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The Right to Abortion in the Council of Europe System

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Contents

| | |
|--|-----------|
| SUMMARY | 1 |
| SAMMANFATTNING | 3 |
| PREFACE | 5 |
| ABBREVIATIONS | 6 |
| 1 INTRODUCTION | 7 |
| 1.1 Purpose and Background | 8 |
| 1.2 Research Question | 9 |
| 1.3 Theory, Methodology and Outline | 9 |
| 1.4 Delimitations and Definitions | 10 |
| 2 WOMEN'S RIGHTS AS HUMAN RIGHTS | 12 |
| 2.1 Identifying Structures of Gender Inequality | 12 |
| 2.2 The Right to Self-Determination | 14 |
| 2.3 Public and Private Spheres | 17 |
| 3 A SHORT HISTORICAL BACKGROUND OF ABORTION – CHOICE AND CONSEQUENCES | 19 |
| 3.1 Historical Background of Abortion | 19 |
| 3.2 Abortion and Choice | 20 |
| 3.3 Consequences of Restrictive Abortion Legislation | 21 |
| 4 ABORTION IN A COMPARATIVE PERSPECTIVE – AN OVERVIEW OF IRELAND, POLAND AND SWEDEN | 23 |
| 4.1 Ireland | 23 |
| 4.2 Poland | 27 |
| 4.3 Sweden | 30 |
| 5 ABORTION AND GENDER EQUALITY IN THE COUNCIL OF EUROPE | 34 |
| 5.1 Policy Decisions of the Council of Europe on Gender Equality | 34 |
| 5.2 Policy Decisions of the Council of Europe on Abortion | 38 |
| 5.3 The Development of the Right to Abortion Within the European Court of Human Rights | 42 |
| 5.4 Margin of Appreciation – Different States, Different Standards | 43 |

| | | |
|----------|--|-----------|
| 6 | CASES REGARDING THE RIGHT TO ABORTION FROM THE EUROPEAN COURT OF HUMAN RIGHTS | 45 |
| 6.1 | The Freedom of Expression in Regard to Abortion – Open Door and Dublin Well Woman v. Ireland | 45 |
| 6.2 | The Right to Private Life in Regard to Abortion | 46 |
| 6.2.1 | <i>Tysic v. Poland</i> | 47 |
| 6.2.2 | <i>A, B and C v. Ireland</i> | 48 |
| 6.2.3 | <i>R.R. v. Poland</i> | 51 |
| 6.2.4 | <i>P. and S. v. Poland</i> | 53 |
| 7 | ANALYSIS | 55 |
| 7.1 | Gender Equality in Decision-Making and Its Importance for the Right to Abortion | 55 |
| 7.2 | Comparison of the Abortion Legislation in Ireland, Poland and Sweden | 59 |
| 7.3 | The Protection of the Right to Abortion in The Council of Europe System | 62 |
| 7.4 | Conclusion | 66 |
| | BIBLIOGRAPHY | 67 |
| | CITED SOURCES | 67 |
| | Literature | 67 |
| | Articles | 67 |
| | Publications | 68 |
| | Official documents from the Council of Europe | 68 |
| | <i>The Parliamentary Assembly of the Council of Europe</i> | 68 |
| | <i>Committee of Ministers of the Council of Europe</i> | 69 |
| | Online Resources | 70 |
| | Legislation | 72 |
| | <i>International and Regional</i> | 72 |
| | <i>Sweden</i> | 72 |
| | <i>Poland</i> | 72 |
| | <i>Ireland</i> | 72 |
| | Sources for Background Reading | 72 |
| | TABLE OF CASES | 74 |
| | European Court of Human Rights | 74 |
| | Supreme Court of Ireland | 74 |

Summary

My research question is to what extent the right to abortion is protected in the Council of Europe system, with a focus on the case law of the European Court of Human Rights.

First, theories and models of explanation are presented that are used to analyse the policies, legislation and cases on the issue abortion the Council of Europe. In short, these theories state that there is a structural discrimination against women. Because human rights have been created based on male norms, they do not take into consideration the situations that only women encounter, of which pregnancy is a prime example. For as long as women are outside the decision-making process, women's rights will be viewed as secondary rights.

In order to analyse the right to abortion, I have conducted an extensive literature study on the subject of gender equality, women's rights as human rights, reproductive rights and the development of abortion. The thesis presents an analysis of the right to abortion in Europe as it has been expressed in the policy documents of the Council of Europe and the case law of the European Court of Human Rights, and to what extent the right to abortion is protected in the Council of Europe system. A brief presentation of the history of abortion is used as an introduction to the subject, and with the theories and models of explanation, this introductory overview together with the national abortion legislation and policies in Ireland, Poland and Sweden gives the reader a better understanding of the cultural and legislative context that the cases from the European Court of Human Rights stem from. The comparison is important to illustrate how very different abortion legislation can be expressed in the Contracting States to the European Convention on Human Rights. The policy decisions that have been adopted in the Council of Europe on the issues of gender equality, abortion and reproductive rights are studied and used to assess the stance of the Council. Furthermore, an overview of the development of the European Convention on Human Rights in regard to abortion is given and the doctrine of margin of appreciation is presented.

Both Ireland and Poland have restrictive abortion legislations. In Poland, abortion is allowed on certain grounds; *inter alia* the risk to the life or the health of the mother, the severe malformation or ailment of the foetus or if the pregnancy is the result of a crime. In Ireland, no such exceptions exist except for in rare circumstances; the woman in need of an abortion must travel to another State to obtain the procedure. The European Court of Human Rights has found that there is no right to abortion in the Convention (stated in *Tysic v. Poland, A, B and C v. Ireland, R.R. v. Poland and P. and S. v. Poland*). However, if a Contracting State has enacted regulations that allow for abortion in certain circumstances, then the effective enjoyment of these rights must be guaranteed (stated in the cases *Tysic v. Poland, R.R. v.*

Poland and P. and S. v. Poland). Furthermore, the Court stated in *Open Door and Dublin Well Woman v. Ireland* that the right to receive and impart information in regard to abortion under the article 10 right to freedom of expression was of crucial value to women, as it affected their health and well-being. Finally, although the Court have not found a European consensus on the idea of when life begins and therefore will not use the evolutive interpretation of the Convention to confer a right to abortion, it did leave the door open for potentially narrowing a State's margin of appreciation in this regard.

Sammanfattning

Min forskningsfråga är i vilken utsträckning rätten till abort är skyddad i Europarådets system, med fokus på rättspraxis från den Europeiska domstolen för de mänskliga rättigheterna.

Teorier och förklaringsmodeller som används för att analysera policybeslut, lagstiftning och rättsfall gällande abort i Europarådet presenteras först. I korthet menar dessa teorier att det finns en strukturell diskriminering mot kvinnor. Eftersom mänskliga rättigheter har skapats utifrån manliga normer tar de inte hänsyn till de situationer som endast kvinnor möter, bland vilka graviditet är ett slående exempel. Så länge som kvinnor befinner sig utanför beslutsprocessen kommer kvinnors rättigheter att ses som sekundära rättigheter.

För att analysera rätten till abort har jag genomfört en omfattande litteraturstudie om jämställdhet, kvinnors rättigheter som mänskliga rättigheter, reproduktiva rättigheter och abortens utveckling. I uppsatsen analyseras rätten till abort i Europa såsom denna har uttryckts i policybeslut från Europarådet och rättspraxis från den Europeiska domstolen för de mänskliga rättigheterna, och vidare analyseras i vilken utsträckning rätten till abort är skyddad i Europarådets system. En kort presentation av abortens historia introducerar ämnet. Tillsammans med de teorier och förklaringsmodeller som presenterats ger denna inledande översikt tillsammans med den nationella abortlagstiftningen och abortpolitiken i Irland, Polen och Sverige läsaren en bättre förståelse av det kulturella och rättsliga sammanhang som rättsfallen från Europadomstolen stammar från. Jämförelsen är viktigt för att belysa hur olika abortlagstiftning kan uttryckas i de fördragsslutande staterna till den Europeiska konventionen om skydd för de mänskliga rättigheterna och de grundläggande friheterna. De politiska beslut som har tagits i Europarådet inom ämnen som jämställdhet, abort och reproduktiva rättigheter studeras i uppsatsen och används för att bedöma Europarådets ställning till dessa frågor. Vidare ges en översikt över utvecklingen av Europakonventionen i fråga om abort och läran om *margin of appreciation* presenteras.

Både Irland och Polen har mycket restriktiva abortlagstiftningar. I Polen är abort tillåtet under vissa omständigheter; t.ex. vid livsfara eller fara för hälsa för den gravida kvinnan, vid svår missbildning eller sjukdom hos fostret eller om graviditeten är resultatet av ett brott. I Irland finns inga sådana undantag utom i ytterst sällsynta fall. En kvinna i behov av abort måste resa till en annan stat för att få genomgå behandlingen. Europadomstolen har funnit att det inte finns någon rätt till abort i Europakonventionen (se *Tysic v. Poland, A, B and C v. Ireland, R.R. v. Poland* och *P. and S. v. Poland*). Om en avtalsslutande stat däremot har antagit regler som tillåter abort under vissa omständigheter, måste det faktiska åtnjutandet av dessa rättigheter garanteras (se *Tysic v. Poland, R.R. v. Poland* och *P. and S. v. Poland*).

Vidare har domstolen i *Open Door and Dublin Well Woman v. Ireland* klarlagt att rätten att ta emot och sprida information i fråga om abort är av avgörande betydelse för kvinnor, eftersom det påverkar deras hälsa och välbefinnande, och alltså faller under rätten till yttrandefrihet i artikel 10 till Europakonventionen. Slutligen, även om domstolen inte har funnit ett europeiskt samförstånd över när livet anses börja och därför inte använder sig av *evolutive interpretation* av Europakonventionen för att läsa in en rätt till abort, så lämnades dörren öppen för att potentiellt minska en stats *margin of appreciation* i denna fråga.

Preface

Tack till mamma och pappa.

Tack till Pelle, Malin och David.

Tack till Evy och Lennart.

Tack till Moa och Melody.

Tack till alla ni som har gjort Lund till Lund.

Och tack till Pär Lagerkvist, vars bevingade ord har följt mig genom sex år på Juristprogrammet:

Ångest, ångest är min arvedel,
min strupes sår,
mitt hjärtas skri i världen.

Abbreviations

| | |
|--------------------|--|
| CEDAW | Convention on the Elimination of All Forms of Discrimination Against Women |
| Beijing Conference | The 4 th World Conference for Women (Beijing, 1995) |
| ICCPR | International Covenant on Civil and Political Rights |
| ICPD | 1994 International Conference on Population and Development |
| IGO | Inter-Governmental Organization |
| NGO | Non-Governmental Organization |
| UDHR | Universal Declaration of Human Rights |
| UN | United Nations |
| UNFPA | United Nations Population Fund |
| WHO | World Health Organization |

1 Introduction

“The lawfulness of abortion does not have an effect on a woman’s need for an abortion, but only on her access to a safe abortion.”¹

In the fall of 2012, while writing an assignment in one of the courses at the Master Programme in International Human Rights Law in Lund, I stumbled across the case of *P. and S. v. Poland*. It might be an exaggeration to say I stumbled upon it, because I was reading about the subject of abortion and how it affects women’s lives. The case, with all its terrible and unimaginable twists and turns, caught my attention and it has stuck with me since. Because of my interest in women’s rights and human rights, it was easy to decide on the topic of my thesis. My aim is to shed light upon a question that I believe is of fundamental importance.

In short, this thesis is about abortion. It is my view that if the State is the one to decide over a woman’s body, or the one to take away the woman’s choice over her own body, then the woman does not have self-determination or personal autonomy which is contrary to – and a violation of – women’s human rights. It is more than a question of reproductive rights; it is a question of gender equality. Human rights have been created based on male norms, and thus they do not take into consideration the situations that only women encounter, of which pregnancy is a prime example.

When I spoke to my aunt about my research subject, she told me of one of her first memories in Lund as a student. In *Lundakarnevalen* 1966, the girls in one of the floats were wearing yellow sundresses, and big pregnant bellies, and suitcases – implying they were going to Poland for an abortion. A generation later, Polish women are fighting for their right to private life, and for the effective remedy of the rights they are guaranteed under the Convention – and if wealthy enough, some of them will be travelling to Sweden or other States to obtain the procedure.

The purpose of human rights is to protect the human dignity of individuals against powers of the State, or those who act under the authority of the State. Without these human rights conventions, individuals would be vulnerable to intrusions of the government, and it is therein their significance lies. This is true also for those instances where the government is acting according to the preference of the democratic majority. Cook writes that human rights “are not dependent on privilege or the legal or democratic approval of others”² and that these rights give equal power to each person, including those who would otherwise be powerless. It is the inherent human dignity of every individual that lets them exercise their

¹ Resolution 1607 (2008) on the access to safe and legal abortion in Europe, adopted by the Assembly on 16 April 2008, *para* 4.

² Cook, Rebecca J., “Human Rights and Reproductive Self-Determination” in *American University Law Review*, Vol. 44 (1994-1995), pp. 975-1016, p. 977f.

human rights.³ In States where the religious hierarchies instruct individuals on their duties and demand their obedience, the rights of international human rights treaties are hardly protected. Allowing the spiritual guidance of the religious authorities to co-exist with the protection of the individual's right to reproductive choice is a challenge that is fundamental to meet for the advancement of reproductive rights.⁴ The preamble to the European Convention on Human Rights state that:

Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;
Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms;
Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend [...]

In order to protect women's reproductive rights, States need to meet the practical and strategic needs of women, work towards a gender equal society and conform to legally binding international human rights standards.⁵ The secondary status of women has been solidified by the separation of women's rights from human rights, and this highlights the importance of recognizing the concern for specific women's rights.⁶

1.1 Purpose and Background

The purpose of this thesis is to study the abortion policy and legislation in the Council of Europe and analyse how women in the Contracting States to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter cited as the European Convention on Human Rights or the Convention) are affected by this system. The focus of the discussion will be on the case law of the European Court of Human Rights, for the determination of private life in the context of abortion.

As the preface of the Irish Report of the Expert Group on *A, B and C v. Ireland*⁷ state, abortion is a difficult issue – both in itself and in discussing it. Abortion collects intense ethical, religious, political, social and intimate

³ Cook, p. 977f.

⁴ Ibid., p. 978.

⁵ Ibid., p. 983f.

⁶ Bunch, Charlotte, "Transforming Human Rights from a Feminist Perspective" in Peters, Julie and Andrea Wolper (eds.), *Women's Rights, Human Rights: International Feminist Perspectives* (1995), Routledge, New York, pp. 11-17, p. 12.

⁷ "Report of the Expert Group on the Judgment in *A, B and C V Ireland*", published by the Department of Health, Government of Ireland (November 2012).

personal issues in one single debate. I acknowledge that I am a white, middle-class woman, born and raised in a country which prides itself in being one of the most gender equal countries in the world. My concept of the world is unquestionably coloured by the values of the society I live in. This essay is moral and ethical in its perspective, because the issue of abortion is at heart a moral and ethical question.

1.2 Research Question

My research question is to what extent the right to abortion is protected in the Council of Europe system, with a focus on the case law of the European Court of Human Rights.

1.3 Theory, Methodology and Outline

To answer the research question, I have studied the documents of the Council of Europe on the subject, as well as looked at five prominent cases from the European Court of Human Rights. I provide a history of abortion as an introduction to the subject, and also make a comparative study of three of the countries within the Council of Europe System – Ireland, Poland and Sweden. My reasoning for choosing these countries is that they are on opposite sides of the spectrum when it comes to abortion legislation.

In this thesis, I have made the assumption that there is a structural inequality between women and men. Further discussion on this is presented in chapter 2. Although the material I have used is feminist, this essay employs no one definite feminist theory. Instead, I make references to different authors whose view or analysis on this subject matter makes for a coherent analysis.

I have conducted an extensive literature study on the subject of gender equality, women's rights as human rights, reproductive rights and the development of abortion. The literature I have used is not all written in a European perspective. Some of the literature is focused on other regions, while others are applied in a global context. The thesis presents an analysis of the right to abortion in Europe as it has been expressed in the case law of the European Court of Human Rights, and to what extent the right to abortion is protected in the Council of Europe System. I analyse the judgments, the domestic law and the European Convention on Human Rights. I use the legal dogmatic method to study the situation of women in this particular part of the law.

In order to make a coherent point for the reader, the disposition is as follows: in chapter 2, the reader is presented with theories and models of explanation for the structural inequality between men and women. This, together with chapter 3, on the historical background on abortion forms the backdrop for the following chapters.

In chapter 4, three countries are studied more in-depth, namely Ireland, Poland and Sweden. Ireland and Poland are the most represented in the European Court of Human Rights case law on the issue of abortion. In this thesis, I compare the Irish and Polish domestic law to the Swedish domestic law. It is natural to choose Sweden as a comparison because I am Swedish, and because it is one of the countries with the most liberal view on abortion, as contrasted against the restricted views of Ireland and Poland.

In chapter 5, the policy decisions on abortion and gender equality of the Council of Europe are presented, together with an overview of the European Convention on Human Rights in regard to abortion and the notion of margin of appreciation. The sub-chapter on gender equality is essential in that abortion as an expression of the right to private life goes hand in hand with the furtherance of gender equality. At the same time, gender equality policies are needed to advance women's human rights, among them the right to private life. Chapter 6 then summarizes the relevant case law of the European Court of Human Rights on the issue of abortion. In chapter 7, I analyse my findings of abortion policy, legislation and case law through the theories presented in chapter 2.

1.4 Delimitations and Definitions

This thesis focuses on the European System. The main focus is therefore the European Convention on Human Rights, the European Court of Human Rights and the Council of Europe. As such, other legislation of international character is used for comparative purposes, but not studied in-depth. There is a whole battery of conventions and international instruments, especially within the system of the United Nations, that focus on the human rights of women and so also brings focus to the reproductive rights of women. Furthermore, I will not study the European Union, or the Community law. Although the Charter of Fundamental Rights of the European Union might encompass this subject matter, it is not yet developed enough to be of use in this study.

One of the imperfections of this thesis is that there is no focus on the differences between women. It is not my intention to treat women as a homogenous group, because nothing could be further from the truth. However, because there are endless variables to take into account, acknowledging all the differences within the group will be too ambitious a project. I ask the reader to keep in mind throughout the essay that women as a group are as diverse as there are women: ethnicity, class, social status and family relations are just a few of the aspects that make a difference to each and every one. Nevertheless, the question of abortion is common for all women, in that it potentially affects all women.

In this thesis, because of time and space constraints, I do not study abortion in a perspective of the right to health, which is why I will not look into the

European Social Charter. Nor will I study sexual rights, even though they are intricately linked to reproductive rights. This thesis does not rely on statistics to compare and contrast the States – the difference in legislation, hospital routines and routines for reporting and registration of abortions make it a problematic task.⁸ Finally, the Protection of Life during Pregnancy Bill 2013 was presented by the Irish government on the 30th of April, 2013. Because this was at the end stage of writing this thesis, the proposed legislation is acknowledged and discussed, but would have figured more prominently if the timing had been different. It is uncertain whether this new bill will be adopted, and if so, what impact it will have.

In the analysis, several discussion points that have come up throughout the thesis are left outside the discussion because of time and space constraints. Although the issues are relevant and important, they are not the most relevant and the most important for this study. One discussion that has been left for another thesis is the claims of a foetal right to life. It is an interesting topic, and abortion can hardly be discussed without the mention of it, but it does not fall within the scope of this thesis. Another discussion that this thesis touches upon but will not go into further detail of is the discussion on gender equality. It is concisely presented and analysed in a manner to help the understanding of the discussion on the right to abortion under articles 8 and 10 of the Convention, but it is not the main focus of this thesis.

⁸ “Abort i Sverige”, Rapport nr: 27 (1994), Svensk förenings för Obstetrik och Gynekologi Arbets- och Referensgrupp *ad hoc*, p. 9 (In English: ”Abortion in Sweden”, Report no.27, Swedish Society for Obstetrics and Gynaecology, Work and Reference group *ad hoc*, author’s translation).

2 Women's Rights as Human Rights

The theories presented in this chapter are used to analyse the policy decisions of the Council of Europe and the cases of the European Court of Human Rights, as well as serve as a foundation for a discussion on the national legislation of the Member States and the conflict of State sovereignty and the universality of human rights. The purpose of this chapter is to give a coherent presentation of the theories that is used throughout the thesis to analyse the policies, legislation and cases on abortion. There is an abundance of various feminist discourses; Gunnarsson and Svensson mention for example liberal feminism, religious and cultural feminism, radical feminism, post-modern feminism, and post-colonial feminism.⁹ I use influences from different writings, instead of focusing on one specific theory. My main idea is that “[a]ll human beings are born free and equal in dignity and rights”¹⁰. It is important to note that there are different power relations between women as well as between women and men, and that these are based on differences of class, wealth, race and nationality.¹¹ However, the focus of this thesis is the structural discrimination of women, especially in regard to the effective right to private life.

In this part I use influences from other systems, such as the UN, to formulate coherent theories about women's right as human rights, about the right to self-determination and reproductive rights. In the following chapter, abortion is introduced in a historical context. These two chapters together form the context for the later chapters in this thesis.

2.1 Identifying Structures of Gender Inequality

In order to identify the structural inequality between men and women, it is important to look at society at an above-individual level. The patterns that cannot be explained by studying the unique individual that participates in it show the structures of society. The idea is that the society forms the individual more than the individual forms the society.¹²

⁹ Gunnarsson, Åsa and Eva-Maria Svensson, *Genusrättsvetenskap* (2009), Studentlitteratur, Lund, p. 120 (In English: *Gender jurisprudence*, author's translation).

¹⁰ Universal Declaration of Human Rights, article 1.

¹¹ Charlesworth, "Human Rights as Men's Rights" in Peters, Julie and Andrea Wolper (eds.), *Women's Rights, Human Rights: International Feminist Perspectives* (1995), Routledge, New York, pp.103-113, p. 103.

¹² Gunnarsson and Svensson, p. 141.

Feminist legal theorists question the “gender-less legal subject”, because people are not without a gender. Men and women are autonomous legal subjects, and men and women have different circumstances and living conditions. These differences are not rooted in biology, but in the socially constructed reality that we live in. Gender-neutral rules are prone to favour men, while women are getting the short end of the stick.¹³ Women’s rights are neither trivial nor secondary to the concerns of life and death – gender inequalities and discrimination kills.¹⁴ Oppression of women is political, and it results from the structural relationships of power, domination, and privilege that exist between men and women in society.¹⁵ The explanation for structures of gender inequality is the unequal power balance between the genders.¹⁶

Gender is a product of psychology, culture and social construction, while sex is biological. Women suffer discrimination under both of these grounds.¹⁷ This discrimination is also present in reproductive rights, where women are portrayed as incapable of making good decisions concerning abortion. Instead, the legislation is patronizing and shaped by male values.¹⁸ The development and enforcement of law has been male-gendered for a very long time. Women have traditionally not been present in the evolvment, due to explicit barriers that have obstructed and prevented them from taking part.¹⁹

An interesting point that Stamatopoulou brings up is that the discrimination against women is often viewed as something that is so deeply embedded in history and tradition that it is not possibly to tackle it with human rights monitoring and the urgency that it imposes. However, the same argument is often made about racism, and the elimination of racial discrimination is, in fact, part of the human rights agenda.²⁰ The problem with the inequality structures between men and women are that female subordination runs so deep that it is still viewed as natural or inevitable. It is not always seen for what it is, which is a politically constructed reality that is maintained by patriarchal interests, ideology, and institutions.²¹ The fact that legislation and social change that allow the control of women’s bodies into women’s hands are so strongly opposed in many States, show the importance of control over women.²² The structure and institutions of the international legal order mirror and cement the continued dominance of a male

¹³ Gunnarsson and Svensson, p. 203f.

¹⁴ Bunch, Charlotte, “Women’s Rights as Human Rights: Toward a Re-Vision of Human Rights” in *Human Rights Quarterly*, Vol. 12 (1990), pp. 486-498, p. 488.

¹⁵ *Ibid.*, p. 491.

¹⁶ Gunnarsson and Svensson, p. 142.

¹⁷ Cook, p. 982, see also Bunch (1990) p. 486.

¹⁸ Cook, p. 983.

¹⁹ *Ibid.*, p. 985.

²⁰ Stamatopoulou, “Women’s Rights and the United Nations” in Peters, Julie and Andrea Wolper (eds.), *Women’s Rights, Human Rights: International Feminist Perspectives* (1995), Routledge, New York, pp. 36-48, p. 36.

²¹ Bunch (1995), p. 14, see also Bunch (1990) p. 491.

²² Bunch (1995), p. 15, see also Bunch (1990) p. 491.

perspective. Both in States and in international organizations there is an appalling lack of women, effectively turning the discussion masculine and silencing women's voices.²³

According to Stamatopoulou the weakness of the international community has been first and foremost in two areas; at the conceptual level and at the operational level. Conceptually, the international community (including States and NGOs) have historically failed to declare all women's human rights concerns to be part of the international human rights law. Operationally, the issue of women's human rights have been marginalized as they were not integrated into the mainstream human rights agenda.²⁴ Because of the long-term male domination of all major institutions of the international legal order and of national bodies that hold political power, traditionally issues that concern men are viewed as general human rights. This has led to "women's concerns" being regarded as a distinct and limited category. Charlesworth calls for women's equal representation in law-making forums, as a beginning to mainstream the international legal order. Without the experiences of women being directly contributed to it, the international human rights law loses its claim to universal applicability.²⁵ Women must be made visible, and the concept and practice of human rights must be transformed to better address issues that are traditionally female-gendered.²⁶ Charlesworth finds it remarkable that although women make up more than half of the world's population this does not shine through in international human rights, producing an "impoverished, ineffective and lopsided jurisprudence"²⁷. According to Gunnarsson and Svensson the objective and general gendered view is male in legislation and policies, making women the "opposite", or *le deuxième sexe*, as Simone de Beauvoir expressed it.²⁸ This sort of discrimination against any other group than women would be seen as a civil and political emergency.²⁹

2.2 The Right to Self-Determination

Any discussion of abortion needs to put women at the centre of the discussion. Women are affected in ways that men are not, when their freedom, dignity and equality is continually compromised by law and by custom.³⁰ If women are going to be in control of their own lives, they need the freedom and the ability to decide when and whom they get pregnant with. It is women who live with the consequences of pregnancy for the rest of their lives, and therefore women need to be at the centre of the decision-

²³ Charlesworth, p. 104.

²⁴ Stamatopoulou, p. 36.

²⁵ Charlesworth, p. 105, see also Bunch (1990) p. 487.

²⁶ Bunch (1990), p. 487.

²⁷ Charlesworth, p. 105f.

²⁸ Gunnarsson and Svensson, p. 205f.

²⁹ Bunch (1990), p. 486.

³⁰ Peters, Julie and Andrea Wolper (eds.), *Women's Rights, Human Rights: International Feminist Perspectives* (1995), Routledge, New York, p. 2.

making.³¹ Women's lives are actually in danger when legislation regulating reproductive rights is missing.³² According to Bunch, women's bodies are the physical territory of women's rights as human rights.³³ Women's voices have been absent from the discussion on reproductive self-determination. Reproduction has been addressed from a male perspective, and States have let perceptions and values permeate the debate that affords a strategic value to procreation, i.e. the strength of the community is measured in population numbers, and so high birth rates are preferred.³⁴

The Committee on the Elimination of Discrimination against Women stated in its addendum³⁵ that empowering women to take decisions about their fertility will lead to empowerment in other domains of their lives as well, giving the examples of decision-making within the household and the participation in economic and educational life.³⁶ It refers to the Beijing Conference, which together with the International Conference on Development in Cairo were two of the most significant summits on reproductive rights during the end of the 20th century. Smyth argues that the choice women have over their reproductive rights at once both shows the bodily and personal autonomy of women, and at the same time uphold the illusion that women can make these kinds of choices without thought to the economic, social and political context that they live in.³⁷ She argues, like Petchesky, that choice is an illusion if you believe a choice can ever be made without a respect to the context.

The relationship between reproductive rights and other human rights are fluid and interacting. For example, the right to education is relevant to the effective protection of reproductive rights.³⁸ Eriksson notes that from the feminist viewpoint, it is obvious that decision-making on reproduction can only be voluntary when women have full knowledge about the consequences or ramifications of accepting or rejecting a particular method of family planning. Risks and benefits of medical procedures and contraceptives must be explained, and information and education about family planning should never be restricted.³⁹ As Cook writes, it is essential for reproductive decision-making that there is a right to receive and impart information regarding sexual and reproductive health.⁴⁰ Eriksson argues that

³¹ Lee, Ellie (ed.), *Abortion Law and Politics Today* (1998), Macmillan Press Ltd, Hampshire, p. xii.

³² Peters and Wolper, p.2.

³³ Bunch (1990), p. 491.

³⁴ Cook, p. 978.

³⁵ "Implementation of Article 21 of the Convention on the Elimination of all Forms of Discrimination Against Women", UN Doc. CEDAW/C/1996/3/Add. 1.

³⁶ *Ibid.*, para 13.

³⁷ Smyth, Lisa, "Feminism and Abortion Politics: Choice, Rights, and Reproductive Freedom" in *Women's Studies International Forum*, Vol. 25 Issue 3 (2002), pp. 335-345, p. 336.

³⁸ Cook, p. 979.

³⁹ Eriksson, Maja Kirilova, *Reproductive Freedom – In the Context of International Human Rights and Humanitarian Law* (2000) in *International Studies in Human Rights*, Vol. 60, Martinus Nijhoff Publishers, The Hague, p. 245.

⁴⁰ Cook, p. 1011.

the inclusion of reproductive health as a fundamental component in women's human rights should infer a right to non-directive counselling, thus enabling women to make free, fully informed choices.⁴¹ Petchesky argues that there is no such a thing as a "free" choice – it is always coloured by the social, economic and cultural context.⁴² Nevertheless, education and information is of fundamental importance. In *Open Door and Dublin Well Woman v. Ireland* the Court was of the view that although the foetus had a constitutional right to life, it did not exclude the right to receive information on how to obtain an abortion in another State.⁴³ The ability to make decisions free from external pressure⁴⁴ and in an informed manner on the number and spacing of one's children is a basic human right, because it is a fundamental part of the contemporary concept of what makes a free individual. Reproductive freedom is *sine qua non* for the attainment of any genuine equality between men and women.⁴⁵

Every individual is presumed to have an autonomous sphere, in which the free will exists without being subject to external influences, according to Kant's philosophical ideas about the autonomous individual. Because all individuals should be free and equal all individuals should be allowed to develop freely. The autonomous person must be aware of its own limitations and the co-existence with other autonomous persons, leading to a symbiosis between the autonomous ego and the common interests of the State. This autonomous individual is central for the idea of the individual's human rights and the rule of law ideology.⁴⁶

The State should guarantee women the basic conditions necessary for reproductive autonomy. This includes removing the barriers for making choices, and that States promote and establish social and legal conditions that work towards a reproductive autonomy.⁴⁷ Cook writes that:

Reproductive security [...depends] on respect for several related rights that are separately identified in human rights conventions. These rights include the right to life, the right to liberty and security of the person, the right to be free from torture and ill-treatment, the right to marriage and to found a family, and the right to enjoyment of private and family life.⁴⁸

⁴¹ Eriksson, p. 245.

⁴² Petchesky, Rosalind Pollack, *Abortion and Woman's Choice – The State, Sexuality, and Reproductive Freedom* (1986), Verso, London, p. 374. The free choice of the individual is a fascinating topic but this thesis cannot go into a more in-depth discussion at this point. For the reader interested in learning more, Petchesky's *Abortion and Woman's Choice – The State, Sexuality, and Reproductive Freedom* is recommended.

⁴³ *Open Door and Dublin Well Woman v. Ireland*, paras 63-80, cf. chapter 6.1, see also Eriksson, p. 249.

⁴⁴ This is a truth with modification. See chapter 3.2 for the discussion on how a decision is never made in free from economic, cultural or social context.

⁴⁵ Eriksson, p. 166.

⁴⁶ Gunnarsson and Svensson, p. 204.

⁴⁷ Cook, p. 993.

⁴⁸ Ibid.

Protection and promotion of these rights – separately and collectively – advance the reproductive security that is fundamental for reproductive self-determination to exist.⁴⁹ In this thesis focus is placed on the right to private life and freedom of expression to mirror the discussion taking place in the European Court of Human Rights.

Included in the concept of the right to private life (protected under article 8 of the Convention) is the right of the individual to choose freely on matters of procreation.⁵⁰ For women to be able to exercise their right to their own choice in family planning, the right to implement their decision is of crucial importance. Without effective exercise the abstract right to make the decision is meaningless.⁵¹ The control over one's body is a condition for full human participation in social and communal life, and for women this means also the control over if, and when, and under what circumstances to have children.⁵²

The difficulty in balancing competing interests against each other, is determining which one weighs the heaviest. The liberal view, focusing on the interests of the individual, is competing against the communitarian ideals, whereby the interests of the community should prevail. Eriksson writes that it is to what degree it is possibly to restrict an individual's human rights and on what grounds the restriction is justified that becomes the debate.⁵³

Pragmatically, it is a win-win situation for both the individual and the community if women are afforded control over their reproductive choices and their bodies. It is beneficial for the women, for their families and for the society as a whole.⁵⁴

2.3 Public and Private Spheres

“The personal is political”⁵⁵, and in the policies, legislations and cases that are presented in this thesis, the highly private choice of abortion is heavily politicised. Although the choice should be private, the States need to ensure the availability of, and the access to, abortion services. Feminist theory and law collide because the former want to affect the latter, and lead to social change. Feminist theories are useful to provide tools for how to examine and develop law, e.g. through the “law in context”-movement, and the socio-legal or critical studies of law. Because the personal is political, feminist

⁴⁹ Cook, p. 993.

⁵⁰ Eriksson, p. 251f.

⁵¹ Eriksson, p. 292, see also *R.R. v. Poland* and *P. and S. v. Poland* (cf. chapter 6.2.3 and 6.2.4).

⁵² Petchesky, p. 378.

⁵³ Eriksson, p. 166.

⁵⁴ Cook, 979.

⁵⁵ Richardson, Janice and Ralph Sandland, *Feminist Perspectives on Law and Theory* (2000), Cavendish Publishing Limited, London, p. 7.

analysis is applicable to law in its operational and practical context. The role of law in social change is important, although the social change is not made from logic found within the law itself.⁵⁶

There exists a dichotomy about the relation between the public and the private, which is central in a discussion of gender inequality. It is also a dichotomy about dependence and independence, where women are viewed to be dependent on men. In such a view of the society, women are not autonomous; they are restricted in relation to men.⁵⁷ In this view, women are therefore subordinate to men. States need to take the responsibility for protecting women's human rights and stop perpetuating these ideas.⁵⁸

Unless reproductive rights of women are secured in the private sphere, other human rights of women will remain unobtainable.⁵⁹ Often, it is the preservation of family and culture that has been used as a rationale for the denial of human rights to women.⁶⁰ The view of the public and the private as separate spheres is used to justify the subordination of women, and in its extension to exclude the private sphere from the reach of human rights and public scrutiny.⁶¹ The international human rights law operates, like many national legal systems, in the public sphere. The public sphere is the government, politics, economics and the workplace – it is the sphere traditionally associated with men. This makes the international human rights principles inherently biased against women. The private sphere – where most violations against women's rights generally occur – is the home, hearth and family, and it is traditionally outside the scope of national and international legislation and principles.⁶² Mullaly makes the point that the problem does not lie in the rights discourse *per se*, it is the gendered division – the dichotomy between public and private – that hampers the pursuit of equality through rights. This division allows discriminatory practices to continue unrestricted in the areas of life that falls under the “private” scope.⁶³ It is clear that in the international community women's rights *are* human rights. However, the socially constructed division between private and public spheres must be counteracted. If the division into private and public was to be removed, then it would be possible to counteract the silence on the matter that protects the continuance of human rights violations that are based in cultural, religious and traditional values and prejudices.⁶⁴

⁵⁶ Richardson and Sandland, p. 6f.

⁵⁷ Gunnarsson and Svensson, p. 207f.

⁵⁸ Bunch (1990), p. 491f.

⁵⁹ Eriksson, p. 165.

⁶⁰ Freeman, "The Human Rights of Women in the Family: Issues and Recommendations for Implementation of the Women's Convention" in Peters, Julie and Andrea Wolper (eds.), *Women's Rights, Human Rights: International Feminist Perspectives* (1995), Routledge, New York, pp. 149-164, 149.

⁶¹ Bunch (1995), p. 14.

⁶² Charlesworth, p. 106.

⁶³ Mullaly, Siobhán, *Gender, Culture and Human Rights: Reclaiming Universalism* (2006) in Human Rights Law In Perspective Series, Vol. 7, Hart Publishing, Oxford, p. 129.

⁶⁴ Stamatopoulou, p. 39.

3 A Short Historical Background of Abortion – Choice and Consequences

In the previous chapter, the theories for analysing the material in this thesis were presented. This chapter gives a historical background of abortion and the choice surrounding it, as well as problematizes restrictive abortion legislation. This chapter serves as an introductory overview, to help the reader connect the dots. This chapter is based in a literature study on the subject, as well as the reports of the World Health Organization and the Swedish Society for Obstetrics and Gynaecology, and the ICPD Programme of Action. The next chapter presents a more detailed discussion on the national legislation and the development of the abortion policy in Ireland, Poland and Sweden, providing a backdrop for the cases and thus furthering a deeper understanding for the cases and the connection to the Council of Europe.

3.1 Historical Background of Abortion

In 1992 David noted that the lowest abortion rates and ratios were found in the Netherlands and the Scandinavian countries. He drew the conclusion that it is linked to societies where sexuality is more openly accepted as part of a healthy lifestyle, and for which individuals are expected to assume personal responsibility, *inter alia* through effective contraceptive practice. Education on sex is promoted from an early age in these countries. In Eastern Europe, abortion has been preferred to modern contraceptives, which remains a taboo topic together with sexuality.⁶⁵ Since David's article, the legislation in Poland has made a *volte-face*, and now the country is sporting one of the most restrictive abortion legislations in Europe (*cf. infra*, chapter 4).

According to David, there were few – if any – legal restrictions on abortion in Rome and throughout most of the Roman Empire's existence. The foetus was believed to be part of the woman's body, and so women could request its removal.⁶⁶ Ross agrees with this view, and writes that the attitude of restrictive abortion is not from the ancient Roman or Greek. Ancient religion did not forbid abortion. In the cases where abortion was prosecuted, it was mainly as a violation of the father's right to offspring. Instead of leaving thoughts to foetal rights, the opposition against abortion was mainly

⁶⁵ David, Henry P., "Abortion in Europe, 1920-91: A Public Health Perspective" in *Studies in Family Planning*, Vol. 23 Issue 1 (1992), pp. 1-22, p. 2.

⁶⁶ *Ibid.*, p. 3.

because of the serious health risks the procedure posed to the mother.⁶⁷ Today, the health risk posed to the mother is a reason abortion should be lawful. In States where abortion is not legal, women will find other ways to obtain the procedure, *inter alia* through “back alley clinics”. Where there are no lawful options, unsafe and clandestine abortions will prosper.⁶⁸

Religion is an important part of the discussion surrounding abortion. Ross asks if every woman should be able to choose her own religious view (and her own position on abortion), or if States should allow the religious views of the majority to decide for all the women in the country what they are allowed to do in this regard, as the State laws then mirror and enact these religious views?⁶⁹ This is discussed in the analysis (*cf.* chapter 7). The number of abortions in a society is not only connected to the legislation, but also on the level of urbanisation, education, religion, culture and the socio-economic context.⁷⁰ There are many questions concerning abortion. For example, who has the right to choose an abortion? And who should fund it? When is it okay to have an abortion? When is it not? Like Susan Deller Ross explains, between the two extremes lie many variations.⁷¹

3.2 Abortion and Choice

There are different reasons as why to have an abortion. Dividing them into crude categories, there are medical grounds, social grounds and eugenic grounds. For the medical grounds, there are for example the cases of when the pregnant woman’s life or health is in danger. The social grounds can be that the woman is not in a position, e.g. financially or psychologically to care for a child. The eugenic grounds are some of the most controversial because it is the way to avoid hereditary diseases – it can be considered a form of human engineering and shows a lack of value given to some individuals, especially when combined with forced sterilization (*cf.* chapter 5.3).

The choice to have an abortion can be both controversial and the most logical thing in the world. Petchesky writes that even if all circumstances are the same for two different women, her consciousness about abortion can at the same time be multi-layered and contradictory.⁷² There are ethical and pragmatic-practical considerations to weigh against one another, and this leads to the paradoxical idea that “the abortion was wrong, but it was the

⁶⁷ Ross, Susan Deller, *Women’s Human Rights – The International and Comparative Law Casebook* (2008), University of Pennsylvania Press, Philadelphia, p. 574.

⁶⁸ Zampas, Christina and Jaime M. Gher, “Abortion as a Human Right – International and regional standards” in *Human Rights Law Review*, Vol. 8 Issue 2 (2008), pp. 249-294, p. 255.

⁶⁹ Ross, p. 572.

⁷⁰ ”Abort i Sverige” (1994), p. 7.

⁷¹ Ross, p. 571.

⁷² Petchesky, p. 365.

right thing to do”.⁷³ Some, like Denbow, call for restrictive abortion legislation, arguing that taking the decision away from women actually favours their autonomy, because they are no longer “forced” by society to choose a certain option. Her example is a woman who wants to carry her pregnancy to term, but feels the need to have an abortion to conform to the societal view.⁷⁴

3.3 Consequences of Restrictive Abortion Legislation

In 2007, the World Health Organization estimated that a woman dies every *eighth* minute in a developing country as a result of unsafe abortion.⁷⁵ An unsafe abortion, defined by the WHO, is a “procedure for terminating an unintended pregnancy carried out either by persons lacking the necessary skills or in an environment that does not conform to minimal medical standards, or both”⁷⁶. Broadly categorized, there are four categories for traditionally inducing an abortion, which are:

1. Oral and injectable medicines;
2. Vaginal preparations;
3. Introduction of a foreign body into the uterus, and
4. Trauma to the abdomen.⁷⁷

Most of these traditional “remedies” are dangerous to the woman’s well-being, and most of them even constitute a serious threat to her life. The number of pregnancies that end in voluntary abortion every year is approximately 42 million. Out of these, around 20 million are done outside of the national legal systems. Illegal, clandestine abortions are often performed by unskilled providers, or in unhygienic conditions, or both.⁷⁸ Around 70 000 women die every year as a result from unsafe abortion. The number of women who are left with temporary or permanent disability due to unsafe abortion is close to five million.⁷⁹ One in four women that have an unsafe abortion is likely to face severe complications, and apart from risking the lives and health for millions of women, this also puts a strain on the health care facilities, which puts a heavy demand on often scarce resources.⁸⁰

⁷³ Furedi, Ann, “Wrong but the Right Thing to Do: Public Opinion and Abortion” in Lee, Ellie (ed.), *Abortion Law and Politics Today* (1998), Macmillan Press Ltd, Hampshire, pp. 159-171, p. 159.

⁷⁴ Denbow, Jennifer, “Abortion: When Choice and Autonomy Conflict” in *Berkley Journal of Gender, Law and Justice*, Vol. 20 (2005), pp. 216-228, p. 220ff.

⁷⁵ “Unsafe abortion – Global and regional estimates of the incidence of unsafe abortion and associated mortality in 2003”, 5th ed. World Health Organization (2007), preface.

⁷⁶ “Unsafe abortion”, p. 1.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*, p. 5.

⁸⁰ *Ibid.*, p. 1.

The 1994 International Conference on Population and Development (ICPD) adopted the Cairo Programme For Action, in which it was recommended that:

“All Governments and relevant intergovernmental and non-governmental organizations are urged to strengthen their commitment to women’s health, to deal with the health impact of unsafe abortion as a major public health concern and to reduce the recourse to abortion through expanded and improved family-planning services. Prevention of unwanted pregnancies must always be given the highest priority and every attempt should be made to eliminate the need for abortion.”⁸¹

The paragraph started out, however, by stating that in no case should abortion be promoted as a method of family planning. The Cairo Programme of Action is not legally binding, but because it has been endorsed by a large majority of the governments (approximately 180) it bears great authority.⁸²

The European Court of Human Rights has often favoured the aphorism that individual liberties must have a broad interpretation, whereas restrictions upon these liberties require a restrictive interpretation.⁸³ It was in the 1994 Cairo Programme for Action that the term “reproductive health” was set out in a universal governmental programme for the first time.⁸⁴ Reproductive health is defined as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes”⁸⁵. Implicit in the term is the prevention, or termination, of a mistimed and/or unwanted pregnancy.⁸⁶ According to Eriksson, the political controversy as to the legality of abortion was sidestepped in the Cairo Conference, because it was presented as an issue of reproductive health, not reproductive right, and as such the focus was shifted to the serious health effects of illegal, clandestine and unsafe abortions. By aiming to remove the existing legal restrictions to abortion, it is possible that the intention of the drafters of the ICPD programme was that by ensuring the legality of all abortions, all abortions would be safe.⁸⁷

⁸¹ “Report of the International Conference on Population and Development (1995)”, International Conference on Population and Development (ICPD) Programme of Action (A/CONF.171/13/Rev.1), UNFPA, *para* 8.25, p. 58.

⁸² Eriksson, p. 177.

⁸³ *Ibid.*, p. 169.

⁸⁴ *Ibid.*, p. 172.

⁸⁵ “Report of the International Conference on Population and Development (1995)”, *para* 7.2.

⁸⁶ Eriksson, p. 171, see also “Report of the International Conference on Population and Development (1995)”, *para* 7.2.

⁸⁷ Eriksson, p. 172.

4 Abortion in a Comparative Perspective – An Overview of Ireland, Poland and Sweden

In the previous chapter, the historical background of abortion was presented, together with the choice an abortion represents and the consequences of illegal or clandestine abortions. For a better understanding of the cultural and legislative context that the cases from the European Court of Human Rights that are presented in chapter 6 come from, this chapter provides an overview of the abortion legislation and policy in Ireland and Poland. The chapter also provides an overview of the Swedish abortion legislation. As a State with liberal abortion legislation will be used to compare and contrast against the aforementioned legislations. I limit myself to these countries because they are the relevant ones to the cases presented and for the purpose of this thesis.⁸⁸

The purpose with this chapter is to provide a basis for a comparison on the development of the legislation in Sweden, Ireland and Poland. It is also important to demonstrate just how very different forms abortion legislation takes in the Contracting States to the European Convention on Human Rights. For this chapter I have used legal dogmatic method, studying the legislation, case law and *travaux préparatoires* of the States. I have complemented this with a literature study. This chapter is meant to be an overview of the current legal situation of abortion in these particular Member States. This will then tie in with the chapter 6 which summarizes the most important cases of the European Court of Human Rights on this issue.

4.1 Ireland

Ireland is one of the few countries in Europe that still has a very restrictive abortion legislation. The reason for this is the heavy presence of the church – the majority of the Irish people are Roman Catholic, with almost eighty-five per cent of the population self-identifying as Roman Catholic in the 2011 Census.⁸⁹ In 1983, a total ban on abortion and an explicit right to life

⁸⁸ Another Member State to the Convention that should be mentioned is Malta. Malta is the only State in the Council of Europe that has no exceptions to the ban on abortion. This discussion has been left outside the scope of the thesis because of time and space constraints. Cf. "Abortion Policies: A Global Review", The United Nations, from <http://www.un.org/esa/population/publications/abortion/>, p. 125f, see also "Abort i Sverige: Betänkande av Utredningen om utländska Aborter", SOU 2005:90 (Stockholm 2005) (In English: "Abortion in Sweden", The Official Investigation of the Government 2005:90, Report from the Investigation of abortion for aliens, author's translation.), p. 105.

⁸⁹ "This is Ireland – Highlights from Census 2011, Part 1", Central Statistics Office, Government of Ireland, Published by the Stationary Office, Dublin. Cf. Table 36: Persons,

of the foetus was adopted into the State's Constitution, as the Eighth Amendment. In the end of the 1980s, Ireland was one of the few Western European States where abortion was illegal in all instances⁹⁰, and it had never before that been available. This did not mean that abortions were non-existent; it just meant that women travelled across borders – usually to Great Britain – to have the procedure done.⁹¹

The use of non-medical contraception was banned for use by non-married couples (and required a doctor's permit) until 1985, when a liberalization of the law was passed by a narrow parliamentary majority. There had been intense opposition from the Catholic Church on the matter, and this was the first time State and Church went head to head.⁹²

Article 40.3.3 of the Constitution of Ireland, stands as follows:

The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right. [*Eighth Amendment of the Constitution Act*, 7 October 1983]

This subsection shall not limit freedom to travel between the State and another state. [*Thirteenth Amendment of the Constitution Act*, 23 December 1992]

This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state. [*Fourteenth Amendment of the Constitution Act*, 23 December 1992]

The eighth amendment of the Constitution Act acknowledged the right to life of the unborn, with due regard to the equal right of the mother. An additional three amendments were proposed in 1992 (*cf. infra*).

The *X case*⁹³ from 1992 is the landmark case on abortion in Ireland. A 14-year old girl was allegedly raped by her friend's father. When she found out that she was pregnant, she and her parents decided to travel to England for an abortion. They asked the gardaí [the police] if there would be any way to test the aborted embryo for DNA, and as such use it as evidence against the alleged rapist. The gardaí informed the Director of Public Prosecutions who in turn communicated it to the Attorney General, resulting in an injunction

males and females, classified by religious denomination with actual and percentage change, 2006 and 2001, p. 104.

⁹⁰ The other one was Belgium, see Boyle, C. Kevin "Ireland" in Frankowski, Stanislaw J. and George F. Cole (eds.), *Abortion and Protection of the Human Fetus* (1987), Martinus Nijhoff Publishers, Dordrecht, pp. 113-127, p. 114.

⁹¹ Boyle, p. 114.

⁹² Ibid.

⁹³ *Attorney General v X*, [1992] IESC 1; [1992] 1 IR 1.

against the family, prohibiting them to travel outside Ireland for 9 months. This effectively meant that the girl was not allowed to obtain an abortion. It was shown in court that there was a real and substantial risk that the pregnant girl was going to end her life by suicide if she could not obtain an abortion. The Irish Supreme Court interpreted article 40.3.3 of the Constitution and ruled that abortion is allowed in cases where the mother's life is at risk, even if this risk is constituted by suicide – that is, the mother herself is the threat to her life. The reasoning of the Court was that when there is a real and substantial risk to the life of the mother, and the risk can only be averted with an abortion, the abortion is lawful. However, this balancing of the rights according to article 40.3.3 still meant that the procedure had to be done outside of Ireland because the abortion in itself would not be legal in the State. If the woman's life was not at any "real and substantial risk", a woman could still be prevented from travelling to another country, because the right to life of the foetus took precedence over the mother's right to travel.⁹⁴ Three amendments to the Constitution on the issue of abortion were held up for voting following the *X case*⁹⁵, where the two adopted amendments and the *X case* together resulted in a slightly less restricted abortion legislation. The Twelfth Amendment was rejected in 1992, which would have restricted the right to abortion. It would have limited the effect of the *X case*, excluding suicide as grounds for abortion. At the same time the Thirteenth and Fourteenth Amendments of the Constitution Act were passed. The Thirteenth Amendment provided that article 40.3.3 does not limit the freedom to travel between Ireland and another State, and the Fourteenth Amendment provided that the article does not limit the freedom to obtain or make available information relating to services lawfully available in another State.⁹⁶ It is important to note here that the application for the case of *Open Door and Dublin Well Woman v. Ireland* to the European Court of Human Rights was made in 1988. When the case was decided by the Court in October 1992, these amendments were only two months away in the national arena.

After the 1992 case, a bill⁹⁷ was introduced in 2001 to change the legislation. According to the Taoiseach [the Prime Minister] the government was of the view that if the opinion of the *X case* was upheld, it would be a slippery slope, inevitable and unstoppable, to social abortion.⁹⁸ The proposal meant that the right to abortion would not be recognized if it was the woman herself that was the risk to her life.⁹⁹ In 2002, a referendum was held for the proposal for the Twenty-Fifth Amendment to the Constitution Act, which would further restrict abortion under the "Protection of Human Life in Pregnancy Act". The act itself would not be added to the constitution, but

⁹⁴ Mills, Eithne and James McConville, "The 2002 Irish Abortion Referendum: A Question of Constitutionalism and Conscience" in *European Journal of Law Reform*, Vol. 4 (2002), pp. 481-494, p. 484f.

⁹⁵ *Ibid.*, p. 485.

⁹⁶ *Ibid.*, p. 486.

⁹⁷ The Twenty-Fifth Amendment of the Constitution (Protection of Human Life in Pregnancy) Bill (2001).

⁹⁸ Smyth, p. 337.

⁹⁹ *Ibid.*, see also Mills and McConville p. 486f.

the proposed amendment would have entailed that it accrued the same status as a constitutional amendment. The proposed amendment was rejected.¹⁰⁰

In October 2012, a woman died at a hospital when medical staff refused her an abortion. Mrs Halappanavar arrived at the hospital complaining of back pain. When it was determined she was miscarrying, her demand for an abortion was not met. She contracted septicaemia (blood poisoning) as a result and died on the 28th of October.¹⁰¹

An expert report was ordered by the Irish Government in November 2011 with the task of examining the judgment in *A, B and C v. Ireland* of the European Court of Human Rights (discussed in chapter 6.3) and to elucidate its implications for the provision of health care services to pregnant women in Ireland. In November 2012 the Expert Group appointed by the Irish Government published their report¹⁰² on how Ireland should comply with the ruling in the case *A, B and C v. Ireland*. This report was published a month after the death of Mrs Halappanavar. The expert group recommended a series of options on how to implement the judgment taking into account the constitutional, legal, medical, and ethical considerations involved in the formulation of public policy in this area and the over-riding need for speedy action.¹⁰³

As recently as April 30, 2013, the new abortion legislation was proposed called the Protection of Life during Pregnancy Bill¹⁰⁴. In the bill abortion to save the life of the woman is permitted, but other than that no significant changes are made to the current status of abortion in Ireland; rather the bill aims to make the legislation clarified and more accessible. A person found guilty of destroying unborn life with the intent of doing so faces a prison term of up to 14 years.¹⁰⁵ If, however, the reason for the abortion or termination of pregnancy is the real and substantial risk of loss of the pregnant woman's life and this risk only can be averted by that medical procedure, it is not an offence. Two medical practitioners must jointly certify this in good faith, and consult with to woman's general practitioner. In an emergency, the procedure may be carried out by a medical practitioner, who in good faith believes there is an immediate danger to the woman's life, and the procedure is immediately necessary to save the life of the woman.¹⁰⁶ Risk of life of the woman through self-imposed harm does not qualify as a risk to life (in an emergency or not) unless one obstetrician/gynaecologist and two psychiatrists (preferably in consultation with the woman's general practitioner) certify in good faith that the life of

¹⁰⁰ Mills and McConvill, p. 487ff.

¹⁰¹ Reported in newspapers, see for example "Ireland abortion policy under scrutiny after woman's death", 14 November 2012, The Guardian; "Woman dies after abortion request 'refused' at Galway hospital", 14 November 2012, BBC News; or "Ireland's Historic Abortion Shift and the Tragedy That Shadowed it", 19 December 2012, TIME.

¹⁰² "Report of the Expert Group on the Judgment in *A, B and C V Ireland*".

¹⁰³ *Ibid.*, p. 55.

¹⁰⁴ General Scheme of the Protection of Life During Pregnancy Bill 2013.

¹⁰⁵ *Ibid.*, Head 19.

¹⁰⁶ *Ibid.*, Head 2f.

the woman is at a real and substantial risk.¹⁰⁷ The bill has not yet been adopted.

4.2 Poland

Poland has peculiarly moved from having one of the most liberal abortion legislations in the world to demonstrating one of the most restrictive. This sub-chapter gives an overview of the development of the Polish abortion legislation, trying to explain why it developed in the way it did, and show what today's legislation looks like. Unlike Ireland, which has had a restrictive abortion legislation throughout, Poland actually had one of the most liberal legislations in the world until the change in the late 1980s and early 1990s.

Abortion was permitted in the 1932 Penal Code if it was the result of a criminal offense or the mother's life was in danger. This expanded to include social and economic reasons in 1956, with the introduction of the Abortion Admissibility Act. The final decision was still the doctor's. In 1959, the law was changed to make abortion administered on the woman's application, effectively making abortion available on demand. The medical professionals would decide on a case by case basis because there was no set time limit. There was no feminist motivation behind this very liberal change, which was instead motivated by the widespread Soviet bloc policy of integrating more women in the workforce. Because of the difficulty in obtaining contraceptives, abortion seems to have been widely used in place of birth control.¹⁰⁸

When the regime fell in 1989, and Soviet's political influence in Poland was diminished, the Catholic Church made a claim to power in the country. Because of its doctrinal opposition to abortion, and as a part of the strategy to become a stronger institutional actor and to manifest its hold on its followers the episcopate sought a legal ban on the procedure.¹⁰⁹ In 1989, just before the first parliamentary elections following the new political freedom, a draft law submitted that proposed a restriction of abortion rights, making it legal only when the mother's life was in danger. An illegal abortion was to be punished with up to two years in prison. Contraceptives like intrauterine devices and pills would be illegal.¹¹⁰ Even though the initiative was sponsored by the Church, the public rejected it. It is notable, because at that time ninety-five per cent of Poland's population was baptized Catholic. However, because of the difficulty in obtaining other

¹⁰⁷ General Scheme of the Protection of Life During Pregnancy Bill 2013, Head 2-4.

¹⁰⁸ Standish, Dominic, "From Abortion on Demand to its Criminalization: the Case of Poland in the 1990s" in Lee, Ellie (ed.), *Abortion Law and Politics Today* (1998), Macmillan Press Ltd, Hampshire, pp. 116-129, p.116ff, cf. also Kulczycki, p. 471f.

¹⁰⁹ Kulczycki, Andrzej, "Abortion Policy in Postcommunist Europe: The Conflict in Poland" in *Population and Development Review*, Vol. 21 No. 3 (September 1995), pp. 471-505, p. 472.

¹¹⁰ Standish, p. 117.

forms of birth control, the effect of an abortion ban would be significant on the options of fertility control that women could access. In the Polish Parliament the bill was rejected. Although most hospitals had by this point in time stopped performing abortions, it was the first setback of the Catholic Church in the post-communist era.¹¹¹ The winds turned quickly, however, and by 1990 three medical opinions and a consultation with a State-approved psychologist were needed to authorize a request of abortion, greatly restricting the access to affordable abortion services. If the request was made on non-medical grounds, the physicians were allowed to refuse to issue the certificate, and State hospitals had to increase their fee for the procedure. In May 1992 a new medical code of ethics arrived, only allowing for abortion to be performed if the pregnancy either threatened the life or the health of the mother, or if it was the result of a criminal act.¹¹² Today's abortion legislation in Poland is The Family Planning (Protection of the Human Foetus and Conditions Permitting Pregnancy Termination) Act¹¹³ and was passed by Parliament in 1993 (hereafter called "the 1993 Act"). The 1993 Act provided that legal abortion is possible only until the twelfth week of pregnancy in cases where the pregnancy endanger the mother's life or health, or in cases where prenatal tests or other medical findings indicate a high risk that the foetus will be severely and irreversibly damaged or suffering from an incurable life-threatening disease, or if there are strong grounds for believing that the pregnancy is a result of rape or incest. In January 1997 an amended text of the 1993 Act came into force providing that pregnancy could also be terminated during the first twelve weeks in cases where the mother either suffered from material hardship or was in a difficult personal situation. However, in December 1997 further amendments were made to the text of the 1993 Act, following a judgment of the Constitutional Court given in May 1997 in which the Court held that the provision legalizing abortion on grounds of material or personal hardship was incompatible with the Constitution as it stood at that time.¹¹⁴ Section 1 provided at that time of when the cases *Tysic v. Poland, R.R. v. Poland* and *P. and S. v. Poland* that "every human being shall have an inherent right to life from the moment of conception".

Section 2 (a) of the 1993 Act reads:

The State and local administration shall ensure unimpeded access to prenatal information and testing, in particular in cases of increased risk or suspicion of a genetic disorder or development problem or of an incurable life-threatening ailment.

Section 4(a) of the 1993 Act reads, in its relevant part:

1. An abortion can be carried out only by a physician where
 - 1) pregnancy endangers the mother's life or health;

¹¹¹ Kulczycki, p. 471ff, see also Standish, p. 117f .

¹¹² Kulczycki, p. 474.

¹¹³ Here presented as a translation of the original Polish text from the European Court of Human Rights cases *R.R. v. Poland*, *Tysic v. Poland*, and *P. and S. v. Poland* (cf. *infra*, chapter 6).

¹¹⁴ From the European Court of Human Rights case *Tysic v. Poland*, paras 35-37.

- 2) prenatal tests or other medical findings indicate a high risk that the foetus will be severely and irreversibly damaged or suffering from an incurable life-threatening ailment;
 - 3) there are strong grounds for believing that the pregnancy is a result of a criminal act.
2. In the cases listed above under 2), an abortion can be performed until such time as the foetus is capable of surviving outside the mother's body; in cases listed under 3) above, until the end of the twelfth week of pregnancy.
3. In the cases listed under 1) and 2) above the abortion shall be carried out by a physician working in a hospital.
- (...)
5. Circumstances in which abortion is permitted under paragraph 1, sub-paragraphs 1) and 2) above shall be certified by a physician other than the one who is to perform the abortion, unless the pregnancy entails a direct threat to the woman's life.

It is a criminal offence to perform a termination of pregnancy in breach of the conditions specified in the 1993 Act. It is punishable under article 152 § 1 of the Polish Criminal Code. Anyone who terminates a pregnancy in violation of the Act or assists such a termination may be sentenced to up to three years' imprisonment. There is no criminal liability for the pregnant woman herself for an abortion performed in contravention of the 1993 Act.¹¹⁵

Although the 1993 Act does have legitimate grounds for abortion, hurdles are set up at every step of the way. Three physicians need to certify the grave threat to a woman's life or health that would allow for an abortion. A public prosecutor has to confirm the case of rape or incest. For prenatal testing to be carried out there must be good reason to suspect foetal defects.¹¹⁶

The 1993 Act has also been called "the Anti-Abortion Act", and rather than eliminate the practice of abortion, it has instead made the practice take place outside the law, with an estimated 80,000 to 200,000 illegal abortions being performed each year. The expensive abortions are often performed in unsafe conditions, leading to unnecessary suffering and death. Because of the rising prices of illegal abortions, women who are economically constrained are prevented from accessing abortion services.¹¹⁷ The official numbers showed a marked decrease in the number of abortions carried out in the early 1990s. However, the number of reported miscarriages skyrocketed. Kulczycki's interviews with gynaecologists and other specialists in the years 1991 to 1994 suggested that women could obtain abortions under pretext.¹¹⁸ In the years following the new restricted legislation, the number of abandoned

¹¹⁵ From the European Court of Human Rights case *Tysic v. Poland*, para 41.

¹¹⁶ Kulczycki, p. 474.

¹¹⁷ "Sexual and Reproductive Health and Rights in Europe – Report to the European Union" by Zampas, Christina and Wanda Nowicka (January 2006), ASTRA Network, p. 18.

¹¹⁸ Kulczycki, p. 475f.

children and infanticides rose significantly, as did the number of children left in hospitals.¹¹⁹ Kulczycki concludes that the 1993 Act “gives legal protection to the beginning of human life in preference to the autonomy of the woman”¹²⁰.

As to the Polish Constitution, its two relevant articles read:

The Republic of Poland shall ensure the legal protection of the life of every human being.¹²¹

Everyone shall have the right to legal protection of his private and family life, of his honour and good reputation and to make decisions about his personal life.¹²²

According to the Central Statistical Office in Poland, the vast majority – almost ninety per cent – of the population are affiliated with the Roman Catholic Church.¹²³ This can be compared to the Roman Catholic population in Ireland (*cf. supra*).

It is important to note that even though abortion was legal in 1956 and onward in Poland, the safety and quality of abortions varied.¹²⁴

4.3 Sweden

In Sweden, there was a public debate on the future of the country in the 1930s. A large part of Sweden’s working and reproductive population had emigrated, leading to public policy encouraging marriage and a higher number of children. At the same time, family planning was encouraged, and arguments in favour of abortion were heard.¹²⁵ There was an estimated number of 20 000 illegal abortions per year in Sweden, although it was not until the 1st January 1939 that abortion was legalized.¹²⁶ Because of the dangers associated with abortions the approach was initially to ban and discourage them. An investigation for abortion legislation in 1934 observed that the threat of punishment did not deter those seeking abortion. Instead, the number of abortions seemed to go up during these years. The investigation established that the social conditions that made women seek

¹¹⁹ Standish, p. 119.

¹²⁰ Kulczycki, p. 497.

¹²¹ Article 38 of the Polish Constitution.

¹²² Article 47 of the Polish Constitution.

¹²³ “Concise Statistical Yearbook of Poland 2012”, by the Central Statistical Office, published 2012-07-23, p. 134f.

¹²⁴ Kulczycki, p. 495.

¹²⁵ Nelson, Alvar, “Sweden” in Frankowski, Stanislaw J. and George F. Cole (eds.), *Abortion and Protection of the Human Fetus* (1987), Martinus Nijhoff Publishers, Dordrecht, pp. 189-212, p. 190.

¹²⁶ “Abort i Sverige” (2005), p. 33.

abortion (such as the stigma surrounding children born outside of wedlock and the difficulty in raising children alone) should be improved.¹²⁷

In the Abortion Act of 1938 termination of pregnancy was allowed if the pregnant woman's life or health was in danger or if the pregnancy was the result of a crime. Eugenic grounds for abortion were also allowed in the 1938 Act. If an abortion was performed because of the unfit hereditary character of the mother, she was required to undergo sterilization at the same time. The time limit for abortion was twenty weeks of gestation, unless the health of life of the woman was in danger. The adopted legislation ended up being more restrictive than the proposed law of the 1934 investigation.¹²⁸ Socio-medical grounds were introduced in 1946.¹²⁹ The reasoning behind this was that the 1938 Act was being interpreted too restrictively, and the social reform the 1934 investigation had called for had not taken place.¹³⁰ In 1963, the abortion legislation was widened again to include deformities of the foetus. This was following the Thalidomide scandal¹³¹ in the early 1960s and in part also because of rubella in pregnant women.¹³²

A motion to the Liberal Youth Party in the beginning of the 1960s said "I believe that women must be able to decide over her own body, therefore I demand the right to free abortion"¹³³. Apart from the resistance from the Church, the opposition bore patronizing ideas and an overly trusting confidence for authorities, claiming women were not able to make the choice of abortion themselves. Because of the limited access to abortion in Sweden, when it became known that Poland had at the time "free abortion" at the woman's application (*cf. supra*, chapter 4.2), many women travelled there to have the procedure done. This led to the public opinion turning quickly to support free abortion and the current legislation was being questioned.¹³⁴ According to Nelson, the practice of abortion in Sweden predated the legislation of 1974. The statistical material indicates that when the Parliament considered the bill, abortions on demand were already being carried out.¹³⁵ The transition from the 1938 act to the 1974 act was consequently reasonably smooth.

The relevant parts of the current Swedish Abortion Act¹³⁶ is presented below. It is the 1974 law with subsequent amendments:

¹²⁷ "Abort i Sverige" (2005), p. 38f.

¹²⁸ *Ibid.*, p. 39f.

¹²⁹ *Ibid.*, p. 41ff, see also Nelson, p. 200.

¹³⁰ "Abort i Sverige" (2005), p. 41ff.

¹³¹ In Sweden known under the brand name Neurosedyn, a tranquilizer, which when used during the early stages of pregnancy led to deformities of the foetus. *Cf.* Nelson, p. 201

¹³² "Abort i Sverige" (2005), p. 44.

¹³³ Author's translation from Swedish, original text: "Jag anser att kvinnan måste få bestämma över sin egen kropp, därför kräver jag rätten till fri abort." from "Abort i Sverige" (2005), p. 44.

¹³⁴ *Ibid.*, p. 44ff.

¹³⁵ Nelson, p. 203.

¹³⁶ Abortlagen (1974:595) (In English: the Abortion Act (1974:595), author's translation).

1 § At the request of a woman that her pregnancy shall be terminated, abortion may be performed if the procedure is made by the end of the eighteenth week of gestation and it is not likely to have present a serious risk to her life or health because of any medical condition of the woman. Act (1995:660).

2 § If a woman requests an abortion or if a question of termination of pregnancy according to § 6 has arisen, she shall be offered counselling before proceeding with it. Act (1995:660).

3 § After the end of the eighteenth week of pregnancy abortion may be performed only if the woman receives a permit from the National Board of Health and Welfare for the procedure. Such authorization may be granted only if there are exceptional reasons for the abortion.

Permits under the first paragraph may not be granted if there is reason to assume that the foetus is viable.

(...)

5 § Only those who are authorized to practice medicine may perform abortion or termination of pregnancy according to § 6.

Abortion or termination of pregnancy under § 6 shall be carried out in a public hospital or other medical institution which is approved by the National Board of Health and Welfare. Act (2007:998).

6 § If it can be assumed that the pregnancy presents a serious risk to the woman's life or health, because of illness or a physical defect of the woman, the National Board of Health and Welfare may grant permission for termination of pregnancy after the end of the eighteenth week of pregnancy, and irrespective of how far the pregnancy has progressed.

If termination of pregnancy because of illness or physical defect in the woman cannot be postponed without endangering the woman, the action may be performed, notwithstanding the provisions of the first paragraph and § 5 second paragraph. Act (2007:998).[...]¹³⁷

The Swedish Abortion Act allows for abortion of the foetus up until the eighteenth week, on the demand of the woman. After week eighteen an application must be made to the National Board of Health and Welfare, which decides on a case by case basis. This usually means that abortion is allowed up until week twenty-two, but if the foetus is not compatible with life then an abortion can be obtained at any point in the gestation.¹³⁸ Neither is there a time limit for abortion if the woman's life is in danger (*cf.* 6§ of the 1975 Abortion Act).

As the number of legally induced abortions in Sweden increased, there was a reduction of those illegally performed. With the 1975 Act, illegal abortion

¹³⁷ Author's translation from Swedish.

¹³⁸ "Meddelandeblad: Rättsliga rådets behandling av abortärenden m.m." published by Socialstyrelsen (February 2006), p.2 (In English: "Message: The legal council's treatment of abortion cases etc." published by the National Board of Health and Welfare, author's translation).

ceased to exist in Sweden.¹³⁹ Sweden has one of the most liberal abortion legislations in Europe.¹⁴⁰ There is hardly any discussion in Sweden today as to the existence of the liberal abortion right in Sweden. The right-wing conservative party *Sverigedemokraterna* [the Sweden Democrats] has recently aimed to make the discussion more varied by re-introducing a more restrictive approach.¹⁴¹

In a comparison with Ireland and Poland, it is interesting to note that Sweden is one of the most secularized countries in the world.¹⁴²

¹³⁹ “Abort i Sverige” (2005), p. 81, see also Nelson, p. 191.

¹⁴⁰ “Abort i Sverige” (2005), p. 101.

¹⁴¹ “Fortsatt debatt om aborter”, published by the Swedish political party *Sverigedemokraterna*’s women’s association (In English: “Continued debate on abortions”, author’s translation).

¹⁴² “Landguiden” by Utrikespolitiska Institutet, published at 27 September 2012 (In English: “The State Guide” by the Swedish Institute of International Affairs, author’s translation).

5 Abortion and Gender Equality in the Council of Europe

In the previous chapter the national legislations on abortion within three Member States of the Council of Europe was presented. In this chapter, the policy decisions in the form of resolutions, recommendations and declarations that have been adopted in the Council of Europe on the issues of gender equality, abortion and reproductive rights are studied. The methodology in this chapter is a legal dogmatic one. In regard to the gender equality documents I am more limited in terms of time and space constraints. Overall, the gender equality debate within the Council of Europe is very interesting, and could easily be made into a master thesis on its own. An overview of the development of the European Convention on Human Rights in regard to abortion is given and the doctrine of margin of appreciation is presented. This chapter serves to give an overview of how the debate on abortion and gender equality has developed in the Council of Europe.

The next chapter presents the cases from the European Court of Human Rights in regard to abortion. In chapter 7 the policy decisions of the Council of Europe and the judgments of the European Court of Human Rights will be used to form a coherent analysis of to what extent the right to abortion is protected in the Council of Europe System.

5.1 Policy Decisions of the Council of Europe on Gender Equality

First off, to understand the abortion debate within the Council of Europe, the Council's stance on gender equality must be studied. Liberal abortion policy and legislation is in itself an expression of a more gender equal society, because in a society where a woman can decide over her own body and make her own reproductive choices, she is more likely to have deciding power in both the private and the public sphere (*cf. supra*, chapter 2). The Council of Europe is working to further the cause of gender equality, although a lot of work still remains. The Directorate General of Human Rights and Rule of Law define gender equality as the following:

Gender equality means an equal visibility, empowerment, responsibility and participation of both sexes in all spheres of public and private life. Gender equality is the opposite of gender inequality, not of gender difference.¹⁴³

¹⁴³ "Equality between women and men", Directorate General of Human Rights and Rule of Law, Gender Equality and Human Dignity Department, Council of Europe, p.1.

In 1988 the Committee of Ministers adopted the declaration of equality between men and women¹⁴⁴, in which it was stated that equality of women and men is a principle of human rights, upheld as a fundamental right in many international instruments.¹⁴⁵ The Committee stressed the importance of the aspirations, interests and talents of both sexes being included for the betterment and progress of humanity, and observed that both legal and factual inequalities persist to exist between men and women in present-day society.¹⁴⁶ The purpose was that resolute overall policies should be pursued for the effective achievement of equality between women and men, and that these policies should involve authorities, groups and individuals. The Committee of Ministers even goes so far as to say that without equality between men and women, there cannot be democracy and social justice is a fallacy.¹⁴⁷

Four years later, in 1992, the Parliamentary Assembly tabled a written declaration¹⁴⁸ on the protection of women's life, dignity and rights, stating that equality in the sphere of private life implies the recognition of freedom of choice and the right to self-determination as regards procreation, for both men and women.¹⁴⁹ The declaration made a point of that the free choice for women of motherhood is an established fact in democratic societies and that this should include, *inter alia*, the voluntary interruption of pregnancy.¹⁵⁰ The great majority of the Member States of the Council of Europe have enacted liberal legislations in the field which are respectful of women's life, dignity and rights.¹⁵¹

A written declaration of the Parliamentary Assembly does not commit the Assembly to the content.¹⁵² The Parliamentary Assembly is strictly an investigative, advisory body of the Council of Europe. A recommendation is the Assembly's proposal addressed to the Committee of Ministers, for implementation by them or the governments of the Member States.¹⁵³

In 1994 the Parliamentary Assembly adopted recommendation 1229 on equality of rights between men and women¹⁵⁴. The Parliamentary Assembly stressed that the fundamental rights of women and girls are an inalienable,

¹⁴⁴ Declaration on the equality of women and men, adopted by the Committee of Ministers on 16 November 1988.

¹⁴⁵ *Ibid.*, para 1.

¹⁴⁶ *Ibid.*, paras 3f.

¹⁴⁷ *Ibid.*, para 6.

¹⁴⁸ Written Declaration No. 220 on the protection of women's life, dignity and rights, originally tabled by the Parliamentary Assembly on 16 May 1992 Doc. 6634.2 (2nd ed.) on 15 July 1992.

¹⁴⁹ *Ibid.*, para 1.

¹⁵⁰ *Ibid.*, para 2.

¹⁵¹ *Ibid.*, para 3.

¹⁵² "Members Handbook" by the Parliamentary Assembly of the Council of Europe (March 2013), p. 29f.

¹⁵³ *Ibid.*, p. 29.

¹⁵⁴ Recommendation 1229 (1994) on equality of rights between men and women, adopted by the Assembly on 24 January 1994.

integral and indivisible part of universal human rights.¹⁵⁵ The Parliamentary Assembly went on to state its conviction that greater participation by women in all levels of political life would entail a fuller understanding and perception of all the issues facing a modern democratic society.¹⁵⁶ The Assembly recommended the Committee of Ministers to pursue and strengthen its work on equality of rights between women and men, putting particular emphasis on the equal participation of men and women in political life and the decision-making process, and be mindful to also apply this to the representative organs of the Council of Europe.¹⁵⁷

The Committee of Ministers replied¹⁵⁸ to Recommendation 1229 (1994). It affirmed the fact that equality between men and women is a prioritized political issue in Europe and agreed with the Parliamentary Assembly that a contemporary “genuine” democracy needs to have the full participation of women, on an equal footing with men, or it is not functional.¹⁵⁹ The Committee went on to state that there is a generally recognized gap in contemporary legal and political doctrine between the equality in law, and the situation *de facto* for women.¹⁶⁰ In answer to the specific points of criticism of the Parliamentary Assembly, the Committee of Ministers declared that it was prepared to do its utmost to step up its work on equality between women and men, notably in regard to the equal participation in political life and the decision-making process.¹⁶¹

In 2003 the Committee of Ministers adopted the recommendation to Member States on balanced participation of women and men in political and public decision making¹⁶². The governments of the Member States were recommended to commit themselves to promote a balanced representation of women and men. The governments should do this by recognizing publicly that when men and women of different ages and backgrounds are equally participating in the decision-making democracy is strengthened and enriched.¹⁶³ Among other measures, governments should stimulate and support women’s will to take part in political and public decision making.¹⁶⁴ The governments should monitor and evaluate the progress in this field, and report this and the measures taken regularly to the Committee of Ministers.¹⁶⁵ A recommendation from the Committee of Ministers to a

¹⁵⁵ Recommendation 1229 (1994), *para* 5.

¹⁵⁶ *Ibid.*, *para* 6.

¹⁵⁷ *Ibid.*, *para* 8.iii-iv.

¹⁵⁸ Communication from the Committee of Ministers, Reply to Recommendation 1229 (1994) on the equality of rights between men and women, adopted by the Committee of Ministers on 24 May 1994, Doc. 7096.

¹⁵⁹ *Ibid.*, *para* 2.

¹⁶⁰ *Ibid.*, *para* 3.

¹⁶¹ *Ibid.*, *para* 6.

¹⁶² Recommendation Rec(2003)3 of the Committee of Ministers to member states on balanced participation of women and men in political and public decision making, adopted by the Committee of Ministers on 12 March 2003.

¹⁶³ *Ibid.*, *para* 1.

¹⁶⁴ *Ibid.*, *para* 5.

¹⁶⁵ *Ibid.*, *para* 8.

Member State is made under article 15.b of the Statute of the Council of Europe, and it is not binding.¹⁶⁶

In 2009 the Committee of Ministers issued a declaration on making gender equality a reality¹⁶⁷, which reviewed the progress in the twenty years since the Declaration on equality of women and men and called for further action. The Committee of Ministers noted that even though the legal status of women has improved over time, there is still a lot to be done, *de jure* and *de facto*.¹⁶⁸ The declaration drew attention to the underrepresentation of women in political and public life, highlighting and deprecating the gender-based discrimination against women that is continually a part of women's lives, at all ages and in all sectors of society. It emphasised that a genuine democracy must fully use the competences, the skills and the creativity of both women and men in order to build a society with a better quality of life for all.¹⁶⁹ The Committee continued to urge governments and parliaments of Member States to integrate a gender equality perspective in governance in order to achieve full gender equality.¹⁷⁰ One of the ways in which to achieve this, according to the Committee of Ministers, is to take the necessary measures to guarantee an equal sharing of responsibilities between women and men in private and family life and to create conditions favourable to the reconciliation of private and family life with professional life. It is important to take into account the different situations in women's and men's lives, the Committee of Ministers emphasized. Finally, the Committee pointed to the importance of encouraging men to participate actively in the discussions and activities aimed at achieving gender equality in all spheres of life.¹⁷¹

In the Charter of the United Nations, the non-discrimination between men and women is stated in the first paragraph of the preamble:

[We the Peoples of the United Nations] reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women [...]

The Statute of the Council of Europe and the European Convention for Human Rights both lack this policy statement in their respective preambles.¹⁷² However, the European Court of Human Rights frequently applies the evolutive theory of interpretation, which places a great emphasis on contemporary, cultural and sociological notions, *inter alia* gender equality.¹⁷³

¹⁶⁶ "About the Committee of Ministers", Council of Europe. See also the Statute of the Council of Europe, article 15b.

¹⁶⁷ Declaration: Making gender equality a reality, CM(2009)68final, 12 May 2009.

¹⁶⁸ Preamble of the Declaration: Making gender equality a reality.

¹⁶⁹ Ibid.

¹⁷⁰ Declaration: Making gender equality a reality, *para V*.

¹⁷¹ Ibid., *para 1*.

¹⁷² Eriksson, p. 102f.

¹⁷³ Eriksson, p. 109.

5.2 Policy Decisions of the Council of Europe on Abortion

Already in 1972, the Parliamentary Assembly adopted a recommendation on birth control and family planning in Council of Europe Member States¹⁷⁴. It considered that the last fifty years of socio-cultural changes in Western European societies meant that couples were claiming the right to decide the number and spacing of their children. The Parliamentary Assembly criticized the use of abortion and advocated other forms of contraception, hoping that promotion of alternative methods of family planning would decrease the number of abortions.¹⁷⁵

By the 1990s, the Parliamentary Assembly made it clear that women need access to contraceptives, abortion and information and education thereof. It is needed for their reproductive rights to be effective and for equality to be achieved between men and women, as the 1992 written declaration on the protection of women's life, dignity and rights (*cf. supra*) attested to.

In 2003, the Parliamentary Assembly adopted the resolution 1347 (2003) on the impact of the “Mexico City Policy” on the free choice of contraception in Europe¹⁷⁶, in which it stated:

In no case should abortion be promoted as a method of family planning. But in circumstances where abortion is not against the law, such abortion should be safe and accessible. This both avoids the health complications (and deaths) arising from unsafe abortions and allows family planning counsellors direct access to women who have recently undergone an abortion in order to help them avoid another unwanted pregnancy.¹⁷⁷

In 2004, the Parliamentary Assembly adopted two resolutions on the topic of reproductive health. It was both a plan on how to involve men in reproductive rights, and a strategy for the promotion of sexual and reproductive rights.

Resolution 1394 (2004) on the involvement of men, especially young men, in reproductive health¹⁷⁸ highlighted that traditionally issues of reproductive health have been considered “women’s issues”. Because it is women that are

¹⁷⁴ Recommendation 675 (1972) on birth control and family planning in Council of Europe member States, adopted by the Assembly on 18 October 1972.

¹⁷⁵ *Ibid.*, paras 4-5.

¹⁷⁶ Resolution 1347 (2003) on the impact of the “Mexico City Policy” on the free choice of contraception in Europe, adopted by the Assembly on 30 September 2003.

¹⁷⁷ *Ibid.*, para 6.

¹⁷⁸ Resolution 1394 (2004) on the involvement of men, especially young men, in reproductive health. adopted by the Standing Committee, acting on behalf of the Assembly, on 7 September 2004.

the ones who become pregnant, regularly women have been made to deal alone with the potential consequences of being sexually active.¹⁷⁹

Resolution 1399 (2004) on the European strategy for the promotion of sexual and reproductive health and rights¹⁸⁰ stated that every individual has the right to the enjoyment of the highest attainable standard of health, which is a state of complete physical, mental and social well-being¹⁸¹. To achieve reproductive health people must be able to avoid *inter alia* unwanted pregnancies. Individuals and couples should be able to regulate their fertility without adverse or dangerous consequences.¹⁸² A large number of Member States have very high standards of sexual and reproductive health, and the Parliamentary Assembly recommended that their experiences should serve as useful examples to other Member States in finding solutions to improve the sexual and reproductive health situation in their own countries. The Parliamentary Assembly also drew attention to the enormous disparity of standards between Member States, such as in the case of poor access, availability and affordability of sexual and reproductive health commodities and services, or even a lack of use thereof in Member States with a lower standard on sexual and reproductive health. It condemned the need in some Member States for illegal, backstreet and unsafe abortions. The Parliamentary Assembly called upon Member States to work together to design a European strategy for the promotion of sexual and reproductive health and rights, and prepare, adopt and implement comprehensive national strategies for sexual and reproductive health that would address *inter alia* reproductive health information and education, the high abortion rates (and the unsafe abortions in the Member States where abortion is illegal), and the lack of affordable, accessible and available sexual and reproductive health commodities and services.

Following resolution 1399 (2004), the Assembly adopted the text of recommendation 1675 (2004) on a European strategy for the promotion of sexual and reproductive health and rights¹⁸³. It recommended the Committee of Ministers to design a comprehensive European strategy for the promotion of sexual and reproductive health and rights¹⁸⁴, to promote an exchange of experiences between Member States on successful national sexual and reproductive health approaches and to promote a dialogue on sexual and reproductive health rights in public health policy.¹⁸⁵

¹⁷⁹ Resolution 1394 (2004), *para* 1.

¹⁸⁰ Resolution 1399 (2004) on a European strategy for the promotion of sexual and reproductive health and rights, adopted by the Assembly on 5 October 2004.

¹⁸¹ As defined by the WHO.

¹⁸² Resolution 1399 (2004), *para* 2.

¹⁸³ Recommendation 1675 (2004) on a European strategy for the promotion of sexual and reproductive health and rights, adopted by the Assembly on 5 October 2004.

¹⁸⁴ *Ibid.*, *para* i.

¹⁸⁵ Recommendation 1675 (2004), *para* iii.a-b.

In 2006, parliamentarian Christina Hägg presented the motion for resolution on abortion and its impact on women and girls in Europe¹⁸⁶. It focused on the fact that although abortion is legal (to various extent) in the majority of the Member States, women are still being denied abortions when they come to the hospital.¹⁸⁷ The motion called for the Member States of the Council of Europe to ensure that in the countries where abortion is legal, access to safe, acceptable, high-quality, affordable abortion services, and a full range of modern contraception, is within the reach of every woman within her community, with a particular focus on those women living outside urban areas. It is of fundamental value that women across Europe have the possibility to exercise their legal rights and not to be discriminated against.¹⁸⁸

In the report¹⁸⁹ from the Commission on Equal Opportunities for Women and Men following the motion, the Assembly was urged to take the stance pro-abortion. The Commission pointed out that a ban on abortion does not lead to fewer abortions, but to a higher number of illegal, unsafe, clandestine abortions, which are more traumatic and are more dangerous than legal abortions. The report also suggested that the Parliamentary Assembly should invite the governments of the Member States to guarantee women's effective exercise of their right to abortion. This entails lifting restrictions which hinder, *de jure* or *de facto*, access to safe abortion.¹⁹⁰

Following the report the Parliamentary Assembly adopted resolution 1607 (2008) on access to safe and legal abortion in Europe¹⁹¹. The Assembly took the view that:

A ban on abortions does not result in fewer abortions but mainly leads to clandestine abortions, which are more traumatic and increase maternal mortality and/or lead to abortion "tourism" which is costly, and delays the timing of an abortion and results in social inequities. The lawfulness of abortion does not have an effect on a woman's need for an abortion, but only on her access to a safe abortion.¹⁹²

While the Parliamentary Assembly did condemn the use of abortion as a family planning method¹⁹³, it voiced its concern that in many Member States numerous conditions were imposed that restrict the effective access to safe, affordable, acceptable and appropriate abortion services. The

¹⁸⁶ Motion for resolution: Abortion and its impact on women and girls in Europe, presented by Mrs Hägg and others, 24 January 2006, Doc 10802.

¹⁸⁷ *Ibid.*, para 2.

¹⁸⁸ *Ibid.*, para 4.

¹⁸⁹ Report on the access to safe and legal abortion in Europe, Committee on Equal Opportunities for Women and Men, 8 April 2008, Doc. 11537.

¹⁹⁰ Preamble of the report on the access to safe and legal abortion in Europe.

¹⁹¹ Resolution 1607 (2008) on the access to safe and legal abortion in Europe, adopted by the Assembly on 16 April 2008.

¹⁹² *Ibid.*, para 4.

¹⁹³ "[Abortion] can in no circumstances be regarded as a family planning method. Abortion must, as far as possible, be avoided", resolution 1607 (2008), para 1.

Assembly pointed out that these restrictions have discriminatory effects, since women who are well informed and possess adequate financial means can often obtain legal and safe abortions more easily. The Assembly also noted that, in Member States where abortion is permitted, the conditions are not always such as to guarantee women effective access to this right¹⁹⁴ (*cf. infra, Tysiac v. Poland, R.R. v. Poland and P. and S. v. Poland*). Whether the hindrances are a lack of local health care facilities, the lack of doctors willing to carry out abortions, the repeated medical consultations required, the time allowed for changing one's mind or the waiting time for the abortion, they all lead to a difficulty, or even practical impossibility, of accessing safe, affordable, acceptable and appropriate abortion services. The Assembly affirmed:

[...] the right of all human beings, in particular women, to respect for their physical integrity and to freedom to control their own bodies. In this context, the ultimate decision on whether or not to have an abortion should be a matter for the woman concerned, who should have the means of exercising this right in an effective way.¹⁹⁵

The Parliamentary Assembly invited the Member States of the Council of Europe to decriminalize abortion within reasonable gestational limits and to guarantee women's effective exercise of their right to access to a safe and legal abortion, both *de jure* and *de facto*. Further it recommended the Member States to allow women freedom of choice and to offer the conditions for a free and enlightened choice without specifically promoting abortion, and to ensure that women and men have access to contraception and advice on contraception at a reasonable cost. Non-judgmental sex information and education should also be made available. For women wanting an abortion because of family or financial pressure, counselling and practical support should be provided.¹⁹⁶

In January 2013, Parliamentary Assembly member Mr Luca Volontè of Italy posed a written question¹⁹⁷ to the Committee of Ministers, wherein he asked how a country could be pressured to legalise abortion in the name of the European Convention on Human Rights, which “does not enshrine a right to abortion”¹⁹⁸. Mr Volontè also asked why the Committee of Ministers decided to give precedence to the case of *A, B and C v. Ireland*, when “so many important cases of violations of human rights guaranteed by the Convention are treated under the ordinary procedure”¹⁹⁹.

Mr Volontè stated that according to the European Court of Human Rights no right to abortion is contained within the European Convention, and that

¹⁹⁴ Resolution 1607 (2008), *para* 3.

¹⁹⁵ *Ibid.*, *para* 6.

¹⁹⁶ *Ibid.*, *para* 7.

¹⁹⁷ “Imposing Abortion in Ireland”, Written question No. 622 to the Committee of Ministers, from Mr Luca Volontè, Doc. 13090, 15 January 2013.

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*

prenatal life is not in principle excluded from the scope of protection of the Convention. It is, according to Mr Volontè, within each Member State's margin of appreciation to decide when life begins. Mr Volontè criticizes what he believes to be the abuse of Convention system to impose an obligation upon Ireland that is contrary to the original intention of the drafters of the Convention.²⁰⁰

5.3 The Development of the Right to Abortion Within the European Court of Human Rights

The European Convention on Human Rights is the primary human rights instrument in Europe. The question of if, and if so to what extent, the Convention guarantee access to safe and legal abortion has been left open by the Strasbourg organs. The case of *Brüggemann and Scheuten v. the FRG*²⁰¹ was the first case to directly confront access to abortion as a right to privacy, under article 8. The Commission came to the conclusion that not every termination of pregnancy could be said to be a matter solely about the right to life of the mother because the life of the developing foetus is closely connected to the life of the mother.²⁰² In the report of the Commission, the three Nordic members wrote in the dissenting opinion of Mr. Opsahl:

And we take the view, personally, that laws regulating abortion ought to leave the decision to have it performed in the early stage of pregnancy to the woman concerned. [...] 'Fristenlösung' based on self-determination-- is the one most consistent with what we think a right to respect for private life in this context ought to mean in our time.²⁰³

In *H v. Norway*²⁰⁴, this view was upheld by the Commission. Abortion on social grounds in the fourteenth week of gestation was not contrary to the Convention. The cases that have reached the Court on the question of abortion are complaints of violation of the article 8 right of the applicants to self-determination in regard to procreation matters.²⁰⁵

In the next chapter, five cases of great importance for the development on the doctrine on abortion within the Council of Europe are presented.

²⁰⁰ "Imposing Abortion in Ireland".

²⁰¹ *Brüggemann and Scheuten v. the FRG* (App. no. 6959/75) 12 July 1977 Report of the European Commission for Human Rights (1981) 3 E.H.R.R. 244.

²⁰² Eriksson, p. 313, see also *Brüggemann and Scheuten v. the FRG*, para 61.

²⁰³ *Brüggemann and Scheuten v. the FRG*, para 2 of the dissenting opinion, see also Eriksson, p.313.

²⁰⁴ *H v. Norway* (App. no. 17004/90) 14 May 1992, found inadmissible, cf. Eriksson, p. 313f.

²⁰⁵ Eriksson, p. 314.

5.4 Margin of Appreciation – Different States, Different Standards

The margin of appreciation, although it is surrounded by a multitude of jurisprudence, is striking in its “casuistic, uneven, and largely unpredictable nature”²⁰⁶. The term refers to the scope of freedom of action governments enjoys in deciding how to fulfil their obligations under the European Convention on Human Rights.²⁰⁷ When the Convention was adopted in 1950 it was supposed to be the lowest common denominator for the Contracting States, a minimum standard of fundamental rights. For the Contracting States to defer sovereignty and to adhere to common standards of human rights was, and continues to be, difficult because of different cultural and legal traditions. The Convention is understood to be complementary to national systems, but ultimately subsidiary, which means that the enforcement of the Strasbourg organs ultimately depend on the good faith and cooperation of the Contracting States. In order to strike a balance between the uniform application of the Convention and the differing national views of human rights, the margin of appreciation has thus been developed.²⁰⁸ In the case *Handyside v. the UK*²⁰⁹ the European Court of Human Rights stated that:

[...]it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the “necessity” of a “restriction” or “penalty” intended to meet them.²¹⁰

The Court noted that the national authorities were in principle in a better position to assess if there is a “pressing social need”, and if this need justifies the interference of rights in the interest of “public morals”, thus whether a measure is “necessary in a democratic society” or not.²¹¹ According to Greer, the margin of appreciation cannot be said to have a wider scope than article 15 of the Convention, from which it stems. This means that the margin of appreciation is not applicable to non-derogable

²⁰⁶ Greer, Steven, “The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights” in *Human rights files No. 17* (2000), Council of Europe Publishing, Strasbourg, p. 5.

²⁰⁷ Arai-Takahashi, Yutaka, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (2002), Intersentia, Antwerpen, p. 2.

²⁰⁸ *Ibid.*, p. 3.

²⁰⁹ *Handyside v. the UK* (App. no. 5493/72) 7 December 1976.

²¹⁰ *Ibid.*, para 48.

²¹¹ Arai-Takahashi, p. 7.

rights, such as the right to life and the prohibition of torture.²¹² According to Arai-Takahashi the “clawback” clauses in articles 8 to 11 of the Convention which prescribe that an interference must be “necessary in a democratic society” presented the prototype for the margin of appreciation that made the judgment in *Handyside v. the UK* significant.

The application of the doctrine has been extended over time. National authorities have a margin of appreciation in evaluating whether a fair balance has been struck between the interest of society as a whole, and the rights of the individual. In repeatedly emphasizing the scope of the Contracting States’ sovereignty and the doctrine as an exercise of balancing rights, the Strasbourg organs have justified the doctrine of margin of appreciation for all Convention rights but four; the right to life, the prohibition of torture, the prohibition of slavery and forced labour and freedom from *ex post facto* laws.²¹³ In matters of morality the European Court on Human Rights has often allowed the Member States a wide margin of appreciation without for that matter letting it prevent the Court from scrutinizing and materially reconsidering decisions made by the domestic court (*cf. Open Door and Dublin Well Woman v. Ireland*, chapter 6.1).²¹⁴

²¹² Greer, p. 7f.

²¹³ Arai-Takahashi, p. 8.

²¹⁴ Eriksson, p. 246.

6 Cases Regarding the Right to Abortion from the European Court of Human Rights

In the previous chapter, the policy decisions of the Council of Europe on the issues of gender equality, abortion and reproductive rights were studied. In this chapter, the main cases on abortion in the European Court of Human Rights are presented. It is no coincidence that out of the five cases presented in the thesis, only two countries are represented; Ireland and Poland. Apart from Malta, they represent some of the most restrictive abortion legislations in the Member States of the Council of Europe. The cases are presented chronologically for the best overview of the Court's development of its policy on abortion. The cases pertain both to the freedom of and the right to respect for private life in regard to abortion. In this chapter I use the legal dogmatic method to study and present the cases.

In the next chapter, the cases are discussed and analysed in the context of the Council of Europe with regard to the margin of appreciation, States' sovereignty and the feminist theories of law, reproductive rights and gender inequality presented in chapter 2.

6.1 The Freedom of Expression in Regard to Abortion – Open Door and Dublin Well Woman v. Ireland

The case of *Open Door and Dublin Well Woman v. Ireland*²¹⁵ centre around two companies, the Open Door Counselling Ltd [hereafter Open Door] and Dublin Well Woman Centre Ltd [hereafter Dublin Well Woman] together with three Irish citizens, Ms Downes, Mrs X, and Ms Geraghty, and one U.S. citizen, Ms Maher. Ms Downes and Ms Maher were both employed by Dublin Well Woman as trained counsellors, and Mrs X and Ms Geraghty joined the application as women of child-bearing age.

Both Open Door and Dublin Well Woman were non-profit-making organizations²¹⁶ that provided a broad range of services relating to counselling and marriage, family planning, procreation and health matters. Among their wide range of services relating to women's health, it was agreed in the Supreme Court of Ireland that the organizations counselled pregnant women in a non-directive manner, in which abortion and

²¹⁵ *Open Door and Dublin Well Woman v. Ireland* (App. no. 14234/88; 14235/88) 29 October 1992.

²¹⁶ Open Door ceased to operate in 1988.

termination of pregnancy sometimes were discussed. If the pregnant woman wanted to consider the option of abortion, the organizations arranged for a referral to a medical clinic in Great Britain, where women had then obtained abortions. Dublin Well Woman also helped arrange the travel for pregnant women to these medical clinics, in certain circumstances.

In the national High Court, and later in the Irish Supreme Court, an injunction was made against the applicants, wherein the applicants and their servants or agents were “perpetually restrained from assisting pregnant women within the jurisdiction to travel abroad to obtain abortions by referral to a clinic, by the making for them of travel arrangements, or by informing them of the identity and location of and the method of communication with a specified clinic or clinics or otherwise”²¹⁷.

The European Court of Human Rights found, by fifteen votes to eight, that there had been a violation of article 10 freedom of expression of the Convention. The injunction interfered with the corporate applicants’ right to impart information, and there could be no doubt that the applicant counsellors’ right to impart information was interfered with as well. There was also an interference with the right to receive information, in the case of Mrs X and Ms Geraghty, should they become pregnant.²¹⁸ Although the Court could not accept the restriction upon the freedom of expression to be pursued in the aim of the prevention of crime, it did find that the restriction pursued a legitimate aim under article 10.2 of the Convention.²¹⁹ The 1983 referendum was used to show the stance of the majority of the Irish population on this issue of morality. Further, the Court found that the restriction of the freedom of expression was prescribed by law.²²⁰ However, the Court found that the restriction placed on the applicants was disproportionate to the aims pursued, and concluded that there had been a breach of article 10.²²¹

6.2 The Right to Private Life in Regard to Abortion

In *Open Door and Dublin Well Woman v. Ireland*, the Court answered to what extent abortion was protected under the Convention in regard to the freedom of expression. In the following four cases, the Court answered to what extent abortion is protected under the article 8 right to private life.

²¹⁷ *Open Door and Dublin Well Woman v. Ireland*, para 20.

²¹⁸ *Ibid.*, para 55.

²¹⁹ *Ibid.*, para 63.

²²⁰ *Ibid.*, paras 59 to 63.

²²¹ *Ibid.*, paras 69ff.

6.2.1 Tysic v. Poland

The applicant in the 2007 case²²², Ms Tysic, suffered from severe myopia. She already had two children when she became pregnant again in early 2000. The applicant was worried about her condition and sought the consultation of her doctors. Even though all three doctors concluded that due to pathological changes in her retina both the pregnancy and the delivery constituted a risk to her eyesight, they all refused to issue a certificate for the pregnancy to be terminated. Not only was her eye-sight at risk, but she also were at risk of her uterus rupturing, due to her two previous Caesarean sections. A general practitioner issued a certificate to this effect. In the second month of her pregnancy, the applicant's eye sight was determined to have deteriorated and the applicant contacted the State hospital in Warsaw to have her pregnancy terminated. When she arrived, the Head of the Gynaecology and Obstetrics Department of the clinic examined the applicant visually for no more than five minutes. He then made a note on the back of her certificate that her condition did not constitute grounds for an abortion. Consequently, the applicant gave birth to a child in November 2000. After the birth, the applicant's eye sight worsened seriously and approximately six weeks after the delivery she was taken to the emergency ophthalmological clinic in Warsaw. She faces the risk of going blind.

The Court found that there had been a violation of article 8 of the Convention in that the State failed to comply with its positive obligations to secure to the applicant the effective respect for her private life. The Polish abortion legislation does allow for abortion on grounds that the woman's health or life is in danger (*cf. supra*, the 1993 Act in chapter 4.2), and so the Court did not find it to be their task to examine whether abortion is a right guaranteed under the Convention.²²³ The Court referred to *Brüggemann and Scheuten* and repeated that legislation on the matter of interrupting pregnancy touches upon the sphere of private life "since whenever a woman is pregnant her private life becomes closely connected with the developing foetus"²²⁴. The Court reiterated that aspects of an individual's physical and social identity, including her right to personal autonomy and development, are encompassed, among other things, in the broad meaning of "private life". The right to private life means that the State has a positive obligation to secure to its citizens their right to effective respect for their physical and psychological integrity. Privacy and public interest are balanced in a State's regulation of abortion, but in the case of therapeutic abortion, the physical integrity of a pregnant woman must be included in the assessment of the State's positive obligation to secure it.²²⁵ In both the negative and the positive context of a State's obligations under article 8, a fair balance has to be struck between the individual and the community.²²⁶ This is where the State's margin of appreciation comes in. The rule of law is a fundamental

²²² *Tysic v. Poland* (App. No. 5410/03) 20 March 2007.

²²³ *Ibid.*, para 104.

²²⁴ *Ibid.*, para 106.

²²⁵ *Ibid.*, para 107.

²²⁶ *Ibid.*, para 111.

principle of a democratic society, and in order for a State to comply with its requisites, it is presupposed that the rules of domestic law provide a measure of legal protection for the rights in the Convention against the arbitrary interference by public authorities.²²⁷ It is of fundamental importance that the rights safeguarded in the Convention are not theoretical or illusory, but practical and effective.²²⁸

6.2.2 A, B and C v. Ireland

In the 2010 Grand Chamber case of *A, B and C v. Ireland*²²⁹, the applicants complained under article 8 of the Convention. Applicants A and B were Irish nationals, and applicant C was Lithuanian. The first two applicants complained that their article 8 right to respect for private and family life was violated, primarily because of the prohibition of abortion for health and well-being reasons in Ireland. The third applicant's main complaint was under the same article, for the alleged failure to implement the constitutional right to an abortion in Ireland in the case of a risk to the life of the woman.

Applicant A became unintentionally pregnant, and travelled to England in February 2005 for an abortion. She did not believe she was entitled to an abortion in Ireland. She already had four children, all of them in foster care because of her alcoholism. During all of her pregnancies she had suffered from depression. Before her unintentional pregnancy she had been sober for a year, and hoped to regain custody of her children. One more child put her health and the reunification of her family in jeopardy, which is why she decided to travel to England for an abortion. She had to borrow the money for travel expenses and procedures. In order to make it back to Ireland in time for a meeting with her youngest child, she travelled to Ireland the day after the abortion. When she began bleeding profusely on the train, an ambulance was called for. For weeks the applicant experienced pain, nausea and bleeding, but she did not seek further medical advice.

The second applicant, B, travelled to England in January 2005 to obtain an abortion she did not believe she was entitled to in Ireland. The pregnancy was unintended after the failure of emergency contraception. She was advised by two doctors that there was a substantial risk that the pregnancy was an ectopic pregnancy. Apart from the risk to her health, the applicant was not in a position to care for a child at this time of her life. She had to borrow money to travel to England in secret. When the applicant returned to Ireland, she started passing blood clots. After two weeks she sought follow-up care at a clinic in Dublin that was affiliated to the English clinic.

In March 2005 the third applicant, C, had an abortion in England. She did so believing that she could not establish her right to an abortion in Ireland. At the time, she had been treated for three years with chemotherapy for a rare

²²⁷ *Tysiac v. Poland*, paras 112f.

²²⁸ *Ibid.*, para 113.

²²⁹ *A, B and C v. Ireland* (App. no. 25579/05) 16 December 2010.

form of cancer. According to her doctor, it was not possible to predict the effect of the pregnancy on the cancer, and if she had chemotherapy in the first trimester it would be dangerous for the foetus. When she unintentionally became pregnant she did not know of it until after she had gone through a number of tests for cancer. The applicant consulted her general practitioner and several other medical consultants, but she believed she received insufficient information as to the impact of the pregnancy on her health and life and of the effect the tests would have on the foetus, due to the chilling effect of the Irish legal framework. When she returned to Ireland after the abortion, the applicant suffered prolonged bleeding and infection, due to the abortion being incomplete. The applicant alleged that the doctors provided inadequate medical care.

All three applicants complained under articles 3, 8, 13, and 14 of the Convention. The third applicant, C, also complained under the article 2 right to life. C complained about the absence of legislative implementation of article 40.3.3 of the Constitution. Without the legislative implementation, she argued there was no appropriate means of establishing her right to, on grounds of the risk to her life, a lawful abortion in Ireland. Applicants A and B complained about the prohibition of abortion in Ireland on ground of health and well-being.

The Court found that there had been a violation of article 8 in regard to the third applicant, C. The Court recalled that within the meaning of article 8 of the Convention, the notion of “private life” is a broad concept. It encompasses, *inter alia*, the right to personal autonomy and the right to personal development. It concerns, among other subjects, a person’s physical and psychological integrity and the decision whether or not to have a child. Citing *inter alia Tysic v. Poland*, the Court reiterated that legislation regulating the interruption of pregnancy touches upon the sphere of the private life of the woman, and although article 8 cannot be interpreted as conferring a right to abortion, pregnancy and the termination of pregnancy pertain uniquely to the woman’s private life:²³⁰

When a woman is pregnant, her private life becomes closely connected with the developing foetus. The woman’s right to respect for her private life must be weighed against other competing rights and freedoms including those of the unborn child.²³¹

The Court concluded that by the absence of any implementing legislative or regulatory regime providing accessible and effective procedure for establishing whether or not a woman qualifies for a lawful abortion in Ireland in accordance with article 40.3.3 of the Constitution, the Irish authorities failed to comply with their positive obligation under article 8 to secure for the third applicant effective respect of her private life.²³²

²³⁰ *A, B and C v. Ireland*, paras 212f.

²³¹ *Ibid.*, para 213.

²³² *Ibid.*, paras 267f.

In regard to the first and the second applicant, although the Court did not find any violation to their rights under the Convention, it discussed the prohibition in Ireland of abortion on the ground of health and well-being. It found that the prohibition of termination of pregnancy for health or well-being reasons constituted an interference with the first and second applicants' right to private life in the wide interpretation of the term. However, the interference was found to be justified under the second paragraph of article 8, fulfilling the requirements of being in accordance with the law, and being necessary in a democratic society for legitimate aims specified in the article.²³³ These are:

[...] national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.²³⁴

The Court found that the national legal provisions on the prohibition of abortion were clearly accessible, and it was clearly foreseeable that the first and second applicants were not entitled to an abortion under Irish law. As to the legitimate aim of the interference, the Court referred to *Open Door and Dublin Well Woman v. Ireland* and the 1983 Irish referendum on the stance of the majority of the Irish people on abortion. The applicants maintained that the will of the Irish public had changed since the 1983 referendum. The Court, however, did not see that the changes in Irish law (*cf. supra*, chapter 4.1 on the rejection of restrictive amendments to the Constitution and the adoption of the Thirteenth and Fourteenth Amendment to the Constitution) demonstrated a relevant change of public opinion.²³⁵ Referring *inter alia* to cases *Handyside v. the UK* and *Open Door and Dublin Well Woman v. Ireland*, the Court reiterated that State authorities are in principle in a better position to give an opinion on the content of the requirements of morals in their State, and the necessity of a restriction intended to meet them. The international judge is too far removed from the issue, and in this case the State's opinion on the matter should not be displaced, as the applicants did not show sufficiently indicative evidence of a change of the public mind.²³⁶

As to the necessity in a democratic society, the Court looked to the existence of a pressing social need and if the interference was proportionate to the legitimate aim pursued. A fair balance has to be struck between the competing interests of the applicants' right to private life and the profound moral values of the Irish people. In this respect the State enjoy a margin of appreciation. In determining the breadth of the margin of appreciation the State enjoy when determining any case under article 8, there is a number of factors to take into account. This margin will be restricted when a particularly important facet of an individual's existence or identity is at stake. However, in cases where there is no consensus between the Member

²³³ *A, B and C v. Ireland*, paras 212-231.

²³⁴ Article 8.2 of the European Convention on Human Rights.

²³⁵ *A, B and C v. Ireland*, paras 221-228.

²³⁶ *Ibid.*, paras 223.

States of the Convention as to either the relative importance of the interest at stake or the best way to protect it, the margin of appreciation is wider, especially in cases of sensitive moral or ethical issues. The Court pressed upon that there could be no doubt of the acute sensitivity of the moral and ethical questions raised by abortion, or of the importance of the public interest at stake. Therefore, it was within Ireland's margin of appreciation to determine the question of whether a fair balance was struck between the protection of the public interest and the conflicting interest of the applicants' right to private life under the Convention. Even though there is a consensus on allowing abortion on broader grounds than allowed under Irish law amongst a substantial majority of the Contracting States, the Court did not consider this to decisively narrow the broad margin of appreciation of Ireland.²³⁷

Because applicants A and B still had the option of travelling abroad for an abortion (as per the Thirteenth and Fourteenth Amendment of the Irish Constitution) and this information was freely available to them (following Ireland's compliance with the Court's decision in *Open Door and Dublin Well Woman v. Ireland*), and because their access to appropriate medical care in Ireland, the Irish prohibition of abortion on health and welfare grounds did not exceed the margin of appreciation accorded to the State.²³⁸ The Court concluded that in respect to the two first applicants there was no violation of article 8 of the Convention.

6.2.3 R.R. v. Poland

In the case of *R.R. v. Poland*²³⁹ the 29-year-old applicant wanted an abortion because she suspected that the foetus was affected with a malformation. At this point in time the applicant was married and had two children. An ultrasound in the eighteenth week of her pregnancy (20 February 2002) showed signs that the foetus could be suffering from malformation. The applicant made it clear that she wished to have an abortion if the suspicion proved to be true. From this point, the applicant was sent between hospitals and ultra sounds, each confirming a likely foetal malformation. In spite of this, her doctor refused to make the referral for a genetic examination by means of amniocentesis. The ultrasound could not be treated as the sole ground for a termination of pregnancy, and the applicant was refused a genetic examination until the twenty-third week of gestation, with a waiting time of two weeks for the results. The applicant requested a termination in writing on the 29th of March and on April 3rd she had a scheduled meeting with a consultant, which, when she arrived at the hospital, was rescheduled to a week later. On April 9th the applicant requested a termination of her pregnancy again, this time referring to the result of the genetic tests which she received that very same day. The presence of Turner syndrome in the foetus was confirmed by the results of the genetic test. By this time the

²³⁷ *A, B and C v. Ireland*, paras 230-236.

²³⁸ *Ibid.*, paras 240f.

²³⁹ *R.R. v. Poland* (App. no. 27617/04) 26 May 2011.

doctors refused to carry out the termination because it was too late in the pregnancy; the foetus was able to survive outside the mother's body. The applicant gave birth in July 2002 to a girl with Turner syndrome.

The Court found that there had been a violation of articles 3 and 8 of the Convention. For the relevancy of this thesis, the violation of article 8 is of interest.

Reiterating that private life is a broad concept, and that the notion of private life also applies to the decision whether or not to have a child, the Court stated that the decision of a woman to continue her pregnancy or not falls squarely in the sphere of private life. Therefore, legislation regulating the interruption of pregnancy touches upon the sphere of private life.²⁴⁰ The protection of the individual against the arbitrary interference by public authorities is the essential object of article 8. Any interference with the right to private life must be justified by the terms in the second paragraph of the article (*cf. supra A, B and C v. Ireland* for a comprehensive discussion on the matter, and also *Tysic v. Poland*). Furthermore, the Court noted, in the positive obligation of the State to respect the right to private life there is a right to the effective respect for its citizens' physical and psychological integrity. As shown in *Tysic v. Poland* and *A, B and C v. Ireland*, this includes the protection of individual's rights and the implementation of specific measures in the context of abortion.²⁴¹

The Court again held that the issue of when life begins should be left to each State's margin of appreciation, although it referred to the evolutive interpretation of the Convention. The evolutive interpretation of the Convention reflects that the Convention is a "living instrument which must be interpreted in the light of present-day conditions"²⁴². The reason for the Court taking the position that this issue is within the State's margin of appreciation is that it has not yet been resolved within the majority of the Contracting States. There is no European consensus on the definition, legally or scientifically, of when life begins. However, there *is* a substantial majority consensus among the Contracting States on allowing abortion. In accordance with the approach in *A, B, and C v. Ireland*, the Court stated that it was for the State to balance the conflicting rights of the mother and the unborn.²⁴³ In the context of the negative obligation of the State to respect the individual's right to private life, once the decision is made for under which circumstance abortion is permitted in the State, the legal framework should reflect this in a coherent manner, adequately weighing the conflicting interests and in accordance with the Convention (*cf. supra A, B and C v. Ireland*). A fair balance has to be struck between the competing interests of the individual and the community in both the context of positive or negative obligations. The rights guaranteed by the Convention are not supposed to be theoretical or illusory, but practical and effective, and there must be legal

²⁴⁰ *R.R. v. Poland*, paras 180f.

²⁴¹ *Ibid.*, paras 183-185.

²⁴² *Ibid.*, para 186.

²⁴³ *Ibid.*

protection against arbitrary interferences by public authorities provided in the domestic law, or the rule of law is undermined.²⁴⁴ Reiterating its findings in *Tysic v. Poland*, the Court stated that a State has a positive obligation to create a procedural framework that enables a woman to exercise her right of access to a lawful abortion, if that State has adopted legislation allowing abortions, acting within the limits of its margin of appreciation.²⁴⁵

6.2.4 P. and S. v. Poland

In *P. and S. v. Poland*²⁴⁶, a mother and a daughter were the applicants. The first applicant, a 14-year-old girl had become pregnant as a result of a rape in early April 2008. Together the applicants decided that an abortion was the best choice for the girl. The District Prosecutor issued a certificate stating that the pregnancy was the result of unlawful sexual intercourse with a minor under 15 years of age. In their pursuit of a referral to obtain an abortion, they were met by the opposition of medical practitioners, religious leaders, anti-abortion protesters and even the police. The hospital staff at the hospital where the first applicant tried to obtain an abortion attempted to convince her of continuing her pregnancy, despite her own wishes and her young age. The hospital leaked the sensitive information about her to the press, and she was harassed about her decision by phone and in person by people she did not know. By way of the medical staff a catholic priest was involved, with no question as to the faith of the girl or her family. After a long process the girl was allowed an abortion in June 2008, in a hospital approximately 500 miles away from her home, in a clandestine manner, although the termination was lawful.²⁴⁷

The Court found that there had been a violation of articles 3, 8 and 5.1 of the European Convention on Human Rights. The violation under article 8 was in regard to both applicants concerning the determination of access to lawful abortion and the disclosure of the applicants' personal data. The first applicant's rights under article 5.1 and article 3 were also violated. For the relevancy of this thesis, the violation of article 8 in regard to the determination of access to lawful abortion is of interest and is discussed now.

The reasoning of the Court for a violation under article 8 was that the authorities failed to comply with their positive obligation to secure the applicants effective respect for their private life. The Court noted that the Convention does not confer a right to abortion, *cf. Tysic v. Poland, A, B,*

²⁴⁴ *R.R. v. Poland*, paras 189-191.

²⁴⁵ *Ibid.*, para 200.

²⁴⁶ *P. and S. v. Poland* (App. no. 57375/08) 30 October 2012.

²⁴⁷ Because of time and space constraints, only the facts of relevance to the discussion on abortion in regard to the right to private life are presented here. However, I recommend the reader to read the details of the case in full for the best understanding of the difficulty of obtaining an abortion for the applicants.

and C v. Ireland and *R.R. v. Poland*.²⁴⁸ The discussion of the Court on this issue mirrors the discussion in the three previous cases. The absence of a common approach within Europe as to the beginning of life leads to the importance of examining national legal solutions as applied to the circumstances of the individual case. It is of particular interest that the individual rights and the public interest are balanced fairly against one another.²⁴⁹

The case at hand differed from the cases *Tysi c v. Poland* and *R.R. v. Poland* in that it concerns an unwanted pregnancy that was the result from rape, one of the grounds under the 1993 Act for lawful abortion (*cf.* chapter 4.2).²⁵⁰ Even though the first applicant had a right to have effective respect of her right to private life under article 8, and thus obtain a lawful abortion, the Court noted that the medical staff involved in the applicant's case did not consider themselves obliged to carry out the procedure. Procrastination and confusion surrounded the determination of the first applicant's access to legal abortion, and the applicants were given misleading and contradictory information.²⁵¹ For the exercise of personal autonomy the effective access to reliable information on the condition for the availability of lawful abortion and the relevant following procedures are necessary. All the hinders that that the applicants met in this time sensitive issue meant that there was a striking discordance between the theoretical right to an abortion and the practical implementation of such a right.²⁵²

²⁴⁸ *P. and S. v. Poland*, para 96.

²⁴⁹ *Ibid.*, para 97.

²⁵⁰ *Ibid.*, para 100.

²⁵¹ *Ibid.*, para 108.

²⁵² *Ibid.*, para 111.

7 Analysis

In the previous chapter, the landmark cases on the issue of abortion from the European Court of Human Rights were presented. As is evident, Poland and Ireland are two of the States in Europe that struggle with ensuring the Convention rights of their citizens on the issue of abortion. Although the discussion on abortion encompasses a battery of rights, such as the right to life, the freedom from torture, and the right to effective remedy, the two that figure most prominently is the right to private life (article 8) and the freedom of expression (article 10). In this chapter, the policy decisions of the Council of Europe on gender equality and abortion are analysed together with the cases from the European Court of Human Rights. The theories and models of explanation that were introduced in chapter 2 are used to form a coherent analysis.

The findings of this thesis are summarized in this chapter, showing the conclusion and my hopes and recommendations for the future. A moral and ethical perspective permeates this analysis, because the issue is moral and ethical by definition.

This analysis does not include a discussion of the right to life of the foetus, nor is there a discussion on the right to abortion under article 2 in the Convention, the right to life. It is an interesting question that inevitably comes up when abortion is discussed, but it falls outside the scope of this thesis.

7.1 Gender Equality in Decision-Making and Its Importance for the Right to Abortion

All human beings are born free and equal. In a utopia where people were treated like this, the fight for gender equality would be obsolete. Unfortunately, there is a structural discrimination against women. The equality between women and men in private and family life is an important step of the way to creating a gender equal society.

If women's voices are not heard, the international human rights lose their universal applicability. States and the international order lack women in the decision-making process. The Committee of Ministers adopted a recommendation to the member states, asking them to work for an equal representation of both genders in the public and political life. When women are not part of the decision-making process, women's needs are not reflected in the legislation to the same extent that men's needs are. Why is this discrimination in regard to abortion not more politically interesting? It is something that potentially affects all women, and in its extension all men. It

is strange how the structural discrimination against women do not get the proportionate response. An interesting note is that out of the *twenty-three* judges in the case of *Open Door and Dublin Woman Well v. Ireland*, one was a woman. Keeping in mind that this was over twenty years ago, it might not be very shocking. However, women continue to hold a disproportionately low number of seats in e.g. the European Court of Human Rights. The Council of Europe has acknowledged this and is working towards a greater gender equality.

The subordination of women is seen by some as a natural state, not possible to change with legislation and politics. With this view, women will never become more than second-class citizens, and rights that pertain specifically to women – such as the right to abortion – will not get international or domestic support. The subordination of women is maintained by patriarchal interests, values and institutions. Law is shaped by male values; it is made for men, by men. Reproductive policies have been based in communitarian ideals, in which higher birth numbers means a greater population, which in turn is indicative of a powerful State. The problem with this approach is that the communitarian ideal does not always match the individual's needs or wants – or rights. Therefore the communitarian ideal may favor a restrictive approach towards abortion, when, from a woman's perspective, a liberal abortion policy is preferred.

If women are allowed to take responsibility over their own reproductive choices, they are empowered in other areas of life as well, e.g. decision-making within the household and in economic and educational matters. If women are empowered in these spheres, it is not a long way to go before women will be participating in political and public decision-making as well, leading in turn to a more gender equal legislation over all. This positive feedback leads to an ideal society that we should all strive for, because a gender equal society is a requirement for genuine democracy, as stated by the Committee of Ministers in their 1994 reply to the Parliamentary Assembly's recommendation. The Parliamentary Assembly stressed in its recommendation to the Committee of Ministers that the fundamental rights of women and girls are an inalienable, integral and indivisible part of universal human rights. The lack of women in political life has been one of the reasons that women's rights are sometimes seen as secondary to human rights in general. However, the number of women in public and political life is increasing, and with gender equality in the decision-making powers come greater gender equality in the private life of individuals. When gender equality is achieved in both the public and the private sphere, the human rights of women will no longer be regarded as subordinate rights. The Committee of Ministers answered that it was prepared to do its utmost to work for the equal participation of men and women in decision-making. With the 2003 recommendation the Committee of Ministers sent a clear message to the Member States that a balanced representation of women and men in public and political decision-making is necessary for a genuine democracy and a step on the way to achieve gender equality. It is clear that

the Council of Ministers is working towards greater gender equality, but social change takes time.

The importance of gender equality in regard to abortion is a two-way street. Recalling the statement of the undersigning members of the Parliamentary Assembly's 1992 written declaration, equality in the sphere of private life entails that both men and women have the right to respect for their right to self-determination and private life, including reproductive choices. The free choice of motherhood for women is an established fact in democratic societies. The 1992 written declaration noted that the vast majority of Member States to the Council of Europe have liberal legislations in regard to abortion. Still, the European Court of Human Rights did not find this enough to call it a European consensus, choosing not to interpret a right to abortion under the Convention in *A, B and C v. Ireland*.

It is important to keep in mind that women and men face different situations in their lives, and it is important to take this into account when working for a more gender equal society. The Committee of Ministers pointed this out in its 2009 declaration. One such glaringly obvious situation is pregnancy. Although men are part of creating a new life, too often women are the ones left to face the consequences of sexual relations, as mentioned in the Parliamentary Assembly's resolution from 2004 on how to integrate men into issues of reproductive rights. Men care about reproductive rights, but their lives are not formed by it (or by the lack of it) in the same way as women's lives. This is again an instance where the equal representation of men and women in decision making bodies would make a great impact.

The Council of Europe has recognized the structural discrimination against women, both *de jure* and *de facto*. Studying the structures of gender inequality, it is at the above-individual level these structures can be discerned. It is not helpful for the analysis that one medical practitioner in one of the Polish cases hinder a woman from obtaining a lawful abortion. However, when several medical practitioners in all of the presented Polish cases hinder the lawful procedure, this is a pattern and it is indicative of a structural discrimination. The medical practitioners acted like they felt no obligation to perform a lawful termination of pregnancy, the Court noted in *P. and S. v. Poland*. The lack of procedural safety to ensure the effective respect of the women's right to private life in these cases were appalling. The resolution on access to safe and legal abortion in Europe, adopted by the Parliamentary Assembly in 2008, urged the Committee of Ministers and the Member States to take action towards ensuring access to safe, legal and available abortions. It seems that often the call for a less restrictive abortion policy and legislation is prefixed by the statement that abortion should not be encouraged, but is more of a "necessary evil". In the report on access to safe and legal abortion in Europe the Commission on Equal Opportunities for Women and Men stated that abortion should never be considered a method of family planning and must be avoided as far as possible. Also in the ICPD programme it was stated that in no case should abortion be promoted as a method of family planning.

Law should be used to work for social change, but policy decisions and external pressure must be used to make the law change. Although the political will to influence the few States in Europe that still have restrictive abortion legislation is present, as seen by the policy decisions of the Council of Europe on the issue of abortion and reproductive rights (*cf. inter alia* resolution 1607 (2008) from the Parliamentary Assembly), it is difficult to bring social change in a top-down manner. The social change is more organic when it stems from the public, which affect the legislation over time. As Richardson and Sandland note, the change in law will not come from logic within the law itself. It is the external forces that change law, and it is welcomed that the Council of Europe is adopting policies on gender equality and reproductive rights that will work toward a common European consensus on these issues. Some human rights do not grow organically to include those who need them the most. Then, action needs to be taken and sometimes culture, tradition and religion has to step aside for the rights of the individual. The democratic majority should not be able to restrict an individual's right, as Cook writes. The possibility of a democratic majority to force a religious view not shared by all the citizens upon them is very relevant. In the case of Mrs Halappanavar, as a Hindu, she was refused an abortion that could have saved her life because of Roman Catholic values. The question Ross poses of whose decision an abortion should be is extremely poignant – should the religious majority or the woman in question be the one to decide? In both Ireland and Poland the Roman Catholic Church has a strong hold; in Ireland almost eighty-five per cent identify as Catholic, and in Poland the number is close to ninety per cent. Still, for women to have true personal autonomy, I believe the decision of abortion should lie with the woman.

Lee wrote that women must be at the centre of the discussion about abortion. For a woman to be in control of her life, the woman must also be able to control her body. Furthermore, for a woman to have genuine self-determination, Mr Opsahl and the other Nordic judges in *Brüggemann and Scheuten v. the FRG* support this view in their dissenting opinion. They claimed it is the most consistent with the idea of self-determination to leave the decision of abortion to the woman herself. Bunch explained it as the physical territory of this political struggle is women's bodies.

The context is important; there are social, economic and cultural aspects to consider when analysing the 'choice' of abortion. For example, women who are poor and live in rural areas may not have the option to have an abortion, because it would be too expensive. The resolution 1607 (2008) from the Parliamentary Assembly highlighted this issue, and called for more inclusive abortion politics in the Member States. In some States, religious morals dictate that abortion is wrong, and thus make a great impact on women's choice. Furedi described how women she interviewed told her that they thought that abortion was wrong, but for them, it was the best choice and the right thing to do. This further supports the statement of the

resolution 1607 (2008) that the legality of abortion does not affect women's need for the procedure, only the access to safe and legal abortion.

Information and education on reproductive rights have also been called for in several of the policy decisions of the Council of Europe. It is necessary for the possibility to make an informed choice in reproductive matters, and especially the choice of abortion. Reproductive rights and the right to abortion need to be part of the public debate. Men, although they have an interest in reproductive rights being regulated, do not hold the same stake in the question as women do. For women this is a question of life and death.

Mr Volontè's question on why the case of *A, B and C v. Ireland* should get precedence when so many other important cases of human rights violations are treated in the ordinary procedure shows a complete disregard for how restrictive abortion legislation has a negative impact on half the population of the world. In this case Mr Volontè embodies the idea that women's rights are not the same as human rights. He has a gendered perception of the law, in which "women's issues" are regarded as secondary.

7.2 Comparison of the Abortion Legislation in Ireland, Poland and Sweden

It is important to bear in mind that it is difficult to make a compromise where the States keep their sovereignty, but where they can also be affected in their stance on certain human rights issues. To achieve the successful cooperation of States, the Court cannot alienate them, or take a too strong position on issues that have a high moral value within the Member States. The Convention is understood to be complementary to the national systems, and the enforcement of the decisions of the European Court of Human Rights and of the Council of Europe ultimately depends on the good faith and cooperation of the Contracting States.

Religion is a very important factor in the development of national abortion legislation and policies. Both Ireland and Poland are countries with a very high percentage of Roman Catholic population. Sweden is a secularized country. The influence of religion can be discerned in the legislation. In Poland the right to life begins at conception. The Irish Constitution states that the mother and the unborn have the equal right to life. In Sweden, the Abortion Act of 1975 gives the woman free access to abortion on her own application until the eighteenth week of gestation. Using religious or cultural traditions as a reason to keep women subordinate to men should not be possible. However, in the case of Ireland, the morality of the population (as shown in the 1983 referendum) was given considerable weight by the European Court of Human Rights in the cases *Open Door and Dublin Well Woman v. Ireland* and *A, B and C v. Ireland*. The religious morals therefore dictated to what extent women decide over their bodies.

The differences between the cases from Ireland and Poland is that in Ireland the question is in regard to the freedom of expression surrounding abortion, and the right to abortion itself – the to be or not to be of legal abortion. In the Polish cases, the women have all been entitled to a lawful termination of pregnancy under the domestic legislation, and as such the failure of the State to ensure the respect for this right meant a violation of article 8. Both Ireland and Poland have an exception to their strict abortion laws if the pregnant woman's life is in danger. In Ireland's case, this does not entail a right to have an abortion in Ireland, but an implicit right to travel to another State to have an abortion performed. This is both costly and time consuming. As is evident from the cases of the European Court of Human Rights (*cf. supra*, chapter 6.2), even though there are exceptions to the ban on abortion, it is difficult to obtain an abortion in a country where the opposition is great, and where it is also represented by State officials and those acting under the State's authority.

Legality of abortions is not enough to guarantee that all abortions are safe abortions. Illegality of abortion, however, leads to conditions under which most abortions are unsafe, and this issue is important to solve. In Sweden, a State with a liberal abortion legislation, it is interesting to note that the number of clandestine abortions is officially zero. The aim with liberal abortion legislation is to make sure abortions are regulated and can be provided to those who wish to have access to them in a safe and legal manner. The resolution on access to safe and legal abortion from the Parliamentary Assembly was an important step in showing which way the Council of Europe leans on this heavily politicised question. However, the failure – or unwillingness – of the Committee of Ministers to make this a recommendation to the Member States shows the difficulty in taking a strong position on this issue. The political consequence of taking a strong view on abortion, e.g. by the European Court of Human Rights interpreting a right to abortion under the Convention, could be that Member States like Ireland and Poland protest, and maybe even walk out. As stated before, the enforcement of the decisions of the European Court of Human Rights and of the Council of Europe ultimately depends on the good faith and cooperation of the Contracting States.

When the Twenty-Fifth Amendment to the Irish Constitution was suggested, the fear was that women would start claiming that they were suicidal for obtaining an abortion. The Prime Minister of Ireland, when he made that statement, voiced a fear of social and eugenic abortion. It is grounded, however, in the very real need for abortion. The need for lawful abortion is ever-present. As both the WHO report and the report on access to safe and legal abortion in Europe pointed out, without a safe and legal alternative of abortion, unsafe and clandestine abortions will take place. The legality of abortion does not affect the need for abortion, just the accessibility of safe abortion.

In Ireland, the Court's decision in *A, B and C v. Ireland* sparked a debate on how to best implement the ruling into Irish legislation, without for that matter straying too far from the State sovereignty. An expert committee was set up to investigate the implications of the case on Irish legislation. The new legislation was proposed in April 2013. With the proposed legislation, abortion will be permitted in cases where the pregnant woman's life is in danger, but only if two medical practitioners attest to this in good faith. The jail sentence of up to fourteen years if doctors are found to carry out "unnecessary" abortions is going to put a damper on the will to carry out the procedure.

With this legislation, the Irish Government has followed the ruling in the case of *A, B and C v. Ireland*, which called for a clear and accessible regulatory framework. It is not really a liberalisation of the abortion right, although it permits abortion in life-or-death situation. It will probably have a deterring effect, because medical practitioners will err on the side of caution – in this case this does not mean to perform a termination of pregnancy, but to wait until it is absolutely clear there is a "real and substantial" risk to life of the woman. The European Court of Human Rights referred to this chilling effect in the case of *Tysic v. Poland*, and stated that provisions regulating lawful abortion should be clearly formulated in a way to alleviate the effect.²⁵³ If there is a legal right to abortion, the legislation must not be formulated in such a way that the effective enjoyment of this right is blocked. Worth pointing out is that the bill makes it absolutely clear that it is the woman's decision in the end whether to have an abortion or not. This can be connected to Denbow's fear that allowing a "liberal" abortion legislation (which this is not, keep in mind) will take away the autonomy of women who want to choose a pregnancy, in spite of the societal views of e.g. her suitability or her possibility to care for a child. It is important to note that although the bill gives the woman the final decision on whether to *opt out* of the procedure or not, it does not give her a right to *choose* an abortion, other than for situations which are life-threatening. The Protection of Life during Pregnancy Bill 2013 is not yet adopted. If it is adopted, it is too early to know what the impact of it will be.

In a comparison between these three Contracting States to the European Convention on Human Rights, it is obvious that the Convention and the Court has allowed for a wide margin of appreciation on the issue of abortion. In Sweden no reason must be given by the woman for a termination of pregnancy, and so it is freely available up until the eighteenth week. If the life of the woman is in danger because of the pregnancy, or the foetus is not viable, there is no gestational time limit for the abortion either. In Poland abortion is illegal except for in a handful of cases. In Ireland abortion is illegal except for saving the life of the mother, in limited circumstances, but the legislation on this point is not sufficiently clear and accessible (*cf. A, B and C v. Ireland*).

²⁵³ *Tysic v. Poland*, para 116

7.3 The Protection of the Right to Abortion in The Council of Europe System

For the idea of the individual's human rights and the rule of law, all individuals are presumed to have an autonomous sphere. If the State is the one to decide over women's bodies in regard to abortion, then women cannot be said to have a right to self-determination or personal autonomy. In States where the right to abortion is restricted, women are viewed as incapable of taking the right decisions (whichever they might be) in regard to abortion. This was evident e.g. in the Swedish patronizing opposition to the 1975 Abortion Act.

In the two Irish cases analysed here, the question was if there was a right to abortion at all in the State, and if the freedom of expression could be restricted on the matter out of a necessity to protect the public morality. In the Polish cases, the existence of a possible right to abortion in the Council of Europe system was not discussed, as the national legislation had already regulated situations in which abortion is lawful. In *Tysic v. Poland*, the abortion constituted a risk to health of the mother, in *R.R. v. Poland* the ground for abortion was the suspected malformation of the foetus, and in *P. and S. v. Poland* the pregnancy was the result of a criminal act. Each of these cases falls under a situation under which the applicants had a right to lawful abortion in the domestic legislation. In all of these cases, the women were restricted in their tries to obtain an abortion, both *de jure* and *de facto*.

The European Court of Human Rights have focused on two of the rights in the Convention when it has met the issue of abortion; the right to private life in article 8, and the freedom of expression in article 10. The margin of appreciation is applicable for both articles.

In the case of *Open Door and Dublin Well Woman v. Ireland*, the Court avoided the question of the right to abortion, but determined that the injunction against the applicants which hindered them from imparting and receiving information about abortion services was disproportionate to the legitimate aim of the protection of the public morals. To completely silence the counselling services on matters of abortion, that are legal in other Contracting States, and which may be crucial to women's life, health or well-being, is an overly broad restriction. It can be seen that the Court held that the right to receive and impart information on matters that are of central importance for women's lives, health and well-being cannot be restricted unless they are proportionate to a legitimate aim.

The right to private life under article 8 of the Convention in regard to abortion have been discussed at length in the European Court of Human Rights. From the case law of the European Court of Human Rights, it is clear that the question of the right to abortion can be divided into two questions under the article 8 right to private life in the Convention; the right

to abortion, and the right to effective respect for the rights under the convention.

In *Tysic v. Poland* the Court found that the State had failed to comply with its positive obligations to secure to the applicant the effective respect for her private life. The Court referred to *Brüggemann and Scheuten v. the FRG* and repeated that legislation on the matter of interrupting pregnancy touches upon the sphere of private life. An individual’s social and physical identity is part of the meaning of private life within the Convention. Consequently, so is her personal autonomy and development. This was reiterated in *A, B and C v. Ireland*, *R.R. v. Poland* and *P. and S. v. Poland*. The State has a positive obligation to secure to its citizens their right to effective respect for their physical and psychological integrity under article 8 of the Convention. This means that where the State has adopted a regulatory framework on abortion, the physical integrity of a pregnant woman must be included in the assessment of the State’s positive obligation to secure it. The State must ensure the legal protection of the Convention rights. If the rights safeguarded in the Convention are nothing more than theoretical or illusory, the Council of Europe system does not work.

In *Tysic v. Poland*, the Court explicitly stated that it did not find it to be the Court’s task to examine whether abortion is a right guaranteed under the Convention, because in this case there was already a national right to the procedure under certain circumstances. As such, the right to have effective respect of a right that falls under the scope of article 8 – which legislation of abortion does, according to the Court in the case and also in *R.R. v. Poland* and *P. and S. v. Poland* – must be ensured by the State.

In *A, B and C v. Ireland* the Court pressed on the fact that “private life” concerns, among other aspects, a person’s physical and psychological integrity and the decision whether or not to have a child. The Court reiterated that legislation regulating the interruption of pregnancy touches upon the sphere of the private life of the woman, and although article 8 cannot be interpreted as conferring a right to abortion, pregnancy and the termination of pregnancy pertain uniquely to the woman’s private life.

The pregnant woman’s right to life must be weighed against competing interests. In the Irish Constitution, equal protection is given to the life of the mother and the unborn, but when this balancing means that the choice is between a dying foetus and the mother, the text has been exceedingly unclear. This is what happened in in the tragic incident of Mrs Halappanavar. She and her foetus had equal right to life according to the Irish Constitution, but even though Mrs Halappanavar was miscarrying, the legislation was not clear enough to ensure that the medical practitioners knew what to do. The Court concluded in *A, B and C v. Ireland* that a regulatory framework with an accessible and effective procedure for establishing whether or not a woman qualifies for a lawful abortion in Ireland in accordance with article 40.3.3 of the Constitution was needed to safeguard the Convention right of private life. The Expert Group presented

their report on how to make the Irish national law comply with the judgement in *A, B and C v. Ireland* only a month after the death of Mrs Halappanavar. The bill following this report was discussed above.

The Court also discussed the prohibition in Ireland of abortion on the ground of health and well-being in the case of *A, B and C v. Ireland*. It found that the prohibition of abortion for health or well-being reasons constituted an interference with the right to private life. However, the interference was found to be justified under the second paragraph of article 8, fulfilling the requirements of being in accordance with the law, and being necessary in a democratic society for legitimate aims specified in the article.

As to the legitimate aim of the interference, the Court referred to the 1992 case *Open Door and Dublin Well Woman v. Ireland* and the 1983 Irish referendum on the stance of the majority of the Irish people on abortion. The applicants argued that the will of the Irish public had changed since the 1983 referendum. The Court, however, did not see that the changes in Irish law (*cf. supra*, chapter 4.1 on the rejection of restrictive amendments to the Constitution and the adoption of the Thirteenth and Fourteenth Amendment to the Constitution) demonstrated a relevant change of public opinion. The Court reiterated that State authorities are in principle in a better position to give an opinion on the content of the requirements of morals in their State, and also in a better position to assess the necessity of a restriction intended to meet them. It was within Ireland's margin of appreciation because of the lacking European consensus, and the importance of the public interest. Even though a majority of the Contracting States to the Convention have a consensus on abortion that is more liberal than the legislation in Ireland, the Court did not consider this to decisively narrow the broad margin of appreciation of Ireland. The applicants had not shown sufficiently indicative evidence of a change of the public mind either.

The applicants A and B still had the option of travelling abroad for an abortion and this information was freely available to them. Therefore, the Irish prohibition of abortion on health and welfare grounds did not exceed the margin of appreciation accorded to the State.

In the case *A, B and C v. Ireland*, the European Court of Human Rights left the door open for a scenario in which they could narrow the State's margin of appreciation so much as to confer a right to abortion under the Convention. If the first and second applicants had shown that the public's morality in the question of abortion had changed since the 1983 referendum, the Court hinted that the margin of appreciation of the State on the issue would have been made more narrow.

In *R.R. v. Poland*, the Court reiterated that any interference with the right to private life must be justified by the Convention. The positive obligation of the State to respect the right to private life entails a right to the effective respect for its citizens' physical and psychological integrity. The physical and psychological integrity includes the protection of individual's rights and

the implementation of specific measures in the context of abortion, as the Court had already stated in *Tysic v. Poland* and *A, B and C v. Ireland*.

The Court referred to the evolutive interpretation of the Convention in *R.R. v. Poland*. The evolutive interpretation reflects that the Convention is a living instrument, and that it must be interpreted in the light of present-day conditions. Again, the Court took the position that because the issue of when life begins, and from what point in time it is protected, is not resolved within the majority of the Member States, the issue of abortion is within the State's margin of appreciation. The Court reiterated that the legal framework should reflect under which circumstances abortion are permitted in the State in a coherent manner, adequately weighing the conflicting interests and in accordance with the Convention. The competing interests of the individual and the community must be fairly balanced. The Conventional rights are not supposed to be theoretical or illusory, and there must be legal protection against arbitrary interferences by public authorities provided in the domestic law, or the rule of law is undermined.

In 2012, in *P. and S. v. Poland*, the Court found again that the authorities failed to comply with their positive obligation to secure for the applicants the effective respect for their private life. Again, The Court noted that the Convention does not confer a right to abortion. The continued absence of a common understanding within Europe of when life begins left the question of balancing the individual's rights against the public interest to the State.

Even though the first applicant had a right to have effective respect of her right to private life under article 8 and obtain a lawful abortion, the medical staff involved in the applicant's case did not consider themselves obliged to carry out the procedure. For the exercise of personal autonomy, the effective access to reliable information and the availability of lawful abortion are necessary. The applicants were met by many hinders in this time sensitive issue, effectively meaning that there was a disaccord between the theoretical right to an abortion and the practical implementation of such a right.

The ability to make decisions free from external pressure is a fundamental part of being a free individual, as Eriksson points out, and the control over one's own body is a prerequisite for full human participation in social and communal life. The Court has noted that this right to self-determination falls under the scope of article 8 and although it has not - yet - used the evolutive interpretation to confer a right to abortion in the Convention, it has left the possibility open.

The conclusion to be drawn from how the Court has debated the issue of abortion under article 8 is that as long as there is no European consensus on from which point in time the right to life is protected, the Court will not take a stance in this question. However, in *A, B and C v. Ireland*, the Court hinted at restricting the margin of appreciation of a State on the issue of abortion. If the applicants had shown that the public morals in Ireland no longer were reflected by the outcome in the 1983 referendum, that the right

to abortion now was supported by the public, the Court could have found that the restriction of the article 8 right to life was not made in pursuit of a legitimate aim, and could have thus deemed the restrictive legislation as being in violation of the Convention rights.

As was discussed above, it is important to remember that the Council of Europe system is built on the good will and cooperation of the Contracting States. The margin of appreciation will only be restricted when a particularly important facet of an individual's existence or identity is at stake, according to the Court in *A, B and C v. Ireland*. However, the right to personal autonomy and the psychological and physical integrity of women *should* be interpreted to be a particularly important facet of an individual's existence or identity, in my opinion. Therefore, the Court should use the evolutive interpretation, which means that it should interpret the Convention in the light of present-day conditions. Like Cook writes, the Convention is made to protect the vulnerable that otherwise would be powerless. Even if the State or those acting under the authority of the State are acting in accordance with the democratic will, this should not be reason to oppress a group of people. Given that the Irish public have started to change its position on the right to abortion (*cf.* chapter 4.1), and that the vast majority of the Member States of the Council of Europe have enacted some form of abortion legislation, the European consensus should be strong enough to affect the Court's decision in a way to interpret a right of abortion under the Convention.

7.4 Conclusion

In conclusion, the Court has not taken a stance on the issue of abortion, stating that for as long as there is no European consensus on the matter, the Court cannot use the evolutive interpretation to interpret that the right to private life under article 8 confer a right to abortion. From the European Court of Human Right's case law it is clear that, at this time, there is no right to abortion under the Convention. However, in Member States where abortion is lawful the Member State has a positive obligation to protect the individual's effective right to private life under the Convention. The Court did not take the opportunity to interpret a right of abortion into the Convention in the case of *A, B and C v. Ireland*, but it left an opening for possibly narrowing a State's margin of appreciation on the issue in the future. Furthermore, the right to abortion is somewhat protected in the Council of Europe system under the article 10 right to receive and impart information.

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