests itself not only in laws that are highly restrictive of abortion, but also in laws that, in practice, confer only paper rights, as they are generally never implemented in a manner that allows women to avail themselves of lawful abortions as permitted by the letter of the law. Thus, abortion regimes that restrict access to lawful abortion are perpetuated even after liberalization. What *LC v Peru* does is address this injustice by requiring state parties to take positive measures to ensure that abortion laws are faithful to the legislative or constitutional intentions and do in fact deliver any abortion rights they purport to confer on women. Ultimately, *LC v Peru* requires a paradigm reorientation of the historical preoccupation with a crime and punishment model for regulating abortion so that, where abortion is permitted, even if in a highly restricted form, it is accompanied by a credible and accessible legal and administrative framework that facilitates access to abortion to the extent permitted under the law. In this way, incentives for unsafe abortion can be mitigated.

Worldwide, a significant proportion of maternal deaths are linked to unsafe abortion. According to the World Health Organization (WHO), unsafe

---

contd
questions of equal protection" (1992) 44 *Stanford Law Review* 261 at 277; R Cook and S Cusack *Gender Stereotyping: Transnational Perspectives* (2010, Pennsylvania University Press) at 85–87.

35 Siegel, id at 265; Cook and Howard "Accommodating women's differences" above at note 8 at 1048–51.

https://doi.org/10.1017/S0021855313000107 Published online by Cambridge University Press

abortion accounts for 13 per cent of global maternal mortality.[36] While unsafe abortion is a global phenomenon, it disproportionately affects countries in the South. The majority of the 21.6 million unsafe abortions that take place annually occur in the South.[37] Within the South, the African region is the most affected region. It is estimated that, globally, 47,000 maternal deaths each year are due to unsafe abortion.[38] Africa's share of this figure is 29,000 (almost 62 per cent).[39] The African region bears a disproportionate burden of unsafe abortion partly because its abortion laws are disabling.[40] The laws are disabling not just for women seeking abortion, but also for African health-care systems. In some African countries, the cost of treating unsafe abortion-related illness consumes as much as 50 per cent of the budget allocated to gynaecological care.[41]

Although an increasing number of African countries have, in the last two decades or so, liberalized abortion to broaden the grounds for abortion,[42] abortion law remains largely unoperationalized at the national level.[43] Countries, such as South Africa, that have radically transformed abortion law in a way that combines broadening the grounds for abortion with a practical framework for equitable access to abortion services in the public health sector, remain the exception.[44] Furthermore, although the human rights system in the African Charter on Human and Peoples' Rights has taken a global lead in explicitly recognizing abortion as a human right through the adoption of the African Women's Protocol,[45] abortion remains largely unoperationalized even in ratifying countries.

---

36 *Unsafe Abortion. Global and Regional Estimates of the Incidence of Unsafe Abortion and Associated Mortality in 2008* (2011, WHO) at 27.

37 Id at 1 and 18–23.

38 Id at 1 and 27.

39 Id at 28.

40 Id at 6–8; Grimes et al "Unsafe abortion", above at note 5 at 1912–13.

41 Grimes et al, id at 1914; H Rees et al "The epidemiology of incomplete abortion in South Africa" (1997) 87 *South African Medical Journal* 432.

42 Centre for Reproductive Rights "World's abortion laws" (2013), available at: <http://worldabortionlaws.com/map/> (last accessed 16 June 2013).

43 C Ngwena "Inscribing abortion as a human right: Significance of the Protocol on the Rights of Women in Africa" (2010) 32 *Human Rights Quarterly* 810 at 830–34.

44 C Ngwena "Access to legal abortion: Developments in Africa from a reproductive and sexual health rights perspective" (2004) 19 *South African Public Law* 328 at 329–34.

45 Above at note 4. Art 14(2)(c) of the African Women's Protocol permits abortion on the grounds of risk to the life or the physical and mental health of the pregnant woman, sexual assault, rape or incest, or risk to the life of the foetus. Thus far, the African Women's Protocol has been ratified by: Angola, Benin, Burkina Faso, Cape Verde, Comoros, Democratic Republic of Congo, Djibouti, Gambia, Ghana, Guinea-Bissau, Lesotho, Liberia, Libya, Malawi, Mali, Mauritania, Mozambique, Namibia, Nigeria, Rwanda, Senegal, Seychelles, South Africa, Tanzania, Togo, Uganda, Zambia and Zimbabwe: African Commission on Human and Peoples' Rights "Ratification table: Protocol to the African Charter on Human and Peoples' Rights", available at: <http://

https://doi.org/10.1017/S0021855313000107 Published online by Cambridge University Press

For example, although Malawi has ratified the African Women's Protocol, its abortion law, as contained in sections 149 and 243 of the Penal Code, remains not only highly restrictive but also essentially unoperationalized.[46] The lack of transparency in Malawi's abortion law deters healthcare providers from providing lawful services, and deters women from seeking safe services on account of misperceptions that the circumstances in which abortion is lawful are extremely limited.[47] Unsafe abortion accounts for 18 per cent of maternal mortality in Malawi.[48] In its report, while expressing concern with unsafe abortion-related maternal mortality, the Committee urged Malawi to review its abortion law with a view to providing women with the health services they need consistent with the right to health enshrined in article 12 of CEDAW.[49]

African jurisdictions that have adopted guidelines to assist in the operationalization of abortion laws are exceptions to the rule.[50] Even countries such as Kenya and Swaziland, which have adopted constitutions that guarantee a right to abortion, have yet to take concrete measures to implement those rights.[51] The paradigm for regulating abortion in African countries is still, on the whole, a mirror of the region's colonial bequest. Abortion is still regulated mainly through a crime and punishment model that is expressed in penal codes or legislation whose accent is on proscribing abortion, subject to tersely described exceptions. Rarely is guidance provided about how the law applies in practice. Even rarer (except for the prospect of an aggrieved woman instituting civil proceedings to recover civil damages for consequent loss or injuries, or instituting a constitutional claim to protect the violation

---

contd
www.achpr.org/instruments/women-protocol/ratification/> (last accessed 16 June 2013).

46 E Jackson et al "A strategic assessment of unsafe abortion in Malawi" (2011) 19 *Reproductive Health Matters* 133 at 135–37.

47 Id at 136.

48 Id at 134.

49 CEDAW "Concluding observations of the Committee on the Elimination of Discrimination against Women, Malawi": CEDAW/C/MWI/CO/6 (2010), paras 36–37.

50 Examples are Ghana, Ethiopia and Zambia. They adopted the following guidelines respectively: "Prevention and Management of Unsafe Abortion: Comprehensive Care Services, Standards and Protocols" (2006, Republic of Ghana); "Technical and Procedural Guidelines for Safe Abortion Services in Ethiopia" (2006, Family Health Department); "Standards and Guidelines for Reducing Unsafe Abortion Morbidity and Mortality in Zambia" (2009, Ministry of Health).

51 Art 26(4) of the Constitution of Kenya of 2010 permits abortion on the grounds of: medical emergency; risk to the life or health of the pregnant woman; or where abortion is permitted by any other written law. Sec 15(5) of the Constitution of Swaziland of 2005 permits abortion on the grounds of: risk to the life of the pregnant woman; a serious risk to the physical or mental health of the pregnant woman; rape; a serious risk of a physical or mental foetal "defect" of a nature that the child to be born will be "irreparably and seriously handicapped"; and incest or unlawful sexual intercourse with a mentally disabled female.

https://doi.org/10.1017/S0021855313000107 Published online by Cambridge University Press

of a constitutional right) are provisions for administrative procedures for a timely review of decisions about eligibility for abortion under domestic law.

LC v Peru is a proposition for the human rights principle that domestic laws that permit abortion but remain unimplemented, or are opaque, hidden, unknown by or unclear to women seeking abortion or to the health professionals who have the responsibility to provide abortion services, constitute a human rights violation. This is partly because they do not provide women with equal protection under the law. Such laws are discriminatory because they deny access to services that only women need.[52] The human rights cogency of *LC v Peru* is easy to appreciate, not least because there is sufficient evidence that, in those jurisdictions where abortion has been historically highly restricted and stigmatized, laws that permit abortion, but remain unimplemented, do little to alleviate a pervading public perception that abortion is illegal at all times.[53] When the law is uncertain, or there are no clear implementing guidelines, health professionals tend to interpret the law very cautiously, tending, for fear of prosecution, to refrain from providing abortion services, even where the woman is entitled to them. A perception among women that the law is highly restrictive of abortion and only permits abortion in rare circumstances is a significant incentive for unsafe, illegal abortions, especially among poor women.[54] An important rationale for operationalizing abortion law is therefore to empower not just women seeking to exercise their right to safe, legal abortion services, but also the health professionals who have the professional and legal competence to provide such services.

By requiring states parties to operationalize abortion laws, the Committee was not so much breaking novel jurisprudential ground but, rather, was following in the footsteps of jurisprudence developed earlier by other tribunals. While the Committee primarily followed the decision of the European Court in *Tysiac*,[55] which the same court has since followed in *A, B and C v Ireland*[56] and *RR v Poland*,[57] it is important to note that, even before *Tysiac*, jurisprudence for interrogating the procedural aspects of abortion had already been in the making, though not necessarily with the same emphasis or systematic approach that is apparent in *Tysiac*.[58] In this regard, a notable contribution is *Family Planning Association of Northern Ireland v Minister of Health, Social Services*

52 CEDAW Committee "General Recommendation No 24", above at note 27, paras 11 and 14.

53 *Unsafe Abortion in Kenya* (2008, Guttmacher Institute) at 1; Jackson et al "A strategic assessment", above at note 46 at 136; B Johnson et al "Reducing unplanned pregnancy in Zimbabwe through postabortion contraception" (2002) 33 *Studies in Family Planning* 195.

54 Jackson et al, id at 136–37.

55 Above at note 18.

56 Appln no 255579/05 (2010), [2010] ECHR 2032.

57 Appln no 27617/04 (2011).

58 R Cook et al "Achieving transparency in implementing abortion laws" (2007) 99 *International Journal of Gynecology and Obstetrics* 157.

https://doi.org/10.1017/S0021855313000107 Published online by Cambridge University Press

and Public Safety,[59] a decision of the Court of Appeal of Northern Ireland. It held that the state was in breach of its domestic statutory obligations to provide health services when it failed to clarify the legality of abortion under Northern Ireland's Offences Against the Person Act of 1861. Failure to provide guidelines to clarify that act had left women seeking abortion, as well as health providers, uncertain about the legality of abortion. Consequently, each year, thousands of women travelled to mainland Britain to have abortions at considerable physical and financial cost. Another source of persuasive jurisprudence that preceded *Tysiac* is the decision of the UN Human Rights Committee in *KL v Peru*.[60] In this case, which incidentally also involved Peru and was relied upon by the complainant in *LC v Peru*,[61] the Human Rights Committee held that denying an abortion to an adolescent who was pregnant with an anencephalic foetus violated her rights guaranteed under the International Covenant on Civil and Political Rights.[62] The decision was reached in part because there had been failure by the state to implement a legal and administrative framework for regulating abortion under domestic law.

Tysiac is significant in that it was the first decision in which a supranational court enunciated a fuller and more systematic jurisprudential statement on the human rights imperative of specifically operationalizing abortion laws. The European Court underlined the importance of alleviating the deterrent effects of the criminalization of abortion and of the timely resolution of any disputes. According to the European Court, the state has a duty to ensure that a domestic law that was passed with the intention of permitting abortion in given circumstances is structured in a manner that facilitates rather than impedes access to lawful abortion.[63] A woman who has been denied an abortion must be given reasons for the denial, and a right to challenge the denial before an independent body without first being expected to litigate.[64] Furthermore, the administrative procedures must be responsive to time being of the essence for women seeking an abortion. The court underlined that it is of little avail only to provide women with after-the-fact procedural safeguards.[65]

Against this backdrop, *LC v Peru* is an important addition to the stock of emerging jurisprudence on the state's duty to operationalize laws that impact

59 [2004] NICA 39. R Fletcher "Abortion needs or abortion rights? Claiming state accountability for women's reproductive welfare" (2005) 13 *Feminist Legal Studies* 123.

60 Comm no 1153/2003, Human Rights Committee: UN doc CCPR/C/85/D/1153/2003 (2005).

61 *LC v Peru*, above at note 1, paras 2.15 and 5.5.

62 The Human Rights Committee found violations of art 2 (right to an effective remedy), art 7 (right to be free from cruel, inhuman and degrading treatment), art 17 (right to privacy) and art 24 (right to special protection as a minor).

63 *Tysiac*, above at note 18, para 116.

64 Id, paras 117–18.

65 Id, para 118.

https://doi.org/10.1017/S0021855313000107 Published online by Cambridge University Press

women's reproductive rights.[66] It highlights the radiating influence of the regional human rights jurisprudence of the European Court. Even more pertinently, it highlights the taking root of an innovative jurisprudential development, namely the potential of using procedural law to promote women's access to safe and legal services. While persuading domestic legislatures or domestic or supranational courts to liberalize the substantive aspects of abortion law by extending the grounds of abortion should continue to be an important strategy for advocates of abortion law reform, *LC v Peru* tells us that this need not be the only strategy. It can also be strategic to attempt to secure reform of abortion law and practice not so much through amending the substance of the law (which might be harder to achieve, especially where the state is in thrall to religious authorities and political constituencies which are hostile towards abortion) but through requiring existing laws and practices to be responsive to the imperatives of equal protection under the law and access to fair administrative procedures. Indeed, even where abortion law has been liberalized, as had been the case in Peru, it is essential to ensure that it operates in a legal framework in which there is real rather than token commitment to facilitating access to lawful abortion as provided by the law. The availability of a legal and administrative framework for determining entitlement to abortion and resolving disputes between doctors and women or between doctors who disagree on whether there is entitlement to abortion, serves as an enabling as well as a destigmatizing tool. It reassures women seeking an abortion, as well as health providers, that abortion is lawful in given circumstances and that it is not the intention of the law to render all abortion procedures illegal. Furthermore, the availability of such a framework serves as a safeguard against health practitioners who are opposed to abortion and are inclined to abuse the law and arbitrarily deny requests for abortion, for religious or other reasons, as indeed was the undercurrent in *LC v Peru*.

Interpreting risk to the pregnant woman holistically

To an extent, as alluded to earlier, *LC v Peru* is also significant for its contribution towards elucidating the criteria for determining whether a continuation of the pregnancy poses a risk to the woman's health. As a ground for abortion, risk to the health of the pregnant woman is a feature of many abortion laws, including African abortion laws. Some laws, such as the Peruvian law,[67] calibrate the risk requiring a certain threshold of seriousness before the ground is met, but more liberal laws do not. However, other than vesting in health professionals the competence to determine whether the pregnant

66 In this respect, it is also important to note a decision of the Human Rights Committee: *LMR v Argentina*, UN doc CCPR/C/101/D/1608/32007 (2011), where it was held that failure by the state to implement procedures to allow access to lawful abortion under Argentinean abortion law constituted violations under the International Covenant on Civil and Political Rights.

67 Peruvian Criminal Code, art 119.

https://doi.org/10.1017/S0021855313000107 Published online by Cambridge University Press

woman meets the legal requirement, abortion laws rarely provide guidelines for determining what constitutes a risk to health. *LC v Peru* underlines the importance of accepting that psychological distress experienced by a woman who is compelled to continue with an unwanted pregnancy is as relevant to determining detriment to the woman's health as distress or injury emanating from a physical or organic source.[68] In this way, *LC v Peru* requires state parties not to discriminate against women seeking abortion on the ground of mental health. Instead, they should adopt a holistic or inclusive approach to the conceptualization of health. In this sense, *LC v Peru* demonstrates a rapport between the Committee's approach to health and that of the WHO. Under the WHO Constitution, health is a much broader concept that embraces social wellbeing and does not only connote the mere absence of a pathological disorder.[69]

It is also significant that the Committee highlighted that risk to the woman's mental health is not something that health professionals can determine on their own, without taking into account the views of the pregnant woman, as happened in *LC v Peru*. To this extent, *LC v Peru* underlines the appropriateness of a woman-centred approach when determining risk to a pregnant woman's health as a ground for abortion.

CONCLUSION

Although, ultimately, it is accessibility to abortion services that is crucial in empowering women with unwanted pregnancies to make reproductive decisions and avoid the pitfalls of unsafe, illegal abortion, the law is nonetheless an important gateway to abortion services. There is a correlation between laws that, in theory or in practice, are highly restrictive of abortion and incentives for unsafe, illegal abortion. Requiring abortion laws to be transparent and amenable to meaningful tangible procedural safeguards, as *LC v Peru* does, is a way of promoting a woman's "capabilities approach" to abortion.[70] It is a way of ensuring that abortion rights are not theoretical abstracts, but do in fact connect with the human dignity of women seeking abortion, so as to guarantee them a certain minimum threshold of physical and psychological wellbeing. The procedural human rights imperatives that were articulated by the Committee in *LC v Peru* as necessary attributes of human rights-compliant domestic abortion law have the potential to contribute to the development of domestic abortion laws that empower women by facilitating rather than impeding access to abortion. The cardinal message is that,

68 R Cook et al "Legal abortion for mental health indications" (2006) 95 *International Journal of Gynecology & Obstetrics* 185; Ngwena, "Inscribing abortion as a human right", above at note 43 at 849–50.

69 Preamble to the WHO Constitution (1948).

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

https://doi.org/10.1017/S0021855313000107 Published online by Cambridge University Press

however restrictive, abortion laws should not be solely preoccupied with deterrence, but should also seek concomitantly to facilitate lawful abortion to the maximum extent permitted by domestic law. In this way, *LC v Peru* advances the consensus that has been reached at global as well as regional levels to provide access to abortion to the maximum extent permitted under the law.[71]

While this commentary has highlighted the progressive nature of the jurisprudence that was enunciated and applied by the Committee in *LC v Peru*, its limited equality paradigm should not be overlooked. *LC v Peru* frames women's equality essentially as procedural equality and equality under the law, rather than substantive equality. It stops short of a more holistic consideration of the impact of abortion laws on women in a gendered society. *LC v Peru* does not interrogate abortion law as law that has historically drawn its impulse from the wellspring of patriarchal institutions and profusely masculine theologies that stereotype women as reproductive instruments and child-carers.[72] It does not implicate the historical criminalization of a health service that only women need as an instance of gender inequality and unfair discrimination.[73] *LC v Peru* adopts an incremental rather than radical approach to implicating gender inequality in abortion laws. In the final analysis, it is steeped more in formal than substantive equality.

71 On global consensus see: "Programme of action" (International Conference on Population and Development (ICPD), 5–13 September 1994), doc ST/ESA/SER.A/149, paras 8.25 and 12.17; and "A follow-up to ICPD in 1999 – ICPD +5: Key actions for the further implementation of the programme of action of the International Conference on Population and Development" (UN GAOR, 21st special session, 30 June – 2 July 1999), para 63. On regional consensus in the African region, see "Maputo plan of action for the operationalisation of the continental policy framework for sexual and reproductive health and rights 2007–2010" (2006, African Union), para 4.2.1a.

72 Cook and Cusack *Gender Stereotyping*, above at note 34 at 85–89; B Harrison *Our Right to Choose: Towards a New Ethic of Abortion* (1983, Beacon) at 6 and 9.

73 CEDAW Committee "General Recommendation No 24", above at note 27, paras 11 and 12.

https://doi.org/10.1017/S0021855313000107 Published online by Cambridge University Press