

CEDAW general discussion on access to justice, 18 February 2013

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Introduction

The criminalization of abortion, and the discriminatory application of criminal laws regarding abortion, by both judicial and police authorities clearly violate women's access to justice. The denial of access to a medically safe procedure has a detrimental effect on women's full enjoyment of their rights to health, the benefits of scientific progress, privacy, liberty, equality, security, and freedom from discrimination in health care.

In this submission, we focus on challenges faced by women in accessing justice in relation to the criminalization of abortion and the ways in which criminal laws are applied. It is based partly on research conducted by Ipas in 2012 in Argentina, Bolivia, Brazil and Malawi on charges, arrests and imprisonment or alternative penalties for women and health-care providers accused of illegal abortion. Examples of cases from that research and other reports illustrate how justice is denied to women seeking abortion care.

Appropriate legislative measures must prohibit all discrimination against women

In order to comply with their obligations under CEDAW, States must enact and implement national laws that protect and fulfill women's rights, including freedom from discrimination. The CEDAW Committee stated in General Recommendation 24 that: "Other barriers to women's access to appropriate health care include laws that criminalize medical procedures only needed by women and that punish women who undergo those procedures", indicating that laws criminalizing abortion are discriminatory. In the same General Recommendation, the Committee reiterated that: "When possible, legislation criminalizing abortion should be amended, in order to withdraw punitive measures imposed on women who undergo abortion."¹

The UN Special Rapporteur on the right to health has advised that all laws criminalizing abortion should be rescinded.² States should protect against interference with sexual and reproductive health rights by third parties (e.g., attempts to prevent women from accessing legal abortions) by adopting and enforcing appropriate laws, policies, regulations and guidelines that sanction this.³ The UN Special Rapporteur on the independence of judges and lawyers has noted that "by upholding discriminatory laws, judges and prosecutors become parties to the violation of the State's international obligations."⁴

Several UN treaty monitoring bodies have further reiterated that access to safe legal abortion is essential when women's health and lives are endangered by pregnancy and in cases of pregnancies resulting from rape.⁵⁶⁷⁸

Nevertheless, women in countries of all regions of the world are charged, investigated, prosecuted and convicted in relation to having illegal abortions. In most cases, this is based on criminal abortion laws, but women suspected of having clandestine abortions may also be charged with other crimes such as concealment of birth or infanticide.

For example, Ipas research in Malawi on newspaper reports and records from police, courts and prisons in populous areas of the country's three regions indicated that, between 2006-2012, 63 women were arrested for abortion-related crimes. The charges were abortion (10 cases), infanticide (9 cases), or concealment of birth (45 cases; one woman faced multiple charges). The women who were convicted received prison sentences ranging from six months to two years. In Mexico, from 2009 to 2011, 679 women were charged with the crime of abortion according to a report presented to the Inter-Commission on Human Rights; of those convicted, the majority were aged 18-25 years.⁹ In El Salvador, which bans legal abortion for any reason including to save a woman's life, 628 women have been imprisoned since 1998 under the abortion law and 24 women have been convicted for "aggravated murder" after having an abortion.¹⁰ In a number of cases, this occurred when women had miscarriages or stillbirths and were falsely accused of having induced a pregnancy termination.

The UN Special Rapporteur on the independence of judges and lawyers named the criminalization of abortion as an example of criminal legal provisions that are discriminatory against women, further stating that: "Judges must be in a position to challenge gender stereotyping and discrimination when they encounter it in the form of wrongful charging of suspects, charges being brought without any supporting evidence of wrongdoing and merely on the basis of hearsay, or mis-charging of a particular form of conduct (like charging abortion as infanticide)."¹¹

Economic challenges and vulnerable women

In countries where abortion is highly restricted, poor, uneducated and young women may have particular problems in obtaining information about legal abortions and may resort to illegal procedures to terminate unwanted pregnancies; this was found in Ipas's study in Argentina, Bolivia and Brazil. In addition, women who are economically better off can often obtain safe, albeit illegal, procedures from private health-care providers so that the procedures are kept confidential.¹²

Ipas's research on 334 women charged with illegal abortions in Rio de Janeiro state, Brazil, revealed that 53% had only finished primary school, 37% middle school and only 8% had graduated from high school. In Rwanda, in July 2010, 21 of the 114 women in the Karubanda prison had been convicted for illegal abortions and 90% were 25 years old or younger.¹³

A case followed by Ipas in 2012 concerned a 28-year-old Bolivian indigenous woman living in extreme poverty who became pregnant as a result of rape. She was afraid the police would not believe her if she reported the rape and she was unaware that she could legally terminate the pregnancy. After suffering complications from a self-induced abortion, she went to a hospital for care, where she was handcuffed and kept in police custody during her stay in the hospital; she was then charged with having an illegal abortion. In Brazil, as well, Ipas research found two cases of women who had been handcuffed to hospital beds while their cases were under investigation, in one instance for three months as the woman could not afford to post bail.

Discrimination against female health-care providers

In Argentina, from 1996-2008, there were 234 cases in which women or health-care providers were convicted for illegal abortions at the national level. Disaggregated data on the convictions from 2002-2008 show that midwives represented more than 80% of the convictions, which provides evidence of discriminatory application of the law as most midwives are women.

Institutional obstacles

Even when abortion is permitted by law, women may face considerable obstacles in accessing this legally permitted medical procedure. The institutional obstacles posed include lack of implementation of abortion laws, unnecessary requirements such as mandatory reporting of rape to law enforcement officials to qualify for a legal abortion, a need for judicial authorization, refusals or delays in providing a legal pregnancy termination by health-care providers and facilities, and a lack of health-care professionals to provide the service due to appeals to conscientious objection.

In 2010, the European Court on Human Rights issued a judgment against the State of Ireland for failing to implement “effective and accessible procedures to establish a right to an abortion”, resulting “in a striking discordance between the theoretical right to a lawful abortion in Ireland on grounds of a relevant risk to a woman’s life and the reality of its practical implementation.”¹⁴ When a dentist died in late 2012 due to denial of an abortion to save her life, the government finally announced plans to regulate therapeutic abortions to save women’s lives.¹⁵ However, abortion will still be criminalized in other cases, requiring many women to incur expenses to obtain legal procedures abroad; between January 1980 and December 2011, at least 150,000 women had done so.¹⁶

In Brazil, the country’s Technical Guidelines for Humane Abortion Care state that health-care providers should not report women to the police¹⁷ and Article 154 of the Penal Code punishes illegal disclosure of professional secrets with detention for up to a year. Nevertheless, Ipas research found that many women are investigated and charged with illegal abortions after health-care providers report them to law enforcement when they seek post-abortion care for complications. This was also found in Bolivia.

In Bolivia, a woman who has been raped must begin criminal proceedings against the perpetrator before she can request judicial authorization for an abortion. However, Ipas found that judges rarely authorize abortions, often claiming conscientious objection based on religious and moral grounds. Other times, judges simply delay making a decision until a woman’s pregnancy may be too advanced in order to safely have an abortion.

In South Africa, which allows abortion for a wide variety of reasons, women still resort to illegal abortions because health-care facilities are understaffed and the waiting periods are consequently long. This is partly due to the fact that some nurses and midwives refuse to provide the procedure and discourage colleagues who are willing to do so.¹⁸

Lack of legal aid services and gender-insensitive, inappropriate law enforcement

Women’s access to justice and rights are violated in relation to abortion care through factors such as laws and regulations that require health-care providers to report suspected cases of illegal abortion to law enforcement authorities, and delays in legal proceedings that deprive women of their liberty, thereby placing their employment and family lives at risk.

Ipas’s study in Argentina, Bolivia and Brazil found that many women were investigated and charged after being denounced by health-care providers when they sought care for abortion complications in public health facilities. This practice violates women’s rights to privacy, medical confidentiality, and to due process as some women in Bolivia and Brazil were arrested in their hospital beds and then sent to detention centers.

The UN Special Rapporteur on the right to health has noted that: “Women are entitled to...have access to quality health services for the management of complications, including those arising from unsafe abortions and miscarriages. Such care must be unconditional even where the threat of criminal punishment is present, and it should not be contingent on a woman’s cooperation in any subsequent criminal prosecution, or used as evidence in any proceeding against her or the abortion providers. Laws must not require health-care personnel to report women for abortion-related care to law enforcement or judicial authorities.”¹⁹ The World Health Organization has also reiterated that the: “practice of extracting confessions for prosecution purposes from women seeking emergency medical care as a result of illegal abortion and the legal requirement for doctors and other health-care personnel to report cases of women who have undergone abortion” should be eliminated.²⁰

It is especially young, poor and uneducated women who may lack proper legal aid when charged with the crime of illegal abortion. For example, the above-mentioned indigenous Bolivian woman was placed in preventive detention while awaiting trial because the prosecutor argued that she had neither permanent housing nor a job, even though she was employed and had housing at the time of her arrest. Her request for a hearing was delayed or postponed three times over a 3.5-month period, in two cases because her public defender failed to show up in court. She was ultimately able to receive assistance from a private lawyer and was granted a judicial pardon.

Ipas found that in addition to delays in various stages of legal proceedings for women charged with illegal abortion, in Bolivia and Brazil women are sometimes offered the possibility of confessing to the crime in exchange for the benefit of having their proceedings suspended. In this way, the legal process can be shortened and women can avoid trial; however, this procedure violates their rights to due process and to not produce evidence against themselves.

The UN Special Rapporteur on extreme poverty and human rights has noted: “lawyers can play a crucial role at the time of arrest and during pretrial stages, especially in cases where the accused does not have access to legal information or financial resources for bail.”²¹

Bias and gender insensitivity of the judiciary

The CEDAW Committee has noted that officials involved in the administration of justice may lack understanding about certain violations of women’s rights and that judges may lack an equality perspective in conducting cases, leading to discriminatory judgments and further violations of women’s human rights in the course of seeking justice. This is also seen in relation to women’s attempts to obtain judicial authorizations for legal abortions.

In El Salvador, a 33-year-old mother of two was accused of having an abortion, convicted of murder and sentenced to 30 years’ imprisonment after suffering severe complications following delivery. During her imprisonment, it was discovered that she had advanced Hodgkin’s lymphoma, which likely contributed to the severe obstetric emergency she had suffered. She never had a chance to meet with her lawyer, was not given an opportunity to speak in her own defense, and was unable to appeal the decision. The judge overseeing her case said that “her maternal instinct should have prevailed” and “she should have protected her child.”²² She died in prison in 2010.

In another case in El Salvador, a 20-year-old woman, taken to the hospital by her family when hemorrhaging from a premature delivery, was accused by a physician of having induced an abortion, shackled to her bed and subsequently sentenced to 30 years in prison for murder. During her trial, the

prosecution presented no evidence of a crime and no autopsy on the fetus was carried out; the sentence was based on the opinions of the physician and judge. Although she was released from prison after seven years, more than 20 other women are still imprisoned with similar sentences.²³ One judge interviewed for research on application of the abortion law in El Salvador commented that there is no discussion within the judiciary about criminalization of abortion as a violation of women's rights.²⁴ A contributing factor could be fear of accusations of condoning a crime.

The Human Rights Committee ruled against the State of Argentina in 2011 in the case of L.M.R., a mentally-disabled young woman who was refused a legal abortion following rape. A juvenile court judge denied authorization because in her opinion it was not acceptable to remedy the consequences of the sexual abuse "with another wrongful assault against a new innocent victim, i.e. the unborn child".²⁵ Even after the Supreme Court of Justice of Buenos Aires ruled that the pregnancy could be legally terminated, hospital authorities refused to carry out the procedure, leading to unacceptable delays and an ultimately illegal but safe abortion organized by women's organizations.

The European Court of Human Rights issued a judgment against the State of Poland in a case concerning a 14-year-old adolescent whose parents had requested a legal abortion for a pregnancy resulting from rape. Although a district prosecutor had issued a certificate confirming the legality of the request, numerous hospital officials refused to perform the procedure and informed religious anti-choice persons about the case, which resulted in national news coverage (violating the family's right to privacy and confidentiality). Subsequently, a family court instituted proceedings to terminate her mother's parental rights and ordered the minor to be placed in a shelter, where she was questioned by a criminal judge without legal assistance. After confirming that she herself consented to the abortion, the parental custody proceedings were dropped and ultimately the abortion was performed. The European Court, however, found that numerous rights had been violated in this case and awarded monetary damages to the adolescent and her mother, reiterating that: "the State is under a positive obligation to create a procedural framework enabling a pregnant woman to effectively exercise her right of access to lawful abortion."²⁶

Lack of remedies

The CEDAW Committee has emphasized that access to effective remedies, adequate reparation and/or compensation should be provided to women who suffer discrimination in relation to health-care services. The UN Special Rapporteur on extreme poverty and human rights has noted that reproductive rights are inadequately addressed in many legal systems, which particularly has an impact on poor women whose efforts to seek remedies are curtailed.²⁷ Women who are denied legal abortions may have to undergo numerous judicial and legal proceedings, involving legal, transportation and other expenses, in order to obtain their right to a legal abortion.

In 2006, the parents of a 10-year-old girl who became pregnant as a result of rape in Bolivia requested authorization for a legal abortion. However, a family judge refused, stating that this could be considered the equivalent of a legal homicide and he was obliged to protect the rights of children from conception. The country's Constitutional Court rejected his argument, and the family judge finally had to authorize the abortion.

In the above-mentioned case of L.M.R. in Argentina, the Human Rights Committee noted that the International Covenant on Civil and Political Rights had been violated as she did not have access to an

effective remedy because the young women's mother had to appear before three separate courts to obtain authorization for a procedure, which was ultimately still denied by the hospital.²⁸

Conclusion

CEDAW General Recommendation No. 28 emphasizes that “States parties have an obligation to ensure that women are protected against discrimination committed by public authorities, the judiciary, organizations, enterprises or private individuals, in the public and private spheres. This protection shall be provided by competent tribunals and other public institutions and enforced by sanctions and remedies, where appropriate.”²⁹

The illustrative cases cited above demonstrate that laws used to criminalize abortion prevent women from exercising their reproductive rights and result in discriminatory treatment within the legal system. Moreover, women's access to justice is additionally impeded when States fail to effectively implement provisions of laws that do permit access to legal abortion.

¹ CEDAW Committee. 1999. *General recommendation 24*, paras 14 and 31(c).

<http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom24>

² UN General Assembly. 3 August 2011. *Interim report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*. A/66/254, para 65(h). New York: United Nations. http://www.un.org/ga/search/view_doc.asp?symbol=A/66/254

³ Diya Uberoi, Maria de Bruyn and Beatriz Galli. 2012. Using human rights to address consequences of criminal laws on sexuality and reproductive autonomy. *The International Journal of Human Rights*, 16/7: 1023-1039. <http://www.tandfonline.com/doi/abs/10.1080/13642987.2011.652366#preview>

⁴ United Nations General Assembly. 10 August 2011. *Interim report of the Special Rapporteur on the independence of judges and lawyers*. A/66/289, para 74. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/449/71/PDF/N1144971.pdf?OpenElement>

⁵ CEDAW Committee. 2011. *Concluding Observations to Mauritius*, para 33

⁶ Committee on the Rights of the Child. 2012. *Concluding Observations to Peru*, para 21

⁷ Human Rights Committee. 2012. *Concluding Observations to the Dominican Republic*, para 15

⁸ Committee against Torture. 2011. *Concluding Observations to Paraguay*, para 22

⁹ Anayeli García Martínez. 9 November 2012. Cerca de 700 mujeres son denunciadas por abortar. En 3 años se dictaron 86 sentencias, informan activistas. *Cimacnoticias*. <http://www.cimacnoticias.com.mx/node/61934>

¹⁰ CAWN. September 2012. *Maternal health, reproductive rights and the criminalization of abortion*. London, Central American Women's Network. http://www.cawn.org/assets/Maternal%20Health%20paper_final.pdf

¹¹ United Nations General Assembly. 10 August 2011. *Interim report of the Special Rapporteur on the independence of judges and lawyers*. A/66/289. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/449/71/PDF/N1144971.pdf?OpenElement>

¹² Anastasia Moloney. 23 Oct 2012. Jailing of a mentally ill woman exposes El Salvador's tough abortion laws - rights group; *Trustlaw*; <http://www.trust.org/trustlaw/news/jailing-of-a-mentally-ill-woman-exposes-el-salvadors-tough-abortion-laws-rights-group>

¹³ Association Rwandaise pour le Bien Etre Familial. 2011. *Abortion and young people in Rwanda*. Kigali, ARBEF; <http://www.rutgerswpf.org/sites/default/files/YAM%20booklet%20of%20personal%20stories%20on%20abortion.pdf>

¹⁴ European Court on Human Rights. 16 December 2010. *GRAND CHAMBER.CASE OF A, B AND C v. IRELAND (Application no. 25579/05). JUDGMENT*. Strasbourg, European Court on Human Rights

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- ¹⁵ David McKittrick. 19 December 2012. Abortion to be legalised in Republic of Ireland for pregnancies that threaten mothers' lives following death of Savita Halappanavar. *Belfast Telegraph*. <http://www.belfasttelegraph.co.uk/news/local-national/republic-of-ireland/abortion-to-be-legalised-in-republic-of-ireland-for-pregnancies-that-threaten-mothers-lives-following-death-of-savita-halappanavar-16252378.html>
- ¹⁶ Irish Family Planning Association. 2012. *Statistics*. <http://www.ifpa.ie/Hot-Topics/Abortion/Statistics>
- ¹⁷ Ministry of Health Brazil. 2005. *Norma Técnica Atenção Humanizada ao Abortamento*. Brasília DF, Ministério da Saúde. http://bvsmis.saude.gov.br/bvs/publicacoes/atencao_humanizada.pdf
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- ²¹ United Nations General Assembly. 9 August 2012. *Report of the Special Rapporteur on extreme poverty and human rights*. A/67/278, para 67. New York, United Nations. <http://www.ohchr.org/Documents/Issues/Poverty/A-67-278.pdf>
- ²² Center for Reproductive Rights. 21 March 2012. *Manuela's story demonstrates the fatal consequences of El Salvador's law and why it must change*. New York, Center for Reproductive Rights; <http://reproductiverights.org/en/press-room/center-for-reproductive-rights-files-case-revealing-the-horrifying-reality-of-el-salvador>
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- ²⁵ Human Rights Committee. 28 April 2011. *Communication No. 1608/2007*. CCPR/C/101/D/1608/2007, para 2.4. http://www.worldcourts.com/hrc/eng/decisions/2011.03.29_VDA_v_Argentina.pdf
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- ²⁷ United Nations General Assembly. 9 August 2012. *Report of the Special Rapporteur on extreme poverty and human rights*. A/67/278, para 30. New York, United Nations. <http://www.ohchr.org/Documents/Issues/Poverty/A-67-278.pdf>
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- ²⁹ CEDAW Committee. 16 December 2010. *General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/472/60/PDF/G1047260.pdf?OpenElement>