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A comparative examination of the legality of restrictions on abortion in light of the right to gender equality

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INTRODUCTION

This memorandum was prepared by the Berkeley Center on Comparative Equality and Anti-Discrimination Law in cooperation with the Equality Law Clinic at the Université libre de Bruxelles (ULB).¹ We hope it will be of service to advocates and policy makers in abortion restrictive countries challenging punitive, unjust, and often deadly legal regimes.

Within this memo, we provide examples of countries around the globe recognizing abortion rights through legislation, referendum, and court mandate. The analysis includes jurisdictions where abortion continues to be heavily restricted as well as those where abortion is currently readily available. We discuss the legal framework used in each country to expand abortion rights, focusing primarily on judicial understandings of women's rights, gender equality and other fundamental rights². We consider the use of national constitutions and legislation as well as regional and international treaties in establishing the basis for abortion access. We are aware of the gap that might exist between the law and its implementation on the ground, as well as the many obstacles in enforcing the decisions of international courts or committees. Our legal analysis is supplemented by data regarding the health, well-being, relationships, and lived experiences of women and others with gestational capacity.

I. Human rights courts, national constitutional courts, and national legislatures are increasingly recognizing that unreasonable restrictions on access to abortion violate the right to gender equality

National governments and international human rights bodies alike are increasingly recognizing that unreasonable restrictions on access to abortion violate the right to gender equality. These courts and legislatures exist within different political and cultural realities and draw on distinct legal frameworks but have reached the same conclusion: the right to abortion must be recognized if gender equality is to be achieved. Some representative examples follow.

a. Argentina and Argentine National Legislation

On January 14, 2021, Argentine President Alberto Fernández signed the Voluntary Interruption of Pregnancy Act into law, legalizing abortion during the first fourteen weeks of

¹ This memorandum was prepared by Anna Katz, Alyssa Mejia Whisler, and AJ Stone Jonathan under the supervision of David Oppenheimer, Clinical Professor of Law and Director of the Berkeley Center on Comparative Equality and Anti-Discrimination Law with our partners at the Equality Law Clinic at the ULB, Université Libre de Bruxelles, (Hania Ouhnaoui under the supervision of Isabelle Rorive, Full Professor of Law, former President of the Centre Perelman and Senior Expert in the European Equality Law Network) regarding our jointly undertaken research project presenting the question of whether restrictions on the access to abortion constitutes a violation of the right to gender equality. We wish to recognize the contribution of our ULB colleague Nina Hetmanska, who tragically passed away during the time that we were working on this project.

² The authors recognize that people of many genders hold gestational capacity and are affected by restrictions on access to abortion. Within this memo, the authors endeavor to use the most gender inclusive language provided by the relevant regional legislatures or judiciaries, and will directly echo the language used by other sources to present data by demographic. The authors seek to emphasize the importance of and global attention to women's rights while remaining inclusive of all individuals with gestational capacity.

pregnancy.³ The Argentine Senate had approved the bill in late 2020, breaking with the position of the highly influential Catholic Church despite the Roman Catholic faith's recognition in the Argentine Constitution.⁴ Before the passage of the law, abortion was explicitly criminalized in the penal code except in the case of the rape of a mentally disabled woman or where the pregnant person's life was threatened by continued pregnancy.⁵

In 2012, the Argentine Supreme Court had declared that abortion is constitutionally permitted in all cases of rape, referencing the standards set by human rights treaties requiring governments to offer abortion services to rape victims.⁶ The 2021 passage of the Voluntary Interruption of Pregnancy Act brought the penal code in line with this court ruling. Human rights experts praised the legislature's move to legalize abortion as "a historic step in Argentina's fulfilment of its international human rights obligations, and . . . a model for the whole region and beyond."⁷

The Supreme Court of Argentina recognizes a right to gender equality based on Argentina's ratification of several international human rights treaties that provide a right to gender equality. Although gender equality is not explicitly provided in the Argentine Constitution, the document incorporates a number of international treaties, which Argentina treats as merged into constitutional law under Article 75(22). Among these treaties are the American Convention on Human Rights; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; and the Convention on the Elimination of All Forms of Discrimination Against Women.⁸ In addition, Article 16 of the Constitution broadly recognizes that all are equal before the law and Article 37 guarantees "equality of opportunity between men and women" in running for political office.⁹

³ *In Historic Victory, Argentina Legalizes Abortion*, CENTER FOR REPRODUCTIVE RIGHTS (Jan. 15, 2021), <https://reproductiverights.org/historic-vote-argentina-legalize-abortion/>; Law No. 27610, Jan. 15, 2021, [34.562] B.O. 3 (Arg.),

<https://www.boletinoficial.gob.ar/detalleAviso/primera/239https://www.boletinoficial.gob.ar/detalleAviso/primera/239807/20210115#807/20210115#>.

⁴ Katy Watson, *Argentina abortion: Senate approves legalisation in historic decision*, BBC NEWS (Dec. 30, 2020), <https://www.bbc.com/news/world-latin-america-55475036>; see also Art. 2, CONSTITUCIÓN NACIONAL [Const. Nac.] (Arg.), https://www.constituteproject.org/constitution/Argentina_1994.pdf.

⁵ Art. 85 – 88, Código PENAL [Cód. Pen.] [CRIMINAL CODE] (1984) (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/15000-19999/16546/texact.htm#2>.

⁶ *Argentina Decriminalizes Abortion in All Cases of Rape*, CENTER FOR REPRODUCTIVE RIGHTS (Mar. 19, 2012), <https://reproductiverights.org/argentina-decriminalizes-abortion-in-all-cases-of-rape/>; see also *F., A. L. s/ Medida autosatisfactiva*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice] (March, 13, 2012) (Arg.), <http://www.saij.gob.ar/corte-suprema-justicia-nacion-federal-ciudad-autonoma-buenos-aires--medida-autosatisfactiva-fal2000021-2012-03-13/123456789-120-0002-1ots-eupmocsollaf>.

⁷ U.N. Off. of the High Comm'r, *Argentina: UN experts praise historic law legalising abortion*, U.N. DOC. (Dec. 31, 2020), <https://www.ohchr.org/en/press-releases/2020/12/argentina-un-experts-praise-historic-law-legalising-abortion>.

⁸ Art. 75.22, CONSTITUCIÓN NACIONAL [Const. Nac.] (Arg.).

⁹ Art. 16, Art. 37, CONSTITUCIÓN NACIONAL [Const. Nac.] (Arg.).

b. Colombia and the Colombian Constitutional Court

In February 2022, Colombia's Constitutional Court decriminalized abortion within the first twenty-four weeks of pregnancy based in part on the Constitutional right to gender equality.¹⁰ The case expanded a decision from 2006 that had partially decriminalized abortion based on Colombia's ratification of several human rights treaties, but without reliance on the right to gender equality.¹¹

Prior to 2006, Colombia had criminalized abortion with no exceptions.¹² In case C-355 of 2006, the Constitutional Court issued a decision finding that abortion could not be a crime where the pregnancy resulted from rape, incest, or nonconsensual artificial semination, or where a physician determined that the pregnancy threatened the adult's life or the fetus "would suffer serious malformations."¹³ Though the Colombian Constitution includes a right to gender equality,¹⁴ the Court explained their decision as being responsive to international human rights law.¹⁵ They affirmed that the right to abortion was implicit in the right to life,¹⁶ health,¹⁷ integrity, self-determination,¹⁸ privacy,¹⁹ and dignity of women.²⁰

The Court's decision in February 2022 established Colombia as the eighth country in Latin America to decriminalize abortion.²¹ The case originated in 2020, when a coalition of organizations and advocates filed a lawsuit calling on the court to end the use of criminal law to regulate abortion.²² The coalition argued, in part, that Colombia's lack of legislation protecting abortion under exceptions named by the Court obligated the Court to protect gender equality by invalidating the law criminalizing abortion altogether. Citing their obligation to protect prenatal life, the Court declined to decriminalize abortion altogether, instead allowing it up to twenty-four weeks of gestation. The Court agreed with the plaintiffs that the current restrictions denied the

¹⁰ Samantha Schmidt & Diana Durán, *Colombia Court Decriminalizes Abortion, Adding to Regional Momentum*, WASH. POST (Feb. 21, 2022),

<https://www.washingtonpost.com/world/2022/02/21/colombia-decriminalize-legal-abortion/>.

¹¹ Corte Constitucional [C.C.] [Constitutional Court], Sentencia C-355/06 (May, 10, 2006) (Colom.),

<https://www.corteconstitucional.gov.co/relatoria/2006/c-355-06.htm>.

¹² Art. 122-124, CÓDIGO PENAL [Cód. Pen.] [CRIMINAL CODE] (Colom.),

http://www.secretariassenado.gov.co/senado/basedoc/ley_0599_2000_pr004.html#122.

¹³ Sentencia C-355/06 (Colom.) at ¶363.

¹⁴ Art. 13, Constitución POLÍTICA DE COLOMBIA [C.P.] (Colom.), <http://www.secretariassenado.gov.co/constitucion-politica>.

¹⁵ Corte Constitucional [C.C.] [Constitutional Court], Sentencia C-055/22 (Feb. 21, 2022) (Colom.),

<https://www.corteconstitucional.gov.co/Relatoria/2022/C-055-22.htm>.

¹⁶ Art. 11, CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] (Colom.).

¹⁷ Art. 49, CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] (Colom.).

¹⁸ Art. 9, CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] (Colom.).

¹⁹ Art. 15, CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] (Colom.).

²⁰ ART. 21, CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] (Colom.).

²¹ *Causa Justa Lawsuit to Decriminalize Abortion in Colombia*, CENTER FOR REPRODUCTIVE RIGHTS (Sept. 16, 2020), <https://reproductiverights.org/case/causa-justa-decriminalize-abortion-colombia/>.

²² *Statement from the Center for Reproductive Rights on the Constitutional Court Decision Decriminalizing Abortion in Colombia*, CENTER FOR REPRODUCTIVE RIGHTS (Feb. 21, 2022), <https://reproductiverights.org/press-statement-abortion-decriminalized-in-colombia/>.

Constitutionally protected rights to health, free decision on reproduction, the freedom of conscience, and the right to equality of vulnerable women.²³

c. El Salvador and the Inter-American Human Rights Court

El Salvador is one of seven countries in Latin America that ban abortion in all cases. Prior to 1997, abortion was legal in the extreme cases of rape or risk to the pregnant person's life.²⁴ The 1998 Criminal Code made provision of any abortion and consensual receipt of abortion criminal and punishable by up to eight years in prison, with additional sanctions for doctors or anyone performing an abortion without the consent of the pregnant person.²⁵ In addition, El Salvador amended its Constitution in 1999 to recognize as a human person "every human being from the moment of conception."²⁶

On November 30, 2021, the Inter-American Court of Human Rights issued a ruling in *Manuela v. El Salvador* that, for the first time, established standards throughout the region to help protect women seeking reproductive health care, including abortion.²⁷ The Court deemed El Salvador responsible for the death of a Salvadoran woman, Manuela, who in 2008 was sentenced to 30 years in prison for aggravated homicide after suffering an obstetric emergency that resulted in her pregnancy loss.²⁸

In 2008, Manuela injured her pelvis in a fall while unknowingly pregnant. She was brought to the hospital the following day by her parents after being found unconscious in bed, pale, and bleeding. The hospital record reflected that she was admitted due to abortion, and that while admitted Manuela received post-partum care.²⁹ She was diagnosed with severe postpartum preeclampsia and had a blood transfusion recommended.³⁰ Her treating physician then submitted a complaint against Manuela, and the government initiated criminal proceedings charging her with "murder of her newborn son."³¹ Manuela was handcuffed to her hospital bed within a day of admittance, then transferred to the police station before being found guilty of aggravated homicide and sentenced. While incarcerated, Manuela received medical care for a swollen lymph node and was subsequently diagnosed with lymphoma. She underwent chemotherapy before dying in 2010 due to the condition and treatment complications while incarcerated.³²

²³ Corte Constitucional, sentencia C-055/22 (Colom.); see also *Causa Justa Lawsuit*, *supra* note 21.

²⁴ *Manuela et al. v. El Salvador* (2021) Inter-Am. Ct. H.R. No. 13.069 at ¶81, https://www.corteidh.or.cr/docs/casos/articulos/seriec_441_ing.pdf.

²⁵ Art. 133-137, CÓDIGO PENAL [Cód. Pen.] [CRIMINAL CODE] (1997) (El Sal.), https://www.oas.org/dil/esp/codigo_penal_el_salvador.pdf.

²⁶ Tit. I art. 1, CONST. POL. REPUB. EL SAL. [CONSTITUTION] (1983) (El Sal.), https://www.constituteproject.org/constitution/El_Salvador_2014.pdf?lang=en.

²⁷ *Manuela v. El Salvador* (*Inter-American Court of Human Rights*), CENTER FOR REPRODUCTIVE RIGHTS (Mar. 21, 2012), <https://reproductiverights.org/case/manuela-v-el-salvador-inter-american-court-of-human-rights/>; See also FLY SO FAR (Women Make Movies 2021) (documentary directed by Celina Esher portraying the story of Teodora Vasquez, sentenced like Manuela and many others to 30 years in prison for aggravated homicide after suffering an obstetric emergency).

²⁸ Inter-Am. Ct. H.R. No. 13.069 at ¶259.

²⁹ *Id.* at ¶49-53 (Postpartum care included placenta extraction, dilation and curettage, and the suturing of her perineal tissue).

³⁰ *Id.* at ¶55.

³¹ *Id.* at ¶64 (citing the Record of Arrest of Feb. 28, 2008.)

³² *Id.* at ¶64, 73, 83, 88.

In *Manuela v. El Salvador*, the IACHR examined whether El Salvador had upheld certain rights defined in the American Convention, including the rights to life, personal integrity, health, privacy, and equality before the law.³³ The Court ultimately ordered El Salvador to adopt structural measures towards banning the criminalization of pregnant people due to obstetric emergencies. Such measures include developing comprehensive sexual education policies; modifying the legislation on doctor-patient confidentiality to ensure that women are not denounced by the medical personnel who care for them; removing legislation that provides for automatic detention of individuals who are denounced for having committed abortion; and adopting public policies to ensure full access to health care is guaranteed to people who suffer obstetric emergencies.³⁴

While recognizing equality before the law, the Convention does not otherwise explicitly recognize women's rights or gender equality. However, El Salvador has additionally ratified the IACHR's Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, which establishes that women have the right to equal protection, dignity, integrity, and personal liberty.³⁵ The IACHR relied on this as well as the original American Convention in issuing their decision. Interestingly, though not cited as authority in the IACHR case, El Salvador's Constitution does establish that sex may not be a basis for the restriction of any civil rights.³⁶

d. Ireland and the European Court of Human Rights, the U.N. Human Rights Committee, Irish Referendum and National Legislation

In the last fifty years, restrictions on abortion in Ireland have been challenged before multiple human rights courts, as well as in the country's own Supreme Court and Parliament, and by referendum.

Ireland criminalized abortion beginning with the 1861 Offences Against the Person Act, and in 1983 further entrenched this restriction into Irish law with the Eighth Amendment to the Constitution.³⁷ Article 40, holding all citizens equal before the law, was amended to clarify that the "right to life of the unborn" was equal to the "right to life of the mother," and that the State was empowered to "vindicate that right."³⁸ Other legislation further limited the provision of information on abortion services abroad, and barred healthcare providers from giving direct referrals abroad for reproductive services.³⁹

³³ *Id.* at ¶180-189; *American Convention on Human Rights*, 22 Nov. 1969, O.A.S. T.S No. 36 (entered into force 18 July 1978).

³⁴ Inter-Am. Ct. H.R. No. 13.069 at ¶287, 290, 298.

³⁵ *Inter-American Convention on the Prevention, Punishment And Eradication Of Violence Against Women*, 9 June 1994, O.A.S. T.S. No. 36 (entered into force 5 May 1995), <http://www.oas.org/juridico/english/treaties/a-61.html>.

³⁶ Tit. II cap. I art. 3, CONST. POL. REPUB. EL SAL. [CONSTITUTION] (1983) (El Sal.)

³⁷ *History of Abortion in Ireland*, IR. FAM. PLAN. ASS'N (last visited July 14, 2022), <https://www.ifpa.ie/advocacy/abortion-in-ireland-legal-timeline/>.

³⁸ Eighth Amendment, CONSTITUTION ACT (1983) (Act No. C8/1983) (Ir.), <https://www.irishstatutebook.ie/eli/1983/ca/8/enacted/en/print.html>.

³⁹ Regulation of Information Act 1995 (Act No. 5/1995) (Ir.), <https://www.irishstatutebook.ie/eli/1995/act/5/enacted/en/print>.

The Irish Supreme Court heard *Attorney General v. X and Others* in 1992, appealing the grant of an injunction that prohibited X, a fourteen year old girl who was raped and became pregnant, from traveling abroad for an abortion.⁴⁰ Facing forced pregnancy, X was subsequently suicidal. The Court interpreted the Eighth Amendment to establish a right to life for both the “unborn” and the “mother” that, absent clarifying legislation, the Court was constitutionally obligated to balance. Where the life of the mother was at real and substantial risk due to pregnancy, including by potential suicide, the Court determined it necessary to permit abortion.

Ireland’s abortion restrictions were later challenged before the European Court of Human Rights in the *Case of A, B, and C v. Ireland*. A, B, and C were three women living in Ireland who had sought abortion abroad and experienced complications upon returning to Ireland.⁴¹ The Court distinguished between the situations, on one hand, of the first and second applicants (A and B) who travelled for abortion for reasons of health and/or well-being and, on the other hand, the third applicant who did it as she feared a risk to her life. In the cases of A and B, the Court found that there was an interference in the applicants’ right to private life under Article 8 of the Convention, but that this interference was justified. Indeed, the interference was in accordance with the law and pursued the legitimate aim of the protection of life valued by a majority of the Irish people. The prohibition had thus struck a fair balance between the first and second applicants’ right to respect for their private lives and the rights invoked on behalf of the unborn.⁴² The Court concluded that the prohibition of abortion for reasons of health and well-being was not contrary to Article 8, which, the Court recalled could not be interpreted as granting a right to abortion. In the case of C, who challenged the absence of appropriate procedural means to establish her right to a lawful abortion due to risk to her life,⁴³ the Court found that Ireland violated Article 8 by not providing a procedure by which one could establish their right to a lawful abortion.⁴⁴ Though A, B, and C had also cited Article 14, the prohibition of discrimination, the Court concluded that the Article 8 judgement satisfied this challenge without further discussion.⁴⁵

In 2013, after the dreadful death of Savita Halappanavar⁴⁶ was publicized, Ireland adopted the Protection of Life During Pregnancy Act, which updated the abortion ban to include an explicit exception when the life of the pregnant person is endangered.⁴⁷

⁴⁰ *Att’y Gen. v. X & Others*, Supreme Court, ILRM 401 (March, 5, 1992) (Ir.), <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Ireland-%20Attorney%20General%20v%20X%20and%20Others.pdf>.

⁴¹ *A, B, & C v. Ireland* [GC] No. 25579/05 (2010) ECHR, <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-102332%22%7D>}. See a more complete analysis in: Patricia Londono, *Redrafting abortion rights under the Convention: A, B and C v. Ireland*, in E. Brems (Ed.), *Diversity and European Human Rights*, 95-121(Cambridge University Press: 2012).

⁴² ECHR No. 25579/05 at ¶219-241.

⁴³ *Id.*; *Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)*, Nov. 4, 1950, E.T.S. No. 005, https://www.echr.coe.int/Documents/Convention_ENG.pdf.

⁴⁴ ECHR No. 25579/05 at ¶214.

⁴⁵ *Id.* at ¶270; *Convention for Protection of Human Rights and Fundamental Freedoms*, *supra* note 42.

⁴⁶ Savita Halappanavar, 17 weeks pregnant, was completing her dentistry training when she rushed to Galway University Hospital. She was experiencing immense pain and a miscarriage was diagnosed. A termination of pregnancy was refused as there was still a fetal heartbeat. After a week, she went into septic shock and died.

⁴⁷ Protection of Life During Pregnancy Act 2013 (Act No. 35/2013) (Ir.), <https://www.irishstatutebook.ie/eli/2013/act/35/enacted/en/pdf>.

In 2016 and 2017, *Mellet v. Ireland* and *Whelan v. Ireland* challenged Ireland’s abortion restrictions before the United Nations Human Rights Committee. Amanda Mellet had sought an abortion after learning that the fetus she carried would likely die in utero or shortly after birth.⁴⁸ She traveled abroad for the procedure, undergoing 36 hours of induced labor. She returned to Ireland only 12 hours after the still-birth due to the expense of remaining abroad. Upon her return, she received no aftercare from her hospital or care team, as would have been provided had she miscarried.⁴⁹

A year later, the Committee heard the case *Whelan v. Ireland*, addressing a similar fact pattern. Siobhán Whelan, upon learning of the non-viability of her pregnancy, sought an abortion abroad but received no support from her care team in Ireland. Whelan additionally addressed the issue of accommodation at the workplace and with childcare for individuals needing to travel for abortion.⁵⁰

In both cases the Committee held the Irish legislation criminalizing abortion and the provision of resources on abortion violated the rights guaranteed by the International Covenant on Civil and Political Rights.⁵¹ The Committee determined that the laws forcing Mellet and Whelan to procure an abortion overseas contravened Article 7 (freedom from cruel or inhuman treatment), Article 17 (the right to privacy), and Article 26 (equality before the law, including as to sex and gender) of the Covenant.⁵² As a remedy, Ireland was to update their laws on abortion, “including if necessary the Constitution,” to make abortion accessible within Ireland and ensure healthcare providers could provide full information on safe abortion services.⁵⁴

In May 2018, a referendum to repeal the Eighth Amendment was passed by nearly two-thirds of Irish voters.⁵⁵ The Health (Regulation of Termination of Pregnancy) Act, passed in 2018, now allows a woman to receive an abortion after a three-day waiting period and up until twelve weeks of pregnancy, and makes abortion free to residents in Ireland.⁵⁶

e. Mexico and the Mexican Supreme Court

Two decisions from September 2021 by Mexico’s high court, La Suprema Corte de Justicia de la Nación, expanded women’s right to abortion and recognized the gender inequality inherent

⁴⁸ *Mellet v. Ireland*, U.N. Human Rights Comm., Commc’n No. 2324/2013, U.N. Doc. CCPR/C/116/D/2324/2013 (2016), <https://reproductiverights.org/wp-content/uploads/2020/12/CCPR-C-116-D-2324-2013-English-cln-auv.pdf>.

⁴⁹ *Id.* at ¶2.3.

⁵⁰ *Whelan v. Ireland*, U.N. Human Rights Comm., Commc’n No. 2425/2014, CCPR/C/119/D/2425/2014 (2017), https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/IRL/CCPR_C_119_D_2425_2014_25970_E.pdf.

⁵¹ Commc’n No. 2324/2013; Commc’n No. 2425/2014; *International Covenant on Civil and Political Rights*, Dec. 19, 1966, 171 U.N.T.S. 999.

⁵² Commc’n No. 2324/2013; Commc’n No. 2425/2014; *International Covenant on Civil and Political Rights*, *supra* note 49 at 175, 177, 179.

⁵³ Commc’n No. 2324/2013; Commc’n No. 2425/2014.

⁵⁴ Commc’n No. 2324/2013 at ¶17.

⁵⁵ Sarah Bardon, *Ireland votes to remove constitutional ban on abortion by resounding two-thirds majority*, THE IRISH TIMES (May 27, 2018), <https://www.irishtimes.com/news/politics/ireland-votes-to-remove-constitutional-ban-on-abortion-by-resounding-two-thirds-majority-1.3510068>.

⁵⁶ IR. FAM. PLAN. ASS’N, *supra* note 37.

in total bans on the right to abortion.⁵⁷ Abortion restrictions in Mexico had previously differed by local state law, most forms of which were based on the federal 1931 Penal Code criminalizing the procedure.⁵⁸ Previous cases before the Supreme Court had established the right to abortion in cases of rape, nonconsensual artificial insemination, danger to the mother's health, or fetal malformation.⁵⁹

The Court relied on the Mexican Constitution's guarantee of equality between men and women and freedom from gender discrimination in their 2021 decisions.⁶⁰ In AI 148/2017, the Court recognized the constitutional right of pregnant people to obtain legal, safe, and free abortion services in the initial stages of pregnancy.⁶¹ In AI 54/2018, the court struck down part of the General Law regulating health services because it established an expansive right to conscientious objection by medical personnel, thus impeding pregnant people's ability to obtain abortions.⁶² The court emphasized its commitment to combating gender violence and asserted that it recognized "that violations of sexual and reproductive rights of women are forms of gender violence that in some circumstances can begin to constitute cruel, inhumane, and degrading treatment."⁶³

f. Vietnam and National Legislation

Vietnam is one of few countries worldwide that has not historically criminalized abortion. Access to abortion was implicitly established by the country's Constitution, first drafted in 1946, recognizing equality between men and women as well as the obligation of the State and its people to meet the State's population and family planning goals.⁶⁴ The more recent 1992 Constitution specifically provides for the right to gender equality and the prohibition of sex discrimination, and tasks the State with creating conditions for women's development and promotion in society.⁶⁵

Beginning in 1989, Vietnam explicitly recognized the right to abortion through legislation, passing the Law on the Protection of Public Health. The Law entitles women to an abortion "if they so desire," and requires abortion providers to be authorized by the Health Ministry.⁶⁶ The law

⁵⁷ Press Release, Mexican Supreme Court, *Mexican Supreme Court: Landmark Decisions at the Vanguard for Reproductive Rights* (Oct. 1, 2021), <https://www.internet2.scjn.gob.mx/red2/comunicados/noticia.asp?id=6606>.

⁵⁸ *Abortion: Mexico*, HUMAN RIGHTS WATCH (last accessed July 14, 2022), <https://www.hrw.org/legacy/women/abortion/mexico.html>.

⁵⁹ Suprema Corte de Justicia de la Nación [Supreme Court], Acción de Inconstitucionalidad 10/2000 (Jan. 30, 2002) (Mex.), <https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=37867>.

⁶⁰ CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS [Const. Pol.] [CONSTITUTION] (Mex.), <https://www.diputados.gob.mx/LeyesBiblio/ref/cpeum.htm>.

⁶¹ Suprema Corte de Justicia de la Nación [Supreme Court], Acción de inconstitucionalidad 148/2017 (Sept. 7, 2021) (Mex.), <https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=227921>.

⁶² Suprema Corte de Justicia de la Nación [Supreme Court], Acción de Inconstitucionalidad 54/2018 (Sept. 21, 2021) (Mex.), https://www.scjn.gob.mx/sites/default/files/proyectos_resolucion_scjn/documento/2021-08/AI%2054-2018%20-%20PROYECTO.pdf.

⁶³ *Id.* at ¶325.

⁶⁴ *Women of the World: Laws and Policies Affecting Their Reproductive Lives*, CENTER FOR REPRODUCTIVE RIGHTS & ASIAN-PACIFIC RESOURCE AND RESEARCH CENTRE FOR WOMEN (2005), <https://reproductiverights.org/wp-content/uploads/2018/08/Vietnam.pdf>, 222.

⁶⁵ Art. 26, Art. 58.2, HIẾN PHÁP [CONSTITUTION] (1992) (Viet.), https://www.constituteproject.org/constitution/Socialist_Republic_of_Vietnam_2013.pdf?lang=en.

⁶⁶ Về Bảo Vệ Sức Khỏe Nhân Dân [Law on protection of people's health], 21-LCT/HDNN8 (June 30, 1989), <https://vanbanphapluat.co/law-no-21-lct-hdnn8-of-june-30-1989-of-people-s-health>.

does not provide any gestational limits on abortion, though guidance on national healthcare standardizes some aspects of the procedure. The Criminal Code of 1999 establishes provision of an illegal abortion as an offense, but criminalizes only the provider and not the recipient.⁶⁷

The Vietnamese Health Ministry also formulated a National Strategy on Reproductive Health Care in 2001, created in accordance with the United Nations International Conference on Population and Development (ICPD) Programme of Action.⁶⁸ The National Strategy aimed to improve the reproductive health of Vietnamese women and in so doing expanded the State's obligation to abortion care. The Strategy emphasized the importance of providing safe abortion procedures and post-abortion care; in response to the Strategy, many local governments recognized the right to maternity leave for women following an abortion. The Strategy also called for the expansion of safe abortion access for adolescents.⁶⁹

Though Vietnam has established the right to abortion, the impetus for abortion access has primarily been attributed to the country's focus on family planning and the reduction of overpopulation. Notably, Vietnam has one of the highest abortion rates in the world.⁷⁰

g. Kenya and Constitutional Referendum and the Kenyan High Court

Kenya's High Courts⁷¹ have recognized several exceptions to the criminalization of abortion in the last five years, responding to a new Constitution adopted in 2010.

The 2010 Constitution recognizes the right to life in Article 26 and explicitly states that life begins at the point of conception.⁷² The Kenyan Penal Code had previously criminalized the "unlawful" administration or procurement of abortion, but had not specified the circumstances under which an abortion might be lawful.⁷³ The 2010 Constitution established these circumstances in Article 26(4), stating "Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law."⁷⁴ A national referendum was conducted to ratify the 2010 Constitution, including among other changes this new language on abortion. The referendum passed by a vote of 68% and the Constitution came into force at the end of August 2010.⁷⁵

⁶⁷ Art. 243 [VIETNAM PENAL CODE], No. 15/1999/QH10 (Dec. 21, 1999) (Viet.), <https://www.refworld.org/docid/50f92bb92.html>.

⁶⁸ WOMEN OF THE WORLD *supra* note 62 at 215; UN Population Fund (UNFPA), *Report of the International Conference on Population and Development, Cairo, 5-13 September 1994*, 1995, A/CONF.171/13/Rev.1, <https://www.refworld.org/docid/4a54bc080.html>.

⁶⁹ WOMEN OF THE WORLD *supra* note 62 at 219-220.

⁷⁰ WOMEN OF THE WORLD *supra* note 62 at 215; UN Population Fund (UNFPA) *supra* note 68.

⁷¹ Decisions by Kenya's High Courts may be appealed to the Court of Appeals and then the Supreme Court. *See* <https://www.judiciary.go.ke/courts/>.

⁷² CONSTITUTION art. 26 (2010) (Kenya), <http://kenyalaw.org/kl/index.php?id=398>.

⁷³ *A Decade of Existence: Tracking Implementation of Article 26(4) of the Constitution*, CENTER FOR REPRODUCTIVE RIGHTS (June 2020), https://reproductiverights.org/sites/default/files/documents/A-Decade-of-Existence-Kenya_0.pdf.

⁷⁴ Art. 26(4), CONSTITUTION (2010) (Kenya).

⁷⁵ *Kenya: UN welcomes successful end of referendum on constitution*, U.N. NEWS (Aug. 6, 2010), <https://news.un.org/en/story/2010/08/347072-kenya-un-welcomes-successful-end-referendum-constitution>.

In 2012, to implement Article 26(4) of the Constitution, the Kenyan Ministry of Health issued a series of guidelines on the provision of abortion and post-abortion care. A year later, the Ministry withdrew these guidelines and banned training for healthcare professionals on abortion provision.⁷⁶ In 2019, *FIDA Kenya and Others v. Attorney General and Others* came before the High Court and challenged the withdrawal of these guidelines as well as the statement of the Minister of Health that “abortion on demand is illegal and as such there was no need to train health care workers on safe abortion or importation of medicines for medical abortion.”⁷⁷ The case centered the experience of a fourteen year old who was raped, became pregnant, and received an incomplete and unsafe abortion procedure that resulted in her hospitalization and, four years later, death from related complications.⁷⁸

In the High Court’s decision, the Court found that the actions of the Kenyan government, including those of the Ministry of Health, violated the rights of women and girls. Among the rights violated were the right to health, to non-discrimination, and to access to information.⁷⁹ The Court also explicitly affirmed the right to abortion when a pregnancy results from sexual violence, and charged the government with ensuring the availability of safe abortion procedures.⁸⁰

In March 2022, Kenya’s High Courts released an opinion in an additional case addressing abortion access, *PAK and Salim Mohammed v. Attorney General and Three Others*. The fact pattern in *PAK* followed the experience of a sixteen year old girl who became pregnant and presented at the clinic where Salim Mohammed worked complaining of pain and bleeding. Mohammed concluded that PAK had lost the pregnancy and provided post-abortion care. Both PAK and Mohammed were subsequently arrested - PAK from her hospital bed - and charged with violating the Penal Code’s abortion restrictions. They appealed to the High Court to end the proceedings against them.⁸¹

The High Court halted the proceedings, noting a violation of several rights guaranteed to women and girls when quality abortion care is made inaccessible. Those rights included the right to life, the right to the highest attainable standard of physical and mental health, and the right to bodily autonomy. In addition, the Court noted that sanctioning abortion through the Penal Code without complementary legislation providing a framework for abortion would result in arbitrary and unreasonable prosecutions. The decision charged Kenya’s Parliament with providing such a framework.⁸²

⁷⁶ *FIDA-Kenya and others v. Attorney General and others (High Court of Kenya)*, CENTER FOR REPRODUCTIVE RIGHTS (June 29, 2015), <https://reproductiverights.org/case/fida-kenya-and-others-v-attorney-general-and-others-high-court-of-kenya/>

⁷⁷ *FIDA-Kenya and others v. Attorney General and others*, High Court of Kenya, Petition 266 of 2015 (June 12, 2019) (Kenya), <http://kenyalaw.org/caselaw/cases/view/175490/>, at ¶35.

⁷⁸ *Id.* at ¶35.

⁷⁹ Art. 43.1(a), 10.2(b), 35, CONSTITUTION (2010) (Kenya).

⁸⁰ *Abortion Services in Kenya*, CENTER FOR REPRODUCTIVE RIGHTS (Feb. 2, 2022), <https://reproductiverights.org/center-reproductive-rights-abortion-services-kenya/>.

⁸¹ *Aligning the Penal Code to the Constitution: the Malindi High Court Decision on the Question of Abortion in Kenya*, CENTER FOR REPRODUCTIVE RIGHTS (June 4, 2022) <https://reproductiverights.org/wp-content/uploads/2022/06/crr-malindi-04-june-2022ruling.pdf>.

⁸² *Id.*; *PAK & another v Attorney General & 3 others*, High Court of Kenya, Petition E009 of 2020 (Mar. 24, 2022) (Kenya), <http://kenyalaw.org/caselaw/cases/view/231489>.

h. South Africa and National Legislation and the High Courts

South African abortion law has been characterized as among the “most liberal abortion laws in the world.”⁸³ Enacted in 1996, the Choice on Termination of Pregnancy Act (“CTOPA” or “the Act”) authorizes the termination of pregnancy upon request during the first twelve weeks of gestation.⁸⁴ A pregnancy may be terminated from the thirteenth through the twentieth week of gestation if a medical practitioner believes that the continued pregnancy would pose a risk to the woman’s physical or mental health; that there is a substantial risk of a physical or mental fetal abnormality; that the pregnancy resulted from rape or incest; or that the continued pregnancy would significantly affect the social or economic circumstances of the woman.⁸⁵ In addition to these broad grounds during the first twenty weeks, a pregnancy may be terminated after the twentieth week if two medical practitioners agree that the continued pregnancy would endanger the woman’s life, result in severe fetal malformation, or pose a risk of injury to the fetus.⁸⁶

The South African government recognized the equality principles central to the right to abortion in the law’s preamble. The preamble explains that “the values of human dignity, the achievement of equality, security of the person, non-racialism and non-sexism, and the advancement of human rights and freedoms which underlie a democratic South Africa” motivated CTOPA’s enactment.⁸⁷ The Act further underlines the importance of gender equality, stating that “both women and men have the right to be informed of and to have access to safe, effective, affordable and acceptable methods of fertility regulation of their choice.”⁸⁸

There have been two high-profile legal challenges to the CTOPA since the law’s enactment. In *Christian Lawyers’ Association v. National Minister of Health and Others*, a regional court ruled that fetuses do not possess a constitutional right to life.⁸⁹ Plaintiffs asked the court to strike down the CTOPA in its entirety, arguing that fetuses possessed the right to life under section 11 of the South African Constitution and that the Act violated their right to life.⁹⁰ The court held that a fetus is not a legal person and therefore does not possess the constitutional right to life.⁹¹ Noting that the South African Constitution “is ‘primarily and emphatically’ an egalitarian Constitution,” the court explained that to afford the fetus legal personhood would impinge on the constitutional rights of women, including “the right to equality, which includes the full and actual

⁸³ Frances A. Althaus, *Work in Progress: The Expansion of Access to Abortion Services in South Africa Following Legalization*, 26 INT’L PERSPS. ON SEXUAL AND REPROD. HEALTH 84, 84 (2000), https://www.gutmacher.org/sites/default/files/article_files/2608400.pdf.

⁸⁴ Choice on Termination of Pregnancy (Act 92 of 1996) (S. Afr.), https://www.hpcsa.co.za/Uploads/Legal/legislation/CHOICE_ON_TERMINATION_OF_PREGNANCY_ACT%C2%A092_OF_1996.pdf.

⁸⁵ *Id.* at ¶2(1)(b).

⁸⁶ *Id.* at ¶2(1)(c).

⁸⁷ *Preamble*, Choice on Termination of Pregnancy (Act 92 of 1996) (S. Afr.).

⁸⁸ *Id.*

⁸⁹ *Christian Lawyers Association of SA and Others v Minister of Health and Others*, High Court of Justice, No 16291/97 (July, 10, 1998) (S. Afr.), https://www.law.utoronto.ca/sites/default/files/documents/reprohealth/south_africa_1998_christian_lawyers.pdf; CONSTITUTION (1996) (S. Afr.), <https://www.gov.za/documents/constitution/constitution-republic-south-africa-1996-1>.

⁹⁰ High Court of Justice (S. Afr.), No 16291/97; CONSTITUTION (1996) (S. Afr.).

⁹¹ High Court of Justice (S. Afr.), No 16291/97.

enjoyment of all rights and freedoms and the protection that the State may not unfairly discriminate against anyone *inter alia* on the grounds of sex.”⁹²

The same plaintiff brought a second constitutional challenge in 2004, arguing that women under eighteen years of age are not capable of giving informed consent to terminate their pregnancies and asking the court to hold as unconstitutional sections 5(2) and 5(3) of the Act.⁹³ The court rejected the plaintiff’s claims, holding that the Act makes informed consent—and not age—the cornerstone of its regulation of abortion access and emphasizing that the medical practitioner must determine capacity to give informed consent on a case-by-case basis.⁹⁴ The court affirmed that “the right to termination of pregnancy . . . [is] reinforced by the following constitutional rights: the right to equality and protection against discrimination on the grounds of gender, sex and pregnancy.”⁹⁵

II. Restricting access to abortion deprives people of the right to health

Human rights bodies have consistently recognized that access to safe abortion services is crucial in ensuring the right to health for women and other people with gestational capacity. Synthesizing the findings of a number of key human rights entities, a recent report from the Office of the United Nations High Commissioner for Human Rights explained, “Preventing unsafe abortion is a core obligation within the right to sexual and reproductive health. . . . The right to sexual and reproductive health requires health facilities, goods, information and services, including safe abortion and post-abortion services, which are available, accessible, acceptable and of good quality.”⁹⁶

Restricting legal abortion forces pregnant people to rely on less safe methods of pregnancy termination that endanger their health or to undergo the risks and dangers inherent to childbirth. The denial of a wanted abortion can also harm a person’s mental and psychological health. Though a number of countries that otherwise restrict abortion permit the procedure, at least on paper, when the pregnancy puts the pregnant person’s health at risk, Colombia and Mexico both recognize abortion restrictions themselves as violative of the right to health.⁹⁷

a. Restricting legal abortion forces people to rely on less safe methods of pregnancy termination that endanger their health

⁹² *Id.*

⁹³ *Christian Lawyers Association of SA and Others v Minister of Health and Others*, High Court of Justice, No 7728/2000 (May, 24, 2004) (S. Afr.), <https://www.globalhealthrights.org/wp-content/uploads/2013/01/HC-2004-Christian-Lawyers-Association-v.-Minister-of-Health.pdf>.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ U.N. Off. of the High Comm’r, *Information Series on Sexual and Reproductive Health and Rights: Abortion* (2020), https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WRGS/SexualHealth/INFO_Abortion_WEB.pdf

⁹⁷ Sentencia C-055/22 (Col.) at ¶197-204; Acción de inconstitucionalidad 54/2018 (Mex.).

When people are desperate to obtain abortion care—whether for economic, relationship, or other reasons—but unable to access services legally, they often turn to unregulated providers or less safe methods of termination. Rates of unintended pregnancy are highest in countries that restrict abortion access; higher rates of unintended pregnancy correlate to higher rates of abortion, thus abortion rates are similar between countries that legally restrict abortion and countries where abortion is broadly legal.⁹⁸ Countries that restrict abortion access may in fact have higher abortion rates than countries that do not.⁹⁹ Crucially, in countries with highly restrictive laws, the proportion of unsafe abortions is significantly higher than where laws are less restrictive.¹⁰⁰ According to the World Health Organization (WHO), “In countries where abortion is most restricted, only 1 in 4 abortions are safe, compared to nearly 9 in 10 in countries where the procedure is broadly legal.”¹⁰¹ In other words, when abortion is heavily restricted, it is just as likely to occur but is far less likely to be safe.

The burdens of unsafe and less safe abortions fall disproportionately on people living in low-income countries or who otherwise live in poverty. In low-income countries, nearly 54% of abortions are classified as ‘least-safe’ by WHO, compared to less than 1% of abortions in high-income countries.¹⁰² Areas with higher rates of least-safe abortions also tend to show high fatality rates in cases of abortion.¹⁰³ Where abortion is available it is often financially infeasible due to facility and procedure costs, and post-abortion complications often cause additional financial loss.¹⁰⁴ Even in less legally restrictive jurisdictions, low-income individuals often face the unaffordable costs of abortion, a cost that typically falls on the pregnant person as opposed to others involved in the pregnancy. Women and girls are also more likely overall to live in extreme poverty and thus least likely to be able to afford an abortion; women also tend to experience increased poverty during their child-bearing years as compared to men, and that increase is in part due to the presence of young children-dependents.¹⁰⁵ Absent financial protection for abortion, individuals are more likely to seek substandard care, self-induce abortion, or continue with an unwanted or dangerous pregnancy.¹⁰⁶

⁹⁸ GUTTMACHER INST., *Unintended Pregnancy and Abortion Worldwide* (2022) <https://www.guttmacher.org/factsheet/induced-abortion-worldwide>.

⁹⁹ *See id.* (Removing the large populations of India and China from the data shows higher abortion rates in countries that restrict abortion).

¹⁰⁰ Bela Ganatra et al., *Global, regional, and subregional classification of abortions by safety, 2010-14: estimates from a Bayesian hierarchical model*, 390 *Lancet* 2372, 2372 (2017),

[https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(17\)31794-4/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(17)31794-4/fulltext).

¹⁰¹ WHO issues new guidelines on abortion to help countries deliver lifesaving care, WORLD HEALTH ORGANIZATION (Mar. 9, 2022) <https://www.who.int/news/item/09-03-2022-access-to-safe-abortion-critical-for-health-of-women-and-girls>.

¹⁰² Bela Ganatra et al. *supra* note 100 at 2379 tbl.2. Abortions are considered least safe when performed by untrained providers or use dangerous methods such as ingesting caustic substances or inserting foreign bodies.

¹⁰³ *Id.* at 2380 fig.8.

¹⁰⁴ Antonella Lavelanet et al., *Global Abortion Policies Database: a Descriptive Analysis of Financial Coverage for Abortion Care*, 9 *Current Obstetrics & Gynecology Reports* 105, 106 (2020),

<https://abortion-policies.srhr.org/documents/reference/Financial-Coverage-for-Abortion-Care.pdf>.

¹⁰⁵ Ana Boudet et al., *Gender Differences in Poverty and Household Composition Through the Lifecycle: A Global Perspective* 20 (World Bank Grp., Working Paper No. 8360, 2018),

<https://documents1.worldbank.org/curated/en/135731520343670750/pdf/WPS8360.pdf>.

¹⁰⁶ *Id.* at ¶109.

Importantly, the WHO recently released new guidelines on abortion care to help prevent unsafe abortions, which occur at a global rate of over twenty-five million annually. For the first time, the WHO approved self-management of medication abortion during the first twelve weeks of pregnancy.¹⁰⁷ This recognition that self-managed medication abortion can be safe and effective may help broaden access to safe methods of termination and increase the proportion of abortions that are safe. The guidelines also recommend that nations remove the legal and policy barriers to safe abortion, including criminalization, mandatory waiting periods, and gestational limits, as well as shifting abortion expenses from the individual to public funding to address cost barriers¹⁰⁸

b. Proscribing or restricting the right to abortion subjects people to the health risks of pregnancy and childbirth

When people are unable to access abortion care, they are forced to continue their pregnancies and will likely go on to give birth. Despite advances in obstetric healthcare, pregnancy and childbirth continue to be lethal for many adolescents and adults across the globe; nearly three hundred thousand pregnant people died during and following pregnancy and childbirth in 2017.¹⁰⁹ The risk of pregnancy-related death also falls disproportionately on young people. Among girls aged 15-19, the leading cause of death globally is complications from pregnancy and childbirth.¹¹⁰ Even younger girls are also at risk of pregnancy-related mortality. After adjusting for unrelated factors, one Latin American study found that girls aged 15 or under had a significantly higher risk of obstetric death than women aged 20-24.¹¹¹ Denying young people the right to abortion subjects already vulnerable children to the violence of forced pregnancy and the possible fatal dangers of childbirth.

c. Restricting information about abortion or refusing to provide guidelines on legal abortion access prevents appropriate healthcare

Criminalizing safe abortion procedures or the provision of information on abortion leads to confusion for those seeking abortion and their providers. Without clear guidance, providers may excessively restrict access to avoid legal liability. This is especially relevant when interpreting legal thresholds such as when pregnancy threatens a person's life, when fetal impairment justifies abortion, or when a pregnancy falls within gestational limits on abortions.¹¹²

¹⁰⁷ *Abortion care guideline*, WORLD HEALTH ORGANIZATION 99 (2022), <https://apps.who.int/iris/bitstream/handle/10665/349316/9789240039483-eng.pdf?sequence=1&isAllowed=y>.

¹⁰⁸ *WHO issues new guidelines on abortion to help countries deliver lifesaving care*, *supra* note 101.

¹⁰⁹ *Maternal mortality*, WORLD HEALTH ORGANIZATION (Sept. 19, 2019), <https://www.who.int/news-room/fact-sheets/detail/maternal-mortality>. (Leading causes of pregnancy-related death globally are severe bleeding, infections, high blood pressure, complications from delivery, and unsafe abortion).

¹¹⁰ *Adolescent and young adult health*, WORLD HEALTH ORGANIZATION (Jan. 19, 2021), <https://www.who.int/news-room/fact-sheets/detail/adolescents-health-risks-and-solutions>.

¹¹¹ Agustin Conde-Agudelo et al., *Maternal-perinatal morbidity and mortality associated with adolescent pregnancy in Latin American: Cross-sectional study*, 192 *Am. J. Obstetrics and Gynecology* (2005), <https://pubmed.ncbi.nlm.nih.gov/15695970/>.

¹¹² Antonella Lavelanet et al., *Global Abortion Policies Database: a Descriptive Analysis of the Legal Categories of Lawful Abortion*, 2 *BMC International Health and Human Rights* (2018), <https://abortion-policies.srhr.org/documents/reference/Legal-categories-of-lawful-abortion.pdf>.

Both the Irish Supreme Court and the Constitutional Court of Colombia have recognized that restricting information on abortion threatens the health and well-being of pregnant people.¹¹³ In taking on cases challenging abortion criminalization statutes, the Courts acknowledged their obligation to determine legal standards for abortion access in the absence of clear guidance from the national government. In both *Attorney General v. X and Others* of Ireland and C-055/22 of Colombia, the Courts expanded abortion access and directed the legislature to enact clarifying legislation elucidating the distinctions between lawful and unlawful abortion.¹¹⁴ Subsequent human rights courts cases against Ireland also identified that the lack of information on abortion care jeopardized the health of the plaintiff-women.¹¹⁵

Additionally, the Kenyan High Court case *FIDA Kenya and Others v. Attorney General and Others* challenged the removal of guidelines on lawful abortion access by the Kenyan Health Ministry. The plaintiffs in the case identified the lack of guidelines as having contributed in part to the death of the girl that the case was founded on. The Court identified this act of the Health Ministry, as well as other restrictions, as violative of the constitutionally guaranteed right to health.

d. High courts in North America, South America, and Africa, as well as the European Committee for Social Rights have recognized abortion restrictions as a violation of the right to health

Given the many ways the criminalization of abortion can harm women's health, it is unsurprising that courts and legislatures have recognized abortion restrictions as violative of the right to health. The courts of Columbia, Mexico, and Kenya all cited the right to health in expanding abortion access.

Though the Colombian Constitutional Court declined to decriminalize abortion procedures completely, it agreed with the plaintiffs' claim that the law violated several fundamental principles including the right to health.¹¹⁶ The court explained that the right to health includes the obligation of the State to remove obstacles to accessing reproductive health services for "las mujeres, las niñas, y las personas gestantes," [women, girls, and pregnant people].¹¹⁷

Importantly, the law banning abortion remains in effect after the twenty-four week gestation period.¹¹⁸ Before this threshold, the right to health of pregnant people must be prioritized.¹¹⁹ Following this period, abortion remains permitted in cases of rape, nonviability, and when the pregnancy endangers the pregnant person's life.

¹¹³ Supreme Court (Ir.) ILRM 401 at ¶54; Corte Constitucional, sentencia C-055/22 (Colom.) at ¶197-204.

¹¹⁴ Supreme Court (Ir.) ILRM 401 at ¶54; Corte Constitucional, sentencia C-055/22 (Colom.) at ¶443.

¹¹⁵ Comme'n No. 2425/2014; Comme'n No. 2425/2014.

¹¹⁶ CORTE CONSTITUCIONAL [C.C.] [CONSTITUTIONAL COURT], Constitutionality Review as per citizens request (Ana Cristina Gonzalez Velez et alia) of the Act 599 of 2000 (Criminal Code - partial), (Feb. 21, 2022), <https://www.corteconstitucional.gov.co/english/Decision.php?IdPublicacion=13181>; Art. 49, CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.].

¹¹⁷ Press Release, Constitutional Court of Colombia, *Sentencia C-055-22 6* (Feb. 21, 2022), <https://www.corteconstitucional.gov.co/comunicados/Comunicado%20de%20prensa%20Sentencia%20C-055-22%20-%20Febrero%2021-22.pdf>.

¹¹⁸ Art. 122, CÓDIGO PENAL [C. Pen.] [CRIMINAL CODE] (Colom.).

¹¹⁹ Corte Constitucional, sentencia C-055/22 (Colom.) at ¶300.

La Suprema Corte de Justicia de la Nación, Mexico’s highest court, also recognized the relationship between reproductive freedom and the right to health in its unanimous 2021 decision in *Accion de Inconstitucionalidad (AI) 148/2017*. The Court notably considered “la salud psicológica y física,” [psychological and physical health], and recognized that the right to health is a prerequisite for other guaranteed basic rights.¹²⁰ Drawing on guidance from the IACHR and the Court’s own past jurisprudence, the Mexican Supreme Court explained that the ability to access a safe abortion contributes to the health and well-being of pregnant people, not only when their physical health is at risk but also “when the continuation of the pregnancy is . . . incompatible with their life project.”¹²¹ The Court concluded:

“It is clear that the specific relationship between health and reproductive rights . . . is linked intrinsically with the attributes related to the exercise of their own life plan and conducting it through the protection and search for the broadest well-being in a framework of legal equality.”¹²²

The Kenyan High Court saw the right to health as core to the petition, stating “the right to health is an underlying determinant of the enjoyment of other rights.”¹²³ The Constitutional protections for abortion include those cases where the “life or health of the mother is in danger.”¹²⁴ The Court further recognized the WHO definition of health as representative,¹²⁵ and found that abortion was justified when the “mental, psychological, or physical health of the mother” was endangered.¹²⁶

In the European Union, Malta and Poland are the only Member States with highly restrictive laws that result in a total or near-total ban, respectively. Even when abortion is allowed on broad grounds, most Member States maintain a range of procedural barriers restricting access to abortion such as requiring specific written consents, waiting periods or mandatory counseling. In September 2022, Hungary’s government tightened its abortion rules and urged health care providers to present pregnant women with a fetus’s vital functions such as heartbeat.¹²⁷ Access to abortion is also undermined by the overly wide conception of the medical personnel’s right to conscientious objection¹²⁸ often used to deny providing reproductive healthcare to women.

¹²⁰ Suprema Corte de Justicia de la Nación [Supreme Court], *Acción de inconstitucionalidad 148/2017 (Mex.)* at ¶46-47.

¹²¹ *Id.* at ¶55; Human Rights Office of Mexico’s Supreme Court of Justice of the Nation, Extract from the *Acción de Inconstitucionalidad 148/2017 (Mex.)*, <https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emblematicas/summary/2022-05/Summary%20AI148-2017%20HRO.pdf>.

¹²² Suprema Corte de Justicia de la Nación [Supreme Court], *Acción de inconstitucionalidad 148/2017 (Mex.)* at ¶56. “[Q]ueda claro que la relación específica entre salud y derechos reproductivos . . . se vincula de forma intrínseca con los atributos relacionados con el ejercicio de su propio plan de vida y la conducción de éste a través de la protección y búsqueda del más amplio bienestar en un marco de igualdad jurídica.” *Id.* page 56 (translated from Spanish by Anna Katz).

¹²³ High Court of Kenya, *Petition 266 of 2015 (Kenya)* at ¶337.

¹²⁴ High Court of Kenya, *Petition 266 of 2015 (Kenya)* at ¶305; CONSTITUTION art. 26(4) (2010) (Kenya).

¹²⁵ *Preamble to the Constitution of the World Health Organization*, U.N. T.S., vol. 14, 185 (November 1, 1946).

¹²⁶ High Court of Kenya, *Petition 266 of 2015 (Kenya)* at ¶642.

¹²⁷ Weronika Strzyżyńska, *Hungary tightens abortion access with listen to ‘foetal heartbeat’ rule*, THE GUARDIAN, <https://www.theguardian.com/global-development/2022/sep/13/hungary-tightens-abortion-access-with-listen-to-foetal-heartbeat-rule> (last visited October 24, 2022).

¹²⁸ “Conscientious objection in reproductive health refers to the refusal of healthcare personnel, including doctors -- general practitioner, gynecologist, anesthetics-- nurses and other nonmedical staff to perform abortion or provide

Twenty-three of the twenty-seven Member States of the European Union allow such conscientious objection as a ground not to perform abortions. Its use is highly unregulated, and governments commonly fail to address it and to ensure that such refusals do not result in denial of abortion care.

For instance, 71% of practitioners in Italy were conscientious objectors in 2016.¹²⁹ In the cases *IPPF v. Italy* and *CGIL v. Italy*, the European Committee for Social Rights emphasized that conscientious objection clauses undermine the effectiveness of the right to health guaranteed by Article 11 of the European Social Charter.¹³⁰ In the first case, the Committee considered that the State is required to give full effect to the right of health by ensuring effective abortion services as provided under the national legislation and by taking the necessary measures for monitoring procedure of the conscientious objection.¹³¹ The Committee also judged that the State's failure to ensure effective access to lawful abortion facilities resulted in intersectional discrimination on the grounds of gender, health status, territorial location and socio-economic status, in violation of the principle of non-discrimination (Article E of the European Social Charter) read alone or in conjunction with the right to health.¹³²

By comparison, Sweden, Finland, Bulgaria, and Lithuania are the only EU Member States that do not allow health care providers to refuse to perform abortions¹³³. The prohibition of conscientious objection in Sweden has been challenged before several human rights jurisdictions, and it has been found that neither the European Convention on Human Rights nor the European Social Charter entitle healthcare professionals to claim a right to refuse reproductive health services based on their personal conscience. In a 2015 decision, the European Committee for Social Rights found that the Charter, “does not impose on states a positive obligation to provide a right to conscientious objection for health care workers.”¹³⁴ The Committee concluded that the Swedish authorities did not violate the right to health (Article 11) nor the right to non-discrimination (Article E) by failing to provide for conscientious objection.¹³⁵ The European Court

pre-abortion or post-abortion care on the ground of their moral, religious or philosophical beliefs”: Emmanuelle Bribosia, Isabelle Rorive & Ivana Isailovic, *Objection ladies! Taking IPPF -EN v. Italy one step further*, in E. Brems & E. Desmet (Eds.), *Integrated Human Rights in Practice*, 261-289 (Edward Elgar Publishing: 2017); Emmanuelle Bribosia & Isabelle Rorive, *Seeking to square the circle: a sustainable conscious objection in reproductive healthcare*, in S. Mancini & M. Rosenfeld (Eds.), *The Conscience Wars: Rethinking the Balance between Religion, Identity, and Equality*, 392-413 (Cambridge University Press: 2018).

¹²⁹ Paola Tamma, *Even where abortion is legal, access is not granted*, THE EUROPEAN DATA JOURNALISM NETWORK (last visited October 24, 2022), <https://www.europeandatajournalism.eu/eng/News/Data-news/Even-where-abortion-is-legal-access-is-not-granted>.

¹³⁰ *IPPF-EN v. Italy* (2013), Eur. C. S. Rts, No. 87/2012, [https://hudoc.esc.coe.int/eng/#{%22sort%22:\[%22ESCPublicationDate%20Descending%22\],\[%22ESCDcIdentifier%22:\[%22cc-87-2012-dmerits-en%22\]}](https://hudoc.esc.coe.int/eng/#{%22sort%22:[%22ESCPublicationDate%20Descending%22],[%22ESCDcIdentifier%22:[%22cc-87-2012-dmerits-en%22]}); *Confederazione Generale Italiana del Lavoro (CGIL) v. Italy* (2015), Eur. C. S. Rts., No. 91/2013, [https://hudoc.esc.coe.int/eng/#{%22sort%22:\[%22ESCPublicationDate%20Descending%22\],\[%22ESCDcIdentifier%22:\[%22cc-91-2013-dadmissandmerits-en%22\]}](https://hudoc.esc.coe.int/eng/#{%22sort%22:[%22ESCPublicationDate%20Descending%22],[%22ESCDcIdentifier%22:[%22cc-91-2013-dadmissandmerits-en%22]}).

¹³¹ Eur. C. S. Rts, No. 87/2012 at ¶174.

¹³² *Id.* at ¶190.

¹³³ Anna Heino and others, *Conscientious objection and induced abortion in Europe*, 4 (18) *The European Journal of Contraception & Reproductive Health Care* 231, 231-233 (2013).

¹³⁴ *FAFCE v. Sweden* (2015), Eur. C. S. Rts No. 99/2013, [https://hudoc.esc.coe.int/eng/#{%22sort%22:\[%22ESCPublicationDate%20Descending%22\],\[%22ESCDcIdentifier%22:\[%22cc-99-2013-dmerits-en%22\]}](https://hudoc.esc.coe.int/eng/#{%22sort%22:[%22ESCPublicationDate%20Descending%22],[%22ESCDcIdentifier%22:[%22cc-99-2013-dmerits-en%22]}), at ¶190.

¹³⁵ *Id.* at ¶75 and ¶79.

of Human Rights followed the same reasoning in the cases *Grimmark v. Sweden* and *Steen v. Sweden*. It assessed that healthcare professionals do not have a right to refuse to assist in abortion services based on their freedom of conscience.¹³⁶ In both cases, the applicants were midwives who had been denied employment following their refusal to participate in performing abortions because of their religious beliefs. The Court noted that although there was an interference with the applicants' freedom of religion under Article 9 of the Convention (right to freedom of thought, conscience and religion), it was proportionate and justified.¹³⁷ In those judgments, the Court considered the protection of health of women seeking an abortion as a legitimate aim since it guaranteed an effective access to abortion care.

III. Restricting access to abortion deprives women of the right to live in safety and free from violence

Violence against women is broadly understood as a global public health problem and violation of human rights.¹³⁸ More than one in four women worldwide has been subjected to physical or sexual violence by an intimate partner in her lifetime.¹³⁹ In Latin America, the number is even higher—reportedly thirty-eight percent.¹⁴⁰ For many women and girls, intimate partner violence (IPV) begins in adolescence.¹⁴¹

a. Restricting access to abortion exposes pregnant people to increased risk of intimate partner violence and coercion

Intimate partner violence is a risk factor for both unintended pregnancy and abortion. A population study of more than 17,500 women across 10 countries found that women with a history of victimization by IPV tended to have significantly higher odds of unintended pregnancy.¹⁴² In

¹³⁶ *Grimmark v. Sweden*, No. 43726/17 (2020) ECHR, [https://hudoc.echr.coe.int/eng - {"itemid":\["001-201915"\]} ;](https://hudoc.echr.coe.int/eng - {) *Steen v. Sweden*, No. 62309/17 (2020) ECHR, [https://hudoc.echr.coe.int/eng - {"itemid":\["001-201732"\]}.](https://hudoc.echr.coe.int/eng - {)

¹³⁷ ECHR No. 43726/17 at ¶ 25-26; ECHR No. 62309/17 at ¶20-21.

¹³⁸ Violence Against Women, WORLD HEALTH ORGANIZATION (March 9, 2021), <https://www.who.int/news-room/fact-sheets/detail/violence-against-women>.

¹³⁹ *Violence against women prevalence estimates, 2018: global, regional and national prevalence estimates for intimate partner violence against women and global and regional prevalence estimates for non-partner sexual violence against women*, WORLD HEALTH ORGANIZATION (2021), <https://www.who.int/publications/i/item/9789240022256>. Data on transgender and gender nonconforming people with gestational capacity is scarce. A study of transgender people living in the United States reported that 15% of female-to-male transgender people and 21% of gender nonconforming people experienced family violence. Grant, Jaime M., et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011, https://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf.

¹⁴⁰ Lynnmarie Sardinha et al., *Global, regional, and national prevalence estimates of physical or sexual, or both, intimate partner violence against women in 2018*, 399 LANCET 803, 803-815 (2022), [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(21\)02664-7/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(21)02664-7/fulltext).

¹⁴¹ *Id.* at 803.

¹⁴² Christina C. Pallitto et al., *Intimate Partner Violence, Abortion, and Unintended Pregnancy: Results from the WHO Multi-Country Study on Women's Health and Domestic Violence*, 120 INT'L J. GYNECOLOGY & OBSTETRICS 1, 5 (2012).

addition, women who had been physically or sexually abused by an intimate partner were nearly three times more likely to seek an abortion than women who had not experienced IPV.¹⁴³

Some pregnant women report concern about violence as a reason they choose to terminate their pregnancies.¹⁴⁴ They fear that a child could tether them to an abusive partner and do not want to raise children in violent environments.¹⁴⁵ A prospective cohort study of women seeking abortions in the United States compared the experiences of women who received and were denied abortions based on gestational age limits.¹⁴⁶ The study analyzed the relationship between abortion receipt or denial and subsequent violence from the man involved in the pregnancy.¹⁴⁷ Women who sought and obtained an abortion reported a statistically significant reduction in violence from the man involved in the pregnancy, while women who carried the pregnancy to term did not.¹⁴⁸ “Terminating an unwanted pregnancy may allow women to avoid physical violence” from the man involved in the pregnancy, the authors explained, “while having a baby from an unwanted pregnancy appears to result in sustained physical violence over time.”¹⁴⁹

Restricting legal abortion may make women and girls even more vulnerable to reproductive violence and coercion. When abortion is legal, people can access factual, unbiased pregnancy options counseling from trained professionals. Confidential pre-abortion counseling can reveal whether a pregnant person is being coerced into obtaining abortion services, enabling healthcare providers to intervene.¹⁵⁰ But when abortion is criminalized, information about abortion is often provided “clandestinely, and often informally, denying women standardized, reliable, and confidential reproductive health counseling to make pregnancy decisions without undue influence from anyone else.”¹⁵¹

b. High courts in North and South America have held that gender violence caused by restrictions on reproductive access threatens gender equality

La Suprema Corte de Justicia de la Nación, of Mexico, acknowledged the relationship between abortion rights and intimate partner violence in AI 148/2017. The Court recognized the constitutional right of women and people capable of pregnancy to obtain safe, legal, and free abortion services at least within early pregnancy.¹⁵² The Court emphasized that Article 4 of the

¹⁴³ *Id.*

¹⁴⁴ Karina S. Chibber et al., *The Role of Intimate Partners in Women’s Reasons for Seeking Abortion*, 24 WOMENS HEALTH ISSUES 1, e134 (2014); Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH 3, 116 (2005).

¹⁴⁵ Chibber, *supra* note 131 at e134.

¹⁴⁶ Sarah Roberts et al., *Risk of Violence from the Man Involved in the Pregnancy After Receiving or Being Denied an Abortion*, 12 BMC MEDICINE 144 (2014), <https://doi.org/10.1186/s12916-014-0144-z>.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ See, e.g., Lauren Ralph et al., *The Role of Parents and Partners in Minors’ Decisions to Have an Abortion and Anticipated Coping After Abortion*, 54 J. ADOLESCENT HEALTH 4, 432-33 (2014).

¹⁵¹ Margaret Wurth, “*It’s Your Decision, It’s Your Life*”, 62 HUMAN RIGHTS WATCH (Nov. 19, 2018), <https://www.hrw.org/report/2018/11/19/its-your-decision-its-your-life/total-criminalization-abortion-dominican-republic>.

¹⁵² Suprema Corte de Justicia de la Nación [Supreme Court], *Acción de inconstitucionalidad 148/2017 (Mex.)* at ¶224, 231.

nation's Ley General de Acceso de las Mujeres a Una Vida Libre de Violencia (General Law on Women's Access to a Life Free of Violence) establishes the legal equality between men and women as a guiding principle and makes clear that gender-based violence should be understood as any action or omission based on gender that causes psychological, physical, patrimonial, economic, or sexual harm.¹⁵³ This definition is codified into law.¹⁵⁴ The Court reasoned that if women and people with gestational capacity do not have some degree of reproductive autonomy—particularly when choosing whether to continue a pregnancy or interrupt it—then their legal equality is annulled.¹⁵⁵ When those with gestational capacity face criminalization for abortion, they face a type of gender violence that reinforces gendered stereotypes, inhibiting the legal equality guaranteed by the country's Constitution.¹⁵⁶

Mexico has also recognized that the general violation of women's sexual and reproductive rights is itself another form of gender-based violence. In AI 54/2018, the Mexican Supreme Court struck down part of the General Law regulating health services because it “established an expansive right to conscientious objection by medical personnel, without establishing the limits necessary to ensure patients' rights to healthcare.”¹⁵⁷ The court emphasized its commitment to combatting gender-based violence and emphasized that the violation of women's sexual and reproductive rights is a form of gender violence that, in some circumstances, can constitute cruel, inhumane, and derogatory treatment of women.¹⁵⁸

In *Manuela v. El Salvador*, the IACHR recognized that abortion restrictions themselves constitute gender violence. The Court referenced the Convention on the Prevention, Punishment, and Eradication of Violence Against Women, which defines such violence as “any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere.”¹⁵⁹ Manuela's death was thus an act of gender violence by El Salvador, due to the certainty that seeking necessary obstetric care would lead to criminalization.¹⁶⁰ The Court found El Salvador responsible for Manuela's death, having violated Article 7(a) of the Convention on Violence Against Women.¹⁶¹

¹⁵³ *Id.* at ¶102; Ley General De Acceso De Las Mujeres A Una Vida Libre De Violencia, CÓDIGO CIVIL [CC], Diario Oficial de la Federación [DOF] (2007) (Mex.).

¹⁵⁴ *Id.* at art. 5.IV (“Violencia contra las Mujeres: Cualquier acción u omisión, basada en su género, que les cause daño o sufrimiento psicológico, físico, patrimonial, económico, sexual o la muerte tanto en el ámbito privado como en el público.”)

¹⁵⁵ Suprema Corte de Justicia de la Nación [Supreme Court], Acción de inconstitucionalidad 148/2017 (Mex.) at ¶103.

¹⁵⁶ Suprema Corte de Justicia de la Nación [Supreme Court], Acción de inconstitucionalidad 148/2017 (Mex.) at ¶236.

¹⁵⁷ Press Release, Mexican Supreme Court, *Mexican Supreme Court: Landmark Decisions at the Vanguard for Reproductive Rights* (Oct. 1, 2021), <https://www.internet2.scjn.gob.mx/red2/comunicados/noticia.asp?id=6606>.

¹⁵⁸ Suprema Corte de Justicia de la Nación [Supreme Court], Acción de inconstitucionalidad 54/2018 (Mex.) at ¶90, 322.

¹⁵⁹ Inter-Am. Ct. H.R. No. 13.069 at ¶258.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at ¶260; art. 7(a), *Inter-American Convention on the Prevention, Punishment And Eradication Of Violence Against Women*, *supra* note 35.

IV. Restricting access to abortion deprives women and other people with gestational capacity of autonomy, which infringes on the rights to life, self-determination, human dignity, and privacy

The American Convention on Human Rights, the International Covenant on Civil and Political Rights, and the European Convention on Human Rights all recognize a right to life.¹⁶² The American Convention and the International Covenant additionally recognize a right to privacy, within which the Convention includes a right to recognition of one's dignity.¹⁶³ The International Covenant recognizes a right to self-determination, as well as premising all fundamental rights on the inherent dignity of the person.¹⁶⁴ The European Convention on Human Rights instead recognizes a right to "respect for private and family life."¹⁶⁵ Analysis of these rights and their equivalents in local constitutions has led both legislatures and courts to expand abortion access in order to guarantee such rights for pregnant people.

a. Restricting abortion access denies women and pregnant people the right to life and the right to autonomy

The Mexican case AI 148/2017 relied on the right to life and autonomy in expanding abortion access.¹⁶⁶ Explaining the foundational basis of the right to life with regard to other rights, including the right to autonomy, the court indicated that the government infringes on the right to life when it denies people access to abortion.¹⁶⁷ The Court's concept of life encompasses aspects of physical and social identity, such as the right to personal development and the right to establish and maintain relationships with other human beings.¹⁶⁸ Focusing on the individuality of women, the court defines this right as being the means through which each individual can set and aspire to achieve their expectations, according to their own conditions and context.¹⁶⁹ As such, the right to life is personal, intimate, and fundamental. The effectiveness of the exercise of the right to life is conditioned on exercising personal autonomy over the future course of events relevant to an individual's quality of life.¹⁷⁰ Pregnancy is relevant when exercising the right to life because the possibility of being a mother is intrinsically linked to one's personal life undergoing significant change.¹⁷¹ Continuing pregnancy is an intimate choice formed from the pregnant person's system of personal values, and it therefore constitutes a main expression of human nature.¹⁷² Both the

¹⁶² Art. 4, *American Convention on Human Rights*, *supra* note 33; Art. 6, *International Covenant on Civil and Political Rights* *supra* note 49; Art. 2, *Convention for Protection of Human Rights and Fundamental Freedoms*, *supra* note 42.

¹⁶³ Art. 11, *American Convention on Human Rights* *supra* note 33; Art.10, *International Covenant on Civil and Political Rights* *supra* note 49.

¹⁶⁴ *Preamble*, *International Covenant on Civil and Political Rights* *supra* note 49.

¹⁶⁵ Art. 8, *Convention for Protection of Human Rights and Fundamental Freedoms*, *supra* note 42.

¹⁶⁶ Suprema Corte de Justicia de la Nación [Supreme Court], *Acción de inconstitucionalidad 148/2017 (Mex.)* at ¶59.

¹⁶⁷ *Id.* at ¶24-25, 61.

¹⁶⁸ *Id.* at ¶37, 88.

¹⁶⁹ *Id.* at ¶29, 70.

¹⁷⁰ *Id.* at ¶29, 70 (quoting the Inter-American Court of Human Rights, *Cfr. Caso de las Masacres de Ituango Vs. Colombia. Excepción preliminar, Fondo, Reparaciones y Costas*, Sentencia de 1 de julio de 2006, Serie C No. 148, párrafo 194; y *Caso Atala Riffo y Niñas Vs. Chile. Fondo, Reparaciones y Costas*, Sentencia de 24 de febrero de 2012. Serie C No. 239. Párrafo 161).

¹⁷¹ *Id.* at ¶31, 74.

¹⁷² *Id.* at ¶28, 68.

decision to procreate voluntarily and the decision not to exercise that reproductive freedom equally engage one's individual system of beliefs and values.¹⁷³ The Mexican Supreme Court held that this autonomy is a crucial part of the ability to live life according to one's own purpose.¹⁷⁴

In the same opinion, the Court determined that when law hinders the means by which a woman may control her fertility, it violates her right to reproductive autonomy.¹⁷⁵ The Court explained that women must be recognized as rational, individual, and autonomous beings, fully aware of the decisions they make, and explicitly rejected the paternalistic notion that women need to be "protected" from making certain decisions about their life and reproductive health as a justification for restricting women's access to abortion.¹⁷⁶ Being that Mexico's Constitution protects the right to make a free and informed decision as to whether to have children, the Court found an implied constitutional right to reproductive autonomy.¹⁷⁷ The decision to go through with or terminate a pregnancy allows a woman to choose who she wants to be and is thus an instrument for the exercise of the right to autonomy, which includes the choice of and free access to all forms of contraception, assisted reproductive techniques, and the termination of pregnancy.¹⁷⁸ In this way, the decision to terminate a pregnancy constitutes a mechanism of recognizing women's autonomy.¹⁷⁹

The IACHR expressed a more literal understanding of the right to life in *Manuela v. El Salvador*, wherein the Court examined whether El Salvador had deprived Manuela of her right to life by failing to comply with healthcare obligations that may have reduced the probability of her death. Rather than the Mexican Supreme Court's understanding of life as encompassing many spheres of decision-making and autonomy, the IACHR instead recognized life as the physical functions of living.¹⁸⁰ El Salvador had a positive obligation to protect Manuela's right to life by providing appropriate medical care, which here included abortion.¹⁸¹

In considering the right to life, several courts have assessed the balance between a pregnant person's right to life as compared to the right to life of the unborn. It is important to note that recognizing the right to life of the unborn is a tactic routinely used to limit women's control over their bodies, and that many jurisdictions do not recognize this right, instead recognizing that life begins at birth.

The 2022 decision of the Colombian Constitutional Court focused on the right to life and the right to autonomy, holding that both necessarily prohibited unwarranted restrictions on abortion.¹⁸² Regarding the right to life, the court found the criminalization of voluntary abortion disproportionate to its intended purpose of protecting the life of the fetus.¹⁸³ Penalization of

¹⁷³ *Id.*

¹⁷⁴ *Id.* at ¶29, 70.

¹⁷⁵ *Id.* at ¶29-30, 70.

¹⁷⁶ *Id.* at ¶54, 123.

¹⁷⁷ *Id.* at ¶20, 51.

¹⁷⁸ *Id.* at ¶34, 82.

¹⁷⁹ *Id.* at ¶35, 82.

¹⁸⁰ See Inter-Am. Ct. H.R. No. 13.069 at ¶150.

¹⁸¹ *Id.* at ¶24.

¹⁸² Corte Constitucional [C.C.] [Constitutional Court], Sentencia C-055/22 (Colom.) at ¶290.

¹⁸³ *Id.* at ¶9.

voluntary abortion within the first 24 weeks of pregnancy impeded pregnant people’s full exercise of their right to life and conscience by denying them reproductive choice and thus the possibility of acting according to their individual convictions.¹⁸⁴

Ireland, acting under the Protection of Life During Pregnancy Act of 2013—a replacement to the Offences Against Person Act of 1861, both Acts now being moot—has considered the balance of these rights in numerous cases. The many challenges to abortion restrictions in Ireland demonstrate the growth of both Irish and international understandings of the right to life. The first major abortion case, *Attorney General v. X and Others*, established the important question of how to balance the right to life of the unborn and the right to life of a pregnant woman. In this case, the Court determined that the right to life was a fundamental right taking precedence over most others.¹⁸⁵ The appropriate balance of each right to life was adjusted in this decision, changing the requirement of “inevitable or immediate risk to the life of the mother” to “real and substantial risk.”

Later, in *A, B, and C v. Ireland* before the European Court of Human Rights, the balance of the unborn’s right to life and the pregnant person’s right to life was again considered. The Court held that since there was no consensus among the EU as to when life begins, and thus who Article 2 of the Convention entitles to a right to life, States have broad discretion in interpreting Article 2’s protection of the unborn.¹⁸⁶ It also found that since the rights claimed on behalf of the fetus and those of the mother were inextricably interconnected, States also enjoy a margin of appreciation to determine the respective weight of the right to life of the unborn and the rights of the pregnant woman.¹⁸⁷ However, it should be noted that this Grand Chamber ruling was adopted by a majority of eleven votes to six. In a partly dissenting opinion, some judges stated that there is a strong European consensus that the right to life of the pregnant woman, and, in most countries’ legislation, her well-being and health, are considered more valuable than the right to life of the fetus.¹⁸⁸

More recently, Ireland’s abortion restrictions were considered by the U.N. Human Rights Committee in *Mellet v. Ireland* and *Whelan v. Ireland*. The Committee recognized that the language of Ireland’s abortion restrictions inherently imposed gendered differences on the guarantee to the right to life. The Committee commented that “The legal framework has a distinct and specific impact on women,” which subjected women to severe consequences not imposed on men.¹⁸⁹ In the Committee’s view, Ireland failed to justify such discrimination and, further, failed to justify their disproportionate value of unborn life over the mother’s life.¹⁹⁰

South Africa’s High Courts have also seen challenges to abortion laws premised on protecting the unborn’s right to life as opposed to the pregnant person’s same right. *Christian Lawyers Association of SA and Others v Minister of Health and Others* (1998) considered the

¹⁸⁴ *Id.* at 6.

¹⁸⁵ Supreme Court (Ir.) ILRM at 401.

¹⁸⁶ ECHR No. 25579/05 at ¶237.

¹⁸⁷ *Id.*

¹⁸⁸ ECHR No. 25579/05, Joint partly dissenting opinion of judges Rozakis, Tulkens, Fura, Hirvelä, Malinverni and Poalelungi at ¶2.

¹⁸⁹ *Mellet v. Ireland* (2016), Commc’n No. 2324/2013 at ¶5.12.

¹⁹⁰ *Id.*

petitioner's claim that the Choice on Termination of Pregnancy Act of 1996 violated the right to life of the unborn. The Court's decision questioned whether the unborn have a right to life equal to that of the born and living.¹⁹¹ Though concluding that a fetus may have a right to life, the Court did not read that right in Article 11 of the Constitution providing that "Everyone has a right to life."¹⁹² The Court found no indication that fetuses were included among "everyone," and indicated that the Constitution would explicitly state so if such inclusion had been the intent of the drafters.

FIDA-Kenya and others v. Attorney General and others, before the High Court of Kenya, was also premised on interpreting the country's constitutional guarantee of the right to life. Like Ireland, the Kenyan Constitution addresses abortion explicitly in Article 26 proclaiming the right to life.¹⁹³ It is within delineating the right to life that the Constitution affirms the right to abortion in specific circumstances.¹⁹⁴ However, in analyzing the case the High Court deferred primarily to considerations of the right to health, believing the right to life to be bound within that.¹⁹⁵

It is worth stressing that relying on the protection of the right to life may also lead to restrictions on access to abortion when this right is also granted to the fetus, as is the case in Hungary. Abortion has been legal in Hungary since 1953 and since 1992, the current abortion law allows it in the first 12 weeks of pregnancy in cases where the woman's health is at risk or when the fetus could suffer from a serious disability or impairment. The legal time limit for abortion can be extended up to 24 weeks in some special circumstances.¹⁹⁶ In 2011, the Hungarian Parliament adopted an ultra-conservative Fundamental Law opening the possibility of banning abortion by protecting life from conception. It states that "Every human being shall have the right to life and human dignity; the life of the fetus shall be protected from the moment of conception."¹⁹⁷ It is the only Constitution in Europe which confers right to life protection from the moment of conception.¹⁹⁸ More recently, the government tightened again its abortion laws with the adoption of a new decree that went into effect on September 15, 2022 imposing mandatory ultrasounds. When seeking an abortion, women will have to listen to the fetus's heartbeat and the medical staff will have to write a report assuring that this has been done. The interior Minister justified this new regulation by referring to the right of life, stating that "Nearly two-thirds of Hungarians associate

¹⁹¹ High Court of Justice, No 16291/97 (July 10, 1998) (S. Afr.); Choice on Termination of Pregnancy Act 92 of 1996 (S. Afr.).

¹⁹² CONSTITUTION (S. Afr.), 1996.

¹⁹³ Art. 26, CONSTITUTION (2010) (Kenya).

¹⁹⁴ Art. 26 (4), CONSTITUTION (2010) (Kenya); High Court of Kenya, Petition 266 of 2015 (Kenya).

¹⁹⁵ High Court of Kenya, Petition 266 of 2015 (Kenya) at ¶337.

¹⁹⁶ Art. 2, 1992. évi LXXIX. törvény a magzati élet védelméről [ACT LXXIX OF 1992 ON THE PROTECTION OF FETAL LIFE] (Hung.).

¹⁹⁷ Art. 2, MAGYARORSZÁG ALAPTÖRVÉNYE [FUNDAMENTAL LAW] (Apr. 25, 2011) (Hung.),

<https://reproductiverights.org/maps/provision/hungarys-abortion-provisions/#fund>.

¹⁹⁸ *New Hungarian Constitution Puts Reproductive Rights at Risk*, CENTER FOR REPRODUCTIVE RIGHTS (Apr. 21, 2011), <https://reproductiverights.org/new-hungarian-constitution-puts-reproductive-rights-at-risk/>.

the beginning of a child’s life with the first heartbeat”.¹⁹⁹ Hungary’s Civil Rights Union is challenging the constitutionality of this rule.²⁰⁰

b. Restricting abortion access denies people their full right to self-determination

The right of self-determination has been expressed in court decisions from both Mexico and Colombia, situating the reproductive rights of women and mothers as including a right to self-determination, which extends to a right to human dignity, a right to life and autonomy, and a right to identity, reproductive choice, and sexual intimacy.²⁰¹

The Supreme Court of Mexico explained in AI 148/2017 the state’s need to guarantee women equal rights by recognizing their freedom and autonomy to define themselves based on their convictions and beliefs.²⁰² The court emphasized the necessary result of this requirement to leave the individual a “broad sphere of sovereignty” for the self-determination of their personal beliefs, virtues, and fundamental aspects of their existence. This includes self-determination related to one’s sexuality and reproduction, and should be free from the interference of the State or any institution.²⁰³ The Court premised the right to choose abortion as being in part a result of the right to self-determination.²⁰⁴

Regarding the right to autonomy, the Colombian Court’s decision emphasized the need for a secular government to guarantee women’s right to self-determination without forcing its own values and beliefs.²⁰⁵ Self-determination of religion is thus bound up with the abortion access, according to the Court.²⁰⁶ The Court also saw women’s self-determination as stymied by restrictions on abortion, which then restrict the availability of choice in family planning.²⁰⁷

c. Restricting abortion access denies women full access of their rights to privacy, private life, identity, reproductive choice, and “sphere of intimacy”

Mexico’s Supreme Court also relied on identity and reproductive choice to justify its holding that access to abortion is constitutionally required.²⁰⁸ Explaining this necessity, the court stressed the need to recognize women’s right to develop their identities free of impositions, and

¹⁹⁹ Weronika Strzyżyńska, *Hungary tightens abortion access with listen to ‘foetal heartbeat’ rule*, THE GUARDIAN (Sept. 13, 2022), <https://www.theguardian.com/global-development/2022/sep/13/hungary-tightens-abortion-access-with-listen-to-foetal-heartbeat-rule>.

²⁰⁰ Sofia Stuart Leeson, *Civil society condemns Hungary’s new anti-abortion decree*, EURACTIV (Sept. 16, 2022) https://www.euractiv.com/section/politics/short_news/civil-society-condemns-hungarys-new-anti-abortion-decree/.

²⁰¹ Suprema Corte de Justicia de la Nación [Supreme Court], *Acción de Inconstitucionalidad 148/2017* (Mex.) at ¶52; Corte Constitucional [C.C.] [Constitutional Court], *Sentencia C-055/22* (Colom.) at ¶55.

²⁰² Suprema Corte de Justicia de la Nación [Supreme Court], *Acción de Inconstitucionalidad 148/2017* (Mex.) at ¶35, 84.

²⁰³ *Id.*

²⁰⁴ *Id.* at ¶52.

²⁰⁵ *Id.* at ¶11.

²⁰⁶ Corte Constitucional [C.C.] [Constitutional Court], *Sentencia C-055/22* (Colom.) at ¶152.

²⁰⁷ Corte Constitucional [C.C.] [Constitutional Court], *Sentencia C-055/22* (Colom.) at ¶160.

²⁰⁸ Suprema Corte de Justicia de la Nación [Supreme Court], *Acción de Inconstitucionalidad 148/2017* (Mex.) at ¶68.

that women can freely dispose of their bodies and build their identity autonomously.²⁰⁹ To do this, minimum freedoms of access to abortion are necessary.²¹⁰ According to the court, recognition of human dignity implies women’s right to fully exercise their “freedom of identity” and the right to privacy.²¹¹ Each person has the right to freely choose their life plan, as well as to determine how they will achieve the goals and objectives relevant to them.²¹² In order to meet the goals and objectives one sets based on their values, ideas, expectations, and tastes, the right to identity and reproductive choice must be recognized for its role in allowing every person to be individually as they want to be, without coercion or unjustified control.²¹³ The Court asserted that the freedom to develop one’s own identity includes the following freedoms: to marry or not; to procreate and determine the amount of children to have, or not to have any at all; to determine one’s personal appearance, profession, and work activity, as well as their free sexual choice.²¹⁴

Finally, the court justified its decision based on the right to a “sphere of intimacy” derived from the constitutional right to dignity.²¹⁵ The Court reasoned that this provides women the right to establish and develop their own life purpose.²¹⁶ An essential element of this constitutionally protected quest is a right to a “sphere of intimacy” that protects women from external incursions limiting their decision-making ability.²¹⁷ The court concluded that the “sphere of intimacy” makes abortion access indispensable to decisions regarding one’s own identity.²¹⁸

Similarly, the Colombian decision also recognized a right to privacy in one’s intimate life as a justification for expanding women’s equality rights through increased access to abortion.²¹⁹ Explaining that the decision to follow through with a pregnancy is an intimate choice closely linked to the individual’s system of personal values, the court emphasized that the decision acts as an exercise of one’s sexual and reproductive freedoms.²²⁰ It constitutes a manifestation of reproductive choice and autonomy intimately linked to the individual.²²¹

In *Manuela v. El Salvador*, the IACHR noted several violations of the right to privacy guaranteed by the American Convention. Firstly, the disclosure of Manuela’s health information was considered an interference with her right to privacy.²²² The Court declined to provide a complete ruling on the charge of a violation of the right to privacy, finding that their analysis of other charges appropriately satisfied the investigation.

²⁰⁹ *Id.* at ¶26-27, 65.

²¹⁰ *Id.* at ¶49, 114.

²¹¹ *Id.* at ¶29, 70 (quoting the Inter-American Court of Human Rights, Cfr. *Caso de las Masacres de Ituango Vs. Colombia. Excepción preliminar, Fondo, Reparaciones y Costas*, Sentencia de 1 de julio de 2006, Serie C No. 148, párrafo 194; y *Caso Atala Riffo y Niñas Vs. Chile. Fondo, Reparaciones y Costas*, Sentencia de 24 de febrero de 2012, Serie C No. 239. Párrafo 161.).

²¹² Suprema Corte de Justicia de la Nación [Supreme Court], *Acción de Inconstitucionalidad 148/2017 (Mex.)* at ¶70.

²¹³ *See id.* at ¶27, 66.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* at ¶27, 67.

²¹⁷ *Id.* at ¶28, 68.

²¹⁸ *Id.*

²¹⁹ Corte Constitucional [C.C.] [Constitutional Court], Sentencia C-055/22 (Colom.) at ¶374.

²²⁰ *Id.*

²²¹ *Id.*

²²² Inter-Am. Ct. H.R. No. 13.069 at ¶208.

The U.N Human Rights Committee also determined that certain restrictions on abortion access in Ireland had violated women's right to privacy. Under Article 17 of the International Covenant on Civil and Political Rights, Amanda Mellet was guaranteed both the right to be free from interference with her privacy, as well as the right to have this freedom protected by law. The Committee found that Mellet's rights had been unreasonably and arbitrarily interfered with, and that the State's desire to balance the rights of the fetus Mellet carried did not justify this interference.²²³ The same conclusion was reached in *Whelan v. Ireland*, with the Committee recognizing an invasion of privacy wherein Ireland's restrictions "caused [Whelan] mental anguish and constituted an intrusive interference in her decision as to how best to cope with her pregnancy."²²⁴

Although the European Convention on Human Rights, which was adopted in 1950, is silent about reproductive rights, the European Court of Human Rights has decided that they fall under the right to private and family life guaranteed in Article 8.²²⁵ On the basis of Article 8 and of Article 3 which provides for the prohibition of torture and inhuman and degrading treatment, many applications have been submitted to the Court concerning the recent legislative changes in Poland.²²⁶

While Poland was a pioneer in legalizing abortion in the 20th Century, this progress slowed after the fall of the Berlin wall and the end of the communist regime. The Family Planning, Human Embryo Protection and Conditions of Permissibility of Abortion Act of 1993 provided in Article 1 that "The right to life shall be subject to protection, including in the prenatal phase". As a result, a termination of pregnancy was only allowed in three cases: (1) threat to the life or health of the pregnant woman, (2) rape or incest, and (3) when "there is a high probability of a severe and irreversible fetal defect or incurable illness that threatens the fetus's life".²²⁷ On 22 October 2020, Poland's Constitutional Court ruled that abortion on this third ground was unconstitutional.²²⁸ In practice, there is now a near-total ban on abortion in Poland, which has been denounced by the Council of Europe's Commissioner for Human Rights and the European Parliament.²²⁹

²²³ Commc'n No. 2324/2013 at ¶7.8.

²²⁴ Commc'n No. 2425/2014 at ¶7.3.

²²⁵ See *Bribosia et al*, *supra* note 128.

²²⁶ The European Court of Human Rights received over 1,000 applications concerning abortion rights in Poland. It is expected to begin ruling on 12 applications (applications nos. 1819/21, 3682/21, 4957/21, 6217/21, 3639/21, 4188/21, 5876/21, 6030/21, 3801/21, 4218/21, 5114/21 and 5390/21) that have been classified into three groups of four applications (K.B. v. Poland and 3 other applications, K.C. v. Poland and 3 other applications and A.L. - B. v. Poland and 3 other applications). See <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7074470-9562874&filename=Notification%20of%20applications%20concerning%20abortion%20rights%20involving%20Poland.pdf>.

²²⁷ Article 4a, Ustawa, O Planowaniu Rodziny, Ochronie Płodności Ludzkiego I Warunkach Dopuszczalności Przerwywania Ciąży [Family Planning, Human Embryo Protection and Conditions of Permissibility of Abortion Act] (1993), <http://licodu.cois.it/?p=10789&lang=en>.

²²⁸ TRYBUNAŁU KONSTYTUCYJNEGO [C.C.] [CONSTITUTIONAL COURT], akt K 1/20 (Oct. 22, 2020) (Poland), [https://reproductiverights.org/sites/default/files/2021-01/Constitutional%20Tribunal%20Decision%20on%202022%20October%202020%20%20\(in%20Polish\).pdf](https://reproductiverights.org/sites/default/files/2021-01/Constitutional%20Tribunal%20Decision%20on%202022%20October%202020%20%20(in%20Polish).pdf).

²²⁹ Council of Europe's Commissioner for Human Rights (Dunja Mijatović), [@CommissionerHR] (Oct. 22, 2020), Twitter, <https://twitter.com/CommissionerHR/status/1319273573240893452?s=20>.

dignity, leading the Court to find that the Constitution of Mexico protects every person's ability to freely decide whether and when to have children.²³⁵

Under Mexican law, human dignity is the foundational basis from which all other rights derive.²³⁶ The Constitution recognizes a unique and exceptional quality to every human being whose full extent must be respected and protected without exception.²³⁷ This implies an inherent interest of every person to be treated as such without being degraded, objectified, or humiliated.²³⁸ With respect to women, the right to human dignity acquires nuances innate to their features and defining characteristics.²³⁹ Dignity serves as a prerequisite for women to decide for themselves how to live and interact with others.²⁴⁰ Thus, being that motherhood is a possibility exclusive to people with the ability to gestate, the Court finds motherhood inseparable from their dignity.²⁴¹ In the view of the Mexican Supreme Court, human dignity is based on the central idea that women can freely make decisions regarding their bodies and build their own identity autonomously, free from impositions or transgressions.²⁴²

Human dignity was similarly at the heart of the recent decision from the Constitutional Court of Colombia, which found the criminal penalization of abortion disproportionate to its intended purpose of protecting the life in gestation.²⁴³ Explaining that human dignity serves as the basis for governmental power and individual rights, the Court found the penalization of women contrary to the law's intended purpose of protecting life. The law failed to protect the lives of women "as independent human beings" by creating barriers to abortion access, thus violating women's right to dignity.²⁴⁴ Regarding the counterintuitive results of the law, the Court additionally noted that such restrictions on abortion are likely to increase, rather than decrease, rates of abortion.²⁴⁵

In comparison, the IACHR considered dignity through the lens of the right to health and the balancing of the right to life in *Manuela v. El Salvador*. There, the Court first acknowledged dignity as a guarantee of the American Convention. The Court considered this guarantee as a basis for the legal doctrine that punishment should be proportionate to an offender's individual level of blame. A disproportionate punishment, as the Court found the incarceration of Manuela to be, denies human dignity.²⁴⁶ Additionally, the Court pointed out that the use of handcuffs when not strictly necessary similarly attacks human dignity, as occurred when Manuela was handcuffed to her hospital bed.²⁴⁷

²³⁵ *Id.* at ¶24, 60.

²³⁶ *Id.*

²³⁷ *Id.* ¶24-25, 61.

²³⁸ *Id.* at ¶25, 62.

²³⁹ *Id.* at ¶25, 63.

²⁴⁰ *Id.* at ¶29, 71.

²⁴¹ *Id.* at ¶28, 68.

²⁴² *Id.* at ¶26, 64.

²⁴³ Corte Constitucional [C.C.] [Constitutional Court], Sentencia C-055/22 (Colom.) at ¶194.

²⁴⁴ *Id.* at ¶163.

²⁴⁵ *Id.*

²⁴⁶ Inter-Am. Ct. H.R. No. 13.069 at ¶164.

²⁴⁷ *Id.* at ¶164.

When considering the right to health, the Court established that this right is specifically “to enjoy the highest attainable standard of health that allows [one] to live with dignity.”²⁴⁸ When Manuela was detained and unable to receive appropriate medical care, the Court identified a violation of her inherent dignity.²⁴⁹

South Africa also premises abortion access on human dignity, with the preamble to the Choice on Termination of Pregnancy Act of 1996 beginning, “Recognising the values of human dignity....”²⁵⁰ The South African Constitution additionally states that the country is founded on a principle of human dignity.²⁵¹ Both the 1998 and 2004 cases challenging the constitutionality of the Choice on Termination of Pregnancy Act led the High Court to consider women’s right to dignity. In *Christian Lawyers Association of SA and Others v. Minister of Health and Others* (1998), the Court explained that women’s right to human dignity is infringed upon when legal personhood is afforded to a fetus.²⁵² Later, in the 2004 case *Christian Lawyers Association v. National Minister of Health and Others*, the Court further explored the constitutional right to human dignity through comparison to two cases from the United States, *Roe v. Wade* and *Casey v. Planned Parenthood*.²⁵³ The Court concluded that the South African Constitution referred to a dignity similar to that protected by the U.S. courts, who held that “choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment [of the Constitution of the United States].”²⁵⁴ The High Court explained that the dignity afforded by the South African Constitution was synonymous with that afforded by the United States’ Fourteenth Amendment, and that these concepts protect “a woman’s right to choose.”²⁵⁵

V. Criminalizing abortion subjects women to unequal deprivation of liberty

Criminalizing a health service that only women require is an unequal deprivation of women’s liberty. Women who seek abortion face detainment, persecution, and imprisonment in countries and regions that criminalize abortion. The application of the law criminalizing abortion results in violations of the rights to due process, privacy, and freedom from violence and cruel or inhuman treatment to women when they are seeking abortion as a patient. Across the globe, a diminishing number of states continue to detain, persecute, and imprison women for seeking an abortion. Although the number of states prohibiting abortion is shrinking, the impact of unfair treatment of women from those states that do still prohibit the procedure deprives women of liberty and their lawful right to equality before the law.

The incarceration of Salvadorian women exemplifies how criminalizing abortion deprives women of liberty. El Salvador’s criminalization of abortion resulted in the deprivation of liberty and violations of the rights to due process, privacy, and freedom from violence and cruel or inhuman treatment. In *Manuela and Family v. El Salvador*, The IACHR found that Manuela had

²⁴⁸ *Id.* at ¶184.

²⁴⁹ *Id.* at ¶241.

²⁵⁰ Choice on Termination of Pregnancy Act 92 of 1996 (S. Afr.).

²⁵¹ CONSTITUTION (S. Afr.), 1996.

²⁵² High Court of Justice, No 16291/97 (July, 10, 1998) (S. Afr.);

²⁵³ High Court of Justice, No 7728/2000 (May, 24, 2004) (S. Afr.);

²⁵⁴ *Id.*

²⁵⁵ *Id.*

been arbitrarily detained and that her criminal proceedings were marred by fair trial violations. Manuela was a young, illiterate woman from a very poor area of El Salvador who began to develop painful symptoms of lymphatic cancer and at the same time unknowingly became pregnant. When she suffered a bad fall that led her to expel several blood masses, among which the fetus was found, her mother buried them in the latrine where they had been evacuated. After seeking care, Manuela was handcuffed to her hospital bed and interrogated by both physicians and police officers as to whether she induced an abortion to hide her infidelity. She was later criminally tried for the crime of aggravated homicide, and was convicted and sentenced to 30 years in prison. She died imprisoned two years later from cancer, after receiving inadequate medical diagnosis and treatment.²⁵⁶

An amicus brief in *Manuela v. El Salvador* detailed two similar cases involving Salvadoran women.²⁵⁷ The brief also noted documentation of other Salvadoran women experiencing similar procedures, with interrogation occurring either immediately following delivery or while receiving medical treatment. The brief identified several women who suffered poor pregnancy outcomes and were prosecuted for aggravated homicide.²⁵⁸ Like Manuela, Evelyn Hernandez is a young woman from an impoverished community in El Salvador. She was found unconscious and covered in blood after she had felt ill and delivered a fetus in the bathroom. However, after being rushed to a public hospital, she was reported by the healthcare professionals to the police for suspected abortion, and was then handcuffed to her hospital bed, detained, and eventually charged with aggravated homicide and sentenced to thirty years' imprisonment.²⁵⁹ Also from a poor community in El Salvador, Diana is a woman who suffers from psychological issues. She was unaware of her pregnancy before giving birth at home, unassisted, in the bathroom; the child did not survive. Diana was rushed to a public hospital, where the healthcare professionals reported her to the police. Like Manuela and Evelyn, Diana was handcuffed to her hospital bed. She too was eventually arrested, detained (and shuttled between a detention facility and a psychiatric hospital), and charged with aggravated homicide. Diana faced up to forty years in prison for the charges against her. While the charges were ultimately dismissed prior to trial due to a lack of evidence, she was detained for eight months.²⁶⁰

The IACHR report identifies that the court executing Manuela's initial detention identifies the act as a necessary "deprivation of liberty."²⁶¹ El Salvador's reliance on a charge of aggravated homicide in such an instance, and Manuela's subsequent thirty-year sentence, were considered a deprivation of liberty because the Court considered it disproportionate punishment, contrary to the Convention.

On November 30, 2021, the Inter-American Court of Human Rights established standards throughout the region to help protect women seeking reproductive health care, including abortion.

²⁵⁶ Inter-Am. Ct. H.R. No. 13.069 at ¶47-88.

²⁵⁷ Brief for The Center for International Human Rights at Northwestern University Pritzker School of Law as Amici Curiae Supporting Petitioner, *Manuela v. El Salvador*, Inter-Am. Ct. H.R. No. 13.069 at ¶4, <https://www.law.northwestern.edu/legalclinic/humanrights/documents/amicus-brief-to-the-inter-american-court-of-human-rights-on-the-criminalization-of-obstetric-emergencies-in-el-salvador.pdf>.

²⁵⁸ *Id.*

²⁵⁹ *Id.* at ¶22-29.

²⁶⁰ *Id.* at ¶30-38.

²⁶¹ Inter-Am. Ct. H.R. No. 13.069 at ¶78.

The Court ordered El Salvador to adopt structural measures to avoid arbitrary criminalization of women’s obstetric emergencies, including modifying its legislation on doctor-patient confidentiality towards assuring that women are not denounced by the medical personnel who care for them, and removing legislation that provides for automatic detention of women who are denounced for having committed abortion.²⁶² To ensure that Manuela’s experience is not repeated, the Inter-American Court of Human Rights Court also ordered all States under its jurisdiction to make sure that doctor-patient confidentiality is specially protected in cases where reproductive rights are a matter of concern.²⁶³

CONCLUSION

Abortion rights and gender equality rights are closely intertwined. Legal systems across the globe are increasingly finding that to unreasonably restrict abortion access violates the right to gender equality. Further, abortion restrictions are burdens on the right to health, safety, autonomy, self-determination, privacy and human dignity. Yet close to half of women of reproductive age globally—forty one percent—still live under laws that restrict abortion access.²⁶⁴ Backlashes are occurring in the United States of America and in some European countries that trample on women’s rights. This comparative law study, which recounts cases where women's lives and dignity are disregarded, aims to show how the right to equality remains a fundamental tool of struggle and of transnational solidarity.

²⁶² *Id.* at ¶287-288, 290.

²⁶³ *Id.* at ¶257.

²⁶⁴ *World Abortion Map By the Numbers*, CENTER FOR REPRODUCTIVE RIGHTS (2018), <https://reproductiverights.org/maps/worlds-abortion-laws/>.