

POLICY BRIEF ON THE RIGHT TO ABORTION



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Purpose

The purpose of this policy brief is to present the international legal regulations on the right to artificial termination of pregnancy (abortion), the existing international standards and practices, as well as to elaborate counter-arguments for initiatives calling for restricting access to the right to abortion. The paper is prepared for representatives of state agencies and civil society carrying out advocacy in this area, including working on legislative initiatives. The approach applied in developing this paper is rights-based and evidence-based.

Historical Perspective and Overview of the Situation in Armenia

As in all former Soviet Union Republics, in Armenia too, the ban on abortions had for years been considered as the main instrument for ensuring . In 1920, for the first time in history, abortion was legalized in the Soviet Union; however it was banned in 1936. In 1955, the ban was lifted with the argument that during the years of the ban the mortality rate of women dramatically rose in all over the Soviet Union due to unsafe abortions carried out in homes. ¹

The legal regulations on abortion in Armenia were codified in the "RA Law on Human Reproductive Health and Reproductive Right" (hereinafter, Law) adopted in 2002. According to the Law, abortion before the 12th week of pregnancy is performed upon the demand of the woman and upon medical advice, with the woman's written consent. Abortion between the 12th and 22nd

¹ See, "Что было после запрета аборта в 1936 году" (What happened after the ban of abortion in 1936), http://www.demoscope.ru/weekly/2005/0221/reprod01.php?fbclid=IwAR1qCd8ynu1DH_vJ-cz07Xz_DaEwVhi4kVj4krckHpiuPcQw2hjLZUFZafA#_FN_17



weeks of pregnancy is carried out with the written consent of the woman only upon the presence of medical advice or social circumstances, the list of which is approved by a Government decision.²

In 2016, the Law was amended incorporating a number of restrictions to the accessibility of abortion, including the ban on sex-selective abortions, the 3-day mandatory waiting period and mandatory medical counseling on the potential negative consequences of abortion, as well as counseling on means and/or methods of contraception.

In recent years, and most actively in 2020 and 2021, a number of initiatives surfaced in the public discourse calling for a ban of abortion. The activities of these initiatives range from making petitions on the protection of the life of "unborn child" to organizing campaigns³ promoting fertility⁴ and against sex-selective abortions under an overall "prolife"⁵ ideology.

This context calls for a scrutiny of the international legal regulations on abortion and the fundamental rights of women, case law and international practice.

International Standards of the Right to Abortion

Abortion is one of the highest manners of exercising the right to privacy by women, a fundamental human right to make a personal choice independently and freely, to make a reproductive decision

² See RA Government Decision 180-N of February 23, 2017 on Approving the procedure and conditions for artificial termination of pregnancy, <https://www.arlis.am/DocumentView.aspx?docID=111980>

³ See <https://www.facebook.com/ProLife-Armenia-102500398250647>

⁴ In April 2020, the lawyers of a private law firm specialized in commercial law presented a petition to the Parliament on the protection of the right to life of "unborn child" and called for adopting a law to ban abortion. The petition was discussed in one of the committees in September 2020 and the proposed draft law was rejected. This was followed by statements of a number of parliamentarians to propose similar draft laws. The petition in Armenian is available online at:

http://www.parliament.am/committee_docs7/Social/Hanragir_26.06.2020.pdf?fbclid=IwAR2Xm7sR610liCg5fPrtNbkZXVtFGJ6SwcVX1ZGHjQJ5wMRGqaqL6s7R8Qk

⁵ These groups call themselves "prolife" aiming to emphasize that life starts from the moment of conception.



free from inhuman treatment, rude or coercive interventions. While it has taken decades of struggle to bring societies to this understanding and recognition of this fundamental right of women, up until now women face difficulties and barriers.

As has already been mentioned, the right to abortion was no longer restricted in the Soviet Union starting 1955. Due to the policy adopted by the state, the secularization of the society, as well as the vertical governance of the state, the right to abortion did not become a subject to broad public scrutiny and judicial examinations.

The situation was different in the USA and Europe where the restrictions to the right to abortion, at times its absolute ban at the second half of the 20th century and the beginning of the 21st century, made the recognition of the right to abortion an imperative and it was brought up to scrutiny by highest courts. These processes resulted in setting the legal foundations for the right to abortion and the standards of its implementation.

Abortion as a woman's fundamental right was first acknowledged by the Supreme Court of the USA in the Roe v. Wade landmark decision in 1973.⁶ The plaintiff was a woman who wished to terminate her third pregnancy; however the anti-abortion legislation of her state would not allow it providing criminal liability for any woman undergoing illegal abortion. Roe was forced to lie that she was a victim of rape assuming that this would grant her right to abortion, however it later turned out that the legislation of the state did not contain an exceptions even for this case. The woman had to deliver a child and hand it over for adoption. The US Supreme Court, in their ruling over Roe v. Wade, held that the US constitution protected the freedom of a woman to terminate her pregnancy without any action by the government as part of the woman's right to protection of her privacy. As a result of this decision, the federal and state anti-abortion laws were revisited and the right to abortion was recognized as a right protected under the Due Process Clause of the 14th

⁶ See, <https://supreme.justia.com/cases/federal/us/410/113/>



Amendment to the US Constitution by which the right to privacy was protected.⁷ After this precedent, the American society was split into two polarized groups around abortion: one propagating conscious free choice by a woman, who is known to be the "pro-choice" groups and groups advocating against this right and propagating for restriction of abortion, also known as "anti-choice"⁸ groups.

Since 1970s, the European Court of Human Rights has also dealt with issues of the right to abortion; however the landmark rulings that became a case law were made in the 2000s in the A. B. and C. v. Ireland; R. R. v. Poland; P. and S. v. Poland and several other cases.⁹ The ECtHR rulings are predominantly based on the "European Consensus" on the right, meaning that the more European states adopted regulations recognizing the right to abortion, the stronger the case law of the ECtHR became on the recognizing the right to abortion as a fundamental right of women.

In the past 60 years, significant progress has been made in Europe in relation to legalization of abortion and accessibility of safe and legal abortion services for women. Today, nearly all European states (41), allow abortion on a woman's request or broad social grounds, while some European countries continue to enact reforms to remove harmful procedural and regulatory barriers in order to ensure accessibility of abortion.¹⁰ As a result of this legalization process, the number of risky and unsafe abortions has significantly declined in Europe. Strict restrictions continue to be enforced in Andorra, Lichtenstein, Monaco, Malta, San Marino and Poland. Restrictions of the right to abortion are manifested in a number of ways, including the following:

⁷ The recognition of the right was not absolute, it predominantly referred to the choice of the woman to have abortion only in the first trimester of pregnancy, while for terms beyond the third trimester, the government was entitled to interfere by setting out the circumstances under which abortion during these terms was considered legal.

⁸ These groups also call themselves "pro-life" as they wish to emphasize that according to them, life starts at the moment of conception.

⁹ See ECHR document at: https://www.echr.coe.int/documents/fs_reproductive_eng.pdf

¹⁰ See, <https://reproductiverights.org/european-abortion-law-comparative-overview-0/>



1. **Criminalization** of abortion, wherein criminal liability is placed upon the doctor performing the abortion or even the woman (for example, in Bolivia, Chile and a number of other Latin American states).
2. **Extremely short terms** for abortions on request, such as a couple of weeks only. These short terms become largely a formality, as women often learn of the fact of pregnancy (especially of unplanned pregnancy) when abortion is no longer permitted.
3. **Mandatory waiting periods** for abortions on request, which entails approval of the woman's decision of abortion only after a few days (normally, after 2-5 days). This means that the woman needs to visit the healthcare institution at least twice in order to have abortion performed. The mandatory waiting period, as well as the extremely short terms within which abortion is allowed, make especially the rural women and those living far from healthcare institutions vulnerable; they often have to spend additional time and financial resources to have abortion, and in case they lack these resources, they are often deprived of the right to abortion.
4. **Mandatory counseling** (often biased) aimed at convincing the woman by all means to drop the idea of abortion. During counseling, the potential negative impacts of abortion are presented, but often involve psychological pressure on the woman when she is presented detailed description of the growth of the fetus, the formation of organs and other circumstances.
5. **Third partie authorization procedure**, which means that minors, persons with disabilities and in certain jurisdictions, married women cannot make a sovereign decision on abortion and need to receive the agreement of their parent, guardians, medical committee or partner.
6. **Refusing medical care** on the grounds of conscience or religious belief (conscientious objection), which means that a doctor may decline performing abortion based on their religious views or beliefs. In countries with such regulations, the accessibility of abortion



is significantly restricted as the medical staffs are free to decline abortion services and women are often forced to travel from one city to another to access abortion services.

7. Ban on sex-selective abortions.

Judicial processes have emerged around these issues in a number of countries. More specifically, the anti-abortion groups in Croatia, Portugal and Slovakia were disputing the constitutionality of abortion on demand; however their claims were declined by supreme judicial authorities. In Sweden and the UK, the right of medical personnel to refuse abortion based on conscience or belief was brought up to judicial review. Courts decided upon rejecting conscientious objection in medical settings as the widespread declinations of care services might result in impeding women to exercise their right and resorting to unsafe abortions which could lead to severe consequences to their lives and health.

One of the milestones in ECHR case law is the **P. and S. v Poland case**,¹¹ in which the Court addressed the issue of **abortion stigma**. One of the two applicants was a 14-year-old girl who was raped by her classmate and became pregnant. The second applicant was her mother, who had reported the crime to the police. The forensic examination revealed that the girl was pregnant, and with her mother's consent, the girl decided to terminate the pregnancy. Despite the fact that the law in Poland allowed abortion in the event of sexual assault, the mother and her daughter repeatedly faced barriers; from being assigned to an appointment with a Catholic priest without the girl's consent, all the way to suggestions to marry her off and publicizing their personal information in media.

The hospitals in Warsaw declined performing abortion and required the mother to sign a consent form by which she agreed to her daughter's abortion and acknowledged that it could lead to her death. Then, the state authorities separated the girl from her mother attempting to deprive the

¹¹ See ECHR ruling at: [https://hudoc.echr.coe.int/eng-press#{%22itemid%22:\[%22003-4140612-4882633%22\]}](https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-4140612-4882633%22]})



mother of parenthood rights for advising her daughter to carry out abortion; the girl was transferred to a care institution and only after repeated complaints of the woman was her daughter given an opportunity of abortion. The ECHR found the violation of Article 3 and Article 8 of the Convention – prohibition of inhuman treatment and the right to respect for private life, as the Polish authorities repeatedly disrupted the lawful exercise of the applicant's right to access to abortion, which resulted in severe mental and physical health consequences.

The UN Committee on the Rights of the Child has recommended that all states decriminalize abortion and safeguard accessibility of safe abortion and post-abortion services for girls.¹² The **Committee on Elimination of All Forms of Discrimination against Women** has recommended¹³ that states ensure accessibility of safe abortion as part of reproductive health services.¹⁴

The UN Human Rights Committee has also addressed the dangerous nature of restrictive laws. In the **Mellet v. Ireland** case decision from 2016,¹⁵ the Committee found that strict restrictions to access to abortion in Ireland amounted to inhuman degrading treatment against a woman. During the pregnancy of the applicant woman, it was found out that the fetus had a fatal congenital heart defect, in other words, that it would not survive before delivery and even after birth. Nonetheless, even in this situation, the legislation of Ireland would not permit abortion. The woman was informed by the doctor that even if the fetus survived birth, it would suffer a great deal. The woman expressed a wish to terminate pregnancy to which the doctor proposed traveling to another country

¹² Committee on the Rights of the Child, General Comment No. 20, Implementation of the Rights of the Child during Adolescence, UN Doc. CRC/C/GC/20 (2016), para. 60; Committee on the Rights of the Child (2013, see note 13), para. 70.

¹³ CEDAW Committee, Concluding Observations on New Zealand, UN Doc. CEDAW/C/NZL/CO/7 (2012), para. 35(a) CEDAW Committee, Concluding Observations on Sierra Leone, UN Doc. CEDAW/C/SLE/CO/6 (2014), para. 32.

¹⁴ <https://www.hhrjournal.org/2017/06/the-role-of-international-human-rights-norms-in-the-liberalization-of-abortion-laws-globally/>

¹⁵ <https://juris.ohchr.org/Search/Details/2152>



without providing any further information. Together with her husband, the woman travelled to England where the abortion was performed in an environment foreign to her and she had to immediately return to Ireland, as she did not have financial resources to stay in England longer. The abortion was performed by means of induced labor and she delivered a stillborn infant and upon return to Ireland, the woman suffered psychological trauma, and did not receive any aftercare and mental health support.

The woman submitted before the Committee violations of her right to be free from inhuman and degrading treatment (Article 7) and the right to privacy (Article 17) of the International Covenant on Civil and Political Rights. The Committee, thus, found that the woman went through psychological suffering due to the policy of criminalization of abortion by Ireland which could be prevented if she would have been able to undergo the same medical procedures in an environment known to her. The stigma and shame around abortion exacerbated her suffering. After this decision and a similar decision by the Constitutional Court of Ireland, a state committee was set up to develop a package of amendments to the abortion legislation of Ireland which was eventually enacted in 2020.

The ban on sex-selective abortion is one of most controversial regulations. Parallel to the scientific development which allows in-utero identification of the sex of the fetus, in a number of traditional (patriarchal) societies, the ratio of the sex of newborn infants has become skewed towards male infants.¹⁶ Examination of the reasons of sex-selective abortions has made it clear that they are rooted in gender stereotypes, inequality and societal pressure, therefore preference is given to sons.

A number of countries saw the solution to this demographic issue in banning sex-selective abortions, which entailed criminal liability for medical personnel (often also for parents) performing termination of pregnancy due to the sex of the fetus. However, more recent research

¹⁶ China, India, South Korea, in the European region – Albania, Georgia, Armenia, Montenegro.



shows that in countries (India, China) where sex-selective abortions have been banned for many years already, the issue continues to pose a big concern, with the ban not resulting in shifting the ratio of newborns.¹⁷ In contrast to these countries, in states undergoing social and cultural changes (for example, South Korea) and organizing widespread media campaigns aimed at weakening gender inequality, the shift in the ratio of newborns is quite visible.

In addition to being inefficient, the ban of sex-selective abortions also **limits the accessibility of abortion for all women** and holds control over the reasons behind women's decisions. This ban endangers the life and health of women by making the accessibility of abortion more difficult for women who need it. Regulations providing criminal liability make safe abortion services less accessible to all women because the medical personnel are forced to apply stricter procedures in order to avoid criminal prosecution. Thus, they result in unsafe and illegal abortion practices.¹⁸

While the ban on sex-selective abortion in a number of South-East Asian and South Caucasian countries is justified by demographic arguments, similar attempts in the USA and Canada are promoted by anti-abortion forces and aim to restrict accessibility of abortion for women.¹⁹

Thus, the ban and criminalization of sex-selective abortions leave the entire burden of addressing this larger social issue upon the shoulders of women and the medical personnel performing the abortion and therefore it endangers the health and dignity of women and misses out effective alternative solutions.

In a number of countries, including Armenia, the legislation sets out for a mandatory waiting period between the time the woman expresses her desire for abortion and performance of abortion.

¹⁷ See <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8153244/>

¹⁸ https://www.who.int/reproductivehealth/publications/gender_rights/9789241501460/en/

¹⁹ See <https://www.nbcnews.com/news/us-news/sex-selective-abortion-reproductive-rights-being-pitted-against-gender-n1067886> , <https://www.guttmacher.org/state-policy/explore/abortion-bans-cases-sex-or-race-selection-or-genetic-anomaly>



If this waiting time is not adhered to, the abortion will not be considered legal. The WHO guideline on abortion clearly sets out that these waiting times do not pursue any medical purpose; they degrade the autonomy of women to make their own decisions and delay their opportunity of using safe abortion services. They also entail additional financial and logistic costs, as women often have to cross certain distances to reach a medical institution. As a result, women living in rural areas and those living in domestic violence are disproportionately affected by this restriction.²⁰

The Moment the Right to Life Begins

The discourse against the right to abortion often focuses on the argument that the right to life begins at conception and that the unborn child has a right to live. In this context, the international legal regulations and commentaries of courts on the right to life are important sources of reference.

It is noteworthy that none of the international or regional human rights conventions apply protection of the right to life in their substance to a fertilized embryo. The ECHR has also addressed the substance of the right to life and has noted that the language of the Convention confirms the opinion that **Article 2 of the Convention does not extend to the period before birth** and that recognition of the absolute right to life before birth would be against the subject and purposes of the Convention.²¹

The absolute right to life before birth is not recognized by any other convention either, including the UN Convention on the Rights of the Child. The Committee of the Convention has never interpreted the provisions of the Convention in this way. The CEDAW Committee has held that laws restricting abortion can violate the right of women to health and life, while prioritizing the

²⁰ See, <https://rm.coe.int/women-s-sexual-and-reproductive-health-and-rights-in-europe-issue-pape/168076dead>

²¹ See, ECHR ruling over *Paton v. United Kingdom*



rights of an unborn fetus over the life and health of a woman violates fundamental rights to equality and being free from discrimination.²²

As has already been mentioned, ECHR has addressed the issue of abortion in a number of its rulings and has held that issues arising from abortion are related to the right of women to freedom of private life and respect for privacy.²³ Moreover, the Court has also held that the rights of the woman who has decided to terminate pregnancy need to be prioritized even if the husband of the woman does not agree with her decision.²⁴ As for the rights of the unborn embryo in this process, the Court has noted that the rights of the unborn embryo are restricted to the rights of the pregnant woman.²⁵

Examination of the experience of various countries shows that the ban of abortion leads to women performing this procedure in home conditions. According to the WHO, around 47.000 women around the world die due to unsafe abortions, while 5 mln women become disabled.²⁶

Summary

The international and regional human rights documents, their interpretations by courts and human rights bodies, the legislative trends globally and particularly in the European countries show that accessibility of safe and secure legal abortion is an inalienable part of the right of women to privacy and health. Restrictions to the accessibility of abortion can lead to violations of women's right to life and being free from inhuman treatment.

²² See more details on the position of international human rights bodies at:

https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/RTL_3%2014%2012.pdf

²³ See, EHCR Ruling over Tysiąc c. Pologne, May 20, 2007, Complaint N 5410/03.

²⁴ See, Boso c. Italie ruling, September 5, 2002, complaint N 50490/99.

²⁵ See, Vo c. France ruling, July 8, 2004, complaint N 53924/00.

²⁶ See, <https://www.who.int/news-room/fact-sheets/detail/preventing-unsafe-abortion>



According to Article 81 of Armenian Constitution, interpretation of the basic rights and freedoms enshrined in the Constitution should take into account practice of bodies operating on the basis of international treaties on human rights, ratified by the Republic of Armenia, The interpretations of the international bodies presented in this policy paper, therefore, are to be taken into account when attempting to interpret constitutional rights in Armenia.

Given the above-stated legal developments, as well as the historical legal tradition in Armenia of respecting the right of women to terminate pregnancy, **we recommend developing the state policy in the direction of making safe abortion accessible in more flexible ways and removing the 3-day mandatory waiting period.**

We would like to stress that the existing regulations and accessibility of abortion should not be lowered and no decisions and policies should be adopted with a negative impact on the accessibility of abortion that will endanger the life and health of women.