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Women's Autonomy, Equality and Reproductive Health in International Human Rights: Between Recognition, Backlash and Regressive Trends

Working Group on the issue of discrimination against women in law and in practice[1]

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The UN Working Group on the issue of discrimination against women in law and in practice has expressed its concern, throughout its first 6 years of mandate, regarding the severe challenges to the universality of women's rights, in the global community. The challenges have resulted from economic crisis and austerity measures on one hand and from cultural and religious conservatism, on the other hand. This retrenchment has been evident in the passage of HRC resolutions on traditional values and protection of the family[2], which have excluded mention of women's right to equality in the family and thus threatened to undermine the guarantees of this right rooted in the Universal Declaration of Human Rights and the human rights treaties. And this undermines the whole concept of women's equal personhood as, when women are not viewed as equal to men within the family, their full personhood comes into question. The existence of a backlash against women´s right to equality has in fact been acknowledged by the HRC 2017 Resolution on the elimination of discrimination against women. It is in this context of rising fundamentalisms and backlashes against women's human rights that the current discourse on the termination of pregnancy is taking place at the international level. This is the reason why our expert group feels the necessity to clarify our position with regards to termination of pregnancy.

The rights of women to equality, dignity, and respect for private life, without discrimination

Women's human rights include the rights to equality, to dignity, autonomy, information and bodily integrity and respect for private life and the highest attainable standard of health, including sexual and reproductive health, without discrimination; as well as the right to freedom from torture and cruel, inhuman and degrading treatment.

The right of a woman or girl to make autonomous decisions about her own body and reproductive functions is at the very core of her fundamental right to equality and privacy, concerning intimate matters of physical and psychological integrity[3]. Equality in reproductive health includes access, without discrimination, to affordable, quality contraception, including emergency contraception. Countries where women have the right to termination of pregnancy and are provided with access to information and to all methods of contraception, have the lowest rates of termination of pregnancy. Unfortunately, according to WHO, an estimated 225 million women are deprived of access to essential modern contraception[4].

[1] Paper prepared and led by Frances Raday and endorsed by the members of the Working Group (Alda Facio, Eleonora Zelinska, Kamala Chandrakirana and Emna Aouij). Paper finalized by the Chair of the WG in December 2017.
[2] http://www.ohchr.org/Documents/Issues/Women/WRGS/JointLetterPresidentHRCProtectionFamily.pdf
[3] Articles 3 and 17 of the ICCPR
[4] WHO, "Ensuring human rights in the provision of contraceptive information and services: guidance and recommendations", (2014)

The decision as to whether to continue a pregnancy or terminate it, is fundamentally and primarily the woman's decision, as it may shape her whole future personal life as well as family life and has a crucial impact on women's enjoyment of other human rights. Accordingly, and following the good practice of many countries, the Working Group has called for allowing women to terminate a pregnancy on request during the first trimester. It is imperative to understand that at this stage, despite the intense efforts made by religious lobbies to portray the zygote as a baby, it still consists of unindividualized cells, from which the embryo as well the placenta will develop.

Further, the right to equality in the highest available standard of healthcare[5] and the right to non-discrimination in access to health care services, including those related to sexual and reproductive health and family planning[6], require specific protection. Our expert group has called for recognition of the fact that equality in the supply of health services requires a differential approach to women and men, in accordance with their biological needs. Thus both the CEDAW Committee and the WGDAW determined that the right to safe termination of pregnancy is an equality right for women. The WHO has demonstrated that, in countries where induced termination of pregnancy is restricted by law and/or otherwise unavailable, safe termination of pregnancy is a privilege of the rich, while women with limited resources have little choice but to resort to unsafe providers and practices. According to a new study, 25 million (or 45%) of all abortions that occurred every year worldwide, between 2010 and 2014, were unsafe. The newly published evidence shows that in countries where abortion is completely banned or allowed only to save the women's life or her physical health, only 1 in 4 abortions were safe – whereas in countries where abortion is legal on broader grounds nearly 9 in 10 abortions were safe.[7] A previously published paper showed that these unsafe abortions resulted in 47,000 deaths annually and that there is no evidence to suggest that restrictive laws lower the rate of abortion incidence.[8] This results in severe discrimination against economically disadvantaged women.

The right to life and all other human rights under the human rights treaties are accorded at birth

In the current discourse, the necessity of putting women's human rights at the center of the policy considerations regarding termination of their pregnancy is obfuscated by the rhetoric and political power behind the argument that there is a symmetrical balance between the rights to life of two entities: the woman and the unborn. But there is no such contestation in international human rights law. It was well settled in the 1948 UDHR and upheld in the ICCPR that the human rights accorded under IHRL are accorded to those who have been born. [9] "All human beings are **born** free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood[10]."

[5] Articles 3 and 12 of the ICESCR
[6] Article 12 of the CEDAW
[7] http://www.who.int/reproductivehealth/topics/unsafe_abortion/abortion-safety-estimates/en/
[8] WHO, "Safe abortion : technical and policy guidance for health systems" (2012), p. 17
[9] CCPR/C/GC/36, para 10.
[10] Article 1 of the Universal Declaration of Human Rights.

The entire field of law relating to termination of pregnancy is an area of regression for women's control over their reproductive lives and their bodies. Prior to the beginning of the 19th century, there were no abortion laws in existence. In 1869 Pope Pius IX declared that ensoulement occurs at conception. Furthermore, the approach of the Church, has also encompassed a prohibition of contraceptive methods, suggesting that the issue is the recognition of divine will and not only protection of the foetus after conception. As a result of the view of the Pope, the laws of many countries were changed to prohibit any termination of pregnancy and, in some cases, contraception. These laws form the basis of the restrictive legislation on abortion and contraception that still exists in some countries.

Between 1950 and 1985, almost all developed countries liberalized their abortion laws for reasons of women's human rights, including equality, health and safety. This liberalization reflects the understanding that personhood is not established until birth. Those who believe that the foetus is already a human person with rights from the moment of conception are entitled to their belief but a democratic State cannot have laws that are based on belief systems that are not shared by all individuals, cultures and religions. Those who believe that personhood commences at the time of conception have the freedom to act in accordance with their beliefs but not to impose their beliefs on others through the legal system.[11]The true parameters of contestation are then between the rights of a born person who is the subject and repository of international human rights and any societal interest that there may be in the process of gestation of a possible future person. The limits of intervention in order to promote any such societal interest must stop short of violating the human rights of the pregnant woman in whose body the gestation is to take place. Most notably the Colombian Constitutional Court, , basing its decision on women's right to health, life and equality, determined that the legal right to life is limited to born human beings and drew the distinction between value of life, including fetal life, and a legal right to life.[12]

In this context, we have, like several human rights bodies and mechanisms[13], called for an end to prosecutions and punishment of women or medical service providers for murder or manslaughter for termination of pregnancy. Murder and manslaughter are relevant only to human persons, which, as said, is a status acquired at birth. Hence, for instance, our expert group intervened in the numerous cases of women in El Salvador who, in cases of miscarriage, have been given prison sentences of up to 30 years on grounds of murder or manslaughter[14].

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[11] As the Inter American Court of Human Rights declared in Artavia et al. vs. Costa Rica: "Regarding the dispute as to when human life begins, the Court considers that this is a question that has been assessed in different ways from a biological, medical, ethical, moral, philosophical and religious perspective, and it concurs with domestic and international courts that there is no one agreed definition of the beginning of life. Nevertheless, it is clear to the Court that some opinions view a fertilized egg as a complete human life. Some of these opinions may be associated with concepts that confer certain metaphysical attributes on embryos. Such concepts cannot justify preference being given to a certain type of scientific literature when interpreting the scope of the right to life established in the American Convention, because this would imply imposing specific types of beliefs on others who do not share them".

[12] https://www.jstor.org/stable/25475303?seq=1#page_scan_tab_contents

[13] See, inter alia, CESCR General Comment 22, CEDAW General Recommendation 35, CRC General Comment 20, and also CEDAW, CESCR, CAT, CRC relevant concluding observations, Special Procedures mandate holders' reports (Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, Special Rapporteur on extrajudicial, summary or arbitrary executions.

[14] See Working Group's communication on this at: https://spcommreports.in.ohchr.org/TmSearch/Results

Decriminalization of termination of pregnancy

Our expert group has called for decriminalization of the termination of pregnancy and repeal of restrictive abortion laws which have persisted or are being newly passed and give deference to a societal interest in gestation in preference to protecting the woman's right to life, health and her other human rights.

Human rights mechanisms had started from a hesitant approach to the liberalization of termination of pregnancy, only requesting that states consider changing their laws on termination of pregnancy so as to at least allow abortion in the exceptional cases of risk to the woman's life or health, rape and a severely impaired foetus. They also tended to focus on the health issue alone. In 1999, the CEDAW Committee called, in its General Recommendation 24 on health, to "Prioritize the prevention of unwanted pregnancy through family planning and sex education and reduce maternal mortality rates through safe motherhood services and prenatal assistance. When possible, legislation criminalizing abortion should be amended, in order to withdraw punitive measures imposed on women who undergo abortion". But by 2009, the CEDAW reports make it clear that the fundamental principles of equality and non-discrimination require that precedence be given to protecting the rights of pregnant women over the interest of protecting the life in formation. In the case of L.C. v. Peru, the Committee found the State responsible for violating the rights of a girl who was denied a crucial surgical operation, based on the excuse that she was pregnant, giving priority to the fetus over the mother's health. In view of the fact that the continuation of the pregnancy represented a grave danger for the young woman's physical and mental health, the Committee concluded that denying her a therapeutic abortion and postponing the operation constituted gender-based discrimination and a violation of her right to health and non-discrimination.

Human rights mechanisms call in parallel for decriminalization of abortion, on one hand, and legalization of abortion, variously, in cases in which the life or health, including mental health, of the pregnant woman is threatened, in cases of rape, incest and fatal or severe fetal impairment. Where access to termination of pregnancy is denied in these circumstances, expert international human rights mechanisms and entities have repeatedly concluded that, in some situations, failure to provide women access to legal and safe abortion may amount to cruel, inhuman or degrading treatment or punishment or torture, or a violation of their right to life[15].

Moreover, in the last two years, a number of human rights mechanisms have moved to requiring decriminalization in general. In 2016, in its annual thematic report, our expert group called to "Discontinue the use of criminal law to punish woman for ending a pregnancy". In 2016, the CESCR Committee stated in GC 22: "States parties are under immediate obligation to eliminate discrimination against individuals and groups and to guarantee their equal right to sexual and reproductive health. This requires States to repeal or reform laws and policies […] and practices that undermine autonomy and right to equality and non-discrimination in the full enjoyment of the right to sexual and reproductive health, for example criminalization of abortion […]". In 2017, in

[15] See Human Rights Committee decisions in Whelan v. Ireland, Mellet v.Ireland, and VDA v. Argentina; and in the CEDAW Committee's decision in KL v. Peru as well as Special Rapporteur on Torture and other cruel, inhuman and degrading treatment report: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/000/97/PDF/G1600097.pdf?OpenElement

General Comment 35 on gender-based violence, the CEDAW Committee determined that criminalization of abortion, is a form of "gender-based violence that, depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment."

In line with these calls for the decriminalization of the termination of pregnancy, the Working Group has called for protection of the right to safe termination of pregnancy in the context of the right to life enshrined in article 6 of the ICCPR.[16] The criminalization of termination of pregnancy deters health officials from carrying out safe termination of pregnancy, even where it is legal, thus increasing the number of women seeking clandestine and unsafe solutions: "Ultimately, criminalization does grave harm to women's health and human rights by stigmatizing a safe and needed medical procedure."[17] The Working Group wishes to draw attention to the fact that it is a form of femicide to deny access to lawful and safe termination of pregnancy for women whose life is at risk if the pregnancy is continued[18].

Termination of pregnancy after the first trimester

It seems that the human rights mechanisms in their call for decriminalization are differentiating criminalization from legalization which they continue to restrict to exceptional grounds. Thus, for instance, our expert group distinguished between decriminalization and legalization: "Repeal restrictive laws and policies in relation to termination of pregnancy, especially in cases of risk to the life or health, including the mental health, of the pregnant woman, rape, incest and fatal impairment of the fetus"; and "Discontinue the use of criminal law to punish a woman for ending a pregnancy and provide women and girls with medical treatment for miscarriage and complications of unsafe termination of pregnancy". Similarly, the CEDAW Committee in its concluding observation to Myanmar stated that the State should:[19]: "Amend its legislation to legalize abortion not only in cases in which the life of the pregnant woman is threatened, but also in all cases of rape, incest and severe fetal impairment, and to decriminalize abortion in all other cases;"[20]In practice, most states which allow abortion on request during the first trimester do require grounds for termination of pregnancy after the first trimester.

Regulation of the medical procedure for termination of pregnancy after the first trimester may provide a balance between the human rights of the pregnant woman and a societal interest in discouraging termination where the pregnancy is more advanced, which involves a more complex medical procedure for the woman, and a more fully developed foetus. Though there should never be criminalization of termination of pregnancy, termination after the first trimester may be subject to the need to make room for greater societal interest in the process of gestation and may hence be regulated in the health system, as regards the procedures for accessing medical services.

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[16] The Working Group has expressed its opinion that a recent formulation by the Human Rights Committee, in its draft General Comment on Article 6 – Right to Life, could lead to a regressive interpretation of Article 6 setting back the considerable progress made by UN human rights mechanisms in recognizing women's human rights to dignity, autonomy, highest attainable standard of health and respect for private life on a basis of equality with men, without discrimination.

[17] See WHO, "Safe abortion: technical and policy guidance for health systems", (2012)

[18] See also report of the Special Rapporteur on extrajudicial, arbitrary and summary executions, http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/35/23

[19]Myanmar, CEDAW/C/MMR/CO/4-5, 25 July 2016, para. 39(b)

[20] http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/MMR/CO/4-5&Lang=En

Nevertheless, the requirement of grounds must not result in creating a barrier to termination of the pregnancy in situations in which the woman will pursue the course of seeking an unsafe termination rather than continuing the pregnancy. This involves a subjective as well as objective test of good reason, relying on the equal and indeed superior ability of women to make a judgment call regarding their reasons for not being able to continue the pregnancy. The procedure for fulfilling the requirement must be immediate, in consultation with the medical service providers in order to avoid delays which will in effect prevent the carrying out of a termination procedure before the pregnancy becomes more advanced. Barriers which do not fulfil these conditions in effect force the termination underground, resulting in maternal mortality and morbidity for women who do not have the financial resources to seek illegal medical services by qualified practitioners.

In any case, where objective grounds are required, they should be expansive.[21] Grounds proposed by various human right mechanisms have included risk to the life or health, including the mental health, of the pregnant woman, rape, incest and fatal or severe impairment of the fetus. The existing list is eclectic and gives a solution only to a few distinct reasons amongst the many legal, cultural, social or economic reasons just as compelling which may force women to seek termination of pregnancy. Examples include pregnancies in situations of domestic violence, child marriage, refugee status, extreme poverty etc. Indeed it is not possible to list a priori all the situations in which women may be forced to seek termination of pregnancy. Our expert group has suggested[22] that in the vast majority of cases women only seek termination of pregnancy when they are forced to do so by oppressive legal, cultural, social or economic circumstances.

Human rights mechanisms have unambiguously called for legalizing the termination of pregnancy of children under the age of 18. Our Working Group had repeatedly called for provision of access to termination of pregnancy for adolescent girls, in its country visits and also intervened, unfortunately without success, in the case of a 10 year old girl in Paraguay[23] who was forced to carry to term a pregnancy resulting from rape. The Group included a recommendation to this effect in its 2016 Thematic Report on Health and Safety: “Allow pregnant girls and adolescents to terminate unwanted pregnancies, as a measure of equality and health, so that they can complete their school education and protect them from the high risk to life and health, including from obstetric fistula, in continuing to bring a pregnancy to term”. The Committee on the Rights of the Child too included a strong recommendation for decriminalization of abortion in the case of pregnant adolescents in its General Comment 80, in 2016: "The Committee urges States to decriminalize abortion to ensure that girls have access to safe abortion and post-abortion services, review legislation with a view to guaranteeing the best interests of pregnant adolescents and ensure that their views are always heard and respected in abortion-related decisions."

While the Working Group supports the extremely important goal of respecting, protecting and fulfilling the human rights of persons with disabilities, the approach chosen to avoid any type of

[21] See the comments of the WGDAW to the Human Rights Committee General Comment on Art.6 on the Right to Life
[22] WG DAW response to the proposed Draft of the Human Rights Committee in its draft proposal for a General Comment on Article 6 ICCPR.
[23] https://spcommreports.in.ohchr.org/Tmsearch/TMDocuments

stigmatization should not be detrimental to women's autonomy and decisions over their own body and a woman's human right to choose whether or not to continue her pregnancy[24]

The right of the pregnant woman to access termination of pregnancy should be autonomous, affordable and effective

Termination of pregnancy should be by qualified medical service providers in a safe environment. WHO data has clearly demonstrated that criminalizing termination of pregnancy does not reduce women's resort to abortion procedures. Rather, it is likely to increase the number of women seeking clandestine and unsafe solutions. Countries where women gained the right to termination of pregnancy in the 1970s or 1980s and are provided with access to information and to all methods of contraception, have the lowest rates of termination of pregnancy. Ultimately, criminalization does grave harm to women's health and human rights by stigmatizing a safe and needed medical procedure.

The WGDAW has called on states to ensure that access to health care, including reproductive healthcare, is autonomous, affordable and effective. This necessitates a series of measures with regard to termination of pregnancy: to invalidate conditioning of women's and girls' access to health care on third-party authorization; provide training to health providers, including on gender equality and non-discrimination, respect for women's rights and dignity; provide non-discriminatory health insurance coverage for women, without surcharges for coverage of their reproductive health; include contraception of choice, termination of pregnancy in universal health care or subsidize provision of these treatments and medicines to ensure that they are affordable; restrict conscientious objection to the direct provider of the medical intervention and allow conscientious objection only where an alternative can be found for the patient to access treatment within the time needed for performance of the procedure; exercise due diligence to ensure that the diverse actors and corporate and individual health providers who provide health services or produce medications do so in a non-discriminatory way and establish guidelines for the equal treatment of women patients under their codes of conduct; provide age-appropriate, comprehensive and inclusive sexuality education based on scientific evidence and human rights, for girls and boys, as part of the mandatory school programmes. Sexuality education should give particular attention to gender equality, sexuality, relationships, and responsible parenthood and sexual behaviour to prevent early pregnancies.[25]

Backlash and Regression

Twenty five per cent of the world's population lives in countries with highly restrictive abortion laws, mostly in Latin America, Africa and Asia. In Europe two countries have highly restrictive abortion laws. The politicized religious conservative movement is active in numerous countries to either stop the clock or set it back and is making a concerted effort in countries in many regions to retain or even introduce prohibitions on termination of pregnancy. In a few countries the effort is to have a total ban, even where the pregnancy threatens the life of the pregnant woman. It was

[24] See for instance http://www.safeabortionwomensright.org/open-letter-to-the-special-rapporteur-and-committee-on-the-rights-of-persons-with-disabilities/

[25] See Working Group on discrimination against women in law and practice report on health and safety, A/HRC/32/44

evident for instance in Chile[26] in the long struggle, recently won, to allow termination of pregnancy where the woman's life is at risk. It was also recently evidenced in the defeat of a bill presented in the Dominican Republic[27] to allow termination of pregnancy where the life of the woman is at risk. Attempts to turn the clock back and introduce restrictive abortion laws have also been taking place taking place for instance in the United States, Poland, the Philippines and Sierra Leone. There are efforts to intensify restrictions on the funding of contraceptives in the United States – in the Hobby Lobby Case[28] and in recent legislative proposals to extend the discretion of health insurance agents to exclude funding for contraception.

The commitment to women's human rights regarding termination of pregnancy, such as evident in the decisions of the US Supreme Court in Roe v. Wade and most notably the Colombian Constitutional Court, has not been upheld by all constitutional courts in different regions. Most recently, the UK Supreme Court in its recent majority decision on National Health funding for women in Northern Ireland seeking abortions in the UK, deferred to the democratic will of the North Ireland legislature in its ban on abortions in cases other than preservation of the pregnant woman's life, thus putting women's human rights to autonomy, health and equality to a popular vote rather than respecting, protecting and fulfilling them as human rights and hence not subject to majority votes or referendums[29].

Conclusion

The Working Group on discrimination against women would like to reiterate that much of the discrimination women face in their right to access to health services and the resulting preventable ill health of women, including maternal mortality and morbidity, can be attributed to the instrumentalization and politicization of women's bodies and health. Insisting on the right to life of zygotes and fetuses and equating this right to the right of a born woman to her life, her health, her autonomy and her entire personhood by criminalizing termination of pregnancy is one of the most damaging ways of instrumentalizing and politicizing women's bodies and lives, subjecting them to risks to their lives or health and depriving them of autonomy in decision-making.[30]

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[26] http://www.ohchr.org/EN/Issues/Women/WGWomen/Pages/Communications.aspx
[27] http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21119&LangID=E
[28] http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/32/44/Add.2
[29] https://spcommreports.in.ohchr.org/Tmsearch/TMDocuments
[30] See Working Group on discrimination against women in law and practice report on health and safety A/HRC/32/44, 2016