

# REPRODUCTION, RIGHTS, AND REALITY: HOW FACTS AND LAW CAN WORK FOR WOMEN

## EUROPEAN APPROACHES TO ENHANCING REPRODUCTIVE FREEDOM

KATARINA TOMAŠEVSKI\*

The history of human rights guarantees can be depicted in concentric circles. These guarantees were broadened from the initial protection of the rights of white, propertied males to encompass women, people without property, and non-white people. This process goes on to extend human rights guarantees, taken for granted by citizens, to non-citizens as well.

Concentric circles can similarly be drawn to illustrate the broadening of protected rights. Starting with the protection of individual integrity and liberty against governmental abuses of power, human rights have been extended to require governments to interfere in "private" economic and social relations so as to make equal enjoyment of human rights possible. Achieving equal rights means removing obstacles hindering their enjoyment, and these obstacles are many. Government obligations are therefore not only negative, but positive as well.

---

\* Dr. Katarina Tomaševski (born in 1953 in what was then Yugoslavia and is now Croatia) works as a Senior Research Associate at the Danish Centre for Human Rights (University of Copenhagen). Her main research area is human rights in international development co-operation, with a view to elaborating human rights impact assessment. This encompasses effects of sanctions, the elaboration of specific measures to promote human rights, and development of an analytical framework for main aid sectors. She holds graduate degrees in international law from Harvard Law School (LL.M., 1977) and University of Zagreb (Ph.D., 1980). She previously worked, *inter alia*, at McGill Centre for Medicine, Ethics and Law (Montreal), at the Global Programme on AIDS of the World Health Organization (Geneva), and at the Netherlands Human Rights Institute (Utrecht).

The elimination of multiple obstacles to equal rights for women embodied in "private" economic and social relations is a significant accomplishment of human rights protection in Europe, and was made possible by the co-existence of two supranational systems. The Council of Europe offers enforceable protection of civil and political rights, while the European Union has extended safeguards against gender discrimination to encompass labor rights, thus broadening legal remedies to the conventionally exempt economic and social rights.

Neither in theory nor in practice is this process of eliminating gender discrimination fast or easy. Governments, and intergovernmental bodies embodying their collective will, are, on the one hand, obliged not to interfere in the name of respecting human freedom but, on the other hand, obliged to interfere to reduce inequalities between men and women, and thus must balance these mutually contradictory requirements. This Article describes and analyzes current European approaches to human rights relating to reproduction in order to demonstrate the accomplishments, controversies, and unresolved problems relating to the balance between freedom and equality.

The European human rights protection related to women's reproductive freedom is strongly influenced by pro-natalist policies that are in turn a consequence of falling birth rates and an increasingly aging population. Another influential factor is the commitment to human rights, which has changed the approach to population due to the acceptance of safeguards against the interference by public authorities in private and family life.

Compared with other regions in the world, European safeguards are impressive. Safeguards for individual choice constitute, however, only the first concentric circle of the necessary human rights protections. They require, most importantly, a geographical broadening within the concentric circles into which "Europe" remains divided.<sup>1</sup> The need to broaden the geographical scope is most clearly

---

1. The term "Europe" is today often confined to the members of the European Union, which has added three new members (Austria, Finland, and Sweden) to the Twelve (Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and United Kingdom) with the possible enlargement to Central Europe (Czech Republic, Hungary, Poland, and Slovakia) at the turn of the century. Norway, on the other hand, has recently rejected membership in the Union. Membership of the Council of Europe encompasses all members of the European Union, but constitutes a wider circle of 32 countries (Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Liechtenstein, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Romania, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, and United Kingdom).

seen from the effects on women's reproductive freedom of the transition in the former Eastern Europe.

### EUROPEAN PARTICULARITIES

The final documents of the World Conference on Human Rights<sup>2</sup> and of the International Conference on Population and Development<sup>3</sup> (ICPD) affirm that specific features of regions or countries influence the scope of human rights guarantees. The dangers inherent in this recent trend in international policymaking for the future of the universality of human rights are not dealt with herein because this would far extend the subject matter and size of this text, which focuses on the European region, whose supranational human rights protection is often portrayed as a model for other regions.

This Europe-as-a-model approach is also visible in population policies. The model underlying the final document of the ICPD, for example, is reduced population growth (Europe has reached negative growth rates,<sup>4</sup> and within the European Communities, the fertility rate in 1991 was below generation replacement level for all countries except Ireland<sup>5</sup>) and smaller families (with the European "model" increasingly becoming single-person households<sup>6</sup>). This Euro-model encompasses features that are not unanimously considered attractive, such as the virtual disappearance of the family as an institution. Public authorities have taken over many family functions, and a series of individual entitlements have further eroded traditional family functions. The family as a unit lacks human rights protection due to the individualism of human rights—it is the individual child, disabled

---

2. Vienna Declaration and Programme of Action, *infra doc. biblio.*, ¶ 5. The Vienna Declaration notes "the significance of national and regional particularities and various historical, cultural and religious backgrounds" in reminding governments that it is their duty to promote and protect all human rights and fundamental freedoms. *Id.*

3. ICPD Programme of Action, *infra doc. biblio.* The preamble to the principles guiding the ICPD Programme of Action embodies two mutually opposed approaches: first, it affirms that its implementation is the sovereign right of each country and that its recommendations are to be implemented in accordance with "national laws and development priorities, with full respect for the various religious and ethical values and cultural backgrounds of its people"; second, it adds that implementation of the Programme of Action is to be carried out "in conformity with universally recognized human rights." *Id.* pmbl. & ch. II.

4. *OECD Health Systems: The Socio-economic Environment, Statistical References, Health Policy Studies No. 3*, 2 OECD 13 (1993). The lowest fertility rates, that is, the average number of children per woman aged 15 to 44, were recorded in 1991 in Spain (1.28), Italy (1.30), Germany (1.40), Greece (1.40), and Portugal (1.42). *Id.*

5. EUROPE IN FIGURES 86 (3d ed. 1992).

6. *The Rise of the One Person Household*, THE EUROPEAN, Oct. 14-20, 1994. One-person households account for more than one-quarter of all households in quite a few countries, with 40% in Sweden, 35% in Germany, 34% in Denmark, 29% in Austria and the Netherlands, 27% in France, and 25% in the United Kingdom. *Id.*

person, or pregnant woman who has a legal claim against the public authorities. Moreover, the interplay between the commitment to individual freedom of choice and the disappearance of a uniform concept of "the family" further strengthened human rights guarantees for single-person households, same-sex couples, and single parents. The freedom not to conform has become a pillar of European human rights protection.

Changes in the institutions of marriage and family in Western Europe have resulted in the abolition of a link between marriage and family as originally envisaged in international human rights standards, and, until recently, used in demographic statistics.<sup>7</sup> Moreover, the awareness of the conceptual conflict between national population policies and individual reproductive freedom caused the abolition of the very term "population policy" in favor of "family policy."<sup>8</sup> Because care of the elderly has been taken over by the public health and welfare systems, in many countries family policy now amounts in practice to childcare policy.

Delinking marriage and parenthood has resulted in demands for reproductive rights to be recognized as rights of the individual rather than of the couple.<sup>9</sup> Technological developments created demands for entitlement to surrogate motherhood, embryo transfer, and treatments for infertility. International human rights law, however, recognizes the rights of the child, but not a "right" to a child.<sup>10</sup> The Human Rights Committee defined the right to found a family as "the possibility to procreate and live together," not going any further than "possibility."<sup>11</sup> The question whether there is a right to have recourse to techniques of artificial procreation, which could be subsumed under the universally guaranteed right to found a family,

---

7. See CENTRE FOR EDUCATIONAL RESEARCH AND INNOVATION, CHILD AND FAMILY: DEMOGRAPHIC DEVELOPMENTS IN THE OECD COUNTRIES 55 (1979). In 1979, demographic statistics relating to family life were presented under the title "Normality and Pathology of Family Events," and the family was defined as such only when created through marriage. Unmarried couples, which had just become statistically significant at the time, were named "illicit unions." *Id.*

8. KATARINA TOMAŠEVSKI, HUMAN RIGHTS IN POPULATION POLICIES: A STUDY FOR SIDA 14-17 (1994).

9. Kerkhoven, Hinke & Hinke v. The Netherlands, App. No. 15666/89, Eur. Comm'n H.R. (1992) (unreported). Same-sex couples do not have "a right to parenthood." The European Commission on Human Rights decided on May 19, 1992, that "a homosexual couple cannot be equated to a man and woman living together" with regard to the acquisition of parental authority over a child. *Id.*

10. Linda Nielsen, *The Right to a Child Versus the Rights of a Child*, in PARENTHOOD IN MODERN SOCIETY: LEGAL AND SOCIAL ISSUES FOR THE TWENTY-FIRST CENTURY 213-21 (J. Eekelaar & P. Šarčević eds., 1993).

11. General Comment No. 19: art. 23, in Report of the Human Rights Committee, Human Rights Committee, U.N. GAOR, 45th Sess., Supp. No. 40, Annex VI, ¶ 5, at 176 (1990).

has been answered thus far only by one international human rights body, the European Steering Committee for Human Rights, in the negative. It held that human rights cannot be interpreted to guarantee "a right to procreate, if need be, in the absence of natural capacity, by means of artificial procreation."<sup>12</sup> No country has thus far recognized an individual entitlement to the application of a scientific discovery that would overcome the biological inability to procreate. The government remains required to respect the freedom to procreate, but it is not obliged to secure access to medically assisted procreation.

#### EMPOWERMENT OF WOMEN: ELIMINATING LAYERS OF DISCRIMINATION

As much as both the people and the governments in other regions may not wish to achieve some features of the Euro-model, this model does embody empowerment of women as one important pillar and thus offers experiences in putting into practice the main components of recent global policy-documents in this area. For example, in its resolution on family policy in the European Community, the European Parliament stressed that "family policy cannot in any way stand in the way of progress towards ensuring that women have their own non-derivative rights."<sup>13</sup> Human rights indeed require that women do not have to earn societal recognition and protection through motherhood—that women are, as much as men, entitled to full protection of their rights and freedoms because they are human beings. The implications of motherhood for equal rights of women emanate from the biological fact that women bear children and men do not. Compensation derives from the acknowledgement that childbearing and childrearing are societal functions, hence it is not granted to all women.

Human rights require people to take responsibility for their reproductive lives, and they cannot do this unless they are free to do so. Freedom and responsibility are two sides of the same coin; people cannot be held responsible when denied choice. Human rights make population policies self-sustainable by enabling people to take responsibility for their reproductive lives. Respect for individual freedoms of women necessitates protection of *all* their equal rights

---

12. Council of Europe, *Progress of Medicine, Biology and Respect for Private and Family Life*, Doc. DH-DEV (91) 1, at 45 (Mar. 1, 1991).

13. EUR. PARL. RES. (June 9, 1983), reprinted in *Human Rights Information Sheet No. 13: Europe*, Council of Europe, Directorate of Human Rights, Doc. H/Inf (83) 2, at 120 (Apr.-Oct. 1983).

and freedoms, and this requires elimination of the many layers of discrimination that prevent women from exercising them. The European jurisprudence has advanced a great deal in outlawing multiple grounds of discrimination against women, starting obviously with sex, but carrying on to tackle marriage, pregnancy and potential pregnancy, motherhood, and family responsibilities, and further to challenge the stereotyping of gender roles.

An important facet of discrimination is that distinct grounds of discrimination cumulate. Thus a person who is female, black, and disabled is likely to be victimized by triple discrimination. Proposed safeguards against discrimination affecting disabled women, for example, stipulate: "Appropriate legislation that guarantees the full exercise of the rights of women to decide on sexuality, pregnancy, new reproductive technology, adoption, motherhood and any other relevant issue should be adopted and implemented."<sup>14</sup>

Another example of multiple discrimination is the treatment of unmarried mothers. Historically, children born out of wedlock were exposed to discrimination, the extreme being the concept of *filius nullius* (nobody's children) in the ancient Roman law where such children simply did not exist—neither parents nor public authorities had any responsibility towards them. The eradication of this type of discrimination was given an impetus by the European Convention on the Legal Status of Children Born Out of Wedlock.<sup>15</sup> The status of mothers of such children, namely discrimination against unmarried mothers, was dealt with by the European Court of Human Rights.<sup>16</sup>

This type of discrimination has attained little attention at the global level, and it is thus important to note that in many European

---

14. U.N. Seminar on Women and Disability, Aug. 20-24, 1990 (Recommendations), ¶ 4, in 1 WOMEN 2000, at 12 (1991).

15. European Convention on the Legal Status of Children Born Out of Wedlock, Oct. 15, 1975, EUR. T. S. NO. 85 (entered into force Aug. 11, 1978). It has been ratified by twelve countries: Austria, Cyprus, Denmark, Greece, Ireland, Luxembourg, Norway, Portugal, Romania, Sweden, Switzerland, and United Kingdom. Chart of Signatures and Ratifications, Council of Europe, Nov. 5, 1993.

16. The well-known case *Marckx v. Belgium* resulted in the affirmation by the European Court of Human Rights that the government had positive obligations relating to family life. *Marckx v. Belgium*, 1979 Y.B. EUR. CONV. ON H.R. (Eur. Ct. H.R.) 410, 410-20. Its obligation not to interfere in private and family life was only one side of the coin; the other one was its positive obligation to create equal status for, in this specific case, children born out of wedlock. The same subject matter was revisited in 1991, *Vermeire v. Belgium*, App. No. 12849/87, 15 Eur. H.R. Rep. 488, 488 (1991), when the European Commission on Human Rights reaffirmed the validity of the "evolutionary interpretation" of individual rights and corresponding governmental obligations, emphasizing that a distinction between "legitimate" and "illegitimate" family had been permissible in the 1950s when the European Convention on Human Rights was adopted, but in the meantime such a distinction has been outlawed, and accordingly the provisions of the Convention have to be interpreted in the light of present-day circumstances. *Id.*

countries single mothers enjoy special legal protection and are entitled to social assistance.<sup>17</sup> Although the term "family policy" is still used, national policies and laws often do not refer to the *family* as an institution, but specify what support is being provided to specific family functions, most importantly childrearing, knowing that such family functions are increasingly carried out by single persons, most often women.<sup>18</sup> There are large differences in the status of single mothers within Europe: "In Greece . . . an unemployed single mother receives \$3.68 a month in benefits. Her Danish counterpart gets \$1,162, plus free kindergartens and subsidized housing."<sup>19</sup> Despite the fact that the European Union offers protection against gender discrimination with respect to labour rights, and the Council of Europe provides access to supranational remedies for civil and political rights, discrimination against single mothers still falls outside enforceable human rights protection.

Considering that only women can bear children, the exclusion of those workers who are or may become pregnant constitutes discrimination against women because men cannot be affected by such exclusion. International norms, therefore, prohibit discrimination on the grounds of pregnancy and childbearing as a form of gender discrimination. The Convention on the Elimination of All Forms of Discrimination Against Women (Women's Convention) outlawed "dismissal on the grounds of pregnancy or maternity leave."<sup>20</sup> National labour laws, following basic standards set by the International Labour Organization (ILO), generally provide protection against discrimination on the grounds of pregnancy and maternity leave. Maternity protection had formed part of international law long before human rights entered it. The ILO regulated maternity protection as soon as it was established, but later found this approach counterproductive to sex equality. Its objects of protection are (future) children and not women themselves; thus such protection addresses women's childbearing capacity while denying their equal rights. The conceptual progress from motherhood to parenthood is illustrated by ILO Convention 156 on workers with family responsibilities, which requires

---

17. In the Nordic countries, generous financial, social, and legal support for childbearing and child care was partially prompted by the demographic deficit of the early 1980s. This is combined with the social acceptance of childbearing and childrearing outside marriage, which affects close to 50% of children.

18. See FAMILY POLICY IN EEC—COUNTRIES: REPORT PREPARED FOR THE COMMISSION OF THE EUROPEAN COMMUNITIES, DIRECTORATE GENERAL FOR EMPLOYMENT, SOCIAL AFFAIRS AND EDUCATION (W. Dumon ed., 1990).

19. Pelle Neroth & Julie Ready, *Mothers Pay the Price of Being Single*, THE EUROPEAN, Nov. 19-25, 1993, at 10.

20. Women's Convention, *infra doc. biblio*.

governments "to enable persons with family responsibilities who are engaged or wish to engage in employment to exercise their right to do so without being subject to discrimination and, to the extent possible, without conflict between their employment and family responsibilities."<sup>21</sup> The ILO's standard-setting for the protection of women workers is thus illustrative of the evolving notion of gender equality. It explicitly recognized that identical treatment of men and women perpetuates inequality; the terminology and provisions of subsequent instruments changed to include equal opportunities for women, not only equal treatment.

The European Court of Justice found that specific prohibitions embodied in maternity protection, such as night work, should protect women from abuse rather than constituting an obstacle to their professional advancement.<sup>22</sup> The Court ruled in 1990, however, that dismissal on account of women's absences due to sickness related to pregnancy and childbirth does not violate human rights.<sup>23</sup> Ideally, workers with family responsibilities should be able "to choose the type of employment best suited to their individual family circumstances, free from discriminatory constraints."<sup>24</sup> Neither the European Court of Justice nor any national court has yet reached this goal. This fact, therefore, reinforces rather than undermines the ILO's approach. It emphasizes that safeguards for workers with family responsibilities are flexible and can only be implemented step-by-step, while the ultimate goal is a necessary reminder that the "normalcy" of our past should be contrasted against a different vision of the future.

The increase in women's employment has been one of the most significant changes in the West European labour market in the last two decades, but "the rise in women's paid work had been largely concentrated in part-time, low-paid jobs."<sup>25</sup> Women constitute the bulk of part-time workers, mostly attempting to reconcile labour participation and family responsibilities, which often excludes them from labour protection. The Court of Justice of the European

---

21. Convention Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities, art. 3, in INTERNATIONAL LABOUR ORGANIZATION, INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS 1919-1981, at 52-55 (1982).

22. Case C-421/92, Habermann-Beltermann v. Arbeiterohlfahrt, Bezirksverband Nbd/Opf eV, 1994 E.C.R. 1657.

23. Case C-179/88, Handelsog Kontorfunktionærernes Forbund i Danmark v. Dansk Arbejdsgiverforening, 1990 E.C.R. 3979.

24. International Labour Conference, *Workers with Family Responsibilities*, 80th Sess., ¶ 266 (1993).

25. Judy Jones & Barrie Clement, *Social Security System Biased Against Women*, THE INDEPENDENT (London), May 1, 1992, at 6.



Communities has undertaken steps towards remedying this lack of national protection by extending labour rights to part-time workers, specifically with the aim of eliminating gender discrimination.<sup>26</sup> This high level of protection against discrimination was achieved during the 1980s. It is worth recalling that the ILO had found that "the avoidance of interference by the public authorities in wage fixing in the private sector" constituted the first obstacle towards equal labour rights of women.<sup>27</sup>

Married women tend to face discrimination in employment-related social rights because of their assumed financial dependence on their husbands. Few countries have changed their law in order to eliminate the requirement that a married woman must prove that she is a breadwinner of the family before she can claim entitlements that are granted automatically to married men. Because men are seen as the heads of the family and/or the breadwinners, "any rights a married woman may have acquired through her own employment are denied her because of the protection she can obtain as a dependant person; in the most favorable of circumstances her rights may be recognized provided she meets certain conditions which are never required of men."<sup>28</sup> In 1987, the Human Rights Committee accorded remedies to married women who had been discriminated against in a series of well-known "Dutch cases," and decided that "a differentiation which appears . . . to be one of status is in fact one of sex, placing married women at a disadvantage as compared with married men."<sup>29</sup> The Human Rights Committee affirmed in 1989 that governments are required to ensure equality of rights and responsibilities of spouses as to marriage, during marriage, and at its dissolution, and added that "it is a positive duty of States Parties to make certain that spouses have equal rights."<sup>30</sup>

26. In six judgments rendered on September 28, 1994, the European Court of Justice reinforced its insistence on equal treatment of women by extending their equal rights to occupational pensions. It recognized the standing of female full-time employees to challenge breaches of equal pension rights even when these have been "contracted out," and affirmed the right of (female) part-time workers to enforceable access to occupational pension schemes. These cases were: *Coloroll* (No. C-200/91), *Avdel Systems* (C-408/92), *Beune* (No. C-7/93), *Shell* (No. C-28/93), *Vroege* (No. C-57/93), and *Fischer* (No. C-128-93). An illustrative newspaper report was entitled, *Equal Pensions Could Cost Firms Dear*, THE EUROPEAN, Sept. 30-Oct. 6, 1994.

27. International Labour Conference, *Equal Remuneration: General Survey by the Committee of Experts on the Application of Conventions and Recommendations*, 72d Sess., ¶ 247, at 186 (1986).

28. ANNE-MARIE BROCAS, WOMEN AND SOCIAL SECURITY: PROGRESS TOWARDS EQUALITY OF TREATMENT 30 (1990).

29. Katarina Tomaševski, *Women*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 271-81 (Asbjorn Eide et al. eds., 1994).

30. General Comment N-18(37), in *General Comments Adopted by the Human Rights Committee Under Article 40, Paragraph 4 of the International Covenant on Civil and Political Rights: Addendum*, Human Rights Committee, U.N. Doc. CCPR/C/21/Rev.1/Add.1, ¶ 5 (1989).

The process of enhancing equal enjoyment of human rights entails much more than legislation affirming equal rights for women and specifying corresponding governmental obligations. It involves the breakdown of powerful sex stereotyping, which prevents women from demanding their rights from men in positions of authority.<sup>31</sup> While national courts may refrain from challenging stereotyping, international human rights bodies increasingly do challenge it. Thus, in the *Schuler-Zraggen*<sup>32</sup> case, the European Court of Human Rights found the assumption that married women give up their jobs when their first child is born, which had been declared by the Swiss Federal Insurance Court to constitute an "assumption based on experience of everyday life," untenable.<sup>33</sup>

In a similar case, *Burghartz v. Switzerland*,<sup>34</sup> the Court addressed a still prevailing stereotype evident in the choice of the family name. Swiss legislation forces married couples to take the husband's name as family name, and allows the wife to use her previous name and follow it by the family name. In the *Burghartz* case, the husband desired to take his wife's name as the family name but was prohibited from doing so. The European Commission on Human Rights noted "the Swiss legislators' intention to remain within the bounds of tradition," but found Switzerland to be in violation of human rights. The Commission reasoned that "in view of the importance of the advancement of the equality of sexes today in the Member States of the Council of Europe, the Commission finds that tradition in itself no longer suffices to justify the difference of treatment on the grounds of sex."<sup>35</sup>

Much has been written about stereotyping and it need not be repeated here, but it is worthwhile to recall that stereotyping affects both women and men. Occupational segregation keeps women in professions such as nursing or childcare, sometimes to the extent of denying men access to these professions.<sup>36</sup> The Council of Europe urged that "men should bring their experiences and values into family

---

31. *Id.*

32. *Schuler-Zraggen v. Switzerland*, App. No. 17/1992/362/436, 263 Eur. Ct. H.R. (ser. A) (1993).

33. *Id.* at 13, 21-22; see also UNITED NATIONS CENTER FOR SOCIAL DEVELOPMENT AND HUMANITARIAN AFFAIRS WORLD SURVEY OF THE ROLE OF WOMEN IN DEVELOPMENT, U.N. Sales No. E.89.IV.2 (1989).

34. *Burghartz v. Switzerland*, App. No. 16213/90, 280 Eur. Ct. H.R. (ser. A) (1994).

35. *Id.* ¶¶ 65-66.

36. See *London Relents on Male Au Pair? London Says No*, INT'L HERALD TRIB., Sept. 2, 1992, at 2.

life and occupations which at present are typically female.”<sup>37</sup> Typically, however, “women have more choice about how to spend their lives than men; men are conditioned to work, they cannot easily choose to stay at home.”<sup>38</sup> Elimination of stereotyping should tackle broadening choices for men as well as for women. The process towards changing this stereotype within the European Union was halted in September 1994 with the lack of unanimity with regard to the recognition of the right to parental leave for fathers.<sup>39</sup> Although opponents of this measure opposed and defeated it on the grounds of improving international competitiveness, that is, reducing labour costs for employers, the right to parental leave for fathers has attracted much publicity and is likely to gain additional advocates with the enlargement of the European Union.

Mass media have not escaped the attention of critics, given the media’s frequent enhancement of sexism and stereotyping. Inter-governmental policies, however, attach priority to the freedom of the media from interference. This controversy has been summarized by the Council of Europe:

Pending a development in the concept of equality between women and men towards the stage when it will be possible for the authorities to criticize sexism and the depicting of women in an unfavorable or stereotyped light in different media, the mass media policy has been restricted for the moment to making media professionals aware of the need to adopt socially aware attitudes in this field and help dispel prejudices.<sup>40</sup>

The Committee of Ministers of the Council of Europe specifically adopted a recommendation on the elimination of sexism from language. The reasoning used by the Committee is illustrative of the progress still needed to be achieved in the human rights field, even in that part of the world which calls itself “developed.” The Committee found that “the sexism characterizing current linguistic usage in most Council of Europe Member States—whereby the masculine prevails over the feminine—is hindering the establishment of equality between women and men, since it obscures the existence of women

---

37. Council Directive 86/378/EEC on the Implementation of the Principle of Equal Treatment for Men and Women in Occupational Social Security Schemes, 1986 O.J. (6225) 40.

38. *Women in Management: The Spare Sex*, ECONOMIST, Mar. 28, 1992, at 21.

39. David Laudner & David Loodhart, *Portillo Uses UK Veto on EU Statutory Paternity Leave*, FIN. TIMES, Sept. 23, 1994, at 22.

40. Report by the Secretary General on Equality Between Women and Men in the Council of Europe, EUR. PARL. DOC. (COM 6606) 12 (1992).

as half of humanity, while denying the equality of women and men."<sup>41</sup>

The Declaration on Violence Against Women suggests that governments recognize that human rights obligations include prevention, investigation, and punishment of violence against women, and the provision to women of effective legal remedies. In order to eliminate violence against women, States are required "to modify the social and cultural patterns of conduct of men and women, and to . . . eliminate practices based on the idea of inferiority or superiority . . . and on stereotyped roles for men and women."<sup>42</sup>

Despite such noteworthy policy recommendations, eradication of discrimination lags far behind existing human rights requirements. Difficulties in tackling violence against women are due, *inter alia*, to the fact that in history women have been considered the property of their husbands, fathers, or sons, or in other words, the male heads of family. The heritage of treating women as property prevents them from equal enjoyment of economic and social rights, ranging from owning property to protection against marital rape.

#### EXTENDING EUROPEAN HUMAN RIGHTS PROTECTION EASTWARDS

Factors that influence women's reproductive behavior often derive from discriminatory heritage, namely gender discrimination, but are analyzed as a *cause* of reproductive behavior and not as a *consequence* of this discriminatory heritage. The identification of causes is obviously crucial for designing remedies. Much criticism thus focused on the fact that women are given the responsibility, but not the authority, for decisionmaking. Human rights, therefore, focus on the empowerment of women to make reproductive choices, while access to family planning services should facilitate their ability to actualize their choices.

The provision of means to exercise individual choice alone does not, however, bring about changes in reproductive behavior. The Programme of Action of the ICPD laid emphasis on "macroeconomic and sectoral policies,"<sup>43</sup> within its general orientation towards integrating population concerns into development. The ICPD has identified specific areas where the lack of such integration easily

---

41. Council Recommendation R(90)4 on the Elimination of Sexism From Language, *pmbl.*, in Council of Europe, Information Sheet No. 28, at 153-54 (1991) (adopted by Committee of Ministers of the Council of Europe on Feb. 21, 1990).

42. Declaration on the Elimination of Violence Against Women, *infra doc. biblio.*, art. 4, ¶¶ (c), (d), (j).

43. ICPD Programme of Action, *infra doc. biblio.*, ¶ 3.3, at 10.

denies women reproductive choice, such as unequal access to the labour market and social security systems and discriminatory practices by employers against women (especially required proof of contraceptive use or pregnancy status).<sup>44</sup> This broadening of governmental efforts aimed at ensuring women's reproductive choice redresses the previously narrow focus of international policies: "Family planning, as a health measure, is partly one of practical containment, and it can be defeated by more primary influences."<sup>45</sup> Such "primary influences" are evident in the transformation of Central and Eastern European countries.

Europe still consists of two halves. An overview of national policies relating to fertility shows that national models range between two extremes. One exists in Northern and Western Europe, in which societal compensation of motherhood is exemplified by the maternal wage for a period equivalent to maternity leave.<sup>46</sup> The other extreme, evidenced in Central and Eastern Europe, is the penalization of motherhood, where the labor market discriminates against pregnant women, mothers with small children, or even all women of childbearing age, while the government is unable—or unwilling—to outlaw such discrimination and provide compensation for childbearing and childrearing.

A dramatic change took place during the rapid transformation of Central and Eastern Europe in the early 1990s. The media displayed rates of childlessness as low as those recorded in wartime.<sup>47</sup> Demographers provided the background to such alarming news by confirming, in the case of the former Eastern Germany, for example, that "by 1992, births amounted to a mere 44% of the 1989 total, and birth rates were 55% lower than they had been three years earlier."<sup>48</sup> Fertility rates dropped between 1989 and 1992 from 1.90 to 1.54 in Bulgaria, from 1.92 to 1.52 in Romania, and from 2.01 to 1.55 in Russia.<sup>49</sup> In Poland, "three-quarters of the single-mother families and over a half of families with at least four children were living below

---

44. ICPD Programme of Action, *infra doc. biblio.*, ¶ 4.4(d), (f), at 18.

45. INGRID PALMER, INTERNATIONAL LABOUR ORGANIZATION, GENDER AND POPULATION IN THE ADJUSTMENT OF AFRICAN ECONOMIES: PLANNING FOR CHANGE 168 (1991).

46. BROCAS, *supra* note 28, at 63-64.

47. J.O. Jackson, *Warning: Freedom Can Be Dangerous to Your Health*, TIME, June 27, 1994, at 17.

48. Nicholas Eberstadt, *Demographic Shocks in Eastern Germany, 1989-93*, 46 EUROPE-ASIA STUD. 519, 520 (1994).

49. International Child Development Centre, *Central and Eastern Europe in Transition: Public Policy and Social Conditions*, 1 REGIONAL MONITORING REP. 73 (1993).

the poverty line."<sup>50</sup> The brutal reality of having to provide for one's children and not being able to has obviously jeopardized reproductive freedom.

Protection against discrimination in access to employment exists today in most Western European countries, but the absence of enforceable protection is detrimental for women in Eastern Europe, where they may constitute the majority of the unemployed. In discussing how far international human rights law has gone in providing such protection, Theodor Meron pointed out that even the Women's Convention does not provide explicit protection to women in hiring.<sup>51</sup> Although law is perceived as the main method of securing human rights, a review of national jurisprudence relating to gender discrimination in economic and social rights shows that a national mechanism to secure access to justice has yet to be established.

Indeed, it appears that law often legalizes discrimination through the reluctance of legislators to recognize equal economic and social rights as rights, or to acknowledge that human freedom is rendered meaningless when pressures to ensure survival force women, for example, to have themselves sterilized "voluntarily" in order to obtain employment. Involuntary sterilization "cannot be justified in law, on the ground that it violates fundamental human rights."<sup>52</sup> A series of court cases towards the end of the 1980s that dealt with the sterilization of mentally ill women focused attention on the importance of informed consent. A judge in one of these cases, involving sterilization of a mentally handicapped girl, summarized the relationship between sterilization and human rights: "Sterilization is an operation which involves the deprivation of a basic human right, namely the right of a woman to reproduce, and therefore it would, if performed on a woman for non-therapeutic reasons and without her consent, be a violation of that right."<sup>53</sup> The constraints upon women's freedom from involuntary sterilization in the former Eastern Europe were illustrated by Editha Beier, State Secretary for Women in Saxony-Anhalt, who described women's resort to sterilization as the consequence of unleashed labour market. Beier stated that women are

---

50. B. Łaciak, *Family Benefits and Social Policy in Poland*, in *FAMILIES, POLITICS AND THE LAW: PERSPECTIVES FOR EAST AND WEST EUROPE* 284 (Mavis Maclean & Jacek Kurczewski eds., 1994).

51. THEODOR MERON, *HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS: A CRITIQUE OF INSTRUMENTS AND PROCESS* 74 (1986).

52. Ian Kennedy, *Patients, Doctors, and Human Rights*, in *HUMAN RIGHTS FOR THE 1990s: LEGAL, POLITICAL AND ETHICAL ISSUES* 106 (Robert Blackburn & John Taylor eds., 1991).

53. *In Re B (a minor)*, 2 E.C.R. 206 (1987) (Sterilization).

"having themselves sterilized either because employers tell them they must, or because they believe it to be their only chance."<sup>54</sup>

The number of abortions recorded during the political transition has also become alarming. In Lithuania, the annual number of abortions in 1992 was close to that of live births (48,400 abortions and 53,600 births).<sup>55</sup> In Russia, the "continued low availability of contraceptives has lead to reliance on abortion as a first, rather than a last resort, method of limiting family size. Abortion rates per 100 births have reversed their steady decline from 253 in 1970 to 170 in 1987, and were exceeding 200 in 1990."<sup>56</sup> Such statistics point to the need to refocus the debate from legalizing or criminalizing abortion to access to other family planning methods. "[L]aws on abortion should open the way to contraceptive practice that will reduce the incidence of repeated abortion."<sup>57</sup> Recent political and economic changes may have thus jeopardized women's reproductive freedom rather than enhanced it.

A workshop on women's health and reproductive rights concluded that "as new laws are drawn up, it is vital that women's groups become involved in political activism to ensure that their rights are maintained at national and international levels."<sup>58</sup> This plea is a good illustration of the need to prevent further deterioration of human rights standards for women, which may become one of the noticeable features of the current changes in the former Eastern Europe. The need for political activism illustrates the interrelatedness of human rights: Women's access to employment is restricted on the grounds of their prospective motherhood, while public compensation for motherhood is lacking due to a "de-recognition" of governmental obligations in economic and social rights.

---

54. *Berlin Wall Down, Gloom and Sterilization Up*, INT'L HERALD TRIB., May 25, 1992.

55. Lithuanian Department of Statistics, *Moterys ir šeima, Skiriama tarptautiniams Šeimos metams [Women and Family, Contribution to the International Year of the Family]*, at 116 (1993).

56. Monica S. Fong, *The Role of Women in Rebuilding the Russian Economy*, in THE WORLD BANK: STUDIES OF ECONOMIES IN TRANSITION (Sept. 1993) 9 (Paper No. 10, Washington, D.C.).

57. Rebecca J. Cook, *From Abortion to Reproductive Health: The Role of the Law*, presented at From Abortion to Contraception: Public Health Approaches to Reducing Unwanted Pregnancy and Abortion through Improved Family Planning Services, (Tbilisi), Oct. 10-13, 1990.

58. *Women's Reproductive Rights in Eastern Europe*, OPEN FILE, Jan. 1992, at 1 (A News Digest of the International Planned Parenthood Federation, London).

