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CONTROVERSIES ON THE PROTECTION OF PRENATAL LIFE THROUGH THE PERSPECTIVE OF EUROPEAN LAW

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Abstract: *The purpose of this article is to present the well-reasoned legal situation of abortion under European law in order to examine, from the point of view of the jurisprudence of the European Court of Human Rights (the Court), whether the conception product is the right-holder of the right to life enshrined in Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and, on this occasion, to grasp the position of the European instance on the legality of pregnancy interruption.*

Keywords: *human rights, prenatal life, European standards, corpus of jurisprudence.*

JEL Classification*:* **K10, K33, K38**

Introduction

Although in the 21st century most law systems no longer absolutize the prohibition of abortion, the issue of the legality of pregnancy interruption seems inexhaustible due to the fact that, hypothetically speaking, interruption of pregnancy outlines the polarization of two diametrically opposed interests, namely: the interest of the pregnant woman and the interest of the fruit of the conception. Thus, the oscillations regarding the legality of pregnancy interruption are conditioned by the content of the conferred right to life, the difficulty deriving from the imprecision of the nature of the relationship "pregnant woman – the product of conception".

In recent years, the Court has tried on a number of cases on abortion, having provided a solid *corpus* of jurisprudence. Reflecting the variety and complexity of abortion-related situations, the cases presented to the Court are not limited by abstracted claims of the right to abortion access, but concern various issues, such as child abortions, eugenic abortions, informing and giving consent to various persons involved. Hence, one of the main difficulties for the Court is to determine how to legally handle the matter of abortion: how to introduce the practice of abortion within the internal logic of the Convention and of its case-law. The central question is whether the unborn child is a "person" within the meaning of Article 2. The Court keeps this question open in order to allow States to determine when life begins, and therefore when legal protection of life begins.

Evidently, a unitary solution is hardly possible because interruption of pregnancy is based on religious, psychological, ethical, demographic and political issues. It is worth noting that countries that maintained abortion restrictions have come under strong internal and external political pressure. However, "as soon as the State, acting within its discretion, adopts legal regulations permitting abortion in some situations" (Krzyanowska-Mierzewska, M., 2004, Pt. I(b)-(f)), then, as a matter of principle, "the legal framework designed for this purpose should be

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formulated in a coherent way, which allows the various legitimate interests concerned to be taken into account adequately and in accordance with the obligations deriving from the Convention" (*P. & S. v. Poland* (2012), Para 99) evaluating the balance of interests for the issue of abortion is a difficult exercise because "it is not possible to balance one's life with the right or interest of someone else. Therefore, if the State recognises the unborn child as a person, it could balance the life of the child only with the life of another person, that of the mother. It is not possible to balance the value of the mother's will, on the one hand, and that of the unborn child's life, on the other. Neither the value of a will nor of a human life can actually be estimated, let alone be compared to each other." (Puppinck, Gr., 2013, p. 142)

Beyond this reality, at both institutional and jurisprudential European levels, pregnant women have been recognised the right to have access to termination of pregnancy under the conditions of legality and safety. However, differences arise regarding the way it is regulated. From this perspective, in the context of an intense liberalisation of the system of abortion criminalization, European legislators have reported the legality of pregnancy interruption on the ground of the gestation period system and/or the indications system. The implications of such an inclusion are far from exhausting controversies about reproductive health within the legitimacy of pregnancy interruption.

Gosso modo, the widespread practice of abortion on demand, constitutes the major share of consequence of the systematic failure of States to meet their obligations with regard to socio-economic rights. One of four pregnancies ends in an abortion every year, estimates the World Health Organization and the Guttmacher Institute (Institute Guttmacher, 2022). Globally, 73 million abortions take place every year. In Europe, 30% of pregnancies end up in abortion (Sedgh, G., Bearak, J., […], 2016, p. 258). The socio-economic constraint of the mother and the family and the large number of abortions resulting from it could be limited if States endeavoured to fulfill their socio-economic obligations in which "special protection should be given to mothers during a reasonable period before and after birth" (*R.R. v. Poland* (2011), Para 187).

At present, after more than three decades later since the legalization of abortion in the European area, it seems that the viewpoint on this practice must be changed, requiring an objective and complex approach to this practice, detaching from its ideological implications. In this respect, Lord *David Steel*, the architect of the liberal law on abortion in the UK, declared that he "could not have ever imagined that there would be so many abortions" (Ward, L., Butt, R., 2007.). We support the idea that "it is no longer possible to talk about abortion in terms of progress and liberation of women" (Puppinck, Gr., 2013, p. 7). Furthermore, it is high time States implemented a "forgotten" right: the right not to abort.

Prenatal Life through the Perspective of International Instruments

Ab initio, the right to life, survival and development is a fundamental human right, a precondition for freedom, progress, justice and creativity. It is the alpha and omega of human rights, the first and last human right, the beginning and the end, the means and the purpose of human rights, in short, it is the central right from which all others are born (Bedjaoui, M., 1991, p. 182).

The right to life, the universal right of a human, is enshrined in many international acts. Thus, the Universal Declaration of Human Rights reads that "everyone has the right to life, liberty and personal security" (UDHR, Art. 3). The International Covenant on Civil and Political Rights

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promotes the same principle: "The right to life is inherent to the human person" (ICCPR, Art. 6). The syntagma of the inherent right to life requires that every State adopt constructive measures, entirely positive, intended to protect life. States will have to abstain from any actions that result in the life termination of a person. Moreover, they should take measures to protect life in general. Implicitly, the Covenant contains no mention of abortion or the exclusion of unborn children from the protection of the right to life. A fortiori, it is specified that a death penalty "is not carried out on pregnant women" (ICCPR, Para 5), implicitly acknowledging the right to life of the unborn child, or at least the value of his/her life. It should be emphasised that at the time of the adoption of the text, "death penalty was lawful in many jurisdictions, while abortion on demand was a crime in most countries of the world" (Puppinck, Gr., 2013, p. 18).

The specific instrument pertaining to a child, the most dense and complete in the human rights materia which funds all the legitimacy of the institution of the international protection of the child's rights, the Convention on the Rights of the Child, defines the child as a human being under the age of 18 (CRC, Art. 1). The text leaves the issue of the childhood outset unsettled, without mentioning when it begins: at conception, at birth, or at the time between these two. It does not set a specific moment, advocating a "flexible approach" to the problem, leaving it to the discretion of States to decide, depending on their own circumstances, the conflicting rights, especially the child's right /mother's right, and the interests involved in the problems of abortion and family planning. To put it another way, this regulation in the Convention is most often criticized, being regarded as one of the most vulnerable (Hodgkin, R., Newell, P., 2007, p. 2). It should be noted that neither of the two the 1924 and 1959 children's rights Declarations define the childhood outset. However, the 1959 Declaration in its Preamble reads that "due to their physical and mental immaturity, the child needs special protection and care, including adequate legal protection, both before and after birth" (DRC, Preamble).

In concreto, the European Convention in Article 2 reads: "everyone's right to life is protected by law" (ECHR, Art. 2) and the *Court* elaborates on that as follows: "the right to life is an inalienable attribute of human beings and forms the supreme value in the hierarchy of human rights" (*Pretty v. UK* (2002), Para 65). The Convention is silent as to the temporal limitations of the right to life. "Everyone" (*Vo v. France* [G.C.] (2004), Para 75) can expect protection without any limitation or reduction of the temporal scope of the right to life. At the same time, the Court has never construed Article 2 so as to allow an implicit exception to the right to life with regard to prenatal life, or such an approach "would be at variance with both the letter and the spirit of the Article" (*Bruggemann & Scheuten v. FRG* (1981), Para 60, *Vo v. France* [G.C.] (2004), Para 78). *Ad valorem*, the Court claimed that the "embryo/foetus belongs to the human race" (*Vo v. France* [G.C.] (2004), Para 84) and that he/she needs "protection in the name of human dignity" (*Vo v. France* [G.C.] (2004), Para 84). In other words, this principle offers protection to the unborn child against violations of his/her dignity, such as inhuman or degrading treatment, which the Court cannot tolerate due to the absolute prohibition of such treatment under the Convention. Furthermore, more subtly, in practice the Court has permitted States to exclude the unborn from the protection conferred by Article 2, leaving the determination of the scope of this Article in their margin of appreciation, preferring in this way to avoid judging and making a decision on the conventionality of abortion in principle.

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New medical technologies in the field of procreation have imposed legal instruments to protect human dignity and the embryo, as well as the scientific development of knowledge and practices. Many European human rights instruments relating to bioethics contain provisions on prenatal life[45]. Although these legal instruments do not explicitly define the "human being," they provide the embryo and/or foetus with "certain protection, depending on scientific progress and the potential consequences of research in genetic engineering, medically assisted procreation, or embryo experimentation" (*Vo v. France* [G.C.] (2004), Para 84).

A European "consensus" on a scientific and legal definition of the beginning of life was "found" by the European Court of Justice (ECJ) in its judgment of 18 October 2011 in the case of *Oliver Brüstle v. Greenpeace* (Case C-34/10 ECR I-9821). The Grand Chamber of the ECJ, interpreting the Directives 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the Legal Protection of biotechnological inventions, defined the term "human embryo" as "any human ovum after fertilisation, any non-fertilised human ovum into which the cell nucleus from a mature human cell has been transplanted, and any non-fertilised human ovum whose division and further development have been stimulated by parthenogenesis" (*Oliver Brüstle v. Greenpeace* (2011), Para 15). In the ECJ's view, the principle of the person's dignity and integrity protects the human embryo and the cells derived from it at any stage of its formation or development (*Oliver Brüstle v. Greenpeace* (2011), Para 16). This is the first decision of a European instance which provides a definition of the human embryo. The Court specified that this definition is "an autonomous notion of the European Union law": the meaning and the scope of the term "human embryo" must be given a uniform and independent interpretation throughout the European Union legislation.

European Convention: between the Protection of Prenatal Life and the Right to Abortion

Ab initio, the Convention does not contain a right to abortion. The document must be interpreted in the light of the objective for which it was created: protection of human rights, especially for vulnerable people. Excluding prenatal life from its scope, as a principle, would go against the intended aim. Moreover, recognising abortion as a right would be equivalent to overcoming the dimensions of the Convention. It would represent a mutation at the philosophical level of the Convention from the substrate of the protection of the human being in its natural structure to the protection of its autonomous will. Although "autonomy is a set of capacities whereby each person determines how to use his/her faculties and abilities.., the matrix of the decisions and actions of the person.., the source of personal freedoms" (Puppinck, Gr., 2013, p. 24), this autonomy cannot be the source of the individual's rights, for which the society would be liable. *De facto*, the so-called right to abortion implies the domination of individual will over life, subjectivity over objectivity. In this respect, the Court explicitly declared in the *Pretty v. the United Kingdom* case that "Article 2 cannot, without a language distortion, be interpreted as

[45] 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 (Oviedo 4 April 1997) , Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings (Paris 12January 1998), Additional Protocol to the Convention on Human Rights and Biomedicine, concerning Biomedical Research (Strasbourg 25 January 2005).

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conferring the diametrically opposed right, namely the right to die, nor can it create a right to self-determination"(*Pretty v. UK* (2002), Para 39). Similarly, the Grand Chamber of the Court declared in the *A. B. & C. v. Ireland* case that "Article 8 cannot be interpreted as conferring the right to abortion." (*A.B. & C. v. Ireland* [G.C.] (2010), Para 214) In addition to these clear statements, the Court, in the case of *Maria do Céu Silva Monteiro Martins Ribeiro v. Portugal*, declared inadmissible an application claiming a right of access to abortion on demand against the national legislation, which was considered too restrictive by the applicant.

The Convention does not establish the right to conduct abortion. The Court has consistently rejected requests by doctors with regard to condemning them for supporting (*Jerzy Tokarczyk v. Poland* (2002)) or performing illegal abortions (*Jean-Jacques Amy v. Belgium* (1988)). However, *in the cases of P. & S. v. Poland and R. R. v. Poland*, the Court acknowledges that health professionals have a right not to perform abortion (*P. & S. v. Poland* (2012), Para 206). The same position was also formulated by the Parliamentary Assembly of the Council of Europe (PACE Resolution 2010/1763) which supported "the right to conscientious objection in lawful medical care", declaring that: "no person, hospital or institution shall be coerced, held liable or discriminated against in any manner because of a refusal to perform, accommodate, assist or submit to an abortion, the performance of a human miscarriage, or euthanasia or any act which could cause the death of a human foetus or embryo, for any reason".

Abortion is a derogation from the right to life. Most States which allow abortion permit it as a derogation from the right to life in their national law (*Abortion Policies and Reproductive Health around the World*, 2014). *In hoc casu*, from the point of view of abortion legislation, the European Union (EU) countries are divided into 3 groups. The countries which severely restrict abortion are Malta and Poland, complemented by Northern Ireland, which is part of the UK. Malta strictly forbids abortion for any reason. In Poland and Northern Ireland, it is theoretically possible to acquire a right to abortion if pregnancy resulted from a rape, incest, if the foetus has serious malformations or if the mother's life and health are endangered; in practice, however, both specific regulations and State support in assisting women who intend to resort to termination of a pregnancy reduce the number of abortions to almost insignificant percentage. For example, in the case of Poland, the abortion rate is very low (1 / 1,000 births). The second group includes States where abortions may be accessed under certain conditions, more relaxed, financially and medically motivated: Cyprus, Finland, Luxembourg and the UK. In the rest of the EU States, abortion is available on demand. This is the situation in former communist countries, except for Poland (the Baltic countries, Bulgaria, the Czech Republic, Slovakia, Slovenia, Hungary), which have had such legislation since the "iron curtain" (which is quite explainable through the fact that the first country in the world to legalize abortion was the USSR in 1922) along with Western countries, even Catholic ones like Italy and Spain (*Abortion Policies and Reproductive Health around the World*, 2014).

Exceptions formulated by States must necessarily be prescribed by law. Hence, these States do not question the applicability of the right to life during the prenatal life, although they allow a small possibility to derogate from this rule. "This means that for all States allowing abortion as a derogation, the right to life, in principle, covers and protects life before birth." (Puppinck, Gr., 2013, p. 25) *A fortiori*, being a derogation from the right to life, abortion cannot constitute a right

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in itself, it cannot become an autonomous right. As a derogation, its scope is limited by the corresponding right. Furthermore, according to the doctrine of the "conditional applicability" of the Convention, once a State, acting within its limits of appreciation, adopts legal regulations permitting abortion (*R.R. v. Poland* (2011), Para 99), then a legal framework should comply with the Convention (*A.B. & C. v. Ireland* [G.C.] (2010), Para 249, *P. & S. v. Poland* (2012), Para 99, *R.R. v. Poland* (2011), Para 187). If States recognise in their internal legal order that the right to life covers, in principle, life before birth, or the reality that the embryo or foetus is a "person", the Court should apply the Convention by taking into consideration this reality, applying Article 2 with reference to the unborn child. As a result, the Court "should not only limit itself to merely observing the absence of a European consensus on the beginning of life" (Puppinck, Gr., 2013, p. 27), but should also seek to ascertain whether national legislation recognises, at least to a certain extent, the right to life of the unborn child, or whether he or she is a "person".

Moreover, the "consensus" of a substantial majority of the contracting States of the Council of Europe, towards allowing abortion in broader terms than those accorded under the national legislation of some States (*A.B. & C. v. Ireland* [G.C.] (2010), Para 235), "does not determine the narrowing of the margin of appreciation" (*A.B. & C. v. Ireland* [G.C.] (2010), Para 236), enjoyed by some States in the interpretation of the Convention. In the case of *A. B. & C. v. Ireland,* as well as in the one of *S. H. and others v. Austria*, the Court considered that "the acute sensitivity of moral and ethical issues raised by the problem of abortion or the importance of the public interest at stake" (*A.B. & C. v. Ireland* [G.C.] (2010), Para 233, *S.H. and others v. Austria* [GC] (2011), Para 97), determines the granting of a wide margin of appreciation to States. *In dissentientes sententia*, six judges (*A.B. & C. v. Ireland* [G.C.] (2010), Dissenting Opinion) of the Court considered that the existence of a consensus on abortion between the Member States of the Council of Europe should have been used to reduce the width of the margin of appreciation enjoyed by Ireland, in order to straighten the dynamic interpretation of the Convention to the development of a right to easier access to abortion (*Marckx v. Belgium* (1979), Para 41, *Dudgeon v. UK* (1981), Para 60, *Soering v. UK* (1989), Para 102). In their view, "profound moral opinions" might impede the dynamic expansion of human rights created by the Court through interpreting the provisions of the Convention. The consensus of the Member States of the Council of Europe regarding the " right of the woman " over her unborn child does not similarly represent their consensus on the right to life of the unborn child, which depends on the "the question when the right to life begins" (*A.B. & C. v. Ireland* [G.C.] (2010), Para 237). Thereafter, the Court has been unable to assess the proportionality of Irish legislation regarding abortion, having limited itself by merely considering whether there is a balance between the mother's interests and other rights and interests involved in the matter. "Such a balance is not possible if the State recognises the unborn child as a person: a balance cannot be achieved between the rights and interests of a person and the life of another" (Puppinck, Gr., 2013, p. 29). Therefore, the unborn child's legal status takes precedence to the status of the "woman's right" over the life of her unborn child. By avoiding the formulating of the answer to the question of whether the unborn child is a person protected by Article 2, the Court declared: "the margin of appreciation which is accorded to a State's protection of the unborn child necessarily translates into a margin of appreciation for the State as to how it balances the conflicting rights of the mother" (*A.B. & C. v. Ireland* [G.C.] (2010), Para 237).

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The right to life implies positive and negative obligations of the State (*H. v. Norway* (1992), *L.C.B. v. UK* (1998), Para 36, *Pretty v. UK* (2002), Para 38). "Article 2 required the State not only to refrain from taking a person's life intentionally, but also to take appropriate steps to safeguard life" (*H. v. Norway* (1992), Para 167). In general terms, the negative obligation requires the State should absolutely refrain from taking a person's life intentionally. Meanwhile, the positive obligation outlines a margin of appreciation for the State in determining the means by which the life of those within its jurisdiction will be safeguarded.

Once the State, "acting within its limits of appreciation, adopts statutory regulations allowing abortion in some situations" (*R.R. v. Poland* (2011), Para 99), "the legal framework formed 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" (*A.B. & C. v. Ireland* [G.C.] (2010), Para 249, *R.R. v. Poland* (2011), Para 187, *P. & S. v. Poland* (2012), Para 99). The derogation of a State from a right does not waive its obligations under the Convention with respect to this right and other rights affected by that measure and the "margin of appreciation is not unlimited" (*A.B. & C. v. Ireland* [G.C.] (2010), Para 238) "as to how it [the State] balances the conflicting rights of the mother" (*A.B. & C. v. Ireland* [G.C.] (2010), Para 237) with the "protection of the unborn child" (*A.B. & C. v. Ireland* [G.C.] (2010), Para 237). Therefore, in the context of the legalization of abortion, the fundamental principle the Court is guided by in classifying abortion cases is the balance between abortion regulation, in order to ensure the life and health of the mother and other competing rights and interests, including the protection of the unborn child. In this regard, the Court held that respect for the right to life compels national authorities to take positive action to protect individuals from making a hasty decision and to prevent abuse of the system (*Boso v. Italy* (2002)). Thus, even when abortion is allowed, the State must prevent the abuse of this facility, due to the State's obligation to protect life, particularly as it concerns vulnerable people. Women who undergo abortions are in distress and therefore vulnerable, especially if they are minors, disabled, face financial constraint, or seek an abortion for psychological reasons (*A.B. & C. v. Ireland* [G.C.] (2010), Para 213, *Vo v. France* [G.C.] (2004), Paras 76, 80, 82).

Concurrent rights and interests determine the position of the State while defining, within its margin of appreciation, the legal framework of abortion. In principle, a fundamental right guaranteed by the Convention, for example, the right to life, cannot be subordinated or put on an equal footing as an alleged right, not guaranteed by the Convention, but only allowed in the internal legal order, for example abortion. The Court insists that "where restrictions are imposed on a right or freedom guaranteed by the Convention in order to protect 'rights and freedoms' not, as such, enunciated therein: in such a case only indisputable imperatives can justify interference with enjoyment of a Convention right" (*Chassagnou and others v. France* [GC] (1999), Para 113). In its jurisprudence, the Court has on several occasions identified a number of "legitimate interests" justifying restrictions on the practice of abortion when abortion is lawful. Hence, along with the interest in protecting the unborn child's right to life (*H. v. Norway* (1992), *Boso v. Italy* (2002), *Vo v. France* [G.C.] (2004), Paras 86, 95), the Court recognised the legitimate interest of society in limiting the number of abortions (*Odièvre v. France* [G.C.] (2003), Para 45), the interests of the society with regard to protecting moral standards (*Open Door & Dublin Well*

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Woman v. Ireland (1992), Para 63, *A.B. & C. v. Ireland* [G.C.] (2010), Paras 222, 227), the interest of the father (*Boso v. Italy* (2002), *X. v. UK* (1980)), the right to freedom of the conscience of health professionals (*Tysiac v. Poland* (2007)) and institutions based on ethical or religious beliefs (*Rommelfanger v. RFG* (1989)), the State's duty to properly inform women of the risks associated with abortions (*Cosma v. Romania* (2013)), the interest of the society in relation to prohibiting gender-based abortion (PACE Resolution 2011/1829), the woman's freedom and dignity (*V.C. v. Slovakia* (2011)); without casuistry being exhaustive. Forced or obliged abortion is likewise impossible to justify under the Convention as well as this is clearly a violation of both rights of the mother and of the child. The European Parliament "condemns the practice of forced abortion and sterilisations globally, especially in the context of the one-child policy" (European Parliament Resolution 2012/2712(RSP)). The reasons given by women show that their choice of abortion is not free but, in fact, the one made under social constraint: poverty, lack of work and social security, lack of schooling or the capacity of taking care of maintenance, not willing to be a single parent or having problems with the husband or partner, etc. (*Abortion Policies and Reproductive Health around the World*, 2014). Under these circumstances, the mother's consent cannot be described as freely expressed, with the actions being comparable to forced abortion. In this regard, the causes of abortion should be seen in the light of the State's obligation to protect life, family and human dignity and to adopt positive measures to support them (UNFPA Programme, 1994).

"Legitimate interests" that justify the lawfulness of abortion. The polemic focused on the possibility of women to access abortion is so pervasive that most often when being reported as "solving" this problem by the State, it is considered the degree of "democratisation" of society (Romanovskiy, G.B., 2003). However, the strong argument *in favor* of abortion liberalisation appears to be related to the interests of protecting the life and health of the mother.

Undoubtedly, when pregnancy puts mother's life at risk, it makes balancing competing interests possible. However, the problem of performing abortion in order to save the life of the mother is not directly related to the existence of a "right" to abortion. A ban on abortion is not an obstacle to providing the medical treatments necessary to save the life of a pregnant woman, even if the results of the treatment lead to the loss of her unborn child's life, that is, to an unintentional interruption of pregnancy (*A.B. & C. v. Ireland* [G.C.] (2010), Para 238). *In principle*, the right of a woman which is abided through such a termination of pregnancy is not the right to abortion; it is her right to life (*A.B. & C. v. Ireland* [G.C.] (2010), Para 245). It should be noted that at the time of the signing of the Convention, the quasi-majority of the Contracting Parties States "permit abortion when it is necessary to save the life of the mother" (*X. v. UK* (1980), Para 20). Therefore, this issue was never a matter of public and ethical debate under the Convention. Moreover, when it is certified that the authorities put at risk an individual's life, including the one of the pregnant woman, by refusing to allow taking care of their health, which is the care available to the general public (*Nitecki v. Poland* (2002)), the provisions of Article 2 of the Convention are susceptible to being infringed.

Regarding the "right to health", the Convention does not form an autonomous right. The protection of "health" falls within the scope of Article 8 of the Convention, safeguard of the right to respect for private life. International norms only "recognise the right of everyone to enjoy the

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highest standard of physical and mental health"(ICESCR, Art. 12) and encourage States to take action to achieve this goal. Abortion promoters insist that abortion is necessary to protect women's health and that many women die from illegal abortions. They argue that "the right to abortion should be extended so that abortion on demand or for socio-economic reasons is included and that in case of refusal it could significantly affect the physical or mental health of women" (Zampas, Ch., Gher, J. M., 2008). It is difficult to assess whether the threat to the mother's health is severe or not, and whether abortion is a reasoned request or the one of convenience.

The determination of the threshold of danger for the life or health of the woman who justifies/requires such an abortion belongs to the State. In addition, when it is established that the pregnant woman fulfils the legal conditions that allow access to abortion, the State "must not structure the legal framework in a way that would limit the real possibilities of getting the access to an abortion" (*P. & S. v. Poland* (2012), Para 99, *Tysiac v. Poland* (2007)). It should allow the pregnant woman to be able to know if her medical condition would require her pregnancy to be interrupted because it constituted a menace to her life and, therefore, to "effectively exercise her right to legally access abortion" (*P. & S. v. Poland* (2012), Para 99, *Tysiac v. Poland* (2007)). *In concreto*, the national legal framework must be outlined in a manner that clarifies the legal situation of the pregnant woman (*A.B. & C. v. Ireland* [G.C.] (2010), Pt. E 3(c)). Respecting the spirit of the Convention, States are expected to identify the circumstances in which there is "real and substantial risk for the life of the mother" (*A.B. & C. v. Ireland* [G.C.] (2010), Para 64) and provide an "accessible and effective procedure" whereby a pregnant woman can determine whether or not she fulfils the conditions for a legal abortion, namely whether the risk to her life is real and whether undergoing an abortion is necessary (*A.B. & C. v. Ireland* [G.C.] (2010), Para 267). In the language of the Court, "institutional and procedural procedures" do not mean legislation or regulations, but the commitment that the procedure should be as less complex as possible (*R.R. v. Poland* (2011), Para 191).

Abortion on demand: uncertainty in the case-law of the Court. Serum veritas, there is no direct, indirect or implicit right to abortion for socio-economic reasons, or on demand, in any international or regional treaty (Zampas, Ch., Gher, J. M., 2008, p. 287), including the Convention. In addition, "abortion on demand remains a blind spot, a dead angle, in the case-law of the Court" (Puppinck, Gr., 2013, p. 46). Until today, the Court has not directly determined whether or not the practice of abortion on demand is compatible with the Convention. The cases examined by the Court were placed under the guise of some extreme situations, such as therapeutic or eugenic abortions (*Tysiac v. Poland* (2007), *R.R. v. Poland* (2011), *A.B. & C. v. Ireland* [G.C.] (2010)) or abortions following a rape (*P. & S. v. Poland* (2012)). As a rule, requests submitted by the opponents of abortion legalisation are considered inadmissible for the lack of active processual status, *locus standi*, due to their not being direct victims of the abortion legalization (*Borre Arnold Knudsen v. Norwey* (1985), *X. v. Austria* (1976)).

The conventionality of abortion practice could be analysed by the Court only in the context of the case that inclines the balance of competing interests to the detriment of the protection of the life of the unborn child. It is difficult to outline a "legitimate interest" that can be protected by an abortion argued only by the personal request. The Court, through its judgments, has never acknowledged that personal autonomy might be sufficient to justify an abortion (*A.B. & C. v. Ireland* [G.C.] (2010), Para

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214). Abortion on demand, not substantiated in the terms of the Convention, affects the rights and interests recognised and guaranteed by it (*A.B. & C. v. Ireland* [G.C.] (2010), Para 249, *R.R. v. Poland* (2011), Para 187, *P. & S. v. Poland* (2012), Para 99). The "solution" would be for the Court to waive the application of the Convention for the unborn child, transforming, *de facto,* its "dead angle" into a legal goal. We note that until now, the Court has exercised its abortion law and refused to ignore the unborn child, insisting that only abortion for health or life reasons can be justified as pursuing a legitimate interest guaranteed by the Convention (*A.B. & C. v. Ireland* [G.C.] (2010)), not including abortion on demand in this category.

In the context of the balance between the life of the unborn child and the protection of other "legitimate interests", it is difficult to determine the value of this life impartially. *Ad valorem*, the right to life of the unborn child can only be balanced with the equal right to life of his/her mother. "Any other balance has an arbitrary component and is ultimately the manifestation of the power of the strong over the weak, of the domination of the born on the not-yet-born." (Puppinck, Gr., 2013, p. 49).

Conclusion

Quod er demonstrandum, European law does not recognise and much less guarantees the right to abortion. Moreover, international law guarantees the right to life for all human beings and encourages States to "limit the recourse to abortion" (U.N. Doc A/CONF.171/13/Rev 1) which should "as far as possible, be avoided" (European Parliament Resolution 2008/1607, Para 1). The ambiguous status of the product of conception follows from the fact that in Art. 2 of the Convention the notions of "life" and "person" are not juridical defined. However, the Convention does not exclude prenatal life from the scope of protection and the Court did not exclude prenatal life from its scope. The rights claimed on behalf of the foetus and those of the mother are inextricably interconnected; or, the life of the foetus is intimately linked to the life of the woman bearing it, which means that she cannot be considered separately, providing reasons from which the product of the conception is not recognised and guaranteed an absolute right to life.

The cases presented to the Court reflect the variety and increasing complexity of abortion-related situations. These cases are not limited to the abstract request of a right to access abortion but relate to various issues, such as abortions on minor, eugenic abortions, consent and divulging of information. In its judgments, the Court declared that abortion is not a right under the Convention, i.e. there is no right to access or conduct abortion. According to the jurisprudence of the Court, the Convention only enshrines the right to have access to interruption of pregnancy. In most European national legislations, abortion is a derogation from the protection accorded to the life of the unborn. Essentially, the right to life of the unborn child is not the only right guaranteed by the Convention which is affected in case of an abortion. If the State permits abortion in national law, it is compelled, under the Convention, to protect and respect competing rights and interests. These rights and interests fall upon both sides of the balance, limiting the scope of the derogation as well as supporting it. Once a State adopts the legal norms allowing interruption of pregnancy under certain circumstances, it is positively compelled to create a procedural legal framework enabling the pregnant woman to exercise access to a legal abortion, but it should also take positive measures to avoid abortion.

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Finally, this analysis notices that abortion on demand is a "dead corner" in the jurisprudence of the Court and concludes that this practice violates the Convention because it harms the interests and rights guaranteed by it without any proportionate justification. While abortion is not a human right, the protection of life, dignity, physical and family integrity are inherent human rights. *In mens legis*, the State should implement the woman's "right not to abort".

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