

No. 19-1392

**In The
Supreme Court of the United States**

**THOMAS E. DOBBS, M.D., M.P.H., STATE HEALTH
OFFICER OF THE MISSISSIPPI DEPARTMENT OF
HEALTH, *ET AL.*,**
Petitioners,

v.

JACKSON WOMEN'S HEALTH ORGANIZATION, *ET AL.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

**AMICUS BRIEF OF THE EUROPEAN
CENTRE FOR LAW AND JUSTICE
IN SUPPORT OF PETITIONERS**

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INTEREST OF AMICUS¹

The European Centre for Law and Justice (ECLJ) is an international, non-governmental organization based in Strasbourg (France) dedicated to the promotion and protection of Human Rights in Europe and worldwide. The ECLJ has held special Consultative Status before the United Nations/ECOSOC since 2007. The ECLJ has been authorized by the European Court of Human Rights (European Court) to intervene before it in several cases related to the protection of human life, before, as well as after, birth. The ECLJ has also recently intervened before the Inter American Court of Human Rights in the *Manuela and others v. El Salvador* case (No. 13.069), and took part in the revision of the Human Rights Committee's General Comments No. 36 on the right to life.

SUMMARY OF THE ARGUMENT

The purpose of this amicus brief is to offer this Court a precise description of the legal standing of abortion within the case law of the European Court, including the abortion legislation currently in force in the forty-seven Member States of the Council of

¹ Counsel of record for the parties have filed blanket consents for amicus briefs. No counsel for any party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity aside from the ECLJ, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Europe (States), especially in regard to gestational limits.

Regarding the caselaw of the European Court, on the whole, the European Court does not exclude in principle the unborn child from the scope of application of the European Convention of Human Rights (ECHR), especially from the right to life, and does not find in the ECHR any ground for a conventional right to abortion. Therefore, the ECHR does not contain, nor guarantee, any right of access to abortion.

However, the European Court allows States, within their margin of appreciation,² to decide when the right to life begins, and consequently, to permit abortion. But if a state permits abortion, its legal framework must then respect the competing rights and interests of the unborn child, the child's parents and the society, guaranteed by the ECHR.

Regarding the comparative law in Europe, thirteen States prohibit abortion on demand entirely, and only authorize abortion in exceptional cases (e.g.,

² The term "margin of appreciation" refers to the room for maneuver that the European Court affords national authorities in fulfilling their obligations under the ECHR. The Court considers that this margin of appreciation is wider in the absence of consensus among Member States on a specific issue, especially in moral matters. The margin of appreciation is rooted into the principle of subsidiarity organizing the relationship between the European Court and national authorities, and according to which the national authorities are often better placed than the Strasbourg Court to assess a situation and to make the appropriate decision. It also respects and takes into account the diversity of European Member States.

rape of the mother, risk to the mother's life, etc.)³. In the States where abortion on demand is legal, eight States permit it only through the first ten weeks of pregnancy,⁴ Estonia through eleven weeks,⁵ and a further twenty States through twelve weeks.⁶ Thus, of the thirty-four States that permit limited abortion on demand, twenty-nine (85% of them) only permit it within the first twelve weeks of pregnancy. Those States, coupled with the thirteen States that prohibit abortion, account for a vast majority (89%) of all States. Five other States allow abortion on demand in later stages. It is permitted through the first fourteen weeks in Spain and Romania,⁷ through eighteen weeks in Sweden,⁸ through twenty-two weeks in

³ These Member States are Albania, Andorra, Bulgaria, Hungary, Italy, Liechtenstein, Macedonia, Malta, Monaco, Poland, United Kingdom, San Marino, and Switzerland. See *Abortion on Demand in the European States: Legality & Time Limits (2021)*, ECLJ.org, <http://media.aclj.org/pdf/Abortion-on-Demand-in-the-European-States-Legality-and-Time-Limits-2021-ECLJ.pdf> (last visited July 27, 2021).

⁴ These Member States are Bosnia Herzegovia, Croatia, Ireland, Montenegro, Portugal, Serbia, Slovenia, and Turkey. See *Abortion on Demand in the European States*, *supra* note 3.

⁵ Estonia, Abortion and Sterilization Act art 6, Vastu võetud 25.11.1998, RT I 1998, 107, 1766 jõustumine 21.12.1998.

⁶ These Member States are Germany, Armenia, Austria, Azerbaijan, Belgium, Cyprus, Denmark, Finland, France, Georgia, Greece, Latvia, Lithuania, Luxembourg, Norway, Republic of Moldova, Czech Republic, Russia, Slovakia, and Ukraine. See *Abortion on Demand in the European States*, *supra* note 3.

⁷ See *id.*

⁸ See *id.*

Iceland,⁹ and through twenty–four weeks in the Netherlands.¹⁰

Only under exceptional circumstances, such as in the case of fatal or serious malformation of the unborn child, pregnancy resulting from rape, and pregnancy that endangers the health of the pregnant woman do the majority of States allow abortion to be performed after the legal deadline has passed. However, ten of those States still prohibit even exceptional abortions from being performed after twenty–four weeks of pregnancy.

ARGUMENT

THE CASELAW OF THE EUROPEAN COURT REGARDING ABORTION

A. There Is No Conventional Right to Abortion

The ECHR does not contain, nor guarantee, any right of access to abortion, and therefore does not impose on States any duty to legalize abortion.

The European Court authorizes States, within the States’ limited margin of appreciation, to determine “the starting point of the right to life”¹¹ in the States’ domestic legal system.¹² 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

⁹ *See id.*

¹⁰ *See id.*

¹¹ *Vo v. France*, 2004–VIII Eur. Ct. H.R. 67, 107, para. 82.

¹² *See id.* at 107–108, para. 82.

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 European Court, sitting in Grand Chamber (its most solemn formation), ruled that there was no European consensus as to the scientific and legal definition of the starting point of the life of a person. This lack of consensus 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 'person' to be protected for the purposes of Article 2.¹³

Note that the "legal definition of the beginning of life" and "the starting point of the right to life" are one and the same. In *Vo v. France*, however, the European Court, sitting in Grand Chamber, was 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."¹⁴ The Grand Chamber added, "it may be regarded as common

¹³ *A., B., & C. v. Ireland*, 2010–VI Eur. Ct. H.R. 185, 261, para. 237.

¹⁴ *Vo*, 2004–VIII Eur. Ct. H.R. at 110–11, para. 85.

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.”¹⁵ Therefore, for the European Court, “it would be equally legitimate for a State to choose to consider the unborn to be such a person and to aim to protect that life.”¹⁶ As a consequence, the European Court ruled that

[w]hile 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, 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.’¹⁷

The ECHR Never Excluded Unborn Children from the Scope of the European Convention

Despite allowing States to legalize limited abortion, the European Court has never ruled that, under the scope of Article 2 of the ECHR, the unborn child is not a person. Rather, the Court has refused,

¹⁵ *Id.* at 110, para. 84.

¹⁶ *A., B., & C.*, 2010–VI Eur. Ct. H.R. at 257, para. 222 (confirming *Vo*, 2004–VIII Eur. Ct. H.R.).

¹⁷ *A., B., & C.*, 2010–VI Eur. Ct. H.R. at 265, para. 249.

since the cases *Brüggemann v. Federal Republic of Germany*¹⁸ and *H. v. Norway*,¹⁹ to exclude, as a matter of principle, the unborn child from the scope of the protection of the ECHR and to declare that he is not a person in the regard of Article 2 of the ECHR.²⁰ For the European Court, “Article 2 of the Convention is silent as to the temporal limitations of the right to life.”²¹ Judge Jean–Paul Costa, former President of the European Court, explained in a separate opinion:

Had Article 2 been considered to be entirely inapplicable [to an unborn child], 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.²²

Indeed, the European Court is competent to appreciate the existence of an injury to the life of an unborn child, and it has not declared baseless the requests that invoke Article 2 for the benefit of

¹⁸ *Brüggemann v. Federal Republic of Germany*, App. No. 6959/75, 10 Eur. Comm’n H.R. Dec. & Rep. 100, 116, para. 60 (1977).

¹⁹ *H. v. Norway*, App. No. 17004/90, paras. 1–6 (May 19, 1992).

²⁰ Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, Nov. 4, 1950, 5 C.E.T.S. 5.

²¹ *Vo*, 2004–VIII Eur. Ct. H.R. at 104, para. 75.

²² *Vo*, 2004–VIII Eur. Ct. H.R. at 119, para. 13 (Costa, J., separate opinion).

stillborn babies.²³ Therefore, the European Court's applicability of Article 2 to human beings prior to birth implies that the unborn child benefits from the protection of the right to life guaranteed by the ECHR, just as does any born person.

Abortion is only tolerated by the European Court, based on the doctrine of the margin of appreciation as limited by the legitimate competing interest of the unborn child.

Finally, Article 2 is not the only article that may be applied to the unborn child. The European Court has also applied other provisions, particularly Articles 3²⁴ and 8,²⁵ in cases where the father argued that abortion is the torture of an unborn child²⁶ or that abortion is a violation of the right to family life.²⁷

The applicability of Article 2 to human beings prior to their birth is an obstacle to the claim that abortion is an autonomous conventional right. One cannot have a conventional right to end a life that is protected under the same Convention. The fact that the majority of States currently allow limited abortion is not sufficient to create a new right to abortion, as such a right would have no conventional basis. No state which took part in the drafting of the ECHR authorized abortion at that time. The Parliamentary Assembly of the Council of Europe still defended in

²³ *Şentürk v. Turkey*, 2013–II Eur. Ct. H.R. 363 at 393, para. 107.

²⁴ Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 20, at 9, art. 6.

²⁵ Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 20, at 11, art. 8.

²⁶ *H. v. Norway*, App. No. 17004/90 at para. 2; *see also Boso v. Italy*, 2002–VII Eur. Ct. H.R. 451, 458–60, paras. 1–3.

²⁷ *H. v. Norway*, App. No. 17004/90 at para. 3.

1979 “[t]he rights of every child to life from the moment of conception”²⁸ and emphasized a few years later that “from the moment of fertilisation of the ovule, human life develops in a continuous pattern.”²⁹ It is clear, therefore, that the ECHR was not drafted in order to guarantee a “right” to abortion.

Moreover, the absence of a right to abortion under the ECHR is perfectly established and accepted by the very people who want to create such a right.³⁰ In its jurisprudence, the European Court detailed that the ECHR does not guarantee a right to undergo an abortion,³¹ nor a right to practice it,³² nor even a right to contribute with impunity to its being practiced abroad.³³ The European Court additionally found that the prohibition of abortion by a State does not violate the ECHR.³⁴ In regard to the autonomy of the

²⁸ Eur. Parl. Ass., *European Charter on the Rights of the Child*, Recommendation 874, para. 17.6(a) (1979).

²⁹ Eur. Parl. Ass., *Use of Human Embryos and Foetuses for Diagnostic, Therapeutic, Scientific, Industrial and Commercial Purposes*, Recommendation 1046, para. 5 (1986).

³⁰ Christina Zampas & Jaime M. Gher, *Abortion as a Human Right—International and Regional Standards*, 8:2 Hum. Rts. L. Rev. 249, 287 (2008); Daniel Fenwick, *The Modern Abortion Jurisprudence under Article 8 of the European Convention on Human Rights*, 12:3–4 Med. L. Int’l, 249, 263 (2013).

³¹ *Silva Monteiro Martins Ribeiro c. Portugal*, App. No. 16471/02, paras. 1–4 (Oct. 26, 2004), <http://hudoc.echr.coe.int/eng?i=001-67313>.

³² *Amy c. Belgique*, App. No. 11684/85, paras. 1–3 (Oct. 5, 1988), <http://hudoc.echr.coe.int/eng?i=001-24113>.

³³ *Tokarczyk v. Poland*, App. No. 51792/99, paras. 2–5 (Jan. 31, 2002), <http://hudoc.echr.coe.int/eng?i=001-22203>.

³⁴ See, e.g., *A., B., & C.*, 2010–VI Eur. Ct. H.R. at 195–274 (upholding, upon challenge by B. and C., the legislative

woman, whose respect is guaranteed by Article 8 relating to the protection of private life, the European Court has repeated, since *A., B., & C. v. Ireland*,³⁵ “Article 8 cannot . . . be interpreted as conferring a right to abortion.”³⁶

Therefore, within the ECHR, the right to life applies to the unborn child, and the right to privacy does not confer any right to abortion. However, as abortion falls within the ambit of the ECHR, its practice must be justified and proportionate in light of the ECHR.

During the drafting of the Universal Declaration of Human Rights in 1947, there was a vigorous debate about when the right to life begins. The Commission on the Status of Women, chaired by Madame Begtrup, recommended providing exceptions to the respect for the right to life in order to allow “the prevention of the birth of mentally handicapped children” and of children “born of parents suffering from mental illness.”³⁷ Eduardo Cruz-Coke, the representative of Chile, remarked on the similarity between these proposals and Nazi legislation.³⁸ Charles Malik, of Lebanon, proposed, on the contrary, to affirm that “everyone has the right to life and to physical integrity from the moment of conception regardless of

prohibition of abortions performed in the interest of health and well-being).

³⁵ *A., B., & C.*, 2010–VI Eur. Ct. H.R. at 255, para. 214.

³⁶ *Id.*

³⁷ U.N. Commission on Human Rights, 2d Sess., 35th mtg. at 12–13, U.N. Doc. E/CN.4/SR.35 (Dec. 12, 1947).

³⁸ *Id.*

his or her physical or mental condition.”³⁹ Objecting that several countries permitted abortion when the life of the mother is in danger, the representative of China, supported by the Soviet Union and the United Kingdom, opposed the explicit protection of human life from conception.⁴⁰ In the end, the text remained deliberately silent on this point.⁴¹

Nevertheless, such absence of explicit protection cannot be interpreted as creating an individual right to abortion. It should be noted that at the same time, in 1948, the World Medical Association⁴² took the initiative of updating the Hippocratic Oath by adding the Declaration of Geneva, in the spirit of the Charter of San Francisco. In this text, doctors promise to “maintain the utmost respect for human life from the time of conception” and not to permit “considerations of religion, nationality, race, party politics or social standing to intervene between my duty and my patient.”⁴³

In 1969, the American Convention on Human Rights explicitly applied the right to life to the unborn

³⁹ Drafting Committee of U.N. Commission on Human Rights, 2d Sess., 35th mtg. at 4, U.N. Doc. E/CN.4/AC.1/SR.35 (May 29, 1948). Mr. Vanistendael of the International Federation of Christian Trades Unions also made a similar proposal, Working Group on the Declaration of Human Rights, U.N. Commission on Human Rights, 2d Sess., 3d mtg. at 7, E/CN.4/AC.2/SR.3 (Dec. 6, 1947).

⁴⁰ Drafting Committee of U.N. Commission on Human Rights, *supra* note 39, at 6.

⁴¹ U.N. Commission on the Status of Women, 2d Sess., 9th mtg. at 2–3, U.N. Doc. E/CN.6/SR.28 (Jan. 14, 1948).

⁴² World Medical Assoc., *Declaration of Geneva (Version 1948, Rescinded)* (Sept. 1948).

⁴³ *Id.*

child, asserting that “Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life”.⁴⁴

There is an International Duty to Prevent Abortion

Similarly, international law also protects human prenatal life. The Convention on the Rights of the Child of November 20, 1989 recalls the principle according to which “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as after birth.”⁴⁵

Indeed, the only international commitment regarding abortion is to prevent its recourse. During the International Conference on Population and Development (ICPD) held in Cairo in September 1994, the Member States of the United Nations pledged to “take appropriate measures to help women avoid abortion, which in no case should be promoted as a method of family planning”⁴⁶ and to “reduce the

⁴⁴ American Convention on Human Rights, Article 4.1, *available at* <https://treaties.un.org/doc/Publication/UNTS/Volume%201144/volume-1144-I-17955-English.pdf> (last visited July 27, 2021).

⁴⁵ G.A. Res. 44/25, Convention on the Rights of the Child (Nov. 20, 1989), quoting G.A. Res. 1386(XIV), Declaration of the Rights of the Child (1959).

⁴⁶ U.N. Population Fund, Programme of Action of the International Conference on Population and Development (hereinafter *ICPD*), U.N. Doc. A/CONF.171/13, at 49, para. 7.24 (Oct. 18, 1994).

recourse to abortion”.⁴⁷ In 1995, during the Fourth Conference on Women, also called the Beijing Conference, the Member States strengthened their commitment made in Cairo “to reduce the recourse to abortion”⁴⁸ and affirmed that “every attempt should be made to eliminate the need for abortion.”⁴⁹ In 2014, the Secretary-General of the United Nations, Ban Ki-moon, asserted that this “roadmap . . . remain[ed] undiminished.”⁵⁰

In Europe, the Parliamentary Assembly of the Council of Europe (PACE) has regularly recalled the need to reduce recourse to abortion. For example, in 2003, it underscored that “[t]he goal of a successful family planning policy must be to reduce the number both of unwanted pregnancies and abortions.”⁵¹ Similarly, in 2008, the PACE “reaffirm[ed] that abortion can in no circumstances be regarded as a family planning method. Abortion must, as far as possible, be avoided. All possible means compatible with women’s rights must be used to reduce the number of both unwanted pregnancies and abortions.”⁵² In the explanatory report, the

⁴⁷ *Id.* at 61, para. 8.25.

⁴⁸ Fourth World Conference on Women, *Beijing Declaration & Platform for Action* (hereinafter *Beijing Conference 1995*), U.N. Doc. A/CONF.177/20, 103, para. 106(k) (Oct. 17, 1995).

⁴⁹ *Id.*

⁵⁰ U.N. Women, Foreword to *Beijing Declaration & Platform for Action & Beijing+5 Political Declaration & Outcome 1* (reprt. 2015).

⁵¹ Eur. Parl. Ass., *Impact of the “Mexico City Policy” on the Free Choice of Contraception in Europe*, Res. 1347, para. 6 (Sept. 30, 2003).

⁵² Eur. Parl. Ass., *Access to Safe and Legal Abortion in Europe*, Res. 1607, para. 1 (Apr. 16, 2008).

rapporteur of the 2008 Resolution underscored that “[w]hatever view we hold on abortion, we can all agree that, in an ideal world, abortions would not exist. . . . Our aim should thus be to avoid as many abortions as possible.”⁵³ The Assembly concluded the 2008 Resolution by inviting all the Member States to “promote a more pro-family attitude in public information campaigns and provide counselling and practical support to help women where the reason for wanting an abortion is family or financial pressure”.⁵⁴

Abortion Cannot be a “Fundamental Right”

In many countries, abortion is decriminalized under certain conditions, but because of these very conditions, abortion remains a derogation from the principle of the right to life. One cannot abort “freely”, as one would exercise a true freedom or a true right. There is a fundamental reason for this: abortion will always be different from a right. Indeed, a right exists to guarantee the faculty of a person to act for his/her good as a human being. Everything that we recognize as fundamental rights – to think, associate, pray, speak – are faculties through which every person expresses his/her humanity. These are faculties that animals do not have and, thus, that define “human” rights. Fundamental rights protect the exercise of these noble, specifically human faculties.

⁵³ Eur. Parl. Ass., *Access to Safe and Legal Abortion in Europe: Explanatory Memorandum* (Gisela Wurm, Rapporteur), Doc. No. 11537, para. 23 (Apr. 8, 2008).

⁵⁴ *Id.* at para. 7.8.

Between a fundamental right and abortion, the difference in nature is obvious. If abortion truly were a fundamental right, it would be absurd and unfair to prevent its use. That most countries prohibit most abortions is a conspicuous indication that abortion is not a fundamental right. Moreover, precisely because some countries only tolerate abortion as a derogation to the right to life, abortion should be the object of a policy of prevention.

Everyone knows the phrase that reads that “one person’s freedom ends where another person’s freedom starts”. Freedom has no internal limitations; it is not limited by its object but solely by external circumstances. For example: speech is limitless; what limits it is not the discourse (its object), but the circumstances through which it is led to be externalized and expressed (*i.e.*, others). In regard to abortion, it is not the woman, but the unborn child who is the object – one cannot have an abortion if no unborn child is present, thus the child creates the first limit to abortion. The unborn child is a human being with inherent dignity and worth, but for abortion to occur, that inherent dignity and worth, and the rights and freedoms that should be accorded the unborn child, must be completely disregarded. Only then is the woman allowed to exercise “freedom” over another human being. But no person has “freedom” over another person, only control. Once the value of the unborn child as a human being is taken into consideration, it is clear that abortion is not a freedom; it is the exertion of control ultimately costing an unborn child its life. Hence abortion can neither be a “fundamental right” nor a “freedom.”

B. If States Legalize Abortion, They Must Respect Competing Rights and Interests Guaranteed by the ECHR

The ECHR neither imposes, nor refuses, the legalization of abortion, but if a state legalizes it, its legal framework must respect the ECHR. Indeed, the European Court made clear that “once that decision is taken [to legalize abortion] 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.”⁵⁵ Indeed, according to the European Court, “the pregnancy cannot be regarded as relating solely to the sphere of private life”⁵⁶: Other rights and interests are involved. Therefore, when a case is brought before it, the European Court then “supervise[s] whether the interference constitutes a proportionate balancing of

⁵⁵ *A., B., & C.*, 2010–VI Eur. Ct. H.R. at 265, para. 249 (quoting in part *S.H. v. Austria*, 2011–V Eur. Ct. H.R. 295, which reads, “. . . shaped in a coherent manner which allows the different legitimate interests involved to be taken adequately into account,” *S.H.*, 2011–V Eur. Ct. H.R. at 323, para. 100); *accord R. & R. v. Poland*, 2011–III Eur. Ct. H.R. 209, 247, at para. 187; *P. & S. v. Poland*, App. No. 57375/08, para. 99 (Oct. 30, 2012), <http://hudoc.echr.coe.int/eng?i=001-114098>; *Tysiac v. Poland*, 2007–I Eur. Ct. H.R. 219, 249, para. 116.

⁵⁶ *Brüggemann*, 10 Eur. Comm’n H.R. Dec. & Rep at 116, para. 59; *accord Brüggemann*, 10 Eur. Comm’n H.R. Dec. & Rep. at 116–17, paras. 59–61; *see also Boso*, 2002–VII Eur. Ct. H.R. at 458–60, paras. 1–3.

the competing interests involved.”⁵⁷ For the European Court, “It is also clear . . . that the issue has always been determined by weighing up various, and sometimes conflicting, rights or freedoms.”⁵⁸

Although limited abortion is tolerated, as a matter of principle, a fundamental right, such as the right to life, should not be subordinated to, or put on the same footing as, an “ability” which is not guaranteed by the ECHR.⁵⁹ Therefore, if the right to life applies to the unborn child, only an equivalent right – such as the right to life of the mother – could legally justify the child’s abortion. This is the exact reasoning of the recent decision from the Polish Constitutional Court that led to the reduction of the scope of abortion.⁶⁰

In the process of the appreciation of various conflicting legitimate interests, the European Court has already had the opportunity to identify several fundamental rights and legitimate interests involved that the State must consider and respect while regulating the access to abortion.

In addition to the right to life⁶¹ and other interests of the unborn child,⁶² the European Court has

⁵⁷ *A., B., & C.*, 2010–VI Eur. Ct. H.R. at 261, para. 238.

⁵⁸ *Vo*, 2004–VIII Eur. Ct. H.R. at 107, para. 80.

⁵⁹ *Chassagnou v. France*, 1999–III Eur. Ct. H.R. 21, 65–66, para. 113.

⁶⁰ Dziennik Ustaw K1/20 of Oct. 20, 2020 of the *Trybunał Konstytucyjnego* (Constitutional Tribunal of Poland).

⁶¹ See *H. v. Norway*, No. 17004/90 at paras. 1–6; *Boso*, 2002–VII Eur. Ct. H.R. at 458–60, paras. 1–3; *Vo*, 2004–VIII Eur. Ct. H.R. at 109, 110, 112, paras. 86, 95.

⁶² See *Open Door & Dublin Well Women v. Ireland*, 246 Eur. Ct. H.R. (ser. A.) at para. 63 (1992); *A., B., & C.*, 2010–VI Eur. Ct. H.R. at p. 257, para. 222, p. 259, para. 227.

identified, to date, the legitimate interests of the society to limit the number of abortions,⁶³ to protect morality⁶⁴ and to oppose eugenics.⁶⁵

The European Court has recognized that the right to respect for family life of the “potential father”⁶⁶ and potential grandmother⁶⁷ was affected by the abortion of their child or grandchild.

The European Court also recognizes that the prohibition of torture and inhuman and degrading treatments applies to human beings before birth⁶⁸ in cases where the father denounces the torture suffered by his unborn child during the unborn child’s abortion.⁶⁹ The Court did not reject this claim as manifestly unfounded or inadmissible, but examined the case.

The European Court further recognizes that other rights can be curtailed in specific situations, such as the right to freedom of conscience of medical professionals⁷⁰ and the autonomy of medical institutions.⁷¹

⁶³ See *Odièvre v. France*, 2003–III Eur. Ct. H.R. 51, 80, para. 45.

⁶⁴ See *Open Door*, 246 Eur. Ct. H.R. (ser. A.) at para. 63; *A., B., and C.*, 2010–VI Eur. Ct. H.R. at 257–59, paras. 222–27.

⁶⁵ *Costa v. Italy*, App. No. 54270/10 (Aug. 28, 2012).

⁶⁶ *X. v. United Kingdom*, App. No. 8416/79, 19 Eur. Comm’n H.R. Dec. & Rep. 244, 248, para. 2 (1980); see also *Boso*, 2002–VII Eur. Ct. H.R. at 458–60, paras. 1–3.

⁶⁷ *P. & S.* at para. 109.

⁶⁸ *Boso*, 2002–VII Eur. Ct. H.R. at 458–60, paras. 1–3.

⁶⁹ *H. v. Norway*, App. No. 17004/90 at para. 2; see also *Boso*, 2002–VII Eur. Ct. H.R. at 458–60, paras. 1–3.

⁷⁰ *Tysi c v. Poland*, 2007–I Eur. Ct. H.R. at 251, para. 121; *R. & R. v. Poland*, 2011–III Eur. Ct. H.R. at 253, para. 206.

⁷¹ *Rommelfanger v. Federal Republic of Germany*, App. No. 12242/86, 62 Eur. Comm’n H.R. Dec. & Rep. 161 (1989).

One can also consider that States have the obligation to prevent forced and coerced abortions, while regulating access to abortion.⁷² The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) of May 11, 2011, requires States Parties to criminalize forced abortion and sterilization⁷³ which are described as “performing an abortion on a woman without her prior and informed consent”⁷⁴ and “performing surgery which has the purpose or effect of terminating a woman’s capacity to naturally reproduce without her prior and informed consent or understanding of the procedure.”⁷⁵ Abortion is forced if there is no “prior and informed consent.”⁷⁶

C. There are Special Issues Caused by Abortion “On Demand” and Late-term Abortion

As shown by its caselaw, for the European Court, abortion should have (at least apparently) an objective motive that must outweigh the various competing rights and interests affected by the abortion and guaranteed by the ECHR.

⁷² *Beijing Conference 1995*, *supra* note 48, at 49, para. 115; *see generally id.* at 48ff.

⁷³ Convention on Preventing and Combating Violence Against Women and Domestic Violence, Nov. 11, 2011, art. 39, 210 C.E.T.S 11.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

Examining the European Court's caselaw, it appears that the European Court has never admitted that the free will or the autonomy of the woman could, on its own, suffice to justify an abortion. No right to abortion stems from the right to personal autonomy, as was reaffirmed in *P. and S. v. Poland*. In that case, the Grand Chamber of the Court "held that Article 8 [guaranteeing personal autonomy] cannot be interpreted as conferring a right to abortion."⁷⁷ Therefore, while abortion "on demand" finds no justification under the ECHR, it does affect rights that are guaranteed by the ECHR and interests that are recognized by it. The curtailment of those rights and interests by abortion on demand is not balanced with and justified by any competing right guaranteed by the ECHR. Consequently, abortion on demand violates the ECHR. At first glance, people may think that abortion on demand is acceptable under the ECHR because the European Court has not yet condemned a State for permitting it. This is so only because of the general toleration of abortion in Europe, and because the direct victims of abortion have never had the chance to survive and to complain before the European Court. Furthermore, opponents of abortion have not been recognized as victims.⁷⁸

⁷⁷ *P. & S.* at para. 214.

⁷⁸ See *Knudsen v. Norway*, App. No. 11045/84, 42 Eur. Comm'n H.R. Dec. & Rep. 247, 255–58 at paras. 1–2 (1985); *X. v. Austria*, App. No. 7045/75, 7 Eur. Comm'n H.R. 87, 87–89 (1976).

**Abortion Based on an Unborn Child's
Gestational Age is Arbitrary and Assigns
Worth to a Human Based on Their Stage of
Development**

Among the States where abortion is legal, it is allowed up to ten weeks of pregnancy in eight States, up to eleven weeks in Estonia, and up to twelve weeks in twenty States. Only five other States allow a longer period for abortion: up to fourteen weeks in Spain and Romania, up to eighteen weeks in Sweden, up to twenty—two weeks in Iceland, and up to twenty—four weeks in the Netherlands.⁷⁹

However, this graduated conception of the protection of life is arbitrary and introduces a judgment on the relative value of human lives, and thus a hierarchy between human lives, as some human lives would deserve to be protected more than others. To consider that the value and protection of human life increases with the physiological development of the person logically leads to the acceptance of neonatal infanticide⁸⁰—and of so-called post-natal abortion.⁸¹ Such an approach would also go against the very logic of human rights that tends to afford a higher protection to individuals when they are more vulnerable, and not the inverse.

⁷⁹ *Abortion on Demand in the European States*, *supra* note 3.

⁸⁰ Claire de la Hougue & Grégor Puppinc, *Late Term Abortion & Neonatal Infanticide in Europe*, in *Law and Prevention of Abortion in Europe* 137, 137–60 (Grégor Puppinc ed., 2018).

⁸¹ Alberto Giubilini & Francesca Minerva, *After-Birth Abortion: Why Should the Baby Live?*, 39 *J. Med. Ethics* 261 (2013).

This Honorable Court is not being asked to rule that abortion should be legal up to 15 weeks, which the ECLJ does not support, but that states can—and indeed must—protect all human life and reduce the use of abortion accordingly.

Harmful consequences of abortion include, but are not limited to, pain inflicted on the unborn child by abortion, sex-selective abortion (gendercide), and eugenics.

Abortion Causes Pain to an Unborn Child

The ability of the unborn child to feel pain is increasingly recognized, but still ignored by proponents of abortion. However, the European legislation⁸² clearly recognizes that it is “scientifically shown” that the “foetal forms of mammals” (which includes human beings) can “experience pain, suffering and anguish” even before the third trimester of pregnancy.⁸³ As a result, the European Directive establishing “measures for the protection of animals used for scientific or educational purposes” shall apply to the mammals before birth. If scientific evidence shows that “foetal forms of mammals” can experience pain in the womb, and that is recognized as a reason to provide unborn mammals protection in Europe, why should the same evidence not be considered in relation to the ability of a human to

⁸² Directive 2010/63, of the European Parliament and of the Council of 22 September 2010 on the Protection of Animals Used for Scientific Purposes, arts. 4, 6, 2010 O.J. (L 276) 33–79.

⁸³ *Id.* at para. 9.

experience pain in the womb, which can harm further development?

The most often used method of late abortion is the method of “dilatation–evacuation.”⁸⁴ The cervix is dilated, then the unborn child is pulled out piece by piece with a clamp. In the end, the pieces are examined to make sure everything has been removed. This means that the body of the unborn child is 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, the unborn child was alive while its members were being torn off one after the other. This frightfully cruel method is inhumane and constitutes torture.

When a pregnancy has reached its sixteenth week, another termination method employed is medical induction abortion.⁸⁵ In most cases, unborn children are killed in utero via injection which causes cardiac arrest, then labor is induced and the unborn child is delivered. However, it is well documented that some unborn children survive this procedure⁸⁶, and the number of surviving unborn children

⁸⁴ Rafael Napolitano & Basky Thilaganathan, *Late Termination of Pregnancy and Foetal Reduction for Foetal Anomaly*, 24 Best Prac. & Rsch. Clinical Obstetrics & Gyneacology 529, 529–537 (Aug. 2010).

⁸⁵ Lynn Borgatta & Nathalie Kapp, *Labor Induction Abortion in the Second Trimester*, 84:1 Clinical Guidelines 4, 4–18 (July 1, 2011).

⁸⁶ Claire de la Hougue & Grégor Puppink, *supra* note 80, at 137–60.

increases as the pregnancy advances.⁸⁷ Children are often born alive between the twenty–second and twenty–fourth weeks. This “problem” occurs in all States allowing late term abortions and is listed on the International Classification of Diseases published by the World Health Organization; Chapter XVI entitled ‘Certain conditions originating in the prenatal period’; section P96–4, ‘Termination of pregnancy affecting fetus and newborn’.⁸⁸

Abortion Advances the Practice of Sex- Selection

Since the 1980s, as the practice of ultrasound technology has spread, the imbalance between the number of girls and boys born has continued to increase, showing that ultrasounds are used in order to select children according to their sex for either birth or for abortion.⁸⁹ For the sex of the unborn child to be visible, the ultrasound is performed after

⁸⁷ Deborah Nucatola et al., *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*, 81 Nat’l Libr. Med. 67–74 (January, 2010).

⁸⁸ *International Statistical Classification of Diseases and Related Health Problems (ICD–10)*, World Health Organization, 10th Version, Ch. XVI, P96.4 (2015).

⁸⁹ See John Bongaarts & Christophe Z. Guilmoto, *How Many More Missing Women? Excess Female Mortality and Prenatal Sex Selection, 1970–2050*, 41:2 Population & Dev. Rev. 241, 241, 242 (June 2015).

fourteen weeks at the earliest.⁹⁰ In addition, blood tests also purport to be able to identify the unborn child's sex at ten weeks.⁹¹ Since the unborn child's sex can be known before the legal time limit of abortion, nothing prevents parents from deciding to abort on the basis of the child's sex.

In the UK, for instance, the sex ratio at birth reflects an imbalance in certain communities, especially Asian; no other factor can explain such an imbalance.⁹² This imbalance is reflected in other Asian immigrant communities, particularly in the United States and Canada.⁹³

One of the objectives set by the ICPD was “[t]o eliminate all forms of discrimination against the girl child and the root causes of son preference, which results in harmful and unethical practices regarding female infanticide and prenatal sex selection.”⁹⁴ The following year, the Beijing Conference stressed in its Programme of Action that “Acts of violence against women also include forced sterilization and forced

⁹⁰ See Farideh Gharekhanloo, *The Ultrasound Identification of Fetal Gender at the Gestational Age of 11–12 Weeks*, 7:1 J. Fam. Med. & Primary Care 210, 210–12 (Jan.-Feb. 2018).

⁹¹ Maley Milot, Alexa de Jerez & Chris Jacob, *Large Scale Follow-Up Research Study: SneakPeek Early Gender DNA Test 99.9% Accurate for Fetal Sex By Live-Birth Confirmation*, 6:6 Int'l J. Pregnancy & Child Birth 165, 165–66 (2020).

⁹² Sylvie Dubuc & David Coleman, *An Increase in the Sex Ratio of Births to India-Born Mothers in England and Wales: Evidence for Sex-Selective Abortion*, 33:2 *Population and Dev. Rev.* 383 (2007).

⁹³ Joel G. Ray, et al., *Sex Ratios Among Canadian Liveborn Infants of Mothers from Different Countries*, 184 *Canadian Med. Assoc. J.* E492 (Apr. 16, 2012).

⁹⁴ *ICPD*, *supra* note 46, at 28, para. 4.16.

abortion, coercive/forced use of contraceptives, female infanticide and prenatal sex selection.”(para. 115)⁹⁵ Similarly, in 1998, the UN General Assembly adopted a resolution 52/106 urging all Member States to “enact and enforce legislation protecting girls from all forms of violence, including female infanticide and prenatal sex selection”.⁹⁶ Various measures were recommended since then to prevent such abortions. In Europe, signatories to the Convention on Human Rights and Biomedicine (1997) undertook to ban the use of techniques of medically assisted reproduction for the sole purpose of selecting the sex of the unborn child.⁹⁷ The Parliamentary Assembly of the Council of Europe recalled this obligation in 2011.⁹⁸

Abortion Advances Eugenic Practices

Prohibition of eugenics is the basis of medical law, which is founded on the principle of the therapeutic purpose of medicine. The purpose of medicine is to heal; it is not to eliminate the sick. The Nuremberg trials are a stark reminder of this.

Article 3 of the EU Charter of Fundamental Rights, regarding the “Right to the integrity of the

⁹⁵ *Beijing Conference 1995*, *supra* note 48, at 49, para. 115.

⁹⁶ G.A. Res. A/RES/52/106, at 3 (Feb. 11, 1998).

⁹⁷ Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, art. 14, Apr. 4, 1997, 164 E.T.S. 4. (hereinafter *European Convention on Biomedicine*).

⁹⁸ See Eur. Parl. Ass., *Prenatal Sex Selection*, Res. 1829, art. 2 (2011); see also Eur. Parl. Ass., *Accountability of International Organisations for Human Rights Violations*, Res. 1979, art. 3 (2014).

person,”⁹⁹ states that “in the fields of medicine and biology, the following must be respected in particular . . . : the prohibition of eugenic practices, in particular those aiming at the selection of persons.”¹⁰⁰ The words “in particular” indicate that it is eugenics that is forbidden, and that this prohibition is not limited to the purpose of selecting persons. Furthermore, Article 3 of the EU Charter applies to persons *before* birth, as evidenced by a subsequent provision on the prohibition of reproductive cloning of human beings.¹⁰¹

More generally, the European Convention on Human Rights and Biomedicine states that “[a]ny form of discrimination against a person because of his or her genetic heritage is prohibited.”¹⁰² Similarly, the Universal Declaration on the Human Genome and Human Rights states that “everyone has a right to respect for their dignity and for their rights regardless of their genetic characteristics,”¹⁰³ and therefore, “no one shall be subjected to discrimination based on genetic characteristics that is intended to infringe or has the effect of infringing human rights, fundamental freedoms and human dignity.”¹⁰⁴

In its comments on the draft General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights (ICCPR), the United

⁹⁹ Charter of Fundamental Rights of the European Union, Oct. 26, 2012, 2000 O.J. (C 364) 366.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *European Convention on Biomedicine*, *supra* note 97, at 4.

¹⁰³ UNESCO, Universal Declaration on the Human Genome and Human Rights, 29th Sess., 29C/Res. 19, at art. 2 (Nov. 11, 1997).

¹⁰⁴ *Id.* at art. 6.

Nations Committee on the Rights of Persons with Disabilities (CRPD) declared that “[l]aws which explicitly allow for abortion on grounds of impairment violate the Convention on the Rights of Persons with Disabilities (Arts. 4, 5, and 8).”¹⁰⁵ Indeed, abortion violates many provisions of the Convention, including the prohibition of discrimination on the basis of disability.

The CRPD further explained that abortion on the basis of disability is often based on inaccurate diagnosis and that “even if it is not false, the assessment perpetuates notions of stereotyping disability as incompatible with a good life.”¹⁰⁶ In fact, screening for diseases in order to eliminate the unborn child rather than to cure them, constitutes a systemic incitement to discrimination and violence on the grounds of health, disability and physical characteristics of the disabled persons. The victims of this structural incentive are not only the unborn children, but also those who survived this screening elimination procedure, and who are considered socially guilty of being born. This stigma is a violation of the rights of the disabled persons.¹⁰⁷

¹⁰⁵ CCPR, 73d Sess., *Gen. Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the right to life*, para. 1 (Oct. 3, 2018).

¹⁰⁶ *Id.*

¹⁰⁷ G.A. Res. 2856 (XXVI), Declaration of the Rights of Mentally Retarded Persons (Dec. 20, 1971).

CONCLUSION

The ECHR, as consistently interpreted by the European Court, does not provide for a right to abortion. If, however, limited abortion is allowed in a State, its legal framework must respect the competing rights and interests guaranteed by the ECHR. These competing rights and interests, as well as the States' international duty to reduce recourse to abortion, are best respected when the life of the unborn baby is rightfully acknowledged and afforded just protection, and the legal time limit for abortion is restricted accordingly.

This Honorable Court should reverse the judgment of the court below.

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