CHAPTER 3

International Trends in the Recognition of Abortion Rights

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1 Introduction

The issue of abortion rights is a divisive and emotive one. While instinctively supported by the rights to autonomy and health, it inevitably conflicts with the interests, and possibly rights, of the foetus, as well as many strongly held religious beliefs. It is a classic example of a conflict between one person’s freedom of choice and broader societal interests in religion and the sanctity of human life.¹ Although most states have chosen to resolve the issue either by favouring one side of the debate over the other, or by entrenching a compromise into national legislation, there remains a wide discrepancy between different states. The focus in this chapter is on the role of international human rights law in seeking to resolve such differences. While there are discernible trends towards the development of some limited protection for access to safe and legal therapeutic abortions at international law, this remains a topic on which considerable discretion is left to each individual state. Even the appropriate role of international law on this topic remains disputed. Do moves towards a right to abortion represent objectionable judicial activism or are they a response to an emerging consensus? If states are unable to agree a position when negotiating international and regional human rights treaties, is it for the bodies enforcing those documents to fill the gap or to respect the lack of agreement? This chapter will begin by considering the extent to which different international and regional bodies speak as one on this topic by an analysis of the use of comparative international materials by these bodies. The bulk of the chapter will

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1 The issue of whether a foetus has a right to life (even if only a limited right and/or only after viability) impacts significantly upon the issues discussed in this chapter. However, for reasons of space this related but distinct question will not be considered here. It has been discussed elsewhere, such as in Plomer, ‘A Foetal Right to Life? The Case of Vo v France’ (2005) 5(2) Human Rights Law Review 31; and Wicks, ‘The Meaning of Life: Dignity and the Right to Life in International Human Rights Treaties’ (2012) 12(2) Human Rights Law Review 199.

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then focus on identifying, explaining and critiquing two important international trends on the issue of abortion rights: the need for rights to be practical and effective; and the development of a right to reproductive health. Finally, there will be some discussion of the appropriate role of international law on this topic and the continued significance of margins of appreciation given to national authorities. Conclusions will be drawn not just on the future direction of abortion rights but also on the convergence between different human rights bodies on this topic and their (somewhat limited) use of comparative materials.

2 The Use of Comparative Regional and International Materials in Abortion Cases

In recent years, there have been a number of abortion rights cases brought before international and regional human rights bodies. The responses of these bodies have been remarkably similar, despite the disparate rights documents they are tasked with enforcing and the variety of cultural, social and religious perceptions of abortion around the world. In reaching decisions that recognise an evolving right to abortion, albeit one that is significantly limited and never engages directly with freedom of choice, the different bodies have obviously made use of a range of comparative and international materials. The manner in which this has been done varies considerably, however. Three different approaches to comparative materials are evident in the cases and will now be considered in turn.

First, the body considering the issue of abortion rights may cite this material and, by doing so, acknowledge its relevance. An example of this approach is the judgment of the European Court of Human Rights in *A, B and C v Ireland*. Relevant European and international material cited includes the third periodic report of Ireland on observance of the International Covenant on Civil and Political Rights (*ICCPR*) and the Human Rights Committee’s concluding observations, the report of the Council of Europe Commissioner for Human Rights on his visit to Ireland in 2007, the concluding observations of the Committee on the Elimination of Discrimination against Women on Ireland’s periodic report, the International Conference on Population and Development

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2 Application No 25579/05, Merits and Just Satisfaction, 16 December 2010.
3 Ibid. at para 111.
4 Ibid. at para 109.
5 Ibid. at para 110.