

Adjudicating on Abortion: The Complex Compliance of Contracting States With ECtHR Jurisprudence¹

1. Introduction 2. The ECtHR jurisprudence 3. Complying with Strasbourg: some controversial cases 4. Conclusions.

1. Since the end of WWII, human rights of women have been protected by human rights agreements (as the UN Declaration of Human Rights, and the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights), devoted treaties (as the Convention on the Elimination of All Forms of Discrimination against Women – CEDAW) and regional conventions (as ECHR, ACHR, ACHPR). Nevertheless, reproductive rights, and notably abortion, are still a controversial issue and, though their discipline evolved “from placement within criminal or penal codes, to placement within health or public health legislation, and eventually to submergence within laws serving goals of human rights”,² they are not considered as autonomous women’s rights and are balanced with the rights of the unborn. The experiences of Council of Europe’s Contracting States (CSs) and the interpretative activity of the European Court of Human Rights (the Court – ECtHR) demonstrate the difficulties in realizing this balance.

Therefore, the present article reviews ECtHR jurisprudence concerning the right to abortion³, briefly highlighting the standard the ECtHR settled and the way CSs (not) comply with it.

2. The Court mainly discusses abortion in the light of the right to private life (art. 8). At the beginning, in *Bruggemann*,⁴ it was conceived as a matter which cannot solely concern the private life of the mother, but Opsahl’s dissenting opinion already stated that the vision against such a link derived by traditional views.⁵

Since then, the Court increasingly confirmed the nexus between privacy and reproductive rights and clarified the duties of CSs. In *Tysiack*,⁶ albeit not stating the existence of an absolute right to abortion, the ECtHR affirmed that, when national legislations grant the interruption of pregnancy, the legal framework cannot be structured “in a way which would limit real possibilities to obtain it”. Relying on this, in *A., B., and C. v. Ireland*⁷ the Court, though confirming again the inexistence of a right to abortion, deemed the legislation into force in Ireland a serious threat for women, as it allows abortion only when women’s life, and not their health, is in danger.

Recently, the Court also discussed the possibility that impeding abortion may represent an inhuman treatment in violation of art. 3 and, on this ground, condemned Poland in *R.R.*,⁸ and *P. and S.*⁹

3. Therefore, the ECtHR never supported the existence of a right to abortion, just recognizing CSs’ duty to provide it when necessary for protecting mothers’ health.¹⁰ Despite this great discretion, CSs often demonstrated resistance in respecting the conditions themselves arranged beforehand: Parliaments provide for unclear rules; Governments try to gain support defending them or sometimes proposing more restrictive laws; Judiciaries adjudicate assessing the national standard, not always in line with the ECtHR one.

An interesting case is Italy, whose [law n. 194/1978](#) regulating abortion introduced very unclear provisions on conscientious objection, allowing it for the activities specific and necessary for abortion (art. 9.3), but not for those to be performed before and after it, furthermore excluding the possibility of objecting in case of immediate danger of death

for the mother (art. 9.5). As the law did not clarify the definition of “immediate danger”,¹¹ and the existence of competing moral values on the rights of the unborn makes almost impossible the approval of a new – and clearer – law, ordinary judges often intervene in the field¹².

More critical is the situation in Poland. The [existing legislation](#) strictly narrows the possibility of interrupting a pregnancy and, in April 2016, the conservative Government backed a citizen’s bill providing for a total ban on abortion and a sanction of five years’ imprisonment both for women who undergo abortions and doctors who perform them. Though the Parliament rejected the bill after a three-day strike of Polish women, the Government is still considering to increase the control on reproductive rights by introducing a law banning the morning-after-pills.

The case of Ireland is also noteworthy. In 1983, a constitutional amendment was introduced for safeguarding the rights of the unborn (art. 40.3 Const.). Therefore, in 1992, the Supreme Court,¹³ whose decision was then codified by the 2014 [Protection of Life during Pregnancy Act](#) prescribing a fourteen-year prison sentence for illegal abortion in Ireland, stated that abortion in the country is allowed only in cases of “real and substantial” risks to a pregnant woman’s life. As said, this means ignoring physical or mental threats until they do not represent a risk for life.

Finally, it should be mentioned the case of FYROM, whose Constitutional Court on 8 October 2014¹⁴ confirmed the constitutionality of a law restricting the access to abortion the Parliament approved in 2013, explicitly negating the possibility of complying with ECtHR jurisprudence.

4. Out of the mentioned cases, a restrictive approach toward women’s reproductive rights, mainly based on the upsurge of patriarchal values, is consolidating in several CSs,¹⁵ making interesting to investigate whether the ECtHR will succeed in protecting them.

In effect, ECtHR jurisprudence is relevant for all CSs¹⁶, and, in theory, it “might one day set abortion policy for all of the Council of Europe nations”¹⁷ supposing “a European consensus [on the fact] that the balance should fall in favor of the women”.¹⁸ Nevertheless, such a consensus evidently lacks and the unwillingness of CSs in complying with the – already minimum – existing standard demonstrates the difficulties in establishing a common ground. Besides the case of FYROM, the Irish in compliance with *A.*, *B.*, and *C.* makes this discourse more evident. Though the Irish Government ensured the would be implemented appointing an expert group for proposing recommendation aimed at reforming the law on abortion,¹⁹ finally the 2014 Act merely transposed the Supreme Court interpretation – rendered in 1992 (!) – instead of aligning the country to the ECtHR decision.²⁰

¹ Post-doctoral researcher Valentina Rita Scotti, Koç University

² R.J. Cook, B.M. Dickens, “Human Rights Dynamics of Abortion Law Reform”, 25 Human Rights Quarterly, 1–59, 2003, s. 7.

³ Though it cannot be discussed here, it is also noteworthy the ECtHR case-law connecting abortion with freedom of information. See, i.e., *Open Door and Dublin Well Woman/Ireland*, B. No. 64/1991/316/387-388, 29.10.1992, *Van den Dungen/the Netherlands*, B. No. 22838/93, 22.02.1995, and *Annen/Germany*, B. No. 3690/10, 26.11.2015.

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- ⁴ Bruggemann and Scheuten / Federal Republic of Germany, B. No. 6959/75, 17.07.1977.
- ⁵ Bruggemann and Scheuten / Federal Republic of Germany, par. 3, Opsahl's dissenting.
- ⁶ Tysiac / Poland, B. No. 5410/03, 20.03.2007.
- ⁷ A., B., and C./Ireland, B. No. 25579/06, 16.12.2010.
- ⁸ R.R./Poland, B. No. 27617/04, 26.05.2011. On the relevance of this decision for the evolution of the Court's jurisprudence see E.I. Ireland, Do not abort the mission: an analysis of the European Court of Human Rights Case of R.R./Poland, *North Carolina Journal of International Law*, 38 (2) (2013), s. 651-695.
- ⁹ P. and S./Poland, B. No. 57375/08, 30.10.2012. Nevertheless, the Court failed to confirm this interpretation in Z./Poland, B. No. 46132/08, 13.02. 2013, making instable the interpretative link between abortion and art. 3 of the ECHR.
- ¹⁰ In the same vein see the PACE Resolution n. 1607, 16.04.2008.
- ¹¹ The CoE Committee of Ministers confirmed such unclearness in 2016, despite at the same time it argued that the number of pro-choice doctors can suffice for the scope (see Resolution [CM/ResChS\(2016\)3](#), 6.07.2016).
- ¹² For instance, in Court of Cassation, pen. sec. VII, decision n. 14979, 2.04.2013, judges had to confirm the adjudication of the Court of Appeal of Trieste, sentencing a doctor to 1 year of imprisonment for having refused to assist a women in expulsing the placenta, in order to state that such an operation occurs after abortion and doctors cannot refuse to assist during it, furthermore when it may endanger the patient's health. Interesting cases of judicial intervention in the field of abortion are reported also as regard to the Slovak Constitutional Court (see, i.e., dec. n. 12/01, 4.12.2007) and the Portuguese one (i.e., dec. n. 75/2010, 3.02.2010), deeply commented in A. Lamačková, Women's Rights in the Abortion Decision of the Slovak Constitutional Court, and R. Rubio-Marin, Abortion in Portugal: New Trends in European Constitutionalism, both in R. Cook et al. (eds.), *Abortion law in transnational perspective: cases and controversies* (University of Pennsylvania Press 2014), 56-76 and 35-55.
- ¹³ Attorney General / X and Others, [1992] 1 IR 1.
- ¹⁴ Though the decision is not available in English, for a comment see A. Miškovska Kajevska, The 2013 Law on Termination of Pregnancy: A Clear Case of the Suspension of Democracy in Macedonia, *IPSA 2016 World Congress of Political Science Poznań*, Poland, July 2016.
- ¹⁵ For instance, since 2012 Turkish Government is planning measures for restricting abortion, restrictive legislations are still into force in Northern Ireland and Cyprus, and Malta maintains a legislation completely banning abortion.
- ¹⁶ It is worth to remind that CSs have to compulsory fulfill ECtHR decisions when they are the respondents, but they are also compelled to respect the interpretation of the Convention the ECtHR provides (see Ireland/United Kingdom, B. No. 5310/71, 18.01.1978; Dudgeon/United Kingdom, B. No. 7525/76, 22.10.1981; Modinos/Cyprus, B. No. 15070/89, 22.04.1993).
- ¹⁷ E.I. Ireland, Do not abort the mission: an analysis of the European Court of Human Rights Case of R.R./Poland, 676.
- ¹⁸ E. Wicks, A., B., and C. / Ireland: Abortion Law under the European Convention of Human Rights, 11 *Human Rights Law Review* 2011, 556 ss., s. 565.
- ¹⁹ For a summary of the activities the Irish Government led for implementing the decision, and for a critical comment on them, see the Communication to the Council of Europe Committee of Ministers of the NGO "National Women's Council of Ireland, 3.08.2012.
- ²⁰ The Act not only is inconsistent with ECtHR jurisprudence, but is also at the origin of the decision of the UN Human Rights Committee in *Mellet / Ireland* (9.06.2016), held on an individual complaint and condemning Ireland as its abortion law, despite the guidelines approved by the mentioned group of experts in September 2013, harms the psychological and physical health of women.