

# Why the Continuing Siege on Reproductive Rights?

Written by Rebecca J. Cook

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REBECCA J. COOK, JUL 13 2014

“Why do countries persist in attacking reproductive rights?” is an important question with no easy answers. Finding answers to this question requires us to stand back and examine the reasons for women’s unequal status in society, more generally, and of men’s insecurity at accepting women’s equality. Explanations might rely on historical insights about the persistence of patriarchy or psychological explanations about the nature of prejudice against women. Explanations might also be found in examining how countries have addressed the continuing attacks on reproductive rights through legal cases and controversies. In a wide-ranging new volume, *Abortion Law in Transnational Perspective: Cases and Controversies*, [1] legal scholars from different parts of the world analyze recent cases and controversies with a view toward understanding how ideas are changing the way abortion is advocated, regulated, and adjudicated.

### Historical Explanations

An historical perspective might explain the continuing siege on reproductive rights as the persistence of patriarchy. It has been explained that the major assumptions about gender in patriarchal society include that

Men are ‘naturally’ superior, stronger and more rational, therefore designed to be dominant... Men, by their rational minds, explain and order the world. Women by their nurturant function sustain daily life and the continuity of the species. While both functions are essential, that of men is superior to that of women... Men have an inherent right to control the sexuality and the reproductive functions of women, while women have no such right over men (Lerner, 1993:4).

Another historical explanation is that, after a liberalizing trend, such as has happened with abortion law reform, there is a period of backlash whereby fierce resistance to reforms emerges in order to reestablish the *status quo ante*, the situation before the reforms. Examples of backlash to reformations have appeared over time, including the Catholic Inquisitions in the 1600s (Cook, 2011). Each backlash has introduced its own particular forms of repression, but they are often characterized by the use of stigma to discredit and silence reformers.

### Psychological Explanations

Psychological explanations on the nature of prejudice against women provide further insights into the persistence of attacks on reproductive rights. For example, in most communities, normative stereotypes that positively characterize women solely in terms of their roles as nurturing mothers can be pervasive across social sectors and persistent over time. Where this is the case, hostile prejudices might emerge against women who do not comply with these sex-role stereotypes or against the very idea of reproductive justice in ways that jeopardize reproductive rights overall.

Attacks on reproductive rights might be rationalized as a way of protecting women. Where the nature of the prejudice is paternalistic, such justifications can have pernicious effects because they reinforce constructions of women—or certain subgroups of women such as adolescent girls (Kelly, 2014)—as vulnerable dependents, and not as actual or potential autonomous agents. Moreover, understanding the negative effects of the benevolent nature of gender prejudice can be difficult because such effects are often invisible (Rudman, 2005:117). The normality and the ordinariness of gender prejudice blinds societies to its pernicious effects, like the proverbial fish that is blind to the

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water in which it swims (Rudman, 2005:107).

## Legal, Religious, and Political Explanations

In addition to the historical and psychological explanations for the persistence of attacks on women's reproductive rights, insights can be found in the frames of reasoning used in public debates and court decisions, which often reflect religious and political perspectives. It has been explained that

mental constructs explaining the world have been androcentric, partial and distorted. Women have been defined out and marginalized in every philosophical system and have therefore had to struggle not only against exclusion but against a content which defines them as subhuman (Lerner, 1993:5).

This is especially the case with the frames of legal reasoning that are used to attack reproductive rights.

Frames of legal reasoning can be found in the type of law that is chosen to regulate reproductive health services, whether it is criminal law, health law, or constitutional and human rights law. For example, where abortion services continue to be regulated as a matter of crime and punishment, the criminal law has a stigmatizing effect on both the providers and seekers of such services (Cook, 2014). Stigmatization is a dehumanizing process used to spoil the identity and dignity of those associated with abortion. Individuals are often more easily persecuted when they are stigmatized. Persecution can take many forms, including police confiscation of medical records of women attending a family planning clinic, breaching their rights to privacy and appropriate medical care, and ignoring the state's duties to protect confidentiality (Lopes Da Costa, 2013).

In contrast to a criminal law approach are medical frames of reasoning. Medical frames have helped to legitimize reproductive health services as necessary medical services and have contributed to the improvement of access to abortion services. However, the conceptualization of abortion solely as a medical matter might obstruct the understanding of abortion as a women's rights issue (Sheldon, 2014).

Within the constitutional and human rights framework, how courts balance various rights through, for example, the analytical framework of proportionality, can be important (Undurraga, 2014). Where multiple constitutional rights and values are vindicated through the use of balancing as a method of analysis (Lamačková, 2014), there might be less backlash. The power to define the content and meaning of a particular right also can be decisive. The meaning of a right is often restricted through the cooption of secular discourse of human rights to advance Catholic theological reasoning (Lemaitre, 2014). Another example is the framing of the right of conscience. The right to act lawfully according to one's individual conscience is often framed as if it were the right only of those who conscientiously object to reproductive rights (Dickens, 2014). The right to freedom of conscience of women seeking reproductive health services and of practitioners committed to providing reproductive health services are ignored in ways that give opponents a monopoly on the definition of the right, and a self-issued license to deny women necessary health services.

Attacks on reproductive rights, such as through constitutional provisions protecting life from the moment of conception, are often justified as a way of protecting prenatal life. Such justifications are oversimplified. They shape public debate in ways that marginalize and subordinate pregnant women's rights, often enabling a pernicious use of criminal law and ignoring the deprivations of reproductive choice that make the pregnancies unwanted (Madrazo, 2014). In addition, oversimplified narratives overlook the many ways in which prenatal life can be protected consistently with women's rights (Cook, 2011: 788). For example, clinical measures for protecting prenatal life, such as decreasing miscarriages, including recurrent miscarriages, of wanted pregnancies (Rai & Regan, 2006:601); decreasing perinatal deaths (fetal or early neonatal deaths that occur during late pregnancy—at 22 completed weeks of gestation and over—during childbirth and up to seven completed days of life), estimated around 5.9 million annually (World Health Organization, 2004:2-4); and reducing intrapartum (during labor and childbirth) stillbirths and neonatal deaths (in the first twenty-eight days of life), estimated around two million annually (Lawn et al., 2009).

The frames of judicial reasoning that are used to protect reproductive rights might also be a basis for perverse

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infringements. Access to lawful abortion is often facilitated through procedural rights. Courts often require governments to issue guidelines clarifying the conditions under which women can gain access to lawful abortion, and to provide a right of appeal against a denial within a specified time frame. While such court decisions are important in facilitating access to abortion for specific legal exceptions to the criminal prohibition (Ngwena, 2014), it has been asked whether such procedural approaches actually help or hinder the achievement of broader substantive rights to abortion in the long term (Erdman, 2014). It has been shown, for instance, that procedural approaches that provide guidance clarifying the conditions under which women can access lawful abortions can be undermined by the application of informal rules by conservative opposition (Bergallo, 2014).

Some explain that social movements have led courts to acknowledge, accommodate, and even respect women's agency in abortion through their respective constitutions (Siegel, 2014). Where courts have denied women's reproductive rights, such as through blocking access to emergency contraception, this failure of respect has instigated legal mobilization that, in effect, has superseded courts' decisions in order to ensure access (Muñoz León, 2014). Whether mobilization has led to rights-affirming decisions (Upreti, 2014) or followed rights-denying decisions (Muñoz León, 2014), the continuing attacks on reproductive rights might be explained by a general absence of strong, politically influential social movements for reproductive justice and women's equality.

Answers to the question "Why do countries persist in attacking reproductive rights?" will depend on the context of each country. Understanding the framework of ideas that influence these attacks by examining the historical, psychological, legal, religious, and political perspectives of a particular country will illuminate paths to finding answers to this question.

## Notes

[1] The court decisions discussed in this book's chapters are online at [www.law.utoronto.ca/irshl/AbortionLaw](http://www.law.utoronto.ca/irshl/AbortionLaw).

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