



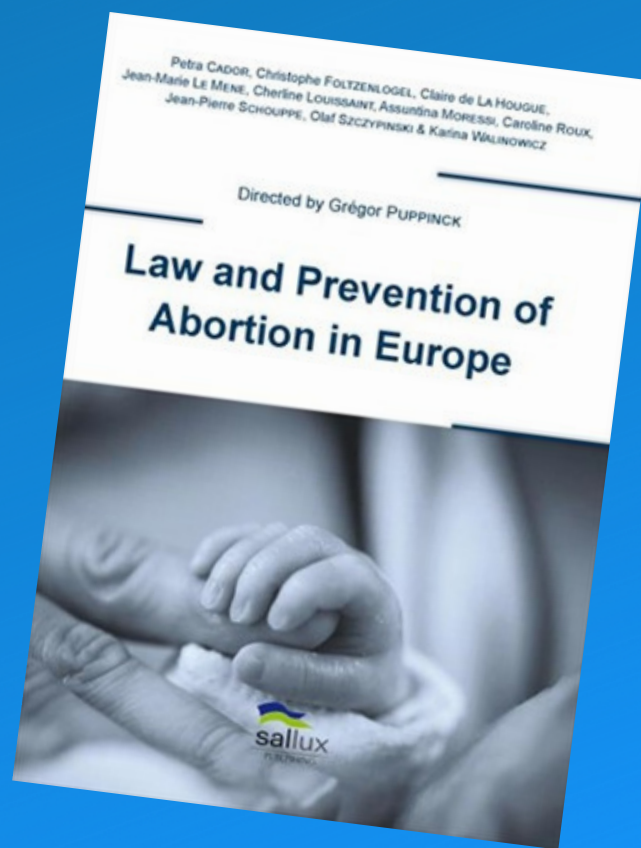
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Abortion and the European Court of Human Rights

Grégor Puppinck

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SUMMARY

For the European Court of human rights, as for most national laws, the recourse to abortion is something that is tolerated. This tolerance is based on the *petitio principii* that it would be legally and scientifically impossible, but much more not wished, to know whether the unborn child is alive or not. This tolerance is accorded in the national law through the technique of the margin of national appreciation but it has no effect as regards the substance of the right to life in the properly conventional law. The Court always refused to explicitly exclude the unborn child from the ambit of the Convention and to judge that this unborn child is not a person. As long as it will be so, it will be impossible to claim for a right to abortion as regards the Convention, and every abortion practised would have to be justified by rights and freedoms guaranteed by the Convention and proportionate to the “other rights and freedom, including those of the unborn child”.¹

¹ Étude publiée dans les *Mélanges en l'honneur de Gérard Mémeteau, Droit médical et éthique médicale : regards contemporains*, sous la direction de Julie Leonhard, Bruno Py et François Vialla, octobre 2015, Ed. Les Etudes Hospitalières.

Introduction

While abortion was widely criminally repressed in Europe², when the European Convention of Human Rights (hereinafter The Convention) was adopted, the situation is nowadays quite the opposite. Abortion still remains a cause of litigation, both in society and before the jurisdictions. Obeying the evolution of morals, the European Court of Human Rights (hereinafter the Court or ECHR) and the former Commission have progressively taken this practise into account in the legal order of the Convention. This integration is difficult, not only because of the passionate character of abortion, but also because it disrupts the economy of human rights, in accepting an irreconcilable opposition between the life of an elusive being and the undefined freedom of an adult. Freedom and being are in the heart of the theory of human rights and abortion casts a doubt on their coherence.

Since the mid-1970s, the instances in Strasbourg have built, through two dozens of cases and decisions, a jurisprudential corpus on abortion. The aim of this article is to pull out of this corpus the legal regime of abortion within the scope of the Convention and to ensure a rational criticism of it. The legal regime of abortion is necessarily conditioned by the status of its *object*, who also happens to be a *subject*: the *unborn child*³. The Court obeys a simple logic in building on the basis of her comprehension of this unborn child (I), its reasoning as regards abortion (II).

I. The Unborn Child.

The Court has never excluded the unborn child from the scope of the article 2 of the Convention (1), although it allows the States to determine the starting point of the right to life in its internal legal order (2).

A. The starting point of life.

1. Approach of the Court.

The Court authorises States, within their limited margin of appreciation, to determine “*the starting point of the right to life*”⁴ in their domestic legal system. Determining the starting point of the right to life is a matter of both fact and law. The question of fact is relative to the point when the life begins which, in turn, determines the question of law relative to the point at which the right to life begins. In the case of *A.B.C. v. Ireland*, the Court ruled that there was no European consensus as to the scientific and legal definition of the starting point of the life of a person, which as a consequence grants States a margin of appreciation as to the definition of the starting point of the *right to life*: given “*that the question of when the right to life begins came within the States’ margin of appreciation because there was no European consensus on the scientific and legal definition of the beginning of life, so that it was impossible to answer the question whether the unborn was a*

² *Brüggemann and Scheuten v. Federal Republic of Germany*, No. 6959/75, Report of the Commission, 12 July 1977, para 60.

³ As in the Court, the expression “unborn child” is used to designate the embryo and the foetus.

⁴ *Vo v. France*, [GC], N°53924/00, 8 July 2004, paragraph 82. Hereafter *Vo*.

'person' to be protected for the purposes of Article 2".⁵ Note that the "legal definition of the beginning of life" is none other than "the starting point of the right to life."

Although in *Vo v. France* the Grand Chamber had been more nuanced, stating "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",⁶ before adding that "it may be regarded as common ground between States that the embryo/foetus belongs to the human race" and that the "potentiality of that being and its capacity to become a person ... require[s] protection in the name of human dignity".⁷ Therefore, for the Court, it can be "legitimate for a State to choose to consider the unborn to be such a person and to aim to protect that life,"⁸ simply because the State can determine the moment from which an unborn child is a *person* benefitting from the protection of the Convention. This determination is initially a question of fact: the determination of the beginning of life.⁹

2. Criticism of the approach of the Court.

a. Confusion between facts and values

To speak of a "scientific and legal definition of the beginning of life"¹⁰ confuses scientific reality and its judicial representation, the fact (the child) and the value (the person). It is true that there is no European consensus regarding the legal protection of the unborn child. On the other hand, the scientific definition of the beginning of life, which does not fall within a legal jurisdiction, is the subject of a scientific consensus: it is established that every individual life is an uninterrupted continuum from conception until death.¹¹ Any other definition of the beginning of individual life cannot escape being arbitrary and false. The factual beginning of individual life does not have the contingent character of a choice of values¹² which may alone justify granting a national margin of appreciation. It cannot be claimed that it is the state of scientific knowledge (that is to say, embryology and foetology) which makes it "impossible to answer the question whether the unborn child is a 'person,'" it is only a matter of moral understanding, a choice of values, and not an issue of fact¹³. This is not to deny the difficulty to visually recognise a human being during the first weeks of pregnancy, but it is a question of accepting that to recognise or to not recognise an unborn child as a person is a voluntary moral *choice*. Having said that, it should be considered that to be rational, any choice should be informed by scientific knowledge; and yet, to suppose there is no scientific consensus on the beginning of life permits the claim that it is impossible to form an objective and rational opinion on the nature of the unborn child. *Can* the Court, not know? Or does it not *want* to

⁵ *A. B. C., v. Ireland*, [GC], N°25579/05, 16 December 2010, paragraph 237. Hereafter *A. B. C.*

⁶ *Vo v. France*, para. 85.

⁷ *Idem*.

⁸ *A. B. C.*, paragraph 222, confirms *Vo*.

⁹ Laurent Sermet, « Le droit de l'enfant à naître et la Convention européenne des droits de l'homme », in Joël Benoît d'Onorio, *Le respect de la vie en droit français*, Tequi, p. 170.

¹⁰ *ibid* paragraph 237.

¹¹ Moore *et al.*, *The Developing Human: Clinically Oriented Embryology*, 7th ed. (Philadelphia: Saunders 2003), p. 2.

¹² Unlike, for example, morality which cannot be uniform, thus justifying a national margin of appreciation. *Handyside v. United Kingdom*, N°5493/72, 7 December 1976, paragraph 48.

¹³ The evidence is that the ontological recognition of the unborn child as a person has regressed compared to 50 years ago, whilst scientific knowledge has progressed to the point of recognising the unborn child as a *patient*.

know? Indeed, the Court made the avowal that, in its opinion, it is not *desirable*¹⁴ to know if the unborn child is a person, for recognising him would limit one's power towards him.

b. The distinction between the unborn child and the person¹⁵

The court adopts a distinction between, on the one hand, *the unborn child*, which is a being belonging to the human species¹⁶ and whose existence is determined by science, and on the other hand, the '*person*' which is a being belonging to human society and whose existence is determined by law. However, the unborn child and the person materially designate the same thing, a single and unique being. This distinction implies a difference of *nature* even though the difference is only a matter of *degree* within the same vital continuum; birth is an accident which does not change the nature of the being. It is furthermore, in the name of this oneness of nature between the *pre-born* child and the *post-born* child that the practice of infanticides, termed "*after-birth abortions*"¹⁷ has been justified. The distinction between the unborn child and the person is fictional, because the notion of the person itself becomes fictional from the moment it claims to mean something other than tangible reality. This difference between the fact (the child) and the notion (person) only exists by choice, in order to make space for individual liberty.

The legal notion of "person" which should designate a tangible reality, tends to adopt the philosophical conception that defines the person by the possession - uniquely human of conscience and reason, rather than the possession of physical characteristics man widely shares with other living beings. Through this rapprochement between legal concepts and philosophical person, the person is then defined in law by his mind rather than by his body. The distinction drawn by the Court between the unborn and the person recovers *in fine* a human dualistic conception opposing matter and mind, and recognizing to the spirit a paramount value. The human being is then a person because of and in proportion to his animation by his spirit: the foetus is not one yet the comatose in vegetative state is not really one any longer.¹⁸ It is this dualistic philosophical option which explains the approach of the Court relating to assisted suicide and euthanasia: When the spirit of a person is "trapped" in a suffering body, or when the spirit has already apparently "turned off."¹⁹ This definition of the person is open as to the unknown at the arbitrary, because the question of when the mind emerge from the lively involve material prior to agree on the definition of "spirit" and the amount of mind necessary for a human being to be recognized as a person.

c. The "margin of appreciation"

Establishing a margin of appreciation for the moment when life begins is problematic because the subject and the object of the right to life merge: they are the same. When applied to the unborn child, the margin does not adapt the scope of a Convention right according to national

¹⁴ *Vo*, paragraph 85.

¹⁵ The notion of "person" within the meaning of the Convention is different from the concept of "legal personality".

¹⁶ See *Vo*.

¹⁷ A. Giubilini and F. Minerva, "After-birth abortion: why should the baby live?" *Journal of Medical Ethics*, February 2012.

¹⁸ Claire de La Hougue et Grégor Puppinc, «["L'effrayant" arrêt Lambert – Commentaire de l'arrêt CEDH, Lambert et autres contre France, GC, n°46043/14, 5 Juin 2015](#)», *RGDM*, n°56, 2015, p. 19-42.

¹⁹ Claire de La Hougue et Grégor Puppinc, « Le droit au suicide assisté dans la jurisprudence de la Cour européenne des droits de l'homme », *Revue suisse de droit de la santé*, Neuchatel, 2015, p. 157.

circumstances, as is its function, **but it subordinates the applicability of the Convention to the provisions of national law.** Yet, the States cannot unilaterally reduce the scope of the Convention and thus exonerate their conventional obligations by relying on the provisions of internal law. Such a practice would be contrary to both the treaties²⁰ and the Convention.²¹ But, this is precisely what happens in the case of abortion: the Court and the States rely on provisions of internal law so that they do not have to apply Article 2 to the foetus; but they do not do it in a way that is totally unilateral, due to the convergence between the nations' legislation and the position of the Court.

In contrast to the attitude of the Court, it is precisely to prevent the States from giving a definition of the human embryo with the aim of depriving it of the protection granted by the Directive on biotechnological inventions²² that the Court of Justice of the European Union of Luxembourg ontologically defines the human embryo, and gives that definition the quality of autonomous notion of European right.²³

Moreover, logically, when national law acknowledges the unborn child as a *person* such as in the Irish Constitution or under Italian law;²⁴ the Court should take this qualification into account and grant the unborn child full protection under the Convention²⁵ Yet, the Court has not done so yet, it has not applied the consequences of its own reasoning which only seems to work in one way, to the detriment of the unborn child.

d. Qualification and error of fact

The Court emphasises regularly that in principle, it is for the national authorities, and them alone, to assess the facts of the case and that this assessment is binding upon the Court.²⁶ Then, it would still consider itself authorised, in some cases, to acknowledge the errors of fact or of law committed by an internal jurisdiction, "*if and in so far as they may have infringed rights and freedoms protected by the Convention.*"²⁷ Yet, the decision not to recognise a preborn child as a *person* steams from a factual assessment, and it has the consequence of depriving this human life of the protection of the Convention. Therefore, this decision can be analysed as an error of fact. Theoretically, the Court should sanction such an error. This is not a futile question when one considers the practice of partial-birth abortion (during childbirth), the infanticide of new-born children with disabilities,²⁸ or the situation of children born alive during a late abortion. Could the Court accept the States not to recognise these new-borns as persons?²⁹ In a case³⁰ which concerned the accidental death of a child in the eighth month of

²⁰ The Convention of Vienna on the Law of the Treaties 1969, Article 27: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

²¹ Article 19 of the Convention.

²² Directive 98/44/CE on the legal protection of biotechnological inventions.

²³ CJEU, *Oliver Brüstle v. Greenpeace eV*, 18 October 2011, C-34/10.

²⁴ The Medically Assisted Reproduction Act (n° 40/2004) sets down in Article 1 that the conceived embryo is a "subject" which has rights as all other concerned subjects have.

²⁵ Each State is free to grant, in its domestic legal system, a degree of human rights protection superior to those required by the Convention (Article 53).

²⁶ *Perlala v. Greece*, N°17721/04, 22 February 2007, paragraph 25 (text unavailable in English); *Kemmache v. France (no 3)*, N°17621/91, 24 November 1994, paragraph 44.

²⁷ *Perlala; García Ruiz v. Spain*, [GC], N°30544/96, 21 January. 1999, paragraph 28.

²⁸ See E. Verhagen and P. J. Sauer "The Groningen protocol, euthanasia in severely ill newborns" (2005) 352 N. Engl. J. Med. 959.

²⁹ The same question also arises with regard to the legal definition of death: what protection does a person with brain death benefit from; are they still a person in the sense of the Convention?

³⁰ *Mehmet Şentürk et Bekir Şentürk v. Turkey*, N°13423/09, 9 April 2013; hereafter *Şentürk*.(text unavailable in English).

pregnancy, the Court maintained that it could not “*answer in the abstract the question of knowing if the unborn child is a ‘person’*” due to “*the absence of a European consensus on the scientific and legal definition of the beginning of life.*”³¹ These extreme cases illustrate the limits of the Court’s reasoning while asserting that it is not called at responding “*in abstracto*”, because, *in concreto*, on the facts, it is the Court which chooses to remain *in abstracto* so that reality does not constrain freedom. Abstraction is the necessary digression of subjectivism, allowing one to pass from object to subject.

Similarly, in the judgment *Costa and Pavan v. Italy* which relates to medically assisted reproduction, the Court felt that “*the concept of ‘child’ cannot be put in the same category as that of ‘embryo’*” (§ 62). However, children and embryos are not abstract “concepts” created by our intellect, they are realities. It would have been more honest to say that embryos are not children, assuming that such an assessment falls within the jurisdiction of the Court.³²

e. The principle of precaution?

Finally, if it was genuinely not possible to know if the unborn child is a person, the principle of precaution³³ would have the Court rule in favour of respect for life as long as the doubt persists.³⁴ Yet, conversely, it uses the doubt to rule against the child. Imagine a hunter who feels authorised to shoot a bush on the grounds he pretends not knowing if what is moving is a man or an animal...

In the end, the position of the Court on the subject of the starting point of life is not rational; yet how would it be different? Moreover, by referring the question to a national margin of appreciation, the Court of Strasbourg allows *de facto* abortion, while claiming that the decision to dehumanise the unborn child is not theirs, but the result of scientific ignorance and the choice of national legislation.

B. Applicability of article 2 with regard to the unborn child.

The Court allows the States to determine the starting point of the right to life in their internal legal order and has never judged that, under the scope of the article 2 of the Convention, the unborn child was not a person. The Court has always refused, ever since the cases *Brüggemann and Scheuten v. Federal Republic of Germany*³⁵ and *H. v. Norway*,³⁶ to exclude, as a matter of principle, the unborn child from the scope of the protection of the Convention and to declare that he is not a person in the regard of article 2 of the Convention. Here is a subtlety that needs to be made clear to understand well the articulation between national and conventional orders: the Court allows the States to not give, in their nation law, a

³¹ *ibid* paragraph 107, (unofficial translation).

³² *Costa and Pavan v. Italy*, N°54270/10, 28 August 2012.

³³ *Tătar v. Romania*, N°67021/01, 27 January 2009, § 120 (text unavailable in English).

³⁴ As in the matter of euthanasia, “*in case of doubt, the decision must always aim to protect the life of the individual and extend life*”. Parliamentary Assembly of the Council of Europe, Resolution 1859 (2012) on *Protecting human rights and dignity by taking into account previously expressed wishes of patients*, § 7.8.

³⁵ *Brüggemann and Scheuten v. Federal Republic of Germany*, No. 6959/75, Report of the Commission, 12 July 1977, § 60.

³⁶ *H. v. Norway*, No. 17004/90, Decision of inadmissibility of the former Commission of 19 May 1992, p. 167 (hereinafter *H. v. Norway*.)

total protection *rationae temporis* to prenatal life, but in the conventional order, the Court does not deprive prenatal life from any protection, for, contrary to national laws which allow abortion up to a certain point, “Article 2 of the Convention is silent as to the temporal limitations of the right to life”³⁷ and the Court never judged that the unborn child was not a person. If the Convention had not protected 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”³⁸ Indeed the Court is not incompetent *rationae materiae* to appreciate the existence of an injury to life of an unborn child; it does not either declare baseless the requests that invoke Article 2 for the benefit of stillborn babies.³⁹

Finally, article 2 is not the only one that can be applied to the unborn child. The Court also applied other dispositions, particularly articles 3 and 8 in cases where the father denounced the torture suffered by the child during abortion⁴⁰ and the violation to the respect to their family life⁴¹. Yet these cases are exceptions.

In the end, considering the unborn child as but a potential person, the Court gives him a potential protection, which to this day has largely been theoretical.

II. Abortion

Because it is theoretical, the protection granted by the Court to the unborn child does not oppose the practise of abortion, but it still blocks the recognition to a conventional right to abortion (A) and leads to the demand, theoretical as well, of a necessity to justify the violation to the life of the unborn child and other rights and interests affected by abortion (B).

A. Absence of an autonomous conventional right to abortion.

The potential applicability of Article 2 to prenatal life is an obstacle in particular that abortion becomes an autonomous conventional right. A case currently pending will lead the Court to decide whether Article 2 also blocks the embryo in vitro from being subject of a right in rem⁴². Indeed, the question of the status of the unborn child affects necessarily those of abortion and the rights of the embryo. The Grand Chamber infers that link when it states that “*the margin of appreciation accorded to a State’s protection of the unborn necessarily translates into a margin of appreciation for that State as to how it balances the conflicting rights of the mother.*”⁴³ Then it is logical that “*It follows that, even if it appears from the national laws*

³⁷ *Vo v. France*, [GC], No. 53924/00, 8 July 2004, (hereinafter *Vo v. France*) para. 75.

³⁸ Jean-Paul Costa, Separate opinion under *Vo v. France*, § 13.

³⁹ *Şentürk*, § 107

⁴⁰ *H. v. Norway*; *Boso c. Italie*, n°50490/99, Dec., 5 Sept. 2002.

⁴¹ *H. v. Norway*

⁴² *Parrillo v. Italy*, n°46470/11, pending.

⁴³ *A. B. C.*, § 237.

referred to that most Contracting Parties [allow...] abortion, this consensus cannot be a decisive factor in the Court's examination [...] notwithstanding an evolutive interpretation of the Convention" (§ 237) The consensus in favour of abortion does not solve the distinct and previous issue of the legal status of the unborn child that falls within the internal order and on which, however, there would be no consensus for the Court. Thus, the European consensus favourable to abortion is not sufficient to reduce the margin of appreciation of states and establishing a conventional right to abortion. This was not understood by the six dissenting judges in the case *A.B.C. against Ireland* nor by some commentators⁴⁴ who only saw in the status of the foetus a public morality subjective question to be balanced with the conflicting interests of the mother, and not a preliminary question of applicability of the Convention. The judges must be recognized the merit of not hiding behind an alleged scientific ignorance about the beginning of life and clearly assuming that the choice of abortion is purely moral, even if we regret such an option of radical dehumanization of the unborn child. The Court declined to follow this path.

Moreover, this absence of a right to abortion under the Convention is perfectly established and accepted by the very people who want such a right to be established.⁴⁵ Along its jurisprudence, the Court detailed that the convention does not guarantee a right to undergo an abortion⁴⁶ nor a right to practise⁴⁷ it, nor even a right to contribute with impunity to its being practised abroad.⁴⁸ Finally, the prohibition of abortion itself by a state does not violate the Convention.⁴⁹ As regards the autonomy of the woman, whose respect is guaranteed by article 8 relating to the protection of private life, the Court repeated, since the *A. B. and C. v. Ireland*⁵⁰ case that "Article 8 cannot, [...] be interpreted as conferring a right to abortion".⁵¹

In addition, in some countries, such as Germany, abortion remains formally illegal and is only allowed from public authorities, in respect of certain conditions. In this case, the Court held that such tolerance does not amount to an authorization granted by law nor a internal "right" which could be invoked before the Court⁵².

As abortion is part of the conventional field, without being in itself a treaty law, its practice must be justified and proportionate in the light of the Convention.

⁴⁴ P. Ronchi, "A, B and C v. Ireland: Europe's *Roe v Wade* Still Has to Wait", *Law Quarterly Review*, 2011, 127(3), pp 365-369. E. Wicks, "Abortion Law under the European Convention on Human Rights", *Human Rights Law Review* 11:3 (2011), p. 556.

⁴⁵ Ch. Zampas et J. M. Gher, "Abortion as a Human Right —International and Regional Standards", *Human Rights Law Review*, 8:2(2008), p. 287; D. Fenwick, "The modern abortion jurisprudence under Article 8 of the ECHR", *Medical Law International*, 2012 12, 249, 2013, p. 263.

⁴⁶ *Silva Monteiro Martins Ribeiro v. Portugal*, n°16471/02, Dec., 26 Oct. 2004.

⁴⁷ *Jean-Jacques Amy v. Belgique*, n°11684/85, 5 Oct. 1988.

⁴⁸ *Jerzy Tokarczyk v. Pologne*, n°51792/99, Dec., 31 Jan. 2002

⁴⁹ See particularly *A. B. C. where B. and C.* unsuccessfully challenged the prohibition of abortion for motive of health and well-being.

⁵⁰ *A. B. C.*, § 214.

⁵¹ *A., B. and C. v. Ireland*, para. 214.

⁵² *Noel De Bruin v. The Netherlands*, n°9765/09, Dec., 13 Septembre 2013, § 57.

B. Ponderation of the different rights and legitimate interests at stake.

If, according to the Court, “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,”⁵³ yet “once that decision is taken 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”.⁵⁴” Hence the Convention neither imposes nor refuses the legalisation of abortion but its legal framework must respect the framework of the Convention. When a case is brought to it, the Court must then “*supervise whether the interference constitutes a proportionate balancing of the competing interests involved*”⁵⁵ Here is the linchpin of the reasoning of the Court; it relies on previous jurisprudence from which “*It is also clear [...] that the issue has always been determined by weighing up various, and sometimes conflicting, rights or freedoms*”⁵⁶

The question is now as follows: what are these rights, freedoms and interests which confront one another and for which the national legal framework must provide, under the control of the Court, the “*proportionate balancing*”? They are first the rights and interests of the pregnant woman but not only.

1. The rights of the mother

a. the right to life of the mother

The right to life of the mother (Article 2) sometimes conflicts with that of the unborn child. The Court has not yet ruled on a case where a State would have prevented the performance of an abortion on a woman whose life was threatened because of her pregnancy. Arguably, it is this possibility that the Court refers to when it underlines 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*”⁵⁷.

b. The right to respect for the private life of the mother (Article 8)

The right to respect for private and family life of the mother (Article 8) also carries weight in the balancing of the rights and interests called into question by abortion. The Court has extended the contents of privacy to the notions of personal development and personal autonomy⁵⁸ which cover elements related to euthanasia,⁵⁹ medically assisted reproduction⁶⁰, prenatal or preimplantation diagnosis,⁶¹ homosexuality,⁶² and even the physical⁶³ and moral⁶⁴

⁵³ A. B. C., § 249.

⁵⁴ A. B. C., § 249; R. R. v. Pologne, n°27617/04, 26 May 2011, § 187; P. et S. v. Pologne, § 99; Tysiac v. Pologne, n°5410/03, 20 March 2007, § 116, hereinafter Tysiac

⁵⁵ A. B. C., § 238.

⁵⁶ Vo, § 80

⁵⁷ A. B. C., § 238.

⁵⁸ Pretty v. United Kingdom, N° 2346/02, 29 April 2002, § 61.

⁵⁹ Koch v. Germany, N°497/09, 19 July 2012.

⁶⁰ S. H et al. v. Austria, [GC], N°57813/00, 3 November 2011; Evans v. UK, N°6339/05, 10 April 2007.

⁶¹ Costa and Pavan v. Italy.

⁶² Dudgeon v. UK, N°7525/76, 22 October 1981, § 41; X and al. v. Austria, [GC], N°19010/07, 19 Feb 2013.

⁶³ Tysiac, § 107; R. R. v. Poland, § 189.

integrity of a person. The Convention does not explicitly provide the right to health or access to certain medical practices⁶⁵ but links these subjects to the respect of private life from the viewpoint of physical and moral integrity. It is from this angle that the Court considers abortion within the scope of Article 8, while clearly stating that “Article 8 cannot (...) be interpreted as establishing a right to abortion.”⁶⁶

However, the Court held that, where domestic law permits abortion, its prohibition when requested for reasons of health and/or well-being⁶⁷ as well as the practical difficulty in accessing a legal abortion are interferences in the right to respect for private life⁶⁸. The Court can thus determine the compatibility of these interferences with Article 8 “on the basis of the above-described fair balance test to which a broad margin of appreciation is applicable.”⁶⁹

*Regarding the prohibition of abortion for reasons of health and/or well-being, the Court, in the case *A. B. C. v. Ireland*, said “the Court does not consider that the prohibition in Ireland of abortion for health and well-being reasons ... exceeds the margin of appreciation accorded in that respect to the Irish State” and that “the impugned prohibition in Ireland struck a fair balance between the right of the first and second applicants to respect for their private lives and the rights invoked on behalf of the unborn” (paragraph 241). As a result, the prohibition of abortion for reasons of health and/or well-being is not *per se* contrary to the Convention.

*Regarding, on the other hand, the practical difficulty in accessing a legal abortion, the Court considers, since the case of *Tysiack*,⁷⁰ that Article 8 requires the State to adopt clear positive procedures: “these obligations may involve the adoption of measures, including the provision of an effective and accessible means of protecting the right to respect for private life . . . including both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals’ rights and the implementation, where appropriate, of specific measures in an abortion context.”⁷¹ In several cases, the Court held that it is not the impossibility of access to abortion *per se*, but the shortcomings of the legal framework that undermines the physical and moral integrity of the applicants. In the cases of *R. R v. Poland* and *P. and S. v. Poland*, the Court even held that the consequences of the state of uncertainty and stress resulting from these material deficiencies were such that they had violated Article 3 of the Convention prohibiting inhuman and degrading treatments.

Thus, the Court has judged that once the State decides to permit abortion, even if only under exceptional circumstances, it must establish a specific legal framework and a reliable procedure allowing women to exercise effectively their national *right* to an abortion. This procedural approach only requires clarification of the conditions for legal access to abortion.⁷² Those procedural obligations of the State will be presented more in detail in the following section. At first glance, this procedural approach obliges Ireland and Poland only to clarify the

⁶⁴ *A. B. C.*, § 244.

⁶⁵ *R. R. v. Poland*, § 198; see also *Tysiack*; *Cyprus v. Turkey*, [GC], N°25781/94, 10 May 2001; *Nikky Sentges v. The Netherlands*, N°27677/02, 8 July 2003.

⁶⁶ *A. B. C.*, § 214; *P. and S. v. Poland*, § 96. The court also refused to consider the argument submitted by Mrs *Tysiack* that the fact of not being able to abort is in itself a violation of Article 8 (§ 108).

⁶⁷ Applicants A and B., *A. B. C.* § 216.

⁶⁸ Applicant C in *A. B. C.*; *Tysiack*; *P. and S. v. Poland*.

⁶⁹ *A., B. C.*, § 238.

⁷⁰ *Tysiack*, § 110.

⁷¹ *A. B. C.*, § 245.

⁷² The same reasoning has been applied in the subject of euthanasia. See G. Puppincx “Suicide assisté : nécessité d’un cadre légal (à propos de la Suisse)”, *Dalloz*, n° 19/7556, 30 May 2013 (text unavailable in English).

concrete conditions of access to abortion; in actual practice, however, it goes far beyond that obligation. In order to execute the judgments, Ireland and Poland must institute a decision-making mechanism to which women wishing to have an abortion will be able to address their demands. The composition of this committee is decisive and is debated within the Council of Europe: some⁷³ would like to reduce the number of doctors on such committees because “*a commission composed exclusively of health professionals presents a structural flaw which is detrimental to its impartiality*”.⁷⁴ This issue is important, as doctors have a scientific, objective and concrete approach to the causes justifying a possible abortion. By contrast, lawyers and political organisations view abortion under the abstract angle of individual freedoms. The refusals of these committees will be subject to appeal, so that the ultimate decision of allowing abortion will not belong to doctors anymore but to judges, guarantor of freedoms...⁷⁵

One must note that, in theory, Ireland and Poland could have answered the obligation to clarify their legal framework by suppressing the exceptions allowing abortion. A recent try following this path was recently made in Poland and was quite successful.

2. Other rights and freedom competing, including those of the unborn child.

Abortion is not reduced to a confrontation between the rights of the mother and the unborn child. As the Court has repeatedly stressed “*whenever a woman is pregnant, her private life becomes closely connected with the developing foetus*”⁷⁶. In fact, “*the pregnancy cannot be regarded as relating solely to the sphere of private life*”⁷⁷ of women, and “*Article 8.1 cannot be interpreted as meaning that pregnancy and abortion are, in principle, only a matter within the mother's private life.*”⁷⁸ Other legitimate rights and interests are at stake. In addition to those of the unborn child, the Court has identified to date the legitimate interest of the company to limit the number of abortions,⁷⁹ protect morality⁸⁰ and fight against eugenics.⁸¹ In the scope of Articles 3 and 8 of the Convention, the Court applied, before birth, the prohibition of torture and inhuman and degrading treatments.⁸² It also recognizes that the right to respect for family life of the “*potential father*”⁸³ and potential grandmother⁸⁴ was affected by the abortion of their child or grandchild. The Court also recognized the obligation of the

⁷³ See the communication of the « Centre for reproductive rights » to the Committee of Ministers of the Council of Europe and the answer of the Polish Government DH-DD(2010)610E (*last visited on May 10th 2013*).

⁷⁴ See the Report on Poland of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, M. Anand Grover, 20 May 2010, Human Rights Council, document n° A/HRC/14/20/Add.3).

⁷⁵ The approach adopted by the Court consists in not frontally imposing the liberalization of abortion, but to increase its practical accessibility when authorized in exceptional cases would also be the one promoted in the CEDAW: see J. Erdman, ‘Access to Information on Safe Abortion: A Harm Reduction and Human Rights Approach’, *Harvard Journal of Law & Gender* 34 (2011), 413; R. Sifris, ‘Restrictive Regulation of Abortion and the Right to Health’, *Medical Law Review* 18(2) (2010), p. 185.

⁷⁶ A., B. C., § 213.

⁷⁷ *Brüggemann*, §§ 59- 61 et *Boso c. Italy*,

⁷⁸ *Brüggemann*, § 61

⁷⁹ *Odievre v. France*, GC, n°42326/98, 13 fév. 2003, § 45

⁸⁰ *Open Door and Dublin Well Woman v. Ireland*, n°14234/88; 14235/88, 29 Oct 1992, § 63; A.B.C. § 222-227.

⁸¹ *Costa et Pavan v. Italy*

⁸² *Boso v. Italy*

⁸³ *X. v. UK*

⁸⁴ *P. and S. v. Poland*

State to inform women about the risks of abortion.⁸⁵ One can also think that States have the obligation to prevent forced and coerced abortions, and selective abortions.⁸⁶ The Court also recognized that other rights may be affected in specific situations, such as freedom of conscience for healthcare professionals⁸⁷ and the autonomy and ethics of medical institutions.⁸⁸

Like any proportionalist approach, that developed by the Court should work in both directions and allow to conclude the proportionate or disproportionate nature of the disputed abortions. To be regarded as proportionate, abortion should aim to preserve a right or an interest protected by the Convention and overriding other rights and freedoms affected by abortion. The result is that an abortion that would tend to preserve no conventional right or legitimate interest of the woman could not be considered proportionate. It would be so-called abortions on demand (or convenience) which cannot find other legal grounds that the application itself. Yet the Court held that Article 8 protecting individual autonomy does not contain a right to abortion.⁸⁹ As a result, convenience abortion has no justification under the Convention, it relates rather to an infringement of rights and conventional interests⁹⁰. The Court has found a violation of the Convention due to lack of access to abortion only in specific situations of pregnancies resulting from rape or causing a risk to physical health (not psychological) and the life of the woman. The Court has never ruled on the conventionality of convenience abortions. It would be interesting to see how the Court considers the request of a “potential father” contestant on the basis of Article 8 the conventionality of such an abortion on her child.

Another logical consequence of this approach proportionalist: States should limit access to abortion to cases with conventional objective justification, particularly regarding the life and health of the mother. In addition, the Court may deem disproportionate late, forced, coerced or selective by gender or race abortions. Since the states also have positive obligations to protect life⁹¹ and family life, such abortions not only affect Article 2, but also Articles 3, 8, 12 and 14. We cannot reduce the abortion to a confrontation between the rights of the mother and those of the unborn child.

Conclusion

Ultimately, in the Convention as in most national rights, abortion falls within a logic of tolerance. It is based on the *petitio principii* that it would be legally and scientifically impossible, but in fact not especially desirable, to know whether the unborn child is a person. This tolerance is granted in domestic law via the technique of national discretion, but has no effect on the substance of the right to life in the actual conventional order. The Court has always refused to rule out explicitly the unborn child from the scope of the Convention and declare that this unborn child is not a person. As long as it will be, it will be impossible to claim the existence of a right to abortion under the Convention, and all abortions will have to be justified by the rights and interests under the Convention and proportionate to “*other*

⁸⁵ *Csoma v. Roumania*, n° 8759/05, 15 Jan. 2013

⁸⁶ Resolution APCE 1829 and Recommendation 1979 on sex-selective abortions of 3 October 2011

⁸⁷ *Tysiac*, § 121 ; *R. R.*, § 206

⁸⁸ *Rommelfanger c. RFA*, n°12242/86, Com., Dec., 6 Sept. 1989.

⁸⁹ *A. B. C.*, § 214 ; *P. et S. v. Pologne*, § 96.

⁹⁰ Grégor Puppink, “Abortion on Demand and the European Convention on Human Rights”, *EJIL:Talk!* Website blog of the *European Journal of International Law*, 22 February 2013.

⁹¹ *Calvelli et Ciglio c. Italie*, GC, n°32967/96, § 48.

competing rights and freedoms, including those of the unborn.”⁹² It will also be impossible to maintain that convenience abortion respects the Convention, even if the majority of judges and states do not currently wish to condemn this practice.

The spring of this argument lies in the fact that when the discretion is applied in section 2, it bears simultaneously and confusedly on determining not only the scope of the law (as is usual), but also about the right to life. Yet -and this is where slides the no-go area creating a space of convenience abortion- if the unborn child is not a subject of law, then regardless the scope of the right. But conversely, if he is a subject, there should be no question of modulating his law to be full. Any intermediate position between protection and abandonment is arbitrary, unless recreating an intermediate category between people and things. If not succeeding in convincing humanity of prenatal life, it is important to retain the legal means to retain some protection. In the current state of the Court's reasoning, this protection should be made by an implementation of the review of proportionality in a way that could actually conclude in favour of the protection of life of the unborn child.

⁹² *Tysiack*, § 106 ; *Vo*, §§ 76, 80 et 82 ; *A. B. C.*, § 213.