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SCHOOL OF LAW

DISSERTATION

LLM/MA IN: International Human Rights Law

STUDENT'S NAME: Beatriz Santaemilia del Hoyo

SUPERVISORS'S NAME: Patricia Palacios Zuloaga

DISSERTATION TITLE

Intersectionality in strategic litigation: formulating alternatives in adolescent girls' abortion rights litigation

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Name: Beatriz Santaemilia del Hoyo

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TABLE OF ABBREVIATIONS

CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CRC	Convention on the Rights of the Child
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
UNDP	United Nations Development Programme
UNGA	United Nations General Assembly
WHO	World Health Organisation

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1. INTRODUCTION

The traditional understanding and conceptualisation of the right to abortion as a privacy or autonomy right has largely forgotten to capture and analyse the different discriminations created at the intersections. Identities are complex and multi-faceted and international human rights law must evolve in order to incorporate an intersectional perspective able to apprehend such diverse realities.

In an attempt to propose a change in the way we understand the issue of abortion rights in relation to adolescence from an intersectional perspective that takes into account, at least, three different grounds which are sex, age and pregnancy, in this dissertation we argue that abortion is not a question of privacy (or, at least, not primarily a question of privacy) and that what is more, it is actually counterproductive to frame abortion rights as privacy rights in the case of adolescent girls.

The main aim of this work is to design an adaptable and effective theoretical framework in order to develop alternative litigation strategies in girls' abortion rights cases. To this end, we have first and foremost formulated three essential research questions which will essentially guide our research and structure the dissertation we are now presenting. The three research questions are the following:

1. What has been the traditional approach when litigating for girls' abortion rights? The traditional approach focused on privacy or autonomy will be explored in Chapter 2.
2. How have childhood studies and feminist legal theory addressed and analysed the right to abortion, childhood and pregnancy? This question will be analysed in Chapter 3.
3. What are the elements of a litigation strategy that takes into account an intersectional approach to abortion rights for girls in the cases when they are denied abortion? This last question will be explored in Chapter 4.

The research methods we will be using are mainly doctrinal research, literature review and case law analysis and interpretation.

As it will be seen in the final chapter of the dissertation, the three elements that compose our litigation strategy are the prohibition of torture or other cruel, inhuman or degrading treatment, the prohibition of discrimination and the girl's best interests.

In cases where adolescent girls have expressed their wish to terminate their pregnancies, the denial or imposition of barriers to accessing abortion care constitutes firstly a form of torture or other cruel, inhuman or degrading treatment given the health, socioeconomic and educational consequences associated to child pregnancy and that they generally do not have the capacity of implementing their decisions (this is closely connected, as we will see to the powerlessness requirement in the definition of torture), especially if they differ from those of their parents. Secondly, it constitutes an act of intersectional discrimination based on, at least, the three above-listed grounds which interact potentially creating shared experiences of oppression and marginalisation.

2. THE TRADITIONAL APPROACH TO ADOLESCENT GIRLS' ABORTION RIGHTS LITIGATION

This chapter will analyse how litigation strategies concerning adolescent girls' abortion rights have been traditionally designed around the right to privacy or (reproductive) autonomy, failing to apply an intersectional analysis, and therefore, failing to identify and understand what specific barriers adolescent girls face in claiming and exercising their right to abortion.

Even though, as Zampas and Gher point out, the right to abortion is arguably integral to a constellation of other human rights such as the right to life, health, physical integrity and liberty and security of the person among others¹, it has been mainly framed in terms of privacy protections. This privacy or autonomy approach has predominantly been adopted at the international, regional and national levels.

The emphasis on women's and girls' reproductive autonomy is derived from the biological connection between their bodies, sexuality and reproduction.² The autonomy approach, which comprises the principle of "bodily integrity", rests on the notion that women and girls must be able to control their own bodies and the reproductive and sexual uses to which these are put.³ That is why reproductive rights advocates, not in vain called "pro-choicers", have historically placed a lot of emphasis on "the right to choose". To this day, together with foetal claims on the right to life, the "my body, my rules" mantra still shapes the abortion debate in every country.

In the first section of this chapter, we will explore and discuss the long-standing tension in feminist legal theory between two apparently opposing ideas in relation to abortion rights⁴:

¹ Christina Zampas and Jaime M. Gher, 'Abortion as a Human Right – International and Regional Standards' (2008) 8,2 Human Rights Law Review 251

² Rosalind Pollack Petchesky, *Abortion and a Woman's Choice. The State, Sexuality and Reproductive Freedom* (Northeastern University Press 1990) 2

³ Rosalind Pollack Petchesky, 'Reproductive Freedom: Beyond "A Woman's Right to Choose"' (1980) 5, 4 Signs. Women: Sex and Sexuality 662

⁴ Pollack Petchesky (n 3) 662

equality and autonomy. Arguments rejecting the excessive focus on latter in the case of adolescent girls will also be presented. In the second section, we will focus on the evolution of litigation strategies in relation to adolescent girls' right to abortion by considering said right under the lens of different and already recognised human rights. Three cases in particular, one of the ECtHR (*P and S v. Poland*), another of the CEDAW Committee (*L.C. v. Peru*) and another one of the HRC (*K.L. v Peru*) will help us illustrate this evolution. These three leading cases embody albeit in different ways abortion rights' traditional conceptualisation as autonomy or privacy rights, which as we will see can be considered detrimental to the realisation of adolescent girls' right to abortion.

2.1. Abortion: is it a question of privacy or equality?

Two political and philosophical ideas have informed historically and still today the movement for reproductive freedom.⁵ These two essential ideas are, broadly speaking, autonomy and equality.

In the landmark decision *Roe v. Wade*, the United States Supreme Court established a woman's "fundamental" right to abortion.⁶ The Court anchored this right to a concept of personal autonomy derived from the due process guarantee⁷ by essentially affirming that the right to privacy was 'broad enough to encompass a woman's decision whether or not to terminate her pregnancy'.⁸ Similarly, in *Tysic v. Poland*, the first decision of the European Court of Human Rights on abortion, the Court confirmed that "private life" is a broad term, encompassing, inter alia, 'aspects of an individual's physical and social identity including the right to personal autonomy, personal development and to establish and develop relationships with other human

⁵ Pollack Petchesky (n 3) 662

⁶ *Roe v. Wade*, 410 U.S. 113 (1973)

⁷ Ruth Bader Ginsburg, 'Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*' (1985) 63, 2 North Carolina Law Review 381

⁸ *Roe v. Wade*, 410 U.S. 113 (1973) 153

beings and the outside world'.⁹ As it becomes apparent in these two cases, the right to abortion has been traditionally linked to the rights and principles of personal autonomy, privacy and sometimes more specifically to the right to bodily integrity, which could essentially be considered the 'grounded application of the more ethereal duty to respect autonomous decisions'.¹⁰

The autonomy approach has tended to emphasise, as Pollack Petchesky notes, the individual dimensions of reproduction by appealing to a "fixed level" level of the biological person.¹¹ Simply put, a woman has the right to choose to continue or end her pregnancy basically because she has the right to control her own body and the procreative capacities it possesses.

However politically compelling it may be, an approach based solely on autonomy is both insufficient and problematic¹² and even more so when discussing adolescent girls' right to abortion.

Firstly, it seems quite clear that reproductive freedom begins at women's and girls' bodies, but the question is, where does it end? The very nature of reproduction is individual and social at the same time.¹³ It is therefore not only a biological activity, but also social activity that certainly has the potential to restrict women and girls' ability to participate in society on equal footing with men.¹⁴ Firestone has even gone so far as to sustain that it is a woman or a girl's 'reproductive biology that accounted for her original and continued oppression'.¹⁵

Girls' "choices" over sexuality, reproduction and motherhood are exercised in a specific social, political, cultural and legal context, or in other words, in a framework in which sexuality,

⁹ *Tysic v. Poland* App no. 5410/03 (ECtHR, 20 March 2007) para. 107

¹⁰ Jonathan Herring and Jesse Wall, 'The Nature and Significance of the Right to Bodily Integrity' (2017) 76, 3 *Cambridge Law Journal* 577

¹¹ Pollack Petchesky (n 3) 663

¹² Pollack Petchesky (n 2) 6-7

¹³ Pollack Petchesky (n 3) 663

¹⁴ Katha Pollit, *Pro: Reclaiming Abortion Rights* (Picador 2015) 20

¹⁵ Shulamith Firestone, *The Dialectic of Sex: The Case for a Feminist Revolution* (Bantam Books (1970) 73

reproduction and motherhood have determined their relationship to society¹⁶, the State and their parents. The issues that have been conceptualised in terms of women's or girls' choices or bodies actually involve questions concerning their expected roles.¹⁷

Proponents of a sex equality approach understand reproduction as “socially gendered”¹⁸ and therefore, believe that the rhetoric of privacy prevents us from considering ‘the socio-political forces which produce both involuntary pregnancies and calls for abortion access, and constrain the “choices” of different women in different contexts’.¹⁹ As MacKinnon eloquently explains it

‘[w]omen [and especially girls] often do not control the conditions under which they become pregnant; systematically denied meaningful control over the reproductive uses of their bodies through sex, it is exceptional when they do. Women are socially disadvantaged in controlling sexual access to their bodies through socialization to customs that define a woman's body as for sexual use by men.’²⁰

In essence, the idea of privacy impedes us from seeing the obvious: it is women and girls who are oppressed when abortion access is denied or hindered²¹, oppression which comes from simply happening to be a woman or a girl.

Secondly, conceptualising the right to abortion as a privacy or autonomy right reinforces the private/public dichotomy, ‘central to almost two centuries of feminist writing and political struggle’.²² In liberal political tradition, personal autonomy defines the boundaries of state

¹⁶ Pollack Petchesky (n 3) 677

¹⁷ Reva B. Siegel, ‘Abortion as a Sex Equality Right: Its Basis in Feminist Theory’ in Marta Fineman and Isabel Karpin (eds.) *Mothers in Law: Feminist Theory and the Legal Regulation of Motherhood* (Columbia University Press 1995) 45

¹⁸ Catharine A. MacKinnon, ‘Reflections on Sex Equality Under Law’ (1991) 100, 5 *Yale Law Journal* 1313

¹⁹ Lisa Smyth, ‘Feminism and abortion politics: choice, rights and reproductive freedom’ (2002) 25, 3 *Women's Studies International Forum* 336

²⁰ MacKinnon (n 17) 1312

²¹ Sylvia Law, ‘Rethinking Sex and the Constitution’ (1984) 132 *University of Pennsylvania Law Review* 1020

²² Carole Pateman, ‘Feminist Critiques of the Public/Private Dichotomy’ in Carole Pateman, *The Disorder of Women. Democracy, Feminism and Political Theory* (Stanford University Press 1989) 118

interference. In demarcating the private sphere, free by definition (or at least, free for some), the State has centred ‘its self-restraint on body and home [and] especially bedroom’.²³ Although both the public and the private sphere are controlled by adult men, the latter has become one of ‘sanctified isolation, impunity and unaccountability’.²⁴ In addition to activities in the private sphere being valued less, the private sphere receives little or in certain occasions no international and domestic protection, leaving women and children, particularly girls, vulnerable to abuse and marginalisation.²⁵ That is why, according to MacKinnon, men’s right to privacy or “to be let alone” exists to protect the unequal distribution of power within this private sphere.²⁶ The problem with the privacy doctrine is that ‘while the private has been a refuge for some, it has been a hellhole for others, often at the same time’.²⁷

Thirdly, grounding the right to abortion on autonomy protections can be counterproductive when focusing on the specific case of adolescent girls. Apart from all that has been previously mentioned, it is important to be aware that the tension between autonomy and protection lies at the very heart of international child law. Although these principles are understood as mutually reinforcing²⁸, in the sense that protection becomes ‘necessary in order to develop autonomy and autonomy is necessary to ensure protection’²⁹, the truth is that is difficult to ignore that historically focus has been largely placed on children’s protection.³⁰ It is mostly in the name of protection, that both the State and the family, and more specifically, adult men in

²³ Catherine MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989) 187

²⁴ MacKinnon (n 18) 1311

²⁵ Ladan Askari, 'Girl's Rights under International Law: An Argument for Establishing Gender Equality as a Jus Cogens' (1998) 8 *Southern California Review of Law and Women's Studies* 23

²⁶ MacKinnon (n 23) 193

²⁷ MacKinnon (n 18) 1311

²⁸ CRC, General Comment No. 12 (2009). The right of the child to be heard (1 July 2009) UN Doc CRC/C/GC/12 para. 74

²⁹ Gerison Lansdown and Marie Wernham, ‘Understanding Young People’s Right to Decide. Are protection and autonomy opposing concepts?’ (2012) IPPF 2

<http://createsolutions.org/docs/resources/IPPFprotection_autonomy.pdf> accessed 1st of August 2019

³⁰ Anna Holzscheiter, *Children’s Rights in International Politics: The Transformative Power of Discourse* (Palgrave Macmillan 2010) 116

the family, intervene to limit or control girls' decisions. It is due to the intersectional discrimination pregnant adolescent girls suffer (they are discriminated against on the basis, at least, of their age, sex and pregnancy) that they have less ability and control to make decisions about their pregnancies, abortions and sexuality. The legal instrument par excellence that allows parental intervention in girls' abortion decisions are parental notification and consent laws, present today in the United States (some federal states), Italy, Spain, Greece, Turkey, Uruguay or Norway, countries where we could say there are liberal abortion policies and laws in place.³¹ In Chapter 3 all this will be analysed more in depth.

Fourthly and finally, it is important to build a strong discourse to counter-act the powerful discursive tools anti-abortion advocacy has developed. As Pollitt asserts, the anti-abortion movement has managed 'to colonise the word "life", which is a very big, resonant and powerful word'.³² The dangerous consequence is that in doing so they have casted the other side as "pro-death".³³ "Choice" represents after all no match against "life". That is why the autonomy approach is not really providing a sustaining discursive framework to advocate for abortion rights.

³¹ Center for Reproductive Rights, The World Abortion Laws Map (2019) (multimedia resource) <<https://reproductiverights.org/worldabortionlaws>> accessed 20th July 2019

³² Marie Solis, 'How Anti-Abortion Rhetoric Shapes Pro-Choice Advocacy' *Vice* (2 April 2019) <https://www.vice.com/en_us/article/qvyy9w/history-of-pro-choice-pro-life-abortion-discourse> accessed 15th July 2019

³³ *ibid*

2.2. The evolution of strategic litigation for adolescent girls' abortion rights

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, known as the Maputo Protocol, provides in its Article 14(2)(c) that States Parties shall take all the appropriate measures 'to protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.'³⁴

By inscribing for the first time a fundamental right to abortion in a binding treaty, Article 14 has broken new ground in international human rights law.³⁵ Unsurprisingly, the Protocol does not mention girls, although as indicated by its drafters the word women 'means persons of female gender, including girls'.³⁶

With the exception of Article 14 of the Maputo Protocol, a general right to abortion has never expressly been recognised in the international legal system.³⁷ Nevertheless, the right to abortion has been bolstered by a broad range of human rights that support it.³⁸ Adolescent girls' right to abortion, just as women's right to abortion, has been conceptualised as part of other already enshrined human rights. By looking specifically into three cases, *P and S v. Poland* (ECtHR), *L.C. v Peru* (CEDAW Committee) and *K.L v. Peru* (HRC) we will now examine all these different conceptualisations of the right to abortion.

2.2.1. The right to privacy

³⁴ African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (2003) Art. 14(2)(c)

³⁵ Charles G. Ngwena, 'Protocol to the African Charter on the Rights of Women: Implications for access to abortion at the regional level' (2010) 110 *International Journal of Gynecology and Obstetrics* 163

³⁶ Maputo Protocol Art. 1 k)

³⁷ Ronli Sifris, *Reproductive Freedom, Torture and International Human Rights: Challenging the Masculinisation of Torture* (Routledge 2014) 114

³⁸ Zampas and Gher (n 1) 251

The right to privacy or to private and family life in the case of the European regional system, represents the traditional approach to strategic litigation in relation to adolescent girls' abortion rights. Although the issue of abortion has been discussed from a myriad of perspectives³⁹, in both *P and S v. Poland* and *K.L v. Peru* the primary focus is on the right to privacy, which as we have already argued, becomes problematic in the case of adolescent girls. In the case of *L.C. v. Peru*, the CEDAW precludes this possibility, given that the convention does not contain such a provision.

In *P and S v. Poland*, the ECtHR (or the Court) addressed the human rights violations resulting from hospital staff and clergy members severely obstructing P's access to abortion services. At the age of 14, P was raped and as a result became pregnant. Although in Poland it is lawful to get an abortion if the pregnancy results from a crime⁴⁰, as it is the case, and although she ultimately obtained it, P and S, her mother, faced multiple obstacles and pressures to carry the pregnancy to term. At the first hospital they visited in Lublin, for instance, S was asked to sign a declaration acknowledging that the procedure could lead to her daughter's death and P was forced to talk with a Catholic priest who tried to convince her to not get an abortion. At the second hospital, in Warsaw, after P's confidential information was leaked to the press, both P and her mother were harassed by anti-abortion activists.

The Court found that the facts of the case gave rise to a breach of Article 8 of the European Convention on Human Rights (ECHR), for two reasons, the obstruction of access to abortion services and the disclosure of the applicants' personal and medical information. We will only focus on the first one.

Article 8 of the ECHR establishes the right to respect for private and family life. The essential object of this Article is to protect the individual against arbitrary or unlawful state

³⁹ Ronli Sifris, 'Restrictive regulation of abortion and the right to health' (2010) 18 *Medical Law Review* 185

⁴⁰ Section 4 (a)(1)(3) of the Family Planning, Human Embryo Protection and Conditions of Permissibility of Abortion Act of 7 January 1993

interference.⁴¹ Although this obligation is defined as the classic negative kind, States also have positive obligations deriving from Article 8.⁴² It is precisely under a positive obligation that the State must ‘create a procedural framework enabling a pregnant woman [or girl] to effectively exercise her right of access to lawful abortion’.⁴³ The existing legal framework in Poland cannot, therefore, limit real possibilities of obtaining an abortion.⁴⁴

The Court has clearly affirmed that Article 8 cannot be interpreted as conferring a right to abortion.⁴⁵ Nevertheless, the broad notion of “‘private life’” has been considered to apply to both decisions to have or not to have children.⁴⁶ The question that follows is in P’s case is who makes said decisions? The Court interpreted that the legal setting in Poland did not allow for P’s mother, S’s views to be truly respected and balanced against the interests of her pregnant daughter. Consequently, while it affirmed that ‘proper regard must be had to the minor’s personal autonomy’⁴⁷ in relation to abortion, it determined that a procedure whereby both parties can be heard and their views considered must have been in place. So, the Court is of the opinion that these interests, which in some cases may be different and competing (although this was not the case) must be both taken into consideration and balanced.

In the case of *K.L. v. Peru*, the HRC analysed the human rights violations stemming from hospital staff denying K.L, a 17-year-old adolescent girl, the access to abortion services. K.L. was pregnant with an anencephalic foetus. Doctors confirmed that the foetus would likely be born without major portions of its brain leading to stillbirth or death, which clearly posed risks to K.L.’s life. Although Peruvian abortion laws allow abortion when the life or health of the

⁴¹ *P and S v. Poland* App no. 57375/08 (ECtHR, 30 October 2012) para. 94

⁴² European Court of Human Rights, ‘Guide on Article 8 of the European Convention on Human Rights. Right to respect for private and family life, home and correspondence’ (2019) <https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf> 8 accessed 10th August 2019

⁴³ *P and S v. Poland* (n 39) para. 99 and *Tysic v. Poland* App no. 5410/03 (ECtHR, 20 March 2007) paras. 116-124

⁴⁴ *P and S v. Poland* (n 39) para. 99

⁴⁵ *ibid* para. 96

⁴⁶ *Evans v. The United Kingdom* App no. 6339/05 (ECtHR, 10 April 2007) para. 71

⁴⁷ *P and S v. Poland* (n 39) para. 109

mother is in danger (therapeutic abortion)⁴⁸, she was denied abortion and consequently forced to carry her pregnancy to term and breastfeed her for the four days she managed to survive. Among others, the HRC found a violation of Article 17 of the ICCPR which establishes the right to respect of privacy, family, home and correspondence. In her complaint to the HRC, K.L. sustains that Article 17 objective is to protect ‘(...) women from interference in decisions which affect their bodies and their lives, and offers them the opportunity to exercise their right to make independent decisions on their reproductive lives’.⁴⁹ The Peruvian State arbitrarily interfered in her private life, ‘taking on her behalf a decision relating to her life and reproductive health which obliged her to carry [the] pregnancy to term’.⁵⁰

2.2.2. The right to health

L.C. was a 13-year-old Peruvian girl who had been raped since the age of 11. As a result, she became pregnant and, desperate and depressed, attempted to commit suicide by jumping from a building. She was left quadriplegic and emergency surgery was required. But after finding out she was pregnant, during psychological and gynaecological examinations prior to the surgery, a doctor informed L.C.’s mother that L.C.’s surgery was postponed. The mother then requested hospital officials a therapeutic abortion for her daughter. Later, L.C. miscarried spontaneously and she was finally operated for her spinal injuries almost three and one half months after the surgery had been considered necessary. L.C.’s family could not afford the rehabilitation services and currently she is paralysed from the neck down having only regained partial movement of her hands. She requires constant care and she had to stop attending school.

⁴⁸ Penal Code of Peru (1992) Article 119

⁴⁹ HRC, *K.L. v. Peru*, Communication No 1153/2003, UN Doc HRC CCPR/C/85/D/1153/2003 para. 3.6

⁵⁰ *ibid*

In this case, the CEDAW Committee's first case on abortion, the CEDAW Committee found that the refusal by the medical staff to perform the therapeutic abortion violated, among others, L.C.'s right to health.

The right to health has been expressly recognised in the ICESCR, the CEDAW and the CRC. And even though this right is not listed among ICCPR's provisions, in *K.L. v. Peru*, the HRC 'addressed the intersections of health, privacy rights and the right to be free from inhumane and degrading treatment and called for a broad reading of health exceptions under a state's abortion law'.⁵¹

The right to health can be said to include, as a sub-category, the right to reproductive health.⁵²

The incorporation of the right to reproductive health to the international legal discourse has been a rather recent phenomenon.⁵³ The 1994 Report of the International Conference on Population and Development held in Cairo called upon government 'to deal with the health impact of unsafe abortion as a major public health concern'.⁵⁴ It further stated that 'in circumstances where abortion is not against the law, such abortion should be safe [and] in all cases, women should have access to quality services for the management of complications arising from abortion.'⁵⁵ At the Fourth World Conference on Women in Beijing, just a year later (1995), the international community reaffirmed said commitment and specifically highlighted how 'unsafe abortions threaten the lives of a large number of women, representing a grave public health problem as it is primarily the poorest and youngest who take the highest

⁵¹ Zampas and Gher (n 1) 269

⁵² Sifris (n 37) 193

⁵³ *ibid*

⁵⁴ UNDP, Report of the International Conference on Population and Development (18 October 1994) UN Doc A/51/950 para. 8.25

⁵⁵ *ibid*

risk'.⁵⁶ The Beijing Platform of Action also recognised adolescents' vulnerability due to 'their lack of information and access to relevant services in most countries'.⁵⁷

According to Article 12(1) of the CEDAW, 'States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning'.⁵⁸ In the case of L.C., as the CEDAW Committee noted, owing to her condition as pregnant "woman"⁵⁹, she did not have access 'to an effective and accessible procedure allowing her to establish her entitlement to the medical services that her physical and mental condition required'.⁶⁰ The case of L.C. is thus a matter of accessibility of a medical procedure which is legally, although not practically, available to her.⁶¹

After examining the facts, the CEDAW Committee considered that the medical board of the hospital denied her abortion services alleging that her life was not in danger, but in doing so, they did not consider the damage to her health, both her physical and mental health and they essentially based their decision on the stereotypical assumption that the protection of the foetus should prevail over the health of the pregnant woman or girl.⁶²

In relation to mental health specifically, the CEDAW Committee in its decision took into account three different factors.⁶³ One was the suicide attempt, which was clearly 'a demonstration of the amount of mental suffering she had experienced'⁶⁴, another one was her age and another one was her status as a victim of sexual abuse. As the CEDAW Committee

⁵⁶ Beijing Platform for Action 2005, UN Doc A/CONF.177/20/Rev.1 para. 97

⁵⁷ *ibid* para. 95

⁵⁸ CEDAW Art. 12 (1)

⁵⁹ It is worth noting that the CEDAW Committee refers to L.C. as both a woman and a girl, but generally uses the word 'woman' throughout the decision.

⁶⁰ CEDAW, *L.C. v. Peru*, Communication No 22/2009, UN Doc CEDAW/C/50/D/22/2009 para. 8.14

⁶¹ Charlotte Bates, 'Abortion and a Right to Health in International Law: *L.C. v. Peru*' (2013) 2, 3 *Cambridge Journal of International and Comparative Law* 644

⁶² *ibid* 8.15

⁶³ *ibid*

⁶⁴ *ibid*

had previously noted in General Recommendation 24 regarding the interrelations of these three factors, ‘girl children and adolescent girls are often vulnerable to sexual abuse by older men and family members, placing them at risk of physical and psychological harm and unwanted and early pregnancy.’⁶⁵

2.2.3. The right to be free from torture or cruel, inhuman and degrading treatment

In *P and S v. Poland*, the Court also found that the facts of the case had given rise to a breach of Article 3, which enshrines the right to be free from torture or cruel, inhuman and degrading treatment. In *K.L. v. Peru*, the HRC established that the facts revealed a violation of Article 7 of the ICCPR which provides that ‘no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’.⁶⁶

Although the inclusion in the analysis of the prohibition of torture or cruel, inhuman and degrading treatment represents indeed a significant shift towards a new way of understanding and litigating for adolescent girls’ rights, both cases prove that the use of this absolute prohibition in litigation strategies remains underdeveloped. Furthermore, as we will argue in Chapter 4, in these cases the decisional bodies have failed to apply an intersectional approach regarding adolescent girls’ situation.

According to well-established jurisprudence and legal doctrine, torture or cruel, inhuman or degrading treatment in order to be considered as such must attain a minimum level of severity. The assessment of this ‘‘entry level threshold’’ of severity is therefore relative and depends on all the circumstances of the case and of course, of the victim.⁶⁷ In *P and S v. Poland*, the circumstances that the Court takes into account to evaluate the minimum threshold, are both

⁶⁵ CEDAW Committee, *CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health)* (1999) UN Doc A/54/38/Rev.1, chap. I para. 12(b)

⁶⁶ ICCPR Art. 7(1)

⁶⁷ *P and S v. Poland* (n 39) para. 157

objective circumstances such as the denial of a lawful medical procedure due to Polish public authorities' 'procrastination, confusion and lack of proper and objective counselling and information'⁶⁸, the 'considerable pressure'⁶⁹ put on P and S by medical staff and clergy members or the harassment suffered by both after confidential information about the case was relayed to the press⁷⁰ and subjective circumstances such as her status as a victim of rape, her age and consequently, her vulnerability due to these two factors.⁷¹ Similarly, in the case of K.L., the Human Rights Committee considered diverse objective and subjective circumstances, such as the refusal of the medical authorities to carry out the therapeutic abortion, the pain and distress caused first by the forced unwanted pregnancy and second by the fact that she had to give birth, see her daughter's deformities and finally watch her die, the medically diagnosed state of depression she fell into following the baby's death and also her age.⁷²

Both bodies apply what could be named as a "cumulative" approach, in the sense, that, for instance, age is just one of the elements they consider in order to establish that her suffering had reached the minimum threshold of severity. In Chapter 4 we will see that if we apply an intersectional analysis, taking into consideration the, at least, three elements at stake (sex, age and pregnancy) the fact that K.L. or P were adolescent girls is sufficient to understand they have the right to abortion and thus, the denial of abortion care in their cases, amounts to a violation of the right to be free from torture or cruel, inhuman or degrading treatment, without having to consider additional objective or subjective circumstances.

2.2.4. The right to equality and non-discrimination

⁶⁸ *ibid* para. 167

⁶⁹ *ibid* para. 163

⁷⁰ *ibid* paras. 162-165

⁷¹ *ibid* para. 161 and 162

⁷² HRC, *K.L. v. Peru* (n 48) para. 6.3

As it has been seen, while at the international, regional and national level there have been decisions conceptualising restrictions on abortion as violations of different human rights, there have not really been decisions discussing the right to abortion of adolescent girls in the context of the prohibition of discrimination.⁷³

In *P and S v. Poland*, the Court considered that apart from the violations of Articles 8, 3 and 5 (right to liberty and security), the materials in its possession did not ‘disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols’.⁷⁴ Although the applicants in their litigation strategy understood there had been a violation of Article 14 of the ECHR (prohibition of discrimination) and hoped that the Court would recognise that the denial or delay of abortion services is discriminatory, just like in other cases on reproductive health services, the Court declined to analyse this aspect or address this claim.⁷⁵

In the case of *K.L.*, the authors claimed they have suffered discrimination in breach of Articles 3 and 26 of the ICCPR in three different forms. First, in her access to health services, because according to the authors ‘her different and special needs were ignored because of her sex’⁷⁶, second, in the exercise of her rights and third, in access to the courts, ‘bearing in mind the prejudices of officials in the health system and the judicial system where women are concerned and the lack of appropriate legal means of enforcing respect for the right to obtain a legal abortion when the temporal and other conditions laid down in the law are met.’⁷⁷ The HRC, however, understood that the claim on discrimination had not been ‘properly substantiated’

⁷³ Sifris (n 37) 116

⁷⁴ *P and S v. Poland* (n 39) para. 171

⁷⁵ Strasbourg Observers, ‘P and S v. Poland: adolescence, vulnerability, and reproductive autonomy’ (*Strasbourg Observers* November 2012) <<https://strasbourgobservers.com/2012/11/05/p-and-s-v-poland-adolescence-vulnerability-and-reproductive-autonomy/>> accessed 1st August 2019

⁷⁶ HRC, *K.L. v. Peru* (n 48) para 3.2

⁷⁷ *ibid*

given that the author had not ‘placed before the Committee any evidence relating to the events which might confirm any type of discrimination under the article in question’.⁷⁸

Finally, in the case of *L.C. v. Peru*, given the CEDAW’s nature and special focus on discrimination, the CEDAW Committee evaluated the discriminatory aspects of the case finding violations of Articles 12 (equal rights to health services), 5 (freedom from gender stereotyping), 3 (right to equality), 2 (c) (legal protection of the rights of women on an equal basis with men) and (f) (modification or abolition of existing laws, regulations, customs and practices which constitute discrimination against women). Nevertheless, two critiques should be made. Firstly, in this decision the Committee applied what Ngwena called a “‘limited equality paradigm’” mainly because it framed women’s equality essentially as a procedural and not substantive equality.⁷⁹ In this sense, ‘it stops short of a more holistic consideration of the impact of abortion laws on women in a gendered society’.⁸⁰ Secondly, it does not really apply an intersectional approach, as in general, it refers to women’s discrimination. Age and pregnancy appear to be either isolated categories or cumulative categories that simply aggravate a given situation. This becomes apparent, for instance, when the Committee states ‘owing to her condition as a pregnant woman, L.C. did not have access to an effective and accessible procedure (...) This is even more serious considering that she was a minor and a victim of sexual abuse’.⁸¹

We will undertake a thorough analysis of intersectional discrimination in Chapter 3 and 4, ultimately arguing that the prohibition of discrimination should be key in a litigation strategy advancing adolescent girls’ right to abortion.

⁷⁸ *ibid* para. 5.3

⁷⁹ Charles G. Ngwena, ‘A Commentary on *LC v Peru*: The CEDAW Committee’s First Decision on Abortion’ (2013) 57, 2 *Journal of African Law* 324

⁸⁰ *ibid*

⁸¹ HRC, *L.C. v. Peru* (n 59) para. 8.15

2.2.5. The right to life

The right to life has been invoked to support opposing claims, some to support foetuses’ “right to life” and others to support women and girls’ right to life.⁸²

According to the Guttmacher Institute, an estimate range of 22.800–31.000 women died after undergoing an unsafe and clandestine abortion.⁸³ Consolidated research indicated then that there is a strong correlation between abortion safety and abortion legality.⁸⁴ In General Comment 28, the HRC urged States parties to ‘give information on any measures taken by the State to help women prevent unwanted pregnancies and to ensure that they do not have to undergo life-threatening clandestine abortions’.⁸⁵ In a much more recent General Comment, the HRC has even declared that States parties ‘must provide safe, legal and effective access to abortion where the life and health of the pregnant woman or girl is at risk’.⁸⁶

In *K.L. v. Peru*, an interesting discussion regarding the right to life was generated. The HRC in its decision did not consider there had been a breach of Article 6 of the ICCPR, protecting the right to life. The HRC argued that due to them finding a violation on the prohibition of torture or cruel, inhuman or degrading treatment, they did not consider it necessary in these circumstances to made a finding on Article 6.

Nonetheless, in his dissenting opinion, Committee Member Hipólito Solari-Yrigoyen sustained that the case of K.L. revealed a violation of the right to life. Taking a brave stance, he claimed

⁸² Rebecca J. Cook and Bernard M. Dickens, ‘Human Rights Dynamics of Abortion Law Reform’ (2003) 25 Human Rights Quarterly 22

⁸³ Susheela Singh, Lisa Remez, Gilda Sedgh, Lorraine Kwok and Tsuyoshi Onda, ‘Abortion Worldwide 2017. Uneven Progress and Unequal Access’ (2017) Guttmacher Institute
<https://www.guttmacher.org/sites/default/files/report_pdf/abortion-worldwide-2017.pdf> 33

⁸⁴ Zampas and Gher (n 1) 250

⁸⁵ HRC, ‘General Comment No. 28: Equality of rights between men and women (Art. 3)’ (29 March 2000) U.N. Doc. CCPR/C/21/Rev.1/Add.10 para. 10

⁸⁶ HRC, ‘General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life’ (30 October 2018) UN Doc CCPR/C/GC/36 para. 8

that ‘it is not only taking a person’s life that violates article 6 of the Covenant but also placing a person’s life in grave danger, as in this case’.⁸⁷

So far, no decisional body has ever analysed the issue of abortion and more specifically the denial and restrictions on abortion services as a violation on the right to life, a right which has historically been the cornerstone of anti-abortion movement’s rhetorical and legislative strategy.

⁸⁷ HRC, *K.L. v. Peru* (n 48) 12

3. THEORETICAL REVIEW ON THE INTERSECTION BETWEEN SEX, AGE AND PREGNANCY IN RELATION TO ABORTION

This chapter will offer a brief theoretical review on how feminist legal theory and childhood studies have considered and analysed in relation to abortion the intersectional discrimination based on the grounds of sex, age and pregnancy. This does not mean, however, that we will not acknowledge or evaluate other grounds of discrimination, such as race or poverty, but we will focus primarily on the three ones we mentioned.

Three topics have been selected for the purposes of this dissertation. First, we will explore the definition of intersectionality. Second, we will analyse the social and cultural construction of girls' sexuality and its relation to reproduction and pregnancy. Finally, the third section will focus on the complex relationship between the State, parents and adolescent pregnant girls and how this relationship is sometimes redefined when adolescent girls get pregnant and when they decide to get an abortion.

3.1. Understanding intersectionality

The notion of intersectionality was originated in gender and post-colonial studies, although it was coined by American legal scholar Kimberle Crenshaw.⁸⁸ She explored how the experiences of black women, situated at the margins of race and gender, were insufficiently and inadequately represented in both the feminist and antiracist discourse. Her point of departure was the opposition to the “single-axis framework” according to which race and gender were considered two exclusive categories of experience and analysis.⁸⁹ The relevant and defining

⁸⁸ Kimberle Crenshaw, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’ (1989) 1989, 1 University of Chicago Legal Forum 139

⁸⁹ *ibid*

experiences of discrimination were those of white women or black men, excluding black women's intersectional experiences not as man or as black but as black women.

Discrimination categories or grounds such as sex, age, poverty, sexual orientation or race interact with each other. They can 'mutually strengthen or weaken each other'⁹⁰. Intersectional discrimination therefore focuses on the interwoven nature of these discrimination categories.⁹¹ Girls, for example, are marginalised 'within the category of children as females, and within the category of women as minors'.⁹² According to Taefi, this is because 'the experience of adulthood defines what it means to be a woman and the experience of being male what it is to be a child'.⁹³ If the discourse around women's rights is adult-centred, girls' needs and interests are relegated to the margins, creating a 'distorted analysis of the experience of childhood, because it is grounded in the assumption that boys and girls face oppression in an identical way'.⁹⁴

A clear link between women's rights and children's rights has been recognised by both feminist theory and childhood studies. Backstrom indicates that even though women's and children's rights may be connected, there is 'a tendency to disassociate [them] because they are viewed as undermining each other'.⁹⁵ For Prince-Cohen children's rights discourse, prominently focused on children's protection, represents in a way a threat to the adult woman's autonomy⁹⁶, who is 'in danger of being tainted with children's dependency and either being infantilised by the connection or suppressed in the name of the child.'⁹⁷

⁹⁰ Gabriele Winker and Nina Degele, 'Intersectionality as multi-level analysis: Dealing with social inequality' (2011) 18, 1 *European Journal of Women's Studies* 51

⁹¹ *ibid*

⁹² Nura Taefi, 'The Synthesis of Age and Gender: Intersectionality, International Human Rights Law and the Marginalisation of the Girl-Child' (2009) 17 *International Journal of Children's Rights* 347

⁹³ *ibid* 348

⁹⁴ *ibid* 349

⁹⁵ Kirsten M. Backstrom, 'The International Human Rights of the Child: Do They Protect the Female Child?' (1996) 30, 2/3 *George Washington Journal of International Law and Economics* 572

⁹⁶ Cynthia Price-Cohen, 'The United Nations on the Rights of the Child: a feminist landmark' (1997) 3 *William and Mary J Women and the Law* 72

⁹⁷ Jo Bridgemand and Daniel Monk (eds.) *Feminist Perspectives on Child Law* (Routledge-Cavendish 2000) 232

While addressing women's rights and children's rights separately can benefit each of these groups, it is also important to acknowledge the existing interconnectedness of these rights⁹⁸, especially if we are applying an intersectional approach to analyse girls' rights violations.

Grillo points that one of the key lessons of intersectionality is that diverse 'oppressions cannot be dismantled separately because they mutually reinforce each other'.⁹⁹ Although this illustrates the enormous difficulties that exist in operationalising intersectionality, in Chapter 4 we will analyse intersectional discrimination in the case at hand aiming to understand the different interactions between three specific discrimination grounds: age, sex and pregnancy.

⁹⁸ Jonathan Todres, 'Women's Rights and Children's Rights: A Partnership with Benefits for Both' (2004) 10 *Cardozo Women's Law Journal* 605

⁹⁹ Trina Grillo, 'Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House' (1995) 10 *Berkeley Journal of Gender, Law and Justice* 27

3.2. Social and cultural construction of girls' sexuality

The concept of childhood, at least as it has been understood since the 19th century, has been premised upon an idea of sexual innocence.¹⁰⁰ The child and especially the girl child, is essentially good and pure. Childhood is essentially 'constructed in opposition to a dangerous and potentially corrupting adult world'.¹⁰¹ At the same time, especially in the case of girls, some have argued that we are witnessing a whole process of "erotisation" or "sexualisation", sometimes referred to as the premature or hyper-sexualisation of girls.¹⁰² Girls thus 'appear simultaneously as innocent and sexually knowing'¹⁰³, becoming 'the most perfect object of male desire'.¹⁰⁴ This ambivalent image has been significantly encouraged by the media, art and popular culture.¹⁰⁵ A good example can be the novel *Lolita* by Vladimir Nabokov. The protagonist and narrator of this novel, a middle-aged man named Humbert, describes his obsession with a 12-year-old girl and the sexual relationship they have.

Even though the situation differs for different groups, the majority of teenage girls are in the same 'anomalous position of being at once infantilised by the cult of virginity (codified, for example, in statutory rape and "age of consent" laws) and objectified by the media's cult of "Lolita"'.¹⁰⁶ As Walkerdine puts it

'popular images of little girls as alluring and seductive, at once innocent and highly erotic, are contained in the most respectable and mundane of locations [...] This is not about a few perverts, but about the complex construction of the highly contradictory gaze at little girls, one which places them as at once threatening and sustaining

¹⁰⁰ Mary Jane Kehily and Heather Montgomery, 'Innocence and experience. A historical approach to childhood and sexuality' in Mary Jane Kehily (ed) *An introduction to childhood studies* (McGraw Hill OUP 2009) 70

¹⁰¹ *ibid*

¹⁰² Emma Renold and Jessica Ringrose, 'Feminisms re-figuring 'sexualisation', sexuality and 'the girl' (2013) 14, 3 *Feminist Theory* 247

¹⁰³ Kehily and Montgomery (n 100) 86

¹⁰⁴ Patricia Holland, *What is a Child? Popular Images of Childhood* (Virago Press 1992) 127

¹⁰⁵ Pollack Petchesky (n 2) 220

¹⁰⁶ *ibid* 224

rationality, little virgins that might be whores, to be protected yet to be constantly alluring'.¹⁰⁷

Just as childhood, adolescence, generally understood as a transitional phase between childhood and adulthood, is a culturally constructed concept. In said phase, rites of initiation become crucial.¹⁰⁸ Exploring sexuality is undoubtedly one of these rites of initiation. For Kehily and Montgomery adolescence is a 'time when there is a struggle for control over a young woman's sexuality and her fertility'.¹⁰⁹ Pollack Petchesky argues that pregnancy, an undeniable and visible sign of sexual initiation, is in itself a way to explore the boundaries between childhood and adulthood.¹¹⁰ These two notions have been historically exclusively conceptualised.¹¹¹ Put simply, you are either a child or an adult. Teenage pregnancy challenges this distinction. It can be seen therefore as a 'contradiction in terms'.¹¹² How does then the image of a pregnant adolescent girl differ from the image of a non-pregnant girl? As Murcott points, to be sexually active and consequently sexually knowledgeable is to have lost innocence, the very essence of childhood. 'A girl's pregnancy is proof of her loss of innocence, and thereby raises doubts about her status as a child'.¹¹³ After all, how can a child be a mother?

It is important to note that, despite the common "'Western'" assumption about sexuality as a biologically determined phenomenon¹¹⁴, ideas about girls' sexuality are 'closely tied to ideas about the body, about gender relationships and about the culturally sanctioned expression of sexuality.'¹¹⁵

¹⁰⁷ Valérie Walkerdine, *Daddy's Girl: Young Girls and Popular Culture* (Macmillan 1997) 256

¹⁰⁸ Heather Montgomery, *An Introduction to Childhood: Anthropological Perspectives on Children's Lives* (Wiley-Blackwell 2008) 87

¹⁰⁹ Montgomery (n 107) 84

¹¹⁰ Pollack Petchesky (n 2) 222

¹¹¹ Anne Murcott, 'The social construction of teenage pregnancy: a problem in the ideologies of childhood and reproduction' (1980) 2,1 *Sociology of Health and Illness* 7

¹¹² *ibid*

¹¹³ *ibid* 8

¹¹⁴ Kehily and Montgomery (n 100) 76

¹¹⁵ *ibid* 81

Gender clearly ‘shapes attitudes and behaviours related to sexuality by the different norms and expectations it imparts on young women and young men’.¹¹⁶ Gender norms therefore influence ideas about sexuality, reproduction and motherhood or parenthood in opposite directions, while boys are considered to be ‘‘naturally’’ predisposed and prepared for sex, they are not prepared to become fathers, and while girls are not sexually driven and active, they can make sacrificed and selfless mothers.¹¹⁷ Research has also shown that many girls have been socialised to accept male control of sexual activities and decision-making¹¹⁸ and that rigid gender norms reinforce violence towards them.

The existing ambivalence towards girls’ sexuality helps us understand first and foremost girls’ forms of sexual expression, some of which are clearly modelled after media images of girls’ and women’s sexuality¹¹⁹ and markedly influenced by defined gender roles and norms. It also helps us understand the sexual behaviour and attitudes of others and their ideas about pregnancy and abortion.

¹¹⁶ Christine Ricardo et al, ‘Gender, sexual behaviour and vulnerability among young people’ in Roger Ingham and Peter Aggleton (eds.) *Promoting Young People's Sexual Health. International Perspectives* (Routledge 2006) 62

¹¹⁷ Isabel Goicolea et al, ‘Adolescent pregnancies and girls' sexual and reproductive rights in the amazon basin of Ecuador: an analysis of providers' and policy makers' discourses’ (2010) 10, 12 *BMC International Health and Human Rights* 6

¹¹⁸ Shireen J Jejeebhoy and Sarah Bott, ‘Non-consensual Sexual Experiences of Young People: A review of the evidence from developing countries’ (2003) *Population Council Regional Working Papers* 16 <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.175.9529&rep=rep1&type=pdf>> accessed 1st August 2019

¹¹⁹ Sharon Lamb and Zoë Peterson, ‘Adolescent Girls’ Sexual Empowerment: Two Feminists Explore the Concept’ (2012) 66 *Sex Roles* 709

3.3. Power imbalances: The exercise of choice in regard to abortion

Pregnancy and abortion redefine albeit in different ways the interrelations between the State, parents and adolescent girls.

A lot of adolescent girls, and more specifically those who live with their parents, are inevitably ‘influenced by their parents’ power over them and control of their time, resources and future.’¹²⁰ Precisely because of their dependence on their parents, pregnancy and abortion can be a critical struggle for power between adolescent girls and their parents.¹²¹ Abortion care can be thus understood, just as for instance, sex education or access to contraceptive methods, as a site for the recognition not only of sexual desire but also of adolescent girls’ sexual and reproductive agency.¹²² Giddens, although referring to the much broader concept of sexuality, understands sexuality as a ‘terrain of fundamental political struggle and also a medium of emancipation’.¹²³

Article 5 of the CRC places parents centre stage. It provides that ‘States Parties shall respect the responsibilities, rights and duties of parents or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise [of his or her rights]’. Article 5 anticipates that parents ‘will invariably be making decisions on behalf of their children given that children will often lack the capacity to determine their best interests.’¹²⁴

Parental involvement laws regarding abortion are an expression of the principle of parental guidance or parental authority. There are essentially two categories of parental involvement laws which are parental consent and parental notification standards. Parental consent laws

¹²⁰ Polland Petchesky (n 2) 225

¹²¹ *ibid* 223

¹²² Mary Jane Kehily, ‘Contextualising the sexualisation of girls debate: innocence, experience and young female sexuality’ (2012) 24, 3 *Gender and Education* 260

¹²³ Anthony Giddens, *The Transformation of Intimacy. Sexuality, Love and Eroticism in Modern Societies* (Stanford University Press 1992) 181

¹²⁴ John Tobin, *The UN Convention on the Rights of the Child: A Commentary* (OUP 2019) 176

require girls to obtain consent by one or both parents before abortion services are provided. Parental notification laws require written notification to parents before the medical provider can perform the procedure. Proponents of this type of laws have argued that these requirements have reduced unwanted pregnancy rates and that excluding parents from their daughters' decision to seek an abortion would otherwise harm them.¹²⁵ Another arguments which have been recurrently raised have been that parental involvement will result in better family communication and a more reasoned decision-making process.¹²⁶ Research has shown, nevertheless, that most parental involvement laws have little impact on girls' abortion rate¹²⁷ and that they have also no effect on a girl's decision to talk with her parents about her pregnancy and her decision prior to having an abortion.¹²⁸ In fact, the determining factor in these cases was the relationship the adolescent girl had with her parents.¹²⁹ Furthermore, in certain cases, imposing parental involvement can lead to violence and some girls can be forced to continue with unwanted pregnancies.¹³⁰ The most frequent reasons for not telling their parents include 'the desire to protect a vulnerable parent from stress and disappointment, the belief that the knowledge would damage their relationship with the parent, and the fear that disclosure would escalate conflict or coercion'.¹³¹

Although parents play indeed a vital role in the realisation of girls' rights (and the right to abortion is no exception) and the family in the CRC is considered to be a 'fundamental group

¹²⁵ Amanda Dennis et al, 'The Impact of Laws Requiring Parental Involvement for Aobrtion: A Literature Review' (2009) Guttmacher Institute 3
<<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.637.2442&rep=rep1&type=pd>> accessed on 15th August 2019

¹²⁶ Kathryn D. Katz, 'The Pregnant Child's Right to Self-Determination' (1999) 61 Albany Law Review

¹²⁷ *ibid* 28

¹²⁸ Advocates for Youth, 'Abortion and Parental Involvement Laws. A Threat to Young Women's Health and Safety' (2013) Factsheet

<<https://advocatesforyouth.org/wp-content/uploads/storage/advfy/documents/abortion%20and%20parental%20involvement%20laws.pdf>>
accessed 7th August 2019

¹²⁹ *ibid*

¹³⁰ *ibid*

¹³¹ Committee on Adolescence (AAP), 'The Adolescent's Right to Confidential Care When Considering Abortion' (2017) 139, 2 Pediatrics 4

of society and the natural environment for the growth and well-being of all its members and particularly children'¹³², Article 5 and the Convention in general, deal with children's rights not parental rights.

First, parents must provide what Article 5 qualifies as "appropriate" direction and guidance. This basically means, in accordance with the principle of consistency, that said direction and guidance will only be appropriate when it is consistent with the rest of provisions of the CRC. Second, parental direction and guidance 'must have a nexus with the ability of a [girl] to progressively enjoy [her] rights in light of [her] evolving capacities'.¹³³ The principle of the evolving capacities of the girl must definitely be taken into consideration when analysing parental authority, as it has become an essential enabling, interpretative and policy principle under international child law.¹³⁴ The introduction of this notion of "evolving capacities" alongside the general principle enshrined in Article 12 in the CRC (the right to be heard and have their views taken into consideration), has 'challenged the entrenched perception of the child as an object of protection and introduced the prospect of the child as a rights-holder under international law'.¹³⁵ Just as Lansdown observes the principle of evolving capacities created a direct relationship between the State and the child, not mediated by their parents, making the child visible as a subject of rights within the family.¹³⁶ To a certain extent it could be said that the acknowledgement of a child's partial independence from adult protection has significantly blurred the line of division between adulthood and childhood, as it 'introduces an evolutionary understanding of competence and maturity, and, therefore, produces exactly a 'grey zone' identified above'.¹³⁷

¹³² Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC)

¹³³ Tobin (n 124) 172

¹³⁴ Sheila Varandan, 'The Principle of Evolving Capacities under the UN Convention on the Rights of the Child' (2019) 27 *International Journal of Children's Rights* 306

¹³⁵ *ibid* 307

¹³⁶ Gerison Lansdown, 'The Evolving Capacities of the Child' (2005) UNICEF *Innocenti Insight* 6

¹³⁷ Holzscheiter (n 30) 136

In the case of abortion, the State must be able to strike a balance between two different duties as it must protect adolescent girls from violence while simultaneously recognizing the sexual autonomy of girls who are just beginning to explore and experience their sexuality.¹³⁸ Cases like *Gillick*¹³⁹, which established the means by which to assess the legal capacity of a girl under the age of 16 to consent to medical treatment, ‘pointed towards the possibility of transforming the complex relationship between the State, parents and the child to the benefit of the child and of emancipating the individual child from a sacred, private sphere of family life that left little room for public intervention and potential protection of the child and his or her rights’¹⁴⁰

Mandatory parental involvement in adolescent girls’ decision to seek an abortion increases the risk of harm by delaying access to appropriate medical care and can also have adverse health, psychological and social impact.¹⁴¹ Ideally, of course, when facing the decision to undergo an abortion an adolescent girl will seek the advice of those who care for her the most, but should do so voluntarily.

¹³⁸ Jessie Clyde et al, ‘Evolving capacity and decision-making in practice: adolescents’ access to legal abortion services in Mexico City’ (2013) *Reproductive Health Matters* 168

¹³⁹ *Gillick v West Norfolk and Wisbech Area Health Authority*

¹⁴⁰ *Holzscheiter* (n 30) 135

¹⁴¹ *Committee on Adolescence* (n 131)

4. BUILDING AN ALTERNATIVE LITIGATION STRATEGY: THE DENIAL OR RESTRICTIONS ON ABORTION CARE AS A FORM OF TORTURE OR OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT AND AN ACT OF INTERSECTIONAL DISCRIMINATION

In the first section of this chapter, the main aim is to analyse the different elements of an alternative and adaptable legal framework which incorporates an intersectional approach to girls' abortion rights. The key elements of this legal framework, which would be present in every legal strategy we design, are the prohibition against torture or other cruel, inhuman or degrading treatment, the prohibition discrimination and the girl's best interests' principle. Each of these elements will be separately and thoroughly considered.

In the second section of the chapter, we will test the application of this theoretical framework and reimagine the rulings that were previously analysed in Chapter 2 which embodied the traditional approach to litigation strategy in adolescent girls' abortion rights cases.

4.1. Prohibition of torture or cruel, inhuman or degrading treatment

Simone de Beauvoir once wrote that 'the representation of the world as the world itself is the work of *adult* men; they describe it from a point of view that is their own and that they confound with the absolute truth.'¹⁴² (Italics are mine). Law, and more specifically international law is no exception to this assertion. Adult men have for centuries defined our systems of rules and their rules have been equated to neutral and objective rules. After underlying the pervasiveness of gendered assumptions in domestic legal systems¹⁴³, feminist legal critique has strongly argued that international law is too a 'thoroughly gendered system'.¹⁴⁴ It has attempted to show,

¹⁴² Simone de Beauvoir, *The Second Sex* (Lowe and Brydone 1967) 162

¹⁴³ Hilary Charlesworth, 'Feminist Critiques of International Law and their Critics' (1995) 13, 1 *Third World Legal Studies* 1

¹⁴⁴ *ibid*

as Chinkin points, how the ‘structures, processes and methodologies of international law marginalise women by failing to take into account of their lives or experiences’.¹⁴⁵

If we take the example of the prohibition of torture not only the gendered nature of international human rights law becomes apparent but we can also see that it has been conceptualised in a very adult-centric way.

While it has been traditionally associated with the paradigm of interrogation, intimidation or punishment committed against detainees by State actors in State-run facilities, the concept of torture and cruel, inhuman or degrading treatment has considerably expanded in recent decades.¹⁴⁶ Human rights bodies have begun to consider certain situations or cases of violence, such as domestic violence or female genital mutilation to fall inside the scope of the prohibition of torture or cruel, inhuman or degrading treatment.¹⁴⁷

Following the definition of torture contained in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), we will now proceed to examine all its elements in order to understand how to challenge the adult and male-centric conceptualisation of the prohibition of torture or other cruel, inhuman or degrading treatment present in both legal and popular imagination¹⁴⁸ and to ultimately be able to apply the definition of torture or other cruel, inhuman or degrading treatment to those cases in which adolescent girls who have clearly manifested their decision to end their pregnancies are denied this possibility or find difficulties in accessing abortion care.

4.1.1. Elements of the definition of torture or other cruel, inhuman or degrading treatment

¹⁴⁵ Christine Chinkin, ‘Feminism, Approach to International Law’ *Max Planck Encyclopedia of Public International Law* (October 2010) <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e701>> accessed 20 April 2019

¹⁴⁶ Alyson Zureick, ‘(En)gendering suffering: Denial of Abortion as a Form of Cruel, Inhuman or Degrading Treatment’ (2014) 38 *Fordham International Law Journal* 101

¹⁴⁷ *ibid*

¹⁴⁸ Sifris (n 37) xiii

The absolute prohibition of torture or other cruel, inhuman or degrading treatment is a rule of *jus cogens*, a peremptory rule of international law which cannot be modified even by treaty.¹⁴⁹ This prohibition is guaranteed by different international and regional human rights treaties and it is considered customary international law.¹⁵⁰ As Rodley points, indicators of this are ‘the fact that the rule is couched in absolute terms, brooking no exception [...], the non-derogability of the rule even in time of war or other public emergency and the fact that states do not claim a right to torture’.¹⁵¹ So, CAT is based on the presumption of ‘the existing prohibition under international and national law of the practice of torture and other cruel, inhuman or degrading treatment or punishment.’¹⁵²

Article 5 of the UDHR provides that ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’. Article 7 of the ICCPR has followed the exact same wording. In addition to its inclusion in a general human rights treaty, the prohibition of torture and cruel, inhuman or degrading treatment has been established in the CAT, a treaty which can be considered the backbone of the international structure for combating torture and cruel, inhuman or degrading treatment.¹⁵³ Article 1 of said convention sets out the generally recognised and accepted definition of torture, according to which “torture” means

‘[...] any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third

¹⁴⁹ Nigel Rodley, ‘Integrity of the person’ in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds.) *International Human Rights Law* (OUP 2018) 168

¹⁵⁰ *ibid* 167

¹⁵¹ *ibid* 168

¹⁵² GA Res 39/46, UN GAOR, 39th sess, 93rd plen mtg, UN Doc A/RES/39/46 (10 December 1984)

¹⁵³ Sifiris (n 37) 30

person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity’.

4.1.1.1. Act of severe pain or suffering

If the definition of torture requires an “act”, our first essential question is necessarily if an omission constitutes an act? Can restrictions on abortion services be considered an act of severe pain or suffering then? Doctrine and jurisprudence both have agreed that indeed the requirement for an act of torture includes omissions. Herman Burgers and Danelius, for instance, indicate the fact that the definition explicitly refers to acts, ‘this does not exclude, however, that in special cases an omission should be assimilated to an act’.¹⁵⁴

The CAT, ICCPR and ECHR all recognise that torture or cruel, inhuman or degrading treatment involves acts that inflict severe pain or suffering on the victim.¹⁵⁵ The act or omission must attain thus a certain level of severity. This notion, nonetheless, is ‘both inherently subjective and inherently vague’.¹⁵⁶ The assessment of this threshold of severity has been made taking into consideration both objective and subjective factors.¹⁵⁷ When adolescent pregnant girls have expressed their clear wish to terminate their pregnancies the denial or imposition of barriers to accessing abortion care constitutes a form of cruel, inhuman and degrading treatment given the biological, psychological and socioeconomic effects associated to child pregnancy. These effects will be explored more closely in subsection 4.1.2. Due to all these reasons, which undoubtedly make adolescent pregnant girls extremely vulnerable to experiencing torture or

¹⁵⁴ J. Herman Burgers and Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Martinus Nijhoff Publishers, Dordrecht, 1988) 118.

¹⁵⁵ Zureick (n 136) 107

¹⁵⁶ Sifris (n 37) 65

¹⁵⁷ Zureick (n 136) 107

other cruel, inhuman or degrading treatment when accessing abortion services, we argue that no other circumstances should be taken into consideration. The subjective and intersectional experience of an unwanted pregnancy adolescent pregnant girls experience is sufficient to qualify the act of denying or restricting girls' access to abortion care as torture or cruel, inhuman or degrading treatment. Other objective factors could be only considered in order to establish whether the act in itself constitutes either a form of torture or a form of other cruel, inhuman or degrading treatment.¹⁵⁸

4.1.1.2. Intention and purpose

Just as Article 1 of the CAT establishes, in order to ascertain that certain acts or omissions amount to torture, it is necessary to prove that these were “intentionally inflicted” on the victims. If a State legally or practically restricts adolescent girls' access to abortion, for instance, establishing parental involvement laws, can we say said State intended to cause severe pain or suffering? The CAT Committee has adopted a broad conception of the meaning of intention, only affirming that “intentionally” excludes negligent conduct.¹⁵⁹ In General Comment 2, the Committee stated that both elements, intent and purpose, ‘do not involve a subjective inquiry into the motivations of the perpetrators, but rather must be objective determinations under the circumstances’.¹⁶⁰

Apart from being intentionally inflicted, the pain or suffering must be inflicted for one of the purposes the article enumerates. Among the different purposes in Article 1, the one that can be

¹⁵⁸ We must keep in mind that perhaps with the exception of the ECtHR (see for example *Ireland v. UK*), the distinction between torture and other cruel, inhuman or degrading treatment is not based on the idea of aggravation or different levels of severity. According to Ferstman, ‘the Committee Against Torture has interpreted progressively states’ obligations and has recognised that both form part of a continuum of ill-treatment that states are obligated to prevent, prohibit and repair’ (see Carla Ferstman, ‘Torture’ in Ferstman et al, *Contemporary Human Rights Challenges: The Universal Declaration of Human Rights and its Continuing Relevance* (Routledge 2018)).

¹⁵⁹ Sifris (n 37) 103

¹⁶⁰CAT, ‘General Comment No. 2. Implementation of Article 2 by State parties’ (24 January 2008) UN Doc CAT/C/GC/2 para. 9

clearly identified with the situations we are analysing is discrimination. Just as Sifris asserts, the adoption of a discrimination-based approach to conceptualising restrictions on abortion, for both women and girls, is gaining momentum although quite slowly.¹⁶¹ As we will explain on next section, restricting or denying access to abortion services is a form of intersectional discrimination that severely affects adolescent pregnant girls' right to abortion.

4.1.1.3 The public official requirement

During the *travaux préparatoires* of the CAT, there was some debate concerning whether the definition of torture should be strictly limited to “public officials” or whether it should also include private individuals acting in a private capacity within the jurisdiction of the State party. In the end, a compromise was reached that resulted in the current wording of the definition of torture contained in Article 1¹⁶², which, in essence, provides that a State may be held responsible for an act of torture if it is intentionally inflicted by either a public official or a private actor with the consent or at the instigation of a public official. In the case of abortion rights, a direct link can be found between legal restrictions on abortion services and the pain or suffering experienced by adolescent pregnant girls wishing to end their pregnancies. States are ‘directly involved in the passing of legislation and in general, in the absence of a declaration that a law is unconstitutional, the machinery of investigation and prosecution function so as to enforce such a law’.¹⁶³

Even though the CAT Committee has not addressed any claims regarding the specific question of whether legislative restrictions on abortion services contravene the Convention, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment remarked that minorities and marginalised groups and individuals, such as adolescent pregnant

¹⁶¹ Sifris (n 37) 117

¹⁶² *ibid* 148

¹⁶³ *ibid* 151

girls, are particularly vulnerable to be subject to torture in the healthcare context.¹⁶⁴ A direct link can be thus found between not only the State and the pain or suffering girls must endure when their access to abortion services is hindered or denied but also between such pain or suffering and the medical personnel who essentially are persons ‘acting on behalf of the State, in conjunction with the State, under its direction or control or otherwise under colour of law’.¹⁶⁵

4.1.1.4. The “powerlessness” requirement

Despite not being stated as one of the requirements or elements of the above definition of torture, leading international human rights commentators, such as Nowak, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment from 2004 to 2010, consider that torture ‘presupposes a situation of powerlessness of the victim’.¹⁶⁶

While it cannot be understood that the CAT Committee regards the element of “powerlessness” of the victim as an implicit requirement, a brief analysis of the case law of CAT allows us to see that this element ‘at least increases the likelihood of conduct constituting torture’ and has therefore become a relevant consideration.¹⁶⁷ The HRC, by contrast, has more clearly linked torture to abuse of power. It is true that it has not gone ‘so far as to explicitly require that ‘powerlessness’ of the victim be established for conduct to constitute torture [but] it has expressed the view that a power imbalance is necessary for conduct to amount to torture’.¹⁶⁸

In the case of adolescent pregnant girls, the “powerlessness” requirement becomes an interesting element of discussion to fully understand and frame restrictions on abortion services

¹⁶⁴ UNGA, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez* (2013) UN Doc A/HRC/22/53 para. 26

¹⁶⁵ CAT (n 160) para. 15

¹⁶⁶ Manfred Nowak, ‘What Practices Constitute Torture?: US and UN Standards’ (2006) 28, 4 *Human Rights Quarterly* 832

¹⁶⁷ Sifris (n 37) 175

¹⁶⁸ *ibid*

within the prohibition of torture. The traditional conception of adolescent pregnant girls as objects of protection, instead of subjects of rights, coupled with their subordinated position within the family and societal structures, given their age, sex and pregnancy, place them ‘under the total control of another person(s)’.¹⁶⁹ Restrictions on abortion services ‘take away the individual decision-making and legal capacity of individual [girls] rendering them powerless’.¹⁷⁰ The three primary factors that contribute to rendering them in said state are the power of the law, the power of the medical profession and the power of parental authority. Adolescent pregnant girls’ multi-level dependence on their parents or caregivers, the State or sometimes both operate to create imbalances of power in the relationship between the torturer and the tortured.¹⁷¹

4.1.2. Framing restrictions on adolescent pregnant girls’ right to abortion as a form of torture or other cruel, inhuman or degrading treatment

Once the different elements of the definition have been explored, we will now examine the adverse consequences associated with forced child pregnancy. The different effects forced child pregnancy can have on adolescent girls’ health, development and lives is the basis for arguing that the denial or restrictions on abortion care for adolescent pregnant girls constitutes an act of torture or cruel, inhuman or degrading treatment.

4.1.2.1. *Health consequences*

¹⁶⁹ UNGA, *Torture and other cruel, inhuman or degrading treatment or punishment* (2008) UN Doc A/63/175 para. 50

¹⁷⁰ Sifris (n 37) 183

¹⁷¹ *ibid*

According to the WHO, in developing regions about 16 million adolescent girls (ages 15 to 19 years) and 2.5 million adolescent girls under 16 years old give birth every year.¹⁷² On a global scale, possible complications during pregnancy and childbirth are the leading causes of death for adolescent girls.¹⁷³ Adolescent pregnant girls are indeed disproportionately affected by maternal mortality.¹⁷⁴ Given its magnitude, teenage pregnancy has been identified as major public health problem.

Even though it has been argued that health problems are more associated to older adolescent girls and that significant differences exist between high-income and low- and middle-income countries which are generally characterised by poor healthcare services¹⁷⁵, studies have shown that adolescent mothers face increased risks of puerperal endometritis, eclampsia and systemic infections than young women aged 20 to 24 years old. Adolescent pregnant girls are also more likely to develop pregnancy-related high blood pressure and anaemia.¹⁷⁶ Adolescent pregnancy has long-term health consequences, as it has been demonstrated that in general, adolescent mothers exhibit poorer physical health in later life than other groups of older women.¹⁷⁷ Complications in teenage pregnancies are 50% more likely than average to occur requiring emergency intervention, such as therapeutic abortion.¹⁷⁸

Adolescent pregnancies also have a negative impact on the health and well-being of new-born babies. Especially in low- and middle-income countries, a rather significant increase in the

¹⁷² WHO, 'Adolescent pregnancy' (2019) Factsheet <<https://www.who.int/news-room/factsheets/detail/adolescent-pregnancy>> accessed 10th August 2019

¹⁷³ *ibid*

¹⁷⁴ Vickie Knox, 'Abortion in the Americas: Non-discrimination and Equality as Tools for Advocacy and Litigation' (2012) 9, *The Equal Rights Review* 31

¹⁷⁵ Sylvia Kirchengast, 'Teenage pregnancies: A Worldwide Social and Medical Problem' in Rosario Laratta, *An Analysis of Contemporary Social Welfare Issues* (IntechOpen 2016) 14

¹⁷⁶ Eunice Kennedy Shriver National Institute of Child Health and Human Development, 'What are some factors that make pregnancy high risk?' (2019) <<https://www.nichd.nih.gov/health/topics/high-risk/conditioninfo/factors#f12>> accessed 15th August 2019

¹⁷⁷ Payal H. Patel and Bisakha Sen, 'Teen Motherhood and Long-Term Health Consequences' (2012) 16, 5 *Maternal and Child Health Journal* 1063

¹⁷⁸ Knox (n 174) 31

prevalence of preterm delivery, risks of low birth weight and severe neonatal conditions has been noted.¹⁷⁹

As Kooijmans claims, torture ‘is the violations par excellence of the physical and mental integrity’.¹⁸⁰ This means there is an indissoluble interdependence between physical and mental health. There is a clear psychological impact of adolescent pregnancies. Some researches have found that adolescent pregnant girls suffer postpartum depression at a rate that is twice as high as women who are 25 or older.¹⁸¹ Adolescent mothers also face important levels of stress and anxiety and have higher rates of suicidal ideation than other women of different age groups.¹⁸²

4.1.2.3. Socioeconomic and educational consequences

It has been affirmed that adolescent pregnancy is a ‘socially inflicted health hazard’.¹⁸³ What this means is that it is actually very difficult to dissociate health consequences from social and economic consequences when discussing the phenomenon of teenage pregnancy. Some studies have even gone as far as saying that ‘adverse health consequences and poor pregnancy outcome among teenage mothers seem not to be associated with low gynaecological or chronological age of the mothers but with adverse life circumstances’¹⁸⁴, making adolescent pregnancy not a clinic problem but a primarily a social one.

¹⁷⁹ WHO (n 172)

¹⁸⁰ Commission on Human Rights, *Report by the Special Rapporteur, Mr. P. Kooijmans, pursuant to Commission on Human Rights resolution 1987/29* (1988) UN Doc E/CN.4/1986/15

¹⁸¹ Rachel Nall, ‘What Are the Effects of Teenage Pregnancy?’ (2016) <<https://www.healthline.com/health/pregnancy/teenage-pregnancy-effects#research>> accessed 16th August 2019

¹⁸² *ibid*

¹⁸³ Bratati Banerjee et al, ‘Teenage Pregnancy: A Socially Inflicted Health Hazard’ (2009) 34, 3 *Indian Journal of Community Medicine*

¹⁸⁴ Kirchengast (n 174) 17

Adolescent pregnancy has negative socioeconomic effects on girls, their families and communities.¹⁸⁵ It is a perpetuation of the widening gap in health and social inequalities.¹⁸⁶

In certain contexts, there is a direct link between child marriage and early childbirths; in some cases, teenage pregnancy and childbirth may be the consequence for child marriage while in others marriage may result from an early pregnancy or childbirth.¹⁸⁷ Whereas married adolescent girls face an increased risk of intimate partner violence¹⁸⁸, unmarried adolescents may face stigma or rejection by their parents, peers or communities and threats of violence.¹⁸⁹

Furthermore, especially in certain regions like Latin America, adolescent pregnant girls are disproportionately affected by sexual violence within the family environment and outside.¹⁹⁰

Adolescent pregnancy is significantly associated with lower education attainment. Especially in early teens, adolescent mothers experience greater difficulties in realising their life plans¹⁹¹ and often perpetuate cycles of poverty.¹⁹² School disruption directly impacts on the development of skills and consequently on their employment prospects.¹⁹³

It has also been reported that children of adolescent mothers are at risk in terms of social and economic development.¹⁹⁴

¹⁸⁵ WHO (n 172)

¹⁸⁶ Shanitini Paranjothy et al, 'Teenage pregnancy: who suffers?' (2009) 94, Archives of Disease in Childhood 239

¹⁸⁷ Quentin Wodon et al, 'Economic Impacts of Child Marriage: Global Synthesis Report' (2017) World Bank <<http://documents.worldbank.org/curated/en/530891498511398503/pdf/116829-WP-P151842-PUBLIC-EICM-Global-Conference-Edition-June-27.pdf>> accessed 20th August 2019

¹⁸⁸ *ibid* 12

¹⁸⁹ WHO (n 172)

¹⁹⁰ Knox (n 174) 31

¹⁹¹ Frank F. Furstenberg Jr, 'The Social Consequences of Teenage Parenthood' (1976) 8, 4 Family Planning Perspectives 148

¹⁹² WHO (n 172)

¹⁹³ *ibid*

¹⁹⁴ Jorge L. Pinzon and Veronnie F. Jones, 'Care of Adolescent Parents and Their Children' (2012) 130, 6 Pediatrics (American Academy of Pediatrics) 1749

4.2. Prohibition of discrimination

Intersectionality is very difficult to operationalise and in spite of this fact, the attempt in this dissertation has been to try and understand the interactions of, at least, three discrimination grounds which are: age, sex and pregnancy. One might think that sex and pregnancy are closely tied and that perhaps we should be discussing age and sex as discrimination grounds, but cis women and cis girls, even though they are the majority and clearly more visible, are not the only ones who need and get abortions. Different people across the gender spectrum, such as intersex people, non-binary people or transgender men, might need to access abortion services too.

It is true that experiences in relation to abortion are different from one person to another. It is indeed a very personal experience. Nonetheless, age, sex and pregnancy have the potential to create and define shared experiences among adolescent pregnant girls, given the fact that they have the potential to “vulnerabilise” them and in many cases, they do.

For MacKinnon, the legal system has not adequately conceptualised pregnancy essentially because ‘the social conception of pregnancy that has formed the basis for its legal treatment has not been from the point of view of the pregnant woman [or girl], but rather from the point of view of the observing outsider [adult] gendered male’.¹⁹⁵ As a consequence, pregnancy and abortion have been understood, defined and regulated from an adult and male perspective. When access to abortion services is denied by either legal barriers or practical barriers or hindered by, for instance, establishing mandatory parental consent laws, adolescent pregnant girls are targeted and discriminated against. Laws restricting abortion have the effect and purpose of preventing adolescent girls from exercising their rights on basis of equality with

¹⁹⁵ MacKinnon (n 17) 1309

boys and men. On this basis, we strongly argue that the right to equality and to be free from discrimination is essential in building an alternative litigation strategy.

Historically it can be said that there has been an overly large focus on formal equality. Formal equality involves equality of treatment, rather than equality of results. That is why in dealing with discrimination cases, a typical test is applied by judicial or quasi-judicial bodies in order to determine if someone was treated less favourably than a comparator because of his or her specific characteristics.¹⁹⁶ But when referring to adolescent pregnant girls accessing abortion services, how can a comparator be found? Who can be considered to be similarly situated?

Formal equality seeks to ‘combat direct discrimination by treating persons in a similar situation similarly and persons in different situations differently [whereas] substantive equality seeks to address structural and indirect discrimination and takes into account power relations’.¹⁹⁷

Moving beyond formal equality and understanding structural discrimination is key to evaluate how adolescent pregnant girls are targeted and discriminated against when access to abortion services is denied or hindered. Gender and age are used to structure the experiences of people in social life and the entrenchment of gender and age-related norms in law and other social institutions help us explain why some forms of sex discrimination and age discrimination are so persistent and pervasive.¹⁹⁸

As Siegel points, abortion restrictions are clearly ‘gender-biased in justification and structure’¹⁹⁹ in the sense that they create and reinforce certain roles girls are expected to fulfil in society. They are in essence a way of controlling girls’ sexuality and reproductive capacities.

In addition, some of these restrictions, such as parental involvement laws, have a

¹⁹⁶ Katarzyna Sękowska-Kozłowska, ‘A tough job: recognizing access to abortion as a matter of equality. A commentary on the views of the UN Human Rights Committee in the cases of *Mellet v. Ireland* and *Whelan v. Ireland*’ (2018) 26, 54 *Reproductive Health Matters* 27

¹⁹⁷ CRPD, ‘General Comment No. 6 (2018) on equality and non-discrimination’ (26 April 2018) UN Doc CRPD/C/GC/6 para. 14

¹⁹⁸ Joanna N. Erdman, ‘The gender injustice of abortion laws’ (2019) 27, 1 *Sexual and Reproductive Health Matters* 4

¹⁹⁹ Siegel (n 17) 65

discriminatory purpose as they undermine girls' capacity to make decisions about their bodies and lives. Forced motherhood certainly deprives girls of control over timing of motherhood and exacerbate the inequalities in educational, economic and political life.²⁰⁰

²⁰⁰ Neil S. Siegel and Reva B. Siegel, 'Equality Arguments for Abortion Rights' (2013) 60 UCLA Law Review 163

4.3. The girl's best interests' principle

Article 3 of the CRC introduces the best interests' principle. It specifically provides that '[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'. Logically, the questions that immediately arises, and even more so in the context of reproductive freedom, is who defines what is best for adolescent girls?

One of the multiple ways in which the CRC has tried to find promote girls' autonomy has been by granting Article 12, which enshrines the right to be heard and taken into consideration, sometimes called the principle of participation, and Article 3 the same legal status for both are general principles of the Convention. This essentially implies that as general principles of the Convention, the interpretation and implementation of all other rights in said instrument are guided by them. Consequently, protection and autonomy cannot be seen as completely opposing concepts. As the Committee pinpoints there is 'a complementary role of the two general principles'.²⁰¹ Article 3 must be interpreted in light of Article 12 and vice versa. They are mutually reinforcing principles. Protection becomes 'necessary in order to develop autonomy and autonomy is necessary to ensure protection'.²⁰² Eekelar develops the concept of "dynamic self-determinism" to describe the synergy between both concepts. For this author, the best interests' principle can only be respected if we allow scope for children to determine what their interests are.²⁰³ The best interest of a pregnant adolescent girl who faces the decision between abortion and childbirth should always be therefore determined with her participation.

²⁰¹ CRC, 'General Comment No. 12 (2009). The right of the child to be heard' (1 July 2009) UN Doc CRC/C/GC/12 para.74

²⁰² Gerison Lansdown and Marie Wernham, 'Understanding Young People's Right to Decide. Are protection and autonomy opposing concepts?' (2012) IPPF 2

<http://createsolutions.org/docs/resources/IPPFprotection_autonomy.pdf> accessed 8th of April 2019

²⁰³ John Eekelar, 'The interests of the child and the child's wishes: the role of dynamic self-determinism' (1994) 8 International Journal of Law and the Family 43

There is an ongoing debate as to whether the foetus is human for the purposes of international law, and consequently as to whether the best interests' principle should be applied when referring to the "unborn child".²⁰⁴ Anti-choice campaigners and analysts have recurrently argued that this principle should apply to the "unborn child" on the ground that the Preamble of the Convention explicitly says that 'by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth'.²⁰⁵ To cite just an example, Joseph claims that jurisdictions which decriminalise abortion 'discriminate against children before birth, denying them a right to survival and development and having the intended dire outcome for these children of arbitrary deprivation of life'.²⁰⁶ She further asserts that in consequence, in these jurisdictions 'the best interests of the child principle was not a primary consideration in the decision to enact such legislative changes'.²⁰⁷

Nonetheless, Article 1, the provision of the Convention dealing with the definition of what constitutes a "child", only sets an upper age limit. It establishes then that '[f]or the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier'. Despite the Convention's textual ambiguity, numerous scholars consider that the right of the mother in international law supersedes the right to life of an unborn child under the Convention.²⁰⁸ Alston does not go as far as to affirm this, but recognises that according the status of child to the foetus would be to attribute to the preamble an importance considerably in excess of that which may reasonably be accorded to such broad policy pronouncements'.²⁰⁹

²⁰⁴ John Tobin, *The Right to Health in International Law* (OUP 2012) 51

²⁰⁵ Convention on the Rights of the Child (n 132) Preamble para. 9

²⁰⁶ Rita Joseph, *Human Rights and the Unborn Child* (BRILL 2009) 119

²⁰⁷ *ibid*

²⁰⁸ See, for example, Abby F. Janoff, 'Rights of the Pregnant Child vs. Rights of the Unborn under the Convention on the Rights of the Child' (2004) 22 *Boston University International Law Journal* 188

²⁰⁹ Philip Alston, 'The Unborn Child and Abortion un the Draft Convention on the Rights of the Child' (1990) 12, 1 *Human Rights Quarterly* 177

This debate, which is actually far from finished, often takes on a ‘dualistic, binary nature positioning a woman against a foetus, and result in what has been described as a zero-sum game attitude to recognition in abortion rights debates’.²¹⁰ That is why, in the abortion debate, anti-choice advocates, when referring to the best interests’ principle, have considered it applies to the unborn child. But how does the situation change when a girl wants to have an abortion? The debate then is not framed then in terms of a woman vs. an unborn child, but instead as a child vs. an unborn child.

In a matter such as this, that clearly and directly affects adolescent girls, the best interests’ principle dictates that her interests and her decisions should be the primary consideration. In accordance, the State should guarantee their right to abortion. To consider girls’ interests as a primary consideration in its action, the State should guarantee access to abortion services.

²¹⁰ Claire Pierson and Fiona Bloome, ‘Macro- and Micro-Political Vernaculizations of Rights: Human Rights and Abortion Discourses in Northern Ireland’ (2017) 19, 1 Health and Human Rights Journal 176

4.4. Litigating intersectionality: reimagining the analysed case law

After having analysed the elements that compose our litigation strategy, we consider it could be quite interesting to test its application to the already existing cases concerning adolescent girls' abortion rights. When trying to conduct any strategic litigation, we should first consider the effectiveness of the forum we intend to litigate in. This decision is indeed crucial for the development and outcome of the whole process.

Leaving the case of *K.L. v Peru* aside, the other two the cases that were previously analysed in Chapter 2, were brought to the ECtHR and the CEDAW Committee. Given that the violations of human rights defined earlier (prohibition of torture, prohibition of discrimination and girls' best interests) clearly influences our choice of legal fora, neither the ECtHR nor the CEDAW Committee would be appropriate to bring these cases. The CEDAW Committee has a limited scope as it does not contain any provisions regarding the prohibition of torture and the ECtHR does not contain a stand-alone provision on discrimination since Article 14 of the ECHR which introduces the right to be free from discrimination, prohibits discrimination only in relation to the exercise of other rights guaranteed by the ECHR. Having discarded these two fora, choosing an appropriate forum may depend on several of the following circumstances:

1. **Region.** Depending on the case and the country, one might find regional jurisdictions available. In the case of *P and S v. Poland*, the ECtHR could seem at first as a valid option given the fact that in Europe rulings from the ECtHR are binding and enforceable. However, this system impedes us from tackling the structural and intersectional discrimination adolescent pregnant girls face when accessing abortion care.
2. **Effective application of the proposed litigation framework.** If we consider the three elements, the options boil down to two: The Human Rights Committee and the Committee on the Rights of the Child. If the cases had been brought to the Human

Rights Committee the claims would have focused on Article 7 (the right to be free from torture or other cruel, inhuman or degrading treatment), Article 26 and 2(1) (prohibition of discrimination) and Article 24 (special protection afforded to minors). If the cases had been brought to the Committee on the Rights of the Child the claims would have focused on Article 37 (prohibition of torture or other cruel, inhuman or degrading treatment), Article 2 (prohibition of discrimination) and Article 3 (best interests of the child).

3. More political impact and influence. It is true that the Convention on the Rights of the Child is the most widely ratified human rights treaty, but the Human Rights Committee, given the historical prevalence of civil and political rights and the importance of the ICCPR if compared with other international human rights instruments, could be expected to have more influence on State behaviour.

The Human Rights Committee presents itself as an adequate legal forum to bring the cases we analysed to and it would have probably been the most effective one.

5. CONCLUSION

Just as Charlesworth, Chinkin and Wright affirm ‘long-term domination of all bodies wielding political power nationally and internationally means that issues traditionally of concern to men become seen as general human concerns, while "women's concerns" are relegated to a special, limited category’.²¹¹ If women’s concerns are relegated to a limited category, adolescent pregnant girls’ concerns are not even considered. At the intersections or at the margins is where those who are generally considered invisible exist. In other words, due to the intersection of two or more prohibited grounds of discrimination in relation to abortion, certain groups suffer more than others. Such discrimination ‘has a unique and specific impact on individuals and merits particular consideration and remedying’.²¹²

In order to make the invisible visible it is crucial to reframe and reinterpret international human rights law. Our focus in this dissertation has been to advance adolescent girls’ right to abortion through strategic litigation, a tool we consider fundamental and quite powerful.

Given adolescent girls’ dependency and vulnerability, the traditional approach to abortion rights litigation based on privacy or autonomy and designed primarily for adult women, cannot be considered appropriate to frame and litigate for adolescent girls’ rights. In an (adult) man’s world where the so-called pro-life movement has precisely co-opted the right to life, we need stronger legal bases.

Even though the right to abortion has been historically conceptualised as part of other already enshrined human rights, we propose its denial or restrictions should be understood as a violation of the right to be free from torture or other forms of cruel, inhuman or degrading treatment, the right to be free from discrimination and the girl’s best interests.

²¹¹ Hilary Charlesworth, Christine Chinkin and Shelley Wright, ‘Feminist Approaches to International Law’ (1991) 85, 4 *The American Journal of International Law* 625

²¹² CESCR, General Comment No. 20 Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights) (2 July 2009) UN Doc E/C.12/GC/20 para. 17

We firmly believe and hope this legal framework can be applied to different litigation strategies and that it contributes to recognising and realising adolescent girls' right to abortion.

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Use of previous work on dissertation:

Only on page 49 (subsection 4.3.) certain passages I wrote for LW910's paper have been used.