



The regime of abortion in the normative framework of the Council of Europe

Synthesis¹

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Summary

Every year, 2.4 million abortions take place among the people of the Member States of the Council of Europe, ending more than a fourth of pregnancies².

It is established that human life deserves respect from its start, yet the content of this respect is not precisely defined (1).

Considering that “*Article 2 of the Convention is silent as to the temporal limitations of the right to life*”³, the European Court of Human rights (ECHR) recognises to States, within The Court authorises States, within the limit of their margin of appreciation, to determine “*the starting point of the right to life*”⁴. From then, every State can legitimately “*State to choose to consider the unborn to be such a person and to aim to protect that life*”⁵ or not (2). Yet the Court does not exclude explicitly the unborn child from the scope of the protection of the Convention; from then, it does not it does not contain a conventional right to the convention does not guarantee a right to undergo an abortion⁶ nor a right to practise⁷ it (3)

If the State decides to allow abortion, “*a broad margin of appreciation is accorded to the State as to the decision about the circumstances in which an abortion will be permitted in a State*”⁸, the legal framework devised for this purpose should be “*shaped in a coherent manner which allows the different legitimate interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention*”⁹ (4), particularly the “*other competing rights and freedoms (...) of the unborn child*”¹⁰ (4). Finally, during the Cairo and Beijing Conferences, the States committed to “*take appropriate steps to help women avoid abortion*” and to “*reduce the recourse to abortion*”¹¹ (5).

¹ By Grégor Puppink, PhD in Law, Director of the ECLJ. He directed the writing of the collective book *Droit et prévention de l'avortement en Europe*, LEH publisher, 2016. secretariat@eclj.org (soon to be published in English as well)

² Calculation made from the figures of Johnston's Archives
<http://www.johnstonsarchive.net/policy/abortion/>

³ *Vo v. France*, [GC], n° 53924/00, 8 July 2004, § 75.

⁴ *Vo v. France*, § 82.

⁵ *A. B. C.*, § 222, confirms *Vo*.

⁶ *Silva Monteiro Martins Ribeiro v. Portugal*, n° 16471/02, Dec., 26 Oct. 2004.

⁷ *Jean-Jacques Amy v. Belgium*, n° 11684/85, 5 Oct. 1988.

⁸ *A. B. C.*, § 249.

⁹ *A. B. C.*, § 249; *R. R. v. Poland*, n° 27617/04, 26 May 2011, § 187; *P. and S. v. Poland*, § 99; *Tysiac v. Poland*, n° 5410/03, 20 March 2007, § 116,

¹⁰ *A., B. C.*, § 213.

¹¹ Conferences of Cairo and Beijing, often quoted by the organs of the Council of Europe.

Introductory remarks: some figures

Every year among the countries of the Member States of the council of Europe, 2.4 million abortions are practised, while there are 9.4 million birth, hence representing more than a fourth of the pregnancies¹². Most of these abortions have economic and social causes. There is a strong disparity among European countries as regards the recourse to abortion depending on the culture and the national public policies, more or less aimed at prevention. According to Eurostat, the fertility rate in the European Union dropped of 45% since the 1960s, to reach 1.58 child per woman in 2014¹³. The population growth rate in Europe is one of the weakest in the world and is largely due to extra-European immigration¹⁴.

1. Human life deserves respect from the prenatal period

States have an obligation to respect prenatal human life, without the content of this respect to be precisely defined.

The Oviedo convention states in its article 18 that the law “shall ensure adequate protection of the embryo”. The explanatory report of the Oviedo Convention specifies that “It was acknowledged that it was a generally accepted principle that human dignity and the identity of the human being had to be respected as soon as life began.” (§ 19).

Report by the Working Party on the Protection of the Human Embryo and Fetus by the CBDI (which became DH-Bio) states that “even if positions differ on the status of the embryo and the creation of embryos *in vitro*, there is general agreement on the need for protection”¹⁵.

In the *Vo v. France* case, the Grand Chamber of the ECHR had specified, concerning the human embryo that “*it is the potentiality of that being and its capacity to become a person that require protection in the name of human dignity*”.¹⁶

The Parliamentary Assembly of the Council of Europe (PACE), in 1979, recognised “*The rights of every child to life from the moment of conception*”¹⁷ and underlined the obligations of governments to this end. In Recommendation 1046 (1986), PACE stated that “*human embryos and fetuses must be treated in all circumstances with the respect due to human dignity*”¹⁸. In Resolution 1352 (2003) regarding research on embryos, PACE affirms that “*the destruction of human beings for research purposes is against the right to life of all humans and against the moral ban on any instrumentalisation of humans*”¹⁹.

In the system of the United Nations, the Convention on the Rights of the Child (1989) reaffirms in its preamble that “*the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth*”. The child is hence protected since before his birth.

¹² Calculation made from the figures of Johnston's Archives

<http://www.johnstonsarchive.net/policy/abortion/>

¹³ Eurostat http://ec.europa.eu/eurostat/statistics-explained/images/2/21/Total_fertility_rate%2C_1960%E2%80%932014_%28live_births_per_woman%29_Y_B16.png

¹⁴ In 2011, 68% of the EU population growth was the result of the migratory surplus with about one million people.

¹⁵ Steering Committee on Bioethics, *The protection of human embryo in vitro*, CDBI-CO-GT3 (2003) 13.

¹⁶ *Ib.*

¹⁷ APCE, Recommendation 874 (1979) *European Charter on the Rights of the Child*.

¹⁸ APCE, Recommendation 1046 (1986) *Use of human embryos and fetuses for diagnostic, therapeutic, scientific, industrial and commercial purposes*, §14.

¹⁹ APCE, Resolution 1352 (2003) *Human stem cell research*, §10.

The International Covenant on Civil and Political Rights recognises the right to life of the “human person” and implicitly protects the unborn child by stating that the sentence of death shall not “be carried out on pregnant women” (art. 6)

The American equivalent to the European Convention, the American Convention on Human Rights, also prohibits the execution of pregnant women and specifies that *“every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life”* (art. 4).

2. It is for the State to define the starting point of the right to life

When the European Convention was adopted, all the Members States guaranteed the respect of life from its protection. To not oppose the subsequent movement of liberalisation of abortion, the European Commission and Court interpreted the Convention in such a way as to leave the responsibility of their choice to the States. For this purpose, the ECHR notes that *“Article 2 of the Convention is silent as to the temporal limitations of the right to life”*²⁰ and believes *“that it is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention”*²¹. It then authorises States, within the limits of their margin of appreciation, to determine *“the starting point of the right to life”*²² in their national legal order. Hence, it is *“legitimate for a State to choose to consider the unborn to be such a person and to aim to protect that life”*²³, or not to do so.

Yet the Court always refused to deprive the unborn child of any conventional protection. The Former Commission had already noted that it *“did not exclude”* that *“in certain circumstances”* the foetus may enjoy *“a certain protection under Article 2, first sentence”*²⁴. If the Convention did not protect prenatal life, there would be no point in recognising a margin of appreciation to the States, for every margin is necessarily referring to a pre-existing obligation. Judge Jean-Paul Costa explains: *“Had Article 2 been considered to be entirely inapplicable, there would have been no point – and this applies to the present case also – in examining the question of foetal protection and the possible violation of Article 2, or in using this reasoning to find that there had been no violation of that provision”*²⁵

By protecting the unborn child, States act in conformity with article 53 of the European Convention of Human Rights and article 27 of the Oviedo Convention, which guarantee States the faculty to give in their internal order a wider protection of rights and prohibit to interpret these conventions as limiting the extent of these rights, the extent being guaranteed in the national order.

The fact that the majority of States only grant a reduced protection to the life of the unborn child cannot coerce a State which made the opposite choice to reduce the granted protection. The reference to a consensus can only lead to the increasing of the global level of protection of rights, not to its decreasing.

The Committee of Ministers adopted this posture, declaring, as an answer to parliamentary questions on abortion that *“In view of the differences in situation and approach among member States regarding the issue raised by the Honourable Parliamentarian, the*

²⁰ *Vo v. France*, § 75.

²¹ *Vo v. France*, § 85.

²² *Vo v. France*, § 82.

²³ *A. B. C.*, § 222, confirms *Vo*.

²⁴ ECom.HR, *H. v. Norway*, n° 17004/90, Dec. 19 May 1992.

²⁵ Jean-Paul Costa, Separate opinion under *Vo v. France*, § 10.

Committee of Ministers considers that it is at the national level that a response must be given”²⁶.

3. The Convention does not contain a right to abortion

The Court judged that the Convention does not guarantee a right to undergo an abortion²⁷ nor a right to practise²⁸ it, nor even a right to contribute with impunity to its being practised abroad²⁹. The prohibition of abortion by a state does not in itself violate the Convention³⁰.

The Court never condemned a State for having prohibited abortion. It is only if the life of the mother were truly endangered and that only abortion could save her that a State could be condemned under article 2 of the Convention for not allowing the recourse to it; situation that never happened yet to the Court. The Court underlined that “*A prohibition of abortion to protect unborn life is not therefore automatically justified under the Convention on the basis of unqualified deference to the protection of pre-natal life or on the basis that the expectant mother’s right to respect for her private life is of a lesser stature*”³¹. In some circumstances, according to the Court, the respect of the life of the mother can prevail on that of the child.

But the Convention does not impose upon States to make the respect of the will or physical or psychological integrity of the mother prevail upon the life of the child. The Court hence judged several times that “*Article 8 [which guarantees personal autonomy, physical and psychological integrity] cannot, accordingly, be interpreted as conferring a right to abortion*”³². From then, the Convention does not contain a right to abortion.

4. If the State decides to allow abortion, its legal framework must respect the Convention

“A broad margin of appreciation is accorded to the State as to the decision about the circumstances in which an abortion will be permitted in a State”³³ and “the legal framework devised for this purpose should be shaped in a coherent manner which allows the different legitimate interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention”.³⁴

When a case is brought to it, the Court must then “*supervise whether the interference constitutes a proportionate balancing of the competing interests involved*”³⁵. The Court does not perceive abortion as an abstract, subjective and unilateral right of the woman, but as a choice which, to be justified under the Convention, must be proportionate to competing rights and interests. Among these, the Court identified the right to life of the mother³⁶, the

²⁶ Answer of the Committee of Ministers to written questions n° 684 and 706, adopted on 15th September 2015 and 6th July 2016. Documents CM/AS(2016)Quest706-final and CM/AS(2015)Quest684-final.

²⁷ *Silva Monteiro Martins Ribeiro v. Portugal*, n° 16471/02, Dec., 26 Oct. 2004.

²⁸ *Jean-Jacques Amy v. Belgium*, n° 11684/85, 5 Oct. 1988.

²⁹ *Jerzy Tokarczyk v. Poland*, n° 51792/99, Dec., 31 Jan. 2002

³⁰ See particularly *A. B. C.* where A. and B. unsuccessfully challenged the prohibition of abortion for motive of health and well-being.

³¹ *A. B. C.*, § 238.

³² *A. B. C.*, § 214, *P. and S. v. Poland*, n°57375/08, 30 Oct. 2012, § 96

³³ *A. B. C.*, § 249.

³⁴ *A. B. C.*, § 249; *R. R. v. Poland*, n° 27617/04, 26 May 2011, § 187; *P. and S. v. Poland*, § 99; *Tysiac v. Poland*, n° 5410/03, 20 March 2007, § 116,

³⁵ *A. B. C.*, § 238.

³⁶ *Ib.*

*“competing rights and freedoms (...) of the unborn child”*³⁷, the rights of the *“potential father”*³⁸ and of the family³⁹, the legitimate interest of society to limit the number of abortions⁴⁰, to protect morality⁴¹ and to fight against eugenics⁴². Moreover, the Court applied, before birth, the prohibition of torture and inhuman and degrading treatments⁴³.

In the cases against Poland and Italy, the Court did not judge that the Convention introduces itself the obligation to allow abortion, but that the national choice to allow abortion, once adopted, must set up a legal framework which respects the demands of the Convention, particularly in terms of precisions and predictability as regards the possibility to legally access abortion. It is the imprecision as such of the national legal framework that caused the violations of the Convention.

The Court has found a violation of the Convention due to lack of access to abortion only in specific situations of pregnancies resulting from rape⁴⁴ or causing a risk to physical health⁴⁵ (not psychological) and the life of the woman, situations in which abortion was allowed by the national law.

5. The States committed to “reduce the recourse to abortion”

During the Cairo International Conference on Population and Development (1994), the States committed to *“take appropriate steps to help women avoid abortion, which in no case should (...) be promoted as a method of family planning”* (7.24) and *“to reduce the recourse to abortion”* (8.25). Likewise, during the World Conference on Women, in Beijing (1995), the States renewed their commitment *“to reduce the recourse to abortion”*, assuring that *“every attempt should be made to eliminate the need for abortion”* (§160.k).

This commitment is a consensus, including within the Council of Europe.

In 2003, the PACE underlined that *“The goal of a successful family planning policy must be to reduce the number both of unwanted pregnancies and abortions”*⁴⁶. In 2008, the PACE reminded that *“abortion must, as far as possible, be avoided”* and invited the States to *“promote a more pro-family attitude in public information campaigns and provide counselling and practical support to help women where the reason for wanting an abortion is family or financial pressure”*⁴⁷.

The commitment *“to reduce the recourse to abortion”* is also a corollary to that aiming at protecting maternity and family. The European Social Charter guarantees that *“the family as a fundamental unit of society has the right to appropriate social, legal and economic protection to ensure its full development”* (art. 16). This development lies first on the faculty to found a family. The Human Rights Committee specifies that *“the right to found a family implies, in principle, the possibility to procreate and live together”*⁴⁸. The protection due to the family by the State extends to maternity, notably against pressures coercing to abortion.

³⁷ *A., B. C.*, § 213, see also *Tysiac v. Poland*, n°5410/03, 20 March 2007, § 106; *Vo*, §§ 76, 80 and 82.

³⁸ *X. v. UK*

³⁹ *P. and S. c. Poland*, n°57375/08, 30 Oct 2012.

⁴⁰ *Odievre v. France*, GC, n°42326/98, 13 Feb 2003, § 45

⁴¹ *Open Door and Dublin Well Woman v. Ireland*, n° 14234/88; 14235/88, 29 Oct 1992, § 63; *A.B.C.* § 222-227.

⁴² *Costa and Pavan v. Italy*, n° 54270/10, 28 Aug 2012.

⁴³ *Boso v. Italy*, n° 50490/99, Dec., 5 Sept 2002.

⁴⁴ *P. and S. v. Poland*, § 96.

⁴⁵ *Tysiac*, § 106; *Vo*, §§ 76, 80 and 82; *A., B. C.*, § 213.

⁴⁶ APCE, Resolution 1347 (2003), *Impact of the “Mexico City Policy” on the free choice of contraception in Europe*, 30 Sept 2003, § 6.

⁴⁷ APCE, Resolution 1607 (2008), *Access to safe and legal abortion in Europe*, §§ 1 and 7.8.

⁴⁸ Human Rights Committee, General Observation n° 19: Article 23 Protection of the Family, 1990, § 5.