

The Decriminalization of Abortion: A Human Rights Imperative

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Introduction

Reproductive rights are human rights, and they include the right to safe, accessible, and legal abortions.¹ Over 40 million abortions take place each year.² In most developed countries and in many developing countries, abortion is legal on demand until the 12th or 14th week of pregnancy, and abortion is legal beyond that timeframe when there is a threat to the woman's life or health, or fetal impairment, or when the pregnancy is a result of rape or incest. Nevertheless, the majority of women of childbearing age live in countries where abortion is much more restricted, and nearly 20% of women ages 15 through 44 live in countries where abortion is not permitted at all or is only permitted when necessary to save the woman's life.³

Criminalizing abortion drives the market for abortions underground, leading to an increase in clandestine, unsafe abortions. Unsafe abortions are defined by the World Health Organization (WHO) as procedures for terminating unintended pregnancies carried out either by persons lacking the necessary skills or in an environment that does not conform to minimal medical standards, or both.⁴ In fact, the WHO categorizes all illegally performed abortions as "unsafe," in part due to the unlikelihood that a woman experiencing post-abortion complications will seek and receive timely medical care in such an environment. The WHO estimates that 22 million abortions are performed unsafely each year.⁵

The United Nations Special Rapporteur on the right to health describes the prevalence of abortion criminalization worldwide as follows:

In States where abortion is criminalized, particular grounds for seeking an abortion may be exempt from criminalization. In the most severe cases, however, abortion is completely criminalized without exception — a situation that exists in only a handful of States — or allowed only to save the life of the woman. Approximately 25 per cent of the world's population lives under legal regimes that prohibit all abortions except for those following rape or incest, as well as those necessary to save a woman's life. Slightly less restrictive legal regimes permit abortion on a number of physical health, mental health and socio-economic grounds, such as poverty and number of children. Finally, abortion is unrestricted on any grounds in 56 States, though limits still exist with respect to how late in pregnancy an abortion will be permitted.⁶

The criminalization of abortion – either by punishing the women who choose to have abortions or by punishing the service providers that perform them – violates women's reproductive rights, leads to devastating health consequences, and has a disproportionately grave impact on the most vulnerable women in the world. It is therefore of vital importance that countries with restrictive abortion laws change those laws and make legal abortion a real, accessible option for all women.

I. The Fundamental Right to Abortion

International law guarantees all people the right to life and the right to the highest attainable standard of physical and mental health. Yet in the year 2008 alone, 47,000 women died and millions more experienced temporary or permanent disabilities as a

result of unsafe abortions.⁷ Legal abortion in developed countries is one of the safest medical procedures in practice today. Almost every single death and injury caused by unsafe abortions was preventable, and the failure to prevent those deaths and injuries was a violation of women's rights to life and health. The Special Rapporteur on the right to health has reported that "criminal laws penalizing and restricting induced abortion are the paradigmatic examples of impermissible barriers to the realization of women's right to health and must be eliminated."⁸

The mental health effects of the criminalization of abortion have also been noted by the Special Rapporteur:

The criminalization of abortion ... has a severe impact on mental health. The need to seek illegal health services and the intense stigmatization of ... women who seek [abortions] can have deleterious effects on women's mental health. In some cases, women have committed suicide because of accumulated pressures and stigma related to abortion. In jurisdictions where rape is not a ground for termination of pregnancy, women and girls who are pregnant as a result of rape but who do not wish to continue their pregnancy are either forced to carry the pregnancy to term or seek an illegal abortion. Both options can cause enormous anguish. ... Moreover, while the psychological impact of seeking an illegal abortion or carrying an unwanted pregnancy to term is well documented, no corresponding evidence supports the existence of long-term mental health sequelae resulting from elective abortion.⁹

International law also guarantees all people the right to be free from cruel, inhuman and degrading treatment. The Committee against Torture has repeatedly expressed concerns about bans and restrictions on access to abortion as violating the prohibition of torture and ill-treatment.¹⁰ In conjunction with those bans and restrictions, many States either deny or limit access to post-abortion care, often as punishment or in order to coerce a confession. Forcing a woman to carry an unwanted pregnancy, possibly resulting from rape or incest, to term is degrading; forcing her to resort to unsafe abortion methods, which can include the insertion of foreign bodies like coat hangers into the uterus and "vigorous pummeling" of the abdomen,¹¹ is inhuman; and denying or discouraging post-abortion medical care, in addition to being a clear violation of the right to health, is cruel.

Finally, international law guarantees all people the right to liberty and security of person. Control over one's own body, including the decision whether to terminate a pregnancy or carry it to term, is an essential element of liberty. Moreover, one cannot enjoy personal security when such decisions are imposed onto one's body by others. Embedded in the rights to liberty and security, therefore, is the right to bodily autonomy, the ability to make sexual and reproductive decisions free of coercion and violence.¹² Undue restrictions on abortion detract from "a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."¹³

The criminalization of abortion is incompatible with every human right listed above: life, liberty, security, health, and freedom from torture. States that criminalize abortion violate universally accepted human rights, and they must be held accountable.

II. The Unintended Effects of Criminalization

Legal restrictions on abortion do not reduce abortion rates.¹⁴ Instead of preventing women from seeking abortion, the criminalization of abortion causes women to turn to illicit and often highly dangerous abortion methods, including the ingestion of toxic solutions, the placement of foreign bodies into the uterus, and severe trauma. Using correct techniques in a sanitary environment, abortion can be as safe as a penicillin shot,¹⁵ yet deaths due to unsafe abortions account for 13% of all maternal deaths worldwide. 49% of all abortions were unsafe in 2008, and the proportion is growing over time.¹⁶ The leading causes of death from unsafe abortion are hemorrhage, infection, and poisoning from substances used to induce abortion.¹⁷

The criminalization of abortion also has a profoundly negative impact on post-abortion medical care. Fearing prosecution, many women refuse to seek treatment for debilitating and often fatal complications resulting from self-induced or otherwise unsafe abortions, or even from miscarriages. Others do seek treatment but are denied it due to either the healthcare provider's hostility or the provider's fear of facing prosecution him- or herself. Still others are told that they will not be treated unless they confess to having had an illegal abortion and provide information on the person who performed it.¹⁸ Faced with such formidable barriers, it is no surprise that an estimated 3 million women each year do not receive the medical care they need for health complications following unsafe abortions.¹⁹

Lastly, the criminalization of abortion under certain circumstances and restrictions on abortion can hinder access even to legal abortion services. Restrictive abortion laws can be harsher in reality than on paper, due to provisions in the laws that make doctors criminally liable for providing illegal services. The European Court of Human Rights has stated that such criminal provisions cause a "chilling effect" on doctors who, in each individual case, have the responsibility of deciding whether or not they can legally perform the medical procedure.²⁰ In situations where the law or the facts are unclear, fear of facing criminal charges is often stronger than respect for a woman's health and rights. In addition, such criminalization and restrictions can impact women and girls' own perceptions, leading them to believe that abortions under particular circumstances—for instance, when a pregnancy threatens the mental health of the woman—are illegal even when they are in fact legal. Those misperceptions can in turn lead women and girls to seek out unsafe abortions.

When countries remove legal barriers to abortion, the resulting improvement to women's health can be dramatic. South Africa's passage of the Choice on Termination of Pregnancy Act in 1997, for example, precipitated a 91% decrease in abortion-related maternal deaths.²¹ Of course, removing legal barriers can have little effect unless practical barriers to safe abortion are also addressed; these can include lack of education regarding sexual and reproductive health and rights, exorbitant clinical fees, lack of confidentiality, and unwarranted restrictions on the type of health-care facilities that can lawfully provide abortions. States have a human rights obligation to make abortion not only legal, but accessible and affordable as well.

III. Criminalization and Discrimination

There are two levels of discrimination that occur when abortion is made illegal. The first, embedded in the laws themselves, is sex discrimination: the laws criminalize health services used exclusively by women. United Nations treaty monitoring bodies have, on many separate occasions, recommended that States reform laws that criminalize medical procedures needed only by women and that punish women who undergo such procedures, including abortion.²² The Committee on the Elimination of Discrimination against Women (CEDAW), for example, recommended that Liechtenstein remove “punitive provisions for women who undergo abortion, in line with the Committee’s general recommendation 24 on women and health and the Beijing Declaration and Platform for Action.”²³ The United Nations Human Rights Committee, in its review of El Salvador, recommended that “until the current legislation [on abortion] is amended, the State party should suspend the prosecution of women for the offence of abortion.”²⁴

Through the Convention on the Elimination of All Forms of Discrimination against Women, a binding international treaty, almost one hundred States agreed to “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women,” and to “repeal all national penal provisions which constitute discrimination against women.”²⁵ Article 12 and Article 16 of the Convention explicitly mention reproductive rights, obligating states to “to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning”²⁶ and guaranteeing women the right to “decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.”²⁷ By criminalizing abortion, States violate the terms of that treaty.

The second level of discrimination is *de facto*: the criminalization of abortion disproportionately harms women in poverty, adolescent girls, women living in rural areas, and women who are members of other disadvantaged groups (migrants, ethnic minorities, etc.).^{28,29} Without the means to travel to countries where safe abortion is available, and often without access to contraception, those women are much more vulnerable to the hazards of unsafe abortion. For example, in Peru, according to one healthcare worker, “safe backstreet abortions are available, but these are expensive and most [hospital] patients are too poor to pay for such safe procedures. They risk serious complications from the cheap, unsafe procedures, but fears of being reported to the police prevent them from seeking prompt medical attention.”³⁰ Although the criminalization of abortion constitutes discrimination against all women, it is primarily the poorest, the youngest, and the most disadvantaged that face the grimmest consequences of that discrimination.

Conclusion

The decriminalization of abortion is a necessary step for human rights to become a reality for women worldwide. Where abortion is banned or severely restricted, women are denied their fundamental rights to life, to health, to bodily autonomy, to freedom from torture, and to freedom from discrimination. States that deny those rights to their populations must be held accountable as perpetrators of human rights violations, and must change their laws and policies to comply with the rights guaranteed by international law.

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- ¹ Grimes, David, et al. *Unsafe Abortion: The Preventable Pandemic*, p. 1 (2006).
- ² Guttmacher Institute. *Facts on Induced Abortion Worldwide*. Available at http://www.guttmacher.org/pubs/fb_IAW.html. (January 2012.)
- ³ World Health Organization. *Unsafe abortion: Global and regional estimates of the incidence of unsafe abortion and associated mortality in 2008*. Sixth Edition, p. 4.
- ⁴ WHO, *Unsafe abortion* p. 2.
- ⁵ WHO, *Unsafe abortion* p. 1.
- ⁶ United Nations document A/66/254, *Interim report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, para. 21 (2011).
- ⁷ WHO, *Unsafe abortion* p. 1.
- ⁸ United Nations Document A/66/254 para. 21.
- ⁹ United Nations Document A/66/254 para. 36.
- ¹⁰ United Nations Document A/HRC/22/53, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez*, para. 50 (2013).
- ¹¹ Grimes, *Unsafe Abortion: The Preventable Pandemic* p. 4.
- ¹² Shalev, Carmel. *Rights to Sexual and Reproductive Health - the ICPD and the Convention on the Elimination of All Forms of Discrimination Against Women*, p. 6 (1998).
- ¹³ *Gonzales v. Carhart*, US Supreme Court (2007) (Ginsburg, J., dissenting) p. 4.
- ¹⁴ World Health Organization, *Safe abortion: Technical and policy guidance for health systems*. Second Edition, p. 90.
- ¹⁵ WHO, *Unsafe abortion* p. 14.
- ¹⁶ Sedgh, Gilda, et al. *Induced abortion: Incidence and trends worldwide from 1995 to 2008*. *The Lancet*, p. 628 (2012).
- ¹⁷ Grimes, *Unsafe Abortion: The Preventable Pandemic* p. 2.
- ¹⁸ United Nations Document CAT/C/CR/32/5, *Conclusions and recommendations of the Committee against Torture: Chile*, para. 6 (j) (2004).
- ¹⁹ WHO, *Unsafe abortion* p. 14.
- ²⁰ Case of A, B and C v. Ireland. *European Court of Human Rights*. Available at <http://www.bailii.org/eu/cases/ECHR/2010/2032.html>, para. 254 (2010).
- ²¹ Grimes, *Unsafe Abortion: The Preventable Pandemic* p. 6.
- ²² WHO, *Safe abortion* p. 89.
- ²³ United Nations Document CEDAW/C/LIE/CO/3, *Concluding comments of the Committee on the Elimination of Discrimination against Women: Liechtenstein* (2007).
- ²⁴ United Nations Document CCPR/C/SLV/CO/6, *Concluding observations of the Human Rights Committee: El Salvador* (2010).
- ²⁵ Convention on the Elimination of All Forms of Discrimination against Women Article 2.
- ²⁶ Convention on the Elimination of All Forms of Discrimination against Women Article 12 (1).
- ²⁷ Convention on the Elimination of All Forms of Discrimination against Women Article 16 (1) (e).
- ²⁸ United Nations Document CCPR/CO/70/ARG. *Concluding Observations of the Human Rights Committee: Argentina* (2000).
- ²⁹ United Nations Document A/CONF.177/20/Rev.1. *Report on the Fourth World Conference on Women: Beijing, 4-15 September 1995*, p. 36.
- ³⁰ Vega, Luis. *The battle to reduce maternal deaths in Southern Lima*. *PLoS Medicine* (2006).