

# THE RIGHT TO INFORMATION NECESSARY FOR REPRODUCTIVE HEALTH AND CHOICE UNDER INTERNATIONAL LAW\*

SANDRA COLIVER\*\*

## I. INTRODUCTION

This Article aims to identify various concrete, mandatory, and immediate obligations imposed on governments by the right to information necessary for reproductive health<sup>1</sup> and choice. This right derives from various clusters of international human rights, including, most importantly: the right to receive and impart information; the right to equality and nondiscrimination; the right to make free and informed decisions about fundamental aspects of one's private and family life, including whether and when to have children; the rights to respect for human dignity, bodily integrity, personal security, and individual liberty; and the rights to life and health.

Of the various constituent rights, the right to freedom of expression and information imposes the most clear-cut obligations on governments. This right is also the most limited. Traditionally, it has been understood to guarantee only the freedom to seek, receive, and impart information and ideas without government interference.

The central argument of this Article is that the right to freedom of expression and information, taken together with the other above-named rights, has evolved to the point where it now imposes concrete

---

\* This Article is a condensed version of the Author's chapter in *THE RIGHT TO KNOW: HUMAN RIGHTS AND ACCESS TO REPRODUCTIVE HEALTH INFORMATION* (London: ARTICLE 19, the International Centre Against Censorship, forthcoming May 1995), which examines obstacles to the communication of information about abortion, contraception, AIDS, and other threats to reproductive health in a range of countries. All citations to this Article should include reference to the book.

\*\* B.A., Yale University, 1976; J.D., University of California, Berkeley (Boalt Hall), 1981; Law Program Director, ARTICLE 19.

1. "Reproductive health" as used throughout this Article is defined *infra* Part I.B.

and immediate obligations on governments to provide, and to refrain from interfering with the communication of, information that is necessary for the protection and promotion of reproductive health and choice. At a minimum, these obligations include:

(1) the obligation not to prohibit or interfere with the communication of such information (including information about abortion, even where abortion is legally restricted, but excluding advocacy to have or perform an illegal abortion);

(2) the affirmative obligation to provide information necessary for the protection and promotion of a minimum standard of reproductive health (including information about effective methods of contraception), where women, particularly those at high risk, such as rural women and adolescents, do not otherwise have access to such information;

(3) the obligation to ensure an opportunity for the expression of opposing views in the public media and in publicly supported schools; and

(4) the obligation not to perform or permit medical interventions (including abortion, sterilization, or contraception) without free and informed consent.

The rights to health and informed choice, along with other related rights, have not been elaborated as extensively as the right to freedom of expression and information. The intergovernmental bodies that monitor compliance with these rights are still defining governmental obligations.<sup>2</sup> These bodies have not, for the most part, declared what constitutes a violation with sufficient precision to result in the sort of condemnation that is leveled at governments that commit violations of the right to freedom of expression and other "traditional" civil and political rights.

This Article proposes a way to define one component of reproductive health and choice, namely, the right to information necessary to make informed decisions about reproductive health, in a sufficiently concrete way so as to enable assessment of a government's compliance or noncompliance with immediately binding obligations. The right to information is one channel by which other fundamental, though less well-defined, rights can be made the subject of immediate protection by international tribunals.

---

2. The lack of attention by the U.N. human rights bodies to the impact of population policies on human rights was noted in one of the background studies for the 1993 World Conference on Human Rights. Maxime Tardu, *The Effectiveness of U.N. Methods and Mechanisms in the Field of Human Rights: A Critical Overview*, ¶¶ 48, 68, U.N. Doc. A/CONF.157/PC/60/Add.5 (1993). In particular, this study criticized the U.N. Commission on Human Rights for paying "no attention to the standard-setting proposals made by U.N. symposia on population and human rights." *Id.* ¶ 68.

This Article does not attempt to examine all of the fundamental rights that are implicated by population policies, or that are necessary for the achievement of reproductive health, autonomy, or women's empowerment. Rather, this Article's aims are modest: to sketch out a few arguments that may be used to enlist the assistance of international human rights mechanisms in applying pressure on governments to stop violating the right to reproductive information and choice.

The remainder of this Part briefly examines the nature of governmental obligations under international human rights law, the importance of information in securing the rights to reproductive health and choice, and mechanisms for promoting government compliance with the obligation to respect the right to reproductive health information. Part II sets forth relevant international jurisprudence concerning the right to freedom of expression and information.<sup>3</sup> Part III identifies four components of the right to reproductive health information that impose immediate obligations on governments. The Conclusion urges that these four component-rights should be enforced by intergovernmental human rights bodies as well as by national courts that apply international law.

#### A. *The Nature of States' Obligations*

Human rights are sometimes classified for analytic purposes as either primarily civil or political, or primarily economic, social, or cultural. For instance, the rights to privacy and freedom of information are classic civil rights. The right to health is generally viewed as an economic right. The right to decide on the number and spacing of one's children is a recently evolved right that includes both civil and economic components.

The nature of a right has implications concerning the nature of the obligations it imposes on governments. Obligations may be primarily negative, primarily positive, or some combination of both. A negative obligation requires governments to *respect* the right by not violating it directly through legislation, policies, judicial decisions, or the actions of its officials or agents. A positive obligation requires governments

---

3. For excellent discussions of the other above-identified rights, see REBECCA COOK, WORLD HEALTH ORGANIZATION, HUMAN RIGHTS IN RELATION TO WOMEN'S HEALTH (1993); KATARINA TOMAŠEVSKI, HUMAN RIGHTS IN POPULATION POLICIES (1994); Sandra Coliver, *The Right to Information Necessary for Reproductive Health and Choice*, in ARTICLE 19, THE RIGHT TO KNOW: HUMAN RIGHTS AND ACCESS TO REPRODUCTIVE HEALTH INFORMATION (forthcoming May 1995); Rebecca Cook, *International Protection of Women's Reproductive Rights*, 24 N.Y.U. J. INT'L L. & POL. 645 (1992); Lynn P. Freedman & Stephen L. Isaacs, *Human Rights and Reproductive Choice*, in 24 STUD. IN FAM. PLAN. 18 (1993); Virginia Leary, *The Right to Health in International Human Rights Law*, 1 HEALTH & HUM. RTS. 24 (1994).

to take direct, affirmative action. A positive obligation may require governments to *protect* the right by preventing others from violating it, or to *fulfill* the right, via legislation, policies, judicial decisions, or programs aimed at ensuring the effective enjoyment of the right.<sup>4</sup> Governments are accorded greater leeway in complying with the obligation to fulfill rights because governments have broad discretion concerning allocation of public resources. Nevertheless, the fundamental premise of the system of international human rights law is that sovereignty is not absolute and that governments may indeed be obliged to expend money or reallocate resources in order to give effect to human rights.

The main civil and political rights treaty with worldwide applicability, the International Covenant on Civil and Political Rights (Civil and Political Covenant), imposes both negative obligations "to respect" rights, and positive obligations "to ensure" or "ensure respect for" rights, through adoption of "such legislative or other measures as may be necessary" to give them effect.<sup>5</sup> The International Covenant on Economic, Social and Cultural Rights (Economic Covenant)<sup>6</sup> imposes primarily positive obligations. Although the Civil and Political Covenant's positive obligations require the expenditure of money,<sup>7</sup> in general, they require less than the positive obligations of the Economic Covenant. This is one of the reasons why governments traditionally have been viewed as having greater discretion in fulfilling the Economic Covenant's obligations.

Obligations may be categorized as requiring either immediate action or progressive implementation. Traditionally, economic, social, and cultural rights have been viewed as imposing progressive obligations, while only civil and political rights have been viewed as requiring immediate action. Increasingly, obligations viewed as primarily progressive are being interpreted to require some immediate action, or at a minimum, immediate steps toward implementation, leading over time to a certain degree of progress. The main international treaty that declares the right to health, the Economic Covenant, imposes a general obligation on States Parties "to take steps

---

4. See Asbjørn Eide, *Realization of Social and Economic Rights and the Minimum Threshold Approach*, 10 HUM. RTS. L.J. 35, 37 (1989).

5. Civil and Political Covenant, *infra doc. biblio.*, art. 2.

6. Economic Covenant, *infra doc. biblio.*

7. For instance, the requirement that "no one shall be subject to cruel, inhuman or degrading treatment," Civil and Political Covenant, *infra doc. biblio.*, art. 7, requires governments to build prisons that provide prisoners with adequate living space, ventilation, sanitation, clothing, and nutritional food. See, e.g., *Albert Mukong v. Cameroon*, U.N. Hum. Rts. Comm., Communication No. 458/1991, ¶ 9.3, U.N. Doc. CCPR/C/51/D/458/1991 (1994).

... to the maximum of [their] available resources, with a view to achieving progressively the full realization of the rights recognized in the ... Covenant."<sup>8</sup> Leading authorities have urged, and governments increasingly are accepting, that the obligation "to take steps" requires a State to take some actions immediately or shortly after ratification, and that the obligation to make progress in realizing the rights increases over time.<sup>9</sup>

Human rights bodies have tended to reserve their strongest condemnation for failure to comply with immediate, negative obligations, and accordingly, most decisions of human rights tribunals focus on such obligations.<sup>10</sup> In the past ten years, only a few civil and political rights, including freedom of expression, have been found to impose immediate, positive obligations.<sup>11</sup> Few economic, social, or cultural rights have been found to impose immediate obligations of any sort. This traditional view is changing, however, primarily as a result of the increasing recognition of three circumstances: (1) that the categories overlap in practice; (2) that some economic, social, or cultural rights do indeed impose immediate obligations in certain circumstances; and (3) that the right to be free from discrimination, even regarding access to economic, social, or cultural rights, entails duties that are immediately binding.

Thus, it is increasingly accepted that governments are obliged to take positive measures to ensure that individuals have access to fundamental rights. Regarding the realization of the right to health, a positive obligation is most likely to be recognized where a health crisis that the government could prevent or alleviate threatens substantial numbers of the population.<sup>12</sup> A positive obligation should also be found where significant numbers of the population are unable to exercise their rights to reproductive health and choice, and

---

8. Economic Covenant, *infra doc. biblio.*, art. 2(1).

9. See Philip Alston & Gerard Quinn, *The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic Social and Cultural Rights*, 9 HUM. RTS. Q. 156, 164-86 (1987); Cook, *International Protection of Women's Reproductive Rights*, *supra* note 3, at 659-61.

10. The word "tribunal" is used to refer to a body that applies standards to the facts of a particular case and often also engages in interpretation of the applicable standards. The main adjudicative bodies that have considered human rights relevant to reproductive rights are the U.N. Human Rights Committee, the Inter-American Court and Commission of Human Rights, the European Court, and the European Commission of Human Rights.

11. See *infra* Part I.

12. For instance, an international tribunal concluded that a government violated the right to health of indigenous people, Brazil's Yanomani, when it failed to stop outsiders with contagious diseases from entering their territory and then failed to provide timely and adequate medical assistance. See Case 7615 (The Yanomani Case), Inter-Am. C.H.R. 24, 32-33, OEA/ser.L/V/II.66, doc. 10 Rev. 1 (1985).

where measures are available to the government that would likely have an ameliorative effect.

The obligation to provide information necessary for reproductive health is a particularly compelling obligation in light of the fundamental nature of the rights involved,<sup>13</sup> the relative weakness of competing governmental or societal interests,<sup>14</sup> and the relative availability of the resources necessary for imparting accessible and appropriate information. Many governments devote money to population programs that do not serve their intended goals well (e.g., to increase effective use of contraceptives), let alone promote reproductive health and choice.<sup>15</sup> Compliance with the obligation to provide adequate information in many cases would require only a more effective use of resources already devoted to family planning and reproductive health programs.

### B. *The Importance of Information*

The term "reproductive health" is used throughout this Article as it has been defined by a leading expert:

Reproductive health . . . implies that people have the *ability* to reproduce, to regulate their fertility and to practice and enjoy sexual relationships. It further implies that reproduction is carried to a *successful outcome* through infant and child survival, growth, and health development. It finally implies that women can go *safely* through pregnancy and childbirth, that fertility regulation can be achieved without health hazards and that people are safe in having sex.<sup>16</sup>

According to the World Health Organization, reproductive health means, at a minimum: "that people have the ability to reproduce as well as to regulate their fertility with the fullest possible knowledge of

---

13. See *supra* note 3.

14. See *infra* Part II.

15. Pakistan is frequently cited as a country that has actively pursued a policy of reducing population growth and devoted a sizeable amount of resources (primarily from foreign development aid) to support programs, and yet has experienced only a small reduction in fertility levels. See, e.g., A.R. Rakanuddin & K. Hardee-Cleveland, *Can Family Planning Succeed in Pakistan?*, 18 INT'L FAM. PLAN. PERSP. 109, 115 (1992). The aggressive population program pursued by Indira Gandhi's government from 1974 through 1977—including compulsory sterilizations and community incentives—resulted thereafter in a dramatic decrease in the acceptance of sterilization and other family planning methods and was a major setback to India's family planning efforts overall. See generally James G. Chadney, *Family Planning: India's Achilles Heel?*, 22 J. ASIAN & AFRICAN STUD. 218 (1987).

16. Mahmood F. Fathalla, *Reproductive Health: A Global Overview*, 626 ANNALS N.Y. ACAD. SCI. 1 (1991), cited in Cook, *International Protection of Women's Reproductive Rights*, *supra* note 3, at 651.

the personal and social consequences of their decisions, and with access to the means of implementing them."<sup>17</sup>

People need information in order to be able to exercise the right to reproductive health and choice effectively. The provision of family planning services without full and impartial information results in population policies that deny women the ability to choose freely the number and spacing of their children. Such policies have promoted, discouraged, or prohibited particular forms of contraception without adequate regard to the impact on women's health and on the right of women to make decisions about their private and family lives.<sup>18</sup>

Women need information and counselling about their particular circumstances. In addition, women require basic information about their reproductive physiology, the impact of pregnancy on health, the ways in which diseases can be transmitted sexually, the ways in which the risk of transmission can be minimized, the benefits and risks of various methods of contraception, and safe options about what to do when those methods fail. Rumors and myths about modern contraceptive methods often prevent women and men from using them. Accurate information is needed to dispel these myths.<sup>19</sup> In sum, information about family planning is crucial in reducing unwanted pregnancies, spacing births, protecting against sexually transmitted diseases, promoting maternal and infant health, and giving women more time, energy, and ability to exercise control over their lives.

General education and literacy are also important. Women with some secondary education are substantially better able than less-educated women to take the steps necessary to plan their families and protect their health.<sup>20</sup> Inadequate information is not, however, just a problem for women in developing countries. A 1992 report by the World Bank stressed the need for information and education about

---

17. Mahmoud F. Fathalla, *Research Needs in Human Reproduction*, in WORLD HEALTH ORGANIZATION, RESEARCH IN HUMAN REPRODUCTION, BIENNIAL REPORT 1986-87, at 30 (1988).

18. For a thoughtful and ground-breaking exploration of the importance of information to reproductive health and choice from both public health and international law perspectives, see Lynn Freedman, *Censorship and Manipulation of Family Planning Information: An Issue of Human Rights and Women's Health*, in THE RIGHT TO KNOW, *supra* note 3.

19. A study of the effects of an information, education, and communication outreach program on the method of acceptance of Tunisian women found that women who received appropriate information from trained providers were more likely to accept a method than women who received no information. Acceptance of contraceptives increased by 125% in areas with such a program, compared to only 65% in other areas. Another study found that providing full information led to higher continuation rates. See 10 OUTLOOK 2 (1992).

20. UNICEF, STATE OF THE WORLD'S CHILDREN, 1994, at 43 (1994); see also Z. Sathar & Karen O. Mason, *Why Female Education Affects Reproductive Behavior in Urban Pakistan: Research Report No. 89-148* (Univ. of Mich. 1989).

family planning and other aspects of reproductive health in virtually all countries and among all cultural and socioeconomic groups.<sup>21</sup>

Women require information in order to be able to participate effectively in an open, public debate about the issues and interests affecting their reproductive capacities and health. With decisions about family planning policies being made or heavily influenced by politicians, religious hierarchies, pharmaceutical companies, and foreign donors, the voices of women's groups are often ignored.<sup>22</sup> To make their voices heard, women need information about their reproductive rights and about strategies that women's groups have used successfully to press for such rights in other countries.

The importance of women's participation in public debates about contraception and abortion cannot be overstated. Public debate plays a central role in shaping public opinion, social values, and even morality. Accordingly, public debate defines the parameters of women's reproductive choices. When women are excluded from access to information, or when debate is limited by mechanisms of formal or informal censorship, the result is the adoption of policies that are coercive and fundamentally undemocratic. Because public debate is so central to democracy and liberty, even if an action, such as abortion, is legally restricted within a particular country, discussion about the action and even advocacy of legal reform must be permitted.

### C. *Mechanisms for Protesting and Stopping Violations*

People who have suffered violations of their right to reproductive health information, and the nongovernmental organizations that represent them, have three major arenas in which to protest and/or seek redress.<sup>23</sup> First, those who live in a country that has a functioning, independent judiciary that enforces international human rights law or comparable national law may seek remedies from those courts.<sup>24</sup>

Second, if many people are victims of the same violation, they may be able to mobilize mass popular support to bring pressure on their government to change its policies and practices. The language of

---

21. MARJORIE A. KOBLINSKY ET AL., *THE WORLD BANK, MAKING MOTHERHOOD SAFE* (1992).

22. For a discussion of the role of vested interests in circumscribing women's reproductive choices, see Sheila McClean, *Women, Rights and Reproduction*, in *LEGAL ISSUES IN HUMAN REPRODUCTION* 213 (Sheila McClean ed., 1994).

23. Ken Roth, Executive Director of Human Rights Watch, outlined these three approaches at a talk in New York on July 28, 1994, cohosted by the Center for Reproductive Law and Policy and the Center for Women's Global Leadership.

24. See *THE ARTICLE 19 FREEDOM OF EXPRESSION HANDBOOK* 24-44 (1993).



international human rights can assist these efforts by making clear to the national government through the press, the public, and the international community that the government has not merely engaged in bad policy or flouted notions of justice, but has violated internationally agreed upon minimum standards of human rights.

Third, victims may protest to, and in some cases seek remedies from, various international bodies. This avenue tends to be most effective where the government is sensitive to international scrutiny and criticism and where the applicants have developed sufficient national and international networks to be able to publicize any adverse decision by the international body.

Where the government is a State Party to a relevant treaty, individuals or nongovernmental organizations may complain to the bodies that monitor and promote compliance. Bodies that monitor compliance with rights that give rise to the right to reproductive health information include the U.N. Human Rights Committee (which promotes compliance with the Civil and Political Covenant), the U.N. Economic, Social and Cultural Committee, the U.N. Committee on the Elimination of Discrimination Against Women (CEDAW), the U.N. Committee on the Rights of the Child, the European Commission of Human Rights, the Inter-American Commission on Human Rights, and the African Commission on Human and Peoples' Rights. Violations committed by governments, whether or not they are parties to one of the relevant treaties, may be brought to the attention of the U.N. Commission on Human Rights, the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, the U.N. Rapporteur on Freedom of Expression, or the Commission on the Status of Women.<sup>25</sup>

## II. THE RIGHT TO FREEDOM OF EXPRESSION AND INFORMATION

The right to freedom of expression encompasses both the right to express and receive opinions and ideas of all kinds and the right to receive and impart information.<sup>26</sup> The right to freedom of expression has been widely recognized as fundamental to a democratic

---

25. For a cogent discussion of the full range of international and regional bodies and procedures that may be enlisted to assist efforts to promote the enjoyment of human rights by women, see Andrew Byrnes, *Toward More Effective Enforcement of Women's Human Rights Through the Use of International Rights Law and Procedures*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 189-227 (Rebecca J. Cook ed., 1994).

26. Universal Declaration of Human Rights, *infra doc. biblio.*, art. 19; Civil and Political Covenant, *infra doc. biblio.*, art. 19; African Charter, *infra doc. biblio.*, art. 9; American Convention, *infra doc. biblio.*, art. 13; European Convention, *infra doc. biblio.*, art. 10.

society and to the inherent dignity of the person.<sup>27</sup> The right to freedom of information is a key component of the right to freedom of expression, and is necessary for the protection of all other human rights.<sup>28</sup> Without the free flow of information, governments cannot be held accountable for their actions and are able to commit violations with impunity. Without information, people cannot make informed choices about the most important aspects of their public life, including their form of government, nor their private life, including the number and spacing of their children and their reproductive health. Without information, they can neither make true choices nor assume responsibility for their lives. As a result, democracy is undermined, human growth is impeded, and individual liberty and human dignity are violated.

Article 19 of the Civil and Political Covenant guarantees to "everyone" the right to freedom of expression, including the "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers."<sup>29</sup> Governments are obliged to "respect and ensure respect" for this right by all individuals subject to their jurisdiction, without distinction as to sex or any other grounds. In other words, governments have a negative obligation to refrain from infringing on the right as well as a positive obligation to take all necessary measures, including legislation, to give effect to the right.

The main regional treaties (for the Americas, Africa, and Europe),<sup>30</sup> the Convention on the Rights of the Child,<sup>31</sup> and the Universal Declaration of Human Rights<sup>32</sup> (most of which is widely viewed as stating customary international law)<sup>33</sup> recognize the right

27. For example, the European Court of Human Rights declared that "[f]reedom of expression constitutes one of the essential foundations of . . . [such a democratic] society, one of the basic conditions for its progress and for the development of every man." *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) ¶ 49 (1976).

28. The U.N. General Assembly affirmed the centrality of the right to information at its opening session, declaring that "[f]reedom of information is a fundamental human right and . . . the touchstone of all of the freedoms to which the United Nations is consecrated." G.A. Res. 59, at 95, U.N. Doc. A/Res./103-34 (1946).

29. Civil and Political Covenant, *infra doc. biblio.*, art. 19.

30. See African Charter, *infra doc. biblio.*; American Convention, *infra doc. biblio.*; European Convention, *infra doc. biblio.*

31. Convention on the Rights of the Child, *infra doc. biblio.*

32. See Universal Declaration of Human Rights, *infra doc. biblio.*

33. See, e.g., Muhammad Haleem, *The Domestic Application of International Human Rights Norms*, in *DEVELOPING HUMAN RIGHTS JURISPRUDENCE: THE DOMESTIC APPLICATION OF INTERNATIONAL HUMAN RIGHTS NORMS* 97 (1988); John P. Humphrey, *The Universal Declaration of Human Rights: Its History, Impact and Juridical Character*, in *HUMAN RIGHTS: THIRTY YEARS AFTER THE UNIVERSAL DECLARATION* 21, 28-33 (B.G. Ramcharan ed., 1979); Egon Schwelb & Philip Alston, *The Principal Institutions and Other Bodies Founded Under the Charter*, in 1 *THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS* 245 (Karel Vasak ed., 1982).

to freedom of expression and information in essentially similar terms.<sup>34</sup> The Convention on the Rights of the Child makes clear that adolescents are entitled to information from the government on equal terms with adults, subject only to the "appropriate direction and guidance" of parents or legal guardians.<sup>35</sup> The European Court of Human Rights has interpreted the right to extend not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population."<sup>36</sup>

The right to freedom of information increases with the importance of the information at issue to the individual or society.<sup>37</sup> Information necessary for the protection of health is indisputedly of great importance and the public has a clear "right . . . to be properly informed" about such matters.<sup>38</sup> Information necessary to make informed choices that affect reproductive health, one of the most intimate aspects of one's private and family life, should be entitled to the highest degree of protection, just as information necessary to make decisions about the choice of government is entitled to the highest protection in the sphere of public life.<sup>39</sup>

The right to freedom of information has traditionally been understood to be limited to the freedom to receive and impart information free from government interference, and not to establish a right to receive any particular kind of information from the government or others.<sup>40</sup> Neither did the traditional interpretation of the right impose positive obligations on governments. The traditional interpretation is, however, changing.<sup>41</sup>

---

34. Compare African Charter, *infra doc. biblio.*, art. 9 with American Convention, *infra doc. biblio.*, art. 13 with European Convention, *infra doc. biblio.*, art. 10 with Convention on the Rights of the Child, *infra doc. biblio.*, art. 13 with Universal Declaration of Human Rights, *infra doc. biblio.*, art. 19.

35. Convention on the Rights of the Child, *infra doc. biblio.*, arts. 5, 13.

36. *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) ¶ 49 (1976).

37. *Id.* ¶¶ 65-66; see also *Gaskin v. United Kingdom*, 160 Eur. Ct. H.R. (ser. A) ¶ 49 (1989); *The Sunday Times v. United Kingdom*, 30 Eur. Ct. H.R. (ser. A) ¶ 66 (1979).

38. *The Sunday Times*, 30 Eur. Ct. H.R. ¶ 66.

39. For decisions noting the paramount importance of political debate, see, e.g., *Castells v. Spain*, 236 Eur. Ct. H.R. (ser. A) ¶¶ 42, 46 (1992); *Lingens v. Austria*, 103 Eur. Ct. H.R. (ser. A) ¶ 42 (1986).

40. This view is reflected in the jurisprudence of the European Court of Human Rights, which has ruled that the right to receive information "basically prohibits a Government from restricting a person from receiving information that others may wish or may be willing to impart to him." *Leander v. Sweden*, 116 Eur. Ct. H.R. (ser. A) ¶ 74 (1987); cf. *Open Door Counselling & Dublin Well Woman Centre*, 246 Eur. Ct. H.R. (ser. A) ¶ 55 (1992) (affirming that women have right to receive information about family planning options, which, however, may be subject to various restrictions).

41. See, e.g., *Informationsverein Lentia v. Austria*, 276 Eur. Ct. H.R. (ser. A) ¶ 36-39 (1993) (suggesting that State, as ultimate guarantor of pluralism, may have certain positive obligations).

The right to freedom of information is a fundamental and powerful right under international law, but not absolute. The right is subject to limitations as "provided by law" and "necessary . . . for respect of the rights or reputations of others [or] . . . for the protection of national security or of public order . . . or of public health or morals."<sup>42</sup> The European Court of Human Rights has emphasized that any restriction of this right must not only be necessary, but "necessary in a democratic society" and also "proportionate" to a legitimate aim.<sup>43</sup> Concerning the "most intimate aspects of private life," there must be "particularly serious reasons" to justify any interference by public authorities.<sup>44</sup> These standards have been endorsed by other international and regional human rights documents and bodies.<sup>45</sup>

The two main grounds that governments have invoked to justify restrictions on the right to receive information about reproductive health are the protection of: (1) public morals (a term that has been interpreted to include the right of others to be free from offense to religious sensibilities); and (2) public order, which includes crime prevention (relevant in countries where abortion and/or certain methods of contraception are legally restricted). These grounds are not to be *balanced* against the rights to information and expression; rather, they are to be applied as narrow exceptions to the general rule in favor of the right.<sup>46</sup>

---

42. Civil and Political Covenant, *infra doc. biblio.*, art. 19(3). For language similar to that used in the Civil and Political Covenant, see American Convention, *infra doc. biblio.*, art. 13(2); European Convention, *infra doc. biblio.*, art. 10(2). Article 9 of the African Charter does not contain a specific limitation, but is limited by Article 27(2), which provides that "[t]he rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest." African Charter, *infra doc. biblio.*, art. 27(2); see also *id.* art. 9.

43. *The Sunday Times*, 30 Eur. Ct. H.R. ¶¶ 59, 62 (citing European Convention, *infra doc. biblio.*, art. 10(2)).

44. *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) ¶ 46 (1988).

45. See Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Advisory Opinion, Inter-Am. Ct. H.R. No. OC-5/85/ser.A., doc. 5, ¶¶ 44-46 (Nov. 13, 1985), reprinted in 7 HUM. RTS. L.J. 74, 78-83 (1986); *General Comment No. 18, in Report of the Human Rights Committee*, U.N. GAOR, 38th Sess., Supp. No. 40, Annex VI, U.N. Doc. A/38/40 (1983); Universal Declaration of Human Rights, *infra doc. biblio.*, art. 29. The fact that the African Charter's protection of freedom of expression does not specify a similar test does not preclude the possibility that it will be interpreted to include the test implicitly. Of relevance is the fact that the African Charter's protection of the related freedom of assembly expressly incorporates the standards of "necessary" to protect a limited number of interests and "provided by law." African Charter, *infra doc. biblio.*, art. 11.

46. As stated by the European Court of Human Rights, the decisionmaker "is faced not with a choice between two conflicting principles but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted." *The Sunday Times*, 30 Eur. Ct. H.R. ¶ 65.

A governmental claim that a restriction on freedom of expression or information is required by "public morals" must be scrutinized carefully particularly because of the inherent breadth and subjectivity of the term "public morals" and the potential to perpetuate discrimination against practices or ideas found offensive to the majority. In many, if not most, societies, women's reproductive autonomy and sexuality have been perceived as threats to traditional values and male-dominated social systems. In these societies, restrictions in the name of "public morals" are particularly incompatible with freedom of information and expression given that a primary purpose of these freedoms is precisely to encourage debate about, and tolerance for, minority perspectives.

While international bodies in the 1970s and 1980s tended to accord a broad "margin of appreciation" to decisions by national courts concerning "public morals,"<sup>47</sup> that trend has changed in recent years. In several cases, international tribunals have concluded that the interest in protecting public morals and/or religious sensibilities could not justify an interference with the right to privacy or to information necessary to protect health.<sup>48</sup> These cases suggest that a government's interest in protecting public morals is unlikely to be found sufficient to justify a restriction on freedom of expression where: (1) the allegedly offensive information or expression was communicated only to adults who expressed willingness to receive the information, and was not widely publicized; (2) the practice that had been prohibited was tolerated in other countries that subscribed to the human rights treaty at issue; and/or (3) the law prohibiting the behaviour had not been enforced for several years.<sup>49</sup> These same considerations are likely to be relevant in the assessment by international bodies of the legitimacy of restrictions on information about abortion and contraception, ostensibly justified on the ground of public order and crime prevention.

---

47. See *Müller v. Switzerland*, 133 Eur. Ct. H.R. (ser. A) ¶ 19 (1990); *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) ¶¶ 43-59 (1976).

48. See *S. v. Switzerland*, App. No. 17116/90, Eur. Comm'n H.R. ¶ 65 (1993) (stating that government may not prohibit showing of obscene films portraying homosexual activity to consenting adults); *Open Door Counselling & Dublin Well Woman Centre v. Ireland*, 246 Eur. Ct. H.R. (ser. A) ¶¶ 73-77 (1992), discussed *supra* note 40. But see *Otto-Preminger-Institut v. Austria*, 295-A Eur. Ct. H.R. (ser. A) ¶ 57 (1994) (concluding that government was entitled to ban film found to be blasphemous where film had been widely advertised). In *Toonen v. Australia*, the U.N. Human Rights Committee (which monitors compliance with the Civil and Political Covenant) concluded that two laws that prohibited private consensual homosexual activity could not be justified by the State's interest in protecting public morals. *Toonen v. Australia*, U.N. Doc. CCPR/C/50/D/488/488/1992 (1994).

49. *Toonen*, U.N. Doc. CCPR/C/50/D/488/488/1992, ¶ 8.6; *S. v. Switzerland*, Eur. Comm'n H.R., ¶ 65.

### III. IMMEDIATELY BINDING GOVERNMENT OBLIGATIONS TO RESPECT AND ENSURE RESPECT FOR THE RIGHT TO INFORMATION NECESSARY FOR REPRODUCTIVE HEALTH AND CHOICE

#### A. *The Obligation Not to Interfere with Information About Abortion, Contraception, and Other Reproductive Health Matters*

While the status of abortion under international law is unsettled, it is well-accepted that governments have discretion to *permit* abortion; it is also generally accepted that governments have discretion to *prohibit* abortion, except when necessary to protect the life of the woman.<sup>50</sup> Nonetheless, even when a government has decided to prohibit abortion in most circumstances, a strong argument can be made that a government's interest in suppressing information about abortion may be outweighed in some circumstances by the right of women to have access to information free from government interference that is vital to their health and ability to make decisions about their private lives. The right of women to have access to information about abortion becomes stronger, and is likely to override the government's interest in suppressing the information, the more clearly it can be demonstrated that a particular woman or group of women are at high risk of death or serious ill-health if they do not receive the information.

This argument does not go so far as to claim that governments may never prohibit information about criminal activity. Where information is necessary to protect health, however, the government bears a heavy burden of showing that suppression of such information is necessary to protect a compelling public interest. The fact that a government has declared an activity to be criminal does not automatically establish a compelling interest, especially where the criminal prohibition is infrequently enforced and penalties are generally light. The remainder of this Part examines how one international court, the European Court of Human Rights, has examined the right to abortion information that may promote women's health and well-being. Because the European Court's reasoning is often followed by other

---

50. See, e.g., Case 2141 (Baby Boy Case), Inter-Am. C.H.R. 23, OAS Ser. L/V/II.52.48 (1981) (finding abortion permissible and not in violation of right to life as defined in American Convention on Human Rights), *reprinted in* 2 HUM. RTS. L.J. 110 (1981); Paton v. United Kingdom, App. No. 8416/78, 19 Eur. Comm'n H.R. Dec. & Rep. 244, 252, ¶¶ 19-20 (1980) (reasoning that whatever right to unborn life constituted, it was qualified by considerations relating to preservation of woman's life); Brüggeman & Scheuten v. Federal Republic of Germany, App. No. 6959/75, 10 Eur. Comm'n H.R. Dec. & Rep. 100, ¶¶ 54-61 (1977) (upholding German restrictions on access to abortion).

regional and international bodies, especially when considering core aspects of fundamental rights, the Court's judgment may reasonably be viewed as indicative of the way in which international law is developing. While the Court's judgment focuses on the importance of information necessary for health, similar (although less powerful) arguments may be made regarding information necessary to make decisions about one's private life.

The case, *Open Door Counselling & Dublin Well Woman Centre v. Ireland*,<sup>51</sup> arose when two family planning agencies, two counselors, and two women challenged a ruling of the Irish Supreme Court that prohibited the imparting of information about where to obtain legal abortions outside of Ireland. The European Court examined the interest of women in receiving information vital to their health in light of the Government's interest in protecting public morals (which, the Court reasoned, encompasses the interests in protecting religious sensibilities and the right to life of the fetus).<sup>52</sup> The Court did not consider the Government's interest in preventing crime because the case focused on information about where to obtain abortions abroad and, at the time, the law of Ireland did not clearly prohibit travel abroad for an abortion (although it was and remains a crime to obtain an abortion inside Ireland).

The Court, recognizing that abortion "may be crucial to a woman's health and well-being,"<sup>53</sup> concluded that the Irish court's order violated the right to freedom of information for several reasons. First, and most importantly, the order was too sweeping; it made no exceptions for women who might have a special need for the information, such as because of their "age, state of health or reasons for seeking counselling on the termination of pregnancy."<sup>54</sup> Second, the Court found it significant that most member states of the Council of Europe tolerated abortion, reasoning that activities that are widely tolerated "call for careful scrutiny . . . as to their conformity with the tenets of a democratic society."<sup>55</sup> Third, the counselling that was prohibited was nondirective; the Court found that there could be "little doubt that following such counselling there were women who decided against a termination of pregnancy" and, accordingly, the provision of information did not inevitably lead to the destruction of

---

51. 246 Eur. Ct. H.R. (ser. A) (1992).

52. *Open Door Counselling & Dublin Well Woman Centre v. Ireland*, 246 Eur. Ct. H.R. (ser. A) ¶ 63 (1992).

53. *Id.* ¶ 72.

54. *Id.* ¶ 73.

55. *Id.* ¶ 72.

unborn life.<sup>56</sup> Fourth, the information was not made available to the public at large but only to women who expressed interest. Fifth, the Government did not seriously contest the fact that information concerning abortion facilities abroad was obtainable from other sources in Ireland "in a manner which was not supervised by qualified personnel and thus [was] less protective of women's health."<sup>57</sup> Sixth, the injunction appeared to have been largely ineffective in protecting the life of the unborn, given that the number of Irish women who obtained abortions in Great Britain had not declined.<sup>58</sup> Seventh, the available evidence, which the Government did not contest, suggested that the injunction had "created a risk to the health of those women who are now seeking abortions at a later stage . . . and who are not availing [themselves] of customary medical supervision after the abortion has taken place."<sup>59</sup> Eighth, the injunction was likely to affect women who lacked education, information, or resources more adversely than other women.<sup>60</sup>

Several principles may be extrapolated from the *Open Door Counselling* decision that arguably reflect the way in which international law is developing. All of them apply to the circumstances of at least some categories of women (including adolescents and the rural poor) in most countries where abortion is stringently restricted.<sup>61</sup>

First, even in a country where abortion is subject to stringent legal restriction, the government may not prevent a woman from receiving information about where or how to obtain a safe and legal abortion where the circumstances supporting her right to information outweigh the government's interest in restricting the right. A woman's freedom to receive information, under international norms, should be found to outweigh the interests of others when, at the least, her age, state of health, or circumstances may make a live birth harmful to her.

A compelling range of data demonstrate that pregnancy is a high-risk undertaking for poor women in developing countries. The World Health Organization has estimated that 500,000 women die every year from avoidable pregnancy-related causes, ninety percent of whom live in developing countries.<sup>62</sup> The maternal mortality rate in developing

---

56. *Id.* ¶ 75.

57. *Id.* ¶ 76.

58. *Id.*

59. *Id.* ¶ 77.

60. *Id.*

61. See THE RIGHT TO KNOW, *supra* note 3.

62. WORLD HEALTH ORGANIZATION, MATERNAL MORTALITY: A GLOBAL FACTBOOK (1991).



countries averages thirteen times higher than in developed countries.<sup>63</sup> Women are at highest risk in the least developed countries in sub-Saharan Africa and South Asia, where maternal mortality rates are 200 times higher than in industrial countries.<sup>64</sup>

Child-bearing is least safe for women who are in their teens or over the age of thirty-five, who have borne another child within the past two years, or who have had three or more children.<sup>65</sup> Women also are at high risk if poor, anaemic, or malnourished; if they engage in heavy physical labor during or preceding pregnancy; and if they do not have good access to a hospital.<sup>66</sup>

All women whose health will be put at risk by a pregnancy have the right to receive information that others wish to impart to them about ways to minimize the health risks, including termination of the pregnancy. While this right, under international law, may be limited by certain countervailing interests (including crime prevention and protection of public morals), a compelling argument can be made that a woman in any or several of the high-risk categories has an overriding right to information.

Second, the government's interest in suppressing the information is less substantial when the information concerns an activity that, despite its moral implications, has been, and continues to be, tolerated by the government or by other governments generally. A U.N. survey completed in 1994 found that in 173 of the world's 190 countries (ninety-two percent), in which ninety-six percent of the world's people lived, abortion was permitted to save the woman's life.<sup>67</sup> Abortion was legal to preserve the women's physical health in 119 countries; to preserve the woman's mental health in 95 countries; in cases of rape or incest in 81 countries; and where there was a possibility of fetal impairment in 78 countries.<sup>68</sup> These figures

63. U.N. POPULATION FUND, STATE OF WORLD POPULATION 1994, at 15 (1994).

64. *Id.* at 13-14; Halfdan Mahler, *The Safe Motherhood Initiative: A Call to Action*, 1987 LANCET 668.

65. PREVENTING MATERNAL DEATHS 47 (E. Royston & S. Armstrong eds., 1989); THE WORLD'S WOMEN 3 (1991).

66. See PREVENTING MATERNAL DEATHS, *supra* note 65, at 47-48. See generally Beverly Winikoff & Mary Sullivan, *Assessing the Role of Family Planning in Reducing Maternal Mortality*, 18 STUD. FAM. PLAN. 128 (1987).

67. U.N. DEP'T FOR ECONOMIC AND SOCIAL INFO. & POLICY ANALYSIS, POPULATION DIVISION, WORLD ABORTION POLICIES 1994: WALL CHART (1994).

Abortion is officially illegal in 16 countries: Djibouti, Mauritius, Central African Republic, Sao Tome and Principe, Egypt, Bhutan, Nepal, the Philippines, Andorra, the Holy See, Malta, San Marino, Chile, Dominican Republic, Honduras, and Colombia. In several of these countries, however—including the Philippines, Chile, Dominican Republic, and Colombia—emergency abortions are performed in hospitals to save the woman's life and prosecutions are rare despite a high number of abortions. There is no information about Micronesia.

68. *Id.*

reflect a trend towards liberalization of abortion laws, including liberalization in at least 65 countries between 1967 and 1987.<sup>69</sup>

Moreover, in most countries, prosecutions for abortion are rare,<sup>70</sup> despite the fact that the rate of illegal abortion is often estimated to be high (except in Ireland and countries of the Middle East). In those cases that are prosecuted, most convictions are of people who performed abortions that resulted in the woman's death. Patients are rarely prosecuted. Those who are, tend to have sought an abortion late in their term. In most countries, doctors in hospitals will perform emergency abortions even when it is apparent that the woman has self-induced; only in a few countries, such as the Philippines, do doctors wait until the life of the woman is clearly at risk before completing an emergency abortion.<sup>71</sup> Moreover, although abortion is subject to severe legal restriction in more than half the world's countries, more than half the world's people live in countries where abortion is legal in most circumstances.<sup>72</sup>

Third, a government has less interest in suppressing information when the information is not published widely and is communicated only to women who desire to receive it. In countries where abortion is restricted, the argument advanced here is only that health providers should be able to provide information about abortion to women or couples who expressly request the information, and not that there should be a right to disseminate such information to the general public. There is no evidence that providing information under such circumstances encourages people to seek abortions. To the contrary, in Ireland, one of the few countries where, although abortion is illegal, the communication of abortion information can be documented on a meaningful scale (because it is legal to provide information about where to obtain abortions outside the country), providers report that many women decide not to have an abortion after receiving information and counselling.<sup>73</sup>

Fourth, the woman's interest in receiving information assumes greater weight when: (a) similar information is available from other sources that are equally illegal but harder to regulate; (b) suppression of the information does not reduce the number of abortions; (c)

---

69. Rebecca J. Cook, *Abortion Laws and Policies: Challenges and Opportunities*, 39 INT'L J. GYNECOLOGY & OBSTETRICS 61 (Supp. 3 1989).

70. See THE RIGHT TO KNOW, *supra* note 3.

71. See ALAN GUTTMACHER INST., CLANDESTINE ABORTION: A LATIN AMERICAN REALITY 3 (1994); Martin de la Rosa II, *Induced Abortion: Is It Really a Problem?*, in NATIONAL CONFERENCE ON SAFE MOTHERHOOD 43 (1987).

72. See U.N. DEP'T OF ECONOMIC AND SOCIAL INFO. & POLICY ANALYSIS, *supra* note 67.

73. RUTH RIDDICK, CRISIS PREGNANCY IN IRELAND: MAJOR NEW FINDING 2 (1992).

suppression increases the risk to the health of the woman; and/or (d) suppression has a disproportionate impact on the health of women who lack education or resources.

According to a 1991 estimate, some fifteen million abortions are performed illegally each year.<sup>74</sup> It is estimated that 60,000 to 200,000 women die each year as a result of unsafe abortions, and that more than a million suffer continuing health consequences.<sup>75</sup> Virtually all of these women live in developing countries and are poor. Virtually all of these deaths and health complications are preventable.<sup>76</sup> In countries where information has been restricted, there does not seem to be any significant reduction in the abortion rate.<sup>77</sup>

Clearly, women are going to continue having abortions. It is equally clear that governments are not going to do much to stop them. In most countries, there are family planning providers and other qualified people who are willing and able to provide information about abortions and, in particular, about how to perform them safely or at least more safely than the way in which most illegal abortions currently are performed. The question is whether governments have an obligation to refrain from suppressing information that could help women have safer abortions? For all of the above reasons, a strong argument can be made that the answer must be "yes."

The difference between information that promotes health, on the one hand, and information that encourages abortions, on the other,

---

74. ALAN GUTTMACHER INST., *supra* note 71.

75. For the 60,000 estimate, see U.N. POPULATION FUND, *supra* note 63, at 36; WORLD BANK, WORLD DEVELOPMENT REPORT 1993: INVESTING IN HEALTH 228 (1993). For an estimate of up to 200,000, see S. K. Henshaw, *Induced Abortion: A World Review: 1990*, 22 FAM. PLAN. PERSP. 76, 81 (1990).

76. For instance, in 1985, there were only 0.4 deaths for every 100,000 abortions in the United States. ALAN GUTTMACHER INST., *supra* note 71, at 26. The situation in Romania provides a dramatic example. Official records show that in 1989, when abortion was severely restricted, Romania had the highest maternal mortality rate in Europe: 545 women died from pregnancy-related causes, 86% of whom died of abortion-related complications, and another 20,000 women annually were treated for abortion related complications. Reed Boland, *Abortion Law World-Wide: A Survey of Recent Developments*, in JARMILA BEDNAŘÍKOVÁ & FRANK C. CHAPMAN, Festschrift für Jan Štěpán 90 (1994). In the very first year after abortion was legalized, the number of women who died from abortion-related complications declined by more than 60%. Gail Kligman, *The Politics of Reproduction in Ceausescu's Romania: A Case Study in Political Culture*, 6 E. EUR. POL. & SOCIETIES 364, 398 (1992).

77. For instance, in May 1993, the Supreme Court of Germany declared most abortions illegal (but ruled that punishment generally is not warranted for first term abortions). It further ruled that health providers were henceforth obliged to provide counselling "oriented to the protection of the unborn life," and thus could not provide nondirective, or balanced information and counselling. Marc Fisher, *German Court Rules Most Abortions Illegal*, WASH. POST, May 29, 1993, at A20. This restriction does not appear to have had any impact on the abortion rate in Germany (although the evidence is inconclusive). Telephone conversation with staff member of International Planned Parenthood.

is clearly illustrated by the situation in Brazil, where it is estimated that more than a half million women annually used the drug Cytotec as an abortifacient in the early 1990s. Countless numbers of women suffered unnecessary complications after they took an excessive amount of the drug because pharmacists were discouraged by government-imposed penalties from communicating information about unsafe dosages. Communication of information about unsafe dosages was unlikely to have served as a significant incentive to use the drug as an abortifacient, yet offered a high likelihood of improving the safety of abortions so induced. Although more research is needed, data and patterns of behavior around the world suggest that information about where and how to obtain safe abortions would not have a substantial impact on the number of abortions performed in most countries, but would have a substantial impact on their safety. To the extent that this relationship can be established for a given country, a strong argument can be made that the government is obliged not to interfere with the communication of such information. Similar arguments can be made regarding information about methods of contraception and other practices that promote women's health and informed choice.

*B. The Obligation to Provide Adequate and Accessible Information About Reproductive Health, Especially to Women at High Risk*

It is increasingly accepted that governments are obliged to take positive measures to ensure that individuals have access to fundamental rights.<sup>78</sup> Several international bodies have emphasized that, in particular, governments are obliged to take positive steps within their available resources to reduce the main preventable threats to the health and lives of their people. Thus, for instance, the U.N. Human Rights Committee declared that protection of the "inherent right to life" . . . requires that states adopt positive measures," and expressed the view that states should take "all possible measures" to reduce infant mortality and increase life expectancy.<sup>79</sup> The Inter-American Commission on Human Rights concluded that the government of Brazil violated the right to health of an indigenous people when it failed to stop outsiders with contagious diseases from entering their territory and then failed to provide timely and adequate medical assistance.<sup>80</sup>

---

78. See *supra* Part I.A.

79. U.N. Doc. CCPR/C/21/Rev.1, at 5, ¶ 5 (1989).

80. Case 7615 (The Yanomani Case), Inter-Am. C.H.R. 24, 213, OEA/ser.L/V/II.66, doc. 10 Rev. 1 (1985).

The obligation to take positive steps to reduce threats to life and health clearly extends to maternal mortality and poor health.<sup>81</sup> A strong argument can be made that governments that fail, for instance, to provide information about the risks to health of early and closely spaced pregnancies and the means to prevent them, or about the risks of and means to prevent sexually transmitted diseases, violate an immediate obligation to promote freedom of information, protect health, respect privacy, and prevent discrimination.

Although governments have broad discretion in deciding how to allocate their resources, this discretion is limited by immediately binding human rights obligations. In any event, effective programs for improving health need not be costly. As noted in a 1991 World Bank report, "a poor nation if it allots scarce resources appropriately can achieve a relatively low maternal mortality rate."<sup>82</sup> According to the report, the most important steps that can be taken towards safe motherhood include improved family planning, appropriate management of induced abortions, and community education.<sup>83</sup>

Leading authorities maintain that governments are obliged to offer women at high risk of maternal mortality or morbidity "education and counselling services that alert them both to risks and to means to minimize risks."<sup>84</sup> This obligation is particularly strong and increases over time for governments that have ratified the Economic Covenant. The compelling nature of the obligation increases for women at high risk, including women in developing countries, especially the poorest ones, adolescents, women over thirty-five years, women who are malnourished, women who engage in heavy physical labor, and women with three or more children.<sup>85</sup> Adolescents are far more likely than women aged twenty to twenty-four to die of pregnancy-related complications, to become infertile, or to suffer other lasting effects.<sup>86</sup> Teenagers are also more susceptible to HIV infection and to certain STDs.<sup>87</sup>

Government-sanctioned restrictions on the access of adolescents and unmarried women to information violate the right of nondiscrim-

---

81. See COOK, HUMAN RIGHTS IN RELATION TO WOMEN'S HEALTH, *supra* note 3, at 21-22.

82. KOBLINSKY ET AL., *supra* note 21, at 2.5.

83. KOBLINSKY ET AL., *supra* note 21, at 2.5.

84. COOK, HUMAN RIGHTS IN RELATION TO WOMEN'S HEALTH, *supra* note 3, at 31; *see also* Leary, *supra* note 3, at 50-51.

85. *See supra* notes 62-66 and accompanying text.

86. PREVENTING MATERNAL DEATHS, *supra* note 65, at 47.

87. U.N. POPULATION FUND, *supra* note 63, at 32; Deborah Maine et al., *Risk, Reproduction, and Rights: The Uses of Reproductive Health Data*, in POPULATION AND DEVELOPMENT: OLD DEBATES, NEW CONCLUSIONS (1994).

ination on the basis of age and status<sup>88</sup> in addition to the other rights discussed above. The government's interest in protecting public morals is not sufficient to outweigh the rights and needs of adolescent and other women at high risk of serious impairments of their health.

Moreover, while governments have a progressive obligation to take steps towards the full realization of the right to education,<sup>89</sup> they arguably have an immediate obligation to take concrete steps to improve the literacy of women of reproductive age, especially those who are at high risk of maternal mortality or ill health. Studies show dramatic differences in the ability of illiterate women and women with a secondary education to use information to protect their reproductive health.<sup>90</sup> The obligation to improve women's literacy is especially strong in countries where the "gender gap" is greatest. For instance, in Africa and parts of Asia, the level of illiteracy averages twenty percent higher for women than men.<sup>91</sup> In countries where the gap is even greater, the obligation to take immediate steps is that much more compelling.

*C. The Duty of Balance: The Obligation to Provide an Opportunity for the Expression of Opposing Views in Public Schools and Public Media*

In several countries, antiabortion viewpoints are broadcast on government supported radio and television stations, but views in favor of the right to choose are not. Such one-sided presentations constitute a violation of the government's duty not to publish biased information or opinions about matters of public interest without providing an opportunity for opposing views or information to be heard. Thus, for instance, although a government radio or television station is not required to broadcast statements by candidates for elected office, when a station broadcasts the statements of one candidate, it is obliged to broadcast the statements of other candi-

---

88. Age discrimination is prohibited by the main international human rights treaties as a discrimination based on "other status." See Universal Declaration of Human Rights, *infra doc. biblio.*, art. 2; Economic Covenant, *infra doc. biblio.*, art. 2(2); Civil and Political Covenant, *infra doc. biblio.*, art. 2(2); African Charter, *infra doc. biblio.*, art. 2; European Convention, *infra doc. biblio.*, art. 14. The American Convention does not prohibit discrimination on grounds of "other status." Discrimination between married and unmarried women is further prohibited by the Women's Convention. See Women's Convention, *infra doc. biblio.*, art. 1.

89. See Economic Covenant, *infra doc. biblio.*, arts. 2, 13; see also African Charter, *infra doc. biblio.*, art. 17(1); American Convention, *infra doc. biblio.*, art. 26; European Convention, *infra doc. biblio.*, art. 2.

90. UNICEF, *supra* note 20, at 43; Sathar & Mason, *supra* note 20.

91. See U.N. POPULATION FUND, *supra* note 63, at 8.

dates.<sup>92</sup> A government's duty to provide balanced information, if it provides any information at all, is particularly compelling concerning controversial matters that involve fundamental rights, such as elections and decisions about the number and spacing of one's children.<sup>93</sup> A government is *not* obliged to publish opposing views on all matters. In the context of reproductive health, the government is *not* obliged to publish information or theories that are untrue or of dubious credibility, or that advocate illegal action (such as where or how to obtain an illegal abortion). Nor is a government obliged to publish views in support of practices that violate international law, such as racial discrimination. If, however, a government publishes opinions that condemn practices that do not violate international law, such as abortion or contraception, then that government is obliged to provide the proponents of other viewpoints the opportunity to air their views.

A similar issue is presented when publicly supported schools sponsor speakers who provide biased information to students. In many countries, public schools provide biased information about sexual intercourse and abortion; particularly popular is an antiabortion film, *The Silent Scream*, which presents false information about fetal development. Government schools should strive not to present biased or false information to students at all, but if these schools do offer controversial information, then the duty of balance compels them to invite speakers who can present a counter-perspective.

*D. The Obligation Not to Perform or Permit Medical Interventions (Abortion, Sterilization, Administration of Contraception) Without Informed Consent*

The human right to make informed decisions about one's life, and especially about matters directly affecting one's body, is closely associated with the rights to liberty, security, the inherent dignity of the person, and the prohibition of inhuman or degrading treatment.<sup>94</sup> The right requires adequate information to make an

---

92. See *X & the Ass'n of Z v. United Kingdom*, App. No. 4515/70, 38 Eur. Comm'n H.R. Dec. & Rep. 86 (1971).

93. For further examination of the government's duty to provide balanced information about matters of fundamental importance, see ARTICLE 19, GUIDELINES FOR ELECTION BROADCASTING IN TRANSITIONAL DEMOCRACIES 51-53, 70 (1994).

94. See Civil and Political Covenant, *infra doc. biblio.*, pmbl., arts. 7, 9; Economic Covenant, *infra doc. biblio.*, pmbl.; African Charter, *infra doc. biblio.*, note 2, arts. 5, 6; American Convention, *infra doc. biblio.*, arts. 5, 7; European Convention, *infra doc. biblio.*, arts. 3, 5; see also REBECCA J. COOK, WOMEN'S HEALTH AND HUMAN RIGHTS 29-30 (1994); Cook, *International Protections of Women's Reproductive Rights*, *supra* note 3, at 696-99.

informed decision, as well as the liberty freely to give or refuse one's consent.

The fundamental right to refuse consent to invasions of one's body, including abortion, sterilization, forced pregnancy, and forced use of contraceptives, is noted here only in passing. It is a fundamental right guaranteed by the rights to liberty and security and the right to be free from cruel, inhuman, or degrading treatment or punishment. The right to refuse bodily intrusions that manipulate one's reproductive capacity gains further strength from the rights to privacy and family life. The right is not substantially strengthened, however, by the right to freedom of information and, for this reason, is not examined here. In contrast, the efforts of governments to encourage people to undergo medical procedures, by means short of coercion, do directly implicate the right to have information about the options to, and consequences of, those procedures.

For example, in 1966, the government of India initiated a program of paying incentives to clinic staff based on the number of "acceptors" they served and sending mobile vasectomy units around the country offering on-the-spot services.<sup>95</sup> Other programs involved payments to couples when one of them was sterilized or the woman accepted an IUD. Because the Government actively promoted one option (or outcome) over others, it had an enhanced obligation to provide unbiased information about the risks and benefits of the favored procedure as well as about options.

The obligation derives primarily from the right to information about matters relevant to health, combined with the government's strong obligation not to discriminate. Whether one accepts the position that governments are obliged to provide information necessary to effectuate reproductive health and choice, the proposition is strengthened considerably when the government has undertaken to provide biased information aimed at motivating a particular action, especially when recipients of government information have scant opportunity to obtain information about other options or perspectives.

#### IV. CONCLUSION

Human rights law should not be used only as a stick with which to beat the worst offenders. Human rights doctrines can and should be

---

95. S. Shukla, *Is It Possible—And How—To Affect Fertility? Policy Responses To High and Low Fertility Conditions*, PROC. OF THE SCI. CONF. ON FAM. & POPULATION, ESPOO, FIN., May 27, 1984, at 221 (Hellevi Hatunen ed., 1984).



used to encourage governments to deploy their resources to promote maximum enjoyment of human rights on a nondiscriminatory basis. But equally, the worst violators should not be spared criticism. The time has come for the policies of governments that contribute to the deaths of tens of thousands of women, by manipulating, interfering with, or failing to provide them with information they need to make informed decisions about their reproductive health, to be scrutinized with the same vigor and by the same international bodies that condemn a vast array of other, often less deadly or intrusive, forms of censorship.

Governments also must be held accountable at the national and local levels. If the international treaties and developing norms are to have any actual impact, they must be incorporated into national laws, regulations, and policies and be consulted by national courts. The campaign for women's reproductive health and choice will be strengthened by the use of all available forums, norms, and actions, including a freedom of expression and information approach that works in tandem with public health and other hands-on strategies.

