FEATURE

Peer-Reviewing Abortion Laws: Lessons from the Universal Periodic Review

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In May 2018 the Universal Periodic Review (UPR) held its 30th Working Group session. More than 50,000 recommendations have been made since the UPR was established in 2006 by the General Assembly. This 'unique' process involves a periodic review of the human rights records of all 193 member states of the United Nations (UN). The mechanism is, by nature and by structure, a state-driven process, and is meant to be 'objective, transparent, non-selective, constructive, non-confrontational and non-politicised'.

The UPR assesses the extent to which states respect their human rights obligations set out in: (1) the UN Charter; (2) the Universal Declaration of Human Rights; (3) the human rights treaties that the state concerned has ratified; (4) voluntary pledges and commitments made by the state (for example, national human rights policies and/or programmes implemented); and (5) applicable international humanitarian law. The UPR is also significant for the scope and content of its reporting procedure, given that all countries, and not merely those that affirmatively ratify a particular treaty, are required to report on their human rights obligations.

The UPR process envisages three different outcome documents: (1) recommendations made to the 'state under review' by the reviewing states; (2) the state's response to each recommendation; and (3) any voluntary pledges the state wishes to make. Document number 2 – which requires states to express their views about the recommendations either by 'accepting' or 'noting' them – adds an extra layer of commitment by the state and enhances accountability. The acceptance of UPR recommendations is, in other words, a clear expression of a state's political commitment to, and active engagement with, the UN monitoring mechanisms in the advancement of human rights.

Human rights standards and legal barriers to abortion services

The evidence is overwhelming that restrictive abortion laws are associated with a high incidence of unsafe abortions and negative health consequences (Ashford, Sedgh & Singh 2012). Abortions in restrictive legal settings contribute significantly to maternal mortality rates and preventable deaths worldwide.

Liberalising abortion laws is thus a human rights imperative, and the UPR can play a crucial role in this regard. There are important human rights obligations that necessitate legal reform around abortion; the scope and content of these obligations have been evolving rapidly and ought to be an integral component of the UPR. In their peer-led assessment,

states should be guided not only by international human rights instruments but the work done by UN treaty monitoring bodies. The very nature of the UPR process as one that aims to be 'non-confrontational' and 'non-politicised' makes it an ideal opportunity to assess states' compliance with their international obligations related to the right to sexual and reproductive health, specifically the right to access abortion services.

This section briefly outlines the standards against which states are measured. To begin with, the UN human rights system has repeatedly confirmed that sexual and reproductive rights are human rights, having first enshrined them under the right to health in the International Covenant on Economic, Social, and Cultural Rights. Thereafter, the International Conference on Population and Development (ICPD) (Cairo 1994) shifted the discourse on these rights from an emphasis on reproductive control as a strategy to meet demographic targets and control population growth to a more comprehensive and positive approach to sexuality and reproduction. The ICPD forged a link between sexuality and health as human rights, stressing that women's agency over their own bodies and sexuality is an inherent part of their sexual and reproductive health (SRH) rights. The Beijing Platform for Action then expanded the ICPD definition to cover both sexuality and reproduction, doing so by upholding the right to exercise control over and make decisions about one's sexuality.

Among their many achievements, these documents recognised the duty of governments to legislate on the matter and thereby translate international commitments into national laws and policies. In March 2016, the Committee of Economic, Social, and Cultural Rights adopted General Comment 22 (GC 22) with the aim of assisting state parties in implementing their international obligations in regard to SRH. Among other things, GC 22 affirms that states have an obligation to adopt 'appropriate legislative' measures to achieve the full realisation of SRH.

The Comment affirms that the right to SRH is an integral part of the right to health, which has enjoyed longstanding recognition based on already existing international human rights instruments. In addition, GC 22 recognises abortion services as a component of the right to health (sections 56-57) and notes that states have an obligation to repeal or eliminate laws, policies and practices that criminalise, obstruct or undermine an individual or group's access to health facilities, services, goods and information, including abortion (section 35).

The obligation to undertake legal reform on abortion is twofold. On the one hand, GC 22 affirms that states are under an 'immediate obligation' to eliminate discrimination against individuals and groups and guarantee their equal right to SRH. The GC explains that the realisation of women's rights and gender equality requires states to repeal or reform any discriminatory laws, policies, and practices in this area – for instance, laws that criminalise or restrict abortion must be repealed. On the other hand, states are required to refrain from enacting laws and policies that create barriers in access to sexual and reproductive services. GC 22 explicitly addresses the duty to remove all barriers interfering with women's access to reproductive health services.

Abortion in the UPR: What the numbers show

This article investigates UPR recommendations on the topic of abortion. As part of this, in December 2017 and February 2018 the author searched the UPR Info database of recommendations (accessible at https://www.upr-info.org/database) for the keywords 'abortion' and 'termination of pregnancy'.

As at 8 February 2018, the UPR Info database showed 140 recommendations and one voluntary pledge making specific reference to 'abortion'. Of these 140, 99 were 'noted' by the states under review and 41 were 'accepted'. Moreover, there were five recommendations on 'termination of pregnancy'. A total of 45 countries worldwide received recommendations related to abortion. Ireland and Nicaragua received the most: 19 and 24, respectively. Twenty-nine countries made recommendations. Andorra made a voluntary pledge during the UPR in which it committed, in the 'medium term', to examine the necessary legislative amendments to its restrictive abortion law.

The recommendations on abortion showed a significant increase, which highlights the growing visibility and importance of the topic. In the first

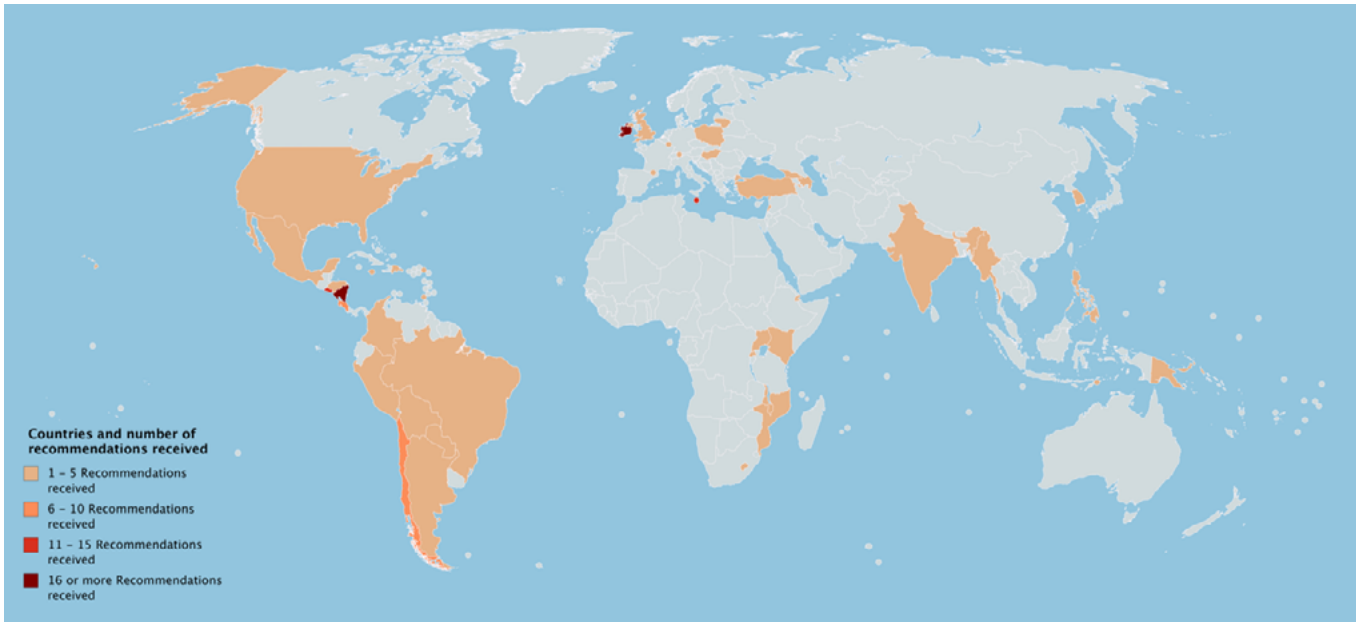

Figure 1: Countries that received recommendations on abortion and the number of recommendations received

cycle (2008-2011) there were 30 recommendations on abortion; in the second cycle (2012-2016), there were 115 – almost four times the number registered for the first cycle.

Of the 145 recommendations on abortion, 100 were 'noted' and 45, 'accepted' – that is to say, 31 per cent of the recommendations were accepted. This data requires further analysis, however, because the classification 'noted' or 'accepted' has room for improvement. The database indicates that when a recommendation is accepted partially or 'in principle', it is classified as 'noted'.

All of the recommendations made to the states under review on the topic of abortion urge that procedures for accessing abortion services should be liberalised; conversely, there are no recommendation to further criminalise or restrict access to these services. The recommendations thus send a coherent message which is consistent with the international human rights norms described above.

In broad terms, the recommendations require states (1) to decriminalise abortion, or at least in cases where the pregnancy involves a risk to the life or health of the pregnant women, the pregnancy is the result of rape or incest, or the foetus is non-viable; (2) to remove barriers to accessing abortion services – legal barriers, but so too barriers in terms of education, training of medical personnel, and so on; and (3) to free women who have been criminalised for seeking abortion services and to expunge their criminal records.

One hundred and twenty-eight out of 145 recommendations ask states to undertake legal reform in order to liberalise access to abortion. For example, it was recommended that Andorra '[a]mend legislation in order to decriminalize abortion under certain circumstances, such as pregnancies that are the result of rape' (UPR, Second Cycle, Session 9). Chile was asked to '[r]epeal all laws criminalizing women and girls for abortion and take all necessary measures to ensure safe and legal abortion in cases of rape or incest and in cases of serious danger for the health'; in addition, it was encouraged to '[m]ake further efforts to ensure that the abortion laws are brought in line with Chile's human rights obligations' (UPR, Second Cycle, Session 18).

Out of the 128 recommendations that require legal reform, 30 specifically urge states to decriminalise abortion. For instance, it was recommended that El Salvador '[m]ake the necessary constitutional and legislative amendments in order to decriminalize and remove the ban on abortion' (UPR, Second Cycle, Session 20).

Various recommendations ask states to bring their legislation on abortion in line with international human rights norms. For example, it was recommended that El Salvador and Ireland, respectively, '[a]dopt legislation on abortion that is in line with its international human rights obligations' (UPR, Second Cycle, Session 20) and '[c]onsider revising its relevant legislation on

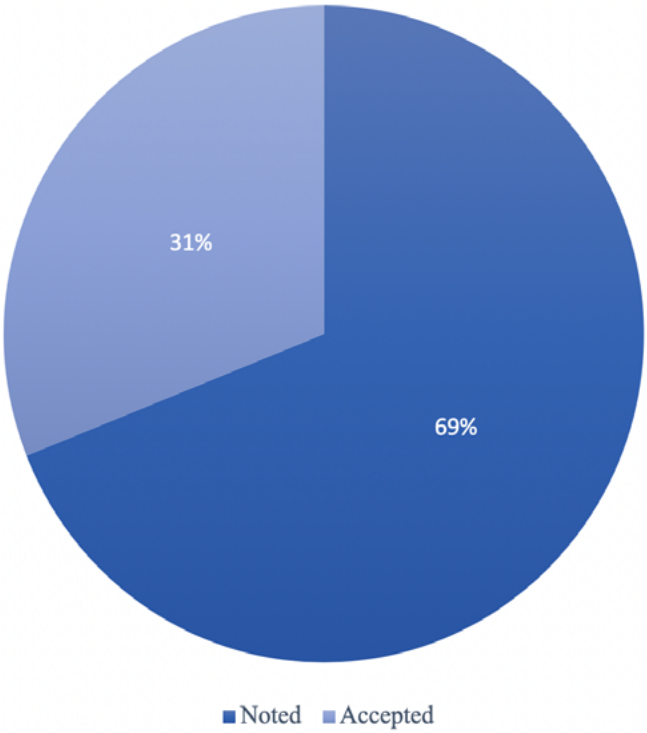

Figure 2: Percentage of 'noted' and 'accepted' recommendations

abortion in line with international human rights standards on sexual and reproductive health and rights' (UPR, Second Cycle, Session 25).

This highlights the conviction among recommending states that an essential part of a state's international human rights obligations is the duty to liberalise abortion and guarantee its access. What makes the trend especially relevant is that it is based on the states' own direct interpretation of human rights obligations.

As mentioned, it has been recommended that countries 'review', 'revise' or 'amend' laws to guarantee women's right to access abortion services, at least 'in cases when pregnancies are due to rape or incest, or when it is established that the foetus is not viable, or when the life or the health of the mothers is at risk' (UPR, Paraguay, Second Cycle, Session 24). In recommendations to Argentina and Ireland, the recommending states explicitly recognise a 'right to abortion' (UPR, Ireland, Second Cycle, Session 25 and UPR, Argentina, Second Cycle, Session 14).

The call for the decriminalisation of abortion requires that states review the criminal consequences women face when they seek abortions. For instance, the recommendations urge El Salvador to '[f]ree all women and girls incarcerated for having undergone an abortion, or for having endured one spontaneously, and also remove their criminal records for these motives' (UPR, El Salvador, Second Cycle, Session 20).

Recommendations are usually specific enough to allow for follow-up. States have been clear on the obligation to decriminalise and give states under review clear guidelines on the type of amendments that are needed. For example, it was recommended that Bolivia 'eliminate the requirement for prior judicial authorisation for abortion' (UPR, Bolivia, Second Cycle, Session 20).

Conclusion

The UPR recommendations build on international human rights norms and the pivotal work UN monitoring mechanisms and bodies have done in contributing slowly but steadily to defining the scope and content of the states' obligations regarding SRH, including abortion (Gilmore et al. 2015). The recommendations refer explicitly to decisions adopted by UN monitoring bodies, to recommendations made by the CEDAW committee, and even to domestic judgements seeking to unpack the right to abortion and the obligation to undertake legal reform efforts in order to guarantee it.

Although only one-third of the recommendations were 'accepted' by the states under review, a clear trend is evident: all recommending states – together with some of the states under review – agree that the international human rights norms call for liberalised abortion. By the same token, no state has issued any recommendation calling for further criminalisation of abortion or restriction of access to it.

States have demonstrated their engagement in the review process both as reviewers and reviewees, showing considerable willingness to accept human rights and this new, sometimes challenging, peer review process. Accountability is one of the foundational principles of the UPR. Furthermore, the recommendations on abortion seem to break the pattern – criticised in the literature – of being formulated so

vaguely that any follow-up process is extremely difficult (Abebe 2009). Generally speaking, these recommendations make a clear case for law reform and specify the type of legislation required.

The UPR results, and the strong political support states have given to the UPR process, show that this mechanism should not be underestimated as an important forum to monitor and interpret international law. First, the recommendations themselves – regardless of their acceptance or not by the state under review – reflect goals which the international community wishes states to strive for. Secondly, the dialogue required by the UPR presents a crucial opportunity for states to share best practices. It has been noted that 'sharing good practices among peers, as well as offering constructive technical assistance and other forms of capacity building, are cornerstones of the process' (Smith 2013).

The UPR relies on cooperation rather than confrontation. This is particularly relevant in the case of sexual and reproductive rights, which require concerted efforts to guarantee their enjoyment. For instance, the recommendations touch upon issues that can be addressed only via international cooperation, such as the right to abortion in cases of rape in cross-border conflicts, and through international funding assistance to provide abortion services.

Thirdly, the UPR's review of human rights compliance is universal. That is, it aims to monitor states' compliance with international human rights obligation emanating from different sources – from treaties to voluntary pledges – which has not been the case for the treaty bodies. As the right to access abortion is interwoven with many other rights, namely the right to health, bodily autonomy and non-discrimination, the UPR mechanism clearly provides added value in addressing a multidimensional issue.

Fourth, the impact of the recommendations goes beyond the specific state under review: they are an opportunity for states to develop a state-driven process of interpretation of the provisions of treaties. Since the ICPD, the UN has developed a large body of knowledge on the interpretation and scope of the obligation to guarantee the right to abortion, the effects of which come into focus upon consideration of the countries that have explicitly cited international treaties or TMB decisions when changing their abortion laws. By making recommendations and either accepting or noting them, states are contributing directly to the clarification, delimitation, interpretation and continuing development of human rights standards.

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References

Abebe AM (2009) 'Of shaming and bargaining: African states and the Universal Periodic Review of the United Nations Human Rights Council.' *Human Rights Law Review*, 9(1), pp. 1-35

Ashford L, Sedgh G, and Singh S (2012) *Making Abortion Services Accessible in the Wake of Legal Reforms*. Guttmacher Institute

Committee on Economic, Social and Cultural Rights General Comment No. 22 on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights) (2016). UN Doc. No. E/C.12/GC/22

Gilmore K, Mora L, Barragues A, and Mikkelsen IK (2015) 'The Universal Periodic Review: A platform for dialogue, accountability, and change on sexual and reproductive health and rights.' *Health & Human Rights: An International Journal,* 17(2)

Smith R (2013) '"To see themselves as others see them": The five permanent members of the Security Council and the Human Rights Council's universal periodic review.' *Human Rights Quarterly*, 35(1), pp. 1-32