

# Late Term Abortion and Neonatal Infanticide in Europe

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*This study was published in French in the  
“**Revue Générale de Droit Médical**”  
n°57, Decembre 2015*

**EUROPEAN CENTRE FOR LAW AND JUSTICE**

# **Late Term Abortion & Neonatal Infanticide in Europe**

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<sup>1</sup> This chapter is extracted from an article published in *Revue générale de droit médical* (RGDM), n°57, Dec. 2015.

## Summary

A very sensitive and painful subject has been examined by the Bureau of the Parliamentary Assembly of the Council of Europe (PACE): the question of children who are born alive during a late abortion. Indeed, a petition was handed to the PACE, in accordance Rule 65 of the Rules of Procedure and Directive n°342 from January 22<sup>nd</sup>, 1974, of the Assembly, signed by almost 225,000 petitioners and by several diverse NGOs the *European Centre for Law and Justice*.

The Petition asked the Assembly:

1. To investigate and report on the situation of children born alive during their abortion.
2. To reaffirm that all human beings born alive have the same right to life guaranteed by article 2 of the European Convention of Human Rights and must benefit from appropriate and necessary health care, without discrimination, according to articles 3, 8 and 14 of the same Convention.
3. To recommend to Member States to take into account the threshold of viability of human foetuses in their legislation on termination of pregnancy.

On 24 April 2015, the Bureau of the PACE asked the Committee of Legal Affairs and Human Rights to decide on the formal admissibility of the petition. The petition was first examined on 19 June 2015 after which the Committee decided that it was better to reject the petition because the examination of the latter before the Assembly could have divided the latter because of the sensitivity of the subject. On 28 September 2015, the Bureau of the Assembly followed that recommendation, after postponing its decision several times. The Assembly refused to examine the question of the petition for a motive of political inopportunity. It was not the only one to do so.

On 31 January 2014, a member of the PACE, Mr. Angel Pintado, had asked the Committee of Ministers the following question: “What specific steps will the Committee of Ministers take in order to guarantee that foetuses who survive abortions are not deprived from the medical treatment that they are entitled to -as human persons born alive- according to the European Convention on Human Rights?” The Committee of Ministers of the Council of Europe has not managed to resolve this situation. On July 9, 2014, the Committee declared that “*owing to a lack of consensus, it has not been possible to adopt a reply to Written Question No. 655 by Mr Pintado*”. The Committee of Ministers could not respond because certain governments do not wish to reaffirm these fundamental human rights. This failure is a shame on the Council of Europe, because it manifests its implicit consent to infanticide.

On November 20, 2014, the Commissioner for Human Rights refused to examine the problem of children born alive after an abortion, somehow deciding that it did not fall within his mandate. Yet according to Resolution (99) 50 on the Council of Europe Commissioner for Human Rights, the Commissioner is mandated to:

- foster the effective observance of human rights, and assist member states in the implementation of Council of Europe human rights standards;
- identify possible shortcomings in the law and practice concerning human rights;
- facilitate the activities of national ombudsperson institutions and other human rights structures.

The Commissioner's work thus focuses on encouraging reform measures to achieve tangible improvement in the area of human rights promotion and protection. Being a non-judicial institution, the Commissioner's Office cannot act upon individual complaints, but the Commissioner can draw conclusions and take wider initiatives on the basis of reliable information regarding human rights violations suffered by individuals. The Office also cooperates closely with leading human rights NGOs. One can there hardly understand why some children would be excluded from this mandate.

Several United Nations instances, as the Committee on the Rights of the Child and the United Nations Special Rapporteur on Torture to which the case was submitted, also kept a deafening silence on this subject.

The reluctance to tackle this question is probably to be explained by an embarrassment in front of these persons that are left to die, often with no care, in our civilised society, and by the fear of being opposed to abortion. Yet, these children are born alive, and, according to the Universal Declaration of Human Rights, "All human beings are born free and equal in dignity and rights" Yet, as regards premature children, equality depends on the circumstances of their birth. When a child is born prematurely, physicians make every effort to save the life of the baby<sup>2</sup>. If survival is not possible, the baby still receives care and is supported until his death. Palliative neo-natal care is developing in hospitals in accordance with Resolution 1649 (2009) of the Parliamentary Assembly of the Council of Europe.

With the advance of medicine, premature babies can be saved as early as 21 weeks, even before the limit of viability as defined by the World Health Organisation (22 weeks or 500g). It means that a child who is born at this limit can be saved if he receives the adequate care. Incidentally, abortion is defined in relation to the limit of viability by the Committee for the Ethical Aspects of Human Reproduction and Women's Health of the International Federation of Gynecology and Obstetrics (FIGO): abortion may be defined as the termination of pregnancy using drugs or surgical intervention after implantation and before the conceptus has become independently viable (WHO definition of a birth: 22 weeks' menstrual age or more.)<sup>3</sup> Consequently, according to FIGO, after 22 weeks, it is not *stricto sensu* an abortion but a "foetocide" or neonatal infanticide, even if the child has an anomaly or an illness. If pursuing the pregnancy is seriously risky for the mother or the child, his birth can be decided, assuming the risk of the death of the child, as if already practised.

According to the WHO, "*live birth occurs when a fetus, whatever its gestational age, exits the maternal body and subsequently shows any sign of life, such as voluntary movement, heartbeat, or pulsation of the umbilical cord, for however brief a time and regardless of whether the umbilical cord or placenta are intact.*"<sup>4</sup> This definition is applied, whether the birth is spontaneous or provoked in order to perform an abortion. Quoting this definition, the "Principles and recommendations for a vital statistics system" of the United Nations explained that "all live born infants should be registered and counted as such, irrespective of gestational

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<sup>2</sup> "Every year in France, of 750,000 birth, extreme prematurity concerns 9,000 children who are born before 33 weeks", in Expertise collective, « Grande prématurité, Dépistage et prévention du risque », INSERM, 1997, p. 1.

<sup>3</sup> Ethical Issues In Obstetrics And Gynecology by the FIGO Committee for the Study of Ethical Aspects of Human Reproduction and Women's Health, October 2012.

<sup>4</sup> *International Classification of Diseases and Related Health Problems*, 10th Revision, Vol 1, World Health Organization, 1992.

age or whether alive or dead at the time of registration, and if they die at any time following birth they should also be registered and counted as dead”<sup>5</sup>.

Figures show that in the United Kingdom,<sup>6</sup> five babies out of 247 who were born alive at less than 22 weeks have lived at least a year.<sup>7</sup> 11 out of 171 born at 22 weeks and 76 out of 332 born at 23 weeks have survived. In France and in Switzerland, it is rare that babies at 22 or 23 weeks are revived, but at 24 weeks resuscitation is always undertaken as the chances of survival without complications are high<sup>8</sup>.

The situation concerning babies who are born alive *accidentally* after an abortion is quite different from those whose birth is induced because the continuation of the pregnancy poses a major threat to them or to the mother.

Every year in Europe, numerous children are born alive after an abortion, especially when the abortion is performed after the 20<sup>th</sup> week, but it can also happen as soon as 16<sup>th</sup> week. Survival being opposite to the aim of the abortion, said aim is then reached through other means: asphyxia, lethal injection or abandonment of the naked child in a basin, kept apart, to death. Given the legal framework allowing late abortion in many countries (I), such cases are far from exceptional (II). To avoid live birth, some use the method called “dilation-evacuation”, which consists in dig the child out in pieces, often with no analgesia nor preliminary foeticide. (III)

## I. The framework of late abortion in Europe

### A. The legal Framework

Abortion is legal in most European countries under conditions and during variable time. If some only allow it during the first semester, other allow it after that, for more or less strictly defined motives. Currently, abortion is free on demand whatever the motive until the 18<sup>th</sup> week in Sweden. It is still possible for medical reasons, theoretically no later than 22 weeks (viability limit of the WHO) but there have been reports of abortions after this time<sup>9</sup>. Doctors are not allowed to refuse an abortion, even if the sole reason for this abortion is the sex of the baby<sup>10</sup>.

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<sup>5</sup> United Nations Department of Economic and Social Affairs, *Principles and recommendations for a vital statistics system*, Revision 3, 2015, p.3

<sup>6</sup> <http://www.telegraph.co.uk/health/healthnews/9598649/One-in-ten-babies-born-under-abortion-limit-survives.html>

<sup>7</sup> I draw attention here to the case of Amilia, born in October 2006 in the Baptist Children’s Hospital of Miami. This “miracle baby”, according to statements of American doctors who were in charge of her, was born at 22 weeks of pregnancy and at her birth she measured only 24.1 centimetres and weighed only 284 grams. She survived without future difficulties.

<sup>8</sup> “In France, the youngest children hospitalised in neonatal intensive care are 22 weeks of gestation. At that age, the child is at the limit of viability. There is no survival in children between 22 and 23 weeks of gestation, and a 50% risk of death at least until 25 weeks of gestation” (free translation) in Laurence Henry, « *On ne peut imposer ça à personne* », Collection Carte Blanche, Salvator, 2013, p.96.

<sup>9</sup> Abortions after the 22nd week may be allowed in the rare cases where the foetus cannot survive outside the womb even if it is carried to term. Law on abortion, n° 1974-595, §§ 3 and 6.

<sup>10</sup> Yet the international community has been fighting, at least since the Cairo International Conference on Population and Development, against sex-selective abortions. Sweden was criticised on this point in Mrs. Stump’s report to the Parliamentary Assembly of the Council of Europe which ended in the Resolution 1829 (2011) on

In the Netherlands, abortion is allowed on demand up to 13 weeks but is allowed up to 24 weeks, when a situation of distress is defined by the woman and the doctor, which makes abortion quite possible anyway<sup>11</sup>. In the United Kingdom, abortion is legal on demand up to 24 weeks. In theory, only abortion for medical reasons is decriminalised. The conditions of the British law demand that two doctors estimate, bona fide, that the pregnancy is not older than 24 weeks, that in pursuing it there would be more risks for the mother or other children of the family of physical or mental health issues than stopping it, or that there is a substantial risk of major anomaly in the child<sup>12</sup>. In practice, none of these conditions are controlled, and some doctors even have blank forms already signed by a colleague. In some countries, such as France<sup>13</sup> and the United Kingdom, there are no limits in case of danger for the life of the mother or of serious anomaly in the foetus. There may be a quite constraining procedure, like in France, but the difficulty is in the interpretation of the conditions. Indeed, depending on the places and the people who take the decision, the health of the mother can include her mental health, which would be affected should her child be handicapped, or social and material difficulties (like in Italy<sup>14</sup>). The seriousness of the anomaly of the foetus can also be freely interpreted and may not be fatal. Some serious illnesses, but that do not prevent people from living, such as Down syndrome, some forms of dwarfism or heart conditions which can be operated lead, most of the time, to abortions. In France, 90% of children affected with Down syndrome are aborted<sup>15</sup>, with some statistics going up to 95%<sup>16</sup>. In 2012, in the United Kingdom, according to official statistics, there were four abortions (before 24 weeks) because of a cleft lip and cleft palate, also known as orofacial cleft; 191 abortions because of cardiovascular diseases, including 12 abortions after 24 weeks, while many of them could have been treated by surgery; 149 abortions

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prenatal sex selection. Finally, the Commissioner for Human Rights of the Council of Europe reaffirmed on 15 January 2014 that “sex-selective abortions are discriminatory and should be banned”

<sup>11</sup> Law on abortion, 1<sup>st</sup> May 1981, decrees 17 May 1984. If the woman claims she suffers from a state of stress, confirmed by a doctor, abortion is possible up to the limit of viability (24 weeks).

<sup>12</sup> Abortion Act 1967: “(a)that the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family; or

(b)that the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or

(c)that the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or

(d)that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.” <http://www.legislation.gov.uk/ukpga/1967/87/contents>

<sup>13</sup> Code de la santé publique, article L-2213-1, § 1 “Voluntary termination of pregnancy may, at any time, be performed if two doctors of a multidisciplinary team attest, after the advisory opinion of the team, that the continuation of the pregnancy may endanger the health of the woman or that there is a strong probability that the unborn child suffers from an ailment of particular gravity recognized as incurable at diagnosis.” (free translation)

<sup>14</sup> Legge 22 maggio 1978, n. 194, in *materia di Norme per la tutela sociale della maternità e sull'interruzione volontaria della gravidanza*, article 6 : « The voluntary termination of pregnancy after the first ninety days can be practiced: “a) when the pregnancy or childbirth constitutes a serious danger to the woman's life; b) when pathological processes are established, including those related to relevant anomalies or malformations of the foetus, which constitute a serious danger to the physical or mental health of the woman.” (free translation)

<sup>15</sup> B. Guidicelli, « Les interruptions de grossesse après 23 semaines », *Réalités en Gynécologie-Obstétrique*, Performances médicales, n°167, January-February 2013 ; Comité Consultatif National d’Ethique pour les Sciences de la Vie et de la Santé, Avis n°107, *Avis sur les problèmes éthiques liés aux diagnostics anténatals : le diagnostic prénatal (DPN) et le diagnostic préimplantatoire (DPI)*, 15 Octobre 2009, pages 12 and 13.

<sup>16</sup> Laurence Henry, « On ne peut imposer ça à personne », Collection Carte Blanche, Salvator, 2013, p. 97.

because of spina bifida, including 5 after 24 weeks; and 544 abortions because of Down syndrome, including 3 after 24 weeks<sup>17</sup>.

## **B. Some European figures**

In 2013 in Finland, 10,120 abortions<sup>18</sup> took place, including 195 between 18 and 22 weeks. In 2012, out of the 10,178 abortions, 213 were performed between 18 and 22 weeks<sup>19</sup>.

In 2012 in Sweden, there were 37,366 abortions. Of these, 2,551 were performed after 12 weeks gestation<sup>20</sup>. Provisional statistics for 2014 show 447 abortions after 18 weeks, out of 36,629, or 1.2% of abortions (in the mid-1990s, there were 0.5% of abortions after 18 weeks)

In Sweden, abortion is possible after 18 weeks with the authorisation of the *Socialstyrelsen*, in principle under the condition that the child is not viable. In 2014, out of 578 requests, 548 were accepted: all those concerning the physical (3) or mental (13) health of the mother, all those concerning a malformation or chromosomal anomaly (336) and most (86.7%) of the 226 requests because of social problems (196 requests accepted on this ground)<sup>21</sup>.

In 2014 in Norway, 408 abortions were performed between 13 and 18 weeks, 124 between 19 and 21 weeks and 11 after 22 weeks<sup>22</sup>. In January 2014, Norway reinforced its law to prohibit all abortions after 22 weeks.

In Denmark in 2012, 15,608 abortions were performed.<sup>23</sup> Of these, 738 were performed during the second trimester until 27 weeks of gestation. In 2013, there were 680 abortions performed during the second trimester. Of these, 47 were because of the state of health of the mother, 392 because of a foetus anomaly and 235 for a social cause<sup>24</sup>.

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<sup>17</sup> Department of Health, “*Abortion Statistics, England and Wales: 2012*”, National Statistics, April 2014. On: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/307650/Abortion\\_statistics\\_England\\_and\\_Wales.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/307650/Abortion_statistics_England_and_Wales.pdf).

<sup>18</sup> Official Statistics on Finland, 16 October 2014, Raskaudenkeskeytykset 2013 (Induced abortions 2013), [http://www.julkari.fi/bitstream/handle/10024/116832/Tr25\\_14.pdf?sequence=1](http://www.julkari.fi/bitstream/handle/10024/116832/Tr25_14.pdf?sequence=1).

<sup>19</sup> *Induced Abortions*, NATIONAL INSTITUTE FOR HEALTH AND WELFARE, Database report: Induced abortions, in the whole country <https://www.thl.fi/en/web/thlfi-en/statistics/statistics-by-topic/sexual-and-reproductive-health/abortions/induced-abortion>.

<sup>20</sup> Statistics on abortions in Sweden in 2012, corrected May 2014, Socialstyrelsen, Abortstatistik 2014 p. 22, <http://www.socialstyrelsen.se/Lists/Artikelkatalog/Attachments/19915/2015-9-4.pdf>

<sup>21</sup> *Id.* p. 14.

<sup>22</sup> Folkehelseinstituttet, Norvège, March 2015 “*Rapport om svangerskapsavbrot for 2014*” (Report on abortion in 2014), <http://www.fhi.no/dokumenter/c8d6191ba2.pdf>.

<sup>23</sup> Statistics Denmark, *Abortion by age*, 15 June 2015, [www.statbank.dk/ABORT](http://www.statbank.dk/ABORT)

<sup>24</sup> Øjvind Lidegaard, *Early Pregnancy and Abortion: Annual Report for the Year 2013*, LANDSDÆKKENDE KLINISK KVALITETSDATABASE [NATIONWIDE CLINICAL DATABASE]. [https://www.sundhed.dk/content/cms/67/4667\\_14-07-11-%C3%A5rsrapport-2013.pdf](https://www.sundhed.dk/content/cms/67/4667_14-07-11-%C3%A5rsrapport-2013.pdf) (November 7, 2014).



In the Netherlands, 30,577<sup>25</sup> abortions were performed in 2012, including 19% during the second trimester. Out of these 5,800 abortions, 2,352 were performed between 18 and 23 weeks<sup>26</sup>.

In Germany in 2012, there were 106,815 performed abortions. Of these, 2,476 after 12 weeks, including 443 were performed between 19 and 21 weeks of gestation. Additionally, 447 were performed as late abortions after 22 weeks of gestation. While the number of abortions is regularly decreasing over the years (from 134,609 in 2000 to 99,715 in 2014) the number of very late abortions has increased. In 2014, out of 2,780 abortions after 12 weeks, 495 were between 19 and 21 weeks and 584 after 22 weeks<sup>27</sup>. A German midwife was able to confirm to us that the official procedure is to euthanize a baby that is born alive.

In the United Kingdom, the Department of Health figures show<sup>28</sup> that 185.122 abortions were carried out in England and Wales in 2012, including 2860 at 20 weeks or more. 160 abortions were done after 24 weeks, including 38 between 28 and 31 weeks, and 28 after 32 weeks. 66 babies were thus aborted after 28 weeks, which was the viability limit defined by the WHO until 1975: an infant born at that gestational age can survive without medical help.

In France in 2010, there were 3,245 performed abortions after 15 weeks, but the statistics of the *INED* do not give more information.<sup>29</sup> Only 1,078 of them would enter the legal criteria of medical abortion, but the INED said those figures were due to computer problems. The following years, INED has taken into account only the abortions which entered the legal criteria of medical abortion, so that about 1,000 late abortions are counted then. Yet, according to several testimonies, some hospitals would not hesitate to perform abortions after 14 weeks, with no medical reason, especially on underage girls.

In Italy, while the total number of abortions decreases, the number of abortions after 12 weeks regularly increased from 0.9 % in 1990 to 3.4 % in 2010. That year, there were 115,372 abortions<sup>30</sup>. Of these, 900 were performed after the 21st week of gestation representing 0.8% of the country's abortions<sup>31</sup>.

In Spain in 2013, there were 108,690 performed abortions. Of these, 2.63 (2,858) between 17 and 20 weeks and 1.33% were performed at 21 weeks gestation or later totalling to 1145 late abortions. In 2012, there were 112,390 performed abortions. Of these abortions, 1.28% were performed at 21 weeks gestation or later totalling to 1,438 late abortions<sup>32</sup>.

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<sup>25</sup> 26,871 on women living in the Netherlands, the rest on foreigners coming to the Netherlands to abort, mainly French (1,352 in 2012) (Jaarrapportage 2012 van de Wet afbreking zwangerschap, December 2013, p. 37).

<sup>26</sup> IGZ, Dec. 2013, "Jaarrapportage 2012 van de wet afbreking zwangerschap," IGZ (Netherlands), <http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/rapporten/2013/12/06/jaarrapportage-2012-van-de-wet-afbreking-zwangerschap/jaarrapportage-2012-van-de-wet-afbreking-zwangerschap.pdf>, pp. 7, 24, 39

<sup>27</sup> Gesundheit, Schwangerschaftsabbrüche, 2011, Destatis, Statistisches Bundesamt, 2012. <https://www.gbe-bund.de/stichworte/SPAETABTREIBUNGEN.html>

<sup>28</sup> « Abortion Statistics, England and Wales: 2012 », Department of Health, April 2014. Available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/307650/Abortion\\_statistics\\_England\\_and\\_Wales.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/307650/Abortion_statistics_England_and_Wales.pdf)

<sup>29</sup> *Abortion following gestation time and medical motive*, INED, Tableau 23, France, 2010, updated 23 Jan 2013.

<sup>30</sup> W. Robert Johnston, *Abortion statistics and other data*: <http://www.johnstonsarchive.net/policy/abortion/ab-italy.html> (February 2008).

<sup>31</sup> Carlo Principe, *Boom degli aborti tardivi: triste segnale di una società sempre più eugenetica* (Boom of the late abortions: sad sign of a increasingly eugenic society), ROMA <http://www.marciaperlavita.it/articoli/boom-degli-aborti-tardivi-triste-segnale-di-una-societa-sempre-piu-eugenetica/>

<sup>32</sup> [http://www.msssi.gob.es/profesionales/saludPublica/prevPromocion/embarazo/tablas\\_figuras.htm#Tabla5](http://www.msssi.gob.es/profesionales/saludPublica/prevPromocion/embarazo/tablas_figuras.htm#Tabla5)



Russia has the highest rate of abortion in Europe, even though it is decreasing. It went from more than 54 abortions for 1,000 women aged 15 to 44 in 2000 to less than 30 for 1,000 women in 2012<sup>33</sup>, still far ahead of Rumania and Bulgaria (19 ‰)<sup>34</sup> the number of abortions (including spontaneous miscarriages) went from about 2 million in 2000 to 935,000 in 2012 according to the Ministry of Health (the figures of Rosstatt being slightly more) including 6,600 between 12 and 21 weeks gestation<sup>35</sup>. In 2012, after the application of the law of 21 November 2011 reducing to 12 weeks the legal time to abort<sup>36</sup>, abortions after 22 weeks are counted in premature birth. In 2011, there were 989,375 abortions<sup>37</sup>. Over 16,000 of these were performed as late abortions between 22 and 27 weeks gestation<sup>38</sup>.

## II. Children born alive during a late abortion.

Late term abortions are technically difficult to perform (at 20 weeks, the rate of complications is ten times higher than before 10 weeks according to the official statistics of the United Kingdom<sup>39</sup>). Thus, it can occur that viable babies who were supposed to be aborted are born alive. After 21 weeks, some of them are able to breathe unaided for a long period of time.

**Being born alive after an abortion is not exceptional.** This possibility is listed on the International Classification of Diseases published by the World Health Organisation; Chapter XVI entitled '*Certain conditions originating in the prenatal period*'; section P96-4, '*Termination of pregnancy affecting fetus and newborn*<sup>40</sup>'.

When a pregnancy has reached its 16<sup>th</sup> week, the usual termination method employed is birth induction. In most cases the heart of the baby stops during labour and it is born dead. However, some babies survive this procedure, and the number of surviving babies increases as the pregnancy advances. Children are often born alive between the 22<sup>nd</sup> and the 24<sup>th</sup> weeks. Knowing this, physicians often inject foeticide directly into the body of the baby without any anaesthetic. An injection can also be given during delivery when the child is partially born. This

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<sup>33</sup> Boris Denisov & Viktoria Sakevich, *АБОРТЫ В ПОСТСОВЕТСКОЙ РОССИИ: ЕСТЬ ЛИ ОСНОВАНИЯ ДЛЯ ОПТИМИЗМА* [Abortion in Post-Soviet Russia: Are there any Grounds for Optimism?] p. 146 [www.hse.ru/data/2014/07/15/1312456972/5\\_Денисов\\_Сакевич\\_Аборты%20в%20России.pdf](http://www.hse.ru/data/2014/07/15/1312456972/5_Денисов_Сакевич_Аборты%20в%20России.pdf).

<sup>34</sup> IGZ, Dec. 2013, "Jaarrapportage 2012 van de wet afbreking zwangerschap," IGZ (Netherlands), <http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/rapporten/2013/12/06/jaarrapportage-2012-van-de-wet-afbreking-zwangerschap/jaarrapportage-2012-van-de-wet-afbreking-zwangerschap.pdf>

<sup>35</sup> Boris Denisov & Viktor Sakevich, *op. cit.* p.154.

<sup>36</sup> Federal law, Russian Federation "On the basis of the health of citizens of the Russian Federation," No. 323-FZ, adopted by the State Duma on 1<sup>st</sup> November 2011, approved by the Federation Council on 9 November 2011 and ratified by President Dmitry Medvedev 21 November, 2011.

<sup>37</sup> Единая межведомственная информационно-статистическая система, [United Interagency Information-Statistical System: The Number of Abortions, Federation of Russia], available at <http://www.fedstat.ru/indicator/data.do?id=41696>

<sup>38</sup> Boris Denisov & Viktor Sakevich, *АБОРТЫ В ПОСТСОВЕТСКОЙ РОССИИ: ЕСТЬ ЛИ ОСНОВАНИЯ ДЛЯ ОПТИМИЗМА* [Abortion in Post-Soviet Russia: Are there any Grounds for Optimism?] 154 available at [www.hse.ru/data/2014/07/15/1312456972/5\\_Денисов\\_Сакевич\\_Аборты%20в%20России.pdf](http://www.hse.ru/data/2014/07/15/1312456972/5_Денисов_Сакевич_Аборты%20в%20России.pdf) (2014).

<sup>39</sup> Department of Health, "Abortion Statistics, England and Wales: 2011", National Statistics, May 2012, p. 22, chart 8.

<sup>40</sup> <http://apps.who.int/classifications/icd10/browse/2015/en#P90-P96> Canadian statistics follow these categories.

act is technically difficult, and can, consequently, have a high failure rate.<sup>41</sup> Therefore, the child is born alive.

### A. Figures on live birth during abortions

This problem occurs in all countries allowing late term abortions on demand or for medical reasons.

For example, at least 622 children were born alive in **Canada** after failed abortions between 2000 and 2011.<sup>42</sup> In the **United States**, 362 children were born alive between 2001 and 2010<sup>43</sup>. The Government passed the *Born-Alive Infants Protection Act*<sup>44</sup> in 2002 to protect these children. In **Norway**, from 2001 to 2009, five babies had been aborted after the 22-week limit; between 2010 and 2011, 12 late abortions were carried out. The hearts of some of the aborted children continued to beat for almost 45 to 90 minutes<sup>45</sup>. Following this, Norway prohibited all abortions after 22 weeks in January 2014<sup>46</sup>. In 2010 in **Italy**, a baby, who was aborted at 22 weeks because of a cleft palate, was discovered alive 20 hours after birth and continued to survive for one more day. A similar case had already happened in 2007 when a baby had survived almost 3 days to his abortion<sup>47</sup>. In the **Netherlands** the situation is even worse: after 24 weeks, in cases of serious malformation, not only is abortion possible but so is infanticide<sup>48</sup>. In Denmark, a study conducted in the University Hospital of Skejby between August 2011 and November 2012 showed that of the 877 fetuses aborted after the 12<sup>th</sup> week since 2010, 140 would have shown signs of life<sup>49</sup>. The Statistics from Denmark's second largest maternity clinic at the Aarhus University Hospital Skejby show that out of 70 late terminations between August 2011 and November 2012, 11 – or 16 per cent – showed signs of life.<sup>50</sup> Yet abortion after 12 weeks is only possible with a special authorisation, supposed to be given only when the child is not viable or for a serious reason concerning the mother. The majority of these countries do not give any information on these events. It is very difficult to obtain precise data because these States rarely acknowledge this situation let alone provide information.

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<sup>41</sup> According to a study, the success rate is 87%, in other words there is a 13% failure rate: Nucatola D, Roth N, Gatter M. [A randomized pilot study on the effectiveness and side-effect profiles of two doses of digoxin as fetocide when administered intraamniotically or intrafetally prior to second-trimester surgical abortion.](#)

<sup>42</sup> “Termination of pregnancy, affecting foetus and new-born” [P96.4]: <http://www5.statcan.gc.ca/cansim/a26>

<sup>43</sup> <http://aclj.org/planned-parenthood/362-infants-born-alive-result-botched-abortions-died-decade>.

<sup>44</sup> 107th Congress, “Born-Alive Infants Protection Act”, Pub.L. 107–207, 116 Stat. 926, adopted 5 August 2002.

<sup>45</sup> <http://www.newsenglish.no/2014/01/02/total-ban-on-late-term-abortions/> The side P96-4 is an issue of the International Statistical Classification of Diseases and Related Health Problems published by WHO.

<sup>46</sup> “Norway tightens law after late abortions revealed”, *The Local*, 2 January 2014. On: <http://www.thelocal.no/20140102/norway-to-tighten-law-after-late-abortions-revealed>

<sup>47</sup> Simon Cadwell, “Baby boy survives for nearly two days after abortion”, *The Telegraph*, 28 avril 2010 <http://www.telegraph.co.uk/news/worldnews/europe/italy/7646540/Baby-boy-survives-for-nearly-two-days-after-abortion.html> ; Simon Cadwell “Baby that survived botched abortion was rejected for cleft lip and palate” *The Telegraph*, 29 avril 2010, <http://www.telegraph.co.uk/news/worldnews/europe/italy/7652889/Baby-that-survived-botched-abortion-was-rejected-for-cleft-lip-and-palate.html>

<sup>48</sup> <http://leblogdejeannesmits.blogspot.fr/2014/07/pays-bas-vers-lajustement-des-regles-de.html> ; see A. Giubilini and F. Minerva, “After birth abortion: why should the baby live?” <http://jme.bmj.com/content/early/2012/03/01/medethics-2011-100411.full>

<sup>49</sup> Julian Isherwood, Dec 4, 2012, *Abortion: Every sixth fetus showed signs of life.* <http://politiken.dk/news/english/ECE1842893/abortion-every-sixth-fetus-showed-signs-of-life/> See footnote 50.

<sup>50</sup> Kirsten Andersen, Dec 18, 2012, *As many as 1 in 6 babies aborted after 12 weeks born alive: Danish study*, complete article: <https://www.lifesitenews.com/news/as-many-as-1-in-6-babies-aborted-after-12-weeks-born-alive-danish-study>

In **France**, children born before 22 weeks or during a medical termination of pregnancy have no birth certificate but only a record of a lifeless child, even if they were born alive. “*The record drawn up shall be without prejudice to knowing whether the child has lived or not*” according to Article 79-1 of the Civil Code. No information is given on the number of children born alive, how long they survive such procedures nor what is to be done with them. Even parents do not know, they may sometimes be given the child, who dies in their arms, but often the child is brought to another room. The parents, therefore, only see (if they wish) the child later, without having been able to be there with their child during those few moments, not knowing how the baby died. Numerous testimonies confirm that and show the distress of the parents in front of this uncertainty and the fact of having been deprived of the few moments of life of their child.

In the **United Kingdom**: In 2005, the *British Journal of Obstetrics and Gynaecology* published the conclusions of Dr. Shantala Vadeyar, a researcher at the St. Mary Hospital (Manchester), who states that children at 18 weeks have survived, for a certain time, outside the uterus after an abortion<sup>51</sup>. Dr. Vadeyar revealed that in the Northwest between 1996 and 2001, at least 31 children survived attempted abortions. In 2007, a study published in the *British Journal of Obstetrics and Gynaecology*<sup>52</sup> concluded that around one abortion out of 30 beyond 16 weeks of pregnancy results in the birth a living child. At 23 weeks, the level of children born reached 9.7%.

In the *Confidential Enquiry into Maternal and Child Health (CEMACH) 2007 “Perinatal Mortality,”* releasing data from hospitals in England and Wales in 2005, it was revealed that: “*Sixty-six of the 2235 neonatal deaths notified in England and Wales followed legal termination (predominantly on account of congenital anomalies) of the pregnancy i.e., born showing signs of life and dying during the neonatal period. Sixteen were born at 22 weeks’ gestation or later and death occurred between 1 and 270 minutes after birth (median: 66 minutes). The remaining 50 fetuses were born before 22 weeks’ gestation and death occurred between 0 and 615 minutes after birth (median: 55 minutes)*”<sup>53</sup>. In other words, one of these new-borns breathed without assistance for more than ten hours.

The director of the CEMACH Richard Congdon stated that the lethal injection had not been given in the 16 cases when the abortion took place after 22 weeks of pregnancy because death was “inevitable”<sup>54</sup>. Therefore, they were left to die<sup>55</sup>.

In 2004, delegates to the *British Medical Association’s* annual conference in Llandudno voted 65% in favour of a motion that said children born alive after an attempted abortion should be given the same care and treatment as other infants<sup>56</sup>.

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<sup>51</sup> Shantala Vadeyar, Tracey A. Johnston, Mary Sidebotham and Jean Sands “Neonatal death following termination of pregnancy”, BJOG, Volume 112, Issue 8, August 2005, Pages: 1159–1162, <http://onlinelibrary.wiley.com/doi/10.1111/j.1471-0528.2005.00648.x/full>.

<sup>52</sup> MP Wyldes\* and AM Tonks, “Short communication: Termination of pregnancy for fetal anomaly: a population-based study 1995 to 2004”, BJOG, Volume 114, Issue 5, pages 639–642, May 2007 <http://onlinelibrary.wiley.com/doi/10.1111/j.1471-0528.2007.01279.x/full>.

<sup>53</sup> <http://www.hqip.org.uk/assets/NCAPOP-Library/CMACE-Reports/41.-April-2007-Perinatal-Mortality-2005.pdf>

<sup>54</sup> <http://www.dailymail.co.uk/health/article-512129/66-babies-year-left-die-NHS-abortions-wrong.html>

<sup>55</sup> Because of the scandal made by the publication of these information, the United Kingdom changed its methods so that no mention of neonatal death following an abortion appeared. Now children born alive during an abortion are not mentioned anymore. All statistics are given “except declared abortions.”

<sup>56</sup> <http://www.lifesitenews.com/news/66-british-babies-survived-abortion-all-were-left-to-die-without-medical-ai>

The *Royal College of Obstetricians and Gynaecologists* published new recommendations in May 2010. According to them: *“Live birth becomes increasingly common after 22 weeks of gestation and, when a decision has been reached to terminate the pregnancy for a foetal abnormality after 21+6 weeks, feticide should be routinely offered. (...) Where the foetal abnormality is not lethal and termination of pregnancy is being undertaken after 21+6 weeks of gestation, failure to perform feticide could result in live birth and survival, an outcome that contradicts the intention of the abortion. In such situations, the child should receive the neonatal support and intensive care that is in the child’s best interest and its condition managed within published guidance for neonatal practice. A foetus born alive with abnormalities incompatible with life should be managed to maintain comfort and dignity during terminal care<sup>57</sup>”*.

However, these are only recommendations. Resuscitation depends largely on the wishes of the parents, and it is evident that, in the case of a botched abortion, the parents would not want their baby to receive intensive care. Additionally, oversight of their treatment is very difficult because there are not many reported statistics.

## **B. The Fate of Children Born Alive During Abortions**

The main question arising when children are born alive during an abortion is the following: what happens to these children?

According to a study<sup>58</sup>, 73% of French neonatologists would declare having administrated drugs to new-borns with the intention to kill the babies. For the same question, the result would be 47% in the Netherlands, 4% in Germany and in the United-Kingdom and 2% in Spain, Sweden and Italy.

There are very few statistics on these facts which are often kept confidential. To check their veracity and be able to better know the truth, the *European Centre for Law and Justice*, NGO which is at the root of the petition addressed to the Council of Europe, has gathered several testimonies, especially in France, from midwives and medical doctors. They may confirm their testimonies to the PACE and give further details, should they be asked to. (The names and places have been removed, as asked by the witnesses.<sup>59</sup>

A Student Midwife in 3<sup>rd</sup> Year, revealed:

*“It happened in 2015, in the hospital delivery room. One patient was present, she was 22 weeks +3 days amenorrhea and was there for a late miscarriage.*

*The child was born alive, and to prevent it from crying, the doctor quickly covered his face. He was then taken into a side room (baby resuscitation room) where I could join him. I was able to find that there was no apparent defect, he struggled to breathe, and he had some slight gestures. He was fully formed, had eyelashes, hair, nails ... (He had even slightly long nails!) He*

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<sup>57</sup> Termination of pregnancy for fetal abnormality, Chapter 8, p. 31:

<https://www.rcog.org.uk/globalassets/documents/guidelines/terminationpregnancyreport18may2010.pdf>

<sup>58</sup> EURONIC group (2000), “End-of-life decisions in neonatal intensive care: physicians' self-reported practices in seven European countries”, *The Lancet*, Vol. 355 (9221): 2112 - 2118.

<sup>59</sup> On file with author.

*weighed 565g and was about 27cm. The doctor came in and asked me if he was still breathing, or else we would make an injection for that "to be resolved." Five minutes later he came back and grabbed a syringe of KCl (lethal injection for this premature baby). Somewhat bewildered, I asked him if we cannot do something "more natural", but he answers my question by sweeping he prefers not to let the child suffer. He then pierced the baby in the heart, and injected the product. The child, during the injection, moved all its members. I do not know what that meant, but perhaps he suffered. The little boy lived just a quarter of an hour.*

*The medical team told the parents of the child that he was stillborn. This is why we did not want him to cry at birth: it would be too traumatic for them."*

Another midwife testifies:

*"A midwife for almost 9 years, I can testify that babies born from late abortions (case of abortion on medical grounds) without feticide, usually between 20 and 24 weeks gestation, may be born alive. The medical team is then often uncomfortable and either puts the baby in a tray in a separate room until he stops showing signs of life, or asks a gynaecologist, anaesthetist or paediatrician for a morphine injection in the cord that some accept ... or not.*

*For my part, I have already proposed to concerned couples that if the baby was alive at birth, to lay him on the woman's stomach for him to die with dignity. Two couples agreed."*

A doctor said:

*"In a multidisciplinary meeting in "video-conference" between the main Hospital and different obstetrical services of peripheral hospitals, I saw the geneticist of the Hospital make very sharp and scathing reproaches to an obstetrician in a peripheral hospital. The latter had not been able to obtain histological diagnosis on the brain of a foetus after an abortion on medical grounds in the 3rd trimester because the expulsion was too long and the brain tissue was not histologically interpretable. The geneticist had entered a kind of fury, asking how often he should say that we should not commit feticides in utero, but to kill the baby after it was born (those are of course not the words that were used, but I do not remember the euphemism).*

The use of aborted children and the modulation of abortion methods depending on the needs of laboratories were recently confirmed in the United States through the scandal of foetus sold to laboratories searching on foetal tissues<sup>60</sup>.

The doctor added:

*"At the end of my internship of three months, during the validation, I was invited by the clinician who looked after me to give my impressions about the internship. I then said that despite all the wonderful things that can be seen*

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<sup>60</sup> <http://edition.cnn.com/2015/07/15/health/planned-parenthood-undercover-video/>; vidéos disponibles sur <http://www.centerformedicalprogress.org/cmp/investigative-footage/>.



*in a maternity hospital, I was shocked by some things I had seen, especially feticide. She then told me that it was true that it was sometimes difficult. And I again see this young woman gaze into space, saying: "It is true that sometimes it's like a little murder among friends"<sup>61</sup> (these are the words that she said). She then tells me of a case where the baby had time to scream before being hastily brought into the next room. These cases are not uncommon, and are dramatic because the mother hears her child, and the moment she realizes that he is alive, the child is being killed. But in the case told by the head of my clinic, what made her uncomfortable is that three doctors (an anaesthesiologist, an obstetrician and a paediatrician) took an hour to kill a new-born. Because as it was alive, the child struggled vigorously and they could not give him the lethal injection."*

Another doctor testifies something that he was a direct witness of, in the north of France in 1999, during his anaesthetist's internship:

*"The midwife told me how quickly the gynaecologist had ended the life of the child in the womb, making an ultrasound location and injecting the product to make the child's heart stop beating. Then the vaginal delivery was induced. By the time the child came out, the midwife was alone. When the child was completely out, he cried; he was alive. The midwife told how she was seized and choked the child's cries with her hand and hurried out so the parents would not hear their child. She walked to the neonatal intensive care unit. It was at that precise moment she called me on the guard telephone and I could not answer. The anaesthetist said in turn that he was called by the midwife in the neonatal resuscitation room.*

*The midwife had to go back to the woman who had just given birth and the anaesthetist was alone with the child. He did not resuscitate the child, and after several manoeuvres, they killed the child.*

*Barely an hour or two later, another young woman came for threatened pre-term labour at six months of pregnancy. Quickly, she gave birth. Her child was taken immediately into the neonatal resuscitation room. It was a difficult resuscitation; paediatricians soon arrived to help us because things were not going the way we wanted. After a long resuscitation, the child was stabilized and he went to the neonatal intensive care unit.*

*I realized then that this child we had to resuscitate was the same age as the other child, a few hours before, who had not had the right to live."*

Other testimonies explain that the child was suffocated:

*"I have been a physician for 8 years. Here are two testimonies dating back to my studies: the first when I was a student, the second during my internship.*

*At the guard in the delivery room, a woman was in labour as part of an abortion on medical grounds at 5 months pregnant. The birth was imminent, and the gynaecology interns were prepared. The senior gynaecologist of the*

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<sup>61</sup> in French "Petits meurtres entre amis", which is the French title of the movie *Shallow Grave*.

*guard who is about to return to her bed, approaches the interns and said in a low voice, but loud enough for me to hear: “If the child is breathing on arrival, you press hard here on the trachea until it completely stops breathing,” and turning to me: “And you, you did not hear anything.”*

*A new night in the guard, but this time in paediatrics. I am interning in paediatric emergencies. The senior paediatrician of the guard called me and asked me to join him in the neonatal resuscitation room juxtaposed to delivery rooms. A child who has just been born is intubated and ventilated. The child presented multi-system organ failure and the morphotype of a child carrying Down’s syndrome (none of these signs had been detected during prenatal ultrasounds). My boss asked me to tell him what I think of the features of this baby. After my answer, he asked the present anaesthesiologist if any of the mother’s epidural product remained, which was the case. He took it and then injected the child, who died in a minute or two alone. As the child lay dying, the two doctors were talking, without any discomfort and with no regard for this baby. As for the parents, they were informed about the health status of their child after his death!”*

According to testimonies, new-borns would have been put with organic waste despite signs of life. In some countries, hospital organic waste are burnt as fuel to heat the hospital. British newspaper revealed in 2014 that the bodies of thousands of foetuses had been burnt to heat hospitals (at least 15,500 in two years)<sup>62</sup>.

These children can also be simply abandoned to death, in a basin left aside until they show no more sign of life. It happened in 2010 to a baby with a cleft lip who was born in Italy at 22 weeks, and who was found still alive more than twenty hours after birth<sup>63</sup>. In Sweden, according to a paediatrician, a baby girl who was aborted at 22 weeks (that is to say illegally) in March 2014, the midwives were ordered not to call the paediatrician on duty, so that the child received neither care nor treatment against pain, whereas she should have.

This also happens in France: “I am a midwife student in my last year, and saw, during an internship in a maternity department of the North of France, a child born alive from an abortion on medical grounds. He was 24 weeks of gestation and the midwife left the child struggling to breathe, by leaving the baby alone on the resuscitation table.”

These children fight to breathe and die alone, from exhaustion, hunger and cold.

*“I want to testify to infanticide, not that we have actually killed a new-born of 28 weeks but worse: we have not had the humanity to come to his aid.*

*It was in a maternity of Paris suburbs (South) in 1987. I was an aesthetic nurse at the time and I intervened in monitoring the epidural composed by*

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<sup>62</sup> Reissa Su, “Thousands of Dead Fetuses Burned Without Parents’ Permission to Heat British Hospitals”, *International Business Times*, 24 March 2014. <http://au.ibtimes.com/thousands-dead-fetuses-burned-without-parents-permission-heat-british-hospitals-1335740#.UzK4CKh5Ogy>

<sup>63</sup> Simon Caldwell, “Baby boy survives for nearly two days after abortion”, *The Telegraph*, 28 April 2010, <http://www.telegraph.co.uk/news/worldnews/europe/italy/7646540/Baby-boy-survives-for-nearly-two-days-after-abortion.html>



*the Anaesthetist. Medicine thought to be born from HIV positive mothers necessarily implied that the child would be contaminated (We now know that the child can “negate” a few months after and not be suffering from AIDS).*

*The young mother was an HIV positive drug addict who discovered her pregnancy late. Gynaecologists convinced her to abort but the baby was born alive.*

*Midwives simply put it in an empty box, naked in a stainless steel tub, cold, without any care.*

*His mother was conscious during labour and delivery of the baby; she was crying and wanted to see her little one but the doctors decided that this child should die. They did not give the child to the mother to spare her. This baby was viable, he was breathing on his own and cried vigorously. I honestly think it was just left to die of cold ... it was horrible...! We were harnessed in our gloves, overshirts, headwear, masks, “overshoes” because we were afraid of getting AIDS, and the baby, naked, abandoned by all, and so vulnerable. He took a long time to stop whining.”*

Controlling this situation is impossible because of the taboo surrounding these children since the majority of information originates from news items and witness testimonies. In most cases, the medical staff hides to the parents the fact that the child was born alive, in order to preserve them. Yes testimonies of specialists in palliative neonatal care show that informing parents and giving them the possibility to accompany their child can highly help them get over this ordeal. Moreover, these palliative neonatal care can also reduce the sufferings of the child. Failing that, these new-borns are killed or left to die, even though in another room, doctors try to save premature babies of the same gestational age. These situations are significantly traumatising for medical staff.

### **III. Abortion Methods and Foetal Suffering**

In France, the child or the foetus is usually killed by lethal injection in the heart or in the umbilical cord, and then the birth is induced. Sometimes this injection is badly done or does not produce its effect and the child is born alive<sup>64</sup>. The most often used method of late abortion in certain countries is called the method of “dilatation-evacuation”. In England and Wales the method of “dilatation-evacuation” is used in 76% of abortions between 15 and 19 weeks and 44% after 20 weeks<sup>65</sup>. It is frequently used in Canada and in the Netherlands.

First, the cervix is dilated, then the “content of the uterus” or the “product of conception” (depending on the euphemism in use) is pulled out with a clamp. In the end, the pieces are examined to make sure everything has been removed. This means that the body of the foetus is

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<sup>64</sup> B. Guidicelli, « Les interruptions de grossesse après 23 semaines », *Réalités en Gynécologie-Obstétrique*, Performances médicales, n° 167, January-February 2013 ; see also the testimonies collected by the ECLJ in : « L'avortements tardifs et les infanticides néonataux en Europe », June 2015, pages 13-20.

<sup>65</sup> Department of Health, Abortions Statistics, England and Wales: 2013, Table 7a p. 25, published June 2014.

gathered like a puzzle, because in many cases it has been dismembered during the operation. If there was no feticide injection first, or if the injection did not cause death<sup>66</sup>, the foetus was alive while its members were being torn off one after the other. This frightfully cruel method is inhumane and constitutes torture.

### **A. Medical Evidence of Foetal Suffering.**

There has been a long-standing position taken by many in the medical community that infants are not capable of experiencing pain during invasive procedures, such as abortions, until 29 to 30 weeks of development<sup>67</sup>. Therefore, medical staff have traditionally performed abortions on infants as late as 20 weeks with little to no regard for the potential suffering or pain inflicted on the infant, despite studies showing that foetuses and new-borns could feel pain as well if not more acutely than adults<sup>68</sup>. However, since 2007, there has been substantial medical research performed that has changed the way in which the medical community should view the ability of an unborn child of 20 weeks or younger to experience pain<sup>69</sup>.

Those that argue that the foetus is incapable of feeling pain before 29 to 30 weeks of development base their argument on 3 factors: (1) the requirement of a functioning cortex, or connections from the periphery to the cortex, in order to experience pain. This functioning of the cortex is argued to not occur until 23 to 24 weeks. (2) The behavioural reactions of premature infants to pain can be stimulated without pain and therefore is not evidence of the infant experiencing pain and (3) no evidence that premature infants can remember and interpret pain like an adult<sup>70</sup>.

There have been several studies conducted that directly contradict these assertions, one of the most prominent was conducted by Dr. K.J.S. Anand who is one of the key experts asked to testify in front of the House of Representatives Committee on the Judiciary in relation to the Pain-Capable Unborn Child Protection Act in 2005<sup>71</sup>. Dr. Anand found that *“The neural pathways for pain may be traced from sensory receptors in the skin to sensory areas in the cerebral cortex of new-born infants. The density of nociceptive nerve endings in the skin of new-borns is similar to or greater than that in adult skin. Cutaneous sensory receptors appear in*

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<sup>66</sup> According to a study, the injection induced fetal death in 87%. This means that 13 % survived. Nucatola D, Roth N, Gatter M. [A randomized pilot study on the effectiveness and side-effect profiles of two doses of digoxin as fetocide when administered intraamniotically or intrafetally prior to second-trimester surgical abortion.](#)

<sup>67</sup> Lee SJ, Ralston HJP, Drey EA, Partridge, JC, Rosen, MA, A Systematic Multidisciplinary Review of the Evidence, 294 JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION 8, 947-954 (2005).

<sup>68</sup> Anand and Hickey, “Pain And Its Effects In The Human Neonate And Fetus” *The New England Journal Of Medicine*, Volume 317, Number 21: Pages 1321-1329, 19 November 1987. Available at <http://www.cirp.org/library/pain/anand/>

<sup>69</sup> *Pain of the Unborn: Hearing before the Subcomm. on the Constitution, Comm. on the Judiciary House of Rep.*, 109<sup>th</sup> Cong., 1<sup>st</sup> Session, No. 109-57, 15 (Nov. 1, 2005); Pain-capable Unborn Child Protection Act, H.R. 36, 114<sup>th</sup> Cong., 1<sup>st</sup> Session, §2 (6) (May 14, 2015).

<sup>70</sup> Lee SJ, Ralston HJP, Drey EA, Partridge, JC, Rosen, MA, A Systematic Multidisciplinary Review of the Evidence, 294 JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION 8, 947-954 (2005); *Fetal Awareness: Review of Research and Recommendations for Practice, Report of a Working Party, ROYAL COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS*, (March 2010).

<sup>71</sup> Other prominent doctors with years of experience with new-borns testified to the evidence that new-borns 20 weeks or younger are capable of experiencing pain including: Dr. Jean Wright (Mercer University Pediatrics) and Dr. Arthur Caplan (Center for bioethics, Chair of the Department of Medical Ethics-University of Pennsylvania). *Pain of the Unborn: Hearing before the Subcomm. on the Constitution, Comm. on the Judiciary House of Rep.*, 109<sup>th</sup> Cong., 1<sup>st</sup> Session, No. 109-57, 15 (Nov. 1, 2005).

*the perioral area of the human foetus in the 7th week of gestation; they spread to the rest of the face, the palms of the hands, and the soles of the feet by the 11th week, to the trunk and proximal parts of the arms and legs by the 15th week, and to all cutaneous and mucous surfaces by the 20th week. The spread of cutaneous receptors is preceded by the development of synapses between sensory fibres and interneurons in the dorsal horn of the spinal cord, which first appear during the sixth week of gestation. Recent studies using electron microscopy and immunocytochemical methods show that the development of various types of cells in the dorsal horn (along with their laminar arrangement, synaptic interconnections, and specific neurotransmitter vesicles) begins before 13 to 14 weeks of gestation and is completed by 30 weeks.*"<sup>72</sup>

Other scientific studies also show that the foetus is responsive to touch by 8 weeks, and he feels suffering by the 14<sup>th</sup> week. At 20 weeks it has the *"physical structures necessary to experience pain"*<sup>73</sup>. Researchers *'have observed that the foetus reacts to intrahepatic vein needling with vigorous body and breathing movements, which are not present during placental cord insertion needling'*<sup>74</sup>.

In the U.S., the medical community now adopted the prevailing view<sup>75</sup> that *"...current knowledge suggests that humane considerations should apply as forcefully to the care of neonates and young nonverbal infants as they do to children and adults in similar painful stressful situations."*<sup>76</sup> U.S. doctors also show recognition of the premature infant's ability to experience pain by commonly administering anaesthesia before performing surgery on infants in the womb<sup>77</sup>.

Others refuse these conclusions. The *Royal College of Obstetricians and Gynaecologists* keep asserting that the foetus does not feel pain and concludes that analgesia is not necessary at least up to 24 weeks. It asserts that until birth the foetus is kept in a state of unconsciousness or sedation<sup>78</sup>.

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<sup>72</sup> K.J.S. ANAND, M.B.B.S., D.PHIL., AND P.R. HICKEY, M.D, Pain and its Effects in the Human Neonate and Fetus, *The New England Journal of Medicine*, Volume 317, Number 21, 19 November 1987, pages 1321-1329.

<sup>73</sup> Glover V. "The fetus may feel pain from 20 weeks"; in *The Fetal Pain Controversy*, *Conscience*. 25:3 (2004) 35-37.

<sup>74</sup> In addition, Dr. Anand found that the lack of myelination used as a pretext for the lack of maturity in the neonatal nervous system only implies a slower conduction velocity rather than the total inability to feel pain. Furthermore, that slower connection is offset by the shorter distance the pain impulse must travel in the body of the infant. Not only are there biological indicators that pain can and is experienced by premature infants before 20 weeks, but also other factors such as: the presence of substance P used in the transmission and control of pain impulses in the spinal cord at 12 to 16 weeks of development, cardio respiratory changes in heart rate and blood pressure in response to painful stimuli, hormonal and metabolic changes in reaction to stress, and motor responses such as moving limbs, crying, grimacing, etc. Anand KJS & Hickey PR, *Pain and its Effects in the Human Neonate and Fetus*, 317 NEW ENGL. J. MED. 21, 1321-1329 (1987); see also Vivette Glover & Nicholas M. Fisk, *Fetal Pain: Implications for Research and Practice*, 106 BRIT. J. OBSTETRICS & GYNAECOLOGY 881 (1999).

<sup>75</sup> Note, *The Science, Law, and Politics of Fetal Pain Legislation*, 115 HARV. L. REV. 2011 (2002).

<sup>76</sup> Anand KJS & Hickey PR, *Pain and its Effects in the Human Neonate and Fetus*, 317 NEW ENGL. J. MED. 21, 1329 (1987).

<sup>77</sup> *Complex Science at Issue in Politics of Fetal Pain*, Pam Belluck, NEW YORK TIMES, 16 Sept. 2013. [http://www.nytimes.com/2013/09/17/health/complex-science-at-issue-in-politics-of-fetal-pain.html?\\_r=0](http://www.nytimes.com/2013/09/17/health/complex-science-at-issue-in-politics-of-fetal-pain.html?_r=0)

<sup>78</sup> RCOG, *Fetal Awareness 2010*, <https://www.rcog.org.uk/globalassets/documents/guidelines/rcogfetalawarenesswpr0610.pdf>

## B. Animal Foetuses Better Protected Than Humans

European law protects better animals than human beings. [Directive 2010/63/EU](#) of the European Parliament and of the Council of the European Union<sup>79</sup> established the protection of animals used for experimental or scientific purposes due to the recognition by scientific research that animals can feel and experience pain and suffering (§). Therefore, because animals are considered to have “*intrinsic value which must be respected*,” (§), the European Union agreed that animals must be treated in a beneficial manner. Further, the directive also considered animals to be “*sentient*” creatures, including their foetus. The Directive is not applicable to human beings. However, it recognises that it is “*scientifically shown*” that the “*foetal forms of mammals*” (which comprises also the human beings) can “*experience pain, suffering and anguish*” even before the third term of the pregnancy<sup>80</sup>.

If scientific evidence shows that animals can experience pain in the womb, and that is recognized and protected in Europe, why should the same evidence not be considered in relation to the ability of a human to experience pain in the womb, which can harm further development?<sup>81</sup>

## C. Legislation in the United States

In response to this new awareness in the U.S. medical community, the U.S. House of Representatives Committee on the Judiciary held a hearing in which various medical experts presented evidence, both from research and from extensive field experience, that unborn infants younger than 20 weeks are able to feel pain during abortions<sup>82</sup>. The House of Representatives then passed the Pain-Capable Unborn Child Protection Act<sup>83</sup>, which recognizes that children can experience pain by no later than 20 weeks, and there is a compelling governmental interest in protecting the lives of unborn children who are capable of feeling pain. (§ 4) The Act also states that an abortion will not be performed or attempted if the child is age 20 weeks or greater (§ 6). Furthermore, if the child has the potential to survive outside the womb, or does survive the abortion, the physician is required to ensure that the child receives the same neonatal care as provided to other children (§ 8-9).

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<sup>79</sup> Council Common Position (EC) 2010/63 of 22 Sept. 2010, Art. 4, 6, 2010 O.J. (L 276) 33-79 [http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1434097733354&uri=CELEX:32010L0063#ntr3-L\\_2010276EN.01003301-E0003](http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1434097733354&uri=CELEX:32010L0063#ntr3-L_2010276EN.01003301-E0003)

<sup>80</sup> In its preamble para (9), it states: “*This Directive should also cover foetal forms of mammals, as there is scientific evidence showing that such forms in the last third of the period of their development are at an increased risk of experiencing pain, suffering and distress, which may also affect negatively their subsequent development. Scientific evidence also shows that procedures carried out on embryonic and foetal forms at an earlier stage of development could result in pain, suffering, distress or lasting harm, should the developmental forms be allowed to live beyond the first two thirds of their development.*”

<sup>81</sup> Some U.S. state statutes have used this comparison between sentient animals and human unborn children, as the U.S. also has laws that regulate the use of laboratory animals, methods of killing livestock, and laws regarding hunting methods. Glenn Cohen & Sadath Sayeed, *Fetal Pain, Abortion, Viability and the Constitution*, Harvard Law School, Public Law and Legal Theory (Harvard Law Working Paper Series, Paper No.11-26, 2011) available at <http://dash.harvard.edu/bitstream/handle/1/12025606/SSRN-id1805904.pdf?sequence=1>; Leg. Bill. 1103 § 3 (6) (Neb. Jan. 1, 2010) available at <[nebraskalegislature.gov/FloorDocs/101/PDF/Intro/LB1103.pdf](http://nebraskalegislature.gov/FloorDocs/101/PDF/Intro/LB1103.pdf)>.

<sup>82</sup> *Pain of the Unborn: Hearing before the Subcomm. on the Constitution, Comm. of the Judiciary, House of Rep.*, 109<sup>th</sup> Cong., 1<sup>st</sup> Session, No. 109-57, 15-39 (Nov. 1, 2005).

<sup>83</sup> Pain-Capable Unborn Child Protection Act, H.R. 36, 114<sup>th</sup> Cong., 1<sup>st</sup> Session, (passed May 13, 2015).

In the U.S., thirteen states have already adopted legislation modelled after the Pain-Capable Unborn Child Protection Act including: Alabama, Arizona, Arkansas, Georgia, Indiana, Kansas, Louisiana, Nebraska, North Carolina, North Dakota, Oklahoma, Texas, and West Virginia<sup>84</sup>. These states therefore currently prohibit abortions of children 20 weeks or older which “*medical evidence indicates...are capable of experiencing pain.*”<sup>85</sup> Other states such as New York and California, have also introduced similar bills in 2001<sup>86</sup>. A total of 43 states ban abortion after the foetus has reached a certain age<sup>87</sup>.

## Conclusion

Late abortion and neonatal infanticide do not only pose medical and ethical problems, but also legal problems.

The most elementary humanity demands all children born alive to be taken care of according to their needs, including palliative neonatal care if they cannot survive, the minimum being to cover them, surround them and treat them with the respect due to their dignity of human beings.

All children born alive, in their capacity as human beings, are entitled to human rights and must benefit from every protection of these rights, like any other person, as reminds paediatrician Michel Dehan: “the founding principle of our approach lays on the recognition of the new-born. Whatever his weight, his age, his aspect, he possesses the status of human being and that gives him, de facto, rights, especially the right to be taken care of”<sup>88</sup>. Questioning this principle jeopardises the very system of human rights protection. Leaving new-borns to die without care simply because they are handicapped or unwanted is inhuman; it is a violation of their dignity and of their most fundamental human rights.

Professor Israël Nisant, during his audition by the Parliamentary Committee on Revision of Bioethics law had asserted with no shame the current eugenics: “*Genteics today are good and the aim of the couples is only to have a healthy child. Both programs [the Nazi and ours] are eugenics, but on both extremities of the spectrum. Yes, we choose children who will live, in our country, even if you do not like it*”<sup>89</sup>.

Killing infants or leaving them to die alone in agony constitutes infanticide aggravated by torture. These practices clearly constitute blatant violations of universal human rights, notably the Convention on the Rights of the Child which declares that “*the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate*

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<sup>84</sup> *Constitutionality of West Virginia Bill “Protecting Unborn Children who are Capable of Experiencing Pain by Prohibiting Abortion after 20 Weeks,”* ALLIANCE DEFENDING FREEDOM, available at <http://www.adfmedia.org/files/HB4588letter.pdf> (March 18, 2014); *Pain Capable Unborn Child Protection Act Fact Sheet*, NATIONAL RIGHT TO LIFE, available at <http://www.nrlc.org/uploads/stateleg/PCUCPAfactsheet.pdf> (June 1, 2015).

<sup>85</sup> *The State of Abortion in the United States*, NATIONAL RIGHT TO LIFE, pg. 29 available at <http://www.nrlc.org/uploads/communications/stateofabortion2015.pdf> (January 2015).

<sup>86</sup> *Note: The Science, Law, and Politics of Fetal Pain Legislation*, 115 HARV. L. REV. 2019 (2002).

<sup>87</sup> Guttmacher Institute, *State Policies in Brief*, State Policies on Later Abortions, 1 October 2015, p. 2. [http://www.guttmacher.org/statecenter/spibs/spib\\_PLTA.pdf](http://www.guttmacher.org/statecenter/spibs/spib_PLTA.pdf)

<sup>88</sup> Michel Dehan, « Grands prématurés : enjeux éthiques de la décision en néonatalogie », *Lettre de l'Espace éthique* n°9-10-11, « Fin de vie et pratiques soignantes », 17 June 2003.

<sup>89</sup> Jean Leonetti, *Rapport de la mission d'information sur la révision des lois bioéthiques*, report n° 2235, tome 2, Assemblée nationale, 20 January 2010, p. 600.



*legal protection, before as well as after birth*” and by which the States agreed to respect and guarantee the rights of children “*without discrimination of any kind*” particularly “*birth*” (Article 2). The same Convention guarantees in Article 6 that “States Parties recognize that every child has the inherent right to life.” and “shall ensure to the maximum extent possible the survival and development of the child.” Moreover, in Article 24: “*States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.*”

Killing infants or leaving them to die without care is also a blatant violation of the European Convention on Human Rights, in particular their right to life (Article 2) and constitutes inhuman treatment (forbidden by Article 3 of the ECHR). Moreover, it is also discrimination in relation to the access to healthcare services<sup>90</sup> founded on the circumstances of their birth<sup>91</sup> (contrary to Article 14 of the ECHR). Additionally, according to the European Social Charter, children have the right to special protection against physical and moral hazards, social, legal and economic protection, and the right to benefit from any measures enabling them to enjoy the highest standard of health possible.

All premature children should have the same right to life and access to health services without discrimination. All care and medical aid possible must be offered, whatever the conditions of their birth. Even in the case where these infants cannot survive, they must be taken care of up until the moment of their death.

The decision of several Western States not to allow abortion after 22 weeks<sup>92</sup> is a progress in medical practice as well as in the protection of human rights. To this day, numerous States<sup>93</sup> in the United States as well as in Europe (notably Estonia, Finland, Germany<sup>94</sup>, Norway, Russia<sup>95</sup> and even Ukraine) take into account the threshold of viability and ban abortions after 22 weeks of amenorrhoea. These restrictions on abortion should be equally encouraged as they significantly improve the protection of human rights.

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<sup>90</sup> See in particular the Convention on the Rights of the Child 1989, Article 24: “*States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.*”

<sup>91</sup> Article 14 of the ECHR: “*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as (...) birth or other status.*”

<sup>92</sup> If the life of the mother is directly threatened, it may be necessary to terminate the pregnancy if this measure may save her life. It will then not be an abortion (whose aim is the death of the child) but a necessary measure to save her life, the consequence of which may be the loss of the child.

<sup>93</sup> 43 American States ban late abortion after the foetus depending on various criteria (number of weeks or viability limit ([http://www.guttmacher.org/statecenter/spibs/spib\\_PLTA.pdf](http://www.guttmacher.org/statecenter/spibs/spib_PLTA.pdf)))

<sup>94</sup> § 97 of the German Criminal Code provides for liability exemption for abortions performed after 3 months of gestation if the pregnancy poses an immediate danger to the life of the pregnant woman, or a substantial risk of serious harm to physical health or mental, or if the woman was not 14 yet when she became pregnant, or if there is a serious risk for the child to be born severely disabled (free translation).

<sup>95</sup> Federal law, Russian Federation “On the basis of the health of citizens of the Russian Federation”, No. 323-FZ, adopted by the State Duma on 1<sup>st</sup> November, 2011, article 56, § 4.