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Access to knowledge and the Global Abortion Policies Database

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Abstract

Research shows that women, healthcare providers, and even policy makers worldwide have limited or inaccurate knowledge of the abortion law and policies in their country. These knowledge gaps sometimes stem from the vague and broad terms of the law, which breed uncertainty and even conflict when unaccompanied by accessible regulation or guidelines. Inconsistency across national law and policy further impedes safe and evidence-based practice. This lack of transparency creates a crisis of accountability. Those seeking care cannot know their legal entitlements, service providers cannot practice with legal protection, and governments can escape legal responsibility for the adverse effects of their laws. This is the context for the newly launched Global Abortion Policies Database—an open-access repository that seeks to promote transparency and state accountability by providing clear and comprehensive information about national laws, policies, health standards, and guidelines, and by creating the capacity for comparative analysis and cross-referencing to health indicators, WHO recommendations, and human rights standards.

KEYWORDS

Abortion; Abortion law and policy; Human rights; Safe abortion

1 | INTRODUCTION

The United Nations (UN) conferences of the 1990s recognized unsafe abortion as a major public health concern, and called for state actions to address it. Governments committed to ensure that, in circumstances where abortion is not against the law, such abortion is safe and accessible.^{1,2} The commitment to facilitate access to safe abortion to “the full extent of the law” has since been restated in many political declarations and plans of action, becoming a cornerstone of the WHO safe abortion guidance.³ This global consensus on safe abortion calls on states to make effective the rights and services promised in their national laws. The call assumes, however, that the entitlements of abortion laws are known, or at least knowable.

Many abortion laws are written in vague terms, breeding uncertainty and even conflict as to what they allow in practice. This is

especially true in countries where abortion is partially decriminalized, allowed only on certain legal grounds (e.g. protection of life and health, criminal act [rape and incest], and fetal impairment), or where unlawful abortion is prohibited with no indication of what abortions might be lawful. In such circumstances, abortion laws often delegate the responsibility to determine the bounds of lawful abortion to medical and legal professionals. Without guidance or oversight, this delegation leads to inconsistent and arbitrary practice. Beyond the interpretive problems of a single law, there is also inconsistency across national laws and policies, for example, in the reconciling of constitutional rights and state policies of life and health protection with criminal prohibitions on life-saving and health-preserving abortion care. In some federal states, abortion laws and policies vary by subnational jurisdiction, further complicating access for women, girls, and others who can become pregnant.

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The lack of transparency in abortion laws and policies creates a crisis of accountability. The legal entitlement of women and others seeking care cannot be known with any confidence, leading to delays and denials of care or their avoidance of the formal health system altogether. The precarious legal status of service providers likewise requires them to forgo provision of care or risk arbitrary arrest and other sanction. Without clarity on the law, governments can escape accountability for the adverse effects of their laws on health and human rights.

Knowledge of abortion law and policy is therefore crucial to ensuring access to safe abortion, and to protecting sexual and reproductive health and human rights. This insight grounds the extraordinary efforts behind the Global Abortion Policies Database,^{4,5} an open-access repository of abortion laws and policies for 197 UN Member States.⁶ The UNDP-UNFPA-UNICEF-WHO-World Bank Special Programme of Research, Development and Research Training in Human Reproduction and the UN Department of Economic and Social Affairs launched the database in June 2017. The database is designed to promote transparency by providing clear and accurate information about national-level abortion laws and policies, and to improve state accountability by facilitating comparative analysis across countries and against evidence-based recommendations and human rights standards.

In this article, we describe the context for and basic features of this landmark global intervention for safe abortion, and explore the opportunities the Global Abortion Policies Database creates to increase transparency in abortion law and policy, and to improve state accountability for health and human rights.

2 | ACCESS TO LEGAL KNOWLEDGE AS A DETERMINANT OF SAFE ABORTION

In a 2010 judgment, the European Court of Human Rights drew attention to the Irish Government's failure to lay down any criteria by which the only legal ground for abortion, to save the life of the pregnant woman, could be established.⁷ Physicians were placed in an impossible position, facing criminal charges on the one hand and an absence of clear legal guidance on the other. This bind provoked nationwide protests after Savita Halappanavar died from miscarriage complications.⁸ Her treating physicians refused to terminate the pregnancy on the wrongful belief that their hands were legally tied.

Empirical research shows that women and providers worldwide have limited or inaccurate knowledge of the abortion laws and policies that govern in their country. This knowledge gap influences how women enter the health system and whether they can successfully navigate its bureaucratic measures, including in countries with permissive laws. Findings from a systematic review⁹ confirm women's general low knowledge, but also show important inequalities in knowledge based on geography, wealth, and education. In the USA, low-income first-generation immigrants and Spanish speakers are significantly less likely to have correct knowledge of gestational age limits and parental or partner consent laws.¹⁰ Given legal information as a determinant of

access to safe abortion, these inequalities partly explain why marginalized women are disproportionately subject to arbitrary denials of service, as documented in Argentina, Bolivia, and Brazil,¹¹ raising human rights concerns of discrimination in access to care.¹²

Many women rely on and defer to the legal knowledge of service providers, thereby making their full and accurate knowledge of the law crucial to ensuring access. The knowledge of healthcare professionals influences how and whether they provide care with a strong correlation between accurate knowledge and progressive practice.^{13,14} This is partly attributable to the so-called chilling effect of criminal laws.³ When abortion laws do not explicitly specify what conduct is prohibited, providers fearful that their decisions could be deemed in violation of the law *ex post facto* are overly cautious and even restrictive in interpretations of the law. A US study¹⁵ found a statistical correlation between laws forbidding "late-term" abortions and refusals of "near-late-term" abortions, that is, abortions within 1 month of the legal limit. The chilling effect of criminal abortion laws is amplified by the fact that in some jurisdictions older criminal laws are selectively or rarely enforced today, leaving their contemporary interpretations genuinely unknown.¹⁶

Unenforced laws and the information vacuums they create additionally lead to inconsistent, arbitrary, and even discriminatory practice through unfettered delegations of power. When abortion laws are unknown or mistaken, medical and state authorities may refuse lawful services in bad faith, for improper purpose, or in light of irrelevant considerations.¹⁷ Legal uncertainty affords these actors coverage to impose their moral views on those seeking care, to obstruct the exercise of their legal rights, and to thereby frustrate the intentions of the law.

Information deficits among women and service providers are often created and sustained by lack of knowledge among policy makers, who do not know what the law allows or what obligations it entails for them.^{16,18} The Family Planning Association in Northern Ireland, for example, brought a case against the Department of Health for its failure to ensure that healthcare providers understood the abortion law.¹⁹ In deciding the case, the Court of Appeal found that officers within the Department did not fully understand the law, unaware of how courts had interpreted key phrases of the law such as "serious injury to the physical health or mental health of the mother".

These widespread knowledge gaps suggest a systemic cause. Lack of transparency may be endemic to certain structural features of abortion law and policy, a claim supported by the shared colonial heritages of laws in the global south. The prohibitions of criminal laws, for example, often appear absolute and their exceptions are rarely defined, making the law difficult to understand and seemingly contradictory. When these laws are then translated into common knowledge, their prohibitions are recalled, while their exceptional entitlements are neglected.

3 | TRANSPARENCY IN ABORTION LAW AND POLICY

In recognition of the crucial role of legal knowledge in securing health and human rights, the Global Abortion Policies Database

seeks to provide open access to clear and accurate information about national-level (and selected subnational) law and policy. The information is presented in country profiles, organized by a common set of policy domains: legal grounds and gestational limits, administrative requirements (such as third-party authorizations, compulsory counselling, mandatory waiting periods, or medical tests), service delivery regulation (such as who, where, and how abortions may be provided; permitted and registered methods; national insurance coverage; or conscientious refusal practices), and criminal penalties (who may be charged and associated penalties).

This diversity of domains is a deliberate effort to present a more comprehensive picture of abortion regulation than older resources focused on criminal laws and their legal grounds.²⁰ While abortion was historically, and remains in some countries exclusively, regulated under penal codes, with successive waves of liberal reforms, these laws have been replaced or supplemented by health legislation, and other forms of subordinate regulation, such as medical standards, practice guidelines, and ethics codes.²¹ Indeed countries, such as Kenya, Swaziland, and Somalia, also have explicit constitutional provisions on abortion, whereas others have health provisions particular to pregnancy.²²

By incorporating these sources of abortion law and policy into the country profiles, supplemented by extensive notes on conflicting directives and subnational variations, the Global Abortion Policies Database reveals a complexity to abortion regulation that defies previous and simplistic classification schemes.²³ The database is marked by the diversity of abortion laws and policies. By showcasing this diversity, the database breaks a strict association between abortion and crime—the root of much abortion stigma. Publicizing laws and policies that treat abortion as a healthcare intervention and seek to ensure access to it normalizes safe abortion as part of comprehensive sexual and reproductive health care.

The database also provides direct links to downloadable source documents, a key resource given that many subordinate forms of regulation, which often set administrative and service delivery requirements, can be difficult to access and therefore remain unknown. A study from Brazil²⁴ shows that providers have particularly low knowledge of Ministry of Health norms setting out official documents or procedures required to carry out legal abortions, including the wrongful belief that a judicial order is always required.²⁴ To this end, one limitation of the database is that it does not include a comprehensive compilation of judge-made or common-law sources. The Supreme Court of India, for example, ruled to extend a formal 20-week gestational time limit in the abortion law in a case involving a minor survivor of sexual violence, and several high courts followed, authorizing termination after 20 weeks in similar circumstances.²⁵ Online resources, such as the University of Toronto's Abortion Law Decisions, therefore offer useful supplements to the database.²⁶

This limitation is also an important reminder that local legal norms and traditions will always need to be consulted to fully understand the abortion law of any country. More fundamentally, because all legal texts require interpretation, abortion laws can never be fully transparent, clear, and absolute, but remain always in a state of formation. Indeed gaps and ambiguities in the law are often what allow it to

accommodate evolving practices of evidence-based care in the protection of health and human rights.

In Colombia, following the 2006 Constitutional Court's liberalization of the abortion law, a group of women's organizations, La Mesa por la Vida y Salud de las Mujeres, created a rights-based framework for the interpretation of the law and, specifically, the legal ground of risk to health.²⁷ By accompanying women seeking services in the health system, they learned about access barriers and systematized this knowledge to develop guidance to assist health-care providers and public officials in their efforts to interpret and apply the law.

In Uruguay, a service delivery model designed to reduce the risks and harms of unsafe abortion similarly relied on an affirmative interpretation of the law.²⁸ Before decriminalization, when abortion was not yet part of the healthcare system, service providers at Pereira Rossell Hospital confirmed pregnancy, informed women of risks, and provided follow-up care based on an interpretation of the law that excluded these acts of harm reduction from its prohibition. The model and the legal interpretation on which it was founded later became official policy of the Ministry of Health. In Uganda, a complex and seemingly contradictory policy environment is similarly seen as an opportunity to improvise a harm reduction program for safe abortion.²⁹

4 | STATE ACCOUNTABILITY IN ABORTION LAW AND POLICY

The provision itself of accurate and comprehensive information about national-level laws and policies, as with the Global Abortion Policies Database, improves state accountability. In the most basic sense, state accountability means that governments and those to whom they delegate power do not have absolute discretion over what abortion services they allow, or whom they punish and for what activities.³⁰ Accountability is impossible, however, when the entitlements and protections of laws are unknown. Clear and accessible standards of abortion law and policy are a baseline against which those seeking care and service providers can hold states accountable for failures and abuses of practice. Transparency in abortion laws and policies has thus become a positive legal obligation of governments, recognized and enforced by authorities worldwide.³¹ As phrased by the European Court of Human Rights, "the applicable legal provisions [regulating abortion] must, first and foremost, ensure clarity of the pregnant woman's legal position".³² (para. 116)

The database further contributes to state accountability in the capacity it creates to comparatively analyze laws and policies across countries and geographical regions, and to cross-reference national laws and policies with sexual and reproductive health indicators, WHO evidence-based recommendations, and human rights standards.

Under the doctrine of state responsibility in international human rights law, states are held accountable for public health harms when a connection can be drawn between state action and harm.³³ Sexual and reproductive health indicators are helpful in drawing this connection by showing population-level patterns of harm. This perspective brings into view the context of unsafe abortion, including the role of

structural factors, such as law and policy. Laws likely to result in bodily and psychosocial harms and preventable mortality are direct violations of the right to health.³⁴ Standardized indicators thus provide concrete evidence of breakdowns in implementation, gaps between law and practice or other dysfunctions and negative externalities. States are accountable for these practical effects given human rights obligations to formulate and advance laws and policies that serve their populations' health.

States enjoy discretion in determining the measures by which they comply with human rights obligations, given that the most appropriate measure may vary from one state to another. However, this discretion is not absolute. International law sets limits on appropriate abortion policy based on principles of non-arbitrariness and proportionality: laws must be rationally designed to achieve legitimate ends and cannot limit human rights in a manner disproportionate to these ends. Every state must be able to demonstrate that its laws and policies meet these criteria.³⁵ Cross-country comparisons and cross-referenced evidence-based standards of abortion care are useful in this task.

For example, international law recognizes legitimate state interests in the respect and protection of prenatal life. However, given that any criminal regulation of abortion impacts on the human rights of pregnant people, the existence of reasonable alternatives to protect this interest, as evidenced by comparative law, render criminal restrictions arbitrary and disproportionate, thus an infliction of harm without need or reason. WHO safe abortion guidance supports criminal law reform on this basis.³ Abortion services are also often targeted for excessive health regulation, requiring access requirements, training, or infrastructure that is unnecessary, even counterproductive to safe provision and access. Cross-referenced WHO standards on expanded health worker roles in the provision of safe abortion care, for example, create an onus on states to justify more stringent requirements.³⁶ Indeed, abortion regulation consistent with WHO guidance is a key structural indicator of quality abortion care.³⁷

Over the last four decades, UN human rights treaty monitoring bodies and Special Rapporteurs have articulated human rights standards on abortion law and policy. The database cross-references these standards to relevant policy domains in its country profiles, offering further analytical criteria to assess and evaluate abortion laws and policies. This form of human rights accountability is intended to be constructive. Deviations from these standards call on states to provide an answer and defense for existing policy or, alternatively, create powerful incentives for reform. The database thus follows important lessons from in-country strategic health and human rights assessments, such as in Malawi, which serve to strengthen the public health and legal evidence upon which governments can rely to reform policy.³⁸ In 2015, Malawi's Special Law Commission on the Review of the Law on Abortion released a draft bill.³⁹ Although many factors contribute to unsafe abortion in the country, the law, in particular provisions of the Penal Code that effectively outlaw abortion, was singled out for attention. The near prohibition in the law makes it very difficult to reconcile with a National Sexual and Reproductive Health and Rights Policy that calls not only for the prevention of unsafe abortion, but for "the provision of abortion services to the full extent of the law."³⁹

5 | CONCLUSION

Access to and the provision of sexual and reproductive health information has long been acknowledged as a key determinant of safe abortion and a core component of human rights. Less acknowledged is that legal information is a form of health information. Awareness and understanding of the restrictions and entitlements of abortion law and policy is essential to ensuring access to safe abortion, and to maintaining health and well-being. Access to legal knowledge is therefore also a crucial health intervention. This commitment grounds the Global Abortion Policies Database and inspires its aims to increase transparency and to improve accountability.

AUTHOR CONTRIBUTIONS

Both authors contributed equally to conception of the article. JNE completed the first draft and both authors contributed to revisions.

CONFLICTS OF INTEREST

JNE formerly served as the co-chair of the Gender and Rights Advisory Panel of the Department of Reproductive Health and Research, WHO, which reviewed and provided advice on the development of the Global Abortion Policies Database. BRJ is a WHO/HRP staff member responsible for the Global Abortion Policies Database. The views expressed in this article are those of the authors and do not necessarily represent the views of, and should not be attributed to, their affiliated organizations.

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