



**JUDICIAL SYSTEM MONITORING PROGRAMME
PROGRAMA DE MONITORIZAÇÃO DO SISTEMA JUDICIAL**

**ABORTION REFORM STILL NEEDED: ARTICLE 141 OF
EAST TIMOR PENAL CODE MUST COMPLY WITH
CONSTITUTION AND INTERNATIONAL LAW**

DILI, 28 DE ABRIL 2009



Introduction

On 1 April 2009, the President of Timor Leste promulgated the national Penal Code (the Code). Article 141 of the Code provides that abortion will be a crime, except where the health of the mother is at risk, or where or there is severe foetal impairment.

JSMP cautiously welcomes the inclusion of exceptions to the criminalisation of abortion in the Code. However, without further amendment and regulation, JSMP believes that Article 141 may not be constitutionally competent, and may also breach the State's duty to comply with international human rights standards.

The focus of this report is to examine the existing scope and effect of Article 141 of the Code, and to make recommendations for its ongoing reform.

Abortion law in Timor Leste

Prior to the promulgation of the Code, the Indonesian Penal Code was the applicable law in Timor Leste. Under the Indonesian law, abortion was illegal in all circumstances. While the Code has maintained the criminal nature of abortion, it also includes exceptions to this criminalisation.

Article 141 of the Code provides:

Article 141 – Interruption of Pregnancy

1. *Any person who performs abortion through whatever means and without the consent of the pregnant woman shall be sentenced to 2 to 8 years imprisonment.*
2. *Any person who performs abortion through whatever means and with the consent of the pregnant woman shall be sentenced to 3 years imprisonment.*
3. *Any pregnant woman who consents to an abortion procedure by any other individual or induces an abortion as a result of her own deeds or those of a third party shall be sentenced to up to 3 years imprisonment.*
4. *The provisions on the previous items are not applicable in cases when the interruption of pregnancy is the only means to counter the risk of death or irreversible lesion to the body and physical or psychological health of the mother or the fetus, as long as the procedure is authorized and monitored by a medical team and performed by a doctor or health professional in a public health institution with the consent of the pregnant woman and/or her life partner.*
5. *The provisions of item 4 of this Article will be the object of a separate regulation.*

The first three sections of Article 141 provide that criminal penalties apply to:

- (a) a person who performs an abortion procedure (either with or without the consent of the pregnant woman) and;
- (b) a woman who voluntarily undertakes an abortion.

However, paragraph 4 of Article 141 provides a number of limited circumstances in which abortion will not be regarded as criminal behaviour, while paragraph 5 states that these circumstances will be further defined at a later stage.

The inclusion of exceptions in the abortion law means that Timor Leste is now one of the majority of countries that permit abortion in certain circumstances. According to 2003 World Health Organisation data, 98% of countries permit abortion to save a woman's life. Abortion is permitted to preserve the physical and or mental health of the woman in approximately 63% of countries. Abortion is also permitted in cases of rape and incest in 43% of countries and for foetal impairment in 39%. Approximately one-third of countries permit abortion for socio-economic or personal reasons.¹

Several of the countries that permit abortion include those with a strong Catholic influence, such as Portugal and Italy. In Italy, abortion is permitted on request during the first 90 days of pregnancy. It is thereafter permitted where the life of the mother is in danger or where there is severe foetal deformation.² Following a referendum held in February 2007, Portugal decriminalised abortion without restriction until the tenth week of pregnancy, and also for the remainder of a pregnancy that resulted from rape or incest, involved foetal impairment, or where there is a threat to the life or the physical or psychological health of the woman.³

Potential application of if Article 141

JSMP welcomes the inclusion of exceptions to the criminalisation of abortion in Article 141(4). JSMP believes that the absence of a time frame in which abortions must be procured under Article 141 strengthens women's capacity to make informed choices about their family planning decisions.

JSMP also applauds the Code's recognition of the importance of psychological health considerations as they relate to pregnancy and child birth. Construed broadly, psychological health may encompass a wide range of illnesses, and a variety of factors may therefore be considered in determining whether a woman's psychological health will be at risk from pregnancy. Depending on a woman's background and circumstances, sustained distress over a pregnancy resulting from rape or incest, a diagnosis of a severe foetal impairment or a pregnancy occurring outside of marriage may all be deemed sufficient grounds for an abortion for psychological health reasons.⁴

Nevertheless, it is concerning that in the current absence of further regulation, the standard required by Article 141 for abortions to be considered a non-criminal act is

¹ World Health Organization. 'Safe Abortion: Technical and Policy Guidance for Health Systems'. 1st edn. Geneva: WHO; 2003, pp. 106 (cited in Kamini A. Rao, *Access to safe abortion within the limits of the law*, Best Practice & Research Clinical Obstetrics and Gynaecology Vol. 20, No. 3, (2006), p 426)

² Italian law 194 of 1978.

³ Tiago Villaneuva, 'Portugal is ready to decriminalise abortion' *British Medical Journal*, 2007, 324:332.

⁴ Cook RJ et al., 'Legal abortion for mental health indications', *International Journal of Gynecology and Obstetrics*, 2006, 95(2):185–190.

an onerous one. JSMP believes that there may be a number of structural barriers to the judiciary concluding that the interruption of pregnancy was 'the only means to counter' a threat to the physical or mental health of the mother or child, particularly after the fact.

First, the presentation and evaluation of evidence in relation to Article 141(4) may be problematic. JSMP presumes that in order for a court to be satisfied that 'the interruption of pregnancy [was] the only means to counter the risk of death or irreversible lesion to the body and physical or psychological health of the mother or the foetus', the evidence of a doctor would be paramount. However, because Articles 141(1) and (2) criminalise the actions of doctors performing abortions, there is a strong disincentive for those doctors to give evidence before a court.

Second, previous JSMP reports have demonstrated that some members of the judiciary in Timor Leste have little knowledge of the physical and psychological experiences undergone by women suffering domestic violence and sexual assault (see, for example, 'The Law of Gender Based Violence in Timor Leste', 2005). In an environment where the courtroom demeanour of women has been used to assist in determining the veracity of sexual assault claims, it is foreseeable that erroneous assumptions may also be made about the true physical and psychological trauma being undergone by women consenting to abortion procedures - particularly in the aftermath of sexual violence.

Third, it appears that the circumstances in which a court may find that the interruption of pregnancy was a non-criminal act under paragraph 4 are currently very poorly defined. Since reasons for judicial decision making are seldom publicly available in Timor Leste, poorly defined terms in legislation may lead to the uneven application of the law in otherwise analogous cases coming before the courts. In order to ensure consistency in the application of justice, JSMP respectfully submits that in future regulations under paragraph 5, the judiciary should be given examples of the circumstances in which abortions should properly be regarded as non-criminal acts.

It is also concerning that the exceptions in Article 141(4) only apply when 'performed by a doctor or health professional in a *public health institution*' (emphasis added). This specification is concerning, since the majority of women living in rural areas in Timor Leste only have access to private health clinics. As set out in more detail below, JSMP believes if the law creates *de facto* barriers of access to abortion services for women living in rural areas, this may constitute discrimination.

Future regulations should be made in accordance with the norms of Timorese society, but also with an understanding of the many detrimental impacts that flow from the criminalisation of abortion. Studies have shown that criminalising abortion does not reduce the overall number of abortions performed, but does dramatically

increase the dangers and consequences of performing unsafe abortions.⁵ This is because if women are in a situation where they need to procure an abortion, they will often go to extreme lengths to do so, regardless of the legal or medical consequences. In contrast, in countries where abortion is legal, maternal mortality is reduced. This is because abortions are performed by trained persons and conducted in safe and hygienic places. Further, there is no evidence that the legalisation of abortion in other countries has led to an overall increase in their abortion rates.

Compliance with the Constitution

In order to determine what exceptions to abortion should exist, it is necessary to examine the obligations of the state with regard to international law and the Constitution.

The Constitution provides that the validity of laws and policies of State and Local Governments depend on their compliance with the Constitution.⁶ Courts are constitutionally prohibited from applying laws that are found to contravene the Constitution or its principles.⁷

Since the Constitution was promulgated, there has been little available jurisprudence or scholarship on the scope of its substantive rights provisions. However, the Constitution was drafted to codify much of the International Bill of Human Rights, and mandates that judicial interpretation of fundamental rights provisions must accord with the Universal Declaration of Human Rights,⁸ and with other international treaties and agreements to which Timor-Leste is a party.⁹ International human rights jurisprudence is therefore a useful tool in establishing how the judiciary in Timor Leste should interpret the scope of fundamental rights provisions in the Constitution, as well as being a binding source of law in its own right.

International law under the Constitution

Section 9 of the Constitution provides that the rules of international law shall form part of the domestic legal system where international treaty law is ratified and published in the Official Gazette. Any rules 'contrary to the provisions of international conventions, treaties and agreements applied in the internal legal system of East Timor shall be invalid'.¹⁰ JSMP believes that if the new abortion law does not accord with international law, it may therefore be found by a court to be constitutionally invalid. Further, as a signatory to the major international

⁵ Kamini A. Rao, *Access to safe abortion within the limits of the law*, Best Practice & Research Clinical Obstetrics and Gynaecology Vol. 20, No. 3, (2006), p 425.

⁶ Constitution, s 2(3).

⁷ Constitution, s 120.

⁸ Constitution, s 23.

⁹ Constitution, s 9.

¹⁰ Constitution s 9(3)

conventions that support the right to abortion, Timor Leste has an international obligation to ensure that its domestic law complies with international law.

The right to access to safe abortion procedures is commonly considered within the context of reproductive rights. At least eleven international human rights support and protect women's reproductive rights.¹¹ These include the right to life, right to liberty and security, right to health including the right to reproductive health, right to decide number and spacing of children, right to privacy, right to be free from discrimination, right to modify traditions and customs that violate woman's rights, right not to be subject to torture or degrading treatment and punishment, right to be free from sexual violence, right to education and the right to benefit from scientific progress.

International treaty law and jurisprudence specifically support the right of women to have access to safe abortion methods in cases where a woman's life or health is at risk, where the pregnancy resulted from rape or incest, or where there is risk of foetal impairment.¹² This right derives from the International Convention on Civil and Political Rights (ICCPR)¹³ the Convention on the Elimination of all forms of Discrimination Against Woman (CEDAW)¹⁴ the Convention on the Rights of the Child (CRC)¹⁵ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹⁶ Timor Leste is a State Party to each of these instruments, and has an obligation to uphold and protect the rights of its citizens accordingly.

Each of these conventions establish committees which monitor state compliance with the treaties that they administer.¹⁷ The committees also provide interpretation of the conventions in the form of General Comments or General Recommendations in order to assist states in understanding the purpose and obligations of the treaties. While committee jurisprudence is not legally binding, it should be regarded as a best practice guide for states when considering how to interpret and implement their treaty obligations.

¹¹ Human Rights Watch Women's Rights Division, *International Human Rights Law, and Abortion in Latin America*, Human Rights Watch, July 2005, p 4.

¹² Zampas, Christina and Gher, Jaime M, *Abortion as a Human Right—International and Regional Standards*, Human Rights Law Review, Volume 8, Number 2 pp. 249-294, p 251.

¹³ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1971), Entered into force in Timor Leste 16 March 2003.

¹⁴ *Convention for the Elimination of all forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981). Entered into force in Timor Leste 16 March 2003.

¹⁵ *Convention on the Rights of the Child*, (entered into force Sept. 2, 1990). Entered into force in Timor Leste 16 March 2003

¹⁶ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976), Entered into force in Timor Leste 16 March 2003.

¹⁷ ICCPR established the Human Rights Committee, CEDAW creates the Committee on CEDAW, the CRC creates the Committee on the CRC and the ICESCR creates the Committee on the ICESCR.

Due to the overlapping nature of international law and the Constitution in Timor Leste, the international human rights standards that apply with respect to abortion will be also be considered below in relation to their impact on constitutional rights.

Constitutional Rights

The Constitution explicitly guarantees a number of human rights to individuals under Timorese jurisdiction. These rights are principally contained in Part II of the Constitution. The Constitution also enshrines the principle of effective equality of opportunities between women and men. Three constitutional rights are of particular relevance to the issue of abortion: the right to equality and non-discrimination; the right to life; and the right to health care. The JSMP submits that as Article 141 currently stands, the criminalisation of abortion under the code should be regarded as inconsistent with these human rights and gender equality provisions.

(i) *Universality and Equality*

Section 16 of the Constitution provides:

- 1. All citizens are equal before the law, shall exercise the same rights and shall be subject to the same duties.*
- 2. No one shall be discriminated against on grounds of colour, race, marital status, gender, ethnical origin, language, social or economic status, political or ideological convictions, religion, education and physical or mental condition.*

Section 17 of the Constitution specifically provides that '*[w]omen and men shall have the same rights and duties in all areas of family, political, economic, social and cultural life*'.

The Constitution additionally obliges the State of Timor-Leste to realise gender equality rights. Section 6 of the Constitution specifically mandates that one of the State's 'fundamental objectives' is '*to create, promote and guarantee the effective equality of opportunities between women and men*'.

The current effect of Articles 141(2) and 141(3) of the Code is to criminalise any procedure which voluntarily involves an interruption of pregnancy. Therefore, the key question to be answered with regard to constitutional competence is whether the criminalisation of abortion infringes upon women's rights to equality and non-discrimination. Although Article 141(2) criminalises the actions of any doctor performing an abortion - thereby potentially affecting men as well as women - it is clear that the primary intention of the law is to prevent women from seeking and accessing abortion procedures.

Relevant international law

The complementary rights to equality and non-discrimination codified in Sections 16 and 17 of the Constitution derive from a number of major international human rights

conventions to which Timor Leste is a signatory, including the ICCPR,¹⁸ ICESCR,¹⁹ and CEDAW.²⁰

Each of these human rights instruments confirms that the fulfilment of non-discrimination under the law will often mean separate legal treatment for groups in society facing differing social circumstances. This separate treatment, which is a process designed to achieve substantive equality, is underscored by the principle that laws may be discriminatory if they appear to apply equally on their face, but disproportionately impact upon one group of people in their application.

There is strong evidence to suggest that actions taken by the State which restrict women's family planning choices, such as that in Article 141 of the penal code, undermine equality between men and women. Furthermore, laws criminalising abortion often have the most severe impact on women in poor or rural sectors of society, where access to education and information about both family planning and the law is often of a lower standard than that available to women living in urban areas. In 2000, the Human Right Committee commented that for these reasons, restrictive abortion laws undermined Argentina's compliance with women's right to be free from discrimination under the ICCPR, noting:

*On the issue of reproductive health rights, the Committee is concerned that the criminalization of abortion deters medical professionals from providing this procedure without judicial order, even when they are permitted to do so by law, inter alia when there are clear health risks for the mother or when pregnancy results from rape of mentally disabled women. The Committee also expresses concern over discriminatory aspects of the laws and policies in force, which result in disproportionate resort to illegal, unsafe abortions by poor and rural women.*²¹

Where women continue with unwanted pregnancies, bearing children may also adversely affect their right to substantive equality. Ideally, the obligations associated with parenthood should be borne equally by male and female partners in a familial relationship. However, in practice women are more likely than men to face personal disadvantage from men through child-rearing. Women typically experience a disproportionate share of physical and financial hardship through parenthood, as well as limitations on their future opportunities in the areas of education and employment. This experience is particularly pronounced in cases where a child's father, for whatever reason, refuses to assume responsibility for the care of a child.

(ii) Right to life

¹⁸ ICCPR Articles 2(1), 3.

¹⁹ ICESCR Articles 2(2), 3.

²⁰ CEDAW Article 1.

²¹ Human Rights Committee, *Concluding Observations of the Human Rights Committee, Argentina*, U.N. Doc. CCPR/CO/70/ARG (2000), Article 14.

Section 29 of the Constitution provides:

1. *Human life is inviolable.*
2. *The State shall recognise and guarantee the right to life.*
3. *There shall be no death penalty in the Democratic Republic of East Timor.*

The question of how the current provisions of the code interact with the right to life is a complex one. However, relevant international jurisprudence confirms that laws which seriously endanger the lives of women may infringe upon their right to life.

As noted above, in countries where abortion is a crime the dangers and consequences of performing unsafe abortions are dramatically increased. Indeed, unsafe abortions are one of the most common causes of maternal death worldwide, and in some countries they are the most common cause.²² Where women are unable to access safe abortion procedures, they may resort to dangerous means of inducing a miscarriage, such as by inserting wires and sticks into their uterus; drinking harmful substances; taking traditional medicine with dangerous side-effects; or inflicting physical abuse upon themselves by falling down stairs or by punching their own abdomen. These types of abortions can have dramatic consequences such as severe bleeding and haemorrhaging, poisoning, scarring of the uterine tissue and infertility. Where these injuries are serious, they may easily lead to death, particularly in a developing country context.

Relevant international law

The explanatory materials and negotiation papers of the Universal Declaration of Human Rights, the ICCPR and CRC clarify that under international law, the right to life commences at birth, and not before. The wording of Article 1 of the UDHR states that 'All human beings are *born* free and equal in dignity and rights'. The specific inclusion of the word 'born' has generally been used to infer that the right excludes any application to the foetus. The commencement of the right to life was also the subject of debate in the negotiations of the ICCPR and the CRC. During the negotiation stage of the ICCPR, a request to protect life from the moment of conception was rejected for the wording of Article 6(1), the right to life.²³ Similarly, debates concerning the right to life in the CRC also rejected the proposal that protection of rights commenced at conception.²⁴ Legal scholars have also suggested

²² The Alan Guttmacher Institute. 'Sharing Responsibility. Women, Society and Abortion Worldwide'. p. 37, <http://www.agi-usa.org/pubs/sharing.pdf>; 1999 (Cited in Kamini A Rao supra n 2, p 424).

²³ UN GAOR Annex, 12th Session, Agenda Item 33, at 96, UN Doc. A/C.3/L.654; UN GAOR, 12th Session, Agenda Item 33, at 113 UN Doc. A/3764, 1957.

²⁴ Convention on the Rights of the Child, GA Res. 44/25, Annex, UN GAOR 44th Session, Suppl. No.49 at 166, UN Doc. A/44/49 (1989) (entered into force Sept. 2, 1990).

that due to the national and international interpretation of human beings as only human beings born alive, it does not include the protection of foetal life.²⁵

JSMP submits it would be incorrect to conceptualise abortion procedures as negatively impacting a foetus' right to life, since no such right accrues until birth. However, unless Article 141 is amended so that women are guaranteed the ability to access safe abortions procedures, the abortion law may not be constitutionally competent. International treaty law and jurisprudence provides further guidance on the specific obligations of states in this regard.

In interpreting Article 6 of the ICCPR, which codifies the right to life, the Human Rights Committee (HRC) has stated that the right includes measures to increase life expectancy. The HRC has commented on the link between illegal and unsafe abortions and the increase in maternal mortality, and also recognised the connection between women's right to health and access to safe abortion. Specifically, the HRC's General Comment Number 28 requires that when State Parties report upon Article 6, they should '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'.²⁶

The HRC has also stated that criminalising abortion in cases of rape or incest is in direct conflict with the woman's right to life.²⁷ In cases of rape or incest, women are considered particularly likely to attempt clandestine abortions, which, as noted above, may significantly threaten their lives. The HRC has also stated that laws which subject women to criminal penalties for terminating a pregnancy resulting from rape or incest are incompatible with the rights under the ICCPR to equal enjoyment of rights (Article 3) and to be free from torture and from cruel, inhuman or degrading treatment or punishment (Article 7).²⁸ The HRC has recommended that States Parties review or amend criminal legislation to establish exceptions to the prohibition and punishment of abortion, or to bring abortion laws in line with the ICCPR.

In relation to Ecuador and Colombia the HRC expressed its concern

about the very high number of suicides of young females ...which appear in part to be related to the prohibition of abortion ... the Committee regrets the State party's failure to address the resulting problems faced by adolescent girls, in particular rape victims, who suffer the consequences of such acts for the rest of their lives. Such situations are,

²⁵ Berta E. Hernández, "To Bear or Not to Bear: Reproductive Freedom as an International Human Right," *Brooklyn J. of Int'l L.*, Vol. XVII (1991), p. 334

²⁶ General Comment No. 28: Equality of rights between men and women (Article 3), 29/03/2000, CCPR/C/21/Rev.1/Add.10, General Comment No. 28. (General Comments), para 10.

²⁷ HRC, *Concluding Observations of the HRC regarding Peru*, 15/11/00, CCPR/CO/70/PER at para. 20.

²⁸ *Ibid.*

*from both the legal and practical standpoints, incompatible with Articles 3, 6 and 7 of the Covenant, and with Article 24 when female minors are involved. The Committee recommends that the State party adopt all necessary legislative and other measures to assist women, and particularly adolescent girls, faced with the problem of unwanted pregnancies to obtain access to adequate health and education facilities.*²⁹

The Committee on the Elimination of Discrimination against Women (CEDAW Committee) has also recognised the link between women's right to health during pregnancy and childbirth, and women's right to life. The Committee has explicitly framed the criminalisation of abortion as a violation of women's right to life.³⁰ Like the HRC, the Committee has explained this link by emphasising the strong correlation between unsafe abortion and high maternal mortality rates.

In April 2009, the CEDAW Committee indicated its concern about the criminalisation of abortion in Timor Leste. In its questions to Timor Leste following the submission of its first country report, the Committee requested that Timor Leste 'indicate what is the Government policy to protect women from the consequences of unsafe abortion, including death'.³¹ JSMP expects that unless Article 141 is amended so that women are guaranteed the ability to access safe abortions procedures, the matter will likely be commented upon further when the Committee releases its first report on Timor Leste in late 2009.

Finally, the Committee of the CRC has frequently considered the right to life under Article 6 of the CRC³² as it applies to adolescent girls, stating that they have a particular right to access safe abortion services. The Committee has also stated that states parties must 'provide access to sexual and reproductive health services, including ... safe abortion services'.³³

(iii) Right to health

Section 57 of the Constitution provides:

1. *Everyone has the right to health and medical care, and the duty to protect and promote them.*
2. *The State shall promote the establishment of a national health service that is universal and general. The national health service shall be free of charge in accordance with the possibilities of the State and in conformity with the law.*

²⁹ HRC, *Concluding Observations of the Human Rights Committee, Ecuador*, U.N. Doc. CCPR/C/79/ARG (2000), Article 11. See also Human Rights Committee, *Concluding Observations of the Human Rights Committee, Colombia*, U.N. Doc. CCPR/CO/80/COL (2004) Article 13.

³⁰ Concluding Observations of CEDAW regarding; Belize, 1 July 1999, A/54/38 at para. 56; Colombia, 5 February 1999, A/54/38 at para. 393; and Dominican Republic, 14 May 1998, A/53/38 at para. 337

³¹ CEDAW Committee, *Responses to the list of issues and questions with regard to the consideration of the initial periodic report: Timor Leste*, U.N. Doc CEDAW/C/TLS/Q/1/Add.1 (2009) Article 21.

³² CRC Article 6 – (1) State Parties recognise that every child has the inherent right to life; (2) State Parties shall ensure to the maximum extent possible the survival and development of the child.

³³ General Comment No. 4 (2003), Adolescent health and development in the context of the CRC, para 24.

3. *The national health service shall have, as much as possible, a decentralised participatory management.*

With regard to constitutional competence, the key question is to what extent the criminalisation of abortion under Articles 141(2) and 141(3) of the Code infringes upon the right of women to access safe and appropriate health care on an equal basis under Section 57(1) of the Constitution.

'Unsafe abortion' is defined by the World Health Organization as the termination of a pregnancy in an environment with low medical standards, or by people without the relevant skills to perform an abortion.³⁴ As stated above, it is clear that criminalisation of abortion leads to a greater number of unsafe abortions being performed, and seriously jeopardises the health of women that undergo them. While there is presently no data on the rate of abortions procured in Timor Leste, it is estimated that in South East Asia 3 out of every 1,000 women aged 15–44 are hospitalised each year for abortion-related complications.³⁵

JSMP submits that the criminalisation of abortion seriously affects the right of women to access health care on an equal basis. This position is confirmed by significant international jurisprudence explaining the scope of the right.

Relevant international law

Article 12 of CEDAW provides that State Parties are to 'eliminate discrimination against women in the field of health care in order to ensure on a basis of equality of women and men, access to health care services, including those related to family planning'. The CEDAW Committee has called upon State Parties to review legislation criminalising abortion, and to remove impediments to accessing safe abortions, thus supporting women's right to health.

CEDAW's General Recommendation Number 24 concerning women and health care³⁶ provides that for the State to deny access to medical procedures which are uniquely accessed by women may be considered as a form of discrimination, and interfere with women's right to health. The General Recommendation also provides that there is a State obligation to refrain from criminalising medical procedures that are only needed by women, such as abortion procedures:

³⁴ AbouZahr C & Ahman E. 'Unsafe abortion and ectopic pregnancy'. In Murray CJL, Lopez AD (eds.). *Health Dimensions of Sex and Reproduction: the Global Burden of Sexually Transmitted Diseases, HIV, Maternal Conditions, Perinatal Disorders, and Congenital Anomalies*. Cambridge, MA: Harvard University, 1998, pp. 266e296. (Cited in Kamini A Rao supra n 2, p 422)

³⁵ Singh S, 'Hospital admissions resulting from unsafe abortion: estimates from 13 developing countries', *Lancet*, 2006, 368(9550):1887–1892 (Cited in Guttmacher Institute, Abortion in Indonesia, *In Brief* 2008, Series no 2, p 1).

³⁶ CEDAW Committee, General Recommendation 24, on Article 12 of CEDAW, Women and Health, U.N. Doc. No. A/54/38/Rev.1, Part I (1999).

The obligation to respect rights requires States parties to refrain from obstructing action taken by women in pursuit of their health goals. States parties should report on how public and private health care providers meet their duties to respect women's rights to have access to health care. For example, States parties should not restrict women's access to health services or to the clinics that provide those services on the ground that women do not have the authorization of husbands, partners, parents or health authorities, because they are unmarried or because they are women. Other barriers to women's access to appropriate health care include laws that criminalize medical procedures only needed by women and that punish women who undergo those procedures.³⁷

Specifically, Section 31(c) of the Committee's General Recommendation provides that States must:

Prioritize the prevention of unwanted pregnancy through family planning and sex education and reduce maternal mortality rates through safe motherhood services and prenatal assistance. When possible, legislation criminalizing abortion should be amended, in order to withdraw punitive measures imposed on women who undergo abortion.

The CEDAW Committee has commended those states that have amended restrictive legislation. Particular commendations have been given to those states that have removed restrictive legislation on abortion in cases of severe foetal impairment and where the pregnancy is a result of rape or incest.³⁸

Article 24 of the CRC places responsibility on State Parties to ensure proper health care for mothers, children and families.³⁹ The Committee of the CRC has specifically stated that this includes health risks from unwanted pregnancies and unsafe abortions noting that 'high maternal mortality rates, due largely to high incidence of illegal abortion' contribute significantly to inadequate local health standards for children.⁴⁰ The Committee has asked states to 'take measures to reduce maternal mortality in adolescent girls, particularly caused by early pregnancy and unsafe abortion practices, and to support adolescent parents'.⁴¹

Although there are a limited number of Articles in the ICESCR which directly support women's right to abortion, the Committee of ICESCR has noted its concern about the correlation between unsafe abortions and maternal deaths. The ICESCR

³⁷ CEDAW Committee, General Recommendation 24, on Article 12 of the CEDAW, Women and Health, U.N. Doc. No. A/54/38/Rev.1, Part I (1999), para. 14.

³⁸ Concluding Observations of CEDAW regarding Colombia, 2 February 2007, CEDAW/C/COL/CO/6, para. 22.

³⁹ CRC Article 24(1) – States Parties recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

⁴⁰ Concluding Observations of the CRC regarding: Guatemala, 9 July 2001, CRC/C/15/Add.154 at para. 40; Chad, 24 August 1999, CRC/C/15/Add.107 at para. 30; and Nicaragua, 24 August 1999, CRC/C/15/Add.108 at para. 35.

⁴¹ General Comment No. 4 (2003), Adolescent health and development in the context of the CRC, para 24

Committee has requested states to remedy the problem of the relationship between illegal and unsafe abortions and high maternal mortality rates.

Specifically the Committee of the ICESCR has asked states to consider legalising abortion for health reasons (mother and in cases of foetal impairment) and when pregnancies are the result of rape or incest. On at least three separate occasions the ICESCR Committee has asked a state party to legalise abortion when a pregnancy threatens a woman's life or is the result of rape or incest.⁴² In addition, Article 12 of the ICESCR provides strong legal argument for abortion to be provided to health reasons, both the health of the woman and the health of the foetus. Article 12 provides that States must 'recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'.

Additional international law concerning the right to abortion

The above analysis clarifies that the criminalisation of abortion does not accord with rights deriving from the Constitution and international law. However, it is also worth noting that international law provides particularly strong protection for reproductive rights in cases where pregnancy is result of rape or incest, and where pregnancy endangers the woman's physical and psychological health.

Foetal impairment is increasingly being recognised internationally as a valid basis for abortion, and was the subject of the HRC's investigation into Peru's denial of an abortion to an adolescent girl. In *KL v Peru*⁴³ the HRC deemed Peru's denial of a therapeutic abortion to a 17 year old girl pregnant with a fatally impaired foetus as a violation of Article 7⁴⁴ of the ICCPR, which prohibits inhuman and degrading treatment. In KL's case, KL's obstetrician recommended that she have an abortion, since her pregnancy posed a serious risk to her health and life. Following this advice, KL decided to terminate the pregnancy. However, the authorities refused to grant permission and KL was forced to carry the pregnancy to term. The child died four days after birth. In the aftermath of the birth, KL suffered both physically and mentally and required psychiatric intervention.

The Committee's decision in this matter centred on the fact that carrying an impaired foetus caused KL immense mental distress that was foreseeable and preventable. The HRC relied on Articles 2, 7, 17 and 24 of the ICCPR in finding that the denial of abortion to KL seriously breached her human rights. The HRC determined that refusal of an abortion procedure in KL's case constituted inhuman and degrading

⁴² CESCR, concluding observations on Chile, U.N. Doc. E/C.12/1/Add.105 (2004), para. 52; Kuwait, U.N. Doc. E/C.12/1/Add.98 (2004), para. 43; and Nepal, U.N. Doc. E/C.12/1/Add.66 (2001), para. 55.

⁴³ *KL v Peru*, Decision issued by the HRC on 22 November 2005, Communication No. 1153/2003

⁴⁴ ICCPR Article 7 – No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

treatment, irrespective of the criminalisation of abortion in Peru. The HRC noted that the violation of Article 7 was particularly pronounced because of its imposition on a minor. The decision in *KL v Peru* has had a major impact on the interpretation of health restrictive abortion laws worldwide.

The HRC has also noted its concern in relation to two countries with complete bans on abortion: Ireland and Chile. The HRC called upon Ireland to 'ensure that women are not compelled to continue with pregnancies where that is incompatible with obligations arising under the ICCPR (Article 7) and General Comment No. 28'.⁴⁵ The Committee recommended that Ireland change its law to ensure it conforms to the Covenant and its interpretations.⁴⁶ In the case of Chile, the HRC stated:

*The criminalization of all abortions, without exception, raises serious issues, especially in the light of unrefuted reports that many women undergo illegal abortions that pose a threat to their lives ... The State party is under a duty to take measures to ensure the right to life of all persons, including pregnant women whose pregnancies are terminated ... The Committee recommends that the law be amended so as to introduce exceptions to the general prohibition of all abortions.*⁴⁷

Conclusion and recommendations

JSMP cautiously welcomes the inclusion of exceptions to the criminalisation of abortion in the Code. However, without further clarification of the law, JSMP is of the opinion that the law breaches both the Constitution and Timor Leste's obligations under international law.

JSMP submits that the most decisive way in which the government could ensure that Article 141 of the Code is constitutionally competent would be to completely decriminalise abortion until the tenth week of pregnancy, and also for the remainder of a pregnancy that resulted from rape or incest, involved foetal impairment, or where there is a threat to the life or the physical or psychological health of the pregnant woman.

However, JSMP recognises that there are unlikely to be immediate changes to the criminal code, with the exception of the development of future regulations regarding exceptions to Article 141 under subsection (5). In the interim development of these regulations, JSMP therefore recommends the following:

- That the regulations provide that interruption of pregnancy shall not be considered a crime, *inter alia*, when:
 - (i) the pregnancy resulted from a non-consensual sexual relationship; or

⁴⁵ HRC *Concluding Observations of the HRC regarding Ireland*, 29/3/00, CCPR/C/21/Rev.1/Add.10 at para. 24

⁴⁶ *Ibid* at para 23.

⁴⁷ HRC, *Concluding observations of the Human Rights Committee : Chile*. 30/03/99. CCPR/C/79/Add.104, at para 15.

(ii) the pregnancy resulted from an incestuous relationship; or

(iii) it is open to a judge to find that the procedure taken for the interruption of pregnancy was undertaken to protect the physical or psychological health of the mother; or

(iv) the procedure was undergone by a female aged under the age of 18 years.

- That the regulations clarify that no penalty shall apply to women who undergo abortion procedures in private health clinics.
- That the Government engage in in-depth consultation with medical experts in drafting the regulations, and provide immunity from prosecution for medical professionals giving evidence before the court.