

DISPUTARE NECESSE EST

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PROCEDURAL OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS: AN INSTRUMENT TO ENSURE A BROADER ACCESS TO ABORTION

In Europe, Ireland and Poland are symbols of resistance against abortion. Nevertheless, those countries are on the point of giving in to the concerted pressure of the Council of Europe and the pro-abortion advocates groups.

Irish people have always been firmly opposed to abortion. Since the 1980s, they have rejected by referendum the legalisation of abortion three times in 1983, 1992 and 2002, while affording equal constitutional protection to the life of the unborn child and that of the mother. Abortion is therefore always prohibited, except when doctors consider it necessary to save the life of the mother.

The situation is similar in Poland where abortion is submitted to strict conditions¹ compared to other European countries. In 2011 a nation-wide grassroots effort supported by 600,000 signatures collected

¹ Current Polish law, Section 4(a) of the 1993 Act, provides three exceptions for abortions: abortion is legal until the twelfth week of pregnancy where the pregnancy endangers the mother's life or health (medical abortion); when prenatal tests or other medical findings indicate a high risk that the foetus will be severely and irreversibly damaged or suffering from an incurable life-threatening disease (eugenic abortion); or when there are strong grounds for believing that the pregnancy resulted from rape or incest.

in just two weeks led to the proposal of bold, new legislation aimed at removing all exceptions to the country's abortion laws, thus protecting children from the moment of conception. The proposed bill was voted in on July 1, 2011 by the lower house of Poland's parliament, but finally rejected at the Senate only by a tiny majority.

However, the Council of Europe is at the heart of a campaign aiming to impose abortion "from the top" onto a people who have constantly refused its liberalisation "from the bottom." It is to be noted that the Council of Europe was created to defend democracy and human rights. The European Court of Human Rights is part of the Council of Europe. Its role is to ensure the observance, by member States, of human rights and fundamental freedoms enshrined in the European Convention on Human Rights. States should abide by the judgements decided against them by the Court. States are free to choose the most appropriate means to put right the violation found by the Court; and they are not required to adopt the potential measures suggested by the Court in its judgements. This execution of judgements is placed under the supervision of the Committee of Ministers, namely the ambassadors of the 47 Member States.

The *A., B. and C. v. Ireland* and the *Tysiack v. Poland*² cases are the landmark abortion cases against Ireland and Poland respectively. In these cases, the women complained about their inability to have an abortion particularly due to the refusal of the doctors. The two cases result from the clash between two approaches on this issue: one, the women who demand abortion as if it were an individual right and, two, the doctors and the State who submit abortion to objective criteria, especially related to the life and the health of the mother.

On 16 December 2010, in the *A., B. and C. v. Ireland* case, the Grand Chamber of the European court condemned Ireland, considering that its legislation on abortion is not clear, as it did not allow a pregnant woman (the third applicant), who wanted to have an abortion, to know whether she qualified for an abortion according to the exception (to save the life of the mother). That woman, having previously suffered

² *Tysiack v. Poland*, N^o. 5410/03, judgement of 20 March 2007.

from cancer, feared that the pregnancy would adversely affect her health. Thinking that she would not be granted the medical permission for an abortion, she travelled to England where she underwent an abortion.

While affirming explicitly that there is no autonomous right to abortion under the Convention,³ the Court found a violation of the right to respect for the private life of the third applicant⁴ because she could not gain access to an effective procedure to establish whether she fulfilled the conditions established by Article 40.3.3 of the Constitution,⁵ the article which permits abortion on the grounds of a relevant and serious risk to a woman's life.

The Court concluded that the applicant found herself in an "uncertain situation"⁶ which amounted to a violation of her right to respect for her private life. This judgement required the Irish Government to adopt measures so that applicant C, or any other woman in the same situation, would be able to know whether her medical situation would necessitate the termination of her pregnancy, as her pregnancy constitutes a risk to her life.⁷ In summary, the Court found that the national legal framework

³ *A., B. and C. v. Ireland*, para. 214.

⁴ Applicant C. affirmed (without any medical evidence submitted to the Court) that she had a rare form of cancer and, on discovering she was pregnant, had feared for her life as she believed that her pregnancy increased the risk of her cancer returning. She would not have obtained treatment in Ireland while pregnant, without indicating what kind of cancer she had had and without presenting any medical certificate at least to show that she had consulted a doctor. Before the Court she complained about the failure by the Irish State to implement Article 40.3.3 of the Constitution by legislation and, notably, to introduce a procedure by which she could have established whether she qualified for a legal abortion in Ireland on grounds of the risk to her life due to her pregnancy (para 243).

⁵ *Bunreacht na hEireann*

⁶ *A. B. C. v. Ireland*, GC, § 267

⁷ The decision taken by the national authorities on whether the medical situation of applicant C would or not necessitate the termination of the pregnancy has in no incidence provided for protection of the right to life of applicant C. In other words, this ruling does not require Ireland to make sure that abortion would be available to applicant C, but to clarify its regulation in one sense or the other, in order to respect the competing interest of the pregnant woman to know where she stands.

was not shaped in a manner which clarified the pregnant woman's legal position.⁸ Therefore, according to the Court, the violation of the right to private life of the applicants is not caused by the State's decision to forbid or strictly limit abortion, but by the fact that the legislation puts women who are considering having an abortion in an excessively uncertain situation. For the Court, the respect for private life implies an obligation on the State to clarify the pregnant woman's legal position.

Additionally, when it is established that the pregnant woman fulfils the legal conditions allowing access to abortion, the Court ruled that the state "must not structure its legal framework in a way which would limit real possibilities to obtain an abortion."⁹ It must enable "a pregnant woman to effectively exercise her right of access to legal abortion."¹⁰ *In fine*, the state's obligations are therefore mainly procedural in regard to a legal abortion carried out to save the life or preserve the health of a pregnant woman. The determination of the threshold of danger for the life or health of the woman justifying such an abortion belongs to the state.

In *A. B. and C. v. Ireland*, the Grand Chamber reiterated its well-established case law while specifying that "it is not for this Court to indicate the most appropriate means for the state to comply with its positive obligations."¹¹ Therefore, it is for the Government to determine the most appropriate measures to adopt in order to prevent similar violations of the Convention in the future. This is a consequence

⁸ According to the Court, the procedural safeguards for situations where a disagreement arises as to whether the preconditions for a legal abortion are satisfied in a given case should be the following: first, they should take place before an independent body competent to review the reasons for the measures and the relevant evidence and to issue written grounds for its decision; second, the pregnant woman should be heard in person and have her views considered; third, the decisions should be timely, and fourth, the whole decision-making procedure should be fair and afford due respect to the various interests safeguarded by it.

⁹ *P. and S. v. Poland*, para. 99; see also *Tysic v. Poland* and *R. R. v. Poland*.

¹⁰ *P. and S. v. Poland*, para. 99, *Tysic v. Poland*, paras 116-124, *R.R. v. Poland*, para. 200)

¹¹ *A. B. C. v. Ireland* at para 266, cited above, see also the previous references given by the Court.

of the subsidiary nature of the system of the Convention.¹² The task of the Irish Government is to consider in which circumstances there is a “real and serious risk to the life of the mother” and to provide for an “accessible and effective procedure” by which a pregnant woman can establish whether or not she fulfils the conditions for a lawful abortion according to Article 40.3.3 of the Constitution, *i.e.* whether the risk to her life is real and makes the abortion necessary.¹³ In the language of the Court, “procedural and institutional procedures” do not imply legislation or regulation. The real requirement is that this procedure shall not be too complex *in concreto*. Within the Convention’s system,¹⁴ it is for each individual State to determine the most appropriate remedy, keeping in mind, in the field of medical care, that a balance also has to be struck between the competing interests of the individual and of the community as a whole, and that the margin of appreciation is wide when the issue involves “an assessment of the priorities in the context of the allocation of limited State resources”¹⁵.

¹² It is true that in the *A. B. and C.* ruling the Court went very much into the details of the Irish law while identifying some problematical points as to effectiveness of the existing procedures (paras 252-264), but those considerations are not binding: they have only an informative and explanatory purpose. The Court explains the reasons of its judgement. By indicating those reasons, the Court also makes some suggestions, but Ireland does not have to answer to each of those points.

¹³ *A. B. C. v. Ireland* at para 267

¹⁴ The Court can assess, after the exhaustion of domestic remedies by the applicants, on a case by case basis, and decide by a binding judgement whether in a specific situation there has been a violation of the individual rights guaranteed by the Convention. But it does not belong to the Court to indicate which general measures a State should adopt in order to prevent similar violations of the Convention in the future. The Court only indicates why a certain human right was violated and the State against which the Court has given a judgement remains free to choose the means that it considers necessary to ensure and implement the rights prescribed by the Convention to comply with the judgment. Similarly, during the supervision process of the execution, it belongs to the Committee of Ministers to decide whether the measures adopted can be considered as satisfactory, but not to indicate which general measures the State should have adopted.

¹⁵ See *Zehnalová and Zehnal v. the Czech Republic*, No. 38621/97, (Dec.) 14 May 2002; *O’Reilly and Others v. Ireland* (dec.), no. 54725/00; *Sentges v. the Netherlands*, No.27677/02, (Dec.) 8 July 2003.

Mutatis mutandis the Court applied the same reasoning and procedural approach in the various abortion cases against Poland (*Tysic v. Poland, R. R. v. Poland*¹⁶ and *P. and S. v. Poland*¹⁷).

At first glance, this procedural approach obliges Ireland and Poland only to clarify the concrete conditions of access to abortion; in actual practice, however, it goes far beyond that obligation. In order to execute the judgements, as the Court recommends¹⁸ (a recommendation which is not compulsory), Ireland¹⁹ and Poland will institute a decision-making mechanism to which women wishing to have an abortion will be able to address their demands. Ireland will probably follow the example of Poland, which in order to carry out the *Tysic v. Poland* judgment established a committee of experts in charge of deciding on a case by case basis whether the conditions of access to an abortion are fulfilled. This committee will necessarily interpret and change those conditions. The composition of this committee is decisive and is debated within the Council of Europe: the pro-abortion lobbies²⁰ would like to reduce the number of doctors on such committees in favour of other professions and categories (lawyers, representatives of NGOs, etc). This request was backed by the UN Special Rapporteur for the right to health who affirms that “a commission composed exclusively of health professionals presents a structural flaw which is detrimental to its impartiality.”²¹ This issue is important, as doctors

¹⁶ *R. R. v. Poland*, 27617/04, 26 May 2011

¹⁷ *P. and S. v. Poland*, N° 57375/08, 30 October 2012 (not definitive).

¹⁸ *Tysic v. Poland*, cited above, para 117: “The Court has already held that in the context of access to abortion the relevant procedure should guarantee to a pregnant woman at least the possibility to be heard in person and to have her views considered. The competent body or person should also issue written grounds for its decision”.

¹⁹ See the Report of the official group of experts instituted by the Irish Government to propose ways of executing the judgment, published in November 2012 et accessible to this address: http://www.dohc.ie/publications/pdf/Judgment_ABC.pdf?direct=1

²⁰ See the communication of the “Centre for reproductive rights” to the Committee of Ministers of the Council of Europe and the answer of the Polish Government DH-DD(2010)610E

²¹ See the Report on Poland of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,

have a scientific, objective and concrete approach to the causes justifying a possible abortion. By contrast, lawyers and political organisations view abortion under the abstract angle of individual freedoms. What is at stake in the debate on the composition of those committees is the definition of the nature of abortion; on one side it is considered from a concrete and medical point of view and, on the other side, from an abstract point of view and as an individual freedom. If abortion is a freedom, its exercise inevitably clashes with the doctors' assessment, which is perceived as an illegitimate interference. This confrontation is stronger when the doctors invoke their freedom of conscience to refuse to carry out an abortion.

Moreover, entrusting a committee with a decision to authorise an abortion makes this decision collective, dissolving the moral and legal responsibility of the decision into the entire committee.

The decisions of this committee should be timely, reasoned and in writing, to be challenged in the court system. Thus, the final decision to authorise abortion will belong no longer to the doctors or even to the committee of experts, but to the judge who will ultimately interpret the criteria for access to abortion. At present, no procedure has been proposed to challenge in the courts a decision authorising abortion. In practice, only a decision of refusal can go before the courts. Will the unborn child have a lawyer to represent and defend him/her in this committee? Will safeguards be provided against the abusive interpretation by this committee of the legal conditions for access to abortion? However, the pressure to liberalise abortion is very strong, especially from the European²² and international institutions.²³

M. Anand Grover, 20 May 2010, Human Rights Council, document n° A/HRC/14/20/Add.3).

²² During its meeting on 6 December 2012, the delegates to the Committee of Ministers invited Ireland to answer the issue of the “general prohibition of abortion in criminal law,” as it constitutes “a significant chilling factor for women and doctors because of the risk of criminal conviction and imprisonment,” inviting “the Irish authorities to expedite the implementation of the judgement (...) as soon as possible.” 1157DH meeting of the Ministers’ Deputies 04 December 2012, Decision concerning the execution of *A., B. and C. v. Ireland* judgement.

²³ See the Report of the Human Rights Commissioner on his visit in Ireland (26-30 November 2007), adopted on 30 April 2008 (CommDH(2008)9), the Report of the

Thus, the final interpretative power of the conditions for access to abortion will be transferred to the judicial power and ultimately to the European Court of Human Rights. With such a mechanism, the European Court would soon be called on to decide on the reasons for decisions of refusal of those committees. This could likely be a new opportunity to advance a “right to abortion.” This procedural approach allows, ultimately, to take away the control of the framework of abortion from the legislator and the doctor. Concerning the legislator, the decision in principle of whether to permit or not to permit abortion will no longer belong to the State and its citizens, because it is sufficient for the European Court to declare that there is actually a “right to abortion” in Ireland, in order to impose this as a new and authentic interpretation of the Irish Constitution. As to the doctor, his power will be transferred to the judge, guarantor of the respect for human rights.

In fine, in these two cases, the Court tried to favour greatly the expression and the freedom of the women, without directly confronting the State’s right to submit abortion to strict conditions. To that end, the Court stated that if the State decides to authorise abortion, even exceptionally, it should create a coherent legal framework and a procedure allowing women to establish effectively their “right” to abortion. Thus, abortion is not imposed directly on Ireland and Poland, but by the peripheral way of the procedural obligations which guarantee not a substantial right to abortion, but a procedural right of knowing whether one fulfils the right to access to an abortion. This procedural approach obliges Ireland and Poland only to “clarify” the concrete conditions of access to abortion; in actual practice, however, it goes far beyond that obligation. This result is achieved while recognising the absence of a right to abortion under the European Convention on Human Rights, and without its being necessary for the Court to comment on the prohibition in principle of abortion in Irish law and on its strict limitation in Poland. In order to impose this procedural obligation, it

Committee for the elimination of discrimination against women (“CEDAW”), of the High Commissioner Office of Human Rights of July 2005 (A/60/38(SUPP)), the Periodical Report of the Human Rights Committee on the observance of the UN Covenant on civil and political rights (CCPR/C/IRL/CO/3, 30 July 2008).

suffices to affirm, starting from an exception from the prohibition on the ground of danger to the life of the mother, that there is a “right” to abortion and that this “right” falls within the scope of the Convention.

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Some questions arise: why is such pressure being put on Ireland and Poland, when they are among the best countries in the world in respect of maternity services, far ahead of France and the United States?²⁵ Why transfer to the judge the responsibility of the doctor, when assessing the medical necessity of the abortion is the scientific responsibility of the doctor? Why is it so urgent to legalise abortion? Why did the Committee of Ministers of the Council of Europe decide to give “precedence” to these cases, when so many cases concerning torture, disappearances, and murders are treated under the ordinary procedure? Maybe because abortion profoundly defines the culture of a country – its legalisation has the value of a ritual passage into post-modernity, as it allows the domination of individual will over life, subjectivity over objectivity.

This process is not ineluctable, it depends on the strength of the political will of the Irish and Polish Governments which can recall to the Council of Europe that their respective country has never engaged to legalise abortion by ratifying the European Convention on Human Rights, simply because abortion is not a human right, but a derogation

²⁴ 1157DH meeting of the Ministers’ Deputies 04 December 2012, Decision concerning the execution of *A., B. and C. v. Ireland* judgment.

²⁵ *Trends in Maternal Mortality: 1990-2010*. Estimates Developed by WHO, UNICEF, UNFPA and the World Bank, <http://data.worldbank.org/indicator/SH.STA.MMRT> (last visited 20th November 2012).

to the right to life guaranteed by the European Convention on Human Rights.²⁶

PROCEDURALNE OBOWIĄZKI PAŃSTWA WYNIKAJĄCE Z EUROPEJSKIEJ
KONWENCJI PRAW CZŁOWIEKA JAKO INSTRUMENT SŁUŻĄCY ZAPEWNIENIU
SZERSZEGO DOSTĘPU DO ABORCJI

Streszczenie

Ten krótki artykuł ma za zadanie odpowiedzieć na wyzywające pytanie o to, w jaki sposób Irlandia, kraj który trzykrotnie odrzucił w drodze referendum propozycję depenalizacji aborcji, może zostać wezwany do jej zalegalizowania w imię zgodności ze standardami Europejskiej Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności, która nie zawiera wśród swych postanowień prawa do aborcji. W tekście podkreśla się, że Polska znajduje się w bardzo podobnej sytuacji do Irlandii.

²⁶ The *European Centre for Law and Justice* submitted a report to the Committee of Ministers on the execution of *A. B. and C. v. Ireland* DD(2012)917 http://www.coe.int/t/dghl/monitoring/execution/Themes/Add_info/IRL-ai_en.asp.