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Temporal Dimension of Reproductive Choice and Human Rights Issues¹

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Purpose:

The purpose of this investigation is to contribute to better understanding of the scope of positive obligations in safeguarding specific rights related to reproduction. The first aim of the research is to determine the States' obligations in respect of an abortion surviving child. These obligations arise from the right to life and the prohibition on inhuman treatment. The second aim is to determine the effects of temporal constraints to reproductive choice on the Conventional rights of a pregnant woman. This refers to the right to privacy.

Design/Methods/Approach:

Spelled objectives are mostly achieved through the case-law study method. Also, we have used a method of comparison – between exclusive and inclusive theoretical approaches to the issue. We have approached to the topic from the utilitarian positions. The scope of this research is limited only to the margins of the mother-foetal conflict.

Findings:

The main findings could be summarized as follows: the States' positive obligations require providing medical care to the surviving child. Simultaneously, the temporal constraints to accessing the negative aspect of reproductive choice require the States to provide timely information to a woman. Thus, she can decide about terminating her pregnancy.

Originality/Value:

The conclusions may contribute to domestic thought, which mostly relies on defect utilitarian calculations when discussing the issues. The judicial bodies may benefit from this research since it highlights which measures should be imposed upon a handling practitioner. The medical staff is provided with guidance on how to face a situation when it is overlooked in legislation.

UDC: 342.7

Keywords: reproductive choice, temporal constraints, right to life, blameworthy, private life

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Namen prispevka je prispevati k boljšemu razumevanju pozitivnih dolžnosti pri varovanju posebnih pravic, povezanih z reprodukcijo. Prvi cilj raziskave je ugotoviti dolžnosti države pri pozni prekinitvi nosečnosti, kjer glede na različne metode prekinitve obstaja možnost, da otrok prekinitve nosečnosti preživi. Obveznosti držav članic Sveta Evrope do takega otroka se obravnavajo v sklopu pozitivnih dolžnosti, ki bremenijo države v okviru pravice do življenja in prepovedi nehumanega in ponižujočega ravnanja. Drugi cilj je ugotoviti učinke časovnih omejitev reproduktivne izbire na osnovi konvencijskih pravic nosečnic, ki so zaščitene v okviru pravice do zasebnega življenja.

Metode:

Navedeni cilji so v večini doseženi preko študije primerov. Uporabili smo metodo primerjave med izključujočimi in vključujočimi teoretičnimi pristopi k temu vprašanju. Pri analizi smo uporabili utilitaristični pristop. Cilj te raziskave je omejen le na mejno področje odnosa mati – zarodek.

Ugotovitve:

Glavne ugotovitve raziskave so naslednje: pozitivne dolžnosti države zahtevajo zagotovitev zdravstvene oskrbe za otroke, ki preživijo prekinitve nosečnosti, hkrati pa časovna omejitev pristopa k splavu nalaga državi obveznost, da nosečnici pravočasno zagotovi ustrezne informacije, na podlagi katerih se bo odločila o prekinitvi nosečnosti.

Praktična uporabnost:

Sklepi lahko prispevajo k oblikovanju domačih mnenj, ki večinoma temeljijo na napačnih utilitarističnih predpostavkah pri obravnavi teh vprašanj. Raziskava je lahko uporabna tudi za pravosodne organe, saj izpostavlja ukrepe, ki bi morali biti uvedeni zoper odgovorne zdravnike. Medicinsko osebje se lahko v prispevku seznanilo z navodili, kako ukrepati v primerih, ki so spregledani v zakonodaji.

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Ključne besede: reproduktivna izbira/pravica, časovna omejitev, pravica do življenja, kazenska odgovornost, zasebno življenje

1 INTRODUCTION

For the purpose of this article, the phrase 'reproductive choice' refers to its negative aspect, i.e., the access to pregnancy interruption. Also, this phrase has been used by the Conventional institutions, the former Commission for Human Rights and now European Court of Human Rights. The European Court of Human Rights (hereinafter: the Court) has used this phrase mostly when deciding on relations between abortion and human rights safeguarded through European Convention on Human Rights and Fundamental Freedoms (1950; hereinafter: the Convention).

In order to explore temporal constraints to reproductive choice and human rights consequences, which have arisen from it, we address its main features in the first section of the article. This section is divided into two subsections. The first subsection addresses the legal background of a temporal dimension of reproductive choice. It is done through the analysis of historical developments of two different European national legislations, which represent essentially opposite approaches to the issue of the right to life beginning. Current national standings on temporal constraints are presented in the second subsection. Further discussion in this subsection presents the impact of national standings on regional human rights approach. Through recapitulation of case law, the concluding remarks in this section are about the temporal frameworks of reproductive choice, which is recognized by the Conventional institutions as compliant with human right guarantees.

The second section discusses one of the most controversial questions concerning temporal dimension of reproductive choice. It investigates human right requirements in regard to an empirical consequence of the extensions of temporal framework. It should be borne in mind that neither this section nor the article as a whole addresses legitimacy of late termination of pregnancy or legitimacy of temporal constrains. Special attention is given to the analysis of general right to life requirements regarding the abortion surviving child. Our starting point considers the issue whether the right to life guarantees is applicable on such a child, and if it is, whether all Council of Europe Member States (hereinafter: the States) have obligations to provide life-sustaining treatment or medical care to this child. Furthermore, it considers the obligation of the States to enforce judicial mechanisms against (handling) medical professionals who fail to do so. In order to determinate whether such a child is entitled for human rights protection, the article discusses on his/her Conventional status, which is afforded to him/her through case law. The consequences of this status are addressed in proceedings. Simultaneously, it is discussed whether such consequences are just theoretical ones taking into account the procedural requirements of human right mechanisms.

The third section addresses the effects of temporal dimension of reproductive choice on the private life of a pregnant woman. Temporal constraints unequivocally affect a scope of her reproductive choice denying her access to legal abortion. From the other hand, temporal constraints safeguard her health as late termination of pregnancy imposes considerable risk to it. Thereof, the primary object in this discussion is whether the States which permit termination of pregnancy maintain fair balance between the private life of the pregnant woman on one hand and public interest in maternal health safeguarding on the other hand. National practices in resolving such conflicts have been examined by the Conventional institutions in the cases concerning timely information on mothers' entitlement for therapeutic abortion or foetus's condition in the light of temporal constrains of reproductive choice. Through the recapitulation of relevant case law, we have allocated certain general human rights requirements, which safeguard reproductive choice when national legislation allows abortion access and imposes temporal restrictions to it. Close to this subject is the question of informed consent, which is not going to be addressed on this occasion. Instead, our focus will remain on timely, full and reliable information as one of its aspects.

2 TEMPORAL DIMENSION OF REPRODUCTIVE CHOICE

2.1 Legal Background

The European approach to reproductive choice is partly determined with its historical course, which can be described as ranging from criminalization of abortion to arising reproductive rights. In proceedings, we are going to briefly address legal evolution, which has occurred in statutory regulation of two major European legal schools in regard to the negative aspect of reproductive choice, which refers to abortion. First, we are going to review the developments in England law, which is the leading example of European liberal approach. On the other hand, we choose to explore the historical roots of German legal approach, which is, considering the current legal framework especially in the field of biomedicine, known as one of the most restrictive regimes in Europe.

The first references to abortion in English law appeared in the 13th century (Wakley, 2007). The law followed religious standings that abortion was acceptable until ‘quickening’, i.e., till the soul entered the body (Eser, 1986). The legal situation remained constant for centuries. In 1803, the Ellenborough Act prescribed that abortion after ‘quickening’ (16–20 weeks) should be sanctioned with capital punishment (Parliament of the United Kingdom of Great Britain and Ireland, 1803). Previously, the punishment had been less severe. In the 1837, this Act was amended to remove the distinction between the abortion before and after quickening. Offences against the Person Act (Parliament of the United Kingdom of Great Britain and Ireland, 1861) performing an abortion or trying to self-abort carried a sentence of life imprisonment. Infant Life Preservation Act adopted in 1929 introduced a new crime of killing a viable foetus (at that time fixed at 28 weeks) in all cases except when the woman’s life was at risk (British Parliamentary, 1929). This Act was at force till Abortion Act (British Parliamentary, 1967), which legalized the abortion under certain conditions. It allows an abortion on demand till 24th week of pregnancy and certain grounds for late-term abortion. In 1990, the Human Fertilization and Embryology Act introduced controls over new techniques, which had been developed to help infertile couples and to monitor experiments on embryos (British Parliamentary, 1990). The 1990 Act lowered the legal time limit from 28 to 24 weeks, which is the currently accepted point of viability. It also clarified the circumstances (grounds) under which abortion could be obtained at a later stage.

The first German native act regulating abortion was the *Constitutio Criminalis Carolina* of 1532 (effective in some parts of Germany until the mid-nineteenth century). The *Constitutio Criminalis Carolina* as well as certain criminal codes of various German states punished abortion less severely in the first half of pregnancy than in the second (Eser, 1986). Certain German states did not punish the former at all. From the middle of the nineteenth century the German states considered abortion to be an independent crime distinguishable from the killing of born life (Berner, 1900). The highest German court in decision from 1927 considered abortion as an ‘extra-statutory necessity’ when it was performed in end to secure the pregnant woman’s life and health. Further analysis of national case

law envisages that legalizing abortion during the first three months of pregnancy was considered for incompatible with the constitutionally guaranteed right to life of the foetus. On the other hand, in attempt to regulate time laps between procreation and pregnancy and prevent misuse of artificially created embryos, the Law for Protecting Embryos (ESchG) was passed to protect embryos in vitro from the moment of fertilization, providing prenatal life with wider scope of the protection, from the moment prior the law rendering abortions illegal recognizes that pregnancy has begun (Karnein, 2012).

2.2 Current National Positions and Regional Approach

At national level temporal dimension of reproductive choice is still covered by a prohibition against unlawful termination of pregnancy sanctioned through criminal law. Different criteria, which qualify pregnancy termination as lawful or unlawful are mostly reduced on procedural requirements which should be fulfilled at certain gestational age. For instance, in the Western Balkan countries, self-termination of pregnancy is not criminalized whenever it occurs, even in situation when it is not permissible, considering temporal limitations. There are opinions that grounds for such an approach are determined by considerations for women's health – stimulating them to look for a professional help in case of health complications (Lazarević, 1983). A quite opposite approach is taken in Germany (German Criminal Code, 1998), which introduces punishment of imprisonment if a crime (of unlawful termination of pregnancy) was committed by a woman. The grounds for the latter approach could be also found in the consideration for women's health. It stimulates women to practice safe and lawful methods of pregnancy termination and to avoid health complications. The former approach facilitates health consequences while the latter apparently prevents them.

Considering protection of the positive aspect of reproductive choice by means of criminal law, we might consider that European legislators were negligent to it. Legislation of the most Council of Europe Member States does not extend offence of unintentional homicide to the foetus regardless of its gestational stage. Unlike this general feature of the most European legislations, there are three countries, which have created specific offences.² In Italy a person negligently causing 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 (British Parliamentary, 1978). In Spain Article 157 of the Spanish Criminal Code (1995) 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 Turkish Criminal Code (2004) 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. French criminal law recognizes that if, as a result of unintentional negligence, a mother gives birth to a live child who dies shortly after being born,

² See *Vo v France Application No 17004/90, Merits, 8 July 2004, para 41.*

the person responsible for it may be convicted of the unintentional homicide of the child.³

In regard to the negative aspect of reproductive choice, European national statutory regulation is divided into two broadly drawn concepts. There are the States with a restrictive approach to abortion and the States with a liberal legislation.⁴ In most of the States the law permits abortion in order to save the expectant mother's life. Abortion is available on request (according to certain criteria including gestational limits) in some 30 States. Abortion on health grounds is available in some 40 Contracting States, while on well-being grounds in some 35 of them. Three States prohibit abortion in all circumstances (Andorra, Malta and San Marino). In recent years, certain States have extended the grounds on which abortion can be obtained (Monaco, Montenegro, Portugal, Spain and Bosnia and Herzegovina/Republic of Srpska), while two States reduced them (Hungary and the Former Yugoslav Republic of Macedonia). Ireland adopted legislation, which enables women to obtain abortion in certain situations.

Such legal background affected regional human right approach to the negative aspect of reproductive choice. Apparently, the issue of prenatal life protection has not been resolved within the majority of the States themselves and there is no European consensus on the scientific and legal definition of the beginning of life. Thereof, whenever the questions of relations between human right guarantees and abortion have been invoked before the Court, it stated that the issue of determining the moment when the protection of right to life began had come within the States' margin of appreciation. However, the Court noted that most States had had in their legislation resolved the conflicting rights of the foetus and mother in favour of a greater access to abortion. This also refers to wider temporal frameworks of abortion permissibility.

Convention institutions have found that abortion is compliant to human right guarantees when it occurs in the initial stage of pregnancy on the grounds of medical indication and/or well-being reasons. Such provisions are, from the Conventional point, legitimizing for interference into other parties' conflicted rights and according to Court's opinion taken in the *Boso v Italy*,⁵ they strike a fair balance between, on the one hand, the need to ensure protection of the foetus and, on the other, the woman's interests. In this light, some considers that if the State permits temporally unlimited abortions it would breach Conventional guarantees (O'Donovan, 2006). In their case law, Convention institutions do not determinate the exact duration of the initial stage of pregnancy. The conclusion could be reached through a recapitulation of the relevant case law. In the *Paton* case⁶ in which temporal parameter was applied for the first time, the termination of pregnancy occurred approximately at 10th week of gestation. In the aforementioned *Boso v Italy*, the precise information when termination occurred was not presented to the Court. It was concluded according to the procedural

3 See *Vo v France Application No 17004/90, Merits, 8 July 2004, para 83.*

4 For the European laws review refer to *A, B and C v Ireland, Application No 25579/05, Merits, 16 December 2010 para 112.*

5 *Boso v Italy, Application No 50490/99, Merits 5 September 2002.*

6 See *Paton v United Kingdom, Application No 8416/78, Decision of the Commission 1980at para 2-4.*

provisions of the national legislation to have been happened during the first twelve weeks. In *R. H. v Norway* the abortion occurred between 12th and 18th week of pregnancy. Therefore, we could conclude that the relevant case law indicates that first 18 weeks comes within the initial stage of pregnancy. In the *following discussion*, we will be considering the temporal dimension of reproductive choice and how it bears significant legal consequences. It affects the guarantees inherent in Article 2, Article 3 and Article 8 of the Convention (1950).

3 LATE TERMINATION OF PREGNANCY AND RIGHT TO LIFE PROTECTION

In the previous subsection, we were trying to determine the duration of the initial stage of pregnancy. It is, according to Conventional institutions, 'safe zone' for operation of medical indication and/or well-being reasons as abortion grounds. Since it is not defined at regional scale when the right to life begins, there is no strict parameter in defining the meaning of 'late termination of pregnancy'. It could mean the termination following the initial stage of pregnancy or any other provisory moment. For the purpose of further discussion, 'late termination of pregnancy' means the interruption of pregnancy after the point that the foetus becomes viable. From this point, it is quite possible that the child survives pregnancy interruption. Most techniques of late termination of pregnancy are similar to the procedure of medically induced labour. The difference between those two procedures is in their purposes; the former aims to deliver the life, while the latter does not (Mujović-Zorić, 2009). The human right issues which arise here relates the States' obligation to provide life-sustaining treatment or medical care for those who survive abortion, legal accountability of handling medical professional (Wicks, Wyldes, & Kilby, 2004), and even the purpose of abortion itself.

The obligation of the States to provide life-sustaining treatment or medical care could arise of Article 2 of the Convention (1950), which 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.

According to Conventional institutions, right to life cannot be derogated,⁷

⁷ *McCann and others v The United Kingdom*, Application No 18984/91, Merits, 27 September 1995, para 147; *Soering v The United Kingdom*, Application No 14038/88, Merits, 07 July 1989, para 88; *Cruz Varas and others v Sweden*, Application No 15576/89, Merits, 20 March 1991, para 99; *Orhan v Turkey*, Application No 25656/94, Merits, 18 June 2002, para 325; *Ipek v Turkey*, Application No 25760/94, Merits, 17 February 2004, para 163; *Imakayeva v Russia*, Application No 7615/02, Merits, 09. November 2006, para 139; *Timurtas v Turkey*, Application No 23531/94, Merits, 13. June 2000, para 82-83; *Velikova v Bulgaria*, Application No 41488/98, Merits, 18 May 2000, para 68; *Makaratzis v Greece*, Application No 50385/99, Merits, 20 December 2004, para 56; *Esmukhambetov and others v Russia*, Application No 23445/03, Merits, 29 March 2011, para 138.

except in the circumstances expressly listed in paragraph 2 of Article 2.⁸ General positive obligations introduced in Article 2 require from the States to take appropriate steps to safeguard the lives of those within its jurisdiction.⁹ This provision requires the States not only to refrain from the ‘intentional’ taking of life, but also to take positive measures to safeguard those within its jurisdiction.¹⁰ In certain circumstances, it may also imply a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk.¹¹ Also, in the field of medical care, positive obligations require the States to make regulations which compel hospitals, whether private or public, to adopt the appropriate measures for the protection of patients’ lives.¹² 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 could be determined and those responsible made accountable.¹³

Therefore, the failure of the State to adopt and enforce life-saving procedures in the case when a child survives the abortion, and to enforce judicial proceedings against responsible, could constitute the breach of Article 2 of the Convention (1950).¹⁴ In order to examine the applicability of general guarantees on the surviving children, we must first determine their Conventional status. First, we should bear in mind that the Court has recognized these embryos, which are not viable in the sense such as foetuses, as the members of the human race. It is an important recognition as being a human is inextricably connected to human rights protection. As members of the human race, embryos and foetuses are entitled to human rights protection to the certain extent. Second, Conventional institutions have found that the unborn child’s right to life is subject to implied limitations. When reasoning on the constraints to its right to life, then the existed Commission stated that ‘protecting the life and health of the woman “at that stage, of the right to life” of the foetus’ justifies termination. Because of the applied graduation of right to life protection depending on gestation, it could be considered that the scope of right to life protection grows with foetus while the implied limitations are being reduced. Third, from the age of *Paton* case Conventional institutions have separated recognition of legal status from right to life protection (Wicks, 2011). Although the recognition of the legal status of a person in the moment of

8 *Esmukhambetov and others v Russia*, Application No 23445/03, Merits, 29 March 2011, para 138.

9 *L.C.B. v the United Kingdom*, Merits, 9 June 1998, Reports of Merits, s and Decisions 1998-III, p. 1403, para 36. In regard to protection against third parties offences see: *Osman v the UK*, Application No 23452/94 Merits, 18 October 1998, par 115; *Mahmut Kaya v Turkey*, Application No 22535/93, Merits, 28/03/2000, par 85; *Akkoç v Turkey*, Application No 22947/93, Merits, 10 October 2000, par 71; *Kiliç v Turkey*, Application No 22492/93, Merits, 28 March 2000, par 62; *Oneryildiz v Turkey*, Application No 48939/99, Merits, 30 November 2004, par 89.

10 *L.C.B. v the United Kingdom*, supra n 18, *Association X v the United Kingdom*, Application No 7154/75, Decision of 1979, Decisions and Reports 14, pp 31.

11 *Osman v the UK*, Application No 23452/94 Merits, 18 October 1998 para 115, and *Keenan v the United Kingdom*, Application No 27229/95, ECHR 2001-III.

12 *Trocilier v France (dec.)*, Application No 75725/01, para 4, ECHR 2006-XIV

13 *Powell v the United Kingdom (dec.)*, Application No 45305/99, ECHR 2000-V

14 About required judicial response on infringement of new-born patient’s lives refer to *Calvelli i Ciglio v Italy*, Application No 32967/96, Merits, 17. 01. 2002 par 50–57.

his or her birth is common European legal standard (Enders, 2010), it does not necessarily restrict the legal protection afforded to human beings in prenatal stage.¹⁵ Therefore, if some argue that such child cannot be recognized as a person before law for whatsoever reasons, it cannot affect its entitlement for human rights protection. Fourth, as potential moments for beginning of right to life protection, Conventional institutions marked: conception, nidation, point that the foetus becomes 'viable' or live birth.¹⁶ There is considerable academic support for position that right to life is applicable when the foetus reaches the point of viability. According to Wicks, foetus has right to life from this moment, which requires right to life protection (Wicks, 2010). It follows that regardless of the employed means or length of gestation, live birth is the last moment for the beginning of right to life protection afforded to 'everyone'.

Considering Conventional status afforded to prenatal life, it may be concluded that the abortion surviving child is entitled for Conventional protection. Without regard for the question whether labour was induced at 6th or 9,5th month of gestation or it occurred naturally, from the moment of live birth, life becomes universally and regionally profound value. From that moment, the States' have positive obligation to preserve it by any reasonable means, which cannot be derogated by private,¹⁷ or/and professional interests (Heywood, 2012). From that moment human life certainly steps out the scope of 'limited' right to life protection afforded to the initial stage (in uterus) foetus. Thereof, no matter on which grounds abortion (pregnancy termination) occurs, initiating reasons cannot be applied to termination of new born life. Even more, the purpose of the pregnancy termination cannot be to kill foetus, which is hardly justified under the human rights. The purpose of the pregnancy termination could be only to remove foetus from the uterus (Thomson, 1971).

Now, after the conclusion that the surviving child is entitled for Conventional protection, we should address human rights safeguards of its inviolability. Although the Court has yet to determine the issue of the 'beginning' of 'everyone's right to life' within the meaning of Article 2 of the Convention (1950) provisions (Mowbray, 2005), the infringement in this case could be qualified as manslaughter or even as homicide. Because of that, mere civil-law remedies could not satisfy requirements of Article 2 of the Convention (1950), even though the infringement occurs by means of omission. The infringement of the right to life or to personal integrity caused by means of omission in the field of health care could not stay immune on this requirement.¹⁸ Moreover, it cannot be excluded that acts and omissions on the part of the authorities in the field of health-care may engage

15 *German Federal Constitutional Court, February 25, 1975 (BVerfGE 39, 1) and May 28, 1993 (BVerfGE 88, 203).*

16 *Paton v United Kingdom, supra n 13 at para 12.*

17 *In Sommerfeld v. Germany [GC], No. 31871/96, ECHR 2003-VIII, para 66, Görgülü v. Germany, No. 74969/01, 26 February 2004, para 43; and Ahrens v. Germany, No. 45071/09, 22 March 2012, para 63, the Court recognized that depending on their nature and seriousness, the child's best interests may override that of the parents.*

18 *See Anguelova v Bulgaria, Application No 38361/97, Merits, 13 June 2002 and Velikova v Bulgaria, Application No 41488/98, Merits, 18 May 2000.*

their responsibility also under Article 3 of the Convention (1950),¹⁹ even when the purpose of omission was not intended to humiliate or debase the surviving new-born. Although the purpose of treatment is a factor to be taken into account when deciding whether it falls within the scope of Article 3 of the Convention (1950), the absence of any such purpose does not inevitably lead to a finding that there has been no violation of Article 3 of the Convention (1950).²⁰ Apparently, denial of medical care to those children stands against both, Article 2 of the Convention (1950),²¹ and Article 3 of the Convention (1950),²² guarantees. Bearing in mind that existing human rights norms protect human dignity from the earlier stages of life²³ till the dying stage (Wicks, 2010), it would be truly hard to justify denial of at least medical care, which is the most naturally expected and which in the most cases bears a significant benefit potential.

But, the practice in the States seems to be negligent over those requirements. In the States where late termination of pregnancy is allowed, hospitals are practicing the so-called *comfort care*, a sort of nonmedical treatment to surviving new-borns. This treatment includes leaving these children to die of dehydration or hunger, deprived of any medical care meanwhile (Mujović-Zorić, 2009). This practice is challenged under the collective complaint before European Comity for Social Rights, and the outcome in this procedure is going to unequivocally impact standings on this practice in Europe. There is one fact, which in this regard makes Convention (1950) guarantees and rights close to theoretical and illusory, distant from practical and effective as they should be.²⁴ That fact stares out of the procedural requirements for starting the Strasbourg machinery i.e. in the power to invoke application before the Court in behalf of those children. If there is parental consent to abortion and following *comfort care* procedure, in reality those children are completely excluded from the Conventional protection (CF to Congress of the United States of America, 2002). There are considerations that the approach should be extended to children born alive with no temporal limitations (Giubilini & Minerva, 2012). In future, this practice could be challenged before the Court probably by the non-consent parent. Depending on judicial outcome, the Court is going to support for the growing scope of children rights and their autonomy, or introduce the renaissance of Romans' *jus vitae ac necis*. In the comparative law, even the techniques of pregnancy termination were legislatively referred in the light of unborn life protection (Steinbock, 2011). The Supreme Court of USA upheld the ban on so called partial birth abortion, considering that even when abortion is legal, not every method is acceptable: "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."²⁵

19 See, for example, *Powell v the United Kingdom Application No 45305/99*, ECHR 2000-V, *İlhan v Turkey* [GC], Application No 22277/93, para 87, ECHR 2000-VII. Paragraph 1 of Article 3 reads: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

20 *P. and S. v Poland*, Application No 57375/08, Merits, 30 October 2012 par 160.

21 *Cyprus v Turkey*, Application No 25781/94, Merits, 10 May 2001.

22 *D v United Kingdom*, Application No 30240/96, Merits, 2 May 1997.

23 *Vo v Francesupra n 3 para 84*.

24 See *Airey v Ireland*, 9 October 1979, para 24, Series A Application No 32.

25 *Gonzales, Attorney General v Carhart et al. Application No 05-380*, 18 April 2007

4 TEMPORAL DIMENSION OF REPRODUCTIVE CHOICE AND MOTHER'S RIGHTS

Temporal dimension of reproductive rights does not necessarily have restrictive effects on the rights and interests of a pregnant woman. In fact, it imposes demanding obligations on the States' side. For instance, it requires law to provide effective procedural mechanisms capable for determining whether the conditions existing for obtaining a lawful abortion on the grounds of danger to the mother's health²⁶, or of addressing the mother's fears on condition of foetus.²⁷ It also requires timely information to be obtained.²⁸ In *Tysic v Poland*²⁹ there were indications that delivery might endanger the applicant's health. Previously, Conventional institutions had considered that the establishment of any such relevant risk to a woman's life caused by her pregnancy clearly concerned fundamental values and essential aspects of her right to respect for her private life.³⁰ Therefore, having regard to the particular circumstances of the case and notably the nature of the decisions to be taken, the question was invoked before the Court whether an individual had been involved in the decision-making process to a degree sufficient to provide her with the requisite protection of her interests. On this occasion the Court pointed the importance of time factor in deciding on pregnancy. It was done through reviewing possibilities to make timely decision to terminate pregnancy in order to avoid or prevent damage to a woman's health, which might be occasioned by a late abortion. In this case, the Court concluded it had not been demonstrated that Polish law as applied to the applicant's case contained any effective mechanisms capable of determining whether the conditions for obtaining a lawful abortion had been met in her case.

The access to timely information about the foetus health in the light of the mother's reproductive choice has been addressed in the *R.R. v Poland*.³¹ In this case, the applicant was denied adequate and timely medical care in the form of prenatal genetic examinations, which were prescribed by law in circumstances, which she obtained. Such testing would have made it possible to establish whether in her case the conditions existed for a lawful termination of pregnancy within the meaning of national legislation. Thus, the access to a full and reliable explanation about the foetus' health was not only important for the comfort of the pregnant woman but also a necessary prerequisite for a legally permitted possibility. Therefore, the denial to adequate and timely medical testing was qualified as breach of Article 8 of the Convention (1950). The Court stated that unlawful deprivation of medical services proscribed by the law to a pregnant woman was humiliation and therefore caused suffering enough to disclose a level of severity falling within the scope of Article 3 of the Convention (1950).³²

26 *Tysic v Poland Application No 5410/03 Merits, 20 March 2007*

27 *R.R. v Poland, Application No 27617/04, Merits, 26 May 2011 at para 200*

28 *R.R. v Poland, supra n 49 at para 148–162*

29 *Tysic v Poland supra n 48*

30 *X and Y v. the Netherlands, 26 March 1985*

31 *R.R. v Poland, supra n 49*

32 *See R.R. v Poland, supra n 49 at para 161*

In this light we cannot overlook a raising threat of eugenic practices, which is inherent in selective abortions. Although the Court has accepted a right to access to embryonic screening, Article 8 of the Convention (1950) must not be interpreted as providing claimants with right to a genetic healthy child since the Court recognized it as a right only when a certain genetic disorder is recognized as abortion defence under national statutory (Exter, 2012). It is to bear in mind that a different treatment based on disability stands against universal³³ and regional³⁴ human rights guarantees. Those guarantees could be applicable in regard to legal treatment of all members of human race; they refer even to those humans in prenatal stage of development. If we consider killing an able body foetus at certain point of gestation as *actus reus* of criminal offence, then killing a foetus with abnormality at that gestation is also *actus reus* of criminal defense. Discussions on this issue are not new (Joseph, 2009). There are national legislators who are reviewing statutory regulation, which introduced malformation as abortion defence (British Parliamentary, 2013). Some other characteristics of the unborn have been already recognized at regional level as prohibited for abortion or in vitro created embryos destruction (Council of Europe, 2011). Although this regional source allows abortion and destruction if there is a potential disability, a conceptual novelty is in prohibiting body characteristics (sex) to be taken as grounds for it. Apparently, most recent European tendency goes toward limiting the operation of foetal malformations (physical or genetic) as abortion defence. Such tendency could rather have restrictive effects on access to the negative aspect of reproductive choice.

5 CONCLUSION

A temporal framework of reproductive choice, which is recognized by the Conventional institutions to be compliant with human right guarantees, is reduced to the initial stage of pregnancy. First 18 weeks fall within this stage, and pregnancy could be interrupted on the grounds of medical indications and/or well-being reasons. National statutory regulation allows pregnancy interruption after that stage when exceptional conditions are met. Since in this stage a child becomes viable, he/she may survive pregnancy interruption. If it happens, this child is entitled for Conventional protection inherent in Article 2 and Article 3 of the Convention (1950). According to right to life guarantees and supported by prohibition against inhumane and degrading treatment, the States have obligation to provide life-sustaining treatment or medical care to them. Human rights guarantees also require the State to enforce judicial mechanisms against the handling medical professional who fails to do so. Such State obligations cannot be derogated by parental wishes not to have a child, since their capacity in reproductive sphere is reduced to power to reproduce or not to reproduce. More precisely, neither of them can be forced to have or not to have a child. However,

33 *The Convention on the rights of Persons with Disabilities, adopted by the General Assembly on 13 December 2006, and entered into force on 3 May 2008.*

34 *See Council of Europe (1979).*

when procreation occurs through natural fertilization, the male partner is not afforded with the power to withdraw his consent to reproduction. In symmetry to that, the female partner cannot withdraw her consent to reproduce as well, but she is accorded with the power to deny her further assistance to life developing inside her womb (to detach herself from the unborn) when certain conditions are fulfilled. Thereof, neither one of the parents is afforded with the power to decide on life of a viable foetus especially when it is ex uterus located. Although the outcome of life sustaining treatment or medical care could be uncertain, professional interests (which is very arguable in this light since medical professionals are not accorded with the power to decide in such manner who is going to live and who is not) cannot precede over the States' positive obligation in this field. Still, the operation of such guarantees in practice depends on parental will as parents are accorded with power to invoke judicial proceedings on behalf of their children. Because of such procedural requirement, abortion surviving children are deprived of Conventional protection.

Next consequence of temporal constraints to reproductive choice concerns whether the States maintain fair balance between private life of a pregnant woman from one hand and public interest in maternal health safeguarding from the other. When the State acting within its limits of appreciation afforded by regional human right instruments adopts statutory regulations allowing abortion in some situations, access abortion becomes safeguarded under the Convention if statutory conditions are fulfilled. Since temporal constraints limit access to abortion, simultaneously they require that full and reliable information is provided to a pregnant woman enabling her to establish whether in specific case the conditions for lawful termination of pregnancy within the meaning of national legislation are fulfilled. Therefore, such information is a necessary prerequisite for a legally permitted possibility and human rights exercise. Denial of adequate and timely medical service, which could provide such information the Court qualified as breach of Article 8 and Article 3 of the Convention (1950).

REFERENCES

- Berner, A. (1900). *Lehrbuch des Deutschen Strafrechts*. Berlin: Guttentag.
- British Parliamentary. (1929). *Infant Life Preservation Act*. Retrieved from <http://www.legislation.gov.uk/ukpga/Geo5/19-20/34/section/1>
- British Parliamentary. (1967). *Abortion Act*. Retrieved from <http://www.legislation.gov.uk/ukpga/1967/87/contents>
- British Parliamentary. (2008). *Human Fertilization and Embryology Act*. <http://www.legislation.gov.uk/ukpga/2008/22/contents>
- British Parliamentary. (2013). *Parliamentary inquiry into abortion on the grounds of disability*. Retrieved from <http://www.abortionanddisability.org/resources/Abortion-and-Disability-Report-17-7-13.pdf>
- Congress of the United States of America. (2002). *Born-Alive Infants Protection Act of 2002*. Retrieved from <http://www.gpo.gov/fdsys/pkg/BILLS-107hr2175enr/pdf/BILLS-107hr2175enr.pdf>

- Council of Europe. (1979). *Recommendation 874 (1979) on European Charter on the rights of the Child*. Retrieved from <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta79/erec874.htm#1>
- Council of Europe. (2011). *Resolution 1829 on prenatal sex selection*. Retrieved from <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta11/ERES1829.htm>
- Enders, C. (2010). A right to have rights – The German constitutional concept of human dignity. *National University of Juridical Sciences Law Review*, 3(3), 253–264.
- Eser, A. (1986). Reform of German Abortion Law. *The American Journal of Comparative Law*, 34, 369–373.
- European Convention on Human Rights and Fundamental Freedoms*. (1950). Strasbourg: Council of Europe.
- Exter, A. (2012). Embryonic screening as a European human right. *Journal of Family and Reproductive Health*, 6(4), 134–144.
- German Criminal Code. (1998). *Federal Law Gazette*, (I, p. 945, p. 3322). Retrieved from <http://www.iuscomp.org/gla/statutes/StGB.htm#218>
- German Law for Protecting Embryos. (1990). *Federal Law Gazette*, (BGBl. I S. 2746). Retrieved from <http://www.gesetze-im-internet.de/eschg/BJNR027460990.html>
- Giubilini, M., & Minerva, F. (2012). After-birth abortion: Why should the baby live? *Journal of Medical Ethics*. Retrieved from <http://jme.bmj.com/content/early/2012/03/01/medethics-2011-100411.full.pdf+html>
- Heywood, R. (2012). Parents and medical professionals: Conflict, cooperation, and best interests. *Medical Law Review*, 20(1), 29–44. Retrieved from <http://www.legislationline.org/documents/action/popup/id/6872/preview>
- Joseph, R. (2009). *Human rights and the unborn child*. Netherlands: Martinus Nijhoff.
- Karnein, A. (2012). *A theory of unborn life: From abortion to genetic manipulation*. Oxford: Oxford University Press.
- Lazarević, Lj. (1983). *Krivično pravo – posebni deo* [Criminal law – material norm]. Beograd: Savremena Administracija.
- Mowbray, A. (2005). Institutional developments and recent Strasbourg cases. *Human Rights Law Review*, 5(1), 169–188.
- Mujović-Zorić, H. (2009). Reproduktivna prava: Otvorena pitanja kasnog pobačaja [Reproductive rights: Opened questions in late termination of pregnancy]. *Stanovništvo*, (1/2009), 49–67.
- O'Donovan, K. (2006). Taking a neutral stance on the legal protection of the fetus. *Medical Law Review*, 14(1), 115–123.
- Parliament of the United Kingdom of Great Britain and Ireland. (1861). *Offences against the Person Act*. Retrieved from <http://www.legislation.gov.uk/ukpga/Vict/24-25/100/introduction/enacted>
- Parliament of the United Kingdom of Great Britain and Ireland. (1803). *Lord Ellenborough's Act*. Retrieved from http://swarb.co.uk/acts/1803Lord_EllenboroughAct.html
- Spanish Criminal Code. (1995). *Official State Gazette*, (No. 281 on 24th November 1995). Retrieved from http://www.legislationline.org/download/action/download/id/5160/file/Spain_Criminal_Code_Codigo_Penal.pdf

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- Steinbock, B. (2011). *Life before birth: The moral and legal status of embryos and fetuses*. Oxford: Oxford University Press.
- Thomson, J. (1971). A defense of abortion. *Philosophy and Public Affairs*, 1(1), 69–80.
- Turkish Criminal Code. (2004). *Official Gazette*, (No. 25611 on 12. October 2004). Retrieved from http://www.unodc.org/res/cld/document/tur/2004/criminal_code_law_no_5237_html/Turkey_Criminal_Code_Law_No_5237_2004.pdf
- Wakley, G. (2007). Legal interpretation of the Abortion Act 1967: The role of nurses in surgical induced abortion. *Journal of Family Planning and Reproductive Health Care*, 33(2), 77–78.
- Wicks, E. (2010). *The right to life and conflicting rights of the others*. Oxford: Oxford University Press.
- Wicks, E. (2011). A, B, C v Ireland: Abortion law under the European Convention on Human Rights. *Human Rights Law Review*, 11(3), 556–566.
- Wicks, E., Wyldes, M., & Kilby, M. (2004). Late termination of pregnancy for foetal abnormality: Medical and legal perspectives. *Medical Law Review*, 12(3), 285–305.

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