

# REPRODUCTIVE RIGHTS

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Supplement

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## *Comparative Abortion Law*

The right of an individual to control her reproductive present and future and her right to determine whether and when she will have a family, and the size of that family, are basic human rights that are recognized by and enshrined in several human rights treaties—including the International Covenant on Civil and Political Rights [“ICCPR”], the International Covenant on Economic, Social and Cultural Rights [“ICESCR”], the Convention on the Elimination of All Forms of Discrimination against Women [“CEDAW”], and the Convention on the Rights of the Child [“CRC”]—as well as other consensus documents. The foundations for reproductive and sexual rights, along with the right to create (or avoid creating) a family, are found in other extant, internationally-recognized rights, such as:

- The right to life, liberty, and security;
- The right to health, reproductive health, and family planning;
- The right to decide the number and spacing of one’s children;
- The right to consent to marriage and to equality in marriage;
- The right to privacy;
- The right to be free from discrimination;
- The right to modify traditions and customs that violate women’s rights;
- The right not to be subjected to torture or other cruel, inhuman, or degrading treatment or punishment;
- The right to be free from sexual violence; and
- The right to enjoy scientific progress and to consent to experimentation.

Perhaps the most familiar, and controversial, reproductive right is the right of a woman to terminate an unwanted pregnancy. In the U.S., the Supreme Court first recognized the fundamental nature of this right in *Roe v. Wade*—holding that an implied right to privacy could be found within the penumbras of the enumerated rights in the Constitution; moreover, this right to privacy protected certain private decisions, like the decision to terminate a pregnancy, from governmental interference. Later cases clarified that a person’s right to privacy was a part of the guarantee of “liberty” found in the Fifth and Fourteenth Amendments.

However, conceptualizing a woman’s right to an abortion as a “liberty” is just one of many possible rationales for recognizing the right. There is a compelling argument that a woman’s right to control whether she will bear a child is necessary for her to achieve some *equality* with men, and that the right enables women, as a group, to avoid being relegated to the private sphere as “mothers” and “caretakers” and facilitates their participation in the public sphere alongside men—as equals. There is another compelling argument that women require the right to an abortion because forcing a woman to bear a child, by criminalizing or restricting her choice to terminate a pregnancy, is a violation of her *dignity*. That governments must respect the dignity of all individuals has been recognized in several international human rights instruments. In the included excerpt from Professor Reva Siegel’s article, “Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart,” she makes a compelling case that a woman’s “right to dignity” is a preferable base on which to build the abortion right.

In the following case excerpts, compare the different rationales given for the state’s protection of the woman’s right to an abortion. Which rationales offer more robust protection? Which rationales are weaker and more subject to limitation?

r. v. morgentaler, [1988] 1 S.C.R. 30

**Dr. Henry Morgentaler, Dr. Leslie Frank Smoling and Dr. Robert Scott**  
*Appellants*

v.

**Her Majesty The Queen** *Respondent*  
and

**The Attorney General of Canada** *Intervener*

INDEXED AS: R. v. MORGENTALER

File No.: 19556.

1986: October 7, 8, 9, 10; 1988: January 28.

Present: Dickson C.J. and Beetz, Estey, McIntyre, Lamer, Wilson and La Forest JJ.  
ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

The judgment of Dickson C.J. and Lamer J. was delivered by

**THE CHIEF JUSTICE**--The principal issue raised by this appeal is whether the abortion provisions of the *Criminal Code*, R.S.C. 1970, c. C-34, infringe the "right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" as formulated in s. 7 of the *Canadian Charter of Rights and Freedoms*. The appellants, Dr. Henry Morgentaler, Dr. Leslie Frank Smoling and Dr. Robert Scott, have raised thirteen distinct grounds of appeal. During oral submissions, however, it became apparent that the primary focus of the case was upon the s. 7 argument. It is submitted by the appellants that s. 251 of the *Criminal Code* contravenes s. 7 of the *Canadian Charter of Rights and Freedoms* and that s. 251 should be struck down. Counsel for the Crown admitted during the course of her submissions that s. 7 of the *Charter* was indeed "the key" to the entire appeal. As for the remaining grounds of appeal, only a few brief comments are necessary. First of all, I agree with the disposition made by the Court of Appeal of the non-*Charter* issues, many of which have already been adequately dealt with in earlier cases by this Court. I am also of the view that the arguments concerning the alleged invalidity of s. 605 under ss. 7 and 11 of the *Charter* are unfounded. In view of my resolution of the s. 7 issue, it will not be necessary for me to address the appellants' other *Charter* arguments and I expressly refrain from commenting upon their merits.

During argument before this Court, counsel for the Crown emphasized repeatedly that it is not the role of the judiciary in Canada to evaluate the wisdom of legislation enacted by our democratically elected representatives, or to second-guess difficult policy choices that confront all governments. In *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616, at p. 671, [hereinafter "*Morgentaler (1975)*"] I stressed that the Court had "not been called upon to decide, or even to enter, the loud and continuous public debate on abortion." Eleven years later, the controversy persists, and it remains true that this Court cannot presume to resolve all of the competing claims advanced in vigorous and healthy public debate. Courts and legislators in other democratic societies have reached completely contradictory decisions when asked to weigh the competing values relevant to

the abortion question. See, e.g., *Roe v. Wade*, 410 U.S.113 (1973); *Paton v. United Kingdom* (1980), 3 E.H.R.R. (European Court of Human Rights); *The Abortion Decision of the Federal Constitutional Court -- First Senate -- of the Federal Republic of Germany*, February 25, 1975, translated and reprinted in (1976), 9 John Marshall J. Prac. and Proc. 605; and the *Abortion Act, 1967*, 1967, c.87 (U.K.)

But since 1975, and the first *Morgentaler* decision, the Court has been given added responsibilities. I stated in *Morgentaler* (1975), at p. 671, that:

The values we must accept for the purposes of this appeal are those expressed by Parliament which holds the view that the desire of a woman to be relieved of her pregnancy is not, of itself, justification for performing an abortion.

Although no doubt it is still fair to say that courts are not the appropriate forum for articulating complex and controversial programmes of public policy, Canadian courts are now charged with the crucial obligation of ensuring that the legislative initiatives pursued by our Parliament and legislatures conform to the democratic values expressed in the *Canadian Charter of Rights and Freedoms*. As Justice McIntyre states in his reasons for judgment, at p. 138, "the task of the Court in this case is not to solve nor seek to solve what might be called the abortion issue, but simply to measure the content of s. 251 against the *Charter*." It is in this latter sense that the current *Morgentaler* appeal differs from the one we heard a decade ago.

#### I

The Court stated the following constitutional questions:

1. Does section 251 of the *Criminal Code* of Canada infringe or deny the rights and freedoms guaranteed by ss. 2(a), 7, 12, 15, 27 and 28 of the *Canadian Charter of Rights and Freedoms*?
2. If section 251 of the *Criminal Code* of Canada infringes or denies the rights and freedoms guaranteed by ss. 2(a), 7, 12, 15, 27 and 28 of the *Canadian Charter of Rights and Freedoms*, is s. 251 justified by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?
3. Is section 251 of the *Criminal Code* of Canada *ultra vires* the Parliament of Canada?
4. Does section 251 of the *Criminal Code* of Canada violate s. 96 of the *Constitution Act, 1867*?
5. Does section 251 of the *Criminal Code* of Canada unlawfully delegate federal criminal power to provincial Ministers of Health or Therapeutic Abortion Committees, and in doing so, has the Federal Government abdicated its authority in this area?
6. Do sections 605 and 610(3) of the *Criminal Code* of Canada infringe or deny the rights and freedoms guaranteed by ss. 7, 11(d), 11(f), 11(h) and 24(1) of the *Canadian Charter of Rights and Freedoms*?

7. If sections 605 and 610(3) of the *Criminal Code* of Canada infringe or deny the rights and freedoms guaranteed by ss. 7, 11(d) 11(f), 11(h) and 24(1) of the *Canadian Charter of Rights and Freedoms*, are ss. 605 and 610(3) justified by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

The Attorney General of Canada intervened to support the respondent Crown.

## II

### Relevant Statutory and Constitutional Provisions

#### *Criminal Code*

- 251.** (1) Every one who, with intent to procure the miscarriage of a female person, whether or not she is pregnant, uses any means for the purpose of carrying out his intention is guilty of an indictable offence and is liable to imprisonment for life.
- (2) Every female person who, being pregnant, with intent to procure her own miscarriage, uses any means or permits any means to be used for the purpose of carrying out her intention is guilty of an indictable offence and is liable to imprisonment for two years.
- (3) In this section, "means" includes
- (a) the administration of a drug or other noxious thing,
  - (b) the use of an instrument, and
  - (c) manipulation of any kind.
- (4) Subsections (1) and (2) do not apply to
- (a) a qualified medical practitioner, other than a member of a therapeutic abortion committee for any hospital, who in good faith uses in an accredited or approved hospital any means for the purpose of carrying out his intention to procure the miscarriage of a female person, or
  - (b) a female person who, being pregnant, permits a qualified medical practitioner to use in an accredited or approved hospital any means described in paragraph (a) for the purpose of carrying out her intention to procure her own miscarriage, if, before the use of those means, the therapeutic abortion committee for that accredited or approved hospital, by a majority of the members of the committee and at a meeting of the committee at which the case of such female person has been reviewed,
  - (c) has by certificate in writing stated that in its opinion the continuation of the pregnancy of such female person would or would be likely to endanger her life or health, and
  - (d) has caused a copy of such certificate to be given to the qualified medical practitioner.
- (5) The Minister of Health of a province may by order
- (a) require a therapeutic abortion committee for any hospital in that province, or any member thereof, to furnish to him a copy of any certificate described in paragraph (4)(c) issued, by that committee, together with such other information relating to the circumstances surrounding the issue of that certificate as he may require, or
  - (b) require a medical practitioner who, in that province, has procured the miscarriage of any female person named in a certificate described in paragraph (4)(c), to furnish to him a copy of that certificate, together with such other information relating to the procuring of the miscarriage as he may require.

(6) For the purposes of subsections (4) and (5) and this subsection "accredited hospital" means a hospital accredited by the Canadian Council on Hospital Accreditation in which diagnostic services and medical, surgical and obstetrical treatment are provided; "approved hospital" means a hospital in a province approved for the purposes of this section by the Minister of Health of that province; "board" means the board of governors, management or directors, or the trustees, commission or other person or group of persons having the control and management of an accredited or approved hospital; "Minister of Health" means

(a) in the Provinces of Ontario, Quebec, New Brunswick, Manitoba, Newfoundland and Prince Edward Island, the Minister of Health,

(a.1) in the Province of Alberta, the Minister of Hospitals and Medical Care,

(b) in the Province of British Columbia, the Minister of Health Services and Hospital Insurance,

(c) in the Provinces of Nova Scotia and Saskatchewan, the Minister of Public Health, and

(d) in the Yukon Territory and the Northwest Territories, the Minister of National Health and Welfare;

"qualified medical practitioner" means a person entitled to engage in the practice of medicine under the laws of the province in which the hospital referred to in subsection (4) is situated;

"therapeutic abortion committee" for any hospital means a committee, comprised of not less than three members each of whom is a qualified medical practitioner, appointed by the board of that hospital for the purpose of considering and determining questions relating to terminations of pregnancy within that hospital.

(7) Nothing in subsection (4) shall be construed as making unnecessary the obtaining of any authorization or consent that is or may be required, otherwise than under this Act, before any means are used for the purpose of carrying out an intention to procure the miscarriage of a female person.

### *The Canadian Charter of Rights and Freedoms*

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

...

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

### III

#### **Procedural History**

The three appellants are all duly qualified medical practitioners who together set up a clinic in Toronto to perform abortions upon women who had not obtained a certificate from a therapeutic abortion committee of an accredited or approved hospital as required by s. 251(4). The doctors had made public statements questioning the wisdom of the abortion laws in Canada and asserting that a woman has an unfettered right to choose whether or not an abortion is appropriate in her individual circumstances.



Indictments were preferred against the appellants charging that they conspired with each other between November 1982 and July 1983 with intent to procure the miscarriage of female persons, using an induced suction technique to carry out that intent, contrary to s. 423(1)(d) and s. 251(1) of the *Criminal Code*.

\* \* \*

#### IV

##### Section 7 of the *Charter*

In his submissions, counsel for the appellants argued that the Court should recognize a very wide ambit for the rights protected under s. 7 of the *Charter*. Basing his argument largely on American constitutional theories and authorities, Mr. Manning submitted that the right to "life, liberty and security of the person" is a wide-ranging right to control one's own life and to promote one's individual autonomy. The right would therefore include a right to privacy and a right to make unfettered decisions about one's own life.

In my opinion, it is neither necessary nor wise in this appeal to explore the broadest implications of s. 7 as counsel would wish us to do. I prefer to rest my conclusions on a narrower analysis than that put forward on behalf of the appellants. I do not think it would be appropriate to attempt an all-encompassing explication of so important a provision as s. 7 so early in the history of *Charter* interpretation. The Court should be presented with a wide variety of claims and factual situations before articulating the full range of s. 7 rights. I will therefore limit my comments to some interpretive principles already set down by the Court and to an analysis of only two aspects of s. 7, the right to "security of the person" and "the principles of fundamental justice".

##### A. *Interpreting s. 7*

The goal of *Charter* interpretation is to secure for all people "the full benefit of the *Charter's* protection": *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344. To attain that goal, this Court has held consistently that the proper technique for the interpretation of *Charter* provisions is to pursue a "purposive" analysis of the right guaranteed. A right recognized in the *Charter* is "to be understood, in other words, in the light of the interests it was meant to protect" . . .

In *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at p. 204, Justice Wilson emphasized that there are three distinct elements to the s. 7 right, that "life, liberty, and security of the person" are independent interests, each of which must be given independent significance by the Court (p. 205). This interpretation was adopted by a majority of the Court, *per* Justice Lamer, in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 500. It is therefore possible to treat only one aspect of the first part of s. 7 before determining whether any infringement of that interest accords with the principles of fundamental justice. (See *Singh*, *Re B.C. Motor Vehicle Act*, and *R. v. Jones*, [1986] 2 S.C.R. 284.)

With respect to the second part of s. 7, in early academic commentary one of the principal concerns was whether the reference to "principles of fundamental justice" enables the courts to review the substance of legislation . . . In *Re B.C. Motor Vehicle Act*, Lamer J. noted at p. 497 that any attempt to draw a sharp line between procedure and substance would be ill-conceived. He suggested further that it would not be beneficial in Canada to allow a debate which is rooted in United States constitutional dilemmas to shape our interpretation of s. 7 (p. 498):

We would, in my view, do our own Constitution a disservice to simply allow the American debate to define the issue for us, all the while ignoring the truly fundamental structural differences between the two constitutions.

Lamer J. went on to hold that the principles of fundamental justice referred to in s. 7 can relate both to procedure and to substance, depending upon the circumstances presented before the Court.

I have no doubt that s. 7 does impose upon courts the duty to review the substance of legislation once it has been determined that the legislation infringes an individual's right to "life, liberty and security of the person". The section states clearly that those interests may only be impaired if the principles of fundamental justice are respected. Lamer J. emphasized, however, that the courts should avoid "adjudication of the merits of public policy" (p. 499). In the present case, I do not believe that it is necessary for the Court to tread the fine line between substantive review and the adjudication of public policy. As in the *Singh* case, it will be sufficient to investigate whether or not the impugned legislative provisions meet the procedural standards of fundamental justice. First it is necessary to determine whether s. 251 of the *Criminal Code* impairs the security of the person.

#### B. *Security of the Person*

The law has long recognized that the human body ought to be protected from interference by others. At common law, for example, any medical procedure carried out on a person without that person's consent is an assault. Only in emergency circumstances does the law allow others to make decisions of this nature. Similarly, art. 19 of the *Civil Code of Lower Canada* provides that "The human person is inviolable" and that "No person may cause harm to the person of another without his consent or without being authorized by law to do so". "Security of the person", in other words, is not a value alien to our legal landscape. With the advent of the *Charter*, security of the person has been elevated to the status of a constitutional norm. This is not to say that the various forms of protection accorded to the human body by the common and civil law occupy a similar status. "Security of the person" must be given content in a manner sensitive to its constitutional position. . . . Nor is it to say that the state can never impair personal security interests. There may well be valid reasons for interfering with security of the person. It is to say, however, that if the state does interfere with security of the person, the *Charter* requires such interference to conform with the principles of fundamental justice.

The appellants submitted that the "security of the person" protected by the *Charter* is an explicit right to control one's body and to make fundamental decisions about one's life. The Crown contended that "security of the person" is a more circumscribed interest and that, like all of the elements of s. 7, it at most relates to the concept of physical control, simply protecting the individual's interest in his or her bodily integrity.

\* \* \*

... Lamer J. held, at pp. 919-20, that even in the specific context of s. 11(b):

... security of the person is not restricted to physical integrity; rather, it encompasses protection against "overlong subjection to the vexations and vicissitudes of a pending criminal accusation" ... These include stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction.

If state-imposed psychological trauma infringes security of the person in the rather circumscribed case of s. 11(b), it should be relevant to the general case of s. 7 where the right is expressed in broader terms. . .

I note also that the Court has held in other contexts that the psychological effect of state action is relevant in assessing whether or not a *Charter* right has been infringed. In *R. v. Therens*, at p. 644, Justice Le Dain held that "The element of psychological compulsion, in the form of a reasonable perception of suspension of freedom of choice, is enough to make the restraint of liberty involuntary" for the purposes of defining "detention" in s. 10 of the *Charter*. . . .

\* \* \*

The case law leads me to the conclusion that state interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal law context, constitute a breach of security of the person. It is not necessary in this case to determine whether the right extends further, to protect either interests central to personal autonomy, such as a right to privacy, or interests unrelated to criminal justice.

I wish to reiterate that finding a violation of security of the person does not end the s. 7 inquiry. Parliament could choose to infringe security of the person if it did so in a manner consistent with the principles of fundamental justice. The present discussion should therefore be seen as a threshold inquiry and the conclusions do not dispose definitively of all the issues relevant to s. 7. With that caution, I have no difficulty in concluding that the encyclopedic factual submissions addressed to us by counsel in the present appeal establish beyond any doubt that s. 251 of the *Criminal Code* is *prima facie* a violation of the security of the person of thousands of Canadian women who have made the difficult decision that they do not wish to continue with a pregnancy.

At the most basic, physical and emotional level, every pregnant woman is told by the section that she cannot submit to a generally safe medical procedure that might be of

clear benefit to her unless she meets criteria entirely unrelated to her own priorities and aspirations. Not only does the removal of decision-making power threaten women in a physical sense; the indecision of knowing whether an abortion will be granted inflicts emotional stress. Section 251 clearly interferes with a woman's bodily integrity in both a physical and emotional sense. Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus a violation of security of the person. Section 251, therefore, is required by the *Charter* to comport with the principles of fundamental justice.

Although this interference with physical and emotional integrity is sufficient in itself to trigger a review of s. 251 against the principles of fundamental justice, the operation of the decision-making mechanism set out in s. 251 creates additional glaring breaches of security of the person. The evidence indicates that s. 251 causes a certain amount of delay for women who are successful in meeting its criteria. In the context of abortion, any unnecessary delay can have profound consequences on the woman's physical and emotional well-being.

More specifically, in 1977, the *Report of the Committee on the Operation of the Abortion Law* (the Badgley Report) revealed that the average delay between a pregnant woman's first contact with a physician and a subsequent therapeutic abortion was eight weeks (p. 146). Although the situation appears to have improved since 1977, the extent of the improvement is not clear. The intervener, the Attorney General of Canada, submitted that the average delay in Ontario between the first visit to a physician and a therapeutic abortion was now between one and three weeks. Yet the respondent Crown admitted in a supplementary factum filed on November 27, 1986 with the permission of the Court that (p. 3):

... the evidence discloses that some women may find it very difficult to obtain an abortion: by necessity, abortion services are limited, since hospitals have budgetary, time, space and staff constraints as well as many medical responsibilities. As a result of these problems a woman may have to apply to several hospitals.

If forced to apply to several different therapeutic abortion committees, there can be no doubt that a woman will experience serious delay in obtaining a therapeutic abortion. . . . In her *Report on Therapeutic Abortion Services in Ontario* (the Powell Report), Dr. studies showed that in Quebec the waiting time for a therapeutic abortion in hospital varied between one and six weeks.

These periods of delay may not seem unduly long, but in the case of abortion, the implications of any delay, according to the evidence, are potentially devastating. The first factor to consider is that different medical techniques are employed to perform abortions at different stages of pregnancy. The testimony of expert doctors at trial indicated that in the first twelve weeks of pregnancy, the relatively safe and simple suction dilation and curettage method of abortion is typically used in North America. From the thirteenth to the sixteenth week, the more dangerous dilation and evacuation procedure is performed,

although much less often in Canada than in the United States. From the sixteenth week of pregnancy, the instillation method is commonly employed in Canada. This method requires the intra-amniotic introduction of prostaglandin, urea, or a saline solution, which causes a woman to go into labour, giving birth to a foetus which is usually dead, but not invariably so. The uncontroverted evidence showed that each method of abortion progressively increases risks to the woman. . . .

The second consideration is that even within the periods appropriate to each method of abortion, the evidence indicated that the earlier the abortion was performed, the fewer the complications and the lower the risk of mortality. For example, a study emanating from the Centre for Disease Control in Atlanta confirmed that "D & E [dilation and evacuation] procedures performed at 13 to 15 weeks' gestation were nearly 3 times safer than those performed at 16 weeks or later". (Cates and Grimes, "Deaths from Second Trimester Abortion by Dilation and Evacuation: Causes, Prevention, Facilities" (1981), 58 *Obstetrics and Gynecology* 401, at p. 401. See also the Powell Report, at p. 36.) The Court was advised that because of their perceptions of risk, Canadian doctors often refuse to use the dilation and evacuation procedure from the thirteenth to sixteenth weeks and instead wait until they consider it appropriate to use the instillation technique. Even more revealing were the overall mortality statistics evaluated by Drs. Cates and Grimes. They concluded from their study of the relevant data that: Anything that contributes to delay in performing abortions increases the complication rates by 15 to 30%, and the chance of dying by 50% for each week of delay. These statistics indicate clearly that even if the average delay caused by s. 251 *per arguendo* is of only a couple of weeks' duration, the effects upon any particular woman can be serious and, occasionally, fatal.

It is no doubt true that the overall complication and mortality rates for women who undergo abortions are very low, but the increasing risks caused by delay are so clearly established that I have no difficulty in concluding that the delay in obtaining therapeutic abortions caused by the mandatory procedures of s. 251 is an infringement of the purely physical aspect of the individual's right to security of the person. . . . The above physical interference caused by the delays created by s. 251, involving a clear risk of damage to the physical well-being of a woman, is sufficient, in my view, to warrant inquiring whether s. 251 comports with the principles of fundamental justice. However, there is yet another infringement of security of the person. It is clear from the evidence that s. 251 harms the psychological integrity of women seeking abortions. A 1985 report of the Canadian Medical Association, discussed in the Powell Report, at p. 15, emphasized that the procedure involved in s. 251, with the concomitant delays, greatly increases the stress levels of patients and that this can lead to more physical complications associated with abortion. A specialist in fertility control, Dr. Henry David, was qualified as an expert witness at trial on the psychological impact upon women of delay in the process of obtaining an abortion. He testified that his own studies had demonstrated that there is increased psychological stress imposed upon women who are forced to wait for abortions, and that this stress is compounded by the uncertainty whether or not a therapeutic abortion committee will actually grant approval.

Perhaps the most powerful testimony regarding the psychological impact upon women caused by the delay inherent in s. 251 procedures was offered at trial by Dr. Jane Hodgson, the Medical Director of the Women's Health Center in Duluth, Minnesota. She was called to testify as to her experiences with Canadian women who had come to the Women's Health Center for abortions. Her testimony was extensive, but the flavour may be gleaned from the following short excerpts:

May I add one other thing that I think is very vital, and that is that many of these [Canadian] women come down because they know they will be delayed in getting, first, permission, then delayed in getting a hospital bed, or getting into the hospital, and so they know they will have to have saline [instillation] procedures. And some of them have been through this, and others know what it is about, and they will do almost anything to avoid having a saline procedure. And of course, that is -- I consider that a very cruel type of medical care and will do anything to help them to avoid this type of treatment.

The cost, the time consumed, the medical risks, the mental anguish -- all of this is cruelty, in this day and age, because it's [the instillation procedure] an obsolete procedure that is essentially disappearing in the United States.

I have already noted that the instillation procedure requires a woman actually to experience labour and to suffer through the birth of a foetus that is usually but not always dead. Statistics from 1982 indicated that 33.4 per cent of second trimester abortions in Ontario were done by instillation . . . The psychological injury caused by delay in obtaining abortions, much of which must be attributed to the procedures set out in s. 251, constitutes an additional infringement of the right to security of the person.

\* \* \*

In summary, s. 251 is a law which forces women to carry a foetus to term contrary to their own priorities and aspirations and which imposes serious delay causing increased physical and psychological trauma to those women who meet its criteria. It must, therefore, be determined whether that infringement is accomplished in accordance with the principles of fundamental justice, thereby saving s. 251 under the second part of s. 7.

#### *C. The Principles of Fundamental Justice*

Although the "principles of fundamental justice" referred to in s. 7 have both a substantive and a procedural component (*Re B.C. Motor Vehicle Act*, at p. 499), I have already indicated that it is not necessary in this appeal to evaluate the substantive content of s. 251 of the *Criminal Code*. My discussion will therefore be limited to various aspects of the administrative structure and procedure set down in s. 251 for access to therapeutic abortions.

In outline, s. 251 operates in the following manner. Subsection (1) creates an indictable offence for any person to use any means with the intent "to procure the miscarriage of a female person". Subsection (2) establishes a parallel indictable offence for any pregnant woman to use or to permit any means to be used with the intent "to procure her own miscarriage". The "means" referred to in subss. (1) and (2) are defined in subs. (3) as the administration of a drug or "other noxious thing", the use of an instrument, and "manipulation of any kind". The crucial provision for the purposes of the present appeal is subs. (4) which states that the offences created in subss. (1) and (2) "do not apply" in certain circumstances. The Ontario Court of Appeal in the proceedings below characterized s. 251(4) as an "exculpatory provision" ((1985), 52 O.R. (2d) 353, at p. 365). In *Morgentaler (1975)*, at p. 673, a majority of this Court held that the effect of s. 251(4) was to afford "a complete answer and defence to those who respect its terms".

The procedure surrounding the defence is rather complex. A pregnant woman who desires to have an abortion must apply to the "therapeutic abortion committee" of an "accredited or approved hospital". Such a committee is empowered to issue a certificate in writing stating that in the opinion of a majority of the committee, the continuation of the pregnancy would be likely to endanger the pregnant woman's life or health. Once a copy of the certificate is given to a qualified medical practitioner who is not a member of the therapeutic abortion committee, he or she is permitted to perform an abortion on the pregnant woman and both the doctor and the woman are freed from any criminal liability. 37. A number of definitions are provided in subs. (6) which have a bearing on the disposition of this appeal. An "accredited hospital" is described as a hospital accredited by the Canadian Council on Hospital Accreditation "in which diagnostic services and medical, surgical and obstetrical treatment" are provided. An "approved hospital" is a hospital "approved for the purposes of this section by the Minister of Health" of a province. A "therapeutic abortion committee" must be "comprised of not less than three members each of whom is a qualified medical practitioner" who is appointed by a hospital's administrative board. Interestingly, the term "health" is not defined for the purposes of s. 251, so it would appear that the therapeutic abortion committees are free to develop their own theories as to when a potential impairment of a woman's "health" would justify the granting of a therapeutic abortion certificate.

As is so often the case in matters of interpretation, however, the straightforward reading of this statutory scheme is not fully revealing. In order to understand the true nature and scope of s. 251, it is necessary to investigate the practical operation of the provisions. . . . the most serious problems with the functioning of s. 251 are created by procedural and administrative requirements established in the law. . . . [E]ven if a hospital is eligible to create a therapeutic abortion committee, there is no requirement in s. 251 that the hospital need do so. . . . [I]n 1976, of the 559 general hospitals which met the procedural requirements of s. 251, only 271 hospitals in Canada, or only 20.1 per cent of the total, had actually established a therapeutic abortion committee (p. 105).

. . . . The requirement that therapeutic abortions be performed only in "accredited" or "approved" hospitals effectively means that the practical availability of the exculpatory provisions of subs. (4) may be heavily restricted, even denied, through provincial

regulation. In Ontario, for example, the provincial government promulgated O. Reg. 248/70 under *The Public Hospitals Act*, R.S.O. 1960, c. 322, now R.R.O. 1980, Reg. 865. This regulation provides that therapeutic abortion committees can only be established where there are ten or more members on the active medical staff . . .

A further flaw with the administrative system established in s. 251(4) is the failure to provide an adequate standard for therapeutic abortion committees which must determine when a therapeutic abortion should, as a matter of law, be granted. Subsection (4) states simply that a therapeutic abortion committee may grant a certificate when it determines that a continuation of a pregnancy would be likely to endanger the "life or health" of the pregnant woman. It was noted above that "health" is not defined for the purposes of the section. The Crown admitted in its supplementary factum that the medical witnesses at trial testified uniformly that the "health" standard was ambiguous, but the Crown derives comfort from the fact that "the medical witnesses were unanimous in their approval of the broad World Health Organization definition of health". The World Health Organization defines "health" not merely as the absence of disease or infirmity, but as a state of physical, mental and social well-being.

I do not understand how the mere existence of a workable definition of "health" can make the use of the word in s. 251(4) any less ambiguous when that definition is nowhere referred to in the section. . . . In the absence of such a definition, each physician and each hospital reaches an individual decision on this matter. How the concept of health is variably defined leads to considerable inequity in the distribution and the accessibility of the abortion procedure. . . . Some committees refuse to approve applications for second abortions unless the patient consents to sterilization, others require psychiatric assessment, and others do not grant approval to married women.

\* \* \*

The combined effect of all of these problems with the procedure stipulated in s. 251 for access to therapeutic abortions is a failure to comply with the principles of fundamental justice. . . .

I conclude that the procedures created in s. 251 of the *Criminal Code* for obtaining a therapeutic abortion do not comport with the principles of fundamental justice. It is not necessary to determine whether s. 7 also contains a substantive content leading to the conclusion that, in some circumstances at least, the deprivation of a pregnant woman's right to security of the person can never comport with fundamental justice. Simply put, assuming Parliament can act, it must do so properly. For the reasons given earlier, the deprivation of security of the person caused by s. 251 as a whole is not in accordance with the second clause of s. 7. It remains to be seen whether s. 251 can be justified for the purposes of s. 1 of the *Charter*.



## Section 1 Analysis

Section 1 of the *Charter* can potentially be used to "salvage" a legislative provision which breaches s. 7 . . . . A statutory provision which infringes any section of the *Charter* can only be saved under s. 1 if the party seeking to uphold the provision can demonstrate first, that the objective of the provision is "of sufficient importance to warrant overriding a constitutionally protected right or freedom" (*R. v. Big M Drug Mart Ltd.*, at p. 352) and second, that the means chosen in overriding the right or freedom are reasonable and demonstrably justified in a free and democratic society. This second aspect ensures that the legislative means are proportional to the legislative ends (*Oakes*, at pp.139-40). In *Oakes*, at p. 139, the Court referred to three considerations which are typically useful in assessing the proportionality of means to ends. First, the means chosen to achieve an important objective should be rational, fair and not arbitrary. Second, the legislative means should impair as little as possible the right or freedom under consideration. Third, the effects of the limitation upon the relevant right or freedom should not be out of proportion to the objective sought to be achieved.

The appellants contended that the sole purpose of s. 251 of the *Criminal Code* is to protect the life and health of pregnant women. The respondent Crown submitted that s. 251 seeks to protect not only the life and health of pregnant women, but also the interests of the foetus. On the other hand, the Crown conceded that the Court is not called upon in this appeal to evaluate any claim to "foetal rights" or to assess the meaning of "the right to life". I expressly refrain from so doing. In my view, it is unnecessary for the purpose of deciding this appeal to evaluate or assess "foetal rights" as an independent constitutional value. Nor are we required to measure the full extent of the state's interest in establishing criteria unrelated to the pregnant woman's own priorities and aspirations. What we must do is evaluate the particular balance struck by Parliament in s. 251, as it relates to the priorities and aspirations of pregnant women and the government's interests in the protection of the foetus.

Section 251 provides that foetal interests are not to be protected where the "life or health" of the woman is threatened. Thus, Parliament itself has expressly stated in s. 251 that the "life or health" of pregnant women is paramount. The procedures of s. 251(4) are clearly related to the pregnant woman's "life or health" for that is the very phrase used by the subsection. As McIntyre J. states in his reasons (at p. 155), the aim of s. 251(4) is "to restrict abortion to cases where the continuation of the pregnancy would, or would likely, be injurious to the life or health of the woman concerned, not to provide unrestricted access to abortion." I have no difficulty in concluding that the objective of s. 251 as a whole, namely, to balance the competing interests identified by Parliament, is sufficiently important to meet the requirements of the first step in the *Oakes* inquiry under s. 1. I think the protection of the interests of pregnant women is a valid governmental objective, where life and health can be jeopardized by criminal sanctions. Like Beetz and Wilson JJ., I agree that protection of foetal interests by Parliament is also a valid governmental objective. It follows that balancing these interests, with the lives and health of women a major factor, is clearly an important governmental objective. As the Court of Appeal

stated at p. 366, "the contemporary view [is] that abortion is not always socially undesirable behavior."

I am equally convinced, however, that the means chosen to advance the legislative objectives of s. 251 do not satisfy any of the three elements of the proportionality component of *R. v. Oakes*. The evidence has led me to conclude that the infringement of the security of the person of pregnant women caused by s. 251 is not accomplished in accordance with the principles of fundamental justice. It has been demonstrated that the procedures and administrative structures created by s. 251 are often arbitrary and unfair. The procedures established to implement the policy of s.251 impair s. 7 rights far more than is necessary because they hold out an illusory defence to many women who would *prima facie* qualify under the exculpatory provisions of s. 251(4). In other words, many women whom Parliament professes not to wish to subject to criminal liability will nevertheless be forced by the practical unavailability of the supposed defence to risk liability or to suffer other harm such as a traumatic late abortion caused by the delay inherent in the s. 251 system. Finally, the effects of the limitation upon the s. 7 rights of many pregnant women are out of proportion to the objective sought to be achieved. Indeed, to the extent that s. 251(4) is designed to protect the life and health of women, the procedures it establishes may actually defeat that objective. The administrative structures of s. 251(4) are so cumbersome that women whose health is endangered by pregnancy may not be able to gain a therapeutic abortion, at least without great trauma, expense and inconvenience.

I conclude, therefore, that the cumbersome structure of subs. (4) not only unduly subordinates the s. 7 rights of pregnant women but may also defeat the value Parliament itself has established as paramount, namely, the life and health of the pregnant woman. As I have noted, counsel for the Crown did contend that one purpose of the procedures required by subs. (4) is to protect the interests of the foetus. State protection of foetal interests may well be deserving of constitutional recognition under s. 1. Still, there can be no escape from the fact that Parliament has failed to establish either a standard or a procedure whereby any such interests might prevail over those of the woman in a fair and non-arbitrary fashion.

Section 251 of the *Criminal Code* cannot be saved, therefore, under s. 1 of the *Charter*.

\* \* \*

The reasons of Beetz and Estey JJ. were delivered by

**BEETZ J.--**

... A pregnant woman's person cannot be said to be secure if, when her life or health is in danger, she is faced with a rule of criminal law which precludes her from obtaining effective and timely medical treatment.

Generally speaking, the constitutional right to security of the person must include some protection from state interference when a person's life or health is in danger. The *Charter* does not, needless to say, protect men and women from even the most serious misfortunes of nature. Section 7 cannot be invoked simply because a person's life or health is in danger. The state can obviously not be said to have violated, for example, a pregnant woman's security of the person simply on the basis that her pregnancy in and of itself represents a danger to her life or health. There must be state intervention for "security of the person" in s. 7 to be violated.

If a rule of criminal law precludes a person from obtaining appropriate medical treatment when his or her life or health is in danger, then the state has intervened and this intervention constitutes a violation of that man's or that woman's security of the person. "Security of the person" must include a right of access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction. If an act of Parliament forces a person whose life or health is in danger to choose between, on the one hand, the commission of a crime to obtain effective and timely medical treatment and, on the other hand, inadequate treatment or no treatment at all, the right to security of the person has been violated.

\* \* \*

Finally, I wish to stress that we have not been asked to decide nor is it necessary, given my own conclusion that s. 251 contains rules unnecessary to the protection of the foetus, to decide whether a foetus is included in the word "everyone" in s. 7 so as to have a right to "life, liberty and security of the person" under the *Charter*.

\* \* \*

The reasons of McIntyre and La Forest JJ. were delivered by

**MCINTYRE J. (dissenting)**

\* \* \*

... The battle lines so drawn are firmly held and the attitudes of the opposing parties admit of no compromise. From the submission of the Attorney General of Canada (set out in his factum at paragraph 6), however, it may appear that a majority in Canada do not see the issue in such black and white terms. Paragraph 6 is in these words: The evidence of opinion surveys indicates that there is a surprising consistency over the years and in different survey groups in the spectrum of opinions on the issue of abortion. Roughly 21 to 23% of people at one end of the spectrum are of the view, on the one hand, that abortion is a matter solely for the decision of the pregnant woman and that any legislation on this subject is an unwarranted interference with a woman's right to deal with her own body, while about 19 to 20% are of the view, on the other hand, that destruction of the living fetus is the killing of human life and tantamount to murder. The remainder of the population (about 60%) are of the view that abortion should be prohibited in some circumstances.

Parliament has heeded neither extreme. Instead, an attempt has been made to balance the competing interests of the unborn child and the pregnant woman. . . .

\* \* \*

In *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616, at p. 671, (hereinafter "*Morgentaler (1975)*") I stressed that the Court had "not been called upon to decide, or even to enter, the loud and continuous public debate on abortion." Eleven years later, the controversy persists, and it remains true that this Court cannot presume to resolve all of the competing claims advanced in vigorous and healthy public debate. Courts and legislators in other democratic societies have reached completely contradictory decisions when asked to weigh the competing values relevant to the abortion question. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Paton v. United Kingdom* (1980), 3 E.H.R.R. (European Court of Human Rights); *The Abortion Decision of the Federal Constitutional Court -- First Senate -- of the Federal Republic of Germany*, February 25, 1975, translated and reprinted in (1976), 9 John Marshall J. Prac. and Proc. 605; and the *Abortion Act, 1967*, 1967, c. 87 (U.K.) But since 1975, and the first *Morgentaler* decision, the Court has been given added responsibilities. I stated in *Morgentaler (1975)*, at p. 671, that:

The values we must accept for the purposes of this appeal are those expressed by Parliament which holds the view that the desire of a woman to be relieved of her pregnancy is not, of itself, justification for performing an abortion. Although no doubt it is still fair to say that courts are not the appropriate forum for articulating complex and controversial programmes of public policy, Canadian courts are now charged with the crucial obligation of ensuring that the legislative initiatives pursued by our Parliament and legislatures conform to the democratic values expressed in the *Canadian Charter of Rights and Freedoms* . . . . It is in this latter sense that the current *Morgentaler* appeal differs from the one we heard a decade ago.

While I differ with the Chief Justice in the disposition of this appeal, I would accept his words, referred to above, which describe the role of the Court, but I would suggest that in "ensuring that the legislative initiatives pursued by our Parliament and legislatures conform to the democratic values expressed in the *Canadian Charter of Rights and Freedoms*" the courts must confine themselves to such democratic values as are clearly found and expressed in the *Charter* and refrain from imposing or creating other values not so based.

It follows, then, in my view, that the task of the Court in this case is not to solve nor seek to solve what might be called the abortion issue, but simply to measure the content of s. 251 against the *Charter*. While this may appear to be self-evident, the distinction is of vital importance. If a particular interpretation enjoys no support, express or reasonably implied, from the *Charter*, then the Court is without power to clothe such an interpretation with constitutional status. It is not for the Court to substitute its own views on the merits of a given question for those of Parliament. The Court must consider not what is, in its view, the best solution to the problems

posed; its role is confined to deciding whether the solution enacted by Parliament offends the *Charter*. If it does, the provision must be struck down or declared inoperative, and Parliament may then enact such different provisions as it may decide. I adopt the words of Holmes J., which were referred to in *Ferguson v. Skrupka*, 372 U.S. 726 (1963), at pp. 729-30:

There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. In this manner the Due Process Clause was used, for example, to nullify laws prescribing maximum hours for work in bakeries, *Lochner v. New York*, 198 U.S. 45 (1905), outlawing "yellow dog" contracts, *Coppage v. Kansas*, 236 U.S. 1 (1915), setting minimum wages for women, *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), and fixing the weight of loaves of bread, *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504 (1924). This intrusion by the judiciary into the realm of legislative value judgments was strongly objected to at the time, particularly by Mr. Justice Holmes and Mr. Justice Brandeis. Dissenting from the Court's invalidating a state statute which regulated the resale price of theatre and other tickets, Mr. Justice Holmes said:

"I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain".

... The doctrine that prevailed in *Lochner*, *Coppage*, *Adkins*, *Burns*, and like cases -- that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely -- has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. Holmes J. wrote in 1927, but his words have retained their force in American jurisprudence: see *New Orleans v. Dukes*, 427 U.S. 297 (1976), at p. 304, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), at p. 469, and *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982), at pp. 504-5. In my view, although written in the American context, the principle stated is equally applicable in Canada.

It is essential that this principle be maintained in a constitutional democracy. The Court must not resolve an issue such as that of abortion on the basis of how many judges may favour "pro-choice" or "pro-life". To do so would be contrary to sound principle and the rule of law affirmed in the preamble to the *Charter* which must mean that no discretion, including a judicial discretion, can be unlimited. But there is a problem, for the Court must clothe the general expression of rights and freedoms contained in the *Charter* with real substance and vitality. How can the courts go about this task without imposing at least some of their views and predilections upon the law? . . .

\* \* \*

The present case may serve, perhaps, to emphasize that the courts lack both the exposure to public opinion required in order to discharge the essentially "political" task of weighing social or economic interests and deciding between them, and also the ability to gather the information they would need for that task. When it has run its course the litigation may also have served to demonstrate -- if demonstration be needed -- that the judicial system of necessity lacks the capacity of parliamentary bodies to act promptly when economic or social considerations indicate that a change in the law is desirable and, of equal importance, to react promptly when results show either that a change made for that purpose has not achieved its objective or that the objective is no longer desirable. . . .

The following are the reasons delivered by

**WILSON J.—**

\* \* \*

(a) *The Right to Liberty*

\* \* \*

The *Charter* is predicated on a particular conception of the place of the individual in society. An individual is not a totally independent entity disconnected from the society in which he or she lives. Neither, however, is the individual a mere cog in an impersonal machine in which his or her values, goals and aspirations are subordinated to those of the collectivity. The individual is a bit of both. The *Charter* reflects this reality by leaving a wide range of activities and decisions open to legitimate government control while at the same time placing limits on the proper scope of that control. Thus, the rights guaranteed in the *Charter* erect around each individual, metaphorically speaking, an invisible fence over which the state will not be allowed to trespass. The role of the courts is to map out, piece by piece, the parameters of the fence.

The *Charter* and the right to individual liberty guaranteed under it are inextricably tied to the concept of human dignity. . . . liberty [is] "a condition of human self-respect and of that contentment which resides in the ability to pursue one's own conception of a full and rewarding life" . . .

To be able to decide what to do and how to do it, to carry out one's own decisions and accept their consequences, seems to me essential to one's self-respect as a human being, and essential to the possibility of that contentment. Such self-respect and contentment are in my judgment fundamental goods for human beings, the worth of life itself being on condition of having or striving for them. If a person were deliberately denied the opportunity of self-respect and that contentment, he would suffer deprivation of his essential humanity.

Dickson C.J. in *R. v. Big M Drug Mart Ltd.* makes the same point at p. 346:

It should also be noted, however, that an emphasis on individual conscience and individual judgment also lies at the heart of our democratic political tradition. The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government. It is because of the centrality of the rights associated with freedom of individual conscience both to basic beliefs about human worth and dignity and to a free and democratic political system that American jurisprudence has emphasized the primacy or "firstness" of the First Amendment. It is this same centrality that in my view underlies their designation in the *Canadian Charter of Rights and Freedoms* as "fundamental". They are the *sine qua non* of the political tradition underlying the *Charter*.

It was further amplified in Dickson C.J.'s discussion of *Charter* interpretation in *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 136:

A second contextual element of interpretation of s. 1 is provided by the words "free and democratic society". Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the *Charter* was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

The idea of human dignity finds expression in almost every right and freedom guaranteed in the *Charter*. Individuals are afforded the right to choose their own religion and their own philosophy of life, the right to choose with whom they will associate and how they will express themselves, the right to choose where they will live and what occupation they will pursue. These are all examples of the basic theory underlying the *Charter*, namely that the state will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life.

Thus, an aspect of the respect for human dignity on which the *Charter* is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty. Liberty, as was noted in *Singh*, is a phrase capable of a broad range of meaning. In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance.

This view is consistent with the position I took in the case of *R. v. Jones*, [1986] 2 S.C.R. 284. One issue raised in that case was whether the right to liberty in s. 7 of the *Charter* included a parent's right to bring up his children in accordance with his conscientious beliefs. In concluding that it did I stated at pp. 318-19:

I believe that the framers of the Constitution in guaranteeing "liberty" as a fundamental value in a free and democratic society had in mind the freedom of the individual to develop and realize his potential to the full, to plan his own life to suit his own character, to make his own choices for good or ill, to be non-conformist, idiosyncratic and even eccentric -- to be, in to-day's parlance, "his own person" and accountable as such. John Stuart Mill described it as "pursuing our own good in our own way". This, he believed, we should be free to do "so long as we do not attempt to deprive others of theirs or impede their efforts to obtain it". He added: Each is the proper guardian of his own health, whether bodily *or* mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves than by compelling each to live as seems good to the rest.

Liberty in a free and democratic society does not require the state to approve the personal decisions made by its citizens; it does, however, require the state to respect them.

\* \* \*

The question then becomes whether the decision of a woman to terminate her pregnancy falls within this class of protected decisions. I have no doubt that it does. This decision is one that will have profound psychological, economic and social consequences for the pregnant woman. The circumstances giving rise to it can be complex and varied and there may be, and usually are, powerful considerations militating in opposite directions. It is a decision that deeply reflects the way the woman thinks about herself and her relationship to others and to society at large. It is not just a medical decision; it is a profound social and ethical one as well. Her response to it will be the response of the whole person.

It is probably impossible for a man to respond, even imaginatively, to such a dilemma not just because it is outside the realm of his personal experience (although this is, of course, the case) but because he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma. As Noreen Burrows, lecturer in European Law at the University of Glasgow, has pointed out in her essay on "International Law and Human Rights: the Case of Women's Rights", in *Human Rights: From Rhetoric to Reality* (1986), the history of the struggle for human rights from the eighteenth century on has been the history of men struggling to assert their dignity and common humanity against an overbearing state apparatus. The more recent struggle for women's rights has been a struggle to eliminate discrimination, to achieve a place for women in a man's world, to develop a set of legislative reforms in order to place women in the same position as men (pp. 81-82). It



has not been a struggle to define the rights of women in relation to their special place in the societal structure and in relation to the biological distinction between the two sexes. Thus, women's needs and aspirations are only now being translated into protected rights. The right to reproduce or not to reproduce which is in issue in this case is one such right and is properly perceived as an integral part of modern woman's struggle to assert her dignity and worth as a human being.

Given then that the right to liberty guaranteed by s. 7 of the *Charter* gives a woman the right to decide for herself whether or not to terminate her pregnancy, does s. 251 of the *Criminal Code* violate this right? Clearly it does. The purpose of the section is to take the decision away from the woman and give it to a committee. Furthermore, as the Chief Justice correctly points out, at p. 56, the committee bases its decision on "criteria entirely unrelated to [the pregnant woman's] own priorities and aspirations". The fact that the decision whether a woman will be allowed to terminate her pregnancy is in the hands of a committee is just as great a violation of the woman's right to personal autonomy in decisions of an intimate and private nature as it would be if a committee were established to decide whether a woman should be allowed to continue her pregnancy. Both these arrangements violate the woman's right to liberty by deciding for her something that she has the right to decide for herself.

\* \* \*

(a) freedom of conscience and religion;

In *R. v. Big M Drug Mart Ltd.*, *supra*, Dickson C.J. made some very insightful comments about the nature of the right enshrined in s. 2(a) of the *Charter* at pp. 345-47:

Beginning, however, with the Independent faction within the Parliamentary party during the Commonwealth or Interregnum, many, even among those who shared the basic beliefs of the ascendent religion, came to voice opposition to the use of the State's coercive power to secure obedience to religious precepts and to extirpate non-conforming beliefs. The basis of this opposition was no longer simply a conviction that the State was enforcing the wrong set of beliefs and practices but rather the perception that belief itself was not amenable to compulsion. Attempts to compel belief or practice denied the reality of individual conscience and dishonoured the God that had planted it in His creatures. It is from these antecedents that the concepts of freedom of religion and freedom of conscience became associated, to form, as they do in s. 2(a) of our *Charter*, the single integrated concept of "freedom of conscience and religion".

What unites enunciated freedoms in the American First Amendment, in s. 2(a) of the *Charter* and in the provisions of other human rights documents in which they are associated is the notion of the centrality of individual conscience and the inappropriateness of governmental intervention to compel or to constrain its manifestation. In *Hunter v. Southam Inc.*, *supra*, the purpose of the *Charter* was identified, at p. 155, as "the unremitting protection of individual rights and liberties". It is

easy to see the relationship between respect for individual conscience and the valuation of human dignity that motivates such unremitting protection. It should also be noted, however, that an emphasis on individual conscience and individual judgment also lies at the heart of our democratic political tradition. The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government. It is because of the centrality of the rights associated with freedom of individual conscience both to basic beliefs about human worth and dignity and to a free and democratic political system that American jurisprudence has emphasized the primacy or "firstness" of the First Amendment. It is this same centrality that in my view underlies their designation in the *Canadian Charter of Rights and Freedoms* as "fundamental". They are the *sine qua non* of the political tradition underlying the *Charter*.

Viewed in this context, the purpose of freedom of conscience and religion becomes clear. The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own. Religious belief and practice are historically prototypical and, in many ways, paradigmatic of conscientiously-held beliefs and manifestations and are therefore protected by the *Charter*. Equally protected, and for the same reasons, are expressions and manifestations of religious non-belief and refusals to participate in religious practice. It may perhaps be that freedom of conscience and religion extends beyond these principles to prohibit other sorts of governmental involvement in matters having to do with religion. For the present case it is sufficient in my opinion to say that whatever else freedom of conscience and religion may mean, it must at the very least mean this: government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose. I leave to another case the degree, if any, to which the government may, to achieve a vital interest or objective, engage in coercive action which s. 2(a) might otherwise prohibit. [Emphasis added.]

The Chief Justice sees religious belief and practice as the paradigmatic example of conscientiously-held beliefs and manifestations and as such protected by the *Charter*. But I do not think he is saying that a personal morality which is not founded in religion is outside the protection of s. 2(a). Certainly, it would be my view that conscientious beliefs which are not religiously motivated are equally protected by freedom of conscience in s. 2(a). In so saying I am not unmindful of the fact that the *Charter* opens with an affirmation that "Canada is founded upon principles that recognize the supremacy of God . . . ." But I am also mindful that the values entrenched in the *Charter* are those which characterize a free and democratic society.

As is pointed out by Professor Cyril E. M. Joad, then Head of the Department of Philosophy and Psychology at Birkbeck College, University of London, in *Guide to the Philosophy of Morals and Politics* (1938), the role of the state in a democracy is to establish the background conditions under which individual citizens may pursue the ethical values which in their view underlie the good life. He states at p. 801:

For the welfare of the state is nothing apart from the good of the citizens who compose it. It is no doubt true that a State whose citizens are compelled to go right is more efficient than one whose citizens are free to go wrong. But what then? To sacrifice freedom in the interests of efficiency, is to sacrifice what confers upon human beings their humanity. It is no doubt easy to govern a flock of sheep; but there is no credit in the governing, and, if the sheep were born as men, no virtue in the sheep.

Professor Joad further emphasizes at p. 803 that individuals in a democratic society can never be treated "merely as means to ends beyond themselves" because: To the right of the individual to be treated as an end, which entails his right to the full development and expression of his personality, all other rights and claims must, the democrat holds, be subordinated. I do not know how this principle is to be defended any more than I can frame a defence for the principles of democracy and liberty. Professor Joad stresses that the essence of a democracy is its recognition of the fact that the state is made for man and not man for the state (p. 805). He firmly rejects the notion that science provides a basis for subordinating the individual to the state. He says at pp. 805-6:

Human beings, it is said, are important only in so far as they fit into a biological scheme or assist in the furtherance of the evolutionary process. Thus each generation of women must accept as its sole function the production of children who will constitute the next generation who, in their turn, will devote their lives and sacrifice their inclinations to the task of producing a further generation, and so on *ad infinitum*. This is the doctrine of eternal sacrifice -- "jam yesterday, jam tomorrow, but never jam today". For, it may be asked, to what end should generations be produced, unless the individuals who compose them are valued in and for themselves, are, in fact, ends in themselves? There is no escape from the doctrine of the perpetual recurrence of generations who have value only in so far as they produce more generations, the perpetual subordination of citizens who have value only in so far as they promote the interests of the State to which they are subordinated, except in the individualist doctrine, which is also the Christian doctrine, that the individual is an end in himself.

It seems to me, therefore, that in a free and democratic society "freedom of conscience and religion" should be broadly construed to extend to conscientiously-held beliefs, whether grounded in religion or in a secular morality. Indeed, as a matter of statutory interpretation, "conscience" and "religion" should not be treated as tautologous if capable of independent, although related, meaning.

Accordingly, for the state to take sides on the issue of abortion, as it does in the impugned legislation by making it a criminal offence for the pregnant woman to exercise one of her options, is not only to endorse but also to enforce, on pain of a further loss of liberty through actual imprisonment, one conscientiously-held view at the expense of

another. It is to deny freedom of conscience to some, to treat them as means to an end, to deprive them, as Professor MacCormick puts it, of their "essential humanity". . .

. . . It would be my view, and I think it is consistent with the position taken by the United States Supreme Court in *Roe v. Wade*, that the value to be placed on the foetus as potential life is directly related to the stage of its development during gestation. The undeveloped foetus starts out as a newly fertilized ovum; the fully developed foetus emerges ultimately as an infant. A developmental progression takes place in between these two extremes and, in my opinion, this progression has a direct bearing on the value of the foetus as potential life. It is a fact of human experience that a miscarriage or spontaneous abortion of the foetus at six months is attended by far greater sorrow and sense of loss than a miscarriage or spontaneous abortion at six days or even six weeks. This is not, of course, to deny that the foetus is potential life from the moment of conception. Indeed, I agree with the observation of O'Connor J., dissenting in *City of Akron v. Akron Center for Reproductive Health, Inc.*, *supra*, at p. 461, (referred to by my colleague Beetz J. in his reasons, at p. 113) that the foetus is potential life from the moment of conception. It is simply to say that in balancing the state's interest in the protection of the foetus as potential life under s. 1 of the *Charter* against the right of the pregnant woman under s. 7 greater weight should be given to the state's interest in the later stages of pregnancy than in the earlier. The foetus should accordingly, for purposes of s. 1, be viewed in differential and developmental terms: see L. W. Sumner, Professor of Philosophy at the University of Toronto, *Abortion and Moral Theory* (1981), pp. 125-28.

As Professor Sumner points out, both traditional approaches to abortion, the so-called "liberal" and "conservative" approaches, fail to take account of the essentially developmental nature of the gestation process. A developmental view of the foetus, on the other hand, supports a permissive approach to abortion in the early stages of pregnancy and a restrictive approach in the later stages. In the early stages the woman's autonomy would be absolute; her decision, reached in consultation with her physician, not to carry the foetus to term would be conclusive. The state would have no business inquiring into her reasons. Her reasons for having an abortion would, however, be the proper subject of inquiry at the later stages of her pregnancy when the state's compelling interest in the protection of the foetus would justify it in prescribing conditions. The precise point in the development of the foetus at which the state's interest in its protection becomes "compelling" I leave to the informed judgment of the legislature which is in a position to receive guidance on the subject from all the relevant disciplines. It seems to me, however, that it might fall somewhere in the second trimester. Indeed, according to Professor Sumner (p. 159), a differential abortion policy with a time limit in the second trimester is already in operation in the United States, Great Britain, France, Italy, Sweden, the Soviet Union, China, India, Japan and most of the countries of Eastern Europe although the time limits vary in these countries from the beginning to the end of the second trimester (cf. Stephen L. Isaacs, "Reproductive Rights 1983: An International Survey" (1982-83), 14 *Columbia Human Rights Law Rev.* 311, with respect to France and Italy).

Section 251 of the *Criminal Code* takes the decision away from the woman at all stages of her pregnancy. It is a complete denial of the woman's constitutionally protected right under s. 7, not merely a limitation on it. It cannot, in my opinion, meet the proportionality test in *Oakes*. It is not sufficiently tailored to the legislative objective and does not impair the woman's right "as little as possible". It cannot be saved under s. 1. Accordingly, even if the section were to be amended to remedy the purely procedural defects in the legislative scheme referred to by the Chief Justice and Beetz J. it would, in my opinion, still not be constitutionally valid.

One final word. I wish to emphasize that in these reasons I have dealt with the existence of the developing foetus merely as a factor to be considered in assessing the importance of the legislative objective under s. 1 of the *Charter*. I have not dealt with the entirely separate question whether a foetus is covered by the word "everyone" in s. 7 so as to have an independent right to life under that section. The Crown did not argue it and it is not necessary to decide it in order to dispose of the issues on this appeal.

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**C-355/2006**

EXCERPTS OF THE CONSTITUTIONAL  
COURT'S RULING THAT LIBERALIZED  
ABORTION IN COLOMBIA

Bogotá, D. C., May 10, 2006<sup>1</sup>

**Exercising its constitutional jurisdiction in compliance with procedural and substantive requirements found in Decree 2067 of 1991, the full chamber of the Constitutional Court issues the following:**

**DECISION C-355/06**

Writing for the majority of the Court:

Honorable Justice JAIME ARAÚJO RENTERÍA

Honorable Justice CLARA INÉS VARGAS HERNÁNDEZ

...Colombian citizens Mónica del Pilar Roa López, Pablo Jaramillo Valencia, Marcela Abadía Cubillos, Juana Dávila Sáenz and Laura Porras Santillana ("the Plaintiffs") request in separate complaints that this Court declare unconstitutional paragraph 7 of article 32, articles 122 and 124, as well as the expression "or on a woman of less than 14 years of age" contained in article 123 of Law 599, 2000 "by which the Penal Code is enacted."

The Plaintiffs assert that the articles and paragraphs in question violate the following constitutional rights: the right to dignity (Constitutional Preamble and article 1 of the Constitution); the right to life (article 11 of the Constitution); the right to bodily integrity (article 12 of the Constitution); the right to equality and the general right to liberty (article 13 of the Constitution); the right to the free

<sup>1</sup> Editor's note: the footnotes from the original text are omitted for the sake of brevity.

development of the individual (article 16 of the Constitution); the right to reproductive autonomy (article 42 of the Constitution); the right to health (article 49 of the Constitution) and obligations under international human rights law (article 93 of the Constitution).



In general, the arguments of the Plaintiffs revolve around the fact that the articles of the Penal Code that criminalize abortion (article 122) and abortion without consent (article 123), together with the mitigating circumstances therein (article 124), are unconstitutional because they disproportionately and unreasonably limit the rights and liberties of the pregnant woman, including when she is a minor of less than 14 years of age.

The Plaintiffs also assert that the articles in question violate various international human rights law treaties, which are part of the *Constitutional Bundle*<sup>2</sup> in ac-

<sup>2</sup> Translator's note: the term employed by the Court in Spanish is "Bloque de Constitucionalidad" — referring to all the legal norms that are considered incorporated and thus form part of the Constitution.

cordance with article 93 of the Constitution, as well as with the opinions issued by the various bodies charged with interpreting and applying such international treaties. In particular, the challenge to paragraph 7 of article 32 of the Penal Code revolves around the fact that the state of necessity prescribed therein breaches a woman's fundamental right to life and physical integrity because she is forced to resort to a clandestine abortion "*which is humiliating and potentially dangerous to her integrity.*"

Numerous amicus briefs were filed both supporting the arguments of the Plaintiffs as well as opposing them. The amici arguing that the challenged articles are unconstitutional put forward very similar reasons to those presented by the Plaintiffs. On the other hand, those defending the constitutionality of the challenged articles assert that the articles have the purpose of protecting the fetus' right to life; protection that is warranted under article 11 of the Constitution and international human right treaties, which are part of the *Constitutional Bundle*. Many of those who argue that the articles in question are constitutional assert that it is the legislature's prerogative, in its discretion over criminal matters, to legislate in order to protect fundamental rights, and that this is end is served by articles 122, 123 and 124. Furthermore, amici defending the challenged articles coincide in stating that the pregnant woman's constitutional rights are not absolute and are legitimately limited by the fetus' right to life.

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On the other hand, representatives of some state entities as well as representatives of scientific associations appeared as amici to highlight the fact that in-

duced abortion is a serious public health problem in Colombia which primarily affects adolescents, displaced victims of the internal armed conflict, and those with the lowest levels of education and income. This is due to the fact that induced abortions constitute a crime and are therefore often performed in unhygienic and perilous conditions, which endanger the life and physical integrity of the woman.

\* \* \*





Although it is Congress' role to determine and adopt ideal measures for complying with the duty to protect life, this does not mean that all norms aimed at that goal are justified, for, although "life" has constitutional relevance, it does not have an absolute value nor is it an absolute right; it must be weighed against other values and constitutional rights....

Within the legal system, life receives different normative treatments. For instance, there is a distinction between the right to life in article 11 of the Constitution and life as a value protected by the Constitution. The right to life requires that an individual be entitled to it and claim the right. As with all other rights, the right to life is restricted to human persons, while the protection of life can be afforded to those who have not yet reached the human condition....

Following this reasoning, "life" and "the right to life" are different phenomena. Human life passes through various stages and manifests in various forms, which are entitled to different forms of legal protection. Even though the legal system protects the fetus, it does not grant it the same level or degree of protection it grants a human person. These differences are notable in most legal systems where, for example, the criminal punishment for infanticide or for homicide is greater than the punishment for abortion. That is, the protected life is not identical in all cases and therefore the legal implications of the offence carry different degrees of reprisal and thus a proportional punishment.

These considerations must be taken into account by the legislature if it finds it appropriate to enact public policies regarding abortion, including imposing criminal penalties where the Constitution permits, while respecting the rights of women.

5. "Life" as a relevant constitutional value that must be protected by the Colombian state and as distinguished from the "right to life"

...The Preamble of the Constitution establishes "life" as one of the values that the constitutional legal system aims to protect. Article 2 notes that the authorities of the Republic exist in order to protect the life of the people residing in Colombia. Article 11 affirms, along with other references in the Constitution, that "the right to life is inviolable." In the Constitution of 1991, these various references give "life" a multiplicity of functions, as both a value and a fundamental right....

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Thus, it can be said that by virtue of the mentions "life" in various constitutional articles, the Constitution of 1991 is inclined to a general protection of life. From this point of view, all of the state's actions must focus on protecting life. This protection shall not be understood as an anthropocentric protection only. The duty to protect life as a constitutional value extends from the axiological sphere to the normative sphere and becomes a constitutional mandate with real obligations. Among those obligations is that all state authorities, without exception and to the extent of their abilities, act within their legal and constitutional discretion with the purpose of achieving appropriate conditions for the effective development of human life. Public authorities' duty to protect life is the necessary flip side of life as a constitutionally protected value, and as such it has given rise to multiple jurisprudential lines of argument from this Court....

**6. Life and international treaties on human rights; part of the Constitutional Bundle**

Some of the amici assert that under international human rights law, and particularly under the international instruments addressing matters in the *Constitutional Bundle*, the fetus is entitled to the right to life, and therefore the state is obligated to adopt legislation criminalizing abortion under all circumstances. In other words, they assert that the state's obligation to ban abortion derives from those international treaties that form part of the *Constitutional Bundle*....

As this Court has held, international human rights treaties are not to be interpreted only literally; it is necessary to examine other factors, such as the context and the purpose of the norm in question. As was stated in Decision C-028, 2006:

*In this sense, it is necessary to underscore that in recent years, interpreting international treaties by examining the context and the purpose of the norm in question has gained strength, as it permits for historical changes to be considered. Thus, the interpretation of a specific provision of an international treaty is not limited to reviewing the text of the instrument, rather the interpretation includes the examination of other diverse treaties on related matters; even if those other treaties form part of a different system of protection of international human rights. In other words, international treaties cannot be interpreted in an isolated manner. Instead, they should be interpreted in harmony with one another, in order to adequately take into account social*

*changes and adjust to the new challenges faced by the international community. This must be done following existing specific rules of interpretation, which will lead to a coherent understanding of current international public law.*

*Notably, the Inter-American Court of Human Rights, based on article 29 of the Pact of San José, Costa Rica, has stated, as has the European Court of Human Rights, that "the treaties on human rights are living instruments. Their interpretation must be in accordance with the evolution of the times and current social conditions." The Inter-American Court has also stated that "such evolving interpretation is in harmony with the general rules of interpretation found in article 29 of the American Convention, as well as with those established by the Vienna Convention on the Law of Treaties." Therefore, international treaties on human rights must be interpreted in harmony with one another, utilizing the decisions on said treaties by the international bodies charged with enforcing the rights and guarantees contained within them as a starting point.*

In conclusion, it cannot be said that an absolute or unconditional duty to protect the life of the unborn fetus derives from the various international human rights treaties that form part of the *Constitutional Bundle*. A literal interpretation, just as a context-driven interpretation, requires weighing the unborn fetus' right to life against other rights, principles and values recognized in the 1991 Constitution and in other international human rights law instruments, an approach that has been followed by the Inter-American Court of Human Rights.

*the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so.*" This Programme also established that *"Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so."* It was also established that men, women and adolescents have the right *"to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice,"* as well as *"the right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth."*

The Fourth World Conference on Women (Beijing Platform) confirms the reproductive rights established in the Cairo's Program of Action.

In effect, various international treaties form the basis for the recognition and protection of women's reproductive rights, which derive from the protection of other fundamental rights such as the right to life, health, equality, the right to be free from discrimination, the right to liberty, bodily integrity and the right to be free from violence — all of which constitute the essential core of reproductive rights. Other fundamental rights, such as the right to work and the right to education — which are also affected when women's reproductive rights are violated — serve as parameters to protect and guarantee sexual and reproductive rights.

It must be noted that in addition to the protections for women's rights in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural

Rights, and the American Convention on Human Rights, special protection for the rights of Latin American women are found in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which entered into force in Colombia on February 19, 1982, with the passage of Law 51, 1981, and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém do Pará), which entered into force in Colombia on December 15, 1996, by means of Law 248, 1995. These documents, together with those signed by the governments of the signatory countries in the World Conferences, are fundamental to the protection and guarantee of the rights of women as they form the point of reference for establishing concepts which contribute to their interpretation both in the national and international spheres.

The right to health, which includes the right to reproductive health and family planning, has been interpreted by international bodies on the basis of international treaties, including CEDAW, to include the duty of all states to offer a wide range of high quality and accessible health services, which must include sexual and reproductive health services. Furthermore, these international bodies also recommend that a gender perspective be included in the design of public health policies and programs. These same international bodies have also expressed concern for the health of women living in poverty, women living in rural areas, indigenous women and adolescents, as well as with obstacles to access to contraceptive methods.

In the area of health, all states should also eliminate all obstacles that impede women's access to services, education and information on sexual and reproduc-

First, it defines violence against women both in the public and private spheres as a violation of women's human rights and fundamental freedoms. Second, the Convention establishes the state's responsibility for perpetrating or tolerating any such violence, regardless of where it occurs.

It is also important to highlight that the Rome Statute establishes, among other things, that violence and other reproductive and sexual crimes are at the same level as the other most atrocious international crimes, and may amount to torture and genocide. The Rome Statute also recognizes for the first time that violations of women's right to reproductive autonomy, both by means of forced pregnancy and forced sterilization, are amongst the most serious crimes under international human rights law.

One of the essential components of reproductive and sexual rights is women's right to choose freely the number and spacing of children. This is based on the principles of human dignity and the right to autonomy and intimacy, as has been recognized by various international conventions.

CEDAW has established that a woman's right to reproductive autonomy is infringed upon by obstacles to her access to the means of controlling her fertility. Thus, non-consensual sterilization and imposed birth control methods constitute serious violations of this right. Similarly, various committees have stated that the right to freely decide the number of children is directly linked to women's right to life when there are highly restrictive or prohibitive abortion laws that result in high maternal mortality rates.

tive health. CEDAW has emphasized that laws criminalizing medical interventions that specially affect women constitute a barrier to women's access to needed medical care, compromising women's right to gender equality in the area of health, and amounting to a violation of states' international obligations to respect those internationally recognized rights.

The international community has also recognized that violence against women infringes on human rights and fundamental freedoms, and has established, specifically, the right of women to live free from violence based on sex or gender.

The diverse forms of gender violence constitute a violation of women's reproductive rights, due to the fact that violence affects women's health as well as their reproductive and sexual autonomy. Sexual violence infringes on women's reproductive rights, particularly the right to bodily integrity and the right to control their sexuality and reproductive capacity. Sexual violence also threatens women's right to health, not only physical health but also psychological, reproductive and sexual health.

CEDAW declared that "Gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men." The Convention of Belém do Pará, in force since March 5, 1995, and in force in Colombia since December 15, 1996 — Law 248, 1995 — is one of the most important instruments for protecting women's rights against the various forms of violence faced by women in diverse spheres of their lives. The Convention establishes two elements that make it particularly effective.

Sexual and reproductive rights also emerge from the recognition that equality in general, gender equality in particular, and the emancipation of women and girls are essential to society. Protecting sexual and reproductive rights is a direct path to promoting the dignity of all human beings and a step forward in humanity's advancement towards social justice.

Nonetheless, neither a mandate to decriminalize abortion nor a prohibition on the legislature's adoption of criminal abortion laws derives from international treaties or constitutional articles on the topic. Congress has a wide range of discretion to adopt public policies on abortion. However, this discretion is not unlimited. As this Court has held, even in criminal matters, the legislature must respect two constitutional limits. First, the legislature cannot disproportionately encroach upon constitutional rights. Second, the legislature must not leave certain constitutional values unprotected. At the same time, the legislature must recognize the principle that criminal law, due to its potential to restrict liberties, must always be a measure of last resort.

Below, the Court will set out the limits to the legislature's discretion to utilize criminal law to penalize abortion, first examining the more general limits and then turning to the particulars of the case before it.

#### 8. Limits on legislative discretion over criminal matters

...In summary, it is the legislature that must pass criminal laws for the protection of constitutional values such as life. However, fundamental rights and other constitutional principles establish limits on the legislature's discretion and it is the Cons-

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Other sexual and reproductive rights are based on the right of freedom to marry and start a family. The right to privacy is also connected to reproductive rights and is infringed upon when the state or private citizens interfere with a woman's right to make decisions about her body and her reproductive capacity. The right to privacy includes the right of a patient to have her confidentiality respected by her doctor. Therefore, the right to intimacy is infringed upon when the doctor is legally obliged to report a woman who has undergone an abortion.

With regard to the right to equality and to be free from discrimination, the Women's Convention (CEDAW) establishes women's right to enjoy human rights in conditions of equality with men. It also prescribes the elimination of barriers impeding women's effective enjoyment of their internationally recognized rights, as well as of those found in national legislation. It also establishes measures to prevent and sanction acts of discrimination.

Finally, the right to education is closely linked to reproductive rights at various levels. Having access to basic education empowers women within their families and their communities, and it raises their consciousness regarding their rights. Furthermore, the right to an education includes education on reproductive health and on the right to choose freely and responsibly the number of children and the spacing between them.

To conclude, women's sexual and reproductive rights have finally been recognized as human rights, and, as such, they have become part of constitutional rights, which are the fundamental basis of all democratic states.

titutional Court that as guardian of the integrity and supremacy of the Constitution, must oversee the limits imposed by the Constitution on the legislature. The Court must examine whether the legislation validly infringes upon constitutional rights.

Congress may introduce variations in the criminalization and punishment of different conducts that threaten life, a value found in the Constitution. Colombia's legal system includes various laws that aim to protect life, such as laws against genocide, homicide, abortion, abandoning a minor or a person with disabilities, or genetic manipulation. Another example is failing to aid a person at risk. The criminalization of these acts all aim to protect life. Although all these laws have the same objective, that of protecting life, the penalties assigned are different, in accordance with the specific situation and the stage of life in question. In this manner, birth is a relevant event in determining the protection accorded by the law, as is reflected in the penalty associated with the crime.

**8.1. The fundamental right to dignity as a limit on the legislature's discretion over criminal matters**

As with "life," the concept of "dignity" has various functions in Colombian constitutional law, as has been recognized by constitutional jurisprudence. This Court has stated that "human dignity" has three different roles: (i) it is a foundational principle of the legal system and as such, it has an axiological dimension as a constitutional value; (ii) it is a constitutional principle; and (iii) it is a fundamental right....

[T]he rules which flow from the concept of human dignity — both the constitutional principle and the fundamental right to dignity — coincide in protecting the same type of conduct. This Court has held that in those cases where dignity is used as a criterion in a judicial decision, it must be understood that dignity protects the following: (i) autonomy, or the possibility of designing one's life plan and living in accordance with it (to live life as one wishes); (ii) certain material conditions of existence (to live well); and (iii) intangible goods such as physical integrity and moral integrity (to live free of humiliation)....

Human dignity warrants a sphere of autonomy and moral integrity that must be respected by public authorities and by private citizens. The sphere of protection for women's human dignity includes decisions related to their choice of life plan, among them decisions regarding reproductive autonomy. This protection also includes a guarantee of their moral integrity, which manifests itself in prohibitions against assigning women stigmatizing gender roles or imposing deliberate moral suffering.

According to constitutional jurisprudence, the concept of dignity, understood as protecting individual autonomy and the right to choose one's life plan, places a limit on the legislature's discretion over criminal matters....

In this way, the need to respect human dignity places a limit on the legislature's discretion with regard to criminal matters, even in circumstances where the legislature aims to protect other relevant constitutional values such as life.



of the individual, among which the following must be mentioned due to their importance in the present analysis.

The freedom of every individual to choose his or her marital status without coercion of any type; this includes, among others options, the freedom to choose whether to marry, to live in a common law relationship or remain single.

The right to be a mother, or in other words, the right to opt for motherhood as a "life choice," is a decision of the utmost private nature for each woman. Therefore, the Constitution does not permit the state, the family, the employer or educational institutions to introduce any regulation or policy that infringes upon the right of a woman to choose to be a mother or that interferes with the rightful exercise of motherhood. Any discriminatory or unfavorable treatment of a woman on the basis of special circumstances she might be facing at the time of making the decision of whether to be a mother (for example, at an early age, within marriage or not, with a partner or without one, while working, etc.) is a flagrant violation of the constitutional right to the free development of the individual.

The right to a personal identity from which the following rights derive: (i) the right to a name as an expression of individuality. The Court understands this right in a "legal sense" as "the ability of an individual to proclaim his or her uniqueness;" (ii) the right to freely choose one's sexuality. The Court has stated in various decisions that "sexual orientation and the assumption of a sexual identity are at the core of the right to the free development of the individual..." and (iii) the right to make choices about one's appearance. The Court has said

Therefore, when the legislature enacts criminal laws, it cannot ignore that a woman is a human being entitled to dignity and that she must be treated as such, as opposed to being treated as a reproductive instrument for the human race. The legislature must not impose the role of procreator on a woman against her will.

**8.2. The right to the free development of the individual as a limit on the legislature's discretion over criminal matters**

The right to the free development of the individual stems from axiological considerations: the principle of human dignity and the strong libertarian characteristics of the 1991 Constitution. This right is understood as the necessary result of a new conception of the state's role. In this new role, the state is "an instrument at the service of the citizens, as opposed to the citizen as a servant of the state." In this new light, individual autonomy — understood as the vital sphere of matters solely within the decisional ambit of the individual — becomes a constitutional principle, binding on public authorities, who are therefore prevented from infringing on this private sphere and making decisions on behalf of citizens because such infringement would amount to "a brutal usurpation of a citizen's ethical condition, reducing him/her to the condition of an object, converting him/her into a means to ends imposed from outside...."

The substance of the right is found within the realm of an individual's private decisions, which result in a person's life plan or in an individual's ideal of personal achievement. Throughout time, constitutional jurisprudence has identified a spectrum of conduct that is protected under the right to the free development

that a certain standard of esthetics cannot be imposed by educational institutions, the state or private citizens. For instance, decisions about what dress, hair length or whether to use cosmetics cannot be determined by educational institutions. Government entities are also proscribed from establishing regulations that prevent access to certain public employment based on esthetics. Similarly, penal institutions are prevented from imposing rules that prevent visits to inmates based on personal appearance.

The right to make decisions about one's health encompasses the right to pursue or refuse a particular medical treatment even when the patient may be suffering from a mental disorder (so long as the mental condition is not so severe as to impair the patient's judgment or impair the patient's expression of his or her wishes) and even when the patient's decision will not lead, in the expert's medical opinion or the opinion of others, to improvement of the patient's illness or the achievement of wellness.

Finally, it must be noted that our constitutional jurisprudence has also said, on various occasions, that the free development of the individual provides a clear limit on the legislature's discretion, not only in criminal matters but also in its general discretion regarding penalties and prohibitions. The Court has held that regardless of the constitutional values it is aiming to protect, the legislature cannot establish "perfectionist measures" that restrict the free development of the individual in a disproportionate manner.

Decision C-309/97 establishes a differentiation between "perfectionist measures" and "protective measures;" the latter are constitutionally valid when they aim to

preserve relevant constitutional values such as the right to life and the right to health. On this particular point, the Court stated:

*In Colombia, perfectionist measures are not allowed as it is not permissible that a state that recognizes the right to individual autonomy as well as pluralism as a protected value permit its authorities to impose, with the threat of criminal penalties, a predetermined model of virtuous behavior or human excellence. In effect, perfectionist measures are policies that imply that the state only admits one ideal of what is commendable, which is totally incompatible with the notion of a plural society. Such measures also result in criminal sanctions against persons who have not infringed upon the rights of others, but instead have simply rejected the ideals imposed by the state, in flagrant violation of that individual's autonomy. Autonomy means precisely having the ability to establish one's own norms. On the other hand, protective measures that seek to protect the rights of the individual are not incompatible with the Constitution, nor with the recognition of a pluralist society, because these measures are not based on imposing a model of what is virtuous, rather, they aim to protect an individual's own interests and his or her own convictions.*

In order to prevent a protective measure from becoming perfectionist policy, the protective measure must be proportionate and may not excessively restrict the rights at issue, among them, of course, the right to the free development of the individual.



*In close relationship to the above, the Court concludes that the penalty for a violation of a protective norm cannot be excessive when weighed against the interest that the measure seeks to protect. Not only because proportionality in determining criminal sanctions is a guiding principle of criminal law, but also because having proportionality in the penalties imposed is a manner of guaranteeing that a protective norm will not become a perfectionist measure...*

### **8.3. Health, life and bodily integrity as limits on the discretion of the legislature over criminal matters**

...The Constitutional Court has said on various occasions that the right to health, even though it is not expressly found in the Constitution as a fundamental right, has a fundamental character when it is in close relation to the right to life. That is, when its protection becomes necessary in order to guarantee the continuity of life in dignified conditions.

The Court has also said that human life as protected in the Constitution refers not only to a biological existence, but also to life with a minimum degree of dignity. Human beings are multifaceted and their existence involves more than purely material aspects; it incorporates physical, biological, spiritual, mental and psychological factors, all of which must be taken into consideration when defining human dignity.

The right to health encompasses not only physical, but also mental health. As the Court has said, "*The Constitution proclaims the fundamental right to personal integrity, and by doing so, refers not only to the physical aspects of the person, but also to the broad range of elements that affect one's mental health and psychological well-being. Accordingly, both the physical and psychological aspects of integrity must be preserved. A threat to one or the other, by action or omission, infringes upon this fundamental right and endangers the right to life with a minimum degree of dignity.*"

The right to health is an integral right that includes mental and physical well-being. Furthermore, for women, it includes reproductive health, which is closely linked to both induced and spontaneous abortion. Induced abortions and miscarriages may in numerous circumstances put a woman's health or life at risk, or require medical intervention to preserve her reproductive capacity...

The constitutional right to health has a service provision dimension as well as an element of protection against government and third party intrusion or interference with this right. This latter dimension of protection from violation, or obligation on the state to not interfere, is closely related to the duty of every individual to be responsible for his or her own health. From this perspective, certain measures adopted by the legislature that disproportionately restrict the right to health are unconstitutional. This is so even when those measures are adopted in order to protect the constitutional rights of others.

*Prima facie*, it is not proportionate or reasonable for the Colombian state to obligate a person to sacrifice her or his health in the interest of protecting third parties, even when those interests are also constitutionally relevant.

Also, as mentioned above, the right to health has a dimension related to decision-making about one's own health, which is closely linked to the right to autonomy and the right to the free development of the individual. Thus, the Constitutional Court has understood that every person has the autonomy to make decisions related to his or her health, and that therefore the informed consent of the patient prevails over the views of the treating physician, and the interest of society and the state in preserving the health of the people. From this perspective, medical treatment or intervention should always take place with the consent of the patient, except in very exceptional circumstances.

The right to autonomy regarding one's own health encompasses other distinct rights, which are relevant here. These include the right to plan a family, the right to make free and non-coerced decisions regarding reproduction, and the right to be free from all forms of violence and coercion which affect sexual and reproductive health. Following is a brief analysis of each of these rights.

The right to plan a family has been defined as "the possibility of all couples to freely choose in a responsible manner, the number and spacing of their children, and the right to access the information necessary to do so." This right places an obligation on the state to adopt measures to assist couples and individuals in reaching their reproductive objectives and to provide information on family planning and reproductive health.

The right to be free of interference in decision-making regarding reproduction requires access to the information necessary to make informed choices. This is closely related to the right to adequate sex education. This right also "protects

people from unwanted physical intrusions and from other non-consensual restrictions on their physical autonomy."

It must be noted again that the right to be free from all forms of violence and coercion that affect sexual and reproductive health has a gender perspective which derives from various international human rights instruments, particularly the Convention on the Elimination of All Forms of Discrimination against Women. It implies the right to make decisions regarding reproduction without discrimination, coercion or violence, and therefore it is closely connected with the right to personal integrity. This right also requires the state to protect individuals, particularly women, from undue family, social and cultural pressures that diminish their ability to decide regarding sexual or reproductive matters. Such pressures include being forced into marriage at an early age without the full consent of both parties or the practice of female circumcision. The right also implies a prohibition of state-condoned practices such as forced sterilization, violence and sexual abuse....

#### 8.4. The Constitutional Bundle as a limit on the legislature's discretion over criminal matters

The Constitutional Bundle also limits the legislature's discretion with regard to criminal matters, as was recognized by this Court in Decision C-205, 2003:

*The legislature has a broad margin of discretion when it comes to defining social conduct that is so harmful to a greater protected good that it must become crime. This decision is within the legisla-*

vention on the Elimination of All Forms of Discrimination against Women, and the International Covenant on Economic, Social and Cultural Rights, while neither dispositive nor preemptive of the legislature's discretion, are relevant in the analysis of the constitutionality of the total ban on abortion....

### **8.5. Proportionality and reasonability as limits to the legislature's discretion over criminal matters**

...*The political change from a liberal state, founded on national sovereignty and the rule of law, to a social state whose essential objectives are, among others, service to the community, the guarantee of fundamental constitutional principles, rights and duties, and the protection of constitutional rights and freedoms (article 2 of the Constitution) requires a renunciation of absolutist theories about the autonomy of the legislature with regard to criminal matters. The defendant's fundamental rights to dignity and integrity, which are protected by the Constitution (article 5 of the Constitution), limit society's ability to legislate in criminal matters. The axiological content of the Constitution limits the exercise of the power and responsibility of the public authorities (article 6 of the Constitution). The social aspect of the Constitution works to balance the public authority's restricting force so that free will is aligned with reason. Only a proportionate use of the state's punitive power with respect to constitutional rights and freedoms can guarantee a just social order, founded in human dignity and solidarity.*

*ture's realm of action on the basis of democracy, and these norms reflect the predominant societal values at the time. However, this discretion is not unlimited as the Constitutional Bundle provides an axiological limit on the exercise of this discretion. Therefore, when defining which conduct constitutes a crime as well as defining issues of criminal procedure, the legislature must take into account the entirety of the legal system, and in particular, it must respect the rights and dignity of others, as has been held on various occasions and for some time now in the jurisprudence of this Court....*

In a similar manner, the Constitutional Court has said that "Under article 93 of the Constitution, constitutional rights and obligations must be interpreted in harmony with international human rights treaties to which Colombia is a signatory. This means that international jurisprudence from the tribunals in charge of interpreting those treaties constitute a relevant interpretation guide when establishing the meaning of fundamental constitutional rights." This position has been stated in numerous decisions, and permits the conclusion that international jurisprudence provides a relevant guide for interpreting those rights contained in international treaties that form part of the Constitutional Bundle. This is different from saying that such international jurisprudence is part of the Constitutional Bundle....

This distinction aside, international human rights treaties, which, according to constitutional jurisprudence, are part of the Constitutional Bundle, provide a clear limit on the legislature's discretion over criminal matters. Accordingly, various articles of the International Covenant on Civil and Political Rights, the Con-

*Thus, the type and length of a penalty are not matters entirely to be decided by democratic will. The Constitution imposes clear limits on the legislature (articles 11 and 12 of the Constitution). From the right to equality, principles such as reasonableness and proportionality follow and justify a different treatment depending on the particular circumstances of the case (article 13 of the Constitution), thus requiring an evaluation of the relationship between the ends and the means used to achieve those ends....*

Thus, the legislature may choose from amongst the different available measures those that it considers the most adequate for the protection of legitimate ends, and it may adopt criminal laws penalizing conduct that threatens or infringes upon constitutionally protected values, rights or principles. However, the legislature's discretion is subject to various constitutional limits, including the principle of proportionality, which plays two different limiting roles. First, a criminal law cannot impose a disproportionate restriction on the fundamental rights in question. For example, it cannot constitute a perfectionist measure, by means of which the state seeks to impose an ideal model of conduct. Nor can it require a complete sacrifice of any individual's fundamental right in order to serve the general interests of society or in order to give legal priority to other protected values.

Second, the principle of proportionality must exist within the Penal Code because in a democratic state criminal sanctions, as the utmost infringement upon personal liberties and human dignity — both axiological grounds of a democratic state — must only be used when justified and necessary to punish serious and harmful conduct, and must also be proportionate to the crime....

An analysis of proportionality is necessary to determine whether the legislature, in aiming to protect the unborn fetus, affected the rights of women in a disproportionate manner and overstepped the limits within which it can exercise its discretion over criminal matters.

### **9. The issue of abortion in comparative law**

[The court examines decisions from the constitutional courts of the United States, Germany and Spain]

...When constitutional tribunals have examined the constitutionality of laws governing the termination of pregnancy, they have coincided in the need to balance the various interests at stake; on one hand, the life of the fetus, which is constitutionally relevant and therefore should be protected, and on the other hand, the rights of the pregnant woman. Even though the various tribunals have differed on which of those interests must prevail in particular cases, they have shared common ground in affirming that a total prohibition on abortion is unconstitutional because under certain circumstances it imposes an intolerable burden on the pregnant woman which infringes upon her constitutional rights.

### **10. The case before the Court**

#### **10.1. The unconstitutionality of a total prohibition of abortion**

...In the case at hand, as has been held numerous times, the life of the fetus is entitled to protection under constitutional law and therefore the decisions of the pregnant woman regarding the termination of her pregnancy go beyond

the sphere of her private autonomy and implicate the interests of both the state and the legislature....

It is not the role of the constitutional judge to determine the character or the nature of the measures that the legislature should adopt in order to protect a particular state interest. That is an eminently political decision reserved for the legislative branch, which has the legitimate democratic ability to adopt those measures. The intervention of the constitutional judge comes *a posteriori* and only in order to examine whether the legislature has exercised its powers within the limits of its discretion.

If the legislature decides to serve legitimate ends by adopting criminal measures, its margin of discretion is limited due to the severity of such measures and their potential to seriously impair human dignity and individual liberties. In the case of abortion, the decision is extremely complex because the crime impacts various rights, principles and values, all of which are constitutionally relevant. Accordingly, defining which should prevail and in what measure is a decision with profound social repercussions which may alter as society transforms and public policy changes. The legislature has the ability to modify its decisions in response to such changes, and it is the branch responsible for providing the state's response to competing constitutional rights, principles and values....

Even though the protection of the fetus through criminal law is not in itself disproportionate and penalizing abortion may be constitutional, the criminalization of abortion in all circumstances entails the complete pre-eminence of the life of the fetus and the absolute sacrifice of the pregnant woman's fundamental rights. This result is, without a doubt, unconstitutional.

In effect, one of the characteristics of constitutional regimes with a high degree of axiological content, such as the Colombian Constitution of 1991, is the coexistence of different values, rights and principles, none of which is absolute and none of which prevails over the rest. This is one of the fundamental pillars of proportionality that must be utilized as an instrument to resolve the tension amongst laws in a structured and principled manner.

Thus, a criminal law that prohibits abortion in all circumstances extinguishes the woman's fundamental rights, and thereby violates her dignity by reducing her to a mere receptacle for the fetus, without rights or interests of constitutional relevance worthy of protection.

Determining under which circumstances it is excessive to require a woman to continue a pregnancy because it results in an infringement of a woman's fundamental rights is an exercise within the legislature's sphere. Once the legislature has decided that criminal law is the most appropriate way to protect the life of the fetus, then the legislature must set out the circumstances under which it is not excessive to sacrifice the rights of the pregnant woman. Nonetheless, if the legislature does not establish those circumstances, it is then up to the constitutional judge to prevent a disproportionate infringement of the fundamental rights of the pregnant woman. This does not mean, however, that the legislature lacks discretion to deal with this matter within constitutional limits.

Even though the Penal Code contains a general prohibition of abortion, the articles in question demonstrate that under certain circumstances the legislature

did establish mitigating factors and even provided the judiciary with the discretion to not impose a penalty in a particular case. This exclusion relates to pregnancies resulting from rape, sexual abuse, non-consensual artificial insemination or implantation of a fertilized ovule. (article 124 of the Penal Code)

In these circumstances, the legislature decided that the penalty for abortion should be mitigated in light of the fundamental rights of the woman involved, such as her dignity and her right to the free development of the individual. However, the legislature decided that even in those circumstances, where the woman's dignity and free development were imperiled, she should be tried and sentenced as a criminal. A measure such as this is disproportionate because the conduct continues to be criminal, which seriously infringes on the constitutional rights of the pregnant woman.

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This Court is of the view that under the enumerated circumstances, abortion does not constitute a crime. This is not only because that result was originally contemplated by the legislature, but also because the absolute prevalence of the fetus' rights in these circumstances implies a complete disregard for human dignity and the right to the free development of the pregnant woman whose pregnancy is not the result of a free and conscious decision, but the result of arbitrary, criminal acts against her in violation of her autonomy; acts that are penalized in the Penal Code.

With regard to the infringement of the right to human dignity and the autonomy of the pregnant woman, it is worth citing portions of the concurring opinion in Decision C-647, 2001 which stated:

*When a woman is the victim of rape or she is the victim of any of the types of conduct described in the paragraph in question, her right to dignity, her right to intimacy and her right to autonomy and freedom of conscience are blatantly and arbitrarily infringed upon. It is hard to imagine a more serious violation of those rights and a conduct more blatantly against social harmony among equals. A woman who becomes pregnant as a result of rape cannot be legally required to act as a heroine and take on the burden that continuing with the pregnancy entails. Nor can her fundamental rights be disregarded as would be the case if she were required to carry the pregnancy to term against her will, turning her into a mere instrument of procreation. Ordinarily, a woman in this situation will not act indifferently or as a heroine. When a woman has been the victim of rape or has been utilized as an instrument for procreation, she may make the exceptional and admirable decision to carry the pregnancy to term. Despite the lack of government assistance for her or the future child, a woman has the right to decide to continue with the pregnancy if she has the strength to do so and her conscience tells her to do so. But she cannot be obligated to procreate nor be subjected to criminal sanctions for exercising her constitutional rights while trying to lessen the consequences of the crime of which she was a victim.*

Taking the duty to protect the life of the fetus in these exceptional circumstances to the extreme of criminalizing the termination of pregnancy is to give

dence of actual penetration after a report of rape or require evidence to establish lack of consent to the sexual relationship. Nor can they require that a judge or a police officer find that the rape actually occurred; or require that the woman obtain permission from, or be required to notify, her husband or her parents.

The circumstances above are not the only ones in which it is disproportionate to criminalize abortion.

Also, when there is a risk to the health and life of the pregnant woman, it is clearly excessive to criminalize abortion since it would require the sacrifice of the fully formed life of the woman in favor of the developing life of the fetus. If the criminal penalty for abortion rests on valuing the life of the developing fetus over other constitutional interests involved, then criminalization of abortion in these circumstances would mean that there is no equivalent recognition of the right to life and health of the mother.

This Court has held on several occasions that the state cannot oblige a person, in this case a pregnant woman, to perform heroic sacrifices and give up her own rights for the benefit of others or for the benefit of society in general. Such an obligation is unenforceable, even if the pregnancy is the result of a consensual act, in light of article 49 of the Constitution, which mandates that all persons take care of their own health.

The importance of "life" as a constitutional value and the resulting obligation on the state to protect it imposes on the legislature the duty to enact protective measures through legislation. In Decision C-309, 1997, this Court held:

an absolute privilege to the life of the fetus over the fundamental rights of the pregnant woman, in particular, her right to choose whether or not to carry to term an unwanted pregnancy. Such an intrusion by the state on her right to the free development of the individual and her human dignity is disproportionate and arbitrary. A woman's right to dignity prohibits her treatment as a mere instrument for reproduction, and her consent is therefore essential to the fundamental, life-changing decision to give birth to another person.

Pregnancy resulting from incest should also be included within these exceptional circumstances because it represents another example of a pregnancy resulting from a punishable act, where, in most cases, the woman does not consent. Even when there is no physical violence involved, incest generally infringes on a woman's autonomy. It also affects the stability of the family (an institution protected by the Constitution) and results in a violation of the constitutional principle of solidarity, which is, as has been held previously by this Court, a fundamental guiding principle of the Constitution. The criminalization of abortion in this circumstance amounts to a disproportionate and unreasonable infringement on the liberty and dignity of women.

When the pregnancy is the result of rape, sexual abuse, non-consensual artificial insemination or implantation of a fertilized ovule, or incest, it is necessary that such criminal acts be reported accordingly to the competent authorities.

To this end, the legislature may enact regulations as long as the regulations do not preclude access to abortion and do not impose a disproportionate burden on the rights of women. For instance, the regulations cannot require forensic evi-

*The Constitution is not neutral with regard to the values of life and health; rather, it clearly favors them. Thus, the state has a particular interest in seeing these values flourish in society's day-to-day life. Authorities cannot be indifferent to a citizen's decision that puts his or her life or health at risk. The state is authorized to act, through protective measures, even against the will of the citizens, in order to prevent an individual from harming him or herself. Protective measures are constitutional. This does not mean, however, that any measure of this nature is allowed, because, on occasion, the state, or society, in aiming to protect a person from his or her self, ends up infringing upon this person's autonomy. This Court, in recognizing the constitutionality of these measures, has been very careful in stating that they will lose their constitutional character if they turn into "perfectionist" measures, that is, in the "unwanted imposition on a citizen of an ideal of life and an ideal of what is worthy and virtuous, which is contrary to the citizen's beliefs, and is in violation of autonomy, dignity, and the right to the free development of the individual, all fundamental pillars of our legal system."*

For the present analysis, it is relevant to consider various international human rights bodies' interpretation of international treaties that guarantee women's right to life and health. For instance, article 6 of the International Covenant on Civil and Political Rights, article 12.1 of the Convention on the Elimination of All Forms of Discrimination against Women and article 12 of the International Covenant on Economic, Social and Cultural Rights, are all part of the *Constitutional Bundle* and

thus impose an obligation on the state to adopt measures to protect life and health. The prohibition of abortion where the life and health of the mother are at risk may therefore violate Colombia's obligations under international law.

These obligations do not pertain only where the woman's physical health is at risk, but also where her mental health is at risk. It must be noted that the right to health, under article 12 of the International Covenant on Economic, Social and Cultural Rights, includes the right to the highest achievable level of both physical and mental well-being. Pregnancy may at times cause severe anguish or even mental disorders, which may justify its termination if so certified by a doctor.

Some of the interveners argue that when the life or the health of the pregnant woman are at risk due to the pregnancy, article 32-7 of the Penal Code allows for the invocation of the necessity defense to avoid criminal liability. On this point, this Court must warn that the necessity defense does not resolve the constitutional tension at issue here for two reasons. First, application of the necessity defense presupposes that the legislature can completely criminalize abortion, which, as has been discussed here, is unconstitutional because it disregards the right to life and health of the mother in favor of protecting the fetus, regardless of the woman's particular circumstances. Second, for the necessity defense to apply under article 32-7, there must be actual and imminent danger which is not preventable in any other way, which was not willfully caused, and which the person does not have the legal duty to bear. These requirements do not clearly address the risks to the life or health of a pregnant woman and they impose an unreasonable burden on her.



A final circumstance that must be addressed involves medically-certified malformations of the fetus. Although there are different types of malformations, those extreme malformations incompatible with life outside the womb pose a constitutional issue that must be resolved. Those circumstances are different from having identified an illness of the fetus that may be cured during pregnancy or after birth. Rather, those circumstances involve a fetus that is unlikely to survive due to a severe malformation, as certified by a doctor. In these cases, the duty of the state to protect the fetus loses weight, since this life is in fact not viable. Thus, the rights of the woman prevail and the legislature cannot require her, under the threat of a criminal penalty, to carry a pregnancy to term.

An additional reason for the decriminalization of abortion in these extreme circumstances is that imposing a criminal penalty in order to protect the fetus results in the imposition of an unreasonable burden on the pregnant woman, who is forced to go through a pregnancy only to lose the growing life due to the malformation.

Furthermore, in a situation where the fetus is not viable, forcing the mother, under the threat of criminal charges, to carry the pregnancy to term amounts to cruel, inhumane and degrading treatment, which affects her moral well-being and her right to dignity.

In both cases described above, where the continuation of the pregnancy puts the life or health of the pregnant woman at risk or when there are serious malformations of the fetus incompatible with life outside the womb, there should be a medical certificate to validate the circumstances under which the abortion cannot be penalized.

It is not in the realm of the Court's knowledge to stipulate when the continuation of a pregnancy puts the life or health of the mother at risk or when there are serious malformations of the fetus. Such determinations are to be made by medical practitioners acting within the ethical standards of their profession.

From a constitutional standpoint, if these requirements are met — a medical certificate or a report to the authorities, depending on the circumstances — neither the pregnant woman nor the doctor who performs the abortion can be the subject of criminal charges under the three circumstances in which article 122 has been found unconstitutional. Each of these three circumstances is independent from one another. Therefore, it cannot be required, for example, to establish after a rape that the life or health of the mother is at risk or that the fetus is not viable. In the case of rape or incest, the good faith of the woman who reports the incident to the authorities shall be presumed and it is enough for her to show a copy of the report to the doctor.

It must be noted that conscientious objection is not a right that legal entities or the state can exercise. It is only possible for natural persons to exercise this right. Hospitals, clinics or other health centers cannot raise a conscientious objection to performing an abortion when all the requirements established by this decision are met. When it comes to natural persons, it must be underscored that a conscientious objection relates to a religious belief and the opinion of the doctor with regard to abortion should not be questioned. However, women's fundamental rights cannot be disregarded, thus, if the doctor raises a conscientious objection, the doctor must immediately refer the pregnant woman to another medical practitioner who can perform the abortion. That referral is without prej-



prevent the legal system from regulating abortion in circumstances where the Constitution allows for it.

To conclude, under the principle that calls for the preservation of laws, it is necessary to declare the conditional constitutionality of the challenged article. In accordance with this decision, abortion will not be considered a crime in the circumstances described herein. In this manner, protection for the life of the fetus will not disproportionately override the rights of the pregnant woman.

The Court declares that article 122 of the Penal Code is constitutional with the understanding that abortion is not criminal in the following circumstances:

- a) when the continuation of the pregnancy presents risks to the life or the health of the woman, as certified by a medical doctor; b) when there are serious malformations of the fetus that make the fetus not viable, as certified by a medical doctor; and c) when the pregnancy is the result of any of the following criminal acts, duly reported to the authorities: incest, rape, sexual abuse, or artificial insemination or implantation of a fertilized ovule without the consent of the woman.

**10.2. The constitutionality of the expression "or on a woman of less than 14 years of age" in article 123 of the Penal Code**

Article 123 of the Penal Code penalizes abortion when it is performed without the consent of the woman or when it is performed on a woman of less than 14 years of age. The challenged article established a presumption that a woman of less than 14 years of age is legally incapable of consenting to an abortion and therefore her consent is irrelevant from the perspective of the criminal law.

judice to a determination that may be made afterwards, through mechanisms established by the medical profession, regarding whether the objection was legitimate.

Even though regulations are not necessary for the immediate decriminalization of abortion in the three circumstances presented in this decision, the legislature or the authorities regulating social and health services are not prevented from adopting decisions within their discretion and in order to fulfill their duties with respect to the constitutional rights of women; for example, taking measures that will effectively ensure women access in conditions of equality and safety in the area of health and social services.

In these three circumstances, the legislature is proscribed from establishing requirements that limit access to abortion services or that amount to a disproportionate burden on the rights of women.

The above analysis demonstrates that even though the decision to criminalize abortion as a measure to protect the life of the fetus is constitutionally justified — although it is not the only option open to the legislature, as it can choose social service measures for this purpose — the total prohibition of abortion in all cases is a blatantly disproportionate measure as it infringes upon the rights of the pregnant woman, protected by the Constitution of 1991 as well as by the International human rights treaties that are part of the *Constitutional Bundle*.

The protection of women's rights does not call for the complete invalidation of article 122, because this would leave life unprotected. Furthermore, it would

In this case, the article is challenged on the grounds that the presumption infringes on the human dignity, the right to the free development of the individual, the health and even the life of the pregnant woman of less than 14 years of age, because, according to the Plaintiffs, the minor is capable of giving valid consent to an abortion.

In order to address this portion of the constitutional challenge, it is necessary to briefly review the jurisprudence of this Court relating to the right to the free development of the individual and to informed consent by minors to medical interventions.

With regard to the right to the free development of the individual, this Court has held that even though all persons possess this right, autonomy involves decisions which affect a person "in those stages in life in which the person has enough judgment to make a decision" or, in other words, "the right to the free development of the individual must be evaluated differently at each stage of life." Accordingly, this Court has held that minors may be subject, in certain circumstances, to greater restrictions on their exercise of the right, just as are legally incompetent persons and other temporarily or permanently psychologically immature individuals.

These criteria have been subject to refinement through decisions dealing with the protection of constitutional rights. First, with regard to minors, the Court has accepted that the classification in article 34 of the Civil Code (infants, pre-adolescents and adolescents) is based on "the result of a process by which the individual advances gradually in the knowledge of him or her self and in the recognition and use of his or her potential and abilities, discovering his or herself as an au-

tonomous, singular and different being." This classification does not define who is entitled to the right to the free development, but it does permit certain specific restrictions on that right based on the degree of maturity of the person....

It is also relevant to consider the jurisprudential criteria established by this Court in decision SU-337 of 1999 regarding the validity of a minor's consent to treatment or medical interventions affecting one's sexual identity. The Court held:

*On the other hand, a minor is not totally deprived of autonomy, and, in many circumstances, the minor's opinion must not only be taken into account but also respected. The Convention on the Rights of the Child, which was adopted by Colombia in Law 12 of 1991, and which therefore prevails in our legal system (article 93 of the Constitution), expressly establishes in article 12 that "state parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child." Judicial decisions both nationally and internationally have recognized the autonomy of minors to make certain decisions relating to medical procedures, even if these decisions are not in agreement with the opinion of their parents.*

This led the Court to conclude that the age of the minor is not an absolute criterion for authorizing treatments and medical procedures, even when these are of an invasive nature:

*nation of the minor increases, which — it is assumed — becomes fully developed at the age at which the law fixes the coming of age." There is then, an "inverse relationship of proportionality between the capacity of self-determination of the minor and the legitimacy of interventions into a minor's decisions; thus, the higher the degree of intellectual capacity, the lesser the legitimacy of interventions into the decisions of the minor."*

Thus, constitutional jurisprudence has recognized that minors possess the right to the free development of the individual and may consent to medical treatments and interventions, even when they are of a highly invasive nature. Purely objective criteria such as age have been rejected as the only standard for determining whether minors can consent to medical treatments and interventions. With regard to abortion, the legislature, if it deems appropriate, may establish rules in the future regarding representation of minors or the assertion of minors' rights, which shall not invalidate the consent of a minor of less than 14 years of age.

From this perspective, any protective measure that nullifies the legal effect of a minor's consent, such as the challenged expression in article 123 of the Penal Code, is unconstitutional because it completely annuls the minor's rights to the free development of the individual, autonomy and dignity.

Furthermore, this protective measure reveals itself as a counter-productive and ineffective means of achieving its end in cases where it is necessary to perform an abortion to protect the health or life of the pregnant minor. Because of the presumption established by the legislature, any person who performs an abor-

Lastly, not even age is a purely objective criterion because, given the aforementioned distinction between legal capacity and autonomy to make health care decisions, it is understood that the age of the patient serves as a guide for assessing the minor's intellectual and emotional maturity, but is not an element with an absolute quality. It is reasonable to assume that an infant is less autonomous than an adolescent and therefore the degree of protection of their right to the free development of the individual is different in the two cases. Personality is an evolving process of maturity, such that humans go from a state of almost total dependency at birth to full autonomy at adulthood. The access to autonomy is therefore gradual as it is "the result of a process by which the individual advances gradually in the knowledge of him or her self and in the recognition and use of his or her potential and abilities, discovering him or herself as an autonomous, singular and different being." This progressive development of personality and autonomy is to a great degree linked to age, which justifies distinctions such as those made by Roman law and the Civil Code among infants, preadolescents and young adults. Thus, the age of the patient can be taken as an indication of the degree of autonomy, but the number of years is not an absolute criterion, as minors of identical age may, in fact, show different capacities for self-determination, and therefore may enjoy different protections of the right to the free development of the individual. This Court has established that the protection given by this fundamental right "is stronger as the ability of self-determi-

tion on a minor of less than 14 years of age can be charged with violation of article 123 of the Penal Code, even where the abortion is necessary to protect the life or health of the minor and she has given her consent.

For the reasons explained above, the Court must conclude that article 123 of the Penal Code annuls the pregnant minor's fundamental rights to the free development of the individual, autonomy and dignity, and is inadequate to achieve its stated goals. It is therefore clearly disproportionate and unconstitutional. Hence, the expression "or on a woman of less than 14 years of age" is hereby declared unconstitutional.

### **10.3. On the constitutionality of article 124 of the Penal Code**

All of the circumstances cited as mitigating factors in the challenged article are included, by virtue of this decision, together with those not expressly mentioned in the article, as circumstances under which abortion is not a crime.

As a consequence of this decision, the article in question and the paragraph in question are superfluous because the Court declares that, instead of constituting mitigating factors, the circumstances no longer constitute a crime. The article shall be deleted from the Code....

### **11. Final considerations**

Having weighed the duty to protect the life of the fetus against the fundamental rights of the pregnant woman, this Court concludes that the total prohibition of

abortion is unconstitutional and that article 122 of the Penal Code is constitutional on the condition that the three circumstances described in this decision are excluded from its ambit and on the understanding that all three circumstances are autonomous and independent of one another.

However, the legislature in its discretion may decide that abortion is not penalized in additional circumstances. In the present decision, the Court has limited itself to the three extreme circumstances that violate the Constitution when the pregnant woman has consented to the abortion and the pertinent requirements have been met. However, aside from these circumstances, the legislature may foresee others in which public policy calls for the decriminalization of abortion, taking into consideration the circumstances under which abortions are performed, as well as socio-economic situations and other public health policy objectives.

For all legal purposes, including the application of the principle of favorability, the present decision shall enter into force immediately and the enjoyment of the rights protected in this decision do not require further legislation or regulations.

This does not prevent the authorities with discretion over the issues, if they so deem convenient, from issuing legislation establishing public policies in harmony with the present decision.

The Court must clarify that the present decision does not require women to choose to abort. Rather, in the event that a woman finds herself in one of the exceptional circumstances here mentioned, she can decide to carry the pregnancy to term and her decision is constitutionally protected. What the Court is

establishing in the present decision is the ability of women in the described circumstances to choose to terminate their pregnancies without criminal consequences, so long as they so consent.



#### VII. DECISION

Based on the arguments expressed above, and in the name of justice on behalf of the people and under the authority given to it by the Constitution, the Constitutional Court, sitting in full chamber

#### DECIDES

**First.** To deny the requests for nullity as explained in point 2.3 of the present decision.

**Second.** To declare **CONSTITUTIONAL** article 32, paragraph 7 Law 599 of 2000, for the reasons explained in the present decision.

**Third.** To declare **CONSTITUTIONAL** article 122 Law 599 of 2000, with the understanding that abortion is not a crime when, with the consent of the woman, the termination of pregnancy is performed in the following circumstances: i) when the continuation of the pregnancy presents risks to the life or the health of the woman, as certified by a medical doctor; ii) when there are serious malformations of the fetus incompatible with life outside the womb, as certified by a medical doctor; and iii) when the pregnancy is the result of any of the following criminal acts, duly reported to the proper authorities: incest,

rape, sexual abuse, or artificial insemination or implantation of a fertilized ovule without the woman's consent.

**Fourth.** To declare **UNCONSTITUTIONAL** the expression "or on a woman of less than 14 years of age..." in article 123 of Law 599 of 2000.

**Fifth.** To declare **UNCONSTITUTIONAL** article 124 of Law 599 of 2000.

This decision is to be notified, communicated and inserted in the official publication of the Constitutional Court, compiled with, and filed.

**JAI ME CORDOBA TRIVIÑO**  
President

**SELF- RECUSED**

**RODRIGO ESCOBAR GIL**  
Vice-President  
**DISSENTING**

**JAI ME ARAÚJO RENTERÍA**  
Honorable Justice  
**CONCURRING**

**ALFREDO BELTRÁN SIERRA**  
Honorable Justice

**MANUEL JOSÉ CEPEDA ESPINOSA**  
Honorable Justice  
**CONCURRING**

**MARCO GERARDO MONROY CABRA**  
Honorable Justice  
**DISSENTING**

**HUMBERTO ANTONIO SIERRA PORTO**  
Honorable Justice

**ÁLVARO TAFUR GÁLVIS**  
Honorable Justice  
**DISSENTING**

**CLARA INÉS VARGAS HERNÁNDEZ**  
Honorable Justice

**MARTHA VICTORIA SÁCHICA DE MONCALEANO**  
General Secretary

Source: *West German Abortion Decision: A Contrast to Roe v Wade*, 9 John Marshall J. Prac & Proc. 605 1976

**39 BVerfGE 1 (1975)**

**Facts:** The case arose out of a constitutional challenge of Section 218a of the Criminal Code after the passage into law of the Fifth Law to Reform the Criminal Law. The case was brought before the Federal Constitutional Court by 193 members of the Bundestag and five states--Baden-Wuerttemberg, Bavaria, Saarland, Schleswig-Holstein, Rhineland-Palatinate. Section 218a of the reformed Criminal Code reads that termination of a pregnancy is generally legal if the abortion is performed with the consent of the pregnant woman within the first twelve weeks of the pregnancy.

**Translator's Note:** The Fifth Law to Reform the Criminal Code represents the so-called *Fristenloesung*--a solution of the abortion issue relying on a combination of a deadline until when an abortion may be performed with some mandatory counseling procedures. The Federal Constitutional Court overturns this solution and adopts the so-called *Indikationsloesung*--a solution to the abortion issue by limiting the realm of legal abortions to certain indications, that is, predefined circumstances or legally valid reasons for abortions. }

**Issue:** Does the reformed abortion statute violate the right to life of the life developing in the mother's womb?

**Holding by the First Senate:**

Yes, it does. The reformed law is enjoined and the legislative is asked to draft a new statute in accordance with this decision.

**Discussion:**

C.

I.

1. Article 2.2. first sentence of the Basic Law also protects the life developing within the mother's womb as an independent legal interest.

b) "Everyone" within the meaning of Article 2.2. first sentence of the Basic Law is "every living human being", or, put differently, every human individual possessing life; "everyone" thus also includes the still unborn human being.

2. The duty of the state to protect every human life can therefore be derived directly from Article 2.2. first sentence of the Basic Law. [This duty] also arises from Article 1.1. second sentence of the Basic Law; for the developing human life is included in the protection of human dignity which is granted by Article 1.1. of the Basic Law. Where human life exists it merits human dignity; it is not decisive whether the holder of this human dignity knows of it and is able to maintain it by himself. The potential capabilities lying in human existence from its inception on are sufficient to justify human dignity.



3. ... In accordance with the prior decisions of the Federal Constitutional Court the Basic Rights not only provide subjective defensive rights of the individual against the state, they also embody an objective order of values which binds basic constitutional decisions in all areas of the law and constitute guidelines and impulses for the legislative, the administrative and the judiciary...

## II.

1. ... Human life, as need not further be justified, represents the supreme value within the constitutional order; it is the vital basis for human dignity and the prerequisite of all other basic rights.

2. The duty of the state to protect developing human life exists in principle also with respect to the mother. Undoubtedly, the natural union of the unborn life with the mother establishes a special relation for which there is no parallel in any other factual situation of life. Pregnancy belongs to the intimate sphere of women which is constitutionally protected by Article 2.1. of the Basic Law in conjunction with Article 1.1. of the Basic Law. If [one] were to regard the embryo only as a part of the maternal organism, the termination of a pregnancy would fall within the [mother's] sphere of private life decisions into which the legislator may not intrude. Because the nasciturus is an independent human being which is protected by the Constitution, the termination of a pregnancy has a social dimension which makes accessible to and in need of state regulation. It is true that a women's right to develop her personality, which consists of the of the freedom of action in a comprehensive sense and therefore also includes the women's right to take responsibility for herself and to make a decision against parenthood and the duties arising therefrom, also deserves the recognition and protection [of the state]. But this right is not given without limitation--the rights of others, the constitutional order, and moral law limit it... No balance is possible which would guarantee both, the protection of the life of the nasciturus and the freedom of the pregnant women to terminate her pregnancy, for the termination of a pregnancy always means the destruction of unborn life. In the necessary balancing process both constitutional values must be perceived in relation to human dignity as the center of the constitution's value system. When using Article 1.1. of the Basic Law as a standard, the decision must favor the protection of the fetus' life over the right of self-determination of the women. [The women] may be limited in some potential personal developments by pregnancy, birth, and childrearing [and her right to self-determination may thus be impaired]. The unborn life, however, gets destroyed by the termination of a pregnancy. Pursuant to the principle of the most careful balancing of competing constitutionally protected positions, and considering the fundamental concept behind Article 19.2. of the Basic Law, the protection of the nasciturus's life must be granted priority. This priority principally lasts for the entire duration of the pregnancy...

3. From [the discussion] above the constitutionally required fundamental position of the legal order with respect to termination of pregnancies may be deduced: The legal order may not render the women's right to self-determination into its sole guideline for its regulations. The state must principally assume a duty to carry a pregnancy to terms, a termination [of a pregnancy] must therefore principally be seen as a wrong. The legal order must clearly articulate its disapproval of the termination of pregnancies. The wrong impression must be avoided that a termination of a pregnancy is, for instance, an event socially similar to a trip to the doctor to cure an illness or, even worse, a legally irrelevant alternative to contraception. The state may not avoid its responsibility and declare a legal vacuum by not making a value judgment and leaving this judgment to individuals [who make such decisions only on their own behalf].

### III.

[The means] how the state is to fulfill its obligation of an effective protection of life are first to be decided upon by the legislator. [The legislator] decides which protective measurements it judges useful and necessary to effectively guarantee the protection of life.

1. Especially with respect to the protection of unborn life the guiding concept is the priority of prevention as opposed to repression. It is therefore the state's task to use sociopolitical means as well as public assistance to safeguard the developing life... To reawaken and strengthen the maternal will to protect [the unborn life] in cases where it has been lost shall be the noblest end of the state's endeavor to protect life...

2. The issue of how much the state is constitutionally required, in order to protect the unborn life, to use criminal law, the harshest weapon it has at its disposal, cannot be answered by a simplified question asking whether the state has to punish certain acts. [A view of the entire issue is necessary.] ...

The legislator is principally not obliged to employ the same criminal sanctions for the protection of unborn life that it deems useful and necessary for the protection of born life...

a) The task of the criminal law has always been to secure the elementary values of community life. As established above, the life of individual human beings is among the highest legal values. The termination of a pregnancy irrevocably destroys human life which has come into being. The termination of a pregnancy is an act of killing... From this perspective the use of criminal law to punish "acts of abortion" is undoubtedly legitimate; [such use] is the current law in most civilized states--in variously formulated conditions--and fits within the German legal tradition...

b) However, punishment should never be an end in itself. Its use is principally subject to the decision of the legislator. Nothing prevents [the legislator] to express the above outlined constitutionally required legal disapproval of termination of pregnancies by means other than the threat of penal punishment. What is determinative is that the entirety of measurements taken to protect unborn life, be they private, public, or more particularly, be they of the nature of social or criminal law, in fact guarantee a level of protection adequate to the importance of the legal interest to be safeguarded...

3. As has been shown, the duty of the state to protect the developing life also exists with respect to the mother... The incisive effects of a pregnancy upon the mental and physical condition of a woman are evident and require no further exposition... In individual cases serious and even life-threatening situations of conflict may emerge. The unborn's right to life may result in a burden to the woman which is significantly larger than the one normally connected with a pregnancy. Here the question emerges of how much [the woman] can be expected to endure, in other words, the question arises whether in such cases the state may compel [the woman] to carry the child to terms by means of criminal sanction. Respect for the unborn life conflicts with the woman's right not to be forced to sacrifice her own values to an unbearable degree in order to protect the unborn life. In such a situation of conflict, which usually does not permit a clear cut moral judgment and in which the decision to terminate the pregnancy may be one of conscience and worthy of respect, the legislature has the duty to exercise particular restraint. If, in these cases, [the legislator] does not deem the behavior of the pregnant women deserving of punishment and

forgoes the imposition of the means of criminal punishment, then the result of the balancing incumbent upon the legislator must be constitutionally accepted.

When filling the "unbearable criteria" with content, circumstances must not qualify which do not seriously burden the person with the duty [to carry the child to terms], because [such circumstances] represent normal situations with which anyone has to deal. Instead, circumstances with considerable weight must be given, which to a degree out of the ordinary, render it difficult for the affected person to comply with her duty, so that she cannot fairly be expected to do so. [Such circumstances] are especially present when the affected person is thrown into heavy inner conflicts by the fulfillment of her duties. To solve such inner conflicts by the threat of penal sanction does not seem adequate, because [such a solution] uses force in a case where respect for the personal sphere of human beings demands complete inner freedom to make decisions.

A continuation of the pregnancy seems especially unbearable if it can be shown that the termination is necessary in order to "avoid a threat to the pregnant woman's life or [to avoid] a threat of a serious impairment of her health condition." (Sec 218b, No.1, Criminal Code in the Version of the Fifth Law to reform the Criminal Law) In this case [the pregnant woman's] "right to life and inviolability of the person" (Basic Law Article 2.2., first sentence) is in jeopardy, [a right] she cannot be expected to sacrifice for the unborn life. In addition, [in circumstances] in which the burdens for the pregnant woman would subject her to burdens out of the ordinary which, from the viewpoint of what may be expected from someone to bear, are similarly unbearable than the ones listed in Sec 218b, No 1, the legislator may refrain from imposing penal sanctions for a termination of a pregnancy... [Among such circumstances are especially cases in which] eugenic, ethical (criminological), and social or emergency indications {Notlagenindikation} [are reasons for the desire to termination a pregnancy]. In the deliberations of the of the Criminal Law Reform, the representative of the federal government demonstrated at great length and with convincing reasons why, in these four indication cases {Indikationsfaellen}, a carrying to terms of the pregnancy appears to be beyond the burden of what can be expected from someone to bear. The decisive point in all these cases is that another interest asserts itself with urgency, which, from a constitutional perspective is equally worthy of protection, so that state's legal order cannot demand that the pregnant woman always gives priority to the right of the unborn.

Also the indication of general emergency (social indication) may be categorized [as one of legitimate reasons to terminate a pregnancy]. For the general social situation of the pregnant woman and her family may produce conflicts of such gravity, that [the state] cannot extract sacrifices in favor of the unborn life beyond a certain degree from the pregnant woman by the means of the criminal law. When regulating this indication case, the legislator must describe the situation which will not lead to punishment in such a way that the gravity of the required social conflict becomes clearly visible and--from the viewpoint of what burdens may be expected from someone to bear--congruence of this indication with the other indication cases is assured. If the legislator removes these true cases of conflict from the coverage of the penal law, he does not violate his duty to protect life. Also in these cases the legislator may not be content with merely examining and certifying, where appropriate, that the legal prerequisites exist for exempting a termination of a pregnancy from punishment. Rather the legislator [has the duty] to offer counseling and help with the aim to remind the pregnant woman of her fundamental duty to respect the unborn's right to life, to encourage her to continue the pregnancy, and--especially in cases of social need--to support her by means of practical assistance.

In all other case the termination of pregnancy remains a wrong deserving of punishment; for here the destruction of a legal interest of the highest order is subject to the unbound discretion of another which is not motivated by a necessity. If the legislator wanted to do without criminal sanctions in these cases, this would only be compatible with the duty of the state to protect [life] outlined in Article 2.2., first sentence of the Basic Law, had he another equally effective legal sanction at its disposal, which would indicate the wrongness of the conduct and the disapproval of the legal order [of such conduct] and which would prevent termination of pregnancies as effectively as a penal provision.

D.

If one scrutinizes the challenged *Fristenloesung* (deadline and counseling solution) of the Fifth Reform of the Criminal Code with the guidelines [outlined above], it follows that the [reformed] statute does not in the required degree live up to the duty to protect developing life from Article 2.2. first sentence of the Basic Law in combination with Article 1.1. of the Basic Law.

[In the following passages the court concretely outlines several reasons why the reformed abortion regulations of the Criminal Code is unconstitutional.

The reformed Criminal Code fails to explicitly articulate the legal disapproval of termination of abortions as is required under the Basic Law (II. 1).

The reformed Criminal Code fails to provide for legal sanctions in cases where an termination of a pregnancy is not constitutional (II. 2.).

The mandatory counseling procedure in the reformed Criminal Code insufficiently deters abortions. First, doctors are not qualified to inform women about available public and private welfare and aid benefits (II. 3. a)). Second, the fact that the same doctor who performs the abortion does the counseling to dissuade a woman to abort will very likely lead to suboptimal deterrence (II. 3. b)). Third, the fact that the abortion may be performed immediately after the counseling is very unlikely to lead to lead to optimal deterrence (II. 3. c)).]

E.

[The court enjoins Section 218a of the reformed Criminal Code and asks the legislator to redraft the statute consistent with the present decision.

signed by all eight Judges]

Dissenting Opinion by Justices Rupp-v. Bruenneck and Dr. Simon

The life of every single human being is self-evidently a central value of the legal order. It is indisputable that the constitutional duty to protect such life also encompasses its preliminary state before birth. The disputes in parliament and before the Federal Constitutional Court did not refer to *whether*, but only to the *how* of this protection. The decision in this matter belongs to the responsibility of the legislator. Under no circumstances can a duty of the state be derived from the constitution to subject every termination of a pregnancy, at any stage, to punishment. The

legislator was as free to decide for the *Fristenloesung* (counseling and deadline solution) as he was [to opt] for the *Indikationsloesung* (indication solution)...

A.

I.

The mandate of the Federal Constitutional Court to annul decisions of the parliamentary legislator requires sparse use in order to avoid a shifting of power among the constitutional organs. The command of judicial self-restraint, which has been labeled the "life-giving elixir" of the judicial office of the Federal Constitutional Court, is binding in particular when a case does not deal with defending against excesses of the state's power, but rather when it involves directing, by the means of constitutional judicial control, [the work] of the legislator, who is immediately legitimated by the people, in the positive shaping of the social order. [In the above situation] the Federal Constitutional Court may not yield to the inducement to seize the function of the organ to be controlled, if, in the long run, the status of constitutional [subject matter jurisdiction] is not endangered.

1. The [constitutional review] asked for in this case goes beyond the realm of classic constitutional control. The Basic Rights, which are at the center of our constitution, guarantee the citizen, in the form of *defensive rights* in relation to the state, a sphere in which [the citizen can engage in a free design of his life and where he may assume the sole responsibility for his life]. The classic function of the Federal Constitutional Court here lies in warding off injuries to this personal sphere caused by excessive interventions of state authorities. At the peak of the scale of state interventions lie penal provisions: They order the citizen to behave in a certain way and subject him, in cases of noncompliance, to severe restrictions of freedom or to financial burdens. Constitutional control of such provisions thus means a review of whether the encroachment into the sphere of personal freedom protected by the Basic Rights due to the passing or application of the penal provision is permissible. [The question is whether the state] is *permitted* to punish at all or in the desired extent.

In the present constitutional dispute the reverse [question] is, for the first time, subject to review, [namely], whether the state must punish, concretely, whether the lifting of the penal provision against termination of pregnancy during the first three months of pregnancy is compatible with the Basic Rights. It is, however, self-evident, that to refrain from punishment is the opposite of a state intervention...

2. Because the Basic Rights, [if seen] as defensive rights, are from the outset unsuitable to prevent the legislator from lifting penal provisions, the majority of the senate wants to find the basis for doing so in a more extensive meaning of the Basic Rights as *objective value decisions*. [According to the majority's interpretation], the Basic Rights not only are normative as defensive rights of the individual against the state, but simultaneously contain objective value decisions, the realization of which is to be promoted through active measures by the state authorities. This interpretation has been developed by the Federal Constitutional Court in the commendable endeavor to improve the effectiveness of the Basic Rights in their function to secure freedom and achieve social justice. The majority of the senate, however, fails to adequately consider the differences of the two aspects of the Basic Rights which are fundamental for courts' constitutional control.

[Seen] as defensive rights the Basic Rights have a relatively clear, identifiable content; in their interpretation and application the [judicial branch] has developed practical, generally accepted criteria for the control of state interventions--for example, the principle of proportionality. In contrast, it is regularly a highly complex question how a value decision is to be effectuated by active measurements by the legislator. The necessarily broadly formulated value decisions could be characterized as constitutional mandates, which determine the direction of all acts by the state, [mandates] however which depend upon a translation into binding regulations. Depending on the evaluation of the factual circumstances, on the concrete goals and their ranking, [and] on the suitability of conceivable means and methods, very different solutions are possible. The decision [as to which solution to adopt], which in many cases requires prior compromises and [which] is arrived at in a trial-and-error process, belongs, pursuant to the fundamental rule of the separation of powers and the democratic principle, within the responsibility of the legislator.

The concept of the objective value decision shall not become the vehicle for transferring specifically legislative functions, [such as] the design of the social order, to the Federal Constitutional Court. Otherwise the court would be forced into a role for which it is neither competent not equipped... [The court] may only counter the legislator when he has completely disregarded a value decision or when the nature and manner in which [such a decision] was effectuated is obviously erroneous. On the contrary, the majority accuses the legislator, despite seeming recognition of his freedom to design [the effectuation of value decision], of not having realized, in the majority's opinion, a recognized value decision in the best possible manner. If this [way of arguing] became the general yardstick for review, the command of judicial self-restraint would be given up.

## II.

1. Our strongest worry aims at the fact that, for the first time in constitutional adjudication, an objective value decision is to serve [as a justification] for postulating a *duty* of the legislator to *issue penal provisions*, that is, [to assume a duty upon the legislator to employ] the strongest conceivable interference into the citizen's sphere of freedom. This reverses the function of the basic rights into their contrary. If the objective value decision contained in a Basic Right for the protection of a certain legal interest were sufficient to derive therefrom a duty to punish, [then] the Basic Rights could covertly turn from a hub to secure freedom into the basis of a network of rules limiting freedom. What applies to the protection of life can also be employed with respect to other legal interests of high priority, such as inviolability of the person, freedom, marriage, and family.

Of course, the Constitution presupposes that the state, for the protection of an orderly living together [in the society], can also use its power to punish; however, the meaning of the Basic Rights does not aim at demanding [the use of the state's power to punish], but to draw boundaries for such use. [Following a similar line of argument], the Supreme Court of the United States even judged it a violation of a Basic Right to punish termination of pregnancies performed by a physician with the consent of the pregnant woman during the first third of the pregnancy. {citing to *Roe v. Wade*} [Such an argument] would go to far under German constitutional law. However, according to the freedom-oriented character of our constitution, the legislator needs a constitutional justification for punishing, but not if he refrains from a punitive sanction because, in his opinion, the threat of punishment does not promise success or seems to be an inadequate reaction for other reasons.

The contrary interpretation of the Basic Rights inevitably leads to a no less worrisome extension of constitutional control: Not only has it to be checked whether a penal provision interferes too far into the legal sphere of the citizen, but also the reverse, whether the state punishes *not enough*. [In doing this] the Federal Constitutional Court will, contrary to the opinion of the majority, not be able to limit itself to the question of whether the passing of any penal norm is required, but [the court] will also have to clarify which penal sanction for the protection of a particular legal interest is sufficient. In the final consequence the court could even be forced to review whether the application of a penal norm in a single case sufficiently serves the concept of protection [of Basic Rights]...

B.

Even if one, contrary to our opinion, follows the majority and finds a constitutional duty to punish conceivable, [one] cannot accuse the legislator of a violation of the constitution in the present case...

[The court then offers a detailed description of the failure of the penal sanctions before the reform of the Criminal Code.]

3. In this general situation the "reduction of the abortion epidemic" is not only a "sociopolitical desirable aim", but especially important and urgent to better protect life and to restore the credibility of the legal order. In the endeavor to solve this highly difficult task the legislator exhaustingly considered all main viewpoints. The reform of Section 218 of the Criminal Code already extensively occupied the public [which is] deeply polarized with respect to this question. The parliamentary debates, [aware of the polarized public], were conducted with great seriousness and unusual thoroughness. [In these debates] the value decisions of the constitution were explicitly considered; particularly, unanimity existed with respect to the state's duty to protect unborn life...

In choosing the [reform] solution, the legislator could assume that, facing the failure of the penal sanctions, the suitable remedial means are to be sought in the social and societal realm, [it could further assume] that it is essential, on the one hand, to employ preventive psychological, *socio- and societal-political measures of a supportive nature* to facilitate the mother's carrying to terms of the pregnancy and to strengthen her own willingness to do so, [and], on the other hand, to provide better information about the options of contraception to decrease the number of unwanted pregnancies. The majority evidently does not doubt that such measures, seen from a complete perspective, are the most effective ones and most likely [the ones] to lead to an effectuation of the Basic Rights in the sense of greater freedom and increased social justice.

Supportive measure of this kind can understandably, [for instance] due to differing authority of state organs, find only limited inclusion into a criminal statute. The Fifth Law to Reform the Criminal Law therefore solely encompasses a duty to undergo counseling. According to the legislator's plan, the pregnant woman--without the fear of punishment--is thereby to be taken out of her isolation, [moreover] the coping with her problems is to be rendered easier for her by open contacts with her environment and by individual counseling adjusted to her personal situation of conflict. [The fact] that the prescribed counseling is to protect the developing life by awakening and strengthening the [mother's] desire to carry the pregnancy to terms, wherever no serious reasons against [the carrying to terms] exist, is already evident from the statutory material and the majority vote of the parliament cited by the majority.

We do not dispute that the counseling regulation--as outlined by the majority--still has weaknesses. As far as these [weaknesses] could not have been remedied by an interpretation of the law in harmony with the Constitution and by adequate practical regulations of the states, a constitutional challenge should have been limited solely to these weaknesses and should not have questioned the *Fristenloesung* (deadline and counseling solution) in its entirety...

IV.

Altogether, in our opinion, the legislator was not precluded by the Constitution to drop the threat of a penal sanction, which, in his undisputed opinion, was for most parts without effect, inadequate, and even damaging. [The legislator's] attempt to remedy, in the present circumstances, the inability of state and society to protect life by socially more adequate means, may be imperfect; [the attempt], however, is more conform with the spirit of the Basic Law than the demand for punishment and disapproval.

[signed by Rupp-v. Bruenneck and Dr. Simon]





AS TO THE ADMISSIBILITY OF

Application No. 17004/90  
by R.H.  
against Norway

The European Commission of Human Rights sitting in private on 19 May 1992, the following members being present:

MM. S. TRECHSEL, Acting President  
F. ERMACORA  
E. BUSUTTIL  
A.S. GÖZÜBÜYÜK  
A. WEITZEL  
J.-C. SOYER  
H. DANELIUS  
Mrs. G. H. THUNE  
Sir Basil HALL  
MM. F. MARTINEZ RUIZ  
C.L. ROZAKIS  
Mrs. J. LIDDY  
MM. L. LOUCAIDES  
J.-C. GEUS  
M.P. PELLONPÄÄ  
B. MARXER

Mr. J. RAYMOND, Deputy Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 11 September 1986 by R.H. against Norway and registered on 9 August 1990 under file No. 17004/90;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Norwegian citizen, born in 1962. He resides at Barum, Norway. Before the Commission he is represented by Mr. Gusta Høgtun, a lawyer practising in Oslo.

A. The particular facts of the case as submitted by the applicant

In 1986 the applicant lived together with a young Norwegian woman. They were not married. In June 1986 she became pregnant, the applicant being the father. In early August they went to Israel and planted three trees as a symbol of their wish to have the child. The mother, however, changed her mind and together with the applicant she consulted a clinic in order to obtain information about a possible abortion, the applicant however being opposed to such a step.

As the mother was determined to go through with the abortion and as the foetus was now more than 12 weeks old she was called to appear before a board of two doctors on 1 September 1986 and state her reasons. It does not appear that any medical reasons were submitted in support of an abortion but rather social indications seem to have been the reasons for the request. The request was granted on the same day and the abortion was carried out on 5 September 1986, when the foetus was 14 weeks and 1 day old. The actual abortion followed a routine procedure according to which the mother received medicine whereby "birth" was provoked. The foetus would in such circumstances "suffocate" and appear in the same manner as during normal birth. The applicant was not entitled to participate in the above proceedings and was not consulted or heard before the abortion was carried out. Subsequently the applicant requested the hospital to hand over to him the remains of the foetus in order to inter them in accordance with his Jewish faith. However, his request remained unanswered.

Prior to these events, on 31 August 1986, the applicant had applied for an injunction (begjæring om midlertidig forføyning) in order to prevent the mother from terminating the pregnancy. The application was rejected by the City Court on 6 September, by the High Court on 17 September and by the Appeals Committee of the Supreme Court on 23 October 1986.

On 10 March 1987 the applicant instituted proceedings in the City Court of Oslo (Oslo Byrett) against the State represented by the Ministry of Social Affairs claiming vindication and damages inter alia on the ground that the abortion allegedly had been carried out contrary to Articles 2, 3, 8 and 9 of the Convention in respect of himself and the foetus. By judgment of 14 June 1988, which was rendered following hearings held from 26 to 31 May 1988, the City Court dismissed some of the applicant's claims and for the remainder found in favour of the State. The Court did not find that any Convention rights had been violated.

The applicant appealed against the judgment to the High Court of

Eidsivating (Eidsivating Lagmannsrett). The Court was composed of three professional and four lay judges, one of whom was Director of Finances (økonomichef) at the hospital where the abortion had been carried out. Hearings were held from 30 October to 3 November 1989. The Court heard five experts, three witnesses and the representatives of the parties. Before the High Court the applicant claimed inter alia as follows:

- 1) that he was entitled to receive information concerning the foetus,
- 2) that he was entitled to receive information as to whether a danger to the mother's life or health was invoked as a reason for the abortion,
- 3) that he was entitled to be heard on the question whether or not to terminate the pregnancy,
- 4) that the abortion was illegal as being inhuman treatment in respect of the foetus,
- 5) that he was entitled to receive the remains of the foetus after the abortion in order to inter them in accordance with his religion,
- 6) that he was entitled to have the foetus interred after the abortion,
- 7) that it was illegal to put the foetus to death, and
- 8) that the State was not entitled to allow the abortion since the mother did not fulfil the requirements under Norwegian law for terminating the pregnancy after 14 weeks and 1 day.

By judgment of 17 November 1989 the High Court rejected the applicant's claims. In respect of the Convention the High Court stated inter alia:

(translation)

"The question arises whether the Norwegian Act on Termination of Pregnancy violates Article 2 of the Convention when it allows board approved abortion on social indications in the 15th week of the pregnancy. The High Court refers as a starting point to the Supreme Court judgment in the Børre Knutsen case . . . . The Supreme Court left the question open whether Article 2 of the Convention protects the unborn life at all and stated in this connection:

'In any case the provision must be regarded as not imposing any far-reaching restrictions on the legislator's right to set the conditions for abortion. The Norwegian Act, under

which the woman herself makes the final decision whether or not to terminate her pregnancy, provided the operation can be made before the end of the twelfth week of pregnancy, is similar to the legislation of a number of other countries belonging to the same culture and which also have acceded to the European Human Rights Convention. This is hardly immaterial to the consideration of a matter of international law.'

This view on the protection of the foetus under the Convention was expressed by the Supreme Court after considering the Commission's decisions in the case of X v. the United Kingdom (No. 8416/79, Dec. 13.5.80, D.R. 19 p. 244) and the case of Brüggemann & Scheuten v. Germany (Comm. Report 12.7.77).

Thus the High Court finds that a possible protection of the foetus under Article 2 must be decided on the basis of a balance of interests to the extent that the protection is adapted to the degree of biological maturity of the foetus at every stage of its development on the one hand and the considerations which likewise speak in favour of allowing the woman to terminate a pregnancy on the other. The Supreme Court found that an abortion based solely on the woman's choice within the first 12 weeks of pregnancy was not in violation of Article 2. Having regard thereto the High Court does not find that a system, which protects a foetus in requiring a board to establish that the pregnancy, birth or care for the child might place the woman in a difficult situation of life, would be in violation of Article 2 either.

(The applicant) has submitted that the rights of the foetus were particularly strongly protected under Article 8 of the Convention due to the agreement he had with the mother not to terminate the pregnancy.

...

This provision protects the individual's right to family life and according to the Commission's reasoning in the Brüggemann & Scheuten case this provision goes far in protecting the woman's right to abortion. The High Court therefore finds that the provision does not protect the family as such where this runs counter to the rights guaranteed to a spouse.

(The applicant) has furthermore invoked Article 3 of the Convention.

...

The arguments in this respect are based on the assumption that

a 14 week and 1 day old foetus can feel pain. The High Court finds that this cannot be decisive and recalls that it would not be contrary to Article 2 to terminate the pregnancy. Nevertheless, the High Court will not exclude that the foetus may be protected under Article 3, but this could be so only in situations which are alien to Norwegian reality. Torture requires that the evil is intended.

The abortion in this case was carried out with the use of medicine in that the mother received such medicine as provoked an abortion by strong contraction of the uterus so that the foetus dies due to lack of oxygen as the blood supply stops. The foetus will then come out in the same way as during a birth.

The method is used since it minimises the risk of complications for the mother. The process takes such a long time that it is not justifiable from a medical point of view to keep the woman under anaesthesia. Instead she receives painkillers comparable to morphine. The experts have stated that it was not possible to anaesthetise the foetus separately. The possible pain the foetus may suffer was thus based on medical grounds out of consideration for the woman. It is furthermore very doubtful whether the foetus can feel pain at all when it is 14 weeks and 1 day old. The High Court does not need to consider this since its probability is so small that Article 3 would not in any event require the legislator to have regard thereto when considering the woman's interests which are based on medical reasons. It would be a kind of pain which is experienced outside the centre of conscience known to the human brain.

(The applicant) has submitted that Article 8 has been violated since he was not considered a party during the proceedings before the board and could not have his decision tried in the courts. The High Court recalls that the Commission in the case of X v. the United Kingdom concluded that Article 8 did not protect the potential father's procedural rights.

...

The Commission found that, when considering what rights a father had under Article 8, one should take into account the rights of the woman being the person concerned with the pregnancy and whose interests should be protected first of all. The Commission furthermore concluded that the father's right to respect for his family life did not go as far as giving him such procedural rights.

...

Finally, (the applicant) has submitted that Article 9 has been

violated since he was not given the remains of the foetus in order to inter them in accordance with his religious convictions

...

The right to manifest one's religion is not unlimited when it violates the rights of others. Having regard to the woman's rights under Article 8, as interpreted by the Commission in the case of X v. the United Kingdom, the High Court finds that (the applicant's) right to manifest his religion was not violated. To give the foetus to him in order to inter it could be extremely degrading to the woman who has decided to terminate a pregnancy. Such a step must accordingly depend on the woman's acceptance.

Therefore the High Court concludes that the European Convention on Human Rights was not violated."

The applicant asked for leave to appeal against the judgment to the Supreme Court (Høyesterett). In addition to the issues considered by the High Court the applicant also complained of the fact that the Director of Finances at the hospital where the abortion was carried out had participated as a lay judge. On 22 May 1990 the Appeals Committee of the Supreme Court refused leave to appeal.

B. Relevant domestic law

(translation)

Act no. 50 of 13 June 1975 on Termination of Pregnancy as amended on 16 June 1978

"Section 2. If a pregnancy leads to serious complications for a woman she shall be offered information and advice about the assistance society may offer her. The woman has a right to advice in order to enable her to take the final decision.

If the woman considers, after having been offered information etc. as mentioned and advice in accordance with Section 5, subsection 2, that she nevertheless cannot go through with the pregnancy, she takes the final decision as regards the termination of the pregnancy if this can be done before the end of the 12th week of pregnancy and serious medical reasons do not speak against it.

After the 12th week of pregnancy termination of pregnancy may take place if

a) the pregnancy, birth or care for the child may involve an unreasonable burden on the woman's physical and mental health. Regard must be paid to whether she has a predisposition for malady;

- b) the pregnancy, birth or care for the child may place the woman in a difficult situation of life;
- c) there is a great danger that the child may contract serious illnesses as a result of hereditary predisposition, illness or injurious influence during pregnancy;
- d) ...
- e) ...

When considering the request for termination based on the conditions mentioned above under a)-c) regard must be paid to the woman's entire situation, including her ability to provide care for the child in a satisfactory way. Particular importance shall be attached to the woman's own opinion on the situation.

The requirements for accepting termination of pregnancy must increase with the progress of pregnancy.

After the 18th week a pregnancy cannot be terminated, except if there are particularly serious reasons for such a step. If there is reason to presume that the foetus is viable, a termination of pregnancy cannot be authorised.

...

Section 4. A request for termination of pregnancy shall be made by the woman herself. ...

Section 5. A request for termination of pregnancy shall be submitted to a doctor. A request after the 12th week of pregnancy may also be submitted to a board.

A woman who has requested termination of pregnancy shall be informed by the doctor (or the board) about the nature of the intervention and its medical effects. If she so wishes, she shall also receive the information and advice which is mentioned in Section 2, subsection 1.

...

Section 7. If the medical intervention cannot be carried out before the end of the 12th week of pregnancy the doctor shall, after the woman has received the information etc. as mentioned in Section 5, subsection 2, immediately forward the request together with a written report of the grounds advanced by the woman and of his own observations, to the board mentioned in subsection 2. If the request has been sent directly to the board it shall deliberate and decide as soon as the case is

ready. ...

Decisions on termination of pregnancy are taken, after consultation with the woman, by a board composed of two doctors.

Section 8. The board's decision to allow or refuse termination of pregnancy shall be accompanied by reasons. The woman, or her representative, shall be informed of the reasons for the decision...  
...

Section 10. If the pregnancy involves an imminent risk to the life or health of the woman, it may be terminated regardless of the requirements set out in this Act."

#### COMPLAINTS

Under Article 2 of the Convention the applicant complains that the termination of the pregnancy involving a 14 week old foetus was unnecessary in order to protect the mother's life or health. Furthermore, he had entered into an agreement with the mother not to deprive the unborn child of its life and he had expressly undertaken to care for the child after its birth. He had vigorously protested against the abortion from the time it was contemplated by the mother.

Under the circumstances which existed in this case, the applicant maintains that the lack of protection of the unborn child under Norwegian law is unsatisfactory and constitutes a violation of Article 2 of the Convention.

The applicant also complains that no measures were taken to avoid the risk that the 14 week old foetus would feel pain during the abortion procedure. He submits that this constitutes inhuman treatment or torture. Furthermore, his request to receive the remains of the foetus in order that they might be buried in keeping with his religious beliefs was rejected. This, in his opinion, constitutes degrading treatment. The applicant invokes Article 3 of the Convention.

The applicant further submits that he had an agreement with the mother to the effect that an abortion would not be carried out and he had made clear his willingness to assume sole responsibility for the child after its birth. Under these circumstances, he complains that Article 6 has been violated as he had no right to 1) object to the proposed abortion; 2) apply to the court in order to prevent or postpone the abortion; 3) be consulted about the proposed abortion; 4) be informed about the abortion; 5) demand that the abortion board consist of impartial individuals and 6) request possession of the unborn child's remains.

Under this provision the applicant also complains that one of th



lay judges in the High Court was an employee at the hospital where the abortion was carried out, and that therefore his case was not heard by an impartial tribunal.

Under Article 8 of the Convention the applicant submits that he and the mother were living together as a family although they were not married and that he had insisted, and the mother had agreed, that no abortion would take place. Under these circumstances, so the applicant alleges, Article 8 of the Convention must ensure that a father to a 14 week old foetus has a minimum of rights regarding his unborn child where the health of the mother is not endangered. In this case, a foetus of this age should be considered to be a part of his family.

In respect of Article 9 of the Convention the applicant submits that the unborn child meant something particular to him and that, at least at the beginning, the mother shared and accepted this view. The planting of three trees in Israel, one for each of the parents and one for the unborn child, illustrates this. The taking of the foetus's life in the absence of a medical necessity was obviously not in accordance with that concept nor was the denial of his request to be given the child's remains in order to inter them.

Such a step would not have implied a lack of respect for the wishes of the mother. There is no evidence that the mother was asked about her wishes regarding this matter by the doctors or any other persons employed by the hospital. Therefore, the applicant finds that he was unnecessarily denied a manifestation of his conscience and religion which for him was extremely important and vital to his health and well-being.

In order to prevent the termination of the pregnancy, the applicant sought the services of an attorney to intervene on his behalf. However, the board would not listen to any argument from the applicant. Furthermore, the applicant's attorney filed a complaint with the ordinary courts but these complaints were not admitted. No other effective remedy exists in Norway. The applicant considers this to be a violation of Article 13 of the Convention.

Finally, the applicant submits that his actions were based on the conviction that the life of an unborn child should be protected and it should not be deprived of life for non-medical reasons. His relationship with the mother rested on that condition which was also accepted by the mother. Furthermore, the pregnancy and birth of the child in question was planned. It was the result of an agreement between two free, independent and equal persons, mature and under no pressure whatsoever. In these circumstances, the applicant complains that discrimination exists against him as he was completely excluded from any decisions made concerning the welfare of his own child. He refers to Article 14 of the Convention.

## THE LAW

1. The applicant complains that under the circumstances which existed in the present case the lack of protection of the life of the unborn child under Norwegian law was contrary to Article 2 (Art. 2) of the Convention.

The Commission accepts that the applicant, as a potential father in the circumstances of the present case was so closely affected by the termination of the pregnancy that he may claim to be a "victim", within the meaning of Article 25 (Art. 25) of the Convention, of the legislation complained of as applied in the present case. The Commission also accepts that he has exhausted domestic remedies as required by Article 26 (Art. 26) of the Convention for which reason the Commission must examine whether the case discloses any appearance of a violation of Article 2 (Art. 2) of the Convention (cf. No. 8416/79, Dec. 13.5.80, D.R. 19 p. 244).

Article 2 (Art. 2) of the Convention reads:

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

- a. in defence of any person from unlawful violence;
- b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- c. in action lawfully taken for the purpose of quelling a riot or insurrection."

The Commission first notes that the term "everyone" is not defined in the Convention, nor is the term "life" but it finds that Article 2 (Art. 2) contains two separate though interrelated basic elements. The first sentence of paragraph 1 sets forth the general obligation that the right to life shall be protected by law. The second sentence of paragraph 1 contains a prohibition of intentional deprivation of life. This prohibition is delimited by the exceptions mentioned in the second sentence itself and in paragraph 2. The Commission recalls that in its decision mentioned above it stated:

"All the above limitations, by their nature, concern persons already born and cannot be applied to the foetus.

Thus both the general usage of the term 'everyone' ('toute personne') in the Convention ... and the context in which this term is employed in Article 2 (Art. 2) ... tend to support the view that it does not include the unborn."

However, the Commission also recalls that the first sentence of Article 2 (Art. 2) imposes a broader obligation on the State than that contained in the second sentence. The concept that "everyone's life shall be protected by law" enjoins the State not only to refrain from taking a person's life "intentionally" but also to take appropriate steps to safeguard life (cf. for example No. 11604/85, Dec. 10.10.86, D.R. 50 p. 259).

The Commission finds that it does not have to decide whether the foetus may enjoy a certain protection under Article 2 (Art. 2), first sentence as interpreted above, but it will not exclude that in certain circumstances this may be the case notwithstanding that there is in the Contracting States a considerable divergence of views on whether or to what extent Article 2 (Art. 2) protects the unborn life.

The Austrian Constitutional Court found, for example, that Article 2 para. 1 (Art. 2-1), first sentence, interpreted in the context of Article 2 paras. 1 and 2 (Art. 2-1, 2-2), did not cover the unborn life (Decision of 11 October 1974, Erk. Slg. (Collection of Decisions) No. 7400, EuGRZ 1975, p. 74) whereas the German Federal Constitutional Court, when interpreting the provision "Everyone has a right to life" in Article 2 (2) of the Basic Law stated that "'everyone'... is 'every living human being', in other words: every human individual possessing life; 'everyone' therefore includes unborn human beings" (judgment of 25 February 1975).

When considering the Norwegian abortion legislation in the light of Article 2 (Art. 2) of the Convention the Norwegian Supreme Court stated:

"... abortion laws must necessarily be based on a compromise between the respect for the unborn life and other essential and worthy considerations. This compromise has led the legislator to permit self-determined abortion under the circumstances defined by the Act.

Clearly, such a reconciliation of disparate considerations give rise to ethical problems, and clearly too, there will be some disagreement about the system embodied in the Act. The reactions to the Act show that many ... view it as an attack on central ethical principles. But it is equally relevant that others - also from an ethical point of view - regard the Act as having done away with an unacceptable legal situation.

It is not a matter for the courts to decide whether the solution to a difficult legislative problem which the legislator chose when adopting the Act on Termination of Pregnancy of 1978, is the best one. On this point, different opinions will be held among judges as among other members of our society. The reconciliation of conflicting interests which abortion laws require is the legislator's task and the legislator's responsibility. The legislative power is exercised by the People through the Storting. The Storting majority which adopted the Act on Termination of Pregnancy in 1978 had its mandate from the People after an election campaign in which the abortion question was again a central issue, decided moreover not to take the initiative towards any statutory amendment. Clearly, the courts must respect the solution chosen by the legislator" (cf. No. 11045/84, Dec. 8.3.85, D.R. 42 p. 247 at p. 253).

Having regard to this it is clear that national laws on abortion differ considerably. In these circumstances, and assuming that the Convention may be considered to have some bearing in this field, the Commission finds that in such a delicate area the Contracting States must have a certain discretion.

As regards the circumstances of the present case the Commission recalls that the Norwegian Abortion Act itself allows self-determined abortion within the first 12 weeks of pregnancy. From the 12th week until the 18th week of pregnancy a termination may be authorised by a board of two doctors if certain conditions have been fulfilled. After the 18th week a pregnancy cannot be terminated, unless there are particularly serious reasons for such a step. However, if there is reason to presume that the foetus is viable, a termination of pregnancy cannot be authorised.

Furthermore the Commission recalls that the mother, after having received information and advice about the assistance society may offer her, wanted to terminate a pregnancy of 14 weeks and she appeared before a board of two doctors who decided, as appears from the High Court judgment of 17 November 1989, to authorise the abortion, having concluded that the pregnancy, birth or care for the child might place her in a difficult situation of life as set out in Section 2, subsection 3 b of the Act.

As the present case shows there are different opinions as to whether such an authorisation strikes a fair balance between the legitimate need to protect the foetus and the legitimate interests of the woman in question. However, having regard to what is stated above concerning Norwegian legislation, its requirements for the termination of pregnancy as well as the specific circumstances of the present case the Commission does not find that the respondent State has gone beyond its discretion which the Commission considers it has in this sensitive area of abortion. Accordingly, it finds that the applicant's complaint

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under Article 2 (Art. 2) of the Convention is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention

2. The applicant also complains that no measures were taken to avoid the risk that the 14 week old foetus would feel pain during the abortion procedure. He submits that this constitutes inhuman treatment or torture and invokes Article 3 (Art. 3) of the Convention which reads:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

The Commission has not been presented with any material which could substantiate the applicant's allegations of pain inflicted upon the foetus other than what appears from the courts' judgments mentioned above. Having regard to the abortion procedure as described therein the Commission does not find that the case discloses any appearance of a violation of Article 3 (Art. 3) of the Convention. The Commission has reached the same conclusion in respect of the applicant's complaint under this provision that his request to receive the remains of the foetus was rejected. It follows that this part of the application is also manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

3. The applicant submits that he had an agreement with the mother to the effect that an abortion would not be carried out and he had made clear his willingness to assume sole responsibility for the child after its birth. Under these circumstances, he complains that Article 6 (Art. 6) has been violated as he had no right to 1) object to the proposed abortion; 2) apply to the court in order to prevent or postpone abortion; 3) be consulted about the proposed abortion; 4) be informed about the abortion; 5) demand that the abortion board consist of impartial individuals and 6) request possession of the unborn child's remains.

Under this provision the applicant also complains that one of the lay judges in the High Court was an employee at the hospital where the abortion was carried out, and that therefore his case was not heard by an impartial tribunal.

In so far as relevant Article 6 para. 1 (Art. 6-1) of the Convention reads as follows:

"In the determination of his civil rights and obligations ... everyone is entitled to a ... hearing ... by an ... impartial tribunal ..."

The Commission recalls that in order for Article 6 (Art. 6) to apply to the proceedings in question it must first ascertain whether there was a dispute over a "right" which can be said, at least on

arguable grounds, to be recognised under domestic law (cf. for example Eur. Court H.R., Skärby judgment of 28 June 1990, Series A, no 180-B, p. 36, para. 27). It is undisputed that under Norwegian law the applicant had no right at all to participate in the proceedings concerning the termination of the pregnancy. Thus he cannot claim on any arguable ground that he had a right under domestic law. It follows that this part of the application is incompatible *ratione materiae* with the provisions of the Convention and must be rejected under Article 27 para. 2 (Art. 27-2) of the Convention.

4. Under Article 8 (Art. 8) of the Convention the applicant submits that he and the mother were living together as a family although they were not married and that he had insisted, and the mother had agreed, that no abortion would take place. Under these circumstances, so the applicant alleges, Article 8 (Art. 8) of the Convention must grant a father to a 14 week old foetus a minimum of rights regarding his unborn child, where the health of the mother is not endangered. In this case, a foetus of this age should be considered to be a part of his family.

In respect of Article 9 (Art. 9) of the Convention the applicant submits that the unborn child meant something particular to him from a religious point of view. He complains that the taking of the foetus' life in the absence of a medical necessity and the denial of his request to be given the foetus's remains in order to inter them denied him the right to manifest his conscience and religion.

It is true that Articles 8 and 9 (Art. 8, 9) of the Convention guarantee the right to respect for private and family life and freedom to manifest one's religion. However, the Commission finds that any interpretation of the potential father's right under these provisions in connection with an abortion which the mother intends to have performed on her, must first of all take into account her rights, she being the person primarily concerned by the pregnancy and its continuation or termination. The Commission therefore finds that any possible interference which might be assumed in the circumstances of the present case was justified as being necessary for the protection of the rights of another person.

It follows that this part of the application is also manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

5. The applicant furthermore complains about discrimination as he was completely excluded from any decisions made concerning the welfare of his own child. He refers to Article 14 (Art. 14) of the Convention.

The Commission recalls that Article 14 (Art. 14) of the Convention has no independent existence since it has effect solely in relation to the enjoyment of the rights and freedoms safeguarded by the other substantive provisions of the Convention and its Protocols.

Furthermore, it safeguards individuals against discriminatory differences only if they are placed in analogous situations (cf. for example Eur. Court H.R., Rasmussen judgment of 28 November 1984, Serie A no. 87, pp. 12 and 13, paras. 29 and 35).

In relation to the termination of a pregnancy and the proceeding and decisions concerning this the Commission does not find that the applicant was placed in an analogous situation with the mother. Accordingly, there has been no discriminatory treatment within the meaning of Article 14 (Art. 14) of the Convention for which reason this part of the application must also be rejected as being manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

6. The applicant finally complains, under Article 13 (Art. 13) of the Convention, that he had no effective remedy in Norway in respect of his opposition to the termination of the pregnancy.

The Commission recalls that Article 13 (Art. 13) has been interpreted by the European Court of Human rights as requiring a remedy in domestic law only in respect of grievances which can be regarded as "arguable" in terms of the Convention (cf. for example Eur. Court H.R. Boyle and Rice judgment of 21 June 1988, Series A no. 131, p. 23, para 52). However, having regard to its above conclusions in respect of the Convention complaints submitted the Commission finds that the applicant does not have any arguable claims. Furthermore, the Commission recalls that the Norwegian High Court considered all complaints which the applicant has submitted to the Commission. In these circumstances the Commission finds no appearance of a violation of Article 13 (Art. 13) of the Convention. It follows that this part of the application is also manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

Deputy Secretary to the Commission Acting President of the Commission

(J. RAYMOND)

(S. TRECHSEL)

**The Ruling of the Constitutional Tribunal  
of 28th May, 1997  
sign. of the records K 26/96**

The Constitutional Tribunal consisting of:

Andrzej Zoll - president and rapporteur  
Zdzisław Czeszejko-Sochacki  
Tomasz Dybowski  
Lech Garlicki  
Stefan J. Jaworski  
Krzysztof Kolasiński  
Wojciech Ł'czkowski  
Ferdynand Rymarz  
Jadwiga Skórzewska-Łosiak  
Wojciech Sokolewicz  
Janusz Trzciniński  
Błażej Wierzbowski

Joanna Szymczak - précis-writer

having looked on 27th May, 1997, with the participation of authorised representatives of the participants of the proceedings: the mover, the Parliament of the Republic of Poland and the Public Prosecutor General, into the motion brought by a group of Senators of the Republic of Poland that requested the examination:

whether Article 1.2, 1.4b, 1.4c, 1.5 - in the scope referring to Article 4a.1.4, Article 2.1, 2.2, and Article 3.1, 3.2, 3.4 of the Act of 30th August, 1996 in regard to an amendment to the Act on Family-Planning, Human Embryo Protection and Conditions of Legal Pregnancy Termination and to some other acts (Statute Book No. 139 item 646) - is compatible with Article 1, Article 67.1, 67.2 and Article 79.1 of constitutional provisions continued in force on the basis of Article 77 of the Constitutional Act of 17th October, 1992 on Mutual Relations between the Legislative and Executive Institution of the Republic of Poland and on Local Self-government (Statute Book No. 84 item 426; amendment of 1995 No. 38 item 148, No. 150 item 729; of 1996 No. 106 item 488)

rules:

**1. Article 1.2 of the Act of 30th August, 1996 on the amendment to the Act on Family-Planning, Human Embryo Protection and Conditions of Legal Pregnancy Termination, and to some other acts (Statute Book No. 139 item 646) - in the scope in which it conditions life protection in the pre-natal stage on decisions made by the ordinary legislator - is incompatible with Article 1. and Article 79.1 of constitutional provisions continued in force on the basis of Article 77 of the Constitutional Act of 17th October, 1992 on Mutual**



**Relations between the Legislative and Executive Institution of the Republic of Poland and on Local Self-government (Statute Book No. 84 item 426; amendment of 1995 No. 38 item 148, No. 150 item 729; of 1996 No. 106, item 488), because**

**it infringes constitutional guarantees of the protection of human life in every phase of its development.**

**3. Article 1.5 of the Act of 30th August, 1996 on the amendment to the Act on Family-Planning, Human Embryo Protection and Conditions of Legal Pregnancy Termination, and to some other acts (Statute Book No. 139 item 646) - in the scope referring to Article 4a.1.4 of the Act of 7th January, 1993 on Family-Planning, Human Embryo Protection and Conditions of Legal Pregnancy Termination (Statute Book No. 17 item 78; amendment of 1995 No. 66 item 334) - is incompatible with Article 1 and Article 79.1 of constitutional provisions continued in force on the basis of Article 77 of the Constitutional Act of 17th October, 1992 on Mutual Relations between the Legislative and Executive Institution of the Republic of Poland and on Local Self-government (Statute Book No. 84 item 426; amendment of 1995 No. 38 item 148, No. 150 item 729; of 1996 No. 106 item 488), because**

**it legalises abortion, while failing to adequately justify the necessity to protect another value, right or constitutional freedom and it makes use of vague criteria in this legalisation, in this way infringing constitutional human life guarantees.**

**5. Article 2.2 of the Act of 30th August, 1996 on the amendment to the Act on Family-Planning, Human Embryo Protection and Conditions of Legal Pregnancy Termination, and to some other acts (Statute Book No. 139 item 646) is incompatible with Article 1 and Article 67.2 of constitutional provisions continued in force on the basis of Article 77 of the Constitutional Act of 17th October, 1992 on Mutual Relations between the Legislative and Executive Institution of the Republic of Poland and on Local Self-government (Statute Book No. 84 item 426; amendment of 1995 No. 38 item 148, No. 150 item 729; of 1996 No. 106 item 488), because,**

**by depriving the child of the opportunity to lodge its financial claims against the mother, the article has reduced the child's rights in a way that is contrary to the rule of a democratic state of law and the principle of equality.**

**6. Article 3.1 of the Act of 30th August, 1996 on the amendment to the Act on Family-Planning, Human Embryo Protection and Conditions of Legal Pregnancy Termination, and to some other acts (Statute Book No. 139 item 646) is incompatible with Article 1. and Article 79.1 of constitutional provisions continued in force on the basis of Article 77 of the Constitutional Act of 17th October, 1992 on Mutual Relations between the Legislative and Executive Institution of the Republic of Poland and on Local Self-government (Statute Book No. 84 item 426; amendment of 1995 No. 38 item 148, No. 150 item 729; of 1996 No. 106 item 488), because**

**it has infringed constitutional guarantees pertaining to the protection of the health of the conceived child and its undisturbed development.**

**8. Article 3.4 of the Act of 30th August, 1996 on the amendment to the Act on Family-Planning, Human Embryo Protection and Conditions of Legal Pregnancy Termination, and**

to some other acts (Statute Book No. 139 item 646) is incompatible with Article 1 and Article 79.1 of constitutional provisions continued in force on the basis of Article 77 of the Constitutional Act of 17th October, 1992 on Mutual Relations between the Legislative and Executive Institution of the Republic of Poland and on Local Self-government (Statute Book No. 84 item 426; amendment of 1995 No. 38 item 148, No. 150 item 729; of 1996 No. 106 item 488), because

it has limited legal protection of the health of the conceived child to such an extent, that the remaining legal measures do not fulfil the requirements to protect this constitutional value adequately.

...

### 3. The Constitutional Tribunal considered the following:

A preliminary analysis of the purport of those provisions contained in the Act of 30th August, 1996 that were appealed against by the mover, leads to the conclusion that they specify the legal status of the foetus and the limits of legal protection of the foetus's goods, in particular its health and life.

In considering the constitutionality of particular provisions challenged by the mover it therefore seems necessary to establish first, whether and to what extent the foetus's life and health enjoy protection within the scope of constitutional regulations. This will chart the constitutional bases to control most of the appraised provisions of the Act of 30th August, 1996.

There are no provisions relating directly to life protection in the constitutional regulations in force in Poland. This is not to say, however, that human life is not a constitutional value.

The basic provision from which constitutional life protection should be deduced, is Article 1 of the constitutional provisions continued in force, in particular the rule of a democratic state of law. Such a state is realised only as a community of people; so only people can be proper carriers of rights and duties enacted in such a state. The basic attribute of a human being is his or her life. Thus depriving somebody of life at the same time annihilates a human being as a carrier of rights and duties. If the content of the rule of a state of law is a constellation of basic directives that are deduced from the very essence of a democratically legislated law and that guarantee a minimum of its justice, then respecting in a state of law the value, without which any legal personality is impossible, i.e. human life from the moment it develops, must be a primary directive. In a democratic state of law a human being and the goods most precious to him or her are of paramount value. Such a good is life. So in a democratic state of law life, in each and every stage of its development, must be protected by the Constitution.

The value of the constitutionally protected legal good of human life - including life evolving in the pre-natal stage - cannot be differentiated. This is so, because there are no sufficiently fine and justified criteria for distinguishing the value of human life according its developmental phase. Human life, therefore, becomes a value protected under the Constitution from the moment it develops. This applies also to the pre-natal stage.

Moreover constitutional protection of the pre-natal phase of human life is also confirmed by the Convention on the Rights of the Child that was ratified by Poland on 30th September, 1991. The preamble of this Convention, in relation to the Declaration of the Rights of the Child, declares in paragraph 10 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.* That

this principle has been included in the preamble of the Convention must lead to the conclusion that the guarantees contained therein relate also to the pre-natal phase of human life.

Also ordinary [Polish] legislation reflects the recognition that life protection is vested in the human being from the moment of conception. The Act on Family-Planning, Human Embryo Protection and Conditions of Legal Pregnancy Termination states in Article 1 from before as well as from after the amendment that the right to life - including the pre-natal stage - is protected; and occasioning the death of the conceived child by abortion is principally an outlawed and punishable act (the new Article 152a and 152b of the Penal Code in the context of circumstances legalising abortion).

Recognising the value of the life of the conceived human being must be the sole reason for proscribing abortion, a reason that in general applies also to the pregnant woman herself (as shall follow from subsequent considerations).

Also other provisions of the law in force evidence that the life of the foetus is legally protected. Article 31 of the Penal Code of the year 1969, in particular, states beyond any doubt that capital punishment is not applicable to a pregnant women, regardless of how advanced the pregnancy is. There is just one way to explain this provision, namely that the life of the human being in the womb of the convicted woman is a value. The protection of the foetus's life takes precedence over any reasons of criminal policy, although these reasons in turn are more important in this case than the right to life of the child's mother. The regulation under Article 31 of the Penal Code quite clearly indicates the value attached by the legislator to the foetus's life.

A regulation that may be conducive to regarding the life of the conceived child as a constitutional value can also be found under Article 79.1 of constitutional provisions. This article points to the duty of motherhood and family protection. It is reasonable to hold that motherhood protection cannot signify merely a protection of the interests of a pregnant woman and a mother. The use of an attributive noun phrase in the constitutional provisions indicates that a special relationship is attributed to the woman and her child, including a child that has just been conceived. On the strength of Article 79.1 of constitutional provisions this relationship, in its entirety, is a constitutional value. It therefore encompasses also the life of the foetus, without which the motherhood relation would have been broken. So motherhood protection cannot be taken to mean a protection realised solely from the point of view of the mother/pregnant woman.

The analysis of the concept of "family" as a constitutional value should lead to analogous conclusions. This concept implies the protection of a certain complex social reality, which is a sum of bonds linking, in the first place, the parents with their children (though in a wider context the concept of family should also comprise other relations developing through blood bonds or adoption). Inherent in the fundamental procreative function of the family must be the notion that the life of the conceived child must enjoy the protection granted by the Constitution to the family, becoming in this way a constitutional value. Just as the fatherhood or motherhood relationship is protected in respect to children already born, it must also be protected in respect to children in the pre-natal phase of their lives.

The statement, that the life of a human being in each and every phase of its development is a protected constitutional value does not mean that the intensity of this protection should be the same in every phase of life and under all circumstances. For the intensity and kind of legal protection does not follow from the value of the protected good in a straightforward way. The intensity and kind of legal protection is influenced not only by the value of the protected good, but also by a number of various factors which the ordinary legislator must take into account in

deciding upon the choice and intensity of legal protection. This protection, however, should always be adequate from the point of view of the protected good.

Constitutional guarantees of the protection of the health of the conceived child should be inferred, in the first place, from the constitutional value of human life - including the pre-natal stage. The protection of human life cannot be taken to mean merely a protection of the minimum of biological functions that are indispensable for survival; it should be understood as a guarantee of correct development, as well as attaining and maintaining a normal mental and physical condition proper to a given developmental age (life stage). Regardless of the number of factors considered relevant to this condition, beyond any doubt it includes a certain state of a given person's organism, in the aspect of its physiological as well as mental functions, that is optimal from the point of view of life processes. Such a state can be identified with the notion of mental and physical health. So constitutional guarantees of the protection of human life must necessarily comprise also the protection of health. Provisions that are the basis for these guarantees, therefore, are at the same time the basis for concluding that the protection of life, regardless of the stage of its physical, emotional, intellectual or social development, is a constitutional obligation. Since human life is a constitutional value also in the pre-natal stage, should anybody attempt to limit legal protection of health enjoyed by the carrier at this stage, he would plainly have to employ a non-arbitrary criterion in order to justify such a distinction. The state of knowledge of empirical sciences so far does not support the introduction of such a criterion, however.

The stance that human life should also enjoy legal protection in the pre-natal stage is directly confirmed in the Convention on the Rights of the Child. Article 24.1 of the Convention states that *State Parties recognize the right of the child to the enjoyment of the highest attainable standard of health ...*. Whereas in the second paragraph of this article it is said that *State 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*. In the light of paragraph 10 of the preamble to the Convention, the concept of a child employed in the Convention should also embrace the child before its birth. Whatever this wording, Article 24 indicates directly that the *right to the enjoyment of the highest attainable standard of health* comprises also the conceived child. This is the only possible explanation of the obligation, implied under Article 2, to provide mothers with pre-natal care. For this obligation has not been introduced in view of the interests of the pregnant woman herself, but - as Article 24.2 clearly states - in the first place to *pursue full implementation of this right* (as specified in paragraph 1). Plainly, what is meant here, are guarantees for the conceived child to enjoy the best possible health.

It is also possible to find a basis for the constitutional protection of health of the conceived child under Article 79.1 which regards, *inter alia*, motherhood and family as constitutional values. As has already been mentioned, the concept of motherhood implies a necessary relationship between the mother and her child, a relationship that develops on several levels - the biological, emotional, social and legal one. The function of this relationship is to foster a proper development of the life of a human being in its initial stage, at which it requires very special care. In the earliest phase it is absolutely impossible to find a replacement for this care, which is realised mainly on the biological level. Nobody but the mother is capable of sustaining the life of the conceived child during this phase.

Considering the function of motherhood as discussed above, the constitutional protection of this value is not undertaken solely in the interest of the mother. An equivalent recipient of this protection must be the foetus and its proper development. This principle embraces obviously the

protection of the health of the conceived child and a prohibition to cause health damage or bodily injury to it.

In view of all the arguments brought above, it should be beyond any doubt that constitutional provisions guarantee the protection of the health of the conceived child. In particular, they imply the legislator's duty to proscribe inflicting health injury to the conceived child and to legislate legal measures that guarantee to a sufficient extent the abidance by this prohibition.

4.1 In accordance with Article 1.2 of the Act of 30th August, 1996 in regard to the amendment to the Act on Family-Planning, Human Embryo Protection and Conditions of Legal Pregnancy Termination and to some other acts (Statute Book No. 139 item 646), Article 1 of the Act of 7th January, 1993 on Family-Planning, Human Embryo Protection and Conditions of Legal Pregnancy Termination (Statute Book No. 17 item 78; amendment of 1995 No. 66 item 334) that was in force so far has been given a new wording as follows:

*The right to life enjoys protection, including the pre-natal phase, within the limits specified in the act.*

In the wording from before the amendment, Article 1 stated in paragraph 1:

*Every human being has an inherent right to life from the moment of conception,*  
whereas in paragraph 2 it stated:

*The life and health of a child, from the moment of its conception, is under legal protection.*

Article 1 of the Act of 7th January, 1993, in the wording from before the amendment, explicitly indicated the conceived child's right to life, by declaring that this right is inherent. Moreover, by stating that the life and health of a child are under legal protection, it confirmed that both these qualities are legal values, repeating in this respect a guarantee that follows from constitutional provisions, in particular from Article 1 and Article 79.1.

After the amendment introduced with the Act of 30th August, 1996, Article 1 of the Act of 7th January, 1993 states that the right to life enjoys protection, including the pre-natal phase, within the limits specified in the act. Thus the difference is as follows:

- a) the statement about life being inherent has been deleted;
- b) the way of specifying the period of time for the enjoyment of the right to life has been modified by substituting "from the moment of conception" with the phrase: "pre-natal phase"; moreover
- c) the child's health, including the health of a child before its birth, has been deleted from the scope of legal protection provided by Article 1; furthermore
- d) Article 1 of the Act of 7th January, 1993 from before the amendment did not describe in any clear way the "legal protection" that comprised the life and health of the conceived child. The same provision in the wording from after the amendment indicates that the right to life in the pre-natal phase is protected within the limits specified in the act.

Two different issues comprise the evaluation of the constitutionality of the content of Article 1 in the wording given to it by the amending act, namely examining

- a) whether the content of directives and prohibitions following from this prescription contradicts a certain constitutional value;
- b) whether such a value has not been violated by repealing provisions hitherto in force.

Article 1.2 of the amending act has a double normative meaning: it introduces a new legal provision and, by so doing, it abrogates the rules binding so far. Both these actions of the legislator are subject to control by the Constitutional Tribunal in view of constitutional standards.

As to the new wording of Article 1 of the Act of 7th January, 1996, according to which *the right to life enjoys protection, including the pre-natal phase, within the limits specified in the act*, the phrase used in the provision, that the right to life, in the pre-natal phase, enjoys protection *within the limits specified in the act*, gives rise to doubts. Incidentally, such doubts have been expressed by the mover. This phrase means that the life of the unborn enjoys legal protection only within limits provided in a clear way by an ordinary act.

The term "limits of protection" comprises both a rule which prohibits directly the violation of specific goods - in this case the life of the unborn - and measures provided for the execution of abidance by this rule. The reservation that the life of the unborn enjoys protection exclusively within the limits of the act must mean that only a regulation under an ordinary act becomes the source of a potential prohibition of offending the life of the unborn. Similarly, only an ordinary act can provide the measures to enforce this prohibition.

In the latter case, it is evident that the ordinary legislator should have the competence to specify measures which would guarantee abidance by the norm that prohibits offending the life of the conceived child. In the former case, however, bestowing such an exclusive power to enact a prohibition itself, is incompatible with the duty to protect constitutional values which is incumbent on the legislator.

Conditioning the validity of the prohibition of offence against the life of the unborn upon regulations from ordinary acts must result in a lack of any protection of this life, should the legislator fail to introduce such a prohibition or limit its scope.

So the present wording of Article 1 of the Act assigns to the ordinary legislator the right to specify if, and to what extent, the life of the unborn enjoys legal protection. This in turn means that for a prohibition of offence against the life of the unborn to be in force in the legal system, a statutory basis is required.

Such a power, however, breaches constitutional provisions as regards the protection of life.

Because, if human life - including the life of the conceived child - is a constitutional value, then an ordinary act cannot lead to some censorship and suspension of the binding of constitutional rules. The prohibition to offend human life - including the life of the conceived child - follows from constitutional rules. The ordinary legislator, therefore, cannot be empowered to decide under what conditions such a prohibition is binding, because this would render constitutional norms contingent. In particular, the ordinary legislator cannot make this prohibition dependent on regulations in ordinary acts. Therefore, if constitutional guarantees become merely contingently binding due to the enactment of any norms of this kind by the ordinary legislator, it contradicts constitutional norms.

Life - including life in the pre-natal phase - is one of fundamental constitutional values. Article 1 of the Act, in the wording given to it by the Act of 30th August, 1996, conditioned the prohibition to violate this value on decisions taken by the ordinary legislator and by so doing, it violated constitutional provisions basic to the protection of life in the pre-natal phase, in particular Article 1 and Article 79.1 of constitutional provisions continued in force. The ordinary legislator has only the power to define potential exceptions, whose occurrence makes it necessary - due to a conflict of goods that are constitutional values, of rights or of constitutional freedoms - to sacrifice one of the conflicting goods. When the legislator consents to sacrifice a constitutional

good, because it conflicts with another good, right or constitutional freedom, this good still retains its attribute of being a constitutional good enjoying protection.

The former analysis of the normative amendment to Article 1 has shown that the content of this article is much narrower now. As has already been mentioned, the new provision does not speak of legal protection of the health of the child - including the conceived child -, it does not comprise the declaration that the right to life is inherent and it alters the way of specifying the period of time during which the right to life enjoys legal protection.

The repeal of the declaration that the right to life is inherent cannot be taken to be a normative change. Whether a given right or freedom is in fact inherent or not, does not depend on the legislator's will; so it is impossible to nullify (abrogate) the quality of inherence by a statutory act. For the legislator does not have the power to grant or cancel the right to life as a constitutional value. The inherent character of the right to life, therefore, cannot be influenced by the legislator stating it explicitly in statutory provisions or not.

In the amended Article 1, the legislator employed a different expression to specify the period of time during which human life enjoys legal protection. This could suggest that the legislator wanted to change the scope of this protection in this way. The change of terminology, however, is void of any semantic significance. Article 1.1 of the Act from before the amendment spoke of a period "from the moment of conception", whereas after the amendment there is "the pre-natal phase". The latter phrase, without indicating the initial moment, implies in particular that legal protection of human life comprises also the period before birth. This one change in terminology, however, should not lead to the conclusion that in this way the legislator allegedly desired to shift the moment at which this protection begins. The change in terminology by itself does not justify imputing such intents to the legislator, especially as the new phrase does not support the view that the period of the protection of life before birth has been narrowed in respect to the period specified under Article 1.1 from before the amendment. Decisive in this respect, therefore, remains the scope of human life protection implied by constitutional provisions; the changes to the content of Article 1.1 of the Act of 7th January, 1996 cannot be interpreted as an attempt to define a new moment, at which legal protection of human life begins.

As has already been established, human health - including the health of the conceived child - has undoubtedly the quality of being a constitutionally protected value. From this point of view, any behaviours directed at harming the health of a human being must be regarded as behaviours that violate a legal good. The repeal of a provision which just served to confirm the constitutional protection of the health of a human being - including the conceived child - can be interpreted neither as a legalisation of violations as such, nor as the legislator's departure from resorting to legal consequences (e.g. penal law sanctions) for behaviours that violate this good. Only the giving up of sufficient protective measure concerning a good which is a constitutional value must be regarded as a violation of constitutional guarantees that relate to this good.

As has already been mentioned, when a certain value, right or freedom is guaranteed by the constitution, it becomes a legal good. Such a value demands legal protection and ensuring it is, in the first place, the duty of the ordinary legislator. The basic instrument for guaranteeing this protection is a legislation of prohibitions and directives designed to assure the inviolability of a given good. Because of such prohibitions (or directives), a specific conduct that violates a constitutional value is considered unlawful.

Such protection, although it is rudimentary and fundamental, is not sufficient. It is necessary to introduce into a constitutional values protection system in ordinary legislation specific

consequences that would ensure the effectiveness of substantial norms and also special procedures that would make it possible to execute both the substantial norms and the consequences of their violation.

The Constitution should be regarded as a direct source, potentially and factually, for prohibitions and directives which operate within a legal system and which concern certain constitutional values. Thus, from the Constitution itself follows the prohibition to infringe freedom of expression, freedom of assembly, personal inviolability or the privacy of letters. At the same time, however, if one wanted to refer only to the Constitution in order to determine definitively, whether a conduct that violates or limits a given constitutional value is illegal, one would have to examine, whether this conduct is sufficiently justified in relation to the realisation of another constitutional value. In particular, e.g. offence against the life of an aggressor may be justifiable by the need to protect the life of the victim.

Notwithstanding this direct regulating power of the Constitution, the ordinary legislator is not exempt from the duty to legislate substantial norms as regards the protection of constitutional values; in particular, however, it is incumbent on the legislator to solve, in a general way, conflicts that may occur in the process of a practical implementation of constitutional values. Moreover, by construing legal consequences of inobservance as well as procedures of execution, the legislator should specify how substantial norms are to be executed.

In the latter respect, the legislator is endowed with considerable freedom to follow a given policy that would ensure the effectiveness of the substantial norms legislated. This freedom, however, ought not to go beyond certain limits. In particular the legislator cannot completely forfeit the protection of certain legal goods; on the contrary, it is incumbent on the legislator to ensure "a sufficient protection" of these goods.

The normative sense of the repeal of Article 1.1 of the Act of 7th January, 1993 in its former wording in respect to the protection of the health of the child - including the conceived child - should be evaluated in this context. This repeal means that the prescription under Article 1 of the Act is no longer a basis to implement a prohibition on violating the health of a child - including the conceived child. This conclusion by itself, however, does not warrant the view that this change is contrary to constitutional provisions which the motion indicated. The constitutionality of the Act under examination will be decided on the basis of the rules that introduce legal measures aimed at protecting the health of the conceived child.

...

4.3 The challenged provision of the amending Act of 31st August, 1996 introduced a new regulation to the Act of 7th January, 1993 on Family-Planning, Human Embryo Protection and Conditions of Legal Pregnancy Termination. This regulation admitted of the possibility of abortion to be performed only by a doctor, if the pregnant woman had difficult life conditions or a difficult personal situation (Article 4a.1)<sup>1</sup> and the pregnancy did not last longer than 12 weeks (Article 4a.2)<sup>2</sup>. As a formal condition for the doctor to perform an abortion, the woman must submit a written consent (Article 4a.4)<sup>3</sup>, a statement relating to the difficult life conditions or a difficult personal situation, and, moreover, a certificate that she has consulted<sup>4</sup> a doctor from the basic health care, other than the doctor who is to perform the pregnancy termination, or another qualified person (Article 4a.6).<sup>5</sup> No less than three days must elapse between the date of the consultation and abortion. Abortion can be performed both in a health-care institution or in a private surgery. The legislator declared at the same time under Article 4b that individuals covered



by social insurance or entitled to free health care on the basis of other provisions have the right to free pregnancy termination in a public health-care institution.<sup>6</sup>

In evaluating the normative significance of the prescription under Article 4a.1.4, it should be concluded that it legalises specific behaviours that are aimed at abortion. In so doing, it admits of behaviours that are, in principle, outlawed. In the context of the remaining provisions of the Act, especially Article 1 in its new wording, but also the new Articles 152a and 152b of the Penal Code, it should be concluded that also on the basis of new regulations relating to the conceived child, its life enjoys legal protection from the moment of conception; and any acts aimed at taking its life, including, in particular, abortion, are generally outlawed.

Article 4a.1.4, however, limits this prohibition, by allowing the doctor to take the life of a foetus which is not older than 12 weeks, provided the pregnant woman submits documents specified under Article 4a.4.6 and three days elapse between the consultation and abortion.

The legalisation of the doctor's behaviours that relate to abortion must also refer to auxiliary actions of the medical personnel that have to do with abortion, as well as to actions of the mother that are aimed at the doctor's terminating the pregnancy. Article 4a.1.4, however, is no basis for legalising behaviours which the mother undertakes independently and which directly occasion the death of the foetus.

The conclusion that the regulation under Article 4a.1.4 is legislative in character should also be deduced from the fact that the legislator has provided for financing abortions performed at public health-care institutions from public funds and, moreover, that in Article 4b the legislator legislated a claim (right) on the pregnant woman's side to have abortion, addressed to public health-care institutions. Therefore, when a doctor terminates a pregnancy for so called social reasons, the preconditions of which are specified under Article 4a.1.4 as difficult life conditions or a difficult personal situation of the pregnant woman, on the basis of the binding legal state it cannot be maintained that this action definitely excludes the possibility of applying penal sanctions in such a case and does not determine the lawfulness or unlawfulness of the abortion itself.

It would be possible to accept this interpretation, if regulation from Article 4a.1.4 formed an integral part of the Penal Code, complementing, in particular, the repealed Article 149a § 3 which contains also a catalogue of circumstances in which the perpetrator of the death of a child did not commit a crime. Including this regulation in a separate act, which fails to specify the type of punishable acts; assigning public institutions to engage in organisational activities related to procuring an abortion; and, moreover, financing these abortions from public funds leaves no shadow of a doubt - according to the provisions in force since 4th January, 1997, pregnancy termination, under conditions specified under Article 4a.4, is regarded as legal.

Pregnancy termination, an action permitted by the legislator under Article 4a.1.4, is designed to remove an evolving foetus (embryo) from the mother's organism. Since this prescription applies to terminating a pregnancy when the foetus is not older than 12 weeks, at the present stage of medical knowledge removing this foetus from the mother's organism is equivalent to occasioning its death. Anyway, the legislator does not specify, whether the foetus dies when it is still in the mother's organism or already after it has been expelled from it.

Thus, pregnancy termination necessarily involves taking the life of an evolving foetus. The essence of the evaluated regulation from Article 4a.1.4 is the legalisation of actions aimed at taking the life of the foetus and undertaken in conditions specified in this regulation. A constitutional evaluation of this legalisation must therefore determine:

a) whether the good, whose violation the legislator legalises, is a constitutional value,  
b) whether the legalisation of violations of this good is justifiable on the basis of constitutional values, being, in particular, a result of settling a conflict of specific values, rights or freedoms that are guaranteed in the Constitution, and

c) whether the legislator kept the constitutional criteria to be followed in an attempt to settle such conflicts and, in particular, whether the legislator complied with the requirement - which the Tribunal has repeatedly deduced from Article 1 of constitutional provisions (from the rule of a state of law) - to maintain balance in the settling of conflicts that arise between constitutionally protected goods, rights and freedoms.

An acknowledgement of the constitutional value of human life - including its pre-natal phase - does not prejudice that, in some exceptional situations, the protection of this value may be limited or even cancelled due to the need to protect or realise other constitutional values, rights or freedoms.

When the ordinary legislator decides to forfeit the protection of a specific constitutional value or even legalise behaviours that violate such a value, the decision must be justified by a conflict of constitutional goods, rights or freedoms presented above. The legislator, however, is not qualified to settle such conflicts in an uncontrolled and arbitrary manner. The legislator should, in particular, follow the results of comparing the value of conflicting goods, rights or freedoms. The criteria that specify the scope of a permissible violation should match the nature of the settled conflict.

In view of this, the regulation under Article 1.5 of the Act of 30th August, 1996 in the extent to which it concerns the legalisation of abortions when the pregnant woman has difficult life conditions or a difficult personal situation, does not fulfil the conditions specified above.

As can be concluded from the content of Article 4a.1, the reason to legalise abortion as specified in subparagraph 4 were *difficult life conditions* or a *difficult personal situation* of the pregnant woman. A comparison with the remaining grounds for abortion enumerated in Article 4a.1 leads to the conclusion that the so called difficult life conditions, and in particular a difficult personal situation, mean neither a threat to the life or health of the pregnant woman (this is regulated in subparagraph 1), nor genetic defects of the foetus (subparagraph 2) nor do they relate to the pregnancy as a result of a prohibited act (subsection 3). Subparagraph 4, therefore, must have been legislated for a situation which is not embraced by the remaining provisions specified under Article 4a.1.

As to *difficult life conditions*, they comprise in particular the material situation, which may deteriorate or lose a chance for improvement in relation to more advanced stages of the pregnancy or as a result of bearing the child. And in case of a *difficult personal situation*, the legislator most probably meant a specific mental state related to becoming with child. A state that may result from strained relations with other people (family members as well as the environment) because of the pregnancy or from the necessity to limit specific needs of the woman, including her rights and personal freedoms.

Therefore, although the prerequisites specified under Article 4a.1.4 are fairly vague (this element shall be discussed later), they support the conclusion that this regulation probably protects the following values: that the pregnant woman retains a specific material status that could deteriorate or lose a chance for improvement in relation to continuing the pregnancy and bearing the child; or else that the pregnant woman retains the type of relations with others she

used to have before her pregnancy and the extent to which she used to realise her specific need, rights and freedoms.

The prerequisites specified under Article 4a.1.4, however, must be interpreted in the light of paragraph 6 of the same provision. This regulation implies that only the woman herself is entitled to determine the circumstances listed in 4a.1.4, by presenting an appropriate statement concerning this issue. In this way, the legislator has prejudiced that the prerequisites specified under Article 4a.1.4 are to be understood in a subjective way. In the light of this provision, therefore, the woman's subjective conviction that her material situation or her personal relations or else the possibility to realise her own needs, rights and freedoms may perhaps be under threat, becomes a legal good.

This shows that the prerequisites specified under Article 4a.1.4 do not refer to extreme situations, such as could, at the same time, be taken to contradict the principle of the protection of the dignity of the human person.

In addition, it is possible to conclude from the preamble of the Act that a prerequisite for the enacted regulations was, *inter alia*, the recognition of *every individual's right to decide responsibly if to reproduce*.

Weighing against each other the value of the conflicting goods specified in this way disqualifies the regulation under Article 4a.1.4.

Human life, as stressed by the preamble of the Act itself, is a *fundamental good of the human being*. The right of the pregnant woman to avoid aggravating her material situation follows from the constitutional protection of the freedom to shape ones living conditions freely and from the right of the woman that pertains to this freedom to satisfy the material needs she and her family may have. But this protection cannot lead so far as to involve the violation of the fundamental good of human life; in comparison with this good, living conditions are a secondary issue and may change.

As has been mentioned, in case of the precondition pointing to a *difficult personal situation*, there is a whole set of various legal goods related to reputation, proper relations with others, the possibility to exercise specific rights and freedoms, which may conflict with the protection of human life in the pre-natal phase. The legislator, however, failed to specify what constitutional value was meant. With such a term as a *difficult personal situation* used by the legislator, it is impossible to assign to it specific denotations even approximately. An attempt to define this term along the lines implied by the systemic interpretation complicates the situation still further. This is so, because a difficult personal situation is not a situation related to a threat to life or health (which is discussed in Article 4a.1.1); nor is it a difficult material situation, because this category is expressed, though quite vaguely as well, by the phrase *difficult life conditions*. Moreover, a difficult personal situation describes a state which is not a common effect of the pregnancy, because those ordinary complications do not suffice to remove the foetus. Any attempt to define this term can only lead to the conclusion that it refers to a limitation, specified in a general way, on the rights and freedoms of the pregnant woman. Because the term applied by the legislator is so vague, however, it is not possible to specify exactly what rights and freedoms are meant.

Due to the ambiguity of the prerequisites formulated by the legislator, it is impossible to identify the constitutionally protected values, by virtue of which the legislator decides to legalise the violation of another constitutional value. Such a situation is impermissible, especially when these prerequisites allow for the destruction of human life, i.e., as the very legislator specifies in the preamble, for the violation of a fundamental good of a human being. The ambiguity of the

regulation should be challenged by the paramount value of the life of the conceived child and by the right of the parents to reproduce.

A separate matter is considering the right to bear a child in its negative aspect, i.e. also as a right to terminate the pregnancy. In this case, due to the development of life, the right to decide about reproduction should in fact be reduced to the right not to have a child. One cannot decide about having a child, when this child is already evolving in the pre-natal phase and, in this sense, the parents already *have* it. The right to have a child, therefore, can be interpreted solely in its positive aspect, and not as a right to annihilate a developing human foetus.

So the right to decide responsibly if to reproduce is reduced in its negative aspect to the refusal to conceive a child. Once the child has already been conceived, however, this right can be realised only in its positive aspect, as, *inter alia*, the right to bear and bring up a child.

From the very nature of things, the right to decide if to reproduce is a common right of the child's mother and father. Only a free-will decision to conceive a child realises this right. In this context, it is not possible to refer to this right as to a constitutional basis for the legalisation of abortion for "social" reasons, because the Act has made the mother the sole decision maker in regard to the life of the foetus. But the child's mother alone is not entitled to make such decisions. If for no other reason than this, it is out of the question that the regulation of Article 4a.1.4 be justified by the wish to create conditions for the realisation of this right.

As has already been mentioned, the very nature of constitutional values to which one could refer in an attempt to justify the regulation from Article 4a.1.4 implies neither their primacy to nor even equivalence with the value of human life - including its pre-natal stage. The only rational attempt to justify the adopted solution would be to prove that the value of human life before and after birth is different. If this were proved, the comparison of conflicting values could indeed lead to a solution in disfavour of the life of the unborn.

As has been stressed several times, an attempt to differentiate the value of human life on the basis of rational preconditions must specify the criterion from which such a differentiation were to follow. To this end it is not enough to refer to nothing else but the specific statutory regulations which, in particular, differentiate property rights of the child before and after birth. Irrespective of the fact that this case relates to another category of rights, ordinary legislation cannot have a direct impact on specifying the scope of protection that is outlined in constitutional provisions, if only because it may incorrectly recognise the hierarchy of values specified in the Constitution.

Regardless of preceding findings, i.e. regardless of the conclusion that the way the legislator settled the conflict of constitutional values (legalising abortion in circumstances specified under Article 4a.1.4) violated the principle of the proportionality of these values, it turns out that the legislator infringed also other constitutional principles binding in the settlement of such conflicts, in particular the principle to adequately specify the criteria which admit of a violation of a constitutional value.

For it is incumbent on the legislator who decides to legalise actions aimed at violating a certain constitutional value to adequately outline the scope of circumstances under which this violation is permissible. This adequacy must in particular refer to the nature of the conflicts of constitutional values which the adopted legal regulation is to resolve. The regulation following from Article 4a.1.4 of the Act of 7th January, 1993 has not satisfied this condition.

Phrasing the basic substantial prerequisites for the legalisation of occasioning the death of the conceived child, the legislator specified the situation of a pregnant woman who decides to have an abortion. The circumstances specified under Article 4a.1.4, however, have not been linked to

the occurrence of pregnancy in any way. So what follows from this provision, is that even if difficult life conditions and, in particular, a difficult personal situation did not relate in any way to the evolving life of the foetus and to a possible bearing of a child, they still are preconditions that justify an abortion. In this respect, the way of phrasing the preconditions in the challenged provision is completely inadequate to the conflict of constitutional values which were to be their basis.

The period of time during which circumstances justifying an abortion occur has not been specified clearly, either; what is most striking, even a short-term fleeting occurrence of the circumstances discussed under Article 4a.1.4 is a precondition for occasioning the death of the conceived child. This does not match the nature of the conflict of constitutional values that has been assumed.

The legislator has legalised acts which occasions the death of the foetus only in respect to those acts which are undertaken before the foetus is 12 weeks old. This criterion is entirely arbitrary in the context of the Act as a whole. For the nature of a potential conflict between constitutionally protected interests of the pregnant woman and constitutionally protected life in the pre-natal phase does not change in any way either before or after the 12th week of pregnancy. It is at most possible to prove that factual limitations and burdens which the pregnant woman may encounter are likely to increase considerably after the 12th week of the pregnancy.

The legislator does not legalise abortion in view of possible difficult life conditions or of a difficult personal situation that may emerge in the future due to continuing the pregnancy or bearing the child, but, on the contrary, links these circumstances with the moment at which the pregnant woman decides to have an abortion. As has been mentioned, however, such circumstances may be short-lived, while the pregnancy and bearing the child is not bound to influence the future situation of the mother. In other words, on the basis of Article 4a abortion is not a means of avoiding a future threat to the interests of the pregnant woman; it aims at repealing an already existing violation of such interests. ...

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<sup>1</sup> Article 4a.1: Pregnancy termination can be performed only by a doctor, when: 1) the pregnancy imperils the life or health of the pregnant woman, 2) pre-natal examinations or other medical conditions indicate a high likelihood of a severe and irreparable handicap of the foetus or an incurable illness threatening its life, 3) there are grounds to suspect that the pregnancy is a result of an unlawful act, 4) the pregnant woman has difficult life conditions or a difficult personal situation.

<sup>2</sup> Article 4a.2: In the cases specified under para. 1.2, pregnancy termination is permissible, until the foetus becomes capable of living by itself outside the organism of the pregnant woman; in cases specified under para 1.2, 1.3 or 1.4, if no more than 12 weeks have elapsed from the beginning of the pregnancy.

<sup>3</sup> A written consent of the women is needed for pregnancy termination. In case of an infant or an incapacitated woman, a written consent of her legal representative is required. If the infant is over 13, also her written consent is required. If the infant is under 13, a consent of the guardianship court is

required and the infant has the right to express her own opinion. In case of a totally incapacitated woman, her written consent is also required, unless her mental state renders her incapable of consenting. If the legal representative's consent is lacking, a consent of the guardianship court is required for abortion.

<sup>4</sup> Article 4a.7: The aim of the consultation mentioned in para. 6 is, in particular, to determine the health and life situation of the woman; to be of help in solving her problems by pointing to, *inter alia*, aid that is available for women in relation to pregnancy and the time after delivery; to inform the woman of the legal protection vested in life in the pre-natal phase, about medical aspects of the pregnancy and pregnancy termination, as well as about contraceptive means and methods. With the woman's consent her partner, family members or another close person may participate in the consultation.

<sup>5</sup> Article 4a.6: In the case discussed in para. 1.4, the woman submits a written statement and moreover certifies having consulted a doctor from basic health care, other than the one who is to perform the pregnancy termination, or another qualified person of her choice. The pregnancy may be terminated, if three days after the consultation the woman still maintains her intention to have abortion.

<sup>6</sup> Individuals covered by social insurance or entitled to free health care on the basis of other provisions have the right to free pregnancy termination in a public health care institution.

*Edited*

**CASE OF VO v. FRANCE**  
(Application no. 53924/00)

**JUDGMENT**

**STRASBOURG**

**8 July 2004**

The European Court of Human Rights, sitting as a Grand Chamber composed of:  
Mr L. Wildhaber, *President*,  
Mr C.L. Rozakis,  
Mr J.-P. Costa,  
Mr G. Ress,  
Sir Nicolas Bratza,  
Mr L. Caflisch,  
Mrs V. Strážnická,  
Mr P. Lorenzen  
Mr K. Jungwiert,  
Mr M. Fischbach,  
Mr J. Hedigan,  
Mrs W. Thomassen,  
Mr A.B. Baka,  
Mr K. Traja,  
Mr M. Ugrekhelidze,  
Mrs A. Mularoni,  
Mr K. Hajiyeu, *judges*,  
and Mr P.J. Mahoney, *Registrar*,

Having deliberated in private on 10 December 2003 and 2 June 2004,  
Delivers the following judgment, which was adopted on the last-mentioned date:

**PROCEDURE**

1. The case originated in an application (no. 53924/00) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a French national, Mrs Thi-Nho Vo ("the applicant"), on 20 December 1999.

\* \* \*

3. The applicant alleged, in particular, a violation of Article 2 of the Convention on the ground that the conduct of a doctor who was responsible for the death of her child *in utero* was not classified as unintentional homicide.

\* \* \*

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1967 and lives in Bourg-en-Bresse.

10. On 27 November 1991 the applicant, Mrs Thi-Nho Vo, who is of Vietnamese origin, attended Lyons General Hospital for a medical examination scheduled during the sixth month of pregnancy.

11. On the same day another woman, Mrs Thi Thanh Van Vo, was due to have a contraceptive coil removed at the same hospital. When Dr G., who was to remove the coil, called out the name "Mrs Vo" in the waiting-room, it was the applicant who answered.

After a brief interview, the doctor noted that the applicant had difficulty in understanding French. Having consulted the medical file, he sought to remove the coil without examining her beforehand. In so doing, he pierced the amniotic sac causing the loss of a substantial amount of amniotic fluid.

After finding on clinical examination that the uterus was enlarged, the doctor ordered a scan. He then discovered that one had just been performed and realised that there had been a case of mistaken identity. The applicant was immediately admitted to hospital.

Dr G. then attempted to remove the coil from Mrs Thi Thanh Van Vo, but was unsuccessful and so prescribed an operation under general anaesthetic for the following morning. A further error was then made when the applicant was taken to the operating theatre instead of Mrs Thi Thanh Van Vo, and only escaped the surgery intended for her namesake after she protested and was recognised by an anaesthetist.

12. The applicant left the hospital on 29 November 1991. She returned on 4 December 1991 for further tests. The doctors found that the amniotic fluid had not been replaced and that the pregnancy could not continue further. The pregnancy was terminated on health grounds on 5 December 1991.

13. On 11 December 1991 the applicant and her partner lodged a criminal complaint, together with an application to join the proceedings as civil parties, alleging unintentional injury to the applicant entailing total unfitness for work for a period not exceeding three months and unintentional homicide of her child. Three expert reports were subsequently filed.

14. The first, which was filed on 16 January 1992, concluded that the foetus, a baby girl, was between 20 and 21 weeks old, weighed 375 grams, was 28 centimetres long, had a cranial perimeter of 17 centimetres and had not breathed after delivery. The expert also concluded that there was no indication that the foetus had been subjected to violence or was malformed and no evidence that the death was attributable to a morphological cause or to damage to an organ. Further, the autopsy performed after the abortion and an anatomico-pathological examination of the body indicated that the foetal lung was 20 to 24 weeks old.

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17. On 25 January 1993, and also following supplemental submissions by the prosecution on 26 April 1994, Dr G. was charged with causing unintentional injury at Lyons on 27 November 1991 by:

(i) through his inadvertence, negligent act or inattention, perforating the amniotic sac in which the applicant's live and viable foetus was developing, thereby unintentionally causing the child's death (a criminal offence under Article 319 of the former Criminal Code – which was applicable at the material time – now Article 221-6 of the Criminal Code);

\* \* \*

19. By a judgment of 3 June 1996, the Criminal Court found . . . [a]s to the offence of unintentional homicide of the foetus, it held:

“The issue before the Court is whether the offence of unintentional homicide or the unintentional taking of the foetus's life is made out when the life concerned is that of a foetus – if a 20 to 21 week-old foetus is a human person (‘another’ within the meaning of Article 221-6 of the Criminal Code). . . .

At what stage of maturity can an embryo be considered a human person?

The Voluntary Termination of Pregnancy Act of 17 January 1975 provides: ‘The law guarantees respect of every human being from the beginning of life.’

The Law of 29 July 1994 (Article 16 of the Civil Code) provides: ‘The law secures the primacy of the person, prohibits any assault on human dignity and guarantees the respect of every human being from the beginning of its life’.

The laws of 29 July 1994 expressly employed the terms ‘embryo’ and ‘human embryo’ for the first time. However, the term ‘human embryo’ is not defined in any of them.

When doing the preparatory work for the legislation on bioethics, a number of parliamentarians (both members of the National Assembly and senators) sought to define ‘embryo’. Charles de Courson proposed the following definition: ‘Every human being shall be respected from the start of life; the human embryo is a human being.’ Jean-François Mattéi stated: ‘The embryo is in any event merely the morphological expression of one and the same life that begins with impregnation and continues till death after passing through various stages. It is not yet known with precision when the zygote becomes an embryo and the embryo a foetus, the only indisputable fact being that the life process starts with impregnation.’

It thus appears that there is no legal rule to determine the position of the foetus in law either when it is formed or during its development. In view of this lack of a legal definition it is necessary to return to the known scientific facts. It has been established that a foetus is viable at 6 months and on no account, on present knowledge, at 20 or 21 weeks.

The Court must have regard to that fact (viability at 6 months) and cannot create law on an issue which the legislators have not yet succeeded in defining.

The Court thus notes that a foetus becomes viable at the age of 6 months; a 20 to 21 week-old foetus is not viable and is not a 'human person' or 'another' within the meaning of former Article 319 and Article 221-6 of the Criminal Code.

The offence of unintentional homicide or of unintentionally taking the life of a 20 to 21 week-old foetus has not been made out, since the foetus was not a 'human person' or 'another'...

Acquits Dr G. on the charge without penalty or costs ..."

*[The Court of Appeal overturned the judgment and found the doctor guilty of unintentional homicide, the Court of Cassation reversed that decision and held that he could not be convicted of homicide.]*

## II. RELEVANT DOMESTIC LAW AND PRACTICE

### A. The Criminal Code

23. The provision dealing with the unintentional taking of life at the material time and until 1 March 1994 was Article 319 of the Criminal Code, which read as follows:

"Anyone who through his or her inadvertence, negligent act, inattention, negligent omission or breach of regulation unintentionally commits homicide or unintentionally causes death, shall be liable to imprisonment of between three months and two years and a fine of between 1,000 and 30,000 francs."

24. Since 1 March 1994, the relevant provision has been Article 221-6 of the Criminal Code (as amended by Law no. 2000-647 of 10 July 2000 and Order no. 2000-916 of 19 September 2000), which is to be found in Section II ("Unintentional taking of life") of Chapter I ("Offences against the life of the person") of Part II ("Offences against the human person") of Book II ("Serious crimes (*crimes*) and other major offences (*délits*) against the person"). Article 221-6 provides:

"It shall be an offence of unintentional homicide punishable by three years' imprisonment and a fine of 45,000 euros to cause the death of another in the conditions and in accordance with the distinctions set out in Article 121-3 by inadvertence, negligent act, inattention, negligent omission or breach of a statutory or regulatory duty of safety or care.

In the event of a manifestly deliberate breach of a special statutory or regulatory duty of safety or care, the maximum sentences shall be increased to five years' imprisonment and a fine of 75,000 euros."

25. Article 223-10 of the Criminal Code, which concerns the voluntary termination of pregnancy by a third party without the mother's consent, is to be found in Section V under the heading "Unlawful termination of pregnancy" of Chapter III, entitled "Endangering the person", in Part II of Book II. It reads as follows:

"It shall be an offence punishable by five years' imprisonment and a fine of 75,000 euros to terminate a pregnancy without the mother's consent."

26. Section III entitled "Protection of the human embryo" of Chapter I ("Offences against biomedical ethics") of Part I ("Public-health offences") of Book V ("Other serious crimes (*crimes*) and other major offences (*délits*)") prohibits various types of conduct on grounds of medical ethics

(Articles 511-15 to 511-25), including the conception of human embryos *in vitro* for research or experimental purposes (Article 511-18).

## **B. The Public Health Code**

27. At the material time the limitation period for an action in damages in the administrative courts was four years, while the period in which a pregnancy could be voluntarily terminated lawfully was ten weeks following conception.

\* \* \*

## **III. EUROPEAN LAW**

### **Chapter XI – Interpretation and follow-up of the Convention**

#### **Article 29 – Interpretation of the Convention**

The European Court of Human Rights may give, without direct reference to any specific proceedings pending in a court, advisory opinions on legal questions concerning the interpretation of the present Convention at the request of:

- the Government of a Party, after having informed the other Parties;
- the Committee set up by Article 32, with membership restricted to the Representatives of the Parties to this Convention, by a decision adopted by a two-thirds majority of votes cast.

...”

36. The commentary on Article 1 (see paragraphs 16 to 19 of the explanatory report on the convention) states:

#### **Article 1 – Purpose and object**

- “16. This Article defines the Convention’s scope and purpose.
17. The aim of the Convention is to guarantee everyone’s rights and fundamental freedoms and, in particular, their integrity and to secure the dignity and identity of human beings in this sphere.
18. The Convention does not define the term ‘everyone’ (in French ‘*toute personne*’). These two terms are equivalent and found in the English and French versions of the European Convention on Human Rights, which however does not define them. In the absence of a unanimous agreement on the definition of these terms among member States of the Council of Europe, it was decided to allow domestic law to define them for the purposes of the application of the present Convention.
19. The Convention also uses the expression ‘human being’ to state the necessity to protect the dignity and identity of all human beings. It was acknowledged that it was a generally accepted principle that human dignity and the identity of the human being had to be respected as soon as life began....”

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#### IV. COMPARATIVE LAW

41. In the majority of the member States of the Council of Europe, the offence of unintentional homicide does not apply to the foetus. However, three countries have chosen to create specific offences. In Italy a person who negligently causes a pregnancy to terminate is liable to a prison sentence of between three months and two years under section 17 of the Abortion Act of 22 May 1978. In Spain Article 157 of the Criminal Code makes it a criminal offence to cause damage to the foetus and Article 146 an offence to cause an abortion through gross negligence. In Turkey Article 456 of the Criminal Code lays down that a person who causes damage to another shall be liable to a prison sentence of between six months and one year; if the victim is a pregnant woman and the damage results in premature birth, the Criminal Code prescribes a sentence of between two and five years' imprisonment.

#### THE LAW

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#### II. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

46. The applicant complained of the authorities' refusal to classify the taking of her unborn child's life as unintentional homicide. She argued that the absence of criminal legislation to prevent and punish such an act breached Article 2 of the Convention, which provides:

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

- (a) in defence of any person from unlawful violence;
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

\* \* \*

#### C. The Court's assessment

74. The applicant complained that she had been unable to secure the conviction of the doctor whose medical negligence had caused her to have to undergo a therapeutic abortion. It has not been disputed that she intended to carry her pregnancy to full term and that her child was in good health. Following the material events, the applicant and her partner lodged a criminal complaint, together with an application to join the proceedings as civil parties, alleging unintentional injury to the applicant and

unintentional homicide of the child she was carrying. The courts held that the prosecution of the offence of unintentional injury to the applicant was statute-barred and, quashing the Court of Appeal's judgment on the second point, the Court of Cassation held that, regard being had to the principle that the criminal law was to be strictly construed, a foetus could not be the victim of unintentional homicide. The central question raised by the application is whether the absence of a criminal remedy within the French legal system to punish the unintentional destruction of a foetus constituted a failure on the part of the State to protect by law the right to life within the meaning of Article 2 of the Convention.

### 1. Existing case-law

75. Unlike Article 4 of the American Convention on Human Rights, which provides that the right to life must be protected "in general, from the moment of conception", Article 2 of the Convention is silent as to the temporal limitations of the right to life and, in particular, does not define "everyone" ("*toute personne*") whose "life" is protected by the Convention. The Court has yet to determine the issue of the "beginning" of "everyone's right to life" within the meaning of this provision and whether the unborn child has such a right.

To date it has been raised solely in connection with laws on abortion. Abortion does not constitute one of the exceptions expressly listed in paragraph 2 of Article 2, but the Commission has expressed the opinion that it is compatible with the first sentence of Article 2 § 1 in the interests of protecting the mother's life and health because "if one assumes that this provision applies at the initial stage of the pregnancy, the abortion is covered by an implied limitation, protecting the life and health of the woman at that stage, of the 'right to life' of the foetus" (see *X v. the United Kingdom*, Commission decision cited above, p. 253).

76. Having initially refused to examine *in abstracto* the compatibility of abortion laws with Article 2 of the Convention (see *X v. Norway*, no. 867/60, Commission decision of 29 May 1961, Collection of Decisions, vol. 6, p. 34, and *X v. Austria*, no. 7045/75, Commission decision of 10 December 1976, DR 7, p. 87), the Commission acknowledged in *Brüggemann and Scheuten* (cited above) that women complaining under Article 8 of the Convention about the Constitutional Court's decision restricting the availability of abortions had standing as victims. It stated on that occasion: "... pregnancy cannot be said to pertain uniquely to the sphere of private life. Whenever a woman is pregnant her private life becomes closely connected with the developing foetus" (*ibid.*, p. 116, § 59). However, the Commission did not find it "necessary to decide, in this context, whether the unborn child is to be considered as 'life' in the sense of Article 2 of the Convention, or whether it could be regarded as an entity which under Article 8 § 2 could justify an interference 'for the protection of others'" (*ibid.*, p. 116, § 60). It expressed the opinion that there had been no violation of Article 8 of the Convention because "not every regulation of the termination of unwanted pregnancies constitutes an interference with the right to respect for the private life of the mother" (*ibid.*, pp. 116-17, § 61), while emphasising: "There is no evidence that it was the intention of the Parties to the Convention to bind themselves in favour of any particular solution" (*ibid.*, pp. 117-18, § 64).

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77. In *X v. the United Kingdom* (cited above), the Commission considered an application by a man complaining that his wife had been allowed to have an abortion on health grounds. While it accepted that the potential father could be regarded as the "victim" of a violation of the right to life, it considered that the term "everyone" in several Articles of the Convention could not apply prenatally, but observed that "such application in a rare case – e.g. under Article 6, paragraph 1 – cannot be excluded" (p. 249, § 7; for such an application in connection with access to a court, see *Reeve v. the United Kingdom*, no. 24844/94, Commission decision of 30 November 1994, DR 79-A, p. 146). The Commission added that the general usage of the term "everyone" ("*toute personne*") and the context in which it was used in Article 2 of the Convention did not include the unborn. As to the term "life" and, in particular, the beginning of life, the Commission noted a "divergence of thinking on the question of where life begins" and added: "While some believe that it starts already with conception, others tend to focus upon the moment of nidation, upon the point that the foetus becomes 'viable', or upon live birth" (*X v. the United Kingdom*, p. 250, § 12).

The Commission went on to examine whether Article 2 was "to be interpreted: as not covering the foetus at all; as recognising a 'right to life' of the foetus with certain implied limitations; or as recognising an absolute 'right to life' of the foetus" (ibid. p. 251, § 17). Although it did not express an opinion on the first two options, it categorically ruled out the third interpretation, having regard to the need to protect the mother's life, which was indissociable from that of the unborn child: "The 'life' of the foetus is intimately connected with, and it cannot be regarded in isolation of, the life of the pregnant woman. If Article 2 were held to cover the foetus and its protection under this Article were, in the absence of any express limitation, seen as absolute, an abortion would have to be considered as prohibited even where the continuance of the pregnancy would involve a serious risk to the life of the pregnant woman. This would mean that the 'unborn life' of the foetus would be regarded as being of a higher value than the life of the pregnant woman" (ibid., p. 252, § 19). The Commission adopted that solution, noting that by 1950 practically all the Contracting Parties had "permitted abortion when necessary to save the life of the mother" and that in the meantime the national law on termination of pregnancy had "shown a tendency towards further liberalisation" (ibid., p. 252, § 20).

78. In *H. v. Norway* (cited above), concerning an abortion carried out on non-medical grounds against the father's wishes, the Commission added that Article 2 required the State not only to refrain from taking a person's life intentionally but also to take appropriate steps to safeguard life (p. 167). It considered that it did not have to decide "whether the foetus may enjoy a certain protection under Article 2, first sentence", but did not exclude the possibility that "in certain circumstances this may be the case notwithstanding that there is in the Contracting States a considerable divergence of views on whether or to what extent Article 2 protects the unborn life" (ibid.). It further noted that in such a delicate area the Contracting States had to have a certain discretion, and concluded that the mother's decision, taken in accordance with Norwegian legislation, had not exceeded that discretion (p. 168).

79. The Court has only rarely had occasion to consider the application of Article 2 to the foetus. In *Open Door and Dublin Well Woman* (cited above), the Irish Government relied on the protection of the life of the unborn child to justify their legislation prohibiting the provision of information concerning abortion facilities abroad. The only

issue that was resolved was whether the restrictions on the freedom to receive and impart the information in question had been necessary in a democratic society, within the meaning of paragraph 2 of Article 10 of the Convention, to pursue the "legitimate aim of the protection of morals of which the protection in Ireland of the right to life of the unborn is one aspect" (pp. 27-28, § 63), since the Court did not consider it relevant to determine "whether a right to abortion is guaranteed under the Convention or whether the foetus is encompassed by the right to life as contained in Article 2" (p. 28, § 66). Recently, in circumstances similar to those in *H. v. Norway* (cited above), where a woman had decided to terminate her pregnancy against the father's wishes, the Court held that it was not required to determine "whether the foetus may qualify for protection under the first sentence of Article 2 as interpreted [in the case-law relating to the positive obligation to protect life]", and continued: "Even supposing that, in certain circumstances, the foetus might be considered to have rights protected by Article 2 of the Convention, ... in the instant case ... [the] pregnancy was terminated in conformity with section 5 of Law no. 194 of 1978" – a law which struck a fair balance between the woman's interests and the need to ensure protection of the foetus (see *Boso*, cited above).

80. It follows from this recapitulation of the case-law that in the circumstances examined to date by the Convention institutions – that is, in the various laws on abortion – the unborn child is not regarded as a "person" directly protected by Article 2 of the Convention and that if the unborn do have a "right" to "life", it is implicitly limited by the mother's rights and interests. The Convention institutions have not, however, ruled out the possibility that in certain circumstances safeguards may be extended to the unborn child. That is what appears to have been contemplated by the Commission in considering that "Article 8 § 1 cannot be interpreted as meaning that pregnancy and its termination are, as a principle, solely a matter of the private life of the mother" (see *Brüggemann and Scheuten*, cited above, pp. 116-17, § 61) and by the Court in the above-mentioned *Boso* decision. It is also clear from an examination of these cases that the issue has always been determined by weighing up various, and sometimes conflicting, rights or freedoms claimed by a woman, a mother or a father in relation to one another or *vis-à-vis* an unborn child.

## 2. Approach in the instant case

81. The special nature of the instant case raises a new issue. The Court is faced with a woman who intended to carry her pregnancy to term and whose unborn child was expected to be viable, at the very least in good health. Her pregnancy had to be terminated as a result of an error by a doctor and she therefore had to have a therapeutic abortion on account of negligence by a third party. The issue is consequently whether, apart from cases where the mother has requested an abortion, harming a foetus should be treated as a criminal offence in the light of Article 2 of the Convention, with a view to protecting the foetus under that Article. This requires a preliminary examination of whether it is advisable for the Court to intervene in the debate as to who is a person and when life begins, in so far as Article 2 provides that the law must protect "everyone's right to life".

82. As is apparent from the above recapitulation of the case-law, the interpretation of Article 2 in this connection has been informed by a clear desire to strike a balance, and the Convention institutions' position in relation to the legal, medical, philosophical,

ethical or religious dimensions of defining the human being has taken into account the various approaches to the matter at national level. This has been reflected in the consideration given to the diversity of views on the point at which life begins, of legal cultures and of national standards of protection, and the State has been left with considerable discretion in the matter, as the opinion of the European Group on Ethics in Science and New Technologies at the European Commission appositely puts it: "the ... Community authorities have to address these ethical questions taking into account the moral and philosophical differences, reflected by the extreme diversity of legal rules applicable to human embryo research ... 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" (see paragraph 40 above).

It follows that 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, notwithstanding an evolutive interpretation of the Convention, a "living instrument which must be interpreted in the light of present-day conditions" (see *Tyrer v. the United Kingdom*, judgment of 25 April 1978, Series A no. 26, pp. 15-16, § 31, and subsequent case-law). The reasons for that conclusion are, firstly, that the issue of such protection has not been resolved within the majority of the Contracting States themselves, in France in particular, where it is the subject of debate (see paragraph 83 below) and, secondly, that there is no European consensus on the scientific and legal definition of the beginning of life (see paragraph 84 below).

83. The Court observes that the French Court of Cassation, in three successive judgments delivered in 1999, 2001 and 2002 (see paragraphs 22 and 29 above), considered that the rule that offences and punishment must be defined by law, which required criminal statutes to be construed strictly, excluded acts causing a fatal injury to a foetus from the scope of Article 221-6 of the Criminal Code, under which unintentional homicide of "another" is an offence. However, if, as a result of unintentional negligence, the mother gives birth to a live child who dies shortly after being born, the person responsible may be convicted of the unintentional homicide of the child (see paragraph 30 above). The first-mentioned approach, which conflicts with that of several courts of appeal (see paragraphs 21 and 50 above), was interpreted as an invitation to the legislature to fill a legal vacuum. That was also the position of the Criminal Court in the instant case: "The court ... cannot create law on an issue which [the legislature has] not yet succeeded in defining." The French parliament attempted such a definition in proposing to create the offence of involuntary termination of pregnancy (see paragraph 32 above), but the bill containing that proposal was lost, on account of the fears and uncertainties that the creation of the offence might arouse as to the determination of when life began, and the disadvantages of the proposal, which were thought to outweigh its advantages (see paragraph 33 above). The Court further notes that alongside the Court of Cassation's repeated rulings that Article 221-6 of the Criminal Code does not apply to foetuses, the French parliament is currently revising the 1994 laws on bioethics, which added provisions to the Criminal Code on the protection of the human embryo (see paragraph 25 above) and required re-examination in the light of scientific and technological progress (see paragraph 34 above). It is clear from this overview that in France the nature and legal status of the embryo and/or foetus are currently not defined



and that the manner in which it is to be protected will be determined by very varied forces within French society.

84. At European level, the Court observes that there is no consensus on the nature and status of the embryo and/or foetus (see paragraphs 39-40 above), although they are beginning to receive some protection in the light of scientific progress and the potential consequences of research into genetic engineering, medically assisted procreation or embryo experimentation. At best, it may be regarded as common ground between States that the embryo/foetus belongs to the human race. The potentiality of that being and its capacity to become a person – enjoying protection under the civil law, moreover, in many States, such as **France**, in the context of inheritance and gifts, and also in the United Kingdom (see paragraph 72 above) – require protection in the name of human dignity, without making it a “person” with the “right to life” for the purposes of Article 2. The Oviedo Convention on Human Rights and Biomedicine, indeed, is careful not to give a definition of the term “everyone”, and its explanatory report indicates that, in the absence of a unanimous agreement on the definition, the member States decided to allow domestic law to provide clarification for the purposes of the application of that Convention (see paragraph 36 above). The same is true of the Additional Protocol on the Prohibition of Cloning Human Beings and the Additional Protocol on Biomedical Research, which do not define the concept of “human being” (see paragraphs 37-38 above). It is worth noting that the Court may be requested under Article 29 of the Oviedo Convention to give advisory opinions on the interpretation of that instrument.

85. Having regard to the foregoing, the Court is convinced that it is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention (“*personne*” in the French text). As to the instant case, it considers it unnecessary to examine whether the abrupt end to the applicant’s pregnancy falls within the scope of Article 2, seeing that, even assuming that that provision was applicable, there was no failure on the part of the respondent State to comply with the requirements relating to the preservation of life in the public-health sphere. With regard to that issue, the Court has considered whether the legal protection afforded the applicant by **France** in respect of the loss of the unborn child she was carrying satisfied the procedural requirements inherent in Article 2 of the Convention.

86. In that connection, it observes that the unborn child’s lack of a clear legal status does not necessarily deprive it of all protection under French law. However, in the circumstances of the present case, the life of the foetus was intimately connected with that of the mother and could be protected through her, especially as there was no conflict between the rights of the mother and the father or of the unborn child and the parents, the loss of the foetus having been caused by the unintentional negligence of a third party.

87. In *Boso*, cited above, the Court said that even supposing that the foetus might be considered to have rights protected by Article 2 of the Convention (see paragraph 79 above), Italian law on the voluntary termination of pregnancy struck a fair balance between the woman’s interests and the need to ensure protection of the unborn child. In the present case, the dispute concerns the involuntary killing of an unborn child against the mother’s wishes, causing her particular suffering. The interests of the mother and the child clearly coincided. The Court must therefore examine, from the standpoint of the effectiveness of existing remedies, the protection which the applicant was afforded in

seeking to establish the liability of the doctor concerned for the loss of her child *in utero* and to obtain compensation for the abortion she had to undergo. The applicant argued that only a criminal remedy would have been capable of satisfying the requirements of Article 2 of the Convention. The Court does not share that view, for the following reasons.

88. The Court reiterates that the first sentence of Article 2, which ranks as one of the most fundamental provisions in the Convention and also enshrines one of the basic values of the democratic societies making up the Council of Europe (see *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, Series A no. 324, pp. 45-46, § 147), requires the State not only to refrain from the “intentional” taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see, for example, *L.C.B. v. the United Kingdom*, judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-III, p. 1403, § 36).

89. Those principles apply in the public-health sphere too. The positive obligations require States to make regulations compelling hospitals, whether private or public, to adopt appropriate measures for the protection of patients’ lives. They also require an effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable (see *Powell v. the United Kingdom* (dec.), no. 45305/99, ECHR 2000-V, and *Calvelli and Ciglio*, cited above, § 49).

90. Although the right to have third parties prosecuted or sentenced for a criminal offence cannot be asserted independently (see *Perez v. France* [GC], no. 47287/99, § 70, ECHR 2004-I), the Court has stated on a number of occasions that an effective judicial system, as required by Article 2, may, and under certain circumstances must, include recourse to the criminal law. However, if the infringement of the right to life or to physical integrity is not caused intentionally, the positive obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case. In the specific sphere of medical negligence, “the obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and for the publication of the decision, to be obtained. Disciplinary measures may also be envisaged” (see *Calvelli and Ciglio*, cited above, § 51; *Lazzarini and Ghiacci v. Italy* (dec.), no. 53749/00, 7 November 2002; and *Mastromatteo v. Italy* [GC], no. 37703/97, § 90, ECHR 2002-VIII).

91. In the instant case, in addition to the criminal proceedings which the applicant instituted against the doctor for unintentionally causing her injury – which, admittedly, were terminated because the offence was covered by an amnesty, a fact that did not give rise to any complaint on her part – she had the possibility of bringing an action for damages against the authorities on account of the doctor’s alleged negligence (see *Kress v. France* [GC], no. 39594/98, §§ 14 et seq., ECHR 2001-VI). Had she done so, the applicant would have been entitled to have an adversarial hearing on her allegations of negligence (see *Powell*, cited above) and to obtain redress for any damage sustained. A claim for compensation in the administrative courts would have had fair prospects of success and the applicant could have obtained damages from the hospital. That is apparent from the findings clearly set out in the expert reports (see paragraph 16 above)

in 1992 – before the action had become statute-barred – concerning the poor organisation of the hospital department in question and the serious negligence on the doctor's part, which nonetheless, in the Court of Appeal's opinion (see paragraph 21 above), did not reflect a total disregard for the most fundamental principles and duties of his profession such as to render him personally liable.

92. The applicant's submission concerning the fact that the action for damages in the administrative courts was statute-barred cannot succeed in the Court's view. In this connection, it refers to its case-law to the effect that the "right to a court", of which the right of access is one aspect, is not absolute; it is subject to limitations permitted by implication, in particular where the conditions of admissibility of an appeal are concerned, since by its very nature it calls for regulation by the State, which enjoys a certain margin of appreciation in this regard (see, among other authorities, *Brualla Gómez de la Torre v. Spain*, judgment of 19 December 1997, *Reports* 1997-VIII, p. 2955, § 33). These legitimate restrictions include the imposition of statutory limitation periods, which, as the Court has held in personal injury cases, "serve several important purposes, namely to ensure legal certainty and finality, protect potential defendants from stale claims which might be difficult to counter and prevent the injustice which might arise if courts were required to decide upon events which took place in the distant past on the basis of evidence which might have become unreliable and incomplete because of the passage of time" (see *Stubbings and Others v. the United Kingdom*, judgment of 22 October 1996, *Reports* 1996-IV, pp. 1502-03, § 51).

93. In the instant case, a four-year limitation period does not in itself seem unduly short, particularly in view of the seriousness of the damage suffered by the applicant and her immediate desire to prosecute the doctor. However, the evidence indicates that the applicant deliberately turned to the criminal courts, apparently without ever being informed of the possibility of applying to the administrative courts. Admittedly, the French parliament recently extended the time allowed to ten years under the Law of 4 March 2002 (see paragraph 28 above). It did so with a view to standardising limitation periods for actions for damages in all courts, whether administrative or ordinary. This enables the general emergence of a system increasingly favourable to victims of medical negligence to be taken into account, an area in which the administrative courts appear capable of striking an appropriate balance between consideration of the damage to be redressed and the excessive "judicialisation" of the responsibilities of the medical profession. The Court does not consider, however, that these new rules can be said to imply that the previous period of four years was too short.

94. In conclusion, the Court considers that in the circumstances of the case an action for damages in the administrative courts could be regarded as an effective remedy that was available to the applicant. Such an action, which she failed to use, would have enabled her to prove the medical negligence she alleged and to obtain full redress for the damage resulting from the doctor's negligence, and there was therefore no need to institute criminal proceedings in the instant case.

95. The Court accordingly concludes that, even assuming that Article 2 was applicable in the instant case (see paragraph 85 above), there has been no violation of Article 2 of the Convention.

**FOR THESE REASONS, THE COURT**

1. *Joins to the merits* unanimously the Government's preliminary objections of the application's incompatibility *ratione materiae* with the provisions of the Convention and of failure to exhaust domestic remedies, and *dismisses* them;
2. *Declares* unanimously the application admissible;
3. *Holds* by fourteen votes to three that there has been no violation of Article 2 of the Convention.

\* \* \*

**SEPARATE OPINION OF JUDGE ROZAKIS  
JOINED BY JUDGES CAFLISCH, FISCHBACH, LORENZEN  
AND THOMASSEN**

\* \* \*

[T]he Court refuses to draw the relevant conclusions, namely that in the present state of development of science, law and morals, both in France and across Europe, the right to life of the unborn child has yet to be secured. Even if one accepts that life begins before birth, that does not automatically and unconditionally confer on this form of human life a right to life equivalent to the corresponding right of a child after its birth. This does not mean that the unborn child does not enjoy any protection by human society, since – as the relevant legislation of European States, and European agreements and relevant documents show – the unborn life is already considered to be worthy of protection. But as I read the relevant legal instruments, this protection, though afforded to a being considered worthy of it, is, as stated above, distinct from that given to a child after birth, and far narrower in scope. It consequently transpires from the present stage of development of the law and morals in Europe that the life of the unborn child, although protected in some of its attributes, cannot be equated to postnatal life, and, therefore, does not enjoy a right in the sense of “a right to life”, as protected by Article 2 of the Convention. Hence, there is a problem of applicability of Article 2 in the circumstances of the case.

Instead of reaching that unavoidable conclusion, as the very reasoning of the judgment dictated, the majority of the Grand Chamber opted for a neutral stance, declaring: “the Court is convinced that it is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention” (see paragraph 85 of the judgment).

\* \* \*

For the reasons explained above, I am unable to agree with the reasoning of the majority and conclude that, as matters presently stand, Article 2 is inapplicable in this case.

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**SEPARATE OPINION OF JUDGE COSTA  
JOINED BY JUDGE TRAJA**

(Translation)

\* \* \*

3. I voted in favour of finding no violation of Article 2, but would have preferred the Court to hold that Article 2 was applicable, even if such a conclusion is not self-evident. As I will attempt to demonstrate, such a decision would perhaps have been clearer with only minimal inconvenience as regards the scope of the judgment.

4. It seems to me, firstly, that it is not the Court's role *as a collegiate body* to consider cases from a primarily ethical or philosophical standpoint (and, in my view, it has successfully avoided this pitfall in this judgment). The Court must endeavour to remain within its own – legal – sphere of competence, although I accept that law does not exist in a vacuum and is not a chemically pure substance detached from moral or societal considerations. Whether or not they choose to express their personal opinions as Article 45 of the Convention entitles (but does not oblige) them to do, individual judges are not, in my opinion, subject to the same constraints. The present case enters into the realm of deep personal convictions and for my part I thought it necessary and perhaps helpful to set out my views. As the reader will have understood, they differ slightly from those of the majority.

5. From the ethical standpoint, the most natural way to attempt to interpret Article 2 of the Convention (“[e]veryone’s right to life shall be protected by law” – “*le droit de toute personne à la vie est protégé par la loi*” in the French text) is to ask what is meant by “everyone” (“*toute personne*”) and when life begins. It is very difficult to obtain unanimity or agreement here, as ethics are too heavily dependent on individual ideology. In France, the National Advisory Committee, which has been doing a remarkable job for the past twenty years and has issued a number of opinions on the human embryo (a term it generally prefers to “foetus” at all stages of development), has not been able to come up with a definitive answer to these questions. This is only to be expected, particularly bearing in mind the Committee’s composition, which President Mitterrand decided at its inception should be pluralist. To say (as the Committee has done since issuing its first opinion in 1984) that “the embryo must be *recognised as a potential* human person” does not solve the problem because a being that is recognised as potential is not necessarily a being and may in fact, by converse implication, not be one. As to life and, therefore, the point at which life begins, everybody has his or her own conception (see the Committee’s fifth opinion, issued in 1985). All this shows is that there perhaps exists a right for a potential person to a potential life; for lawyers, however, there is a world of difference between the potential and the actual.

6. What is true for the ethical bodies of States such as the respondent State is also true internationally. The judgment rightly notes that the Oviedo Convention on Human Rights and Biomedicine (a Council of Europe sponsored instrument signed in 1997) does not define what is meant by “everyone”. Nor does it provide any definition of “human being”, despite the importance it attaches to the dignity, identity, primacy, interests and welfare of human beings. Nor is there any reference to the beginning of life.

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7. Does the present inability of ethics to reach a consensus on what is a person and who is entitled to the right to life prevent the law from defining these terms? I think not. It is the task of lawyers, and in particular judges, especially human rights judges, to identify the *notions* – which may, if necessary, be the autonomous notions the Court has always been prepared to use – that correspond to the words or expressions in the relevant legal instruments (in the Court's case, the Convention and its Protocols). Why should the Court not deal with the terms "everyone" and the "right to life" (which the European Convention on Human Rights does not define) in the same way it has done from its inception with the terms "civil rights and obligations", "criminal charges" and "tribunals", even if we are here concerned with philosophical, not technical, concepts?

8. Indeed, the Court has already embarked upon this course in the sphere of Article 2, at least as regards the right to life, for instance, by imposing positive obligations on States to protect human life, or holding that in exceptional circumstances the use of potentially lethal force by State agents may lead to a finding of a violation of Article 2. Through its case-law, therefore, the Court has broadened the notions of the right to life and unlawful killing, if not the notion of life itself.

9. Conversely, I do not believe that it is possible to take the convenient way out by saying that Mrs Vo, a "person", had a right to life (of her unborn child). It is true that the notion of who constitutes a victim has been enlarged by the case-law: a complaint by a nephew alleging a violation of Article 2 on account of his uncle's murder has thus been declared admissible (see *Yaşa v. Turkey*, judgment of 2 September 1998, *Reports of Judgments and Decisions* 1998-VI). However, in the instant case, the Court is concerned with a pleaded right to life of the unborn child and this type of decision can only apply to the applicant's case if it is accepted that the unborn child itself has a right to life, since, in order to be a victim within the meaning of Article 34 of the Convention, Mrs Vo must also be a victim of a violation that is recognised by the Convention, *quod est demonstrandum*.

10. Indeed, it seems to me that the Commission and the Court have already worked on the assumption that Article 2 is applicable to the unborn child (without, however, affirming that the unborn child *is* a person). In a number of cases they have held that, even if they did not have to decide the question of applicability, there was in any event no violation of Article 2 on the facts, for instance in the case of a termination of pregnancy in accordance with legislation "which struck a fair balance between the woman's interests and the need to ensure protection of the foetus" (see *Boso v. Italy* (dec.), no. 50490/99, ECHR 2002-VII, which is cited in the judgment; but also, in less forthright terms, the Commission's decision of 19 May 1992 in another cited case, *H. v. Norway*, no. 17004/90, *Decisions and Reports* 73). Had Article 2 been considered to be entirely inapplicable, there would have been no point – and this applies to the present case also – in examining the question of foetal protection and the possible violation of Article 2, or in using this reasoning to find that there had been no violation of that provision.

\* \* \*

17. In sum, I see no good legal reason or decisive policy consideration for not applying Article 2 in the present case. On a general level, I believe (as do many senior judicial bodies in Europe) that there is life before birth, within the meaning of Article 2, that the law must therefore protect such life, and that if a national legislature considers that such protection cannot be absolute, then it should only derogate from it, particularly

as regards the voluntary termination of pregnancy, within a regulated framework that limits the scope of the derogation. The actual circumstances of Mrs Vo's case made it all the more appropriate to find that Article 2 was applicable: she was six months' pregnant (compare this – purely for illustration purposes – with the German Federal Constitutional Court's view that life begins after fourteen days' gestation), there was every prospect that the foetus would be born viable and, lastly, the pregnancy was clearly ended by an act of negligence, against the applicant's wishes.

18. I have nothing further to add, since, with minor differences, I agree with what the judgment has to say in finding that there has been no violation of Article 2.

### DISSENTING OPINION OF JUDGE RESS

(Translation)

\* \* \*

3. In order to reach that conclusion, it seems necessary to find out whether Article 2 applies to the unborn child. I am prepared to accept that there may be acceptable differences in the level of protection afforded to an embryo and to a child after birth. Nevertheless, that does not justify the conclusion (see paragraph 85 of the judgment) that it is not possible to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention. All the Court's case-law and the Commission's decisions (see paragraphs 75-80) are based on the "assuming that" argument (*in eventu*). Yet the failure to give a clear answer can no longer be justified by reasons of procedural economy. Nor can the problem of protecting the embryo through the Convention be solved solely through the protection of the mother's life. As this case illustrates, the embryo and the mother, as two separate "human beings", need separate protection.

4. The Vienna Convention on the Law of Treaties (Article 31 § 1) requires treaties to be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objects and purpose. The ordinary meaning can only be established from the text as a whole. Historically, lawyers have understood the notion of "everyone" ("*toute personne*") as including the human being before birth and, above all, the notion of "life" as covering all human life commencing with conception, that is to say from the moment an *independent existence* develops until it ends with death, birth being but a stage in that development.

The structure of Article 2 and, above all, the exceptions set out in paragraph 2 thereof, appear to indicate that persons are only entitled to protection thereunder once they have been born and that it is only after birth that they are regarded as having rights under the Convention. In view of the "aim" of the Convention to provide extended protection, this does not appear to be a conclusive argument. Firstly, a foetus may enjoy protection, especially within the framework of Article 8 § 2 (see *Odièvre v. France* [GC], no. 42326/98, § 45, ECHR 2003-III). In addition, the decisions of the Commission and the Court contain indications that Article 2 is applicable to the unborn child. In all the cases in which that issue has been considered, the Commission and the Court have developed a concept of an implied limitation or of a fair balance between the interests of society and the interests of the individual, that is to say the mother or the unborn child. Admittedly, these concepts were developed in connection with legislation on the voluntary, but not

the involuntary, termination of pregnancy. However, it is clear that they would not have been necessary if the Convention institutions had considered at the outset that Article 2 could not apply to the unborn child. Even though the Commission and the Court have left the question open formally, such a legal structure proves that both institutions were inclined to adopt the ordinary meaning of "human life" and "everyone" rather than the other meaning.

Similarly, the practice of the Contracting States, virtually all of which had constitutional problems with their laws on abortion (voluntary termination of pregnancy), clearly shows that the protection of life also extends in principle to the foetus. Specific laws on voluntary abortion would not have been necessary if the foetus did not have a life to protect and was fully dependent till birth on the unrestricted wishes of the pregnant mother. Nearly all the Contracting States have had problems because, in principle, the protection of life under their constitutional law also extends to the prenatal stage.

5. It is obvious that the premise of the debate on genetic safeguards in a number of recent conventions and the prohibition on the reproductive cloning of "human beings" in the Charter of Fundamental Rights of the European Union (Article 3 § 2, final subparagraph) is that the protection of life extends to the initial phase of human life. The Convention, which was conceived as a living instrument to be interpreted in the light of present-day conditions in society, must take such a development into account in order to confirm the "ordinary meaning", in accordance with Article 32 of the Vienna Convention.

Even if it is assumed that the ordinary meaning of "human life" in Article 2 of the Convention is not entirely clear and can be interpreted in different ways, the obligation to protect human life requires more extensive protection, particularly in view of the techniques available for genetic manipulation and the unlimited production of embryos for various purposes. The manner in which Article 2 is interpreted must evolve in accordance with these developments and constraints and confront the real dangers now facing human life. Any restriction on such a dynamic interpretation must take into account the relationship between the life of a person who has been born and the unborn life, which means that protecting the foetus to the mother's detriment would be unacceptable.

6. The fact that various provisions of the Convention contain guarantees which by their nature cannot extend to the unborn cannot alter that position. If, by their very nature, the scope of such provisions can only extend to natural persons or legal entities, or to persons who have been born or are adults, that does not preclude the conclusion that other provisions such as the first sentence of Article 2 incorporate protection for the lives of human beings in the initial stage of their development.

7. It should be noted that the present case is wholly unrelated to laws on the voluntary termination of pregnancy. That is a separate issue which is fundamentally different from interference, against the mother's wishes, in the life and welfare of her child. The present case concerns wrongdoing by a third party resulting in the loss of a foetus, if not the death of the mother, whereas voluntary abortion is solely concerned with the relationship between the mother and the child and the question of their protection by the State. Although holding that Article 2 applies to human life before birth may have repercussions on the laws regulating the voluntary termination of pregnancy, that is not a reason for saying that Article 2 is not applicable. Quite the opposite.



Furthermore, it is not necessary in the instant case to decide when life begins. It was noted that the 21-week-old foetus was viable, although I believe that the notion of viability cannot limit the States' positive obligation to protect the unborn child against interference and negligence by doctors.

8. There can be no margin of appreciation on the issue of the applicability of Article 2. A margin of appreciation may, in my opinion, exist to determine the measures that should be taken to discharge the positive obligation that arises because Article 2 is applicable, but it is not possible to restrict the applicability of Article 2 by reference to a margin of appreciation. The question of the interpretation or applicability of Article 2 (an absolute right) cannot depend on a margin of appreciation. If Article 2 is applicable, any margin of appreciation will be confined to the effect thereof.

9. Since I consider that Article 2 applies to human beings even before they are born, an interpretation which seems to me to be consistent with the approach of the Charter of Fundamental Rights of the European Union, and since France does not afford sufficient protection to the foetus against the negligent acts of third parties, I find that there has been a violation of Article 2 of the Convention. As regards the specific measures necessary to discharge that positive obligation, that is a matter for the respondent State, which should either take strict disciplinary measures or afford the protection of the criminal law (against unintentional homicide).

**DISSENTING OPINION OF JUDGE MULARONI  
JOINED BY JUDGE STRÁŽNICKÁ**

*(Translation)*

I conclude that, in the light of the loss of the child she was carrying, the legal protection France afforded the applicant did not satisfy the procedural requirements inherent in Article 2 of the Convention.

Obviously, since I do not accept the reasoning that led the majority to hold that there had been no violation of Article 2 on procedural grounds and that it was therefore unnecessary to determine whether Article 2 was applicable, I must explain why I consider that that provision is applicable and has been violated.

\* \* \*

I consider that, as with other Convention provisions, Article 2 must be interpreted in an evolutive manner so that the great dangers currently facing human life can be confronted. This is made necessary by the potential that exists for genetic manipulation and the risk that scientific results will be used for a purpose that undermines the dignity and identity of the human being. The Court has, moreover, often stated that the Convention is a living instrument, to be interpreted in the light of present-day conditions

.....

I therefore find that Article 2 of the Convention is applicable in the present case and has been violated, as the right to life has not been protected by the law of the respondent State.



**International covenant  
on civil and  
political rights**

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HUMAN RIGHTS COMMITTEE  
Eighty-fifth session  
17 October - 3 November 2005

**VIEWS**

**Communication No. 1153/2003**

<u>Submitted by:</u>	K.L. (represented by the organizations DEMUS, CLADEM and Center for Reproductive Law and Policy)
<u>Alleged victim:</u>	The author
<u>State party:</u>	Peru
<u>Date of communication:</u>	13 November 2002 (initial submission)
<u>Document reference:</u>	Special Rapporteur's rule 91 decision, transmitted to the State party on 8 January 2003 (not issued in document form)
<u>Date of adoption of Views:</u>	24 October 2005

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\* Made public by decision of the Human Rights Committee.

*Subject matter:* Refusal to provide medical services to the author in connection with a therapeutic abortion which is not a punishable offence and for which express provision has been made in the law.

*Procedural issues:* Substantiation of the alleged violation — unavailability of effective domestic remedies.

*Substantive issues:* Right to an effective remedy; right to equality between men and women; right to life, right not to be subjected to cruel, inhuman or degrading treatment; right not to be the victim of arbitrary or unlawful interference in one's privacy; right to such measures of protection as are required by the status of a minor and right to equality before the law.

*Articles of the Covenant:* 2, 3, 6, 7, 17, 24 and 26

*Article of the Optional Protocol:* 2

On 24 October 2005 the Human Rights Committee adopted the annexed draft as the Committee's Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1153/2003. The text is appended to the present document.

[ANNEX]

## ANNEX

VIEWS OF THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 5, PARAGRAPH 4,  
OF THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL  
AND POLITICAL RIGHTS

Eighty-fifth session

concerning

**Communication No. 1153/2003\*\***

Submitted by: K.L. (represented by the organizations  
DEMUS, CLADEM and Center for  
Reproductive Law and Policy)

Alleged victim: The author

State party: Peru

Date of communication: 13 November 2002 (initial submission)

The Human Rights Committee, established under article 28 of the International  
Covenant on Civil and Political Rights,

Meeting on 24 October 2005,

Having concluded its consideration of communication No. 1153/2003, submitted on  
behalf of K.L. under the Optional Protocol to the International Covenant on Civil and  
Political Rights,

Having taken into account all written information made available to it by the author  
of the communication and the State party,

Adopts the following:

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\*\* The following members of the Committee participated in the examination of the  
present communication: Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet,  
Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik  
Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael  
Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Mr.  
Roman Wieruszewski.

The text of an individual opinion signed by Committee member Mr. Hipólito  
Solari-Yrigoyen is appended to the present document.

### Views under article 5 paragraph 4 of the Optional Protocol

1. The author of the communication is K.L., born in 1984, who claims to be a victim of a violation by Peru of articles 2, 3, 6, 7, 17, 24 and 26 of the International Covenant on Civil and Political Rights. She is represented by the organizations DEMUS, CLADEM and Center for Reproductive Law and Policy. The Optional Protocol entered into force for Peru on 3 October 1980.

#### Factual background

2.1 The author became pregnant in March 2001, when she was aged 17. On 27 June 2001 she was given a scan at the Archbishop Loayza National Hospital in Lima, part of the Ministry of Health. The scan showed that she was carrying an anencephalic foetus.

2.2 On 3 July 2001, Dr. Ygor Pérez Solf, a gynaecologist and obstetrician in the Archbishop Loayza National Hospital in Lima, informed the author of the foetal abnormality and the risks to her life if the pregnancy continued. Dr. Pérez said that she had two options: to continue the pregnancy or to terminate it. He advised termination by means of uterine curettage. The author decided to terminate the pregnancy, and the necessary clinical studies were carried out, confirming the foetal abnormality.

2.3 On 19 July 2001, when the author reported to the hospital together with her mother for admission preparatory to the operation, Dr. Pérez informed her that she needed to obtain written authorization from the hospital director. Since she was under age, her mother requested the authorization. On 24 July 2001, Dr. Maximiliano Cárdenas Díaz, the hospital director, replied in writing that the termination could not be carried out as to do so would be unlawful, since under article 120 of the Criminal Code, abortion was punishable by a prison term of no more than three months when it was likely that at birth the child would suffer serious physical or mental defects, while under article 119, therapeutic abortion was permitted only when termination of the pregnancy was the only way of saving the life of the pregnant woman or avoiding serious and permanent damage to her health.

2.4 On 16 August 2001, Ms. Amanda Gayoso, a social worker and member of the Peruvian association of social workers, carried out an assessment of the case and concluded that medical intervention to terminate the pregnancy was advisable "since its continuation would only prolong the distress and emotional instability of [K.L.] and her family". However, no intervention took place owing to the refusal of the Health Ministry medical personnel.

2.5 On 20 August 2001, Dr. Marta B. Rondón, a psychiatrist and member of the Peruvian Medical Association, drew up a psychiatric report on the author, concluding that "the so-called principle of the welfare of the unborn child has caused serious harm to the mother, since she has unnecessarily been made to carry to term a pregnancy whose fatal outcome was known in advance, and this has substantially contributed to triggering the symptoms

of depression, with its severe impact on the development of an adolescent and the patient's future mental health".

2.6 On 13 January 2002, three weeks late with respect to the anticipated date of birth, the author gave birth to an anencephalic baby girl, who survived for four days, during which the mother had to breastfeed her. Following her daughter's death, the author fell into a state of deep depression. This was diagnosed by the psychiatrist Marta B. Rondón. The author also states that she suffered from an inflammation of the vulva which required medical treatment.

2.7 The author has submitted to the Committee a statement made by Dr. Annibal Faúdes and Dr. Luis Távora, who are specialists from the association called Center for Reproductive Rights, and who on 17 January 2003 studied the author's clinical dossier and stated that anencephaly is a condition which is fatal to the foetus in all cases. Death immediately follows birth in most cases. It also endangers the mother's life. In their opinion, in refusing to terminate the pregnancy, the medical personnel took a decision which was prejudicial to the author.

2.8 Regarding the exhaustion of domestic remedies, the author claims that this requirement is waived when judicial remedies available domestically are ineffective in the case in question, and she points out that the Committee has laid down on several occasions that the author has no obligation to exhaust a remedy which would prove ineffective. She adds that in Peru there is no administrative remedy which would enable a pregnancy to be terminated on therapeutic grounds, nor any judicial remedy functioning with the speed and efficiency required to enable a woman to require the authorities to guarantee her right to a lawful abortion within the limited period, by virtue of the special circumstances obtaining in such cases. She also states that her financial circumstances and those of her family prevented her from obtaining legal advice.

2.9 The author states that the complaint is not being considered under any other procedure of international settlement.

### **The complaint**

3.1 The author claims a violation of article 2 of the Covenant, since the State party failed to comply with its obligation to guarantee the exercise of a right. The State should have taken steps to respond to the systematic reluctance of the medical community to comply with the legal provision authorizing therapeutic abortion, and its restrictive interpretation thereof. This restrictive interpretation was clear in the author's case, in which a pregnancy involving an anencephalic foetus was considered not to endanger her life and health. The State should have taken steps to ensure that an exception could be made to the rule criminalizing abortion, so that, in cases where the physical and mental health of the mother was at risk, she could undergo an abortion in safety.

3.2 The author claims to have suffered discrimination in breach of article 3 of the Covenant, in the following forms:

(a) In access to the health services, since her different and special needs were ignored because of her sex. In the view of the author, the fact that the State lacked any means to prevent a violation of her right to a legal abortion on therapeutic grounds, which is applicable only to women, together with the arbitrary conduct of the medical personnel, resulted in a discriminatory practice that violated her rights — a breach which was all the more serious since the victim was a minor.

(b) Discrimination in the exercise of her rights, since although the author was entitled to a therapeutic abortion, none was carried out because of social attitudes and prejudices, thus preventing her from enjoying her right to life, to health, to privacy and to freedom from cruel, inhuman and degrading treatment on an equal footing with men.

(c) Discrimination in access to the courts, bearing in mind the prejudices of officials in the health system and the judicial system where women are concerned and the lack of appropriate legal means of enforcing respect for the right to obtain a legal abortion when the temporal and other conditions laid down in the law are met.

3.3 The author claims a violation of article 6 of the Covenant. She states that her experience had a serious impact on her mental health from which she has still not recovered. She points out that the Committee has stated that the right to life cannot be interpreted in a restrictive manner, but requires States to take positive steps to protect it, including the measures necessary to ensure that women do not resort to clandestine abortions which endanger their life and health, especially in the case of poor women. She adds that the Committee has viewed lack of access for women to reproductive health services, including abortion, as a violation of women's right to life, and that this has been reiterated by other committees such as the Committee on the Elimination of Discrimination against Women and the Committee on Economic, Social and Cultural Rights. The author claims that in the present case, the violation of the right to life lay in the fact that Peru did not take steps to ensure that the author secured a safe termination of pregnancy on the grounds that the foetus was not viable. She states that the refusal to provide a legal abortion service left her with two options which posed an equal risk to her health and safety: to seek clandestine (and hence highly risky) abortion services, or to continue a dangerous and traumatic pregnancy which put her life at risk.

3.4 The author claims a violation of article 7 of the Covenant. The fact that she was obliged to continue with the pregnancy amounts to cruel and inhuman treatment, in her view, since she had to endure the distress of seeing her daughter's marked deformities and knowing that her life expectancy was short. She states that this was an awful experience which added further pain and distress to that which she had already borne during the period when she was obliged to continue with the pregnancy, since she was subjected to an "extended funeral" for her daughter, and sank into a deep depression after her death.

3.5 The author points out that the Committee has stated that the prohibition in article 7 of the Covenant relates not only to physical pain but also to mental suffering, and that this

protection is particularly important in the case of minors.<sup>1</sup> She points out that, after considering Peru's report in 1996, the Committee expressed the view that restrictive provisions on abortion subjected women to inhumane treatment, in violation of article 7 of the Covenant, and that in 2000, the Committee reminded the State party that the criminalization of abortion was incompatible with articles 3, 6 and 7 of the Covenant.<sup>2</sup>

3.6 The author claims a violation of article 17, arguing that this article protects women from interference in decisions which affect their bodies and their lives, and offers them the opportunity to exercise their right to make independent decisions on their reproductive lives. The author points out that the State party interfered arbitrarily in her private life, taking on her behalf a decision relating to her life and reproductive health which obliged her to carry a pregnancy to term, and thereby breaching her right to privacy. She adds that the service was available, and that if it had not been for the interference of State officials in her decision, which enjoyed the protection of the law, she would have been able to terminate the pregnancy. She reminds the Committee that children and young people enjoy special protection by virtue of their status as minors, as recognized in article 24 of the Covenant and in the Convention on the Rights of the Child.

3.7 The author claims a violation of article 24, since she did not receive the special care she needed from the health authorities, as an adolescent girl. Neither her welfare nor her state of health were objectives pursued by the authorities which refused to carry out an abortion on her. The author points out that the Committee laid down in its General Comment No. 17, relating to article 24, that the State should also adopt economic, social and cultural measures to safeguard this right. For example, every possible economic and social measure should be taken to reduce infant mortality and to prevent children from being subjected to acts of violence or cruel or inhuman treatment, among other possible violations.

3.8 The author claims a violation of article 26, arguing that the Peruvian authorities' position that hers was not a case of therapeutic abortion, which is not punishable under the Criminal Code, left her in an unprotected state incompatible with the assurance of the protection of the law set out in article 26. The guarantee of the equal protection of the law implies that special protection will be given to certain categories of situation in which specific treatment is required. In the present case, as a result of a highly restrictive interpretation of the criminal law, the health authorities failed to protect the author and neglected the special protection which her situation required.

3.9 The author claims that the administration of the health centre left her without protection as a result of a restrictive interpretation of article 119 of the Criminal Code. She adds that the text of the law contains nothing to indicate that the exception relating to therapeutic abortion should apply only in cases of danger to physical health. But the

<sup>1</sup> Human Rights Committee, General Comment No. 20, 10 March 1992 (HRI/GEN/1/Rev.7), paras. 2 and 5.

<sup>2</sup> Concluding observations of the Human Rights Committee: Peru, 15 November 2000 (CCPR/CO/70/PER), para. 20.



hospital authorities had drawn a distinction and divided up the concept of health, and had thus violated the legal principle that no distinction should be drawn where there is none in the law. She points out that health is "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity", so that when the Peruvian Criminal Code refers to health, it does so in the broad and all-embracing sense, protecting both the physical and the mental health of the mother.

#### **State party's failure to cooperate under article 4 of the Optional Protocol**

4. On 23 July 2003, 15 March 2004 and 25 October 2004, reminders were sent to the State party inviting it to submit information to the Committee concerning the admissibility and the merits of the complaint. The Committee notes that no such information has been received. It regrets that the State party has not supplied any information concerning the admissibility or the merits of the author's allegations. It points out that it is implicit in the Optional Protocol that States parties make available to the Committee all information at their disposal. In the absence of a reply from the State party, due weight must be given to the author's allegations, to the extent that these have been properly substantiated.<sup>3</sup>

#### **Issues and proceedings before the Committee**

##### **Consideration of admissibility**

5.1 In accordance with rule 93 of the rules of procedure, before examining the claims made in a communication, the Human Rights Committee must decide whether the communication is admissible under the Optional Protocol to the Covenant.

5.2 The Committee notes that, according to the author, the same matter has not been submitted under any other procedure of international investigation. The Committee also takes note of her arguments to the effect that in Peru there is no administrative remedy which would enable a pregnancy to be terminated on therapeutic grounds, nor any judicial remedy functioning with the speed and efficiency required to enable a woman to require the authorities to guarantee her right to a lawful abortion within the limited period, by virtue of the special circumstances obtaining in such cases. The Committee recalls its jurisprudence to the effect that a remedy which had no chance of being successful could not count as such and did not need to be exhausted for the purposes of the Optional Protocol.<sup>4</sup> In the absence of a reply from the State party, due weight must be given to the author's allegations. Consequently, the Committee considers that the requirements of article 5, paragraph 2 (a) and (b), have been met.

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<sup>3</sup> See communication No. 760/1997, *J. G. A. Diergaart et al. v. Namibia*; Views adopted on 25 July 2000, para. 10.2, and Communication No. 1117/2002, *Saodat Khomidova v. Tajikistan*; Views adopted on 29 July 2004, para. 4.

<sup>4</sup> See Communication No. 701/1996, *Cesáreo Gómez Vázquez v. Spain*; Views adopted on 20 July 2000, para. 6.2.

5.3 The Committee considers that the author's claims of alleged violations of articles 3 and 26 of the Covenant have not been properly substantiated, since the author has not placed before the Committee any evidence relating to the events which might confirm any type of discrimination under the article in question. Consequently, the part of the complaint referring to articles 3 and 26 is declared inadmissible under article 2 of the Optional Protocol.

5.4 The Committee notes that the author has claimed a violation of article 2 of the Covenant. The Committee recalls its constant jurisprudence to the effect that article 2 of the Covenant, which lays down general obligations for States, is accessory in nature and cannot be invoked in isolation by individuals under the Optional Protocol.<sup>5</sup> Consequently, the complaint under article 2 will be analysed together with the author's other allegations.

5.5 Concerning the allegations relating to articles 6, 7, 17 and 24 of the Covenant, the Committee considers that they are adequately substantiated for purposes of admissibility, and that they appear to raise issues in connection with those provisions. Consequently, it turns to consideration of the substance of the complaint.

#### **Consideration of the merits**

6.1 The Human Rights Committee has considered the present complaint in the light of all the information received, in accordance with article 5, paragraph 1, of the Optional Protocol.

6.2 The Committee notes that the author attached a doctor's statement confirming that her pregnancy exposed her to a life-threatening risk. She also suffered severe psychological consequences exacerbated by her status as a minor, as the psychiatric report of 20 August 2001 confirmed. The Committee notes that the State party has not provided any evidence to challenge the above. It notes that the authorities were aware of the risk to the author's life, since a gynaecologist and obstetrician in the same hospital had advised her to terminate the pregnancy, with the operation to be carried out in the same hospital. The subsequent refusal of the competent medical authorities to provide the service may have endangered the author's life. The author states that no effective remedy was available to her to oppose that decision. In the absence of any information from the State party, due weight must be given to the author's claims.

6.3 The author also claims that, owing to the refusal of the medical authorities to carry out the therapeutic abortion, she had to endure the distress of seeing her daughter's marked deformities and knowing that she would die very soon. This was an experience which added further pain and distress to that which she had already borne during the period when she was obliged to continue with the pregnancy. The author attaches a psychiatric certificate dated 20 August 2001, which confirms the state of deep depression into which she fell and the severe consequences this caused, taking her age into account. The

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<sup>5</sup> See Communication No. 802/1998, *Andrew Rogerson v. Australia*; Views adopted on 3 April 2002, para. 7.9.

Committee notes that this situation could have been foreseen, since a hospital doctor had diagnosed anencephaly in the foetus, yet the hospital director refused termination. The omission on the part of the State in not enabling the author to benefit from a therapeutic abortion was, in the Committee's view, the cause of the suffering she experienced. The Committee has pointed out in its General Comment No. 20 that the right set out in article 7 of the Covenant relates not only to physical pain but also to mental suffering, and that the protection is particularly important in the case of minors.<sup>6</sup> In the absence of any information from the State party in this regard, due weight must be given to the author's complaints. Consequently, the Committee considers that the facts before it reveal a violation of article 7 of the Covenant. In the light of this finding the Committee does not consider it necessary in the circumstances to make a finding on article 6 of the Covenant.

6.4 The author states that the State party, in denying her the opportunity to secure medical intervention to terminate the pregnancy, interfered arbitrarily in her private life. The Committee notes that a public-sector doctor told the author that she could either continue with the pregnancy or terminate it in accordance with domestic legislation allowing abortions in cases of risk to the life of the mother. In the absence of any information from the State party, due weight must be given to the author's claim that at the time of this information, the conditions for a lawful abortion as set out in the law were present. In the circumstances of the case, the refusal to act in accordance with the author's decision to terminate her pregnancy was not justified and amounted to a violation of article 17 of the Covenant.

6.5 The author claims a violation of article 24 of the Covenant, since she did not receive from the State party the special care she needed as a minor. The Committee notes the special vulnerability of the author as a minor girl. It further notes that, in the absence of any information from the State party, due weight must be given to the author's claim that she did not receive, during and after her pregnancy, the medical and psychological support necessary in the specific circumstances of her case. Consequently, the Committee considers that the facts before it reveal a violation of article 24 of the Covenant.

6.6 The author claims to have been a victim of violation of articles 2 of the Covenant on the grounds that she lacked an adequate legal remedy. In the absence of information from the State party, the Committee considers that due weight must be given to the author's claims as regards lack of an adequate legal remedy and consequently concludes that the facts before it also reveal a violation of article 2 in conjunction with articles 7, 17 and 24.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the Covenant, is of the view that the facts before it disclose a violation of articles 2, 7, 17 and 24 of the Covenant.

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is required to furnish the author with an effective remedy, including compensation. The State

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<sup>6</sup> Human Rights Committee, General Comment No. 20: Prohibition of torture and other cruel, inhuman or degrading treatment or punishment (art. 7), 10 March 1992 (HRI/GEN/1/Rev.7, paras. 2 and 5).

party has an obligation to take steps to ensure that similar violations do not occur in the future.

9. Bearing in mind that, as a party to the Optional Protocol, the State party recognizes the competence of the Committee to determine whether there has been a violation of the Covenant, and that, under article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to offer an effective and enforceable remedy when a violation is found to have occurred, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the present Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

APPENDIX

DISSENTING OPINION BY COMMITTEE MEMBER  
HIPÓLITO SOLARI-YRIGOYEN

My dissenting opinion on this communication - the majority not considering that article 6 of the Covenant was violated - is based on the following grounds:

**Consideration of the merits**

The Committee notes that when the author was a minor, she and her mother were informed by the obstetric gynaecologist at Lima National Hospital, whom they had consulted because of the author's pregnancy, that the foetus suffered from anencephaly which would inevitably cause its death at birth. The doctor told the author that she had two options: (1) continue the pregnancy, which would endanger her own life; or (2) terminate the pregnancy by a therapeutic abortion. He recommended the second option. Given this conclusive advice from the specialist who had told her of the risks to her life if the pregnancy continued, the author decided to follow his professional advice and accepted the second option. As a result, all the clinical tests needed to confirm the doctor's statements about the risks to the mother's life of continuing the pregnancy and the inevitable death of the foetus at birth were performed.

The author substantiated with medical and psychological certificates all her claims about the fatal risk she ran if the pregnancy continued. In spite of the risk, the director of the public hospital would not authorize the therapeutic abortion which the law of the State party allowed, arguing that it would not be a therapeutic abortion but rather a voluntary and unfounded abortion punishable under the Criminal Code. The hospital director did not supply any legal ruling in support of his pronouncements outside his professional field or challenging the medical attestations to the serious risk to the mother's life. Furthermore, the Committee may note that the State party has not submitted any evidence contradicting the statements and evidence supplied by the author. Refusing a therapeutic abortion not only endangered the author's life but had grave consequences which the author has also substantiated to the Committee by means of valid supporting documents.

It is not only taking a person's life that violates article 6 of the Covenant but also placing a person's life in grave danger, as in this case. Consequently, I consider that the facts in the present case reveal a violation of article 6 of the Covenant.

[Signed]: Hipólito Solari-Yrigoyen

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

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(Cite as: 127 S.Ct. 1610)

*Edited – Footnotes may differ from original*

Supreme Court of the United States  
Alberto R. GONZALES, Attorney General,  
Petitioner,  
v.  
Leroy CARHART et al.  
Alberto R. Gonzales, Attorney General, Petitioner,  
v.  
Planned Parenthood Federation of America, Inc., et  
al.  
Nos. 05-380, 05-1382.

Argued Nov. 8, 2006.  
Decided April 18, 2007.

413 F.3d 791, 435 F.3d 1163, reversed.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, THOMAS, and ALITO, JJ., joined. THOMAS, J., filed a concurring opinion, in which SCALIA, J., joined. GINSBURG, J., filed a dissenting opinion, in which STEVENS, SOUTER, and BREYER, JJ., joined.

Justice KENNEDY delivered the opinion of the Court.

These cases require us to consider the validity of the Partial-Birth Abortion Ban Act of 2003(Act), 18 U.S.C. § 1531 (2000 ed., Supp. IV), a federal statute regulating abortion procedures. . . . We conclude the Act should be sustained against the objections lodged by the broad, facial attack brought against it.

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I

A

The Act proscribes a particular manner of ending fetal life, so it is necessary here, as it was in Stenberg, to discuss abortion procedures in some detail. . . . We refer to the District Courts' exhaustive opinions in our own discussion of abortion procedures.

Abortion methods vary depending to some extent on the preferences of the physician and, of course, on the term of the pregnancy and the resulting stage of the unborn child's development. Between 85 and 90 percent of the approximately 1.3 million abortions

performed each year in the United States take place in the first three months of pregnancy, which is to say in the first trimester. . . . The most common first-trimester abortion method is vacuum aspiration (otherwise known as suction curettage) in which the physician vacuums out the embryonic tissue. Early in this trimester an alternative is to use medication, such as mifepristone (commonly known as RU-486), to terminate the pregnancy. . . . The Act does not regulate these procedures.

Of the remaining abortions that take place each year, most occur in the second trimester. The surgical procedure referred to as "dilation and evacuation" or "D & E" is the usual abortion method in this trimester. . . . Although individual techniques for performing D & E differ, the general steps are the same.

A doctor must first dilate the cervix at least to the extent needed to insert surgical instruments into the uterus and to maneuver them to evacuate the fetus. . . . The steps taken to cause dilation differ by physician and gestational age of the fetus. . . . A doctor often begins the dilation process by inserting osmotic dilators, such as laminaria (sticks of seaweed), into the cervix. The dilators can be used in combination with drugs, such as misoprostol, that increase dilation. The resulting amount of dilation is not uniform, and a doctor does not know in advance how an individual patient will respond. In general the longer dilators remain in the cervix, the more it will dilate. Yet the length of time doctors employ osmotic dilators varies. Some may keep dilators in the cervix for two days, while others use dilators for a day or less. . . .

After sufficient dilation the surgical operation can commence. The woman is placed under general anesthesia or conscious sedation. The doctor, often guided by ultrasound, inserts grasping forceps through the woman's cervix and into the uterus to grab the fetus. The doctor grips a fetal part with the forceps and pulls it back through the cervix and vagina, continuing to pull even after meeting resistance from the cervix. The friction causes the fetus to tear apart. For example, a leg might be ripped off the fetus as it is pulled through the cervix and out of the woman. The process of evacuating the fetus piece by piece continues until it has been completely removed. A doctor may make 10 to 15 passes with the forceps to evacuate the fetus in its entirety,

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though sometimes removal is completed with fewer passes. Once the fetus has been evacuated, the placenta and any remaining fetal material are suctioned or scraped out of the uterus. The doctor examines the different parts to ensure the entire fetal body has been removed. . .

Some doctors, especially later in the second trimester, may kill the fetus a day or two before performing the surgical evacuation. They inject digoxin or potassium chloride into the fetus, the umbilical cord, or the amniotic fluid. Fetal demise may cause contractions and make greater dilation possible. Once dead, moreover, the fetus' body will soften, and its removal will be easier. Other doctors refrain from injecting chemical agents, believing it adds risk with little or no medical benefit. . .

The abortion procedure that was the impetus for the numerous bans on "partial-birth abortion," including the Act, is a variation of this standard D & E. . . . The medical community has not reached unanimity on the appropriate name for this D & E variation. It has been referred to as "intact D & E," "dilation and extraction" (D & X), and "intact D & X." . . . For discussion purposes this D & E variation will be referred to as intact D & E. The main difference between the two procedures is that in intact D & E a doctor extracts the fetus intact or largely intact with only a few passes. There are no comprehensive statistics indicating what percentage of all D & Es are performed in this manner.

Intact D & E, like regular D & E, begins with dilation of the cervix. Sufficient dilation is essential for the procedure. To achieve intact extraction some doctors thus may attempt to dilate the cervix to a greater degree. This approach has been called "serial" dilation. . . . Doctors who attempt at the outset to perform intact D & E may dilate for two full days or use up to 25 osmotic dilators. . .

In an intact D & E procedure the doctor extracts the fetus in a way conducive to pulling out its entire body, instead of ripping it apart. . .

Rotating the fetus as it is being pulled decreases the odds of dismemberment. . . . A doctor also "may use forceps to grasp a fetal part, pull it down, and re-grasp the fetus at a higher level-sometimes using both his hand and a forceps-to exert traction to retrieve the fetus intact until the head is lodged in the [cervix]." Carhart, 331 F.Supp.2d, at 886-887.

Intact D & E gained public notoriety when, in 1992, Dr. Martin Haskell gave a presentation describing his method of performing the operation. . . . In the usual intact D & E the fetus' head lodges in the cervix, and dilation is insufficient to allow it to pass. . . . Haskell explained the next step as follows:

" 'At this point, the right-handed surgeon slides the fingers of the left [hand] along the back of the fetus and "hooks" the shoulders of the fetus with the index and ring fingers (palm down).

" 'While maintaining this tension, lifting the cervix and applying traction to the shoulders with the fingers of the left hand, the surgeon takes a pair of blunt curved Metzenbaum scissors in the right hand. He carefully advances the tip, curved down, along the spine and under his middle finger until he feels it contact the base of the skull under the tip of his middle finger.

" '[T]he surgeon then forces the scissors into the base of the skull or into the foramen magnum. Having safely entered the skull, he spreads the scissors to enlarge the opening.

" 'The surgeon removes the scissors and introduces a suction catheter into this hole and evacuates the skull contents. With the catheter still in place, he applies traction to the fetus, removing it completely from the patient.' " H.R.Rep. No. 108-58, p. 3 (2003).

\* \* \*

Dr. Haskell's approach is not the only method of killing the fetus once its head lodges in the cervix, and "the process has evolved" since his presentation. Planned Parenthood, 320 F.Supp.2d, at 965. Another doctor, for example, squeezes the skull after it has been pierced "so that enough brain tissue exudes to allow the head to pass through." App. in No. 05-380, at 41; see also Carhart, supra, at 866-867, 874. Still other physicians reach into the cervix with their forceps and crush the fetus' skull. Carhart, supra, at 858, 881. Others continue to pull the fetus out of the woman until it disarticulates at the neck, in effect decapitating it. These doctors then grasp the head with forceps, crush it, and remove it. . .

Some doctors performing an intact D & E attempt to remove the fetus without collapsing the skull. . . .

D & E and intact D & E are not the only second-trimester abortion methods. Doctors also may abort a fetus through medical induction. The doctor medicates the woman to induce labor, and contractions occur to deliver the fetus. Induction, which unlike D & E should occur in a hospital, can

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last as little as 6 hours but can take longer than 48. It accounts for about five percent of second-trimester abortions before 20 weeks of gestation and 15 percent of those after 20 weeks. Doctors turn to two other methods of second-trimester abortion, hysterotomy and hysterectomy, only in emergency situations because they carry increased risk of complications. In a hysterotomy, as in a cesarean section, the doctor removes the fetus by making an incision through the abdomen and uterine wall to gain access to the uterine cavity. A hysterectomy requires the removal of the entire uterus. These two procedures represent about .07% of second-trimester abortions. . .

\* \* \*

## II

. . . Whatever one's views concerning the Casey joint opinion, it is evident a premise central to its conclusion—that the government has a legitimate and substantial interest in preserving and promoting fetal life—would be repudiated were the Court now to affirm the judgments of the Courts of Appeals.

[1] Casey involved a challenge to Roe v. Wade, 410 U.S. 113 (1973). The opinion contains this summary: "It must be stated at the outset and with clarity that Roe's essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another; and we adhere to each." 505 U.S., at 846 (opinion of the Court).

Though all three holdings are implicated in the instant cases, it is the third that requires the most extended discussion; for we must determine whether the Act furthers the legitimate interest of the Government in protecting the life of the fetus that may become a child.

\* \* \*

We assume the following principles for the purposes of this opinion. Before viability, a State "may not prohibit any woman from making the ultimate decision to terminate her pregnancy." 505 U.S., at 879 (plurality opinion). It also may not impose upon this right an undue burden, which exists if a regulation's "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." Id., at 878 On the other hand, "[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose." Id., at 877. Casey, in short, struck a balance. The balance was central to its holding. We now apply its standard to the cases at bar.

\* \* \*

## IV

. . . The question is whether the Act . . . imposes a substantial obstacle to late-term, but previability, abortions . . .

### A

. . . A description of the prohibited abortion procedure demonstrates the rationale for the congressional enactment. The Act proscribes a method of abortion in which a fetus is killed just inches before completion of the birth process. Congress stated as follows: "Implicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life." . . . The Act expresses respect for the dignity of human life.

Congress was concerned, furthermore, with the effects on the medical community and on its reputation caused by the practice of partial-birth abortion. The findings in the Act explain: "Partial-birth abortion . . . confuses the medical, legal, and ethical duties of physicians to preserve and promote life, as the physician acts directly against the physical life of a child, whom he or she had just delivered, all but the head, out of the womb, in order to end that life." Congressional Findings (14)(J), ibid.



\* \* \*

Casey reaffirmed these governmental objectives. The government may use its voice and its regulatory authority to show its profound respect for the life within the woman. A central premise of the opinion was that the Court's precedents after Roe had "undervalue[d] the State's interest in potential life." 505 U.S., at 873 (plurality opinion); see also id., at 871. . . . [The premise] that the State, from the inception of the pregnancy, maintains its own regulatory interest in protecting the life of the fetus that may become a child, cannot be set at naught by interpreting Casey's requirement of a health exception so it becomes tantamount to allowing a doctor to choose the abortion method he or she might prefer. Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.

The Act's ban on abortions that involve partial delivery of a living fetus furthers the Government's objectives. No one would dispute that, for many, D & E is a procedure itself laden with the power to devalue human life. Congress could nonetheless conclude that the type of abortion proscribed by the Act requires specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition. Congress determined that the abortion methods it proscribed had a "disturbing similarity to the killing of a newborn infant" . . . and thus it was concerned with "draw[ing] a bright line that clearly distinguishes abortion and infanticide." . . . The Court has in the past confirmed the validity of drawing boundaries to prevent certain practices that extinguish life and are close to actions that are condemned. Glucksberg found reasonable the State's "fear that permitting assisted suicide will start it down the path to voluntary and perhaps even involuntary euthanasia." 521 U.S. at 732-35 & n. 23.

Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral decision. Casey, supra, at 852-853 (opinion of the Court). While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained.

See Brief for Sandra Cano et al. as *Amici Curiae* in No. 05-380, pp. 22-24. Severe depression and loss of esteem can follow. See *ibid.*

In a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details of the means that will be used, confining themselves to the required statement of risks the procedure entails. From one standpoint this ought not to be surprising. Any number of patients facing imminent surgical procedures would prefer not to hear all details, lest the usual anxiety preceding invasive medical procedures become the more intense. This is likely the case with the abortion procedures here in issue. See, e.g., Nat. Abortion Federation, 330 F.Supp.2d, at 466, n. 22 ("Most of [the plaintiffs'] experts acknowledged that they do not describe to their patients what [the D & E and intact D & E] procedures entail in clear and precise terms"); see also id., at 479.

It is, however, precisely this lack of information concerning the way in which the fetus will be killed that is of legitimate concern to the State. Casey, supra, at 873 (plurality opinion) ("States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning"). The State has an interest in ensuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.

It is a reasonable inference that a necessary effect of the regulation and the knowledge it conveys will be to encourage some women to carry the infant to full term, thus reducing the absolute number of late-term abortions. The medical profession, furthermore, may find different and less shocking methods to abort the fetus in the second trimester, thereby accommodating legislative demand. The State's interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion.

It is objected that the standard D & E is in some respects as brutal, if not more, than the intact D & E, so that the legislation accomplishes little. What we have already said, however, shows ample

justification for the regulation. Partial-birth abortion, as defined by the Act, differs from a standard D & E because the former occurs when the fetus is partially outside the mother to the point of one of the Act's anatomical landmarks. It was reasonable for Congress to think that partial-birth abortion, more than standard D & E, "undermines the public's perception of the appropriate role of a physician during the delivery process, and perverts a process during which life is brought into the world." Congressional Findings (14)(K), in notes following 18 U.S.C. § 1531 (2000 ed., Supp. IV), p. 769. There would be a flaw in this Court's logic, and an irony in its jurisprudence, were we first to conclude a ban on both D & E and intact D & E was overbroad and then to say it is irrational to ban only intact D & E because that does not proscribe both procedures. In sum, we reject the contention that the congressional purpose of the Act was "to place a substantial obstacle in the path of a woman seeking an abortion." 505 U.S., at 878 (plurality opinion).

\* \* \*

Justice GINSBURG, with whom Justice STEVENS, Justice SOUTER, and Justice BREYER join, dissenting.

... Of signal importance here, the Casey Court stated with unmistakable clarity that state regulation of access to abortion procedures, even after viability, must protect "the health of the woman."

Seven years ago, in Stenberg v. Carhart, 530 U.S. 914 (2000), the Court invalidated a Nebraska statute criminalizing the performance of a medical procedure that, in the political arena, has been dubbed "partial-birth abortion." <sup>FNI</sup> With fidelity to the Roe-Casey line of precedent, the Court held the Nebraska statute unconstitutional in part because it lacked the requisite protection for the preservation of a woman's health. Stenberg, 530 U.S., at 930; cf. Ayotte v. Planned Parenthood of Northern New Eng., 546 U.S. 320, 327 (2006).

<sup>FNI</sup> The term "partial-birth abortion" is neither recognized in the medical literature nor used by physicians who perform second-trimester abortions. . . . The medical community refers to the procedure as either dilation & extraction (D & X) or intact dilation and evacuation (intact D & E). . . .

Today's decision is alarming. It refuses to take Casey and Stenberg seriously. It tolerates, indeed applauds, federal intervention to ban nationwide a procedure found necessary and proper in certain cases by the American College of Obstetricians and Gynecologists (ACOG). It blurs the line, firmly drawn in Casey between previability and postviability abortions. And, for the first time since Roe, the Court blesses a prohibition with no exception safeguarding a woman's health.

\* \* \*

I

A

As Casey comprehended, at stake in cases challenging abortion restrictions is a woman's "control over her [own] destiny." 505 U.S., at 869 (plurality opinion). See also id., at 852 (majority opinion). "There was a time, not so long ago," when women were "regarded as the center of home and family life, with attendant special responsibilities that precluded full and independent legal status under the Constitution." Id., at 896-897 (quoting Hoyt v. Florida, 368 U.S. 57, 62 (1961)). Those views, this Court made clear in Casey, "are no longer consistent with our understanding of the family, the individual, or the Constitution." 505 U.S., at 897. Women, it is now acknowledged, have the talent, capacity, and right "to participate equally in the economic and social life of the Nation." Id., at 856. Their ability to realize their full potential, the Court recognized, is intimately connected to "their ability to control their reproductive lives." Ibid. Thus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature. . . .

In keeping with this comprehension of the right to reproductive choice, the Court has consistently required that laws regulating abortion, at any stage of pregnancy and in all cases, safeguard a woman's health. . . .

We have thus ruled that a State must avoid subjecting women to health risks not only where the pregnancy itself creates danger, but also where state regulation forces women to resort to less safe methods of abortion. . . . Indeed, we have applied the rule that abortion regulation must safeguard a woman's health

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to the particular procedure at issue here—intact dilation and evacuation (D & E).

In *Stenberg*, we expressly held that a statute banning intact D & E was unconstitutional in part because it lacked a health exception. 530 U.S., at 930, 937. We noted that there existed a “division of medical opinion” about the relative safety of intact D & E, *id.*, at 937, but we made clear that as long as “substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women’s health,” a health exception is required, *id.*, at 938.

\* \* \*

## B

In 2003, a few years after our ruling in *Stenberg*, Congress passed the Partial-Birth Abortion Ban Act—without an exception for women’s health. See 18 U.S.C. § 1531(a) (2000 ed., Supp. IV). The congressional findings on which the Partial-Birth Abortion Ban Act rests do not withstand inspection, as the lower courts have determined and this Court is obliged to concede. . . .

Many of the Act’s recitations are incorrect. . . For example, Congress determined that no medical schools provide instruction on intact D & E. . . . But in fact, numerous leading medical schools teach the procedure. . . .

More important, Congress claimed there was a medical consensus that the banned procedure is never necessary. . . . But the evidence “very clearly demonstrate[d] the opposite.” *Planned Parenthood*, 320 F.Supp.2d, at 1025. See also *Carhart*, 331 F.Supp.2d, at 1008-1009. . . .

Similarly, Congress found that “[t]here is no credible medical evidence that partial-birth abortions are safe or are safer than other abortion procedures.” . . . But the congressional record includes letters from numerous individual physicians stating that pregnant women’s health would be jeopardized under the Act, as well as statements from nine professional associations, including ACOG, the American Public Health Association, and the California Medical Association, attesting that intact D & E carries meaningful safety advantages over other methods. . . . No comparable medical groups supported the ban. In fact, “all of the government’s own witnesses disagreed with many of the specific congressional

findings.” *Id.*, at 1024.

## C

In contrast to Congress, the District Courts made findings after full trials at which all parties had the opportunity to present their best evidence. The courts had the benefit of “much more extensive medical and scientific evidence concerning the safety and necessity of intact D & Es.” . . .

During the District Court trials, “numerous” “extraordinarily accomplished” and “very experienced” medical experts explained that, in certain circumstances and for certain women, intact D & E is safer than alternative procedures and necessary to protect women’s health. . . .

\* \* \*

. . . The trial courts concluded, in contrast to Congress’ findings, that “significant medical authority supports the proposition that in some circumstances, [intact D & E] is the safest procedure.” . . .

## II

### A

The Court offers flimsy and transparent justifications for upholding a nationwide ban on intact D & E sans any exception to safeguard a women’s health. Today’s ruling, the Court declares, advances “a premise central to [*Casey’s*] conclusion”—i.e., the Government’s “legitimate and substantial interest in preserving and promoting fetal life.” . . . But the Act scarcely furthers that interest: The law saves not a single fetus from destruction, for it targets only a method of performing abortion. . . . [T]he Court upholds a law that, while doing nothing to “preserv[e] . . . fetal life” . . . bars a woman from choosing intact D & E although her doctor “reasonably believes [that procedure] will best protect [her].” *Stenberg*, 530 U.S. at 946 (STEVENS, J., concurring).

As another reason for upholding the ban, the Court emphasizes that the Act does not proscribe the nonintact D & E procedure. See *ante*, at 1637. But why not, one might ask. Nonintact D & E could equally be characterized as “brutal,” *ante*, at 1633, involving as it does “tear[ing] [a fetus] apart” and “ripp[ing] off” its limbs, *ante*, at 1620 - 1621, 1621 -

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1622. “[T]he notion that either of these two equally gruesome procedures ... is more akin to infanticide than the other, or that the State furthers any legitimate interest by banning one but not the other, is simply irrational.” *Stenberg*, 530 U.S., at 946-947 (STEVENS, J., concurring).

Delivery of an intact, albeit nonviable, fetus warrants special condemnation, the Court maintains, because a fetus that is not dismembered resembles an infant. But so, too, does a fetus delivered intact after it is terminated by injection a day or two before the surgical evacuation, or a fetus delivered through medical induction or cesarean. Yet, the availability of those procedures—along with D & E by dismemberment—the Court says, saves the ban on intact D & E from a declaration of unconstitutionality. Never mind that the procedures deemed acceptable might put a woman's health at greater risk. . . .

Ultimately, the Court admits that “moral concerns” are at work, concerns that could yield prohibitions on any abortion. . . . Notably, the concerns expressed are untethered to any ground genuinely serving the Government's interest in preserving life. By allowing such concerns to carry the day and case, overriding fundamental rights, the Court dishonors our precedent. See, e.g., *Casey*, 505 U.S., at 850 (“Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code.”) . . .

Revealing in this regard, the Court invokes an antiabortion shibboleth for which it concededly has no reliable evidence: Women who have abortions come to regret their choices, and consequently suffer from “[s]evere depression and loss of esteem.” <sup>FN7</sup> Because of women's fragile emotional state and because of the “bond of love the mother has for her child,” the Court worries, doctors may withhold information about the nature of the intact D & E procedure. <sup>FN8</sup> The solution the Court approves, then, is *not* to require doctors to inform women, accurately and adequately, of the different procedures and their attendant risks. . . . Instead, the Court deprives women of the right to make an autonomous choice, even at the expense of their safety. <sup>FN9</sup>

<sup>FN7</sup>. The Court is surely correct that, for most women, abortion is a painfully difficult decision. But “neither the weight of the

scientific evidence to date nor the observable reality of 33 years of legal abortion in the United States comports with the idea that having an abortion is any more dangerous to a woman's long-term mental health than delivering and parenting a child that she did not intend to have ... .” Cohen, *Abortion and Mental Health: Myths and Realities*, 9 *Guttmacher Policy Rev.* 8 (2006); see generally Bazelon, *Is There a Post-Abortion Syndrome?* *N.Y. Times Magazine*, Jan. 21, 2007, p. 40. See also, e.g., American Psychological Association, *APA Briefing Paper on the Impact of Abortion* (2005) (rejecting theory of a postabortion syndrome and stating that “[a]ccess to legal abortion to terminate an unwanted pregnancy is vital to safeguard both the physical and mental health of women”); Schmiede & Russo, *Depression and Unwanted First Pregnancy: Longitudinal Cohort Study*, 331 *British Medical J.* 1303 (2005) (finding no credible evidence that choosing to terminate an unwanted first pregnancy contributes to risk of subsequent depression); Gilchrist, Hannaford, Frank, & Kay, *Termination of Pregnancy and Psychiatric Morbidity*, 167 *British J. of Psychiatry* 243, 247-248 (1995) (finding, in a cohort of more than 13,000 women, that the rate of psychiatric disorder was no higher among women who terminated pregnancy than among those who carried pregnancy to term); Stodland, *The Myth of the Abortion Trauma Syndrome*, 268 *JAMA* 2078, 2079 (1992) (“Scientific studies indicate that legal abortion results in fewer deleterious sequelae for women compared with other possible outcomes of unwanted pregnancy. There is no evidence of an abortion trauma syndrome.”); American Psychological Association, *Council Policy Manual: (N)(I)(3), Public Interest* (1989) (declaring assertions about widespread severe negative psychological effects of abortion to be “without fact”). But see Cogle, Reardon, & Coleman, *Generalized Anxiety Following Unintended Pregnancies Resolved Through Childbirth and Abortion: A Cohort Study of the 1995 National Survey of Family Growth*, 19 *J. Anxiety Disorders* 137, 142 (2005) (advancing theory of a postabortion syndrome but acknowledging that “no

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causal relationship between pregnancy outcome and anxiety could be determined" from study); Reardon et al., *Psychiatric Admissions of Low-Income Women following Abortion and Childbirth*, 168 *Canadian Medical Assn. J.* 1253, 1255-1256 (May 13, 2003) (concluding that psychiatric admission rates were higher for women who had an abortion compared with women who delivered); cf. Major, *Psychological Implications of Abortion-Highly Charged and Rife with Misleading Research*, 168 *Canadian Medical Assn. J.* 1257, 1258 (May 13, 2003) (critiquing Reardon study for failing to control for a host of differences between women in the delivery and abortion samples).

**FN8.** Notwithstanding the "bond of love" women often have with their children, not all pregnancies, this Court has recognized, are wanted, or even the product of consensual activity. See *Casey*, 505 U.S., at 891. ("[O]n an average day in the United States, nearly 11,000 women are severely assaulted by their male partners. Many of these incidents involve sexual assault."). See also Glander, Moore, Michielutte, & Parsons, *The Prevalence of Domestic Violence Among Women Seeking Abortion*, 91 *Obstetrics & Gynecology* 1002 (1998); Holmes, Resnick, Kilpatrick, & Best, *Rape-Related Pregnancy; Estimates and Descriptive Characteristics from a National Sample of Women*, 175 *Am. J. Obstetrics & Gynecology* 320 (Aug. 1996).

**FN9.** Eliminating or reducing women's reproductive choices is manifestly *not* a means of protecting them. When safe abortion procedures cease to be an option, many women seek other means to end unwanted or coerced pregnancies. See, e.g., World Health Organization, *Unsafe Abortion: Global and Regional Estimates of the Incidence of Unsafe Abortion and Associated Mortality in 2000*, pp. 3, 16 (4th ed. 2004) ("Restrictive legislation is associated with a high incidence of unsafe abortion" worldwide; unsafe abortion represents 13% of all "maternal" deaths); Henshaw, *Unintended Pregnancy and Abortion: A Public Health Perspective*, in *A Clinician's Guide to Medical and Surgical*

*Abortion* 11, 19 (M. Paul, E. Lichtenberg, L. Borgatta, D. Grimes, & P. Stubblefield eds. 1999) ("Before legalization, large numbers of women in the United States died from unsafe abortions."); H. Boonstra, R. Gold, C. Richards, & L. Finer, *Abortion in Women's Lives* 13, and fig. 2.2 (2006) ("as late as 1965, illegal abortion still accounted for an estimated ... 17% of all officially reported pregnancy-related deaths"; "[d]eaths from abortion declined dramatically after legalization").

This way of thinking reflects ancient notions about women's place in the family and under the Constitution-ideas that have long since been discredited. Compare, e.g., *Muller v. Oregon*, 208 U.S. 412, 422-423 (1908) ("protective" legislation imposing hours-of-work limitations on women only held permissible in view of women's "physical structure and a proper discharge of her maternal function"); *Bradwell v. State*, 16 Wall. 130, 141, (1873) (Bradley, J., concurring) ("Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. ... The paramount destiny and mission of woman are to fulfil [I] the noble and benign offices of wife and mother."), with *United States v. Virginia*, 518 U.S. 515, 533, 542, n. 12 (1996) (State may not rely on "overbroad generalizations" about the "talents, capacities, or preferences" of women; "[s]uch judgments have ... impeded ... women's progress toward full citizenship stature throughout our Nation's history"); *Califano v. Goldfarb*, 430 U.S. 199, 207 (1977) (gender-based Social Security classification rejected because it rested on "archaic and overbroad generalizations" "such as assumptions as to [women's] dependency" (internal quotation marks omitted)).

Though today's majority may regard women's feelings on the matter as "self-evident," this Court has repeatedly confirmed that "[t]he destiny of the woman must be shaped ... on her own conception of her spiritual imperatives and her place in society." *Casey*, 505 U.S., at 852. See also *id.*, at 877, 112 S.Ct. 2791 (plurality opinion) ("[M]eans chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it."); *supra*, at 1641 - 1642.

B

\* \* \*

One wonders how long a line that saves no fetus from destruction will hold in face of the Court's "moral concerns. The Court's hostility to the right Roe and Casey secured is not concealed. Throughout, the opinion refers to obstetrician-gynecologists and surgeons who perform abortions not by the titles of their medical specialties, but by the pejorative label "abortion doctor." . . . A fetus is described as an "unborn child," and as a "baby," second-trimester, previability abortions are referred to as "late-term"; and the reasoned medical judgments of highly trained doctors are dismissed as "preferences" motivated by "mere convenience." Instead of the heightened scrutiny we have previously applied, the Court determines that a "rational" ground is enough to uphold the Act. . . .

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IV

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In sum, the notion that the Partial-Birth Abortion Ban Act furthers any legitimate governmental interest is, quite simply, irrational. The Court's defense of the statute provides no saving explanation. In candor, the Act, and the Court's defense of it, cannot be understood as anything other than an effort to chip away at a right declared again and again by this Court-and with increasing comprehension of its centrality to women's lives. . . .

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For the reasons stated, I dissent from the Court's disposition and would affirm the judgments before us for review.

# THE YALE LAW JOURNAL

REVA B. SIEGEL

## Dignity and the Politics of Protection: Abortion Restrictions Under *Casey/Carhart*

**ABSTRACT.** This essay on the law and politics of abortion analyzes the constitutional principles governing new challenges to *Roe*. The essay situates the Court's recent decision in *Gonzales v. Carhart* in debates of the antiabortion movement over the reach and rationale of statutes designed to overturn *Roe*—exploring strategic considerations that lead advocates to favor incremental restrictions over bans, and to supplement fetal-protective justifications with woman-protective justifications for regulating abortion. The essay argues that a multi-faceted commitment to dignity links *Carhart* and the *Casey* decision on which it centrally relies. Dignity is a value that bridges communities divided in the abortion debate, as well as diverse bodies of constitutional and human rights law. *Carhart* invokes dignity as a reason for regulating abortion, while *Casey* invokes dignity as a reason for protecting women's abortion decisions from government regulation. This dignity-based analysis of *Casey/Carhart* offers principles for determining the constitutionality of woman-protective abortion restrictions that are grounded in a large body of substantive due process and equal protection case law. Protecting women can violate women's dignity if protection is based on stereotypical assumptions about women's capacities and women's roles, as many of the new woman-protective abortion restrictions are. Like old forms of gender paternalism, the new forms of gender paternalism remedy harm to women through the control of women. The new woman-protective abortion restrictions do not provide women in need what they need: they do not alleviate the social conditions that contribute to unwanted pregnancies, nor do they provide social resources to help women who choose to end pregnancies they otherwise might bring to term. The essay concludes by reflecting on alternative—and constitutional—modes of protecting women who are making decisions about motherhood.

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### III. DIGNITY AS A CONSTRAINT ON WOMAN-PROTECTIVE JUSTIFICATIONS FOR ABORTION RESTRICTIONS

There is deep tension between the forms of decisional autonomy *Casey* protects and woman-protective justifications for restricting women's access to abortion. In what follows, this essay explores the status of the woman-protective justification for abortion restrictions after *Carhart*.

*Casey* mentions woman-protective justifications for abortion restrictions in passing,<sup>195</sup> while *Carhart* invokes these concerns in the much remarked upon passage that opens this essay.<sup>196</sup> The Court's gender-paternalist observations in *Carhart* have drawn wide notice, and plainly signal receptivity to woman-protective antiabortion argument.<sup>197</sup> Yet the Court stops well short of adopting this rationale as a justification for restricting access to abortion under *Casey*.

The most significant constitutional questions about the gender-paternalist justification for abortion restrictions arise, not from the brevity of the Court's discussion in *Carhart*, but instead from *Carhart*'s reliance on *Casey*. *Carhart* takes its authority from *Casey*, and as analysis to this point should make clear, the woman-protective rationale for restricting abortion is in deep and direct conflict with forms of dignity *Casey* protects.

From the standpoint of the Constitution's dignity commitments, fetal-protective and woman-protective justifications for restricting abortion importantly differ.<sup>198</sup> Fifth and Fourteenth Amendment cases decided since the

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195. *Casey*, 505 U.S. at 882 ("In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed. If the information the State requires to be made available to the woman is truthful and not misleading, the requirement may be permissible.").

196. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1634 (2007); see *supra* text accompanying note 16.

197. See *supra* note 24 (Leslee Unruh expressing delighted reaction to *Carhart*); *supra* note 113 (The Justice Foundation citing the success of its Operation Outcry affidavits in persuading Justice Kennedy) and 115 (Harold Cassidy memo discussing court's receptivity to woman-protective rationale).

198. Doctrine clearly differentiates regulation of abortion undertaken for the purpose of protecting the unborn and for protecting women. The case law does not sufficiently address the ways that fetal-protective regulation of abortion may also be based on judgments about women. See Siegel, *supra* note 93 (drawing on history of nineteenth-century campaign to criminalize abortion and contraception to show how judgments about protecting the unborn also entail judgments about women); see also *supra* note 159 (theological and political sources asserting "respect for life" and the "dignity" of life which link opposition to abortion and support for traditional sex and family roles). That said, the cases are clear in tying



1970s treat as weighty the state's interest in protecting potential life, but treat as deeply suspect the state's interest in restricting women's choices for the claimed purpose of protecting them—and treat as *especially* suspect gender-paternalist claims in the tradition of *Muller v. Oregon*<sup>199</sup> that would impose protective restrictions on women in order to free them to be mothers.<sup>200</sup> While *Casey* and *Carhart* do not articulate specific doctrinal limits on the woman-protective justification for restricting abortion, as we have seen, these doctrinal limits can be derived from core principles of both the substantive due process and the equal protection cases.<sup>201</sup>

This Part examines, first, what the Court has affirmatively said about the gender-paternalist justification for abortion restrictions in *Carhart*. It then considers limitations on gender-paternalist justifications for abortion restrictions that flow from the Court's substantive due process and equal protection case law. These limitations become apparent as we examine presuppositions about the rights holder that the substantive due process and equal protection cases share, and the traditions of regulating women's family roles that these two bodies of constitutional law repudiate. This inquiry reveals deep connections between the forms of dignity *Casey* protects and the equal protection cases.

The modern constitutional canon prohibits laws that restrict women's autonomy for the putative purpose of protecting women and freeing women to be mothers. Justifications for restricting abortion to protect women that are advanced by advocates of South Dakota's proposed abortion ban, and the State Task Force Report on which it relies, are gender-paternalist in just this way. These woman-protective justifications for restricting abortion deny women forms of dignity that both *Casey* and the modern equal protection cases protect.

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government's prerogative to restrict abortion to the regulatory purpose of protecting potential life.

199. 208 U.S. 412 (1908).

200. See *UAW v. Johnson Controls*, 499 U.S. 187, 205-06 (1991) (ruling that fetal-protective restrictions on the employment of fertile women violate the pregnancy discrimination amendment to federal employment discrimination laws, citing an article that ties such policies to the sex-based labor protections upheld in *Muller*, and observing that "[w]ith the PDA, Congress made clear that the decision to become pregnant or to work while being either pregnant or capable of becoming pregnant was reserved for each individual woman to make for herself"); see also *infra* note 191 and accompanying text.

201. On the intertwining of liberty and equality values in the substantive due process cases, and equality-based arguments for the abortion right founded on various clauses including the Equal Protection Clause, see *supra* note 133.

A. *Woman-Protective Discourse and Counter-Signals in Carhart*

There is no doubt that the Court's discussion of post-abortion regret and its reference to the Operation Outcry affidavits in *Carhart* signal receptivity to antiabortion advocacy and the abortion-hurts-women claim. It is not simply that the Court upholds the Partial-Birth Abortion Ban Act in terms that make abortion restrictions harder to challenge.<sup>202</sup> At numerous junctures, the *Carhart* decision speaks in an idiom that is distinctly responsive to the antiabortion movement. The opinion employs the discourse of female "depression" and "regret," and the movement-inflected usage of a "choice [that] is well informed."<sup>203</sup> The opinion also makes disparaging reference to "[a]bortion doctors,"<sup>204</sup> insistently refers to a woman who has had an abortion as a "mother,"<sup>205</sup> and provocatively shifts in its description of antenatal life from "the life of the fetus that may become a child,"<sup>206</sup> to the "unborn child,"<sup>207</sup> "infant life,"<sup>208</sup> and "baby,"<sup>209</sup> and finally again to the fetus. In speaking of women's regret, referring to women who have had abortions as mothers, and discussing the unborn child, *Carhart's* use of the antiabortion movement's idiom communicates the Court's receptivity to the movement's claims, without deciding questions of law.

202. Cf. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1641-43, 1650-52 (2007) (Ginsburg, J., dissenting) (protesting the majority's ruling on the health exception and facial challenges).

203. *Carhart*, 127 S. Ct. at 1635 (majority opinion) (Kennedy, J.). The antiabortion movement has given the discourse of informed choice a specialized meaning in the abortion context. In antiabortion usage, a well-informed choice is a choice *against* abortion. For the development of this form of talk as a movement strategy, see *supra* Section I.B. See also Siegel, *supra* note 15, at 1031 ("The [South Dakota] *Task Force Report* expresses its moral judgments about abortion in the language of informed consent, describing decisions against abortion as 'informed' and depicting decisions to have abortion as mistaken or coerced. When the *Report* advocates laws that encourage more 'informed' abortion decisions, it is calling for laws that limit abortion . . .").

204. *Carhart*, 127 S. Ct. at 1635.

205. *Id.* at 1627, 1630 (describing the "partial-birth abortion" procedure by reference to the body of the "mother"); *id.* at 1634 ("It is self-evident that a mother who comes to regret her choice to abort must struggle with grief . . .").

206. *Id.* at 1633.

207. *Id.* at 1634.

208. *Id.*

209. *Id.* at 1622. Justice Ginsburg documents and protests the majority opinion's apparently deliberate blurring of the description of antenatal and postnatal life. See *id.* at 1650 (Ginsburg, J., dissenting).

Language of this kind certainly signals sympathy for the claims of the antiabortion movement, even as it leaves unclear the extent to which the Justices in the majority share the beliefs of the antiabortion movement. In a constitutional democracy, when the Court interprets guarantees that are the focal point of decades of social movement conflict, responsive interpretation of this kind is commonplace and serves a variety of system goods. It communicates that the Court has respectfully engaged with a movement's claims and recognizes as serious the point of view from which the claims emanate. Engaging with movement claims in this way helps establish the Court's authority and engenders in advocates the expectation that the Court may one day recognize movement claims that to this point in time the Court has not. Nothing prevents the Court from responding in like fashion to multiple claimants in a constitutional conflict, in one opinion establishing its authority with a movement *and* its agonist.<sup>210</sup>

Thus, before we assess the discussion of post-abortion regret in *Carhart*, we should also take account of the many ways that *Carhart* reasons within the logic and idiom of the abortion rights movement. Most prominently, *Carhart* applies *Casey*. Justice Kennedy understands *Casey* to require protection for ordinary second-trimester abortions, and *Carhart* construes the Partial-Birth Abortion Ban Act to protect these standard second-trimester procedures, applying "[t]he canon of constitutional avoidance [to] extinguish[] any lingering doubt as to whether the Act covers the prototypical D & E procedure. '[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'<sup>211</sup> Thus *Carhart* reaffirms protection for second-trimester abortions.

But *Carhart's* allegiance to *Casey* runs deeper. Not only does the Court protect second-trimester abortions, it presents itself as respecting women's decisional autonomy even as to the procedures the Partial-Birth Abortion Ban Act regulates. *Carhart* does not offer itself as limiting a woman's decision whether or when to end a pregnancy. To the contrary, the Court decides the case as if the only question in issue was the question of the medical *method* by which doctors would effectuate a woman's abortion decision; the Court

210. See *supra* note 152 (discussing this dynamic in the *Casey* decision); cf. Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV.L.REV. 1470, 1546-47 (2004) (discussing how cases enforcing *Brown* establish their authority by appeal to a principle of ambiguous import that commands the allegiance of Americans with very different views about how *Brown* should be enforced).

211. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1631 (2007) (citation omitted); see also Priscilla J. Smith, *Is the Glass Half-Full?: Gonzales v. Carhart and the Future of Abortion Jurisprudence*, 2 HARV. L. & POL'Y REV. (ONLINE) (2008), [http://www.hlpronline.com/Smith\\_HLPR.pdf](http://www.hlpronline.com/Smith_HLPR.pdf).

authorizes regulation of the abortion procedure to the extent it does not pose an undue burden on women's decision making.<sup>212</sup>

The Partial-Birth Abortion Ban Act is incrementalist regulation, and *Carhart* upholds it as such, reasoning about the statute in a framework that presupposes the abortion right. As antiabortion critics of the incrementalist strategy emphasize, *Carhart* upholds the statute while discussing constitutional and unconstitutional methods of performing second-trimester abortions in vivid detail, involving the Court in approving how doctors are to perform an act that would be infanticide, *if* the Court itself did not view the distinction between pregnancy and birth as absolutely fundamental in determining the act's ethical and legal character. It is because *Carhart* compares but so fundamentally distinguishes abortion and infanticide that absolutist antiabortion critics condemn *Carhart* as "Naziesque" and the "devil's" work, and vilify the movement strategy that produced the ruling and antiabortion advocates who now celebrate it.<sup>213</sup> Indeed, the Court understands the law it is upholding in *Carhart* as *clarifying* the distinction between abortion and infanticide.

The *Carhart* decision is remarkable for the ways that it manages to express meanings and messages of the antiabortion movement within an abortion-rights framework. The opinion emphasizes the importance of expressing respect for life and affirming dignity as life *as part of the practice of abortion*. The Court upholds a statute that requires abortion providers to perform abortions in ways that express respect for human life, without endeavoring to prevent women from obtaining an abortion.<sup>214</sup> The opinion's gender paternalism seems to be similarly expressive in character. *Carhart* speaks of protecting women from decisions they might regret while upholding a statute that the Court presents as constraining *doctors'* decisions about how to perform an abortion, not women's decisions about whether to have an abortion. By signaling in this

212. *Carhart*, 127 S. Ct. at 1633 ("The third premise, that the State, from the inception of the pregnancy, maintains its own regulatory interest in protecting the life of the fetus that may become a child, cannot be set at naught by interpreting *Casey's* requirement of a health exception so it becomes tantamount to allowing a doctor to choose the abortion method he or she might prefer. Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.") (emphasis added).

213. Two such passionate critiques of the *Carhart* opinion include the protests of Rev. Philip L. "Flip" Benham (former national director of Operation Rescue who claims to have saved Norma McCorvey), see *supra* note 51, and of Brian Rohrbough (President, Colorado Right to Life), see *supra* notes 54-55 and accompanying text.

214. See *supra* text accompanying notes 157-161.

fashion, the Court provided *Roe*'s opponents an exhilarating moment of recognition—which, as we will see, has encouraged the movement to act in South Dakota and beyond—within the very same opinion in which the Court reaffirmed the *Casey* framework as governing the regulation of abortion.

There is, of course, a possibility, turning on events beyond the reach of this analysis, that *Carhart* could be a station on the way to *Roe*'s overruling. Without confidence in anyone's capacity to engage reliably in such long-term political forecast, I instead read *Carhart* to restrict abortion as *Casey* did, altering the law of abortion in order to create opportunities, within an abortion-rights regime, for *Roe*'s opponents to express moral opposition to the practice.

The status of *Carhart*'s observations concerning post-abortion regret can be described in more conventional doctrinal terms. The Court may have discussed claims of post-abortion regret that some women might experience if their doctors employed the abortion method Congress banned; but the Court did not discuss, much less sanction, the kind of restrictions on women's decisionmaking that the authors of the amicus brief on behalf of Sandra Cano advocate.<sup>215</sup>

*Casey* and *Carhart* each base the state's interest in restricting abortion on the state's interest in protecting potential life; and the undue burden framework that Justice Kennedy adopted in *Casey* and applied in *Carhart* focused on the state's concern about protecting potential life.<sup>216</sup> While *Roe* recognized a state interest in regulating abortion in the interest of protecting maternal health,<sup>217</sup> the state interest in protecting maternal health that *Roe* recognized was based on an understanding of maternal health that bears no connection to the post-abortion syndrome (PAS) and coercion claims the antiabortion movement is now making, as advocates of PAS and coercion

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215. The Cano brief argued that the Partial-Birth Abortion Ban Act should be upheld because "after thirty-three years of real life experiences, postabortive women and Sandra Cano, 'Doe' herself, now attest that abortion hurts women and endangers their physical, emotional, and psychological health." Brief of Sandra Cano et al., *supra* note 15, at 5. The brief cited the findings of the South Dakota Task Force at length, *id.* at 17-21, and relied on a collection of affidavits to support the proposition that "abortion hurts women emotionally and psychologically, and therefore, abortion should be banned to protect the health of the mother." *Id.* at 20-21. One of the coauthors of the brief, Allan E. Parker, Jr., helped to form the Justice Foundation in 1993, which has joined with Harold Cassidy to represent Norma McCorvey and Sandra Cano, in seeking to reopen their cases. See *supra* note 95-97 and accompanying text.

216. See *supra* Section II.B.

217. *Roe v. Wade*, 410 U.S. 113, 162 (1973).

claims are themselves quick to assert.<sup>218</sup> Given the normative universe separating the understanding of the state's "interest in preserving and protecting the health of the pregnant woman"<sup>219</sup> in *Roe* and many of the premises and claims of the new gender-paternalist arguments for restricting abortion now appearing in constitutional litigation, the gender-paternalist rationale for restricting abortion requires much closer scrutiny.

Advocates of the gender-paternalist rationale for restricting abortion oppose the rights *Roe* and *Casey* grant women by advancing a descriptive claim. As Part I shows, antiabortion advocates now assert that women seeking abortions are vulnerable, dependent, and confused, and need restrictions on abortion to protect them from coercion and their own mistaken decision making and to free them to fulfill their natures as mothers.<sup>220</sup> From this (highly contested) descriptive claim, advocates wish courts to refashion the abortion right, premised on a "new" view of the rights holder as ascriptively dependent—a move that would neatly reinstate the picture of women as constitutional persons that *Casey* and the modern sex discrimination cases repudiate.

The woman-protective justification for abortion restrictions violates the very forms of dignity *Casey* protects. Analyzing these constitutional limitations uncovers deep connections between the forms of dignity *Casey* protects and the equal protection sex discrimination cases. Woman-protective justifications for abortion restrictions would reinstate a legal regime that addresses women as ascriptively dependent—reviving forms of gender paternalism that the Court and the nation repudiated in the 1970s.

#### *B. Ascriptive Autonomy and Dependence: Gender Paternalism Old and New*

What picture of the rights-holder do *Roe* and *Casey* presuppose? As *Casey* emphasizes in reaffirming the abortion right and in striking down the spousal notice provision, *Roe* and its progeny rest on views of women that the modern constitutional order embraced as it recognized adult women as competent to make decisions *sui juris*, and as it repudiated the understanding of women as

218. The antiabortion movement claims that the *Roe* Court did not understand post-abortion syndrome and coerced abortions, and that the evidence the movement is presenting thus warrants reopening *Roe* on a claim of change facts. See *McCorvey v. Hill*, 385 F.3d 846, 850-52 (5th Cir. 2004) (Jones, J., concurring); see also *supra* note 95-97 and accompanying text.

219. *Roe*, 410 U.S. at 162.

220. See *supra* Part I; *infra* notes 247-258 and accompanying text.

dependent on their husbands that prevailed at common law and for much of our constitutional tradition.<sup>221</sup>

*Roe* emancipated women from the hazards and humiliations of a "therapeutic" abortion regime<sup>222</sup> during the same decade in which the nation was beginning to repudiate common law and constitutional traditions that allowed government to impose family roles on women and to exclude them from participation in the market and public sphere. The decision to emancipate women from doctor's authority was in part a decision to emancipate doctors from the hazards of random prosecutions; in part it reflected concern about the hazards to women of illegal abortions. But also in deep and increasing measure, the abortion right was articulated and defended as part of a transformation in the terms of membership of women in the constitutional community.<sup>223</sup> Whatever the Burger Court understood about the connection

221. See Subsection II.C.2. This process begins with legislative reform of the common law marital status rules during Reconstruction, continues through the enfranchisement of women in the progressive era, and culminates in the late twentieth century with the flowering of equal protection and associated civil liberties for women.

222. Before *Roe*, the legal system prohibited abortion except as doctors therapeutically permitted the procedure, requiring women to plead with doctors to diagnose them as too physically or psychologically infirm to become a mother; the alternative, especially for women who lacked resources, was to risk illegal and unsafe abortions. On the gendered logic of the therapeutic abortion, see Siegel, *supra* note 93, at 273, 365 & n.414. At the time of *Roe*, there was widespread concern about the disparities in access that the therapeutic abortion regime produced across class and about the threat that "back alley" abortions posed to women of all classes. In this era, the equality argument for abortion was first of all understood as concerned with wealth equality, then sex equality. See Reva B. Siegel, Siegel, J., *Concurring*, in *WHAT ROE V. WADE SHOULD HAVE SAID* 63, 63-85 (Jack Ballin ed., 2003) (rewriting *Roe* as a sex equality opinion); see also MARK A. GRABER, *RETHINKING ABORTION: EQUAL CHOICE, THE CONSTITUTION, AND REPRODUCTIVE POLITICS* 42-43, 76 (1996) (demonstrating that prior to *Roe*, abortion bans were haphazardly enforced and coexisted with a "gray market" in safe abortions that provided "affluent white women with de facto immunities from statutory bans on abortion" and that socioeconomic power and access to the "gray market" for abortion services mitigated the negative effects of bans upon women of privilege, while simultaneously forcing poor women and women of color to risk dangerous procedures to obtain the same result). *Roe* freed women from these forms of subjection by declaring women competent to make the decision whether to end a pregnancy themselves.

223. See GENE BURNS, *THE MORAL VETO: FRAMING CONTRACEPTION, ABORTION, AND CULTURAL PLURALISM IN THE UNITED STATES* 274-75 (2005) ("[A]bortion rights feminist groups . . . had come to frame restrictive abortion laws as an unjust oppression forced upon women."); LINDA GORDON, *THE MORAL PROPERTY OF WOMEN: A HISTORY OF BIRTH CONTROL POLITICS IN AMERICA* (2002); KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 118, 120 (1984) ("Once they [women] had choices about life roles, they came to feel that they had a right to use abortion in order to control their own lives. . . . The demand for repeal of all abortion laws was an attack on both the segregated labor market and the cultural expectations about women's roles."). For feminist claims that the abortion right was

between its equal protection decisions and its substantive due process decisions in the 1970s, by the decade's end social conflict over sex equality and reproductive rights converged to make the nexus painfully clear.<sup>224</sup>

These struggles are not merely *Casey's* background but instead are woven into the substance of the decision. The Court issued *Casey* after some two decades in which the nation passionately debated the social meaning and practical stakes of the abortion decision for women. If *Casey* reflects community concern about protecting potential life, it also reflects community concern about respecting the autonomy and equality of women.

At multiple points in the decision, *Casey* reflects deep appreciation of the connections between the equal protection and substantive due process decisions that may not have been clear to the Court in the 1970s.<sup>225</sup> As we have seen, *Casey* reaffirms the abortion right, specifically denying to government the prerogative to impose customary family roles on women, and applies the undue burden framework, specifically renouncing common law traditions that made women the ascriptive dependents of men.<sup>226</sup>

This history helps define the forms of dignity and autonomy *Casey* protects. The abortion right was articulated and defended over a several decade period in which women were resisting the power of the state to impose family-role based restrictions on their civic freedom. Just as a history of segregation imbues classification by race with dignitary meaning, so, too, a history of legally imposed family roles helps make family-role based restrictions on women's freedom reverberate with dignitary affront, raising issues of respect as well as questions of immense practical significance for women.

Sometimes these customary, common-law, and constitutional restrictions on women's freedom were justified in terms that denigrated women's competence, but often they were justified paternalistically, as redounding to women's benefit. A special tradition of gender paternalism played a role in

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a sex equality right and tied to claims concerning the conditions in which women worked, raised children, and other activities of citizenship, see Siegel, *supra* note 133, at 826. See also *id.* at 831 ("[*Casey*] expressed constitutional limitations on abortion laws in the language of . . . equal protection sex discrimination opinions, illuminating liberty concerns at the heart of the sex equality cases in the very act of recognizing equality concerns at the root of its liberty cases.").

224. See Post & Siegel, *supra* note 152, at 418-20; Siegel, *supra* note 68, at 1369, 1393-1400; Siegel, *supra* note 133, at 827 ("[Opponents of the Equal Rights Amendment] mobilized opposition by framing abortion and homosexuality as potent symbols of the new family form that ERA would promote.").

225. For discussion and survey of the large body of literature observing these features of the decision, see Siegel, *supra* note 133, at 833 n.63.

226. See *supra* Subsection II.C.2.



rationalizing family-role based limitations on women's civic freedom. For centuries, law employed descriptive claims about women's vulnerability and dependence to justify a regime of "protection" that imposed legal disabilities on women and so made women into ascriptive dependents of their husband and the state.<sup>227</sup> Cases beginning with *Frontiero* condemn these sex-specific limitations on women's freedom.<sup>228</sup>

Paradigmatically, these gender-paternalist restrictions claimed to free women from male coercion, often for the express purpose of enabling women to fulfill their natures as wives and mothers. For example, the common law of coverture, which *Frontiero* repudiated, restricted married women's ability to act as independent legal agents, whether to file suit, sign contracts, or be held accountable for crimes.<sup>229</sup> This regime of ascriptive disabilities was commonly justified by descriptive claims about women's vulnerability. Thus, "when a married woman came before the criminal court, the law started from the assumption that she had an inevitably malleable nature, and it attributed her crime, not to her own exercise of will, but to the influence exerted by her husband's will."<sup>230</sup> Depriving women of legal capacity was said to protect women from male coercion.

The telling and morally problematic feature of this tradition of gender paternalism was its habit of redressing male dominance by laws that empowered men and disempowered women. Instead of protecting women from coercion by restricting the dominating husband, the common law invoked the putatively benign purpose of protecting women as a rationale for depriving women of legal agency, rationalizing gender hierarchy in the

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227. Cf. Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 878 (1994) ("[W]here descriptive autonomy refers to the actual condition of persons and views autonomy as partial and contingent, ascriptive autonomy marks a moral right to personal sovereignty. Where descriptive autonomy is an ideal that can be promoted or protected, sometimes through paternalistic legislation, ascriptive autonomy signifies a right to respect that is incompatible with much if not all paternalism.").

228. *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).

229. See *id.* at 684; 1 WILLIAM BLACKSTONE, COMMENTARIES \*431 ("By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage . . . If the wife be injured in her person or her property, she can bring no action for redress without her husband's concurrence, and in his name, as well as her own: neither can she be sued, without making the husband a defendant. . . . And therefore all deeds executed, and acts done, by her, during her coverture, are void, or at least voidable."); Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127, 2127 (1995).

230. Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 32 (1994). The classic summary of the legal fiction of marital unity resides in 1 WILLIAM BLACKSTONE, COMMENTARIES \*431. See *supra* note 229.

discourse of protection.<sup>231</sup> This common law model served as a foundation for women's roles in a wide variety of settings. Similar stories about women's family roles and women's vulnerability to coercion justified women's exclusion from voting, jury service, and other acts of collective self-governance.<sup>232</sup> Women were too weak to be entrusted with legal agency to act autonomously, and the male will to control was too powerful to be constrained by law:

If the husband is brutal, arbitrary, or tyrannical, and tyrannizes over her at home, the ballot in her hands would be no protection against such injustice, but the husband who compelled her to conform to his wishes in other respects would also compel her to use the ballot if she possessed it as he might please to dictate.<sup>233</sup>

Denying women the vote thus protected them from male coercion: "[W]hat remedy would be found for the inflictions . . . which [women] would suffer at home for that exercise of their right which was opposed to the interests or prejudices of their male relations?"<sup>234</sup>

Protecting women from male coercion was one justification for restricting women's legal agency: it had the salutary effect of preserving natural family roles in which the husband was to govern and represent the wife. Another powerful tradition of gender paternalism justified limitations on women's agency as freeing women to inhabit their natural family roles. Thus, denying women the right to practice law freed them to serve in their natural capacity as wives and mothers.<sup>235</sup> Protective labor legislation restricting the hours and jobs

231. States preserved the status roles of marriage, even as they reformed the common law of coverture. See Siegel, *supra* note 229, at 2127-32 (describing the interpretation of earning statutes that ostensibly abolished coverture by giving wives rights in their labor, yet preserved family roles by refusing to give wives rights in their household labor); Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 YALE L.J. 2117, 2169-75 (1996) (tracing the modernization of marital status roles and showing how they were transformed yet preserved in the way the law enforced companionate understandings of marriage).

232. See Siegel, *supra* note 145, at 983-87 (exploring connections between the common law of coverture and the justifications for women's disfranchisement).

233. *Id.* at 995 (quoting S. REP. NO. 48-399, pt. 2, at 6-7) (emphasis omitted) (describing the argument of members of the Senate Woman Suffrage Committee who opposed the Sixteenth Amendment on grounds that enfranchising women would not protect them from domestic violence and would merely exacerbate marital conflict).

234. L.P. BROCKETT, WOMAN: HER RIGHTS, WRONGS, PRIVILEGES, AND RESPONSIBILITIES 248 (Books for Libraries Press 1970) (1869).

235. See, e.g., *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (denying a female petitioner license to practice law in Illinois because she was a married woman and

in which women might work freed women to perform their natural role as mothers.<sup>236</sup>

It is this common law and public law tradition that the modern constitutional canon specifically rejects.<sup>237</sup> It repudiates the picture of women's roles and capacities long employed to justify gender-paternalist restrictions on women's freedom, and it repudiates the classic form of protection the common-law tradition offered women, in which restricting women's agency was the means chosen to protect and free them: "an attitude of 'romantic

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noting that "the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life"); *In re Goodell*, 39 Wis. 232, 244-46 (1875) (denying the motion of a female to be admitted to the bar for the practice of law in the state of Wisconsin and noting that "it is public policy to provide for the sex, not for its superfluous members; and not to tempt women from the proper duties of their sex by opening to them duties peculiar to ours").

236. In *Muller v. Oregon*, 208 U.S. 412, 421 (1908), the United States Supreme Court upheld an Oregon statute placing maximum hours restrictions on women as an appropriate measure to protect women's health and reproductive capacity, noting that long hours may result in "injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care." See also Judith Olans Brown et al., *The Mythogenesis of Gender: Judicial Images of Women in Paid and Unpaid Labor*, 6 U.C.L.A. WOMEN'S L.J. 457, 470-77 (1996) (arguing that protective labor legislation was animated by concern over preserving women's fertility and reproductive usefulness).

237. See *Frontiero v. Richardson*, 411 U.S. 677, 684-85 (1973) ("There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage. Indeed, this paternalistic attitude became so firmly rooted in our national consciousness that, 100 years ago, a distinguished Member of this Court was able to proclaim: 'Man is, or should be, woman's protector and defender. . . . The paramount destiny and mission of woman are to fulfil [sic] the noble and benign offices of wife and mother. This is the law of the Creator.' *Bradwell v. State*, 16 Wall. 130, 141 (1873) (Bradley, J., concurring). As a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes . . ."). Title VII cases repudiate gender-paternalist limits on women's freedom, as well. See *Int'l Union v. Johnson Controls*, 499 U.S. 187, 211 (1991) (holding that company may not exclude all women with the capacity to become pregnant from certain positions and noting that "[c]oncern for a woman's existing or potential offspring historically has been the excuse for denying women equal employment opportunities. . . . It is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role. Congress has left this choice to the woman as hers to make"); *Dothard v. Rawlinson*, 433 U.S. 321, 335 (1977) ("In the usual case, the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself.").

paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."<sup>238</sup>

In the modern constitutional tradition, it does not state a constitutionally cognizable reason for imposing substantial, sex-specific restrictions on women's freedom to argue that women lack competence to make legally responsible choices; that the best way to protect women against male coercion is to restrict *women's* choices; or that it is in women's interest for government to restrict their choices to free them to assume their natural roles as mothers.<sup>239</sup> Longstanding custom and common law traditions may give arguments premised on gender-stereotypic conceptions of women's roles and capacities a ring of common sense to some; by reason of this very same tradition, however, they inflict deep dignitary affront to others.

More to the point, several decades of sex discrimination cases starting with *Reed* and *Frontiero* insist that the state may not regulate women on the basis of stereotypic, group-based generalizations, but must proceed on the basis of individualized determinations wherever possible, and where not, must satisfy some form of least-restrictive means inquiry to ensure that sex-based restrictions are substantially related to important governmental ends and are not "used, as they once were . . . to create or perpetuate the legal, social, and economic inferiority of women."<sup>240</sup>

Justice Ginsburg and a growing community of scholars have long argued that this body of equality law governs abortion restrictions.<sup>241</sup> Respecting women's choices about whether and when to become a mother simultaneously vindicates autonomy and equality values<sup>242</sup>—values integral to respecting

238. *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).

239. See Siegel, *supra* note 15, at 996 (quoting equal protection cases).

240. *United States v. Virginia*, 518 U.S. 515, 534 (1996) (citation omitted).

241. See Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1199-201 (1992); Siegel, *supra* note 133, at 828-29 (recounting history of sex-equality arguments for the abortion right, in the period before and after the ERA campaign). For my equality analysis of fetal-protective abortion restrictions, see Siegel, *supra* note 93, and Siegel, *supra* note 222. For my equality analysis of woman-protective abortion restrictions, see Siegel, *supra* note 15.

242. See Siegel, *supra* note 15, at 1050 ("The history of South Dakota's abortion ban illuminates a fundamental question at the heart of the abortion debate, a question at the heart of the Fourteenth Amendment's equal protection and substantive due process jurisprudence, a question that lives at the intersection of liberty and equality concerns: whether government respects women's prerogative and capacity to make choices about motherhood."). Some scholars view the substantive due process cases as guaranteeing women equal citizenship in

human dignity that this essay explores, in cases ranging from *Lawrence* and *Casey to Parents Involved* and *J.E.B.*

For this reason, it was to the Court's substantive due process and equal protection cases that *Carhart's* dissenting justices appealed in protesting the Court's decision to uphold the Partial-Birth Abortion Ban Act. Justices Ginsburg, Breyer, Souter, and Stevens understand the right *Roe* and *Casey* protect as a right grounded in constitutional values of autonomy and equality:

As *Casey* comprehended, at stake in cases challenging abortion restrictions is a woman's "control over her [own] destiny. . . . "There was a time, not so long ago," when women were "regarded as the center of home and family life, with attendant special responsibilities that precluded full and independent legal status under the Constitution." Those views, this Court made clear in *Casey*, "are no longer consistent with our understanding of the family, the individual, or the Constitution." Women, it is now acknowledged, have the talent, capacity, and right "to participate equally in the economic and social life of the Nation." Their ability to realize their full potential, the Court recognized, is intimately connected to "their ability to control their reproductive lives." Thus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature.<sup>243</sup>

In opening her dissenting opinion on these terms, Justice Ginsburg is appealing to Justice Kennedy in the name of commitments they both share.<sup>244</sup> In the next case, if not this, the dissenters seem to be saying to Justice Kennedy, you will recognize abortion restrictions that violate women's dignity and encroach upon "a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."

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matters concerning the regulation of abortion, while others argue that the equal protection cases properly apply. See Siegel, *supra* note 133, at 824-26.

243. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1641 (2007) (Ginsburg, J., dissenting) (citations omitted).

244. *Cf. id.* at 1649 (Ginsburg, J., dissenting) (citing Justice Kennedy's opinion in *Casey* as contrary to his reasoning in *Carhart*).

C. *Claims on Which Woman-Protective Justifications for Abortion Restrictions Rest*

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There are some, at least in the antiabortion movement, who credit this possibility. But not Harold Cassidy, who has played a leading role in advancing woman-protective argument, in South Dakota and elsewhere.<sup>245</sup> Cassidy argues that the best way to move the Court to adopt a ban on abortion is to argue, as he did in a suit with Allan Parker that sought to re-open *Roe*, that women lack competence to make responsible choices about abortion; that restricting women's legal and practical capacity to choose abortion will protect women against coercion, as well as their own confusion about what is in their own and their family's interest; and that restricting women's ability to make choices concerning their own lives and the lives of their existing family members will free them to assume their roles as mothers.<sup>246</sup> When Harold Cassidy explains woman-protective antiabortion argument, he typically emphasizes claims about women's capacity and claims about women's roles:

It took the experimentation with abortion to disprove the central fundamental question or fundamental assumption of *Roe*, and the fundamental assumption that there can be a known, there can be a voluntary, there can be an informed waiver of the mother's interest. It took the experience of millions of women, who now have come forward, and said, "I didn't know what I was doing. I wasn't told the truth."

Walk away from it, and live with it, and forget about it. She can't forget, she can't live with it, and it's not just an unnatural act, it is an unnatural, evil act. And for the men of this nation, and the seven male judges who created this, who think that women can deny that they are women, they can deny that they are mothers, without consequence, is not only ignorant, it's cruel.<sup>247</sup>

Litigation documents from the suit to reopen *Roe* and *Doe* express Cassidy and Parker's belief that the affidavits would present the Court with a new understanding of women's decisional capacity in matters concerning abortion:

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245. See *supra* notes 94-99 and accompanying text.

246. See *supra* note 96; *infra* text accompanying notes 247-248, *infra* notes 268, 270 and accompanying text (quoting litigation documents, a memorandum, and interviews).

247. EWTN, *supra* note 89 (Cassidy discussing the Donna Santa Marie tort suit against an abortion provider).

The United States Supreme Court in *Roe* and *Casey* assumed that abortion would be a voluntary choice. Rather than being the result of a knowing, voluntary, dignity-enhancing woman's choice, the attached Women's Affidavits from more than a thousand women who have had abortions reveal that abortion is almost always the result of pressure or coercion from sexual partners, family members, abortion clinic workers, abortionists, or circumstances. Of course, women are intelligent beings capable of making rational, informed decisions. However, it is difficult in a pressured pregnancy situation to make a rational, informed decision under such extreme circumstances with so little truthful information provided.<sup>248</sup>

Similar arguments dominate the South Dakota Task Force Report, the legislative history for the ban the state's voters considered in 2006 and will consider again this year.<sup>249</sup> Relying on the Operation Outcry affidavits, the South Dakota Task Force asserted it received the testimony of 1950 women, reporting that "[v]irtually all of them stated they thought their abortions were uninformed or coerced or both."<sup>250</sup> The Report asserted that women who have abortions could not have knowingly and willingly chosen the procedure and must have been misled or pressured into the decision by a partner, a parent, or even the clinic—because "[i]t is so far outside the normal conduct of a mother to implicate herself in the killing of her own child."<sup>251</sup> The Report asserted that a woman who is encouraged "to defy her very nature as a mother to protect her

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248. Memorandum of Law in Support of Rule 60 Motion, *supra* note 95, at 17, 22-23 ("The attached Affidavit testimony of more than a thousand women who actually had abortions shows the unproven assumption of *Roe* that abortion is 'a woman's choice' is a lie. The 'choice,' a waiver of a constitutional right to the parent-child relationship, requires a voluntary decision with full knowledge. In addition to being coerced, women are also lied to and misled."); see also Brief in Support of Rule 60 Motion for Relief from Judgment, *supra* note 95, at 34 ("Under the assumptions of *Roe* and *Casey*, women were to be "free" to make their own decision about whether to abort or carry a child to birth. This assumes that they are free from pressure or coercion, and that their physician has provided them with complete and adequate knowledge of the nature of abortion and its long term consequences. The women who have experienced abortion testify in sworn Women's Affidavits how they were not informed of the consequences." (citation omitted)).

249. See *supra* text at notes 20, 100-107.

250. SOUTH DAKOTA TASK FORCE REPORT, *supra* note 20, at 31, 38; cf. *id.* at 21-22 ("We find the testimonies of these women an important source of information about the way consents for abortions are taken . . ."). The Report relies heavily on the affidavits and repeatedly cites them as evidence.

251. *Id.* at 56.

child,"<sup>252</sup> is likely to "suffer[] significant psychological trauma and distress."<sup>253</sup> It thus recommended that the state ban abortion to preserve "the pregnant mother's natural intrinsic right to her relationship with her child, and the child's intrinsic right to life."<sup>254</sup> (The chair of the South Dakota Task Force on Abortion, an obstetrician who opposes abortion, resigned from the Task Force and repeatedly spoke out against the Report because of its disrespect of scientific facts and method.<sup>255</sup>)

The preamble of South Dakota's 2005 "informed consent" statute enacts the Task Force Report's claims about women's decisional capacity into law.<sup>256</sup> The statute is based on an official legislative finding:

The Legislature finds that procedures terminating the life of an unborn child impose risks to the life and health of the pregnant woman. The Legislature further finds that a woman seeking to terminate the life of her unborn child may be subject to pressures which can cause an emotional crisis, undue reliance on the advice of others, clouded judgment, and a willingness to violate conscience to avoid those pressures.<sup>257</sup>

South Dakota's stated rationale for intervening in women's decisionmaking is based on generalizations about women as a class that sound in familiar

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252. *Id.* at 56.

253. *Id.* at 47-48. Openly rejecting the findings of numerous government and professional associations, the Task Force found that women who abort a pregnancy risk a variety of life-threatening illnesses ranging from bipolar disorder, post-traumatic stress disorder, and suicidal ideation, to breast cancer. *Id.* at 42-46, 52.

254. *Id.* at 67.

255. See Siegel, *supra* note 22, at 139-40 (discussing decision of the chair of the South Dakota Task Force on Abortion, who opposes abortion, to resign and speak out against the report because of its failure to conform with scientific facts, method, and authority); see also *supra* note 81 (citing public health authorities that repudiate post-abortion syndrome).

256. H.B. 1166, 2005 Leg., 80th Sess. 3 (S.D. 2005) (codified in S.D. CODIFIED LAWS § 34-23A-1.4 (2005)), available at <http://legis.state.sd.us/sessions/2005/1166.htm>.

257. *Id.* The statute further states:

The Legislature therefore finds that great care should be taken to provide a woman seeking to terminate the life of her unborn child and her own constitutionally protected interest in her relationship with her child with complete and accurate information and adequate time to understand and consider that information in order to make a fully informed and voluntary consent to the termination of either or both.

S.D. CODIFIED LAWS § 34-23A-1.4 (2005); see *infra* note 259 (quoting statute).



stereotypes about women's capacity and women's roles<sup>258</sup>— here barely cloaked in public health frames. These gender-conventional convictions—that women are too weak or confused to make morally responsible choices and need law's protection to free them to be mothers—are here used to justify an "informed consent" script between doctor and patient designed to frighten and shame a woman into choosing to carry a pregnancy to term.<sup>259</sup>

258. A popular antiabortion tract authored by the leader of the nineteenth-century criminalization campaign derided women's capacity to make decisions about abortion, suggesting that pregnant women were especially prone to hysteria:

If each woman were allowed to judge for herself in this matter, her decision upon the abstract question would be too sure to be warped by personal considerations, and those of the moment. Woman's mind is prone to depression, and, indeed, to temporary actual derangement, under the stimulus of uterine excitation, and this alike at the time of puberty and the final cessation of the menses, at the monthly period and at conception, during pregnancy, at labor, and during lactation . . .

Is there then no alternative but for women, when married and prone to conception, to occasionally bear children? This, as we have seen, is the end for which they are physiologically constituted and for which they are destined by nature. . . . [The prevention and termination of pregnancy] are alike disastrous to a woman's mental, moral, and physical well-being.

STORER, *supra* note 93, at 74-76; cf. E.P. Christian, *The Pathological Consequences Incident to Induced Abortion*, 2 DETROIT REV. MED. & PHARMACY 119, 145 (1867) (citing "the intimate relation between the nervous and uterine systems manifested in the various and frequent nervous disorders arising from uterine derangements," i.e., "hysteria," and "the liability of the female, in all her diseases, to intercurrent derangements of these functions," as factors that "might justly lead us to expect that violence against the physiological laws of gestation and parturition would entail upon the subject of such an unnatural procedure a severe and grievous penalty"). See generally Siegel, *supra* note 93, at 311 n.199 (surveying physiological arguments in nineteenth-century antiabortion literature and observing that "physiological arguments were used to attack the concept of voluntary motherhood in two ways. In addition to arguing that women's capacity to bear children rendered them incapable of making responsible choices in matters concerning reproduction, Storer (and others) claimed that women would injure their health if they practiced abortion or contraception or otherwise willfully resisted assuming the role of motherhood.").

259. The law directs doctors to tell women that an abortion "will terminate the life of a whole, separate, unique, living human being," and that "the pregnant woman has an existing relationship with that unborn human being and that the relationship enjoys protection under the United States Constitution and under the laws of South Dakota," and directs the doctor to provide the woman seeking an abortion:

A description of all known medical risks of the procedure and statistically significant risk factors to which the pregnant woman would be subjected, including: (i) Depression and related psychological distress; (ii) Increased risk of suicide ideation and suicide; . . . (iv) All other known medical risks to the physical health of the woman, including the risk of infection, hemorrhage, danger to subsequent pregnancies, and infertility.

## DIGNITY AND THE POLITICS OF PROTECTION

In addition to the limitations of the First Amendment,<sup>260</sup> *Casey* imposes dignity-respecting constraints on such “informed consent” dialogues. Whatever its putative protective purpose, “informed consent” counseling that provides a woman false counsel—for example that having an abortion may increase her risk of breast cancer<sup>261</sup>—is an undue burden on a woman’s

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S.D. CODIFIED LAWS § 34-23A-10.1(1)(b), (c) & (e) (2005). Given that the doctor is to communicate this information, inquire whether the patient understands, and record any questions she has, under the sanction of the criminal law, it is not at all clear what freedom a doctor has to deviate from the message provided in the statute and the Task Force Report that is its legislative history. S.D. CODIFIED LAWS § 34-23A-10.1 (S.D. 2005).

260. See *Casey*, 505 U.S., at 884 (“To be sure, the physician’s First Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State.” (citation omitted)); see also *supra* note 164 (discussing authorities who address the First Amendment concerns raised by “informed consent” regulation of abortion).

261. Kansas requires that women receive a state-produced pamphlet at least twenty-four hours before having an abortion which lists breast cancer among the long-term risks of abortion:

Several studies have found no overall increase in risk of developing breast cancer after an induced abortion, while several studies do show an increase [sic] risk. There seems to be consensus that this issue needs further study. Women who have a strong family history of breast cancer or who have clinical findings of breast disease should seek medical advice from their physician irrespective of their decision to become pregnant or have an abortion.

Kansas Dep’t of Health and Env’t, *If You Are Pregnant*, available at <http://www.driller.com/bk1.html> (last visited May 5, 2008). Whereas the pamphlet claims there is consensus about the need for more study, both the National Cancer Institute and the World Health Organization have concluded after extensive study that abortion is not associated with an increased risk of breast cancer. The more recent and better-designed studies have consistently shown no link between abortion and the risk of breast cancer. See sources cited *supra* note 81.

In Texas, the physician must inform a woman seeking an abortion “when medically accurate” of several medical risks, including “the possibility of increased risk of breast cancer following an induced abortion and the natural protective effect of a completed pregnancy in avoiding breast cancer.” Tex. Health & Safety § 171.012 (1), available at <http://tlo2.tlc.state.tx.us/statutes/hs.toc.htm>. This is at best misleading because medical research indicates that it is never medically accurate to inform a woman of an increased risk in breast cancer. It is not clear how much discretion a doctor truly has. To the extent that physicians are required to inform women that an abortion may increase the risk of breast cancer, the state is requiring the provision of false information.

Doctors are required to inform patients that they have the right to view state-created pamphlets, which also describe a possible link between abortion and an increased risk of breast cancer. The pamphlets state:

Your chances of getting breast cancer are affected by your pregnancy history. If you have carried a pregnancy to term as a young woman, you may be less likely to get breast cancer in the future. However, you do not get the same protective effect

decision. So, too, an "informed consent" dialogue that misleads women unduly burdens their decision making: Misleading can occur, not only when government "persuades" by leading a woman to believe facts that are not true,<sup>262</sup> but *also* when government offers women counsel that invites reliance because it resembles the speech of counseling professionals but breaches

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if your pregnancy is ended by an abortion. The risk may be higher if your first pregnancy is aborted.

While there are studies that have found an increased risk of developing breast cancer after an induced abortion, some studies have found no overall risk. There is agreement that this issue needs further study. If you have a family history of breast cancer or clinical findings of breast disease, you should seek medical advice from your physician before deciding whether to remain pregnant or have an abortion. It is always important to tell your doctor about your complete pregnancy history.

Texas Dep't of State Health Svcs., *Woman's Right to Know: After an Abortion*, (Dec. 17, 2007) <http://www.dshs.state.tx.us/wrtk/after-abortion.shm>. It is medically untrue that the risk of breast cancer "may be higher if your first pregnancy is aborted." It is also false that "there is agreement that this issue needs further study." *Id.*

262. For example, a pamphlet that suggests that infertility is a risk of a first trimester abortion impermissibly misleads women who are not at risk. The state-created pamphlet that Texas requires physicians to make available to women seeking an abortion describes the risks an abortion poses to future childbearing:

The risks are fewer when an abortion is done in the early weeks of pregnancy. The further along you are in your pregnancy, the greater the chance of serious complications and the greater the risk of dying from the abortion procedure. Some complications associated with an abortion, such as infection or a cut or torn cervix, may make it difficult or impossible to become pregnant in the future or to carry a pregnancy to term.

Some large studies have reported a doubling of the risk of premature birth in later pregnancy if a woman has had two induced abortions. The same studies report an 800 percent increase in the risk of extremely early premature births (less than 28 weeks) for a woman who has experienced four or more induced abortions. Very premature babies, who have the highest risk of death, also have the highest risk for lasting disabilities, such as mental retardation, cerebral palsy, lung and gastrointestinal problems, and vision and hearing loss.

Texas Dep't of State Health Services, *supra* note 261. This information may be true, but it is certainly misleading: medical research shows that abortions performed in the first trimester do not pose an increased risk to future fertility. See Rachel Benson Gold & Elizabeth Nash, *State Abortion Counseling Policies and the Fundamental Principles of Informed Consent*, 10 GUTTMACHER POL. REV. 6, 11 (2007); FALSE AND MISLEADING HEALTH INFORMATION PROVIDED BY FEDERALLY FUNDED PREGNANCY RESOURCE CENTERS, REPORT TO HOUSE COMM. ON GOV. REFORM (2006). Texas also requires doctors "when medically accurate" to inform patients of "the potential danger to a subsequent pregnancy and of infertility." Tex. Health & Safety § 171.012 (1), *supra* note 261. If this risk is disclosed to all women seeking abortions, it would certainly be misleading as this danger is only applicable to a certain (small) class of women who have abortions.

fiduciary responsibilities ordinarily imposed on those who counsel—for example, by counseling women in ways that distract them from the balance of considerations that a reasonable person in the woman's position might deem relevant.<sup>263</sup>

But these are ordinary applications of the undue burden framework. The undue burden framework we considered in Part II of this essay was premised on the assumption—shared by *Casey* and *Carhart*—that the purpose of abortion restrictions was to protect the unborn and express respect for life. *Casey* authorized government to persuade women to continue a pregnancy to advance government's interest in potential life—not to promote an interest in sex-role conformity.

None of the Court's abortion decisions uphold a law that restricts women's decision making for the kinds of reasons that the South Dakota Task Force Report offers: that women lack capacity to make decisions about abortion or that the abortion decision is against women's "nature." Woman-protective

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<sup>263</sup> In Minnesota, physicians are required to inform women seeking an abortion that they have the right to review state-created materials that includes a section on "The Emotional Side of Abortion." See Minnesota Dep't of Health, *If You Are Pregnant: Information on Fetal Development, Abortion, and Alternatives*, available at [www.health.state.mn.us/wrtk/wrtk-handbook.pdf](http://www.health.state.mn.us/wrtk/wrtk-handbook.pdf). The pamphlet provides no information about the "emotional side" of childbirth, however, and does not at all discuss the risk of post-partum depression or any other emotional or mental health effects of carrying a pregnancy to term:

Each woman having an abortion may experience different emotions before and after the procedure. Women often have both positive and negative feelings after having an abortion. Some women say that these feelings go away quickly, while others say they last for a length of time. These feelings may include emptiness and guilt as well as sadness. A woman may question whether she made the right decision. Some women may feel relief about their decision and that the procedure is over. Other women may feel anger at having to make the choice. Women who experience sadness, guilt or difficulty after the procedure may be those women who were forced into the decision by a partner or family member, or who have had serious psychiatric counseling before the procedure or who were uncertain of their decision.

Counseling or support before and after your abortion is very important. If family help and support is not available to the woman, the feelings that appear after an abortion may be harder to adjust to. Talking with a professional and objective counselor before having an abortion can help a woman better understand her decision and the feelings she may experience after the procedure. If counseling is available to the woman, these feelings may be easier to handle.

Remember, it is your right and the doctor's responsibility to fully inform you prior to the procedures. Be encouraged to ask all of your questions.

*Id.*; cf. Texas Dep't of State Health Svcs., *supra* note 261 (comparing the "emotional side of an abortion" and the "emotional side of birth").

antiabortion argument makes up over half of the lengthy Task Force Report,<sup>264</sup> which in turn is the basis for the state's 2005 informed consent statute, the abortion ban that South Dakota voters rejected in 2006, and the abortion ban that voters in the state will consider this fall.<sup>265</sup> It is Harold Cassidy's view that it is precisely the Report's woman-protective argument that will establish the constitutionality of the state's current proposed ban in the eyes of Justice Kennedy.

In a debate posted on an Operation Rescue website, James Bopp of the National Right to Life Committee, a strong proponent of incrementalism, has warned that sending the Court bans on abortion might push Justice Kennedy to join the *Carhart* dissenters who believe such bans to violate the constitutional guarantees of both liberty and equality.<sup>266</sup> The opposing

264. See SOUTH DAKOTA TASK FORCE REPORT, *supra* note 20.

265. See *supra* note 101 (discussing the ban's relation to the Task Force Report); see also *supra* note 20 (woman-protective argument in endorsements for the ban that are posted on the Web site of the group leading the initiative campaign for the ban).

266. See Legal Memorandum from James Bopp, Jr. & Richard E. Coleson on Pro-life Strategy Issues 3, 6 (Aug. 7, 2007), available at <http://personhood.net/docs/BoppMemorandum1.pdf> (arguing that "now is not the time to pass state constitutional amendments or bills banning abortion," and that "[e]schewing incremental efforts to limit abortion where legally and politically possible makes the error of not saving some because not all can be saved. It also makes the strategic error of believing that the pro-life issue can be kept alive without such incremental efforts"). The memo argues:

But if the U.S. Supreme Court, as presently constituted, were to actually accept a case challenging the declared constitutional right to abortion, there is the potential danger that the Court might actually make things worse than they presently are. The majority might abandon its current "substantive due process" analysis (i.e., reading "fundamental" rights into the "liberty" guaranteed by the Fourteenth Amendment against infringement without due process) in favor of what Justice Ginsberg [sic] has long advocated—an "equal protection" analysis under the Fourteenth Amendment. In *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007), the dissent, written by Justice Ginsberg, in fact did so. See *id.* at 1641 (Ginsberg, J., joined by Stevens, Souter, and Breyer, JJ.) ("[L]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."). If this view gained even a plurality in a prevailing case, this new legal justification for the right to abortion would be a powerful weapon in the hands of pro-abortion lawyers that would jeopardize all current laws on abortion, such as laws requiring parental involvement for minors, waiting periods, specific informed consent information, and so on. A law prohibiting abortion would force Justice Kennedy to vote to strike down the law, giving Justice Ginsberg the opportunity to rewrite the justification for the right to abortion for the Court. This is highly unlikely in a case that decides the constitutionality of such things as PBA bans, parental involvement laws, women's right-to-know laws, waiting periods, and other

position is staked out by Cassidy, who played a leading role in developing the state's unimplemented 2004 and 2006 abortion bans, the ban that will appear on the state's 2008 ballot, as well as its "informed consent" statute.<sup>267</sup> A memo credited to Cassidy and Samuel Casey ridicules Bopp's objections and exhorts South Dakotans to renew their drive to ban abortion, arguing that Justice Kennedy's opinion in *Carhart* suggests that he is open to reversing *Roe* and *Casey* with a showing of new facts about women's need for protection.<sup>268</sup> The

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legislative acts that do not prohibit abortion in any way, since Justice Kennedy is likely to approve such laws.

*Id.* at 3-4.

<sup>267.</sup> See *supra* notes 95-97 and accompanying text.

<sup>268.</sup> See Legal Memorandum from Samuel B. Casey & Harold J. Cassidy to Members of the South Dakota Pro-Life Leadership Coalition on the Proposed 2008 South Dakota Abortion Bill 9 (Oct. 10, 2007), available at <http://operationrescue.org/pdfs/Legal%20Memo%20&%20Proposed%20South%20Dakota%20Abortion%20Bill%20%2810-10-2007%29.pdf>. Analyzing Justice Kennedy's position on *Roe*, the memo observes:

The joint opinion in *Casey* expressly states that if *Roe* was in error—and clearly Kennedy had thought that it was—that error only went to the “weight to be given to the state's interest in fetal life.” *Casey*, 505 U.S. at 855. But, the Justices writing the joint opinion held that if that is the only error or consequence of the error, it was insufficient to justify overturning *Roe* because that error did not affect the “women's liberty.” *Id.* Kennedy and O'Connor were bothered by the perception that protecting the unborn child by banning abortion was at the expense of the liberty interests of the women; and the perception that to do so was anti-women.

Woman-protective argument is responsive to this diagnosis, precisely because it offers a claim of changed facts and thus provides Justice Kennedy the opportunity to back away from *Roe* and *Casey* without appearing to be “anti-women”:

The entire approach that South Dakota has adopted and advances will satisfy the *Casey* stare decisis analysis. This legal and factual analysis has, especially with the witness of the women who have had abortions, and the professionals and pregnancy help centers that care for them, the power to persuade members of the Court that the *Casey* stare decisis analysis has been satisfied.

There will be those who will argue that we can't win Justice Kennedy back to where he was between 1989 and 1992; that his vote in *Gonzales v. Carhart* was simply his asserting the compromise he thought he struck with Justices O'Connor and Souter in the *Casey* case.

However, we know that he knows *Roe* was wrongly decided. He wrote with passion in *Gonzales* about the harm abortion causes women. He demonstrated a predisposition and receptiveness to proof about such harm. More importantly, perhaps, he wrote with passion about the beauty of the bond between mother and child: “Respect for human life finds an ultimate expression in the bond of love the mother has for her child.” *Gonzales*, 127 S.Ct. 1610, 1634 (2007). Justice Kennedy retained his powerful pro-motherhood language despite a bitter attack by Justice Ginsberg [sic].

memo dismisses concerns about Justice Kennedy's receptivity to the equal protection claim, several times referring to equal protection concerns as "ridiculous" and "silly."<sup>269</sup>

The memo's dismissal of the equal protection claim reflects a view of women that Cassidy regularly expresses in legal fora and other venues in which he is advancing his antiabortion arguments.<sup>270</sup> Cassidy's conception of

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It was not a coincidence that Justice Kennedy cited to the "friend of the court" brief of Sandra Cano (the "Doe" in *Doe v. Bolton*) which related the experiences of post abortive women. Of all the Justices on the Court, perhaps Justices Kennedy and Roberts would be most receptive to South Dakota's women's interest analysis.

*Id.* at 10.

<sup>269</sup> See Cassidy, *supra* note 268, at 18 ("We do understand that Justice Ginsberg [sic] does agree with Riva [sic] Siegel that the *Roe v. Wade* analysis should be discarded and replaced with her equal protection violation analysis. But there is no credible evidence that [other Justices] would fully adopt that analysis. . . . More importantly, the Equal Protection analysis would not be worse for us because it is a ridiculous argument. If Mr. Bopp's willing Court that he sees coming in the future would swat away the *Roe* analysis on any reasoning, they surely would swat away Ginsberg's [sic] silly equal protection argument. Actually, Ginsberg [sic] pressing that equal protection argument might be good for our objectives. Justice Kennedy surely did not join her dissent in *Gonzales*, and clearly thinks it is ridiculous. If he thought it could be the law of the land, it is one more reason, along with all of the good facts and law South Dakota gives him, to go back to his old position of striking down *Roe*.").

<sup>270</sup> See, e.g., text accompanying *supra* notes 245-248. In a recent interview, Cassidy observed:

I'm going to say something that may be controversial: There is crisis thinking. I don't care how smart a woman is, I don't care how responsible she is, how in control of her life, there's something about that particular circumstance of pregnancy. The decision has got to be one she can live with for her entire life, and the woman in that position is very vulnerable. It may not be popular to say that, but it is the reality. And part of the problem of abortion is that it is more about what we would like a woman to do than what she is really wired and capable of doing. To have a policy built on a premise that a woman can kill her own child and that it's okay is terrible.

. . . .

There are women who think they are informed, and later find out that they are not informed. And that phenomenon comes in many degrees. There can be women, and there are some, surely, who make a decision that is informed, and it is voluntary, and even they will find out later that it's not. They're not liberated by it; they're enslaved by the experience. In fact, in many ways they were enslaved by the experience before they made this so-called free and informed decision, because there is a culture and society and sexual partners who have come to expect her to be able to perform or to act in a certain way, and those expectations have enslaved her. Not only have they enslaved her in terms of her ability to get an abortion, but also to behave in ways that lead to the pregnancy in the first place.

protecting women is fundamentally at odds with the understanding of women's dignity on which the modern constitutional order rests. A ban statute based on the South Dakota Task Force Report on Abortion violates, not only *Casey*, but the Court's equal protection cases, which prohibit laws "protecting" women in this way.<sup>271</sup>

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Sarah Blustein, *The Right Not To Choose: TAP Talks to Prominent Anti-Abortion Lawyer Harold Cassidy*, AM. PROSPECT, Apr. 13, 2007, [http://www.prospect.org/cs/articles?article=the\\_right\\_not\\_to\\_choose](http://www.prospect.org/cs/articles?article=the_right_not_to_choose).

271. See Siegel, *supra* note 15, at 1078 (analyzing South Dakota's 2006 abortion ban and the woman-protective arguments of the state task force report on which it was based, and concluding that "prohibiting abortion for this purpose violates the Equal Protection Clause. South Dakota cannot use the criminal law to ensure that its female citizens choose and act like women should").

It does not help that ban statutes such as South Dakota's, which deny women the capacity to make decisions in matters of motherhood, often exempt women from responsibility for seeking an abortion. South Dakota's past and current proposed bans would impose criminal liability on abortion-providers only and would not criminalize the conduct of women who seek or obtain an abortion. See Initiative Petition, An Act To Protect the Lives of Unborn Children, and the Interests and Health of Pregnant Mothers, § 13, available at <http://www.voteyesforlife.com/docs/Petition.pdf> ("Nothing in this Act subjects the pregnant woman upon whom any abortion is performed or attempted to any criminal conviction and penalty for an unlawful abortion."); see also H.B. 1215, 2006 Leg., 81st Sess. § 4 (S.D. 2006) (repealed 2006) (same). The Partial-Birth Abortion Ban Act at issue in *Carrhart* similarly assigns liability for performing intact dilation and extraction abortion procedures only to doctors. Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531(e) (2000) ("A woman upon whom a partial-birth abortion is performed may not be prosecuted under this section . . ."). Before *Roe*, many statutes prohibiting abortion imposed liability on doctors but did not criminalize the conduct of women who underwent abortion procedures. See *Roe v. Wade*, 410 U.S. 113, 151 (1973) ("[I]n many States . . . the pregnant woman herself could not be prosecuted for self-abortion or for cooperating in an abortion performed upon her by another.").

A large number of leaders in the antiabortion movement have recently defended the view that criminal abortion statutes should not impose liability upon women who have abortions. *One Untrue Thing*, NAT'L REV., Aug. 1, 2007, <http://article.nationalreview.com/?q=ZjkkvNWQ4ZDQ2NTljNDg4MjUyYWlxZWQ6NDVjMTkxYjg#more>. (quoting seventeen antiabortion activists, including Clarke Forsythe, president of Americans United for Life, who asserts that "the woman is the second victim of abortion" and that "the purpose behind that [antiabortion] law was not to degrade women but to protect them"). The view that law should control women's abortion decisions without imposing criminal sanctions on women who seek abortions seems widely shared in the antiabortion movement. In short documentary video clip that appeared on the internet in 2007, antiabortion protesters are asked, "What should happen to women who would get abortions, if abortions were to become illegal?" YouTube Video, Libertyville Abortion Demonstration, [http://www.youtube.com/watch?v=Uk6t\\_dOkwo](http://www.youtube.com/watch?v=Uk6t_dOkwo). The protesters react with surprise to the question, responding variously, "I haven't thought about that one," "Pray for them," and "I don't have an answer for that." *Id.*



Modern case law enforcing constitutional guarantees of liberty and equality for women emerged precisely as the Court repudiated the understanding that government could single out women as a group and impose limitations on their capacity to make life choices in order to protect women and ensure that women would fulfill their natural roles as wives and mothers.<sup>272</sup> Justice Ginsburg voices just this constitutional objection to woman-protective antiabortion argument:

This way of thinking reflects ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited. Compare, e.g., *Muller v. Oregon* (1908) (“protective” legislation imposing hours-of-work limitations on women only held permissible in view of women’s “physical structure and a proper discharge of her maternal funct[ion]” ); *Bradwell v. State* (1873) (Bradley, J., concurring) (“Man is, or should be, woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The paramount destiny and mission of woman are to fulfil[I] the noble and benign offices of wife and mother.”) with *United States v. Virginia* (1996) (State may not rely on “overbroad generalizations” about the “talents, capacities, or preferences” of women; “[s]uch judgments have . . . impeded . . . women’s progress toward full citizenship stature throughout our Nation’s history”); *Califano v. Goldfarb*, (1977) (gender-based Social Security classification rejected because it rested on “archaic and overbroad generalizations” “such as assumptions as to [women’s] dependency” . . .).<sup>273</sup>

The new gender paternalism is in fact the old gender paternalism: laws (1) based on stereotypes about women’s capacity and women’s roles that (2) deny women agency (3) for the claimed purpose of protecting women from coercion and/or freeing them to be mothers. Gender paternalism of *this* kind violates the very forms of dignity that *Casey*—and the equal protection cases—protect.

South Dakota’s efforts to reverse *Roe* challenge far more than the Court’s substantive due process decisions. The state’s effort to use law to enforce traditional conceptions of women’s capacities and roles strikes at modern understandings of women’s citizenship. These understandings are not simply embodied in *Roe* or *Casey*; they inhere in the equal protection cases, and

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272. See Section III.B.

273. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1649 (2007) (Ginsburg, J. dissenting) (citations omitted).

beyond the case law, are rooted in the norms and forms of community from which these decisions emerged.<sup>274</sup> For this reason, even as the Court's decisions play a role in limiting woman-protective antiabortion argument,<sup>275</sup> constitutional limits on woman-protective antiabortion argument do not depend solely on the authority of the Court's past decisions. To the contrary, the Constitution's dignity-based constraints on woman-protective antiabortion argument are alive in the forms of normative appeal we make on one another, today, inside and outside of courts of law. Should the Supreme Court adopt the modes of reasoning about women expressed in the South Dakota Task Force Report, far more than the abortion right would be in jeopardy.

There are, in short, deep constitutional objections to abortion restrictions based on the woman-protective arguments we have examined. But these constitutional debilities are not the only problem with the claim. The woman-protective antiabortion argument is itself confused, about the capacities of women who consider abortion and the forms of community support that might be responsive to their needs. Women who consider abortion may be in great need, but the remedy that woman-protective antiabortion argument offers does not address those needs.

Of the millions of women who have or consider abortions, many become pregnant without wanting to; it is not responsive to their needs to deny access to abortion "as birth control" without teaching young men and women about contraception, as South Dakota would.<sup>276</sup> Of the millions of women who have

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274. See *supra* notes 187-188 and accompanying text.

275. See, e.g. Section I.A. (discussing the debate between incrementalists and absolutists in the antiabortion movement); *supra* note 98 (discussing incrementalist efforts to block abortion restrictions in South Dakota); *supra* note 266 (quoting memorandum of James Bopp, cautioning antiabortion community against adopting absolutist abortion restrictions that might move Justice Kennedy to join *Carhart's* dissenting Justices in imposing equal protection limitations on abortion regulation); Section II.B (discussing how the case law allows government to express respect for life in a form that respects women's decisional autonomy); Subsection II.C.1. (discussing how *Casey* restricts incrementalist informed consent regulation to forms that respect women's decisional autonomy); Section III.A (discussing the ways *Carhart* recognizes fetal-protective and woman-protective discourse as part of an abortion-rights framework).

276. *Voteyesforlife.com* urges voters to support the proposed ban to stop abortion "as birth control." *Vote Yes For Life*, *supra* note 101 ("[T]his bill prohibits abortions used as birth control."). But the leader of the group supporting the ban opposes public education about birth control. The Task Force specifically refused to include a recommendation supporting sexual education when recommending that the state ban abortion, leading to the resignation of its antiabortion chairwoman. See *supra* note 186; see also Siegel, *supra* note 22, at 138. Many of the groups that oppose abortion now advocate abstinence education. See *Post & Siegel*, *supra* note 152, at 412-24 & n.232.

or consider abortions, some are mentally ill. It is not responsive to their needs to offer them coerced motherhood rather than counseling—nor is it respectful to regulate the decision making of capable women as if they were mentally ill.<sup>277</sup> Of the millions of women who have or consider abortions, some are in abusive relations or lack resources to care for their existing family. It is not responsive to their needs to offer them coerced motherhood rather than the resources and support that would allow them to choose motherhood without harm to themselves and their loved ones.

The new gender paternalism does not merely generalize or stereotype. Like the old gender paternalism, the new gender paternalism points to social sources of harm to women—abuse, poverty, or work/family conflict—and offers control of women as the answer.<sup>278</sup> Women in need deserve better.

Consider the woman-protective claim in light of this information from the Guttmacher Institute:<sup>279</sup>

- (1) *One-Third of American Women Will Have an Abortion.* "At least half of American women will experience an unintended pregnancy by

277. Social scientists report that preexisting psychiatric illnesses, depression, and psychosis often predict post-pregnancy mental health difficulties, regardless of pregnancy outcome. Anne C. Gilchrist, Philip C. Hannaford, Peter Frank & Clifford R. Ray, *Termination of Pregnancy and Psychiatric Morbidity*, 167 *BRITISH J. PSYCHOL.* 243, 247 (1995); Sarah Schmiede & Nancy Felipe Russo, *Depression and Unwanted First Pregnancy: Longitudinal Cohort Study*, 331 *BMJ* 1303, 1306 (2005); Laurie Schwab Zabin, Marilyn B. Hirsch & Mark R. Emerson, *When Urban Adolescents Choose Abortion: Effects on Education, Psychological Status, and Subsequent Pregnancy*, 21 *FAM. PLAN. PERSPS.* 248, 248 (1989); G. Zolse & C.V.R. Blacker, *The Psychological Complications of Therapeutic Abortion*, 160 *BRITISH J. PSYCHOL.* 742, 742 (1992).

This group of women with preexisting psychiatric illness deserves support. But isolating women with preexisting psychiatric illness and requiring them involuntarily to continue pregnancies they wish to end, or subjecting them to government pressure to do so, hardly responds to their needs, or the needs of others dependent on them. Bearing a child—or another child—may well exacerbate mental health problems, and certainly will if the women are pushed into bearing an unwanted child without appropriate counseling and material support.

If pregnant women with preexisting psychiatric illnesses need help, it is counseling that is genuinely open to finding the path that best suits a woman and her family. Making this group of vulnerable women the target of regulation that expresses views about the morality of abortion violates their dignity—just as pointing to women with psychiatric illness as a reason for regulating the decisions of all women violates their dignity.

278. Consider, for example, the efforts of David Reardon, *see supra* notes 73, 87, 91-92 and accompanying text, and Harold Cassidy, *see supra* notes 95-101 and accompanying text. The common law also protected women by restricting their agency. *See supra* text accompanying note 231.

279. *See* GUTTMACHER INST., *FACTS ON INDUCED ABORTION IN THE UNITED STATES* (2008), [http://www.guttmacher.org/pubs/fb\\_induced\\_abortion.html](http://www.guttmacher.org/pubs/fb_induced_abortion.html).

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- age 45, and, at current rates, about one-third will have had an abortion.<sup>280</sup>
- (2) *60% Have Children*. "About 60% of abortions are obtained by women who have one or more children."<sup>281</sup>
- (3) *The Abortion Rate is Higher Among Poor Women*. "The abortion rate among women living below the federal poverty level (\$9,570 for a single woman with no children) is more than four times that of women above 300% of the poverty level (44 vs. 10 abortions per 1,000 women)."<sup>282</sup>
- (4) *There Are a Few Common Reasons Women Have an Abortion*. "The reasons women give for having an abortion underscore their understanding of the responsibilities of parenthood and family life. Three-fourths of women cite concern for or responsibility to other individuals; three-fourths say they cannot afford a child; three-fourths say that having a baby would interfere with work, school or the ability to care for dependents; and half say they do not want to be a single parent or are having problems with their husband or partner."<sup>283</sup>
- (5) *Age*. "Fifty percent of U.S. women obtaining abortions are younger than 25: Women aged 20-24 obtain 33% of all abortions, and teenagers obtain 17%."<sup>284</sup>
- (6) *Use of Contraception*. "Forty-six percent of women who have abortions had not used a contraceptive method during the month they became pregnant."<sup>285</sup>

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280. *Id.* (citing Rachel K. Jones et al., *Repeat Abortion in the United States*, Occasional Report No. 29 (2006), available at <http://www.guttmacher.org/pubs/2006/11/21/or29.pdf>; Stanley K. Henshaw, *Unintended Pregnancy in the United States*, 30 *FAMILY PLANNING PERSPECTIVES* 24 (1998); Guttmacher Instit., *State Facts About Abortion: New York*, 2006, [http://www.guttmacher.org/pubs/sfaa/new\\_york.html](http://www.guttmacher.org/pubs/sfaa/new_york.html)) (last visited May 5, 2008).

281. *Id.*

282. *Id.* (citing Rachel K. Jones, Jacqueline E. Darroch & Stanley K. Henshaw, *Patterns in the Socioeconomic Characteristics of Women Obtaining Abortions in 2000-2001*, 34 *PERSP. ON SEXUAL & REPROD. HEALTH* 226 (2002), available at <http://www.guttmacher.org/pubs/journals/3422602.pdf>).

283. *Id.* (citing Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 *PERSP. ON SEXUAL & REPROD. HEALTH* 110 (2005), available at <http://www.guttmacher.org/pubs/journals/3711005.html>).

284. *Id.*

285. *Id.* (citing Rachel K. Jones, Jacqueline E. Darroch & Stanley K. Henshaw, *Contraceptive Use Among U.S. Women Having Abortions in 2000-2001*, 34 *PERSP. ON SEXUAL & REPROD. HEALTH* 294 (2002)).

### *Comparative Sterilization and Child Cap Laws*

It is important to recognize that an individual's reproductive and sexual rights are violated not only when a state directly interferes with her decision or capacity to reproduce, but also when the state indirectly burdens a decision or capacity to reproduce. Consider the law held unconstitutional in *Skinner v. Oklahoma*, 316 U.S. 535 (1942), which mandated the sterilization of persons who were convicted three times of certain offenses. This law is paradigmatic of laws that directly encumber a person's right to reproductive self-determination. However, states can indirectly encumber individuals' reproductive rights—achieving in a roundabout way what is an obvious human rights infraction when accomplished directly. Accordingly, laws that have the effect of infringing on a person's reproductive rights—as when a state refuses to increase the welfare benefits paid to a beneficiary on the birth of an additional child, or when a state denies certain privileges to persons who have more than a certain number of children—ought to be subjected to the same scrutiny as laws that are more oblique in their goals.

The following cases provide a snapshot of different approaches that courts and other legal bodies have taken to laws that coerce private choices regarding reproduction and the creation of family. Consider whether the decision in any given case evidences an expansive or restricted understanding of reproductive and sexual rights. While the U.S. Supreme Court found in *Skinner* that “marriage and procreation are fundamental to the very existence and survival of the race” and should be understood as “basic libert[ies]” as a result, there are other rationales—such as a person's dignity interests, her right to physical integrity, and the right to be free from gender-based violence—for recognizing sexual and reproductive rights. Compare the rationales given for the recognition (or non-recognition) of these rights.

¶ 1 LA FOREST J.:— These proceedings began with an application by a mother for permission to consent to the sterilization of her mentally retarded daughter who also suffered from a condition that makes it extremely difficult for her to communicate with others. The application was heard by McQuaid J. of the Supreme Court of Prince Edward Island — Family Division. In the interests of privacy, he called the daughter "Eve," and her mother "Mrs. E."

¶ 2 When Eve was a child, she lived with her mother and attended various local schools. When she became twenty-one, her mother sent her to a school for retarded adults in another community. There she stayed with relatives during the week, returning to her mother's home on weekends. At this school, Eve struck up a close friendship with a male student; in fact, they talked of marriage. He too is retarded, though somewhat less so than Eve. However, the situation was identified by the school authorities who talked to the male student and brought the matter to an end.

¶ 3 The situation naturally troubled Mrs. E. Eve was usually under her supervision or that of someone else, but this was not always the case. She was attracted and attractive to men and Mrs. E. feared she might quite possibly and innocently become pregnant. Mrs. E. was concerned about the emotional effect that a pregnancy and subsequent birth might have on her daughter. Eve, she felt, could not adequately cope with the duties of a mother and the responsibility would fall on Mrs. E. This would understandably cause her great difficulty; she is a widow and was then approaching sixty. That is why she decided Eve should be sterilized.

¶ 4 Eve's condition is more fully described by McQuaid J. as follows:

The evidence established that Eve is 24 years of age, and suffers what is described as extreme expressive aphasia. She is unquestionably at least mildly to moderately retarded. She has some learning skills, but only to a limited level. She is described as being a pleasant and affectionate person who, physically, is an adult person, quite capable of being attracted to, as well as attractive to, the opposite sex. While she might be able to carry out the mechanical duties of a mother, under supervision, she is incapable of being a mother in any other sense. Apart from being able to recognize the fact of a family unit, as consisting of a father,

a mother, and children residing in the same home, she would have no concept of the idea of marriage, or indeed, the consequential relationship between, intercourse, pregnancy and birth.

Expressive aphasia was described as a condition in which the patient is unable to communicate outwardly thoughts or concepts which she might have perceived. Particularly in the case of a person suffering from any degree of retardation, the result is that even an expert such as a psychiatrist is unable to determine with any degree of certainty if, in fact, those thoughts or concepts have actually been perceived, or whether understanding of them does exist. Little appears to be known of the cause of this condition, and even less of its remedy. In the case of Eve, this condition has been diagnosed as extreme.

From the evidence, he further concluded:

[t]hat Eve is not capable of informed consent, that her moderate retardation is generally stable, that her condition is probably non-inheritable, that she is incapable of effective alternative means of contraception, that the psychological or emotional effect of the proposed operation would probably be minimal, and that the probable incidence of pregnancy is impossible to predict.

#### General Considerations

¶ 21 ... The Court is asked to consent, on behalf of Eve, to sterilization since she, though an adult, is unable to do so herself. Sterilization by means of a tubal ligation is usually irreversible. And hysterectomy, the operation authorized by the Appeal Division, is not only irreversible; it is major surgery. Eve's sterilization is not being sought to treat any medical condition. Its purposes are admittedly non-therapeutic. One such purpose is to deprive Eve of the capacity to become pregnant so as to save her from the possible trauma of giving birth and from the resultant obligations of a parent, a task the evidence indicates she is not capable of fulfilling. As to this, it should be noted that there is no evidence that giving birth would be more difficult for Eve than for any other woman. A second purpose of the sterilization is to relieve Mrs. E. of anxiety about the possibility of Eve's becoming pregnant and of having to care for any child Eve might bear.

*Parens patriae* Jurisdiction

¶ 72 ... From the earliest time, the sovereign, as *parens patriae*, was vested with the care of the mentally incompetent. This right and duty, as Lord Eldon noted in *Wellesley v. Duke of Beaufort*, *supra* at 2 Russ., at p. 20, 38 E.R., at p. 243 is founded on the obvious necessity that the law should place somewhere the care of persons who are not able to take care of themselves. In early England, the *parens patriae* jurisdiction was confined to mental incompetents, but its rationale is obviously applicable to children and, following the transfer of that jurisdiction to the Lord Chancellor in the seventeenth century, he extended it to children under wardship, and it is in this context that the bulk of the modern cases on the subject arise. The *parens patriae* jurisdiction was later vested in the provincial superior courts of this country, and in particular, those of Prince Edward Island.

¶ 73 The *parens patriae* jurisdiction is, as I have said, founded on necessity, namely the need to act for the protection of those who cannot care for themselves. The courts have frequently stated that it is to be exercised in the "best interest" of the protected person, or again, for his or her "benefit" or "welfare".

¶ 74 The situations under which it can be exercised are legion; the jurisdiction cannot be defined in that sense. As Lord MacDermott put it in *J. v. C.*, [1970] A.C. 668, at p. 703, the authorities are not consistent and there are many twists and turns, but they have inexorably "moved towards a broader discretion, under the impact of changing social conditions and the weight of opinion ...." In other words, the categories under which the jurisdiction can be exercised are never closed. Thus I agree with Latey J. in *Re X*, *supra*, at p. 699, that the jurisdiction is of a very broad nature, and that it can be invoked in such matters as custody, protection of property, health problems, religious upbringing and protection against harmful associations. This list, as he notes, is not exhaustive.

¶ 75 What is more, as the passage from Chambers cited by Latey J. underlines, a court may act not only on the ground that injury to person or property has occurred, but also on the ground that such injury is apprehended. I might add that the jurisdiction is a carefully guarded one. The courts will not readily assume that it has been removed by legislation where a necessity arises to protect a person who cannot protect himself.

¶ 76 I have no doubt that the jurisdiction may be used to authorize the performance of a surgical operation that is necessary to the health of a person, as indeed it already has been in Great Britain and this country. And by health, I mean mental as well as physical health. In the United States, the courts have used the *parens patriae* jurisdiction on behalf of a mentally incompetent to authorize chemotherapy and amputation, and I have little doubt that in a proper case our courts should do the same. Many of these instances are related in *Sirunk v. Sirunk*, 445 S.W.2d 145 (Ky. 1969), where the court went to the length of permitting a kidney transplant between brothers. Whether the courts in this country should go that far or as in *Quinlan* permit the removal of life-sustaining equipment, I leave to later disposition.

¶ 77 Though the scope or sphere of operation of the *parens patriae* jurisdiction may be unlimited, it by no means follows that the discretion to exercise it is unlimited. It must be exercised in accordance with its underlying principle. Simply put, the discretion is to do what is necessary for the protection of the person for whose benefit it is exercised; see the passages from the reasons of Sir John Pennycuik in *Re X*, at pp. 706-07, and *Heilbron J. in Re D*, at p. 332, cited earlier. The discretion is to be exercised for the benefit of that person, not for that of others. It is a discretion, too, that must at all times be exercised with great caution, a caution that must be redoubled as the seriousness of the matter increases. This is particularly so in cases where a court might be tempted to act because failure to do so would risk imposing an obviously heavy burden on some other individual.

¶ 78 There are other reasons for approaching an application for sterilization of a mentally incompetent person with the utmost caution. To begin with, the decision involves values in an area where our social history clouds our vision and encourages many to perceive the mentally handicapped as somewhat less than human. This attitude has been aided and abetted by now discredited eugenic theories whose influence was felt in this country as well as the United States. Two provinces, Alberta and British Columbia, once had statutes providing for the sterilization of mental defectives; The Sexual Sterilization Act, R.S.A. 1970, c. 341, repealed by S.A. 1972, c. 87; Sexual Sterilization Act, R.S.B.C. 1960, c. 353, s. 5(1), repealed by S.B.C. 1973, c. 79.

¶ 79 Moreover, the implications of sterilization are always serious. As we have been reminded, it removes from a person the great privilege of giving birth, and is for practical purposes irreversible. If achieved by

means of a hysterectomy, the procedure approved by the Appeal Division, it is not only irreversible; it is major surgery. Here, it is well to recall Lord Eldon's admonition in Wellesley's case, *supra*, at 2 Russ. p. 18, 38 E.R. p. 242, that "it has always been the principle of this Court, not to risk the incurring of damage to children which it cannot repair, but rather to prevent the damage being done". Though this comment was addressed to children, who were the subject matter of the application, it aptly describes the attitude that should always be present in exercising a right on behalf of a person who is unable to do so.

¶ 80 Another factor merits attention. Unlike most surgical procedures, sterilization is not one that is ordinarily performed for the purpose of medical treatment. The Law Reform Commission of Canada tells us this in Sterilization, Working Paper 24 (1979), a publication to which I shall frequently refer as providing a convenient summary of much of the work in the field. It says at p. 3:

Sterilization as a medical procedure is distinct, because except in rare cases, if the operation is not performed, the physical health of the person involved is not in danger, necessity or emergency not normally being factors in the decision to undertake the procedure. In addition to its being elective it is for all intents and purposes irreversible.

As well, there is considerable evidence that non-consensual sterilization has a significant negative psychological impact on the mentally handicapped; see Sterilization, *supra*, at pp. 49-52. The Commission has this to say at p. 50:

It has been found that, like anyone else, the mentally handicapped have individually varying reactions to sterilization. Sex and parenthood hold the same significance for them as for other people and their misconceptions and misunderstandings are also similar. Rosen maintains that the removal of an individual's procreative powers is a matter of major importance and that no amount of reforming zeal can remove the significance of sterilization and its effect on the individual psyche.

In a study by Sabagh and Edgerton, it was found that sterilized mentally retarded persons tend to perceive sterilization as a symbol of reduced or degraded status. Their attempts to pass for normal were hindered by negative self perceptions and resulted in withdrawal and isolation rather than striving to conform ...

The psychological impact of sterilization is likely to be particularly damaging in cases where it is a result of coercion and when the mentally handicapped have had no children.

¶ 81 In the present case, there is no evidence to indicate that failure to perform the operation would have any detrimental effect on Eve's physical or mental health. The purposes of the operation, as far as Eve's welfare is concerned, are to protect her from possible trauma in giving birth and from the assumed difficulties she would have in fulfilling her duties as a parent. As well, one must assume from the fact that hysterectomy was ordered, that the operation was intended to relieve her of the hygienic tasks associated with menstruation. Another purpose is to relieve Mrs. E. of the anxiety that Eve might become pregnant, and give birth to a child, the responsibility for whom would probably fall on Mrs. E.

¶ 82 I shall dispose of the latter purpose first. One may sympathize with Mrs. E. To use Heilbron J.'s phrase, it is easy to understand the natural feelings of a parent's heart. But the *parens patriae* jurisdiction cannot be used for her benefit. Its exercise is confined to doing what is necessary for the benefit and protection of persons under disability like Eve. And a court, as I previously mentioned, must exercise great caution to avoid being misled by this all too human mixture of emotions and motives. So we are left to consider whether the purposes underlying the operation are necessarily for Eve's benefit and protection.

¶ 83 The justifications advanced are the ones commonly proposed in support of non-therapeutic sterilization (see Sterilization, *passim*). Many are demonstrably weak. The Commission dismisses the argument about the trauma of birth by observing at p. 60:

For this argument to be held valid would require that it could be demonstrated that the stress of delivery was greater in the case of mentally handicapped persons than it is for others. Considering the generally known wide range of post-partum response would likely render this a difficult case to prove.

¶ 84 The argument relating to fitness as a parent involves many value-loaded questions. Studies conclude that mentally incompetent parents show as much fondness and concern for their children as other people; see Sterilization, *supra*, p. 33 et seq., 63-64. Many, it is true, may have difficulty in coping, particularly with the financial burdens involved. But this issue does not relate to the benefit of the incompetent;



it is a social problem, and one, moreover, that is not limited to incompetents. Above all it is not an issue that comes within the limited powers of the courts, under the *parens patriae* jurisdiction, to do what is necessary for the benefit of persons who are unable to care for themselves. Indeed, there are human rights considerations that should make a court extremely hesitant about attempting to solve a social problem like this by this means. It is worth noting that in dealing with such issues, provincial sterilization boards have revealed serious differences in their attitudes as between men and women, the poor and the rich, and people of different ethnic backgrounds; see Sterilization, *supra*, at p. 44.

¶ 85 As far as the hygienic problems are concerned, the following view of the Law Reform Commission (at p. 34) is obviously sound:

... if a person requires a great deal of assistance in managing their own menstruation, they are also likely to require assistance with urinary and fecal control, problems which are much more troublesome in terms of personal hygiene.

Apart from this, the drastic measure of subjecting a person to a hysterectomy for this purpose is clearly excessive.

¶ 86 The grave intrusion on a person's rights and the certain physical damage that ensues from non-therapeutic sterilization without consent, when compared to the highly questionable advantages that can result from it, have persuaded me that it can never safely be determined that such a procedure is for the benefit of that person. Accordingly, the procedure should never be authorized for non-therapeutic purposes under the *parens patriae* jurisdiction.

¶ 87 To begin with, it is difficult to imagine a case in which non-therapeutic sterilization could possibly be of benefit to the person on behalf of whom a court purports to act, let alone one in which that procedure is necessary in his or her best interest. And how are we to weigh the best interests of a person in this troublesome area, keeping in mind that an error is irreversible? Unlike other cases involving the use of the *parens patriae* jurisdiction, an error cannot be corrected by the subsequent exercise of judicial discretion. That being so, one need only recall Lord Eldon's remark, *supra*, that "it has always been the principle of this Court, not to risk damage to children which it cannot repair" to conclude that non-therapeutic sterilization may not be authorized in the exercise of the *parens patriae* jurisdiction. McQuaid J. was, therefore,

right in concluding that he had no authority or jurisdiction to grant the application.

¶ 88 Nature or the advances of science may, at least in a measure, free Eve of the incapacity from which she suffers. Such a possibility should give the courts pause in extending their power to care for individuals to such irreversible action as we are called upon to take here. The irreversible and serious intrusion on the basic rights of the individual is simply too great to allow a court to act on the basis of possible advantages which, from the standpoint of the individual, are highly debatable. Judges are generally ill-informed about many of the factors relevant to a wise decision in this difficult area. They generally know little of mental illness, of techniques of contraception or their efficacy. And, however well presented a case may be, it can only partially inform. If sterilization of the mentally incompetent is to be adopted as desirable for general social purposes, the legislature is the appropriate body to do so. It is in a position to inform itself and it is attuned to the feelings of the public in making policy in this sensitive area. The actions of the legislature will then, of course, be subject to the scrutiny of the courts under the Canadian Charter of Rights and Freedoms and otherwise.

¶ 89 Many of the factors I have referred to as showing that the best interests test is simply not a sufficiently precise or workable tool to permit the *parens patriae* power to be used in situations like the present are referred to in Matter of Guardianship of Eberhardy, *supra*. Speaking for the court in that case, Heffernan J. had this to say, at p. 894:

Under the present state of the law, the only guideline available to circuit courts faced with this problem appears to be the "best interests" of the person to be sterilized. This is a test that has been used for a number of years in this jurisdiction and elsewhere in the determination of the custody of children and their placement -- in some circumstances placement in a controlled environment ... No one who has dealt with this standard has expressed complete satisfaction with it. It is not an objective test, and it is not intended to be. The substantial workability of the test rests upon the informed fact-finding and the wise exercise of discretion by trial courts engendered by long experience with the standard. Importantly, however, most determinations made in the best interests of a child or of an incompetent person are not irreversible; and although a wrong decision may be damaging

indeed, there is an opportunity for a certain amount of empiricism in the correction of errors of discretion. Errors of judgment or revisions of decisions by courts and social workers can, in part at least, be rectified when new facts or second thoughts prevail. And, of course, alleged errors of discretion in exercising the "best interest" standard are subject to appellate review. Sterilization as it is now understood by medical science is, however, substantially irreversible.

¶ 90 Heffernan J. also alluded to the limited capacity of judges to deal adequately with a problem that has such general social overtones in the following passage, at p. 895:

What these facts demonstrate is that courts, even by taking judicial notice of medical treatises, know very little of the techniques or efficacy of contraceptive methods or of thwarting the ability to procreate by methods short of sterilization. While courts are always dependent upon the opinions of expert witnesses, it would appear that the exercise of judicial discretion unguided by well thought-out policy determinations reflecting the interest of society, as well as of the person to be sterilized, are hazardous indeed. Moreover, all seriously mentally retarded persons may not ipso facto be incapable of giving birth without serious trauma, and some may be good parents. Also, there has been a discernible and laudable tendency to "main-stream" the developmentally disabled and retarded. A properly thought out public policy on sterilization or alternative contraceptive methods could well facilitate the entry of these persons into a more nearly normal relationship with society. But again this is a problem that ought to be addressed by the legislature on the basis of fact-finding and the opinions of experts.

¶ 91 The foregoing, of course, leaves out of consideration therapeutic sterilization and where the line is to be drawn between therapeutic and non-therapeutic sterilization. On this issue, I simply repeat that the utmost caution must be exercised commensurate with the seriousness of the procedure. Marginal justifications must be weighed against what is in every case a grave intrusion on the physical and mental integrity of the person.

¶ 92 It will be apparent that my views closely conform to those expressed by Heilbron J. in *Re D*, *supra*. She was speaking of an infant, but her remarks are equally applicable to an adult. The importance of maintaining the physical integrity of a human being ranks high in our

scale of values, particularly as it affects the privilege of giving life. I cannot agree that a court can deprive a woman of that privilege for purely social or other non-therapeutic purposes without her consent. The fact that others may suffer inconvenience or hardship from failure to do so cannot be taken into account. The Crown's *parens patriae* jurisdiction exists for the benefit of those who cannot help themselves, not to relieve those who may have the burden of caring for them.

¶ 93 I should perhaps add, as Heilbron J. does, that sterilization may, on occasion, be necessary as an adjunct to treatment of a serious malady, but I would underline that this, of course, does not allow for subterfuge or for treatment of some marginal medical problem. Heilbron J. was referring, as I am, to cases where such treatment is necessary in dealing with a serious condition. The recent British Columbia case of *Re K*, *supra*, is at best dangerously close to the limits of the permissible.

¶ 94 The foregoing remarks dispose of the arguments based on the traditional view of the *parens patriae* jurisdiction as exercised in this country. Counsel for the respondent strongly contended, however, that the Court should adopt the substituted judgment test recently developed by a number of state courts in the United States. That test, he submitted, is to be preferred to the best interests test because it places a higher value on the individuality of the mentally incompetent person. It affords that person the same right, he contended, as a competent person to choose whether to procreate or not.

¶ 95 There is an obvious logical lapse in this argument. I do not doubt that a person has a right to decide to be sterilized. That is his or her free choice. But choice presupposes that a person has the mental competence to make it. It may be a matter of debate whether a court should have the power to make the decision if that person lacks the mental capacity to do so. But it is obviously fiction to suggest that a decision so made is that of the mental incompetent, however much the court may try to put itself in her place. What the incompetent would do if she or he could make the choice is simply a matter of speculation. The sophistry embodied in the argument favouring substituted judgment has been fully revealed in Eberhardy, *supra*, at p. 893 where in discussing Grady, *supra*, the court stated:

The fault we find in the New Jersey case is the ratio decidendi of first concluding, correctly we believe, that the right to sterilization

is a personal choice, but then equating a decision made by others with the choice of the person to be sterilized. It clearly is not a personal choice, and no amount of legal legerdemain can make it so.

We conclude that the question is not choice because it is sophistry to refer to it as such, but rather the question is whether there is a method by which others, acting in behalf of the person's best interests and in the interests, such as they may be, of the state, can exercise the decision. Any governmentally sanctioned (or ordered) procedure to sterilize a person who is incapable of giving consent must be denominated for what it is, that is, the state's intrusion into the determination of whether or not a person who makes no choice shall be allowed to procreate.

¶ 96 Counsel for the respondent's argument in favour of a substituted judgment test was made essentially on a common law basis. However, he also argued that there is what he called a fundamental right to free procreative choice. Not only, he asserted, is there a fundamental right to bear children; there is as well a fundamental right to choose not to have children and to implement that choice by means of contraception. Starting from the American courts' approach to the due process clause in the United States Constitution, he appears to base this argument on s. 7 of the Charter. But assuming for the moment that liberty as used in s. 7 protects rights of this kind (a matter I refrain from entering into), counsel's contention seems to me to go beyond the kind of protection s. 7 was intended to afford. All s. 7 does is to give a remedy to protect individuals against laws or other state action that deprive them of liberty. It has no application here.

¶ 97 Another Charter related argument must be considered. In response to the appellant's argument that a court-ordered sterilization of a mentally incompetent person, by depriving that person of the right to procreate, would constitute an infringement of that person's rights to liberty and security of the person under s. 7 of the Canadian Charter of Rights and Freedoms, counsel for the respondent countered by relying on that person's right to equality under s. 15(1) of the Charter, saying "that the most appropriate method of ensuring the mentally incompetent their right to equal protection under s. 15(1) is to provide the mentally incompetent with a means to obtain non-therapeutic sterilizations,

which adequately protects their interests through appropriate judicial safeguards." A somewhat more explicit argument along the same lines was made by counsel for the Public Trustee of Manitoba. His position was stated as follows:

It is submitted that in the case of a mentally incompetent adult, denial of the right to have his or her case presented by a guardian ad litem to a Court possessing jurisdiction to give or refuse substituted consent to a non-therapeutic procedure such as sterilization, would be tantamount to a denial to that person of equal protection and equal benefit of the law. Such a denial would constitute discrimination on the basis of mental disability, which discrimination is prohibited by Section 15 of The Canadian Charter of Rights and Freedoms.

¶ 98 Section 15 of the Charter was not in force when these proceedings commenced but, this aside, these arguments appear flawed. They raise in different form an issue already dealt with, i.e. that the decision made by a court on an application to consent to the sterilization of an incompetent is somehow that of the incompetent. More troubling is that the issue is, of course, not raised by the incompetent, but by a third party.

¶ 99 The court undoubtedly has the right and duty to protect those who are unable to take care of themselves, and in doing so it has a wide discretion to do what it considers to be in their best interests. But this function must not, in my view, be transformed so as to create a duty obliging the court, at the behest of a third party, to make a choice between the two alleged constitutional rights -- the right to procreate or not to procreate -- simply because the individual is unable to make that choice. All the more so since, in the case of non-therapeutic sterilization as we saw, the choice is one the courts cannot safely exercise.

...  
**Conclusion**

¶ 101 I would allow the appeal and restore the decision of the judge who heard the application.



## Inter-American Commission on Human Rights

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### REPORT N° 71/03<sup>[1]</sup>

PETITION 12.191

FRIENDLY SETTLEMENT

MARÍA MAMÉRITA MESTANZA CHÁVEZ

PERU

October 22, 2003

#### I. SUMMARY

1. In a petition lodged with the Inter-American Commission on Human Rights (hereinafter "the Commission," "the Inter-American Commission," or "the IACHR") on June 15, 1999, the nongovernmental organizations Office for the Defense of Women's Rights (DEMUS), the Latin American and Caribbean Committee for the Defense of Women's Rights (CLADEM), and the *Asociación Pro Derechos Humanos* [Association for Human Rights] (APRODEH), which subsequently accredited as co-petitioners the Center for Reproductive Law and Policy (CRLP) and the Center for Justice and International Law (CEJIL), (hereinafter "the petitioners"), alleged that the Republic of Peru (hereinafter "Peru") violated the human rights of Ms. María Mamérita Mestanza Chávez, by forced sterilization that ultimately caused her death.

2. The original petitioners alleged that the facts denounced constitute violation by the Peruvian State of the rights to life, personal integrity, and equality before the law, contained in Articles 4, 5, 1, and 24 of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention"), and violation of Articles 3, 4, 7, 8, and 9 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (hereinafter "the Convention of Belém do Pará"), Articles 3 and 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (hereinafter "the Protocol of San Salvador.") and Articles 12 and 14 (2) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

3. On February 22, 2001, the Peruvian State signed a joint press release with the Inter-American Commission on Human Rights, in which it was agreed to pursue friendly settlement of some cases before the Commission, including this one, in accordance with Articles 48(1)(f) and 49 of the American Convention on Human Rights.

4. On March 2, 2001, during the 110<sup>th</sup> session of the Inter-American Commission on Human Rights, the Peruvian State and the victims' representatives signed the Preliminary Agreement for Friendly Settlement with intervention and approval by the IACHR. The final friendly settlement was agreed upon on August 26, 2003, when the act setting out the friendly

settlement reached by the parties was signed in Lima.

5. This friendly settlement report, pursuant to Article 49 of the Convention and Article 41.5 of the Commission's Regulations, presents a brief summary of the facts alleged by the petitioners, the friendly solution reached, and agreement for its publication.

## II. PROCESSING WITH THE COMMISSION

6. The Commission received the claim on June 15, 1999. On July 14, 1999 the IACHR opened the case, transmitted pertinent parts of the petition to the Peruvian State, and requested information within 90 days. Peru asked for additional time to prepare its reply, which was approved by the IACHR. Peru replied on January 14, 2000. The petitioners made comments on the State's reply on April 12, 2000. On October 3, 2000 the Inter-American Commission on Human Rights approved the Report on Admissibility Nº 66/00.

7. On March 2, 2001, with intervention and approval by the Inter-American Commission on Human Rights, the parties signed the Preliminary Agreement for Friendly Settlement, in which the Peruvian State admitted its International responsibility for the acts alleged by the petitioners and promised to take the necessary measures to compensate the victims.

8. On August 26, 2003, in the city of Lima, the representatives of the victims and the State signed the Agreement for Friendly Settlement, requesting that the Commission ratify the entire contents.

## III. FACTS

9. They alleged that the case of Ms. María Mamérita Mestanza is one more among a large number of cases of women affected by a massive, compulsory, and systematic government policy to stress sterilization as a means for rapidly altering the reproductive behavior of the population, especially poor, Indian, and rural women. They noted that the Ombudsman had received several complaints on this matter, and that between November 1996 and November 1998 CLADEM had documented 243 cases of human rights violations through the performance of birth control surgery in Peru.

10. They stated that Ms. María Mamérita Mestanza, a rural woman about 33 years old and mother of seven children, was pressured to accept sterilization starting in 1996 by the Health Center of Encañada District. She and her husband Jacinto Salazar Suárez were subjected to various forms of harassment, including several visits in which health personnel threatened to report her and Mr. Salazar Suárez to the police, and told them that the government had approved a law requiring anyone who had more than five children to pay a fine and go to jail.

11. They state that finally, under coercion, Ms. Mestanza agreed to have tubal ligation surgery. The procedure was performed on March 27, 1988 at the Cajamarca Regional Hospital, without any pre-surgery medical examination. Ms. Mestanza was released the next day, March 28, 1988, although she had serious symptoms including nausea and sharp headaches. In the following days Mr. Jacinto Salazar reported to personnel of La Encañada Health Center on Ms. Mestanza's condition, which worsened daily, and was told by them that this was due to post-operative effects of the anesthesia.

12. They state that Ms. Mestanza Chavez died at home on April 5, 1998, and that the death certificate specified a "sepsis" as the direct cause of death and bilateral tubal blockage as a precedent cause. They report that a few days later a doctor from the Health

Center offered a sum of money to Mr. Jacinto Salazar in an effort to put an end to the matter.

13. They indicate that on April 15, 1998 Mr. Jacinto Salazar filed charges with the Provisional Combined Prosecutor of Baños del Inca against Martín Ormeño Gutiérrez, Chief of La Encañada Health Center, in connection with the death of Ms. Mestanza, for crimes against life, body, and health, in premeditated homicide (first degree murder). They add that on May 15, 1998 this Provincial Prosecutor indicted Mr. Ormeño Gutiérrez and others before the local Provincial Judge, who on June 4, 1998 ruled that there were *insufficient grounds to prosecute*. This decision was confirmed on July 1, 1998 by the Circuit Criminal Court, so on December 16, 1998 the Provincial Prosecutor ordered the case dismissed.

#### **IV. FRIENDLY SETTLEMENT**

14. The State and the petitioner signed the friendly settlement agreement, the text of which follows:

##### **FIRST: BACKGROUND**

Ms. María Mamérita Mestanza Chávez was forced to undergo sterilization surgery, which ultimately resulted in her death. The petitioner organizations allege that her rights to life, personal integrity, and equality before the law were violated, in contravention of Articles 4, 5, 1, and 24 of the American Convention on Human Rights, Articles 3, 4, 7, 8, and 9 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (Convention of Belém do Pará), Articles 3 and 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, and Articles 12 and 14.2 of the Convention on the Elimination of All Forms of Discrimination Against Women.

On July 14, 1999 the Inter-American Commission on Human Rights transmitted the pertinent parts of the complaint to the Peruvian State and requested information. On October 3, 2000 the IACHR approved Report No. 66/00 on admissibility, and continued reviewing the substance of the case, concerning alleged violations of the American Convention and the Convention of Belém do Pará.

On March 2, 2001 during the 110<sup>th</sup> regular session of the IACHR a Preliminary Agreement for Friendly Settlement was reached.

##### **SECOND: RECOGNITION**

The Peruvian State, aware that protection and total respect for human rights is the cornerstone for a just, honorable, and democratic society, in strict compliance with its obligations assumed with the signing and ratification of the American Convention on Human Rights and other international human rights instruments to which it is a party, and aware that any violation of an international obligation that results in injury brings with it the duty for adequate reparation, which can most justly be done through compensation of the victim, investigation of the facts, and administrative, civil, and criminal penalties for the responsible parties, recognizes its international responsibility for the violation of Articles 1.1, 4, 5, and 24 of the American Convention on Human Rights, as well as Article 7 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against women in the harm done to victim María Mamérita Merstanzza Chávez.

This recognition was reflected in the Preliminary Agreement for Friendly Settlement signed between the Peruvian State and the victim's legal representatives, with intervention and approval by the Inter-American Commission on Human Rights, on March 2, 2001 during the 110<sup>th</sup> session of the Inter-American Commission on Human Rights. In that agreement the Peruvian State admitted international responsibility for the facts described and pledged to take steps for material and moral reparation of the harm done and to initiate a thorough investigation and trial of the perpetrators and take steps to prevent the recurrence of similar incidents in the future.

### **THIRD: INVESTIGATION AND PUNISHMENT**

The Peruvian State promises to make a thorough investigation of the facts and apply legal punishments to any person determined to have participated in them, as either planner, perpetrator, accessory, or in other capacity, even if they be civilian or military officials or employees of the government. In this regard, the Peruvian State pledges to carry out administrative and criminal investigations into the attacks on the personal liberty, life, body, and health of the victim, and to punish:

- a. Those responsible for the acts of pressuring the consent of Ms. María Mamérita Mestanza Chávez to submit to tubal ligation.
- b. The health personnel who ignored the need for urgent care for Ms. Mestanza after her surgery.
- c. Those responsible for the death of Ms. María Mamérita Mestanza Chávez.
- d. The doctors who gave money to the spouse of the deceased woman in an attempt to cover up the circumstances of her demise.
- e. The Investigative Commission, named by Cajamarca Sub-Region IV of the Health Ministry, which questionably exonerated the health personnel from responsibility for Ms. Mestanza's death.

Apart from the administrative and criminal penalties, the Peruvian state pledges to report any ethical violations to the appropriate professional association so that it can apply sanctions to the medical personnel involved in these acts, as provided in its statutes.

In addition, the State pledges to conduct administrative and criminal investigations into the conduct of agents of the Office of Public Prosecution and the judicial branch who failed to take action to clarify the facts alleged by Ms. Mamérita Mestanza's widower.

### **FOURTH: INDEMNIFICATION**

#### **1. Beneficiaries of this Agreement**

The only persons recognized by the Peruvian State as beneficiaries of any indemnification are Jacinto Salazar Suárez, husband of María Mamérita Mestanza Chávez, and her children: Pascuala Salazar Mestanza, Maribel Salazar Mestanza, Alindor Salazar Mestanza, Napoleón Salazar Mestanza, Amancio Salazar

Chávez. That sum shall be paid in trust to a public or private institution, designated as the trustee, which will administer the resources spent on providing psychological care needed by the beneficiaries. The institution will be chosen jointly by the State and representatives of the Salazar Mestanza family, with support from the National Human Rights Coordination, DEMUS, APRODEH, and the Archbishop of Cajamarca. Expenses for legal establishment of the trust shall be paid by the Peruvian State.

In addition, the Peruvian State promises to give the husband and children of María Mamérita Mestanza Chávez permanent health insurance with the Ministry of Health or other competent entity. The surviving spouse's health insurance will be permanent, as will that of the children until they have their own public and/or private coverage.

#### **NINTH: EDUCATION PAYMENTS**

The Peruvian State promises to give the victim's children free primary and secondary education in public schools. The victim's children will receive tuition-free university education for a single degree at state schools, provided they qualify for admission.

#### **TENTH: OTHER PAYMENTS**

The Peruvian State agrees to make an additional payment of twenty thousand U.S. dollars (\$20,000.00) to Mr. Jacinto Salazar Suárez to buy land or a house in the name of the children he had with Ms. María Mamérita Mestanza. Within one year of the date of this agreement Mr. Salazar Suárez must register the purchase by delivering the deed to the Executive Secretariat of the National Human Rights Council of the Ministry of Justice. Furthermore, Mr. Salazar Suárez agrees not to sell or lease the property purchased until the youngest of his children is of legal age, unless authorized by the court.

Peru's National Coordinator of Human Rights will be responsible for the necessary follow-up to ensure compliance with the provisions of this clause.

#### **ELEVENTH: CHANGES IN LAWS AND PUBLIC POLICIES ON REPRODUCTIVE HEALTH AND FAMILY PLANNING**

The Peruvian State pledges to change laws and public policies on reproductive health and family planning, eliminating any discriminatory approach and respecting women's autonomy.

The Peruvian State also promises to adopt and implement recommendations made by the Ombudsman concerning public policies on reproductive health and family planning, among which are the following:

- a. Penalties for human rights violators and reparation for victims
  - 1) Conduct a judicial review of all criminal cases on violations of human rights committed in the execution of the National Program of Reproductive Health and Family Planning, to break out and duly punish the perpetrators, requiring them to pay the appropriate civil damages, including the State if it is determined to have some responsibility for the acts that gave rise to the criminal cases.
  - 2) Review the administrative proceedings initiated by the victims and/or



their family members, linked to the cases in the previous paragraph, which are pending or have concluded concerning denunciations of human rights violations.

b. Methods for monitoring and guaranteeing respect for human rights of health service clients

1) Adopt drastic measures against those responsible for the deficient pre-surgery evaluation of women who undergo sterilization, including health professionals in some of the country's health centers. Although the rules of the Family Planning Program require this evaluation, it is not being done.

2) Continuously conduct training courses for health personnel in reproductive rights, violence against women, domestic violence, human rights, and gender equity, in coordination with civil society organizations that specialize in these topics.

3) Adopt the necessary administrative measures so that the rules established for ensuring respect for the right of Informed consent are scrupulously followed by health personnel.

4) Guarantee that the centers that offer sterilization surgery have proper conditions required by standards of the Family Planning Program.

5) Take strict measures to ensure that the compulsory reflection period of 72 hours is faithfully and universally honored.

6) Take drastic action against those responsible for forced sterilization without consent.

7) Implement a mechanism or channels for efficient and expeditious receipt and processing of denunciations of violation of human rights in the health establishments, in order to prevent or redress injury caused.

#### **TWELFTH: LEGAL BASIS**

This agreement is signed in accordance with the provisions of Articles 1, 2, and 48.1.f of the American Convention on Human Rights and Article 41 of the Regulations of the Inter-American Commission on Human Rights; on Articles 2 (paragraphs 1 and 24, point 8), 44, 55, 205 and fourth final provision of Peru's Constitution; and on the provisions of Articles 1205, 1306, 1969, and 1981 of the Civil Code of Peru.

#### **THIRTEENTH: INTERPRETATION**

The meaning and scope of this agreement will be interpreted in accordance with Article 29 and 30 of the American Convention on Human Rights as applicable, and the principle of good faith. In case of doubt or disagreement between the parties on the content of this agreement, the Inter-American Commission on Human Rights shall resolve the interpretation. It shall also be responsible for monitoring the agreement's compliance; the parties shall report to it every three months on the status of compliance.

#### **FOURTEENTH: HOMOLOGATION**

The parties hereto agree to refer this Agreement for Friendly Settlement to the

Mestanza, Delia Salazar Mestanza, and Almanzor Salazar Mestanza.

**2. Monetary compensation**

**a. Moral damages**

The Peruvian State awards one-time compensation to each of the beneficiaries of ten thousand U.S. dollars (\$10,000.00) for reparation of moral injury, which totals eighty thousand U.S. dollars (\$80,000.00).

The State will deposit the amount due the minors in a trust account in accordance with the best terms available under sound banking practice. Arrangements will be made jointly with the Salazar Mestanza family's legal representatives.

**b. Corollary damages**

Injury caused as a direct consequence of the event giving rise to the claim consists of expenses incurred by the family as a direct result of the acts. These expenses were incurred to file and follow-up criminal charges with the Office of Public Prosecutions for aggravated homicide of María Mamérita Mestanza, as well as the costs of Ms. Mestanza's funeral and burial. The amount expended for these purposes is two thousand U.S. dollars (\$2,000.00), which the Peruvian State shall pay to the beneficiaries.

**FIFTH: INDEMNIFICATION FROM THOSE CRIMINALLY RESPONSIBLE FOR THE ACTS**

The Agreement for Peaceful Settlement does not include the beneficiaries' right to damages from all those responsible for violation of Ms. María Mamérita Mestanza's human rights, as determined by a competent court in accordance with Article 92 of the Peruvian Penal Code, a right which is recognized by the Peruvian State. This agreement expressly waives any other claim by the beneficiaries against the Peruvian State as responsible party, a co-defendant, or in any other capacity.

**SIXTH: RIGHT OF RECOVERY**

The Peruvian State reserves the right of recovery against all persons found to be responsible in this case through the definitive sentence of a competent national tribunal, in accordance with current domestic law.

**SEVENTH: TAX EXEMPTION, COMPLIANCE, AND LATE PENALTY**

The damages awarded by the Peruvian State shall not be subject to payment of any present or future tax, assessment, or fee, and shall be paid no later than six months after the Inter-American Commission on Human Rights has sent notification of this agreement's ratification, after which the State shall pay the maximum late fee and interest required or permitted by domestic legislation.

**EIGHTH: MEDICAL PAYMENTS**

The Peruvian State promises to make a one-time payment to the beneficiaries of seven thousand U.S. dollars (\$7,000.00) for psychological rehabilitation treatment they require as a result of the death of María Mamérita Mestanza

Inter-American Commission on Human Rights for confirmation and ratification of all aspects.

**FIFTEENTH: ACCEPTANCE**

The parties signing this agreement express their free and voluntary acceptance of and concurrence with each and every one of its clauses, stating for the record that it resolves the dispute and any claim regarding the international responsibility of the Peruvian State for violation of the human rights of Ms. María Mamérita Mestanza Chávez.

Signed with three copies in the City of Lima this twenty-sixth day of August of the year two thousand three.

**V. DETERMINATION OF COMPATIBILITY AND COMPLIANCE**

15. The IACHR reiterates that as provided in Articles 48.1.f and 49 of the Convention, this procedure is intended for "reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in the Convention." [GDM1] Agreement to follow this procedure reflects the State's good will to comply with the purposes and objectives of the Convention by virtue of the *pacta sunt servanda* principle, according to which states must show good faith in honoring obligations assumed in treaties. It also wishes to reiterate that the friendly settlement procedure contemplated in the Convention permits settlement of individual cases without recourse to litigation, and has demonstrated in the case of several countries that it is an important tool for solution that can be used by both parties.

16. The Inter-American Commission has closely followed development of the friendly settlement reached in this case. The Commission greatly appreciates the effort shown by both parties to reach a solution that is compatible with the objective and purpose of the Convention. As the Commission has said repeatedly, protection and promotion of women's rights is a priority for our hemisphere, in order that women may attain the full and effective enjoyment of their basic rights, especially equality, nondiscrimination, and living free from gender-based violence.

**VI. CONCLUSIONS**

17. On the basis of the preceding considerations, and by virtue of the proceeding envisioned in Articles 48.1.f and 49 of the American Convention, the Commission wishes to reiterate its deep appreciation for the parties' efforts and its satisfaction with the friendly settlement agreement reached in this case in keeping with the objective and purpose of the American Convention.

18. Taking into account the considerations and conclusions expressed in this report,

**THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,**

**DECIDES:**

1. To approve the terms of the Agreement for Friendly Settlement signed by the parties on August 26, 2003.

2. To continue following up and monitoring each and every point of the friendly settlement, and in this context to remind the parties of their obligation to submit reports to the IACHR every three months on compliance with this agreement.

3. To publish this report and include it in its annual report to the OAS General Assembly.

Done and signed at the headquarters of the Inter-American Commission on Human Rights in the city of Washington, D.C., on the 22<sup>nd</sup> day of the month of October, 2003. (Signed): José Zalaquett, President; Clare K. Roberts, First Vice-President; Susana Villarán, Second Vice-President; Robert K. Goldman and Julio Prado Vallejo, Commissioners.

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[1] Pursuant to the provisions of Article 17(2)(a) of the Commission's Regulations, Commissioner Susana Villarán, of Peruvian nationality, did not participate in the consideration or decision of this case.

SOJOURNER A., ON HER OWN BEHALF AND AS GUARDIAN AD LITEM  
FOR HER INFANT Y.A.; ANGELA B., ON HER OWN BEHALF AND AS  
GUARDIAN AD LITEM FOR HER INFANT W.B., PLAINTIFFS-APPELLANTS,  
AND ROSA C., ON HER OWN BEHALF AND AS GUARDIAN AD LITEM FOR  
HER INFANT Y.C.; AND CRYSTAL D., ON HER OWN BEHALF AND AS  
GUARDIAN AD LITEM FOR HER INFANT S.D., ON BEHALF OF  
THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS, v.  
THE NEW JERSEY DEPARTMENT OF HUMAN SERVICES AND WILLIAM  
WALDMAN, COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF  
HUMAN SERVICES, DEFENDANTS-RESPONDENTS.

SUPREME COURT OF NEW JERSEY

828 A.2d 306 (2003)

OPINION:

The opinion of the Court was delivered by

PORITZ, C.J. [\*\*308]

In this appeal, plaintiffs challenge the constitutionality of a provision in the Work First New Jersey Act (WFNJ) that "caps" the amount of cash assistance for families at the level set when the family enters into the State welfare system. *N.J.S.A. 44:10-61(a)*. Although families in the assistance program are eligible to receive additional Medicaid and food stamp benefits on the birth of another child, the statute prohibits an increase in cash assistance benefits for any child born more than ten months after the family initially applies for and obtains such benefits. *N.J.S.A. 44:10-61(a), (b), and (e)*. Plaintiffs claim that the "family cap" violates the right to privacy and equal protection guarantees of the New Jersey Constitution. More specifically, plaintiffs allege that Section 61(a) impinges on a welfare recipient's right to bear a child and, if she chooses to have that child, denies her and her unsupported child equal treatment under the law.

I

A brief description of the two families before the Court provides context for our review of the constitutional claims raised herein.

In 1987, shortly after giving birth to her first child, plaintiff Angela B. began receiving family Medicaid benefits in addition to a monthly allowance in the form of food stamps and cash assistance. Subsequently, in 1988, 1989, and 1995 Angela B. gave birth to three more children. She received an increase in combined welfare benefits for the two children born in 1988 and 1989, but due to the enactment of New Jersey's first family cap

provision in the interim, was unable to obtain additional cash assistance when her fourth child was born.

In 1994, also after bearing her first child, plaintiff Sojourner A. began receiving Medicaid family coverage as well as monthly assistance in food stamps and cash payments. When Sojourner A. became pregnant with her second child in 1996, however, the State notified her that she was not eligible for an increase in cash assistance as her child would be born more than ten months after she had started receiving welfare benefits. According to Sojourner A., she again became pregnant in 1997 and 1998, but terminated those pregnancies because of financial difficulties and because "she was not ready . . . for more children." By 1998, Sojourner A. was working five days a week and was therefore ineligible for cash assistance under WFNJ, although her family remained entitled to Medicaid and an increase in food stamps.

Both Angela B. and Sojourner A. have stated in depositions that the lack of additional cash assistance has imposed an extreme financial hardship on their families and left them without adequate food, shelter and other necessities. At the time of filing, Sojourner A. was receiving \$ 322 in cash assistance, \$ 163 in food stamps, and Medicaid benefits for her two children. Angela B. was receiving \$ 424 in cash assistance, \$ 396 in food stamps, and Medicaid benefits for the three children then residing with her.

[\*\*309] II

On September 5, 1997, plaintiffs filed a class action lawsuit against the New Jersey Department of Human Services and its Commissioner (collectively Department or DHS), claiming that *N.J.S.A. 44:10-61(a)* and *N.J.A.C. 10:90-2.18* violate New Jersey's Constitution. The gravamen of plaintiffs' complaint is that the family cap provision has been designed impermissibly to coerce the procreative and child-bearing decisions of plaintiffs

and other women similarly situated by penalizing them for "exercis[ing] their fundamental right to bear children." Plaintiffs further contend that the "family cap" violates the equal protection rights of certain classes of poor children "based on their parents' reproductive choices and the timing of [their] birth."

all purposes including, but not limited to, the existing cash assistance benefit, child support, medical assistance and food stamp benefits provided to the assistance unit.

Plaintiffs sought preliminary injunctive and declaratory relief, which relief was denied on October 28, 1997. On July 17, 2000, however, the trial court granted class certification to:

all women who have conceived or will conceive a child while they or someone in their family received welfare benefits (or within a year of such receipts) under the former AFDC program or under the Work First program any time after October 1, 1992, and all children born to such women after August 1, 1993 who have been or will be subject to *N.J.S.A. 44:10-61* and *N.J.A.C. 10:90-2.18* or their predecessor statute and regulations, *N.J.S.A. 44:10-3.5* and *N.J.A.C. 10:81-3.8* and 10.81-1.11.

Subsequently, plaintiffs and the DHS filed a motion and cross-motion for summary judgment.

On December 18, 2000, the court entered an order granting the Department's cross-motion and dismissing plaintiffs' complaint with prejudice. In an oral opinion upholding the family cap under the New Jersey Constitution, the court applied the balancing test established by this Court in *Greenberg v. Kimmelman*, 99 N.J. 552, 494 A.2d 294 (1985), and *Right to Choose v. Byrne*, 91 N.J. 287, 450 A.2d 925 (1982). In respect of plaintiffs' right to privacy claim, the court stated that the right "may be restricted only when necessary to promote a compelling governmental interest." Distinguishing our decision in *Planned Parenthood of Central New Jersey v. Farmer*, 165 N.J. 609, 762 A.2d 620 (2000), wherein the data indicated that a significant burden was created when a minor's right to obtain an abortion was conditioned on parental notification, the court found that in this case the plaintiffs had failed to submit any evidence that the family cap materially affected a woman's right to make procreative choices. The court concluded:

[T]he State has demonstrated a legitimate and a substantial relationship between the statutory classification and the ends asserted. The interest here of the Legislature, [which] represents all of us, in promoting self-sufficient citizens, diminishing the dependency upon welfare and creating [parity] between welfare recipients and working people . . . greatly outweighs an[y] slight imposition [\*\*\*310] or mere burden on . . . the plaintiffs' right to privacy.

The Appellate Division affirmed the trial court in a published opinion issued on April 2, 2002. Judge Winkelstein, writing for the panel, first observed that the Third Circuit Court of Appeals previously had affirmed a federal district court determination that the family cap does "not violate the procreative privacy and equal protection guarantees of the United States Constitution." *Sojourner A. v. New Jersey Dep't of Human Servs.*, 350 N.J. Super. 152, 163 2002). See *C.K. v. N.J. Dep't of Health & Human Servs.*, 92 F.3d 171 (3d Cir. 1996) (hereinafter *C.K. II*), affirming, *sub nom.*, *C.K. v. Shalala*, 883 F. Supp. 991 (D.N.J. 1995) (hereinafter *C.K. I*). Nonetheless, because "there may be circumstances in which the [New Jersey] Constitution provides greater protections", *id.* at 166, 794 A.2d 822 (quoting *Barone v. Dep't of Human Servs.*, 107 N.J. 355, 368 (1987)), than does the Federal Constitution, and because state restrictions on a woman's right to privacy and equal protection guarantees under our Constitution have been read expansively by our courts, the panel deemed those federal cases "not dispositive," *id.* at 163, 794 A.2d 822.

As had the trial court, the Appellate Division applied the balancing test set forth in *Right to Choose*, *supra* and *Greenberg*, *supra* acknowledged the fundamental nature of a woman's right to make procreative decisions under Article I, paragraph 1 of the New Jersey Constitution, and found that the family cap "at best, indirect[ly] and insignificant[ly]" intrudes on that right. *Id.* at 169, 794 A.2d 822. The panel concluded that the cap "does not present a direct obstacle to bearing children. It merely introduces one of many factors that a woman considers when deciding whether to become pregnant and carry the child to term[,] a choice that remains hers and hers alone." *Id.* at 171, 794 A.2d 822. Similarly, the panel found that the cap does not

completely deprive either the family unit of the benefits it is already receiving, or eliminate all benefits to the newborn child. Although the welfare recipient will not receive an additional cash stipend for the child, she continues to receive benefits designed to assist her to obtain and retain employment, and

significantly, Medicaid coverage and food stamps are provided for the additional child. [Ibid.]

Agreeing with the trial court that the purposes of the statute--reducing the welfare rolls and putting welfare families on the same footing as working families--are "laudable state objectives," the Appellate Division held that the family cap provision bears a substantial relationship to those legitimate and reasonable goals. *Id.* at 172, 794 A.2D 822 (quoting *Sanchez v. Dep't of Human Servs.*, 314 N.J. Super. 11, 17 (App. Div. 1998)).

### III

#### A

New Jersey has, since 1959, engaged in a cooperative effort with the federal government to provide aid to families in need of assistance. 42 U.S.C.A. § 601 et seq. [\*\*311]; see *In re Petitions for Rulemaking N.J.A.C. 10:82-1.2 and 10:85-4.1*, 223 N.J. Super. 453, 456-58, 538 A.2d 1302 (App. Div. 1988) (outlining history of State's participation in federal welfare programs), *aff'd*, 117 N.J. 311, 566 A.2d 1154 (1989). In a shift in approach related to that effort, the State Legislature enacted the FDA in 1992 to "offer[] intensified and coordinated services that . . . address the educational, vocational and other needs of the public assistance recipient's family. . . ." N.J.S.A. 44:10-20. That legislation included a provision that denied an incremental increase in benefits for children who were born when the family was eligible for AFDC benefits. N.J.S.A. 44:10-3.5 (repealed by L. 1997, c. 38, § 17). Implementation of Section 3.5 required a waiver from the United States Department of Health and Human Services that was obtained by DHS on July 20, 1992.

In 1996, Congress replaced AFDC with the Temporary Assistance to Needy Families (TANF) block grant program, 42 U.S.C.A. § 601-608. Under TANF, Congress provided the states with the flexibility to implement welfare reform in their jurisdictions, subject to a mandatory national welfare-to-work feature similarly designed to motivate welfare recipients to become [\*\*327] self-sufficient. See, e.g., 42 U.S.C.A. § 607(a) (requiring percentage of recipients to work) and § 608(a)(7) (imposing time limits on cash assistance). In March of 1997, the New Jersey Legislature responded to the federal initiative by replacing the FDA with WFNJ, N.J.S.A. 44:10-55 to -70.

Under WFNJ, the level of cash benefits is determined pursuant to a schedule administered by the DHS. That schedule, with certain important limitations, provides incremental increases based on the size and need of the family. N.J.A.C. 10:69-10.2(a) and 90-3.3. One such

limitation is the family cap found at N.J.S.A. 44:10-61(a), which states:

The level of cash assistance benefits payable to an assistance unit with dependent children shall not increase as a result of the birth of a child during the period in which the assistance unit is eligible for benefits. . . .

The Act defines an "Assistance unit" as

a single person without dependent children; . . . dependent children only; or a person or couple with one or more dependent children who are legally or blood-related, or who is their legal guardian, and who live together as a household unit. [N.J.S.A. 44:10-57.]

As noted earlier, the family cap does not apply "to an individual . . . who gives birth to a child fewer than 10 months after applying for and receiving cash assistance benefits." N.J.S.A. 44:10-61(e). The family cap also does not apply when the new child is the product of rape or incest. N.J.S.A. 44:10-61(f).

Like its predecessor New Jersey statute, and consonant with the TANF approach, the primary purpose of WFNJ is to encourage employment, self-sufficiency and family stability. See generally N.J.S.A. 44:10-56. Toward that end, WFNJ contains mechanisms designed to promote independence and decrease long-term reliance on welfare payments. One such mechanism reallocates the savings achieved by application of the family cap to a variety of programs aimed at developing adult welfare recipients' educational and vocational skills to enable them to get and keep stable employment.

Prior to receiving benefits, eligible welfare recipients are assessed as to their educational level, prior work experience and other indicators of their "potential . . . readiness for work." N.J.S.A. 44:10-62f. [\*\*312] After the assessment is completed, "individual responsibility plan[s]" are developed to set specific goals in respect of employment, education obligations, medical care and schooling for the recipient's dependent children. *Ibid.* Once recipients agree to follow the plan, they must "continuously and actively seek employment" or accept placement in an approved "work activity" to continue in the program. N.J.S.A. 44:10-62a. Recipients are not on their own in this endeavor; WFNJ provides or subsidizes a panoply of such activities, including actual "employment; on-the-job training; job search and job readiness assistance; vocational educational training; job skills training related directly to employment; community

work experience; alternative work experience; supportive work; community service programs . . . [and] education that is necessary for employment. . . ." *N.J.S.A. 44:10-57*. The statute encourages education by reducing the hourly work requirements for adult recipients who are "full time post-secondary student[s]," *N.J.S.A. 44:10-62b*, and permitting young parents under the age of nineteen to fulfill the "work activity" requirement by completing high school or a high school equivalency program, *N.J.S.A. 44:10-57*.

WFNJ also aims to remove barriers so that persons receiving welfare can maintain employment or stay in school. Under *N.J.S.A. 44:10-38*, recipients receive "supportive services" such as child care, transportation to and from work, and stipends for necessary "work-related expenses, . . . as determined by the commissioner." Moreover, to enable those who have gained steady employment to remain in the workforce, the State continues to subsidize medical and child care expenses for two years after recipients have become ineligible for cash benefits. *Ibid.*

#### B

The DHS has contracted with Mathematica Policy Research, Inc. (Mathematica), to examine the effectiveness of the WFNJ program. See *N.J.S.A. 44:10-41* (calling for periodic public reports and evaluations of WFNJ). The Department's agreement with Mathematica requires a series of six reports that evaluate how families are faring under the program. Mathematica's first report, released in 1999, found that during the initial eighteen months of WFNJ implementation, approximately one in three WFNJ participants exited the welfare system and entered the workforce. A survey of those who remained on welfare revealed that they faced a variety of more substantial impediments to employment, including low skills levels and less prior work experience.<sup>1</sup>

We note, as did the researchers themselves, that the first Mathematica report covered a period of strong eco-

<sup>1</sup> The record also contains a Rutgers School of Social Work study of the FDP and a 1999 study conducted by Legal Services of New Jersey and the New Jersey Poverty Research Institute. Legal Services and the Poverty Research Institute surveyed Work First New Jersey participants and found that most knew about the goals of the Work First program and wanted to enter the workforce. Those surveyed also expressed concern about the adequacy of such necessary components of the program as transportation, child care and rent subsidies. The Rutgers study was not directed specifically toward the effects of the family cap combined with the provision of back-to-work services.

omic growth and may not reflect real gains due to WFNJ. Further, information obtained after the first eighteen months of any new program may not be indicative of long term improvements, whereas subsequent evaluations are likely to provide more reliable data. In any event, the evaluations provided in the record before the Court do [\*313] not indicate whether WFNJ has achieved (or will achieve) its goals.

#### IV

##### A

Plaintiffs bring this action under the New Jersey Constitution. Nonetheless, when cognate provisions of the Federal Constitution are implicated, we have turned to case law relating to those provisions for guidance. See, e.g., *State v. Schmid*, 84 N.J. 535, 549 (1980) (discussing free speech protections in [\*330] New Jersey within federal *First Amendment* framework), *appeal dismissed sub nom. Princeton Univ. v. Schmid*, 455 U.S. 100, 102 (1982); *State v. Johnson*, 68 N.J. 349, 352-53 (1975) (analyzing defendant's search and seizure rights in light of federal *Fourth Amendment* jurisprudence).

The *Fourteenth Amendment of the United States Constitution* provides that the state governments shall not "deny to any person within [their] jurisdiction the equal protection of the law," and shall not "deprive any person of life, liberty, or property[] without due process of law." *U.S. Const. amend. XIV*, § 1. Under the latter provision, citizens enjoy the right to be free from governmental intrusion in making procreative decisions. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). The extent to which statutory provisions are scrutinized under federal equal protection and right to privacy claims depends on the class of persons affected, the nature of the right implicated, and the level of interference. When a state statute directly impinges on a fundamental right or a suspect class, then the provision is strictly scrutinized, *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 686 (1977); when a statute impairs a lesser interest, the federal courts ask only whether it is "rationally related to legitimate government interests." *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997). It follows, then, that the rational basis test is applied when economic legislation, including statutes that establish benefit programs, is challenged. See *Dandridge v. Williams*, 397 U.S. 471, 485-87 (1970) (upholding limits on welfare benefits as rationally related to legitimate government interest "in encouraging employment and . . . avoiding discrimination between welfare families and the families of the working poor").



As noted earlier, the Third Circuit Court of Appeals and the federal District Court for New Jersey have considered the same claims that are now before this Court. In *C.K. I, supra* plaintiffs brought a class action challenging a decision of the Secretary of the United States Department of Health and Human Services to waive certain federal welfare requirements and [\*\*314] thereby to permit implementation of the family cap provision under FDA. 883 F. Supp. at 996-97. In addition to contesting the Secretary's authority to grant the waiver, plaintiffs claimed that the family cap violated their equal protection and fundamental privacy rights. *Id. at 1012.*<sup>2</sup> The court held that the family cap provision was "rationally related to the legitimate state interests of altering the cycle of welfare dependency . . . [and] promoting individual responsibility and family stability." *Id. at 1015.* It reasoned that "by maintaining the level of . . . benefits despite the arrival of an additional child, [the family cap] puts the welfare household in the same situation as that of a working family, which does not automatically receive a wage increase" when a new child is born. *Id. at 1013-14.*

*C.K. I* also rejected plaintiffs' privacy claims. The court observed that the birth of an additional child in a family on welfare does not result in a decrease in benefits under the cap. Rather, it "remove[s] the automatic benefit increase associated with an additional child under the federal program." *Id. at 1015.* The court held that although women have a fundamental right to make procreative decisions, there is no constitutional right to government subsidies in furtherance of that right. *Ibid.* (citing *Harris v. McRae*, 448 U.S. 297, 316 (1980)).

The Third Circuit "ha[d] nothing to add to the district court's opinion [that plaintiffs' procreative rights are not burdened by the family cap] except to observe that it would be remarkable to hold that a state's failure to subsidize a reproductive choice burdens that choice." *C.K. II, supra*, 92 F. 3d at 195.

## B

In the New Jersey Constitution, both equal protection and the right to privacy derive from the same broad constitutional language, which states: "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of pursuing and obtaining

<sup>2</sup> As in this case, the *C.K. I* plaintiffs asserted that the cap impermissibly infringed on their decision to bear children and denied equal protection to children born when the family was receiving welfare benefits. *Id. at 1012-13.*

safety and happiness." *N.J. Const. art. I, P 1.* Although Article I does not contain the terms "equal protection" or "right to privacy," it is well settled law that the expansive language of that provision is the source for both of those fundamental constitutional guarantees. See *Planned Parenthood, supra*, 165 N.J. at 629 *Right to Choose, supra*, 91 N.J. at 303.

Thirty years ago, Chief Justice Weintraub rejected "[m]echanical approaches to the delicate problem of judicial intervention under either the equal protection or due process clauses" of the New Jersey Constitution. *Robinson v. Cahill*, 62 N.J. 473, 491 (1973). He described the balancing process by which a court "[u]ltimately" decides equal protection and due process challenges:

[A] court must weigh the nature of the restraint or the denial against the apparent public justification, and decide whether the State action is arbitrary. In that process, if the circumstances sensibly so require, the court may call upon the State to demonstrate the existence of a sufficient public need for the restraint or the denial.

[*Id. at 492*, 303 A.2d 273 (citation omitted).]

[\*\*315] Later, in *Right to Choose, supra* and in *Greenberg, supra* the Court reaffirmed that approach, finding that it provided a more flexible analytical framework for the evaluation of equal protection and due process claims. In keeping with Chief Justice Weintraub's direction, we "'consider[] the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction.'" *Planned Parenthood, supra*, 165 N.J. at 630 (quoting *Greenberg, supra*, 99 N.J. at 567 (citing *Right to Choose, supra*, 91 N.J. at 308-09 (1982))). By deviating from the federal tiered model, we are able to examine each claim on a continuum that reflects the nature of the burdened right and the importance of the governmental restriction. See *Planned Parenthood, supra*, 165 N.J. at 630 (noting "that in cases involving a classification that 'indirectly infringes on a fundamental right,' the inflexibility of the tiered framework prevents a full understanding of the clash between individual and governmental interests") (internal citations omitted). We point out, however, that although our mode of analysis differs in form from the federal tiered approach, the tests weigh the same factors and often produce the same result. See *Barone, supra*, 107 N.J. at 368,

*Greenberg, supra*, 99 N.J. at 567.

## C

We turn now to plaintiffs' claims that the family cap provision of WFNJ unconstitutionally infringes on a woman's right to make procreative decisions by penalizing her for choosing to bear a child and, further, that the cap improperly singles out classes of poor children "based on their parents' reproductive choices and the timing of [their] birth."

Our discussion begins with an inquiry into the nature of the affected right. In *Right to Choose, supra* we adverted to the "body of law . . . in New Jersey acknowledging a woman's right to choose whether to carry a pregnancy to full-term or to undergo an abortion." 91 N.J. at 303-304 (citing *Gleitman v. Cosgrove*, 49 N.J. 22, 62-63 (1967) (Weintraub, C.J., dissenting in part) (suggesting that woman with rubella had right to choose abortion); *Berman v. Allan*, 80 N.J. 421, 432 (1979) (establishing cause of action for deprivation of right to decide whether to bear child with Down's Syndrome); *Schroeder v. Perkel*, 87 N.J. 53, 66 (1981) (declaring right to abort second child when first child was born with cystic fibrosis)). Later, in *Planned Parenthood, supra* we emphasized "the importance of a woman's right to control her body and her future, a right we as a society consider fundamental to individual liberty." 165 N.J. at 631-32. The Court was "keenly aware of the principle of individual autonomy that lies at the heart of a woman's right to make reproductive decisions and of the strength of that principle as embodied in our own Constitution." *Id.* at 632. That most basic right, plaintiffs allege, has been burdened impermissibly by the family cap provision of WFNJ.

It is, then, the nature of that burden or the extent of the governmental intrusion that we must consider. Plaintiffs claim that the family cap functions as a coercive tool designed to encourage poor women to avoid having children or to abort their pregnancies when the family unit is receiving welfare. By withholding an incremental increase in cash assistance, plaintiffs argue, the State unduly influences their procreative choices. But even if we assume that procreative choices are influenced by a cap on cash assistance to the family unit, we do not find that influence to be "undue," or that a new burden is thereby [\*\*316] created. We expect that the income of a family unit, whatever the source, is likely to influence a woman's decision to conceive or bear a child. That is true for most families in New Jersey. As noted by the federal courts, working families do not receive automatic wage increases when additional children are born. Indeed, the family cap appears to do no more than place welfare families "on a par with working families."<sup>3</sup> *C.K. I, supra*, 883 F. Supp. at 1013.

<sup>3</sup> We point out that medical benefits and food stamp assistance are provided for children born after the family

We also find that the DHS has presented ample justification for the family cap. The record informs us that resources available as a result of the cap have been diverted to job training, child care, and other programs established and expanded under WFNJ. The goals of promoting self-sufficiency and decreased dependency on welfare are laudable; the focus on education, job training and child care should advance those goals and, ultimately, result in improving the lives of children born into welfare families.

In *Right to Choose, supra* the Court was presented with a challenge to legislation that denied Medicaid funding for abortions except when an abortion was medically necessary to save the life of the mother. 91 N.J. at 292. On considering plaintiffs' equal protection challenge, we stated:

[T]here [is no] fundamental right to funding for an abortion. The right to choose whether to have an abortion, however, is a fundamental right of all pregnant women, including those entitled to Medicaid reimbursement for necessary medical treatment. *As to that group of women*, the challenged statute discriminates between those for whom medical care is necessary for childbirth and those for whom an abortion is medically necessary. Under [the statute] those needing abortions receive funds only when their lives are at stake. By granting funds when life is at risk, but withholding them when health is endangered, the statute denies equal protection to those women entitled to necessary medical services under Medicaid.

[91 N.J. at 305-06 (citations omitted; emphasis added).]

The *Right to Choose* dichotomy is directly relevant to this case. There we held that the state could not distinguish between "those for whom medical care is necessary for childbirth and those for whom an abortion is medically necessary." *Id.* at 305. See also *Planned Parenthood, supra*, 165 N.J. at 634 (expressing concern that delay in obtaining abortion increases risk to health of mother). Most important, we also held that "[e]lective, nontherapeutic abortions . . . do not involve the life or health of the mother, and the State may pursue its interest in potential life by excluding those abortions from the Medicaid program." *Right to Choose, supra*, 91 N.J. at 310. Here, the life or health of the mother is not at issue.

receives welfare and regardless of the family cap. Unlike working families, those benefits establish an "assistance floor" for welfare recipients.

Whatever the impact of the family cap on the family unit, that impact is no different from the impact of another child on any family with a fixed income. Like most women in New Jersey, a woman receiving welfare assistance will likely weigh the extent of the economic strain caused by the addition of a child to the family unit. Ultimately, however, the decision to bring a child to term or to have an abortion remains wholly with the woman.

Plaintiffs also rely on the distinction created in WFNJ between children [\*317] born before the family begins receiving welfare benefits, and similarly situated children born ten months after the receipt of such benefits. The family cap treats these classes disparately, plaintiffs argue, based on when mothers choose to exercise their fundamental right to conceive and bear children. In fact, the *family* does not receive additional cash assistance when a new child is born, although the family does receive additional food stamps and Medicaid benefits. All of the children in the family unit share presuma-

bly in the total amount of cash assistance available, as is the case in other similarly situated family units.

V

This case is not about a woman's right to choose whether and when to bear children, but rather, about whether the State must subsidize that choice. In *Right to Choose, supra* we held that the State may decline to fund a woman's choice to obtain an abortion when the abortion is not medically necessary. We hold today that the State is not required to provide additional cash assistance when a woman chooses to bear a child more than ten months after her family has received welfare benefits. In so holding, we reject plaintiffs' claim that the family cap provision of WFNJ violates the equal protection and due process guarantees of our State Constitution.

The judgment of the Appellate Division is affirmed.

CASE NO.:  
Writ Petition (civil) 302 of 2001

**Javed & Others v. State of Haryana & Others**

DATE OF JUDGMENT: 30/07/2003

BENCH:  
R.C. LAHOTI, ASHOK BHAN & ARUN KUMAR.

**J U D G M E N T**

R.C. LAHOTI, J.

Leave granted in all the Special Leave Petitions. In this batch of writ petitions and appeals the core issue is the vires of the provisions of Section 175(1)(q) and 177(1) of the Haryana Panchayati Raj Act, 1994 (Act No.11 of 1994) (hereinafter referred to as the Act, for short). The relevant provisions are extracted and reproduced hereunder:-  
175. (1) No person shall be a Sarpanch or a Panch of a Gram Panchayat or a member of a Panchayat Samiti or Zila Parishad or continue as such who -

(q) has more than two living children :

Provided that a person having more than two children on or upto the expiry of one year of the commencement of this Act, shall not be deemed to be disqualified;

"177(1) If any member of a Gram Panchayat, Panchayat Samiti or Zila Parishad -

(a) who is elected, as such, was subject to any of the disqualifications mentioned in section 175 at time of his election;

(b) during the term for which he has been elected, incurs any of the disqualifications mentioned in section 175, shall be disqualified from continuing to be a member and his office shall become vacant.

(2) In every case, the question whether a vacancy has arisen shall be decided by the Director. The Director may give its decision either on an application made to it by any person, or on its own motion. Until the Director decides that the vacancy, has arisen, the members shall not be disqualified under sub-section (1) from continuing to be a member. Any person aggrieved by the decision of the Director may, within a period of fifteen days from the date of such decision, appeal to the Government and the orders passed by Government in such appeal shall be final :

Provided that no order shall be passed under this sub-section by the Director against any member without giving him a reasonable opportunity of being heard."

Act No.11 of 1994 was enacted with various objectives based on past experience and in view of the shortcomings noticed in the implementation of preceding laws and also to bring the legislation in conformity with Part IX of the Constitution of India relating to 'The Panchayats' added by the Seventy-third Amendment. One of the objectives set out in the Statement of Objects and Reasons is to disqualify persons for election of Panchayats at each level, having more than 2 children after one year of the date of commencement of this Act, to popularize Family Welfare/Family Planning Programme (Vide Clause (m) of Para 4 of SOR).

Placed in plain words the provision disqualifies a person having more than two living children from holding the specified offices in Panchayats. The enforcement of disqualification is postponed for a period of one year from the date of the commencement of the Act. A person having more than two children upto the expiry of one year of the commencement of the Act is not disqualified. This postponement for one year takes care of any conception on or around the commencement of the Act, the normal period of gestation being nine months. If a woman has conceived at the commencement of the Act then any one of such couples would not be disqualified. Though not disqualified on the date of election if any person holding any of the said offices incurs a disqualification by giving birth to a child one year after the commencement of the Act he becomes subject to disqualification and is disabled from continuing to hold the office. The disability is incurred by the birth of a child which results in increasing the number of living children, including the additional child born one year after the commencement of the Act, to a figure more than two. If the factum is disputed the Director is entrusted with the duty of holding an enquiry and declaring the office vacant. The decision of the Director is subject to appeal to the Government. The Director has to afford a reasonable opportunity of being heard to the holder of office sought to be disqualified. These safeguards satisfy the requirements of natural justice.

Several persons (who are the writ petitioners or appellants in this batch of matters) have been disqualified or proceeded against for disqualifying either from contesting the elections for, or from continuing in, the office of Panchas/Sarpanchas in view of their having incurred the disqualification as provided by Section 175(1)(q) or Section 177(1) read with Section 175(1)(q) of the Act. The grounds for challenging the constitutional validity of the abovesaid provision are very many, couched differently in different writ petitions. We have heard all the learned counsel representing the different petitioners/appellants. As agreed to at the Bar, the grounds of challenge can be categorized into five :- (i) that the provision is arbitrary and hence violative of Article 14 of the Constitution; (ii) that the disqualification does not serve the purpose sought to be achieved by the legislation; (iii) that the provision is discriminatory; (iv) that the provision adversely affects the liberty of leading personal life in all its freedom and having as many children as one chooses to have and hence is violative of Article 21 of the Constitution; and (v) that the provision interferes with freedom of religion and hence violates Article 25 of the Constitution.

The State of Haryana has defended its legislation on all counts. We have also heard the learned Standing Counsel for the State. On notice, Sh. Soli J. Sorabji, the learned Attorney General for India, has appeared to assist the Court and he too has addressed the Court. We would deal with each of the submissions made.

Submissions (i),(ii) & (iii)

The first three submissions are based on Article 14 of the Constitution and, therefore, are taken up together for consideration.

Is the classification arbitrary?

It is well-settled that Article 14 forbids class legislation; it does not forbid reasonable classification for the purpose of legislation. To satisfy the constitutional test of permissibility, two conditions must be satisfied, namely (i) that the classification is founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and (ii) that such differentia has a rational relation to the object sought to be achieved by the Statute in question. The basis for classification may rest on conditions which may be geographical or according to objects or occupation or the like. [See : Constitution Bench decision in Budhan Choudhry and Ors. Vs. The State of Bihar, (1955) 1 SCR 1045]. The classification is well-defined and well-perceptible. Persons having more than two living children are clearly distinguishable from persons having not more than two living children. The two constitute two different classes and the classification is founded on an intelligible differentia clearly distinguishing one from the other. One of the objects sought to be achieved by the legislation is popularizing the family welfare/family planning programme. The disqualification enacted by the provision seeks to achieve the objective by creating a disincentive. The classification does not suffer from any arbitrariness. The number of children, viz., two is based on legislative wisdom. It could have been more or less. The number is a matter of policy decision which is not open to judicial scrutiny.

The legislation does not serve its object?

It was submitted that the number of children which one has, whether two or three or more, does not affect the capacity, competence and quality of a person to serve on any office of a Panchayat and, therefore, the impugned disqualification has no nexus with the purpose sought to be achieved by the Act. There is no merit in the submission. We have already stated that one of the objects of the enactment is to popularize Family Welfare/Family Planning Programme. This is consistent with the National Population Policy.

Under Article 243G of the Constitution the Legislature of a State has been vested with the authority to make law endowing the Panchayats with such powers and authority which may be necessary to enable the Gram Panchayat to function as institutions of self-Government and such law may contain provisions for the devolution of powers and responsibilities upon Panchayats, at the appropriate level, subject to such

conditions as may be specified therein. Clause (b) of Article 243G provides that Gram Panchayats may be entrusted the powers to implement the schemes for economic development and social justice including those in relation to matters listed in the Eleventh Schedule. Entries 24 and 25 of the Eleventh Schedule read:

24. Family Welfare.

25. Women and child development.

In pursuance to the powers given to the State Legislature to enact laws the Haryana Legislature enacted the Haryana Panchayati Raj Act, 1994 (Haryana Act No.11 of 1994). Section 21 enumerates the functions and duties of Gram Panchayat. Clause XIX (1) of Section 21 reads:

"XIX. Public Health and Family Welfare -

(1) Implementation of family welfare programme."

The family welfare would include family planning as well. To carry out the purpose of the Act as well as the mandate of the Constitution the Legislature has made a provision for making a person ineligible to either contest for the post of Panch or Sarpanch having more than two living children. Such a provision necessarily be identical. So is the case with the laws governing legislators and parliamentarians.

It is not permissible to compare a piece of legislation enacted by a State in exercise of its own legislative power with the provisions of another law, though *pari materia* it may be, but enacted by Parliament or by another State legislature within its own power to legislate. The sources of power are different and so do differ those who exercise the power. The Constitution Bench in *The State of Madhya Pradesh Vs. G.C. Mandawar*, (1955) 2 SCR 225, held that the power of the Court to declare a law void under Article 13 has to be exercised with reference to the specific legislation which is impugned. Two laws enacted by two different Governments and by two different legislatures can be read neither in conjunction nor by comparison for the purpose of finding out if they are discriminatory. Article 14 does not authorize the striking down of a law of one State on the ground that in contrast with a law of another State on the same subject, its provisions are discriminatory. When the sources of authority for the two statutes are different, Article 14 can have no application. So is the view taken in *The Bar Council of Uttar Pradesh Vs. The State of U.P. and Anr.* (1973) 1 SCC 261, *State of Tamil Nadu and Ors. Vs. Ananthi Ammal and Ors.* (1995) 1 SCC 519 and *Prabhakaran Nair and Ors. Vs. State of Tamil Nadu and Ors.* (1987) 4 SCC 238.

Incidentally it may be noted that so far as the State of Haryana is concerned, in the Haryana Municipal Act, 1973 (Act No. 24 of 1973) Section 13A has been inserted to make a provision for similar disqualification for a person from being chosen or holding the office of a member of municipality.

A uniform policy may be devised by the Centre or by a State. However, there is no constitutional requirement that any such policy must be implemented in one-go. Policies are capable of being implemented in a phased manner. More so, when the policies have far-reaching implications and are dynamic in nature, their implementation in a phased manner is welcome for it receives gradual willing acceptance and invites lesser resistance.

The implementation of policy decision in a phased manner is suggestive neither of arbitrariness nor of discrimination. In *Lalit Narayan Mishra Institute of Economic Development and Social Change, Patna etc., Vs. State of Bihar and Ors.*, (1988) 2 SCC 433, the policy of nationalizing educational institutes was sought to be implemented in a phased manner. This Court held that all the institutions cannot be taken over at a time and merely because the beginning was made with one institute, it could not complain that it was singled out and, therefore, Article 14 was violated. Observations of this Court in *Pannalal Bansilal Pitti and Ors. Vs. State of A.P. and Anr.* (1996) 2 SCC 498, are apposite. In a pluralist society like India, people having faiths in different religions, different beliefs and tenets, have peculiar problems of their own. "A uniform law, though is highly desirable, enactment thereof in one go perhaps may be counter-productive to unity and integrity of the nation. In a democracy governed by rule of law, gradual progressive change and order should be brought about. Making law or amendment to a law is a slow process and the legislature attempts to remedy where the need is felt most acute. It would, therefore, be inexpedient and incorrect to think that all laws have to be made uniformly applicable to all people in one go. The mischief or defect which is most acute can be remedied by process of law at stages."

To make a beginning, the reforms may be introduced at the grass-root level so as to spiral up or may be introduced at the top so as to percolate down. Panchayats are grass-root level institutions of local self-governance. They have a wider base. There is nothing wrong in the State of Haryana having chosen to subscribe to the national movement of population control by enacting a legislation which would go a long way in ameliorating health, social and economic conditions of rural population, and thereby contribute to the development of the nation which in its turn would benefit the entire citizenry. We may quote from the National Population Policy 2000 (Government of India Publication, page 35):-

"Demonstration of support by elected leaders, opinion makers, and religious leaders with close involvement in the reproductive and child health programme greatly influences the behaviour and response patterns of individuals and communities. This serves to enthuse communities to be attentive towards the quality and coverage of maternal and child health services, including referral care."....."The involvement and enthusiastic participation of elected leaders will ensure dedicated involvement of administrators at district and sub-district levels. Demonstration of strong support to the small family norm, as well as personal example, by political, community, business, professional, and religious leaders, media and film stars, sports personalities and opinion makers, will enhance its acceptance throughout society."



No fault can be found with the State of Haryana having enacted the legislation. It is for others to emulate.

We are clearly of the opinion that the impugned provision is neither arbitrary nor unreasonable nor discriminatory. The disqualification contained in Section 175(1)(q) of Haryana Act No.11 of 1994 seeks to achieve a laudable purpose - socio-economic welfare and health care of the masses and is consistent with the national population policy. It is not violative of Article 14 of the Constitution.

Submission (iv) & (v) : the provision if it violates Article 21 or 25?

Before testing the validity of the impugned legislation from the viewpoint of Articles 21 and 25, in the light of the submissions made, we take up first the more basic issue - Whether it is at all permissible to test the validity of a law which enacts a disqualification operating in the field of elections on the touchstone of violation of fundamental rights?

Right to contest an election is neither a fundamental right nor a common law right. It is a right conferred by a Statute. At the most, in view of Part IX having been added in the Constitution, a right to contest election for an office in Panchayat may be said to be a constitutional right — a right originating in Constitution and given shape by statute. But even so it cannot be equated with a fundamental right. There is nothing wrong in the same Statute which confers the right to contest an election also to provide for the necessary qualifications without which a person cannot offer his candidature for an elective office and also to provide for disqualifications which would disable a person from contesting for, or holding, an elective statutory office.

\* \* \*

In our view, disqualification on the right to contest an election by having more than two living children does not contravene any fundamental right nor does it cross the limits of reasonability. Rather it is a disqualification conceptually devised in national interest.

With this general statement of law which has application to Articles 21 and 25 both, we now proceed to test the sustainability of attack on constitutional validity of impugned legislation separately by reference to Articles 21 and 25.

The disqualification if violates Article 21 ?

Placing strong reliance on *Mrs. Maneka Gandhi Vs. Union of India & Anr.* - (1978) 1 SCC 248, and *M/s. Kasturu Lal Lakshmi Reddy and Ors. Vs. State of Jammu and Kashmir and Anr.* - (1980) 4 SCC 1, it was forcefully urged that the fundamental right to life and personal liberty emanating from Article 21 of the Constitution should be allowed to stretch its span to its optimum so as to include in the compendious

term of the Article all the varieties of rights which go to make up the personal liberty of man including the right to enjoy all the materialistic pleasures and to procreate as many children as one pleases.

At the very outset we are constrained to observe that the law laid down by this Court in the decisions relied on is either being misread or read divorced of the context. The test of reasonableness is not a wholly subjective test and its contours are fairly indicated by the Constitution. The requirement of reasonableness runs like a golden thread through the entire fabric of fundamental rights. The lofty ideals of social and economic justice, the advancement of the nation as a whole and the philosophy of distributive justice - economic, social and political - cannot be given a go-by in the name of undue stress on fundamental rights and individual liberty. Reasonableness and rationality, legally as well as philosophically, provide colour to the meaning of fundamental rights and these principles are deducible from those very decisions which have been relied on by the learned counsel for the petitioners.

It is necessary to have a look at the population scenario, of the world and of our own country.

India has the (dis)credit of being second only to China at the top in the list of the 10 most-populous countries of the world. As on 1.2.2000 the population of China was 1,277.6 million while the population of India as on 1.3.2001 was 1,027.0 million (Census of India, 2001, Series I, India - Paper I of 2001, page 29).

The torrential increase in the population of the country is one of the major hindrances in the pace of India's socio-economic progress. Everyday, about 50,000 persons are added to the already large base of its population. The Karunakaran Population Committee (1992-93) had proposed certain disincentives for those who do not follow the norms of the Development Model adopted by National Public Policy so as to bring down the fertility rate. It is a matter of regret that though the Constitution of India is committed to social and economic justice for all, yet India has entered the new millennium with the largest number of illiterates in the world and the largest number of people below the poverty line. The laudable goals spelt out in the Directive Principles of State Policy in the Constitution of India can best be achieved if the population explosion is checked effectively. Therefore, the population control assumes a central importance for providing social and economic justice to the people of India (Usha Tandon, Reader, Faculty of Law, Delhi University, - Research Paper on Population Stabilization, Delhi Law Review, Vol. XXIII 2001, pp.125-131).

In the words of Bertand Russell, "Population explosion is more dangerous than Hydrogen Bomb." This explosive population over-growth is not confined to a particular country but it is a global phenomenon. India being the largest secular democracy has the population problem going side by side and directly impacting on its per capita income, and resulting in shortfall of food grains in spite of the green revolution, and has hampered improvement on the educational front and has caused swelling of unemployment numbers, creating a new class of pavement and slum-dwellers and leading to congestion in urban areas due to the migration of rural poor. (Paper by B.K. Raina in Population Policy and the Law, 1992, edited by B.P. Singh

Sehgal, page 52).

In the beginning of this century, the world population crossed six billions, of which India alone accounts for one billion (17 per cent) in a land area of 2.5 per cent of the world area. The global annual increase of population is 80 millions. Out of this, India's growth share is over 18 millions (23 per cent), equivalent to the total population of Australia, which has two and a half times the land space of India. In other words, India is growing at the alarming rate of one Australia every year and will be the most densely populous country in the world, outbeating China, which ranks first, with a land area thrice this country's. China can withstand the growth for a few years more, but not India, with a constricted land space. Here, the per capita crop land is the lowest in the world, which is also shrinking fast. If this falls below the minimum sustainable level, people can no longer feed themselves and shall become dependent on imported food, provided there are nations with exportable surpluses. Perhaps, this may lead to famine and abnormal conditions in some parts of the country. (Source - Population Challenge, Arcot Easwaran, The Hindu, dated 8.7.2003). It is emphasized that as the population grows rapidly there is a corresponding decrease in per capita water and food. Women in many places trek long distances in search of water which distances would increase every next year on account of excessive ground water withdrawals catering to the need of the increasing population, resulting in lowering the levels of water tables.

Arcot Easwaran has quoted the China example. China, the most populous country in the world, has been able to control its growth rate by adopting the 'carrot and stick' rule. Attractive incentives in the field of education and employment were provided to the couples following the 'one-child norm'. At the same time drastic disincentives were cast on the couples breaching 'one-child norm' which even included penal action. India being a democratic country has so far not chosen to go beyond casting minimal disincentives and has not embarked upon penalizing procreation of children beyond a particular limit. However, it has to be remembered that complacency in controlling population in the name of democracy is too heavy a price to pay, allowing the nation to drift towards disaster.

The growing population of India had alarmed the Indian leadership even before India achieved independence. In 1940 the sub-Committee on Population, appointed by the National Planning Committee set up by the President of the Indian National Congress (Pandit Jawaharlal Nehru), considered 'family planning and a limitation of children' essential for the interests of social economy, family happiness and national planning. The committee recommended the establishment of birth control clinics and other necessary measures such as raising the age at marriage and a eugenic sterilization programme. A committee on population set up by the National Development Council in 1991, in the wake of the census result, also proposed the formulation of a national policy. (Source - Seminar, March 2002, page 25)

Every successive Five Year Plan has given prominence to a population policy. In the first draft of the First Five Year Plan (1951-56) the Planning Commission recognized that population policy was essential to planning and that family planning was a

step forward for improvement in health, particularly that of mothers and children. The Second Five Year Plan (1956-61) emphasized the method of sterilization. A central Family Planning Board was also constituted in 1956 for the purpose. The Fourth Five Year Plan (1969-74) placed the family planning programme, "as one amongst items of the highest national priority". The Seventh Five Year Plan (1985-86 to 1990-91) has underlined "the importance of population control for the success of the plan programme...." But, despite all such exhortations, "the fact remains that the rate of population growth has not moved one bit from the level of 33 per thousand reached in 1979. And in many cases, even the reduced targets set since then have not been realised. (Population Policy and the Law, *ibid*, pages 44-46).

The above facts and excerpts highlight the problem of population explosion as a national and global issue and provide justification for priority in policy-oriented legislations wherever needed.

None of the petitioners has disputed the legislative competence of the State of Haryana to enact the legislation. Incidentally, it may be stated that Seventh Schedule, List II - State List, Entry 5 speaks of 'Local government, that is to say, the constitution and powers of municipal corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration'. Entry 6 speaks of 'Public health and sanitation' *inter alia*. In List III - Concurrent List, Entry 20A was added which reads 'Population control and family planning'. The legislation is within the permitted field of State subjects. Article 243C makes provision for the Legislature of a State enacting laws with respect to Constitution of Panchayats. Article 243F in Part IX of the Constitution itself provides that a person shall be disqualified for being chosen as, and for being, a member of Panchayat if he is so disqualified by or under any law made by the Legislature of the State. Article 243G casts one of the responsibilities of Panchayats as preparation of plans and implementation of schemes for economic development and social justice. Some of the schemes that can be entrusted to Panchayats, as spelt out by Article 243G read with Eleventh Schedule is - Scheme for economic development and social justice in relation to health and sanitation, family welfare and women and child development and social welfare. Family planning is essentially a scheme referable to health, family welfare, women and child development and social welfare. Nothing more needs to be said to demonstrate that the Constitution contemplates Panchayat as a potent instrument of family welfare and social welfare schemes coming true for the betterment of people's health especially women's health and family welfare coupled with social welfare. Under Section 21 of the Act, the functions and duties entrusted to Gram Panchayats include 'Public Health and Family Welfare', 'Women and Child Development' and 'Social Welfare'.

Family planning falls therein. Who can better enable the discharge of functions and duties and such constitutional goals being achieved than the leaders of Panchayats themselves taking a lead and setting an example.

Fundamental rights are not to be read in isolation. They have to be read along with the Chapter on Directive Principles of State Policy and the Fundamental Duties enshrined in Article 51A. Under Article 38 the State shall strive to promote the welfare of the

people and developing a social order empowered at distributive justice - social, economic and political. Under Article 47 the State shall promote with special care the educational and economic interests of the weaker sections of the people and in particular the constitutionally down-trodden. Under Article 47 the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties.

None of these lofty ideals can be achieved without controlling the population inasmuch as our materialistic resources are limited and the claimants are many. The concept of sustainable development which emerges as a fundamental duty from the several clauses of Article 51A too dictates the expansion of population being kept within reasonable bounds.

The menace of growing population was judicially noticed and constitutional validity of legislative means to check the population was upheld in *Air India Vs. Nergesh Meerza and Ors.* (1981) 4 SCC 335. The Court found no fault with the rule which would terminate the services of Air Hostesses on the third pregnancy with two existing children, and held the rule both salutary and reasonable for two reasons - "In the first place, the provision preventing a third pregnancy with two existing children would be in the larger interest of the health of the Air Hostess concerned as also for the good upbringing of the children. Secondly, ..... when the entire world is faced with the problem of population explosion it will not only be desirable but absolutely essential for every country to see that the family planning programme is not only whipped up but maintained at sufficient levels so as to meet the danger of over-population which, if not controlled, may lead to serious social and economic problems throughout the world."

To say the least it is futile to assume or urge that the impugned legislation violates right to life and liberty guaranteed under Article 21 in any of the meanings howsoever expanded the meanings may be.

The provision if it violates Article 25 ?

It was then submitted that the personal law of muslims permits performance of marriages with 4 women, obviously for the purpose of procreating children and any restriction thereon would be violative of right to freedom of religion enshrined in Article 25 of the Constitution. The relevant part of Article 25 reads as under:-  
25. Freedom of conscience and free profession, practice and propagation of religion. - (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law -

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

A bare reading of this Article deprives the submission of all its force, vigour and charm. The freedom is subject to public order, morality and health. So the Article itself permits a legislation in the interest of social welfare and reform which are obviously part and parcel of public order, national morality and the collective health of the nation's people.

The Muslim Law permits marrying four women. The personal law nowhere mandates or dictates it as a duty to perform four marriages. No religious scripture or authority has been brought to our notice which provides that marrying less than four women or abstaining from procreating a child from each and every wife in case of permitted bigamy or polygamy would be irreligious or offensive to the dictates of the religion. In our view, the question of the impugned provision of Haryana Act being violative of Article 25 does not arise. We may have a reference to a few decided cases.

The meaning of religion - the term as employed in Article 25 and the nature of protection conferred by Article 25 stands settled by the pronouncement of the Constitution Bench decision in *Dr. M. Ismail Faruqi and Ors. Vs. Union of India & Ors.* (1994) 6 SCC 360. The protection under Articles 25 and 26 of the Constitution is with respect to religious practice which forms an essential and integral part of the religion. A practice may be a religious practice but not an essential and integral part of practice of that religion. The latter is not protected by Article 25.

In *Sarla Mudgal (Smt.), President, Kalyani and Ors. Vs. Union of India and Ors.* (1995) 3 SCC 635, this Court has judicially noticed it being acclaimed in the United States of America that the practice of polygamy is injurious to 'public morals', even though some religions may make it obligatory or desirable for its followers. The Court held that polygamy can be superseded by the State just as it can prohibit human sacrifice or the practice of Sati in the interest of public order. The Personal Law operates under the authority of the legislation and not under the religion and, therefore, the Personal Law can always be superseded or supplemented by legislation.

In *Mohd. Ahmed Khan Vs. Shah Bano Begum and Ors.*, (1985) 2 SCC 556, the Constitution Bench was confronted with a canvassed conflict between the provisions of Section 125 of Cr.P.C. and Muslim Personal Law. The question was: when the Personal Law makes a provision for maintenance to a divorced wife, the provision for maintenance under Section 125 of Cr.P.C. would run in conflict with the Personal Law. The Constitution Bench laid down two principles; firstly, the two provisions operate in different fields and, therefore, there is no conflict and; secondly, even if there is a conflict it should be set at rest by holding that the statutory law will prevail over the Personal Law of the parties, in cases where they are in conflict.

In *Mohd. Hanif Quareshi & Ors. Vs. The State of Bihar*, (1959) SCR 629, the State Legislation placing a total ban on cow slaughter was under challenge. One of the submissions made was that such a ban offended Article 25 of the Constitution because

such ban came in the way of the sacrifice of a cow on a particular day where it was considered to be religious by Muslims. Having made a review of various religious books, the Court concluded that it did not appear to be obligatory that a person must sacrifice a cow. It was optional for a Muslim to do so. The fact of an option seems to run counter to the notion of an obligatory duty. Many Muslims do not sacrifice a cow on the Id day. As it was not proved that the sacrifice of a cow on a particular day was an obligatory overt act for a Mussalman for the performance of his religious beliefs and ideas, it could not be held that a total ban on the slaughter of cows ran counter to Article 25 of the Constitution.

In *The State of Bombay Vs. Narasu Appa Mali*, AIR 1952 Bombay 84, the constitutional validity of the Bombay Prevention of Hindu Bigamous Marriages Act (XXV (25) of 1946) was challenged on the ground of violation of Article 14, 15 and 25 of the Constitution. A Division Bench, consisting of Chief Justice Chagla and Justice Gajendragadkar (as His Lordship then was), held - "A sharp distinction must be drawn between religious faith and belief and religious practices. What the State protects is religious faith and belief. If religious practices run counter to public order, morality or health or a policy of social welfare upon which the State has embarked, then the religious practices must give way before the good of the people of the State as a whole."

Their Lordships quoted from American decisions that the laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Their Lordships found it difficult to accept the proposition that polygamy is an integral part of Hindu religion though Hindu religions recognizes the necessity of a son for religious efficacy and spiritual salvation. However, proceeding on an assumption that polygamy is recognized institution according to Hindu religious practice, their Lordships stated in no uncertain terms - "The right of the State to legislate on questions relating to marriage cannot be disputed. Marriage is undoubtedly a social institution an institution in which the State is vitally interested. Although there may not be universal recognition of the fact, still a very large volume of opinion in the world today admits that monogamy is a very desirable and praiseworthy institution. If, therefore, the State of Bombay compels Hindus to become monogamists, it is a measure of social reform, and if it is a measure of social reform then the State is empowered to legislate with regard to social reform under Article 25(2)(b) notwithstanding the fact that it may interfere with the right of a citizen freely to profess, practise and propagate religion."

What constitutes social reform? Is it for the legislature to decide the same? Their Lordships held in *Narasu Appa Mali's* case (supra) that the will expressed by the legislature, constituted by the chosen representatives of the people in a democracy who are supposed to be responsible for the welfare of the State, is the will of the people and if they lay down the policy which a State should pursue such as when the legislature in its wisdom has come to the conclusion that monogamy tends to the welfare of the State, then it is not for the Courts of Law to sit in judgment upon that decision. Such legislation does not contravene Article 25(1) of the Constitution.

We find ourselves in entire agreement, with the view so taken by the learned Judges whose eminence as jurists concerned with social welfare and social justice is recognized

without any demur. Divorce unknown to ancient Hindu Law, rather considered abominable to Hindu religious belief, has been statutorily provided for Hindus and the Hindu marriage which was considered indissoluble is now capable of being dissolved or annulled by a decree of divorce or annulment. The reasoning adopted by the High Court of Bombay, in our opinion, applies fully to repel the contention of the petitioners even when we are examining the case from the point of view of Muslim Personal Law.

The Division Bench of the Bombay High Court in *Narasu Appa Mali* (supra) also had an occasion to examine the validity of the legislation when it was sought to be implemented not in one go but gradually. Their Lordships held - "Article 14 does not lay down that any legislation that the State may embark upon must necessarily be of an all-embracing character. The State may rightly decide to bring about social reform by stages and the stages may be territorial or they may be community-wise."

Rule 21 of the Central Civil Services (Conduct) Rules, 1964 restrains any government servant having a living spouse from entering into or contracting a marriage with any person. A similar provision is to be found in several service rules framed by the States governing the conduct of their civil servants. No decided case of this court has been brought to our notice wherein the constitutional validity of such provisions may have been put in issue on the ground of violating the freedom of religion under Article 25 or the freedom of personal life and liberty under Article 21. Such a challenge was never laid before this Court apparently because of its futility. However, a few decisions by the High Courts may be noticed.

In *Badrudin Vs. Aisha Begam*, 1957 ALJ 300, the Allahabad High Court ruled that though the personal law of Muslims permitted having as many as four wives but it could not be said that having more than one wife is a part of religion. Neither is it made obligatory by religion nor is it a matter of freedom of conscience. Any law in favour of monogamy does not interfere with the right to profess, practise and propagate religion and does not involve any violation of Article 25 of the Constitution.

In *Smt. R.A. Pathan Vs. Director of Technical Education & Ors.* - 1981 (22) GLR 289, having analysed in depth the tenets of Muslim personal law and its base in religion, a Division Bench of Gujarat High Court held that a religious practice ordinarily connotes a mandate which a faithful must carry out. What is permissive under the scripture cannot be equated with a mandate which may amount to a religious practice. Therefore, there is nothing in the extract of the Quaranic text (cited before the Court) that contracting plural marriages is a matter of religious practice amongst Muslims. A bigamous marriage amongst Muslims is neither a religious practice nor a religious belief and certainly not a religious injunction or mandate. The question of attracting Articles 15(1), 25(1) or 26(b) to protect a bigamous marriage and in the name of religion does not arise.

In *Ram Prasad Seth Vs. State of Uttar Pradesh and Ors.* (1957 L.L.J. (Vol.II) 172 = AIR 1961 Allahabad 334) a learned single Judge held that the act of performing a second marriage during the lifetime of one's wife cannot be regarded as an integral part of Hindu religion nor could it be regarded as practising or professing or propagating Hindu religion. Even if bigamy be regarded as an integral part of Hindu religion, the Rule 27



of the Government Servants' Conduct Rules requiring permission of the Government before contracting such marriage must be held to come under the protection of Article 25(2)(b) of the Constitution.

The law has been correctly stated by the High Court of Allahabad, Bombay and Gujarat, in the cases cited hereinabove and we record our respectful approval thereof. The principles stated therein are applicable to all religions practised by whichever religious groups and sects in India.

In our view, a statutory provision casting disqualification on contesting for, or holding, an elective office is not violative of Article 25 of the Constitution.

Looked at from any angle, the challenge to the constitutional validity of Section 175 (1)(q) and Section 177(1) must fail. The right to contest an election for any office in Panchayat is neither fundamental nor a common law right. It is the creature of a statute and is obviously subject to qualifications and disqualifications enacted by legislation. It may be permissible for Muslims to enter into four marriages with four women and for anyone whether a Muslim or belonging to any other community or religion to procreate as many children as he likes but no religion in India dictates or mandates as an obligation to enter into bigamy or polygamy or to have children more than one. What is permitted or not prohibited by a religion does not become a religious practise or a positive tenet of a religion. A practice does not acquire the sanction of religion simply because it is permitted. Assuming the practice of having more wives than one or procreating more children than one is a practice followed by any community or group of people the same can be regulated or prohibited by legislation in the interest of public order, morality and health or by any law providing for social welfare and reform which the impugned legislation clearly does.

If anyone chooses to have more living children than two, he is free to do so under the law as it stands now but then he should pay a little price and that is of depriving himself from holding an office in Panchayat in the State of Haryana. There is nothing illegal about it and certainly no unconstitutionality attaches to it.

Some incidental questions. It was submitted that the enactment has created serious problems in the rural population as couples desirous of contesting an election but having living children more than two, are feeling compelled to give them in adoption. Subject to what has already been stated hereinabove, we may add that disqualification is attracted no sooner a third child is born and is living after two living children. Merely because the couple has parted with one child by giving the child away in adoption, the disqualification does not come to an end. While interpreting the scope of disqualification we shall have to keep in view the evil sought to be cured and purpose sought to be achieved by the enactment. If the person sought to be disqualified is responsible for or has given birth to children more than two who are living then merely because one or more of them are given in adoption the disqualification is not wiped out.

It was also submitted that the impugned disqualification would hit the women worst, inasmuch as in the Indian society they have no independence and they almost helplessly bear a third child if their husbands want them to do so. This contention need not detain

us any longer. A male who compels his wife to bear a third child would disqualify not only his wife but himself as well. We do not think that with the awareness which is arising in Indian women folk, they are so helpless as to be compelled to bear a third child even though they do not wish to do so. At the end, suffice it to say that if the legislature chooses to carve out an exception in favour of females it is free to do so but merely because women are not excepted from the operation of the disqualification it does not render it unconstitutional.

Hypothetical examples were tried to be floated across the bar by submitting that there may be cases where triplets are born or twins are born on the second pregnancy and consequently both of the parents would incur disqualification for reasons beyond their control or just by freak of divinity. Such are not normal cases and the validity of the law cannot be tested by applying it to abnormal situations. Exceptions do not make the rule nor render the rule irrelevant. One swallow does not make a summer; a single instance or indicator of something is not necessarily significant.

### Conclusion

The challenge to the constitutional validity of Section 175(1)(q) and 177(1) fails on all the counts. Both the provisions are held, *intra vires* the Constitution. The provisions are salutary and in public interest. All the petitions which challenge the constitutional validity of the above said provisions are held liable to be dismissed.

Certain consequential orders would be needed. The matters in this batch of hundreds of petitions can broadly be divided into a few categories. There are writ petitions under Article 32 of the Constitution directly filed in this Court wherein the only question arising for decision is the constitutional validity of the impugned provisions of the Haryana Act. There were many a writ petitions filed in the High Court of Punjab & Haryana under Articles 226/227 of the Constitution which have been dismissed and appeals by special leave have been filed in this Court against the decisions of the High Court. The writ petitions, whether in this Court or in the High Court, were filed at different stages of the proceedings. In some of the matters the High Court had refused to stay by interim order the disqualification or the proceedings relating to disqualification pending before the Director under Section 177(2) of the Act. With the decision in these writ petitions and the appeals arising out of SLPs the proceedings shall stand revived at the stage at which they were, excepting in those matters where they stand already concluded. The proceedings under Section 177(2) of the Act before the Director or the hearing in the appeals as the case may be shall now be concluded. In such of the cases where the persons proceeded against have not filed their replies or have not appealed against the decision of the Director in view of the interim order of this Court or the High Court having been secured by them they would be entitled to file reply or appeal, as the case may be, within 15 days from the date of this judgment if the time had not already expired before their initiating proceedings in the High Court or this Court. Such of the cases where defence in the proceedings under Section 177(2) of the Act was raised on the ground that the disqualification was not attracted on account of a child or more having been given in adoption, need not be reopened as we have held that such a defence is not available.

Subject to the abovesaid directions all the writ petitions and civil appeals arising out of SLPs are dismissed.

SLP (C) No.22312 of 2001 Though this petition was heard with a batch of petitions on 17.07.2003, raising constitutional validity of certain provisions of Haryana Panchayati Raj Act, 1994, no such question is raised in this petition. List for hearing on 04.08.2003.

There are three sets of petitions. In petitions under Article 32 of the Constitution, directly filed in this Court, the only question arising for decision is the constitutional validity of the impugned provisions of the Haryana Act. There were some writ petitions filed in the High Court of Punjab and Haryana under Article 226/227 of the Constitution which have been dismissed, appeals by special leave have been filed there against. All the writ petitions and appeals shall also stand dismissed. In some of the matters the High Court had by interim order stayed the disqualification and in some cases proceedings before the Director under Section 177 (2) of the Act. With the decision in these writ petitions, the proceedings shall stand revived at the stage where they were. Within 15 days from the date of this judgment the person proceeded against, may file appeal against the decision of the Director, as the case may be. In such of the cases where defence to the proceedings under Section 177(2) of the Act was raised on the ground of disqualification, being not attracted on account of the child having been given in adoption, the defence shall not be available. The proceedings shall stand concluded and the disqualification shall apply. All the appeals and writ petitions be treated as disposed of in terms of the above said directions.