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FIAPAC Congress: Freedom and rights in reproductive health
13 October 2006

Abortion as a human right: recent international human rights body decisions

- During the last few decades, the right to women's health and within health, the right to sexual and reproductive health, has been recognized as an essential component of human rights. The punitive treatment given to abortion and lack of access to abortion and in certain circumstances not only violates human rights in and of itself, they also limit the enjoyment and exercise of fundamental rights and liberties of women that are recognized worldwide.
 - Right to health (availability, accessibility, acceptability, quality); GC 14 of the CESCR-unsafe abortion can have impact on woman's health
 - The right to privacy – freedom in reproductive decision-making
 - The right to equality and non-discrimination, because denial of abortion only impacts women (effect is discriminatory)
 - The right to life-unsafe abortion associated with high rates of mm, undergoing unsafe abortion threatens right to life.
 - The right to not be subjected to cruel, inhuman or degrading treatment during the process of seeking abortion or being denied abortion
 - The right to information on health status of fetus or on options concerning termination
 - The right to benefit from scientific progress women are denied modern methods, such as medical abortion.
- Human rights principles are not just found in international human rights treaties, they are also part of national laws and constitutions.

When we use the term human rights, we are not just talking about a legal means to address harms in a court of law or international tribunals, we can use human rights in a variety of different ways, including as a:

- language/a discourse that enable individuals and groups to claim or advocate for certain rights to which they are entitled on account of their status as individuals in society;
- an advocacy tool to put pressure on governments politically, socially for their laws, policies or practices that do not comply with human rights principles.
- a means by which one can foster compliance with human rights principles through a variety of different forums (ombudsperson, human rights commissions, courts of law);
- Human rights can help make medical standards on right to certain health care, embedded in the law as human rights principle-such as right to confidentiality in medical care or guaranteeing women access to certain services and information. So for example, the standard setting objectives on access to reproductive health care by WHO can actually become the law, making them more secure, predictable and enabling us to hold governments accountable when they have failed to meet the law.

Litigation (using the tribunal systems at the national or international level) is just one way to advocate for achieving systematic change and for pushing human rights to address the needs of women. There are many other ways—media, legislative lobbying, etc. But often times

litigation is one of the most effective ways when you have governments that are resistant to take action. It can help enforce laws and regulations when those responsible would rather ignore them, which can result in significant reform in public institutions, such as the health care system. Litigation also plays an important educational role by raising awareness of issues that could potentially change public opinion.

It can also have very broad impact. I.e.; having a decision from the UN Human Rights Committee or CEDAW or the European Court of Human Rights or the Inter-American Commission on Human Rights creates standards for all countries that are parties to the relevant treaties.

The ultimate goal of using the human rights system is to have a good decision which condemns a certain medical practice or a restrictive law, this decision can be used to advocate for change in the policy, law or practice both in the country which is at issue in the case but also around the world.

While the courts and judicial models have an important role to play in the everyday struggle to achieve economic and social rights. It should be noted, however, that litigation is often a difficult, lengthy and costly strategy, and that victories in claiming economic and social rights, especially reproductive rights, in court are still few and far between.

Recent cases:

There has been a string of recent victories in international and national tribunals when women are denied abortions.

-At the national level the Colombia Supreme Court liberalized its extremely restrictive abortion law, which totally banned abortion, grounding their decision on fundamental human rights such as human dignity, bodily integrity, privacy, health and life. Colombia's highest court ruled that in accordance with these human rights principles, abortion must be permitted when a pregnancy threatens a woman's life or health, in cases of rape, incest and in cases where the fetus has malformations incompatible with life outside the womb.

-At the regional human rights level, Mexico admitted to the Inter-American Commission on Human Rights that it violated its obligations under human rights law when it denied a 14 year old rape victim access to emergency contraceptives and an abortion

-And at the international level a decision by the UN Human Rights Committee found a Peru in violation of the International Covenant on Civil and Political Rights provisions on right to privacy, right to be free from inhumane and degrading treatment, etc. when it denied an adolescent an abortion despite the fact that she was carrying an anencephalic fetus.

Useful to remember that no international human rights treaty with the exception of the new African protocol on Women's Rights, guarantee woman right to an abortion explicitly but provisions in treaties are being interpreted to protect this right.

Case of KL v. Peru:

I want to highlight one recent landmark decision of the UN Human Rights Committee,

❖ This is the first time an international human rights tribunal has held a government accountable for failing to ensure access to legal abortion services and communicates to governments that they must ensure that textual guarantees of abortion are also guaranteed in practice

It was a decision in individual case regarding a young woman who was denied abortion. These facts were selected to highlight the important role the medical community can play in helping win such types of cases.

Facts

- KL was 17 years old
- KL carrying **anencephalic fetus (fatal for fetus)**.
- ob/gyn explained risks and choice to terminate. **K.L. decided to terminate the pregnancy.**
- **written authorization** from the hospital director required in state hospitals in order to undergo abortion
- The hospital director refused; abortion not legal in her circumstance.

Legal Status of Abortion in Peru

➤ to save a woman's life or to prevent serious and permanent damage to her health (no provision on fetal impairment!!)

➤ However, *no regulations or policies* were in place to interpret this law; left to the discretion of hospital directors to decide. There were no legal avenues available for her to appeal decision of doctor within time limitations of pregnancy.

Assessment of K.L.'s Health During Pregnancy

Pregnancy was serious risk to KL's physical & psychological health:

➤ A social worker: **termination of the pregnancy advisable** "since its continuation would only prolong the distress and emotional instability of K.L. and her family."

➤ A psychiatrist: depression and impact development of KL (as adolescent) and her mental health.

➤ private sector professionals refused because fear of criminal prosecution. Even though they considered that the pregnancy posed a **serious risk to K.L.'s physical and psychological health**.

Results of Delivery

➤ **Gave birth to an anencephalic baby who lived for 4 days and KL was coerced to breastfeed.**

➤After death of baby, K.L. went into a *deep depression*, requiring *psychiatric intervention*.

We took case to the Human Rights Committee together with 2 organizations from Peru. We argued that states violated rights protected under the ICCPR, including that forcing her to carry pregnancy to term is a form of inhumane and degrading treatment, it is a violation of her right to privacy as the law entitles her to undergo abortion, it violates guarantees of special protection as a minor; discrimination against women and right to legal redress as there were no legal avenues available to her that would allow her to appeal refusal within time allowed by law.

Violation of Article 7 ICCPR: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment

➤K.L.'s depression and emotional distress "could have been foreseen... yet hospital director refused termination." **"the omission on the part of the State in not enabling the author to benefit from a therapeutic abortion was ... the cause of the suffering she experienced."**

•article 7, the HRC cited to the **expert doctor's statement** attached to her petition in recognizing that her pregnancy exposed her to a risk that was life-threatening. It also cited to the **psychiatric report** that confirmed the severe psychological consequences, "exacerbated by her status as a minor" that K.L. suffered and the deep depression into which she fell.

•Medical documentation to support K.L.'s complaint played a crucial role (a declaration from the Chair of the Committee on Sexual and Reproductive Rights of the Latin American Federation of Obstetricians and Gynecologists and a Representative of the Peruvian Society of Obstetrics and Gynecology to the Committee on Sexual and Reproductive Rights were submitted)

Lessons learned from Article 7 violation:

➤Acknowledgment that being forced to continue a pregnancy that involves fetal anencephaly results in **serious harm to mental health and denying a woman an abortion in cases of severe fetal impairment is inhumane and degrading treatment.**

Inhumane and degrading treatment : originally meant to protect inhumane treatment of prisoners, but we see it increasingly being interpreted and applied to cases concerning women's issues, such as rape, and in this case denial of abortion. This protection is absolute, there are no reasons a state can give to justify such treatment. Article 7 violation does *not* depend on the lawfulness of the abortion procedure.

➤**Violation of Article 17: No one shall be subjected to arbitrary or unlawful interference with his privacy ...**

➤**"the conditions for a lawful abortion as set out in the law were present" and that "the refusal to act in accordance with the author's decision to terminate her pregnancy was not justified and amounted to a violation of article 17 of the Covenant."**

➤ *Lessons learned from Article 17 violation*

- **Read into law mental health, even though does not say this and does not say fetal impairment.** It relied on the WHO definition of health to interpret an abortion law which allows abortion in circumstances when women's health or life is seriously in danger. The interpretation by national authorities was that health only included physical health, not mental. WHO defines health as "a state of complete physical, mental and social well-being, not merely the absence of disease or infirmity."

➤ **When a state permits abortion, it must ensure that 1- refrains from interfering in decision (such as KL's and 2-take positive steps to guarantee it is a right in practice.**

Privacy: originally meant to protect unlawful intrusion by police into the home, being now extended to issues concerning control over women's bodies, such as forced gynecological examinations, issues concerning pregnancy, and in this case access to lawful abortion.

Violation of Article 24: Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

➤ **The HRC noted K.L.'s "special vulnerability" as a minor girl that she should have been given special protection.**

Lessons learned from Article 24 violation

➤ **In finding this violation the HRC recognizes the unique barriers and susceptibility to rights violations that adolescents experience in accessing abortion and other RH services; sex and gender as compounding factors**

➤ **special duty of states to ensure adolescent access**

Violation of Article 2: State must provide way that if rights violated or threatened you can have access to legal or admin mechanisms to prevent or to get redress.

➤ **K.L. argued that the State should have taken steps to respond to the medical community's restrictive interpretation of the legal provision authorizing therapeutic abortion. And that there should have been mechanisms in place to appeal decision**

Lessons learned from Article 2 violation

- **article 2 "accessible and effective" remedies (GR 31 on Legal Remedies)**
- **effectiveness of a legal remedy depends on the circumstances of the case:**
 - **Abortion context: the timeliness of relief**
 - **The state failed to establish administrative procedures, such as a procedure providing for an appeal or review of a doctor's refusal within timely manner**

Other violations and non-violations but do not have time to address.

The HRC's Decision: Remedy

The HRC ordered the State party to “furnish the author with an effective remedy, including compensation” and to “take steps to ensure that similar violations do not occur in the future.”

The State is currently developing protocols on abortion care in line with the decision of the HRC, which includes broad definition of health in accordance with WHO definition, provisions regarding access to abortion and ensuring there are remedies available, and NGOs on the ground are advising and monitoring. There has been some opposition from groups.

Significance of K.L. Decision

❖ This is the first time an international human rights tribunal has held a government accountable for failing to ensure access to legal abortion services and communicates to governments that they must ensure that textual guarantees of abortion are also guaranteed in practice

Lessons learned from K.L. Role of medical evidence

Thus, it is important to identify and develop and cultivate relationships with medical associations and individual medical practitioners who can lend their medical expertise and provide documentation to support and strengthen our cases.

• Medical documentation to support K.L.’s complaint played a crucial role (a declaration from the Chair of the Committee on Sexual and Reproductive Rights of the Latin American Federation of Obstetricians and Gynecologists and a Representative of the Peruvian Society of Obstetrics and Gynecology to the Committee on Sexual and Reproductive Rights were submitted)

• In deciding on K.L.’s claim of a violation of article 7, the HRC cited to the **expert doctor’s statement** attached to her petition in recognizing that her pregnancy exposed her to a risk that was life-threatening. It also cited to the **psychiatric report** that confirmed the severe psychological consequences, “exacerbated by her status as a minor” that K.L. suffered and the deep depression into which she fell.

Conclusion:

- Liberalize laws that do not guarantee access to services
- o Measures that should be adopted:
 - Defend/support the legal victory
 - Work with health providers: provide them with knowledge of their responsibilities and rights
 - Strengthen the capacity of the health system: issue necessary regulations and protocols
 - Provide information to the community, and in particular to the most vulnerable communities
- The challenge: working together towards the guarantee of safe abortion

- Important to remember. Many international human rights treaties were not written at a time when women's helped shaped them (except for CEDAW) but human rights evolve and role of lawyers is to help push that evolution so that HR reflect and protect the reality of women's lives. Medical professionals, both as individuals and as associations, play a crucial role in this process by supporting such cases through statements, affidavits, amicus curiae briefs on pending cases.
- o Work together with other health professionals and legislators and members of the public administration through the implementation of norms and policies that guarantee the respect and effective protection of the right to health of women