

**OUR VOICES HEARD
ROMANI WOMEN'S
RIGHTS CONFERENCE
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**REPRODUCTIVE RIGHTS
UNDER THE EUROPEAN CONVENTION
FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS
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The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

- Individual applications - a cornerstone of the system
- From any person, non-governmental organisation or group of persons
- Victims of a violation by any public authority
- Rights guaranteed by the ECHR or its Protocols
- Article 34 of the ECHR

Is the ECHR a relevant instrument for the protection of reproductive rights?

■ What are the advantages of the ECHR system?

- Very easily accessible
- Huge public relations potential/impact
- Judgments binding on a State – both in individual and systemic terms
- A case won before the Strasbourg Court gives impetus to national legal reform
- The ECHR now evolving rapidly – scope for new developments in the case-law

ECHR – Advantages of the System

- The Strasbourg Court reactive by nature – reacts to cases brought to it
- Nothing set in stone as new case-law develops in response to new cases;
- Hence the responsibility of the NGOs for bringing „good” cases to the Court to make it give landmark decisions;
- Case-law developing since 1960;
- Look beyond principles established in the „old” case-law to the „new”

ECHR - Shortcomings of the System

- **Obligation to exhaust domestic remedies - may be a problem in itself for reproductive rights**
- **No direct intervention in pending proceedings or situations - except for Rule 39**
- **But – Evans v. UK**
- **Time-consuming proceedings**
- **Huge case-load – may tend to simplify issues for the sake of efficiency**
- **The Court now in throes of reform: individual justice versus constitutional justice**

ECHR – Shortcomings of the System

- Instrument for vindicating individual rights – not useful for developing of policies

■BUT: prohibition of discrimination in the enjoyment of the Convention rights on the ground of sex:

■‘Since the advancement of equality of the sexes is a major goal in Member States, very weighty reasons would have to be advanced before a difference of treatment on grounds of sex could be regarded as compatible with the Convention’.

ECHR - Shortcomings of the System

■NOT a specific reproductive rights instrument

■Reproductive rights have to be translated into the language of the ECHR rights

■International law instrument – the doctrine of the margin of appreciation – certain deference to states;

■The fact that it is a HR institution does not mean that it must automatically be sympathetic to women’s rights approach

Recourse to the ECHR – Policy Decisions for NGOs

■Strategic litigation

■If strategic litigation – how to find and support the victims

■Risk of instrumentalisation

■Responsibilities of NGOs towards victims/prospective applicants/applicants

■Judgments as PR instruments to promote reproductive rights

■Stories versus principles: judgments versus legal instruments

Recourse to the ECHR – Policy Decisions for NGOs

■Legitimisation of RR rights by putting them in the language of traditional HR

■Reliance on judgments in formulation of policies

■Reliance on judgments before domestic courts and administrative authorities

■Judgments as instruments of pressure on legislators

■Judgments as instruments of persuasion in public discourse

■Judgments as markers of common ground between public authorities and civil society

Recourse to the ECHR – Policy Decisions for NGOs

■Strategy after a Strasbourg case has been won: monitor the action taken by the state to execute the judgment

■Execution of a judgment often necessitates amendment/adoption of laws

■Engage in dialogue with the national authorities responsible for its execution – how to make best use of the potential of the judgment

ECHR – Principles of interpretation relevant also for reproductive rights

■ECHR as a living instrument;

■ECHR meant “to protect rights that are practical and effective, not theoretical and illusory”

■Negative obligations of the State: to abstain from interference

■Positive: to take active measures to make enjoyment of rights effective

■Non-discrimination in the enjoyment of the ECHR rights

■Principle of proportionality: human rights are not absolute

ECHR – Principles of interpretation

■The **exercise of an individual rights can be limited by a broader public interest,**

- **But:** inherent in the ECHR is a search for a **fair balance** between the demands of the general / public interest and the requirements of the protection of individual rights;
- Principle to be relied on also in reproductive rights cases if too much weight is given by the public authorities to community interest at the expense of the individual;

Health issues under the ECHR – access and quality

- No right to any given standard of medical care
- But the acts and omissions in the field of health care may in certain circumstances engage the responsibility of the state (Article 2, right to life)
- Error of judgment on the part of health professionals or negligent co-ordination among health professionals in the treatment of a particular patient are not – as such - sufficient of themselves to give rise to the State's liability

Health issues under the ECHR- access and quality

- But various examples of failure to provide adequate care might be analysed under Articles 2, 3, 8 ECHR (in the context of the State's positive obligations)

Health issues under the ECHR- access and quality

- *Powell v. the United Kingdom*
- *Sentges v. Netherlands*
- *Pentiacova v. Moldova*
- *Nitecki v. Poland*
- *Calvelli and Ciglio v. Italy*
- *Glass v. the United Kingdom*
- *Byrzykowski v. Poland*
- *Erikson v. Italy*

Health issues under the Convention – access and quality

- Availability and quality of medical care can thus be examined
- No review of policies – just how the application of policies affected the applicant
- Positive obligations of States under these provisions can be invoked also in support of reproductive rights arguments

Health issues under the ECHR – malpractice

- Positive obligations include procedural ones: to put in place national mechanisms to examine alleged medical malpractice/negligence to establish persons responsible and determine responsibility
- If these mechanisms faulty/insufficient/lack transparency: procedural complaints under Articles 2,3,8

Health issues under the ECHR – malpractice

- Minimum fairness standard in such *ex post* proceedings: *Mantovanelli v. France*
- Given the weight that courts are likely to give to the expert opinions in medical negligence cases, it is important that not only the judicial proceedings themselves, i.e. hearings before the

court, are truly adversarial. It is also essential that the very process of preparing the expert opinions is, to some degree dictated by the technical character of this preparation, also adversarial

Health issues under the ECHR – the determination of access

- Also, minimum procedural requirements for *ex ante* procedures in which access to certain medical services is determined: *Tysiack v. Poland*
- Requirement possibly transposable to other cases concerning access to medical care

Expanding Article 8

- Negative obligation of the State under Article 8: to abstain from interference with individual rights
- Positive obligation: to undertake measures necessary for an individual to fully enjoy his/her rights stemming from this Article
- Even in the sphere of the relations of individuals between themselves
- A strong trend to expand obligations towards positive ones;
- Great potential here for access to health care and reproductive rights issues

Positive obligations

- Not easy, maybe impossible to list all situations in which they arise
- Boundaries between negative and positive obligations difficult to trace
- Applicable principles similar: regard to the fair balance between the interests of the individual and those of the community
- Potential for great developments, lots of creativity allowed here to cover what has been left uncovered in the ECHR case-law so far, including reproductive rights.

Positive obligations and reproductive rights – possible arguments

- **The right to respect for private life may be said to entail a positive obligation for the State to provide a person with, or pay for, or reimburse by state-run medical insurance system, certain kind of medical devices or treatments**
- **The concept of private life encompasses notions pertaining to the quality of life, including personal autonomy and self-determination (*Pretty v. the UK*, decision 29 April 2003)**
- **A failure to secure access to reproductive health services seriously undermines the possibility for a woman concerned to avail herself of her human rights**

Abortion – access to information

- *Open Door and Dublin Well Woman v. Ireland*, judgment of 29 October 1992- violation of freedom of expression by restrictions on providing information on abortion
- Conclusions and reasoning can be transposed to situations in which access to information on reproductive matters is impeded or withheld
- Great weight attached to the importance of the well-being and health of a pregnant woman
- Medical staff refusing to provide reproductive health services
- **OBVIOUSLY** not covered by freedom of thought, conscience and religion
- Freedom of religion protects the sphere of personal beliefs and religious creeds;

- Such as acts of worship, which are aspects of the practice of a religion in generally recognised form
- Does not always guarantee the right to behave in the public sphere – including the exercise of a profession - in a way which is dictated by such a belief.
- Pichon and Sajous v. France*

Relevant case law – discrimination against Roma

- D.H. AND OTHERS v. THE CZECH REPUBLIC
- NACHOVA V. BULGARIA
- GERGELY V. ROMANIA
- BEKOS AND KOTROPOULOS V. GREECE
- SECIC V. CROATIA
- JANE SMITH V. UK, CHAPMAN V. UK

Relevant case-law – reproductive rights

- TYSIAC v. POLAND
- D.D. V. IRELAND
- HALLER V. AUSTRIA
- BOSO V. ITALY
- BRUGGEMANN V. GERMANY
- H. V. NORWAY
- X. V. UK
- VO V. FRANCE
- EVANS V. UK

ECHR

- Individual application – the cornerstone of the Convention
- Remember: ECHR is a court like any other
- Only that it is international
- Procedure user-friendly
- Step-by-step guidance available throughout the proceedings
- The Court well used to accommodate many national, cultural and legal differences

Speak the Convention language

- Express the reproductive rights issues in the Convention language;
- Relevant rights: Articles 2, 3, 6 (limited scope), 8, 9, 10, 12, 13, 14.
- Get to know the most relevant case-law via www.echr.coe.int/HUDOC ...
- And take a strategic decision how to have recourse to the ECHR