



European Centre for Law and Justice
Memorandum

Access to Safe and Legal Abortion in Europe

(doc. 11537)

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Introduction

The European Centre for Law & Justice (“ECLJ”) is an international law firm dedicated to protecting human rights and religious freedom in Europe. Attorneys for the ECLJ have served as counsel in numerous cases before the European Court of Human Rights. Additionally, the ECLJ has special Consultative Status as an NGO before the United Nations.

The proper resolution of the issues set forth in this draft resolution are a matter of substantial organizational concern to the ECLJ because of the threat to human life, the consequences of the promotion by the Council of Europe of such a direct breach of respect for subsidiary and national sovereignty with regard closely held moral and cultural beliefs, the undermining of the importance, integrity, and well-being of family life in Europe and contravention of the case law of the European Court of Human Rights.

SECTION I. SUBSIDIARITY AND RESPECT FOR NATIONAL SOVEREIGNTY

The promotion of abortion rights throughout the Council of Europe violates the very values upon which the Council of Europe was built by greatly offending the principles of subsidiarity and respect for national sovereignty.

Paragraphs 1-4, 6, 7 of the draft resolution provide a stark departure from the established case law governing the right to life in the Council of Europe, vis-à-vis the European Court of Human Rights, by not only promoting enlarged abortion rights but also infringing upon domestic laws dealing with conscientious objection of physicians from performing abortions and the use of tax funds for abortion services.

The Court has always held that, with relation to Article 2, a wide margin of appreciation must be granted Member States with regards to making decisions affecting life where sensitive moral decisions are at play. In making such decisions, the Court must strike a balance between the various interests involved, including legal, medical, philosophical, ethical and religious dimensions while at the same time taking into consideration the various approaches utilized by Member States.¹

The purpose of Council of Europe binding legislation, with the aim of also respecting national sovereignty, is to not impose rigid standards of requirements of states, particularly with regard to moral questions. Rather, the Council of Europe sets certain minimum standards with relation to law and practice with the scope of discretion offered to states depending on the nature of the right, on the nature of the issues and the importance of the issues at stake, and on the existence or absence of European or international consensus or customary international law on the topic. The Council of Europe organs also use a comparative legal analysis, gleaned from the various approaches of Member States, in discerning what is customary practice with relation to a certain right protected by Council of Europe law, whether it be the Convention or European Social Charter.

The right to life and determination of when life begins in particular is an issue which the European Court of Human Rights has determined is inappropriate for the

¹ ECtHR, Vo v. France, Judgment of 8 July 2004, Application No. 53924/00, § 82.

Council of Europe and its organs to impose its own moral views upon. The interpretation of the Convention with regards to life issues has been that because of the intimate moral details involved in defining life, that such measures are to be enacted at the domestic level:

In *Vo v. France*, the ECHR states that:

...it is not only legally difficult to seek harmonisation of national laws at Community level, but because of lack of consensus, it would be inappropriate to impose one exclusive moral code the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere . . . [and] the issue of such protection has not been resolved within the majority of the Contracting States themselves . . . [and] there is no European consensus on the scientific and legal definition of the beginning of life.²

More recently in *Tysiack v. Poland*,³ the ECHR declined to invalidate the substance of a Member State's restrictive abortion laws which legalizes abortion only when medically necessary to preserve the life or health of the mother. The ECHR simply determined that Poland's procedures for obtaining a medically necessary abortion violated Article 8 of the European Convention on Human Rights.⁴ Although the ECHR recognized "the fair balance that has to be struck between the competing interests of the individual and of the community as a whole," it did not interfere in the State's right to limit abortion rights to situations when the life or health of the mother was at risk. Nor did the ECHR find that such restriction violates the European Convention on Human Rights.⁵ Instead, the ECHR held that more precise procedural mechanisms were necessary in order for Poland's statutes on abortion not to be considered arbitrary.⁶

Indeed, the concurring opinion in *Tysiack* made it clear that the ECHR was "neither concerned with any abstract right to abortion, nor, equally so, with any fundamental human right to abortion lying low somewhere in the penumbral fringes of the [European

² *Vo v. France*, App. No. 53924/00, 40 E.H.R.R. 12, 2004 WL 1808739 Eur. Ct. H.R. § 82 (2004).

³ App. No. 5410/03 (Eur. Ct. H.R. Mar. 20, 2007).

⁴ *Id.* § 124.

⁵ *Id.* § 111.

⁶ *Id.* § 124.

Convention on Human Rights].”⁷ The case was solely about adequate administrative procedures. Furthermore, the dissenting opinion in *Tysiack* points out that:

Considering the decision in *Tysiack v. Poland* and *Vo v France*, we can conclude that the ECHR has constantly refused to take a stand on when life begins and to recognize abortion as a fundamental right.

SECTION II. PROMINENCE OF RIGHT TO LIFE AS FUNDAMENTAL RIGHT

Absent the right to life, all human rights become meaningless. As such, all other rights become subject to this right as the antecedent of all other rights. Further, the fundamental right to life cannot and must not be made inferior to the right to privacy because of the irreversible nature of the termination of pregnancy and the destruction of human life. Therefore, statements in the draft resolution such as those made in paragraph 1 regarding all means compatible with women’s rights fails to take into consideration the fundamental right to life of the child, respect for family life, and the interest of the State in ensuring a healthy and vital citizenry.

The Constitutional Court of Poland, for example, correctly holds in deciding on the issue of whether abortion runs contrary to the rights afforded to family as codified in most Member States of the Council of Europe, and specifically as a Constitutionally protected right in Poland, that:

The questioned regulation of the Act also effects the family, which in Article 79 item 1 is considered a Constitutional value. In this context a common legislator cannot establish legal regulations, which would legalize an attempt on a necessary, personal and structural part of a family-a child. To deprive a child of its legal protection is equivalent to depriving a family of its legal protection as well. Besides, the discrimination of some family subjects is contradictory to the Constitutional warranty on family. The questioned rules have such a character if they legalise the killing of unborn children in order to secure the interests of a mother connected with her personal situation and life

⁷ *Id.* § 1 (Bonello, J. concurring).

conditions.⁸

Abortion rights and the concept of mother and fetus as a single entity are becoming antiquated with the development of fetal surgery and obstetrics. As the Polish Constitutional Court held in 1991, the determination of stages of birth is arbitrary and not based on fact or objective criteria.⁹ So too is the determination of fetal viability. Viability is defined in terms of practicality; that is, how early a fetus can be delivered with hopes of reasonable survival. No single factor determines fetal survival; the prediction of viability in the medical sense involves many factors and is in a constant state of flux.¹⁰

The Council of Europe proposal on expanded abortion rights and funding fails to recognize developing medical knowledge and the ever increasing consensus that the child from the moment of conception is human and deserves protection. This failure is highlighted all the more when taken in comparison to other areas of European law where the unborn child has garnered the appropriate legal protections under both domestic and international law.

SECTION III. SEXUAL EDUCATION

The report suggests the introduction of “compulsory relationships and sex education for young people (*inter alia*, in schools), so as to avoid as many unwanted pregnancies (and therefore abortions) as possible.”

The ECLJ also opposes the language utilized in paragraph 5 of the draft resolution regarding compulsory sexual education. Competency in this matter is beyond the mandate of P.A.C.E. and has by European consensus and ratification of the European Social Charter, been afforded to the European Committee on Social Rights.

Furthermore, a strong correlation exists between Article 11 § 2 of the European Social Charter and Protocol 1, Article 2 of the European Convention of Human Rights on education. The legislative history of Protocol 1, Article 2 of the Convention also is

⁸ Polish Abortion Case, Constitutional Court of Poland, OTK Z.U. z.r. 1997, Nr. 2, 19.

⁹ Polish Abortion Case, Constitutional Court of Poland, OTK Z.U. z.r. 1997, Nr. 2, 19.

¹⁰ Jeffrey N. Lenow, The Fetus as a Patient: Emerging Rights as a Person?, 9 Am. J.L. and Med. 1 (1983), 10-11.

illuminative as to the hermeneutic utilizable when analyzing Article 11 § 2 of the European Social Charter. That history speaks to the fact that Member States were very hesitant to draft a right to education, and did so in a very limiting manner. The wording of the Article is testament to that fact as, unlike other Convention articles guaranteeing substantive rights, Article 2 of Protocol 1 is framed in negative terms rather than as a positive obligation; that rather than asserting that the state shall guarantee respect for the right to education it maintains that the state shall not deny this right.

Furthermore, the second sentence of Article 2 of Protocol 1 calls for respect of the rights of parents to ensure such education and teaching in conformity with their own religious and philosophical beliefs. The European Court of Human Rights has defined the difference between education and teaching thus: “The education of children is the whole process whereby, in any society, adults endeavor to transmit their beliefs, culture and other values to the young, whereas teaching or instruction refers in particular to the transmission of knowledge and to intellectual development.”¹¹

The correlation between the educative principles promulgated in Article 2 of Protocol 1 require that while maintaining a respect for parental beliefs and rights, that sexual education be taught generally and that problem areas be dealt with specifically. In order that this properly occur, a balance must be struck between State interests in fulfilling its obligations under the European Social Charter and the rights of parents that their beliefs, which in several Member States reflects an large majority of conservative pro-life and abstinence mores, be respected.

Precisely stated, Member States are required under their obligations to both the European Social Charter and the European Convention of Human Rights, to establish a curriculum which both reflects the cultural and moral sensitivities of their citizenry while at the same time educating children regarding high risk behavior in problem areas effecting their population. Discretion as to how this is to be done lies exclusively within Member State competency.

SECTION IV. INTERNATIONAL AND EUROPEAN LAW

¹¹ ECtHR, Campbell and Cosans v. The United Kingdom, Judgment of 25 February 1982, Series A No. 48, 4 EHRR 293, § 33.

The Assembly's position undermines state's obligations under international treaties. With regard to paragraph 3, 6-7 of the draft resolution, it is vital to note that no international treaty mandates an international right to abortion. Further, even within the sphere of soft law, no international right to abortion has been promulgated. To the contrary, whereas at both the **Cairo Conference on Population and Development** and the 1995 **Beijing Conference on Women**, vehement attempts were made to determine abortion as a human right; those attempts failed.¹² Both the Cairo Platform and the Beijing Platform determine that the issue of abortion should be left exclusively to the individual nations. The Cairo Platform for Action states that "any measures or changes related to abortion within the health system can only be determined at the national or local level according to the national legislative process." Paragraph 106(k) of the Beijing Platform echoes this identical language, respect State sovereignty as regards defining life and protection of the unborn.¹³

This failure is even more poignantly highlighted by the efforts of several nations, led by the United States, at the Beijing +10 Conference, where a statement was proposed into the text that no international right to abortion exists.

Furthermore, the majority of Council of Europe Member States have signed and ratified the U.N. Convention on the Rights of the Child ("Convention")¹⁴. In ratifying the Convention, Council of Europe signatories accepted an obligation to respect, protect, promote and fulfill the enumerated rights—including the obligation to adopt or change national laws and policies that implement the provisions of the Convention or Protocols.¹⁵

The Convention secures greater constitutional rights and liberties to children by detailing human rights that are inherent to the harmonious development of every child everywhere, including: the right to survival; the right to develop to the fullest; protection

¹² International Conference on Population and Development, Cairo, Egypt, Sept. 5-13, 1994, Report of the International Conference on Population and Development, U.N. Doc. A/Conf.171/13 (Oct. 18, 1994), P 8.25.

¹³ Fourth World Conference on Women, Beijing, China, Sept. 4-15, 1995, Beijing Declaration and Platform for Action, U.N. Doc. A/CONF.177/20 (Oct. 17, 1995), P 106(k).

¹⁴ United Nations Convention on the Rights of the Child, 20 Nov. 1989, 1577 U.N.T.S. 2 [hereinafter Convention].

¹⁵ Id.

from harmful influences, abuse and exploitation; and the right to participate fully in family, cultural and social life.

By promoting abortion throughout the Council of Europe, this body's proposal fails to respect, protect, promote or fulfill the rights of the child as enumerated in the Convention for *all* children. The Convention's Preamble recognizes the "inherent dignity and the equal and inalienable rights of all members of the human family," giving special recognition that "the child by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, *before as well as after birth.*"¹⁶ The Jurisdictional Article reads that "a child means every human being below the age of eighteen years."¹⁷ By applying the international standard of interpretation under the Vienna Convention on the Law of Treaties ("VCLT")¹⁸ to Article 1 in context with subsequent articles, the Convention extends this definition to the unborn.

The VCLT, reflecting customary international law, states that a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."¹⁹ The context of the Convention, for the purposes of interpretation, comprises "the text, including its *preamble* and annexes."²⁰ Specifically, the Preamble of the Convention "serves to set out the general considerations which motivate the adoption of the treaty."²¹ It is therefore imperative to consider the importance placed on protecting the child "*before as well as after birth*" when interpreting the meaning of "child." In this context, when the Convention is viewed in its entirety, "child" includes even those voiceless unborn children at the mercy of their mothers.

¹⁶ Convention, *supra* note 39, at pmb., § 9 (emphasis added) (quoting United Nations Declaration of the Rights of the Child (proclaimed by General Assembly Resolution 1386 (XIV) of 20 Nov. 1959)). The Declaration served as the basis of the Convention of the Rights of the Child adopted by the U.N. General Assembly 30 years later on 20 November 1989. The Convention on the Rights of the Child was entered into force on 2 September 1990.

¹⁷ Convention, *supra* note 39, at art. 1.

¹⁸ Vienna Convention on the Law of Treaties, 23 May 1969, art. 31(1), 1155 U.N.T.S. 331 [hereinafter VCLT].

¹⁹ VCLT, *supra* note 46.

²⁰ VCLT, *supra* note 46, at art. 31(2) (emphasis added).

²¹ See: The Secretary-General, Technical Review of the Text of the Draft Convention on the Rights of the Child, §§ 44, 47, U.N. Doc. E/CN.4/1989/WG.1/CRP.1/Add. 1 (carried out by the Secretariat prior to adoption by the General Assembly).

When Article 1 of the Convention, which defines the right-holder as a “human being,” is read in context with the right to pre-natal care,²² the definition of “human being” extends from conception onward.²³ Article 24 states that “1. States Parties recognize the *right* of the child to the enjoyment of the highest attainable standard of health 2. States Parties shall pursue full implementation of *this right* and, in particular, shall take appropriate measures: (d) To ensure appropriate *pre-natal* and post-natal care for mothers.”²⁴ Article 24 is significant because “it expressly says that babies have human rights during the pre-natal period.”²⁵ Article 24 of the Convention first recognizes the child’s right to the highest attainable standard of health. Second, it specifies a number of positive obligations the State must take for the “full implementation of *this right*.”²⁶ Finally, in paragraph 2, sub-section (d), the State is obligated to ensure pre-natal care.²⁷ Therefore, the child’s right to health includes pre-natal care. Since *pre-natal* care by definition only applies prior to birth, children prior to birth are right-holders under the Convention.²⁸

More importantly, the right to pre-natal care is not qualified by starting at any given trimester. This suggests that empirically and scientifically, life at its various stages cannot be differentiated. Similarly, the right to life granted under Article 6 of the Convention, which states that “every child has the inherent right to life. . . [and that State] parties shall ensure to the maximum extent possible the survival and development of the child”²⁹ must also then extend to the entire pre-natal period.

This very proposition that the Convention on the Rights of the Child legal obliges the State to protect the rights of the unborn from conception has been upheld by the

²² Convention, *supra* note 39, at art. 24.

²³ The preambular language considered in the context of Article 1 and Article 24, strengthens the proposition that “human being” was intended to include children “before and after birth.”

²⁴ Convention, *supra* note 39, at art. 24 (emphasis added).

²⁵ Bruce Abramson, Violence Against Babies: Protection of Pre- and Post-natal Children Under the Framework of the Convention on the Rights of the Child, 61 (World Family Policy Center, revised ed., 2006) (2005).

²⁶ Convention, *supra* note 39, at art. 24 (emphasis added).

²⁷ *Id.* at § 2.

²⁸ In a formal proposal submitted to the U.N. Study on Violence Against Children, Bruce Abramson adds that “[s]ub-paragraph (d) identifies the recipient of the pre-natal care as the mother, which is understandable since what is typically done for the physical well-being of the developing child is done through the medium of the mother’s body. Although the State fulfills the right by providing care to the mother’s body, the right-holder is the child.” Abramson, *supra* note 53, at 61.

²⁹ Convention, *supra* note 39, at art. 6.

Constitutional Court of Poland which stated:

Life is a value protected by the Constitution and life in the prenatal stage cannot be differentiated. There are no satisfactorily precise and proved criteria allowing for such differentiation depending on the particular stage of human life. From conception, however, human life is a value constitutionally protected. It concerns the prenatal stage as well.....The fact of including this stage of human life finds its confirmation in the Convention of the Rights of the Child ratified by Poland on the 30th of September 1991 which preamble declares in the 10th paragraph that “a child because of its physical and mental immaturity requires a special care, especially legal protection before and after birth.” From this rule it results that the protection concerns the prenatal stage as well.”³⁰

With regard to the Polish Constitutional Court’s understanding of the obligations of the Convention on the Rights of the Child, the VCLT permits consulting legislative records to confirm an “ordinary meaning” interpretation.³¹ The Convention’s legislative history with regard to the Preamble’s development serves as textual evidence that *confirms* that the Convention provides rights to the unborn. Although the Convention was modeled after the Declaration of the Rights of the Child, which contained the language “before or after birth,”³² the original working draft for the Convention did not.³³ Delegates strongly objected to this omission and proposed an amendment to include “before or after birth” in the preamble. In anticipation of disagreement,

[a] number of delegations agreed in support of the amendment on the grounds that their national legislation contained provisions protecting the rights of the unborn child *from the time of conception*. They stated that the purpose of the amendment was not to preclude the possibility of abortion, since many countries had adopted legislation providing for abortion in

³⁰ Polish Abortion Case, Constitutional Court of Poland, OTK Z.U. z.r. 1997, Nr. 2, 19.

³¹ VCLT, *supra* note 46, art. 31(2):

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order *to confirm* the meaning resulting from the application of article 31. ... ” (emphasis added). However, if it is impossible to arrive at an interpretation using the “ordinary meaning,” then the VCLT suggests using the “legislative history” to “determine the meaning when the interpretation according to article 31 [either] (a) leaves the meaning ambiguous or obscure; or (b) leads to a result that is manifestly absurd or unreasonable.

³² See: *supra* note 16.

³³ U.N. Doc E/CN.4/L.1542, p.1 (1980) (adopting the draft convention in U.N. Doc. E/CN.4/1349 (1979)).

certain cases, such as a threat to the health of the mother.³⁴

Ultimately, delegates adopted the phrase “before and after birth,” quoting the 1959 Declaration verbatim to reflect the rights of the unborn child from the time of conception.

Preambles typically do not create rights, but serve as a guide to the interpretation of the treaty.”³⁵ However, since the delegates adopted the proposed amendment to reflect the States’ legislation protecting the entire pre-natal period, protecting the unborn child at all stages of life is a consideration that must be read into the motivating purpose for the Convention. The Convention’s Preamble asserts that the child needs special care and assistance in the pre-natal period of life. However, the Convention would fail to ensure such assistance if the rights were limited only to children from the “moment of birth.” Additionally, the language “asserts that the child needs *legal protection* during the pre-natal period.”³⁶ Legal protection can only be provided by the State Party, in this case, Council of Europe Member States signatory to the Convention.

Finally, the Preamble uses “child,”—the same term used in Article 1 of the Convention—signifying parallel definitions that include the entire pre-natal period. Most importantly, the Preamble places no limitation on when this need for care or legal protection begins. To the contrary, the express purpose of adding this language was to include the entire pre-natal period from conception.³⁷

Thus, in conformity with both the plain meaning and legislative history of the Convention and as understood and interpreted by the Polish Constitutional Court as the sole European judicial body to rule on the meaning and extent of Convention protections, and as principles recognized by several prominent Council of Europe Member States such as Ireland and Malta, it is clear that Council of Europe Member State obligations under the Convention are to protect the rights of the child from conception and that therefore the current proposal of this body to extend abortion rights is wholly inconsistent

³⁴ Sharon Detrick, The United Nations Convention on the Rights of the Child: A Guide to the “Travaux Préparatoires,” 102 (1992) (*excerpting* U.N. Doc. E/CN.4/L.1542, pp. 2-5, para. 6 (emphasis added)).

³⁵ See: Technical Review of the Text of the Draft Convention on the Rights of the Child, U.N. Doc. E/CN.4/1989/WG.1/CRP.1/Add. 1 (1989) at §§ 44, 47. This review was carried out by the Secretariat prior to adoption by the General Assembly.

³⁶ See: *supra* note 39, at 76.

³⁷ See: *supra* note 63 and accompanying text.

with the Convention, with international law and with the mission of the Council of Europe.

CONCLUSION

In conclusion, it is the position of the European Centre for Law and Justice that the current draft resolution does violence to the fundamental tenets of the Council of Europe of respect for national sovereignty and subsidiarity. Furthermore, ECLJ notes the departure of the draft resolution from existing European Convention and European Social Charter legal precedent. As this departure upsets the checks and balances of Council of Europe power established through the foundational treaty documents establishing the various bodies and judicial organs of the Council of Europe, it is the position of the ECLJ that the extension of abortion rights in Europe by the proposed draft resolution is violative of Council of Europe law and should therefore be voted down.