

REPRODUCTIVE RIGHTS

ARTICLE

PAOLA A. GUZMÁN ALEJANDRO*

She cannot have the joy of pregnancy that is wanted, avoid the distress of a pregnancy that is unwanted, plan her life, pursue her education, undertake a productive career, or plan her births to take place at optimal times for childbearing, ensuring more safety for herself, and better chances for her child's survival and healthy growth and development.¹

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* The author is a third-year student at the University of Puerto Rico School of Law and writer for the UPR Law Review. This paper was originally written in a shorter version for the New Human Rights Seminar. This course was offered in 2019 by professor Luis E. Rodríguez Rivera. The author wishes to thank professors Luis E. Rodríguez Rivera and Glenda Labadie Jackson for their suggestions and remarks. Also, she would like to thank Zulma Rivera Latorre for revising the use of English grammar in the article.

1 Mahmoud F. Fathalla, *Family Planning Services*, 44 AM. U. L. REV. 1179, 1180 (1995).

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INTRODUCTION

Violations of women's reproductive rights occur every day in all parts of the world. Reproductive rights consist of already recognized human rights that seek to guarantee that women can freely decide on matters concerning their reproductive and sexual lives without the interference of third parties. Since 1994, a series of international conferences that address reproductive rights as human rights have been held. The agreements contained therein were thought to set forth reproductive rights. However, local authorities have been unresponsive in securing these rights. As a result, women have had to go to international forums to hold governments accountable for such violations.

The first section of this paper is dedicated to overviewing the international instruments and conferences that forged reproductive rights, for the purpose of understanding their development. The section also analyses factors that indicate violations of reproductive rights. The second section of this piece will explore the relationship between reproductive rights and international law to illustrate the pros and cons of having reproductive rights expressly recognized as human rights. Lastly, the article addresses reproductive rights in Puerto Rico and how recently proposed legislation may affect such rights.

I. OVERVIEW ON REPRODUCTIVE RIGHTS

The worldwide emergence and recognition of women's rights has taken place during the last decades. Women have been advocating and redefining social concepts and global

policy, accentuating the social significance of women's issues.² Similar to other movements, women have been organizing locally, nationally, regionally, and internationally in order to expose the issues that affect them on a daily basis.³ Although women's movements originally started organizing themselves in order to fight issues that affected them locally, it is unquestionable that the international arena has provided a great opportunity for women to elevate the constant struggles they face. Elisabeth Friedman explains that "[b]y the mid-1980s, women were sharing information across regions and gaining exposure to the human-rights framework, establishing the groundwork for the women's human-rights movement."⁴ It is important to acknowledge the fact that, in its beginnings, the women's rights movement got help from mainstream movements.⁵ However, that was not always the case.⁶

Before 1989, little to no attention was paid to women's human rights movements within any of the major human rights groups.⁷ Friedman states that "[p]ressure from within and without created awareness in these institutions, generating women's human rights activism within the human rights movement."⁸ During the late 1980s and early 1990s, women's issues were starting to get discussed in conferences of the United Nations (UN). As Wendy Harcourt posits, "[d]uring this period, a holistic discourse emerged that aimed to tackle the overlap in women's lives."⁹ The women's agenda contained a variety of topics ranging from sexuality, health and reproductive rights, fair pay, access to work in the public sphere of society, violence, among others.¹⁰ Amnesty International also started working with women's human rights in the late 80's when staff members identified that women were underrepresented in the research they were conducting.¹¹

"In early 1989, U.S. staff convened a formal working group, which consulted with women's rights organizations that had a history of looking into human rights issues. . . ."¹² That same year the International Council of Amnesty International passed a resolution that required that at every level within the organization, women's human rights be looked at and protected.¹³ The gender and development agenda was being debated as the focus

2 Kimberly A. Johns, *Reproductive Rights of Women: Construction and Reality in International and United States Law*, 5 *CARDOZO WOMEN'S L.J.* 1, 1 (1998); Charlotte Bunch, *Transforming Human Rights from a Feminist Perspective*, in *WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES* 11 (Julie Peters & Andrea Wolper eds., 1995).

3 Elisabeth Friedman, *Women's Human Rights: The Emergence of a Movement*, in *WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES* 19 (Julie Peters & Andrea Wolper eds., 1995).

4 *Id.* at 24.

5 *Id.* at 25.

6 *Id.*

7 *Id.*

8 *Id.*

9 Wendy Harcourt, *The Global Women's Rights Movement: Power Politics Around the United Nations and the World Social Forum*, at 6 (2006).

10 *Id.* at 9.

11 Friedman, *supra* note 3, at 25.

12 *Id.*

13 *Id.* at 26.

on women's rights, while issues related to health and reproductive rights gained more momentum.¹⁴

From 1992 onwards, women's rights were beginning to get discussed at the United Nations (UN); conferences for women's movement became a visible player within the organization.¹⁵ Harcourt explains that "the global women's movement became caught up in micro strategies that brought their issues into the UN arena, but in the process of biopower the female body became an individual and social subject of development."¹⁶ Women were mainstreaming gender in order to address the different needs.¹⁷ Harcourt also argues that "as women's rights and gender equality were absorbed conceptually into international development debates, women were invited to take up higher positions in the bureaucracy, gender experts were established, documents were rewritten and many manuals were presented on how to gender mainstream."¹⁸

Since then, women's human rights movements have made their way to political actors such as those in the governmental spectrum securing vulnerable rights. The focus on the women's rights movement has been securing freedom from discrimination on the basis of gender, increasing political power, preventing gender violence, and gaining reproductive rights.¹⁹ From the beginning of the human rights movement, issues related to women's rights and reproductive rights have been recognized in international human rights documents.²⁰ The key document in the modern international human rights system, *The Universal Declaration of Human Rights* (UDHR), states that "motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection."²¹ "Although reproductive rights are inferred by this reference to motherhood, the UDHR did not provide direct protection for reproductive rights under its understanding of the right to health."²² In other words, there is no explicit protection of reproductive rights in the UDHR. Simply, "the UDHR does protect other women's rights that support reproductive rights, including rights to privacy, to consent to and have equal rights in marriage, to be free from discrimination based on gender, and to not be subjected to torture or cruel, inhuman, degrading treatment or punishment."²³

¹⁴ Harcourt, *supra* note 9, at 6.

¹⁵ *Id.*

¹⁶ *Id.* at 10.

¹⁷ *Id.*

¹⁸ *Id.* at 11.

¹⁹ Johns, *supra* note 2, at 1.

²⁰ Lance Gable, *Reproductive Health as a Human Right*, 60 CASE W. RES. L. REV. 957, 973 (2010) (see also Kimberly A. Johns, *Reproductive Rights of Women: Construction and Reality in International and United States Law*, 5 CARDOZO WOMEN'S L.J. 1, 11 (1998)).

²¹ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217 (III) (Dec. 10, 1948) art 25.

²² Gable, *supra* note 20, at 974.

²³ *Id.* (quoting UDHR art. 12, 16, 2, 5).

A. *What are Reproductive Rights?*

The International Conference on Population and Development (ICPD or Cairo Conference), held in 1994, developed the definition that is still used up to this day:

[R]eproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence.²⁴

As seen from the definition articulated in the ICPD, reproductive rights encompass three concepts that are intrinsically related and are needed in order to guarantee reproductive rights. In the first place, women shall have the right to decide when to get pregnant and how many children to have, if any. Secondly, women must be able to obtain information regarding prenatal and postnatal stages and information on ways to avoid pregnancy. Finally, women shall have the highest standard of sexual and reproductive health. Sexual health refers to the ability to have a safe and satisfying sex life.²⁵ “The right to sexual health includes the right to decide when, how, and with whom to have sexual relations.”²⁶ Therefore, this right recognizes that women can have and can enjoy sexual relations without the intercourse being for the sole purpose of producing offspring.²⁷ Furthermore, reproductive health was also defined during the Cairo Conference as a “state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system. . . .”²⁸ “Reproductive health considers and deals with issues of contraception, infertility, and sexually transmitted diseases.”²⁹

B. *An overview on reproductive rights*

The development of women’s reproductive rights may be categorized into two phases: “(1) [the] development brought by international human rights instruments from 1940s

²⁴ International Conference on Population and Development, Cairo, Egypt, Sept. 5-13, 1994, Report of the ICPD, U.N. Doc A/CONF.171/13/Rev.1 ch.7.3 (1995). p. 40.

²⁵ Johns, *supra* note 2, at 9.

²⁶ *Id.* (citing Sarah Y. Lai & Regan E. Ralph, *Female Sexual Autonomy and Human Rights*, 8 HARV. HUM. RTS. J. 201, 202 (1995)).

²⁷ *Id.* (citing Sarah Y. Lai & Regan E. Ralph, *Female Sexual Autonomy and Human Rights*, 8 HARV. HUM. RTS. J. 201, 202 (1995)).

²⁸ International Conference on Population and Development, Cairo, Egypt, Sept. 5-13, 1994, Report of the ICPD, U.N. Doc A/CONF.171/13/Rev.1 ch.7.3 (1995). p. 60.

²⁹ Johns, *supra* note 2, at 6.

to 1980s and (2) [the] development brought by the international conferences in 1990s.”³⁰ However, it is important to emphasize that there is no human rights instrument explicitly dedicated to reproductive rights. Rather, the main human rights instruments protect the various elements of reproductive rights.³¹

i. From 1940s-1980s

a. Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) is the leading document in international human rights law, being the first comprehensive human rights instrument that gathers civil, political, economic, social, and cultural rights.³² The UDHR established:

[T]he foundation for the international protection of reproductive rights through the enumeration of specific rights, which include: (1) the right to a standard of living adequate for the health and well-being, (2) the right to privacy, (3) the right to seek, receive, and impart information, (4) the right to marry and found a family on the basis of equality, and (5) the right to freedom from discrimination on the basis of sex and gender.³³

“The Universal Declaration of Human Rights (UDHR) is a milestone document in the history of human rights.”³⁴ It was the first international instrument to establish the fundamental human rights to be universally protected.³⁵

Thomas Buergenthal argues that it is important to recall that the UDHR is not a treaty.³⁶ The General Assembly of the United Nations set the declaration as a non-binding resolution that sought to provide a common understanding of human rights and fundamental freedoms of every individual.³⁷ Most of the States were eager with the development of the UDHR, but hesitant to acknowledge it had legal force.³⁸ This means that States are not bound by the provisions stated in the UDHR and those are mere standards that parties to the United Nations may follow if they wish. As a result of being a non-binding instrument, States do not have an international obligation to secure rights

³⁰ WANG BING, INTERNATIONAL PROTECTION OF WOMEN’S REPRODUCTIVE RIGHTS UNDER THE ICCPR 5 (2004).

³¹ United Nations Population Fund et. al, *Reproductive Rights are Human Rights: A Handbook for National Human Rights Institutions*, UNITED NATIONS POPULATION FUND (2014), <https://www.ohchr.org/Documents/Publications/NHRIHandbook.pdf>.

³² THOMAS BUERGENTHAL ET AL., INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 41 (5th ed. 2017).

³³ BING, *supra* note 30, at 6-7 (omitted citation).

³⁴ Office of the High Commissioner for Human Rights, *The Universal Declaration of Human Rights*, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, <https://www.ohchr.org/EN/UDHR/Pages/UDHRIndex.aspx> (last visited Nov. 11, 2019).

³⁵ *Id.*

³⁶ BUERGENTHAL, *supra* note 32, at 43.

³⁷ *Id.* at 43-44.

³⁸ Ed Bates, *History*, in INTERNATIONAL HUMAN RIGHTS LAW 35 (Daniel Moeckli et. al., eds., 2010).

that enable women access to their reproductive rights, thus affecting women's rights. Nevertheless, from time to time the UDHR became a point of reference for governments and international organizations that called out for the protection of the human rights embodied in the UDHR.³⁹ Some critics believe that some of the provisions of the UDHR have become customary international law and thus, it is binding upon all states with limited exceptions.⁴⁰ Sohn agrees that "the Declaration, as an authoritative listing of human rights, has become a basic component of international customary law, binding all states, not only members of the United Nations."⁴¹ Recognizing that the human rights included in the UDHR have developed into customary law is a step forward in guaranteeing women can secure their reproductive rights through certain human rights listed in the UDHR.

After the UDHR, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights were adopted by the United Nations General Assembly on December 16, 1966, becoming effective ten years later. The delay in bringing both covenants into force was due to the fact that at least thirty-five states had to ratify the instruments before becoming effective.⁴² As treaties, its provisions create binding legal obligations for the States Parties. Both treaties address cover rights that may be called as people or collective rights.⁴³

b. International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) is a multilateral treaty adopted by the United Nations General Assembly that deals, as its name implies, with protections for civil and political rights, such as the right to a fair trial and liberty. The ICCPR addresses women's rights regarding family and reproductive self-determination. On article 23, the treaty states that "family is the natural and fundamental group unit of society and is entitled to protection by society and the State".⁴⁴ Also, the article states that the "right of men and women of marriageable age to marry and to found a family shall be recognized."⁴⁵ The article also promotes equal rights during marriage and its dissolution.⁴⁶ Article 23 is a landmark provision for it recognizes issues relating to the private sphere of society in a legal international instrument that binds the public sphere of countries. Governments have been reluctant to work on public policy related to domestic affairs, especially with those related to women's rights. Furthermore, the treaty prohibits sex discrimination in the enjoyment of the rights thus assuring equality between men

39 BUERGENTHAL, *supra* note 32, at 45.

40 *Id.* at 47.

41 *Id.* (citing Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1, 16-17 (1982)).

42 *Id.* at 48.

43 *Id.* at 49.

44 International Covenant on Civil and Political Rights art. 23 (1).

45 *Id.* art. 23(2).

46 *Id.* art. 23(4).

and women.⁴⁷ Additionally, article 3 makes sure that “special attention must be paid to achieving women’s equality”.⁴⁸

The ICCPR created a Human Rights Committee, whose tasks are designed to ensure that State Parties are complying with the treaty. The Committee examines reports submitted by State Parties, which explain the measures taken by the State in order to guarantee the rights secured in the ICCPR and the progress made since the ratification of the treaty.⁴⁹ The Human Rights Committee also has authority to adopt General Comments. General Comments are designed to provide guidance to State Parties in their obligations arising from the ICCPR.⁵⁰ Through the General Comments, the Human Rights Committee “spells out its interpretation of different provisions of the Covenant.”⁵¹ In 2000, the Human Rights Committee adopted its General Comment 28 on equality between men and women.⁵² That General Comment applies to all the articles in the ICCPR. For example, the right to life secured in article 6 may be violated if women have no option rather than getting clandestine abortions.⁵³ This explanation by the Human Rights Committee was necessary in order to prioritize women’s rights. As Dianne Otto notes “the General Comment clearly promotes women’s equality as a substantive concept and accepts that different treatment of women and men may be necessary to achieve equality.”⁵⁴ Although the United States ratified the treaty in 1992, the United States’ Senate included a reservation with the intention to limit the ability of litigants to sue in court for direct enforcement of the ICCPR.⁵⁵ This means that if a woman, whose right to life was undermined because of lack of access to abortion procedures, decides to sue the United States for not guaranteeing her right to life, she is not be able to. Thus, United States cannot be held accountable for such violation to article 6 of the ICCPR. As of March 2020, 173 States are parties to the ICCPR.⁵⁶

c. International Covenant on Economic, Social, and Cultural Rights

In contrast with the ICCPR, the International Covenant on Economic, Social, and Cultural Rights (ICESCR) focuses on the protection of economic, social, and cultural rights. Unlike the ICCPR, ratifying the ICESCR does not give the State Party an obligation to give immediate effect to all of its provisions.⁵⁷ Rather, State Parties shall take steps to achieve

47 *Id.* art. 2(1).

48 Dianne Otto, *Women’s Rights*, in *INTERNATIONAL HUMAN RIGHTS LAW* 349 (Daniel Moeckli et. al., eds., 2010).

49 BUERGENTHAL, *supra* note 32, at 55.

50 *Id.* at 64.

51 *Id.*

52 Otto, *supra* note 48, at 359 (citing HRC, General Comment 28, HRI/GEN/1/Rev.9 (Vol 1) 228).

53 *Id.* at 360.

54 *Id.*

55 *FAQ: The Covenant on Civil & Political Rights (ICCPR)*, ACLU 100 YEARS, <https://www.aclu.org/other/faq-covenant-civil-political-rights-iccpr>.

56 *Status of Ratification Interactive Dashboard*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, <https://indicators.ohchr.org>.

57 BUERGENTHAL, *supra* note 32, at 76.

progressively the rights secured in the instrument.⁵⁸ This different approach in its implementation is because economic, social, and cultural rights take more time to implement and are more complicated in comparison with civil and political rights.⁵⁹ The ICESCR addresses in article 10 infant mortality: “the provision for the reduction of stillbirth-rate and of infant mortality and for the healthy development of the child.”⁶⁰ Furthermore, article 10 also states that the parties to the covenant recognize: (1) the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit in society and (2) special protection should be accorded to mothers during a reasonable period before and after childbirth.⁶¹

Similar to the ICCPR, the ICESCR requires State Parties to submit reports on the measures being taken in order to fulfill the securing of the treaty’s rights.⁶² The Committee on Economic, Social, and Cultural Rights (CESCR) was permanently created in 1976 and overlooks the reports submitted by the State Parties. In 2005, the Committee adopted its General Comment 16, which seeks to identify the gender dimensions of each of the rights secured in the ICESCR.⁶³ As Dianne Otto notices “its distinctiveness lies in its identification of men, as well as women, as potentially suffering sex discrimination and inequality in the enjoyment of ICESCR rights.”⁶⁴ As of March 2020, 170 States are parties to the ICESCR.⁶⁵

d. Convention on the Elimination of All Forms of Discrimination Against Women

In 1979, United Nations adopted the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW or the Women’s Convention), the main international instrument that protects women’s right to decide about matters related to their fertility and sexuality.⁶⁶ The treaty constrains signing parties to secure as soon as possible equality between women and men.⁶⁷ The treaty demands state parties to “condemn discrimination against women in all its forms” and “agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women.”⁶⁸ Dianne Otto explains that although the Women’s Convention encompasses issues discussed in the ICCPR and the ICESCR, “it highlights the specificity of women’s experience of discrimi-

⁵⁸ International Covenant on Economic, Social, and Cultural Rights art 2(1).

⁵⁹ BUERGENTHAL, *supra* note 32, at 77.

⁶⁰ International Covenant on Economic, Social, and Cultural Rights art. 12(a).

⁶¹ *Id.* art. 10.

⁶² *Id.* art. 16(1).

⁶³ Otto, *supra* note 48, at 361.

⁶⁴ *Id.*

⁶⁵ *Status of Ratification Interactive Dashboard*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, <https://indicators.ohchr.org>.

⁶⁶ María Plata, *Reproductive Rights as Human Rights: The Colombian Case*, 20 REV. IIDH 99 (1994).

⁶⁷ Barbara Stark, *The Women’s Convention, Reproductive Rights, and the Reproduction of Gender*, 18 DUKE J. GENDER L. & POL’Y 261, 268 (2011).

⁶⁸ Convention on the Elimination of All Forms of Discrimination Against Women, art. 2.

nation and advances a strong form of women's substantive equality as the international norm."⁶⁹

The Convention seeks to end all variety of possible discriminations against women by prohibiting discriminatory treatment, discriminatory outcome, intentional discrimination, and unintentional discrimination.⁷⁰ The goal of advancing women's equality is set out in three steps: (1) defining meticulously what is discrimination against women,⁷¹ (2) "making it clear that non-identical treatment aimed at addressing women's specific experiences of disadvantage may be necessary to hasten the achievement of women's equality,"⁷² and (3) "requiring that State Parties address the underlying causes of women's inequality."⁷³ Article 5 of the Convention provides that all State Parties shall implement measures:

[T]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.⁷⁴

In article 12, the CEDAW requires states to "ensure access to healthcare services, including those related to family planning" and to "ensure women appropriate services in connection with pregnancy, confinement in the postnatal period, granting free services when necessary, as well as adequate nutrition during pregnancy and lactation."⁷⁵ Consequently, "because reproductive rights focus on experiences—conception, pregnancy, childbirth—that affect women more directly than they affect men, these experiences are not reflected in traditional rights' discourse."⁷⁶ Barbara Stark notes that:

CEDAW corrects this omission by recognizing women's reproductive work and requiring the state--and men--to support it. Whether by a state or a non-state third party, whether by an affirmative act (such as coerced sterilization), or by an omission (such as the refusal to fund elective abortions), whether imposed on all women or a discrete group, whether the objective is to disempower women or to promote women's equality, the denial of women's reproductive rights is barred by CEDAW.⁷⁷

69 Otto, *supra* note 48, at 352.

70 *Id.*

71 *Id.*

72 *Id.* at 353.

73 *Id.* at 354.

74 Convention on the Elimination of All Forms of Discrimination Against Women, art. 5(a).

75 Convention on the Elimination of All Forms of Discrimination Against Women, art. 12.

76 Stark, *supra* note 67, at 271 (citing Brenda Cossman, *Sexual Citizens: Freedom, Vibrators, and Belonging in Gender Equality*).

77 *Id.* at 271-72 (citing omitted).

As a result of the Women’s Convention, “policymakers, governments, and service providers have to see fertility regulation and reproductive health services as a way to empower women, and not as a means to limit population growth, save the environment, and speed economic development.”⁷⁸ Furthermore, Roberta Clarke recognizes that:

CEDAW was fairly important in bringing women into the “rights talk” arena. Trying to get your government to ratify CEDAW is a political process that makes you see the ramifications of this quite extensive and encompassing document. Once your government has signed, it’s a social contract that they’re making with the women in the country. . . . [i]t gives you that tool, that leverage to say OK, this is the normative context within which women’s status has to be dealt with—and it’s human rights document, so automatically you are in the basket of human rights.⁷⁹

However, during the first years of its implementation, the Convention did not seem effective because of the great amount of reservations made by State Parties.⁸⁰ Each reservation is one less obligation the State Party has, thus directly affecting women’s rights. It can be argued that the reservations “have sought to preserve various national or religious institutions that are in conflict with the Convention.”⁸¹ Since the celebration of the Vienna World Conference on Human Rights in 1993, which called for members of the CEDAW to withdraw their reservations, more than thirty States have in fact withdrawn reservations.⁸² This is important because with each reservation withdrawn, there is a State Party committed to ending discrimination towards women. As of March 2020, 189 countries are State Parties.⁸³ United States has not ratified the treaty and, as a result, is not bound by the provisions embodied in the instrument, which aims to stop all kind of discrimination against women. The women’s rights movements must keep fighting and advocating for the United States to ratify the CEDAW because, first, it would force the federal government to develop a nationwide plan that addresses reproductive rights and, second, it would create a rule of law that does not depend on the will of the United States Congress or the Supreme Court of the United States (SCOTUS).

ii. 1990s

It is clear that since the beginning of the human rights movement back in 1948 when the UDHR was adopted, states have been securing rights that deal with reproductive rights in a progressive manner. United Nations conferences on human rights have been

⁷⁸ Plata, *supra* note 66.

⁷⁹ Friedman, *supra* nota 3, at 23.

⁸⁰ BUERGENTHAL, *supra* note 32, at 103.

⁸¹ *Id.*

⁸² *Id.* at 104.

⁸³ Office of the High Commissioner for Human Rights, *Status of Ratification Interactive Dashboard*, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (Jan. 07, 2020), <https://indicators.ohchr.org>.

tools for reaffirming and strengthening aspects of human rights.⁸⁴ In the 1990s, several conferences took place relating to human rights, population, and women. These promoted the development of women's reproductive rights. It is important to clarify that "[a]lthough these documents are not treaties and do not create specific obligations for the states, they [do] reflect the international community's common goals and policies regarding reproductive rights."⁸⁵

a. International Conference on Population and Development

In 1994, the International Conference on Population and Development (ICPD or Cairo Conference) was held in Cairo, Egypt. The conference had the purpose of discussing "the broad issue of and interrelationships between population, sustained economic growth and sustainable development, and advances in the education, economic status [,] and empowerment of women."⁸⁶ Although it was previously discussed that there is no human rights instrument dedicated solely to reproductive rights, the Cairo Conference produced the "first international consensus document to recognize that [women's] reproductive rights are human rights."⁸⁷ As a matter of fact, the definitions used today to define reproductive rights and reproductive health developed in the ICPD. The conference set a number of principles to guide participating parties in implementing the main goals of the conference. Principle 4 discusses gender equality and the empowerment of women:

Advancing gender equality and equity and the empowerment of women, and the elimination of all kinds of violence against women, and ensuring women's ability to control their own fertility, are cornerstones of population and development-related programmes. The human rights of women and the girl child are inalienable, integral [,] and indivisible part of universal human rights.⁸⁸

The Programme of Action of the Cairo Conference also states in its principle 8 the right to a high standard of physical and mental health. It endorses states to assure appropriate measures are being taken to guarantee universal access to health-care services, including those related to reproductive health care such as family planning and sexual health.⁸⁹ By stating that reproductive health must be secured under the health-care services countries provide their citizens, the Programme of Action explicitly addresses and calls for action on women's reproductive rights. The Cairo Conference marked a turning

⁸⁴ BUERGENTHAL, *supra* note 32, at 165.

⁸⁵ BING, *supra* note 30, at 9.

⁸⁶ International Conference on Population and Development, *Report of the ICPD*, U.N. Doc A/CONF.171/13/Rev.1, at 7 (Sept. 13, 1994) [hereinafter ICPD Programme of Action].

⁸⁷ Nancy Northup, *Reproductive Rights at Home and Abroad*, 15 CUNY L. REV. 265 (2012).

⁸⁸ ICPD Programme of Action, *supra* note 86, at 12.

⁸⁹ *Id.*

point in the globalization of the women's movement, playing an important role in shaping its agenda.⁹⁰

b. Beijing Conference

A year after the ICPD, the United Nations held the Beijing Conference to cover topics on women, specifically equality and empowerment. The conference took place amongst an atmosphere of excitement and increasing attention to women's issues.⁹¹ In the "Beijing Conference, 189 participating states reaffirmed what had been recognized a year earlier in Cairo."⁹² However, it was in Beijing that the gender problematic was raised.⁹³ Many states recognized that in order to create essential social changes, relationships between men and women had to be reevaluated for it seemed to be the ultimate restructuring of society necessary in order to fully empower women.⁹⁴ Sonja Boezak claims that the recognition by the states "represented a strong reaffirmation that women's rights were human rights and that gender equality was an issue of universal concern, benefiting all."⁹⁵ Gender equality in society may only be fully achieved when women are able to enjoy human rights that are intrinsically related to their reproductive rights. As long as women cannot decide over matters regarding their body, the gender gap will continue to exist.

The Beijing Conference created the Platform for Action in order to fulfill women's interest. The Platform provides that the "explicit recognition and affirmation of the right of all women to control all aspects of their health, in particular their own fertility, is basic to their empowerment."⁹⁶ It adds that "the human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination, and violence."⁹⁷ Additionally, it encouraged governments to review laws containing punitive measures against women who have undergone illegal abortions.⁹⁸

The approval of the Platform for Action did not come easy. There were heated debates, mostly by fundamentalists who attempted to restrict equality provisions on women's rights, such as human rights like health, abortion, and family forms.⁹⁹ However, Beijing's Platform for Action is "a considerable improvement over previous agreements: its clarity,

⁹⁰ Jason Finkle & Alison McIntosh *Cairo Revisited: Some Thoughts on the Implementation of the ICPD*, 6 HEALTH TRANSITION REV. 110, 110 (1996).

⁹¹ Barbara Roberts, *The Beijing Fourth World Conference on Women*, 21 THE CANADIAN JOURNAL OF SOCIOLOGY 237, 239 (1996).

⁹² BING, *supra* note 30, at 11.

⁹³ Sonja Boezak, *Beijing +5: The Long Walk to...?*, 45 AGENDA: EMPOWERING WOMEN FOR GENDER EQUITY 92, 93 (2000).

⁹⁴ *Id.*

⁹⁵ *Id.* at 94.

⁹⁶ Fourth World Conference on Women, *Beijing Declaration and Platform for Action*, ¶ 17, UN Doc. A/CONF.177/20/Rev.1 (Sept. 15, 1995) [hereinafter *Beijing Declaration and Platform for Action*].

⁹⁷ *Id.* ¶ 96.

⁹⁸ *Id.* ¶ 106(k).

⁹⁹ Roberts, *supra* note 91, at 240.

concreteness, strong statement that gender equality was a question of human rights and a necessary condition for social justice, and recognition that women must share power in decision making at all levels of society.”¹⁰⁰ That calls out for women’s autonomy in all aspects of her life, including in the private sphere and her reproductive rights. “The political commitments made by governments in those conferences [Cairo and Beijing] should be turned into legally enforceable duties to respect reproductive rights.”¹⁰¹ With that in mind, Cook explains that:

There is a growing awareness that national and international interactions to develop favorable practices and norms need to continue over time, and not end with court decisions or the approval of international documents. That is, the Cairo and Beijing commitments need to be seen as a dynamic, ongoing law-making and implementation process through which non-binding commitments become politically, socially, and legally binding.¹⁰²

c. Beijing 5+:

In June 2000, the United Nations held a General Assembly Special Session in its headquarters in New York to review implementation of the 1995 Beijing Platform for Action. Although originally named “Women 2000: Gender Equality, Development, and Peace for the 21st Century”, Beijing 5+ brought for discussion the good practices, actions, obstacles, and key challenges that women faced during the new millennium.¹⁰³ Surprisingly, many delegations who in previous conferences demonstrated conservative views on reproductive and sexual rights were now more accepting and supporting of more progressive measures to implement transcendental provisions on women’s rights.¹⁰⁴ States agreed upon revising national policies, programs, and legislations related to maternal mortality, safe and effective contraception, and the reduction of AIDS.¹⁰⁵

C. *Violations to Reproductive Rights*

While women’s rights movements around the world are advocating to obtain full and free exercise of their reproductive rights, many governments have given little to no importance to this fundamental human right. This may be due to the predominance of patriarchal leaders, a lack of commitment to eliminate discrimination against women, and a lack of will to develop public policy that recognizes and guarantees the reproductive rights of

¹⁰⁰ *Id.* at 243.

¹⁰¹ BING, *supra* note 30, at 12. (citing REBECCA J. COOK ET AL., *REPRODUCTIVE HEALTH AND HUMAN RIGHTS* 155 (2003)).

¹⁰² *Id.*

¹⁰³ Boezak, *supra* note 93, at 95.

¹⁰⁴ Center for Reproductive Rights, *Beijing 5+ Assessing Reproductive Rights* 1 (Nov. 2000), https://www.reproductiverights.org/sites/default/files/documents/pub_bp_Beijing+5.pdf.

¹⁰⁵ *Id.* at 3.

women, even if that goes against conservative groups. As Kimberly A. Johns notes, “[t]he current status of reproductive health among women and the effects of its inadequacies are having grave consequences upon populations around the world.”¹⁰⁶ For example, women’s reproductive rights are being violated when women die while being pregnant, when women pass away while giving birth, when women are denied access to healthcare or family planning services, among other discriminating scenarios.

i. Maternal Mortality

There is international consensus that maternal health is not only important to prevent deaths and disabilities, but also to prevent the associated deaths of newborns and infants.¹⁰⁷ Maternal mortality is defined as “deaths due to complications from pregnancy or childbirth.”¹⁰⁸ Most of the health complications women face are developed through pregnancy and most of them are preventable or treatable.¹⁰⁹ A United Nations inter-agency research disclosed that from 2000-2017, the global maternal mortality ratio declined by 38%.¹¹⁰ That percentage is equivalent to a decline from 342 deaths to 211 deaths per 100,000 live births.¹¹¹ In 2017, the number of women and girls who died yearly from complications during pregnancy or childbirth decreased from 451,000 to 295,000.¹¹² Although statistics show that there has been a significant change, one cannot ignore the fact that women still die during pregnancy or during birth, something that should not occur. The drop in the rates could be related to better health-care access during prenatal and postnatal stages. Over 800 women die each day during pregnancy or childbirth around the world.¹¹³ UNICEF explains that “approximately 20 [women] suffer serious injuries, infections, or disabilities.”¹¹⁴ The World Health Organizations (WHO) posits that the number of maternal mortalities displays the inequalities in access to quality health services and stresses the disparities between rich and poor.¹¹⁵ In 2017, the ratio of low-income countries is “462 per 100,000 live births versus 11 per 100,000 live births in high income countries.”¹¹⁶ These statistics show that maternal mortality does

¹⁰⁶ Kimberly A. Johns, *Reproductive Rights of Women: Construction and Reality in International and United States Law*, 5 *CARDOZO WOMEN’S L.J.* 1, 2 (1998).

¹⁰⁷ Dorothy Shaw & Rebecca J. Cook, *Applying Human Rights to Improve Access to Reproductive Health Services*, 119 *INTERNATIONAL JOURNAL OF GYNECOLOGY AND OBSTETRICS* 555, 555 (2012).

¹⁰⁸ UNICEF, *Maternal Mortality*, UNICEF (Sept. 2019), <https://data.unicef.org/topic/maternal-health/maternal-mortality/>.

¹⁰⁹ World Health Organization, *Maternal Mortality*, WORLD HEALTH ORGANIZATION (Sept. 19, 2019), <https://www.who.int/news-room/fact-sheets/detail/maternal-mortality> (see also Dorothy Shaw & Rebecca J. Cook, *Applying Human Rights to Improve Access to Reproductive Health Services*, 119 *INTERNATIONAL JOURNAL OF GYNECOLOGY AND OBSTETRICS* 555, 555 (2012)).

¹¹⁰ WORLD HEALTH ORGANIZATION, ET AL., *TRENDS IN MATERNAL MORTALITY: 2000 TO 2017*, 2 (2019).

¹¹¹ UNICEF, *supra* note 108 (see also WORLD HEALTH ORGANIZATION ET AL., *supra* note 110, at 2).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ World Health Organization, *Maternal Mortality*, *supra* note 109.

¹¹⁶ *Id.*

affect poor women more, partly due to health care inaccessibility and lack of money to pay for medical care.

Regarding maternal mortality, 27% are due to hemorrhage being the leading cause of deaths.¹¹⁷ Another cause of maternal deaths is pre-existing medical conditions that worsened during pregnancy.¹¹⁸ Eclampsia, sepsis, embolism, and other hypertensive disorders affect women during pregnancy and may lead to death.¹¹⁹ As will be discussed below, unsafe abortions also claim a significant number of lives.¹²⁰ However, maternal mortality is mostly preventable. Local governments play a crucial role in reducing maternal mortality. Governments must be proactive in securing the right to life and the right to health by providing health-care services to all women, regardless of their social and economic condition. Furthermore, the WHO claims that “the health-care solutions to prevent and manage complications are well known.”¹²¹ The WHO narrows down the problem to one thing: lack of access to healthcare services.¹²² As discussed earlier, access to healthcare services is a human right everyone has; government officials must be proactive in guaranteeing that basic human right to women. WHO states that:

The latest data suggest that in most high-income and upper middle-income countries, more than 90% of all births benefit from the presence of a trained midwife, doctor or nurse. However, fewer than half of all births in several low income and lower-middle income countries are assisted by such skilled health personnel.¹²³

Deciding whether to have a child or not is part of women’s reproductive rights. In addition, women have the right to adequate healthcare services before, during, and after pregnancy. Governments must address the barriers and limits that are being imposed on women in order to guarantee that no woman dies of a preventable death for it is a human rights violation that cannot be tolerated. The UN Human Rights Council agrees that maternal mortality is a human rights violation.¹²⁴ Furthermore, the CEDAW Committee constantly stresses that “when governments fail to provide health care that only women need, such as maternity care, that failure is a form of discrimination against them that governments are obligated to remedy.”¹²⁵ The United States has not ratified the CEDAW

117 UNICEF, *supra* note 108.

118 *Id.*

119 *Id.*

120 *Id.*

121 World Health Organization, *Maternal Mortality*, *supra* note 109.

122 *Id.*

123 *Id.* (citing World Health Organization and United Nations Children’s Fund. WHO/UNICEF joint database on SDG 3.1.2 Skilled Attendance at Birth).

124 Shaw & Cook, *supra* note 107, at 55 (citing U.N., Human Rights Council, Preventable Maternal Mortality and Morbidity and Human Rights, U.N. Doc. A/HRC/11/L.16/Rev.1 (June 16, 2009); U. N., Human Rights Council, Preventable Maternal Mortality and Morbidity and Human Rights, U.N. Doc. A/HRC/18/L.8 (Sept. 23, 2011)).

125 *Id.* (citing U.N., Report of the Committee on the Elimination of Discrimination against Women, General Recommendation at 24 U.N. Doc. A/54/38/Rev.1 s (1999)).

and, therefore, the instrument is not binding to the country. It should not be a surprise that mortality rates in the United States have been increasing significantly.¹²⁶ As a matter of fact, it is the only developed country whose maternal mortality rates are rising.¹²⁷ The rate has increased from 10.3 deaths per 100,000 live births in 1991 to 23.8 deaths in 2014.¹²⁸ Suzanne Delbanco explains that the increasing numbers “may be due to Cesarean-section deliveries, a procedure that carries added risk and financial burden and is frequently performed unnecessarily in the United States.”¹²⁹ One of the most influential factors in the increase of mortality rate are the high costs of maternal care and the lack of medical insurance in United States.

ii. Access to Reproductive Health-care Services

Lack of adequate healthcare access to women during their pregnancy confirms that access to reproductive healthcare services remains scarce.¹³⁰ The Cairo Convention defined reproductive health as “a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes.”¹³¹ The ICPD also developed a definition that explains how reproductive health care is “the constellation of methods, techniques, and services that contribute to reproductive health and well-being by preventing and solving reproductive health problems.”¹³² Without efficient and adequate reproductive health care, women may not enjoy their reproductive health to full extent. Therefore, governments shall develop and enforce policies and programs that promote and fulfill the right to reproductive healthcare services.

The lack of an adequate level of reproductive health is a global problem, especially in developing countries.¹³³ Reproductive health care may be measured using indicators, such as contraceptive prevalence, fertility rate, personnel at births, basic obstetric care, prevalence of women with genital mutilation, high frequency of pregnant women with HIV, and knowledge of HIV-prevention practices.¹³⁴ Lance Gable argues that “deficiencies in reproductive health indicators are largely conditions that can be alleviated with a combination of better access to health services, improvement in economic and social

¹²⁶ Suzanne Delbanco et al., *The Rising U.S. Maternal Mortality Rate Demands Action from Employers*, HARV. BUS. REV. (June 28, 2019), <https://hbr.org/2019/06/the-rising-u-s-maternal-mortality-rate-demands-action-from-employers>.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Gable, *supra* note 20, at 964.

¹³¹ International Conference on Population and Development, *Report of the ICPD*, U.N. Doc. A/CONF.171/13/Rev. 1, at 40 (Sept. 13, 1994).

¹³² *Id.*

¹³³ Gable, *supra* note 20, at 962.

¹³⁴ *Id.* (citing World Health Organization, Second Interagency Meeting, *Reproductive Health Indicators for Global Monitoring*, at 20-23, U.N. Doc. WHO/RHR/01.19 (2001)).

conditions, and increased protection of human rights related to reproductive health.”¹³⁵ Despite many countries ratifying treaties that promote women’s reproductive healthcare services, the maternal mortality rates discussed previously prove that women are not given access to adequate reproductive healthcare. Hence, women need for governments to implement proactive solutions to this problem and not just go to conferences and sign treaties, for women’s lives are at stake. Women may not continue to die or suffer reproductive health distress because of a government’s incompetence and failure to assure women enjoy their rights. As Gable states “work needs to be done in order to improve health outcomes and increase access to necessary reproductive health services and information.”¹³⁶

iii. Family Planning Services

Family planning is an essential component in fulfilling the basic right of all couples and individuals to decide freely and responsibly the number of children they want and when they want to have the children, if any. The World Health Organization state considers that “[f]amily planning enables people to make informed choices about their sexual and reproductive health.”¹³⁷ Also, it gives women an opportunity to learn and decide over the timing and spacing of their children. Additionally, deciding when to get pregnant promotes the “well-being and autonomy of women,” which may be “achieved through contraceptives and infertility treatments.”¹³⁸ Providing family planning services is highly beneficial, for it reduces unwanted pregnancies, which lead to the reduction of unsafe abortions; it allows women to limit the size of their families; it prevents closely spaced births; it reduces the number of women and men with Sexually Transmitted Diseases (STDs), as well as their children.¹³⁹

A basic component in securing women’s reproductive rights is eliminating economic, racial and social barriers to family planning services. According to the U.N. “[m]ore than 120 million women have an unmet need for family planning services.”¹⁴⁰ Affected women are not able to decide freely on planning when to have their children. Additionally, they are at risk of contracting STDs, which leads to a violation of their reproductive rights. Contraceptives are a tool for family planning. The use of that birth control method has increased worldwide from 54% in 1990 to 57.4% in 2015. ¹⁴¹Although the increase may seem minimal, the trend indicates that women are gradually moving to the use of contraception because they are being given the option and access to the birth control method. The WHO indicates that from 1990 to 2015, contraceptive use in Africa increased from

¹³⁵ *Id.*

¹³⁶ *Id.* at 967.

¹³⁷ World Health Organization, *Family Planning/Contraception*, WORLD HEALTH ORGANIZATION (Feb. 8, 2018), <https://www.who.int/news-room/fact-sheets/detail/family-planning-contraception>.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ United Nations Population Fund et. al, *supra* note 31, at 15.

¹⁴¹ World Health Organization, *Family Planning/Contraception*, *supra* note 137.

23.6% to 28.5% and in Asia from 60.9% to 61.8%.¹⁴² However, in Latin America, including the Caribbean, it remained the same, 66.7%.¹⁴³ Nonetheless, 214 million women in reproductive years are not using modern contraceptive methods in order to prevent pregnancies and STDs.¹⁴⁴ The unmet need for contraception may be due to limited access to contraception, especially among young people, fear or experience of side-effects, poor quality of available services, cultural or religious opposition, and gender-based barriers.¹⁴⁵

Currently there are clinics which offer services that promote the reproductive rights of women, as well as, serve the general community. In Puerto Rico, *Prevén Clinic* is a leading provider of family planning services.¹⁴⁶ It was established forty-eight years ago and receives around 16,500 patients yearly, with or without healthcare insurance.¹⁴⁷ *Prevén* offers STDs' testing, counseling regarding sexual and reproductive health, and sexual education to communities.¹⁴⁸

iv. Abortion

Abortion is one way that many women, couples, and people all around the world manage unwanted pregnancies. As agreed in the Cairo Conference, women have the right to decide over when to have children and how many, if any, and the timing of the pregnancy. According to the Guttmacher Institute, abortions can be divided into three categories those being safe, less safe, and least safe.¹⁴⁹ An abortion is considered safe when it consists of a harmless method performed by an appropriately trained provider such as a doctor.¹⁵⁰ Less safe abortions are the ones that only meet one of the two criteria mentioned above.¹⁵¹ For example, they may be done by a trained provider, but the method used might be outdated.¹⁵² Self-induced abortions using, for example, misoprostol is also considered a less safe abortion.¹⁵³ Misoprostol is a noninvasive drug that is usually used to induced abortions.¹⁵⁴ Least safe abortions are the ones done by an untrained person, such as the

142 *Id.*

143 *Id.*

144 *Id.*

145 *Id.*

146 Metro Puerto Rico, *Ciencias Médicas recibe seis millones para servicios de salud*, METRO, (Sept. 26, 2018) <https://www.metro.pr/pr/estilo-vida/2018/09/26/ciencias-medicas-recibe-seis-millones-federales-servicios-salud.html>.

147 *Id.*

148 *Id.*

149 SUSHEELA SINGH ET AL., *ABORTION WORLDWIDE 2017: UNEVEN PROGRESS AND UNEQUAL ACCESS* 10 (2018), https://www.guttmacher.org/sites/default/files/report_pdf/abortion-worldwide-2017.pdf.

150 *Id.*

151 *Id.*

152 *Id.*

153 *Id.*

154 *Id.*

woman herself, using a dangerous method.¹⁵⁵ From 2010-2014, “55% of all abortions were safe, 31% less safe, and 14% least safe,” being equivalent to more than 25 million unsafe abortions per year.¹⁵⁶ This means that 25 million women are denied reproductive health care, therefore violating their reproductive rights. Even though the percentage of women involved in less and least safe abortion procedures is inferior to the percentage of women who go through safe abortions, the rate is still high. There should be no less and least safe abortions because there is a right to reproductive healthcare that should be secured. Unsafe abortions may lead to complications that may contribute to maternal morbidity, disability, and mortality.¹⁵⁷

Recent data (2010-2014) exhibit that “an estimated 55.9 million abortions occur each year [,] 49.3 million in developing regions and 6.6 million in developed regions.”¹⁵⁸ Global trends indicate that abortions worldwide have increased by 11% between 1990 and 2014. Such increase is associated to the rise in the number of abortions in women of reproductive age.¹⁵⁹ Overall, thirty-five abortions occur each year per 1,000 women aged 15-44 worldwide.¹⁶⁰ The Guttmacher Institute estimates that in real-life terms, “an annual rate of 35 per 1,000 suggests that, on average, a women would have one abortion in her lifetime.”¹⁶¹

However, the report published by the Guttmacher Institute shows that there is little correlation between a country’s economic factors and the abortion rate.¹⁶² Data indicates that women that live in countries with the most restrictive laws have abortions at the same rate as women living in countries with less restrictive laws.¹⁶³ The region with the highest estimated abortion rate is in Latin America and the Caribbean with forty-four abortions per 1,000 women; the lowest rates are in North America and Oceania with seventeen and nineteen per 1,000, respectively.¹⁶⁴ However, the abortion rates from 1990 to 2014 in Eastern Europe declined by more than half. The Guttmacher Institute explains that “the steady increase in access to and use of modern contraceptives in these newly independent countries after the dissolution of the Soviet Union is reflected in the systematic drop from the high abortion rates that used to predominate.”¹⁶⁵

Currently, abortion remains prohibited in many countries. However, the 20th century was a period of change in penal laws and criminal codes that had been restricting

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* (citing Adler AJ et al., Incidence of severe acute maternal morbidity associated with abortion: a systematic review, *Tropical Medicine & International Health*, 2012, 17(2):177-190; Say L et al., Global causes of maternal death: a WHO systematic analysis, *Lancet Global Health*, 2014, 2(6):e323-e333; World Health Organization (WHO), *Health Worker Roles in Providing Safe Abortion Care and Post-Abortion Contraception*, Geneva: WHO, 2015).

¹⁵⁸ *Id.* at 8.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 8.

¹⁶² *Id.* at 9.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

women's reproductive rights. Most countries spelled out exceptions under which induced abortions was not to be subject to penalties.¹⁶⁶ The reforms in abortion-related legislations started in the early 1950s in the Soviet Bloc and satellite states across regions of Europe and Asia.¹⁶⁷ From 1960s onward, the alterations in laws extended through much of the developed world and some developing countries such as Cuba.¹⁶⁸ By the mid-1980s, abortions were "broadly legal" throughout most Europe and North America.¹⁶⁹ From 1985 to 2010, nearly all European countries lifted restrictions on abortion, thus permitting abortion on broad grounds.¹⁷⁰ In 2007, Mexico's federal district became the only part of the country to allow abortion without any restriction.¹⁷¹ This slow but steady shift may be the result of countries finally acknowledging that unsafe abortions are a public health concern and mostly preventable with proactive actions and solutions implemented by governments. The Guttmacher Institute states that as of 2019:

[S]ome 6% of the world's 1.64 billion women of reproductive age live in a country where abortion is prohibited altogether, without any explicit exception. Twenty-one percent of reproductive-aged women live in a country where abortion is explicitly allowed only to save a woman's life. An additional 11% of women live in places that permit abortion to protect a woman's physical health, another 4% where it is also permitted to protect a woman's mental health, and 21% where abortion is also permitted on socioeconomic grounds. . . . Around 37% of women live in countries where abortion is allowed without restrictions as to reason— with maximum gestational limits specified in almost all cases.¹⁷²

Those percentages are equivalent to thirty-nine countries explicitly permitting abortions "only in the most dire of circumstances";¹⁷³ thirty-six countries allow abortion to save a woman's life and protect her physical health; twenty-four countries explicitly specify a woman's mental health as grounds for legal abortion; thirteen countries add socioeconomic reasons to life, physical health, and mental health grounds; sixty-one countries have laws that allow women to have an induced abortion without restriction. It is important to mention that having liberal laws does not guarantee that abortion will be widely available.¹⁷⁴ Barriers, such as "onerous certification regulations, private-sector providers, inadequate access to public-sector facilities, stigma, and a poor understanding of the law among both women and providers",¹⁷⁵ prevent safe abortions. It is useless

¹⁶⁶ *Id.* at 14.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 14, 15.

¹⁷³ *Id.* at 15.

¹⁷⁴ *Id.* at 15-16.

¹⁷⁵ *Id.* at 16.

to have a law that allows abortion when it is not being put into practice because of all the undue burdens placed on practitioners and women, who end up resorting to clandestine abortions.

Abortion-related stigma is a reality that many women of all contexts face, adversely impacting women's health and well-being.¹⁷⁶ This stigma leads to unsafe abortions because women fear judgements and criticism from family and friends.¹⁷⁷ However, removing restrictions on abortion does not necessarily end the stigma.¹⁷⁸ The Guttmacher Institute explains that:

Even in countries where abortion is broadly legal, women's feelings of isolation and anxiety over having a stigmatized procedure can result in their fear of being judged harshly by health professionals, and of being treated as an outcast by their family and community. In legally restrictive settings, by comparison, seeking either an induced abortion or care afterward can mean running the risk of arrest.¹⁷⁹

In El Salvador, from January 2000 and March 2011, nearly thirty-two women per 129 got handed over to police by hospital personnel.¹⁸⁰ "The consequences of clandestine—often unsafe—abortions predominantly affect women in countries with highly restrictive laws."¹⁸¹ Highly restricted laws are concentrated in developing regions.¹⁸² Although women in some countries in developing regions obtain misoprostol to self-induce the abortion, they still face the risk of negative health consequences if they do not use the method correctly.¹⁸³ However, in countries where misoprostol is not available, unsafe abortions are the only option available for women that want to exercise their reproductive rights. The consequences that a woman's health can suffer from an unsafe abortion may include sepsis, hemorrhage, trauma to reproductive organs, and/or even death.¹⁸⁴ Many women experience complications from unsafe abortions and need immediate post-abortion care, yet many wait until they face life-threatening symptoms to seek help.¹⁸⁵ Post-abortion health care is part of women's health care and reproductive rights, being consistent with the Cairo Conference's Programme of Action.

¹⁷⁶ *Id.* at 30.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* (citing Edna Astbury-Ward, Odette Parry & Ros Carnwell, *Stigma, abortion, and disclosure—findings from a qualitative study*, 9 *J. OF SEXUAL MED (ISSUE 12)* 3137–47 (2012); Franz Hanschmidt et al., *Abortion stigma: a systematic review*, 48 *PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH (ISSUE 4)* 169–177 (2016); Kristen Shellenberg et al., *Social stigma and disclosure about induced abortion: results from an exploratory study*, 6 *GLOBAL PUBLIC HEALTH (SUPPL. 1)* S111–S125 (2011)).

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 28.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ Gable, *supra* note 20, at 966.

¹⁸⁵ SINGH, *supra* note 149.

v. Sexually Transmitted Infections (STIs)

STI prevention and control have widespread public benefits, including that they lead to universal access to sexual and reproductive health care.¹⁸⁶ As Lance Gable explains, “the rate of sexually transmitted infections in the population provides a crucial indicator of reproductive health.”¹⁸⁷ The World Health Organization (WHO) reports that in 2016 there were an estimated 376 million new infections of the four curable STIs: chlamydia, gonorrhea, syphilis, and trichomoniasis.¹⁸⁸ These estimates are equivalent to more than one million new infections per day. High rates of STIs evidence that there is still poor access to reproductive health. STIs have a close link to sexual and reproductive practices, for instance, most transmissions happen because there is no access to adequate treatment and health information available.¹⁸⁹ If not treated, STIs increase the risk of HIV transmission during unprotected sexual intercourse, leading to complications such as “pelvic inflammatory disease, infertility, ectopic pregnancy, miscarriage, fetal death, and congenital infections.”¹⁹⁰ Around 200,000 fetal and neonatal deaths occur each year due to mother-to-child syphilis transmission and over 280,000 cervical cancer deaths occur each year due to human papillomavirus (HPV).¹⁹¹

Untreated syphilis in pregnancy is a major cause of morbidity and mortality that lead to fetal deaths, stillbirths, preterm or low-birth-weight infants, and an increase in risk of mother-to-child transmission.¹⁹² From 2015-2018, eleven countries and territories have been validated as having eliminated mother-to-child transmission of syphilis, including Cuba, Anguilla, Bermuda, and Malaysia.¹⁹³ However, many countries are not able to cover antenatal care due to a limited supply of syphilis test kits.¹⁹⁴ Similarly, cervical cancer is a preventable disease, yet over 280,000 women die each year because of this type of cancer.¹⁹⁵ Ninety percent of the deaths happen in low- and middle-income countries.¹⁹⁶ The WHO launched in 2018 a campaign aiming to eliminate cervical cancer. The strategy includes providing HPV vaccination to young women and subsequent cancer screening and treatment for women age 35-45.¹⁹⁷

¹⁸⁶ World Health Organization, *Report on Global Sexually Transmitted Infection Surveillance* vii (2018), <https://apps.who.int/iris/bitstream/handle/10665/277258/9789241565691-eng.pdf?ua=1>.

¹⁸⁷ Gable, *supra* note 20, at 967.

¹⁸⁸ World Health Organization, *Report on Global Sexually Transmitted Infection Surveillance*, *supra* note 186, at 1 (citing Jane Rowley et al., *Global and regional estimates of the prevalence and incidence of four curable sexually transmitted infections in 2016*, 97 *BULL WORLD HEALTH ORGAN* 548, 548-562 (2019)).

¹⁸⁹ Gable, *supra* note 20.

¹⁹⁰ World Health Organization, *Report on Global Sexually Transmitted Infection Surveillance*, *supra* note 186, at 2.

¹⁹¹ *Id.*

¹⁹² *Id.* at 6.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 38.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

II. REPRODUCTIVE RIGHTS AND INTERNATIONAL LAW

Although the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) and the Declaration on the Elimination of Violence Against Women recognized women's rights and emphasized the obligation states have in promoting gender equality and securing a life free of violence, those are instruments that vaguely address reproductive rights.¹⁹⁸ Nevertheless, as can be seen from the Cairo and Beijing Conferences that took place in the 1990s, the recognition of reproductive rights as human rights is a recent event in international law. "The importance of human rights principles in advancing women's health rights, including reproductive and sexual health, was clarified in the language of both the Cairo Programme of Action and the Beijing Declaration."¹⁹⁹ However, there has not been an international instrument developed afterwards that explicitly sets forward reproductive rights as human rights. The lack of a binding treaty that focuses on reproductive rights limits governments' duties to enforce, secure, and protect such rights. As a result, women's rights movements have been using the international human rights rhetoric in order to advance their goals.²⁰⁰

A. *Human Rights Approach*

Human rights set universal standards that are a powerful tool in holding governments accountable for violations.²⁰¹ "Human rights stem from the notion that all human beings are equal and therefore have an equal right to enjoy dignity and security."²⁰² Approaching reproductive rights as human rights would be substantially beneficial to their recognition as such because it would place them in the international arena. This positioning brings governments and international organizations closer to recognizing the importance and necessity of framing them as human rights. "Conceptualizing reproductive rights as human rights—related to equality, freedom, and autonomy—rather than framing them as social or 'second generation rights' is relevant to understanding the scope of the States' obligations regarding the achievement of reproductive self-determination."²⁰³ The human rights approach allows for women's reproductive rights to be seen as a crucial and important aspect of all societies, regardless of the type of government or dominant religion. Reproductive rights may not be demoted to a category of less importance and cannot be addressed as a secondary matter of society, in comparison with other issues, when women across the planet are dying every day due to violations of their reproductive rights.

198 Alma Beltrán Y Puga, *Paradigmatic Changes in Gender Justice: The Advancements of Reproductive Rights in International Human Rights Law*, 3 CREIGHTON INT'L & COMP. L.J. 158, 159 (2012).

199 Isfahan Merali, *Advancing Women's Reproductive and Sexual Health Rights: Using the International Human Rights*, 10 DEVELOPMENT IN PRACTICE SYSTEM, 609, 612 (2000).

200 Gable, *supra* note 20, at 971 (citing BETH A. SIMMONS, MOBILIZING FOR HUMANS RIGHTS 222-231 (2009)).

201 Yeshiva University, *What to Expect: Legal Developments and Challenges in Reproductive Justice*, 15 CARDOSO J.L. & GENDER 503, 588 (2009).

202 Dina Bogecho, *Putting It to Good Use: The International Covenant on Civil and Political Rights and Women's Right to Reproductive Health*, 13 S. CAL. REV. L. & WOMEN'S STUD. 229, 232 (2004).

203 Beltrán Y Puga, *supra* note 198, at 149.

Furthermore, having a human rights framework allows the use of international bodies created by international frameworks in order to hold governments accountable when local mechanisms are not helpful.²⁰⁴ It allows you to look beyond a local government's policies and framework, thus allowing you to frame violations in a way not available before.²⁰⁵ This has been evidenced in the cases recently decided in international courts, which have found local governments responsible of violating women's reproductive rights. Such accountability would not have happened if it was not because the government's actions were taken to an unbiased, international forum. Additionally, the human rights framework helps expand the way we conceive the relationship between our rights and our government's obligation to protect those rights. "State obligations to uphold human rights go beyond what we in the United States traditionally think about our government's requirements to protect our rights, and so in ways that are very important in the reproductive rights context."²⁰⁶ About the States obligation:

States have a tripartite obligation to respect, protect, and fulfill human rights, and what that means is that first states have to respect human rights, and therefore they cannot interfere with an individual's exercise of a right. They then have to protect human rights, meaning that they have to ensure that third parties can't interfere with an individual's exercise of a right. And they also have to fulfill human rights, which means that the state must put in place the conditions necessary to make possible the enjoyment of the right.²⁰⁷

In other words, governments must respect reproductive rights and may not stand in the way of a woman's decision regarding her reproductive rights. Furthermore, governments have the duty to ensure that no third party interferes in a woman's decision concerning such rights. This means that no organization can stand in front of an abortion clinic to dissuade women who enter so that they do not abort. Lastly, the government shall promote and ensure women know about their reproductive rights. Likewise, using a human rights approach gives women everywhere the power to create alliances and partnerships with different human rights advocates. "You do not need to be a lawyer, and it really creates an opportunity for a wide arrange of stakeholders and actors, health service providers, feminists, lawyers, to collaborate around an issue and to try to address it together."²⁰⁸ Altogether, the human rights perspective:

[C]an help change a perception about an issue and as perceptions change we can even bring about different norm internalization, that can eventually hopefully change—even change our law, and second, human

204 Yeshiva University, *supra* note 201, at 589.

205 *Id.*

206 *Id.* at 599.

207 *Id.* at 600.

208 *Id.* at 590.

rights framework and treaties provide advocates with new tools, forums, and alliances that can only strength their work.²⁰⁹

It helps us recognize that human rights go beyond our local laws and government.²¹⁰

B. *Testing Out Possible Human Rights*

Human rights law scholar Philip Alston developed a three-step analysis for evaluating if a right being proposed has what it takes to achieve status of international human right.²¹¹ Alston's test considers three minimum conditions any proposed right must have: (1) it must be fundamental; (2) it must be universally recognized and guaranteed; and (3) it must be capable of sufficiently precise formulation to give rise to legal obligations on state parties.²¹² Alston has somehow considered another requirement, which is that the General Assembly of the United Nations creates a covenant for the right's protection.²¹³ First of all, Alston's primary requisite is widely supported and "rarely questioned when applied to men."²¹⁴ "State control of men's bodies through regulation of their reproductive capacities, such as castration, has long been condemned as tyranny and mayhem."²¹⁵ Women shall have the autonomy to decide freely on any matter regarding their reproductive rights. Secondly, not only international documents and conventions have recognized the need for reproductive rights as human rights, but international courts have also inclined towards the recognition of reproductive rights by holding governments accountable for violations of those rights. Therefore, there should not be much hesitation in securing the rights in a UN treaty.

On the other hand, securing reproductive rights as a more established human right has been difficult because there is no universal definition of reproductive rights.²¹⁶ "Human rights advocates are keenly aware of the difficulties in giving a right universal appeal. Some argue that there is a need for cultural relativism, while others argue that there are human rights so basic that they do not require cultural sensitivity."²¹⁷ Cultural relativism may be defined as "the position according to which local cultural traditions (including religious, political, and legal practices) properly determine the existence and scope of civil and political rights enjoyed by individuals in a given society."²¹⁸ Allowing cultural rel-

²⁰⁹ *Id.* at 599.

²¹⁰ *Id.*

²¹¹ Rebecca J. Cook, *International Protection of Women's Reproductive Rights*, 24 N.Y.U. J. INT'L L. & POL. 645, 657 (1992) (citing Philip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 AM.J. INT'L L. 607 (1984)).

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* at 658.

²¹⁵ *Id.*

²¹⁶ Rishona Fleishman, *The Battle Against Reproductive Rights: The Impact of the Catholic Church on Abortion Law in Both International and Domestic Arenas*, 14 EMORY INT'L L. REV. 277, 305 (2000).

²¹⁷ *Id.*

²¹⁸ Fernando R. Tesón, *International Human Rights and Cultural Relativism*, 25 VA. J. INT'L L. 869, 870 (1985).

ativism to interfere with the establishment of reproductive rights can be brutal for women because that may lead to no universal conception of reproductive rights. Reproductive rights would be bound by the religious, political, and legal practices of each government and thus, no universal consensus would exist. "Female subordination runs so deep that is still viewed as inevitable or natural, rather than seen as a politically construed reality maintained by patriarchal interests, ideology, and institutions."²¹⁹ There is no doubt that in countries where culture is highly influenced by religion, women are subordinate to the roles of men.²²⁰ Cultural relativism furthers that and does not allow for an universal understanding of reproductive rights.

However, Professor Abdullahi An-Na'im explains that new human rights "cannot be seen as truly universal unless they are conceived and articulated within the widest possible range of cultural traditions."²²¹ He believes that an approach towards the recognition of reproductive rights as human rights must, in fact, acknowledge cultural relativism without giving it too much validity or denying its presence in the human rights debate.²²² Under the cultural relativism theory, reproductive rights must be worked upon cultural traditions, including religion. This represents a challenge for reproductive rights advocates because the church has historically been seen as an actor in society that promotes inequality and that pushes for legislations that diminish women rights.

The debate on cultural relativism leads to focus on the gender inequality that exists worldwide. Up to this date, women are treated as second-class citizens and are prevented from playing a significant role in the political process of society.²²³ "Human rights have been historically defined, targeted, and implemented for those who participate in the public spheres of the society and the economy."²²⁴ This idea is what makes many people believe that the discrimination women face on a daily basis should not be prone to intervention by human rights activist, because it takes place in the private sphere, the household.²²⁵ Feminist scholars have been claiming that limiting women's roles to the private sphere of the home retrains the development of the women as a citizen in the public sphere.²²⁶ "Women's enjoyment and exercise of reproductive rights and fundamental freedoms will become a universal fact when women everywhere are allowed to make their own decisions about their fertility and sexuality."²²⁷ Women's rights must be placed on the public sphere because women are also affected by the decisions being made in that arena, in some instances more than men.

²¹⁹ Fleishman, *supra* note 216, at 306 (omitted citation).

²²⁰ *Id.*

²²¹ *Id.* at 306, 307 (citing Abdullahi Ahmed An-Na'im, *Towards a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman, or Degrading Treatment or Punishment*, in HUMAN RIGHTS IN CROSSCULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS 19, 23 (1992)).

²²² *Id.*

²²³ Bogecho, *supra* note 202, at 233.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ Beltrán Y Puga, *supra* note 198, at 172.

²²⁷ Plata, *supra* note 66, at 100.

As long as women are not given their space in the public sphere, there will be a significant gap in recognizing reproductive rights as human rights. Human rights must take that reality into account. Human rights as a legal concept did not traditionally encompass issues of women's rights—such as motherhood and reproductive rights—because these issues were not within the scope of men's practice. Men's experiences of the violation of the right to life have not centered on death through pregnancy or childbirth.²²⁸ As discussed earlier, maternal mortality is a persistent cause of death on women, something human rights law must consider.

vi. Right Redundancy

Although literature and findings about why reproductive rights should not be elevated to human rights are almost inexistent, some opposition may arise from the fact that reproductive rights encompass human rights that have already been recognized in treaties and international documents, such as the right to life, right to health, right to privacy, and the right to non-discrimination. Securing those rights under reproductive rights could seem redundant because those rights are already secured in multiple treaties and documents. As a matter of fact, international human rights treaties have been used lately as tools for change in reproductive rights.²²⁹ "Rights relating to reproductive and sexual health may be protected and promoted through several legally binding human rights instruments."²³⁰ In securing reproductive rights through already established human rights, one must not forget that rights are interrelated and they depend upon others in order to be fulfilled.²³¹ "Applying [the human rights] analysis to reproductive rights, [international human rights] laws must be applied to oblige states to take effective preventive and curative measures to respect, protect, and fulfill women's health rights and to afford women themselves the capacity . . . to achieve their own health and reproductive self-determination."²³²

i. Right to Life

Every single human being has a right to life, yet it is violated every time a woman and/or her child dies during pregnancy and/or at childbirth of an avoidable death.²³³ "The right to life should not be too narrowly interpreted[,] but rather entails obligations on the states to adopt positive measures."²³⁴ Positive measures may include state legislatures' approval of new laws that promote the most basic human right, the right to life. This right can be used to include state obligations to prevent and reduce maternal mortality,

²²⁸ Bogecho, *supra* note 202, at 234.

²²⁹ Merali, *supra* note 199, at 612.

²³⁰ *Id.*

²³¹ *Id.* at 613.

²³² *Id.* at 614.

²³³ United Nations Population Fund et. al, *supra* note 31, at 95.

²³⁴ *Id.*

to guarantee appropriate and affordable health services, and to obtain contraceptives and abortions.²³⁵ Health services, contraceptives and abortions are not only tools that help a woman exercise autonomy over reproductive matters, but they also help women prevent life or death situations. It's a two-way street: government shall be proactive in securing the right to life, especially those issues related to reproductive rights, while women are given alternatives to decide upon such matters. Rebecca J. Cook and Mahmoud F. Fathalla posits that:

If women are to be equal, governments have at least the same obligation to prevent maternal death as to prevent death from disease. In fact, given that maternity, the sole means of natural human propagation, is not a disease, equity requires more protection against the risk of maternal mortality than against death from disease.²³⁶

The Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESC), the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the Cairo Conference, and the Beijing Conference seek to enforce and secure the right to life regarding women.

TABLE 1: TREATIES AND DOCUMENTS SECURING THE RIGHT TO LIFE²³⁷

UDHR: article 3 • ICCPR: article 6 • ICESCR: N/A • CEDAW: N/A • Cairo Programme of Action: chapters 1, 8.21, 8.25 • Beijing Declaration: paragraph 97
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ii. Right to Health

The right to health is wide-ranging.²³⁸ It can be interpreted to require states to: provide and maintain affordable, accessible, and appropriate healthcare services, including family planning services, STD and HIV/AIDS services throughout the lifecycle; encourage and support choice in health services (i.e. contraception, midwives, breastfeeding, etc.); support and promote safe motherhood and reproductive and sexual health services.²³⁹

²³⁵ Merali, *supra* note 199, at 613.

²³⁶ Rebecca J. Cook & Mahmoud F. Fathalla, *Advancing Reproductive Rights Beyond Cairo and Beijing*, 22 INTERNATIONAL FAMILY PLANNING PERSPECTIVES 115, 117 (1996).

²³⁷ *Id.* at 116.

²³⁸ OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, *supra* note 34, at 3.

²³⁹ Merali, *supra* note 199, at 613.

The widely recognized right to health seeks to guarantee the right to reproductive health. The Cairo Program set out the definition of reproductive health that has been widely accepted since the 1990s. “Reproductive health care is defined as the constellation of methods, techniques and services that contribute to reproductive health and well-being by preventing and solving reproductive health problems.”²⁴⁰ Reproductive health also includes sexual health, which seeks the fulfillment of life and personal relationships.²⁴¹

Although women and men are affected by many similar health conditions, women are treated differently when they encounter a health-related problem.²⁴² The Office of the High Commissioner for Human Rights explains that:

The prevalence of poverty and economic dependence among women, their experience of violence, gender bias in the health system and society at large, discrimination on the grounds of race or other factors, the limited power many women have over their sexual and reproductive lives and their lack of influence in decision-making are social realities which have an adverse impact on their health.²⁴³

State authorities and society as a whole have an ongoing duty to create awareness about the importance of ending all types of discrimination and violence towards women. By eradicating discrimination and violence, women are given more power and autonomy over their decisions, including those related to reproductive rights.

The International Covenant on Economic, Social, and Cultural Rights (ICESC) and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) explicitly call for the elimination of discrimination against women in health care and services.²⁴⁴ Furthermore, the CEDAW requires state parties to guarantee services related to pregnancy, childbirth, and the postnatal stage, including family planning and obstetric care.²⁴⁵ Additionally, the Cairo and Beijing Conferences emphasize the importance of securing “the right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, and the right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth.”²⁴⁶

²⁴⁰ Report of the ICPD, *supra* note 24, at 40.

²⁴¹ *Id.*

²⁴² OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, *supra* note 34, at 12.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 13.

²⁴⁶ *Id.*

**TABLE 2: TREATIES AND DOCUMENTS
SECURING THE RIGHT TO HEALTH²⁴⁷**

- UDHR: article 25
- ICCPR: N/A
- ICESCR: 12
- CEDAW: 11(1)(f), 12, 14(2)(b)
- Cairo Programme of Action: chapters 7, 8
- Beijing Declaration: paragraphs 92, 94, 95, 98, 103, 106, 108

iii. Right to Privacy

The right to privacy, which has been secured in multiple treaties. It protects people from “arbitrary interference with[their] privacy, famil[ies], home or correspondence, nor to attacks upon his honor and reputation.”²⁴⁸ The right to privacy also includes the right to confidentiality in treatment and in counselling.²⁴⁹ “One area where states may fail to respect women’s privacy relates to their reproductive functions.”²⁵⁰ A women’s right to privacy gets violated every time she desires to get sterilization, for example, when the doctor requests her husband’s authorization. “Claims by women to autonomous choices against their partners’ attempted vetoes have been consistently upheld by courts in countries of all regions of the world.”²⁵¹ In 2006, the Human Rights Committee found that a government had interfered in the plaintiff’s private life as the state neglected her an abortion that was permitted under local law.²⁵² Both the Cairo and Beijing Conferences sought to ensure women’s autonomy and confidential decision regarding reproductive matters, invoking the right to privacy from governmental interference.²⁵³ As will be discussed, courts in United States and Puerto Rico have upheld the right to privacy over governmental interference regarding reproductive rights.

²⁴⁷ Cook & Fathalla, *supra* note 236, at 116.

²⁴⁸ Universal Declaration of Human Rights, *supra* note 21, art. 12.

²⁴⁹ United Nations Population Fund et. al, *supra* note 31, at 106.

²⁵⁰ *Id.*

²⁵¹ Cook & Fathalla, *supra* note 236, at 120.

²⁵² United Nations Population Fund et. al, *supra* note 31, at 107 (see also Human Rights Comm, Karen Noelia Llatoy v. Perú, U.N. Doc. CCPR/C/85/D/1153/2003 (2005)).

²⁵³ Cook & Fathalla, *supra* note 236, at 120.

TABLE 3: TREATIES AND DOCUMENTS SECURING THE RIGHT TO PRIVACY²⁵⁴

- UDHR: article 12
- ICCPR: article 17
- ICESCR: article 10
- CEDAW: 16
- Cairo Programme of Action: chapter 7
- Beijing Declaration: paragraphs 103, 107(e), 108(m), 267

iv. Right to Non-Discrimination

Non-discrimination is a vital principle of human rights.²⁵⁵ This right includes the obligations to:

- Remedy the lack of adequate and appropriate services for many groups who have traditionally been disempowered.²⁵⁶
- Allocate adequate health resources to address women’s reproductive and sexual health needs.²⁵⁷
- Enact legislation and implement strategies to benefit all women and girls in relating to marriage, divorce, inheritance, property, reproductive rights, violence, and education.²⁵⁸
- Take serious steps to address the particular sexual and reproductive health needs of people with disabilities, young and older women, same-sex couples, disadvantaged families, and minority women.²⁵⁹

The right of non-discrimination is also a crucial human right.²⁶⁰ “Women’s right to control their fertility through invoking the prohibition against all forms of discrimination against women may be considered a fundamental key that opens up women’s capacity to enjoy other human rights.”²⁶¹ Every time a clinic asks a women to obtain her husband’s consent in order to receive a treatment at a clinic, a violation of the non-discrimination clauses of the CEDAW occurs.²⁶² Rarely, if ever, is a man asked for a woman’s authorization to undergo fertility-related treatment. It is important to address the right to non-dis-

²⁵⁴ *Id.* at 116.

²⁵⁵ United Nations Population Fund et. al, *supra* note 31, at 90.

²⁵⁶ Merali, *supra* note 199, at 613.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ United Nations Population Fund et. al, *supra* note 31, at 90.

²⁶¹ *Id.* at 91.

²⁶² *Id.*

crimination having in mind that it may encompass several discriminations.²⁶³ This occurs when a person is not only discriminated for being a woman, but also for being part of a marginalized community.²⁶⁴ “It is important to acknowledge this issue when considering how to secure reproductive rights for all as women belonging to vulnerable groups are often those with least access to reproductive services.”²⁶⁵ The United Nations Population Fund explains that:

Unequal power relations based on gender are a core concern for reproductive rights, as inequality makes it difficult or impossible for women and adolescent girls to refuse sex or insist on safe and responsible sex practices. Inequality also influences the occurrence of harmful practices, such as female genital mutilation, polygamy and marital rape, increasing women’s risk of contracting HIV/ AIDS and other STIs.²⁶⁶

TABLE 4: TREATIES AND DOCUMENTS SECURING THE RIGHT TO NON-DISCRIMINATION²⁶⁷

- UDHR: Articles 1, 2, 7
- ICCPR: Articles 2(1), 3, 26
- ICESCR: 2(2) and 3
- CEDAW: Articles 1 and 2
- Cairo Programme of Action: N/A
- Beijing Declaration: N/A

D. Case Law

In recent times, women have used international treaties to access international courts in order to challenge the actions of their country’s government for violating their reproductive rights. As we will see below, because there is no treaty that secures reproductive rights explicitly, women are using other international human rights instruments that help them hold their local government accountable for violating their basic human reproductive rights. That human rights approach is a way to start pushing the reproductive rights agenda into the international arena and thus, a way to gain international consensus that reproductive rights are human rights.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 92.

²⁶⁷ Cook & Fathalla, *supra* note 236, at 116.

i. *KL v. Perú*²⁶⁸

K.L. was a seventeen-year-old girl from Perú who got diagnosed with an anencephalic fetus during her pregnancy.²⁶⁹ Doctors told K.L. that the fetus would be born with an incomplete brain, eventually leading to the death of the fetus. Such pregnancy was also life-threatening to K.L., for which doctors and a social worker advised the teenager to terminate the pregnancy.²⁷⁰ Although in Perú abortion was illegal in most circumstances, it was permitted in order to secure a women's life.²⁷¹ One of Peru's state hospitals denied the abortion procedures and K.L. was forced to continue her pregnancy and give birth.²⁷² The newborn died four days after birth.²⁷³

Unable to seek justice in Perú, K.L. filed a petition, with the help of the Center for Reproductive Rights, before the United Nations Human Rights Committee claiming Perú had violated her right to receive a therapeutic abortion in order to secure her life.²⁷⁴ In 2005, the Human Rights Committee, which oversees compliance with the International Covenant on Civil and Political Rights (ICCPR), held that Peruvian authorities had violated K.L.'s rights to be free from cruel, inhuman and degrading treatment, privacy, and special protection as a minor.²⁷⁵

The Committee held that K.L.'s privacy was violated when the State refused to act in accordance with K.L. decision to terminate her pregnancy after her gynecologist discussed with K.L. that she could either continue her pregnancy or terminate it.²⁷⁶ Perú's refusal to acknowledge K.L.'s decision concerning her pregnancy violated her right to privacy. A woman's right to privacy enables her to decide, without state intromission, over issues related to her reproductive health, including whether or not to get an abortion. The Human Rights Committee requested Perú to provide K.L. with a remedy that included compensation.²⁷⁷ Additionally, it admonished Perú so that similar violations would not happen again.²⁷⁸ K.L. was the first groundbreaking decision by an international human rights body that held a government accountable for denying access to abortion when it is legal.²⁷⁹

²⁶⁸ Human Rights Comm, *Karen Noelia Llatoy v. Perú*, U.N. Doc. CCPR/C/85/D/1153/2003 (2005) [hereinafter *K.L. v. Perú*].

²⁶⁹ *Id.* at 4.

²⁷⁰ *Id.*

²⁷¹ Nancy Northup, *Reproductive Rights at Home and Abroad*, 15 CUNY L. REV. 256, 267 (2012) (citing Código Penal [Criminal Code], art. 119 (Perú), available at <http://spij.minjus.gob.pe/CLP/contenidos.dll?f=templates&fn=defaultcodpenal.htm&vid=Ciclope:CLPdmo>).

²⁷² *K.L. v. Perú*, *supra* note 268, sec. 2.3.

²⁷³ *Id.* § 2.6.

²⁷⁴ Northup, *supra* note 271.

²⁷⁵ *K.L. v. Perú*, *supra* note 268, at 10.

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ Northup, *supra* note 271, at 266.

ii. R.R. v. Poland²⁸⁰

During her eighteenth week of pregnancy, R.R. was informed that her fetus had a potential malformation and that she needed genetic testing in order to confirm the diagnosis.²⁸¹ This information was crucial in order to determine whether to continue the pregnancy or not. In Poland, abortion is legal when tests indicate that the fetus has a high risk of being irreversibly damaged.²⁸² R.R. went on to get the genetic tests, but doctors denied her the examinations required.²⁸³ R.R. struggled for eight weeks trying to get a doctor who would do a referral for the genetic tests.²⁸⁴ Unable to secure the referral, she went to an emergency room at a hospital.²⁸⁵ R.R. was 33 weeks pregnant.²⁸⁶ The genetic tests results confirmed the fetus had genetic abnormalities.²⁸⁷ R.R. requested an abortion, but she was denied the procedure because at that point, the hospital had determined that the fetus was viable.²⁸⁸ The delay in securing R.R. the tests she needed was the reason she could not get an abortion later because the time frame permitted by law to undergo the procedure had already passed. R.R. gave birth to the child, who suffers from a genetic condition.

Unable to seek remedy in Poland, she turned to the European Court of Human Rights sustaining that Poland authorities had violated their obligations under the European Convention for the Protection of Human Rights.²⁸⁹ In 2011, the European Court of Human Rights found Poland to have violated R.R.'s right to be free from inhuman and degrading treatment and her right to privacy.²⁹⁰ The court specifically held that Poland's failure to implement access to legal abortion, denial of access to information about the fetus' health, and inadequate regulations all violated R.R.'s right to privacy under the European Convention for the Protection of Human Rights.²⁹¹ This was the first time the European Court of Human Rights recognized that State Parties have the obligation to guarantee patients access to reproductive healthcare services.²⁹²

²⁸⁰ R.R. v. Poland, App. No. 27617/04, Eur. Ct. H.R. (2011) [hereinafter R.R. v. Poland].

²⁸¹ *Id.* at 2.

²⁸² *Id.* at 12, 13.

²⁸³ *Id.* at 3, 5.

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 5.

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 6.

²⁸⁸ *Id.*

²⁸⁹ Northup, *supra* note 271, at 270.

²⁹⁰ R.R. v. Poland, *supra* note 280, at 49.

²⁹¹ *Id.* at 50.

²⁹² Northup, *supra* note 271, at 269.

iii. *Alyne v. Brazil*²⁹³

Alyne, an Afro-Brazilian woman and resident of one of Río de Janeiro's poorest areas, was six months pregnant when she experienced severe abdominal pain and vomiting.²⁹⁴ She went to a local health center and, although she possessed high-risk pregnancy symptoms, doctors performed no tests and sent Alyne home.²⁹⁵ When she returned two days later, the fetus had no heartbeat.²⁹⁶ Alyne had to deliver the stillborn fetus.²⁹⁷ Although medical standards require that in circumstances such as the ones Alyne went through, the placenta be removed immediately to prevent hemorrhage and infection, she did not have surgery until fourteen hours later.²⁹⁸ Following the surgical procedures, Alyne suffered severe hemorrhaging, low blood pressure, and disorientation.²⁹⁹ She was transferred to another hospital, where she was given a brief account of her medical condition.³⁰⁰ The staff did not know she had delivered a stillborn fetus hours before.³⁰¹ She died, twenty-one hours after her arrival at the hospital, of an preventable death.³⁰²

Alyne's mother sought redress for her daughter by filing a petition to the Committee on the Elimination of Discrimination against Women (CEDAW Committee).³⁰³ The lawsuit alleged that the Brazilian government had failed to secure maternal healthcare, particularly for marginalized women.³⁰⁴ In 2011, the CEDAW Committee found that Brazil failed to provide appropriate maternal health services, violating its obligations to ensure the right to health and take all the appropriate measures to eliminate discrimination against women, including by private actors.³⁰⁵ Furthermore, the CEDAW Committee ordered Brazil to secure women's reproductive rights.³⁰⁶ Nancy Northup summarizes that:

The Committee ordered the government to ensure women's right to safe motherhood and affordable access to adequate emergency obstetric care, provide professional training for health workers, ensure that private healthcare facilities comply with national and international standards on reproductive healthcare, and ensure sanctions are imposed on health professionals violating women's reproductive rights.³⁰⁷

²⁹³ United Nations, Committee on the Elimination of Discrimination against Women, Communication No. 17/2008, CEDAW/C/49/D/17/2008, July 25, 2011 [hereinafter *Alyne v. Brazil*].

²⁹⁴ *Id.* at 3.

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.* at 4.

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ Northup, *supra* note 271, at 273.

³⁰⁴ *Id.* at 274.

³⁰⁵ *Alyne v. Brazil*, *supra* note 293, at 20.

³⁰⁶ *Id.*

³⁰⁷ Northup, *supra* note 271, at 274.

As discussed before, reproductive rights are being secured through the use of international treaties and documents in international forums, such as the Human Rights Committee and the CEDAW Committee. Two of the cases discussed above stress the importance of the right to privacy in holding governments accountable for interfering with women's autonomy regarding their reproductive rights. Also, the cases highlight how women from marginalized sectors are the ones that suffer the most. Moreover, as more suits related to reproductive rights are seen before international courts, the more recognition reproductive rights get in the international level, thus making it clear that such rights fulfill the second requisite of Alston's test. The scholar's test requires that, in order for a proposed right to achieve status of international right, the right had to be universally recognized. For now, international instruments that secure rights encompassed within the scope of reproductive rights must be used incessantly until there is an instrument that explicitly recognizes and secures women's reproductive rights. Until then, bridging the gap in order to secure them as human rights remains the main objective in the fight for reproductive rights.

III. REPRODUCTIVE RIGHTS IN PUERTO RICO

A. *Abortion*

i. Public Policy and Abortion

The United States invasion of Puerto Rico in 1898 created a shift in reproductive rights, especially those concerning abortion.³⁰⁸ Although during Spanish colonization abortion was criminalized, the United States invasion modified the criminalization of abortion in order to make it analogous to the California Penal Code.³⁰⁹ From 1902 onwards, abortion could be performed only if it was necessary to save the life of the pregnant woman.³¹⁰ This statute did not clarify who was allowed to perform the procedure, so it is believed that anyone, trained or not, could execute the abortion as long as it was done in order to save and protect the woman's life.³¹¹ That state of law remained unaltered until 1937, when four bills aimed at controlling the information being published about birth control alternatives and procreation were formulated in the House of Representatives.³¹²

The House of Representatives Bill 64 was promulgated into Act 33 of May 1, 1937. Act 33-1937 amended article 268 of the Penal Code by eliminating the restrictions on the publication of information related to birth control alternatives.³¹³ Those restrictions were established with the Comstock Act of 1873.³¹⁴ However, Act 33-1937 imposed a restriction on

308 Rosa Marchand-Arias, *Clandestinaje legal: el aborto en Puerto Rico*, 17 PRHSJ 15, 15 (1998).

309 *Id.*

310 *Id.*

311 *Id.*

312 *Id.*

313 *Id.* at 15-16.

314 *Id.* at 16.

the information published on abortion.³¹⁵ Although during the 1930s reproductive rights were not widely recognized as they are now, Act 33-1937 created obstacles in obtaining information related to abortion, something that is crucial and essential to reproductive rights. Women have the right to be informed over procedures related to their reproductive health, for it is the only way one can make an informed decision.

Additionally, Bill 218 of the House of Representatives became Act 136 of May 15, 1937 which amended article 268 of the Penal Code, establishing a penalty term of 5 to 10 years in case of conviction for the publication of information regarding abortion methods or services.³¹⁶ This meant that not only was abortion criminalized more severely, but women had no access to information regarding her reproductive rights. However, that same act clarified that abortion could take place in order to save the life or health of the expecting woman.³¹⁷ Act 136-1937 also legalized sterilization for neomaltusian purposes.³¹⁸ In other words, sterilization was allowed in order to control population growth. Dr. Rosa Marchand believes that Act 136-1937 was the first piece of legislation in United States that allowed abortions in order to save the life of the woman.³¹⁹ Although Act 136-1937 opened up an exception to the prohibition on abortions, Marchand explains that there was no increase in the amounts of abortion being performed, in part due to the restriction that only a doctor authorized by the Health Department could perform abortions.³²⁰ This meant that midwives, who usually performed the abortion for a lower cost, could not engage in the practice and were, in fact, criminalized by the state.³²¹ The authorities excluded midwives from women's reproductive rights and thus, conditioned women's health to a specific sector, authorized personnel. However, this presented a serious issue because not every woman had the economic means to pay what a regular doctor would charge for an abortion procedure, leading to clandestine abortion procedures and the risks related to these practices.³²²

After the statutes approved in 1937, abortion was out of the public eye until 1964 when amendments were made to the Penal Code.³²³ Rather than originating in the House of Representatives, the 1964 bills were generated in the Senate.³²⁴ Act 65 of June 19, 1964 made it a priority that the Health Department be notified of the abortion procedures being held.³²⁵ This act required health professionals to report all abortion procedures they performed.³²⁶ The purpose of submitting the reports was to identify abortion procedures that were not completed or to notify any complications that developed throughout

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ *Id.* at 17.

³²² *Id.* at 19.

³²³ *Id.* at 17.

³²⁴ *Id.*

³²⁵ *Id.* at 18.

³²⁶ *Id.*

the process in order to identify who conducted the procedure.³²⁷ Act 90 of June 26, 1964 amended articles 266 and 267 of the Penal Code to eliminate the word “pregnant” from the first article and to add to the second article “any surgical intervention or alternate method, with the purpose of creating an abortion.”³²⁸ These articles were repealed when the Penal Code got modified in 1974.³²⁹ It is clear that both projects were created in order to make it easier to persecute and condemn people who conducted abortions.³³⁰

Although the acts were aimed at health professionals, they had direct consequences on women who wanted to seek abortions. Women could only obtain abortions from authorized personnel, but there was always an economic factor to consider. A woman’s financial means served as the determining factor to decide if the abortion would be done the legal or clandestine way. As Marchand states, “the safety and quality of an abortion during this period was something that depended mainly on the economic resources that the woman had or could obtain.”³³¹ Many of those that could not pay a legal abortion, provoked the abortion themselves or went to midwives who would charge three times less than what legal clinics would.³³² Home remedies to induce the abortion included permanganate tablets, probes, castor oil purgatives with malted beer, medicinal plants, quinine capsules, lifting heavy objects, falling, and hurting their stomach.³³³ Midwives would typically use the dilation and curettage method, which is a procedure where the cervix gets dilated and an instrument is used to scrape the uterine lining.³³⁴ However, the procedure could result in infections, high fever, shivers, and severe internal bleeding.³³⁵ Those clandestine abortions were not performed under the best conditions.³³⁶ From 1930 to 1936, the “Hospital de la Capital” received at least four patients weekly with internal bleeding, many resulting in death.³³⁷

In 1955, the Supreme Court of Puerto Rico confirmed a sentence imposed by a lower court that found a woman guilty of advising and helping a pregnant woman have an abortion by using medical-surgical instruments without being authorized to practice medicine in Puerto Rico.³³⁸ As can be seen, reproductive rights were clearly constrained by the legislations passed in Puerto Rico during the first five decades of the 20th century, impacting women’s rights on the island. The perception of illegality regarding abortions in Puerto Rico would last until 1973 when the Supreme Court of the United States (SCOTUS) ruled upon *Roe v. Wade*.³³⁹

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Id.* at 19.

³³⁰ *Id.*

³³¹ *Id.*

³³² *Id.* at 20.

³³³ *Id.*

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ *Pueblo v. García Garay*, 78 DPR 396, 398 (1955).

³³⁹ *Roe v. Wade*, 410 U.S. 113 (1973).

ii. Abortion Development through the SCOTUS

Due to the colonial relationship that ties up Puerto Rico to the United States, many of the laws and rulings of the federal government and SCOTUS are binding. As a result, the rulings on abortion have a direct impact on Puerto Rican women's reproductive rights. In 1973, Justice Harry Blackmun delivered the opinion of the Court in the reproductive rights' landmark case, *Roe v. Wade*.³⁴⁰ Jane Roe was a single woman who was pregnant and wished to terminate her pregnancy.³⁴¹ She wished to terminate her pregnancy but was not able to get a legal abortion because her life did not seem to be threatened by the pregnancy and she could not afford traveling to another state.³⁴² As a result, she challenged the constitutionality of the Texas criminal abortion laws.³⁴³ After the state of Texas challenged the District Court's ruling, the SCOTUS ruled that the right to privacy secured in the Fourteenth Amendment was broad enough to encompass a woman's decision on whether to keep or terminate her pregnancy.³⁴⁴ The Court also held that the word "person" as used in the Fourteenth Amendment does not include the unborn.³⁴⁵

However, as Linda Greenhouse and Reva Siegel state, "even as the Court recognized a woman's privacy interests in deciding whether to bear a child, it also recognized that the state had an interest in regulating abortion."³⁴⁶ *Roe v. Wade* also created the trimester framework, which held that during the first trimester, the woman could go to a clinic, consult with an authorized doctor, and decide to terminate her pregnancy.³⁴⁷ The doctor had the final saying on whether to proceed with the abortion or not; the State could not interfere.³⁴⁸ During the second trimester, the State possessed a compelling interest in protecting the woman's health and could regulate abortions.³⁴⁹ Finally, the third trimester recognized the State's interest to protect the viable fetus and hence, could prohibit abortion except when the woman's life was at risk.³⁵⁰ As Greenhouse and Siegel explain "to those who support abortion rights, *Roe* demonstrates the Court's crucial role in protecting individual rights in the face of determined political opposition."³⁵¹

In 1992, the SCOTUS decided *Planned Parenthood of Southeastern Pennsylvania v. Casey*.³⁵² It is one of the most important decisions sustained by the Federal Supreme

³⁴⁰ *Id.* at 115.

³⁴¹ *Id.* at 120.

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ *Id.* at 153.

³⁴⁵ *Id.* at 157.

³⁴⁶ Linda Greenhouse & Reva B. Siegel, *The Unfinished Story of Roe v. Wade*, in *REPRODUCTIVE RIGHTS AND JUSTICE STORIES* 69 (Melissa Murray et. Al., eds., 2019).

³⁴⁷ *Wade*, 410 U.S. at 163.

³⁴⁸ *Id.*

³⁴⁹ *Id.* at 163, 164.

³⁵⁰ *Id.* at 163, 165.

³⁵¹ Linda Greenhouse & Reva B. Siegel, *The Unfinished Story of Roe v. Wade*, in *REPRODUCTIVE RIGHTS AND JUSTICE STORIES* 53 (Melissa Murray et. Al., eds., 2019).

³⁵² *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

Court in relation to abortions and reproductive rights, for it did not overturn *Roe v. Wade* completely.³⁵³ As the 20th century came to an end, reproductive rights were more recognized and talked about. Women were everywhere demanding their reproductive rights to be acknowledged and secured. It's no surprise that social justice activists on both sides of the abortion debate helped shape *Planned Parenthood v. Casey*.³⁵⁴ The case challenged five provisions of the Pennsylvania Abortion Control Act of 1982, which required the pregnant woman to give her informed consent, wait at least 24 hours for the procedure, if married, notify their husbands, and, if it involved minors, obtain parental consent.³⁵⁵ It also imposed certain requirements on facilities that provided abortion services.³⁵⁶ The SCOTUS held that “the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.”³⁵⁷ Justice O'Connor, Justice Kennedy, and Justice Souter summarized it as follows:

Roe's essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another; and we adhere to each.³⁵⁸

The SCOTUS also established the “undue burden test”, which the Court recognized as the standard that balances the State's interest with the woman's constitutionally protected liberty.³⁵⁹ The Court defined undue burden as “the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”³⁶⁰ If the provision of a law creates an undue burden, then the provision is invalid.³⁶¹ The undue burden test does not interfere with the central holding of *Roe v. Wade*, which is that a state may not prohibit a woman from

³⁵³ Serena Mayeri, *Undue-ing Roe: Constitutional Conflict and Political Polarization in Planned Parenthood v. Casey*, in *REPRODUCTIVE RIGHTS AND JUSTICE STORIES* 137 (Melissa Murray et. Al., eds., 2019).

³⁵⁴ *Id.*

³⁵⁵ *Casey*, 505 U.S. at 845.

³⁵⁶ *Id.* at 833.

³⁵⁷ *Id.* at 846.

³⁵⁸ *Id.*

³⁵⁹ *Id.* at 876.

³⁶⁰ *Id.* at 877.

³⁶¹ *Id.* at 878.

deciding whether to terminate her pregnancy or not before viability.³⁶² After analyzing the Pennsylvania statutory sections with the undue burden test, the Court upheld (1) the informed consent requirement,³⁶³ (2) the 24-hour waiting period,³⁶⁴ and (3) the parental consent provided that there is a judicial bypass procedure.³⁶⁵ It also invalidated the spousal notice.³⁶⁶

As recently as March 2020, the SCOTUS held oral arguments in order to decide whether to affirm or reverse the U.S. Court of Appeals for the 5th Circuit's decision in *June Medical Services LLC v. Russo*. The 5th Circuit upheld Louisiana's law requiring doctors who perform abortions to have admitting privileges at a local hospital.³⁶⁷ The law conflicts with the SCOTUS' decision in *Whole Woman's Health v. Hellerstedt*.³⁶⁸ In *Whole Woman's Health*, the Supreme Court overturned a nearly identical law because it imposed an undue burden on women seeking abortion.³⁶⁹ However, this time around the SCOTUS has a conservative majority on its bench, which may be a decisive factor upon the ruling. The Supreme Court's ruling decision is set for summer 2020. The admitting privileges required by Louisiana law pose an obstacle that directly impacts women who seek abortion. If affirmed, this decision will have a direct impact on reproductive rights nationwide including Puerto Rico, for decisions made by the SCOTUS have a direct impact on abortion regulations in Puerto Rico.

Although local laws in Puerto Rico ban abortion, the decision on *Roe v. Wade* made the laws unenforceable. As a result, the Supreme Court of Puerto Rico (TSPR) adopted through jurisprudence what was decided in the SCOTUS regarding abortion and thus, creating a new rule of law: abortion is legal in Puerto Rico. Putting aside the trimester scheme set out by the SCOTUS, *Pueblo v. Duarte Mendoza* affirmed that *Roe v. Wade* applies to Puerto Rico and as such, every woman has the right to decide whether to terminate her pregnancy or not.³⁷⁰ It also states that the Puerto Rican legislature cannot grant parents a full veto on their daughter's decision to obtain an abortion.³⁷¹ That concept was adopted from *Bellotti v. Baird*.³⁷² A year after deciding *Pueblo v. Duarte Mendoza*, the TSPR ruled upon *Pueblo v. Najul Baez*, holding that a doctor who did not perform the necessary examinations prior to abortion violated the state of law.³⁷³

362 *Id.* at 879.

363 *Id.* at 883.

364 *Id.* at 885.

365 *Id.*

366 *Id.*

367 *Russo v. June Medical Services LLC*, SUPREME COURT OF THE UNITED STATES BLOG, <https://www.scotusblog.com/case-files/cases/russo-v-june-medical-services-llc/> (last visited Mar. 23, 2020).

368 *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

369 *Id.* at 2313.

370 *Pueblo v. Duarte Mendoza*, 109 DPR 596, 608 (1980).

371 *Id.* at 610.

372 *Bellotti v. Baird*, 443 U.S. 622 (1979).

373 *Pueblo v. Najul Baez*, 111 DPR 417, 418 (1981).

iii. House of Representatives Bill 950

The abortion debate seemed to stay under the radar until 2018 when Senate Bill 950 ignited months-long debates and activism concerning women's reproductive rights and abortion.³⁷⁴ The measure presented by senator Nayda Venegas Brown sought to impose burdens on the right of women to decide whether to get an abortion or not. If the original bill had been approved and turned into law, it would have required the woman's informed consent before getting an abortion, would have established a 48-hour waiting period, would have prohibited a woman from ending her pregnancy because the fetus was not the sex she desired and/or the fetus had a potential of developing genetic abnormalities, would have required parental concern for women that were not 18-years-old, and would have considered the need to protect the life of the unborn.³⁷⁵ This legislative bill seemed particularly controversial and conflicting because our current state of law does not recognize rights to the unborn. Therefore, a fetus is not considered a person until the baby is born and is allowed to breath on its own, detached from the birth giver's womb.³⁷⁶ Senate Bill 950, however, seemed to give rights to the fetus. This would particularly give rise to a conflicting state of law concerning abortion because it would have considered the fetus a person and, therefore, an abortion the murdering of that person. Similarly, the newly drafted Civil Code of Puerto Rico³⁷⁷ considers the fetus to be a person. As of March 2020, the proposed legislation has not been voted upon.

Although provisions such as the ones contemplated in the bill were upheld by the Supreme Court of the United States in *Planned Parenthood v. Casey*, there is no doubt that they were aimed at constraining women's reproductive rights in the island. However, the bill was amended and the changes toned down the restrictions.³⁷⁸ The bill initially requested parental consent for women of ages 21 or younger, but it got altered to lower the age to 18 years.³⁷⁹ However, requiring women 18-years-old or younger to obtain the permission of her parents in order to proceed with the abortion undermines women's rights to decide over their body and dispenses that right to third parties. This may lead to the birth of an undesired child because of fear of asking parents for their approval. As Dr. Yari Vale Montero, an abortion clinic administrator and obstetrician, states "minors are a vulnerable population because they usually wait longer to disclose [that] they are pregnant. They would be the most impacted."³⁸⁰

Dr. Vale Montero also manifested that the 48-hour waiting period and the requisite of showing the woman who is seeking the abortion a sonogram of the fetus is complete

³⁷⁴ P. del S. 950 de 7 de mayo de 2018, 3ra Ses. Ord., 18va Asam.

³⁷⁵ *Id.*

³⁷⁶ Cód. Civ. PR art. 24, 31 LPRA § 81 (2015).

³⁷⁷ P. de la C. 1654 de 30 de enero de 2019, 5ta Ses. Ord., 18va Asam. Leg., at 40.

³⁷⁸ Andrea González Ramírez, *How Puerto Rico Became the Latest Battleground for Abortion Rights*, REFINERY29 (Mar. 14, 2019), https://www.refinery29.com/en-us/2019/03/226239/abortion-rights-puerto-rico-law-p8950-nydia-venegas-brown?utm_source=t.co&utm_medium=tweet.

³⁷⁹ *Id.* at 3-4.

³⁸⁰ *Id.* at 4.

nonsense.³⁸¹ Vale Montero fears that this bill is “just the beginning of the fight over reproductive rights in Puerto Rico.”³⁸² Although the bill got approved in both the Senate and the House of Representatives, former governor Ricardo Rosselló Nevares vetoed the project. The bill was sent back to the legislature. The House of Representatives reapproved it after considering Rosselló Nevares veto. The Senate did not consider the veto and thus, did not vote again. As to March 2020, Senate Bill 950 is sitting in the legislature.

There is no doubt that citizen participation and activism from different groups, such as “Colectiva Feminista”, Amnesty International, and “Colegio de Abogados y Abogadas de Puerto Rico”, exerted pressure so that the bill would not get approved. Women took streets, public meetings, and work and academic spaces to explain and reject the setbacks contemplated by the bill concerning women’s reproductive rights. The implications the legislation would have had on Puerto Rican women were to be dreadful. The 48-hour waiting period meant that the woman had to visit the abortion clinic twice, affecting her study and/or work hours. Not all women have the privilege of being able to miss work to go to a medical appointment, especially after the labor reform of 2017 that limits sick leave compensation. The parental consent for women younger than 18-years-old might have forced many women to have the baby or undergo a clandestine abortion, health risks included, for some parents would have not agreed with their daughter’s decision to get an abortion. As if the abortion process itself was not accompanied by social stigma, the requisite of showing the sonogram of the fetus to the woman that is seeking an abortion would have been detrimental to her mental and emotional health. A woman’s right to self-determination over her reproductive body cannot be constrained.

TABLE 5: SENATE BILL 950 LEGISLATIVE HISTORY

<ul style="list-style-type: none"> • May 7, 2018 • March 7, 2019 • March 14, 2019 • March 19, 2019 • March 20, 2019 • March 25, 2019 	<ul style="list-style-type: none"> • Bill got filed. • Senate approves the bill. • House of Representatives approves the bill. • Presidents of both Chambers sign the bill. • Former Governor Ricardo Rosselló Nevares vetoes the bill. • House of Representatives reconsiders the bill and approves it, going over the Governor’s veto.
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Data: The Office of Legislative Services (OSL)

³⁸¹ Adriana De Jesús Salamán, “Nefasto y cruel” nuevo proyecto de ley sobre el aborto, NOTICEL (May 12, 2019), <https://www.noticel.com/ahora/legislatura/-nefasto-y-cruel-nuevo-proyecto-de-ley-sobre-el-aborto/741166507>.

³⁸² González Ramírez, *supra* note 378, at 5.

iv. Legal, yet accessible?

Abortion continues to be legal in Puerto Rico. Any women, regardless of her age, can go to one of the six abortion clinics around the island and get an abortion if she's in her first or second trimester of pregnancy.³⁸³ She does not need the consent of her male friend, partner, or husband, whichever the case. Additionally, a woman younger than 21-years-old can obtain the abortion without her parents' consent. Before starting the abortion, the doctor must provide the female with all the relevant and necessary information regarding the process in order for her to make an informed decision of whether to undergo the process or not. From 2006-2018, 65,450 abortions were performed in the island.³⁸⁴ Data analyzed by ONCE displays the profile of a woman seeking abortion in Puerto Rico:

It is a woman between 20 and 29 years old (55.80%); with nine weeks or less of gestation (81.72%); that is not a mother (37.75%) or has only procreated once (29.69%); that has never aborted (46.82%) or has only done it once (31.58%); that is single (62.49%), either because she has not married (42.52%) or because she lives with her partner (19.97%); and that she is between her first and third year of university (29.22%).³⁸⁵

Although women may exercise their right to abortion, this right seems restricted in Puerto Rico due to lack of access and lack of information. There are only six abortion centers around the island: five are located in the metropolitan area and one is located in the southern region of the island.³⁸⁶ This is distressing because there are women who do not have the means to travel to their closest clinic which might be more than an hour away. Furthermore, out of 367 obstetrician-gynecologists working in Puerto Rico, only 5-10 of them perform abortions.³⁸⁷ Puerto Rican women do not have many options to decide from. Additionally, low-income women in Puerto Rico obtain their medical insurance from the federal program Medicaid. Since 1976, the Hyde Amendment has prohibited federal funds from being used in abortion services.³⁸⁸ The Hyde Amendment excludes abortion procedures from thousands of Puerto Rican women's coverage, limiting their right to reproductive health. The only exception to the Hyde Amendment is that the pregnancy results from incest or rape.³⁸⁹ Due to social inequalities in United States and Puerto Rico, women with low incomes are the ones that suffer the most the restriction on their

³⁸³ Ayuda Legal Puerto Rico, *El aborto es legal en Puerto Rico*, AYUDA LEGAL PR (Mar. 8, 2019), <https://ayuda-legalpr.org/resource/en-puerto-rico-el-aborto-es-legal?ref=eNctR>.

³⁸⁴ Glorimar Vázquez Carrasquillo and Emmanuel Estrada López, *Desinformación, inaccesibilidad y otras formas de abortar un derecho*, ONCE (Nov. 19, 2019), <https://oncepr.com/once/2019/11/19/reportajes/aborto-derecho-ps-950-nayda-venegas-brown>.

³⁸⁵ *Id.*

³⁸⁶ *Id.*

³⁸⁷ *Id.*

³⁸⁸ Planned Parenthood, *Hyde Amendment*, PLANNED PARENTHOOD ACTION FUND <https://www.plannedparenthoodaction.org/issues/abortion/hyde-amendment> (last visited March 28, 2020).

³⁸⁹ *Id.*

medical coverage by the Hyde Amendment. The average rate for an abortion procedure in Puerto Rico goes from \$250 to \$500, depending on the number of weeks the woman has. Some have no option but to continue with an unwanted pregnancy, while others resort to clandestine abortions.

On the other hand, local authorities barely address the topic, which adds to the taboo that abortion is a bad thing. The government cannot take sides on whether abortion is right or not. They must be a neutral body that provides its citizens with information on abortion, for abortion is legal in Puerto Rico. Just because it is legal does not mean that every woman that gets pregnant will do it. The legality of abortion is an opportunity for women to make their own choices over their own bodies. Supporting the legality of abortion, but not deciding to undergo it is not a contradiction. It only emphasizes and supports the idea that all women should enjoy reproductive rights and the right to decide.

B. *Testing the Pill in Puerto Rico*

Puerto Rican women were used as participants in birth control trials during the mid-twentieth century in the quest for an effective contraceptive method. The clinical trials were sponsored by Margaret Sanger, the founder of the American Birth Control League and Planned Parenthood, and her friend Katharine McCormick.³⁹⁰ Sanger was an advocate for the right of women to use contraception and followed up closely all research.³⁹¹ McCormick was the financial support behind the research and trials for *the pill*.³⁹² In 1953, Sanger, along with McCormick, went to visit the Worcester Foundation for Experimental Biology in Massachusetts where scientists Gregory Pincus and Min Chueh Chang experimented with progesterone compounds that were capable of being used as oral contraceptives.³⁹³ On the other hand, doctor John Rock was the one to conduct the clinical trials of *the pill*.³⁹⁴

Meanwhile in Puerto Rico, doctor Edris Rice-Wray, director of the Puerto Rico Family Planning Association, followed closely the developments of *the pill* and proposed to the owner of Procter & Gamble inviting the Worcester Foundation for Experimental Biology to conduct the trials of *the pill* in Puerto Rico.³⁹⁵ Since in Massachusetts it was illegal to distribute and/or inform about contraceptives, Rice-Wray's proposal seemed like the perfect plan.³⁹⁶ In 1956, after testing *the pill* on animals, Rock, Pincus, and other colleagues arrived in Puerto Rico to experiment with humans.³⁹⁷ Planned Parenthood points out

³⁹⁰ Planned Parenthood, *Birth Control: History of the Pill* (June 2015), https://www.plannedparenthood.org/files/1514/3518/7100/Pill_History_FactSheet.pdf, at 1.

³⁹¹ *Id.* at 2.

³⁹² *Id.*

³⁹³ *Id.* (see also Suzanne White Junod & Lara Marks, *Women's Trials: The Approval of the First Oral Contraceptive Pill in the United States and Great Britain*, 57 J. HIST. MED. ALLIED SCI. 117, 123 (2002)).

³⁹⁴ Planned Parenthood, *supra* note 390, at 2.

³⁹⁵ Acepresa, *La historia secreta de la píldora anticonceptiva* (Oct. 20, 1993), <https://www.acepresa.com/familia/la-historia-secreta-de-la-p-ldora-anticonceptiva/>.

³⁹⁶ Planned Parenthood, *supra* note 390, at 3.

³⁹⁷ Junod & Marks, *supra* note 393, at 124.

to multiple factors that made Puerto Rico the ideal place for the trials, but one of them stands out for being the most controversial: “Many of the women were semi-literate or illiterate, which allowed the researchers to test whether or not the pill could also be used by women around the world, regardless of their educational accomplishments”.³⁹⁸

Basically, Pincus wanted to prove that if poor, illiterate women living in public housing projects of a United States territory could use *the pill* without any difficulties, women everywhere could also use it for it did not seem too complicated. Puerto Rico was chosen deliberately to be the place where oral contraceptives would be tested. Pincus and Rock had no idea the effects it would have on women, for *the pill* was only tested before on animals. There was, and still is, a colonial relationship between the United States and Puerto Rico, which translates to power and authority over Puerto Ricans. At that time only a few understood the implications of being a colony, while others were astonished by the so-called progress brought by the United States invasion. The government urged for population control and *the pill* seemed an interesting alternative to sterilization. Medical students from the University of Puerto Rico were told to participate on the trials but they refused.³⁹⁹ Nursing students from the Hospital of San Juan were scouted next, but they also refused.⁴⁰⁰ Who were left to be the subjects of the experiment? Poor, illiterate women who did not even give their informed consent.⁴⁰¹ Although women’s reproductive rights include being able to decide whether to use *the pill* or not, Puerto Rican women were given the contraceptive to find out whether *the pill* worked or not. They were being used as guinea pigs. It had little to do with women enjoying their reproductive rights.

In 1957, G.D. Searle and Company sought the United States Food and Drug Administration (FDA) approval of *the pill*, called Enovid, for the use of menstrual irregularities.⁴⁰² The applicants made no reference to the use of Enovid for contraceptive purposes.⁴⁰³ In 1959, Searle submitted a supplemental application for Enovid to the FDA in order to use it as an oral contraceptive.⁴⁰⁴ A year later, Enovid got approved as an oral birth control.⁴⁰⁵ However, as Planned Parenthood states “the first pill was effective and simple to use[...], but it was far from perfect”.⁴⁰⁶ The high dosage caused side-effects that were noticeable during the clinical trials in Puerto Rico.⁴⁰⁷ In fact, Dr. Rice-Wray reported that “17% of the women in the study complained of nausea, dizziness, headaches, stomach pain, and vomiting” and that “a 10-milligram dose of Enovid caused too many side reactions to be generally acceptable”.⁴⁰⁸ Three women died while participating in the trials, yet there is no

398 Planned Parenthood, *supra* note 390, at 3.

399 Aceprensa, *supra* note 395.

400 *Id.*

401 Planned Parenthood, *supra* note 390, at 3.

402 Junod & Marks, *supra* note 393, at 126.

403 *Id.* at 128.

404 *Id.*

405 *Id.* at 133.

406 Planned Parenthood, *supra* note 390, at 4.

407 *Id.*

408 PBS, *The Puerto Rico Pill Trials*, www.pbs.org/wgbh/americanexperience/features/pill-puerto-rico-pill-trials/ (last visited Mar. 27, 2020).

evidence that the pill caused the deaths.⁴⁰⁹ As of December 2018, *the pill* was the second most used birth control, after sterilization, in the United States.⁴¹⁰

CONCLUSION

Although the development and recognition of reproductive rights is a relatively recent event in comparison with other rights, the attention given to such rights, both in international forums and local governments, shows that slowly but steadily international organizations and local authorities are moving in favor of reproductive rights. However, reproductive rights have to be explicitly set forth as human rights under an international instrument that has binding force to its signing parties. This way, local authorities can be overseen and brought before international courts when violations of women's reproductive rights occur. Governments are not going to hold themselves accountable for the violations committed in their country, unless there is external pressure for them to act within the limits of the international instrument. Furthermore, explicitly securing reproductive rights in a treaty assures that local authorities comply with international guidelines, regardless if they support or not such rights.

Notwithstanding the fact that some treaties secure rights that are linked to reproductive rights, statistics unveil that violations of reproductive rights occur on a daily basis despite having related rights, such as the right to life, guaranteed in international documents. We must use technology and the power of social movements as allies of the movement that advocates for reproductive rights to be recognized as human rights. The power and reach of social media have been evidenced by the impact Chilean feminist group Las Tesis' anthem "A Rapist in Your Path" has had. Additionally, green handkerchiefs have been seen wherever a fight for women's rights takes place. In Argentina, thousands of women of all ages have rushed to the doors of the Congress and the Plaza de Mayo, along with their green handkerchiefs, to remind the recently elected President that the fight for legal abortion stands strong and they will fight until it becomes law. In Spain, since the *La Manada* case in 2016, in which six men were convicted of raping a woman, women's rights movements seem stronger than ever. In Puerto Rico, the fight for free, safe and accessible abortion continues until no woman is hindered from exercising her reproductive right to abortion.

Due to the colonial relationship between the United States and Puerto Rico, the way Puerto Rican authorities deal with reproductive rights is highly influenced by the Federal Government. Ironically, federal jurisprudence has managed to secure reproductive rights in Puerto Rico from attempts by the local legislature to set forth public policy that violates those rights. Setting aside our colonial relationship with the United States, local authorities in the island need to have a genuine commitment in advancing reproductive rights through effective public policy and committees that work to assure every Puerto Rican

⁴⁰⁹ *Id.*

⁴¹⁰ Kimberly Daniels and Joyce Abma, *Current Contraceptive Status Among Women Aged 15-49: United States, 2015-2017*, CENTERS FOR DISEASE CONTROL AND PREVENTION, (Dec. 2018) <https://www.cdc.gov/nchs/products/databriefs/db327.htm>.

woman enjoys her reproductive rights. There must be island wide public awareness campaigns to raise public knowledge about reproductive rights and empower Puerto Rican women to decide freely over matters related to their reproductive health. Also, we, as individuals, have to take part in this fight. We have to start recognizing that discrimination against women is widely accepted in our society and that it must be eradicated. Equality and reproductive rights go hand in hand and lead to a better society. Women's reproductive rights are not second-class rights, they are human rights and must be treated as such.