

THE REGULATION OF ABORTION UNDER INTERNATIONAL HUMAN RIGHTS LAW



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Abstract: By imposing responsibilities on states to protect fundamental rights that, when interpreted cumulatively, provide access to secure abortion services, the international human rights law indirectly regulate abortion. This regulation is based on an interpretative and evolutionary approach that aims to fairly consider women's health, autonomy, and dignity as a corollary to abortion, without necessarily recognizing the latter as an independent right.

Key Words: Abortion; Reproductive rights; Bodily autonomy; Right to health; Cumulative interpretation.

تنظيم الإجهاض في القانون الدولي لحقوق الإنسان

ملخص: ينظم القانون الدولي لحقوق الإنسان الإجهاض بشكل غير مباشر من خلال فرض التزامات على الدول بحماية الحقوق الأساسية التي، عند تفسيرها بشكل تراكمي، ترسي الوصول إلى خدمات الإجهاض المأمون. ويستند هذا التنظيم إلى نهج تفسيري وتطوري يسعى إلى جعل حماية صحة المرأة واستقلاليتها وكرامتها متلازمة مع الحق في الإجهاض، دون أن يكشف عن هذا الأخير كحق مستقل بذاته.

الكلمات المفتاحية: الإجهاض؛ الحقوق الإنجابية؛ الاستقلالية الجسدية؛ الحق في الصحة؛ التفسير التكاملي.

LA REGULATION DE L'AVORTEMENT PAR LE DROIT INTERNATIONAL DES DROITS DE L'HOMME

Résumé:

En imposant aux États la responsabilité de protéger les droits fondamentaux qui, lorsqu'ils sont interprétés de manière cumulative, permettent l'accès à des services d'avortement sûrs, le droit international des droits de l'homme régit indirectement l'avortement. Cette réglementation s'appuie sur une approche interprétative et évolutive qui vise à concilier la sauvegarde de la santé, l'autonomie et la dignité des femmes avec l'accès à l'avortement, sans pour autant dévoiler ce dernier comme un droit indépendant.

Mots Clés: Avortement; Droits reproductifs; Autonomie corporelle; Droit à la santé; Interprétation cumulative.

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Introduction:

the crossroads of ethical, legal and human rights issues. A practice that affects millions of women around the world every year, it gives rise to divergent positions due to cultural, religious and social differences. According to the World Health Organisation (OMS),¹ approximately 45% of abortions worldwide are carried out in unsafe conditions, highlighting the urgent need for an appropriate legal framework.

The right to abortion is a controversial subject, oscillating between fundamental rights and legal restrictions. International human rights law, a body of norms and principles designed to protect human dignity and fundamental freedoms, lies at the heart of this issue. It plays a key role in regulating abortion, and must reconcile rights and freedoms, i.e. the right of women to freely dispose of their bodies, the right to health, but also the ethical and moral considerations raised by various stakeholders. Its influence varies according to national contexts. This article will examine the extent to which this legal framework protects or limits this right, drawing on international texts, case law and practical examples. In this context, the question is: to what extent does international human rights law effectively regulate the issue of abortion?

In other words, can we consider abortion to be a human rights issue, and also ask ourselves whether international instruments explicitly address this question? This analysis will enable us to examine how international legal instruments deal with this complex issue, while assessing their effectiveness and limitations. To answer these questions, I will approach this subject in two parts: firstly, I will examine the international legal bases relating to abortion, analysing the rights they enshrine. Secondly, I will assess the effectiveness and limitations of these regulations in the face of contemporary challenges.

THE FIRST TOPIC: THE REGULATION OF ABORTION AT THE HEART OF INTERNATIONAL INSTRUMENTS

First requirement: Fundamental rights relating to abortion

Talking about the right to abortion is a thorny issue as the word right in itself has raised a lot of jurisprudential and legal controversy as it is not possible to refer to any right without there being legal protection for it, whether it is protection within domestic or international laws. I have already indicated in the introduction to this research or rather I wondered about the relationship of abortion to fundamental rights, whether these rights recognize abortion as a right and protect it or whether there is another protection through which it can be said that abortion is a fundamental right of women that must be protected according to the jurists Ronli SIFRIS and Suzanne

¹ WORLD HEALTH ORGANIZATION, Abortion, article published on May 17, 2024. (consulted on 13/02/2025) Website, <https://www.who.int/news-room/fact-sheets/detail/abortion>



BELTON, international human rights law does not recognize an autonomous right to abortion.¹

For these lawyers, even if certain rights - such as the right to privacy, to health, to bodily autonomy or to non-discrimination - can be mobilized to defend access to abortion, this remains an interpretative approach. They argue that these rights, although fundamental, do not automatically translate into an explicit guarantee of access to abortion, but rather into an obligation for states to put in place a legal framework that respects sexual and reproductive rights.

This position has several implications:

Cumulative interpretation: Reproductive rights advocates must rely on a body of existing rights and evolving conferences of those rights to promote access to abortion. This is not a direct recognition but a 'cumulative reading' aimed at protecting women's health and autonomy.

Jurisprudential and normative developments: Although certain international bodies (for example, the United Nations committees responsible for economic, social and cultural rights or women's rights) have recognized the importance of guaranteeing access to sexual and reproductive health services, these decisions alone do not create an autonomous right to abortion.

State obligations: Even in the absence of an autonomous right, most international instruments impose an obligation on States to respect, protect and promote fundamental rights. This includes, in many cases, the need to guarantee access to safe reproductive health care, which may include abortion in specific situations.

In short, for SIFRIS and Suzanne Belton, the absence of an explicit mention of abortion as an autonomous right in international instruments obliges human rights actors to defend this access on the basis of the interpretation and articulation of several fundamental rights, rather than on the basis of a direct and explicit recognition in international law.

The most important development in recognizing abortion as a protected legal right has been the reliance on human rights as rights through which women who do not wish to continue their pregnancy can be protected². Among these rights, or among the most important of these rights:

This development means that, even in the absence of an international text explicitly enshrining a 'right to abortion', women's legal protection has been strengthened through the application of human rights principles. In other words, the

¹ RONLI Sifris & BELTON Suzanne, "Australia: Abortion and Human Rights", Health and Human Rights Journal, Vol. 19, No. 1, June 2017, p. 210.

² COOK J.Rebecca, ERDMAN N.Joanna, & DICKENS M.Bernard, Abortion Law in Transnational Perspective, Cases and Controversies. Philadelphia, University of Pennsylvania press, 2014, p. 1



recognition of rights such as the right to privacy, to health, to bodily autonomy and to non-discrimination has enabled reproductive rights defenders to interpret and mobilise these legal instruments to guarantee women access to safe abortion services that respect their dignity.

In concrete terms, this approach has led to significant advances:

- Cumulative use of fundamental rights: Rather than seeing abortion as an autonomous right, defenders rely on a set of rights already recognized to challenge abusive restrictions. For example, the violation of bodily autonomy or the denial of care in the case of abortion can be considered as infringements of fundamental human rights.

- Bodies such as the European Court of Human Rights or other national courts have sometimes used these arguments to order better access to abortion care. Similarly, some states have chosen to strengthen the legal protection of this right by enshrining it, symbolically or concretely, in their Constitution or national legislation.

- Reducing risks to women's health: Based on the rights to health and integrity, this interpretation aims to counter the use of clandestine abortions, which present major risks to maternal health.

This development marks a paradigm shift: it is no longer simply a moral or political debate, but a question of respect for fundamental rights and the protection of women's health in the context of international commitments to equality and reproductive rights.¹

Second requirement: International Instruments and the Protection of Reproductive Rights

We have seen above that there is no direct regulation to protect the right to abortion, but rather protection was through some derivative rights such as the right to life and the right to health in addition to these rights, and with the advancement of means of protection, we find that there are international legal means that are considered one of the most important means that contributed to the regulation of the right to abortion, and the most important of these means are the International Covenant on Economic, Social and Cultural Rights (PIDESC), the International Covenant on Civil and Political Rights (PIDCP), the International Covenant on the Elimination of All Forms of Discrimination against Women, and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

The International Covenant on Economic, Social and Cultural Rights, one of the main international human rights instruments, aims to guarantee and promote economic, social and cultural rights for all without discrimination, in order to ensure

¹ BERGER Vincent, *Jurisprudence de la Cour Européenne des Droits de l'Homme*, Préfaces par Louis-Edmond Pettiti, 13eme éd, DALLOZ, 2014,



equal dignity and a decent life. Article 12¹ of the Covenant stresses the need to take the necessary measures and means to improve health and reduce mortality. Although it does not explicitly mention abortion, it does stipulate the need to create the conditions and means to benefit from health services and assistance in the event of sickness. In this way, it has ensured that women who do not wish to continue their pregnancy can benefit from safe treatment without having to resort to dangerous and life-threatening methods of terminating pregnancy, in direct violation of Article 12 of the International Covenant. In addition, other articles of the above-mentioned conventions and covenants reinforce the protection of the right to safe abortion through other rights recognized to the pregnant woman as an individual entitled to enjoy these rights, such as the right to life. These laws protect women who live in a society whose domestic law prohibits abortion in all cases. This is dehumanizing and contrary to human rights and the various international laws that stipulate the right to life. At least when a woman's life is in danger because of the pregnancy, she must have the right to life, because her life comes before that of the fetus, and under no circumstances can the life of the fetus take precedence over the life of the mother. The various laws, treaties and conventions therefore impose an obligation on States to respect the rights enshrined in their provisions, in particular the right to life and health, The right to dignity² and the right to be free from any form of discrimination that prevents women from enjoying their reproductive rights.

¹ International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted by UN General Assembly Resolution 2200A (XXI) on 16 December 1966, entered into force on 3 January 1976., Art. 12.

² Council of Europe, European Court of Human Rights. Affaire VO c. France (Requête N.53924/00), Arrêt Strasbourg 8 juillet 2004, p.15 [The Convention on Human Rights and biomedicine, said that the member states of the Council of Europe and other signatory states, and the European Community, must take, in the field of the applications of biology and medicine, the measures necessary to guarantee the dignity of the human being and the fundamental rights and freedoms of the individual....]



THE SECOND TOPIC: LIMITATIONS AND DISPARITIES IN THE APPLICATION OF INTERNATIONAL LAW

First requirement: Regional and national disparities

International human rights law faces major challenges in its application, observance and enforcement, as it often comes up against national legislation that varies in the application of its provisions. between the laws of countries with liberal legislation, more open to individual freedoms and fundamental laws, and therefore in which recourse to safe abortion is guaranteed as an embodiment of the rights enshrined in international law to protect human rights, and legislation that imposes partial restrictions on recognition of the right to abortion, authorizing it only in certain cases, and legislation in which abortion is completely banned or almost banned. This diversity between restrictive and permissive legislation raises the question of the effectiveness of international human rights law and the effects of conflicting national legislation on the non-application of international human rights law. Indeed, the position of the various national legislations is reflected in the evidence of the effectiveness of international human rights law through the implementation by national and international courts of their legal rules in accordance with their constitutions or the implementation of the protective rules of international human rights law.

The member states of the Council of Europe, with the exception of one country¹, according to studies developed by the United Nations Organization

Four countries prohibit or almost prohibit abortion except in the event of a threat to the life of the mother, while the majority of other countries allow recourse to it in a more extensive manner.² We note through judicial applications in various regions that the recognition and judicial protection of stress ranges between restricted and tolerant, and it appears through various judicial decisions that there is some development in the field of protection and adoption of human rights rules, for example, abortion in Colombia remained illegal until 2006,³ but this country advanced in this field and showed more protection for abortion, after it was made within the rules of the criminal code in all cases, regardless of the reason that the

¹ International Planned Parenthood Federation, Abortion Legislation in Europe, IPPF European Network, July 2002, & Abortion Policies: A Global Review, Division de la population de l'ONU, June 2002, (except la Serbie-Monténégro).

² Council of Europe, European Court of Human Rights, Vo v. France, Judgment, 8 July 2004, Strasbourg, p. 32.

³ STIFANI M. Bianca, GIL U. Laura, GONZALEZ V. Ana Cristina, VILLARREAL V. Cristina, "Abortion as a human right: The struggle to implement the abortion law in Colombia", Int J Gynaecol Obstet, Vol.43, Issue S4, Special Issue: Implementing and expanding safe abortion care: an international comparative case study of six countries, October 2018, p. 13



teenager resorted to the termination of the pregnancy, she is considered to have committed a crime. In Latin American countries, abortion is restricted, as it is considered an offence under the Penal Code, except in special circumstances where the pregnancy poses a danger to the teenager who wishes to terminate it¹. Poland remains one of the countries that still largely criminalizes abortion and does not allow it even in cases of congenital malformations of the fetus, as this constitutes a breach of the constitution and the jurist believes that this prohibition is likely to make it impossible to resort to the rules of human rights law in the future².

In many Muslim countries, the issue of abortion is closely linked to interpretations of religious texts (in particular the Koran and the Sunna) and Islamic legal traditions (Sharia). However, these interpretations vary considerably from country to country. While some countries apply very restrictive laws, authorizing abortion only when a woman's life or health is in danger (or even in the case of rape in some instances), others have a more flexible framework. The differences can be explained in part by :

Islamic legal schools: The four Sunni schools (Hanafi, Malekite, Shafiite and Hanbali) and certain Shiite traditions offer nuanced positions on when the soul (or animation) is breathed into the fetus. For example, some consider that before a certain number of days (often 40 or 120 days after conception), the fetus does not yet have the status of fully protected human life. In some countries, this may allow access to abortion under very specific conditions.

National legislation: In several Muslim countries, legislation is partly based on these interpretations. For example, in Tunisia, which is often cited as one of the most liberal Muslim countries in terms of women's rights, abortion is legal up to the 12th week of pregnancy and accessible under certain conditions. Other countries, such as Saudi Arabia, Iran and Pakistan, apply much more restrictive laws, authorizing abortion only when the mother's life is threatened or in very exceptional cases.

Influence of the socio-political context: In addition to religious considerations, historical, cultural and political factors play an important role. In some countries, debates around women's rights and reproductive health reforms can lead to legislative revisions, even in predominantly Muslim contexts.

Concrete examples

Tunisia: Considered to be one of the most progressive Muslim countries in terms of reproductive rights, Tunisia legalized abortion in the 1970s and keeps it accessible as part of a public health system. This can be explained by a desire for modernization and liberalization inherited from the policies of the Bourguiba era.

¹ Abortion as human rights, op. cit, p 14

² BUCHOLC, Marta, "Abortion Law and Human Rights in Poland: The Closing of the Jurisprudential Horizon", Hague Journal on the Rule Law, Vol. 14, No. 2, 2022, p 73.



Turkey: Turkey authorizes abortion on request up to a certain term (around 10 weeks of amenorrhea) and has a legal framework which, while taking cultural sensitivities into account, allows relatively wide access to this service.

Gulf States and certain North African countries (such as Saudi Arabia, Iran, Morocco and Algeria): The laws in these countries are generally more restrictive. Abortion is often authorized only in cases where the woman's life is in danger or, in some cases, in cases of rape. These restrictions are justified by religious and cultural arguments that value the protection of life from the moment of conception.

In **Algeria**, The abortion bill has been a longstanding debate in the People's Assembly since November 2017, and has now been closed following the promulgation of the Health Law 2018. The latter explicitly provides for an exemption from health abortion (also called health or medical interruption aimed at stopping a pregnancy for medical reasons) aimed at preserving the health of the mother during pregnancy. This practice is governed by Law No. 18-11 of 18 Shawwal 1439 (2 July 2018) on health in accordance with the cases mentioned in the regulations. Although abortion is taboo in our society, it is now legalized after many cases in hospitals.

The Penal Code (1966 to 1992) devotes an entire chapter to abortion, which imposes severe and inflexible penalties (imprisonment and fines), leaving mothers and their spouses in great distress, in addition to the risks that health professionals, including doctors, midwives, dentists, pharmacists, as well as students in medicine or dentistry, employees in pharmacy, herbalists, bandages, surgical instrument dealers, nurses, masseuses, are exposed to if they practice or even instigate abortion.

The new health law is synonymous with change and modernity that minimizes the physical and mental suffering of future parents. Abortion is practiced exclusively in public hospitals and is subject to authorization by the competent administration, however, the right to abortion remains limited pending further clarification by regulatory means.

Second requirement: Obstacles and Challenges

International human rights law faces a real crisis in its implementation when it comes to abortion, and despite all the protective articles contained in its various rules, it collides with many obstacles, including moral, cultural, and even national laws or the policies adopted by states and their will to facilitate its application or not, and this may be due to the conflict between the clauses of the constitutions of these countries and the clauses that came in international human rights law, despite the fact that it is supposed to recognize every person's free choice towards his or her body and enjoy the protection stipulated in the human rights to be applied. However, the most important obstacles facing these rights when applied are due to religious justifications that link the issue of abortion to the life of the fetus. The conflict between the provisions of the constitutions of these countries and the provisions of international human rights law, despite the fact that every person is supposed to be recognized as a free choice towards his body and enjoy the protection established within human



rights to be applied to him without restriction or condition¹. The matter varies even with regard to the laws that allow abortion, as they link it to the passage of a certain period of pregnancy during which the pregnancy can be disposed of due to the fact that the fetus has not yet breathed a soul. Therefore, states, by adopting in their internal constitutions a particular religion, establish laws in line with those religions, as the recognition of the legal personality of the fetus in many internal laws guarantees this. The link is clear here when criminalizing abortion, such as Italian law (article 17 of the law on abortion), Spanish law (article 157 of the Penal Code), and Turkish law (article 456 of the Penal Code), and establishing penalties for anyone who causes or assists in abortion or harm to the fetus, as well as for those who cause or assist in abortion or harm to the fetus, as well as the Turkish law, article 456 of the Penal Code.²

Debates on abortion in Muslim countries today are influenced by a number of factors, such as the modernization of health systems and improved access to care; women's rights movements (local activists, often supported by international organizations, calling for greater recognition of reproductive rights, which may lead to revisions of existing laws or better application of provisions already in place); External influences and cultural exchanges (globalization and communication via social networks make it possible to compare legal frameworks and spread arguments in favor of greater access to abortion, even in historically conservative contexts).

In summary, abortion in Muslim countries presents a wide diversity of legal regimes and approaches, ranging from relatively liberal access, as in Tunisia or Turkey, to severe restrictions, as in some Gulf or North African countries. This diversity reflects not only the different interpretations of Sharia law and religious texts, but also the socio-economic and political contexts specific to each country.

These factors show that, despite a common religious framework, there are many different legal and political responses to the issue of abortion in the Muslim world, with major issues at stake in terms of public health and women's rights.

¹ ATLAM Henri, *Le corps humains, sujet des droits de l'homme*, Nation Unies, Unesco 1998..

² Council of Europe, European Court of Human Rights, *Vo v. France*, Judgment, 8 July 2004, Strasbourg, p 21



Conclusion:

International human rights law provides broad protection to ensure women's reproductive rights. However, its implementation has remained partial or can be said to be unbalanced, and despite the efforts made at the international level to ensure its application, it has remained unsuccessful and effective due to ethnic, religious, political and legal diversity, which has led women who do not want to maintain a pregnancy for whatever reason to resort to unsafe abortion methods that often lead to death or disability and the research on the extent of the effectiveness and effectiveness of international human rights law shows that this law has undisputedly contributed to providing individuals with legal tools that they can rely on in litigation.

According to the Center for Reproductive Rights, 40% of the world's women live in countries with restrictive abortion legislation. These restrictions have a major impact on women's lives: every year, the WHO estimates that 39,000 women die as a result of unsafe abortions. However, even in countries where abortion is legal, obstacles can still exist, such as high costs, waiting times, parental or marital consent requirements, and social stigma.

As the NGO Amnesty International points out, whatever the legislation in a country, women have recourse to abortion in the same proportions: 37 out of 1,000 when the law prohibits it, 34 out of 1,000 when it authorizes it. The difference is the danger to women's health: clandestine abortions are the third leading cause of maternal mortality in the world.

The research into the effectiveness and effectiveness of international human rights law shows that this law has undisputedly contributed to providing individuals with legal tools that they can rely on when litigating¹, but they are only effective tools if they are to some extent strongly enshrined in international constitutions and thus it can be said that the effectiveness of this law lies in finding a fair balance that lies at the heart of the exercise of human rights by supreme courts such as the Court of Strasbourg.

¹ Les droits de l'homme et L'efficacité de la justice, Réflexions sur l'efficacité du droit des droits fondamentaux, Pierre-François DOCQUIR, Op. Cit, P 30



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