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Curbing Reliance On Abortion In Russia

by Meghan Stewart

TWO RECENT LEGISLATIVE ACTIONS are threatening to restrict women's access to reproductive healthcare in Russia. The first, the Family Code Amendment (Amendment), a draft law, seeks to restrict a woman's right to abortion by recognizing fetuses as people, thereby granting them the rights held by children after birth. The second law, the Abortion Decree (Decree), issued in August 2003, decreases the number of non-medical reasons for which a woman may obtain an abortion during her second trimester of pregnancy.

These legislative maneuvers are significant because they create conflict between Russian domestic law and binding international law. The Family Code Amendment was introduced to bring Russia's laws in line with its obligations under the Convention on the Rights of the Child (CRC), which Russian lawmakers have narrowly and questionably interpreted as granting rights to unborn children. Restrictions placed on women's access to healthcare by both measures, however, conflict with Russia's obligations as a state party to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). This article explores the origin of the two laws, Russia's obligations under the CRC and CEDAW, and the principles that govern the interpretation of these laws. Abortion is defined as a medical procedure for the purposes of this analysis because it is technically a medical surgery and is commonly understood as such in Russian society.

THE HISTORY OF ABORTION IN RUSSIA

RUSSIA WAS THE FIRST COUNTRY IN THE WORLD to legalize abortion. In 1920, the Bolshevik government granted women the right to abortion. This right was then limited under Stalin in the early 1930s, and eliminated in 1936, primarily in the name of promoting population growth. The procedure was again legalized in 1955 after Stalin's death and has remained legal since.

Russian women have relied on abortion as a primary means of birth control since 1955. During the Soviet era, abortion was virtually the only form of birth control available. Today, some experts estimate that Russian women have thirteen abortions for every ten live births, as compared to about 2.5 abortions per ten live births in the United States. This is despite a reported fifty percent drop in abortions in recent years. Russian women today are familiar with abortion and continue to rely on it above modern forms of contraception, often because they are not educated about modern family planning methods.

In addition to a widespread lack of access to reliable contraception, the dynamics of gender, sexual relations, and economics contribute to Russian women's reliance on abortion. During the Soviet period, women struggled to cope with their "double burden;" society expected them to excel in the workforce while maintaining an idealized maternal standard. Following the breakup of the Soviet Union, women faced enormous economic challenges and obstacles to supporting themselves and their families. The prevalence of sexual harassment and domestic violence in Russian society compounded these economic challenges. Women continue to be the primary caretakers of the family in addition to working outside of the home, and often deal with gender discrimination in one or both settings. Consequently,

many women choose to limit their family size because they do not have the time or resources to provide for more children, and continue to turn to abortion to meet their family planning needs.

The issue of population growth is also important to consider in exploring the history of abortion in Russia. Traditionally, great emphasis has been placed on population growth because increased population has translated into a larger work force. Such an emphasis likely began as a reaction to massive losses of life in the Bolshevik Revolution, the forced collectivization of agriculture, World War I, and the famines that followed. This sentiment remains strong today, but the population does not. Since the fall of the Soviet Union, Russia has seen a sharp decline in its life expectancy and birth rate. The United Nations Population Fund puts Russia's 2003 life expectancy at 60.8 years for men and 73.1 for women down from 61.5 and 73.6, respectively, in 1996. In the world's most developed countries, life expectancy is 72.1 years for men and 79.4 years for women. The birth rate in Russia in 2003, calculated by births per 1000 women aged 15-19, was thirty births per year, compared with a world total of fifty in 2003 and thirty-seven for Russia in 1996. Today, it is estimated that Russia's population is declining by approximately one million people per year.

ABORTION: THE LAWS OF THE LAND

DESPITE THESE CHANGES, RUSSIAN LAWS on abortion remain relatively liberal. Abortion during the first trimester is legal for any reason, and during the second trimester it is legal for some non-medical and all medical reasons (although in practice there may still be obstacles for some women, such as doctors who do not want to perform abortions). In 1996, the Russian government passed Bill No.567 which created thirteen "social situations" in which a woman could obtain an abortion between the twelfth and twenty-second weeks of pregnancy. This list permitted abortions in limited cases, such as when one parent was unemployed or when the family already had three or more children. This law was the first limitation on the right to abortion since the Stalin era.

The Family Code Amendment and Abortion Decree have since been introduced to curb the continued reliance on abortion in Russian culture. While women should have greater access to contraception and should not have to rely so heavily on abortion, the Amendment and Decree do not adequately address the complex social issues underlying Russia's high abortion rate. The Amendment and Decree will not necessarily reduce the number of abortions. Rather than focusing on restricting a woman's right to abortion, Russia should increase access to and education about reliable means of birth control.

THE FAMILY CODE AMENDMENT

ON FEBRUARY 5, 2003, THE RUSSIAN FEDERATION introduced a draft amendment to its Family Code "with regard to the issue of safeguarding children's rights before birth." Its purported purpose is to guard the rights of children before birth and to bring Russian law in compliance with international law, pursuant to its obligations under the Convention on the Rights of the Child. The Amendment is still in the legislative process at this time.

This draft legislation defines a late-term fetus as a person, thereby granting fetuses all the legal rights of children. Most importantly, it grants fetuses the right to life. The draft law defines a viable fetus as

an unborn child, and states that fetal viability begins at the twenty-fifth or twenty-sixth week of pregnancy. Previously, unborn children were not granted specific rights but were recognized only for reasons of inheritance under Russia's Civil Code.

THE ABORTION DECREE

ON AUGUST 11, 2003, THE RUSSIAN GOVERNMENT issued Decree No.485 (Decree), which reduced the "list of social indications for induced termination of pregnancy" from thirteen to four. Between the twelfth and twenty-second weeks, a woman is still theoretically allowed unlimited access for medical reasons, such as one that threatens the life of the woman. A woman is also permitted to have an abortion during this time in the following cases: (1) a court ruling related to depriving a person of parental rights or restricting one's parental rights; (2) pregnancy resulting from rape; (3) incarceration in a detention center; and (4) a husband's severe disability or death at the time of the spouse's pregnancy.

According to the Decree, women in their twelfth to twenty-second weeks of pregnancy must seek permission from the doctor at the local obstetric clinic and, in some cases, the local social welfare organization, to obtain an abortion. Women who want an abortion but are denied permission are left to either find another way to abort the child or to carry the pregnancy to term. The requirement of such permission leads to more late-term and illegal abortions, which are more dangerous for women. Government statistics show that thirty percent of maternal

duction, the main goal of marriage according to the Church.

Statistics indicating that Russia's population is presently decreasing further reinforce the religious argument. Some scientists estimate that Russia's population will fall by one-third by 2075 if it continues its present decline of almost one million people per year. The decrease has been attributed to a range of factors, such as violence (particularly the conflict in Chechnya) and general health problems associated with drinking, poor nutrition, and, most importantly, a decrease in births. To combat the decrease in population, some social commentators, scientists and politicians have begun pushing women to have more children. This population decrease has elicited strong reactions throughout Russian society because of its traditional desire for robust population growth. As child bearers, women have received the majority of the blame for this decrease. In the eyes of some lawmakers, the Amendment and Decree are only the first step in limiting a woman's right to control her fertility, reproductive health and sexuality.

RUSSIA'S OBLIGATIONS UNDER THE CRC

THE CONVENTION ON THE RIGHTS OF THE CHILD, which Russia ratified on August 16, 1990, enumerates rights for children. It entered into force on September 2, 1990. As of November 14, 2003, a total of 192 countries have ratified the CRC.

The Family Code Amendment relies on the Preamble to the CRC to support its assertion that fetuses are entitled to certain rights. The Preamble states, "the child, by reason of his physical and mental

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deaths in Russia result from late-term surgical abortions. These numbers only account for the government-monitored abortions, which comprise only a fraction of the total number of abortions performed. Illegal abortions are likely to increase with more abortion restrictions.

POPULATION PUSH AND THE NEW RELIGION

BOTH THE FAMILY CODE AMENDMENT and the Abortion Decree are part of a new push to roll back abortion rights, effectively restricting women's right to healthcare. While there may be many reasons for the shift in the tide of reproductive rights in Russia, two have made a noticeable impact. First, the Russian Orthodox Church, which staunchly opposes abortion, has grown in popularity in recent years. Second, a sharp decrease in population and recent increase in nationalism have rekindled a desire for population growth in Russia.

Religion, which was suppressed during communist rule, has gained significant popularity since the fall of communism. Even President Vladimir Putin, a former KGB officer charged with decreasing the influence of the church, is now a practicing Russian Orthodox. In 2001, he stated that "since time immemorial, our country has been called 'holy Russia'... emphasize[ing] the special role assumed by Russia voluntarily, as the keeper of Christianity... It is therefore extremely important, useful and timely to get back to this source." Putin's transformation reflects the growing popularity of religion in Russia and influence of the Orthodox Church. The Orthodox Church is a firm and outspoken opponent of abortion, which it regards as murder. The Church also denounces contraception because it interferes with repro-

immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth." The Russian government interpreted this as granting rights to unborn children under international law. In bestowing rights on fetuses, the drafters of the Amendment also rely on the CRC's provisions that "every child has the inherent right to life" and that children have the right to healthy development. Proponents of the Amendment reason that, because the CRC provides children with the rights to registration, a name, a nationality and, as much as possible, to know and be cared for by his or her parents, full compliance with the CRC requires that a child should "have the right to life and healthy development before his birth and registration."

This interpretation is problematic because the drafters of the Family Code Amendment not only failed to interpret the Preamble of the CRC in light of other binding international law, but also did so in a way that directly contradicts both the Russian Constitution and CEDAW. The CRC does not define when a fetus becomes a child. The CRC Preamble language granting children protection "before as well as after birth" was a long-fought compromise by the drafters that allows individual states to define their own views on abortion. Because abortion is controversial, the CRC refrains from granting rights to unborn children while allowing parties the option to do so in their national legislation. That compromise, and the freedom for countries to choose their own interpretation, is not meant to grant states parties license to use this specific language as justification for pro-life legislation, but rather to give states parties the space to do so if they choose.

As the US Delegation argued during the drafting of the Convention, “any attempt to institutionalize a particular point of view on abortion in the draft Convention would make the Convention unacceptable from the outset to countries espousing a different point of view.” The Preamble language is simply a means for the CRC to expand its list of signatories and avoid participation in a very controversial argument.

The Family Code Amendment is also in direct conflict with the Russian Constitution. The Constitution states that “The basic rights and liberties of the human being shall be inalienable and shall belong to everyone from birth.” It also provides that it is the supreme law of the land and that the “recognized principles and norms of the international law and the international treaties of the Russian Federation shall be a component part of its legal system.” Finally, “If an international treaty of the Russian Federation stipulates other rules than those stipulated by the law, the rules of the international treaty shall apply.” Thus, the Family Code Amendment appears to be facially invalid under the Russian Constitution.

RUSSIA’S OBLIGATIONS UNDER CEDAW

THE CONVENTION ON THE ELIMINATION of All Forms of Discrimination against Women (CEDAW) directly addresses a woman’s right to abortion. Russia ratified CEDAW on September 3, 1981 and signed (but has yet to ratify) the Optional Protocol on May 8, 2001.

CEDAW provides that women have an unequivocal, fundamental right to plan the spacing of their children. This right is echoed throughout the Convention. The right to healthcare and the right to abortion as a component of healthcare and family planning are integral to providing the services needed to fulfill a woman’s right to family planning. General Recommendation 19 on violence against women mandates that “States parties should ensure that measures are taken to prevent coercion in regard to fertility and reproduction, and to ensure that women are not forced to seek unsafe medical procedures such as illegal abortion because of lack of appropriate services in regard to fertility control.”

General Recommendation 24 to Article 12 of CEDAW, which provides for a woman’s general right to healthcare, details the steps states must take to fulfill this obligation. States must take appropriate legislative actions to ensure a woman’s right to healthcare. The General Recommendation says that states should not restrict a woman’s access to health clinics by requiring authorization from a husband, partner, parent or health authority, or because they are unmarried or women. A state also should not criminalize medical procedures specific to women. The General Recommendation further requires that states take measures to ensure timely access to “the range of services that are related to family planning, in particular, and to sexual and reproductive health in general,” and advises that a high number of couples that would like to limit their family size but do not have access to contraception is a possible indication of a breach of a country’s duty to provide healthcare. Finally, states parties should “Prioritize the prevention of unwanted pregnancy through family planning and sex education and reduce maternal mortality through safe motherhood services and prenatal assistance. When possible, legislation criminalizing abortion

should be amended, in order to withdraw punitive measures imposed on women who undergo abortion.”

Russia’s Abortion Decree violates its obligations under CEDAW both in fact and in spirit. CEDAW requires states to provide women with safe and accessible means to control their fertility before resorting to abortions. Although Russia, in its 1999 report to CEDAW, claims that it has made strides in this department, the fact that women still rely on abortion as a primary means of birth control is evidence that there is a great deal of work still left to do. Moreover, the purpose of the Abortion Decree is to create barriers to the standard of healthcare that CEDAW specifically protects. The language of General Recommendation 24 states that women should not have to seek the approval of a third party to receive medical care and that states should not criminalize women for seeking abortions. Under the language of the Russian Constitution, which defers to international binding law, this conflict would make the Abortion Decree null and void.

APPLICATION OF INTERNATIONAL LAW

IN ITS TWO-PRONGED APPROACH to restricting abortion rights, Russia has relied on the CRC for justification while ignoring its obligations under CEDAW. This undermines the spirit of both conventions by focusing on criminalizing abortion while failing to allocate resources for the prevention of unwanted pregnancies. However, the resolution of conflicts in international law, particularly those pertaining to abortion, remain undefined and extremely controversial.

Russia’s obligations to the CRC and CEDAW cannot be looked at in isolation. As a party to multiple binding conventions, Russia must look at the whole of its obligations and interpret them so as to harmonize their goals and remain faithful to their spirits. Therefore, the silence

of the CRC does not grant Russia the license to interpret the CRC in a way that directly conflicts with CEDAW.

The Vienna Convention, which governs the Law of Treaties, mandates that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.” The Vienna Convention also mandates that when states are parties to successive treaties relating to the same subject matter and one treaty “specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.” Finally, with regard to interpretation of a treaty, the Vienna Convention states that the “ordinary meaning” should apply. When the “ordinary meaning” is unclear, one may reference the preparatory documents to the treaty to clarify.

Pursuant to these provisions, Russia should look to its obligations under CEDAW on the subject of abortion rather than relying on the CRC. First and foremost, Russia has misinterpreted the language in the CRC to justify restricting women’s rights. The CRC does not give rights to unborn children. Second, Russia’s interpretation directly conflicts with its obligations to women under CEDAW. Women have the right to plan their families and to access healthcare without state intervention. Russia’s interpretation shirks its obligation to a good faith performance of the Conventions because a good faith effort would attempt to harmonize the provisions rather than create blatant conflicts.

“ . . . the resolution of conflicts in international law, particularly those pertaining to abortion, remain undefined and extremely controversial.”

Because access to abortion is an important component of healthcare and family planning, Russia should defer to CEDAW. CEDAW fully articulates women's rights to access healthcare and family planning services. Although the CRC also addresses the rights of mothers to prenatal and postnatal care, CEDAW is the international authority on this area of law. Moreover, both CEDAW and the CRC contain provisions that say they should not conflict with any other international law or national law that is more conducive to realizing the rights that the treaty seeks to embody. For Russia to follow the CRC in good faith it must look to CEDAW for all obligations related to family planning and women's access to healthcare. Finally, the legislative history to the CRC shows that the Preamble clause on which Russia has based its interpretation was meant to be subject to other treaties governing the same subject matter. The clause was purposefully silent on abortion. Hence, CEDAW is the ruling authority on women's right to abortion.

Russia's interpretation of the CRC is not consistent with the spirit of either convention. The goal of both conventions is to provide for the rights and health of women and children, and Russia's plan undermines its ability to provide for these. By narrowly focusing on restricting access to abortion, Russia burdens the health and economic welfare of women and families through unwanted pregnancies and dangerous botched abortions. At the same time, Russia has neglected to provide adequate access to and education on pregnancy prevention or welfare resources to support the new children.

CONCLUSION

RESTRICTING ACCESS TO ABORTION ALONE will not decrease heavy reliance on abortion in Russia. Russian women have relied on abortions for years and will continue to do so whether they are legal or not. Instead, Russia must focus on providing full access to affordable and reliable contraception and reproductive health education. The CRC Committee's 1999 Concluding Observations on Russia stress similar goals, recommending that Russia ensure the effectiveness of measures taken to educate adolescents on contraception and STDs, strengthen reproductive health and family planning services, and take further steps to prevent teenage pregnancy and abortion. Moreover, as a country with a skyrocketing HIV/AIDS rate (the Commonwealth of Independent States has the fastest-growing HIV/AIDS rate in the world), it is imperative that Russia focus on health education and develop prevention and access networks.

With greater power, voice, and freedom, women would likely find ways to control their reproductive health without relying on such invasive procedures as abortion. Russia must take action to provide women with greater control over their education, their sexual health and their family lives. In order to reduce reliance on abortion, women need the education and ability to plan their families in a reliable and noninvasive way. It is likely that the transition away from abortion to modern forms of contraception will be long and complicated. The Abortion Decree and Family Code Amendment, which offer no accompanying legislation to provide additional family planning resources, will only make this process more difficult and painful. *HRB*

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the workload and the duration of the time necessary to finally decide cases. However, now it seems that the proposed reform of the existing system would leave claimants whose applications are rejected on the above considered basis without a remedy at all. Then, where and who will offer that lost remedy? If the Court decides to examine the merits of a case and finds a violation, it may decide under Article 41 of the Convention that the respondent state should pay just satisfaction to the victim of the violation. Under the new proposals, that possibility would no longer exist when the Court decides to reject a case, notwithstanding the fact that the applicant has fulfilled the current admissibility requirements.

In the introduction of our contribution we opened with the statements made by the president of the European Court of Human Rights. Let us conclude with a statement made by Judge Antônio Augusto Cançado Trindade, President of the Inter-American Court of Human Rights, at the hearing of the European Court of Human Rights on the occasion of the opening of the 2004 judicial year in Strasbourg on January 22:

At procedural law level, one of the basic issues dwelt upon by both Courts has been precisely that of the access to justice at [the] international level, achieved under the two Conventions by means of the operation of the respective provisions on the international jurisdiction of the two Human Rights Courts and on the right of individual petition. I regard those provisions of such a fundamental character—as true fundamental clauses (*cláusulas pétreas*) of the international protection of human rights—that any attempt to undermine them would threaten the functioning of the whole mechanism of protection under the two regional Conventions. They constitute the basic pillars of the mechanism whereby

the emancipation of the individual vis-à-vis his own State is achieved. This outlook grows in importance for having come at a time when the establishment of a new international human rights Tribunal (an African Court on Human and Peoples' Rights) under the 1998 Protocol to the African Charter on Human and Peoples' Rights appears forthcoming.

We cannot do more than strongly underline this firm statement, which does justice to those who are seeking justice, those who were disregarded or disappointed at the domestic level and those who have placed their hope in seeking justice at an international level. A proposal made by Mahoney for the introduction of a pilot-judgment for dealing with situations generating repetitive cases is worth considering. Under this proposal, the Court would take up a test case and suspend the examination of all similar applications. If a violation of a structural or organizational nature is found, the respondent state would be obliged, in order to execute the judgment, not only to eliminate the source of the violation for the future but also to make available a retroactive national remedy to provide appropriate relief for other victims of the violation, including in particular persons who had lodged an application with the Court in Strasbourg.

This proposal should be explored further because it offers the original victim a measure of redress while, at the same time, it creates a structure that will not overload the European Court of Human Rights with applications that deal with the same issue often in relation to the same member state. It is proposals for change that do not restrict the right to individual petition that may lead to the final conclusion that the European Court of Human Rights will be a success story in the next ten years and thereafter, since it is this very element of the European system that has made it successful and that has inspired hope for the weakest - the individual. *HRB*