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Ethics of Care and the Public Good of Abortion

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Abstract

This article makes the case for seeing abortion as a public good. It does so using an ethics of care analysis. At the heart of the argument is that ethics of care requires us to promote relationships which are marked by care and mutual flourishing and to terminate relationships which are not so marked. Applying this in the context of pregnancy it is argued that the law should protect and promote wanted pregnancies as profoundly caring relationships, but that law must offer a termination of unwanted pregnancies. By providing abortion the law can end a noncaring relationship and free women to enter other caring relationships. I argue that this approach chimes with the reasons women typically give for seeking termination (to free them to undertake other caring responsibilities). It also provides a reason why unwanted termination of pregnancy, for example by miscarriage or criminal acts, can be recognised as serious wrongs, without challenging a liberal abortion law.

Keywords: Abortion, Ethics of Care, Pregnancy, Caring Relationships,

1. Introduction

This article will seek to apply ethics of care to make the case for the public good of abortion. While ethics of care is thought by some to be antithetical to abortion rights, this article will argue the opposite. The promotion of caring relationships requires both the support and sustenance of care; but also the termination of relationships which are not nurturing or marked by care. This is especially important if people are hindered by non-caring relationships from entering caring ones. I argue in this article that, seen in this way, abortion is an important aspect of promoting caring relationships within society.

This article will start by very briefly summarising the key aspects of an ethic of care. It will then summarise the way that ethics of care has been used by some commentators to oppose abortion rights. It will, thereafter, set out an alternative vision of how ethics of care can be used as the basis for the promotion of abortion rights. It will conclude by summarising how an ethics of care approach can provide more useful tools for promoting the public good of abortion, than the more traditional rights analysis.

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2. Ethics of Care

There is now significant and rich literature on ethics of care.[1] At its heart is the claim that caring should be the most highly valued activity in society. A key role of the state and the law is to ensure that the basic needs of its citizens are met. And caring is essential to that. Therefore, the law and state must promote and protect caring relationships. In reality, caring is often invisible in public policy, law and even ethical discourse. Re-orientating social and legal interventions around ethics of care would have profound ramifications that extend far beyond domestic life, impacting political thought, international relations and core conceptions of legal rights and responsibilities.[2]

As the focus of this article is on its application to abortion, only a very brief overview of ethics of care can be offered here. Joan Tronto summarizes ethics of care in this way:

> ...a set of moral sensibilities, issues and practices that arise from taking seriously the fact that care is a central aspect of human existence...a species activity that includes everything that we do to maintain, continue and repair our 'world' so that we can live in it as well as possible. That world includes our bodies, ourselves and our environment, all of which we seek to interweave in a complex, life-sustaining web.[3]

Clearly, the concept of care is at the heart of the approach. Yet the concept of care is somewhat vague. With some justification, ethics of care has been criticized as lacking a concrete definition of care. In my book, Caring and the Law,[4] I have suggested that care is, in its nature, not subject to a precise definition. What is caring depends on the relationship between the parties, their personalities, and preferences. It is, therefore, not amenable to an objective definition. I argue that the best approach, in contrast to those seeking a definition, is to provide hallmarks of care, and suggest the following four:

- Meeting needs
- Respect
- Responsibility
- Rationality.[5]

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1 Leading works on ethics of care include: Carol Gilligan, 'Moral Orientation and Moral Development' in Eva Feder Kittay and Diane Meyers (eds), *Women and Moral Theory* (Rowman and Littlefield, 1987); Joan Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (Routledge, 1993); Selma Sevenhuijsen, *Citizenship and the Ethics of Care* (Routledge, 1998); Virginia Held, *The Ethics of Care* (OUP, 2006); Jonathan Herring, *Caring and the Law* (Hart, 2013); Rosie Harding, Ruth Fletcher and Chris Beasley (eds), *Revaluing Care in Theory, Law and Policy* (Routledge, 2016); Rosie Harding, Duties to Care (CUP, 2017).

2 Held, The Ethics of Care (n 1); Daniel Engster, *The Heart of Justice: Care Ethics and Political Theory* (OUP, 2007).

3 Tronto (n 1) 12.

4 Herring, *Caring and the Law* (n 1).

5 ibid. For an alternative analysis see Tronto (n 1) 127-34.

These concepts are unpacked in that book and I will not discuss them further here.

A. Care is Part of Being Human

We all have needs, and caring for others in meeting these needs, and having our needs met by the care of others, is a universal experience. Wendy Holloway argues that 'care is the psychological equivalent to our need to breathe unpolluted air'.6 There will be few, if any, stages during anyone's life when they are not in caring relationships. As Eva Feder Kittay et al put it:

> People do not spring up from the soil like mushrooms. People produce people. People need to be cared for and nurtured throughout their lives by other people, at some times more urgently and more completely than at other times.[7]

Not only is care essential, it should be accepted as a moral good. Care should be treasured and valued as a good part of life. Care is the outworking of that most core moral value: love. It involves achieving a primary good: meeting the needs of others.[8]

B. Emotions are Ethically Significant

The law has traditionally been rather sceptical of emotions. It has preferred the idea of law to be governed by rationale and rule following, rather than turning on the whims of emotions. Emotions cannot be assessed by empirical evidence, and cannot be trusted. As a result, emotions are largely ignored, or even treated with suspicion. The love which is involved in caring, and the grief, disappointment, frustration, anger and despair, which are all part of life, find no place.8 An ethics of care approach, by contrast, regards emotions as offering important moral insights. For care work, values such as trust, empathy, compassion and sensitivity are key. If legal interventions are to promote caring relationships, then taking emotions seriously is essential. Law which ignores or undermines emotional values will be ineffective in seeking to promote care.

C. Intermingled Interests

Ethics of care is based on the belief that people are relational. People understand themselves in terms of their relationships. Their well-being is deeply tied up with the well-being of others. If good things happen to those they are in a positive relationship with, then

6 Wendy Holloway, 'Introducing the Capacity to Care' in Wendy Hollway (ed), *The Capacity to Care: Gender and Ethical Subjectivity* (Routledge, 2006).

7 Eva Feder Kittay, Bruce Jennings and Angela Wassuna, 'Dependency, Difference and the Global Ethic of Longterm Care' (2005) 13 Journal of Political Philosophy 433, 436.

8 Jonathan Herring, 'Compassion, Ethic of Care and Legal rights' (2017) 13 International Journal of Law in Context 158.

that is good for them.[9]

An ethic of care, therefore, takes a particular view of the nature of the self, one that is constructed through, and finds its meanings in relation to others.[10] Supporters of ethics of care do not need to entirely reject the notion of an individual self, but simply recognise that its identity and nature can only be appreciated in relation to others. In relationships of care and dependency, interests become intermingled. We do not break down into 'me' and 'you'. As Virginia Held puts it:

> Care should not be understood as self-sacrifice. Egoism versus altruism is the wrong way to interpret the issues. Yes, the interests of care giver and care receiver will sometimes conflict, but for the most part we do not pit our own interests against those of others in this context. We want what will be good for both or all of us together. We want our children and others we care for to do well along with ourselves, and for the relations between us to be good ones. If we are the recipients of care we want our care givers to do well along with us.[11]

D. The Importance of Responsibilities

Ethics of care emphasise the importance of responsibilities within caring relationships.[12] Indeed, many ethics of care supporters suggest that responsibilities should be the primary ethical tool, with rights playing a subordinate role. The classic liberal perspective is that one is 'born free' and that any responsibilities one takes must be, in some sense, voluntarily assumed. However, for an ethics of care approach, with its starting point being that people are relational, the supposition is that there will be responsibilities for others. We are born into relationships which carry responsibilities with them. So, the central legal or ethical question on a given issue should not be 'do I have a right to do X?', the question should be 'what is my proper obligation within the context of this relationship?'[13] Under this vision, rights primarily exist to enable people to carry out their responsibilities.[14] The role of the law should primarily be to encourage and enable people to fulfil their responsibilities to each other, rather than to enforce their rights.

E. The Importance of Non-Abstraction

One of the key aspects of ethics of care is that an ethical analysis must start with the context and concrete reality of particular situations, involving individuals, their relationships and characteristics. It rejects the approach of many mainstream ethical approaches, which seek

9 Jocelyn Downie and Jennifer Llewellyn, *Being Relational* (UBC Press, 2011).

10 Charles Foster and Jonathan Herring, *Identify, Personhood and the Law* (Springer, 2017).

11 Virgina Held, 'Care and Human Rights' in Rowan Cruft, S Matthew Liao, and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (OUP, 2015).

12 Stephanie Collins, *The Core of Care Ethics* (Palgrave, 2015).

13 Held, *The Ethics of Care* (n 1).

14 Herring, 'Compassion' (n 8) 158.

to develop general rules which apply across all cases. Ethics of care argues that what might work for one group of people in one situation, will not work in another. What will be caring, will depend on the particular individuals and their obligations. What will meet one person's needs, cannot be generalized.

F. Gender and an Ethic of Care

Carol Gilligan is the leading pioneer of ethics of care thinking. In her 1980s writing she developed her approach as a response to the writing of Lawrence Kohlberg, who had argued that universalized and principled thinking was the highest and most sophisticated moral analysis. Kohlberg found that a higher percentage of boys in his samples scored higher than girls. Gilligan's response to this was that the girls were speaking in a 'different voice', an ethic of care; as opposed to the ethic of justice. Although she has sometimes been interpreted as suggesting that the ethic of care reflects a feminine voice, it seems that her writing does not support the view that women are more likely to adopt it than men. Certainly, nowadays, few writings on ethics of care would support such a claim.

Nevertheless, the ethic has attracted considerable support among feminists, although it has supporters who do not explicitly adopt a feminist approach.[15] Its support among feminists can, in part, be explained by the fact that women undertake a significantly greater proportion of care work in contrast with men, and the political, social and ethical neglect of this work results in disadvantages for women.

3. The Abortion Debate

We turn now to the issue of abortion. The ethical literature on the issue is extensive, but is commonly divided into three sets of debates.[16] First, there are sophisticated arguments over the nature of personhood and whether the foetus is a person; second, whether claims of autonomy and bodily integrity of the woman trump the claims, if any, of the foetus; and third, whether gender equality arguments strengthen the arguments for rights to abortion. What do ethics of care add to this? It must be admitted that, at first sight, it might be thought that ethics of care would be opposed to abortion, and indeed, this is a line some ethics of care writers have taken. I will set out their views, before explaining why, in fact, ethics of care should apply in a different direction: recognizing the good of abortion.

4. The Anti-Abortion Ethic of Care Arguments

It is unsurprising, at least from a pro-choice perspective, that an ethics of care approach has been relatively neglected in the debates over abortion. It is not immediately clear that

15 Michael Slote, *The Ethics of Care and Empathy* (Routledge, 2007).

16 Kate Greasley, *Arguing About Abortion* (CUP, 2017).

an ethic of care would, in fact, support abortion rights at all.17 Indeed, the language of care and support for dependents might, if anything, play into the hands of antiabortion advocacy.18 I will be arguing that, in fact, an ethic of care can add rich analysis to the literature, and in particular, strengthen the case for abortion as a public good. Before developing that argument, I will look at some of the arguments that have been made about abortion, using ethics of care to deny abortion rights.

Celia Wolf-Devine has been one of the most prominent writers to use ethics of care to oppose abortion rights.[19] She describes abortion as a 'masculine response to the problems posed by unwanted pregnancy.' She argues that the 'feminine voice', promoted by ethics of care, should generate a strong presumption against the use of abortion. She points to the emphasis in ethics of care on responsibilities to care for others; our interconnectedness and importance to preserve relationships; as opposed to abortion rights. She claims, with justification that the language used to promote abortion is typically in terms of the 'masculine' values of autonomy and bodily integrity. Such rights are normally challenged by ethics of care. She writes: 'Abortion is a separation—a severing of a life-preserving connection between the woman and the foetus. It thus fails to respect the interconnectedness of all life. Nor does it respect the natural cycles of nature.'[20]

It is true that many of the strongest defences of abortion rights are put in terms of the right to choose, the right to bodily integrity and the right to self-defence. These arguments are well made, and it is not the aim of the chapter to reject these. Forcing a woman to go through an unwanted pregnancy can properly be seen as a 'non-consensual invasion, appropriation and use of her physical body'[21] and she should be entitled to defend herself against that.[22] But Wolf-Devine is correct that such powerful justifications for abortion rights, sit a little uncomfortably with the language of care and relationality promoted by ethics of care. Indeed, Robin West has challenged ethics of care precisely on the basis that it could undermine abortion rights.[23] She goes on to make a more general critique of ethics of care, arguing:

> The ethic of care, from a liberal perspective, emphasizes and then valorizes precisely the interrelationships, the dependency, the lack of agency, the identification with care and nurturance, the relegation to the private sphere, and in short the sex and gender linked differences that have been used, when an excuse was needed, to justify the two-century-long project of continuing the subordination of women even in a liberal society that should seemingly be

17 Jackie Davies, 'Analogy and Narrative: Caring about the Forgone and Repressed' (2001) OSSA Conference Archive 22.

18 Pamela S Katlan and Daniel R Ortiz, 'In a Diffident Voice: Relational Feminism, Abortion Rights, and the Feminist Legal Agenda' (1993) 87 Northwestern University Law Review 858, 870-90.

19 Celia Wolf-Devine, 'Abortion and the "Feminine Voice"' (1989) 3 Public Affairs Quarterly 81.

20 ibid 84,

21 Robin West, 'Liberalism and Abortion' (1999) 87 Georgetown Law Journal 2117, 2117.

22 Eileen Mcdonagh, *Breaking The Abortion Deadlock: From Choice To Consent* (OUP, 1996)

23 West, 'Liberalism and Abortion' (n 21) 2117.

committed to ending it.[24]

This is not the place to defend an ethic of care against that challenge, although shortly I will explain why I do not think it follows that ethics of care opposes abortion rights. Indeed, Robin West in her article goes on to call on liberalism to incorporate ethics of care and to build ways of thinking that combines ethics of care analysis and liberalism.[25]

5. Developing an Ethics of Care Based Approach

I now move on to make the positive case in favour of using ethics of care to promote abortion as a public good. I will argue that it offers a more convincing case than the standard right to choose and bodily integrity arguments.

A. Pregnancy as Interconnection

As argued earlier, abortion is typically presented as a clash between the rights of the woman and the rights of the foetus. Ethics of care offers us a way to by-pass that approach and understand pregnancy as a relationship. It rejects the standard individualised approach to the issue.

Martha Nussbaum explains why she believes the individual should be the basic unit for political thought:

It means, first of all, that liberalism responds sharply to the basic fact that each person has a course from birth to death that is not precisely the same as that of any other person; that each person is one and not more than one, that each feels pain in his or her own body, that the food given to A does not arrive in the stomach of B.[26]

Whatever one thinks of this argument generally, it is immediately clear that what she is saying is not true of the foetus. The pain of the mother affects the foetus, and the food given to the mother can arrive in the stomach of the foetus. The biological reality is that pregnancy is a relationship of profound interconnection.[27] There are, I suggest, three interlocking aspects to this.

1. Biological Interconnection

As a matter of biology, the pregnant woman and the foetus cannot be neatly divided into two people. There is no clear point at which foetal tissue ends and the woman's tissue

24 Wolf-Devine (n 19) 37.

25 West, 'Liberalism and Abortion' (n 21) 2117.

26 Martha Nussbaum, *Sex and Social Justice* (OUP, 1999) 62.

27 Jonathan Herring, 'The Loneliness of Status: The Legal and Moral Significance of Birth' in Fatemeh Ebtehaj et al (eds), *Birth Rights and Rites* (Hart, 2011).

begins. They share fluids and space. The health and well-being of the woman profoundly affect the foetus, and vice versa.[28] As Iris Marion Young puts it:

> *[p]regnancy challenges the integration of my body experience by rendering fluid the boundary between what is within, myself, and what is outside, separate. I experience my insides as the space of another, yet my own body.*[29]

The interconnection between the two shows that the standard individualised approach is particularly inappropriate in relation to pregnancy.

Likewise, Margaret Anne Little emphasises the significance of the inter-corporality involved in pregnancy:

> *To be pregnant is to be* ***inhabited****. It is to be* ***occupied****. It is to be in a state of physical* ***intimacy*** *of a particularly thorough-going nature. The fetus intrudes on the body massively; whatever medical risks one faces or avoids, the brute fact remains that the fetus shifts and alters the very physical boundaries of the woman's self. To mandate continuation of gestation is, quite simply, to force continuation of such occupation.*[30]

Conceiving of the foetus on its own terms fails to capture the fact that it is integrated into the woman. The traditional presentation is some kind of fairy tale image that the woman provides a cosy sitting room for the foetus to live in, awaiting birth. But the woman is not simply a 'foetal container'.31 Barbara Katz Rothman writes:

> *the reigning medical model of pregnancy, as an essentially parasitic and vaguely pathological relationship, [which] encourages the physician to view the fetus and mother as two separate patients, and to see pregnancy as inherently a conflict of interests between the two. Where the fetus is highly valued, the effect is to reduce the woman to what current obstetrical language calls the 'maternal environment'.*[32]

The reality is that all interaction and dealings with the foetus must be mediated through, and with, the woman. Pregnancy is utterly relational.

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28 See Jonathan Herring and P-L Chau, 'My Body, Your Body, Our Bodies' (2007) 15 Medical Law Review 34, for a discussion of the biology.

29 Iris Marion Young, *On Female Body Experience* (OUP, 2005) 49.

30 Margaret Little, 'Abortion, Intimacy and the Duty to Gestate' (1999) 2 Ethical Theory and Moral Practice 295.

31 George Annas, 'Pregnant Women as Fetal Containers' (1986) 16 Hastings Centre Report 13, 14.

32 Barbara Katz Rothman, *Recreating Motherhood: Ideology and Technology in a Patriarchal Society* (Rutgers University Press, 1989) 89.

2. Psychological interconnection

The interconnection is not simply a biological one, but also a psychological one. Jane Mair writes that the notion of the maternal/foetal conflict which dominates the traditional approach 'is a violent image which disrupts the coexistence of mother and foetus. It is an emotive phrase which suggests unmotherly feelings and a grotesque perception of the struggling foetus'.[33] This conflict model reflects what Anne Morris has called 'an ignorance of what it means to be pregnant'.[34] As she argues, 'the issues involved are much more complex than the easy label of maternal/foetal conflict suggests ... instead of seeking to resolve maternal/foetal conflicts by defining more clearly the individual legal rights of the pregnant woman and the foetus, should we not question the construction of these so-called conflicts?'[35]

We need instead, as Barbara Katz Rothman suggests an acknowledgement that '[m] otherhood is an experience of interpersonal connection. The isolated, atomistic individual is an absurdity when one is pregnant: one is two, two are one.'[36]

The experience of pregnancy profoundly impacts on the body and identity of the woman. As Anne Elvey explains:

> *. . . the pregnant body . . . calls into question these assumptions of separateness and sameness. When I am pregnant, 'my' body is both 'I' and 'not I', mine and not mine. The boundaries of the body shift as the pregnant body creates its own expanding space. While the skin stretches the boundary between the body and its outside is continually renegotiated, until in birth the inside enters the outside. The pregnant body is, moreover, two or more under the influence of a third, the placenta, through the agency of which self and other are interconnected.*[37]

The deep mutuality approach is much better captured by an ethics of care approach, which acknowledges the relational nature of pregnancy.

3. Foetal Status

The standard approach seeks to determine the status of the foetus, and to determine the responsibilities that are owed by the woman to the foetus as a result. The relational ethics

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33 Jane Mair, 'Maternal / Foetal Conflict: Defined or Defused?' in Sheila McLean (ed), *Contemporary Issues in Law, Medicine, and Ethics* (Dartmouth Publishing, 1996) 79.

34 Anne Morris, 'Once Upon a Time in a Hospital...the Cautionary Tale of *St George's NHS Trust v S., R. v Collins and Others ex parte S.* [1998] 3 All ER 673' (1999) 7 Feminist Legal Studies 79, 84.

35 Mair (n 33) 93.

36 Katz Rothman (n 32) 93.

37 Anne Elvey, 'The Material Given: Bodies, Pregnant Bodies and Earth' (2003) 18 Australian Feminist Studies 199, 208.

of care approach argues that, rather than asking what rights or responsibilities are owed to an individual in response to their status, we ask what the responsibilities and rights are owed in relation to a relationship.[38] The argument is that, in order to determine what are the legal rights and responsibilities between person A and B, we need to know what their relationships is. In brief, where a relationship is marked by care, I would advocate that the law should allocate rights and responsibilities to ensure that the relationship is upheld and maintained. [39] Where, however, that relationship is not marked by care, then it does not have moral value, and the law should enable the parties to find other caring relationships. The relational approach sees our obligations and rights emerging from our relationship, rather than our legal status. In order to determine the rights and responsibilities owed by person A to B, we learn little by finding the fact that B is a person. Whether B is A's child; A's parent; a stranger; A's doctor; etc., is far more telling and significant, than merely whether B is a person or not. Contractual claims can transform the responsibilities one person owes to another. Even tort law requires a duty of care emerging typically from the nature of the relationship, and carry duties of care depending on that relationship. Later in this article, I will develop what this means in terms of the law's regulation of abortion.

B. Summary on Interconnection

An ethics of care approach can recognise the deeply interconnected and relational experience of pregnancy.[40] As Rothman puts it,

> *A holistic view of pregnancy understands that pregnancy is a unique relational existential reality that simultaneously represents physiological, existential, and social duality and oneness. This view is consistent with both physiological and maternal understandings of pregnancy. It is reflective of both intended and unintended pregnancies. It is honest. And, it is woman-centred.*[41]

6. Applying a Relational Approach to Termination of Pregnancies

As should already be clear, the relational approach opens up the possibility for a very different weighting and understanding of wanted and unwanted pregnancies. Wanted pregnancies are caring, and therefore of the highest moral value. We need to protect them through the criminal law from unwanted termination, and to recognise the goodness of them. By contrast, unwanted pregnancies lack moral value as these involve coerced care, which may well impede other wanted caring relationships. As Bryon Stoyles puts it:

38 This argument is developed more fully in Foster and Herring (n 10).

39 Herring, *Caring and the Law* (n 1) Chapter 2.

40 Sarudzayi Matambanadzo,'Reconstructing Pregnancy' (2016) 69 Southern Methodist Law Review 187.

41 Katz Rothman (n 32) 89.

> *Relational accounts of fetal value allow that pregnancies have whatever meaning and value they are given by the pregnant woman. Thus, relational accounts allow that pregnancy can have little or no positive value and also that pregnancy can have great value.*[42]

I will develop these two points.

A. Coerced Relationships Are Not Caring

I suggest that a relational ethics of care approach can be helpful when thinking about abortion.[43] The relational ethics of care approach would focus on the question of what obligations flow from the pregnancy, given that it is unwanted, and so will not be marked by the reciprocity and mutuality required for a relationship to be caring. Given that a parent is not obliged by the law to give organs, or to even suffer the prick of a needle to give some blood in order to save the life of their child, it is inconceivable that the law could require a woman to go through pregnancy and birth for a foetus in order to promote a caring relationship. The law is not in the business of coercing relationships through threat of legal sanction, as that undermines the very goodness of a mutually respectful caring relationship. As Bertha Manninen argues, even if one accepts foetal personhood, there are major limits to the responsibilities that can be imposed on others:

> *As much as we can feel for the life of patients in need of organ transplants, we cannot force otherwise healthy persons to donate non-vital organs to save the sick. This does not mean that the lives of these patients have no value; rather what it means is that no matter how valuable they are, this value cannot be used as grounds to infringe upon the rights of other persons. Similarly, we can argue that being prochoice need not entail a wanton disregard of fetal life, but, rather, an acknowledgment that, like all persons, pregnant women have a right to decide if they want to use their bodies to sustain another.*[44]

Hilde Lindemann similarly argues,

> *Anti-abortion legislation holds pregnant women—who are innocent of any wrongdoing—to a punitive standard of specific performance, sentencing them against their will to the many kinds of hard work, physical discomfort, and outright danger that my daughter willingly undertook to bring her child into the world. No other class of people is held to this standard in peacetime. No*

42 Byron Stoyles, 'The Value of Pregnancy and the Meaning of Pregnancy Loss' (2015) 46 Journal of Social Philosophy 91.

43 See for an extended discussion Camilla Pickles, *Pregnancy Law in South Africa* (Juta, 2017).

44 Bertha Manninen, 'The Value of Choice and the Choice to Value: Expanding the Discussion about Fetal Life within Prochoice Advocacy' (2003) 28 Hypatia 664, 679.

woman should be held to it either.[45]

It should not be forgotten that pregnancy carries serious health risks. As Eugenie Gatens-Robinson points out:

> *The adverse physical effects of pregnancy on a woman are serious and common, including hypertension, hemorrhage, diabetes and embolism. The risk of death to both woman and fetus among poor women likely to have pre-existing health problems such as untreated hypertension is quite real. The 25% of women who undergo caesarean sections have a significantly higher risk of adverse effects on health or even death than those who have vaginal delivery.*[46]

So, forcing a woman to remain pregnant, and to provide the deeply embodied work involved in pregnancy, cannot be justified in the name of care.

Finally, it is important to note the impact of wider societal factors influencing abortion. Poverty, social exclusion and poor health care provision can impact on what can be expected of someone in terms of caring. Importantly, domestic violence is commonly associated with an abortion decision.[47] Abortion is, therefore, required as a public good, because it is a way of responding to the inequalities within society, and the failure to offer adequate protection from violence.

In this section, therefore, it has been argued that abortion cannot be seen as a caring response to unwanted pregnancy, because it leads to coerced care, which is not caring. A caring society would never compel the degree of personal and bodily sacrifice called for in pregnancy. Indeed, it does not in any other context.

B. Abortion Enables Caring Relationships to Develop

By contrast, providing abortion can be a means of promoting care. It is important to note that many accounts of women's abortions, explain what they did in terms of caring. Consider, for example, these comments from three women who had abortions, provided to the 'My Body, My Life' project:

> *I was 22 when I found out I was pregnant. I had just qualified as a teacher but was yet to find my first teaching position. My partner had a decent job but he was recovering from a prolonged period of severe depression and while he lived with his elderly mother, I was caring for my grandmother who had been diagnosed with a degenerative illness. Although we were very much in love*

45 Hilde Lindemann, ' "...But I Could Never Have One": The Abortion Intuition and Moral Luck' (2009) 21 Hypatia 41, 57.

46 Eugenie Gatens-Robinson, 'A Defense of Women's Choice' (1992) 30 Southern Journal of Philosophy 39, 66.

47 Indira Gilbert and Vishanthie Sewpaul, 'Challenging Dominant Discourses on Abortion From a Radical Feminist Standpoint' (2015) 30 Affilia 83.

> *and hoped to have children one day, our finances and living arrangements meant we were not equipped to raise a child. We would want to give our children the very best possible start in life and, at that time, we didn't have the opportunity to do so.*[48]

> *I had made my decision even before it had happened. I got pregnant at 23 and knew I could not have it. I wasn't ready to give the baby the life it deserved.*[49]

> *I fell pregnant again shortly after my son turned a year old. I have a long term health condition that means pregnancy can be dangerous for both myself and foetus. I had to consider my son's welfare and was the risk of having another child worth making myself very unwell?*[50]

A review of reasons used in making abortion decisions found that the decision to terminate a pregnancy was often influenced by the desire to be a good parent to a child, when born.[51] The first of the accounts presented above referred to the caring responsibilities to her partner and parent. The decision to abort is influenced by women's responsibilities to other people and to themselves. Sherwin reports from her analysis of women's abortion reasons, that the explanations involve

'...her feelings about her foetus, her relationship with her partner, other children she may have, and her various obligations to herself and others — contextually defined considerations that reflect her commitments to the needs and interests of everyone concerned.'[52]

When thinking about an ethic of care, it is important to remember that care of the self is an aspect of caring. This is brought out in Carol Gilligan's initial work. She rejects a dichotomy between self-care and altruism, showing that effective care of others involves care of the self.[53] Carol Gilligan in her seminal book, In a Different Voice: Women's Conception of Self and Morality[54] uses a study of twenty nine women who made abortion

48 'Post 15' (*My Body, My Choice*) <http://mybody-mylife.org/user-submitted-post-15/> accessed 17 November 2017.

49 'Post 9' (*My Body, My Choice*) <http://mybody-mylife.org/user-submitted-post-9/> accessed 17 November 2017.

50 'Post 16' (My Body, My Choice) <http://mybody-mylife.org/user-submitted-post-16/> accessed 17 November 2017.

51 Maggie Kirkman et al, 'Reasons Women give for Abortion: A Review of the Literature' (2009) 12 Archives of Women's Mental Health 365; Julia Hainsberg, 'Homologizing Pregnancy and Motherhood: A Consideration of Abortion' (1985) 94 Michigan Law Review 371.

52 Susan Sherwin, *No Longer Patient* (Temple University Press, 1992) 102. See also Jeannie Ludlow, 'Sometimes, it's a Child and a Choice: Toward an Embodied Abortion Praxis' (2008) National Women Studies Association Journal 20, 26-50.

53 Inge van Nistelrooij and Carlo Leget, 'Against Dichotomies: On Mature Care and Self-Sacrifice in Care Ethics' (2017) 34 Nursing Ethics 694.

54 Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (HUP, 1992).

decisions to explore the concept of the 'different voice' captured by ethics of care. She explains that the standard presentation of abortion ethics, as a clash between the right to choose of the woman and the interests of the foetus, plays into the argument that abortion is about selfishness and not accepting responsibility. She argues that care is used in the abortion debate, but in a way that plays on assumptions about motherhood, and equates good care as only caring for others, and in particular children. But, as Gilligan argues, this proposes a very narrow understanding of care. She writes:

> *To be a mother in the societal as well as the physical sense requires the assumption of parental responsibility for the care and protection of a child. However, in order to be able to care for another, one must first be able to care responsibly for oneself.*[55]

She explores how the decisions women in her sample were making involved conflicts 'between wish and necessity'. She quotes one woman:

> *What I want to do is to have the baby, but what I feel I should do, which is what I need to do, is have an abortion right now, because sometimes what you want isn't right. Sometimes what is necessary comes before what you want, because it might not always lead to the right thing.*[56]

Gilligan goes on to explain:

> *In separating the voice of the self from those of others, the woman asks if it is possible to be responsible to herself as well as to others and thus to reconcile the disparity between hurt and care. The exercise of such responsibility, however, requires a new kind of judgment whose first demand is for honesty. To be responsible, it is necessary first to acknowledge what it is that one is doing. The criterion for judgment thus shifts from 'goodness' to 'truth' as the morality of action comes to be assessed not on the basis of its appearance in the eyes of others, but in terms of the realities of its intention and consequence.*[57]

So, we have seen in this context, that abortion enables women to care: to meet the caring responsibilities they currently face; to meet their caring responsibilities to any child they ever do have; and to care for themselves. A society committed to an ethic of care must promote caring, and that means promoting the ready availability of abortion.

C. Ethics of Care and Legal Protection of Wanted Relationships

An ethics of care approach provides a meaningful way to respond to all pregnancies.

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55 ibid 192.

56 ibid 201.

57 ibid 202.

One of the difficulties with the standard presentation of pregnancy, involving a separation between the interests of the foetus and those of the woman, is that it fails to account for differences in wanted and unwanted pregnancies. There is a real difficulty here. Those who see the foetus as having personhood from conception are likely to oppose abortion rights; while those who see the foetus as having no personhood cannot capture the value and importance of the pregnancy relationship where it is wanted. However, for many, there is a world of difference between wanted and unwanted pregnancies, and we need a form of legal analysis which distinguishes between them. As Camilla Pickles argues:

> *Female autonomy must also recognise women's vested interests in their unborn. Therefore, female autonomy must be understood as including the decision to continue with a pregnancy, as well as decisions on how to progress through pregnancy. This manifestation of autonomy must be protected in law in order for it to have any meaningful effect for women who want children. Consequently, the single-entity approach only speaks to one side of female autonomy and fails to assist those women who plan to continue with their pregnancies and to adequately protect such decisions.*[58]

The problem with the traditional understanding of the foetus is well captured by Hannah Roberts, a Lecturer in Law whose eight month pregnancy was terminated through a car accident. She writes:

> *The current law's attempt to answer this riddle is a clumsy one. It characterises our daughter's death as one of my 'injuries', because she died in utero, and was not a legal 'person' with a separate existence from me at the time she died. Calling our loss an 'injury' fails to acknowledge the depth of sorrow involved in grieving a child.* [59]

Yet she goes on to express nervousness for saying her foetus was a person or a child, for fear that that would negatively impact on abortion rights. This is also captured by the writing of Victoria Browne, arguing that miscarriage is 'disenfranchised grief'. She acknowledges that there is a concern that

> *if one were to acknowledge that there was something of value lost, something worth grieving in a miscarriage, one would be conceding ground to antiabortion or 'pro-life' arguments.* [60]

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58 Camilla Pickles, 'Approaches to Pregnancy Under the Law: A Relational Response to the Current South African Position and Recent Academic Trends' (2015) De Jure Law Review 2, 16.

59 Hannah Robert, 'Responding to unwanted termination: Why losing my daughter means I don't support Zoe's Law' (*The Conversation*, 18 November 2013) <https://theconversation.com/why-losing-my-daughter-means-i-dont-support-zoes-law-19985> accessed 11 November 2018.

60 Victoria Browne, 'Feminist Philosophy and Prenatal Death: Relationality and the Ethics of Intimacy' (2016) 41

An ethics of care approach provides a way around this dilemma. We can recognize that, in the case of a wanted pregnancy, there is a caring relationship which the state has a duty to support and protect. However, in the case of an unwanted relationship, the state has a duty to provide abortion to ensure there is no coerced relationship, which would be the antithesis of care. Further, by providing abortion, the state promotes caring relationships – the current caring relationships the woman has; the care for any child the woman later has; and care for herself. We can, on this understanding, have a law which offers a liberal approach to abortion, yet is able to provide powerful criminal sanctions against those who terminate a pregnancy without consent, and to acknowledge the serious loss in an unwanted miscarriage.

7. Traditional Reasoning

Having indicates some of the insights offered by ethics of care, it is worth highlighting some advantages of an ethics of care approach over the more standard pro-choice arguments.

First, as we have seen in the arguments above, the traditional analysis pits the rights of the woman to choice and bodily integrity with the right to life of the foetus. As we have seen, this ignores the interconnection in bodily and psychological terms between the woman and the foetus, which means that their interests must be regarded as intertwined, rather than in opposition.

Second, we have seen that the standard approach fails to provide an adequate response to both abortion and miscarriage. Either the status of the foetus is placed at a high level in which abortion rights are threatened, or the foetus is given few rights, which fails to recognise the significance of unwanted miscarriage. By focusing on the qualities and nature of the relationship, we can distinguish between wanted and unwanted pregnancies.

Third, the presentation of abortion as a matter of choice or control tends to privatise the matter. As Petchesky explains, this 'lets men and society neatly off the hook'. [61] While the choice/control language creates a powerful liberty claim, it fails to make the case for positive rights to abortion. As Lisa Smyth notes:

> *the emphasis on privacy prevents any consideration of the socio-political forces which produce both involuntary pregnancies and calls for abortion access, and constrain the 'choices' of different women in different contexts.*[62]

Fourth, the traditional language of choice does not capture the reality of abortion decision making. Catriona Mackenzie has written of the way that the academic discussions on abortion:

Signs 485.

61 Rosalind Petchesky, *Abortion and Woman's Choice: The State, Sexuality and Reproductive Freedom* (Verso, 1986) 7.

62 Lisa Smyth, 'Feminism and Abortion Politics: Choice, Rights, and Reproductive Freedom' (2002) 25 Women's Studies International Forum 335.

> *have focused philosophical and moral reflection away from the contexts in which deliberations about abortion are usually made and away from the concerns and experiences which motivate those involved in the processes of deliberation. The result is that philosophical analyses of abortion often seem beside the point, if not completely irrelevant, to the lives of the countless women who daily not only have to make moral decisions about abortion but, more importantly, who often face serious risks to their lives in contexts where abortion is not a safe and readily accessible procedure.*[63]

The relational model acknowledges the emotional issues raised. Gillian Hadfield writes of those who focus on choice in the abortion decision:

> *Who are these people who populate the economist's ... imaginatio[n], who calmly assess the alternatives available according to a stable set of internally consistent preferences and proceed to select the obvious choice, who apparently feel no passion or emotion, who do not worry about whether they are choosing well, who never feel trapped by their choices, and who never discover over time more about themselves and their understanding of their choices? Where is love, duty, fear, self-doubt, and power?* [64]

An ethics of care approach would also require the state to respond to an unwanted pregnancy in a caring way. As mentioned earlier, this approach rejects ethical assessments based on abstract principles, and requires a focus on the particular relationships, their history and their context. This means that decisions about pregnancy and parenthood must be placed in the real mucky world of relationships, where sometimes things go wrong and sometimes they go right. The world of family life, where being a parent is sometimes about survival, rather than about reaching the highest ideals of parenthood. Where weighing up nicely the competing moral interests makes no sense, when everything is going crazy, and control over life is a long lost fiction. Abortion decisions are complex and not reducible to straightforward analysis of my rights against the non-person. Or reducible to one of five grounds in a statute. That would be a parody on the complexity of women's abortion decisions.65 The language promoted by an ethic of care requires careful listening and respect for each story, in each case, and rejects an abstracted response.

8. Conclusion

This article has sought to use ethics of care to make an argument for abortion as a public good. It has argued that, at the heart of ethics of care is the idea that we should seek to

63 Catriona Mackenzie, 'Abortion and Embodiment' (1992) 70 Australian Journal of Philosophy 136, 142.

64 Gillian Hadfield, 'An Expressive Theory of Contract' (1998) 146 University of Pennsylvania Law Review 1235.

65 Robin West, 'Taking Freedom Seriously' (1990) 104 Harvard Law Review 43.

promote caring relationships. However, unwanted pregnancies are not marked by mutual care, and so lack moral value. The law has no interest in enabling these relationships to continue, and indeed cannot compel people to continue them when they involve the kind of bodily interference involved in pregnancy and childbirth. A coerced relationship is the opposite of a caring one. In no other context does the law compel one party to give up bodily integrity to save another, even to the slightest degree, let alone to the extent required in pregnancy. The law must enable unwanted pregnancies to be terminated, so that caring responsibilities may be fulfilled.

By contrast, the ethics of care approach means that we should have the highest moral regard for wanted pregnancies. These are caring relationships in a rich sense. Wanted pregnancies should be protected by legal rights and protections in employment, criminal, and welfare law.

But, above all, I have argued that ethics of care focus on relational values. The approach looks backwards to the past, and forward to the future, seeking to meet caring responsibilities to others and oneself, and thereby matches the reality of abortion decision making by women. An ethics of care approach gives us the ethical and practical tools to respond to abortion decisions, and recognises that a caring society will want to provide abortion as a public good.

"Women are not in the Best Position to Make These Decisions by Themselves": Gender Stereotypes in the Uruguayan Abortion Law

Lucía Berro Pizzarossa*

Abstract

Efforts to protect women's rights can cast dark shadows. Dangerous and often unnoticed stereotypes can motivate and infiltrate legal reforms. Recent changes to the law on abortion in Uruguay have been held out as a best practice model in South America. Recognising the power of the law to shape our understandings of how people are and should be, this article aims to unpack the stereotypes on women seeking abortions in the Uruguayan legal discourse and map how the law on abortion gives legal force to these harmful stereotyped ideas. This article analyses the parliamentary proceedings on the Voluntary Termination of Pregnancy Act. It asks: Do the debates on abortion in Uruguay reveal a cultural shift? Do members of parliament's arguments hinge on harmful stereotypes? In asking these questions, this article explores the extent to which a fairly liberal and widely praised domestic abortion law complies with the national and international human rights obligations to eradicate harmful gender stereotypes. Mining the rhetoric used in the parliament debates reveals the stereotyped images of women that seek abortion services that— rather than reflecting the true complexity and diverse experiences of women that seek abortion—are grounded in women's perceived degree of deviance from gendered stereotypes, particularly those surrounding motherhood. Uruguayan abortion law, while seemingly protecting women's rights, in fact hinges on traditional gender attitudes and stereotypes. This article provides the foundations to further develop sophisticated legal and political strategies for fulfilling women's sexual and reproductive health and rights.

Keywords: Abortion; Women's Rights; Gender Stereotypes; Parliamentary Debates; Uruguay

> *Categories are constructed. Scars and bruises are felt with human bodies ... when we're talking about constructs having concrete consequences, these consequences are not constructed, they're felt. They're very real.*
>
> *Cornel West*[1]

1 Cornel West, *The Cornel West Reader* (Basic Civitas Books, 1999) 510.

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1. Introduction

Abortion continues to be a highly contentious and highly regulated procedure. In Latin America and the Caribbean, more than 97 per cent of women of reproductive age live in countries that legally restrict access to abortion.[2] However, the demands for safe and legal abortion are gaining momentum in the region. In 2017, the Chilean Congress ended a 28-year blanket ban on abortion. In 2018, the Argentinean Congress debated—and ultimately rejected—a law liberalizing abortion; the Brazilian Constitutional Court heard a case pushing for the liberalization of abortion[3]; and Venezuela's new constituent assembly vowed to debate access to abortion. In the wake of this regional abortion 'lawfare'[4], Uruguay has emerged as a best practice model. In 2012, the country gained international praise and became a reference point in Latin America when it enacted one of the most liberal abortion laws on the continent. The Voluntary Termination of Pregnancy Act (Abortion Law N° 18.987) waives criminal penalties for the termination of pregnancy until the 12th week. In cases of sexual violence, women can access an abortion without fear of criminal liability until the 14th week of pregnancy. At any point during the pregnancy, the pregnancy can be terminated when it endangers the health of the mother or there are foetal abnormalities incompatible with extra-uterine life.

Undoubtedly, the law is a step forward. Abortion is now available on specific grounds and is provided within the public health system, free of charge. However, limits remain. After 12 weeks, in a pregnancy not involving sexual violence, the criminal prohibitions are still in place. In the cases of pregnancy resulting from sexual violence, the criminal prohibitions on abortion exist after the 14th week. Abortion is available at any time when the women's life is at stake or there is a fatal foetal abnormality. Even in these limited situations where women can legally access an abortion, the Voluntary Termination of Pregnancy Act creates significant procedural hurdles. There is still work to be done to ensure women in Uruguay are able to fully and easily access an abortion. This will require both legal and political activism.

In developing strategies to enhance women's sexual and reproductive health rights in Uruguay, this article takes a closer look at the parliamentary proceedings on the Voluntary Termination of Pregnancy Act. Do the debates on abortion in Uruguay reveal a cultural shift? Or do they continue to draw on traditional gender norms? It is crucial to unearth the stereotypes that underpin the law, even a law that partially enhances women's ability to access safe abortion. In asking these questions, this article pinpoints the negative cultural attitudes about women and abortion that permeate the legislative debates. This analysis is crucial for further advocacy on women's rights to safe and legal abortion. Cook and Cusack argue that '[n]aming a gender stereotype and identifying its harm is critical to its

2 Center for Reproductive Rights, 'The World's Abortion Laws 2019' <http://www.worldabortionlaws.com/> accessed 29 October 2018.

3 *Arguição de Descumprimento de Preceito Fundamental* n. 442 is pending as of January 2019.

4 Siri Gloppen et al, 'Sexual and Reproductive Rights Lawfare: Global Battles' <https://www.cmi.no/projects/1836-sexual-and-reproductive-rights-lawfare> accessed 18 July 2018.

eradication'.[5] To understand women's subordination, we must understand the stereotypes that contribute to women's legal and social disadvantage.[6] The conclusions in this article challenge popular discourse in Uruguay on abortion and identify the patriarchal stereotypes in the parliamentary debates that were ultimately codified in the law.

This article begins by evaluating the current legal regime regulating access to abortion in Uruguay. Section 3 assesses Uruguay's obligations under the UN Convention on Elimination of Discrimination of All Forms of Against Women (CEDAW) to demonstrate that there is an international and domestic legal obligation to combat pernicious gender stereotypes even in circumstances where there has been legal reform. Section 4 then proceeds to critically analyse the debates in the Uruguayan parliament on the decriminalization of abortion in order to understand how a woman seeking abortion is portrayed and constructed. It interrogates the Uruguayan abortion law and concludes that, while seemingly protecting women's rights, it in fact hinges on traditional gender attitudes and stereotypes on the roles of women and men.[7] This provides the foundations to further develop sophisticated legal and political strategies for fulfilling women's sexual and reproductive health rights in Uruguay.

2. Uruguayan Abortion Law

From 1907 to 2012, abortion was a crime in Uruguay with a sentence ranging from 3 to 9 years in prison.[8] Notwithstanding these harsh penalties, the criminal law did not prevent unsafe abortions. It is estimated that 30,000 to 50,000 clandestine abortions occurred each year, with devastating consequences for women's health and lives.[9] Research conducted during 1997-2001 demonstrated that although the maternal mortality rates of Uruguay were similar to those of comparably developed countries, there was a disproportionate number of deaths from unsafe abortions.[10] Unsafe abortions accounted for 28 per cent of maternal deaths, particularly affecting women in vulnerable situations.[11] After a lengthy and difficult process—that included a presidential veto—the Voluntary Termination of Pregnancy Act (Abortion Law Nº 18.987) came into force, waiving criminal penalties for the termination of pregnancy under specific circumstances.

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5 Rebecca Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (UPP, 2010); Alexandra Timmer, 'Toward an Anti-Stereotyping Approach for the European Court of Human Rights' (2011) 11 Human Rights Law Review 707.

6 Sandra Fredman, *Women and the Law* (Clarendon, 1997) 3.

7 The Uruguayan abortion law operates on the assumption of two distinct categories: "women" and "men". While acknowledging the problematic nature of this distinction (firmly situated in a static cis hetero normative gender binary) the analysis in this article is limited to these categories.

8 See Criminal Code (Uruguay), arts. 325 and 325(bis).

9 Rafael Sanseviero (ed), *Condena, tolerancia y negacion: El aborto en Uruguay* (Centro Internacional de informacion para la Paz, 2003) 33.

10 Leonel Briozzo et al, 'Unsafe Abortion in Uruguay' (2004) 85 International Journal of Gynecology and Obstetrics 70.

11 ibid 8.

Although the law is a move towards liberalization, abortion remains a criminal matter. If an abortion does not meet the legislative criteria, it is an offense. In practice, the requirements to obtain a legal abortion are burdensome. A woman seeking to terminate a pregnancy must (i) be Uruguayan or a resident of Uruguay; and (ii) fit within the timeframe set by the law. For the termination to be legal under the Voluntary Termination of Pregnancy Act, the woman needs to comply with further procedural requirements, including:

- an initial medical consultation with a gynaecologist;
- a second consultation with an interdisciplinary team—
- gynaecologist, mental health professional and a professional in the social area, usually a social worker—in order to inform the woman of the 'inherent health risks' of an abortion and available alternatives;
- a mandatory waiting period of five days;
- a third consultation to confirm the intention to proceed with the abortion;
- the abortion itself (abortion with pills in most cases);[12] and
- a fourth post-abortion consultation.[13]

Abortion is available on demand—subject to the abovementioned conditions—until the 12th week of pregnancy after which abortion is a crime. There are a few legally prescribed exceptions. Abortion can be obtained until the 14th week of pregnancy in cases of rape, although there is a requirement that the woman needs to have filed a criminal complaint. There are no time limits in cases where the continuation of the pregnancy endangers the health of the woman or there are foetal malformations making extra-uterine life unviable.

The Voluntary Termination of Pregnancy Act was the second attempt at liberalizing abortion law between 2006 and 2012. The far more progressive earlier statute, the Right to Sexual and Reproductive Health, Law 18426, was vetoed by the President, despite having been passed in the Cámara de Diputados by 49 out of 99 votes (two MPs were absent) and in the Cámara de Senadores by 17 votes out of 31. Law 18426 decriminalized abortion and made it available on demand. This law also recognized a wide range of sexual and reproductive rights—from access to contraception to menopausal health care—and committed the state to promote national policies and services on sexual and reproductive health. However, its provisions on abortion were vetoed by the President and Parliament did not attain the number of votes needed to lift the veto. Abortion remained a criminal offense in all circumstances. Between June 2011 and October 2012, parliament debated the Voluntary Termination of Pregnancy Act. It passed by a similarly narrow margin. The Cámara de Diputados approved the law by 50 votes out of 99 and the Cámara de Senadores by 17 votes out of the 31. This time there was no Presidential veto of the law.

The Voluntary Termination of Pregnancy Act was passed amidst the cross-currents of

12 Verónica Fiol et al, 'The Role of Medical Abortion in the Implementation of the Law on Voluntary Termination of Pregnancy in Uruguay' (2016) 134 International Journal of Gynecology & Obstetrics S12.

13 For a detailed analysis of the Voluntary Termination of Pregnancy Act see Lucía Berro Pizzarossa, 'Legal Barriers to Access Abortion Services Through a Human Rights Lens: The Uruguayan Experience' (2018) 26 Reproductive Health Matters 151.

the different perspectives presented by feminist advocates of women's rights, public health arguments, and a very loud anti-abortion opposition.[14] These tensions were present in the debates and are evident in the law which only partially decriminalizes abortion. The Voluntary Termination of Pregnancy Act over-medicalizes, paternalizes and imposes a series of requirements for women wishing to access abortion services.

Uruguayan abortion law does not represent a lessening of control but rather a shift in the forms of control: from criminalization to medical control. It imposes a subtler and more refined means of deploying power. Grounded in a public health rationale, control over the abortion process is greatly enhanced by the law: the multiple consultations, the mandatory multi-professional authorization, and the scrutiny of women's private lives required by the law are indications of the extent of state control over women's reproductive decisions. The over-medicalization of abortion effectively hinders access to legal abortion services and, at its most extreme, continues to places women's lives at risk by forcing them to resort to clandestine abortions.[15] This legislative model that continues to regulate the procedure as both a criminal matter and an overly medicalised procedure feeds abortion-related stigma and hinders access to safe, legal and accessible abortion care.[16] Importantly, the narratives used by both proponents and opponents of the law represent strategic political decisions to garner support. The analysis in this article sheds some light on the discussions and will enable us to re-think the advocacy strategies for continued legal reform on full and easy access to abortion services.

3. The Legal Obligation to Reform Gender Stereotypes

Uruguay has shown a strong commitment to the realization of human rights. It is party to all UN international human rights treaties. In general terms, in Uruguay, international law has the same binding force as domestic law. Under the Uruguayan Constitution—what Latin American jurists have called a 'bloque de constitucionalidad' or constitutionality block—all international human rights treaties ratified by the state are given constitutional rank. They are considered to be directly incorporated into domestic law and can be invoked in court.[17] In the context of abortion reform, this offers an exciting opportunity to use CEDAW to

14 Susan Wood et al, 'Reform of Abortion Law in Uruguay: Context, Process and Lessons Learned' (2016) 24 Reproductive Health Matters 102.

15 Observatorio Nacional en Género y Salud Sexual y Reproductiva, *Salud sexual y reproductiva y servicios de aborto en Uruguay* (MYSU, 2015) 10; CEDAW Committee, 'List of Issues and Questions: Uruguay' (2016) CEDAW/C/URY/Q/8-9/Add.1 [72].

16 World Health Organization, 'Unsafe Abortion: Global and Regional Estimates of the Incidence of Unsafe Abortion and Associated Mortality in 2008' (2011) <https://www.who.int/reproductivehealth/publications/unsafe_abortion/9789241501118/en > accessed 17 January 2019.

17 Armin von Bogdandy et al (eds), Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune (OUP, 2017) 248.

ground legal action.[18] CEDAW is unique in requiring states to transform laws, negative cultural attitudes and stereotypes that impede women's human rights. This section defines stereotypes, canvasses the extent of Uruguay's obligations under CEDAW and analyses the CEDAW Committee's advocacy on stereotypes that relate to women's sexual and reproductive health rights.

Stereotypes perform important cognitive functions and are helpful to comprehend the complexity of the world. At the same time, stereotypes can be harmful. Harmful stereotypes should be contested as they restrict individuals to supposed group characteristics, impairing their dignity, personal autonomy and human rights.[19] Gender stereotyping is defined by the UN Office of the High Commissioner of Human Rights as the 'practice of ascribing to an individual woman or man specific attributes, characteristics, or roles by reason only of her or his membership in the social group of women or men'.[20] Article 5 of CEDAW specifically calls on states to modify negative cultural attitudes and gender stereotypes based on the inferiority of women and the superiority of men. It is a far-reaching obligation. The CEDAW Committee encourages states to develop an approach to combat gender stereotypes that is effective,[21] sustained[22] and systematic.[23] Cusack and Pusey argue that under Article 5, states must transform institutions, systems and structures that cause or perpetuate discrimination and inequality and must modify or transform harmful norms, prejudices and stereotypes.[24] To fulfil its international and domestic commitments due to the constitutional character of international human rights law in Uruguay, the government must endeavour to identify and eradicate negative cultural patterns and stereotyping in all the areas of life including sexual and reproductive health rights (see Article 12 of CEDAW).[25]

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18 Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

19 Timmer (n 5) 707.

20 Office of the High Commissioner of Human Rights, 'Gender Stereotyping as a Human Rights Violation' (2013) 9 <http://www.ohchr.org/Documents/Issues/Women/WRGS/2013-Gender-Stereotyping-asHR-Violation.docx> accessed 18 July 2016.

21 CEDAW Committee, 'Concluding Observations: Mali' (2006) CEDAW/C/MLI/CO/5 [18]; CEDAW Committee, 'Concluding Observations: Fiji' (2010) CEDAW/C/FJI/CO/4 [20].

22 CEDAW Committee, 'Concluding Observations: Côte d'Ivoire' (2011) CEDAW/C/CIV/CO/1-3 [26]; CEDAW Committee, 'Concluding Observations: Vanuatu' (2007) CEDAW/C/VUT/CO/3 [22]; CEDAW Committee, 'Concluding Observations: Kenya' (2007) CEDAW/C/KEN/CO/6 [21].

23 CEDAW Committee, 'Concluding Observations: Colombia' (1999) A/54/38/Rev.1 [182]; 'Concluding Observations: Côte d'Ivoire' (n 22) [26]; CEDAW Committee, 'Concluding Observations: Former Yugoslav Republic of Macedonia' (2013) CEDAW/C/MKD/CO/4-5 [27]; CEDAW Committee, 'Concluding Observations: Qatar' (2014) CEDAW/C/QAT/CO/1 [22]; 'Concluding Observations: Vanuatu' (n 22) [22].

24 Simone Cusack and Lisa Pusey, 'CEDAW and the Rights to Non-Discrimination and Equality' (2013) 14 Melbourne Journal of International Law 1, 12.

25 Elizabeth Sepper, 'Confronting the "Sacred and Unchangeable": The Obligation to Modify Cultural Patterns under the Women's Discrimination Treaty' (2007) 30 University of Pennsylvania Journal of International Law 601.

Even in the 21st century, stereotypes are codified in legal regimes. Article 2(f) reinforces Article 5(a) by requiring states to take 'all appropriate measures' to modify or abolish 'laws, regulations, customs and practices which constitute discrimination against women'. Article 2 places an affirmative obligation on states to achieve equality through domestic legislation. Stereotypical attitudes about the roles and responsibilities of women and men in public and in private life are not only reflected in people's behaviour but are deeply entrenched in legislation and policy.[26] The CEDAW Committee urges states in unequivocal language to change such laws and public policies.

The CEDAW Committee's work is also instrumental in identifying which stereotypes are harmful and need to be eradicated. Some of these harmful stereotypes are relevant to the Uruguayan abortion debates, so it is helpful to canvas the CEDAW Committee's understanding of women, motherhood and victimhood. First, the CEDAW Committee has strongly criticized stereotypes that reduce women to the role of mothers and homemakers.[27] The preamble to CEDAW calls for a change in the traditional roles of men and women in society and in the family as a prerequisite for achieving full equality between men and women. Article 5 takes a sophisticated approach to women and motherhood. The provision is divided into two paragraphs:

> *States Parties shall take all appropriate measures:*
>
> *(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;*
>
> *(b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.*

On one hand, Article 5(a) recognizes the important role of women in the reproduction of humankind. Article 5(b), on the other hand, prevents seeing women solely as mothers.[28] The 'repeated emphasis on the role of women as mothers and caregivers'[29] configures a pernicious gender stereotype which is the direct cause of women's 'disadvantageous and

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26 CEDAW Committee, 'Concluding Observations: Cuba' (2000) A/55/38 [251], [261].

27 CEDAW Committee, 'Concluding Observations: People's Democratic Republic of Korea' (2002) CEDAW/C/PRK/1 [53].

28 Rikki Holtmaat, 'Preventing Violence against Women: The Due Diligence Standard with Respect to the Obligation to Banish Gender Stereotypes on the Grounds of Article 5
(a) of the CEDAW Convention' in Carin Benninger-Budel (ed), *Due Diligence and its Application to Protect Women from Violence* (Martinus Nijhoff, 2008) 73.

29 CEDAW Committee, 'Concluding Observations: Russian Federation' (2010) CEDAW/C/USR/CO/7 [20].

unequal status'.[30] The CEDAW Committee is very clear on rejecting the existing 'sexual division of work'[31] in which women are primarily regarded as mothers and caregivers[32] having the primary responsibility for childrearing and domestic tasks.[33] The Committee considers that these stereotypes relegate women and girls to a 'subordinate and subservient role' within the family.[34]

Second, the CEDAW Committee also calls attention to the assumption that women are weak and vulnerable and ask states to contest such stereotypes.[35] It warns states against protective laws and policies stemming from such assumptions.[36] This stereotype infantilizes women and portrays them as unable to make decisions on their own. The CEDAW Committee has expressed concern about cases where a woman requires her husband's consent regarding sterilization and abortion, even when her life is in danger.[37] The CEDAW Committee connected the requirement of spousal consent with persistent entrenched patriarchal attitudes on the roles and responsibilities of women and men.[38]

The work of the CEDAW Committee provides tools to analyse the stereotypes present in the latest legal developments in Uruguay. This is particularly relevant because—in the words of Balkin—'[w]hat law does, and can do, is proliferate ideas, concepts, institutions and forms of social imagination ... Law has the opportunity to do this because of its status as law, because it is intertwined with, supports and is supported by the power and authority of the state'.[39] Undoubtedly, the law shapes people's behaviour, sometimes 'construct[ing] their very beings'[40] and therefore has the power to give legal force to gender stereotypes. Uncovering the stereotypes in Uruguayan abortion law can be a route to accountability as Uruguay has an international and domestic obligation under Articles 2(f) and 5 of CEDAW to foster cultural change.

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30 ibid.

31 CEDAW Committee, 'Concluding Observations: Congo' (2002) CEDAW/C/COG/1-5.

32 CEDAW Committee, 'Concluding Observations: Mauritania' (2014) CEDAW/C/MRT/CO/2-3 [22].

33 CEDAW Committee, 'Concluding Observations: Mauritius' (2011) CEDAW/C/MUS/CO/6-7 [18].

34 CEDAW Committee, 'Concluding Observations: Maldives' (2007) CEDAW/C/MDV/CO/3 [17].

35 CEDAW Committee, 'Concluding Observations: Nepal' (2003) CEDAW/C/NPL/2-3; CEDAW Committee, 'Consideration of Reports: Finland' (1989) A/44/38 [256].

36 CEDAW Committee, 'Concluding Observations: Finland' (1989) A/44/38 [256]; CEDAW Committee, 'Concluding Observations: Gabon' (1989) A/44/38 [55]-[56]; CEDAW Committee, 'Concluding Observations: Kuwait' (2004) A/59/38 [72]; CEDAW Committee, 'Concluding Observations: Belarus (2004) A / 59/38 [351]; CEDAW Committee, 'Consideration of Reports: Kuwait' (2004) A/59/38 [72]; CEDAW Committee, 'Consideration of Reports: Kuwait' (2004) A / 59/38 [72]. CEDAW Committee, 'Consideration of Reports: Suriname' (2002) A/57/38 (Part II) [56].

37 CEDAW Committee, 'Concluding Observations: Indonesia' (2012) CEDAW/C/IDN/CO/5 [16]-[18].

38 ibid.

39 Jack Balkin, 'The Proliferation of Legal Truth' (2003) 26 Harvard Journal of Law and Public Policy 108.

40 Donald Nicholson, 'Criminal Law and Feminism' in Donald Nicholson and Lois Bibbings (eds), *Feminist Perspectives on Criminal Law* (Routledge, 2013) 13.

4. Mapping the Debates

Stereotypes are ubiquitous yet often invisible; they are the 'subtlest and most pervasive of all influences'.[41] They are particularly dangerous when they are translated into legal norms. This section argues a close consideration of the abortion debates in parliament reveals that Uruguayan abortion law is built on gender stereotypes.

Various salient images emerge from the debates. Women that seek to terminate their pregnancies are portrayed as victims, selfish, irrational and incompetent decision-makers. All these images are complex, layered and correspond to a large extent to the political intentions of the parliamentarians, but they do share an underlying similarity. Women are and should naturally be mothers; women are and should naturally be more capable of nurture; women are and should be self-sacrificial; and prioritize community interests above their own desires. Fundamentally, they all refer to the stereotype that conflates womanhood and motherhood; that envisages 'motherhood as women's privileged vocation or the embodiment of an authentic or natural female practice'.[42]

The construction of women that emerges from the parliamentary debates is that of a monolithic group. Except for very limited references to class, Members of Parliament (MPs) do not discuss the ways rural, disabled, trans or non-binary people or women of colour may be disproportionally burdened in terms of access to abortion. Further work is needed in order to address the different ways in which the law can reflect on the intersection of age, class, race, and more in accessing abortion.

It is striking that both proponents and opponents of reform ground their arguments on these stereotypes, and we can see echoes of these stereotypes in the law that emerged from these debates. The following subsections map how Uruguayan parliamentary discussions portray women seeking abortions. It investigates four prominent stereotypes from the debates, women as: (a) mothers; (b) selfish; (c) victims; and (d) irresponsible. It also investigates two other themes prominent in the debates: (i) competition of rights raised by abortion (linked to women as selfish); and (ii) the over medicalization of abortion (linked to women as victims).

This analysis focuses on the parliamentary discussions on Law 18426 on the Right to Sexual and Reproductive Health (the initial attempt at decriminalizing abortion which was ultimately vetoed by the President) and Law 18.987 on Voluntary Termination of Pregnancy. It brings together statements of MPs in the Chamber of Representatives (Cámara de Representantes) and Chamber of Senators (Cámara de Senadores) to present a critical account of the stereotyped images that underpin abortion law in Uruguay. To enrich the analysis, this section also assesses the interventions of civil society representatives and other stakeholders who participated in the debates.[43]

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41 Walter Lippman Public Opinion (BN Publishing, 1921).

42 Denise Riley, *War in the Nursery: Theories of the Child and Mother* (Virago, 1983) cited in Linda Alcoff, 'Cultural Feminism versus Post-Structuralism: The Identity Crisis in Feminist Theory' in Nancy Tuana and Rosemarie Tong (eds), *Feminism and Philosophy: Essential Readings in Theory, Reinterpretation, and Application* (Boulder, 1995) 451.

43 This article will not refer to the specific authors of the featured interventions. The parliamentary discussions

A. Women as Mothers

The 'motherhood mandate' is the idea that the goal of a woman's life is to raise children. It has been identified as one of the most pervasive stereotypes in need of eradication by the CEDAW Committee. This stereotype is reflected in the MPs' understandings of abortion as a threat to women's 'natural' role. Consequently, in the debates abortion is portrayed as a wrong that threatens the family and more generally the systems that build on 'natural' gender roles.

First, the debates on abortion in Uruguay reveal just how deeply embedded the stereotypes on women's 'natural and sacred' role are:

> *We do not renounce our vocation to find mechanisms and procedures that assist expectant mothers in such a way that they can fulfil the sacred role of giving birth to their children.*[44]

This reflects the idea that women 'should prioritize childbearing and childrearing over all other roles they might perform or choose ... nothing should be more important for women than the bearing and rearing of children'.[45] This is the 'motherhood mandate'. A woman's core purpose is to raise children; it 'is a woman's raison d'etre [and] it is mandatory'.[46] The conflation of being a woman and motherhood plays a prominent role in women's subordination.[47] The motherhood mandate is so strong, argues an MP, that women secretly wish to become mothers:

> *We cannot fully confirm this, but in most cases, it is not an accident. The specialists say...that from a psychoanalytic point of view, neglecting to take the appropriate measures can imply an unconscious desire to be a father or mother.*[48]

This is highly paternalistic and, as argued below, links to stereotypes in the parliamentary debates and the Voluntary Termination of Pregnancy Act on women's decision-making capabilities.

Abortion radically disrupts women's 'natural' role and as such it is presented as morally and legally reprehensible. Opponent MPs argue that abortion goes 'against nature'[49] and

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are accessible at <https://parlamento.gub.uy> accessed 17 January 2019.

44 Cámara de Representantes 52ª Extraordinary Session (2012) 118 (emphasis added).

45 Simone Cusack and Rebecca Cook, 'Stereotyping Women in the Health Sector: Lessons from CEDAW' (2010) 16 Journal of Civil Rights and Social Justice 56.

46 Nancy Russo 'The Motherhood Mandate' (1976) 32(3) Journal of Social Issues 143.

47 See Nancy Chodorow, *The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender* (University of California Press, 1999); Adrienne Rich, *Of Woman Born: Motherhood as Experience and Institution* (WW Norton & Company, 1995).

48 Cámara de Representantes 52ª Extraordinary session (2012) 93.

49 ibid 34.

against the 'mandate that [women] receive from nature, to perpetuate the species'.[50] They explain that 'every abortion has, at least, two victims: one of them dies and the other survives but suffers the consequences of such an abominable crime'.[51] Abortion is equated with crimes committed during the Uruguayan dictatorship[52] and opponents consider the Voluntary Termination of Pregnancy Act to have 'prioritized death over life'.[53]

It is perhaps unsurprising to see opponents of abortion reform base their arguments on the role of women within the traditional family. However, this approach is not confined to opponents of abortion. Both sides of the abortion debate draw on gender stereotypes, pernicious attitudes about women, and dangerous rhetoric to justify their legislative positions. These attitudes are echoed in the law, as the Voluntary Termination of Pregnancy Act 'forbids', 'controls' or 'protects' women.

Indeed, proponents of the reform do not unequivocally support women's sexual and reproductive health rights. MPs supporting changes to the law argued that they were 'not in favour of abortion.'[54] One MP in favour of the reforms explained that 'none of the legislators [are] in favour of abortion or refuse to recognize that life begins at conception'.[55] In the parliamentarians' eyes, 'no woman ... wants to do something like this ... they arrive at this decision with a lot of pain'.[56] The proponents support the law as a necessary evil as it will 'reduce the number of abortions because the right to be born of the foetus will be in the mind of the woman that needs to make the decision'.[57]

Proponents of the law also rely on stereotypes of women as mothers. They hold that decriminalizing abortion is needed to preserve women's future reproductive capacity. One MP supporting the reforms states:

> *We must try to avoid that, facing a situation of desperation, a woman resorts to some type of procedure which results in her death or some other consequences that makes her* unable to procreate.[58]

> *Several women, some of them single mothers...[that] have gotten an abortion in bad conditions and now* can't have children when they want to.[59]

According to this position, women must be granted access, albeit limited access, to abortion

50 Cámara de Senadores 47th Ordinary session (2012) 253.

51 Cámara de Representantes 52nd Extraordinary session (2012) 172.

52 Cámara de Senadores 47th Ordinary session (2012) 214.

53 Cámara de Senadores 47th Ordinary session (2012) 210.

54 ibid 215.

55 Special Commission for consideration of termination of pregnancy bill, Folder 1354/2012, Annex I to Repartido 785 (2012) 15.

56 Cámara de Senadores 61st Extraordinary session (2011) 114.

57 Special Commission for consideration of termination of pregnancy bill (n 55) 15.

58 General Assembly 13th Extraordinary session (2008) (emphasis added).

59 Cámara de Senadores 61st Extraordinary session (2011) 169 (emphasis added).

services because unsafe abortions pose a greater threat to their future fertility and inevitable later desire to become a mother. The MPs supporting the reforms are not concerned about women's agency or the consequences of unsafe abortions. While it might have been politically strategic to argue for abortion reform to protect women's reproductive capacity, this comes at the expense of transforming gender stereotypes. The current abortion laws in Uruguay are not aimed at protecting women's right to make autonomous decisions.

Second, a corollary to this normative ideal of motherhood is that the exercise and enjoyment of sexual and reproductive health and rights are a fundamental threat to the traditional patriarchal family.[60] Abortion is depicted by the opposition as profoundly anti-social behaviour that clashes with women's role as mothers. The MPs forcefully make these claims:

> *We have been legislating to the detriment of the family.*[61]

> *There are no different types of family, there is only one ... We cannot accompany this project because they continue to attack the basic principles of society and legitimizing this to undermine the main institution supporting any community.*[62] *Not only a potential life is killed, but also a woman and the basic cell of the social fabric—the family—are destroyed.*[63]

Third, MPs draw a connection between abortion and what is call 'gender ideology': the decoupling of sex/gender and the threat of this decoupling to traditional gender roles. This association between antiabortion rhetoric and a stricter attachment to traditional gender roles has been very prevalent in the Uruguayan—and international—political arena. Abortion is presented not only as threat to the traditional family but also to 'natural' gender roles and hierarchies. The following intervention in the debates is noteworthy:

> *[In this law], of course, there is a kind of legalization - we say - of the ideology called "gender perspective," which denies the natural character of the distinction between the male and female sexes. We would have to agree that, at least, it is highly debatable and that it is not convenient for the Uruguayan State to adopt this as a law that is imposed on all citizens, regardless of the way of thinking of each one.*[64]

In the same line, another MP explicitly uses the phrase 'gender ideology':

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60 Alicia Ely Yamin and Paola Bergallo, 'Narratives of Essentialism and Exceptionalism: The Challenges and Possibilities of Using Human Rights to Improve Access to Safe Abortion' (2017) 19 Health and Human Rights 1.

61 Cámara de Representantes 52ª Extraordinary session (2012) 92.

62 ibid 93.

63 ibid 64.

64 Parliamentary Public Health Commission, Session 18 September 2007 (Distribuido No 1961) (emphasis added).

> *From an instrumental point of view, we have to know that, as its explanatory statement says, this bill is based on the biology [sic] of gender. We are very concerned to think that in Uruguay, not only in this bill but in the National Plan of Sexual Education, we talk about* the ideology of gender.[65]

The concept of 'gender ideology' appeared in the 90s after the Cairo and Beijing Conferences set the global agenda on sexual and reproductive health rights.[66] Garbagnoli defines the term as 'a controversial invention of the Catholic conservative circles which aims to caricature and thus to delegitimize a field of study'.[67] Those who oppose abortion rights, and sexual and reproductive health rights more generally, have argued that recognizing such rights represents what the Holy See, for example, considers to be a 'culture of death'[68] and as a fundamental threat to the traditional patriarchal family.[69] We can see the MPs using traditional gender stereotypes to justify keeping in place restrictive abortion laws.[70]

B. Women as Selfish

In the parliamentary debates, women are not portrayed as autonomous actors, but subjects in service of the traditional patriarchal, heterosexual family and their future children. The debates also demonstrate that the MPs opposing the Voluntary Termination of Pregnancy Act stereotype women who seek abortions as self-centred; prioritizing individual desires over obligations to family and the needs of the community.

As one opposition MP explains, women that seek abortions are a particular 'type of person':

> *We have studied some civilizations that have moved towards favouring pleasure and that have produced people of this type:* hedonistic, without natural affection, individualistic and egocentric*. I continue with these words to be able to paint the picture in which, I believe, the issue of abortion is circumscribed.*[71]

65 Parliamentary Public Health Commission, Session 11 November 2003 (Distribuido No 2538) (emphasis added).

66 UN International Conference on Population and Development, 'Programme of Action of the International Conference on Population and Development' (1994) A/CONF.171/13 and Beijing Declaration and Platform of Action <http://www.un.org/womenwatch/daw/beijing/platform/> accessed on 6 August 2018.

67 Sara Garbagnoli, 'Against the Heresy of Immanence: Vatican's 'Gender' as a New Rhetorical Device against the Denaturalisation of the Sexual Order' (2016) 6 Religion and Gender 187.

68 UN International Conference on Population and Development, 'Statement of Pope John Paul II' <http://www.un.org/popin/icpd/prepcomm/govern/940423171030.html> accessed on 4 August 2018.

69 Yamin and Bergallo (n 60) 1.

70 See Jennifer Strickler & Nicholas Danigelis, 'Changing Frameworks in Attitudes Toward Abortion' (2002) 17 Sociological Forum 187; Sally Wall et al, 'Gender Role and Religion as Predictors of Attitude Toward Abortion in Croatia, Slovenia, the Czech Republic and the United States' (1999) 30 Journal of Cross-Cultural Psychology 443.

71 Parliamentary Public Health Commission, Session 11 November 2003 (Distribuido No 2536) (emphasis added).

The decision to have an abortion is portrayed as an individual irresponsibility and increasing access to abortion is a collective irresponsibility.[72] An MP claims that:

> *Neither the act of individual irresponsibility nor the failure of the State can be replaced by a law that allows the elimination of human life created from* individual and collective irresponsibility.[73]

Also, the MPs argue that abortion facilitates women's selfish enjoyment of sex. On this view, abortion threatens the traditional understandings of sexual activity: sex for procreation. Consequently, abortion is stigmatized because it envisions that a woman may have non-procreative sex including sex for pleasure. The opponents to the decriminalization of abortion are deeply concerned that access to abortion will change sexual activity and relations. MPs stated:

> *It seems like* personal pleasure *is more important that the biological function of procreation.*[74]

> *[Women] had to pay, suffering and pain, for having yielded to the pleasures of sex without taking responsibility for motherhood. The assumption was: she wanted to have sex; she enjoyed it; did not prevent pregnancy* because she is irresponsible and does not want to be a mother *at all or to be [a mother] again for selfish reasons.*[75]

In the debates, MPs stigmatize women seeking abortions as damaged, coming from broken families,[76] and sexually promiscuous. They describe women wanting abortions as:

> *Women that have relatives in jail ... that don't know who is the father of the child because in the last weeks they had sex with two or three men.*[77]

> *[Women] have various children from different fathers.*[78]

Opponents of abortion argue that women seeking abortions are promiscuous and refuse to bear the burden of their irresponsible behaviour. As such, they are not entitled to access an abortion as it undermines their role as mothers and rewards their recklessness.

Another illustration of the MPs idea of women as selfish or irresponsible is the reference

72 Special Commission for consideration of termination of pregnancy bill, Folder 1354/2012, Anex I to Repartido 785 (2012) 16.

73 ibid.

74 Cámara de Senadores 39th Ordinary session (2007) 75 (emphasis added).

75 Cámara de Senadores 61st Extraordinary session (2011)177.

76 Cámara de Senadores 47th Ordinary session (2012) 214.

77 Cámara de Senadores 61st Extraordinary session (2011)167.

78 Cámara de Senadores 47th Ordinary session (2012) 214.

to abortion tourism. The Uruguayan law provides that access to abortion is restricted to women that have Uruguayan nationality or that have resided permanently in the country for at least one year (Article 13 of the Voluntary Termination of Pregnancy Act). In the discussions on this requirement, the MPs considered—with virtually no opposition—that setting requirements of citizenship and/or permanent residence to access abortion services was appropriate. This was aimed at preventing 'abortion tourism'.[79] The nationality/ residency requirement, the MPs argue, will prevent the creation of an image of Uruguay 'as a country in which it is possible to obtain abortions'.[80] Abortion is not only singled out as an exceptional healthcare service—no other services are subjected to these requirements [81] —but by using the word 'tourism', the MPs evokes images of ease and leisure and obscuring the fact that women travelling to Uruguay to have abortions likely have limited access to health care services in their own countries. At the same time, it perpetuates the image of women as irresponsible—taking the decisions to terminate the pregnancy on a whim, carelessly or even leisurely.

1. Abortion as a Competition Between Rights

The stereotypes described above respond to a large extent to a dominant thread in the debates: the portrayal of abortion as the battle between different rights and rights-holders. In the Uruguayan debates the right to abortion is seen as a claim for which a woman has to compete with the foetus, the potential father, other women and/or the state and the community. Access to an abortion becomes a 'competitive assertion of entitlements'.[82]

First, the opposition MPs bestow rights upon the foetus:

> *Throughout history we have debated which right should prevail. Today, we have heard that the right of life of the embryo does not exist, I think it does.*[83]

The MPs are arguing that the foetus is as an independent entity and a rights-holder. Following this argument through, as a rights-holder, the foetus must be protected from the harms of abortion.

The proponents of reform also see abortion as a battle between women's rights and foetal interests. Unlike the opponents, however, the proponents give greater weight to women's rights. MPs state that:

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79 Cámara de Senadores 61st Extraordinary session (2011) 117. The term refers to a fairly common phenomenon where women are forced to travel, sometimes to other countries, in order to access abortion or other reproductive healthcare services.

80 ibid.

81 Law Nº 18.211 on the National Healthcare System (SNIS) art. 1; see also Constitution of the Oriental Republic of Uruguay, arts. 44, 72, and 332.

82 Nicola Lacey, 'Feminist Legal Theory and the Rights of Women' in Karen Knopf (ed), *Gender and Human Rights* (OUP, 2004).

83 Cámara de Senadores 61st Ordinary session (2011) 158.

> *[I]n those first twelve weeks our system makes a choice for the lesser evil. We believe that within the abovementioned period,* the mother's rights should prevail and after that the unborn rights should take precedence.[84]

> *[T]his draft bill solves* this conflict [of rights], choosing a middle path—the "lesser evil"— *which is the addition of a third party that will help the woman make her decision and a reflection period.*[85]

This presents abortion in a negative light—as something to avoid— transforming a safe and common experience [86] into an exceptional and highly stigmatized health care procedure. By presenting abortion as an evil, MPs set the foundations to argue for further control of women's decisions which is examined below.

Second, potential fathers are also presented as victims of abortion. According to the opposition MPs:

> *The law enshrines expressly the right to hide from the father not only the abortion, but also the pregnancy. This is a direct promotion of irresponsible paternity.*[87]

> *The father is not consulted to see if he agrees with taking his offspring's life forever.* [88]

> *It is unacceptable to allow the termination of human life by the subjective decision of only one of the responsible people involved in its creation.* [89]

> *But yes, if the mother decides to have it we are going to ask the father to give money to maintain the child.*[90]

Gender stereotypes permeate these statements from MPs opposing the law. The woman is portrayed as self-centred and irresponsible because she is making the decision to terminate the pregnancy without the consent of the potential father. Fatherhood is given more weight

84 ibid 175.

85 Special Commission for consideration of termination of pregnancy bill, Folder 1354/2012 (n 55) 2.

86 Globally, one in four pregnancies end in abortion—including in countries with high rates of contraceptive prevalence—and nearly one in four women will have an abortion by age 45. Gilda Sedgh et al, 'Abortion Incidence Between 1990 and 2014: Global, Regional, and Subregional Levels and Trends' (2016) 388 The Lancet 258; Iqbal H Shah and Elisabeth Åhman, 'Age Patterns of Unsafe Abortion in Developing Country Regions' (2012) 12 Reproductive Health Matters 9; Rachel Jones and Jenna Jerman, 'Population Group Abortion Rates and Lifetime Incidence of Abortion: United States 2008–2014' (2017) 107 American Journal of Public Health 1904.

87 Cámara de Representantes 52ª Extraordinary session (2012) 88 (emphasis added).

88 ibid 70.

89 Special commission for Consideration of termination of pregnancy bill (n 55) 15.

90 Cámara de Representantes 52ª Extraordinary session (2012)168.

than a woman's bodily autonomy.

Proponents do not emphasize the rights of fathers. However, in discussing the role of men, proponents contribute to stereotypes that men do not have a responsibility in conception or parenting. Proponent MPs held that:

> *We, male legislators, whether we assumed it or not, are deciding in abstract what concretely is a reality that only women will face.*[91]
> *Here we are, gathered in a body mostly comprised by men, deciding on a draft bill that will never affect us directly.*[92]

These remarks on pregnancy distance men from their shared responsibility for contraception and children. This perpetuates the notion that men's responsibilities begin at birth while the responsibilities for women extend far back into pregnancy as the responsibilities for contraception fall exclusively on women.[93]

Third, the opposition MPs draw on the stereotypes of selfish, sexually irresponsible women to create a conflict between women. Opposition MPs juxtapose the stereotype of a woman who 'gets pregnant carelessly and then, apparently equally carelessly, terminates the pregnancy'[94] with women who long for children, but cannot have them. Women that seek abortions are selfish not only to themselves, their unborn children and the potential fathers, but also to women and men struggling with infertility. They refer to long adoption lists and to abortion as something that 'makes a human being a big problem, when in reality, a new birth could be a blessing and a joyful occasion'.[95] An MP posits:

> *Adoption is a very important mechanism in this topic of unwanted pregnancies. One can think of other countries that have adopted similar policies for women with unwanted pregnancies, so they won't take the life of the product of her pregnancy, but instead the child can be adopted by somebody else and form a family.*[96]

This pits women against each other. The opposition debates elevate women who are trying to become mothers and denigrate women who reject the motherhood mandate.

Furthermore, other than a competition for human rights with other rights holders, opponents frame abortion as a conflict between women's rights and the demographic needs and population growth policies of the state. Opposition MPs argued that women have to procreate—even if they don't want to—because the country has a low birth rate. For example, MPs claim:

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91 Cámara de Senadores 39st Ordinary session (2007) 59.

92 ibid 58.

93 Sally Sheldon 'Reconceiving Masculinity: Imagining Men's reproductive Bodies in Law' (1999) 26(2) Journal of Law and Society 129, 148.

94 Carol Smart, *Feminism and the Power of Law* (Routledge, 1989).

95 Cámara de Senadores 61st Ordinary session (2011) 116.

96 ibid 86.

> *All of us who have taken positions on this subject, we have done so considering that it is the* best for society *... We have a population almost stagnated, which grows very little ... [due to] the low birth rate and emigration, two indicators that predict a* dark and problematic future *for Uruguayan society.*[97]

> *Ours is a country with a low birth rate and we must* protect motherhood.[98]

> *In a country that needs to change its demographic composition—that has an aging population—increasing the possibility of reducing births seems like a contradiction.*[99]

> *I was also going to make reference to the popular song that says that children are needed for the sun to rise. Certainly, in our aging country, children are needed for the sun to rise!*[100]

Within this position, MPs present abortion instead of being a human right of women but as a threat to the patriotic duty to the demographic goals of the country. When there is a low-birth rate, abortion becomes morally reprehensible; the needs of the state justify forcing women into motherhood.

C. Women as Victims

Narratives of victimhood are widespread in the parliamentary debates. Woman seeking abortions, from a multitude of perspectives, are portrayed as victims. This narrative is typically used by proponents of abortion reform who argue that women should be seen as victims so as to capitalise on public sympathy. The opponents of the law also use narratives of victimhood to justify state intervention and 'save' women from their own decisions by helping them to make the 'right choice'. This subsection explores these different uses of the stereotype of 'women as victims'.

Proponents rely on the image of women as tragic victims of sexual violence. Women experience 'all kinds of violence'.[101] In the words of one of the MPs supporting the reforms, women want to get abortions because they have been, for example, 'raped by her employer or by the son of the employer'.[102] The rape victim is innocent and should be allowed to terminate the pregnancy. The core of the argument is not women's autonomy but a sort of 'permission' in face of sexual violence. This is reflected in the legal provisions where there is a longer time period to access abortion in the case of rape. Victims of sexual assault under Article 6 of the Voluntary Termination of Pregnancy are granted a longer

97 Cámara de Senadores 39th Ordinary session Distribuido 1127/2011 (2007) 75 (emphasis added).

98 Cámara de Representantes 52ª Extraordinary session (2012) 64 (emphasis added).

99 Cámara de Senadores 61st Ordinary session (2011) 103 (emphasis added).

100 Cámara de Representantes 52ª Extraordinary session (2012) 71 (emphasis added).

101 Cámara de Senadores 61st Extraordinary session (2011) 167.

102 ibid 114.

time period to legally access abortion— until 14 weeks instead of the general 12-week rule.

Justifying the liberalization of abortion as a remedial measure for sexual violence creates a paradox. Women have slightly greater agency over their reproductive health when there has been a prior lack of autonomy over sexual relations. Sheldon argues that women are construed in this manner because this enables the MPs to equate consensual intercourse with desired conception: '[w]anting sex equals wanting pregnancy and motherhood'.[103] Following through with this line of reasoning, women seeking abortions due to sexual violence can still be seen as subscribing to the motherhood as they are only rejecting that particular pregnancy. Abortion is therefore presented not as a woman's desired choice but as a painful decision available in the absence of choice.

Even the other limited instances where abortion is decriminalized, health consequences of the pregnancy affecting the life of the women or foetal malformations, it is in situations where women can still ascribe to motherhood but are permitted to reject that specific pregnancy. These women are seen as victims of their circumstances and thus morally blameless. This image allows the parliamentarians—and the public in general—to reconcile the deeply embedded stereotype of women as natural mothers with the liberalization of abortion.

Proponents of law reform further deploy the victim narrative. When abortion is criminalized, women become victims of the criminal justice system. Proponents of reforming the law take multiple perspectives on the nature of this harm. On one hand, some MPs argued that women are bearing a double burden as they are 'confronting a painful situation'—the interruption of pregnancy—and 'committing a crime'.[104] This statement is operating on the principle that abortion will always be emotionally painful. On the other hand, other proponents of the law consider that 'there are no traumatic consequences stemming from the procedure itself' but exclusively from 'the environment and the fact that they are committing a crime'.[105]

Regardless of the emotions involved in deciding to end a pregnancy, the criminalization of the abortion means women experience the procedure with 'fear and even with panic'[106] and abortion becomes a 'humiliating clandestine' experience.[107] The MPs explain that women are 'not really criminals, but victims of their circumstances'.[108] When criminalized, abortion is a trauma that involves a great deal of suffering.[109] The law on abortion needs to be liberalized to prevent women from 'resorting to rat poison in order to interrupt their pregnancy'.[110] The proponents of reforming abortion law argue that the criminalization of abortion creates trauma, thereby using the narrative of victimhood to gain public sympathy.

103 Sally Sheldon, '"Who is the Mother to Make the Judgment?": The Constructions of Woman in English Abortion Law' (1993) 1 Feminist Legal Studies 3.

104 Cámara de Senadores 39th Ordinary session (2007) 47.

105 ibid 53.

106 Special commission for consideration of termination of pregnancy bill (n 55) 6.

107 Cámara de Senadores 47th Ordinary session (2012) 208.

108 Cámara de Senadores 61st Extraordinary session (2011) 177.

109 ibid.

110 ibid 114.

MPs rightly highlight the devastating consequences of criminalized abortion. However, the law continues to regulate abortion as a criminal matter outside of the exceptions carved out. The reforms brought no real change as abortion continues to fall within the realm of penal law.[111]

Those in favour of maintaining the criminalization of abortion argue that abortion creates victims and perpetuates harms that women need to be protected from as 'no woman takes with joy or satisfaction' the decision to have an abortion.[112] MPs who opposed the liberalization of abortion laws in Uruguay stated:

> *[The proponents of the law] forget all the* scars and traumas *that abortion leaves in all women.*[113]

> *It is hard to imagine bigger suffering than the one that a woman that has had an abortion will experience when she realizes what she has done. To the natural pain caused by the avoidable death of her child, one needs to add the burden of knowing that she is responsible for such a painful loss.*[114]

> *When a pregnant child or woman in a situation of desperation—oftentimes also alone—have to make this decision, and access to abortion is easy, is 'at hand' because it has been decriminalized, it will be much easier for her to make such decision and* they can regret it*, which is irremediable.*[115]

A similar kind of image is presented when MPs argue that 'postabortion depression will affect her throughout her entire life'.[116] They argue that women who have accessed abortion services will suffer:

> *Post-abortion syndrome, consisting of depression, suicidal thoughts, anxiety, guilt ... alcohol and drug abuse, divorce, neglect of pre-existing children and difficulties in general in their relationships.*[117]

Having an abortion is presented as a life-altering decision that extends the trauma into the woman's future: 'her life will change forever'.[118] No scientific evidence is provided to support these arguments. This is not surprising as the existing empirical evidence indicates

111 Niki Johnson, Cecilia Rocha and Marcela Schenck, *La inserción del aborto en la agenda político-pública uruguaya 1985-2013: un análisis desde el Movimiento Feminista* (Cotidiano Mujer, 2013).

112 Cámara de Senadores 61st Extraordinary session (2011) 145.

113 Cámara de Representantes 52nd Extraordinary session (2012) 170 (emphasis added).

114 ibid 172 (emphasis added).

115 Cámara de Senadores 61st Extraordinary session (2011) 146 (emphasis added).

116 Cámara de Senadores 47th Ordinary session (2012) 211.

117 Cámara de Representantes 52nd Extraordinary session (2012) 70.

118 Special commission for consideration of termination of pregnancy bill, Folder 1354/2012, Annex I to Repartido 785 (2012) 6; Cámara de Senadores 61st Extraordinary session (2011) 129.

women are not harmed or traumatized by abortion.[119] Noticeably, the opponents do not consider or give any weight to how being forced to continue with a pregnancy and being responsible for the care of a child will be immeasurably and immensely life-altering.

The opponents argue that the supposed severe harms of abortion— physical and psychological—justify restrictions on accessing abortion. Women are weak and the criminalization of abortion therefore 'protects women'.[120] The MPs in opposition to the law argue that 'we need to protect

and help pregnant women, not incentivize abortive practices'.121 The antiabortion arguments claim that by prohibiting abortion the state is in fact protecting women against abortion's harms. Both the opponents and proponents of the law minimise the agency of women.

1. The Public Health Narrative

The image of women as victims is strongly connected to the framing of abortion as an issue of public health. Indeed, proponents of the law—with very few notable exceptions—frame abortion not (only) as a criminal matter but as an issue of public health. This rationale is powerful in the Uruguayan context as an instrument to regulate societal issues.122 This argument was spearheaded by public health authorities that were invited to participate in the debate and later claimed that:

> *the aim of this legislation was three-fold: to reduce maternal mortality, to reduce abortion-related complications, and to reduce the practice of abortion.*[123]

This approach is also conceptualized as a harm reduction model characterized by a pragmatic approach to health outcomes rather than a focus on women's autonomy.[124] Scholars warn against the dangers of this framing as it proposes a 'professional, medical management of social problems' focusing on 'individual consequences and societal costs rather than their social causes' and failing to push for transformative gender equality as mandated under CEDAW.[125] Within this framing, abortion is still in some sense 'wrong'—thus the need for its eradication—rather than an integral and normal component of

119 Results conducted in the US confirm that overwhelming majority of women—95 per cent of women—felt that termination was the right decision for them: Corinne Rocca et al, 'Decision Rightness and Emotional Responses to Abortion in the United States: A Longitudinal Study' (2015) 10 Plos One 1.

120 Cámara de Senadores 47th Ordinary session (2012) 209.

121 Cámara de Senadores 61st Extraordinary session (2011) 107 (emphasis added).

122 Wood et al (n 14) 102-10.

123 Leonel Briozzo, 'From Risk and Harm Reduction to Decriminalizing Abortion: The Uruguayan model for Women's Rights' (2016) 134 International Journal of Gynecology & Obstetrics 134.

124 Joanna Erdman, 'Access to Information on Safe Abortion: A Harm Reduction and Human Rights Approach' (2011) 34 Harvard Journal of Law & Gender 413.

125 Gordon Roe, 'Harm Reduction as Paradigm: Is Better than Bad Good Enough? The Origins of Harm Reduction' (2005) 15 Critical Public Health 243.

women's right to health.

As a result of this public health framing, reproductive autonomy is heavily regulated and medicalized. The assumption that women seeking abortions are emotionally fraught and in need of support is echoed in the law and in the debates. MPs characterise a woman seeking abortions as somebody that is in a state of 'anguish, despair and isolation' and 'in the worst of circumstances'.[126] Due to this emotional hardship she faces, a woman is unable to make this decision alone and 'need[s] to be accompanied'.[127] The woman's decision is not enough to access legal abortion services. Articles 2 and 3 of the Voluntary Termination of Pregnancy Act require the approval of a gynaecologist and a multidisciplinary team before a woman can access an abortion. In the case of an abortion resulting from sexual violence, a woman is required under Article 6 of the Voluntary Termination of Pregnancy Act to have filed an official criminal complaint. Unless the woman accepts the participation of all these parties in her personal healthcare decision, she will be committing a crime if she has an abortion. The medical profession has, what Halliday describes as, a gate-keeping role: it has the power to grant an abortion.[128]

The law also doubts the woman's decision to have an abortion. The second consultation which focuses on the risks of abortion and the availability of alternatives is designed to persuade women against abortion.

As conceded explicitly by Article 3 of the Voluntary Termination of Pregnancy Act, the aim of the consultation is to 'contribute to overcome the causes that lead to the interruption of pregnancy'. The overall concern of the law is not the recognition of women's rights to abortion but rather the desire to regulate women's decisions on matters that the MPs perceive as a necessary evil. The law also polices women's decision-making processes by imposing mandatory counselling and a mandatory waiting period of at least five days (Article 4 of the Voluntary Termination of Pregnancy Act).

Underpinning these requirements is the stereotype that women— because they are naturally mothers—experience more conflict about abortion than other healthcare decisions and require additional time and information beyond that typically offered as part of informed consent.[129] The number of consultations the law requires 'constructs women as emotionally vulnerable and medically ignorant';[130] which is diametrically opposed to the 'scientific, rational and objective'[131] characterisation of the medical profession. Sheldon notes that modern trends in medicine have shifted away from 'doctor knows best' paternalism.[132] Patients are routinely trusted, and indeed expected, to make their own

126 Cámara de Senadores 47th Ordinary session (2012) 208.

127 Special commission for consideration of termination of pregnancy bill (n 55) 6.

128 Samantha Halliday, *Autonomy and Pregnancy. A Comparative Analysis of Compelled Obstetric Intervention* (Routledge, 2016) 172.

129 LJ Ralph et al, 'Measuring Decisional Certainty Among Women Seeking Abortion' (2017) 95 Contraception 269.

130 MB Mahowald, 'Sex□Role Stereotypes in Medicine' (1987) 2 Hypatia 21, 25.

131 Halliday (n 128) 212.

132 Sally Sheldon, 'The Decriminalisation of Abortion: An Argument for Modernisation' (2015) 610 Oxford Journal of Legal Studies 12.

informed medical decisions. Abortion, however, remains predominantly in the control of medical professionals. The public health framing undermines women's rights to make autonomous decisions over their reproductive health.

D. Women as Irresponsible

Underpinning all of the MPs' statements, whether proponent or opponent of the reform, is the idea that women cannot be trusted to make decisions over their reproductive lives. An MP explains that women have an 'ambivalent desire to terminate the pregnancy but also to become mothers'.133 Abortion, which is a health care service that only women need, is then constructed as an exceptional procedure that requires a high degree of surveillance and intervention. The debates on the Voluntary Termination of Pregnancy Act signal—in the words of one MP—that 'in any case, women [that seek abortions] are not in the best position to make these decisions by themselves'.[134]

First, opponents argue that women cannot be trusted with liberal abortion laws. Easy access to abortion, opponents hold, will result in an increase in abortion rates. Women will use abortion as a form of contraception and abortions will become banal.[135] An MP claims that by liberalizing abortion laws:

> *We are telling those young women, sometimes even children, that they can act irresponsibly; that is easier and less costly to terminate a life than to protect themselves from pregnancy.*[136]

As another example, a MP argues that:

> *decriminalizing abortion means liberalizing it, facilitating the adoption of irresponsible attitudes in terms of prevention of pregnancy.*[137]

Concerns that abortion perpetuates negligent and irresponsible behaviour are also linked to the fears, discussed above, about women's sexual agency. When women have access to abortion on demand, this will result in women enjoying the freedom to engage in non-procreational sexual experiences.

Second, one of the MPs showed concern because the reasons for seeking abortion services are 'extremely subjective'[138] —the law allows women to argue 'according to her own judgement' why she decides to terminate the pregnancy. These concerns around the reasons for having an abortion are manifested in the law. Although abortion is legally available on broad grounds, a woman still needs to explain and get the approval of the gynaecologist for

133 Special commission for consideration of termination of pregnancy bill (n 55) 6.

134 ibid.

135 ibid 2.

136 Cámara de Senadores 61st Extraordinary session (2011) 143.

137 ibid (emphasis added).

138 Cámara de Senadores 39th Ordinary session (2007).

the reasons that 'prevent her from continuing the pregnancy' (Article 3 of the Voluntary Termination of Pregnancy Act). Under Uruguay's abortion law, women are not decision-makers and their decision to have an abortion does not guarantee access to an abortion. The procedural hurdles in place under the law are deemed a necessary intervention in the lives of these women, who are otherwise unable to make decisions on their own. An MP in support of the law explains:

> *this draft bill solves this conflict [woman v. foetus], choosing for a middle path—the lesser evil—which is the addition of* a third party that will help the woman make her decision and a reflection period.[139]

5. Conclusion

The persistent refusal of the law and political-legal discourse in Uruguay to recognise that the termination of a pregnancy is a decision that fundamentally belongs to the woman is rooted in gender stereotypes enforcing the generalized view that women should be mothers. Article 2(f) and Article 5 of CEDAW together impose the obligation to transform laws, policies and institutions. Although the law undoubtedly represents a step forward—as criminal penalties for abortion may be waived in certain circumstances—it fails to promote the change in cultural patterns that CEDAW requires because it hinges on harmful gender stereotypes. Thus, Uruguayan abortion law is in violation of its international obligations and its own constitution.

Those advocating for the liberalization of abortion laws in line with human rights standards are faced with the dilemma of having to choose between the more principled but risky argument in favour of women's autonomy and the less palatable but safer one based on harm reduction.[140] The image of women as victims seems to be more politically compelling and morally palatable than the idea that abortion is an essential and normal health care service and human right. There is no 'one size fits all' solution, but the analysis here warns of the dangers of using stereotyped images of women, even if it ultimately resulted in the adoption of a more liberal abortion law.

Uruguay must adopt, under Article 2(f) of CEDAW 'all appropriate measures' to modify or abolish this law—and all laws—that hinge on stereotypes. Identifying the stereotypes that underpin the abortion law allows us to spearhead law reform processes that 'build authentic, nonessentialist, and dignified subjectivities'[141] and help further the cultural change required by CEDAW. Without the careful crafting of legislation, such laws will be complicit in perpetuating stereotypes and will run counter to human rights obligations.

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139 Special Commission for consideration of termination of pregnancy bill, (n 55) 2.

140 Jennifer Hendricks, 'Converging Trajectories: Interest Convergence, Justice Kennedy, and Jeannie Suk's "The Trajectory of Trauma"' (2010) 110 Columbia Law Review 795.

141 Veronica Undurraga, 'Gender Stereotyping in the Case Law of the Inter-American Court of Human Rights' in Eva Brems and Alexandra Timmer (eds), *Stereotypes and Human Rights Law* (Intersentia, 2016).

Beyond the Courtroom: Accountability for Grave and Systemic Human Rights Violations

Meghan Campbell*

Abstract

Achieving accountability for grave and systemic human rights abuses is not simple or straightforward. Questions arise on whether individualised, court-based forums can adequately tackle the norms, institutions and systems that underpin endemic injustices. There are many exciting accountability innovations happening around the world. An overlooked innovation is the inquiry procedure under the UN treaty bodies. This procedure, in theory, holds significant potential, as it is exclusively directed towards investigating and remedying 'grave and systemic' human rights issues. Although, several treaty bodies can conduct inquiries, the CEDAW Committee is the only treaty body to have built up a body of jurisprudence. At this early stage in the history of the inquiry procedure, this article asks: what contribution have the inquiries from the OP-CEDAW made to reconceptualising accountability for systemic violations of human rights? To answer this question, the article begins by mapping the prominent blockages to accountability in traditional, individualised court-based accountability forums. It then proceeds to evaluate whether the inquiries under the OP-CEDAW can overcome these blockages. There are multiple strengths to pursuing accountability for grave and systemic abuses through the inquiry procedure. The institutional design, particularly the active role provided for civil society organisations (CSOs) and the CEDAW Committee, means that human rights abuses do not go unchallenged because of costs or technical legal rules. The intense focus on one specific grave and systemic issue sheds light on the embedded and interwoven structures and attitudes that underpin endemic human rights violations. In turn, this gives the CEDAW Committee a strong basis on which to propose targeted recommendations to prevent further violations. The article concludes by identifying areas for reflection and future reform as the UN treaty bodies continue to conduct inquiry procedures.

Keywords: Inquiry Procedure; UN Treaty Bodies; Grave and Systemic Human Rights; Structural Remedies; CEDAW

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1. Introduction

There are questions about whether traditional, individualised, adversarial forums can grapple with grave and systemic human rights violations.[1] Even more fundamentally, there are concerns that human rights as a framework cannot address endemic injustices.[2] Past failures, however, should not lead to cynicism or to abandoning efforts to use the law to uphold human rights. The unhappiness with conventional adversarial forums needs to be a call to reimagine how accountability mechanisms can take account of gross and widespread human rights abuses. There are many exciting innovations: positive duties to eliminate discrimination;[3] public interest litigation;[4] court supervision of remedial orders[5] and truth and reconciliation commissions.[6] Taken together, these efforts aim to modify current models and create new accountability forums that can address systemic human rights violations and 'facilitate structural and institutional change.' [7] Although these measures have been critiqued,[8] there is a continued striving to refine accountability platforms so that they can strike at the root of human rights abuses. One such mechanism is the inquiry procedure into grave and systemic human rights violations available under a select number of UN human rights treaties. This article focuses on the inquiry procedures conducted under the UN Convention on the Elimination of All Forms of Discrimination Against Women [9] (CEDAW) and assesses how this overlooked mechanism offers accountability for grave and systemic violations of human rights.

Through its various mechanisms, the UN human rights treaty body system is creatively responding to the accountability challenges for human rights. Little serious attention has been paid to the inquiry procedure.[10] In theory, it holds significant potential as it is specifically

1 Kent Roach, 'Polycentricity and Queue Jumping in Public Law Remedies: A Two-Track Response' (2016) 66(1) University of Toronto Law Journal 3, 35-6.

2 Gunther Teubner, 'Societal Constitutionalism Beyond the Nation State' in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism* (OUP 2010) 338.

3 Section 149, Equality Act 2010 (UK).

4 Jason Brickhill and Yana Van Leeve, 'From the Courtroom to the Classroom: Litigation Education Rights in South Africa' in Sandra Fredman, Meghan Campbell and Helen Taylor (eds), *Human Rights and Equality in Education* (Policy Press 2018).

5 *Madzodzo and Others v Minister of Basic Education and Others* 2014 (3) SA 441 (ECM) (South Africa).

6 Truth and Reconciliation Commission, The Report <http://www.justice.gov.za/trc/report/> accessed 9 January 2018.

7 Sandra Fredman, 'Making Equality Effective: The Role of Proactive Measures' (2010) European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, Unit EMPL/G/2.

8 Aileen McColgan, 'Litigating the Public Sector Equality Duty: The Story So far' 35(3) (2015) Oxford Journal of Legal Studies 453; Matt James, 'A Carnival of Truth? Knowledge,
Ignorance and the Canadian Truth and Reconciliation Commission' (2012) The International Journal of Transitional Justice 1.

9 (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

10 An exception is Catherine O'Rourke, 'Bridging the Enforcement Gap: Evaluating the Inquiry Procedure of the CEDAW Optional Protocol' (2018) 27 American University Journal of Gender, Social Policy and Journal 1.

targeted towards 'grave and systemic' human rights issues.[11] The CEDAW Committee is the only treaty body which has built up a body of jurisprudence under the inquiry procedure. To date, the two other treaty bodies have conducted inquiries. The Committee on the Rights of Persons with Disabilities[12] which has only conducted two inquiries, in the UK (impacts of welfare reform) and Spain (segregation in education)[13] and the Committee on the Rights of the Child has released one report in Chile (residential protection). [14] The remaining treaty bodies empowered to conduct inquiries—the Committee on Enforced Disappearances, the Committee on the Convention Against Torture and the Committee on Economic, Social and Cultural Rights—have not yet conducted any.[15] At this early stage in the history of the inquiry procedure, it is pertinent to ask: what contribution have the inquiries from the CEDAW Committee made to reconceptualising accountability for systemic violations of human rights?

To answer this question, Section I begins by critically assessing why individualised, court-based models of accountability have struggled to address grave and systemic abuses of human rights. Section II transitions to the international plane; it canvasses the role of international human rights law in achieving accountability and contextualises the inquiry procedure under the Optional Protocol to CEDAW (OP-CEDAW). Section III investigates whether the inquiry procedures undertaken by the CEDAW Committee can overcome the obstacles identified in Section I. This careful reading of the inquiry reports reveals that the greatest strength of this accountability mechanism is a targeted assessment of a specific human rights issue. This intense focus results in a fine-grained analysis that: (i) grasps the underlying causes, cultural norms and oppressive structures that perpetuate severe and widespread human rights abuses and (ii) provides a basis for proposing recommendations that are designed to prevent future violations. As the CEDAW Committee and the other treaty bodies continue to develop the inquiry procedure, this article concludes by flagging areas for future consideration so that accountability forums speak to the realities of structural abuses.

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11 Article 8 of the Optional Protocol to CEDAW (adopted 6 October 1999, entered into force 22 December 2000) 2131 UNTS 83.

12 Article 6 of the Optional Protocol to The Convention on the Rights of Persons with Disabilities (CRPD) (13 December 2006, A/RES/61/106).

13 CRPD Committee, 'Report of the inquiry concerning the UK of CRPD Committee under article 6 of OP-CRPD' (2017) CRPD/C/15/4; CRPD Committee, 'Report of the inquiry concerning Spain of the CRPD Committee under article 6 of OP-CRPD' (2018) CRPD/C/20/3.

14 Committee on the Rights of the Child, 'Informe de la investigación relacionada en Chile en virtud del artículo 13 OP-CRC relativo a un procedimiento de comunicaciones' (2018) CRC/C/CHL/INQ/1 (available only in Spanish).

15 Article 20 of The Convention Against Torture (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85; Article 33 of The Convention for the Protection of All Persons from Enforced Disappearances (adopted 12 January 2007 UNGA Res 61/177); Article 11 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (5 March 2009 A/RES/63/117).

2. The Limits of Individualised Court-Based Accountability

One of the most prominent forums in which to claim accountability for human rights violations is domestic courts. Court-based models of adjudication, especially in common law systems, are based on an individualised and adversarial conception of justice. At the outset, it is important to acknowledge there are diversities and exceptions within this model. As one example, public interest litigators in South Africa, Brazil, the US and India are using the traditional court process to secure systemic remedies beyond reparation for the individual. [16] Although there are differences in the nature and scope of public interest litigation across different jurisdictions and human rights contexts, the common aim is to reform laws and institutions to achieve transformative aims.[17] However, in the traditional paradigm, the individual instigates the claim and presents evidence to the court of the perpetrator's blameworthiness. If the court concludes there has been a violation of the law, it orders some form of punishment to the perpetrator or reparations to the victim.[18] This account of the traditional approach is both over-simplified and highly stylized, but is still a useful analytical device for assessing why individualised, courtbased models can often fail to comprehensively address entrenched human rights abuses. While acknowledging the differences between civil and criminal law proceedings, for the purposes of this section, 'individualised, court-based models' includes criminal proceedings. This type of legal action is instigated by the state, but it is a highly individualised process. Furthermore, criminal courts are common adjudicative forums for gender-based violence, a pernicious form of structural abuse that features prominently in the inquiries of the CEDAW Committee.

This section uses this stylized model to diagnosis the key blockages that exist in the ability of individualised, court-based forums to account for grave and systemic human rights violations. This is not designed to be an exhaustive assessment but rather seeks to map prominent factors that prevent claims from reaching the court and, for the claims that proceed, to pinpoint features within the justice system that work against systemic accountability. This forms the basis for the evaluation of the inquiry procedure's ability to overcome these blockages in Section III.

A. Crossing the Threshold

The initial stumbling block is that grave and systemic human rights issues are not coming before courts. There is an intricate web of factors that explains this invisibility. As a starting

16 Oxford Human Rights Hub, 'Learning Lessons from Litigators: Realising the Right to Education Through Public Interest Lawyering' <http://ohrh.law.ox.ac.uk/media/browse/video/> accessed 19 March 2019.

17 Charles R Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* (Chicago University Press 1998); Austin Sarat and Stuart Scheingold (eds), *Cause Lawyering and the State in a Global Era* (OUP 2001); Ann Skelton, 'Strategic Litigation Impacts: Equal Access to Quality Education' (Open Society Foundations

18 Abram Chayes, 'The Role of the Judge in Public Law Litigation' (1976) 89 Harvard Law Review 1281, 1282-84.

point, individuals may lack *knowledge* of their rights and do not bring their claims to the attention of courts.[19]

Statutes of limitation can bar claims regardless of their merit. This comes to the fore prominently in relation to historic sexual and physical assaults. Victims may require time to understand the nature of the offence. Legally imposed time limits can prevent these individuals from accessing justice. Numerous women have accused comedian Bill Cosby of sexual assault, but due to statutes of limitations only one claim proceeded to court.[20] During the 'Sixties Scoop' in the 1960-70s, the Canadian government escalated its policy of removing Indigenous children from their families and into residential schools. In these schools, Indigenous children were physically and sexually abused. In the 1990s and 2000s, individuals tried to pursue claims against the state, the Catholic and Protestant church (who had operated many of these schools) and specific perpetrators, but many of their claims were time barred.[21] The procedural aspects of individualised, court-based models can operate so as to prevent victims of serious and widespread human rights abuses from obtaining accountability.

There may be *gaps* in legal protection making it impossible to use the law to obtain accountability for structural human rights issues. The UN Special Rapporteur on extreme poverty and human rights observes that the 'laws tend to reflect and reinforce the privileges and interests of the powerful' and may not 'recognize or prioritize [structural] abuses.'[22] Not all jurisdictions criminalise marital rape or have legislation on workplace harassment.[23] The informal labour market is routinely excluded from legal protection[24] and informal workers rarely seek accountability in individualised, court-based forums.[25] Domestic human rights instruments may not protect rights to education, housing, health or standard of living making it almost impossible to obtain accountability in traditional legal forums for severe and entrenched violations in these fields of life.

Individual, court-based models are premised on identifying a *specific victim* and *perpetrator*. This requirement can exclude certain types of grave and systemic human rights claims. For instance, when challenging the failure to revise textbooks that negatively portray women, it is difficult to 'identify particular victims over and above other women.'[26]

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19 CEDAW Committee 'General Recommendation No. 33 on women's access to justice' (2015) CEDAW/C/GC/33 [32].

20 Kyle Kim et al, 'Bill Cosby: A 50 Year Chronicle of Accusations and Accomplishments' (17 July 2017) The Los Angeles Times <http://www.latimes.com/entertainment/la-et-billcosby-timeline-htmlstory.html> accessed 6 March 2018.

21 Blackwater v Pliny [2005] 3 SCR 3 [2]-[4] (Canadian Supreme Court).

22 UN Special Rapporteur on extreme poverty and human rights, 'Access to Justice (2012) A/67/278 [28].

23 World Bank, 'Women, Business and the Law' (World Bank, 2016) 22-3.

24 Working Group on Discrimination Against Women, 'Discrimination Against Women in Economic and Social Life' (2013) A/HRC/26/39 [55]-[56]; Pahmhidzai Bamu-Chipunza, 'Extending Occupational Health and Safety Law to Informal Street Vendors in South Africa' (2018) U of OxHRH J 61.

25 CEDAW Committee, 'General Recommendation No. 26 on migrant women workers' (2008) CEDAW/C/GC/26 [21].

26 Andrew Byrnes and Jane Connors, 'Enforcing the Human Rights of Women: A Complaints Procedure for the

At the same time, violations of human rights may not originate in the failure of one person but be the result of a complex chain of failures making it both difficult and pointless to name a specific perpetrator.[27]

If individuals pursue claims for grave and systemic violations of human rights in traditional adjudicative forums, this can place an enormous burden on their shoulders. The totality of these *costs* can act as a powerful disincentive to obtaining accountability. Court proceedings are notoriously slow, and individuals may have to wait a considerable amount time to have their claims adjudicated.[28] There is an array of financial costs in bringing forward a human rights claim. These can range from filing fees to the costs of lawyers (particularly salient in an era of dwindling legal aid budgets) to the costs of collecting evidence. Proving entrenched human rights violations can be expensive as the individual often has to compile evidence to demonstrate the scale and magnitude of the claim. [29] There is no guarantee that the individual will be able to recover these costs from the perpetrator. If the court orders costs, the individual must still front the costs of litigation before being reimbursed by the defendant after the litigation has concluded.

There are also social costs. Individuals claiming violations of their human rights often face stigma, repercussions and professional and personal ostracism.[30] Bringing a claim can have negative knock-on effects. Mandatory charging policies for gender-based violence increase the risk of state control via migration or child custody law in women's lives, particularly for women with intersectional identities.[31] If the allegation of gender-based violence proceeds it can require the individual to present intimate details of their lives to the adjudicator for public scrutiny.[32] The criminal law's emphasis on disclosure and cross-examination can leave individuals feeling re-victimized.[33] Private rights of action for gender-based violence are, in theory, able to empower the individual as they have more control over the process, but there is evidence that individuals are reluctant to re-engage with an abuser.[34] The totality of these financial and social costs can simply be too great, meaning that individuals decide not to pursue a claim.

Women's Convention?' (1995-1996) 21 *Brooklyn Journal of International Law* 679, 705.

27 Essop v Home Office [2017] UKSC 27 [9]; Sandra Fredman, 'Breaking the Mould: Equality as a Proactive Duty' (2011) 60 American Journal of Comparative Law 263.

28 R v Jordan (2016) 1 SCR 631 (Canadian Supreme Court).

29 The European Court of Human Rights warned against requiring statistics in indirect discrimination cases; see DH v Czech Republic (Application No 57325/00).

30 'General Recommendation No. 33' (n 19) [9], [25(a)(ii)].

31 Linda Mills, *Insult to Injury: Rethinking Our Response to Intimate Abuse* (PUP 2013); Donna Coker, 'Race, Poverty and the Crime-Centered Response to Domestic Violence' (2004) 10 (11) Violence Against Women 1331, 1333.

32 Fiona E Raitt, 'Disclosure of Records and Privacy Rights in Rape Cases' (2011) 15(1) Edinburgh Law Review 33.

33 Jacqueline M Wheatcroft et al, 'Revictimizing the Victim? How Rape Victims Experience the UK Legal System' (2009) 4(3) International Journal of Evidence-Based Research, Policy and Practice 265.

34 Julie Goldschied, 'Elusive Equality in Domestic and Sexual Violence Law Reform' (2007) 34 Florida State University Law Review 731.

Practical hurdles and procedural rules can make it difficult for individuals to come together to overcome these burdens as a group. Domestic workers who work in private homes are isolated from each other, making it hard to organise and pursue collective action.[35] Class actions rules can be narrowly drawn, circumscribing the ability of individuals jointly to pursue structural human rights abuses.[36] The rules of standing can limit CSOs' role in legal processes or the rules on cost orders can create strong disincentives to their participation.[37]

B. Within the Courtroom

Combined, these obstacles can result in an ad-hoc array of grave and systemic issues coming before individualised, court-based forums. If a claim can overcome the hurdles detailed above and make it on the court docket, there is a further range of factors that can create blockages in achieving accountability.

The traditional justice system may be riddled with *myths, stereotypes* and *biased assumptions*. The rules of evidence can be discriminatory. In some states, women need to corroborate their testimony 'requiring them to discharge a higher burden of proof than men in order to establish an offense.'[38] Prosecutors and judges, rather than being neutral arbitrators, can perpetuate dangerous stereotypes. A judge in Quebec, Canada, said a seventeen-year-old girl may have been a bit flattered by sexual harassment;[39] another judge in Canada asked why an Indigenous woman just didn't keep her knees together during a sexual assault.[40] In the UK, there is similar evidence that, despite legal protections against the use of rape myths, prosecutors and judges are not objecting to them being relied upon in sexual assault trials.[41] The Lammy Report found that Black, Asian and Minority Ethnic women in the UK are more likely to be found guilty by magistrates than white women. [42] The US Supreme Court recently overturned a death sentence as there was evidence

35 International Labour Organization, 'Domestic Workers Around the World' (ILO, 2013) 50.

36 David Marcus, 'The Public Interest Class Action' (2015) 104 Georgetown Law Journal 789-95.

37 See proposed reforms in the UK: Ministry of Justice 'Judicial Review: Proposals for Further Reforms' (2013) CM 8703 22-7; and Sections 88 to 90 of the Criminal Justice and Courts Act 2015 (UK) on cost orders.

38 'General Recommendation No. 33' (n 19) [25(a)(iii)].

39 CBC News, 'Justice Minister Denounces Judge's Comments on Teen Sexual Assault Victim's Weight' (25 October 201) CBC <http://www.cbc.ca/news/canada/montreal/quebeccourt-judge-sexual-assault-victim-1.4370997> accessed 9 January 2018.

40 Sean Fine, 'Judges in "knees together" trial resigns after council recommends he be fired' (9 March 2017) The Globe and Mail <https://www.theglobeandmail.com/news/national/judicial-council-recommends-justicerobin-camp-be-fired/article34249312/> accessed 9 January 2018.

41 Jennifer Temkin et al, 'Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study' (2018) 13(2) Feminist Criminology 205.

42 'The Lammy Review: An independent review into the treatment of Black, Asian and Minority Ethnic Individuals in the Criminal Justice System' (2017) 32 (UK) <https://www.gov.uk/government/publications/lammy-review-final-report> accessed 6 March 2018.

that the jury convicted the accused based on racist stereotypes. [43] These are a handful of illustrations of a deeply engrained problem. Decision-makers may misunderstand the law and are often insensitive to the reality of human rights abuses.

There are two further inter-related challenges to using individualised, court-based adjudicative forums to redress grave and systemic human rights abuses. First, the legal proceedings may have a *different aim*. The goal of proceedings is not to evaluate systemic human rights issues. The Supreme Court of Canada noted that courts are 'adjudicators of the *particular claim* that is before it' not a public inquiry investigating the systemic issues raised by the claim.[44] This is most pronounced in using criminal law to redress human rights abuses, such as gender-based violence, as it is a highly individualised and decontextualized process.[45] The purpose of the criminal trial is to determine the guilt of the individual accused. It is not the role of the court to engage in assessing or remedying how patriarchal norms and structures contribute to gender-based violence or to evaluate the failures of the police in investigating violence against women. Criminal law pays little regard to the complex relationship between violence, gender, race, socio-economic class and migration status in maintaining women's subordination.[46] This lack of attention can result in the perpetuation of structural human rights abuses. There is evidence that criminal law can reproduce racial injustices;[47] rob women of their voice and ignore their different needs;[48] and penalise women, disproportionately those with intersectional identities, who do not cooperate with prosecutorial demands.[49] By their institutional design, courts are often unable to grapple with the underlying structural human rights issues that connect each individual claim. This is not to argue that individualised court proceedings should be abandoned. When used in a reflective manner they can serve an important function. Rather, accountability needs to be harmoniously multi-faceted.

Second, can an individual claim be *fully emblematic* of structural human rights issues?[50] It may be readily apparent, or become apparent as the claim unfolds, that the individual's human rights issue is connected to gross, deeply embedded and widespread violations.[51] But, can one claim reveal the full picture of structures, institutions, systems, history, beliefs and attitudes that explain the individual human rights violation? Are there inevitable blind-spots in using an individual claim to redress larger human rights issues? The insights from

43 *Pena-Rodriguez v Colorado*, US 580__(2017) (US Supreme Court).

44 *Moore v British Columbia* (Education) [2012] 3 SCR 360 (Canadian Supreme Court) (emphasis added) [63], [64].

45 Karen Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (2015) Cornell Law Review 1070.

46 Aya Gruber, 'A "Neo-Feminist" Assessment of Rape and Domestic Violence Law Reform' (2012) 15 Journal of Gender, Race and Justice 583.

47 Bennett Capers, 'The Unintentional Rapist' (2010) Washington University Law Review 1345.

48 Mills (n 31).

49 Meghan Condon, 'Bruise of a Different Color: The Possibilities of Restorative Justice for Minority Victims of Domestic Violence' (2010) 17 Georgetown Journal on Poverty, Law and Policy 487.

50 Sarah Joseph and Melissa Castan, *ICCPR: Cases, Materials and Commentary* 2nd ed (OUP 2013) 817-18.

51 Byrnes and Connor (n 26) 750-52.

intersectionality theory serve as a caution. Intersectionality warns of the danger of equating, for example, all women's experiences with the experience of white, middle-class, able-bodied, heterosexual women who live in the developed world.[52] Different identities will impact upon and shape the nature of human rights claims. Examining structures through the lens of an individualised experience raises questions on the ability of the court to see, and take account of, how differently situated individuals experience human rights violations. The aim here is not to answer this tough question but simply to flag that individualized accountability forums may not grasp the full picture.

A final complication is that remedies from individualised, court-based forums are traditionally *backward-looking* and *individualised*. The classical understanding is that 'justice can only be done for individuals before the court and not for larger groups.'[53] It is usually achieved through immediate monetary remedial compensation or, in the case of criminal law, an individualised sentence.[54] A consequence of the court ordered corrective, individualised remedy may be to reform 'large public bureaucracies...new legislation or governmental programs' or shift cultural attitudes, but that is not the central goal of the remedy.[55] Remedies are limited due to concerns about the role and expertise of courts. There is a fear that courts do not have the requisite knowledge to order widespread structural reform, especially when it has budgetary implications. [56] Furthermore, there is often no single solution to grave and systemic human rights violations. There are a range of remedies. It is argued that courts do not have the democratic mandate to make that remedial choice.[57] Out of fears of micro-managing the government and overstepping their role in the separation of powers, remedies are narrowly tailored.[58] Without remedies targeted at the grave and systemic abuses, courts can fail to make rights real. There is widespread acknowledgement of this problem. Courts all over the world, at the domestic and regional level, are responding to it and pushing against the classic conception of remedies.[59] There are debates on whether courts are able effectively to achieve structural change,[60] but the ability of courts to grapple with systemic abuses is forestalled when the traditional remedial process does not even begin to examine the larger context raised by an individualised claim.

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52 Kimberle Crenshaw, 'Demarginalising the Intersection of Race and Sex' (1989) University of Chicago Legal Forum 139.

53 Kent Roach, 'The Challenges of Crafting Remedies for Socio-Economic Rights' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2008) 48.

54 ibid; Julie Goldscheid and Rene Kathawala, 'State Civil Rights Remedies for Gender Violence: A Tool for Accountability' (2018) 87 University of Cincinnati Law Review 171, 199-200.

55 Roach, 'Crafting Remedies' (n 53) 49.

56 Lon Fuller, 'The Forms and Limits of Adjudication' (1978) 92 Harvard Law Review 353; see Roach, 'Two-Track Responses' (n 1) for a re-evaluation of Fuller.

57 Jeremy Waldron, 'The Core Case Against Judicial Review' (2006) 115(6) Yale Law Journal 1346, 1353.

58 McColgan (n 8).

59 Roach, 'Two-Track Responses' (n 1) 18-27; Alexandra Huneeus, 'Reforming the State from Afar: Structural Reform Litigation at the Human Rights Court' (2015) 40(1) Yale Journal of International Law.

60 Martha Minow, In Brown's Wake (OUP 2010).

Not every factor detailed in this section may arise in every national context. Certain issues may be more prominent while others may not be relevant. A selective mix of factors might be at play in different states or in relation to different human rights issues. Nor are these factors exhaustive. New factual matrices can bring to the fore new complications in using individualised, court-based forums to achieve accountability for widespread and serious human rights violations. Even with these caveats, this section does offer explanations as to why traditional accountability forums struggle to understand and remedy structural human rights claims. There are efforts to reform the law and court proceedings and to establish new models for accountability.[61] The next section investigates the role of international human rights in these efforts and the promise of the inquiry procedure.

3. Giving Voice to the Voiceless: International Human Rights Law

What role does the international human rights system—specifically the inquiry procedure under the OP-CEDAW—play in accountability for grave and systemic human rights abuses? This section provides a contextual understanding on the broad goals of accountability under the international human rights system and the history of the inquiry procedure under the OP-CEDAW.

A. Accountability on the International Plane

By signifying and ratifying UN human rights treaties, states have consented to being held accountable on the international plane. Treaty bodies are not judicial bodies.[62] They are a geographically diverse body of experts that monitor the state's implementation of treaty obligations.[63] They do not issue binding interpretations of the treaty nor do they have the power to enforce remedial orders. Treaty bodies are not 'courts to which appeals may be taken from a state's highest domestic court.' [64] Their role in accountability needs to be understood in light of the different nature of the international human rights system.

Treaty bodies' accountability relies on strength of reasoning. First, as argued in Section I, domestic human rights protection may be incomplete or inadequate. The UN treaty bodies can be used to draw attention to human rights issues that are neglected in domestic forums. It is hoped that shining the international spotlight on an issue will prompt the state to undertake human rights reforms. This can be successful. The Human Rights Committee, which monitors the implementation of the

International Covenant on Civil and Political Rights, concluded in *Toonen v Australia*

61 Fredman, 'Making Equality Effective' (n 7).

62 Human Rights Committee, 'Obligation of States parties under the OP-ICCPR' (2009) CCPR/C/GC/33 [11].

63 Article 31(2) of the International Covenant on International Civil and Political Rights (adopted 16 December 1966, entry into force 23 March 1976) 999 UNTS 171.

64 Joseph and Castan (n 50) 21; Jonassen et al v Norway (2002) CCPR/C/76/D/881/1999.

that sodomy laws violated the individual's right to privacy.[65] The Australian government positively responded to the decision by passing the Human Rights (Sexual Conduct) Act 1994 legalising same-sex sexual activity. [66] Second, the treaty bodies share best practice and provide guidance to states on how to fully implement their treaty obligations.[67] Third, treaty bodies seek to deepen the understanding of open-textured human rights. [68] This work is not legally binding, but the standards developed at the international level can and do influence CSOs, courts, policy-makers and legislators. [69] The CEDAW Committee's work on gender-based violence has been cited by numerous apex courts and used as a model for domestic legislation. [70] In an insightful study on the relationship between treaty bodies and domestic courts, Kanetake demonstrates that courts in the UK, Canada, Australia, Bangladesh, Kenya, Switzerland, Peru, Germany, Belize, The Netherlands and Spain have drawn on the findings of treaty bodies.[71]

There is no guaranteed route to achieving the accountability goals of international human rights law and there are as many successes as failures.[72]

The different character of international human rights accountability means there is no competition between domestic and international forums on which body is better able to take account of structural human rights issues. The interaction between international and domestic forums needs to be complementary. The question explored in Section III is how a relatively new accountability mechanism, the inquiry procedure under the OPCEDAW, can provide guidance on redressing grave and systemic abuses of human rights.

B. Accountability under the OP-CEDAW

Before answering this question, this section concludes by canvassing the history of the

65 (1994) CCPR/C/50/D/488/1992.

66 Nick Poynder, 'When All Else Fails: The Practicalities of Seeking Protection of Human Rights Under International Treaties' (2003) Public Lecture Castan Centre for Human Rights Law <https://www.monash.edu/law/research/centres/castancentre/publicevents/events/2003/poynderpaper> accessed 19 March 2019.

67 Helen Keller and Leena Grover, 'General Comments of the Human Rights Committee and Their Legitimacy' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (CUP 2012) 124.

68 Philip Alston, 'The Historical Origins of the Concept of 'General Comments' in Human Rights Law' in L Boisson de Chazournes and V. Gowland Debbas (eds), *The International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-Saab* (Martinus Nijhoff 2001).

69 Martha Nussbaum, 'Women's Progress and Women's Human Rights' (2016) 38(3) Human Rights Quarterly 589, 611.

70 *Vishakav State of Rajasthan* AIR 1997 SC3 011(India Supreme Court); *Carmichele v Minister of Safety and Security and Another*, 2001 (1) BCLR 995 (South African Constitutional Court); *R v Ewanchuk* [1999]1 SCR 330 (Canadian Supreme Court); *Opuz v Turkey* Application No 33401/02 (European Court of Human Rights, 9 June 2009); Indian Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

71 Machiko Kanetake, 'UN Human Rights Treaty Monitoring Bodies Before Domestic Court' (2018) 67 International and Comparative Law Quarterly 201, 207-15.

72 ibid.

OP-CEDAW. Almost immediately upon coming into force, there were concerns that CEDAW was a second-class instrument.[73] Unlike some other UN treaties, it did not have an individual right of petition or an inquiry procedure. The absence of these remedial mechanisms was viewed as a weakness. [74] The extent of this weakness can be seen by examining CEDAW's central accountability mechanism: the periodic reporting process. Under this process, the CEDAW Committee reviews the state's efforts to implement the treaty, identifies areas of concern and provides recommendations on how the state can accelerate its effort to achieve gender equality. This process is heavily dependent on the state providing information to the CEDAW Committee. Unsurprisingly, states, for a multitude of reasons, do not consistently submit their reports on time nor do they always provide a critical assessment of gender inequality.[75] This factual gap has partially been filled by shadow reports of CSOs. Civil society, however, can have its own agenda and may focus on some specific issues at the expense of others.[76]The CEDAW Committee is not empowered to supplement any bias in reporting through its own factfinding missions. The periodic reporting process does have strengths and remains a cornerstone mechanism, but exclusively relying on it for accountability results in an incomplete picture. Since the 1980s, there was a desire to strengthen accountability under CEDAW. The feeling was that the CEDAW Committee should not be overly dependent on states and should itself be empowered to grapple with the many different facets of gender inequality. [77] Throughout the 1990s, the UN Division for the Advancement of Women, the CEDAW Committee, CSOs and academics campaigned for an optional protocol. This process culminated in the OP-CEDAW in 2000.

Examining the drafting history of the OP-CEDAW provides clarity on the aims of the inquiry procedure. It was proposed that, upon receipt of reliable information into grievous or widespread abuses of CEDAW, the CEDAW Committee should engage in dialogue with the state about the allegations and, if required, proceed to conduct an inquiry which could include a fact-finding visit to the state.[78] The majority of states were in favour of the inquiry procedures but there were states in opposition.[79] Those in support of the inquiry hoped that it would 'facilitate the examination of widespread violations, including those that crossed national borders.'[80] It was also hoped that the inquiries could have an educational

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73 Theodor Meron, 'Enhancing the Effectiveness of the Prohibition of Discrimination Against Women' (1990) 84 American Journal of International Law 213.

74 ibid.

75 Felipe Gomex Isa, 'OP-CEDAW: Strengthening the Protection Mechanism of Women's Human Rights 20(2) Arizona Journal of International and Comparative Law 291, 304.

76 Meghan Campbell, *Women, Poverty, Equality: The Role of CEDAW* (Hart 2018) Chapter 5.

77 Jane Connors, 'Optional Protocol' in Marsha Freeman, Christine Chinkin and Beate Rudolf (eds), *CEDAW: Commentary* (OUP 2012) 608.

78 ibid 659.

79 Additional Views of Governments, Intergovernmental Organizations and NonGovernmental Organizations on an Optional Protocol to the Convention' (1997) E/CN.6/5.

80 Connors (n 77) 660.

effect by exposing the root causes of discrimination against women. [81] Increasing attention to systemic gender inequality 'would [hopefully] contribute to the integration of the human rights of women throughout the UN system.'[82] Supporters felt the inquiries could fill an accountability gap 'in cases where individual women who had suffered over and above other women could not be identified'[83] and 'protect women from reprisal or practical constraints on their ability' to bring claims.[84]

States in opposition were concerned that the inquiry procedure could undermine state sovereignty and there was debate on the threshold criteria for initiating an inquiry.[85] Some states felt that there was a difference between serious crimes (racial discrimination) and the elimination of discrimination against women, such that it would be inappropriate to set up a 'court of judgment' under CEDAW.[86] The academic community was strongly in favour of an inquiry procedure, but had concerns that it might tax the limited resources of the CEDAW Committee, needlessly replicate existing accountability mechanisms and expose the CEDAW Committee to 'selectivity and political bias.'[87]

The effect of these debates can be seen in the text of the OP-CEDAW.

Under Article 8(1), an inquiry procedure may be initiated if the CEDAW Committee receives reliable information that CEDAW has been grievously and systematically violated. Under the rules of procedure, the CEDAW Committee can ascertain the veracity of information [88] by examining 'its consistency, corroborating evidence, the credibility of its source and information from other sources, national or international, official or non-official.'[89] The state has an initial opportunity to respond (Article 8(1)). The CEDAW Committee considers all this information when deciding to conduct an inquiry which may include a state visit (Article 8(2)). The state has a right to receive the Committee's findings and recommendations (Article 8(3)); has six months to respond (Article 8(4)); and the response should detail the steps it has taken as a result of the inquiry findings (Article 9(1)). The entire inquiry 'shall be conducted confidentially and the cooperation of the State Party shall be sought at all stages' (Article 8(6)). States are permitted to opt out of the inquiry procedure under Article 10.[90] Only four states have opted out.[91]

As of April 2019, the CEDAW Committee has conducted five inquiries: into murdered and missing women in Ciudad Juárez, Mexico;[92] murdered and missing Indigenous women

81 ibid.

82 O'Rourke (n 10) 9.

83 Connors (n 77) 660.

84 O'Rourke (n 10) 9.

85 Connors (n 77) 661.

86 Byrnes and Connors (n 26) 687.

87 ibid 772.

88 ibid 662.

89 ibid 666.

90 ibid 662.

91 Loveday Hodson, 'Women's Rights and the Periphery: CEDAW's Optional Protocol' (2014) 25(2) The European Journal of International Law 561, 564.

92 CEDAW Committee, 'Report of the inquiry concerning Mexico of the CEDAW Committee under article 8

in Canada;[93] access to modern contraception in Manila, The Philippines;[94] access to abortion in Northern Ireland;[95] and bride-kidnapping in Kyrgyzstan.[96] For the five inquiries, the CEDAW Committee undertook fact-finding missions. In all five inquiries, there had been grave and systemic violations of CEDAW and all states, besides The Philippines, have provided a written response. The limited use of the inquiry procedure may be due to CSOs and the CEDAW Committee's 'reticence to publicly activate the procedure'. [97] These decisions have largely been ignored in the discourse on OP-CEDAW.

4. Re-Imagining Accountability for Grave and Systemic Human Rights Abuses

The drafters of the OP-CEDAW had a bold vision for the inquiry procedure—grappling with the root causes of discrimination against women, redressing gender inequalities that do not fit within the traditional remedial paradigm and alleviating the burdens that prevent women from seeking accountability.[98] Have these goals been realized? Are the inquiry procedures able to take account of grave and systemic human rights abuses? This section analyses the five inquiries against the central blockages identified in Section I. It begins by canvassing how the inquiry procedure can redress obstacles that prevent claims from proceeding and then investigates if the reasoning and remedial process in the inquiry procedure confronts grave and systemic human rights abuses. This analysis reveals the multiple strengths of the inquiry procedure. The institutional design, particularly the active role provided for CSOs and the CEDAW Committee, means that human rights abuses do not go unchallenged because of costs or technical legal rules. The intense focus on one specific grave and systemic issue sheds light on the embedded and interwoven structures and attitudes that underpin endemic human rights violations. In turn, this gives the CEDAW Committee a strong basis on which to propose targeted recommendations to prevent further violations. A careful reading of the inquiries also identifies areas for reflection and future reform.

OP-CEDAW' (2005) CEDAW/C/OP.8/MEX/1.

93 CEDAW Committee, 'Report of the inquiry concerning Canada of the CEDAW Committee under article 8 of OP-CEDAW' (2015) CEDAW/C/OP.8/CAN/1.

94 CEDAW Committee, 'Report of the inquiry concerning the Philippines of the CEDAW Committee under article 8 of OP-CEDAW' (2015) CEDAW/C/OP.8/PHI/1.

95 CEDAW Committee, 'Report of the inquiry concerning the UK and Northern Ireland of the CEDAW Committee under article 8 OP-CEDAW' (2017) CEDAW/C/OP.8/GBR/1.

96 CEDAW Committee, 'Report of the inquiry concerning Kyrgyzstan of the CEDAW Committee under article 8 of OP-CEDAW' (2018) CEDAW/C/OP.8/KGZ/1.

97 O'Rourke (n 10) 13.

98 ibid; Connors (n 77) 660-64.

A. Out of the Shadows: Procedural Innovation under the Inquiry Procedure

1. Overcoming Knowledge Gaps

The inquiry procedure enables *CSOs to instigate the inquiries*, overcoming to a certain extent, the lack of awareness individuals may have about their rights. In all five inquires, it is CSOs that lodged concerns with the CEDAW Committee. At the drafting table, it was hoped that CSOs would be able to bring forward claims for vulnerable women who lacked legal literacy and knowledge of the human rights framework.[99] It is difficult to evaluate whether this aim has fully materialised. For all five inquiry procedures, there was no indication that the CEDAW Committee members met with individuals who were previously unaware of their rights. The confidentiality of the inquiry process makes 'it difficult to track, in detail, the work' of the CEDAW Committee. [100] In all five inquiries domestic legal proceedings challenged gender-based violence (Mexico, Canada and Kyrgyzstan)[101] and restrictions on sexual and reproductive health rights (The Philippines and Northern Ireland),[102] implying that there was knowledge of the human rights claim. There may still have been individuals affected by gender-based violence or the restrictions on contraception and abortion who were unaware of their rights. In theory, the CSOs could direct the CEDAW Committee to consult with these women during the fact-finding mission. The promise still holds that any individualised knowledge gaps that might exist can be overcome by creating a prominent space for CSOs in accountability process. For future inquiry procedures, the CEDAW Committee should endeavour, where possible, to engage with women who have not been aware that their human rights have been violated.

As all five inquiries were instigated by CSOs, it is pertinent to critically reflect on their role in accountability for human rights. Do the concerns of CSOs cluster around certain types of grave and systemic issues whilst ignoring other serious violations of human rights? Public interest litigation has been critiqued for being co-opted by an elite group of CSOs that are more concerned with advancing their own agenda.[103] How can the inquiry procedure ensure it addresses the panoply of grave and systemic issues? These challenges raise questions about creating accountability processes at the UN, that are not reliant on CSOs, and providing support for local grassroots CSOs in the international human rights law system. There are no easy solutions, but this is an issue that requires attention as the inquiry procedure continues to develop.

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99 Isa (n 75) 311, citing Amnesty International, 'The Optional Protocol to the Women's Convention' (1997) AI: IOR/51/47/97.

100 Rourke (n 10) 13.

101 'Inquiry Procedure: Mexico (n 92) [107], [145]-[48]; 'Inquiry Procedure: Canada' (n 93) [169]; 'Inquiry Procedure: Northern Ireland (n 95) [11],[12]; 'Inquiry Procedure: Kyrgyzstan' (n 96) [32]-[41].

102 'Inquiry Procedure: The Philippines (n 94) [20]; *R (on the application of A and B) v Secretary of State for Health* (2017) UKSC 41 (UK Supreme Court).

103 Carol Harlow, 'Public Law and Popular Justice' (2002) 65 Modern Law Review 1.

2. Beyond Time Limits

The inquiry procedure adopts *a fluid approach to time limits* that seeks to understand the relationship between past events and current violations of human rights. This fluid approach, however, still respects the principles of international law. Akin to statutes of limitations in domestic jurisdictions, international treaties do not have retroactive effect unless states manifest a different intention.[104] There is no indication in the text of the OP-CEDAW that it is meant to apply retroactively. The basis for claims under the individual communications and inquiry procedures must be for violations of CEDAW that occurred after the OP-CEDAW came into force in 2003. Individual communications have been defeated on this basis.[105] Under the inquiry procedure, the CEDAW Committee took a different account of the passage of time. It did not draw 'an arbitrary historical borderline between events occurring before and after' the coming into force of the OP-CEDAW.[106] In evaluating the disproportionate levels of violence against Indigenous women in Canada, both the CEDAW Committee and the state 'acknowledged that the past must be understood for its effect on the current situation.'[107] This acknowledgment manifests in two ways. First, the CEDAW Committee took account of the history of Indigenous people in Canada and the state's colonial policies so as to understand the root causes of current violence against Indigenous women. Second, it considered 'the continuing effects of the cases of missing and murdered women that occurred before 2003,' such as the poor quality of investigations and the long-term impact on families. [108] Similarly, the CEDAW Committee linked the rise of bride-kidnapping to the collapse of the USSR and 'a "lost generation" of Kyrgyz men who sought reaffirmation of their masculinity' through bride-kidnapping.[109] Moving away from a strict application of time limits allows the adjudicative forum to understand factors from the past that contribute to contemporary grave and systemic abuses and to assess the on-going effects of past violations while still only holding states accountable for incidences that happened after 2003.

3. Comprehensive Approach to Human Rights

One of the greatest strengths of the international human rights system, particularly of CEDAW, is its *comprehensive approach to human rights*. CEDAW requires states to take all appropriate measures to eliminate discrimination in all fields of life.[110] In one instrument it protects civil, political and socio-economic rights and rights within the family. CEDAW and the CEDAW Committee's transformative approach to equality and

104 Article 28 of The Vienne Convention on the Law of Treaties (adopted 23 May 1965, entered into force 27 January 1980) 1155 UNTS 331.

105 *Muñoz-Vargas y Sainz de Vicuña v Spain* (2005) CEDAW/C/39/D/7/2005.

106 'Inquiry Procedure: Canada' (n 93) [92].

107 ibid [89].

108 ibid [91].

109 'Inquiry Procedure: Kyrgyzstan' (n 96) [23].

110 Article 1 of CEDAW.

non-discrimination is canvased below. The focus here is on the scope of human rights protection and its impact on accountability for grave and systemic human rights abuses. The CEDAW Committee interprets the treaty in an evolutionary manner. It addresses the gendered dimensions of issues to which CEDAW does not explicitly refer, including the effects of intersectionality, migration and climate change.[111] In doing so, it anticipates 'the emergence of new forms of discrimination that had not been identified at the time of drafting.'[112] There are notable gaps in CEDAW, for instance there are no obligations in the text on gender-based violence, gender-based poverty or sexual orientation and gender identity. The CEDAW Committee's evolutionary interpretation has, to varying degrees, overcome these gaps.[113] While not perfect, it is attentive to the stubborn and emerging ways that women's rights are violated. If a domestic system does not offer legal recourse for accountability for certain types of structural human rights issues, the comprehensive and evolutionary obligations in CEDAW offer a route to accountability.

This potential is best exemplified in The Philippines inquiry. Many domestic jurisdictions contain no right to access contraception. There may not be an obvious legal route to bring this claim before domestic accountability forums. Or the claim must be argued through the lens of other human rights and aspects of the claim might remain invisible. CEDAW does have provisions on family planning and control of reproduction.[114] It uses these provisions to demonstrate that depriving women of contraception is harmful. By squarely examining the denial of the right to access contraception, the CEDAW Committee emphasized how it harms sexual and reproductive health. At the same time, the comprehensive approach to women's rights embodied in the text of CEDAW directs the CEDAW Committee to analyse the claim from multiple legal perspectives which reveal the interlaced and often unseen facets of the human rights violation. In Northern Ireland, the CEDAW Committee evaluated abortion through the lens of multiple human rights, including negative cultural norms, a right to health, family planning, education and equality for rural women. O'Rourke is worried that the CEDAW Committee's inquiries do not tap into the strengths of CEDAW and comprehensively assess the multiple legal rights raised by specific issue. She is particularly concerned that the inquiries into gender-based violence (Canada and Mexico) disproportionately focus on civil and political rights at the expense of socio-economic rights.[115] This criticism is misplaced. In the inquiry in

111 CEDAW Committee, 'General Recommendation No 28 on core obligations' (2010) CEDAW/C/GC/28 [18]; CEDAW Committee, 'General Recommendation No 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women' (2014) CEDAW/C/GC/32; CEDAW Committee, 'General Recommendation No 37 on gender related dimensions of disaster risk reduction in the context of climate change' (2018) CEDAW/C/GC/37.

112 'General Recommendation No. 28' (n 111) [8].

113 CEDAW Committee, 'General Recommendation No 19 on violence against women' (1992) CEDAW/C/GC/19; CEDAW Committee, 'General Recommendation No 35 on gender-based violence against women' (2017) CEDAW/C/GC/35; Rikki Holtmaat and Paul Post, 'Enhancing LGBTI Rights by Changing the Interpretation of CEDAW' (2015) 33(4) Nordic Journal of Human Rights 319; Campbell (n 76) Chapter 5.

114 Article 10(h) and Article 16(1)(e) of CEDAW.

115 O'Rourke (n 10) 17-8.

Canada, the CEDAW Committee forcefully concluded that the lack of education (Article 10 of CEDAW), employment opportunities (Article 11 of CEDAW) and transportation in rural areas (Article 14 of CEDAW); substance abuse issues (Article 12 of CEDAW); high rate of exploitative prostitution (Article 6 of CEDAW); and the disproportionate numbers of Indigenous children in the child welfare system (Article 16 of CEDAW) substantially increased Indigenous women's risk of violence.[116] There is similar sensitivity to the interaction between gender-based violence and socio-economic rights for inquiry in Mexico.[117]

4. Chains of Institutions

In the five inquiries, the CEDAW Committee investigates *the chains and layers of actors and institutions* that contributed to the failure to achieve gender equality. In looking at the high rates of violence in Ciudad Juárez, Mexico, the CEDAW Committee examined migration patterns, wealth inequality, the rise of organised crime, poor labour practices, inadequate public services and the incompetence and, arguably, complicity of police forces.[118] For the inquiry into missing and murdered Indigenous women in Canada, the CEDAW Committee evaluated the role of social welfare schemes, the law on prostitution, child protection agencies, highway infrastructure and the lack of housing on Indigenous land reserves.[119] In pinpointing the failure of the police, it examined, in detail, racist and sexist attitudes, missing person policies, the lack of coordinated communication between policies forces in different provinces and the inadequate collection of data. [120] In The Philippines, the CEDAW Committee examined the decentralisation of the health care system and the delays in domestic justice procedures. [121] In Northern Ireland, the CEDAW Committee assessed devolution in the UK; the chilling effect of the law on the medical community; the lack of public services in rural areas and the strategies of pro-life campaign groups.[122] Lastly in the Kyrgyzstan, the CEDAW Committee interrogated gender stereotypes that negatively impact the enforcement of the law, the burden of evidentiary rules in criminal prosecutions and the non-registration of religious marriages.[123] Rather than attempting to identify a single, specific perpetrator, the CEDAW Committee evaluated the complex web of legal frameworks, institutions and actors that played a role in human rights violations.

5. Shifting Burdens

The inquiry procedures *shift the financial and personal costs* of accountability to actors

116 'Inquiry Procedure: Canada' (n 93) [94], [111], [122], [190].

117 'Inquiry Procedure: Mexico' (n 92) [61]-[66].

118 ibid [22]-[25], [39], [42], [63], [76], [87]-[88], [104].

119 'Inquiry Procedure: Canada' (n 93) [51]-[52], [55], [94], [106], [112]-[117], [167]-[169].

120 ibid [132]-[166].

121 'Inquiry Procedure: The Philippines' (n 94) [16], [20], [23], [44]-[45].

122 'Inquiry Procedure: Northern Ireland' (n 95) [9], [13], [17]-[20].

123 'Inquiry Procedure: Kyrgyzstan' (n 96) [37], [38], [75].

in a better position to bear these burdens rather than requiring one person to absorb these costs. No one individual in the inquiry need worry about legal fees or the expense of collecting evidence of the systemic human rights violations. The CEDAW Committee undertakes these costs. There are concerns that treaty bodies do not have adequate budgetary support, but in comparison to individuals they are well-placed to shoulder these costs. The personal costs—stigmas, repercussions, invasions of privacy—that can deter individuals, especially women, from seeking accountability are also mitigated under the inquiry procedure. Unlike mandatory charging policies, (the obligation to lay charges if the police believe there has been an incident of gender-based violence), the CEDAW Committee did not mandate any women to

pursue any particular legal response to a violation of her rights. It is also possible to trace a shift in the CEDAW Committee's approach to mitigating the social costs of accountability. In the first inquiry in Mexico, the report named the murdered women and their family members.[124] This is disconcerting as the report stressed there had been increased threats directed towards victim's families. [125] There may have been strategic reasons for naming the victims as the levels of violence in Mexico were ignored and women literally and figuratively disappear. [126] Naming murdered women could be a powerful statement. Due to the confidentiality requirements, there was no record of the CEDAW Committee's motives or of any repercussions towards the individuals named in the report. Strikingly, in comparison, no individuals were named in the reports from Canada, The Philippines, Northern Ireland and Kyrgyzstan. The high levels of stigma against victims of bride-kidnapping operated to silence women and deny them justice.[127] In dialoguing with individuals, the CEDAW Committee only identified women in the footnotes as 'Victim X' or 'Victim H'. The inquiries accordingly created a private space to share experiences and details of human rights violations while simultaneously being a public forum.

One final procedural aspect needs to be analysed, which points to future developments around the inquiry procedure. Domestic proceedings are notorious for *delay* and the inquiry procedure also suffers from this problem. From the initial submission to the CEDAW

Committee to the release of the final report, the Mexico inquiry took three years; the investigation in Canada took four years and the inquiries for The Philippines and Northern Ireland lasted eight and seven years respectively. The latest report from Kyrgyzstan took five years to complete. The delays in producing inquiry reports suggest that the CEDAW Committee was not properly supported in undertaking these inquiries. This confirms the fears of the academic community at the outset of the OP CEDAW. While the delays reveal glimpses into the need for reform within the UN human rights system, this should not be read as a call to abandon the inquiry procedure. Sadly, the eight years it took to undertake the inquiry procedure in The Philippines was still faster than obtaining accountability in the Filipino courts. A domestic legal challenge to the ban was still working its way through

124 'Inquiry Procedure: Mexico' (n 92) [77]-[82].

125 ibid [78], [79], [89].

126 ibid [238], [239].

127 'Inquiry Procedure: Kyrgyzstan' (n 96) [26], [75].

the courts in 2015 when the CEDAW Committee's inquiry report was released. Even an imperfect system has considerable strengths and the current delays should inspire further discussions on treaty body reform and overall support for the UN human rights system.

B. Centre Stage: Engaging with Grave and Systemic Abuses in the Inquiry Procedure

The design of the inquiry procedure, in theory and practice, facilitated accountability for grave and systemic abuses that often struggle to access justice in traditional domestic settings. Examining the CEDAW Committee's reasoning in the final reports demonstrated a further strength of the inquiry procedure. The CEDAW Committee's expertise combined with an exclusive focus on one specific aspect of human rights means that the inquiry procedure could uncover the laws, norms and institutions that underpin severe and widespread abuses. In turn, the CEDAW Committee could propose recommendations that are programmatic and future oriented. This final subsection analyses the CEDAW Committee's reasoning and recommendations in the reports to assess its ability to engage squarely with grave and systemic human rights violations.

1. Expertise in Gender Equality and Non-Discrimination

The expertise of the CEDAW Committee could be a powerful tool to dismantle disadvantage, bias and stereotypes. There are concerns that domestic justice officials lack the expertise on equality, non-discrimination and human rights necessary to ensure accountability. The CEDAW Committee, on the other hand, consists of twenty-three individuals who are specifically appointed for their expertise in gender equality. This expertise is needed as the concept of equality and non-discrimination in CEDAW differs from many national and regional equality protections. CEDAW prohibits sex/gender discrimination against women. It is designed to be asymmetrical as it recognises that 'it is mostly women who suffer from discrimination on the grounds of their sex.'[128] It also has unique provisions on gender equality: Article 4 requires states to take temporary special measures to achieve gender equality; Article 5 holds that states must modify negative cultural attitudes based on women's inferiority and Article 14 guarantees gender equality for rural women. These provisions reflect the rich and varied concept of equality in CEDAW. The treaty includes aspects of formal equality, equality of opportunity and results and transformative equality.[129] The analysis in this subsection uses transformative equality to evaluate the expertise of the CEDAW Committee and its reasoning in the five inquiries as it is the model of equality in CEDAW geared towards uncovering unequal structures. There are overlapping definitions of transformative equality.[130] Fredman's

128 Rikki Holtmaat, 'The CEDAW: A Holistic Approach to Women's Equality and Freedom' in Anne Hellum and Henriette Sinding Aasen (eds), *Women's Human Rights: CEDAW in International, Regional and National Law* (CUP 2012) 100.

129 Campbell (n 76) 80-119.

130 Holtmaat (n 128) 110; Simone Cusack and Lisa Pusey, 'CEDAW and the Rights to NonDiscrimination and

four dimensional model is used as it has been influential at the UN. [131] Transformative gender equality must break cycles of disadvantage; promote dignity by modifying harmful cultural attitudes and stereotypes; guarantee women's political and social inclusion and transform institutions, systems and structures that perpetuate women's inequality.[132] To what extent has the CEDAW Committee drawn on the transformative model of equality in undertaking inquiries into systemic and grave abuses?

The CEDAW Committee's use of transformative equality both demonstrated the strength of the inquiry procedure and marked out areas for future developments. To varying degrees, the CEDAW Committee was attentive to the multiple dimensions of inequality. The first dimension, breaking cycles of disadvantage, directed the CEDAW Committee to understand how vulnerable and marginalised women experience human rights violations. In Northern Ireland, the CEDAW Committee pointed out that for rural, migrant, asylum seeking and refugee women, the limited availability of sexual and reproductive health services forced them into unsafe abortions. [133] All five inquiries identified a key aspect of disadvantage—gender-based poverty—in exacerbating the risk of genderbased violence and limiting access to sexual and reproductive health services. The CEDAW Committee powerfully concluded that women in Mexico are 'murdered because they are women and because they are poor.'[134] In The Philippines, the contraception ban 'had detrimental consequences for economically disadvantaged women and drove them further into poverty by depriving them of an opportunity to control the number and spacing of their children.'[135] In Kyrgyzstan, the inquiry noted that women from low-income families or female-headed households are 'especially vulnerable to bride kidnapping.'[136]

As to the second dimension, promoting dignity, the CEDAW Committee did not perpetuate gender stereotypes that are often found in domestic judicial systems, although there is space for greater engagement with harmful attitudes that undermine women's equality. The intersectionality aspect of the recognition dimension is discussed further below. At the outset, it is important to flag that evaluating whether the inquiry procedures are free from bias is a difficult task. Due, at least in part, to confidentially requirements, there are no publicly available records for interviews with stakeholders or the CEDAW Committee's internal deliberations. Historically, there is evidence that the CEDAW Committee members were influenced by the politics of the Cold War.[137] Current

Equality' (2013) 14(1) Melbourne Journal of International law 54.

131 CRPD Committee, 'General Comment No 6 on equality and non-discrimination' (2018) CRPD/C/GC/6 [11]; Independent Expert on the effects of foreign debt and other related financial obligations of states on the full enjoyment of all human rights, particularly economic, social and cultural rights 'Guiding Principles on Human Rights Impact Assessment of Economic Reforms' (2018) A/HRC/40/57 [8.3].

132 Sandra Fredman, Discrimination Law (2nd ed, Claredon, 2011) Chapter 1.

133 'Inquiry Procedure: Northern Ireland' (n 95) [69].

134 'Inquiry Procedure: Mexico' (n 92) [66].

135 'Inquiry Procedure: The Philippines' (n 94) [41].

136 'Inquiry Procedure: Kyrgyzstan' (n 96) [25].

137 Elizabeth Evatt, Finding a Voice for Women's Rights: The Early Days of CEDAW' (2002-03) 34 George Washington International Law Review 515, 524.

geopolitical factors and attitudes of Committee members could seemingly also influence the inquiry. It is beyond the scope of this article to undertake an empirical investigation into potential biases within the treaty body. Taking the inquiry reports at face value, the CEDAW Committee is a champion for gender equality and is challenging rather than replicating biases.

A few examples illustrate this point. It expressed concern that in Mexico and Canada officials blamed women for engaging in high risk behaviour.[138] In Canada, the CEDAW Committee goes a step further and noted that the negative police attitudes towards women were intertwined with racist stereotypes.[139] In The Philippines and Northern Ireland, the CEDAW Committee drew attention to stereotypes that essentialise women as mothers and 'moral characterisations of abortion that reinforce stigma.'[140] In Kyrgyzstan, the CEDAW Committee challenged gender stereotypes on masculinity that legitimized bride-kidnapping among families, religious leaders and justice officials and the victim shaming that punished women and ostracised them from their families.[141] This may appear to be covering well-trodden ground, but states continue to deny the impact of negative stereotypes on women's rights. In response to the inquiry in Northern Ireland, despite citing direct statements from the Attorney-General as evidence of negative attitudes to abortion, the UK government held that there was no factual basis to conclude that they failed to combat gender stereotypes.[142]

There is a glaring example where the CEDAW Committee missed the recognition dimension gender equality. The inquiry in The Philippines hinted at the role of the Catholic Church in limiting access to modern contraception.[143] Yet it did not give any significant attention to the role of religion and culture in undermining women's sexual and reproductive health rights. This silence might be explained by background geo-politics, which are difficult to assess due to the confidentiality requirements under the OP-CEDAW. It does suggest, however, that there is space for the CEDAW Committee to employ its expertise more fully and interrogate all the recognition dimensions of the claim.

The focus on systemic abuses lends itself to the third dimension, identifying structural barriers to gender equality and women's human rights. In Mexico, Canada, The Philippines and Northern Ireland the inquiries stressed the negative impact of decentralising power from federal to local authorities[144] In Mexico and Canada, the CEDAW Committee identified how the lack of investment in public services forced women into high risk situations (hitchhiking, prostitution, walking in dimly lit areas) and criticized the state's fragmentary approach to violence and chronic mismanagement of investigations.[145] The criminalisation of abortion in Northern Ireland perpetuated a black market in dangerous

138 'Inquiry Procedure: Mexico' (n 92) [57], [207]; 'Inquiry Procedure: Canada' (n 93) [140].

139 'Inquiry Procedure: Canada' (n 93) [138]-[147].

140 'Inquiry Procedure: The Philippines' (n 94) [42]-[43]; 'Inquiry Procedure: Northern Ireland' (n 95) [50]-[51].

141 'Inquiry Procedure: Kyrgyzstan' (n 96) [4].

142 'Observations of the Government of the UK on Inquiry Report' (2018) CEDAW/C/OP.8/GBR/2 [30].

143 'Inquiry Procedure: The Philippines' (n 94) [7], [9], [51(l)].

144 'Inquiry Procedure: Mexico' (n 92) [265]; 'Inquiry Procedure: Canada' (n 93) [194][195]; 'Inquiry Procedure: The Philippines' (n 94) [23]; 'Inquiry Procedure: Northern Ireland' (n 95) [52]-[53].

145 'Inquiry Procedure: Mexico' (n 92) [265], [267]; 'Inquiry Procedure: Canada' (n 93) [172], [187].

abortifacients; forced women to travel to England; and created a culture of silence on abortion that resulted in a lack of adequate post-abortion health care. For women who could not afford to travel for an abortion, there is virtually no state support for raising unplanned children. [146] The lack of legal recognition of unregistered religious unions meant women in Kyrgyzstan, who are kidnapped and forced to marry in a religious ceremony, had no legal protection, including child support, when they leave the forced marriage. [147] There are limited facilities in Kyrgyzstan to obtain the necessary forensic evidence to prosecute these crimes.[148] Again, there are areas for further engagement with oppressive structures. Rourke is critical of the inquiry in The Philippines in that it does not sufficiently establish a right to safe and legal to abortion.[149] This may be explained by the inquiry's focus on access to contraception or, again, it might link to the relative silence on the role of religion in limiting women's sexual and reproductive health rights.

The final dimension, participation, is emphasised throughout the inquiries. The Canadian inquiry stressed the low rates of Indigenous women serving as police officers and as justice officials. [150] And the Committee is highly critical that Filipino and Northern Irish women are denied a voice in the most intimate choices over their bodies.[151] Together, CEDAW's sophisticated concept of equality and non-discrimination and the CEDAW Committee's expertise has resulted in a rich jurisprudence on women's rights in the inquiry process that brings to the fore nuanced and structural inequalities. This analysis also exposes areas where the CEDAW Committee could more fully engage with sensitive aspects of equality and systemic human rights abuses.

2. Zoning in on Grave and Systemic Issues

One of the strongest features of the inquiry procedure is its exclusive focus on *grave and systemic human rights abuses*. The grave component of the inquiry procedure is centred on 'substantial harms'. [152] In relation to murdered and missing Indigenous Women in Canada, the CEDAW Committee highlighted the 'severe pain and suffering to relatives and communities.' [153] In Kyrgyzstan, the CEDAW Committee noted that women had the deplorable choices of remaining in a forced marriage and risk being exposed to sexual violence, or escape the marriage and risk 'separation from their children, poverty and social isolation.' [154] In Northern Ireland, the CEDAW Committee concluded that limiting access to abortion can condemn women to the 'tortuous experience of being compelled to

146 'Inquiry Procedure: Northern Ireland' (n 95) [25]-[29], [35].

147 'Inquiry Procedure: Kyrgyzstan' (n 96) [29].

148 ibid [38].

149 Rourke (n 10) 22.

150 'Inquiry Procedure: Canada' (n 93) [175].

151 'Inquiry Procedure: The Philippines' (n 94) [41]; 'Inquiry Procedure: Northern Ireland' (n 95) [42].

152 'Inquiry Procedure: Kyrgyzstan' (n 96) [86].

153 'Inquiry Procedure: Canada' (n 93) [214].

154 'Inquiry Procedure: Kyrgyzstan' (n 96)

carry a [unwanted] pregnancy',[155] and in The Philippines the lack of contraception could become a matter of life and death.[156] The systemic component of the inquiry maps the 'significant and persistent pattern of acts that do not result from a random occurrence'.[157] The CEDAW Committee expressed concern about a 'culture of violence...that is based on women's alleged inferiority' (Mexico); the lack of coordinated responses to violence (Canada); the official and deliberate policy to 'place certain ideology above the well-being of women' (The Philippines); the deliberate retention of criminal laws (Northern Ireland) and the failure to enforce criminal law and implement programmes to change 'persistent attitudes' (Kyrgyzstan). [158] Traditional court-based adjudicative forums often do not have a mandate or can only incidentally evaluate patterns of abuse. The inquiries, on the other hand, focus on the most severe human rights violations and on the interlocking and intricate patterns of oppression.

3. Multiple Perspectives

The design of the inquiry procedure permits the CEDAW Committee to examine the claim from *multiple perspectives*. In comparison, traditional adversarial accountability processes are generally focused on the individual factual matrix. The court may not be able to grasp how differently situated individuals experience violence or restrictions on sexual and reproductive health. The inquiry procedure, on the other hand, takes a holistic approach to the claim. For the inquiry into Northern Ireland, the CEDAW Committee considered how the criminalisation of abortion impacted rural women, migrant women and women who live in poverty[159] and in Canada, the CEDAW Committee assessed the different circumstances for Indigenous women on- and off- land reserves.[160] The attention to intra-group difference is linked to the fact-finding mission under the inquiry procedure and the CEDAW Committee member's consultation with numerous stakeholders. Using Canada as an example, the CEDAW Committee members met with local and national government officials from various different government departments, members of the police service, lawyers, the Canadian Human Rights Commission, the Ombudsman for Victims of Crime, members of Parliament, representatives from national and regional indigenous organisations, indigenous women's organisations, academics, services provides for indigenous people on- and off-reserve and forty family members of missing and murdered indigenous women.[161] The CEDAW Committee engaged with a similarly wide array of actors when conducting state visits in Mexico, The Philippines, Northern Ireland

155 'Inquiry Procedure: Northern Ireland' (n 95) [81].

156 'Inquiry Procedure: The Philippines' (n 94) [47].

157 "Inquiry Procedure: Kyrgyzstan' (n 96) [87].

158 'Inquiry Procedure: Mexico' (n 92) [261]; 'Inquiry Procedure: Canada' (n 93) [214]; 'Inquiry Procedure: The Philippines' (n 94) [48] ; 'Inquiry Procedure: Northern Ireland' (n 95) [82]; 'Inquiry Procedure: Kyrgyzstan (n 96) [89]-[90] .

159 Inquiry Procedure: Northern Ireland' (n 95) [69].

160 'Inquiry Procedure: Canada' (n 93) [204].

161 ibid [85]-[87].

and Kyrgyzstan.[162] Its dialogues with numerous actors and individuals allowed the inquiry procedure to take account of a wide range of identities, factors and circumstances. This in turn provided a foundation for the CEDAW Committee's appreciation of how these differences contributed to the experience of endemic and widespread human rights abuses.

4. Systemic Remedies

The remedies in the inquiry procedure are exclusively designed to redress multiple structures that perpetuate grave and systemic abuses. The recommendations start with addressing legal frameworks. Canada is urged to reform the law on prostitution and conduct a national inquiry into murdered and missing Indigenous women. The Philippines is encouraged to revoke the contraception bans and to monitor the health system; and Northern Ireland is directed to decriminalise abortion and expand the grounds for legal abortion.[163] The recommendations then shifted towards the specific aspect of gender inequality under review. For Mexico, Canada and Kyrgyzstan, the CEDAW Committee provided a series of recommendations directed at the justice system, including enhancing coordination between different judicial and governmental agencies; building trust between communities and the police; strengthening police complaints mechanisms and enhancing victim services.[164] In Kyrgyzstan, the CEDAW Committee recommended the registration of religious marriages to ensure victims of bride-kidnapping are entitled to the protections of family law. [165] The Philippines and Northern Ireland recommendations are targeted at the health system. The Philippines is encouraged to provide sufficient budgets so local government units that can provide affordable contraception and to redress lost institutional capacity due to the contraception ban.[166] Northern Ireland is directed to provide usable guidance to health care professionals on legal abortion; to include sex education in the classroom; and to protect women from harassment by anti-abortion groups.[167] Each inquiry also recommended that the state addresses larger cross-cutting structural factors such as socioeconomic conditions, cultural attitudes on women, access to justice and the negative effects of colonalisation and globalisation and increase the participation of women in decision making processes.

The inquiry procedure overcomes the traditional remedial deficit as its recommendations are designed to transform cultural norms, structures and institutions. However, remedial mechanisms at international human rights law are never straightforward. The inquiry procedure can be critiqued for focusing on the structural at the expense of the individual. Domestic courts seeking to hold states to account for structural human rights abuses are

162 'Inquiry Procedure: Mexico' (n 92) [10]-[17]; 'Inquiry Procedure: The Philippines' (n 94) [5]; 'Inquiry Procedure: Northern Ireland' (n 95) [7].

163 'Inquiry Procedure: The Philippines' (n 94) [51(a)]-[51(d)]; 'Inquiry Procedure: Northern Ireland' (n 95) [85(a)], [85(b)].

164 'Inquiry Procedure: Mexico' (n 92) [271]-[286]; 'Inquiry Procedure: Canada' (n 93) [217(a)]-[217(l)].

165 'Inquiry Procedure: Kyrgyzstan' (n 96) [95(b)].

166 'Inquiry Procedure: The Philippines' (n 94) [52(a)], [52(d)].

167 'Inquiry Procedure: Northern Ireland' (n 95) [85(d)], [86(d)], [86(g)].

increasingly adopting a two-track approach to remedies.[168] They are striving to find a balance between systemic remedies and the need for immediate individualised relief.[169] No such balance is achieved through the inquiry procedure as individualised concrete relief is not offered. Does this mean the inquiry procedure risks losing sight of the realities of human rights experiences? These concerns are misguided. The CEDAW Committee engaged in dialogue with numerous women and their family members who have experienced gross human rights violations. In reading the inquiry reports, what springs from the page is attention to the nuances of each woman's experiences and the vivid portrait of the cruelty of grave and systemic human rights abuses. Furthermore, as discussed in Section II, the inquiry procedure needs to be understood as operating in harmony with domestic forums and other international mechanisms, such as individual communications, which operating together can provide both individualised and structural relief.

5. Conclusion

By shifting away from an individualised conception of accountability, the inquiry procedure can squarely confront accountability for grave and systemic human rights abuses. The inquiries adopt a relaxed and fluid approach to procedural rules and shift the burdens of pursuing accountability from the individual to actors more capable of bearing these costs. By focusing on the severity and magnitude of the human rights abuses, the CEDAW Committee can engage from a multi-faceted perspective with laws, policies, institutions, norms and actors that perpetuate human rights abuses. As a result, the CEDAW Committee's recommendations are directed at remedying these endemic factors. The inquiry procedure can overcome many of the obstacles that exist to achieving accountability for grave and systemic abuses and can harmoniously complement domestic individualised accountability forums. The analysis in this article points the way forward for future reform including supporting local and grassroots CSOs and, providing the treaty bodies with the requisite human and financial resources to reduce the delays in conducting inquiries and, hopefully, will prompt the CEDAW Committee to address all aspects of the claim.

The on-the-ground impact of the inquiry procedures is mixed. Despite numerous federal and local reforms, the rates of violence against women in Mexico remain alarmingly high.[170] The public inquiry into missing and murdered indigenous women is bogged with delay.[171] Although President Duterte of the Philippines has a problematic human rights record, he has implemented Executive Order No 12 to ensure there is 'zero unmet need for modern family planning.'[172]Abortion remains a criminal offence in Northern Ireland, although the UK government is taking steps to support Northern Irish women

168 Roach, 'Two-Track' (n 1).

169 Sandra Liebenberg, Socio-Economic Rights (Juta 2012) 400, 408.

170 'Mexico confronts surge in violence against women' (28 December 2017) Al Jazeera <https://www.aljazeera.com/news/2017/12/mexico-femicide-violence-women-increases171228152443323.html> accessed 6 April 2018.

171 'MMIW inquiry leaders say federal red tape to blame for delays' (1 November 2017) Global News <https://globalnews.ca/news/3836984/mmiw-inquiry-federal-delays-report/> accessed 6 April 2018.

172 Executive Order No 12, S. 2017 "Zero Unmet Needs for Modern Family Planning"

to obtain safe and affordable abortions in England.[173] The government in Kyrgyzstan has indicated it will undertake reform but it is too early to assess the impact of the inquiry on bridekidnapping.[174] More research is required to fully understand the domestic impact of the inquiry procedures. Enforcing treaty body recommendations is a perennial challenge in international law. It is imperative that, when initiating an inquiry procedure, CSOs give careful consideration to how they will use the final inquiry report strategically in domestic and international, legal and political forums. Despite the strengths of the inquiry procedure, it is often ignored in international human rights law. It warrants greater consideration by those seeking to challenge laws, policies and practices that contribute to grave and widespread violations.

173 'Observations' (n 142).

174 'Observations of the Kyrgyz Republic under Article 8 of the OP-CEDAW' (2018) CEDAW/C/OP.8/KGZ/2.

Abortion, Reproductive Rights and the Possibilities of Reproductive Justice in South African Courts

Catherine Albertyn*

Abstract

Women's ability to control their reproductive destiny and choose to terminate unwanted and unsupported pregnancies is a core measure of their substantive freedom and equality. Arguing for a substantive recognition of reproductive autonomy within integrated and mutually reinforcing reproductive rights, this article reviews developments in international law (CEDAW and CESCR) and national jurisdictions, with a particular emphasis on South Africa. Although there has been significant progress at international level, a clear recognition of the right to abortion on request remains remarkably circumscribed. The article draws on evolving international norms and domestic jurisprudence to identify two approaches to defining reproductive autonomy within a constellation of reproductive rights. The first identifies inclusive, but negative, ideas of reproductive choice that do not dismantle the gender-, race- and classbound norms, attitudes and structural social and economic

barriers that impede women's reproductive autonomy and abortion choices. The second speaks to reproductive justice, and a relationship between autonomy and equality that enables the normative and practical centring of vulnerable and disadvantaged women, within a commitment to the structural transformation of society. Turning to South Africa, the article suggests that the courts have, at best, adopted an inclusive 'reproductive choice' approach, based on extant dignity and (negative) freedom jurisprudence, that secures legal protection, but have not developed a more transformative understanding of reproductive rights as 'reproductive justice'. To develop this more transformative approach, the article analyses the Treatment Action Campaign's Constitutional Court victory on treatment for poor, HIV-positive women to reduce perinatal HIV transmission, not because this case addresses reproductive autonomy, but because it erases it. It uses this case as a basis for re-imagining the jurisprudence, within a 'reproductive choice' approach (that aligns with current jurisprudence) and a 'reproductive justice' approach (that pushes its boundaries). Finally, the article reflects on the politics and possibilities of reproductive rights as transformative tools of reproductive justice in securing better implementation of abortion legislation across all vectors of disadvantage and difference.

Keywords: Abortion, Autonomy, Equality, Reproductive rights, Reproductive justice, Transformative jurisprudence

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1. Introduction

Women's ability to control their reproductive destiny and choose to terminate unwanted and unsupported pregnancies is a core measure of substantive freedom and equality in society. In the 1990s, this began to gain international recognition in terms of human rights as reproductive rights. Notably, in 1994, the International Conference on Population Development in Cairo (ICPD) placed human rights, autonomy and gender equality at the centre of women's sexual and reproductive health,[1] and the 1995 Fourth World Conference on Women in Beijing (Beijing) reaffirmed these commitments: 'The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence.'[2] Reproductive rights, of course, are not new rights, but constitute a bundle of human rights, recognised in national and international law,[3] that are interpreted and re-interpreted to support and enhance women's reproductive freedom, equality and health. These include rights to privacy, freedom and security of the person, dignity, non-discrimination and equality, life and social rights, particularly the right to health.

Inspired by these developments, the 1996 South African Constitution explicitly includes rights to reproductive health, freedom and autonomy (reproductive decision-making and bodily integrity) alongside equality, dignity and privacy in its text. These provisions and international texts provide a basis for conceptualising reproductive rights as integrated and mutually reinforcing, linking a substantive idea of reproductive autonomy and self-determination to equality and health rights, in a manner that resonates with feminist writings on reproductive freedom as both individual and social.[4] Asserting individual reproductive autonomy affirms women's personhood, moral agency, bodily integrity and self-

determination, and is foundational to their ability to participate equally in society. However, the meaningful exercise of that autonomy requires that unequal gendered social and economic relations be addressed, requiring positive action to eliminate such inequalities and, particularly, to provide reproductive healthcare and other social services. In this sense, freedom and autonomy rights are indivisible from equality and social rights.

Although the interpretation of reproductive rights by international human rights treaty bodies has evolved significantly over the past 25 years, international standards have emphasised equality and reproductive healthcare rights, generally motivated by public health and harm reduction concerns, and often failed to affirm reproductive autonomy

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1 The Cairo Programme of Action affirmed 'the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health...the right of all to make decisions concerning reproduction free of discrimination, coercion and violence.' UN, 'Report of the International Conference on Population Development: Cairo Programme of Action' (1994) A/Conf.171/13 [7.3].

2 UN, 'Report of the Fourth World Conference on Women: Beijing Platform for Action' (1995) A/Conf.177/20 [96].

3 ibid [95], [223].

4 Rosalind Pollack Petchesky, *Abortion and Women's Choice* (Northeastern University 1990) 6-7.

within a fully integrated understanding of mutually reinforcing reproductive rights. South African jurisprudence is also limited in its development of reproductive rights, either defining reproductive autonomy in narrow terms or glossing over autonomy in favour of programmatic healthcare arguments. Against the backdrop of international developments, and mindful of how politics shape possibilities, this article explores South African case-law to consider how to move through and beyond dominant international arguments, and narrow domestic interpretations, to centre a positive, substantive idea of women's reproductive autonomy at the heart of a constellation of reproductive rights.

Section 2 briefly discusses international law developments to suggest that, until very recently, equality and public health rights have enjoyed far greater recognition than autonomy and self-determination. Drawing on these developments and comparative law, Section 3 poses two ways of defining autonomy and centring it within reproductive rights. The first identifies inclusive, but negative, ideas of reproductive choice that do not dismantle the gender-, race- and class-bound norms, attitudes and structural social and economic barriers that impede women's reproductive autonomy and abortion choices. The second speaks to reproductive justice, and a relationship between autonomy and equality that enables the normative and practical centring of vulnerable and disadvantaged women, within a commitment to the structural transformation of society.

Section 4 considers the positive framework of South Africa's 1996 Constitution and the Choice on Termination of Pregnancy Act 92 of 1996 (CTOPA) and judicial interpretations of reproductive rights.[5] Acknowledging the constraints imposed by the nature of the cases, I suggest that courts have adopted an inclusive 'reproductive choice' approach, based on extant dignity and (negative) freedom jurisprudence, that secures legal protection, but does not develop a more transformative understanding of reproductive rights as 'reproductive justice'. Section 5 then analyses the Treatment Action Campaign's Constitutional Court victory in securing treatment for poor, HIV-positive women to reduce perinatal HIV transmission,[6] not because this case addresses reproductive autonomy, but because it erases it. I shift from the forensic to the normative to imagine two ways of deciding the matter. This allows me to illustrate the difference between a 'reproductive choice' approach (that aligns with current jurisprudence) and a 'reproductive justice' approach (that pushes its boundaries). Drawing on this analysis of TAC, Section 6 reflects on the politics and possibilities of reproductive rights as transformative tools of reproductive justice in securing better implementation of the CTOPA across all vectors of disadvantage and difference.

2. Abortion and Reproductive Rights in International Human Rights Law

Reproductive rights refer to a range of rights relating to reproduction and reproductive

5 *Christian Lawyers Association v Minister of Health I* 1998 (4) SA 1113 (South African High Court); *Christian Lawyers Association v Minister of Health II* 2005 (1) SA 509 (South African High Court); *AB v Minister of Social Development* 2017 (3) SA 570 (South African Constitutional Court).

6 *Minister of Health v Treatment Action Campaign* 2001 (5) SA 721 (South African Constitutional Court).

health throughout women's life cycle, including sex education and contraception, the ability and decision to have (or not have) children, ante-natal and obstetric care and the right to give birth safely, and the reproductive needs and interests of women outside of, and beyond, pregnancy and child-birth. This article considers reproductive rights through the lens of abortion, arguably the most contentious issue and one that has enjoyed limited positive and substantive recognition in international human rights law. As this section argues, the right to abortion is rarely seen as an independent right to autonomy and self-determination, but rather as an aspect of equality and reproductive heathcare rights, most often justified by public health and harm reduction concerns. This can reproduce the very stereotypes of motherhood and gendered reproduction that we seek to dismantle. It is only very recently that we have seen the conceptual development of abortion as reproductive autonomy, although with little movement away from a negative (do no harm) approach, focusing on decriminalisation, towards a positive recognition of women's unfettered right to choose. Indeed, abortion remains a key battleground over women's bodies and lives, where a simple recognition of women's right to choose abortion, unencumbered by conditions and procedures, and the state's duty to facilitate this abortion choice, remains remarkably circumscribed.

A. The Compromise of the ICPD and Beijing: Laying the Foundation

Although the ICPD is credited with centring rights within reproductive healthcare and shifting the focus of family planning from 'population control' to 'empowering women and promoting individual choice . . . within comprehensive reproductive healthcare services';[7] women's substantive right to choose safe, legal abortion was not endorsed in its 1994 Programme of Action. Rather, it required that abortion was safe, where legal, and the health impact of unsafe abortion was addressed.[8] In Marge Berer's words, this 'great compromise' left women's autonomy unresolved, as abortion (or 'unwanted pregnancies') were seen as something to be prevented, rather than a right to choose abortion as a normal, legitimate part of reproductive health services.[9] The Beijing Platform for Action went a step further to call for a review of laws that criminalised abortion, but similarly failed to centre rights to freely choose an abortion.[10] Recently, the ICPD/Beijing framework was endorsed in the 2015 Sustainable Development Goals' commitment to gender equality, including 'sexual and reproductive health and reproductive rights as agreed in accordance with the Programme of Action of the [ICPD] and the Beijing Platform for Action'.[11] However, the

7 Adrienne Germain and Rachel Kyte, *The Cairo Consensus: The Right Agenda for the Right Time* (International Women's Health Coalition 1995).

8 Cairo Programme of Action (n 1) [7.6] read with [8.25].

9 'The Cairo "Compromise" on Abortion and its Consequences for Making Abortion Safe and Legal' in Laurie Reichenbach and Mindy Jane Roseman (eds), *Reproductive Health and Human Rights: The Way Forward* (UPP 2009).

10 Beijing Platform for Action (n 2) [106 (k)].

11 'Sustainable Development Goal (SDG)-Goal 5: Achieve gender equality and empower all women and girls'

primary focus on 'maternal mortality' reinforces, rather than disrupts, dominant public health narratives on abortion that can decentre autonomy.

Alongside these global agreements, reproductive rights have been elaborated in the interpretation and enforcement of international human rights documents, especially the Convention on All Forms of Discrimination against Women (CEDAW) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The CEDAW Committee has developed the conceptual framework of equality and non-discrimination to hold states accountable for abortion-related violations and to develop recommendations for the expansion and implementation of abortion laws and reproductive healthcare services.[12] Little has been said of reproductive autonomy. Under the ICESCR, a comprehensive, multi-dimensional right to health has been developed to place reproductive autonomy within a constellation of individual and programmatic rights, but with some hesitation around endorsing abortion as an unencumbered and positive choice.

B. Abortion and CEDAW: Reducing Harm, Reproducing Stereotypes?

The CEDAW Committee's approach to abortion has developed from endorsing the Beijing mandate to decriminalise abortion 'where possible', in its 1999 General Recommendation No. 24 on the right to health ,[13] to a general call not merely for the review, but for the repeal, of all laws criminalising abortion in its 2017 General Recommendation No. 35 on gender-based violence against women (on the basis that the criminalisation of abortion may amount to torture and cruel, degrading and inhumane punishment).[14] Moreover, the interpretation of CEDAW's equality and health provisions in particular cases has led to calls for full decriminalisation, abortion law reform, albeit on limited grounds, and reproductive health care services. This is exemplified by the 2011 case of LC v Peru, in which a young girl who became pregnant as a result of sexual abuse, and had attempted suicide, was denied an abortion necessary to allow her to undergo surgery to prevent disability arising from her injuries.[15] The law allowed termination that was the

UNGA (2015) A/RES/70/1 [5.6]. See also reducing maternal mortality to less than 70 per 100 000 births by 2030 in 'SDG-Goal 3: Ensure healthy lives and promote well-being for all at all ages' ibid [3.1].

12 Rebecca Cook and Mahmous Fathalla, 'Advancing Reproductive Rights Beyond Cairo and Beijing' (1996) 22 International Family Planning Perspectives 115; Centre for Reproductive Rights and UNFPA, 'ICPD and Human Rights: 20 Years of Advancing Reproductive Rights Through UN Treaty Bodies and Legal Reform' (2013) <https://www.unfpa.org/sites/default/files/pub-pdf/icpd_and_human_rights_20_years.pdf> accessed 20 April 2019; Andrew Byrnes, 'Article 1' in Marsha Freeman, Christine Chinkin and Beate Rudolf (eds), *CEDAW: A Commentary* (OUP 2012); Rebecca Cook and Veronica Undurraga, 'Article 12' in Marsha Freeman, Christine Chinkin and Beate Rudolf (eds), *CEDAW: A Commentary* (OUP 2012).

13 CEDAW Committee, 'General Recommendation No. 24: women and health' (1999) CEDAW/C/GC/24.

14 CEDAW Committee, 'General Recommendation No. 35 on gender-based violence against women' (2017) CEDAW/C/GC/35 [18], [29(c)], [9(i)].

15 *LC v Peru* (2011) CEDAW/C/50/22/2009; *Alyne da Silva Pimental Texeira (deceased) v Brazil* (2011) CEDAW/C/49/D/17 a failure to treat an avoidable maternal death violates Articles 2 and 12 of CEDAW and women's

'only way to save the life of the mother or to avoid serious and permanent harm to her health', but no procedures, protocols or services existed to implement the provision.[16] The CEDAW Committee found multiple violations of women's rights, including article 2 (contravening right not to be discriminated against and to be protected by law by denying effective legal remedy), article 5 (violating duty to eliminate patterns and practices based on stereotypes of motherhood and reproductive functions) and article 12 (discrimination in health care services by not providing necessary reproductive health service).[17] The Committee recommended a review of laws to 'establish a mechanism for effective access to therapeutic abortion under conditions that protect women's physical and mental health' and with a view to 'decriminalizing abortion when the pregnancy results from rape or sexual abuse',[18] in addition to the provision of comprehensive reproductive health services in line with CEDAW requirements.[19] Three years later, the CEDAW Committee submitted a statement on sexual and reproductive health and rights to the 2014 ICPD Review in which it recognised that the right to autonomy lay at the heart of sexual and reproductive rights. It suggested that, as a result of the harm of unsafe abortion, 'states should legalise abortion at least in cases of rape, incest, threats to life and/or health or severe foetal impairment', and that states should provide 'access to quality post-abortion care, especially in case of complications arising from unsafe abortions.'.[20] This echoes the 2003 Protocol to the African Charter on the Rights of Women in Africa, the first international document to recognise the need to legalise abortion to 'protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus'.[21]

Whilst showing unquestionable progress in women's international human rights, by limiting abortion to specific grounds and prioritising a harm reduction approach, these interpretations ultimately fail to acknowledge women's autonomy, moral agency and

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rights to equality and non-discrimination require their lives to be prioritised over foetal life; CEDAW Committee, 'Report of the inquiry concerning the Philippines of the CEDAW Committee under article 8 of OPCEDAW' (2015) CEDAW/C/OP.8/PHI/1 denying access to contraception is a violation of articles 2, 5, 10(h), 12, 16(1)(e) of CEDAW.

16 ibid [2.5].

17 ibid [8.6]-[8.9].

18 ibid [9.2 (a)], [9.2(c)].

19 ibid [9.2 (b)] and [9.2(d)] citing General Recommendation No. 24 (n 13).

20 CEDAW Committee 'Statement of the Committee on the Elimination of Discrimination Against Women on sexual and reproductive health and rights: Beyond 2014 ICPD Review' (2014) <https://www.ohchr.org/Documents/HRBodies/CEDAW/Statements/SRHR26Feb2014.pd f> accessed 20 April 2019. See also CEDAW Committee, 'Report of the inquiry concerning the UK and Northern Ireland of the CEDAW Committee under article 8 OPCEDAW' (2017) CEDAW/C/OP.8/GBR/1the criminalisation of abortion and failure to establish a comprehensive and safe legal framework in Northern Ireland, that addresses the problems of vulnerable women, is a violation of articles 1, 2, 5, 12, 14 and 16(1)(e) of CEDAW.

21 Article 14(2)(c) (adopted 11 July 2003, entered into force 25 November 2005) AHG/Res. 240 (XXXI).

bodily integrity and reproduce the very stereotypes that CEDAW commits to overcoming. Indeed, the grounds deemed acceptable by the CEDAW Committee and Women's Protocol represent another compromise, allowing abortion only where women can be seen to be 'morally blameless', either because they had 'no choice' in falling pregnant (by rape and sexual assault) or because of the need to save women's lives or prevent serious damage to their health.[22] These grounds allow the perpetuation of discourses of abortion as a result of tragic circumstances or harm reduction, not individual choice, in which women are 'forced' to terminate pregnancies and where the myths of motherhood and women as natural nurturers of children can remain intact.[23] There is, as yet, no acknowledgment under CEDAW that abortion on request and access to relevant medical procedures, without conditions, are necessary to take women's autonomy seriously and to affirm not only their personhood and self-determination, but also their equality.

It is only a 2017 Discussion Paper of the UN Human Rights Council's Working Group on the Issue of Discrimination against Women in Law and in Practice that has registered a clear call for abortion on request, and thus for women's unfettered autonomy, in the first trimester of pregnancy.[24] Although not repeated in its 2018 Human Rights Council Report, this nevertheless reiterates that: 'The right of a woman or girl to make autonomous decisions about her own body and reproductive functions is at the very core of her fundamental right to equality and privacy, involving intimate matters of physical and psychological integrity, and is a precondition for the enjoyment of other rights.'[25] This represents important progress in developing women's autonomy within a package of mutually reinforcing reproductive rights, especially if read alongside the emerging jurisprudence of the CESCR.

C. CESCR and the Right to Reproductive Health

The CESCR has developed a more complex understanding of reproductive rights through the right to health. Its initial focus on public health and safe abortion in the context of high levels of maternal mortality, especially in the developing world (harm reduction),[26] has advanced to recognise women's rights to decision-making and bodily integrity and their

22 In recent study of six countries, public health emerged as the dominant justification for abortion law reform. Wendy Chavkin et al, 'Implementing and Expanding Safe Abortion Care: An International Comparative Case of Six Countries' (2018) 143 International Journal of Gynaecological Obstetrics 3.

23 Catherine Albertyn, 'Claiming and Defending Abortion Rights in South Africa' (2015) 22 Revista Direito GV 429, 432-33.

24 UN Working Group on the issue of discrimination against women in law and in practice (UN Working Group), 'Women's Autonomy, Equality and Reproductive Health in International Human Rights: Between Recognition, Backlash and Regressive Trends' (2017) <https://www.ohchr.org/Documents/Issues/Women/WG/WomensAutonomyEqualityReproductiveHealth.pdf> accessed 20 April 2019.

25 UN Working Group, 'Reasserting equality, countering rollbacks' (2018) A/HRC/38/46/ [35].

26 UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 'The right to health and the reduction of maternal mortality' (2006) A/61/338 [7], [12].

intersection with equality, non-discrimination and reproductive healthcare services. This is particularly apparent in its 2016 General Comment No. 22 on the right to sexual and reproductive health,[27] which defines the right as constituted by freedoms (including the right to make decisions about one's body) and entitlements (including unhindered access to services). By recognising the relationship between autonomy, equality and social rights; the CESCR notes that the right to health is indivisible from, and interdependent with, a range of other rights, including 'the physical and mental integrity of individuals and their autonomy, such as: the rights to life, liberty and security of the person; freedom from torture and other cruel, inhuman or degrading punishment; privacy and respect for family life; and non-discrimination and equality'.[28] Denial of abortion can amount to a violation of all of these rights.[29] Further, the CESCR moves toward a contextual understanding of autonomy by locating health rights within a substantive understanding of gender equality[30] and with due regard to intersectionality.[31] Based on this, the CESCR calls for respect for women's rights to make autonomous decisions and protection from unsafe abortions, thus requiring full decriminalisation of abortion, liberalisation of restrictive laws and the provision of safe abortion services.[32]

This centring of autonomy develops the 2011 Report of the Special Rapporteur on Health,[33] which had defined the criminalisation of abortion as interfering with women's freedom to 'make personal decisions without interference from the state',[34] thus 'restricting women's control over her body, possibly subjecting her to unnecessary health risks'[35] and resulting in coerced pregnancies.[36] Moreover, General Comment No. 22 is developed and endorsed by the 2018 Guttmacher-Lancet Report on sexual and reproductive health and rights, which documents an 'emerging consensus' on these issues, in which bodily integrity and personal autonomy – and the right to make decisions that govern one's body, free of stigma, discrimination and coercion – are said to be essential to gender equality and women's well-being and economic development.[37]

What is disappointing is that neither the CESCR and the GuttmacherLancet Report endorse abortion on request, limiting their recommendations to decriminalisation and liberalisation or 'expanding grounds',[38] while emphasising programmatic ways of saving

27 CESCR, 'General comment No. 22: on the right to sexual and reproductive health' (2016) E/C.12/GC/22.

28 ibid [10].

29 ibid.

30 ibid [24]-[26].

31 ibid [30].

32 ibid [28].

33 UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 'Criminalisation of sexual and reproductive health rights' (2011) A/66/254 [21], [65(h)].

34 ibid [15].

35 ibid [27], [65(h)].

36 ibid [21].

37 Ann M Starrs et al, 'Accelerate Progress—Sexual and Reproductive Health and Rights for All: Report of the Guttmacher–Lancet Commission' (2018) 391 Lancet 2642.

38 ibid 2644-5.

women's lives via safe abortions.[39]

D. A 'New Compromise' Over Negative Freedom?

Intense political, religious and cultural contestations around women's abortion rights mean that global frameworks are often the result of complex strategies and political compromises. Whilst human rights bodies may have some room for manoeuvre, they are subject to differing mandates and politics. As a result, public health and harm reduction narratives (saving women's lives) are often powerful mediators of progress and drive calls for decriminalisation and 'expanding grounds'. And indeed, high global levels of maternal mortality (25 million women are estimated to undergo unsafe abortion annually),[40] mean any extension of abortion rights is significant for women's lives and health. Yet, by sticking to negative, 'hands off' ideas of freedom and failing to talk in detail about how to enable and facilitate abortion on request, these international texts omit a key normative and policy basis for helping women determine their lives in line with their own circumstances, priorities, needs and aspirations. As set out above, perpetuating ideas of abortion on limited grounds, or decriminalisation without providing meaningful choice and full access and services, reproduces deeply patriarchal gendered norms and power relations about women's place in the family, society and nation - as mothers, care-givers and home-makers required to 'make do' in the face of often overwhelming social and economic odds. Such approaches might broaden the ambit of rights and legal protections, but they are not necessarily inclusive of all women nor transformative of underlying norms and practices. As I argue in the next section, this prioritises a narrower idea of reproductive choice over reproductive justice.

3. Reproductive Rights and Reproductive Justice

Abortion rights are inevitably contested in law and politics. Their interpretation ranges from a narrow focus on individual choice, free from state interference, to a wider understanding of the manner in which reproductive autonomy might be positive, contextual and relational. Further, we might focus on reproductive choice/autonomy alone (often limiting debate to the restrictions placed on choice) or we might explore the relationships between autonomy, equality and social rights (opening up discussion on positive measures to facilitate meaningful choice). Underpinning these interpretations are a variety of ideas of women, gender and sexuality, spanning paternalistic, protective and oppressive ideas of motherhood and dependency to those that centre women's autonomy and personhood, even as they recognise practical constraints.

This section distinguishes two 'models' of abortion choice: a largely negative idea of

39 ibid.

40 ibid.

reproductive choice, dominant in international and comparative law, and a substantive idea of choice that aligns with a wider 'reproductive justice' approach. While the former can extend powerful normative and legal protection to some women, it can be inattentive to the varying contexts and needs of different women's lives. A more transformative idea of reproductive justice asserts mutually supportive forms of substantive autonomy, equality and social rights that aim to disrupt traditional gendered norms and dismantle structural barriers to inequality, thus seeking to address the needs of all women.

A. Reproductive Choice Based on Negative Freedom

Reproductive autonomy and self-determination lie at the centre of reproductive rights, founded in rights to privacy, freedom and security of the person and/or dignity. How this is interpreted – and balanced against public health, medical, doctors' and foetal interests – depends on history, context, politics and legal culture.[41] However, negative ideas of reproductive freedom have been dominant in decriminalising abortion in national jurisprudence and international law.[42] Perhaps best known is US jurisprudence where the 1971 case of Roe v Wade established privacy as the core right underpinning women's abortion rights.[43] As summed up in Thornburg v American College of Obstetricians and Gynaecologists:[44] 'Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision – with the guidance of her physician and within the limits specified in Roe – whether to end her pregnancy. A woman's right to make that choice freely is fundamental.' [45] The Canadian Supreme Court relied on procedural rather than substantive rights to freedom and security of the person to decriminalise abortion. [46] Concluding that the state could not impose (procedural) burdens that interfered with women's physical and psychological integrity,

41 Riva Siegel, 'The Constitutionalisation of Abortion' in Rebecca Cook et al (eds), *Abortion Law in Transnational Perspective* (PENN 2014) 13. Ruth Rabio-Marin, 'Abortion in Portugal: New Trends in European Constitutionalism' in Rebecca Cook et al (eds), *Abortion Law in Transnational Perspective* (PENN 2014) 36; Rachel Rebouche, 'A Functionalist Approach to Comparative Abortion Law' in Rebecca Cook et al (eds), *Abortion Law in Transnational Perspective* (PENN 2014) 98. Countries such as Nepal and Colombia have drawn on all three core elements of reproductive rights: dignity and freedom (as self-determination or free development of the individual), equality and health to define the parameters of abortion. Melissa Upreti, 'Towards Transformative Equality in Nepal. The Lakshmi Dhikta Decision' in Rebecca Cook et al (eds), *Abortion Law in Transnational Perspective* (PENN 2014) 279.

42 'General Recommendation No. 35' (n 14) [9(i)], [18], [29(c)] the criminalisation of abortion may amount to torture and cruel, degrading and inhumane punishment; Committee Against Torture, 'Concluding Observations: Nicaragua' (2009) CAT/C/NIC/CO/1 [16]; Human Rights Committee, 'General Comment no. 36 on the right to life (2018) CCPR/C/GC/36 [8] restrictions on abortion should not 'jeopardise their lives, subject them to physical or mental pain of suffering . . . discriminate against them or arbitrarily interfere with their privacy'.

43 *Roe v Wade*, 410 US 113 (1973) (US Supreme Court).

44 476 US 747 (1986) (US Supreme Court).

45 ibid 772 (per Blackmun J).

46 *R v Morgantaler* [1988] 1 SCR 30 (Canadian Supreme Court).

the Court noted: 'Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus an infringement of security of the person.'[47]

In the US, abortion has generated political and legal battles around appropriate limits to women's private choices. Thus, the trimester system of Roe,[48] as amended by the viability standard of Casey,[49] has seen US jurisprudence focus on the extent to which privacy rights can be limited by states' interests in protecting women's health or in the 'potentiality of human life'.[50] While the courts have required clear evidence to demonstrate that conditions imposed on abortion are necessary for women's health, [51] in practice, this has often resulted in court-endorsed procedures such as waiting periods, referral processes and notification requirements, that act as significant barriers to access. [52] Further, the influence of negative, libertarian ideas has meant that, while state interference in the form of criminalisation and unfair procedures can be prevented, there is no concomitant positive obligation to fund and provide abortion services.[53] In a different context, the Canadian approach, with no further regulation or litigation, has seen widespread acceptance of abortion as a private medical procedure between doctor and patient,[54] within its publicly funded universal health care system.[55]

These jurisdictions exemplify the strength and limits of negative concepts of freedom. The rhetorical power of a private sphere of decisional autonomy where women are free to make decisions about their destiny, taking into account their needs and priorities, cannot be underestimated in affirming women's personhood and citizenship. However, the translation of this into meaningful choice and access is, at the very least, dependent upon the extent to which abortion is contested, the nature of the health system that delivers the services and the position of women in relation to this. Thus while it is important to emphasise that abortion should be a private choice of medical procedure; it is rarely enough to hold states to account and secure abortion on request for all women. First, decriminalisation, on its own, does not necessarily lead to a meaningful recognition of reproductive autonomy,

47 ibid 32-33 (per Dickson J).

48 *Roe* (n 43) 150, 163-66.

49 *Planned Parenthood of Southeastern Pa. v. Casey*, 505 US 833 (1992) 879 (US Supreme Court).

50 The state may regulate in the interests of women's health or foetal life after viability, but may only do so prior to viability if this does not pose an 'undue burden' on women's fundamental right in that it did not have 'the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable foetus' (ibid [873], [876]-[878].

51 *Whole Woman's Health v. Hellerstedt*, 579 US (2016).

52 *Planned Parenthood* (n 49).

53 Robin West 'From Choice to Reproductive Justice: De-Constitutionalising Abortion Rights' (2009) 118 Yale Law Journal 1394, 1422-3.

54 Anne Kingston, 'How Canada's growing anti-abortion movement plans to swing the next federal election' (MacLeans, 12 September 2019) <https://www.macleans.ca/politics/howcanadas-growing-anti-abortion-movement-plans-to-swing-the-next-federal-election/> accessed 20 April 2019.

55 Although access to abortion is in Canada is uneven across provinces; ibid.

especially where laws place conditions and procedures on women seeking abortion. Second, a 'hands off' approach to abortion can fail to account for how women's 'choices', and their ability to act on them are constrained by interpersonal and structural factors, and the multiple, intersecting inequalities that shape women's reproductive lives as a whole. As a result, insufficient attention is paid to inequalities amongst women, [56] and how these affect, and are affected by, lack of abortion access.[57] Overall, a negative approach fails to see that the meaningful exercise of reproductive autonomy should be facilitated by positive state actions. Finally, the constraints of a negative approach to freedom have meant that equality is posed as an alternative framework for abortion rights..[58] As I argue below, a different approach to freedom allows a mutually reinforcing relationship with equality that can enable more transformative outcomes.

B. Reproductive Justice

It is widely understood that decisions to terminate pregnancies are part of a broad set of reproductive choices around 'the right to have, or not to have, children, and to be afforded the means and information to do so'.[59] As Loretta Ross reminds us, questions of reproductive autonomy lie not only in effective access to, and choice in, contraception, ante-natal and obstetric care, abortion, and so on; but also in understanding the barriers to bearing and raising children experienced by marginalised women, including the criminalisation of reproduction, coerced pregnancy or sterilisation, the stigmatising of teenage mothers, the effects of environmental degradation on fertility, and access to reproductive technology. More broadly she points to the problems of raising children when economic means and social support are inadequate or absent. Thus, reproductive autonomy must be contextually understood, both in interpersonal and structural terms: women's reproductive choices should be located within 'a broader analysis of the racial, economic, cultural and structural constraints on [women's] power'.[60] Important too is Jennifer Nedelsky's understanding of relational autonomy, namely that individual autonomy is made possible by constructive relationships, and undermined by destructive ones, not only in 'intimate [and family] relationships . . . [but also in] more distant relationships . . . and social structural

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56 Jael Silliman et al, *Undivided Rights: Women of Color Organize for Reproductive Justice* (South End Press 2004); SisterSong 'What is Reproductive Justice' <https://www.sistersong.net/reproductive-justice/> accessed 20 April 2019; West (n 53) 1422-23.

57 As noted by the UN Special Rapporteur on extreme poverty and human rights, 'Country Mission to the United States of America' (2017) A/HRC/38/33/Add.1 [35]: 'Low-income women who would like to exercise their constitutional, privacy-derived right to access abortion services face legal and practical obstacles, such as mandatory waiting periods and long driving distances to clinics. This lack of access to abortion services traps many women in cycles of poverty.'

58 Nadine Taub, 'Why Afford Constitutional Protection to Reproduction?' in Betty Taylor (eds), *Feminist Jurisprudence, Women and Law: Critical Essays, Research Agenda and Bibliography* (Littleton 1999) 1.

59 Cairo Programme of Action (n 1).

60 SisterSong (n 56).

relationships such as gender, economic relations and forms of governmental power'.[61] This contextual and relational interpretation recognizes that autonomy differs markedly across groups of women, despite a common vulnerability to gendered subordination. Thus a history of racialised sexual subordination and population control in the US, coupled with a complex and particular socialisation about sexuality and child-bearing, means the experience of black women is often distinctly different to that of white women.[62] In South Africa, racialized poverty and inequality, histories and experiences of population control and abortion access, HIV vulnerability and epidemic levels of gender-based violence affect women differently across race, class, sexuality and so forth. This places intersectionality, as a recognition of interlocking mechanisms of subordination and oppression, at the centre of analysis, focusing attention on women pushed to the margins of society by combinations of race, class, sexuality, disability, poverty, migrancy, rural location and many other bases of oppression, for whom the reality is often one of no, or extremely limited, choice in their reproductive lives as a whole.

Under these circumstances, the achievement of substantive reproductive autonomy for women lies in negative and positive state action. Not only must the state refrain from criminalising women, or imposing procedural and substantive burdens on their exercise of choice; it must actively work to enable reproductive autonomy, not only in the provision of accessible and safe abortion on request within comprehensive reproductive healthcare services, but also in social and economic policies and programmes that enable women to make meaningful choices about whether 'to have, or not have, children'. The core aspiration of reproductive justice is to ensure that everyone, especially those who are poor and marginalized, have the social, political and economic power and resources to make healthy decisions about their gender, bodies and sexualities. Thus, not only is the exercise of autonomy and selfdetermination indivisible from women's equality and social rights, especially health; struggles around reproductive autonomy are indivisible from broader social and economic struggles for equality and justice.[63]

C. A Bundle of Mutually Reinforcing Reproductive Rights

A reproductive justice approach suggests that we give substance to one of the original intentions of reproductive rights, namely, that they be viewed contextually, substantively and cumulatively – as mutually reinforcing and complementary reproductive rights. At the heart of this is a substantive and positive idea of freedom or autonomy, that is contextually understood, and that affirms women's moral agency and bodily integrity by underpinning abortion on request.

This idea of substantive freedom is bound up with substantive equality, both as social

61 Jennifer Nedelsky, *Laws Relations: A Relational Theory of Self, Autonomy and Law* (OUP 2011) 4.

62 Silliman et al (n 56) xix-xxi. See Sonia Correa and Rosalind Petchesky, 'Reproductive and Sexual Rights: A Feminist Perspective' in Gita Sen, Adrienne Germain and Lincoln Chen (eds), *Population Policies Reconsidered: Health Empowerment and Rights* (Harvard Center for Population and Development Studies & International Women's Health Coalition 1994) 107.

63 SisterSong (n 56).

equality (recognition) and economic equality (distributive). As feminist scholars have argued, women's rights to abortion are an instance of substantive equality in which the ability to decide when and whether to have children is a measure of the extent to which women are free of stigma and stereotype (especially in relation to motherhood), are able to participate in society and the economy and develop to their full human potential in positive social relationships. Here substantive equality speaks to the conditions that are necessary for the exercise of meaningful reproductive autonomy. However, the use of equality rights, on their own, to justify abortion can run the risk of reinforcing discourses of victimhood, motherhood and disadvantage, identified by Wendy Brown as the 'paradox of rights', namely that rights operate to reinscribe traditional notions of gender and sexuality even as they provide protection and some access to resources and benefits.[64] While this is not inevitable, a transformative approach to reproductive rights is strengthened by an independent assertion of reproductive autonomy within a nuanced understanding of substantive equality.[65]

Finally, as detailed by the CESCR, the right to health encompasses freedom rights and programmatic rights. 'Freedom rights' overlap with autonomy rights, while programmatic rights demand positive action for comprehensive and effective health care services for abortion. Properly read, the CESCR General Recommendation No. 22 proposes an integrated and mutually supportive relationship between freedom, equality and health rights.

In jurisprudential terms, a reproductive justice approach encompasses five principles to engage reproductive rights cumulatively and collaboratively: First, a substantive and positive understanding of women's reproductive autonomy within their particular contexts. Second, this idea of freedom is inextricably related to a substantive idea of equality, that emphasises the unequal conditions in which reproductive autonomy is exercised and allows us to unpack and remedy the complex fault-lines of inequality that structure the choices of different women. Third, socioeconomic rights, and especially the right to heath, should be interpreted with due regard to affirming autonomy and addressing the inequalities that shape women's access to reproductive healthcare services. Fourth, a substantive, contextual and intersectional analysis of all rights will sustain a jurisprudence that places disadvantaged women at the centre. Fifth, remedies must recognise the negative and positive obligations of government to facilitate abortion rights and develop the legal, social and economic conditions that enable reproductive justice. With these two models in mind, I evaluate South African jurisprudence to suggest that it generally aligns with an inclusive reproductive choice perspective and propose how it might be changed.

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64 Wendy Brown, 'Suffering Rights as Paradoxes' (2000) 7 Constellations 230, 230-1.

65 For an example of the relationship between self-determination and equality, Lakshmi Dhikta v. Nepal (2009) WO-0757, 2067 (Supreme Court of Nepal) See 'Lakshmi Dhikta Case Summary and Translated Excerpts' <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Lakshmi%20 Dhikta%20-%20English%20 translation.pdf> accessed 20 April 2019.

4. Constitutional Rights and Abortion Law in South Africa

The 1996 South African Constitution[66] is celebrated as a powerful statement on gender equality and women's rights, including rights against unfair discrimination based on sex, gender and sexual orientation and rights to dignity, privacy, life and freedom and security of the person.[67] The latter specifies in section 12(2) that 'everyone has the right to bodily and psychological integrity, which includes the right (a) to make decisions concerning reproduction [and] (b) to security in and control over their body'. Section 27 of the Constitution further guarantees the right of access to healthcare services, including reproductive healthcare. Both provisions drew on the global framework of reproductive rights established in the ICPD.[68]

Parallel to the development of this Constitution, the South African Parliament enacted the CTOPA in 1996 to provide abortion on request up to twelve weeks of pregnancy and on broadly specified grounds, in consultation with a medical practitioner, between thirteen and twenty weeks.[69] By including social and economic grounds, the enumerated grounds were intended to be sufficiently open-ended to effectively allow abortion on request, in private consultation with one's doctor. Justified by a dominant public health narrative, as well as feminist arguments on substantive equality, reproductive choice and bodily

66 The 1996 Constitution replaced the 'Interim Constitution' (The Constitution of the Republic of South Africa Act 200 of 1993) which was the product of the negotiated settlement of 1993 and gave rise to the first democratic elections in 1994.

67 Sections 9, 10, 11 and 14.

68 Catherine Albertyn, 'Women and Constitution-Making in South Africa' in Helen Irving (ed), Constitutions and Gender (Edward-Elgar 2017) 47, 66-72.

69 The relevant sections read as follows:

2. (1) A pregnancy may be terminated-

(a) upon request of a woman during the first 12 weeks of the gestation period of her pregnancy;

(b) from the 13th up to and including the 20th week of the gestation period if a medical practitioner, after consultation with the pregnant woman, is of the opinion that-

(i) the continued pregnancy would pose a risk of injury to the woman's physical or mental health; or

(ii) there exists a substantial risk that the foetus would suffer from a severe physical or mental abnormality; or

(iii) the pregnancy resulted from rape or incest; or

(iv) the continued pregnancy would significantly affect the social or economic circumstances of the woman ...

(c) after the 20th week of the gestation period if a medical practitioner, after consultation with another medical practitioner or a registered midwife, is of the opinion that the continued pregnancy-

(i) would endanger the woman's life;

(ii) would result in a severe malformation of the foetus; or

(iii) would pose a risk of injury to the foetus.

integrity,[70] the CTOPA sought to widen access to safe, legal abortion. By conferring rights to choose whether to terminate a pregnancy, the Constitution and CTOPA affirm women's moral autonomy, personhood and bodily integrity. Rather than being subjects of medical and legal decisions by others,[71] women are formally ascribed agency as citizens and rights-bearers. Rather than stigmatizing women as immoral and criminal, South African law decriminalised abortion and entrenched substantive abortion rights, ahead of the global curve, and at the optimistic birth of a Constitution that envisaged an inclusive, non-racial and non-sexist democracy, based of equality, dignity, freedom and social justice.[72] It has been argued that such moments are potentially transformative, pointing to the possibilities of disrupting oppressive gendered relations and according women greater practical control over their lives.[73] Indeed, as access expanded and maternal mortality and morbidity declined in the first decade of the CTOPA, many women were able to do just that.[74]

Over the past 22 years, the CTOPA has withstood attempts to strike it down in the courts and to dilute its provisions in Parliament, as the Constitution has been mobilised to support reproductive rights.[75] As discussed below, the courts have generally followed a more traditional reproductive choice approach, often influenced by politics, the legal strategies of lawyers and amici, judicial reasoning and precedent, and the 'optics' of a particular case (how is the matter characterised and will the applicant induce judicial concern?).

A. Defending the CTOPA in the High Court

Two constitutional challenges to the CTOPA by anti-abortion groups elicited a consciously narrow, defensive response from the state and feminist groups that affirmed the core right to reproductive autonomy but did not engage the detail of, or develop, abortion rights. Here the strategic choice was to minimise evidence and argument in defence of the newly won law in order to avoid a 'show trial' on abortion, resulting in narrower 'reproductive choice' arguments.

1. Abortion as unconstitutional? Christian Lawyers Association v Minister of Health I

The Christian Lawyers Association (CLA) attacked the foundation of the abortion right by claiming that the CTOPA violated section 11 of the Constitution: the right to life. The CLA argued that section 11 was held 'from the moment of conception' and protected the

70 Albertyn, 'Claiming and Defending' (n 23) 433-39.

71 The Abortion and Sterilisation Act 2 of 1975 allowed abortion under extremely restrictive circumstances, subject to the scrutiny and consent of medical practitioners, hospital officials and magistrates.

72 Preamble, Section 1 Constitution of South Africa, 1996.

73 Albertyn, 'Women and Constitution-Making' (n 68).

74 Abortion-related morbidity and mortality decreased by 91% between 1997 and 2002. Rachel Jewkes and Helen Rees, 'Dramatic Decline in Abortion Mortality Due to the Choice in Termination of Pregnancy Act' (2005) 95 South African Medical Journal 250.

75 Albertyn, 'Claiming and Defending' (n 23) 441-3.

right to life of 'unborn children'.[76] The Minister of Health raised an 'exception' for the claim to be dismissed as having no basis in law: Section 11 could not be interpreted to include a foetus as a constitutional rights-bearer, especially in light of constitutional rights that supported women's right to choose abortion. The judge agreed. In the absence of an express inclusion of foetal rights, and in view of the Constitution's explicit reference to the right to make decisions concerning reproduction and to security in and control over one's body in section 12(2), as well as rights to equality, dignity, privacy and healthcare, the Constitution clearly granted women the right to choose to terminate pregnancies.[77] The judge found support in comparative law, citing US (Roe v Wade) and Canadian (Tremblay v Daigle[78]) cases as precedent for his conclusion that a foetus does not enjoy a constitutional right to life.[79]

Given the ideological framing of the claim, the matter turned on the question of foetal rights and says little about women's rights, beyond asserting them as a constitutional basis for reproductive choice, and nothing about any balance that might need to be struck between women's rights and the state's interests in protecting potential life. It is a powerful, but abstract, endorsement of women's reproductive rights.

2. Defending adolescent autonomy: Christian Lawyers Association v Minister of Health II

Six years later in 2004, the CLA challenged the CTOPA's provisions that allowed adolescent girls to choose abortion without the consent of, or consultation with, their parents.[80] The CLA argued that, in fact, girls below eighteen were incapable of taking informed decisions on abortion, and should be subject to parental consent or control, undergo mandatory counselling and submit to a period of reflection before acting on their decision. In the absence of this, the CTOPA violated the state's constitutional obligation, in section 28, to act in the best interests of the child. Again, the Minister objected, alleging that the claim had no basis in law.

The court concluded that '[t]he cornerstone of the regulation of the termination of pregnancy of a girl and indeed of any woman under the Act is . . . her "informed consent". No woman, regardless of her age, may have her pregnancy terminated unless she is capable of giving her informed consent to the termination and in fact does so.'[81] This meant that girls who had the emotional and intellectual capacity to consent, as determined by a medical practitioner, could do so regardless of their age. This was supported in common law and the Constitution. The court accordingly dismissed the claim as having no basis in law.

This case provided an opportunity to elaborate the principles underlying the right to terminate pregnancies in the CTOPA. Here the court found that the 'fundamental right to

76 *Christian Lawyers Association I* (n 5) 1117-18.

77 ibid 1122-23.

78 (1989) 62 DLR (4th) 634 (Canadian Supreme Court).

79 *Christian Lawyers Association I* (n 5) 1125-26.

80 Sections 5(2) and (3) of the CTOPA read with the definition of 'woman' in section 1.

81 *Christian Lawyers Association II* (n 5) 514.

individual self-determination . . . lies at the very heart and base of the constitutional right to termination of pregnancy'.[82] This right is not only supported by the section 12(2); but also by section 27(1)(a) providing for access to reproductive healthcare; the rights to dignity and privacy in sections 10 and 14. In support of its conclusions, the court again draws on US and Canadian case-law. In the former, it highlights the right of privacy, bound up with dignity and autonomy, as a right to be to be free from government intrusion.[83] The Court draws on Canadian jurisprudence to emphasise the link between decisional autonomy, free from state interference, and physical and psychological integrity. It concludes that South Africa's Constitution is even more explicit in protecting abortion rights than US and Canadian jurisprudence, thus hinting at, but not engaging in, further development of the rights.[84]

In Christian Lawyers Association II, the section 12(2) right is necessarily asserted in principled and relatively abstract terms to defend the legislation under the preliminary procedure of an exception. It is a crucial recognition of woman's autonomy and personhood as a constitutional basis for abortion, but it remains a negative protection of a sphere of personal autonomy where the state cannot interfere, either by criminalising women's decisions to terminate a pregnancy, or by imposing undue psychological and emotional burdens on the exercise of that decision. Finally, it recognises the presence of a bundle of rights defending abortion in the Constitution, but does not spell out their content and relationship, beyond listing intersecting rights of freedom, dignity, privacy and healthcare that support personal autonomy.

B. Developing Section 12(2) in the Constitutional Court: Reproductive Autonomy and Surrogacy in AB v Minister of Social Development

In 2016, the Constitutional Court finally addressed the right to 'physical and psychological integrity', in particular the right to 'make decisions concerning reproduction' in section 12(2)(a). The question facing the court in AB v Minister of Social Development was whether a legal provision that prohibits surrogacy, if there is no biological or genetic link between the commissioning parent/s and the child, violates the commissioning parent/s' right to reproductive autonomy.

In its first interrogation of freedom since 1996,[85] the Court agrees that the exercise of autonomy is a 'necessary, but socially embedded, part of the value of freedom',[86] which broadly protects 'morally autonomous human beings [and their ability] independently . . . to form opinions and act on them':[87] 'The value recognises . . . our capacity to assess our own socially-rooted situations, and make decisions on this basis. By exercising this capacity,

82 ibid 519.

83 The court cites Blackmun J in Thornburg (n 44).

84 *Christian Lawyers Association II* (n 5) 527-8.

85 *Ferrerira v Levin* 1996 (1) SA 984 (South African Constitutional Court).

86 AB (n 5) [51].

87 ibid [50] citing O'Regan J in *NM v Smith* 2007 (5) SA 250 (South African Constitutional Court) [145].

we define our natures, give meaning and coherence to our lives, and take responsibility for the kind of people that we are.'[88] In this sense, people are not abstract, atomised individuals: 'to be autonomous is to be socially and politically connected, rather than an agent of unfettered individual choice'.[89] This recognition of autonomy in the context of one's social situation and community signifies a step towards a contextual and intersectional understanding of freedom. However, its implications remain undeveloped as the judges split on the detail of section 12(2).

Drawing on the Court's 1996 interpretation of section 11 of the Interim Constitution, whose provisions were limited to detention without trial, torture, and cruel and degrading punishment, the majority Nkabinde judgment finds the primary meaning of section 12 still to be the negative protection of physical integrity.[90] This, together with an incorrect understanding that the two CLA judgments and comparative

jurisprudence prioritise 'bodily integrity' in protecting women's abortion rights,[91] leads Nkabinde J to conclude that section 12(2)(a) only protects reproductive decision-making that affects 'bodily integrity' and cannot be extended to 'psychological integrity'. As the applicant's body would not be physically affected by the anticipated pregnancy, the decision to have a child via the surrogacy agreement could not be viewed as constitutionally protected reproductive autonomy.[92]

Although the majority endorse women's rights to abortion and bodily integrity as a core meaning of section 12(2)(a) and signal respect for women's right to make abortion decisions; their interpretation remains a narrow, abstract and negative protection of the right. First, the equation of reproductive autonomy with physical integrity excludes a wider set of actors that might seek protection under this right, including men, infertile parents and women who suffer psychological or social, but not physical, harm as a result of state (in)activity.[93] This flies in the face of the understanding that reproductive autonomy encompasses the right to have and not to have children. Second, limiting reproductive autonomy to protecting bodily integrity fails to understand the complex nature of reproductive decisions. Whilst women's claims to bodily integrity are a critical part of autonomy, to equate the two is to fail to see the personal, social and economic context in which women exercise autonomy and the multiple psychological, social and economic effects of denying women such autonomy.[94] As Petchesky notes: 'abortion has to do with

88 ibid [52].

89 ibid [51].

90 ibid [77]; [309].

91 As stated in the first and minority judgment, the second and majority judgment misreads comparative law as equating violations of reproductive freedom with the denial of physical integrity only, whereas the foreign cases cited include psychological and emotional harm within their understanding of freedom. ibid [78]; [80].

92 ibid [309]-[315].

93 See the minority judgment ibid [79].

94 In contrast, *H v Fetal Assessment Centre* 2015 (2) SA 193 (South African Constitutional Court) [59] 'having regard to the fundamental right of everyone to make decisions concerning reproduction . . . the harm may simply be seen as an infringement of the right of the parents to exercise a free and informed choice in relation to these interests'.

women's sexual and moral autonomy as much as their physical integrity',[95] and it is in the cumulative violation of women's autonomy that the harm lies.

In the end, the judgment straitjackets a complex idea of reproductive autonomy into a classic liberal idea of abstract physical integrity. The inattentiveness to the context and nature of reproductive autonomy is further highlighted by the finding in the equality analysis that it is not the applicant's infertility that disqualified her from surrogacy, but her choice not to exercise other legal options available to her. Echoing the libertarian ideas of abstract free choice articulated in the much criticised judgment of Volks v Robinson,[96] Justice Nkabinde suggests that:

> *the parent still has available options afforded by the law: a single parent has the choice to enter into a permanent relationship with a fertile parent, thereby qualifying the parent for surrogacy. If the infertile commissioning parents, or parent, decide not to use the available legal options, they have to live with the choices they make.*[97]

It is disappointing that the powerful tug of a narrow libertarian idea of freedom has influenced the Court's interpretation of autonomy in section 12(2)(a). While some might attribute this to the apparently privileged nature of the applicant and her claim,[98] it is nevertheless out of kilter with the extant jurisprudence, which has endorsed a wider approach to individual autonomy and self-determination within mutually reinforcing individual rights to dignity, privacy and equality (as a right to equal dignity).[99] As initially developed in sexual orientation discrimination cases; privacy, dignity and equality protect a sphere of personal autonomy that includes 'intensely significant aspects of one's personal life'[100] such as choices of intimate partners,[101] teenage sexuality[102] and decisions around

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95 Petchesky (n 4) 398.

96 2005 (5) BCLR 446 (South African Constitutional Court).

97 *AB* (n 5) [302].

98 See Marius Pieterse, '"Finding for the Applicant": Individual Equality Plaintiffs and Group-based Disadvantage' (2008) 24 South African Journal on Human Rights 397.

99 See Henk Botha 'Human Dignity in Comparative Perspective' 2009 20 Stellenbosch Law Review171, 204.

100 S v Jordan 2002 (6) SA 642 (South African Constitutional Court) per O'Regan and Sachs JJ [76].

101 *National Coalition for Gay and Lesbian Equality v Minster of Justice* (1999) 1 SA 6 (South African Constitutional Court).

102 See *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 (2) SA 168 (South African Constitutional Court) [64] 'Privacy fosters human dignity insofar as it is premised on, and protects, an individual's entitlement to "a sphere of private intimacy and autonomy". I am therefore of the view that, to the extent that they encroach on the right to privacy, sections 15 and 16 constitute a related limitation of adolescents' dignity rights.'

health status,[103] but does not extend, for example, to decisions on sex work.[104] In all cases, however, this idea of autonomy is a right to left alone, and mostly concerns the obligations of the state to refrain from interference by way of punitive laws.

The minority Khampepe judgment is more in line with this jurisprudence, finding that 'reproductive decision-making' protects autonomy more broadly, where the harm is constituted by infringements on the exercise of free choice that have personal and social effects and involve both bodily and psychological integrity.[105] Thus, if the state puts legal barriers in the way of reproductive decisions that result in psychological – but not bodily – harm, the right is still violated.[106] Reproductive decision-making includes decisions to have a child by means of surrogacy,[107] and with sufficient evidence of psychological harm to the applicant and others similarly situated, Khampepe J concludes that the provision is an unjustifiable violation of her right to reproductive decisionmaking.[108] The minority judgment's idea of decisional autonomy could form the basis for further development. Although it still speaks to the negative protection of autonomy – the state should not legislate to place obstacles in the way of a reproductive decisions – and is not yet precedent for a more positive protection of autonomy and freedom; it does not exclude this. Moreover, by introducing the idea of a 'socially embedded' value of freedom, there is ground for future substantive development. In thinking how that might be done, I return to an earlier case, Minister of Health v Treatment Action Campaign,[109] and the idea of reproductive justice.

5. Re-Interpreting Minister of Health v TAC: From Reproductive Choice to Reproductive Justice?

The much celebrated case of Minister of Health v Treatment Action Campaign (TAC) successfully challenged the Mbeki government's denialism on HIV/AIDS and the state's recalcitrance in providing antiretroviral therapy (nevirapine) to women in public hospitals to reduce the risk of perinatal HIV transmission.[110] A little-told story of this case is the

103 In NM (n 87) [40] in explaining why the non-consensual disclosure of confidential medical information, including the HIV status of the applicants, can found a claim for damages, Madala J states as follows: 'Private and confidential medical information contains highly sensitive and personal information about individuals. *The personal and intimate nature of an individual's health information, unlike other forms of documentation, reflects delicate decisions and choices relating to issues pertaining to bodily and psychological integrity and personal autonomy.*' (emphasis added)

104 Jordan (n 100) [93].

105 ibid [78].

106 ibid [70]-[72].

107 ibid [74]-[75].

108 ibid [82]-[97], [214].

109 TAC (n 6).

110 Mark Heywood, 'Preventing Mother-to-Child HIV Transmission in South Africa: Background Strategies and Outcomes of the Treatment Action Campaign Case Against the Minister of Health' (2003) 19 South African Journal

marginalisation of reproductive autonomy and the agency of poor, black HIV positive women, as a constitutional basis for accessing this treatment.[111] After briefly describing the case, I reflect on two perspectives on how the case could have centred women's reproductive autonomy, within an integrated bundle of reproductive rights, and how this might have affected its normative and practical outcomes.

The case was launched on a number of grounds, leading with the 'rights of women and their babies to access health care services, including reproductive health care (section 27)',[112] children's rights to basic healthcare services (section 28),[113] followed by unfair discrimination against poor, black women (section 9),[114] the constitutional right to life of babies (section 11)[115] and 'the right of the women concerned to make choices and decisions concerning reproduction' (section 12).[116] The Constitutional Court case focused only on section 27: (i) the reasonableness of government's limited roll-out of a programme to prevent perinatal transmission, and (ii) whether section 27 required government to provide 'an effective, comprehensive and progressive programme for the prevention of mother-to-child transmission of HIV throughout the country'. [117] After evaluating the voluminous evidence, the Court found government's inaction to be unreasonable and unconstitutional on several grounds. It concluded that section 27 'require[d] the government to devise and implement within its available resources a comprehensive and coordinated programme to realise progressively the rights of pregnant women and their new-born children to have access to health services to combat mother-to-child transmission of HIV'.[118] It had failed to do so by 'exclud[ing] those who could reasonably be included where such treatment [wa]s medically indicated to combat mother-to-child transmission of HIV'.[119] The Court ordered government to remove all restrictions and make nevirapine available where medically indicated, and to take reasonable measures to expand the programme.[120]

At one level, the exclusive focus on health rights and health systems and policy is unsurprising given the complexity of the case and the plethora of evidence on issues such as feasibility, efficacy and safety, as well as the ability of the health system to administer the

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on Human Rights 278.

111 Catherine Albertyn and Shamim Meer, 'Citizens or Mothers? The Marginalization of Women's Reproductive Rights in the Struggle for Access to Health Care for HIV-Positive

Pregnant Women in South Africa' in Maitrayee Mukhopadyay and Shamim Meer, (eds) *Gender, Rights and Development: A Global Sourcebook* (KIT 2009) 27; Catherine Albertyn, 'Gendered Transformation in South African Jurisprudence: Poor Women and the Constitutional Court' (2011) 3 Stellenbosch Law Review 591.

112 T*reatment Action Campaign v Minister of Health* (Transvaal Provincial Division) Applicants' Founding affidavit, August 2001 [268]; [269] (on file with author).

113 ibid [270].

114 ibid [271]-[272].

115 ibid [273].

116 ibid [264].

117 TAC (n 6) [4]-[5]; [18].

118 ibid [135].

119 ibid [125].

120 ibid [135].

programme effectively (capacity, budget, human resources, etc.). However, underlying these more technical issues, was the normative and legal characterisation of the case as ultimately directed at enabling the public health system to save the lives of infants, rather than to enhance the reproductive choices of women to give birth to healthy children. Absent in the Constitutional Court judgment is any meaningful reference to the reproductive autonomy of women in public hospitals, beyond a single mention of the capacity of hospitals to provide 'counselling . . . to the mother to enable her to take an informed decision as to whether or not to accept the treatment recommended' and reference to 'the rights of pregnant women and their new-born children to have access to health services' in the order.[121]

Of course, one must be mindful of the politics of the TAC case, where its characterisation as a campaign to 'save babies' was strategically identified as most likely to win judicial sympathy. However, this meant that the judgment, while undoubtedly laudable, ends up casting poor women as victims and dependants, their autonomy subordinated to the overriding goal of treatment to save the lives of their children. In rendering the subjectivity of women invisible, the jurisprudence that decisional autonomy is central to self-determination is set to one side, and women are indirectly stigmatized as vessels of reproduction rather than as rightsbearing citizens.[122] This approach reinforces, rather than undermines, 'the ethical and legal inequalities inherent in a societal structure that places more value on a women's reproductive capacity than her . . . individual wellbeing'. [123] The notion of empowering women to make reproductive decisions to give birth to heathy children is absent in the judgment.

A. TAC Re-Imagined

In imagining how the *TAC* case could have centred the section 12(2)(a) right to reproductive decision-making within the rights of access to reproductive healthcare and equality, I briefly outline two approaches. First, I draw on existing jurisprudence on autonomy to delineate a 'reproductive choice' perspective, followed by an alternative 'reproductive justice' perspective which seeks to capture the complexities of women's place in society (especially around race and class in South Africa), their differing ability to exercise meaningful choice and act in accordance with their decisions, and the multiple and intersecting social, economic and political inequalities that differentially structure women's autonomy and self-determination.

In a *reproductive choice* approach, the Court's dominant approach to decisional autonomy and dignity supports the argument that women's right to choose to take ante-retroviral drugs to ensure the birth of a healthy infant is a decision that lies within an individual sphere of decisional autonomy, protected by 'reproductive decision-making' rights in section 12(2)(a). Moreover, the particular facts of the *TAC* case could sustain the development of 'reproductive decision-making' in section 12(2)(a) to include the ability to

121 ibid [69]; [135].

122 Albertyn, 'Gendered Transformation' (n 111) 599.

123 C Eyakuze et al, 'From PMTCT to a More Comprehensive AIDS Response for Women: A Much-Needed Shift' (2008) 8 Developing World Bioethics 33, 36 writing about the intersection of HIV and pregnancy.

parent with safety, and to be given the choices that are necessary to prevent further risks of transmission via breastfeeding. First, the obstacles to accessing treatment to prevent perinatal transmission violate women's reproductive decisions to give birth to, and parent, healthy children and, second, the absence of a comprehensive package to assist women in making decisions after birth (especially in relation to breastfeeding) similarly limits their autonomy. In both instances, the violation of the section 12(2)(a) autonomy right requires positive measures in the form of such a comprehensive package before and after birth.

While the judgment's detailed and compelling findings on access to treatment under section 27(1) would apply, the prior acknowledgment of reproductive autonomy provides a normative frame that places women's autonomy at the centre of reproductive health care, furthering the idea that women should be enabled to make real choices about their sexuality, reproduction and fertility. Rather than cast as mothers, whose primary role it is to bear and raise children, the centrality of reproductive choice sees women as independent and equal agents and rights-bearing citizens, empowered to act to secure their bodily and moral autonomy and make choices on how they wish to parent. This idea of reproductive autonomy is critical to an ideological and policy context concerning HIV/AIDS that affirms 'the rights of a woman to choose when and whether to have . . . sex, to act to protect herself from HIV, to choose whether to have children, and to be entitled to treatment in her own right'.[124]

Such arguments do not require additional evidence and can be made on the basis of what was available in the case and evaluated in the judgment. What they offer is a development of section 12(2), consistent with the Court's broad jurisprudence on autonomy, its positioning as the leading right at play, and the recasting of the section 27(1) argument to recognise that it is primarily a women-centred right of access to reproductive decision-making that is violated, rather than a general right to health. Here, I suggest that the Court work with both autonomy and health rights, rather than section 27(1) alone. By maintaining a strategic consistency with the jurisprudence, whilst also developing the meaning of reproductive decision-making, and highlighting the positive obligations that flow from it, this approach has some prospects of success.

As with the CTOPA judgments, it retains the normative power of affirming women's autonomy and does not explicitly adopt an intersectional approach that centres poor, black women. Such a reproductive justice approach requires a more detailed exposition of the specific nature and context of women's reproductive choices in the public health sector. This would start with a recognition of the gendered and intersectional nature of the HIV epidemic, and the manner in which women's decision-making is contextual, relational and constrained.

By 2000, it was apparent that the HIV epidemic was literally and metaphorically playing out on the bodies of poor, black women. The complex mix of poverty and gendered inequalities that drove the epidemic[125] meant that young, poor and black women were most

124 Marion Stevens, 'Sacrificing the Woman for the Child' (2008) 28 Rhodes Journalism Review 60, 60-61 criticises HIV policy for its focus on women as 'vessels of reproduction'.

125 See Mark Hunter, *Love in the Time of AIDS: Inequality, Gender and Rights in South Africa* (Indiana University Press 2010) 24-28.

at risk of being infected and affected by HIV.[126] These women also bore the burden of blame in society, as they become the scapegoats for a range of social ills from HIV/AIDS to teenage pregnancies to abortion.[127] Underlying this attribution of blame are gendered stereotypes which deepen and reinforce women's unequal position in our society:[128] women are alternatively viewed as promiscuous and responsible for what happens to them (as if their sexual and reproductive choices are unfettered), objectified (and rendered vulnerable to violence) and patronised as victims and dependents (with little or no agency). Either way, their autonomy and equality are undermined, and the personal, social and economic circumstances in which they seek to exercise reproductive decision-making are misunderstood or ignored.

By surfacing these conditions and constraints, content is given to sections 12(2) and 27(1) with reference to the particular needs of poor black women, in a manner that challenges the lure of libertarian freedom in our law. Section 12(2) is nudged toward a contextual and substantive understanding of reproductive autonomy, including the idea that women make 'relational' decisions with due regard to their positions within a series of relationships and collectives, made up of children, family, community (including religious communities) and the state.[129] Section 27(1)(a) is understood with reference to the multiple intersecting barriers that structure women's ability to access reproductive healthcare services. In both instances, the right is 'socially embedded' within a specific understanding of the power relations that influence its exercise.[130]

The particular facts in TAC advance a broader understanding of reproductive autonomy and justice to include the ongoing obligations of the state to support women's decision to have children and to parent them in a safe environment. Both approaches set out above envisage the reciprocal and mutually reinforcing nature of rights to freedom, equality and socio-economic benefits (here the right to reproductive health care). Although space has not allowed the development of equality under section 9, a substantive and contextual approach would clearly strengthen a woman-centred interpretation. As with abortion, reproductive autonomy is simultaneously and necessarily an individual right and a social need. As TAC illustrates, to attend to the social need without affirming woman's individual rights is to subordinate women's autonomy to the needs of others and to reinforce their inequality. A reproductive justice approach explicitly seeks to shift power and resources towards women marginalised by race, class etc. The TAC remedies went some way to achieving this in practical terms, by opening access to treatment to prevent perinatal transmission and

126 ibid.

127 See Suzanne Leclerc-Madlala, 'Virginity Testing: Managing Sexuality in a Maturing HIV/AIDS Epidemic' (2001) 15 Medical Anthropology Quarterly 533; Saadhna Panday et al, 'Teenage Pregnancy in South Africa: With a Specific Focus on School-going Learners' (2009) 26-28 <https://hivhealthclearinghouse.unesco.org/library/documents/teenagepregnancy-south-africa-specific-focus-school-going-learners> accessed 20 April 2018.

128 David Everatt, 'The Undeserving Poor: Poverty and the Politics of Service Delivery in the Poorest Nodes of South Africa' (2008) 35 Politikon 293, 315-16.

129 See Rosalind Petchesky, 'Comparing Across and Within Differences' in Rosalind Petchesky & Karen Judd (eds), *Negotiating Rights: Women's Perspectives across Countries and Cultures* (Zed 1998) 295, 302-3.

130 This was noted, but not developed, in AB (n 5) [50]-[51].

mandating the state to develop a comprehensive package. However, while the remedies directed resources towards the needs of women, the judgment completely failed to address the power relations underpinning the issue. In centring women's reproductive autonomy, both the above approaches shift power towards women in a normative and practical sense. However, it is in the specificity of the reproductive justice approach that the possibilities of greater transformation lie.

6. Conclusion: Reproductive Justice and Implementing the CTOPA

Choices in law and politics are always made in context, and transformative outcomes are not always possible. In many instances, compromises are made, politics intervene, and progress is incremental, extending rights and legal protection, without fundamentally disrupting gendered norms and unequal power relations. Like international and comparative law, the idea of reproductive autonomy in South African jurisprudence is limited to a negative protection of individual choices against state incursions. This protects an important core of reproductive decision-making enshrined in the CTOPA, which is likely to withstand further attack in courts or in Parliament,[131] and attests to the powerful defensive role of rights when laws are in place.

However, an urgent contemporary need is to address the stagnation, if not decline, in abortion service provision and access,[132] especially across race, class, geographic location[133] and other vectors of disadvantage. This is attributed to a combination of state inaction (such as failure to provide information, designate and staff clinics, enable medical abortion, procure drugs and regulate conscientious objection),[134] inadequate formal rules,[135] the operation of powerful informal rules and practices, especially around stigma and

131 A recent attempt to impose restrictions by means of a Private Members Bill was rejected by Parliament, inter alia because of its incursions of the choices of poor women. See Tamar Kahn, 'Emotional Argument by Anti-Abortion ACDP MP Doesn't Sway Parliament' (*Business Live*, 27 March 2018) <https://www.businesslive.co.za/bd/national/2018-03-27emotional-argument-by-anti-abortion-acdp-mp-doesnt-sway-parliament/> accessed 20 April 2018.

132 For example, by 2016, 505 of 3880 public health facilities were designated to provide abortion services, and only 264 did so. Amnesty International, 'Barriers to Safe and Legal
Abortion in South Africa' (2017) 12-4 <https://www.amnesty.org/download/Documents/AFR5354232017ENGLISH.PDF> accessed 21 April 2019.

133 ibid 13; speaks of uneven access across provinces and rural areas. See Karen Trueman and Makgoale Magwentshu, 'Abortion in a Progressive Legal Environment: The Need for Vigilance in Protecting and Promoting Access to Safe Abortion Services in South Africa' (2013) 103 American Journal of Public Health 397.

134 Amnesty International (n 132); Jane Harries et al, 'Conscientious Objection and its Impact on Abortion Service Provision in South Africa: A Qualitative Study' (2014) 11(1) Reproductive Health 16.

135 National Guidelines to implement the CTOPA are only being developed in 2018: National Department of Health, 'National Guideline for Implementation of the Choice on Termination of Pregnancy Act' (2018) (draft on file with author).

conscientious objection.[136] These factors have also exacerbated high rates of unsafe and illegal abortion.[137] Overcoming these problems requires political and legal engagement, thus providing opportunities for building on emerging ideas of reproductive justice [138] and seeking transformative outcomes. This article suggests that one way to do this is to develop and reconstruct mutually reinforcing reproductive rights that resonate with the original, more radical, aspirations of the early 1990s and some recent international developments. Underpinned by an idea of reproductive justice, and the need to centre those on the margins, this requires interpretations of abortion rights that connect a contextual, relational and intersectional understanding of women's autonomy and selfdetermination, with substantive equality and social rights. Overall, these should be based on normative claims and practical remedies that seek to dislodge and dismantle systemic inequalities.

The re-imagined TAC provides some guidance to transformative litigation on implementation. Thus, evidence of the multiple limitations and barriers to exercising choice in terms of the CTOPA could ground a conceptual development of section 12(2) of the Constitution (within a bundle of rights) to recognise the contextual and constrained nature of women's choices, solidify normative standards of self-determination and reproductive autonomy, and mandate positive action by the state to enable meaningful reproductive decision-making, regardless of race, class, geographical location etc. This would link directly to section 27(1)(a)'s guarantee of access to reproductive health care services, where evidence of implementation failure might show not only a failure of progressive realisation, but a regression in the delivery of reproductive health care services to women using in public sector clinics and hospitals, especially in rural areas. This requires due attention to the dynamic context in which abortion services are provided or refused, the complexity of reasons for lack of access, and the different kinds of barriers faced by different women.

In addition, the section 9 right to equality would emphasise not only that a failure in implementation discriminates against women in general, by continuing to stigmatise them for seeking abortions and by disadvantaging them in the social and economic consequences of unwanted pregnancies; but also that these burdens fall disproportionately on particular groups of women defined intersectionally by race, class, age, geographic location etc. Finally, detailed normative, practical and structural remedies can be devised to mandate government to put in place procedures, policies, protocols, facilities and budgets to fulfil their legal and constitutional obligations to provide safe and accessible abortion services.

Whether this is possible, in the end, will depend on politics. As many have pointed out, successful rights strategies need to be embedded in wider political struggles for social justice.[139] Indeed, the 'reproductive justice' approach highlights the primary importance of politics in securing rights. Here TAC serves as an example of a case that was embedded in a

136 See Harries et al (n 134).

137 Rachel Jewkes et al, 'Why are Women Still Aborting Outside Designated Facilities in Metropolitan South Africa' (2005) 12 British Journal of Obstetrics and Gynaecology 1236; Rebecca Hodes, 'The Culture of Illegal Abortion in South Africa' (2016) 42 Journal of Southern African Studies 79.

138 See, for example, the reproductive justice approach of the Sexual and Reproductive Justice Coalition in South Africa <https://srjc.org.za/> accessed 20 April 2019.

139 Stuart Scheingold, *The Politics of Rights* (2nd ed, University of Michigan Press, 2004) 203-20.

wider mobilisation around the right to accessible and affordable treatment for poor people living with HIV/AIDS.[140] Whilst the stigma and secrecy that attach to abortion in South Africa make a similar mobilisation difficult, it remains important that litigation is firmly embedded within a broader politics that emphasises the particular needs and interests of marginalized women and communities,[141] and develops human rights approaches that address 'the structural and social conditions influencing women's abortion decisions and health outcomes, including poverty, weak health and social systems, and stigma'. [142] Of course, the reality of litigation and judicial practice will always tend to more conventional interpretations and compromises. Reproductive justice approaches might not always appear the most strategic in this context. However, even if only in a 'radical outlier' role, a more transformative and integrated embrace of reproductive rights should be engaged politically and legally as part of wider feminist struggles for reproductive justice.

140 Mark Heywood, 'South Africa's Treatment Action Campaign: Combining Law and Social Mobilization to Realize the Right to Health' (2009) 1 Journal on Human Rights Practice 14.

141 Zakiya Luna and Kristin Lukar, 'Reproductive Justice' (2013) 9 Annual Review of Law and Social Science 327; Sarah London, 'Reproductive Justice: Developing a Lawyering Model' (2011) 13 Berkeley Journal of African American Law and Policy 71.

142 Elizabeth Mosley et al, 'Abortion Attitudes Among South Africans: Findings from the 2013 Social Attitudes Survey' (2017) Culture, Health & Sexuality 1058.

Any Act, Any Harm, To Anyone: The Transformative Potential of "Human Rights Impacts" Under the UN Guiding Principles on Business and Human Rights

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Abstract

The concept of 'adverse human rights impacts' introduced by the UN Guiding Principles on Business and Human Rights is frequently used in institutional, activist and scholarly discourse. However, the term is underexplored and usually equated with 'human rights violation', occluding its transformative potential. This article demonstrates its expansiveness and rationale: 'impacts' cover any business act which removes or reduces an individual's enjoyment of human rights. The formula is designed to capture business acts that are not paradigmatically understood as human rights violations but that nonetheless cause harmful outcomes. This can encompass, inter alia, acts which reduce market access to essential goods, harm caused by business-related tax abuse, and business contributions to climate change. The extra-legal concept provides an authoritative argumentative framework through which social understandings of business-related harm can evolve and can underlie a transformative shift in the business-society relationship.

Keywords: UN Guiding Principles on Business and Human Rights; Adverse Human Rights Impacts; International Covenant on Economic, Social and Cultural Rights; Business and Human Rights; Global Justice.

1. Introduction

The UN Guiding Principles on Business and Human Rights (UNGPs) were endorsed by the UN Human Rights Council in 2011. [1] They implement the 'Protect, Respect, Remedy' Framework designed by John Ruggie in 2008, under which states have a duty to protect human rights, corporations have a responsibility to respect human rights, and both parties have differentiated responsibilities to provide access to a remedy in case of breach. [2] They

1 Office of the High Commissioner of Human Rights (OHCHR), 'Guiding Principles on Business and Human Rights' (2011) HR/PUB/11/04.

2 Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 'Protect, Respect and Remedy: A Framework for Business and Human Rights' (2008) A/HRC/8/5.

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have since been incorporated into various international and domestic instruments and are described as having 'definitively changed the lingua franca' of business and human rights (BHR).[3] The UNGPs introduce the concept of 'human rights impacts' in Principle 13, which Ruggie describes as 'the central Guiding Principle regarding the corporate responsibility to respect human rights'. [4] Businesses are responsible for those adverse impacts they cause, contribute to, or are 'directly linked to... by their business relationships'. [5] Firms should also proactively investigate their own impacts through a process of human rights due diligence (HRDD).[6]

This article investigates the definition and scope of 'human rights impacts'. As McCorquodale and others argue, 'impacts' have been understood as synonymous with violations, in practice largely limiting the scope to legal and regulatory infractions.[7] This is a narrow and prima facie incorrect interpretation of the term that negates its transformative potential. The Office of the High Commissioner for Human Rights (OHCHR) guidance on the corporate responsibility to respect human rights defines the term as follows: '[a] n "adverse human rights impact" occurs when an action removes or reduces the ability of an individual to enjoy his or her human rights.' [8] To summarize, I argue that 'impacts' expands well beyond the scope of legal infractions to capture a much wider range of harms. Most importantly, it captures the harmful outcomes of non-violative, or legally-permitted, acts. Any business 'act' that impacts any 'individual' is covered insofar as the act causes the outcome of a 'removal or reduction' in rights enjoyment. The notion of 'reducing' rights enjoyment is particularly important for socio-economic rights, where corporate acts may quantitatively reduce access to a right through legal and ostensibly legitimate business practices.

One such example is provided by the UN Special Rapporteur (UNSR) on the right to housing.[9] She reported in 2017 on the extensive harm caused by corporations through 'the financialization of housing', wherein housing is treated as a commodity and local communities are left at the whims of speculators and corporate landlords.[10] A corporation investing in housing is not, by most definitions of the term, violating the human rights of individuals in that community. But, where they are furthering extreme price inflation,

3 Surya Deva, 'Business and Human Rights: Time to Move Beyond the Beginning' in Cesar Rodriguez Garavito (eds), *Business and Human Rights* (CUP 2017) 62.

4 John Ruggie, 'Comments on Thun Group of Banks: Discussion Paper on the Implications of UN Guiding Principles 13 & 17 in a Corporate and Investment Banking Context' (2017) <https://www.ihrb.org/uploads/submissions/John_Ruggie_Comments_Thun_Banks_Feb_2 017.pdf> accessed 21 June 2019.

5 'Guiding Principles' (n 1) Principle 13 (a) and (b).

6 ibid Principle 17.

7 Robert McCorquodale and others, 'Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises' (2017) 2 Business and Human Rights Journal 195, 198.

8 OHCHR, 'The Corporate Responsibility to Respect Human Rights - An Interpretative Guide' (2012) HR/PUB/12/02 5.

9 UN Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, 'The Financialization of Housing' (2017) A/HRC/34/51.

10 ibid [27].

as occurs in Hong Kong and London,[11] and targeting lowerincome individuals, as the investment company Blackstone is specifically accused of doing,[12] they would appear to meet the definition of an adverse impact in that they are 'reducing' the ability of those individuals to enjoy the right to housing. In legal terms, they are retrogressing the 'affordability' criterion of the right to housing.[13] There is an evident trend towards using the 'impacts' framework to capture a wider range of business harms, including housing[14] as well as tax avoidance[15] and climate change.[16] These arguments have however not fully elaborated the scope of 'impacts', and are vulnerable therefore to the claim that they are overreaching.[17] The aim of this article is therefore to elaborate the scope of 'impacts', and thereby to solidify these arguments.

'Impacts' should be read in light of Ruggie's argument that 'the business and human rights debate needs to expand beyond establishing individual corporate liability for wrongdoing [because] an individual liability model alone cannot fix the larger imbalances in the system of global governance.' [18] The understanding of 'impacts' elaborated herein carries two major benefits. First, 'impacts' offers an expansive moral norm: corporations should not remove or reduce any individual's rights by any means. The second benefit relates to the enforcement technique proffered in the UNGPs. Numerous corporate acts may 'reduce' some individuals' rights enjoyment, including downsizing and increasing prices of essential goods. Not all such acts should be absolutely prohibited - 'impacts' as a hard legal standard would be unworkable. However, the UNGPs are grounded in 'social norms'.[19] As such, 'impacts' provides an authoritative argumentative framework

11 ibid [26].

12 Mandates of the Working Group on the issue of human rights and transnational corporations and other business enterprises and the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, 'Letter to the Blackstone Group' (2019) OL OTH

13 Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No. 4: The Right to Adequate Housing' (1991) E/C.12/1992/23 [8(c)].

14 UN Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, 'The Financialization of Housing' (n 9) [62]-[66].

15 Shane Darcy, 'The Elephant in the Room: Corporate Tax Avoidance & Business and Human Rights' (2016) 2(1) Business and Human Rights Journal 23.

16 Greenpeace Southeast Asia and Philippine Rural Reconstruction Movement, 'Petition To the Commission on Human Rights of the Philippines Requesting for Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations Resulting from the Impacts of Climate Change' (2015) cited in Sara Seck, 'Revisiting Transnational Corporations and Extractive Industries: Climate Justice, Feminism, and State Sovereignty' (2016) 26 Transnational Law & Contemporary Problems 383.

17 David Scheffer, 'The Ethical Imperative of Curbing Corporate Tax Avoidance' (2013) 27(4) Ethics & International Affairs 361, 365.

18 John Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) 101(4) American Journal of International Law 819, 839.

19 John Ruggie, 'The Social Construction of the UN Guiding Principles on Business & Human Rights' (2017) HKS Working Paper No. RWP17-030, 15 <https://ssrn.com/abstract=2984901>.

through which social understandings of what constitutes harmful business impacts upon human rights can evolve. [20] Individuals in Hong Kong can turn the framework to their housing problems; those most suffering under climate change can use it to contest the adverse impacts suffered therein; as can those in states where human rights protection is weakened by tax abuse. As such, 'impacts' can help marshal arguments to contest business practices based on the ensuing human rights harm, while the framework can reflexively assist BHR in moving beyond what Wettstein terms 'human rights minimalism'.[21]

The article proceeds as follows: I first describe the importance of 'strict responsibility' for human rights impacts, and then discuss contemporary understandings, showing the prevalence of the idea that 'impacts' correlate to 'violations'. I return to Ruggie's background to better understand his priorities, and then deconstruct 'impacts' to demonstrate its wide scope. I discuss the role of impacts as an argumentative framework, and finally highlight the transformative potential of the term in capturing structural harm, power, and socio-economic justice, before concluding.

2. Strict Responsibility for Human Rights Impacts

To reiterate, '[a]n "adverse human rights impact" occurs when an action removes or reduces the ability of an individual to enjoy his or her human rights.'[22] Businesses have a responsibility to prevent, mitigate and remedy those impacts which they cause or to which they contribute and they have a responsibility to use their leverage over third parties where they are 'linked to' an impact by the business relationship.[23] A 2017 debate in *The European Journal of International Law* clarified that corporations have 'strict responsibility', akin to strict liability under tort law, for at least those impacts which they cause or to which they contribute. [24] The debate revolved around what Bonnitcha and McCorquodale argue are two different conceptions of HRDD evident in the UNGPs. The first is as a process or method by which to understand and manage business risks, the second is as a standard of conduct, with the latter potentially exculpating the firm from responsibility. Under the process approach, HRDD is a tool designed to help businesses understand their risks, but correct application of HRDD does not provide a defence. Rather, the firm is 'strictly responsible' for all harm caused regardless of their HRDD practices.

20 John Ruggie, 'Taking Embedded Liberalism Global: The Corporate Connection' in John Ruggie (ed), *Embedding Global Markets: An Enduring Challenge* (Routledge 2008) 232, 232.

21 Florian Wettstein, 'CSR and the Debate on Business and Human Rights: Bridging the Great Divide' (2012) 22(4) Business Ethics Quarterly 739, 741-45. It must be noted that Wettstein alleges that the UNGPs are part of this minimalism, in part because reliance on 'respect' ignores the 'protect' and 'fulfil' elements of human rights.

22 OHCHR, 'Responsibility to Respect' (n 8) 5.

23 Guiding Principles (n 1) Principle 13(a) and (b).

24 Jonathan Bonnitcha and Robert Mccorquodale, 'The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights' (2017) 28 European Journal of International Law 899, 912.

The standard of conduct approach has some equivalence to negligence under tort law, where if the firm can demonstrate that it has met the required standard of conduct for HRDD, it is not responsible for the harm caused on the grounds that it took adequate safeguarding measures. HRDD in this reading becomes a proxy for a meeting a common law duty of care.[25]

The authors argue that this latter standard applies only to human rights impacts which are 'linked to' the firm, i.e. to which the company in question is not directly contributing.[26] The conceptualization of HRDD as a risk management process applies to causal and contributory impacts. This does not function as a defence and therefore '[b]usinesses have a strict – or no fault – responsibility for their own adverse human rights impacts.' [27] This therefore 'establishes a clear line of accountability for remediation to victims under Guiding Principle 22'.[28] Ruggie and Sherman, in reply, argue that this 'falls short' of the UNGPs. [29]

Responsibility is contingent solely on the impact itself, suggesting that strict responsibility applies in all situations, with the distinction being that for linked harms leverage over the other actor should be used, rather than incurring direct remedial responsibility.[30]

This means that for both Ruggie and Sherman, and Bonnitcha and McCorquodale, firms at least hold a no fault responsibility for any adverse impact which they cause or to which they contribute. Ruggie and Sherman suggest it extends to impacts which are 'linked to' the firm as well. [31] Bonnitcha and McCorquodale argue that this is an ethically correct standard because '[b]oth states and businesses are complex institutions. Notions of fault, which reflect ideas about the moral culpability of natural persons, are less relevant to harm caused by states and corporate actors.'[32] Bonnitcha and McCorquodale consider this statement only as an incentive to undertake meaningful HRDD, as per the scope of their argument.[33] But perhaps more interesting is what this means for the term 'impacts'.

The notion of strict, no fault responsibility for adverse human rights impacts opens up the scope of impacts in ways which are particularly important to human rights protection in the global economy. Corporate acts frequently 'remove or reduce' an individuals' human rights in ways that cannot be captured by a system predicated on legal liability, in which negligence or 'moral culpability' must be proven. There is no necessary moral fault in an investment that increases rent prices and thereby endangers individuals' right to housing,

25 ibid 903.

26 ibid 919.

27 ibid 912.

28 ibid 918.

29 John Ruggie and John Sherman, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale' (2017) 28 European Journal of International Law 921, 922

30 ibid 926-8; Jonathan Bonnitcha and Robert Mccorquodale, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights: A Rejoinder to John Ruggie and John Sherman' (2017) 28 European Journal of International Law 929, ft 9.

31 Ruggie and Sherman, 'Reply' (n 29) 926.

32 Bonnitcha and McCorquodale, 'Concept' (n 24) 916.

33 ibid.

but it is an act that 'reduces human rights enjoyment'. It is therefore an impact for which the company bears strict responsibility.[34] This appears to be coherent with both sets of authors' positions. It is, however, a long way from how impacts are popularly understood today. I review this understanding next.

3. The Contemporary Understanding: Impacts as Violations

In this section I make two arguments: first, that the scope of 'impacts' is rarely explicated, particularly at intergovernmental and state level. Second, that it is generally assumed to be coterminous with 'violations', defined as legal or quasi-legal infractions of relational human rights standards. The term violation is itself frequently undefined, or inadequately defined, in the literature. I use the term 'violation' in the sense propounded by several BHR scholars, cited below, which depicts violation to mean a specific legal infraction, generally producing specified claimant victims that is, or should be, justiciable.[35] This is narrower than the term violation as applied to state obligations, [36] and much narrower than the scope of 'impacts'. A few comparisons may help fully explicate the distinction. Labour rights violations such as non-payment of wages meet the criteria in that there is a specific legal breach producing a definitive victim, as would the unlawful destruction of individuals' homes or the poisoning of individuals' farmland. Acts by investors which increase house prices are legally permitted and, as they affect market prices, do not generally establish legal claims even where they 'reduce rights enjoyment'.

Deva provides the most complete textual analysis of 'impacts'. [37] In essence, he describes the term as I will, drawing attention to the 'wider scope' as compared to 'violation'. [38] Impacts, Deva argues, cover even harms that breach no legally framed human rights rules.[39] Deva is however critical of the wider scope, arguing that is fosters indeterminacy and a relative lack of normative force. [40] He goes on to argue that the term 'impact' 'shifts the focus from the breach of obligations implicit in the notion of 'violation' to companies

34 This specific example is used in the report of the UN Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, 'Financialization' (n 9) [5], [25]-[27], [37].

35 See Kenneth Roth, 'Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organisation' (2004) 26 Human Rights Quarterly

36 Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (Hart 2009) 93-95.

37 Surya Deva, 'Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (CUP 2013) 78, 99.

38 ibid 98.

39 ibid.

40 ibid.

merely affecting adversely the ability of a person to enjoy human rights'.[41] This 'devalue[s]' human rights'.[42] Deva defines violation as the 'causation of legal injury to [an identified set of people] in terms of a breach of human rights',[43] and sees the prevention and remedy of such harm as at least the primary goal of BHR. In his analysis therefore, 'impacts' cover an expansive range of acts, but this is problematic because it moves away from the harder criteria of human rights violations.

These arguments may be one reason why 'impacts' have been taken as largely coterminous with 'violation' today, used here in the sense defined by Deva, and similarly by Ramasastry as the breaching of 'legal or quasilegal obligations'.[44] McCorquodale et al. claim that '[t]he UNGPs do seem to establish that the 'human rights impacts' of companies should be interpreted in the same way as 'human rights violations''.[45] However, the basis for this deduction is unclear. By way of explanation they write:

> *While 'human rights impacts' is not defined in the GPs, it does seem to be equated there with human rights violations under international law. The Commentary on Principle 12 makes clear that 'business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights', with the examples given of these rights being the major global human rights treaties and instruments.*[46]

There is no positive basis to assume that the UNGPs equate impacts with violations under international law. First, while the UNGPs document does not define 'impacts', the OHCHR's official guidance document, drafted 'in full collaboration' with John Ruggie and designed to 'provide additional background explanation to the Guiding Principles to support a full understanding of their meaning and intent' does offer the definition supplied above.[47] The authors do not state how they define 'violation', but if we accept the 'causation of legal injury' definition then 'impacts' seems significantly broader than 'violations'. Very few experts would be comfortable with a definition of human rights violations as any act which 'removes or reduces the ability of an individual to enjoy his or her human rights'. Moreover, Ruggie himself is staunchly critical of the legalistic approach and has explicated that human rights law provides 'the list' of rights to be respected, but how they should be respected is unique to the UNGPs, with 'impacts' forming a central feature of that uniqueness.[48]

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41 ibid 97.

42 ibid.

43 ibid 98.

44 Anita Ramasastry, 'Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability' (2015) 14 Journal of Human Rights 237, 240.

45 McCorquodale and others, 'Due Diligence' (n 7) 199.

46 ibid ft 18.

47 OHCHR, 'Responsibility to Respect' (n 8) 2-4.

48 John Ruggie, *Just Business: Multinational Corporations and Human Rights* (WW Norton & Company 2013) 96.

However, it is true that in practice 'impacts' have been equated with 'violations', as the authors show through an empirical survey of the business understanding of HRDD. Legal and regulatory compliance and reputational risk are the main factors driving the process. [49] Legal and regulatory compliance suggest an understanding of impacts as coterminous with violations of at least the lex feranda as may be normatively enforced by voluntary regulation. This approach is popular among corporations because it both restricts the scope of their human rights responsibility and makes it relatively simple to manage.[50] It also leads to what many have condemned as a 'check-box' approach to human rights responsibilities.[51] One typical example is the use of factory auditing to check for violations of specific human and labour rights abuses in supply chains.[52] Reputational risk is potentially broader than regulatory compliance, though the authors offer no examples of what is considered a reputational risk. This fuzzier concept requires social norms promotive of expansive understandings of 'impacts', and this has been lacking in the violations-centric discourse thus far.

A paradigmatic case of assuming impacts mean legal violations is a 2016 volume, *Corporate Responsibility for Human Rights Impacts: New Expectations and Paradigms.* [53] Many distinguished scholars contribute chapters, but primarily from the perspective of legal or regulatory compliance. Despite the term 'human rights impacts' being derived from the UNGPs, 'impacts' are taken to be legal infractions. In the words of one reviewer, '[t]he book focuses on the question of legal accountability of corporations for human rights violations.'[54] There is therefore a radical problem with the book, in that many chapters assume that impacts and violations are one and same, and therefore treats the UNGPs as a weak interpretation of the law.[55] The wording of impacts goes unconsidered, as does the potentially more expansive scope.

There are numerous areas in which one could seek understandings of impacts.

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49 McCorquodale and others, 'Due Diligence' (n 7) 201.

50 Christian Scheper, 'From Naming and Shaming to Knowing and Showing: Human Rights and the Power of Corporate Practice' (2015) 19(6) The International Journal of Human Rights 737; Ciarán O'Kelly, 'Human Rights and the Grammar of Corporate Social Responsibility' (2019) Social and Legal Studies 1.

51 Richard Locke, Matthew Amengual, and Akshay Mangla, 'Virtue Out of Necessity? Compliance, Commitment, and the Improvement of Labor Conditions in Global Supply Chains' (2009) 37(3) Politics and Society 319, 327-29.

52 Justine Nolan, 'Business and Human Rights: The Challenge of Putting Principles into Practice and Regulating Global Supply Chains' (2017) 42(1) Alternative Law Journal 42, 44.

53 Lara Blecher, Nancy Kaymar Stafford, and Gretchen C. Bellamy (eds), *Corporate Responsibility for Human Rights Impacts: New Expectations and Paradigms* (ABA Book Publishing 2015).

54 Judith Schrempf-Stirling, 'Review of 'Corporate Responsibility for Human Rights Impacts: New Expectations and Paradigms' in Lara Blecher, Nancy Kaymar Stafford, and Gretchen C. Bellamy (eds), *Corporate Responsibility for Human Rights Impacts: New Expectations and Paradigms* (ABA Book Publishing 2015)' (2016) 26 Business Ethics Quarterly 265, 265.

55 Penelope Simons, 'International Law's Invisible Hand and the Future Corporate Accountability for Violations of Human Rights' in Lara Blecher, Nancy Kaymar Stafford, and Gretchen C. Bellamy (eds), *Corporate Responsibility for Human Rights Impacts: New Expectations and Paradigms* (ABA Book Publishing 2015).

I will focus on National Action Plans (NAPs), documents drafted by states detailing their implementation of the UNGPs. The most obvious commonality among practical guidance documents is a lack of engagement with the meaning of the term 'impacts'. The OHCHR guidance on NAPs provides no explanation of the term, despite defining NAPs as: 'An evolving policy strategy developed by a State to protect against adverse human rights impacts by business enterprises.'[56] The guidance explicates where potential impacts should be investigated, such as trade agreements, extraterritorial impacts, and investment agreements,[57] but fails to define what constitutes an impact. State NAPs then follow suit, failing to define the term but implicitly viewing impacts as coterminous with violations. The updated UK NAP states that firms should 'comply with all applicable laws and respect internationally recognized human rights [and] treat as a legal compliance issue the risk of causing or contributing to gross human rights abuses wherever they operate'. [58] The terminology is that of legal compliance, 'gross abuses', or else vague. There is no discussion of UKbased business impacts on the right to food or health, of zero-hour contracts, of business links to rising use of food banks or domestic homelessness, and no discussion of the impacts of tax avoidance, despite British banks being heavily implicated in its global facilitation.[59] For the UK government, 'impacts' mean legally-defined or 'gross' human rights violations, and this has not been challenged.

This same narrow scope is being drafted into national laws. The French Duty of Vigilance Law, based on HRDD, states that all large companies must implement a vigilance plan. 'The plan shall include the reasonable vigilance measures to allow for...the prevention of severe violations of human rights and fundamental freedoms...'[60] The technique of HRDD is transposed into the law, but the expansiveness of impacts is specifically denied by the change in terminology. Differentiated scopes at binding and non-binding levels are reasonable, but a full understanding of the breadth of 'impacts' would encourage critique and evolving incremental expansions of what the French law could include.

Finally, some posit an expansive understanding in seeking to capture specific harms as human rights impacts, of which climate change and, as described here, tax abuse, are the two most common. Tax abuse, the term adopted by Shane Darcy which encompasses both tax avoidance and tax evasion, is a major contemporary issue.[61] The EU loses €60 billion a year;[62] the Democratic Republic of Congo lost double its combined annual health

56 UN Working Group on Business and Human Rights, 'Guidance on National Action Plans on Business and Human Rights' (2016) <https://www.ohchr.org/Documents/Issues/Business/UNWG_NAPGuidance.pdf> accessed 24 June 2019.

57 ibid 2, 26.

58 HM UK Government, 'Good Business Implementing the UN Guiding Principles on Business and Human Rights Updated May 2016' (2016) Cm 9255 14.

59 John Christensen, 'Africa's Bane: Tax Havens, Capital Flight and the Corruption Interface' (2009) Elcano Working Paper 1, 17.

60 Sandra Cossart, Jérôme Chaplier and Tiphaine Beau De Lomenie, 'The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All' (2017) 2 Business and Human Rights Journal 317, 320.

61 Darcy (n 15) 2.

62 Gabriel Zucman, 'The desperate inequality behind global tax dodging' *The Guardian* (London, 8 November

and education budget from a case of transfer mispricing. [63] Asongu discusses Glencore's transfer mispricing in Zambia, stating that in 2008: 'if Zambia had received for its copper exports the same price that Switzerland declared for its copper exports... Zambia's GDP would have nearly doubled.'[64]

Because tax abuse is a major business-related issue, arguments have been made that it should be considered a human rights impact. UNSR on extreme poverty and human rights, Magdalena Sepúlveda Carmona, argues that tax avoiders would be in breach of the responsibility to respect, 'insofar as they have a negative human rights impact'.[65] For Darcy, '[t]here is little doubt that negative human rights impacts can be linked to the abusive tax activities of accountancy, tax and law firms, banking and other financial services providers, as well as multinational and other companies that have knowingly engaged in tax avoidance.'[66] With such arguments, the potential of the UNGPs 'is beginning to be harnessed'. [67] Juan Pablo Bohoslavsky, the UN Independent Expert on the effects of foreign debt and other related international financial obligations of states on the full enjoyment of all human rights, particularly economic, social and cultural rights, states that:

> *Business enterprises that contribute through transfer mispricing, tax evasion or corruption to significant illicit financial outflows cause adverse human rights impacts by undermining the abilities of States to progressively achieve the full realization of economic, social and cultural rights.*[68]

Tax abuse uncovers the gap between the 'violation' and 'impacts' paradigm. Tax avoidance is like 'taking food off the table for the poor',[69] yet it is not widely-understood as a prima facie human rights violation.[70] Indeed, the act reduces state budgets and thereby potentially undermines state protection of rights, but technically it is the incapacitated state that may be at risk of violating rights through non-provision of essential services. This is the problem of

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2017) <https://www.theguardian.com/commentisfree/2017/nov/08/tax-havens-dodging-theftmultinationals-avoiding-tax?CMP=Share_AndroidApp_Gmail> accessed 23 July 2018.

63 Isabel Mosselmans, 'Tax Evasion: The Main Cause of Global Poverty' (LSE Blogs, 7 March 2014) <http://blogs.lsc.ac.uk/africaatlse/2014/03/07/tax-evasion-the-main-cause-ofglobal-poverty/> accessed 23 July 2018.

64 Simplice Asongu, 'Rational Asymmetric Development: Transfer Mispricing and SubSaharan Africa's Extreme Poverty Tragedy' (2015) African Governance and Development Institute Working Paper 7, 17 <https://mpra.ub.uni-muenchen.de/71175/1/MPRA_paper_71175.pdf> accessed 27 June 2019.

65 UN Special Rapporteur on extreme poverty and human rights, 'Fiscal and Tax Policy' (2014) A/HRC/26/28 [7].

66 Darcy (n 15) 23.

67 ibid 29.

68 Interim report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, 'Illicit financial flows, human rights and the post-2015 development agenda' (2015) A/HRC/28/60 [33]-[34].

69 As quoted in Darcy (n 15) 11.

70 CESCR, 'General Comment No. 24: on state obligations under ICESCR in the context of business activities' (2017) E/C.12/GC/24 [37].

the violations paradigm in contesting global corporate economic activity and its potentially harmful impacts on rights. 'Impacts' overcomes this by encompassing all acts that 'reduce' rights enjoyment, including by contributing to that reduction. If a state claims that tax abuse has reduced its ability to ensure certain human rights provisions, this would constitute an authoritative argument that the act of tax abuse has contributed to reduced access to that right.[71] This bypasses problems of establishing legal fault and finding claimant victims, while in so doing providing powerful human rights arguments against tax abuse.

The meaning of 'impacts' is contested, and expansive understandings exist, but the most common understanding, particularly at the institutional level, connects impacts to legal infractions. To build the more expansive argument, I first review how Ruggie perceives corporate responsibility, his underlying framework, and his priorities for the UNGPs.

4. Reading Ruggie

Ruggie has two major epistemic frameworks that informed the UNGPs. He believes in a post-Westphalian, polycentric world that is organized through the 'global public domain' comprised of states, businesses, activists and other important actors. [72] This angle has been extensively discussed through the lens of polycentric governance.[73] His second belief is more normative. This is grounded in his concept of embedded liberalism and focuses on making markets and market actors work in the social interest. While polycentricity critiques reliance on hard law and state-based regulation, embedded liberalism can be used to critique legalistic human rights concerns. Reifying this latter aspect counters the view that the UNGPs are merely soft law;[74] rather, they are soft to allow greater ambition than could legalistically-framed principles.

Many scholars have analysed Ruggie's interim reports to the UN during the UNGPs drafting process. However, these reports are technical and descriptive in nature and give little away regarding the philosophy underlying them. For example, in the 2008 report Ruggie 'focused on identifying the distinctive responsibilities of companies in relation to human rights',[75] but Ruggie did not provide a conceptual framework to explain how these

71 This example is similar to the contributory impact of a bank loan potentially 'enabling' a human rights violation by the recipient. Tax abuse 'disables' the potential for states to protect rights, see Ruggie, 'Thun' (n 4).

72 John Ruggie, 'Reconstituting the Global Public Domain — Issues, Actors, and Practices' (2004) 10 European Journal of International Relations 499.

73 Larry Cata Backer, 'On the Evolution of The United Nations' "Protect-Respect-Remedy" Project: The State, the Corporation and Human Rights in a Global Governance Context' (2011) 9 Santa Clara Journal of International Law 37, 126; John Ruggie, 'Global Governance and New Governance Theory: Lessons from Business and Human Rights' (2014) 20 Global Governance 5; Radu Mares, 'Decentering Human Rights from the International Order of States: The Alignment and Interaction of Transnational Policy Channels' (2016) 23(1) Indiana Journal of Global Legal Studies 171-199.

74 Justine Nolan, 'The Corporate Responsibility to Respect Human Rights: Soft Law or Not Law?' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (CUP 2013) 138.

75 Special Representative of the Secretary-General on the issue of human rights and transnational corporations

choices were made. Ruggie admits as much in noting his own 'failure to provide a robust moral theory'. [76] His 'principled pragmatism' forbade such an option, since UN Human Rights Council approval was necessary.[77] He therefore focused on creating a document that was 'pushing the envelope, but not out of reach'.[78] This is part of what Mares has termed Ruggie's 'strategic ambiguity',[79] in which the UNGPs state few concrete implications for business but rather offer a framework encouraging norm-evolution. Although it is not my intention to surmise Ruggie's personal, unstated, concerns, it is worth addressing his own academic background for a hint as to his normative priorities.

Ruggie's most telling contribution to academia is the concept of embedded liberalism.[80] This states that in the period roughly from the end of WWII until the neoliberal era emerged around the 1980s, the world trade system was characterized by a 'grand bargain' between trade liberalization and domestic social policy. [81] Serious diversions from free trade were permitted under the General Agreement on Tariffs and Trade (GATT), which allowed domestic economies to be managed in the social interest.[82] In Ruggie's words 'economic liberalization was embedded in social community.' [83] Elsewhere he describes this as a 'domestic social compact. Governments asked their publics to embrace the change and dislocation that comes with liberalization in return for help in containing and socializing the adjustment costs.'[84] The neoliberal era ruptured this, characterized most clearly by the redefinition of a trade barrier to include 'behind the border' barriers such as subsidies and environmental policies.[85] This change allowed experts comprising the free trade regime to critique almost every state policy on the grounds of it disrupting trade. The tuna/dolphin cases between the US and Mexico, each predicated on the legality under World Trade Organization rules of the US prescribing that all tuna sold in the US must be 'dolphin-safe', is one example of this tendency.[86] This instigated a much more radical, interventionist, and

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and other business enterprises 'A Framework for Business and Human Right' (n 2) [53].

76 Ruggie, *Just Business* (n 48) 107.

77 ibid.

78 ibid.

79 Radu Mares, ' " Respect" Human Rights: Concept and Convergence'in Robert Bird and others (eds), *Law, Business and Human Rights: Bridging the Gap* (Edward Elgar 2014) 234.

80 John Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order' (1982) 36 International Organization 379.

81 John Ruggie, 'Taking Embedded Liberalism Global: The Corporate Connection' in David Held and Mathias Koenig-Archibugi (eds), *Taming Globalization: Frontiers of Governance* (Wiley 2008) 232.

82 John Ruggie, 'At Home Abroad, Abroad at Home: International Liberalisation and Domestic Stability in the New World Economy' (1995) 24(3) Millennium 507.

83 ibid.

84 John Ruggie, 'Trade, Protectionism and the Future of Welfare Capitalism' (1994) 48(1) Journal of International Affairs 1, 4-5.

85 Andrew Lang, 'Legal Regimes and Professional Knowledges: The Internal Politics of Regime Definition' in Margaret Young (ed), *Regime Interaction in International Law: Facing Fragmentation* (CUP 2012) 113, 117.

86 Jeffrey Dunoff, 'Institutional Misfits: The GATT, the ICJ and Trade-Environment Disputes' (1994) 15 Michigan Journal of International Law 1043.

less socially-protective free trade system.[87]

Ruggie's academic work is frequently underpinned by his belief that globalization has broken down this domestic social compact, and that there is a need to globalize a grand bargain between market actors and society.[88] 'What is needed...is a new embedded liberalism compromise, a new formula for combining the twin desires of international and domestic stability',[89] he wrote in 1999. In 2001, he was instrumental in developing the UN Global Compact, a voluntary initiative that corporations could join pledging to obey nine, later ten, key principles of responsible business.[90] In 2008, he stated that '[e]mbedding the global market within shared social values and institutional practices represents a task of historic magnitude',[91] and elaborated concerns about inequality, the imbalance in global rulemaking powers, and growing 'economic instability and social dislocation'.[92] At the 2016, UN Forum on Business and Human Rights he argued that exploitative economic structures were linked to 'populist forces [that] involve people who have been left behind by the liberalization and technological innovations.' [93] A 2017 paper dealt with variants of corporate power over society and claimed that neither BHR nor Corporate Social Responsibility (CSR) discourse truly grasps the depth of this power.[94] Ruggie's view of human rights is also more holistic than legalistic. Following Sen, he argues that human rights are not just rules, but 'mediators of social relations'.[95] They emerge from society and understandings of their scope and content evolve through society.[96] Human rights can be expressed as laws, but should also provide a vehicle for social progress through 'public discussion'.[97] For Sen, human rights should evolve with society and can offer far more than just legal guarantees against oppression.[98] This element is particularly important for the idea that 'impacts' provide an argumentative framework through which claims can be made for types of harm not often considered within the scope of business responsibility, as described in Section 6.

87 Andrew Lang, *World Trade Law After Neoliberalism: Reimagining the Global Economic Order'* (OUP 2011) 238.

88 Rawi Abdelal and John Ruggie, 'The Principles of Embedded: Liberalism: Social Legitimacy and Global Capitalism' (2009) New Perspectives 151.

89 John Ruggie, 'Globalization and the Embedded Liberalism Compromise: The End of an Era?' (1998) Internationale Wirtschaft, nationale Demokratie Herausforderungen für die Demokratietheorie 79, 97.

90 Georg Kell and John Ruggie, 'Global Markets and Social Legitimacy: The Case of the Global Compact' (1999) 8(3) Transnational Corporations 101.

91 Ruggie, 'Corporate Connection' (n 81) 234.

92 ibid 236.

93 John Ruggie, 'Keynote Speech at the 2016 UN Forum on Business and Human Rights' (2016) <http://www.ohchr.org/Documents/Issues/Business/ForumSession5/Statements/JohnRuggie .pdf> accessed 23 July 2018.

94 John Ruggie, 'Multinationals as Global Institution: Power, Authority and Relative Autonomy' (2018) 12(3) Regulations and Governance 317.

95 Ruggie, 'Evolving International Agenda' (n 18) 15.

96 Amartya Sen, 'Human Rights and the Limits of Law' (2005) 27 Cardozo Law Review 2913.

97 ibid 2925; Amartya Sen, 'Elements of a Theory of Human Rights' (2004) 32(4) Philosophy & Public Affairs 315.

98 ibid.

Given Ruggie's long-held belief in the virtues of embedded liberalism, and his extensive writings on the need for a comprehensive social compact between markets and societies,[99] it seems plausible that such ideas would be evident in the UNGPs.[100] Such a compact must go beyond preventing human rights violations (as legal infractions), because such a depiction only covers a small slither of this bargain, particularly in the socio-economic sphere. One cannot argue that an adequate social compact is in place if corporations are permitted to practice tax abuse, retrogress the right to housing, distort global food markets and damage the environment.

Ruggie drew on Iris Marion Young to build such a model.[101] Young describes her model as a supplement to the failures of theories of justice grounded in individual (legalistic) liability to address structural forms of harm.[102] Young builds expansive societal responsibilities for structuralized harms based on the argument that through global economic activity multiple groups contribute to, and can help prevent, injustice. She frames one argument around the responsibility felt by student consumers of sweatshop clothing. [103] Ruggie drew from Young's work that 'challenges arising from globalization are structural in character [and] cannot be resolved by an individual liability model of responsibility alone.' [104] The most paradigmatic definition states that: '[t]he "social connection model" of responsibility says that all agents who contribute by their actions to the structural processes that produce injustice have responsibilities to work to remedy these injustices.'[105] 'Impacts' is similarly comprehensive in stating that businesses have responsibility for any act that causes or contributes to a removal or reduction in an individuals' human rights enjoyment. As I show next, this allows arguments to be constructed around a far wider range of harmful business acts, and, properly understood, allows for a significant departure from the limits of individual liability, and towards Young's more expansive conception.

5. Re-Reading Impacts

'An "adverse human rights impact" occurs when an action removes or reduces the ability

99 John Ruggie, 'Reconstituting the Global Public Domain—Issues, Actors, and Practices' (2004) 10(4) European Journal of International Relations 499.

100 Glen Whelan, Jeremy Moon, and Marc Orlitzky, 'Human Rights, Transnational Corporations and Embedded Liberalism: What Chance Consensus?' (2009) 87(2) Journal of Business Ethics 367.

101 Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 'Corporate Responsibility Under International Law and Issues in Extraterritorial Regulation: Summary of Legal Workshops' (2007) A/HRC/4/35/Add.2.

102 Iris Marion Young, 'Responsibility and Global Justice: A Social Connection Model' (2006) 23 Social Philosophy and Politics 102, 103.

103 Iris Marion Young, 'Responsibility and Global Labor Justice' (2004) 12(4) The Journal of Political Philosophy 365.

104 Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 'Legal Workshops' (n 101) [34].

105 Young, 'Social Connection' (n 102) 102-3.

of an individual to enjoy his or her human rights.'106 Firms have strict responsibility to prevent, mitigate and/or remediate all adverse impacts that they have caused or contributed to, at least, as well as responsibility to investigate potential impacts. Breaking this term down reveals its expansiveness.

Four areas will be highlighted: the meaning of 'an action'; of 'remove or reduce'; and of 'an individual'; as well as the role of 'potential impacts'. My reading of impacts is as follows: corporations should investigate whether any of their acts, whether in the boardroom or on the factory floor, might potentially, through violation, retrogression or other means, harm any right of any individual, anywhere. [107]

The term 'an action' relates to how corporations might harm rights. 'An action' by its plain-meaning, means that any act is covered, with the judgement criterion being the 'removal or reduction' of human rights enjoyment. This is far more inclusive than understandings incorporating only acts that breach 'legal or quasi-legal rules'.[108] This has a prima facie link to tort law in that tort claims can in theory cover any action based on the harm caused, providing the other elements of tort law are also met. However, 'impacts' also goes far beyond the scope of tort law. Impacts requires neither that the act breached a legal rule nor that proximity or other tort principles be found, nor is it, like strict liability torts, restricted to a narrow scope of harms based on inherent danger and/or a high level of duty of care, as per product liability. 'Impacts' explicitly encompass any act that leads to the outcome of any 'removal or reduction' of rights' enjoyment.

This wide, extra-legal scope is clear from some examples in the official guidance. The OHCHR lists one contributory impact as '[t]argeting highsugar foods and drinks at children, with an impact on childhood obesity'.[109] This is neither a criminal nor tortious legal breach in any jurisdiction in the world, albeit regulations on advertising and product standards may exist. It is a human rights impact regardless of any regulations based solely on the outcome of increased child obesity. John Ruggie has more recently argued that bank lending can constitute a contributory human rights impact where that loan has 'enabled' the impact by the recipient.[110] These examples teach a great deal about the scope of impacts, particularly when read alongside the notion of 'strict responsibility'. The fundamental rule underlying

106 OHCHR, 'Responsibility to Respect' (n 8) 5.

107 The 'any right' aspect I will address briefly as it is well understood. The UNGOs encompass the International Bill of Human Rights (the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; and the International Covenant on Economic, Social and Cultural Rights), and the principles concerning fundamental rights in the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work. All other human rights treaties 'may be relevant as additional standards'. The OHCHR guidance describes specific situations, such as armed conflict, when these additional standards become relevant, strongly implying that they form part of the responsibility to respect insofar as they are relevant to the specific business actor; OHCHR, 'Responsibility to Respect' (n 8) 11-2. As per Principle 12, the UN Guiding Principles cover all 'internationally recognized human rights'.

108 Ramasastry, 'Gap' (n 44) 240.

109 OHCHR, 'Responsibility to Respect' (n 8) 17.

110 Ruggie, 'Thun' (n 4) 2.

'impacts' is outcome-based.[111] Any act which causes or contributes to the outcome of a removal or reduction in an individual's rights constitutes an adverse impact. This means that all acts by business enterprises are within the scope of impacts if they remove or reduce rights' enjoyment. There is therefore no prima facie exclusion of investment firms, housing developers, or the facilitators of tax abuse; a boardroom choice with repercussive impacts on a human right is just as relevant to the framework as a direct violation such as a boss not paying a worker. The impact is the only relevant factor.

This then makes the term 'removes or reduces' rights enjoyment the crucial element. While the 'removal' of an individual's rights enjoyment suggests its complete violation (i.e. the destruction of a home or instigation of torture), the term 'reduce' expands the scope beyond the compliance/violation legal paradigm. The term 'reduce', which is uncommon in legal or other rights discourse, is likely designed to encompass a wider range of harm to rights, most obviously, in the language of human rights law, 'retrogressions' of rights, without using legal language that may have perturbed states. The term 'reduce' is similar to 'retrogress' in that both are quantitative terms. 'Reduce' means to 'make less in amount', [112] while 'retrogression' is defined as a 'de facto, empirical backsliding in the effective enjoyment of rights',[113] for example, a reduction in the availability of food. Under the International Covenant on Economic, Social and Cultural Rights (ICESCR) state parties undertaking 'deliberately retrogressive measures' are in violation of the Covenant unless the measure is necessary to protect the totality of rights. [114] This includes any law, policy or act that has the effect of quantitatively reducing access to the right. [115] In the Committee on Economic, Social and Cultural Rights' (CESCR) Concluding Observations on Egypt, budget cuts to health, education and housing, as well as 'increasing recourse to regressive indirect taxation' were considered to constitute retrogressive measures based on the harmful outcomes for the rights in question.[116] This may be defined as a violation of Egypt's obligations, but such retrogressive acts are rarely seen as violations by business actors.

The 'impacts' framework thereby shifts corporate responsibility closer to the more comprehensive state obligations. The purpose of the term retrogression is to capture that the macro-level backsliding of the availability of material rights is as harmful to rights as traditional legal breaches. 'Impacts', by covering acts which 'reduce the ability of an individual to enjoy his or her human rights', must include any business practices that retrogress access to human rights. Encompassing retrogressive acts renders the 'impacts'

111 This element is further discussed in David Birchall, 'The Consequentialism of the UN Guiding Principles on Business and Human Rights: Towards the Fulfilment of "Do No Harm"' (2019) 24(1) Electronic Journal of Business Ethics and Organization Studies 28.

112 Oxford Dictionaries, 'Reduce' <https://en.oxforddictionaries.com/definition/reduce> accessed 24 June 2019.

113 Christian Courtis, Nicholas Lusiani and Aoife Nolan, 'Two Steps Forward, No Steps Back? Evolving Criteria on the Prohibition of Retrogression in Economic and Social Rights' in Aoife Nolan (ed) *Economic and Social Rights After the Global Financial Crisis* (CUP 2014) 121, 123.

114 CESCR, 'General Comment No. 3: The Nature of States Parties' Obligations' (1990) E/C.12/1991/23 [9].

115 Courtis, Lusiani and Nolan, 'Retrogression' (n 113Error! Bookmark not defined.) 1234.

116 CESCR, 'Concluding Observations: Egypt' (2013) E/C.12/EGY/CO/2-4 [6].

framework particularly expansive and far beyond legal practice as applied to corporations. The example above of increasing house and rental prices caused by investment companies constitutes a retrogression in the affordability of housing. It is not a legal breach under any domestic law and it is not a tortious wrong.[117] It is, however, a human rights impact insofar as it is reducing individuals' access to affordable housing, one of the seven core criteria of the right.

One possible counterargument is that under the UNGPs firms do not have positive responsibilities to realize human rights. An impact can only be negative. Therefore, it may be claimed that housing investments are positive actions engendering no responsibilities. A company that was providing housing, food or healthcare and is now providing less or a less affordable version, has merely reduced its contribution to the fulfillment of rights. However, this is not the way impacts is framed. A business act that causes any kind of reduction constitutes an impact. Such adverse impacts should best be seen as 'active negative' responsibilities. An active negative responsibility is one in which the prevention of harm requires taking a positive action, and as such it remains part of the 'respect' pillar.[118]

Ruggie has mentioned active negative responsibilities such as implementing a workplace anti-discrimination policy to ensure nondiscrimination, [119] and health and safety policies have similar active components. The essence of 'impact' is the harm the act caused. At least where corporations have significant power over provision of a right, active negative responsibilities will be necessary to prevent adverse impacts. As the retrogression of affordable housing constitutes an adverse impact it requires that companies involved in housing take steps to prevent, mitigate and remedy the impact. It is reasonable that debates take place around the precise limits of this responsibility, as the grounding in 'social norms' encourages, but the wording of 'impacts' creates a paradigm capable of capturing such harmful acts.

The third aspect related to the precise terminology is that it applies to 'an individual to enjoy his or her human rights'. We have already captured any act, and any form of harm. This completes the triad by reinforcing that it applies to anyone, anywhere, thus clarifying the global scope of impacts. An adverse impact occurs if any individual, anywhere, is harmed. It does not matter what kind of relationship the 'victim' has with the corporation, nor how distant the harm may be. As Ruggie has argued in a critique of the 'sphere of influence' depiction of responsibility, corporate impacts ripple around the world, affecting individuals far removed from the source of the issue.[120] It means that managers must consider globally repercussive impacts. This is bolstered by one criterion of 'severe' impacts being the 'scope', that is, the number of people harmed.[121] Such a concept is

117 For example, no constitutional or civil cases have ever been brought successfully over this matter.

118 Florian Wettstein, 'Making Noise About Silent Complicity: The Moral Inconsistency of the 'Protect, Respect, Remedy' Framework' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (CUP 2013) 243, 253.

119 Special Representative of the Secretary-General on the issue of human rights and transnational corporation and other business enterprises, 'A Framework for Business and Human Rights' (n 2) [55].

120 ibid [15].

121 OHCHR, 'Responsibility to Respect' (n 8) 19.

alluded to in Ruggie's critique of the Thun Group's paper, which stated plainly that banks should lend with the repercussions of those lending choices in mind.[122] Even though the banks may never know the specific individuals that might be harmed by a specific project, they should consider how their lending may contribute to an impact.[123]

This allows an expanded look at how rights are being impacted in the global economy, and provides an argumentative basis for those who have identified a particular practice as harmful to their rights. It is not, in my view, an example of 'rights inflation', such that this dilutes the strength of human rights claims. [124] Rather, it centres the rights-holder and takes seriously the fact that human rights are being impacted through actions within the global economy in a litany of ways. Since businesses can cause harm in near infinite and evolving ways, the framework does not create a closed list of obligations (as is Ruggie's fear around a binding treaty),[125] but rather adopts an inclusive definition of what constitutes relevant harm. This is important because many forms of harm to human rights by private actors are not legal breaches and are economic in nature. The financialization of housing is a good example because it comprises a long list of corporate acts, all of which are legally-permitted, which vary by jurisdiction, and for which the same act taking place in different contexts may cause varying levels of harm, or even none at all. 'Impacts' centres the harmful outcome on rights-holders. If certain practices under the umbrella of financialization are causing harm in a particular location, this harm can be challenged. As such it centres the right to housing, rather than a set of preconceived rules within which gaps will inevitably appear. This is crucial if human rights are to be protected from harm by global economic actors.

Finally, 'potential impacts' reverse the demand for proof. Under the impacts framework, the victim does not have to show that a specific firm committed a specific violation, but rather corporations must identify their own potential impacts, including by drawing on outside expertise.[126] This reverses the logic of legalism, from setting stringent demands on the victim: 'can you show legal liability of a specific firm?' to the company: 'will this act adversely impact anyone's human rights anywhere?' Combined with the above, corporations should proactively identify whether any of their acts will reduce the rights of anyone, anywhere. By placing the onus on the outcome of corporate acts, rather than individual legal liability, 'impacts' greatly expand the scope of responsibility.

There is one crucially important final aspect to be discussed. The 'impacts' framework is not legally binding. Firms should prevent and remedy all adverse impacts, but they are not bound to do so. This ostensible weakness is in reality a product of the transformative scope of 'impacts'. As a binding legal standard it would be too onerous. As a social standard, as I show next, it provides a way of understanding BHR impacts and an argumentative

122 Ruggie, 'Thun' (n 4).

123 ibid 2.

124 Paul O'Connell, 'Human rights: Contesting the Displacement Thesis' (2018) 69(1) Northern Ireland Legal Quarterly 19.

125 John Ruggie, 'A Business and Human Rights Treaty? International Legalisation as Precision Tools' (*Institute for Human Rights and Business*, 13 June 2014) <https://www.ihrb.org/other/treaty-on-business-human-rights/a-business-and-human-rightstreaty-international-legalisation-as-precision/> accessed 24 June 2019.

126 'Guiding Principles' (n 1) Principle 18(a).

framework in which affected groups can voice concerns, ultimately offering a contestatory logic for those who suffer not from human rights violations, but under the heaving body of adverse impacts stemming from the global economy.

6. Impacts as an Argumentative Framework

The 'impacts' framework sets prohibitive limits to business activity. Losing one's job may reduce one's ability to enjoy human rights, as may a ban from a social media platform. Some impacts are very minor, some may never be known, and some are necessary to balance interests, yet all are included as impacts. However, there are some defined and some de facto limits. In the former category are severity and salience, both of which are prioritization strategies, rather than limits on the scope, though they will play a role in limiting what firms will address in practice. Severity is judged on 'scale' (seriousness), 'scope' (extent), and 'irremediability' (how difficult the harm would be to remedy).[127] 'Salient human rights issues', refer to those most likely to occur within a specific corporate operation. [128] The most salient issues 'will likely need to be the subject of the most systematized and regular attention.' [129] In the latter category, are the 'socially-binding' status of the UNGPs and the idea that firms should 'know and show' their own impacts. Firms are not legally required to undertake HRDD or consider their impacts beyond that enforced by applicable law, rather, the 'responsibility is based in a social norm', [130] defined as 'shared expectations of how particular actors are to conduct themselves in given circumstances.' [131] The real quality of impacts is in providing an authoritative argumentative framework within which social norms against corporate behaviours can develop. There is little need to worry that empowered calls of 'human rights impact' will meet every redundancy. What the framework provides is a way to both understand and contest corporate impacts.

The social grounding has been heavily criticized. Wettstein states the UNGPs 'appeal to interests rather than to morality'.[132] Cragg agrees that the 'justificatory foundation of the report is enlightened self-interest', and is based on the unpredictable social reaction to a human rights issue.[133] A basing in social costs favours 'those stakeholders with the largest impact on the company's bottom line'.[134] This is 'the ethic of instrumentalism', that 'reasserts, rather than relativizes, the primacy of profits and shareholder value'.[135] 'While

127 OHCHR, 'Responsibility to Respect' (n 8) 9.

128 ibid 8.

129 ibid 21.

130 Kell and Ruggie, 'Social Legitimacy' (n 90) 12.

131 ibid 13.

132 Florian Wettstein, 'Normativity, Ethics, and the UN Guiding Principles on Business and Human Rights: A Critical Assessment' (2015) 14 Journal of Human Rights 162, 175.

133 Wesley Cragg, 'Ethics, Enlightened Self-Interest, and the Corporate Responsibility to Respect Human Rights: A Critical Look at the Justificatory Foundations of the UN Framework' (2012) 22 Business Ethics Quarterly 9, 13-4.

134 Wettstein, 'Ethics' (n 132) 176.

135 ibid 171.

instrumental reasoning is geared to cater to the powerful, the very purpose of human rights is to protect the powerless.'[136]

The authors take the social as synonymous with the business case for human rights, which states that respecting rights improves the firm's reputation and mitigates serious risks, thereby making business sense.[137] This does encourage an instrumental approach favouring the concerns of powerful stakeholders. However, this is a limited view of Ruggie's constructivist conceptualization of social norms. Social constructivism claims that the social reality we inhabit is largely socially constructed 'by the means of commonly shared, intersubjective knowledge.'[138] Therefore, when Ruggie discusses 'social norms' he is not referring to business case instrumentalism, but rather to the norms of society at large. In each society there are harmful acts that businesses are prohibited (legally or socially) from undertaking, and harmful acts that generate minimal pushback. One key norm in need of elaboration is therefore which business acts that cause harm to human rights count as BHR issues. For the constructivist, this is an important and relatively indeterminate question. [139] Such norms are always evolving, with what constitutes discrimination being one case-inpoint.[140] Issues like tax avoidance can become relevant with enough social pressure, but this will only occur through gradual acculturation.[141]

Building intersubjective knowledge around the human rights harm resulting from such acts encourages a shift in the social understanding of BHR, and can therefore lead to powerful evolutions in rights discourse, capable, in time, of informing law. In this constructivist vein, 'impacts' should therefore be seen primarily as an argumentative framework through which social actors – from small community groups to global activists or politicians – can translate the harms of global business into human rights concerns. Sen argues that 'survival in open public discussion' is crucial for any rights-claim.[142] This is a limiting factor, but also a liberating factor from the specific technical boundaries of the legal approach. Not every claim will succeed, but as intersubjective knowledge evolves through this framework, the legitimacy of such claims should increase. As such, the socially-grounded 'impacts' framework provides a vital supplement to binding but inevitably more minimal legal frameworks.[143]

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136 ibid 176.

137 Björn Fasterling, 'Human Rights Due Diligence as Risk Management: Social Risk Versus Human Rights Risk' (2016) 2 Business and Human Rights Journal 225.

138 Tilmann Altwicker and Oliver Diggelmann, 'How is Progress Constructed in International Legal Scholarship?' (2014) 25 European Journal of International Law 425, 427.

139 Alexander Wendt, 'Anarchy is What States Make of It: The Social Construction of Power Politics' (1992) 46(2) International Organization 391.

140 Michael O'Flaherty and John Fisher, 'Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles' (2008) 8(2) Human Rights Law Review 207.

141 John Ruggie, 'What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge' (1998) 54(4) International Organization 855.

142 Sen, 'Limits of the Law' (n 96) 2925.

143 One recent study found that 'corporations and states consistently resist standards that are both strong and broad'; Tori Loven Kirkebø and Malcolm Langford, 'The Commitment Curve: Global Regulation of Business and

HRDD and firms 'knowing and showing' their own impacts assists in the creation of this knowledge.[144] While the basic rule is that all impacts should be prevented and/or remediated, there will be debates around what constitutes an impact, and companies will deny some alleged impacts. But it is more difficult for managers to argue that they should not at least investigate possible impacts. If claims are made that the actions of firm X are adversely impacting right Y, any firm concerned with its reputation, at least, should be motivated to investigate. If human rights impacts are then discovered, much stronger arguments can be made that they should be addressed. Although HRDD and 'know and show' applies to companies, it also creates incentives for others to investigate business impacts. This increases the knowledge of potential impacts that is a prerequisite for ethical business.

Finally, impacts reify a truth marginalized by legalism: that social problems are human rights problems. It is difficult to imagine a socially unpopular business act that definitively has no human rights impacts, yet many such issues are rarely discussed in human rights terms. In so doing, some groups feel under-represented in rights discourses, as Alston discusses around rising populism.[145] Drawing these links can ensure rights are respected in our increasingly corporatized and interconnected world, and 'impacts' provides the means to do so.

7. 'Impacts' as a Lens on Structural Harm, Corporate Power, and Socio-Economic Justice

In this section I want to briefly clarify the transformative potential of 'impacts'. I propose three areas occluded by a violations approach but captured by impacts: structural harm, corporate power, and socioeconomic justice.

A focus on violations occludes structural harm. Linklater defines structural harm as harm rooted in 'systemic forces',[146] and is critical of those 'who would claim so little [as constituting harm that they sought only to prevent] harming each other in the course of their interactions.' [147] This interactional view of harm equates to the violations approach rooted in legal accountability, where acts must provably harm specific individuals. Even structural harm, however, is still ultimately traced to human agency.[148] Housing crises, climate change, the 2008 global food crisis and many other possible examples, are structural in nature (the latter defined by sudden failure of the global food system to provide adequate

Human Rights' (2018) 3(2) Business and Human Rights Journal 157, 160.

144 Guiding Principles (n 1) Principle 15 (commentary).

145 Philip Alston, 'The Populist Challenge to Human Rights' (2017) 9 Journal of Human Rights Practice 1.

146 Andrew Linklater, *The Problem of Harm in World Politics: Theoretical Investigations* (CUP 2011) 60.

147 ibid 79.

148 ibid 60.

food), yet the causes can be traced to specific acts by states and corporations. [149] Calls for structural change are in reality calls for individual duty bearers to take responsibility, and 'impacts' captures the business side of this. It captures, therefore, those problems too often dismissed, as in the UN Working Group (UNWG) report on access to remedy, as requiring 'fundamental changes in social, political or economic structures' and therefore beyond the scope of accountability.[150]

Structural harm matters because of corporate power over rights, states and societies.[151] McKinsey puts total global corporate profits at $7.2 trillion, just under 10% of total global GDP. [152] Complex, corporate-managed, systems dictate the availability of many material rights, while corporate wealth exerts major pressures on other actors, not least states. This power leads to the wide gamut of potential harm beyond violations. Corporations can instrumentalize power resources in harmful ways (e.g. by lobbying states), can exercise power over structures in harmful ways (e.g. housing), and can impact individuals directly such as through employment practices. [153] Such power can cause harmful outcomes for individuals' human rights. This invokes difficult questions of responsibility at the margins that require further research, but when the instrumentalization of power resources causes discernible harm to a human right,[154] they constitute prima facie adverse impacts. Research into impacts should look at specific lobbying practices, for example, to identify whether and how they adversely impact rights.

By covering acts that 'reduce' rights enjoyment, harms to socioeconomic justice are captured, including retrogressions even from relatively high starting points. This is a major advance in a world where socio-economic rights are often theoretically realisable, but are vulnerable to systemic issues, including corporate policies. The risks inherent in financialized housing, commodified food, and through tax abuse have been cited in this area. In these sectors, business acts are reducing human rights enjoyment, but human rights law has been tentative in addressing the issues, with some arguing that it may go beyond the legitimate scope of human rights.[155] While herein I have advocated for the broad approach,

149 Olivier De Schutter, 'Transnational Corporations as Instruments of Human Development' in Philip Alston and Mary Robinson (eds), Human Rights and Development (OUP 2005) 443; UN Special Rapporteur on the right to food, 'Crisis Into Opportunity: Reinforcing Multilateralism' (2009) A/HRC/12/31 [21].

150 Working Group on the issue of human rights and transnational corporations and other business enterprises, 'Access to Effective Remedies' (2017) A/72/162 [16].

151 Florian Wettstein, *Multinational Corporations and Global Justice: Human Rights Obligations of a Quasi-Governmental Institution* (Stanford University Press 2009); Susan Strange, States and Markets (Bloomsbury 2015).

152 McKinsey Global Institute, *'Playing to Win: The New Global Competition For Corporate Profits'* (2015) <https://www.mckinsey.com/~/media/mckinsey/business%20functions/strategy%20and%20 corporate%20finance/our%20insights/the%20new%20global%20competition%20for%20cor porate%20profits/mgi%20global%20competition_full%20report_sep%202015.ashx> accessed 24 June 2019.

153 Ruggie, 'Trade, Protectionism and the Future of Welfare Capitalism' (n 89) 5-10.

154 Wettstein, Quasi-Governmental (n 151) 214-21.

155 See John Tasioulas, 'Minimum Core Obligations: Human Rights in the Here and Now' (2017) Research Paper Commissioned by the Nordic Trust Fund for The World Bank, 48; Tom Campbell, *Rights: A Critical Introduction* (Routledge 2011) 11-19, 91-95, and ff.

the latter does have advantages in terms of enforceability. Nonetheless, the quality of the social norm approach is in providing a framework through which the more ambitious cases can be made linking the business act and the resultant adverse impact. This provides a fresh lens on the major socioeconomic problems of our time, and a powerful weapon for those suffering from such acts.

The next stage in understanding impacts must be research into specific impacts. Corporations are potentially adversely impacting rights in a plethora of ways in every society. Empirical work is needed around each specific right and around multiple corporate practices. Concurrently, affected citizens need to understand that the social problems associated with corporate activity can be contested based on their human rights impacts. At the theoretical level, full engagement with the text of the impacts framework from human rights scholars would assist in understanding the scope and limits of the social responsibilities of business toward human rights.

8. Conclusion

Corporations hold a strict responsibility to prevent and/or remedy all adverse human rights impacts which they cause or to which they contribute. 'Impacts' go far beyond 'violations' to cover any act that removes or reduces an individual's enjoyment of human rights. As such, the framework is rightly understood as having an expansive scope that is of particular use where corporations have power within rights-relevant global markets and to address the corporate role in structural issues such as the global food crisis. This scope is however only socially-binding and therefore requires social norms and expertise promotive of this broader understanding, particularly in popular discourse. It is submitted that this is Ruggie's under-explored contribution to the BHR debate: the creation of an argumentative framework for social actors to use that can capture all business-related harm to rights, and that in so doing offers a platform that can transform the business-society relationship.