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BOFAXE

Clashing Stereotypes

Abortion Regulations at the Intersection of Gender and Disability Stereotypes

The judgment of the European Court of Human Rights (ECtHR) in A.R. v. Poland has recently complemented the growing international jurisprudence on women's reproductive rights, specifically on the access to abortion. The judgment dealt with the widely criticized restriction of Polish abortion legislation following a decision of the Constitutional Court in 2020, which declared one of the exceptions allowing for late-term abortions in cases of "foetal abnormality" unconstitutional (paras. 9-11; see in depth, e.g. here). It follows the judgment in M.L. v. Poland, which dealt with the same situation within Poland. The case concerned a pregnant woman whose unborn child was diagnosed with trisomy 18 and who felt compelled to undergo an abortion in the Netherlands at her own expense given the legal uncertainty caused by the Constitutional Court's decision (para. 15). The ECtHR indeed found a violation of Art. 8 of the European Convention on Human Rights (ECHR) based on rule-of-law concerns, but hardly addressed the substantive matters in question, as it had similarly done in M.L v. Poland in December 2023 (see e.g. here).

This is the reason why the judgment has been criticized for missing a chance to enhance reproductive rights under the ECHR and for lacking a gender-sensitive perspective. While I generally agree that courts should not avoid controversial questions such as access to abortion by stopping their analysis at procedural violations, I will argue that the lack of substantial assessments in those cases has indeed prevented further harm. To that end, I will shed light on an often-neglected discussion: the risk of engaging in ableist assessments when designing abortion legislation.

Disability Selective Abortion and International Law

Worldwide, national legislation on the termination of pregnancy abounds in laws differentiating between foetuses with or without disabilities, providing for disability-selective abortion (DSA). The assumption that foetal disability may constitute a legitimate ground for access to abortion seems to be (at least partially) supported by international human rights bodies, e.g. by the Human Rights Committee (HRC) within its General Comment No. 36 on the right to life (para. 8).

On the other hand, the Committee on the Rights of Persons with Disabilities (CRPD Committee) has repeatedly and sharply criticized such regulations (see for an overview here). Over time, the Committee's argumentative focus has shifted from the potential rights of the foetus to a social perspective that emphasizes the stereotypes and discriminatory notions transmitted through such laws. This shift was arguably motivated by the lack of international consensus on the personhood of the unborn, growing concerns of the CRPD Committee for restrictions on reproductive autonomy and importantly, a stronger focus on the changed understanding of disability. According to the outdated medical model, disability is an individual phenomenon associated with suffering and pain that can be addressed primarily through medical therapy and rehabilitation, historically leading to the denial of autonomy, isolation and segregation as well as severe human rights violations. This must be contrasted with the human rights model of disability adopted under the CRPD, according to which disability is caused by social barriers that prevent equal participation in society and full and autonomous enjoyment of human rights. The CRPD Committee therefore criticizes DSA because it inherently perpetuates harmful stereotypes about persons with disabilities, *inter alia* as a burden whose lives are considered an imposition on the mother and on society as a whole, and as lives less worthy of protection.

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In addition, the Committee emphasized (most recently in its reports on the Netherlands and Belgium) that it is important to combat the prevailing stigma in the health care system, as medical personnel are increasingly pushing for selective abortions. National regulations must ensure that value-neutral and information-based counselling is guaranteed, taking into account the human rights understanding of disability and inherent human dignity (para. 22(b)). However, this is likely to be difficult if the law itself is not value neutral. While women arguably must be free to make individual autonomous reproductive judgments, even if they are ableist, the State must refrain from institutionalizing ableist messages.

Abortion and Stereotypes

To understand why engaging substantively with DSA regulations and the stereotypes embedded therein proves to be so complicated, it is necessary to recall that abortion restrictions rest on a different set of stereotypes, specifically gendered ones (CEDAW Report, paras. 80 ff.). They presuppose that women must be mothers and that they must subordinate their own well-being to their social role as mothers. This is why some scholars and also the Inter-American Court of Human Rights (Case of Manuela et al. v. El Salvador) have identified that harshly restrictive abortion regulations create a discriminatory climate prone to human rights violations. While the ECtHR has traditionally been cautious in its pronouncements on abortion, granting states a wide margin of appreciation, it has indeed confirmed that under certain circumstances the denial of access to abortion can result in human rights violations (A., B. and C. v. Ireland, paras. 250 ff.). In order to uphold reproductive autonomy in line with the obligations under the Convention on the Rights of Persons with Disabilities (CRPD), human rights law calls for liberal abortion regulations that do not perpetuate stereotypes by providing exceptions in cases of "foetal abnormalities", combining feminist reproductive and disability justice approaches. After all, under Art. 8 CRPD, States are not only required to refrain from actions fostering such stigmatization, but also to actively engage in awareness-raising activities to reduce and prevent it. States must be aware that the risk of discriminatory stigmatization is high when having a child with a disability is perceived within legislation as an increased burden by exceptionally justifying abortion. In fact, a liberal, neutral abortion law is the only way for States to avoid complicated case-by-case assessments, which would require evaluations and uncertain predictions about the impact of certain disabilities on the pregnant person's rights and would ultimately lead to further stigmatization and the perpetuation of ableist assumptions. This was also confirmed by a joint declaration of the CRPD Committee and the Committee on the Elimination of Discrimination against Women (CEDAW Committee) in 2018, which held that solutions must be found that respect women's reproductive autonomy without transmitting stereotypical assumptions about persons with disabilities. Even if States are reluctant to adopt liberal approaches decriminalizing abortion, other models, such as the (*prima facie* conservative) German model, show that women's reproductive choice can be protected through broadly interpreted socio-medical exceptions without explicitly referring to a diagnosed disability (§ 218a German Criminal Code).

Caught between Stereotypes

The case A.R. v. Poland is situated precisely within this tension between women's access to abortion and the stereotypes embedded in the law. The decision of the Polish Constitutional Court outlawed abortions based on "foetal abnormalities" and thus practically eliminated any realistic access to abortion.

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As such, the decision of the Constitutional Court amounted to a near-total ban on abortion, permitting termination only in cases of imminent threats to the health of the pregnant person and if the pregnancy was a result of rape.

The ideal scenario would, of course, have been for the ECtHR to consider all the arguments set out above and to declare that both overall restrictive abortion regulations and DSA are in contravention of international human rights law. However, in light of the ECtHR's previous jurisprudence, this remains closer to utopia than to a realistic prospect. The Court has confirmed several times that the Convention does not entail a right to abortion and has granted States a significant margin of appreciation in this regard. While many scholars have criticized this reluctance, a substantive development of its abortion jurisprudence could realistically only have been expected if the ECtHR had considered "foetal abnormality" as an aggravating factor that exceptionally grants a right to abortion. However, despite some of the (conservative) third party interventions (e.g. by the European Centre for Law and Justice, para. 89, and Ordo Iuris, para. 92), arguing against the permissibility of DSA, the Court did not substantially engage with those submissions. Instead, it focused only on the lack of legal certainty relating to the access of a medical procedure and confirmed a breach of Art. 8 ECHR (right to privacy, paras. 198 ff.). Notably, the amicus curiae submissions presupposed legal personhood of the unborn and would have significantly impeded liberal abortion regulation. However, as the Court has repeatedly stipulated, there is no European consensus on pre-natal personhood. Therefore, it would have been much more likely for the Court to assess whether "foetal abnormality" exceptionally grants a right to abortion than whether the ECHR prohibits such regulations.

Given that the Court has deviated from the CRPD Committee's findings and has despite some progress not endorsed the human rights understanding of disability coherently (see also here and here), it is highly likely that in conducting such assessment, it would have perpetuated ableist assumptions and stereotypes. Some of the recent contributions on the cases against Poland (e.g. here and here), already indicate how easily the CRPD perspective may be overlooked in this context, as they unconsciously rely on stereotypes reinforcing the idea of disability as a burden for the pregnant person and their family. Similarly, instead of identifying and deconstructing harmful stereotypes, the ECtHR has the tendency to neglect or even perpetuate disability stereotypes or stereotypes in general. For example, it has held placement in segregated schools for Roma children (rightfully) discriminatory, while legitimizing the same practice for children with disabilities (e.g. Salay v. Slovakia) and in many other judgements related to mental health (see in depth here). Further, in R.R. v. Poland, the Court already missed an opportunity to elaborate on the problematic stereotypes embedded within the Polish legislation permitting DSA. Therefore, a more substantive engagement with the situation in Poland would arguably have risked perpetuating and legitimizing ableist reasoning within the Council of Europe and its member states. Conversely, the Court managed to condemn the situation in Poland without such an undesirable result.

Conclusion

It is a very decisive time for abortion jurisprudence, since many states around the world are returning to restrictive abortion regulations, and valid arguments against DSA may be instrumentalized by anti-abortion activists and conservative governments to justify such restrictive policies (as, in fact, Poland did in 2020). The Court could have seized the opportunity in A.R. v. Poland to comprehensively assess the complex issues at stake and to condemn underlying harmful gender and disability stereotypes. However, it appears likely that a more substantive assessment would instead have neglected the CRPD perspective and the relevance of underlying stereotypes and would have as such operated to the detriment of persons with disabilities. While I believe we need to celebrate every explicit judgment strengthening reproductive autonomy, in this particular instance, the caution of the ECtHR may have prevented the perpetuation and legitimization of ableist assumptions. As such, the judgment does not substantially advance reproductive freedom but at least avoids causing further harm.

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