Chapter 1

Legal and Political Discourses on Women's Right to Abortion

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Introduction

Around the world, political and legal discourses supporting abortion rights have emphasised the impact that denying access to abortion has on women's physical health. There are approximately 22 million unsafe abortions occurring annually worldwide; 98 per cent of which occur in developing countries. Globally, unsafe abortion results in death for approximately 47,000 women, and disabilities for an additional five million (WHO 2014). This accounts for roughly 13 per cent of maternal mortalities, making it the third largest cause of maternal mortality globally (WHO 2011: 14). While abortion is a safe procedure when performed properly, clandestine and illegal abortions are generally unsafe and can lead to complications. The World Health Organization defines unsafe abortion as a procedure for terminating a pregnancy that is performed by an individual lacking the necessary skills or in an environment that does not conform to minimal medical standards or both (WHO 2012: 23, 47–49). World Health Organization estimates confirm that restrictive abortion laws do not reduce the number of induced abortions, as women will seek abortions regardless of its legal status and lawful availability, but restrictive laws push women to undergo illegal and unsafe abortion (WHO 2011: 6).

Recognising unsafe abortion as a major public health concern that states have an obligation to address has been the predominant discourse by advocates supporting access to safe and legal abortion across the globe. This is true at both international and regional intergovernmental levels, including the United Nations (UN), the European Union and Council of

Europe. While physical health arguments may resonate well in parts of the world with restrictive abortion laws and high maternal mortality rates, this discourse has less meaning in Europe. Europe has the most liberal abortion laws in the world and the lowest maternal mortality and morbidity rates in the world. Only a handful of the forty-seven member states of the Council of Europe have restrictive abortion laws that do not allow abortion on request or on broad social and economic grounds (Center for Reproductive Rights 2015a; WHO, UNICEF, UNFPA, World Bank 2010: 14). Yet, political discourses in support of abortion rights, aside from health arguments such as those on bodily autonomy and equality and non-discrimination, despite their critical importance in the debate, have not had the traction they need to keep restrictions on abortion at bay in Europe.

As I will discuss in this chapter, growing nationalism and populism in Europe, combined with the influence of the Catholic and Orthodox churches in some countries and misleading demographic arguments, have fuelled calls to restrict access to abortion and have been successful in erecting barriers to access abortion. The discourse against abortion in Europe, like much of the rest of the world, has focused on values placed on the life of the foetus and embryo and on false and misleading information on the harm abortion has on the physical and mental health of women. Such arguments have led to increased procedural and other barriers in countries with otherwise generally liberal grounds for abortion. Such barriers include mandatory waiting periods, and counselling or information requirements that seek to dissuade women from terminating their pregnancies (Center for Reproductive Rights 2015b).

Justification for such barriers is grounded in prejudicial and non-evidenced based notions of protecting women's health and helping to support women's decision-making. But at their heart, they reinforce deeply entrenched stereotypes and prejudices concerning women's primarily role as child bearers and women's decision-making ability. As Rebecca Cook and Susannah Howard argue (2007: 1039–40), 'differences in women's physiology have been used over the centuries to justify discrimination against women, neglect of health services that only women need, and discriminatory state enforcement of traditional roles for women as mothers and self-sacrificing caregivers'.

Laws and practices limiting women's reproductive choices and other discriminatory laws and practices based on gender stereotypes reinforce inequalities in society and negatively impact women's lives, throughout their life. For example, after childbirth, social custom, lack of equal pay with men, and lack of adequate day care force women to become the primary caretakers of their children (MacKinnon 1991: 1281). They reinforce the

stereotype that women's main value is their physiological and 'social' capacity to bear and raise children (Cook and Howard 2007: 1050–51).

Women's exercise of their reproductive rights has been long recognised as a prerequisite to equal enjoyment of other rights enshrined in international and regional human rights instruments. The United Nations Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW), which monitors compliance with the Convention by the same name, has addressed women's existing inequalities in the family as they relate to decisions on the number and spacing of children, noting that 'the responsibilities that women have to bear and raise children affect their right of access to education [and] employment[,] … impose inequitable burdens of work on women … and also affect their physical and mental health' (CEDAW 1994: 21). The Committee has emphasised the obligation of the state to eliminate prejudices and customary practices grounded in stereotypes about appropriate sex roles for men and women (Cook and Cusak 2010: 5). It has been noted that the Convention requires state parties to adopt measures towards 'a real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns' (CEDAW 2004: 10, Article 5(a)).

Emphasis on this connection between stereotyped roles and women's agency to make reproductive choices would ensure that reproductive rights are not separate from, but rather indispensable to, women's equality, and is necessary to ensure freedom from discrimination. All major international and regional human rights treaties prohibit discrimination based on sex. Recognising restrictions on reproductive choice and autonomous decision-making as discrimination against women is critical, as it gets to the root of the problem and under national and international law states have little room to justify discriminatory laws and practices (ICCPR 1977: 4), and, as such, governments must address these violations immediately (CESCR 2009: 7). Greater recognition in the European and UN political and legal arenas that the denial of reproductive rights is a form of discrimination against women would be an important step towards dismantling the legal and social barriers against abortion in Europe.

This chapter looks at discourses in both political and legal bodies used by those opposing abortion and those supporting abortion. The distinction between political and legal discourses has been made because political debate can often shape developments in legal discourses (Seigal 2012: ch. 52), and vice versa.

An example of this is the influence of the political consensus document agreed upon at the International Conference on Population and

Development (ICPD), the ICPD Programme of Action, where for the first time states explicitly recognised that 'reproductive rights are human rights' and articulated commitments to advancing the reproductive rights of women and girls. This consensus document has played an important role in influencing the development of national law and of international and regional human rights standards on reproductive rights, including on abortion (UNFPA and Center for Reproductive Rights 2013).

While the regional focus of this book is Europe, the chapter begins with a very brief discussion of the discourses at the UN level. In a globalised world, discourses on very politicised issues such as abortion know no boundaries. A country and a region can be influenced by what is happening within the region and also beyond it. The same is true for international regional human rights systems; what happens at a UN level influences and is influenced by what happens at the European level.

This section is followed by a discussion on national level legal developments on abortion in Europe and the various factors influencing those developments. The chapter ends with a look at the political and legal developments and discourses on abortion at the European regional level, particularly at the European Parliament and the Council of Europe.

The Emergence of Women's Right to Access Abortion in the UN Human Rights System: A Brief Summary

Political Level Discourse

Over the past two decades, promotion of women's reproductive rights has gained momentum, in part, due to the 1994 International Conference on Population and Development (ICPD) held in Cairo, and the 1995 Fourth World United Nations (UN) Conference on Women held in Beijing, where unprecedented numbers of women's civil society organisations took part in shaping and influencing the political commitments coming out of these conferences (Cook, Dickens and Fathalla 2003: 148). These conferences led to the formal recognition by UN member states that the protection of reproductive health is a matter of social justice and can and should be realised through the application of binding human rights protections contained in existing national laws and constitutions, and regional and international human rights treaties (ICPD 1994). The consensus documents – adopted by nearly all states across the globe, including all countries in Europe – address abortion, albeit in a limited way.

Within the 1994 ICPD Programme of Action (PoA), focus was placed on the consequences of unsafe abortion as a major public health concern. In response, states committed to reducing the incidence of abortion through expanding and improving access to family planning services. States also agreed within the PoA that where abortion is legal, the procedure should be safe and accessible (ICPD 1994: 8.25).

States also committed to ensuring women have access to quality services for the management of abortion-related complications, and access to post-abortion counselling, education and family planning services (ICPD 1994: 8.25). During the five-year review of the PoA's implementation, states agreed, among other things, to ensure that healthcare providers are trained and equipped to safeguard women's health, including in the context of lawful abortion services (ICPD 1999: 63).

While discourses in UN consensus documents have primarily focused on women's physical health to justify ensuring access to lawful abortion, citing high maternal mortality rates, and have not addressed access to abortion as an issue concerning women's equality and agency, the outcome documents are indicative of the world's growing support for reproductive rights. These documents have supported legislative and policy reform, as well as interpretations of national law, including in Europe, and the development of international human rights standards on this issue (UNFPA and Center for Reproductive Rights 2013).

Since ICPD, discourse on addressing abortion at the UN political level has continued to focus on women's health. The UN Human Rights Council's recent resolutions addressing maternal mortality and morbidity include lack of access to safe abortion as one of the main causes of maternal mortality (UN Human Rights Council 2011). The ability to get beyond the health impact of denial of abortion rights, despite how important that is, and address it is an issue of discrimination against women and women's equality, is an ongoing and ever-growing challenge at the UN political level. This is, in part, due to the influence of the Catholic Church hierarchy and related pushes by very conservative countries, who promote support for 'traditional values', including advocating at the UN for recognition of women's primary role as a mother and wife. Their aim is to prevent further progress on human rights, including equality and non-discrimination, of women or sexual minorities (Omang 2013: 19–21). The UN Special Rapporteur on cultural rights recognised in 2012 that: 'many practices and norms that discriminate against women are justified by reference to culture, religion and tradition', and recommended that states ensure: 'The freedom of women to refuse to participate in traditions, customs and practices that infringe upon human dignity and rights, to critique existing cultural norms

and traditional practices and to create new cultural meanings and norms of behavior'.

UN Treaty Monitoring Bodies: Legal Discourse

Legal bodies at the UN level, particularly UN Treaty Monitoring Bodies' interpretations and jurisprudence on state compliance with international treaty obligations, are not as straddled with such political influences, and have played a major role in advancing women's sexual and reproductive rights (UNFPA and Center for Reproductive Rights 2013). However, they have still not robustly addressed restrictive abortion laws as a violation of equality and non-discrimination, despite continuous pushes by civil society.

Since the ICPD PoA was adopted, United Nations treaty monitoring bodies, which monitor state compliance with their international human rights treaty obligations, have increasingly applied human rights provisions to the abortion context, including through finding violations of human rights in denying access to lawful abortion and calling on countries to liberalise restrictive abortion laws (Zampas and Gher 2008: 249).

The underlying discourse at the UN legal level is similar to that at the political level; a heavy emphasis is placed on the connection between restrictive laws and high rates of unsafe abortion, leading to maternal mortality and morbidity, implicating the rights to life and health, protected by international law. However, treaty bodies have gone an important step further than UN political commitments by condemning very restrictive abortion laws and calling for their liberalisation so that women are not forced to seek clandestine, unsafe abortions. They have recommended that states ensure access to abortion at a minimum, in cases when a woman's life and physical and mental health is in danger, in cases of severe foetal impairment, as well as in cases of rape and incest. They have also urged states to decriminalise abortion, so as to eliminate punitive measures for women and girls who undergo abortions, and for healthcare providers who provide abortion services. While UN treaty bodies have not yet explicitly called on states to ensure access to abortion on request or on broad, social and economic grounds, they have praised countries that have liberalised their laws on these grounds, and have called on countries that have such liberal laws to remove barriers to their effective implementation. They have addressed barriers such as biased counselling requirements, waiting periods and the practice of conscientious objection.

Treaty monitoring bodies have found that laws and practices that deny women access to abortion can violate numerous rights, including the right to life, to health, to private life, to be free from cruel, inhuman and degrading

treatment, and the right to non-discrimination. While recognising there are broad implications for the exercise of women's rights when women cannot access abortion, much of the legal discourse in finding such violations focuses on the physical, and more recently, mental health impact of how such restrictive laws and punitive measures push women to seek clandestine, unsafe abortions. The overwhelming discourse has been the negative impact of restrictions on abortion on maternal mortality and morbidity.

While the health implications of women's experiences are critically important, there has been less meaningful discourse on the impact of such laws and practices on women's equality and non-discrimination, including the disproportionate impact that restrictive laws and practices have on vulnerable women, especially women belonging to ethnic or racial minorities, migrant women, and the young and the poor (Cook and Howard 2007: 1039–40).

To date, there have been four individual complaints brought before UN Treaty bodies claiming violations resulting from restrictive abortion laws. Three of the cases have been before the Human Rights Committee (HRC) under the International Covenant on Civil and Political Rights and one at the CEDAW Committee under the Convention on the Elimination of All Forms of Discrimination Against Women. The Committees, in all of these cases, have ruled in favour of the complainants.

The case of K. L. v. Peru concerned a young woman pregnant with an anencephalic foetus – a fatal condition that medical science has well-established would not allow it to survive more than a few hours or days beyond birth – was denied an abortion. Instead, she was forced to carry the pregnancy to term until its inevitable death four days later. The HRC held that the denial of a therapeutic abortion caused K. L. substantial and foreseeable 'mental suffering' and amounted to a violation of the prohibition on torture or cruel, inhuman or degrading treatment or punishment, amongst other rights. The Committee, however, did not address how the restrictive law and its application was discriminatory (Human Rights Committee 2005, K. L. v. Peru). Eleven years later, in Mellet v. Ireland, another case of a woman carrying a fatal foetal pregnancy and being denied an abortion, the complainant was forced to travel out of the country to terminate her pregnancy. The Committee found that a violation of torture and ill-treatment, as well as a violation of the right to privacy, noting the criminalization of abortion, the restrictive law denying women access to abortion in cases of fatal foetal impairment and to information on safe abortion, as well as being forced to travel abroad to terminate her pregnancy were in violation of the Convention. The Committee again failed to find a violation of the right to be free from gender discrimination, but focused its non-discrimination

finding on the disproportionate socio-economic burdens of travel that the Irish legal system imposes on women who decide not to carry a fetus to term, an important development, but lacking in recognition of the underlying basis for which such a restrictive law exists: discriminatory stereotypes towards women. A separate concurring opinion by a committee member, Prof. Sarah Cleveland, however, importantly noted that the criminalization of abortion subjected the complainant to a gender-based stereotype of the reproductive role of women primarily as mothers, and that stereotyping her as a reproductive instrument subjected her to discrimination. (Human Rights Committee 2016, Mellet v. Ireland) While not part of the majority views, it provides a critically important analysis of the gender discrimination inherent in restrictive abortion laws, and could positively influence future legal developments.

The two other cases concerned abortion restrictions in cases of rape. In addressing an Argentine law that only permits abortion in instances of rape where the woman is mentally disabled, the Human Rights Committee found numerous violations for erecting barriers to lawful abortion and also urged the state to amend its abortion laws to permit abortion in all cases of rape (Human Rights Committee 2007, LMR v. Argentina). In 2011, the CEDAW Committee decided a case involving a young woman who after becoming pregnant as a result of rape was denied an abortion. Under Peru's restrictive abortion laws, abortion is not permitted in cases of rape or incest. In its decision, the CEDAW Committee urged the state party to 'review its legislation with a view to decriminalizing abortion when the pregnancy results from rape or sexual abuse' (CEDAW 2011, L. C. v. Peru).

In these two cases, the Committees recognised the discriminatory aspect of the lack of access to abortion, but both decisions primarily connected the discrimination claims to the physical and mental health impact of denying needed health services, and not to women's and girls' autonomy in decision-making.

In articulating the experiences as a violation of non-discrimination, the CEDAW Committee referred to its general standards on eliminating discrimination in healthcare, including its important standard that 'it is discriminatory for a state party to refuse to legally provide for the performance of certain reproductive health services for women'. Additionally, while the CEDAW Committee found a violation of Article 5 of the Convention, which requires state parties to take measures '[t]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women', they failed to

adequately articulate the stereotype as one relating to imposing reproductive roles on women as mothers. Instead, they articulated the violation as one in relation to 'protection of the foetus over the health of the mother'. Not only does this articulation fail to adequately identify the stereotype that needs to be eliminated – the primary role of a woman as a mother, at all costs, even if raped – and hence its harm, but the Committee reinforced gender stereotypes by using the term 'mother' to describe a pregnant woman seeking an abortion. As legal scholars, Cook and Cusak have noted, '[n]aming the stereotype, identifying its form, exposing its harm are critical to making it recognizable, and therefore legally cognizable, able to be judicially examined. Naming a stereotype is necessary in much the same way that a medical diagnosis is required before treatment can be applied' (Cook and Cusak 2010: 175).

While these case judgements are immensely important in their recognition of the harm caused by denying women access to abortion, findings of violations of gender discrimination based on gender stereotypes are needed in order to address the underlying causes driving restrictive abortion laws. The concurring opinion in Mellet v. Ireland provides a strong basis for such legal developments.

While most of these cases are from Latin America, they are critically important to the development of international human rights law, to which all European countries are bound. Additionally, given the influence UN and regional human rights bodies have on the development of each other's standards (Forowicz 2010: 155; Opuz v. Turkey 2009), their potential to shape abortion standards in the most influential European-wide human rights body, the European Court of Human Rights, is very important.

European Political and Legal Discourse

National Level Discourses

Almost all of the forty-seven Council of Europe member states allow abortion on request ranging from ten to eighteen weeks of gestation, and others allow abortion on broad social and economic grounds. Almost all countries permit abortion when a woman's health and life is in danger until the end of pregnancy, and have extended periods for termination on grounds of foetal impairment. There are a handful of countries, however, with very restrictive regulations. The microstates of Andorra, Malta and San Marino have total bans on abortion with no explicit exceptions in the law, even when a woman's life is in danger. Ireland and Poland also have restrictive laws, the former criminalising abortion in all cases, except when a woman's life is in

danger, and the latter in three circumstances: when a woman's life or health is threatened, in cases when pregnancy is a result of a crime, and in cases of severe foetal impairment (Center for Reproductive Rights 2015a). Both countries have failed to implement their laws.

Despite Europe's relatively liberal legal framework with regards to abortion, advancing abortion rights remains a formidable challenge across the continent; abortion laws are consistently under threat and in some countries there are significant challenges in accessing lawful abortions. Numerous factors have shaped these developments, including the increasing influence of religious institutions. This is especially so in Central and Eastern Europe where the Catholic and Orthodox Church hierarchies, staunch abortion opponents, have gained substantial political clout since the fall of communism. Non-governmental organisations opposed to abortion are also increasingly influential across the continent and employ various means of civic participation, such as protests, advocacy and litigation, to limit access to abortion. In addition, the recent economic crisis has fuelled populism, often grounded in 'traditional family values', which promotes and exacerbates gender stereotypes. Discourses and initiatives attacking the concept of gender and the principle of gender equality have spread throughout Central and Eastern Europe. Such initiatives, promoting 'traditional family values', advocate for discriminatory laws and practices in the area of sexual orientation and gender identity, promote harmful traditional stereotypes of women and men, dispute that violence against women is a form of discrimination against women, and advocate for restrictions on reproductive rights (Heinrich Böll Foundation 2015).

Use of foetal 'rights' arguments, misinformation and biased information seeking to dissuade women from undergoing an abortion, and the practice of conscience-based refusal (conscientious objection) are but three common strategic entry points used by the opposition to attempt to directly restrict access to abortion.

Undermining Women's Decision-Making Authority

Legislative and regulatory proposals to limit women's access to abortion have been met with mixed success. Such proposed restrictions include reducing grounds or gestational limits, and imposing procedural barriers such as mandatory delay periods, or biased counselling or information requirements. While barriers to lawful abortion are particularly pronounced in countries with already restrictive laws, such as in Ireland and Poland, women are increasingly facing such barriers in countries with more liberal legislation (PACE 2008). For example, Hungary, Latvia, Macedonia, Russia, and

Slovakia, in the past few years, have imposed mandated waiting periods before women can access abortion. Some countries in the region have also passed counselling or so called 'informed consent' requirements that promote stigmatising or medically inaccurate or misleading information about abortion with the intention to dissuade women from going through with the procedure (Center for Reproductive Rights 2015b).

The discourse used in supporting such requirements includes overemphasis on the risks involved in the abortion procedure, non-evidence-based information on the negative impact that abortion has on women's mental health, such as regret women have in undergoing abortion and the pseudoscience of 'post abortion syndrome', and describing abortion as the killing of an 'unborn child' (Academy of Medical Royal Colleges 2011; Center for Reproductive Rights 2015a).

Abortion rights proponents, advocating against such restrictions, base their arguments on the health and human rights impact of such restrictions. For example, that waiting periods and biased counselling and information requirements threaten women's health by pushing women to postpone the procedure, which increases the possibility of complications and jeopardises the ability to obtain an abortion within gestational limits required by law. Abortion supporters also note that such restrictions disproportionately impact marginalised women, such as poor women and women living in rural areas who, because of mandatory waiting periods, have to travel several times to a provider before undergoing the procedure. Discourse against such restrictions reflects that such requirements also undermine women's decision-making authority and autonomy and their right to quality health services that includes the right to accurate and evidence-based information. Despite almost universal support for gender equality in Europe and the continent having the world's lowest maternal mortality and morbidity rates, these latter arguments resonate less in the political sphere than the health arguments (Center for Reproductive Rights 2015b; WHO, UNICEF, UNFPA and World Bank 2010: 20).

Governments often hide behind the veil of low maternal mortality and morbidity rates to continue to justify restrictive laws, even in the face of concrete cases that reflect the severe impact of such laws (Amnesty International 2015; Failure in Basic Care of Savita Halappanavar 2013; Tysiac v. Poland 2007; ABC v. Ireland 2010). They fail to address the impact on mental health and social well-being that such abortion laws have, never mind the discrimination and equality issues they raise. They also fail to recognise that restrictive abortion laws do not stop women from having abortions, but force them to undergo clandestine abortions at home or, for those who can afford it and are not prohibited from travelling, to travel to nearby

countries to undergo lawful abortions (Amnesty International 2015). The fact that most women are not prohibited from travelling abroad to undergo abortions is often used as justification for not addressing restrictive laws. The European Court of Human Rights, for example, recently relied on the fact that women can travel to other European countries from Ireland to get abortions to not address the country's restrictive abortion law (A., B. and C v. Ireland 2010). Such argumentation contradicts the foundation on which human rights law stands – that states have an obligation to respect, protect and fulfil human rights within their own borders.

While civil society in support of women's choice have included in their discourse the need to respect women's decision-making authority and that restrictions on abortion are discriminatory, much effort has been placed on responding to abortion opponents' argumentation. At both the regional and national level in Europe, such argumentation emphasises primarily two issues in addition to the already discussed biased counselling and information requirements: protecting foetal life and respecting the practice of conscience-based refusal at all costs, even to the detriment of women's lives. Both arguments have gained traction in recent years primarily due to the influence of the Catholic and Orthodox churches and to conservative and nationalist political parties gaining power, especially in Central and Eastern Europe.

The Practice of Conscience-Based Refusal

The practice of conscience-based refusal (conscientious objection) arises when health professionals refuse to provide certain services based on religious, moral or philosophical objections. Refusal to provide services often arises in the context of abortion and is an increasing barrier to women's access to timely abortion services across Europe where effective regulation of the practice is scant (Zampas and Andión-Ibañez 2012: 232). For example, despite laws requiring objecting healthcare providers to refer patients who are requesting to undergo an abortion to other, non-objecting physicians, some refuse to do so (Chavkin 2013; Dickens and Cook 2006: 337–40).

The situation is exacerbated by states failing to effectively require conscientious objectors to report their objection to their employer, thereby negatively impacting the availability and numbers of healthcare providers willing to perform abortions. Even when they do, the number of objecting providers appears to be increasing in some countries without effective responses to ensure access to lawful abortion services. For instance, in Italy, where there is a law requiring providers to register their refusal to provide abortions, the Ministry of Health has reported that between 2003 and 2007

the number of gynaecologists invoking conscience in their refusal to perform an abortion rose from 58.7 per cent to 69.2 per cent (IPPF-EN v. Italy 2014; Italian Ministry of Health 2008).

In addition, despite the practice of conscience-based refusal being limited to individuals, not institutions, in some countries, such as in Italy, Poland and Spain, entire public hospitals refuse to provide abortion on grounds of conscience, making it difficult for women to gain access to the procedure within reasonable distance of their residence.

Foetal Personhood

Another major strategy used to limit women's access to abortion across Europe, as well as in other parts of the world, is to gain legal recognition and to grant rights to the foetus on par with rights of the pregnant woman. This strategy is being used at both regional and national levels. At the national level, in addition to statutory or regulatory reform there have been calls for interpretation of human rights and constitutional right to life protections that would include an embryo or foetus. In some countries attempts have been made for constitutional reform to recognise all prenatal life as constitutionally protected, including from the moment of conception. The outcomes of these efforts have been mixed.

In Hungary, the governing far-right coalition was successful in introducing a provision to the new 2011 constitution guaranteeing that 'the life of the foetus shall be protected from the moment of conception' (Constitution of Hungary 2011: II). While the application of the provision remains to be seen and government officials supporting this provision noted that it would not restrict access to abortion or the existing abortion law, which allows abortion on broad grounds, the Hungarian Constitution could now be interpreted to support a ban on abortion. In Poland, while an attempt to recognise the right to life from conception through a constitutional amendment narrowly failed, attempts to restrict access to abortion continue unabated (Polish Federation for Women in Family Planning 2013). Abortion opponents are also filing constitutional court cases challenging liberal laws. For example, a group of conservative members of the Slovak Parliament sought to restrict abortion by filing a complaint with the Constitutional Court complaining that the country's abortion law, which allows abortion on request during the first twelve weeks of pregnancy, violated the right to life of the foetus. In other words, they claimed that foetuses have a constitutionally protected right to life that supersedes women's right to reproductive self-determination. The Constitutional Court disagreed. In 2007 it decided that Slovakia's abortion law does not violate the right to life but strikes a fair

balance between women's rights and the state's duty to protect prenatal life. The Court relied, in part, on international and regional human rights law to do so (Lamačková 2014: ch. 3).

European national law and jurisprudence generally support the position that protecting life prenatally as a constitutionally protected right or fundamental human right would interfere significantly with women's basic human rights. They do, however, recognise state interest in protection of prenatal life as a legitimate one, but that it must be pursued through proportionate means that give due consideration for the human rights of pregnant women, and have thus upheld liberal abortion laws.

Addressing Abortion Rights at the European Regional Level

The European Parliament and the Parliamentary Assembly of the Council of Europe have, in non-binding resolutions, directly addressed sexual and reproductive rights issues, including some of the increasing barriers to abortion women in Europe face. They have, for example, supported bold pronouncements calling for the decriminalisation of abortion and liberalisation of abortion laws (PACE 2008). Support for ICPD and for relevant Millennium Development Goals and Sustainable Development Goals related to maternal and reproductive health, especially when it comes to support for developing countries, have also been consistently supported by these bodies.

In very recent years, however, due to the increasing influence of the Catholic Church hierarchy and stronger anti-abortion activism, as well as more conservative political parties gaining ground, the progressive pronouncements directly addressing abortion at the European level that earlier garnered overwhelming support have failed to do so.

European Parliament

While it is in the competency of member states of the European Union to formulate laws on sexual and reproductive health and rights, the EU can exercise policymaking competencies in the area of public health, gender equality and non-discrimination (ASTRA 2006). The EU, though, has generally failed to support better realisation of sexual and reproductive health and rights within its borders, especially when it comes to abortion. The European Parliament, however, has taken up the issue in non-legislative resolutions. The first passed in 2002 and the second attempt to pass a similar

resolution in 2013 failed, with the Parliament voting to send the report back to the FEMM (Women's Rights and Gender Equality) Committee where it originated without any substantive discussion on its merits. The report was subsequently voted down. The outcome is due to the growing conservative composition of the European Parliament and the increasing influence of anti-abortion actors at the European regional level (Datta 2013: 22–27). It is noteworthy, however, that the European Union has consistently supported sexual and reproductive health issues in its aid programme to less developed countries and also at the United Nations.

The recent failed resolution was similar to the resolution that passed in 2002, recognising the disparities between European countries in their protection of sexual and reproductive health and rights, including differences in access to contraception, teenage pregnancy rates, abortion rates, as well as access to evidence-based sexuality education. The resolution identified barriers to exercising sexual and reproductive rights, including the practice of conscience-based refusal, and made recommendations to member states and those being considered for membership to the European Union on how to address this situation. Most importantly, it reinforced the importance of safeguarding women's reproductive health and rights; recommending making abortion legal, safe and accessible to all (European Parliament 2013).

Parliamentary Assembly of the Council of Europe

Reflecting some of the challenges European countries face in terms of access to abortion, in 2008 the Parliamentary Assembly of the Council of Europe (PACE) adopted groundbreaking recommendations regarding women's right to abortion that provide guidance to member states on abortion and abortion-related issues. The 'Access to Safe and Legal Abortion in Europe' report calls upon member states to decriminalise abortion, guarantee women's effective exercise of their right to safe and legal abortion, remove restrictions that hinder de jure and de facto provision of abortion, and adopt evidence-based sexual and reproductive health strategies and policies, such as access to contraception at a reasonable cost and of suitable nature, and compulsory age-appropriate and gender sensitive sex and relationship education for young people (PACE 2008).

Two years later, however, in 2010, due to growing anti-abortion activities at the European bodies, a resolution that recommended member states of the Council of Europe to regulate the practice of conscience-based refusal in healthcare settings, including in relation to abortion, was defeated by

conservative parties and revised to partly support continuing its unregulated practice (PACE 2010; Zampas and Andión-Ibañez 2012: 232).

Discourses at the Regional Level

Discourses at the regional level generally reflect discourses at the national level, as stated above. The organisations and individuals opposing abortion are often those who also oppose recognising equal rights on grounds of sexual orientation and gender identity; the discourse is ideologically based and does not reflect needs, desires or rights of concerned groups or individuals.

One of the discourses centred on respecting 'human dignity' includes protecting all prenatal life. Argumentation in support of this position is often garnered from intentional misrepresentation of legal and medical information. For example, an anti-abortion campaign called 'One of Us' seeks to 'advance the protection of human life from conception in Europe, within the possibilities of the competency of the EU'. The campaign has misrepresented international and European law and jurisprudence as supporting embryonic life to the detriment of women in the context of termination of pregnancy (One of Us 2013). This, despite that no international or regional human rights body has ever found a liberal abortion law to be contrary to international human rights standards and has never recognised embryos or foetuses as independent subjects of protection under international human rights law (Brüstle v. Greenpeace 2011: 49; Zampas and Gher 2008: 262).

Anti-abortion advocates often claim that any support for sexual and reproductive rights is a guise for supporting abortion, which would include maternal health programmes that seek to reduce maternal mortality and morbidity. At the European Union level, the opposition also strongly relies on arguments regarding subsidiarity, arguing that the EU has no competence in addressing issues of abortion within EU member states, even in a non-binding resolution (Federation of Catholic Families Associations in Europe 2013).

Pro-choice organisations, on the other hand, have tried to steer discourses towards the health and human rights of women. While maternal mortality and morbidity rates, two indicators for safe abortion, are low in Europe compared to the rest of the world, disparities between EU member states generally on sexual and reproductive rights issues are being used to highlight the need to ensure respect for women's choices *across* the continent. For example, teenage birth rates and use of modern contraceptives vary significantly between member states (IPPF-EN 2013: 7)

While argumentation around non-discrimination, equality and bodily autonomy are critically important and have been used by defenders of sexual and reproductive rights in the European Parliament, the arguments are often marginalised and viewed as being presented by abortion rights extremists that do not care about children.

Legal Discourses under the European Convention on Human Rights

The Court has developed some groundbreaking standards in recent years on abortion, including for the first time addressing abortion-related violations as inhuman and degrading treatment, articulating state obligations to regulate the practice of conscience-based refusals, and acknowledging a minor's autonomy in decision-making around abortion. However, it has consistently failed to address the inherent discriminatory aspect such practices and laws have on women, and as such has not found human rights violations on grounds of non-discrimination.

Discourse on abortion under the European Convention on Human Rights has focused primarily on the right to private life, that abortion is tied to respect for bodily autonomy and decision-making, rights that are protected under Article 8 (the right to private life) of the Convention. Convention bodies, the European Court of Human Rights and the now defunct European Commission on Human Rights have interpreted the right to respect for private life as extending to the physical and moral integrity of a person and that legislation regulating the termination of pregnancy touches upon the sphere of private life (Zampas and Gher 2008: 276). However, these convention bodies have not stated the extent to which abortion is protected under the Convention, which would require abortion to be legally available under domestic law (N. Priaulx 2008: 370, and J. Erdman 2010: 377). Current Convention law states that while not every restriction on abortion is a violation of the Convention (Brüggemann and Scheuten v. Federal Republic of Germany 1977), member states have a positive obligation to ensure measures are in place to guarantee women's access to abortion where legal. The European Court of Human Rights has applied its longstanding standard that the 'Convention is intended to guarantee not rights that are theoretical or illusory, but rights that are practical and effective' to the abortion context (Tysiąc v. Poland 2007: 113).

The Court has consistently found violations against a member state for failing to implement its own abortion regulation due to the absence of laws or procedural safeguards within the healthcare and legal systems that

ensure women and girls access to lawful abortions. For example, in Tysiąc v. Poland, R. R. v. Poland (2011), and P. and S. v. Poland (2012) the Court found Poland in violation of the European Convention on Human Rights for failing to ensure legal and other measures were in place for women to access lawful abortion, including an effective and timely appeals mechanism to challenge healthcare providers' and health systems' denials of abortion. In A. B. C. v. Ireland, the European Court of Human Rights (2010) found a violation of the state's obligation to respect private life because of its failure to legislate on its constitutional protection guaranteeing the right to life of pregnant women.

The R. R. v. Poland decision is an example of how the Court addressed issues of autonomy in decision-making around termination of pregnancy. The case involved a deliberate delay in providing legal genetic testing after a sonogram indicated a possible severe impairment in the foetus, which is a ground for legal termination of pregnancy in Poland. The Court articulated the importance of personal autonomy in decision-making, and primarily relied on the health implications of not ensuring access to such information to make informed decisions. In finding a violation of the right to private life, the Court noted the crucial importance of timely access to information on one's health condition by stating that, 'in the context of pregnancy, the effective access to relevant information on the mother's and foetus' health, where legislation allows for abortion in certain situations, is directly relevant for the exercise of personal autonomy' (R. R. v. Poland 2011: 197).

The case of P. and S. v. Poland involved a fourteen-year-old girl who became pregnant as a result of rape, a ground for legal termination of pregnancy in Poland, by a boy her own age. Her access to abortion was obstructed in numerous ways, including being given false information on the procedural requirements for obtaining an abortion; breaches of confidentiality by a hospital; harassment and pressure by doctors, priests and anti-abortion activists to change her mind; being denied abortion without receiving referrals by doctors; and by removing her from the custody of her mother, who supported her decision, and placing her in a detention centre for one week for the primary purpose of preventing the abortion. Precisely at the gestational limitation for abortion, the Ministry of Health intervened and she underwent an abortion in a hospital 500 kilometres from her home, in essentially a clandestine manner; she was not registered in the hospital nor was she given information on the procedure nor informed that she would be undergoing anaesthesia. In addition, she was released from the hospital immediately after the procedure and given no post-abortion care. The Court found violations of numerous rights including the right to liberty and the right to private life. And for the first time the Court addressed

the specific vulnerability of a pregnant adolescent seeking an abortion and recognised a minor's autonomy when it comes to decision-making on reproductive health. The Court noted that during P's entire ordeal, there was no proper regard for her 'vulnerability and young age and her own views and feelings' (P. and S. v. Poland 2012: 166). While in this case there was no conflict between the teenager and her mother about undergoing an abortion, the Court stated that 'legal guardianship cannot be considered to automatically confer on the parents of a minor the right to take decisions concerning the minor's reproductive choices, because proper regard must be had to the minor's personal autonomy in this sphere' (ibid.: 109).

With both P. and S. v. Poland and R. R. v. Poland, the European Court of Human Rights also found, for the first time in abortion-related cases, violations of the right to be free from inhuman and degrading treatment. The Court, in neither of the cases, found a violation of non-discrimination, despite such claims being made by the complainants.

Conclusion

Recognition of the principles of non-discrimination and gender equality lie at the heart of women's autonomous decision-making, including on abortion. International and regional human rights laws have been slow to recognise this and there is a long way to go before it is fully recognised in law. Even more challenging is a recognition of these principles in political decision-making. This is evidenced in the rejection of a report on sexual and reproductive rights by the European Parliament that would have acknowledged these principles and the increasing restrictions on abortion in some countries in Europe. The growing activity of anti-abortion activists, supported by the increasing influence of religious institutional hierarchies, and fuelled by growing populism in Europe and weariness over European-wide institutions, makes the need for clear articulation of these principles ever more necessary. Gender equality will not be achieved until women are able to exercise full and autonomous control over their bodies. Until that time comes, women will continue to be relegated to second class status, deprived of their agency and forced to risk their physical, mental, and social well-being, without full human rights protection.

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