

TABLE OF CONTENTS

I. <u>Nepal’s existing abortion law, in permitting abortion during the first trimester without restriction as to reason or need for spousal consent, respects women’s basic human rights and should be reaffirmed.</u>	2
A. Nepalese Supreme Court jurisprudence	2
B. International human rights standards	2
1. Reproductive self-determination	
2. Reproductive health care	
3. Equality	
C. National-level laws and jurisprudence from selected countries	4
1. Global laws and trends	
2. Jurisprudence	
II. <u>Spousal authorization requirements for reproductive health services threaten women’s rights to nondiscrimination, privacy and access to health care, among others.</u>	6
A. International human rights standards	6
B. Regional human rights standards	7
C. National-level laws and jurisprudence from selected countries	7
1. Global laws	
2. Jurisprudence	
III. <u>International and national laws and jurisprudence do not recognize a right to life of fetuses.</u>	9
A. International human rights standards	9
B. Regional human rights standards	10
C. National-level jurisprudence from selected countries	10

I. Nepal’s existing abortion law, in permitting abortion during the first trimester without restriction as to reason or need for spousal consent, respects women’s basic human rights and should be reaffirmed.

The current law on abortion as provided in the Eleventh Amendment of the *Muluki Ain* respects rights and principles recognized by the Nepalese Supreme Court and in international human rights treaties Nepal has ratified. It is also consistent with liberal legal stances on abortion of countries around the world. This body of domestic, international and comparative law strongly supports the assertion that respect for women’s basic human rights, including those to reproductive self-determination, reproductive health care, and gender and sex equality, requires that women be able to make autonomous decisions to terminate their unplanned or otherwise inappropriate pregnancies, as the Eleventh Amendment currently provides.

A. Nepalese Supreme Court jurisprudence

Two landmark decisions of the Supreme Court offer strong interpretations of women’s rights to privacy and self-determination over matters relating to their sexual and reproductive lives, which are important for the instant case. In *Annapurna Rana v. Kathmandu District Court and Others*, petitioner challenged a court order compelling her to undergo a “virginity test.” The Supreme Court invalidated the order as a violation of petitioner’s constitutional right to privacy, recognizing the right to privacy over one’s own body and reproductive organs as an “inviolable” right under the constitution.¹

In the “Marital Rape Case,” the Court strongly articulated women’s rights to self-determination, self-respect, “independent existence,” and equality and equal protection of the law in holding that marital rape should be recognized as a crime under the law of Nepal. The Court held that the rights to self-determination, self-respect and independent existence are inseparable and inalienable, and are equally available to women before as well as after marriage; as the Court recognized, “women do not lose human rights because of marriage.” Although the specific facts of the case differ from the case at hand, there is a common underlying principle: compelling a woman to use her sexual or reproductive capacity against her will—whether by forcing her to engage in sexual intercourse or compelling her to carry an unwanted pregnancy to term—is a serious violation of her human rights. As the Court recognized in this case, “[a]ny act which ... infringes upon the right of women to independent decision-making or which makes women slaves or an object or property is not compatible in the context of the modern world”²

B. International human rights standards

1. Reproductive self-determination

Women’s right to reproductive self-determination describes several interrelated rights, including the rights to private and family life, and liberty. These rights are necessarily implicated in matters

¹ Reju Prasad Chapagai, *Reproductive Rights of Nepalese Women: Use of Litigation and It’s Impact* (paper presented at a roundtable on Reproductive Health and Rights Advocacy in Nepal: Searching for Legal Strategies and Solutions, Aug. 7-8, 2004, Kathmandu, Nepal).

² *On behalf of the Forum for Women, Law and Development v. His Majesty’s Government*, Writ No. 55, 2058 B.S.

regarding a woman's reproductive capacity and jeopardized by restrictions that comprise her ability to decide, according to her own best interests, whether to terminate an unplanned or otherwise unwanted pregnancy.

Article 17 of the International Covenant on Civil and Political Rights, which entered into force in Nepal in 1991, guarantees the right to freedom from arbitrary or unlawful interference with private life.³ The Human Rights Committee, which monitors States parties' compliance with the Covenant, has drawn attention to women's right to equality in exercising their privacy rights, particularly in relation to their reproductive functions. The Committee has specifically recognized that women's privacy rights may be undermined in the context of obtaining abortion services.⁴

In international policy standards on safe abortion issued by the World Health Organization, national health systems are urged to ensure that their abortion laws protect women's rights to privacy, autonomy, and free and informed decision-making, among others.⁵

2. Reproductive health care

Women's right to reproductive health care implicates the rights to life and health, which are threatened by barriers interfering with access to safe abortion and other reproductive health services. The right to health care is established in the International Covenant on Economic, Social and Cultural Rights, which also entered into force in Nepal in 1991. Article 12 of the Covenant guarantees "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."⁶ The Committee on Economic, Social and Cultural Rights, which monitors States parties' compliance with the Covenant, has interpreted the right to health not as a right to be healthy, but as entailing freedoms and entitlements, including the right to control one's health and body in matters of reproductive and sexual health.⁷ Entitlements include the right to a variety of conditions, facilities, goods, and services that must be available as well as accessible. The Committee has urged States parties to provide access to a full range of reproductive and sexual health care and remove all barriers interfering with access to related health services.

The right to health is closely related to and dependent upon the realization of other rights, including the right to life. Restrictions on abortion threaten women's right to life by increasing their recourse to illegal and unsafe means of terminating unplanned or unwanted pregnancies. The Human Rights Committee has addressed restrictions on abortion as potential violations of the right to life under the Civil and Political Rights Covenant, drawing the link between illegal and unsafe abortions and high rates of maternal mortality.⁸

³ International Covenant on Civil and Political Rights, art. 17.

⁴ Human Rights Committee, General Comment 28. Specifically, the Committee has stated: "[s]tates may fail to respect women's privacy [with respect to] their reproductive functions, for example ... where States impose a legal duty upon doctors and other health personnel to report cases of women who have undergone abortion." *Id.*

⁵ World Health Organization: Safe Abortion: Technical and Policy Guidance for Health Systems, at 65 (2003).

⁶ International Covenant on Economic, Social and Cultural Rights, art. 12.

⁷ Committee on Economic, Social and Cultural Rights, General Comment 14, para. 8.

⁸ See e.g., *Concluding Observations of the Human Rights Committee: Bolivia*, 01/04/97, U.N. Doc. CCPR/C/79/Add.74, ¶ 22; *Colombia*, 01/04/97, U.N. Doc. CCPR/C/79/Add.76, ¶ 24; *Mongolia*,

3. Equality

In restricting access to reproductive health-care services that only women need and exposing women to the risks associated with illegal and unsafe abortion that only women bear, restrictions on abortion laws disproportionately disadvantage women over men. As such, they violate women's right to nondiscrimination in the enjoyment of their other human rights.⁹ Article 12 of the Convention on the Elimination of Discrimination Against Women (CEDAW) guarantees the right to equality in access to health care, specifically requiring States to ensure access to services exclusively or disproportionately needed by women. These include family planning and appropriate services in connection with pregnancy.¹⁰ States' failure to ensure such services, which address women's distinct biological needs, is discriminatory against women.

The CEDAW Committee, which monitors States parties' compliance with the Convention, has explicitly recognized that "[i]t is discriminatory for a State party to refuse to provide legally for the performance of certain reproductive health services for women."¹¹ The Committee has considered the effect of restrictions on abortion on women's right to equality, noting that "laws that criminalize medical procedures only needed by women and that punish women who undergo those procedures" constitute a barrier to appropriate health care for women, compromising the right to nondiscrimination in the area of health.¹² Indeed, the health consequences of unsafe abortion are suffered only by women, as are the physical and psychological effects of carrying an unwanted pregnancy to term. In addition, the Human Rights Committee has recognized that laws restricting or criminalizing abortion undermine women's right to enjoy their human rights—including freedom from torture or other cruel, inhuman or degrading treatment or punishment, privacy and life—on an equal basis with men.¹³

C. National-level laws and jurisprudence from selected countries

1. Global laws and trends

Nepal's recent legalization of abortion is consistent with a decisive global trend in favor of liberalization, with at least 27 countries significantly liberalizing their abortion laws over the past two decades¹⁴ and only a handful restricting women's access to abortion during this period.¹⁵

25/05/2000, U.N. Doc. CCPR/C/79/Add.120, ¶ 8(b); *Peru*, 15/11/2000, U.N. Doc. CCPR/CO/70/PER, ¶ 20; *Poland*, 29/07/99, U.N. Doc. CCPR/C/79/Add.110, ¶ 11; *Senegal*, 19/11/97, U.N. Doc. CCPR/C/79/Add 82, ¶ 12.

⁹ See Rebecca J. Cook et al., *Reproductive Health and Human Rights*, at 196–198

¹⁰ CEDAW, art. 12

¹¹ CEDAW Committee General Recommendation 24, *supra* note 25, para. 11.

¹² *Id.*, para. 14.

¹³ Human Rights Committee General Comment 28, *supra* note 24, paras. 10, 11, 20.

¹⁴ These include Albania, Benin, Burkina Faso, Cambodia, Chad, Ethiopia, Guinea, Mali, South Africa, and Switzerland. Anika Rahman, Laura Katzive & Stanley Henshaw, *A Global Review of Laws on Induced Abortion, 1985-1997*, *International Family Planning Perspectives*, 24(2):56-64 (1998); Center for Reproductive Rights, *Abortion and the Law: 10 Years of Reform* (2005).

¹⁵ Anika Rahman, Laura Katzive & Stanley Henshaw, *A Global Review of Laws on Induced Abortion, 1985-1997*, *International Family Planning Perspectives*, 24(2):56-64 (1998); Center for Reproductive Rights, *Abortion and the Law: 10 Years of Reform* (2005).

Currently, of 157 countries around the world that permit abortion on at least some grounds, well over one-third (68 countries) provide for a right to abortion without restriction as to reason or on broad therapeutic or socio-economic grounds.¹⁶

2. Jurisprudence

National courts around the world have upheld women's human rights, including those relating to reproductive self-determination, in dismissing challenges to liberal abortion laws or striking down restrictive laws.

In 1988, the Canada Supreme Court struck down that country's restrictive abortion law to protect women's rights to life, liberty and security. The law at the time criminalized abortion except to save the woman's life or health and made abortion in these limited circumstances subject to approval by a hospital committee. In its landmark decision, the Court recognized the strong liberty and privacy interests at stake in a woman's decision to terminate her pregnancy:

The right to liberty ... guarantees to every individual a degree of personal autonomy over important decisions intimately affecting his or her private life. ... A woman's decision to terminate her pregnancy falls within this class of protected decisions. It is one that will have profound psychological, economic and social consequences for her. ... Section 251 of the Criminal Code [prohibiting abortion except to save the woman's life or health] takes a personal decision away from the woman and gives it to a committee which bases its decision on "criteria" entirely unrelated to [the pregnant woman's] own priorities and aspirations.¹⁷

The Supreme Court of the United States has found that the constitutional right to privacy encompasses an unrestricted right to abortion during the first trimester of pregnancy.¹⁸ The Court has also emphasized the special liberty interests of women that are implicated in decisions concerning abortion, recognizing that there are limits on the State's ability to proscribe abortion because "the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law."¹⁹ Significantly, the Court has stated: "The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society."²⁰ The Court has also recognized the implications of women's ability to control their reproductive functions for other areas of their lives, noting that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."²¹

Constitutional courts throughout Europe, including in France, Italy and the Netherlands, have found that liberal abortion laws are consistent with a woman's right to liberty.²² The Federal

¹⁶ In addition, sixty-nine countries explicitly permit abortion where pregnancy poses a threat to a woman's life or physical health, and another 20 countries permit consideration also of a woman's mental health. CENTER FOR REPRODUCTIVE RIGHTS, THE WORLD'S ABORTION LAWS 2005 (Wallchart, 2005).

¹⁷ *R v. Morgentaler* (1988), 1 S.C.R. 30, at 36-37.

¹⁸ *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁹ *Id.* at 852.

²⁰ *Id.*

²¹ *Id.* at 856.

²² See Rebecca J. Cook et al., *Reproductive Health and Human Rights*, at 165 n. 48, 49, 50 (2003).

Constitutional Court of Germany has upheld that country's liberal abortion law to protect women's right to personality, among others.²³

II. Spousal authorization requirements for reproductive health services threaten women's rights to nondiscrimination, privacy and access to health care, among others.

It is widely recognized in law that mentally competent adults have the right to make autonomous decisions in matters concerning their health care and are neither subject to third-party consent nor veto in their decisions, including from a spouse or a partner.²⁴ International and regional human rights standards, as well as the laws and jurisprudence of countries around the world, recognize that the imposition of such requirements on women's ability to access reproductive health services, including abortion, is a threat to their health and human rights.

A. International human rights standards

International human rights bodies have expressed concern over laws that require women to obtain a spouse's permission in order to access reproductive health services. The CEDAW Committee has specifically recognized spousal consent requirements for abortion as a violation of Article 15 of CEDAW, which requires States parties "to accord women equality with men before the law."²⁵ The Committee has gone further to recommend that a State party review such a requirement in its abortion law.²⁶ The CEDAW and Human Rights Committees have expressed similar concern over spousal consent requirements for a woman's access to family planning methods such as sterilization,²⁷ again recognizing such provisions as violating women's rights to equality and nondiscrimination in access to health care.²⁸

International policy standards on safe abortion issued by WHO provide: "The fundamental ethical principle of respect for persons includes respecting their autonomy. Autonomy means that mentally competent adults do not require the consent (authorization) of any third party, such as a husband or partner, to access a health service."²⁹ The standards also recognize spousal consent requirements for abortion as a barrier to timely provision of services that may have the effect of "creating insurmountable obstacles to access," deterring women from seeking timely care and leading them to risk self-induced abortion or clandestine services.³⁰

²³ Gerald L. Neuman, *Casey in the Mirror: Abortion, Abuse and the Right to Protection in the United States and Germany*, 43 Am. J. Comp. L. 273, 275 (1995).

²⁴ See Rebecca J. Cook et al., *Reproductive Health and Human Rights*, at 115 (2003).

²⁵ See *Concluding Observations of the CEDAW Committee: Turkey* (1997); *Indonesia* (1998); CEDAW, art. 15(1).

²⁶ See *Concluding Observations of the CEDAW Committee: Turkey* (1997).

²⁷ See *Concluding Observations of the CEDAW Committee: St. Vincent and the Grenadines* (1997); *Chile* (1999); Human Rights Committee, General Comment 28.

²⁸ See *Concluding Observations of the CEDAW Committee: Chile* (1999); *St. Vincent and the Grenadines* (1997).

²⁹ World Health Organization: *Safe Abortion: Technical and Policy Guidance for Health Systems*, at 66 (2003).

³⁰ World Health Organization: *Safe Abortion: Technical and Policy Guidance for Health Systems*, at 82, 87, 92 (2003).

B. Regional human rights standards

Regional human rights bodies have given primacy to women's rights and interests in deciding cases brought by putative fathers asserting their rights in decisions regarding abortion. The European Court and Commission of Human Rights have heard and, in each instance, dismissed several such cases.³¹ In *Boso v. Italy*, the most recent case, the complainant challenged Italy's abortion law for precluding spousal consent in the decision-making process, alleging violations of his rights to private and family life and to found a family under the European Convention on Human Rights. The Court dismissed both claims. In addressing the complainant's asserted privacy interest, the Court held:

... the potential father's right to respect for his private and family life cannot be interpreted so widely as to embrace the right to be consulted or to apply to a court about an abortion which his wife intends to have performed on her. ... The Court considers that any interpretation of a potential father's rights under Article 8 of the Convention [which guarantees everyone's right to respect for his private and family life] when the mother intends to have an abortion *should above all take into account her rights, as she is the person primarily concerned by the pregnancy and its continuation or termination* (emphasis added).³²

Having found no unjustified interference with the complainant's right to private and family life, the Court proceeded to dismiss the challenge to his right to found a family as well.

C. National-level laws and jurisprudence from selected countries

1. Global laws

Of the 68 countries globally that permit abortion without restriction as to reason or on broad socio-economic grounds, only three—Japan, Taiwan and Turkey—require spousal authorization. Overall, of the 157 countries that permit abortion on at least some grounds—to save the woman's life, to preserve her physical or mental health, on socio-economic grounds, or without restriction as to reason—only 13 require spousal authorization, and most of these are countries with highly restrictive laws.³³ Thus, the overwhelming majority of countries around the world do not require spousal consent for a woman to obtain an otherwise legal abortion, implicitly recognizing the primacy of the woman's rights and interests in decisions concerning abortion.

³¹ See *Paton v. United Kingdom*, App. No. 8416/78, 3 Eur. H.R. Rep. 408 (1980) (Eur. Comm'n H.R.); *R.H. v. Norway*, decision on admissibility, App. No. 17004/90, Eur. Comm'n H.R. (1992); *Boso v. Italy*, App. No. 50490/99, Eur. Comm'n H.R. (2002).

³² *Boso v. Italy*, App. No. 50490/99, Eur. Comm'n H.R. (2002).

³³ These include Malawi, Nicaragua, Syria, United Arab Emirates, Equatorial Guinea, Kuwait, Maldives, Morocco, Republic of Korea, and Saudi Arabia. These countries either only permit abortion to save the woman's life or to preserve her physical health.

2. Jurisprudence

The European Court and Commission of Human Rights cases noted above were preceded by domestic proceedings that are relevant for the case at hand. In *Boso v. Italy*, Italian courts had dismissed the complainant's case at each stage of domestic litigation prior to his appeal before the European Court of Human Rights. In the domestic proceedings, the complainant argued that Italy's abortion law, which permits abortion during the first 90 days of pregnancy based on the woman's own decision, contravened the principle of equality between spouses as enshrined in the Italian constitution. The Constitutional Court of Italy (and subsequently the district court and Court of Cassation) dismissed the case, declaring that the law was based on a policy decision to grant the woman full responsibility for an abortion, and that this decision was grounded in recognition that the physical and mental effects of pregnancy were felt primarily by the woman.³⁴ National courts elsewhere in Europe, including in the United Kingdom and Norway, have similarly dismissed claims brought by spouses or putative fathers asserting their rights in matters of abortion.³⁵

The United States Supreme Court has found spousal notification requirements in abortion laws to constitute an unconstitutional "undue burden" on a woman's decision to terminate her pregnancy, defining undue burden as a regulation that has:

... the *purpose or effect* of placing a substantial obstacle in the path of a woman seeking an abortion ... a statute with this purpose is invalid because the means chosen by the State to further the interest in fetal life must be calculated *to inform the woman's free choice, not hinder it*. And a statute which ... has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends (emphasis added).³⁶

In a 1992 decision declaring that a spousal notification requirement in a state abortion law was an undue and unconstitutional burden on a woman's access to abortion, the Court held:

The spousal notification requirement is ... likely to prevent a significant number of women from obtaining an abortion. It does not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose a substantial obstacle. We must not blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases ...³⁷

³⁴ See *id.* (referencing the Constitutional Court's decision).

³⁵ See the domestic proceedings as referenced in *Paton v. United Kingdom*, App. No. 8416/78, 3 Eur. H.R. Rep. 408 (1980) (Eur. Comm'n H.R.), and *R.H. v. Norway*, decision on admissibility, App. No. 17004/90, Eur. Comm'n H.R. (1992). In both of these cases, the petitioner's claims were dismissed at each level of the domestic proceedings.

³⁶ *Planned Parenthood of Southeastern Pennsylvania v. Robert P. Casey*, 505 U.S. 833 (1992).

³⁷ *Id.*

III. International and national laws and jurisprudence do not recognize a right to life of fetuses.

International and regional human rights standards, as well as the laws and jurisprudence of countries around the world, have consistently indicated that the right to life of born persons does not extend to fetuses.

A. International human rights standards

International and regional human rights standards do not support a finding that the right to life of born persons extends to fetuses. In particular, the International Covenant on Civil and Political Rights provides no indication that the right to life, protected in Article 6(1) of the Covenant,³⁸ applies to a fetus. To the contrary, in the context of Article 6, the Human Rights Committee has routinely emphasized the threat to women's lives posed by illegal and unsafe abortion, implicitly indicating that the Covenant's protections do not extend to fetuses.³⁹

The Committee on the Rights of the Child has followed an identical approach in interpreting Article 6 of the Convention on the Rights of the Child, which states that "every child has the inherent right to life."⁴⁰ In its concluding observations to state parties, it has expressed concern about denials of safe abortion services to adolescent girls seeking to terminate pregnancies. On several occasions, the Committee on the Rights of the Child has made the link between unsafe abortion and high rates of maternal mortality,⁴¹ and has expressed concern over the impact of punitive legislation on maternal mortality rates.⁴² Again, implicit in the Committee's recommendations is the view that the definition of a "child" for purposes of the Convention does not include a fetus.

B. Regional human rights standards

The jurisprudence of the European Court and Commission of Human Rights clearly establishes that the fetus does not enjoy an absolute right to life under the European Convention on Human

³⁸ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., art. 6(1), Supp. No. 16, U.N. Doc A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976).

³⁹ See e.g., *Concluding Observations of the Human Rights Committee: Bolivia*, 01/04/97, U.N. Doc. CCPR/C/79/Add.74, ¶ 22; *Concluding Observations of the Human Rights Committee: Colombia*, 01/04/97, U.N. Doc. CCPR/C/79/Add.76, ¶ 24; *Concluding Observations of the Human Rights Committee: Mongolia*, 25/05/2000, U.N. Doc. CCPR/C/79/Add.120, ¶ 8(b); *Concluding Observations of the Human Rights Committee: Peru*, 15/11/2000, U.N. Doc. CCPR/CO/70/PER, ¶ 20; *Concluding Observations of the Human Rights Committee: Poland*, 29/07/99, U.N. Doc. CCPR/C/79/Add.110, ¶ 11; *Concluding Observations of the Human Rights Committee: Senegal*, 19/11/97, U.N. Doc. CCPR/C/79/Add.82, ¶ 12.

⁴⁰ Convention on the Rights of the Child, *adopted* Nov. 20, 1989, G.A. Res. 44/25, annex, U.N. GAOR, 44th Sess., art. 6, Supp. No. 49, at 166, UN Doc. A/44/49 (1989), *reprinted in* 28 I.L.M. 1448 (*entered into force* Sept. 2, 1990).

⁴¹ See e.g., Committee on the Rights of the Child, *General Comment 4*, CRC/GC/2003/4, 1 July 2003, 33rd Sess., para. 24.

⁴² See e.g., *Concluding Observations of the Committee on the Rights of the Child: Chad*, 24/08/99, U.N. Doc. CRC/C/15/Add.107, ¶ 30; *Concluding Observations of the Committee on the Rights of the Child: Guatemala*, 09/07/2001, U.N. Doc. CRC/C/15/Add.154, ¶ 40.

Rights.⁴³ In the Court's most recent decision on this issue, the Court again refused to extend the European Convention on Human Rights' protection of "everyone's right to life" to fetuses, reasoning that "there is no European consensus on the scientific and legal definition of the beginning of life."⁴⁴ The Court further noted that "the life of the foetus was intimately connected with that of the mother and could be protected through her."⁴⁵

The jurisprudence of the Inter-American Commission of Human Rights has been consistent with that of other regional and international bodies. The Commission has interpreted Article 4 of the American Convention on Human Rights, which goes so far as to protect the right to life "in general, from the moment of conception,"⁴⁶ *not* to provide absolute protection to a fetus before birth, nor to preclude liberal national-level abortion legislation.⁴⁷

On 11 July 2003, the African Union adopted the Protocol on the Rights of Women in Africa to supplement the the African Charter on Human and Peoples' Rights, which was adopted in 1981. The Protocol, which recently came into force upon being ratified by 15 African states, calls upon governments to protect women's reproductive rights by authorizing abortion in cases of fetal impairment, sexual assault, rape, and incest, and where the continued pregnancy endangers the mental and physical health or life of a woman.⁴⁸ The Protocol co-exists with the African Charter on the Rights and Welfare of the Child, a regional instrument that entered into force in 1999, which provides in Article 5(1), "Every child has an inherent right to life. This right shall be protected by law."⁴⁹ Read together, the two instruments indicate that the right to life referred to in the African Charter is not meant to provide absolute protection to an unborn fetus.

C. National-level jurisprudence from selected countries

National-level courts around the world have declined to treat fetuses as persons under the law.

In South Africa, in *Christian Lawyers Association of South Africa and others v. Minister of Health and others*, the High Court of South Africa, Transvaal Provincial Division considered a constitutional challenge to the 1996 Choice on Termination of Pregnancy Act, which permits abortion without restriction as to reason during the first trimester and on broad grounds at later stages of pregnancy. Plaintiffs argued that the law was in conflict with Section 11 of the Constitution, which guarantees that "everyone has the right to life." In considering whether the constitution's reference to "everyone" was intended to include the fetus, the court held that such an interpretation was untenable. It continued:

⁴³ See *Paton v. United Kingdom*, App. No. 8416/78, 3 Eur. H.R. Rep. 408 (1980) (Eur. Comm'n H.R.); *R.H. v. Norway*, decision on admissibility, App. No. 17004/90, Eur. Comm'n H.R. (1992); *Boso v. Italy*, App. No. 50490/99, Eur. Comm'n H.R. (2002); *Vo v. France*, App. No. 53924/00, Eur. Ct. H.R. (2004).

⁴⁴ *Vo v. France*, App. No. 53924/00, Eur. Ct. H.R. (2004).

⁴⁵ *Id.*

⁴⁶ American Convention on Human Rights, Nov. 22, 1969, art. 4, O.A.S.T.S. No. 36, O.A.S. Off. Rec. OEA/Ser.L/V/II.23, doc. 21, rev. 6 (*entered into force* July 18, 1978).

⁴⁷ See *Baby Boy*, Case 2141, Inter-Am. C.H.R. 25/OEA/ser. L./V./II.54, doc. 9 rev. 1 (1981).

⁴⁸ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, *adopted* 11 July 2003, art. 14(2)(c).

⁴⁹ African Charter on the Rights and Welfare of the Child, art. 5(1), OAU Doc. CAB/LEG/24.9/49 (1990), *entered into force* Nov. 29, 1999.

Moreover, if s 11 were to be interpreted as affording constitutional protection to the life of a foetus far-reaching and anomalous consequences would ensue. The life of the foetus would enjoy the same protection as that of the mother. Abortion would be constitutionally prohibited even though the pregnancy constitutes a serious threat to the life of the mother. The prohibition would apply even if the pregnancy resulted from rape or incest, or if there were a likelihood that the child to be born would suffer from severe physical or mental abnormality...If the plaintiff's contentions are correct then the termination of a woman's pregnancy would no longer constitute the crime of abortion, but that of murder. In my view, the drafters of the Constitution could not have contemplated such far-reaching results without expressing themselves in no uncertain terms. For the above reasons...I consider that under the Constitution the foetus is not a legal persona.⁵⁰

National courts in Europe have reached similar conclusions. In 1974, Austria's Constitutional Court considered a challenge to national legislation that removed restrictions on abortion during the first trimester of pregnancy. The petitioner claimed that the legislation violated the right to life under the European Convention on Human Rights as well as national constitutional protections of the right to life. The Constitutional Court held, *inter alia*, that the right to life should not be interpreted to protect the unborn.⁵¹ The Constitutional Court of the Netherlands had a similar interpretation of the right to life in upholding Dutch legislation liberalizing access to abortion.⁵² These rulings are also consistent with the Supreme Court abortion jurisprudence of Canada and the United States.⁵³

⁵⁰ *Christian Lawyers Association of South Africa and others v. Minister of Health and others*, the High Court of South Africa, Transvaal Provincial Division, 50 BMLR 241, 10 July 1998.

⁵¹ *Decision of the Constitutional Court of 11 October 1974*, 39 Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes (1974), summarized in ANNUAL REVIEW OF POPULATION LAW, Vol. I, 49 (1974).

⁵² *Juristenvereniging Pro Vita v. De Staat der Nederlanden*, summarized in ANNUAL REVIEW OF POPULATION LAW, 1991, Vol. 19, No. 5, 179-80 (1991).

⁵³ See Canada Supreme Court cases *Winnipeg Child Family Services (Northwest Area) v. G*, 3 S.C.R. 925 (1997), and *R v. Morgenthaler*, 1 S.C.R. 30 (1988). See United States Supreme Court cases *Roe v. Wade*, 410 U.S. 113, 163 (1973), *Stenberg v. Carhart*, 530 U.S. 914 (2000), *Ferguson v. City of Charleston*, 532 U.S. 67 (2001).