RECOGNITION OF VIOLATIONS OF WOMEN'S HUMAN RIGHTS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN THE CONTEXT OF RESTRICTIVE ABORTION REGIMES

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Contents

Chapter 1 : Introduction

This thesis considers the possibility that the European Court of Human Rights is developing a role in relation to extreme restriction of access to abortion services, and the impairment of healthcare provision linked to such restriction, especially in Poland and Ireland. This thesis will argue that such development is necessary and that further development is likely because restrictive laws and practices are strongly associated with forms of suffering for women that can readily be captured in terms of rights-violations. This likelihood is further enhanced since under the European Convention on Human Rights (ECHR) it has not so far been accepted that the state can protect the right to life of the foetus as a fundamental human right. That stance corresponds with the majority European consensus in which the decision of the woman to seek an abortion is ultimately upheld in certain circumstances, including that of risk to the health of the woman and on social grounds, in the first trimester of pregnancy.

This thesis sets out to explore the extent to which Strasbourg[1] has already given recognition to rights' violations due to restrictive access to abortion, and the potential, based on established Strasbourg principles, for it to take further steps in that direction in the future. A range of potential claims will be considered, but such recognition could most readily occur under the respect for private and/or family life heads of Article 8 ECHR in terms of health and the freedom to decide whether or not to terminate a pregnancy; also relevant are rights to life under Article 2, freedom from inhuman or degrading treatment under Article 3 and freedom from discrimination under Article 14.

Elaboration of the conceptual framework

Restrictive abortion regimes and creation of suffering for women

[1] The term 'Strasbourg' will frequently be used in the thesis to refer to decisions of the European Court and Commission (now abolished but its decisions have made quite a significant contribution to the jurisprudence in this area) of Human Rights. The European Convention on Human Rights will be referred to as the ECHR or 'the Convention'.

The term 'restrictive' is used to mean that the regulation of abortion in the jurisdiction in question is particularly stringent in relation to the majority European standard. The state, which has responsibility for the restrictive abortion regime, causes suffering when it acts to restrict abortion or omits to act to ensure women's access to a safe and legal abortion service that would preserve women's health or life. Suffering occurs when women turn to illegal and often unsafe abortions or when they have to travel abroad for abortion, which may create stress and impairment of abortion after-care. The restrictive abortion regimes in Ireland and Poland are also associated with the impairment of access to general health care for women due to their reproductive function. For example, access to certain forms of treatment, such as to chemotherapy to treat cancer, may be impaired in practice, due to concern for the foetus.

Relevance of the ECHR to potential rights' violations in restrictive abortion regimes

The European Convention on Human Rights has the role of advancing respect for civil rights by providing an extra-national mechanism to raise particular violations of the rights it guarantees.[2] The premise that the ECHR is relevant relies on the assumption that women undergo suffering due to extremely restrictive policies on the provision of abortion and that such suffering can be conceptualised as a violation of one of more of the ECHR guarantees. On that basis the state would have failed to fulfil a positive obligation to prevent a breach of women's civil rights, or would have directly caused the breach.

Violations of rights under the ECHR by states with restrictive abortion regimes

By violations under the ECHR it is meant, for the purposes of this thesis, that relevant Articles of the Convention that protect the rights of the woman as a citizen in a country that is a signatory to the Convention are breached, either because the instance falls within the ambit of an unqualified right, or because it falls within a qualified one but the infringement cannot be justified.[3] The application of the Convention Articles

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2 Preamble to the European Convention on Human Rights and Fundamental Freedoms at para 5.

3 In a thesis of this nature further exploration of the difference between the qualified, non-materially qualified and the qualified rights of the ECHR would not be appropriate: see further Harris, O'Boyle & Warbrick *Law of the European Convention on Human Rights* (2nd edn, Oxford OUP, 2009).

is determined by their text and by reference to the jurisprudence of the European Court of Human Rights in terms of: 1) the implications of current jurisprudence for the provision of abortion and related healthcare services in restrictive abortion regimes, and 2) the application of principles of the jurisprudence relating to certain Convention Articles to specific instances of suffering of women due to the nature of such regimes. When Strasbourg makes a determination as to the ambit of a certain right or as to justification for its infringement, it may concede a certain margin of appreciation to the state – a certain area of discretion – which may influence it in declining to intervene.[4] Strasbourg may decide that due to the particular cultural or religious sensitivities surrounding an issue the state is better placed to take a particular stance on it than an international Court, finding therefore that the state has not over-stepped its margin of appreciation in relation to the stance taken. Due to the sensitivity of the issue of abortion, the margin of appreciation doctrine has potential relevance to a determination of a rights violation. This thesis will explore the relevance of this doctrine in this context further in Chapter 5,[5] but for present purposes it is most straightforward to consider it as possible route to avoidance of a finding of a violation of a Convention guarantee, in this context.

Lack of recognition of foetal interests as a fundamental right to life

It is assumed that for a violation of women's human rights under the Convention to occur in relation to denial of services to women in restrictive abortion regimes, foetal interests cannot be recognised as amounting to a fundamental right to life protected by Article 2 at all stages of gestational development as this would justify almost all violations of women's Convention rights.

Literature review

This focus is not one that has been adopted so far in the academic writing on this issue, since an in-depth study of the ECHR and abortion has not yet been undertaken.

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4 See further Harris etc *Law of the European Convention* (n 3) at p 12-14; see generally G Letsas 'Two concepts of the margin of appreciation' (2006) 26 OJLS 705.

5 Chap 5 pp 1-4.

In contrast to the position in the US,[6] very little attention has been paid to the potential for emergent abortion rights under the ECHR. The literature on the law and abortion issue falls roughly under five headings: firstly, black letter discussion of abortion as a human right in terms of international and regional standards (Zampas and Gher, Cook),[7] and there are various case-notes discussing Convention abortion cases (eg Priaulx);[8] secondly, there is the literature discussing the status of life under the Convention (eg Plomer, Hewson);[9] thirdly, there is a body of academic writing that attacks the idea of a right to an abortion under the European institutions, often from an 'anti-choice' position (Cornides);[10] fourthly, there are general feminist/socio-legal arguments that access to abortion should be a right (Sheldon, Jackson);[11] fifthly, there are ethical analyses of the issue of abortion from the perspective of rights (eg Dworkin).[12]

This thesis will build on the black letter discussion of abortion rights in Zampas and Gher's piece, but will focus only on the ECHR stance and potentialities. The lack of academic analysis of the Convention from the perspective advanced in this thesis has required a reliance on primary materials and alternative sources such as the literature of international organisations seeking to advance reproductive rights under the Convention, in particular, reports by the Centre for Reproductive Rights, the Federation for Polish Women and Family Planning and the Irish Family Planning Association, as well as reports and observations by bodies concerning human rights.

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6 See eg M Nussbaum 'The Supreme Court, 2006 Term – Foreword Constitutions and Capabilities: Perception against Lofty Formalism [comments]' (2007-2008) 121 Harv L Rev 4; B Siegel 'The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions' [2007] U Ill L Rev 991; K Desrouleaux 'Banning Partial-Birth Abortion At All Costs – Gonzales v. Carhart: Three Decades of Supreme Court Precedent Down the Drain' (2007-2008) 35 SU L Rev 543; M Arnett 'Update: Phasing Out Abortion: One Step Closer to Terminating a Woman's Constitutional Right, in Gonzales v Carhart' (2007) 24 T M Cooley L Rev 597.

7 JM Gher and C Zampas 'Abortion as a Human Right: International and Regional Standards' (2008) 8 HRLR 249. R Cook and B Dickens 'Human Rights Dynamic of Abortion Law Reform' (2003) 25 HRQ 1.

8 N Priaulx 'Testing the Margin of Appreciation: Therapeutic Abortion, Reproductive 'Rights' and the Intriguing Case of Tysiąc v Poland' (2008) 15 EJHL 361.

9 A Plomer 'A Foetal Right to Life? The Case of *Vo v France*' (2005) 5 HRLR 311. B Hewson 'Dancing on the Head of a Pin? Foetal Life and the European Convention' (2005) 13 Fem LS 363.

10 J Cornides 'Human Rights Pitted Against Man' (2008) 12 Int J HR 107 at 115-21.

11 S Sheldon *Beyond Control*: *Medical Power and Abortion Law* (Pluto Press, 1997); E Jackson *Regulating reproduction: law, technology and autonomy* (Oxford, Hart, 2001) Ch 1.

12 R Dworkin *Life's Dominion: An Argument about abortion and euthanasia* (Harper Collins, 1993) Ch 2.

Context and Importance of thesis

Europe, the birthplace of the Enlightenment, is generally perceived as liberal, progressive and characterised by adherence to constitutionalism, democratic values and gender equality. European countries lead the world in recognising women's rights, regardless of religious opposition and European institutions, in particular the European Union, have a strong commitment to combating sex discrimination and generally support women's rights.[13] However, this image of a modern, liberal Europe is not reflected in the approach to abortion regulation in a tiny handful of European countries in which the Catholic Church is dominant: while the majority ensure a reasonable level of access to abortion, there are very striking exceptions, most notably Ireland and Poland. Since lack of access to abortion is strongly associated with forms of suffering for women that can readily be captured in terms of rights-violations, the European Court of Human Rights has, this thesis will argue, a potential role in advancing recognition in certain circumstances of rights of access to abortion in line with the current and emerging European consensus. At this point in time, when cases concerning difficult bioethical issues are increasingly coming before the Strasbourg Court, the question of an emergent 'right to an abortion' is becoming one of increasing pertinence.[14]

This thesis is written at a time when the development of a common European approach to human rights in the context of termination of pregnancy is in its infancy due to the range of stances taken on the matter by the various European countries. A trend is discernable towards an incremental liberalising of laws governing access to abortion. But an opposing trend can also be discerned, in particular the currently discernible rise of conservative, religiously-based sentiment in certain European

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13 For example, the Treaty on European Union by Article 157 guarantees equal pay for equal work (Official Journal C 115 09/05/2008) and the Institutions of the European Union pursue this as a goal: see the work of the Employment, Social Affairs, and Equal Opportunities division of the European Commission <http://ec.europa.eu/index_en.htm> accessed 29.09.10.

14 See the Report of the Research Division of the ECtHR on *Bioethics and the case-law of the ECHR*, 2009 < http://www.coe.int/t/dg3/healthbioethic> accessed 29.09.10 which demonstrates that this issue has been raised most frequently in recent and pending cases.

countries, particularly Poland,[15] and the continuing influence of such sentiment in Ireland. The issue has caused an ongoing controversy in Ireland where three separate referendums have been called on the issue of abortion, although the restrictive regime has not been altered,[16] and in Poland proposals to include explicit protection for life from conception were only rejected by Parliament in 2007.[17] Moreover, the anti-choice movement is currently strongly focused on the possibility of an emergent Strasbourg 'abortion right', and is fiercely campaigning against that possibility in various forums.[18] A clash between feminist/liberal values and religious ones appears to be reaching a climax as this issue gathers greater momentum in human rights terms and comes closer to a resolution at Strasbourg.

The European Court of Human Rights has not yet developed any settled jurisprudence recognising a 'right of access to an abortion', and it cannot yet be said that Strasbourg fully recognises the human rights' implications of failing to protect the access of women to a full range of health care services, or provides full recognition of a need to protect women's reproductive choices in the pregnancy and abortion context. But the expectation that such protection will be established has recently gained greater momentum due to the efforts of a number of national and international NGOs active in the field of reproductive rights in Europe, most notably the Centre for Reproductive Rights,[19] in supporting Strasbourg challenges.[20]

Running alongside these developments there have been extremely important institutional moves towards recognition of rights of access to abortion services, in

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15 AM Fernàndez Abortion: 'Pro-life Tide' CafeBabel.com The European Magazine 08.02.07 <http://www.cafebabel.co.uk/article/19951/abortion-pro-life-tide.html> accessed 29.09.10. TG Jelen and C Wilcox 'Continuity and Change in Attitudes Towards Abortion: Poland and the United States' (2005) Pol & Gender (1) 2 297-317; A Czerwinski 'Sex, Politics, and Religion: The Clash Between Poland and the European Union over Abortion' (2003) 32 Denv J Int'l L & Pol'y 653.

16 In 6 March 2002 Fianna Fail's campaign for the Protection of Human Life in Pregnancy Bill, which would have ruled out suicide as a ground abortion, was rejected.

17 The Polish president Lech Kaczynski was defeated in April 2007 on an amendment to the Constitution which would have protected life from conception: Z Dujisin 'Poland: Abortion Laws not strong enough for some' IPS News May 17th 2007 <http://ipsnews.net/news.asp?idnews=37759> accessed 29.09.10. See further N Priaulx 'Testing the Margin of Appreciation' (n 8) at 379.

18 Eg The European Centre for Law and Justice <http://www.eclj.org/> accessed 29.09.10.

19 See at <http://reproductiverights.org/> accessed 29.09.10. The Center for Reproductive Rights is an established NGO well used to fielding human rights arguments in the global context.

20 These bodies are active in researching the impact on women of restrictive abortion laws, in particular the effects of the rise of unsafe, illegal abortions, risking women's lives and health: see Gher & Zampas 'Abortion as a Human Right' (n 7) at 249.

particular in the stance of the Council of Europe.[21] Most significantly, in 2008 a Report was adopted by a majority of the Parliamentary Assembly of the Council of Europe, entitled *Access to safe and legal abortion in Europe*, calling upon member states to decriminalise abortion and guarantee women's effective exercise of a right to safe, legal abortion.[22] Furthermore, Strasbourg decided an abortion case in favour of the applicant for the first time in 2007 in *Tysiąc v Poland,*[23] although as Priaulx puts it, 'the Court attempted to distance itself from the substantive claim [of access to abortion]'.[24] A number of treaties have a bearing on abortion rights – the ECtHR has often referred to The International Covenant on Civil and Political Rights 1966 (ICCPR) and The Convention on the Elimination of All forms of Discrimination against women 1979 (CEDAW).[25] Each of the aforementioned instruments protects to an extent the quality of life of the woman, which may include a threat to her health due to refusal of an abortion, and CEDAW Art 12 provides a right of women to non-discrimination in the field of health care. Consideration of international law demonstrates that it generally favours the development of rights of access to abortion.[26]

Research questions

The thesis sets out to consider the potential for *development* of the rights under the ECHR as a means of affording protection for access to abortion services and access of women to healthcare services available to the general population, taking account of the general European position and the suffering of women in certain European states. It considers the way that such suffering can be framed as violations of women's rights

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21 There is also a report awaiting endorsement that supports legalisation of abortion services in the third world – Doc 11992 5 August 2009 'Fifteen years since the International Conference on Population and Development Programme of Action' Report of the Social, Health and Family Affairs Committee, Rapporteur: C McCafferty.

22 Doc 11537 (8 April 2008) 'Access to Safe and Legal Abortion in Europe' Rapporteur: G Wurm Committee on Equal Opportunities for Women and Men April 2008 at Pt A Paras 4 and 7.

23 *Tysiąc v Poland* (App no 5410/03) (2007) 45 EHRR 42 see further chapter 3 pp 4-7.

24 Priaulx 'Testing the Margin of Appreciation' (n 8) at 363.

25 See further Cook & Dickens 'Human Rights Dynamics of Abortion Law Reform' (n 7) at 1.

26 See also EU Network of Independent Experts on Fundamental Rights 'The Right to Conscientious Objection and the Conclusion By EU Member States of Concordats with The Holy See' CFR-CDF Opinion No 4-2005 (14 December 2005) pp 17-22. As discussed in chapter 4, claims under the Convention are analogous to those argued before international tribunals: see eg Cook & Dickens 'Human Rights Dynamic of Abortion Law Reform' (n 7) and Gher & Zampas 'Abortion as a Human Right' (n 7).

under the ECHR by referring to established Strasbourg principles and canons of interpretation. To this end, firstly the thesis considers the dominant European approach to abortion services and sets out the restrictive European regimes; secondly the thesis examines the current stance of the Convention on restriction of services related to abortion and the related question of a foetal right to life; thirdly it examines the potential for development of rights to these services under the ECHR and the question of restriction of women's access to health services generally due to their reproductive function in restrictive abortion regimes. As sub-questions linked to the third issue, it examines the question of the impact of relevant established Strasbourg principles; it examines the current and potential impact of the margin of appreciation doctrine and considers the possible influence of other aspects of international human rights law and policy on Strasbourg in this context.

Route-map

This chapter introduces the whole thesis and sets out its parameters. Chapter 2 discusses the nature of regulation of abortion in various European countries, dividing the discussion into various 'models' of abortion so as to highlight the dominant European approaches and the exceptions of Ireland and Poland. Chapter 3 discusses the current recognition under the European Convention on Human Rights of violations of women's rights in restrictive abortion regimes, including consideration of the question of a right to life of the foetus. Chapter 4 considers the potential impact of international human rights law and policy on the development of rights to abortion under the Convention. Chapter 5 discusses the potential for development of further recognition that women's rights are violated in restrictive abortion regimes drawing on relevant Strasbourg principles and referring to the various (unresolved) claims brought by current applicants;[27] it discusses the role of the Court and further examines the potential impact of the margin of appreciation doctrine. Chapter 6 concludes the thesis by evaluating the current and potential developments towards recognition of women's rights in the context of restrictive abortion regimes under the Convention.

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27 *ABC v Ireland* (Statement of Facts) (App no 25579/05), lodged 15 July 2005 and *Brüggemann and Scheuten v The Federal Republic of Germany* (Decision) (App no 6959/75) (1977) 5 DR 103 at 108.

Chapter 2 : Abortion services in Europe: consensus, exceptions and the role of the ECHR

This Chapter seeks to demonstrate that a strong and increasing European consensus exists in favour of permitting the provision of access to abortion in the early stages of pregnancy, going on to consider the most significant exceptions to this permissive consensus. In order to do this the broad nature of the different approaches to abortion regulation in Europe will be set out. The categorisation of the European regimes will be based on that set out by Eser and Koch in their recent and authoritative analysis of abortion regimes in 64 countries. In their book *Abortion and the Law*[1] they categorise abortion regimes as fitting three broad models – the 'Prohibition model', the 'Medical Indications model' and the 'Time Limits Model'.[2] The analysis below will take account of a fourth model recognised by commentators – the 'counselling' or 'social grounds' model.[3] The Chapter will firstly set out the more permissive counselling and time limit models in order to demonstrate the nature of the majority European position on access to abortion and will go on to set out the nature of the regimes conforming to the restrictive models, in particular Poland and Ireland, indicating the impact that the ECHR has already had and making general points as to its potential relevance for those regimes. (Detailed argument as to the development under the Strasbourg jurisprudence of obligations of states to adopt a more permissive abortion regime under the ECHR Articles, and the possible further development of those obligations in accordance with Strasbourg principles, is presented in the subsequent Chapters.)

Permissive models of abortion laws: the European consensus

In interpreting the evolving substance of the guarantees in the Articles of the ECHR and the application of the 'margin of appreciation' doctrine, the Court is influenced by the 'developments and commonly accepted standards' in the European member states

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[1] A Eser and H Koch *Abortion and the law; from international comparison to legal policy* (TM Asser Press, The Hague, 2005).

[2] Eser & Koch *Abortion and the law* p 46 *et seq*.

[3] S Gevers 'Abortion Legislation and the Future of the Counselling model' (2006) 13 EJHL 27, 29.

that compose the Council of Europe.[4] European regimes comprising 92% of the population of Europe permit the termination of a pregnancy as a choice of the woman at some point; by this it is not meant that most countries protect an unencumbered choice to have an abortion (women may have to satisfy certain further conditions such as attending counselling), but rather that ultimately the choice of the woman to terminate the pregnancy is capable of being respected in law. An incremental liberalising of laws governing access to abortion is discernable. The last three years have seen some important reversals in policy in certain countries: in July 2010 abortion on request before 14 weeks was permitted in Spanish law,[5] and in 2007 a Portuguese law came into force permitting abortion on request. after counselling, before 10 weeks of gestation[6] – the previous laws in those two countries permitted abortion only if the woman could advert to various indications such as grave risk to health or rape.[7]

(i) The Time Limits Model

The Time Limits Model describes a regime in which abortion availability is unrestricted before a certain time limit.[8] Sweden is a typical example of this type of

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4 *Tyrer v UK* (A/26) 2 EHRR 1 para 31. See further chapter 5 pp 23-4 and G Letsas 'Two concepts of the margin of appreciation' (2006) 26 OJLS 705, 724-9.

5 C Giles 'Spain's Unrestricted Abortion Law Takes Effect' Associated Press Agency 5th July 2010 <http://www.salon.com/wires/health/2010/07/05/D9GOQ22O3_eu_spain_abortion/index.html> accessed 29.09.10. Reported also by the IPPF < http://www.ippf.org/NR/exeres/26DBE3CB-0B66-47B1-AC9B-0C0B27DA767C.htm> accessed 29.09.10.

6 M Queiroz 'Legal Abortion After Decades of Struggle' Inter Press Service News Agency (Feb 12th 2007); see at <http://ipsnews.net/news.asp?idnews=36534> accessed 29.09.10.

7 Re Spain: Organic Law 9/1985 of 5 July, reforming Article 417 of Penal Code; Re Portugal: Law No 6, Articles 139-141, 11 May 1984 and Law No 90, 30 July 1997.

8 In Eastern Europe reproductive health problems have been raised in relation to an *over-reliance* on abortion which has been indicated as being responsible for women undergoing unnecessary medical treatment leading to medical complications that risk the health or life of the women. See further SK Henshaw, S Singh and T Haas 'The Incidence of Abortion Worldwide' (1999) 25(Supplement) International Family Planning Perspectives S30–S38. This study found that Eastern Europe was the sub-region with the highest rate of abortions in the world, employing abortion as a form of contraception (Eastern Europe has a rate of 90 abortions per 1,000 pregnancies). See also T Baird, S Falk E Shehu 'Shifting Focus to the Woman: Comprehensive Abortion Care in Central and Eastern Europe' and E Ketting 'Why Do Women Still Die of Abortion in a Country Where Abortion is Legal? The case of the Russian Federation' (2005) in Entre-Nous The European Magazine for Sexual and Reproductive Health No 59 <http://www.euro.who.int/en/what-we-do/health-topics/Life-stages/sexual-and-reproductive-health/publications/entre-nous/entre-nous> accessed on 10.10.10. That issue is outside the scope of this thesis.

model – it allows abortion on request up to 18 weeks, and after this point requires the woman to demonstrate social or medical grounds.[9]

Countries adopting the Time limits Model[10]

Country†	Population as % of European Total[11]	Gestational limit*
Spain[12]	7.5	14th week
Romania	4.1	14th week
Netherlands	3.1	13th week
Greece	2	12th week
Portugal[13]	2	10th week
Czech Republic	1.9	12th week
Serbia and Montenegro[14]	1.9	12th week
Belarus[15]	1.8	12th week
Sweden	1.7	18th week
Austria	1.5	12-13th week (3 months)
Bulgaria	1.3	12th week
Denmark	1	12th week
Slovak Republic	1	12th week

9 Abortion Act 595, 14 June 1974, amended May 1995 cited in International Planned Parenthood Federation 'Abortion Legislation in Europe' 8th edn (IPPF European Network, Jan 2007) at p59.

10 Information on abortion laws before 2007 is provided by the International Planned Parenthood Federation 'Abortion Legislation in Europe' (n 9).

11 Information from CIA World Factbook <https://www.cia.gov/library/publications/the-world-factbook/> accessed 29.09.10.

12 As of 5th July 2010: C Giles 'Spain's Unrestricted Abortion Law Takes Effect' Associated Press Agency 5th July 2010 <http://www.salon.com/wires/health/2010/07/05/D9GOQ22O3_eu_spain_abortion/index.html> accessed 29.09.10. Reported also by the IPPF < http://www.ippf.org/NR/exeres/26DBE3CB-0B66-47B1-AC9B-0C0B27DA767C.htm> accessed 29.09.10.

13 M Queiroz 'Legal Abortion After Decades of Struggle' Inter Press Service News Agency (Feb 12th 2007) <http://ipsnews.net/news.asp?idnews=36534> accessed 29.09.10. BBC World Service Portuguese abortion law in force <http://news.bbc.co.uk/1/hi/world/europe/6541143.stm> accessed 29.09.10.

14 Law concerning the conditions of and procedures for the termination of pregnancy, 1977 cited by the International Consortium for Medical Abortion <http://www.medicalabortionconsortium.org/law-policy/CS/> accessed 29.09.10.

15 UN Department of Economic and Social Affairs Population Division 'Abortion Policies: Global review' <www.un.org/esa/population/publications/abortion/doc/belarus1.*doc*> accessed 29.09.10.

Norway	0.9	12th week
Bosnia and Herzegovina	0.8	10th week
Moldova	0.8	12th week
Albania	0.7	12th week
Latvia	0.4	12th week
Macedonia	0.4	10th week
Slovenia[16]	0.4	10th week
Estonia	0.2	12th week
Total 35.4%		

*From conception or implantation.

†Micro-states or countries with a population less than 500,000 not listed.

(ii) The Counselling or Social Grounds model

The Counselling model describes regulation that seeks to *oversee* the reproductive choice of the pregnant woman, but not ultimately to deprive a woman of it, usually up to a time limit beyond which other grounds, such as serious risk to health, must be shown.[17] A variation on this arises under the Social Grounds model whereby abortion is permitted for 'social reasons', such as poverty, or where the woman is a young teenager, up to a time limit.[18] These are rather different approaches in law: the latter model bears a certain similarity to the more restrictive Medical Indications model considered below in that it technically requires the woman to advert to external circumstances in order to obtain an abortion. But adverting to social grounds or to 'distress' amounts in practice to a requirement that the woman has carefully considered her choice to abort.[19] An example of this is provided by abortion regulation in the UK whereby abortion is *prima facie* illegal except in certain

16 UN Department of Economic and Social Affairs Population Division 'Abortion Policies: Global review' <www.un.org/esa/population/publications/abortion/doc/slovenia.doc> accessed 29.09.10.

17 Eser & Koch *Abortion and the Law* (n 1) at p 292-3 and Gevers 'Abortion Legislation and the Future of the Counselling model' (n 3) at 29.

18 See Eser & Koch *Abortion and the Law* (n 1) at p 37-8.

19 Gevers 'Abortion Legislation and the Future of the Counselling model' (n 3) at 29.

circumstances,[20] but it is *in practice* one of the more permissive regimes in Europe since abortion is permitted generally on the request of the woman up to 24 weeks gestation.[21] A further example is provided Germany[22] where legal abortion is available on request up to 12 weeks but this is contingent on establishing that the woman is in a state of 'distress' (in practice established by counselling).[23]

Country†	Population as % of European Total[24]	Gestational limit*
Germany	15.3	12th week
France	11.3	12th week
UK	11.3	24th week
Italy	10.8	12/13th week
Belgium	1.9	12th week
Hungary	1.8	12th week
Switzerland	1.4	10th week
Finland	1	12th week
Croatia[25]	0.8	12th week

[20] The Offences Against the Person Act 1861 Ss 58 59 (the 1967 Act does not extend to Northern Ireland) and the Infant Life (Preservation) Act 1929 prohibits intentional 'child destruction' where the foetus is 'capable of being born alive' which is after 24 weeks gestation (no offences is committed if carried out in accordance with the provisions of the Abortion Act 1967). The term 'born alive' has been held to be breathing without aid of the mother (*Rance v Mid-down Health Authority* [1991] 1 QB 587) and where there are no discernable signs of life: *C v S* [1988] QB 135. In the case of *R v McDonald* [1999] NI 150 a man received 22 years imprisonment for attempted murder, rape and child destruction after stabbing his ex-partner with the intention of killing her and her unborn baby.

[21] The Abortion Act 1967 s(1)(1)(a) states that abortion is permitted up to the 24th week of pregnancy where the continuance of the pregnancy involves risk of physical or mental injury to the pregnant woman or to existing children of her family; a doctor in determining this risk may take account of the actual or reasonably foreseeable environment (s1(2)) i.e. can take account of social considerations.

[22] Abortion law was radically changed in 1993 when the country was reunified – Soviet era abortion law in East Germany was extremely permissive. See generally S Blay and R Piotrowicz 'The Advance of German Unification and the Abortion Debate' (1993) 14 Stat L Rev 171.

[23] International Planned Parenthood Federation 'Abortion Legislation in Europe' (n 9) at p 26.

[24] Information from CIA World Factbook <https://www.cia.gov/library/publications/the-world-factbook/> accessed 29.09.10.

[25] A Rahman, L Katzive and S Henshaw 'A Global Review of Laws on Induced Abortion 1985-1997' (1998) 24(2) International Family Planning Perspectives 56.

Lithuania	0.7	12th week
Total 56.3%		

Countries adopting the Counselling or Social Grounds model[26]

*From conception or implantation.

†Micro-states or countries with a population less than 500,000 not listed.

Restrictive models of abortion laws and the potential application of the ECHR

As Chapter Four explains, the notion of conceptualising reproductive rights as human rights under international human rights law generally is currently an emergent one, but there are clear signs of a gathering momentum in that respect. The few regimes that retain extremely restrictive laws on the provision of abortion cause suffering to women in various ways which could be conceptualised as breaches of the Articles of the ECHR. There is firstly the effect on women who remain within the regime who either undergo unwanted pregnancy or seek out an often dangerous, illegal abortion (considered below);[27] secondly there is the phenomenon of 'abortion tourism',[28] whereby the woman seeking a termination travels to a near-by country that offers a more liberal regime (or, more rarely, a safer one). The patterns of such 'abortion tourism' in Europe have varied over the last 30-40 years as the liberality of the abortion regimes in the various states increases or declines.[29] The state in question

26 Information on abortion laws before 2007 is provided by the International Planned Parenthood Federation 'Abortion Legislation in Europe' (n 9).

27 The relationship between the safety and legality of abortion services has been well documented, for a recent example see A Mundigo 'Determinants of Unsafe Induced Abortion in Developing Countries' in I Warriner and I Shah (eds) *Preventing Unsafe Abortion and its Consequences: Priorities for Research and Actions* (Guttmacher Institute, New York 2006). See also generally R Sifris 'Restrictive Regulation of Abortion and the Right to Health' (2010) 18 Med L Rev 185, 198.

28 This could also be referred to as 'reproductive *choice* tourism' (as opposed to 'reproductive tourism'). See on the issue of reproductive tourism, S Pattinson *Medical Law and Ethics* (2nd edn, Sweet & Maxwell 2009) Ch 8 p268-9.

29 In relation to second trimester abortions women currently travel from: Ireland, Northern Ireland, Portugal, Luxemburg, Belgium, France, Germany, Italy, Poland, Malta, Andorra, Monaco and even Britain. Women currently travel to: Spain, Netherlands, Britain: Presentation given by M Berer at the International Consortium for Medical Abortion in October 2008 as part of the Reproductive Health Matters series entitled Second trimester abortion in Europe <http://www.fiapac.org/> accessed 29.09.10.

from which the woman seeks to travel can take steps to prevent or inhibit women from travelling abroad or to make it as physically and mentally stressful as possible for them to do so,[30] a policy that has the greatest impact in relation to socially disadvantaged women, such as teenage girls from poor families in small rural communities. The phenomenon of 'abortion tourism' in Europe means that when the resultant disadvantages suffered by women surface in challenges at Strasbourg, they tend to emerge as a mixture of claims, mainly, but not exclusively, relying on the protection of physical/mental integrity under Article 8, and the claim for reproductive autonomy may only be ancillary to claims relating to risks to life and health.

(i) The Medical Indications model

This model describes abortion regulation that creates certain specific exceptions set out in law permitting abortion *only* where there is a threat to health, strictly defined as a medical issue; general social factors are excluded from consideration. Further narrow exemptions not necessarily related to the health of the woman may be available, such as abortion in respect of foetal impairment or where conception was as a result of rape. But these relate to maternal stress and mental health and therefore it is convenient to consider this model as referring primarily to medical indications. It is the most restrictive model of regulation for abortion services where abortion is still permissible. The fact that the state *does* permit abortion under this model means that human rights instruments such as the ECtHR and Council of Europe may oversee the working of the regime in practice rather than – in effect – *imposing* exceptions as could arguably be the case where abortion is completely, or almost completely, prohibited. As subsequent chapters will attest, this model tends to create suffering for women in practice that is relatively easily captured as breaches of human rights guarantees under the ECHR.

<u>Countries adopting the Medical Indications model</u>

30 One of the issues raised in *ABC v Ireland* (Statement of Facts) (App no 25579/05), lodged 15 July 2005 COMPLAINTS para 2, 3. See below p 13 and chapter 5 pp 4-7.

Country	Population as % of European Total[31]	Gestational limit:
Poland	7.1	12 weeks: rape, threat to health, foetal impairment No limit: serious threat to health/life
Luxembourg	0.08	12 weeks: foetal impairment or threat to health No limit: serious threat to health/life
Total 7.2%		

*From conception or implantation.

In Poland the provision of access to abortion is generally a criminal offence, although the pregnant woman herself is exempt from punishment;[32] it is permitted only where there is a grave and serious threat to the health of the mother (this appears to include the risk of suicide), and in the cases of rape and serious foetal disability, as set out in the Family Planning (Protection of the Human Foetus and Conditions Permitting Pregnancy Termination) Act 1993.[33] This provision accords with the strict interpretation[34] of Article 38 of the Polish Constitution which provides that the life of every human being is legally protected. A discrepancy can readily arise between the legal terms of the exceptions in the legislation for provision of abortion services and the practical access to such services since doctors consistently refuse to perform abortions, even where one of the permitted grounds applies, on grounds of

31 Information from CIA World Factbook <https://www.cia.gov/library/publications/the-world-factbook/> accessed 29.09.10.

32 Carrying a 3 year prison sentence for anyone other than the pregnant woman who carries out an abortion Art 125(1) Criminal Code.

33 Statute Book 93.17.78 S(4)a1-5. This provision ruled out abortion on social grounds (which was previously available) and on request. This was briefly changed in 1996 to allow abortion until the 12th week of pregnancy if 'a woman is in hard life conditions or in difficult personal situation' but this was challenged subsequently by the Constitutional Tribunal on the basis that life is protected 'at every stage' under the Polish Constitution. (Poland) Constitutional Tribunal 28th May, 1997 K 26/96 at Pt 3 Par 1. Translated and made available by Federa <http://www.federa.org.pl/english/constrib.htm> accessed 29.09.10.

34 Followed by the Polish Constitutional Tribunal, eg Ruling K 26/96 (1997).

conscience.[35] In Poland nationals are not directly restrained from travelling abroad to receive abortions,[36] but the official stance is to favour prosecution of those who facilitate 'abortion tourism'.[37] As a result of this restrictive regime women often turn to unsafe, illegal abortions: the Federation for Polish Women and Family Planning (FEDERA) suggests that as many as 80,000 to 120,000 Polish women do so annually.[38] Women also find it difficult to travel abroad for an abortion from Poland since so doing is expensive, costing women approximately £340-566,[39] and there are few services to aid such women.[40] Furthermore, since the position became much more restrictive after almost 40 years of the permissive approach, that meant that, as FEDERA argues, women, in particular those living in poverty, were denied a previously common form of birth control:

> Abortion on social grounds was legal in Poland since 1956 and it was broadly utilized by women as a method of birth control in result of poor family planning policies of the Polish state. The state did not introduce simultaneously with restrictions any policies that would promote and subsidize any family planning

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35 See the entry on Poland in Amnesty International's *Briefing to the UN Committee on Economic, Social and Cultural Rights* 43rd Session, Nov 2009. Amnesty found that Poland was denying access to abortion for eligible women,' citing criticism that Poland had received from the Human Rights Council (HRC) in May 2008. The Amnesty report stated: 'Women are experiencing pain and suffering, and in some cases loss of life, as a direct result of the deliberate denial of medically indicated treatment to pregnant women' (at p 1) also see on this point p 13.

36 Family planning, Protection of human foetus and conditions of Admissibility 7 January 1993, Article 1. A detailed examination of effects including prosecutions for travelling was made by the Polish group Federation for Women and Family Planning in their 1996 Report <http://www.federa.org.pl/english/report96/rap96_1.htm> accessed 29.09.10.

37 A Ratajczak, 'Democratic Legal State in Totalitarian Wrapping', Rzeczpospolita daily paper, 6.11.1995 cited by FEDERA The effects of the anti-abortion law (Feb 1996) Report No 2 at para 5 <http://www.federa.org.pl/english/report96/rap96_1.htm> accessed 29.09.10.

38 Estimates vary significantly – official figures for abortion in Poland were 123,000 in 1987; however, '...some estimates suggest that the actual number of abortions performed may have been from three to four times the official number. Underground private abortion services are robust in Poland, as is 'tourism' abortion by Polish women who travel to neighbouring countries including, Austria, Belarus, Belgium, the Czech Republic, Germany, Holland, Lithuania, the Russian Federation, Slovakia and Ukraine. Rough 1996 estimates suggest there may be 50,000 underground abortions a year.' UN Population Division Department of Social and Economic Affairs Abortion Policies A Global Review (United Nations, 2005) at 39 <http://www.un.org/esa/population/publications/abortion/> accessed 29.09.10. In relation to Irish figures see n 73; see further Human Rights Watch 'A State of Isolation: The State of Abortion for Women in Ireland' (Jan 2010); see at <http://www.hrw.org/en/reports/2010/01/28/state-isolation> accessed 29.09.10.

39 W Nowicka (ed) *Reproductive Rights in Poland – the effects of the anti-abortion law* (Mar 2008) available: <http://www.federa.org.pl/publikacje/report%20Federa_eng_NET.PDF> accessed 29.09.10 at p 27.

40 FEDERA characterise such 'abortion tourism' in Poland as having an 'individual, unorganised character.' W Nowicka (ed) *Reproductive Rights in Poland* (n 40) at p 18 and 26.

> programmes. This dramatic change affected seriously many women and families, particularly those poor and uneducated ones. The law did not stop abortions. It pushed women to use back-street abortions or travel abroad. These effects of anti-abortion regulations on women's life and health were described in the Federation for Women and Family Planning's three reports (1994,1996, 2000).[41]

FEDERA stresses that in Eastern Europe in general the prevalence of abortion is far higher than in Poland; as a result the Polish regime has led to the creation of a large underground abortion network.[42] Over the years 1999-2006 there were 500 prosecutions for abortion related offences; this is a relatively small number, considering the many thousands of illegal abortions that take place,[43] suggesting that the Polish authorities may connive at reliance on illegal abortions in order to create some alleviation of this social problem without confronting it openly.

The Centre for Reproductive Rights and the Federation for Polish Women have emphasised the culture of antipathy towards women seeking abortion, even where it is technically legal. This formed the background to *Tysiąc v Poland,*[44] a highly significant decision under the ECHR, discussed further in subsequent chapters, in which the applicant complained that although she fulfilled the requirements for a legal abortion, since it was necessary to preserve her eyesight, she was in effect denied one by doctors, with the result that her condition severely worsened and she became near-blind. The Strasbourg Court upheld Tysiąc's complaints that this denial had created a breach of Article 8 of the Convention; while this decision did not require Poland to make a fundamental change to its restrictive regime, it was broadly considered to

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41 Polish Federation for Family Planning and Women 'Abortion Law; Discriminatory Consequences of the Anti-abortion Law' <http://www.federa.org.pl/?page=article&catid=798&lang=2> accessed 29.09.10. See also the latest report by FEDERA: W Nowicka (ed) *Reproductive Rights in Poland – the effects of the anti-abortion law* (Mar 2008) available: <http://www.federa.org.pl/publikacje/report%20Federa_eng_NET.PDF> accessed 29.09.10 and FEDERA's submission to the UN Committee on Economic, Social and Cultural Rights in connection with the Fifth Periodic Review of Poland, July 2009 at p8-9 available at < http://www.federa.org.pl/?page=article&catid=879&lang=2> accessed 29.09.10.

42 W Nowicka (ed) *Reproductive Rights in Poland* (n 40) at p 27-28.

43 W Nowicka (ed) *Reproductive Rights in Poland* (n 40) at p 28-31.

44 *Tysiąc v Poland* (App no 5410/03) (2007) 45 EHRR 42.

demand a relaxation of it,[45] for reasons that will become apparent in Chapter 3. The result in *Tysiąc* led, after a year's delay, to the enactment of the Patients' Rights and the Ombudsman for Patients' Rights Act 2009, intended to provide a mechanism for challenging decisions of health professionals; it is not linked specifically to abortion services. Amnesty International, however, considers that the new provision is inadequate and that Poland 'continues to fail to meet its obligations to ensure access to effective remedies at the national level aimed at ensuring women's right to the highest attainable standard of health, without discrimination'[46] a finding echoed by the UN Human Rights Council in its mission to Poland.[47] FEDERA has further noted that Polish women cannot always access prenatal tests that would enable them to access abortion on genetic grounds.[48]

(ii) The Prohibition model

The Prohibition model describes regimes in which 'abortion is not only generally prohibited but in which, in addition, no express exceptions are granted, so that the only way for a termination to remain unpunished follows from general legal principles'.[49] Very few sizeable countries adopt this model in Europe (and the 'West' in general) but as Ireland retains such a restrictive model it is necessary to consider its implications for women.

Countries Adopting the Prohibition model

Country	Population as % of European Total[50]

45 N Priaulx 'Testing the Margin of Appreciation: Therapeutic Abortion, Reproductive 'Rights' and the Intriguing Case of Tysiąc v Poland' (2008) 15 EJHL 361 at 375-6.

46 See the 2009 Amnesty Report (n 35) at [3.5].

47 United Nations General Assembly Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health Human Rights Council 14th Session, 20 May 2010 A/HRC/14/20/Add.3.

48 FEDERA's submission to the UN Committee on Economic, Social and Cultural Rights in connection with the Fifth Periodic Review of Poland, July 2009 (n 41) at p 8-9.

49 Eser & Koch *Abortion and the Law* (n 1) at p 46.

50 Information from CIA World Factbook <https://www.cia.gov/library/publications/the-world-factbook/> accessed 29.09.10.

Ireland	0.8
Malta[51]	0.07
San Marino[52]	0.006
Monaco[53]	0.006
Total 0.9%	

A straightforward example of this model is provided by the traditionally deeply Catholic state of Malta, which enshrines allegiance to Catholicism in its Constitution.[54] Under the Criminal Code of Malta, abortion is prohibited in all circumstances, with no express exception to save the life of the woman,[55] although Maltese law may possibly excuse abortion in circumstances where the life of the mother is threatened by continuance of the pregnancy, under general criminal law principles of necessity.[56] However, specific provisions allowing an abortion to be performed for that purpose were removed from the Code in 1981. The person performing the abortion is subject to 18 months-three years' imprisonment, as is a woman who performs an abortion on herself or consents to its performance. A physician, surgeon, obstetrician, or apothecary who performs an abortion is subject to 18 months-four years imprisonment and lifelong prohibition from exercising his or her profession. However, Malta is unlikely to see a challenge to this restrictive regime under the Convention due to its very small size and the availability of abortion in neighbouring countries.

It is the adherence of Ireland to this model that creates significant suffering for a large number of women and is creating the likelihood that the Prohibition model could be

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51 UN Department of Economic and Social Affairs Population Division 'Abortion Policies: Global review' <*www.un.org/esa/population/publications/abortion/doc/malta.doc*> accessed 29.09.10.

52 UN Department of Economic and Social Affairs Population Division 'Abortion Policies: Global review' <*www.un.org/esa/population/publications/abortion/doc/sanmarino.doc*> accessed 29.09.10.

53 UN Department of Economic and Social Affairs Population Division 'Abortion Policies: Global review' <*www.un.org/esa/population/publications/abortion/doc/monaco.doc*> accessed 29.09.10.

54 Chapter 1, Article 2 (1) of the Maltese Constitution gives Catholic authorities the 'duty and the right to teach which principles are right and which are wrong to all Maltese'.

55 By Chapter 9 of the Laws of Malta abortion cannot be performed to save the life of the woman or in cases of rape, incest or foetal abnormality.

56 It is unclear whether those performing or aiding an abortion could rely on the defence of necessity as set out by Article 241 Criminal Code.

challenged before the ECHR. The strict regime is due to the protection accorded to the foetus under Article 40.3.3 of the Irish Constitution which reads:

> 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.

This appears to give the foetus equal status with the mother, except where the woman's life is put at risk by the continuance of the pregnancy.[57] However, since this exception has no express statutory basis, but exists only as an interpretation of the Constitution, the Irish position is placed by commentators within the Prohibition model.[58] The lack of access to abortion on the ground of a serious risk to the mother's health is arguably the most striking gap in the protection for women available under current Irish law. No further exceptions in cases of rape or of severe foetal abnormality are available. The absence of an exception in cases of fatal foetal abnormality has created political controversy in Ireland; the government took steps in 2000 to reconsider the question of allowing such an exception, a measure which an influential group of Irish gynaecologists strongly recommended,[59] but this ultimately came to nothing due to religiously motivated political in-fighting over the issue.[60] The failure to provide these further exceptions appears to be increasingly out of line with Irish public opinion, and in particular with female opinion.[61] The lack of legislation was trenchantly criticised by the Irish Supreme Court in the *X case*:

> In the context of the eight years that have passed since the Amendment was adopted… the failure by the legislature to enact the appropriate legislation is no longer just unfortunate; it is inexcusable.[62]

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57 Article 40.3.3 as interpreted in *Attorney General v X* [1992] 1 IR 1 at para 118 *et seq*.

58 Eser & Koch *Abortion and the Law* (n 1) Diagram 11/1 p 63.

59 The Oriechtas Committee on the Constitution 5th Progress Report (2000, Stationary Office Dublin) accessible at <http://www.constitution.ie/reports/5th-Report-Abortion.pdf> accessed 29.09.10 para 40.

60 See eg The Interdepartmental Working Group Green Paper on Abortion, September 1999 at 4.20-8.

61 Opinion polls and research consistently show increased support for access to abortion. In 2004 a Crisis Pregnancy Agency study found that 90% of 18-45 year olds support abortion in certain circumstances, 51% stating that women should always have to right to choose an abortion. In 2007, an Irish Times Behaviour and Attitudes Poll found that 54% of women believe the government should act to permit abortion.

62 *Attorney General v X* [1992] 1 IR 1 at 147.

The ECHR, as a mechanism to protect human rights where the political process has failed to do so, therefore clearly has a potential role in relation to this issue.

In Ireland the Constitutional position is echoed in the criminal law: procuring an abortion is a criminal offence (Offences Against the Person Act, 1861, sections 58 and 59);[63] a woman 'unlawfully' having or attempting to have an abortion, and anyone assisting her, may be penalised in law (although as Irish law is subject to the Constitution an exception to the offence exists where the women's life is endangered)[64] and no general principle of necessity has so far been recognised to provide that abortion may be 'lawful' in extreme circumstances such as rape, as has been recognised in other jurisdictions which have, or used to have, similarly worded laws.[65] The penalty is life imprisonment (s58 OAPA), while those assisting in such may be imprisoned for 3 years (s59 OAPA). Clearly, if a woman sought to undergo an illegal abortion in Ireland and was convicted of this offence, it would be unlikely that the full penalty would be imposed, but in ECHR terms, the significance lies in the fact that such an exceptionally draconian penalty is available.[66] In the case of *X,*[67] relying on statements in *McGee,*[68] an exception to the prohibition where there was a 'real and substantial' risk to woman's life was recognised, which meant that the real risk of suicide[69] could create a positive obligation on the state to provide abortion for those in its care. However, this definition has created some political controversy in Ireland in so far as it is applied to suicide: in 2002 the 25th Amendment to the Constitution

63 Offences Against the Person Act, 1861, sections 58 and 59 set out the offence of 'procuring a miscarriage'. This offence has been affirmed by the legislature by s 10 of the Health (Family Planning) Act 1979: see further S Drislane 'Abortion and the Medical Profession in Ireland' (2009) 15 MLJI 35, 35.

64 *Attorney General v X* (n 62) at 146.

65 That was the position in England after *R v Bourne* [1939] 1 KB 687; the Irish Courts have not so far accepted the judgment and have referred to its incompatibility with the Irish position: *Society for the Protection of the Unborn Child v Grogan*, judgment of March 6 1997 (unreported) at p7 per Keane J. The judgment in *Bourne* was partly based on the explicit proviso in the English Infant Life (Preservation) Act 1929 s1(1) that the offence would not apply if the act was done in good faith for the preservation of the life of the mother (*R v Bourne* at para 6) which was not replicated in Irish law.

66 See eg *Dudgeon v United Kingdom* (App no 7525/76) (1982) 4 EHRR 149, and see discussion of this in Chapter 5 text to note 26.

67 *Attorney General v X* (n 62).

68 [1974] IR 284 at 284, 315.

69 This was confirmed subsequently in *A & B v Eastern Health Board, Mary Fahy, C and the Attorney General* (notice party) [1998] 4 IR 464 at 34.

(Protection of Human Life in Pregnancy) Bill, which would have removed suicide as an exception to the prohibition, was put to the electorate, but it was rejected.

This exceptionally restrictive regime means that women resort to illegal abortions or travel abroad to obtain abortions. However, the state has sought to prevent women travelling to neighbouring countries to obtain an abortion. This issue was raised in the Constitutional court in the *X* case in 1992.[70] The Court overturned a High Court injunction preventing a 14 year old girl travelling to England for an abortion where her pregnancy was a result of rape and the girl was at risk of committing suicide.[71] Understandably, this case generated considerable domestic sympathy and led to the 13th Amendment to the Constitution which explicitly prevented the state interfering with its citizens' ability to travel abroad in order to protect the life of the unborn.[72] A considerable number of women travel abroad annually for abortions from Ireland.[73] But due to the fact that the Constitutional Amendment permitting travel abroad for abortion is framed in negative terms, there is a lack of clarity as to whether those under the control of the state may obtain abortion abroad, which can put vulnerable members of society, such as teenagers in care homes, who are under the care and control of the state, in a difficult and uncertain position.[74] An example of this occurred

70 Initially the Supreme Court in *Attorney General v X* (n 62) para 62 it was held that travel to obtain an abortion could be restricted, but this interpretation of the Constitution was overturned by referendum. After the November 1992 referendum the Thirteenth Amendment was added which reads as follows: 'This subsection shall not limit freedom to travel between the State and another state'. In relation to the provision of information about external abortion it was initially held by the Supreme Court that Art 40.3.3 required the placing of restrictions on such material *Attorney General (SPUC) v Open Door Counselling* [1988] IR 593.

71 *Attorney General v X* (n 62) at para 2 *et seq*.

72 13th Amendment of the Constitution Act, 1992.

73 Recent figures for those giving Irish addresses in UK abortion clinics put the figure at around 4,500, but this is likely to be an underestimate of the total number travelling. The UK Department of Health figures on those performing abortions giving addresses in Ireland in 2008 was 4,600: Department of Health UK 'Number of Women Giving Irish Addresses at UK Abortion Clinics Decreases for Seventh Year in a Row According to Department of Health UK' (Crisis Pregnancy Agency press release, June 2008). Between January 1980 and December 2008, at least 137,618 women travelled from the Republic of Ireland for abortion services in Britain. An increasing number of women are accessing safe and legal abortion services in EU countries other than the UK. According to the Crisis Pregnancy Agency, 331 women from the Republic of Ireland travelled to the Netherlands for safe and legal abortion services in 2008 and 451 women in 2007.

74 The state has on occasion funded travel for this purpose: see the Submission of the Irish Family Planning Association to the UN Committee on the Elimination of Discrimination Against Women May 2005 <http://www.ifpa.ie/eng> accessed 29.09.10 at p 3 and the facts of *A & B v Eastern Health Board, Mary Fahy, C and the Attorney General* (notice party) [1998] 4 IR 464 at 34. See also as regards uncertainty on this issue, the Comments of the Irish Family Planning Association in respect of the Third Periodic Report of Ireland under the International Covenant of Civil and Political Rights, June 2008; see at <http://www2.ohchr.org/english/> accessed 29.09.10.

as recently as 2007 in the case of 'Miss D', an Irish teenager in care who wished to have an abortion, having found that she was carrying an anencephalic foetus.[75] The Health Service Executive attempted to prevent her travelling by seeking the withdrawal of her passport; ultimately she was only able to travel after obtaining a High Court injunction based on her constitutionally guaranteed right to travel.[76]

Somewhat similar legal developments occurred in the early 1990s in relation to the provision of information domestically in relation to abortion services abroad. In this instance development was prompted by the ECtHR ruling in the case of *Open Door Counselling v Ireland.*[77] The Society for the Protection of Unborn Children sought a declaration that the applicant, an abortion counselling service, was acting unlawfully in providing information on abortion services abroad. This was duly granted by the High Court and upheld by the Irish Constitutional Court[78] on the basis that there was no constitutional right to speech which 'if availed of, would have the direct consequence of destroying the... right to life of the unborn'.[79]

The Strasbourg Court subsequently decided that the state was required to refrain from an absolute prohibition on the provision of such information since that stance was contrary to Article 10 of the ECHR (which protects freedom of speech).[80] The detail of the substantive decision will be addressed in the next chapter. In response to the ruling provision was made in Ireland that information could be made available,[81] but a number of limitations were imposed. The nature of counselling on abortion was limited so that 'professional counsellors may only provide abortion information after full non-directive pregnancy counselling,'[82] and the information as to abortion services that could be given was restricted. Thus, while abortion counselling services

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75 Comments of the Irish Family Planning Association Third Periodic Review of Ireland under the ICCPR (n 74).

76 See for further discussion of litigation at the ECHR on this issue, chapter 5 p 10-11.

77 *Open Door Counselling Ltd and Dublin Well Women Centre Ltd and others v Ireland* (App No 14234/88) (1993) 15 EHRR 244. See also chapter 3 text to n 43.

78 *Attorney General (SPUC) v Open Door Counselling* [1988] IR 593.

79 *Open Door Counselling v Ireland* (n 77) at para 19.

80 *Open Door Counselling v Ireland* (n 77) at para 77.

81 Ie it can be divulged by bodies within Ireland such as the Irish Family Planning Association.

82 Regulation of Information (Termination of Pregnancies Outside the State) Act 1995 cited in International Planned Parenthood Federation 'Abortion Legislation in Europe' (8th edn IPPF European Network, Jan 2007) at p 31.

are therefore able to provide some basic information in Ireland on abortion services abroad, the vital service that such agencies could provide by way of providing a full link between abortion providers abroad and local medical services is severely hampered by this law.[83] The provision also creates legitimacy for counselling services which mislead women as to the effects of abortion in order to discourage them from having an abortion, a matter highlighted by Human Rights Watch.[84] Therefore the European Court of Human Rights may have to revisit Ireland's highly restrictive provisions on this issue, which may be putting women at risk.

The UN Committee for the Elimination of Discrimination Against Women has repeatedly highlighted the suffering caused to Irish women by the lack of access to abortion and to related health care services, by the criminal penalties applicable, and the related physical, social and mental effects on women, especially more vulnerable girls and women.[85] Human Rights Watch has also become involved in Ireland, noting similar issues in its recent report in January 2010 'A State of Isolation: Access to Abortion for Women in Ireland'.[86] The Safe and Legal (in Ireland) Abortion Rights Campaign, launched in August 2005,[87] is currently supporting a challenge to the Irish prohibition on abortion at Strasbourg, the case of *ABC v Ireland*,[88] an application brought by three women who were forced to travel abroad to the United Kingdom to receive abortions in difficult circumstances involving medical complications. The application highlights the problems[89] caused indirectly by the Irish regime in forcing Irish women to undergo unnecessarily expensive, delayed and stressful abortion procedures and in severely reducing the effectiveness of the subsequent medical oversight of the procedure. If *ABC* is successful, or partially successful, at Strasbourg it could have the effect of encouraging Ireland to develop a *domestic* policy towards abortion regulation rather than, in a sense, relying on its neighbours to the detriment

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83 Human Rights Watch 'A State of Isolation: The State of Abortion for Women in Ireland' (Jan 2010) at p 1-2 <http://www.hrw.org/en/reports/2010/01/28/state-isolation> accessed 29.09.10.

84 Human Rights Watch 'A State of Isolation' (n 83) at pt V.

85 Convention for the Elimination of Discrimination Against Women 33rd Session July 2005, (CEDAW/C/IRL/4-5) and 21st Session, June 1999 (CEDAW/C/IRL/2-3).

86 Human Rights Watch 'A State of Isolation' (n 83).

87 For more information see <http://www.safeandlegalinireland.ie/sl_aboutcam.html> accessed 19/09/09.

88 *ABC v Ireland* (Statement of Facts) (App no 25579/05), lodged 15 July 2005.

89 The substance of the guarantees in international human rights law which apply to restrictive regimes will be considered in Chapter 4.

of elements of its population. The possibility of such an outcome in *ABC* and its likely form is considered in Chapter 5.

Conclusion

It may be concluded that there is a role for the creation of rights to abortion services under the Convention to address the suffering created by the restrictive regimes. Rights' violations could be or already have been claimed (as in *Tysiąc v Poland*)[90] where abortion that is *de jure* available under the Medical Indications model is not in practice available. They can also be claimed in relation to the Prohibition model where travel abroad creates stress and means that the abortion is later than it need have been; claims would also be expected to relate to lack of abortion after care and to women's lack of access to tests or medical treatment for life-threatening conditions where the foetus might be put at risk – matters associated with both the Medical Indications model and Prohibition model. Such claims are considered in Chapter 5. If Strasbourg accepts that such claims are able to lead to findings of rights' violations that would reflect the dominant position in Europe which is to permit abortion on request, with counselling, or on social grounds in the early stages of pregnancy. It is not however suggested that the ECHR is likely to be employed imminently to impose the Social Grounds model or Counselling model on states adhering to the more restrictive models; rather, it is suggested that it could be employed in order to alleviate certain forms of suffering caused by the regimes in place under those models.

It is argued that since the last two models are strongly associated with Catholicism in Poland and Ireland, intervention at Strasbourg appears to be especially problematic due to the influence of the margin of appreciation doctrine, whereby national cultural and religious sensitivities are allowed to invite a restrained Strasbourg approach.[91] Catholicism affects both the public and private spheres; in other words, it affects the individual consciences of doctors and others involved in operating abortion and healthcare services, as well as influencing law-makers and laws. (By 'Catholicism' is

90 *Tysiąc v Poland* (n 44) see further chapter 3 pp 4-7.
91 See further chapter 5 pp 1-4.

not necessarily meant the direct influence of the Catholic Church; rather, the reference is to cultural acceptance of Catholic morality.) Thus, it is inevitable that a gap between *de jure* and *de facto* abortion practice will arise – as it has done in both Poland and Ireland.[92] The inception of the Grand Chamber at Strasbourg appears to be associated with a decline in the significance of the margin of appreciation doctrine in the Strasbourg jurisprudence.[93] Thus, while seeking to bring about change in Poland and Ireland in reliance on the ECHR, the subject of Chapter 5, is especially complex and sensitive in relation to abortion services, the likelihood of so doing is greater at the present time than it would have been previously. Strasbourg, in other words, may have a greater appetite for attempted intervention in this context than previously; clearly, the *reception* of such intervention in the states in question is likely to remain problematic, a matter that is touched on in Chapter 6.

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92 With implications for the Strasbourg jurisprudence on abortion: see further chapters 3 pp 4-7 and 5 pp 9-11.

93 As chapter 5 will argue (p 5) there are signs in other areas of ECtHR jurisprudence that the influence of that doctrine is diminishing, a change that appears to be associated with the work of the Grand Chamber; an example of this is the judgment of the Grand Chamber in *A and others v UK* (App no 3455/05) (2009) 49 EHRR 29.

Chapter 3 : The current Strasbourg approach to abortion services and a foetal right to life

This Chapter will consider the Convention rights found by the European Court of Human Rights to be relevant to access to abortion and associated healthcare services. Various potential Convention claims are discussed in Chapter 5, but the Court has so far only conducted detailed consideration of claims of rights-violation raised by issues relating to access to abortion under Articles 8 (right to respect for private life) and 2 (right to life) of the Convention. The cases are, where appropriate, presented in chronological order to demonstrate the way that Strasbourg has developed the jurisprudence. The Strasbourg Court has not yet decided any case that straightforwardly recognises that access to abortion is required or prohibited by any Article of the Convention, but Poland has recently been required to recognise the rights of its female citizens in relation to existing, formal provision of access to abortion under Article 8 in *Tysiąc v Poland*.[1] This case will be analysed in detail to determine whether it amounts to a 'breakthrough case' for further development under the Convention of rights to the provision of abortion services, a matter that is fully analysed in Chapter 5.

No current requirement under Article 8[2] of abortion provision on demand as under the permissive models

In the case of *Brüggemann and Scheuten v Germany*[3] the Commission accepted for the first time that the issue of abortion could be considered under the Convention. That was significant since previously the stance had been, in relation to the question of a possible foetal right to life, that applicants had no standing to bring the issue

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1 *Tysiąc v Poland* (App no 5410/03) (2007) 45 EHRR 42.

2 A8(1): 'Everyone has the right to respect for his private and family life, his home and his correspondence.' A8(2): 'There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society… for the protection of health or morals, or for the protection of the rights and freedoms of others.'

3 *Brüggemann and Scheuten v The Federal Republic of Germany* (Decision) (App no 6959/75) (1977) 5 DR 103.

before the Court.[4] The Commission decided that the issue of access to abortion was *capable* of falling within the right to respect for private life under Article 8(1) of the Convention. The case involved two women from West Germany who were prevented from having an abortion due to West German law which, after a Supreme Court Decision,[5] had been made more restrictive so that access to abortion at any time during pregnancy was barred unless exceptional circumstances existed.[6] Brüggemann was single and desired to avoid the disadvantages associated with illegitimate motherhood, while Scheuten was divorced with two children and wished to avoid having another. Dismissing their claims in relation to the right to marry (Article 12) the Commission accepted the relevance of the right to respect for private life within Article 8(1) as covering the 'development and fulfilment of personality', which included 'the possibility of establishing sexual relations'.[7]

However, the Commission was not prepared to go further than to find that pregnancy could be recognised as protected within the ambit of Article 8(1). The Commission's refusal to go further relied on recognition of the interests of the foetus: the Commission noted that certain interests relating to the foetus are legally protected from conception, in particular the right to inherit;[8] it also found that pregnancy did not necessarily 'pertain uniquely to the sphere of private life'[9] because 'whenever a woman becomes pregnant her private life becomes closely linked to that of the developing foetus'. Therefore it went on to find that not 'every' regulation of the termination of foetal life could be considered to be within the ambit of the Article – indicating that this applied to the social or 'choice' based considerations that the applicants raised.[10]

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4 In *X v Norway* (App no 867/60) and *X v Austria* (App no 7045/75) the Commission refused to consider the compatibility of laws regulating abortion to Article 2 *in abstracto*. Also see A Mowbrey 'Institutional Developments and recent Strasbourg Cases' (2005) 5 HRL Rev 169 at para 76.

5 (1975) BVerfGE 39, 1.

6 Law of Feb 12 1976 [1976] BGB1 I 1213 (W Ger).

7 *Brüggemann and Scheuten v Germany* (n 3) at para 55.

8 *Brüggemann and Scheuten v Germany* (n 3) at para 60 referring to laws in signatory states recognising foetal interests, in particular inheritance and A6(5) of the United Nations Covenant on Civil and Political Rights which prohibits the execution of death sentences on pregnant women.

9 *Brüggemann and Scheuten v Germany* (n 3) at paras 59-60.

10 *Brüggemann and Scheuten v Germany* (n 3) at para 56.

Prohibition/restriction of abortion not required to protect a foetal right to life under Article 2[11]

In cases subsequent to *Brüggemann* concerning the matter of potential foetal rights, Strasbourg adopted a similarly evasive stance, but one which appeared to exclude the possibility of foetal rights under the ECHR and to down-play the significance of foetal interests in early pregnancy. Since Article 2 is not materially qualified and contains no exception for abortion, the matter is essentially one of the interpretation of the wording of Article 2(1) – '[e]veryone's right to life must be protected by law'. Assuming that, as contemplated in *Brüggemann,* access to abortion in certain circumstances could be found to fall within the ambit of Article 8(1), interference would be justified by reference to a right to life[12] of the foetus within Article 2, if the foetus was found to be a living being in Article 2 terms. But in *Paton v United Kingdom*[13] the Commission did not accept that interpretation. The case concerned a complaint regarding a woman who had been allowed to have an abortion on health grounds in relation to a foetus of 10 weeks gestation. The Commission decided that the Convention Articles, including Article 2, were not to be construed in such a way as to contemplate their direct application to the unborn, and that the use of the term 'everyone' (within a number of the Articles of the Convention) was generally to be considered not to include the foetus, although this interpretation could not be entirely excluded.[14] This could arguably amount to a finding that the foetus is not therefore a 'person' under the Convention which would entail, under the natural and ordinary meaning of Article 2, that the foetus could not be viewed as protected by its provisions.[15]

However, the Commission went on to consider whether the foetus could nevertheless be viewed as a form of 'life' – impliedly with a lesser status than that of a person –

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11 A2(1) reads: 'Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.'

12 The Court or Commission have not so far considered that the foetus can benefit from the protection of any other right of the Convention: in *H v Norway* 73 dr 155 (1992) the Commission dismissed for lack of evidence the argument that the foetus suffers Article 3 treatment when it is aborted.

13 *Paton v United Kingdom* (App no 8416/78) (1981) 3 EHRR 408.

14 *Paton v United Kingdom* (n 13) at paras 7-9.

15 *Brüggemann and Scheuten v Germany* (n 3) Dissenting Opinion of Mr JES Fawcett. See further chapter 6 pp 4-5.

within the meaning of Article 2.[16] It found, without deciding the matter, that while the foetus could not be seen as 'life' requiring absolute protection, a *possible* interpretation of Article 2 was that the foetus could be afforded *some* protection, subject to an implied limitation to the effect that the life and health of the woman would be paramount in early pregnancy.[17] This evasive approach – based on leaving open the question of a *degree* of recognition of foetal interests under Article 2 – was continued after *Paton* in *H v Norway,*[18] *Open Door and Dublin Well Woman v Ireland,*[19] *Boso v Italy*[20] and *Vo v France*.[21]

Vo v France was, however, highly significant since the Court took the stance taken in *Paton* but in respect of a potentially viable foetus.[22] *Vo* did not concern an abortion at the behest of the woman, as in *Paton*, but an abortion performed due to medical negligence where Mrs Vo desired to carry the pregnancy to term.[23] Vo claimed at Strasbourg that the foetus should receive similar protection in terms of criminal sanctions as could have been available in France in respect of the medically negligent killing of a baby. The Court declined to accept the applicant's argument that the failure of the domestic authorities to classify the termination as unintentional homicide carrying a criminal penalty had afforded inadequate protection to the life of the foetus, amounting to a breach of Article 2.[24] The Court took the approach set out above in *Paton,* but justified it by reference to the importance of maintaining the established balance in abortion regulation, referring to the generally liberal approach in Europe, which, it found, would be disturbed by a finding that the foetus (even at the stage of viability) was absolutely protected.[25]

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16 *Paton v United Kingdom* (n 13) at paras 10-23.

17 *Paton v United Kingdom* (n 13) at para 19. See further S Pattinson *Medical Law and Ethics* (2nd edn, Reuters, 2009) pp 250-3 and A Plomer 'A foetal Right to life? The case of *Vo v France*' (2005) HRL Rev 311 at 319. See also *Paton v United Kingdom* (n 13) para 23; *H v Norway* 73 DR 155 (1992) at p 167.

18 *H v Norway* (App no 17004/90) (1992) 73 dr 155.

19 *Open Door Counselling Ltd and Dublin Well Women Centre Ltd and others v Ireland* (App No 14234/88) (1993) 15 EHRR 244 concerned Ireland's restriction on the provision of abortion literature which it attempted to justify on the basis of protection for the life of the unborn.

20 *Boso v Italy* (App no 50490/99), Reports of Judgments and Decisions 2002-VII.

21 *Vo v France* (App no 53924/00) (2004) 40 EHRR 12.

22 In *Vo v France* (n 21) the foetus was of 20-21 weeks gestation.

23 *Vo v France* (n 21) at para 9 *et seq*.

24 *Vo v France* (n 21) at para 81.

25 *Vo v France* (n 21) at para 82.

The case of *Tysiąc v Poland*

In the case of *Tysiąc v Poland*[26] the applicant had suffered from severely impaired eyesight and on finding out that she was pregnant, having had a history of difficult pregnancies requiring Caesareans, consulted her doctors on the medical implications of the pregnancy. She was seen by three ophthalmologists who determined that while the pregnancy posed a risk to her eyesight, they would not certify that an abortion was needed on therapeutic grounds as it was not certain that her retina would detach (thus causing effective blindness). Subsequently she sought further advice and her GP found that there were grounds for an abortion, taking into account the risk of rupturing the uterus as well as pathological changes to the retina; on this basis the GP issued a certificate which was taken by Tysiąc to permit her to receive a legal abortion. Over the second month of her pregnancy her eyesight deteriorated and she sought to terminate the pregnancy; however, a gynaecologist at a state hospital determined, after a cursory examination, that there was no significant risk to her health and signed a certificate to that effect, which was co-signed by an endocrinologist without examining her personally. The eventual result was that Tysiąc delivered the child by Caesarean and suffered a significant deterioration in her eyesight so that she became near-blind. She filed a criminal complaint against the gynaecologist, but at trial it was found that there was no causal link between his clinical assessment and the damage to her sight suffered by Tsyiac, considering the evidence of the three ophthalmologists and an independent panel of medical experts. No leave for appeal was given. Disciplinary proceedings against the endocrinologist also failed.

Tysiąc complained at Strasbourg that the refusal of access to abortion represented a direct breach of Article 8, as in effect failing to permit abortion, an argument which the Court refused to consider. She further claimed that there had been a breach of the state's positive obligations under Article 8 to secure her physical and mental integrity in relation to medical services. The Court accepted that there had been an unjustified interference with Tysiąc's Article 8 right to respect for her private life, placing

26 *Tysiąc v Poland* (n 1) para 9 *et seq.*

considerable emphasis on the general context of criminal prohibition of abortion in Poland, and referring to the submission of the Polish Federation for Women which suggested that it created a 'deterrent effect'.[27] Reference was also made to the findings of the Committee for the Elimination of Discrimination Against Women which had found deficiencies in the way that the Polish legislation was applied in practice.[28] The Court concluded that the state was under a particular duty to provide an effective review procedure,[29] referring particularly to the disagreements between the medical practitioners.[30] The Court suggested that such a review procedure should be: fair and impartial; should give a woman an opportunity to be heard in person, and to have her views considered; it should be timely in order to be capable of preventing a deterioration of the woman's health due to a late abortion.[31]

Taking these factors into account in relation to the facts, the Court found, despite noting that it was not its place to second-guess medical opinion, that Tysiąc's fears for her health 'could not be said to be irrational'.[32] In light of this, and the aforementioned sensitive context, the procedure for approving abortions was found to be deficient, in particular due to the absence of any procedure by which the *applicant* could obtain review of the decision reached by the doctors as to her suitability for an abortion. The Court concluded:

> ...that it has not been demonstrated that Polish law as applied to the applicant's case contained any effective mechanisms capable of determining whether the conditions for obtaining a lawful abortion had been met in her case. It created for the applicant a situation of prolonged uncertainty. As a result, the applicant suffered severe distress and anguish when contemplating the possible negative consequences of her pregnancy and upcoming delivery for her health.[33]

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27 *Tysiąc v Poland* (n 1) para 116.
28 *Tysiąc v Poland* (n 1) para 117.
29 *Tysiąc v Poland* (n 1) para 118.
30 *Tysiąc v Poland* (n 1) para 118.
31 *Tysiąc v Poland* (n 1) para 119-20.
32 *Tysiąc v Poland* (n 1) para 121.
33 *Tysiąc v Poland* (n 1) para 126.

The Court was careful to maintain distinctions between abortion rights founded on a right to choose, or on the ground of personal fulfilment, as in *Brüggemann,*[34] or on preserving the physical integrity of a patient, giving some endorsement only to the latter position. It did so only in the sense that it found that where a state had made it clear that a particular medical procedure was available, access to it should be effective. Thus the Court took the stance that where the state has provided for a degree of access to abortion to be available in law, the state's margin of appreciation does not extend to the *manner* in which it is made available. Abortion was *not* viewed by the Court – although this stance was open to it – to be a special type of medical procedure to be treated cautiously by the Convention in the light of domestic attitudes towards the protection of foetal interests. The Court did appear impliedly to accord access to abortion a higher status, as opposed to other offered medical procedures. The case was determined only on the issue of the ambit of Article 8(1), presumably because Poland did not consider, after *Paton*[35] and *Vo,*[36] that any sufficiently weighty interest could succeed, on proportionality and necessity grounds, under para 2. Therefore Poland did not put forward an argument based on Article 8(2).

The Court's stance in *Tysiąc* on the question of when an applicant's Article 8 rights might be found to be infringed by denial of access to abortion is subject to at least two interpretations which will be briefly explored. Firstly, and most straightforwardly, the infringement appeared to stem from the value placed on ensuring an effective respect for physical integrity. Importantly, the Court placed great emphasis on the fact that the Polish regime *purported* to grant the pregnant woman some protection, which in Tysiąc's case had been undermined due to medical obstructiveness linked to the influence of the Catholic Church. On that view, it was because Poland had given up its discretion in the area of abortion by creating certain legal rights of access that the Article 8 claim succeeded due to the refusal of an abortion which appeared to be permitted as falling within an accepted exception.[37] It is therefore arguable that the Court was only prepared to find that an abortion that was *potentially* legal should be

34 *Brüggemann and Scheuten v Germany* (n 3) at para 55-6.

35 *Paton v United Kingdom* (n 13).

36 *Vo v France* (n 21).

37 N Priaulx 'Testing the Margin of Appreciation: Therapeutic Abortion, Reproductive 'Rights' and the Intriguing Case of Tysiąc v Poland' (2008) 15 EJHL 361 at 371-2.

in practice possible. This approach arguably accords with the explicit statement of the Court that the case did not concern the issue of whether there was a right to abortion under the Convention.[38]

But alternatively, despite this explicit disavowal, it is possible to argue that there is a further dimension to the Court's decision which comes closer on its facts to providing some support for such a right. This argument has two main strands: the first is that the Court, having regard to the importance of 'physical integrity',[39] to the context of criminal liability for performing abortion, the tendency for women who were entitled to an abortion within the exceptions to fail to receive one, and the sensitivity of the issue, applied a particularly stringent requirement of procedural good practice. This interpretation coheres with the facts of the decision in *Tysiąc* – it is difficult to see how the procedures could have been *improved* in *Tysiąc* so as to avoid the eventuality of the applicant's loss of eyesight, or even in order to provide her with compensation, given the opinion of the medical experts involved. The outcome meant that Poland would only have been able to satisfy the demands of Article 8 by offering a more ready access to abortion in analogous circumstances. In other words, it would have had to *broaden* the access, rather than merely coming under a duty to ensure that effective procedures were available to determine whether access should be granted. The Court appears to suggest, as Priaulx has argued, that as therapeutic abortion involves particularly fundamental interests, the Court may justifiably *alter* the balance between the interests of women in seeking such abortions and the interests of the foetus.[40]

The second, much more contentious, strand of argument finds that the Court was not concerned with procedural good practice at all and was instead creating a right of access to abortion under Article 8 by stealth. The latter argument is put forward by Jacob Cornides in attacking the undeclared pro-choice agenda of European institutions; he claims that they are using human rights arguments merely as a front to further that agenda.[41] Cornides' argument, however, fails to convince since it fails to

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38 *Tysiąc v Poland* (n 1) para 105-6.
39 *Tysiąc v Poland* (n 1) para 107.
40 Priaulx 'Testing the Margin of Appreciation' (n 37) at p 375.
41 J Cornides 'Human Rights Pitted Against Man' (2008) 12 Int J HR 1 107 at p 130.

explain fully the Court's outright rejection of Tysiąc's claim of a direct breach of Article 8 by the denial of a therapeutic abortion.[42]

It is arguable that the Court could merely have found no breach of Article 8 on the basis that since medical opinion gave little support to Tysiąc's case as falling within the legislative exception, there had been no interference with her Article 8(1) right. Adoption of that course would have been in accordance with its previously evasive and ambivalent stance on this matter. Its refusal to take that stance, which appeared to be open to it on the facts, indicates, it is argued, that the Court was prepared to accept that where a right of access to abortion appeared to be available, the state would find it difficult to discharge the burden of proving that there was a basis for refusing such access in any particular instance, if the risk in question had materialised. The distinction appears to create a narrowing between that stance and that of determining that a right of access to abortion in similar circumstances *should* be made available to satisfy Article 8. However, *Tysiąc* provided scope for the Court to concentrate on the procedural aspects of the state's regime; the case did not confront the Court with the more difficult question of accepting a right of such access where the woman's case did not appear to fall fairly clearly within an exception recognised by the state; therefore the 'weaker' version of the two strands of argument appears to capture the stance taken more readily.

It is concluded then that *Tysiąc* supports the proposition that states which purport to provide access to abortion in certain circumstances have an Article 8 duty to ensure that it is available *in practice* in such circumstances, despite the reluctance of doctors to take decisions that might lead to endangering the life of the foetus. That in itself is quite a contentious finding. The determination of the Court that the margin of appreciation doctrine does not extend to the means by which abortion that is theoretically available is made available in practice, implies that the Court is not prepared to accept that Catholic morality can be a driving force in the decisions of doctors if accepting that it can be leads to general reluctance to perform abortions. Thus, *Tysiąc* shows a preparedness to intervene even in the context of private religious sensibilities. But the decision could also arguably support the proposition that the *de*

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42 Priaulx 'Testing the Margin of Appreciation' (n 37) at p 372-3.

jure circumstances in which abortion is made available should be widened or clarified to satisfy Article 8, while remaining within the model already accepted by the state in question. Poland's response to *Tysiąc*, discussed in Chapter 2, of setting up a medical Ombudsman to give permission for abortions, took, it is argued, the most ungenerous stance possible towards the decision since it largely failed to address the central complaint that doctors were refusing to make diagnoses that might lead a woman to seek an abortion, on admitted or unadmitted grounds of conscience. If the Ombudsman upheld a complaint in the circumstances applicable in *Tysiąc*, but a new diagnosis by the medical expert in question agreed with the first one, a woman in the position Tysiąc was in would not be able to gain access to an abortion. The diagnosis might demand too high a level of certainty as to the likelihood of the risk in question (in Tysiąc's case of damage to her eyesight) materialising. The Ombudsman remedy would not address that problem and so would not appear to be adequate to address the demands of Article 8 as laid down at Strasbourg.

Ancillary rights to abortion services – access to information and debate on abortion

The Court has also had regard to the matter of abortion services in various cases, not directly turning on the availability of abortion to the applicant, but on the availability of other services related to abortion provision – the ability to receive information in relation to abortion. In *Open Door Counselling v Ireland*[43] freedom of expression in relation to abortion services under Article 10 overcame the potentially legitimate concerns of the state in protecting unborn life. An injunction had prevented the claimant, an abortion counselling service, from informing Irish people of the identity or location of abortion services abroad, or of methods of communicating with such services. While the Court avoided deciding on the issue of abortion explicitly, it did allude to the fact that the injunction created a risk to health since it could create delays in obtaining legal abortions; further, the Court found that it had a greater impact on impecunious women in terms of leading to delay.[44] The Court deliberately left open the possibility that Article 2 interests might be capable of placing *some* restrictions on

43 *Open Door Counselling v Ireland* (n 19).
44 *Open Door Counselling v Ireland* (n 19) at para 72.

information on abortion, but clearly accepted the significance of the provision of such information.[45]

The Court recently defended expression in relation to reproductive rights in Portugal (before the more permissive regime was introduced) in *Women on the Waves and Others v Portugal*.[46] Dutch and Portuguese family planning organisations had aimed to spark debate on the matter of abortion in Portugal; a ship was commissioned which would travel to Portugal where people would then be able to debate decriminalisation and learn about family planning on board during various events. The Portuguese government responded by banning the ship from entering its waters (by Ministerial Decree) on the basis that it planned to distribute prohibited pharmaceuticals; in order to carry this ban into effect a warship was dispatched to meet the ship. The Strasbourg Court, noting that there was no evidence for the government's assertion, characterised the government's interests as related to 'public order or health', which could not justify the severe chilling of the free speech of the family planning organisations that such an extreme measure had created.

Conclusions as to the Court's stance

The current approach of the Strasbourg Court to abortion cases cannot be predicted with certainty until and if a clearer stance is taken in relation to the right to life of the foetus. If that occurred the gulf in reasoning in *Tysiąc v Poland*[47] as to the relationship between foetal interests and the question of abortion would be filled,[48] which in particular would indicate whether the Court had clearly accepted an implied limitation to a concept of a foetal right to life based on the health of the mother, as had been suggested in *Paton v United Kingdom*.[49] In *Tysiąc* the argument centred on the ambit of Article 8(1); while the argument as to a competing 'right of others' was not put forward, the state appeared instead to be seeking to establish a restricted ambit for Article 8(1) in this context which would have placed rights of access to abortion

45 *Open Door Counselling v Ireland* (n 19).

46 *Women on Waves and Others v Portugal* (App no 31276/05), judgment of 3rd February 2009.

47 *Tysiąc v Poland* (n 1).

48 N Priaulx 'Testing the Margin of Appreciation' (n 37) at 370: referring to the missing link between *Tysiąc* and previous abortion cases.

49 *Paton v United Kingdom* (n 13) at para 19.

outside it. Thus the difficult issue of the status of the foetus in relation to the protection of the 'rights of others' was not addressed.

It is clear that the decision in *Tysiąc* is significant since for the first time regulation that touched on the central abortion issue (that of availability) was found to be incompatible with Article 8. This reflects the approach of the Court in relation to ancillary abortion rights in which the discretion of the state to treat the foetus as a living being is arguably given very little weight (in *Women on the Waves* and *Open Door*). This may be contrasted with the approach in *D v Ireland* (admissibility),[50] decided before *Tysiąc,* in which the Commission emphasised that the matter of balancing such 'constitutionally enshrined' rights as those of the mother and foetus was one with which it would be reluctant to interfere. As was argued above, although in *Tysiąc* the Court sought to confine its judgment to procedural matters, the indications were that the Court had decided to form its own judgment on this extremely sensitive matter, given the suffering undergone by Tysiąc. Clearly, however, the procedural aspects of *Tysiąc* obscured the substantive issue: had Poland provided no possibility of abortion even where the woman's health would be placed at serious risk due to continuance of the pregnancy, the Court would have had to confront the substantive issue head-on.

Given that certain countries, on religious grounds, are now so out of line with the rest of Europe on this issue, and given the inescapable indications that denial of access to reproductive or general health services for women due to the influence of religious leaders is hard, if not impossible, to reconcile with the aspiration of the ECHR to respect and promote sexual equality,[51] this highly significant decision is arguably likely to be the forerunner of future ones making further forays into this contentious area of social policy. The stance at Strasbourg in relation to reliance on the margin of appreciation doctrine on this issue supports the notion of an emergent recognition of rights of access to abortion services since Strasbourg has declined to decide that the foetus falls within Article 2, but has decided – at least on procedural grounds – that access to abortion falls within Article 8. So in effect the discretion of a state under the

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50 *D v Ireland* (Admissibility) (App no 26499) (2006) 43 EHRR SE 16 dismissed as inadmissible for failure to exhaust domestic remedies. See chapter 5 p 6.

51 Universal Declaration of Human Rights Arts 1-2.

ECHR to treat the foetus as a living being of equal status (or of equal status except where the mother's life is at risk) to the mother is diminishing.

Chapter 4 : International human rights law and access to abortion services

This chapter will outline the developments under international human rights jurisprudence that could provide both impetus for further recognition of rights to abortion services at Strasbourg[1] and a model for the form those rights could take in the European system under the ECHR. The international human rights context will be briefly set out to demonstrate that there is currently a trend towards recognition that access to abortion and to full healthcare services for women – even where they are pregnant and the foetus could be placed at risk – are human rights issues. This chapter will focus in particular on the developments under certain key instruments: the International Covenant on Civil and Political Rights (ICCPR), monitored by the Human Rights Committee (HRC); further reference will be made to the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), monitored by the Committee on the Elimination of all forms of Discrimination Against Women (CEDAW Committee), and to the International Covenant on Economic, Social and Cultural Rights (ICESCR) monitored by the Committee on Economic Social and Cultural Rights (CESCR). The ICCPR is of particular significance since its provisions are closest in form to the rights in the ECHR. The rights of the mother will be discussed separately from consideration of possible recognition of a right to life of the foetus in order to reflect the distinct approach adopted towards the two issues.

These treaties are particularly pertinent as they are well established; their provisions (discussed below) touch on the provision of abortion services and they contribute to a European consensus on human rights (all major European countries have signed and ratified these treaties). They are also 'quasi-legal' in that they use an enforcement mechanism of reports and recommendation by committee and thus have a

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[1] It is well established that international treaties affect the development of the Strasbourg jurisprudence: see eg J Merrills *The development of international law by the European Court of Human Rights* (Man UP 1993) at 218 *et seq*; another example is presented by the case of *DH and others v Czech Republic* (App no 57325/00) (2008) 47 EHRR 3 in which race was recognised as a category demanding heightened protection from discrimination (reference was made to the Framework Convention on the Protection of National Minorities, the International Convention on the Elimination of All Forms of Racial Discrimination and the EU Race Equality Directive).

considerable persuasive authority for the Strasbourg Court. Finally, all have been cited by the Court already in its jurisprudence.[2] However, they clearly do not render the ECHR superfluous as not all possess a mechanism for considering individual cases and none are as effective as the ECHR in this regard. Therefore the Strasbourg Court has the further role in relation to the European signatories of these treaties of interpreting and, in effect, enforcing their provisions in so far as it allows them to influence its determinations as to the ECHR; furthermore, as a regional human rights instrument specific to Europe the ECHR has greater relevance for European countries.

International Human Rights Context

The European Convention could and, it is argued, should join international human rights treaties in recognising the expansion in protection as human rights of women's rights in the reproductive sphere. As early as 1968 the first conceptualisation of 'reproductive rights' – the right of parents to determine freely the number and spacing of their children – as human rights was recognised in the Final Act of the First World Conference on Human Rights at Tehran.[3] Since then the rights of women in relation to family planning services have been repeatedly recognised by international human rights bodies - for example, in the Programme of Action of the 1994 United Nations International Conference on Population and Development in Cairo, which stressed the importance of the right to decide when and how to reproduce and the 'right of access to appropriate health care services that will enable women to go safely through pregnancy and childbirth'.[4] At the 1994 Conference the attending governments from over 180 nations expressly acknowledged, for the first time, that reproductive rights are grounded in already existing human rights obligations. That has led to an expansion in international human rights law dealing with women's rights to abortion services. The most far-reaching (and arguably most progressive) of such laws is the African Charter (1981)[5] which became the first legally binding international human

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2 See re ICCPR *Tysiąc v Poland* (App no 5410/03) (2007) 45 EHRR 42 at paras 50-52 re CEDAW *Rantsez v Cyprus* (App no 25965/04) (2010) 51 EHRR 1 and re ICESCR (2009) *Demir v Turkey* (App no 34503/97) (2009) 48 EHRR 54.

3 A/Conf.32/41 UN Doc.

4 Report of the International Conference on Population and Development, Cairo, 5-13 Sept 1994 A/Conf 171/13 Rev 1 at Chapter VII 7.12.

5 OAU Doc. Cab/Leg/76/3 Rev.5; 21 ILM 58 (1982).

rights instrument to recognise explicitly a right to therapeutic abortion in 2003 after adopting the African Women's Protocol,[6] which requires member states to authorise measures to:

> …protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.[7]

The substance of rights in international human rights law affecting the provision of abortion

The right to life of the woman

The ECHR, which explicitly protects the right to life, could conceptualize this right as requiring the state to provide abortion services in line with the trend in international human rights law. The obligation to protect the woman's life, established explicitly in the ICCPR,[8] has been interpreted by the HRC to extend to positive obligations to safeguard life[9] (which is similar to the position under the ECHR).[10] From this position the HRC has recognised that extremely restrictive abortion laws, e.g. those that criminalise abortion without an exception for rape, are incompatible with this right due to the link with maternal mortality associated with high rates of clandestine abortion.[11] In this observation the ICCPR is joined by the CEDAW Committee[12] in

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6 Res. AHG/Res.240 (XXXI).

7 Article 14.2 (c).

8 Article 6(1) 'every human being has the inherent right to life'. This has been recognised to extend to positive obligations: CCPR/C/21.rev. 1 at para 5, 19 May 1989.

9 CCPR/C/21.rev. 1 at para 5, 19 May 1989.

10 *LCB v United Kingdom* (App no 23413/94) (1998) 27 EHRR 212 and chapter 5 pp 17-19.

11 See eg in regard to Poland: 29 July 1999 CCPR/C/79/Add.110 at para 11 and Peru: Nov 2000 CCPR/CO/70/PER at para 20. Furthermore by the HRC explicitly recognised the relevance of the right to life to the provision of abortion services by stating that when contracting parties report on the right to life they should 'give information on any measures taken by the state to… ensure that [women] do not have to undergo life-threatening clandestine abortions' Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies HRI/GEN/1/Rev. 7 (2004) HRC, General Comment No. 28L: Article 3.

relation to the right of non-discrimination in access to healthcare during pregnancy and by the CESCR as an aspect of the right to healthcare,[13] recently restated in relation to Poland.[14] The CEDAW Committee has further found a potential breach of women's right to life due to punitive provisions creating a 'chilling effect', indirectly preventing women from seeking medical treatment in cases of abortion conducted illegally or outside the provisions of the state in question. In this regard it has urged state parties to ensure access to post-abortion care to reduce maternal mortality.[15] The CEDAW Committee has further found that fundamental reproductive health is essential to women's equality and thus 'it is discriminatory for a State Party to refuse to provide legally for the performance of certain reproductive health services for women'.[16] There is therefore a high degree of consensus that the right to life requires access to abortion services where the life of the woman is endangered by the continuation of a pregnancy. The intersection between freedom from discrimination and the right to life where the state withholds or criminalises basic reproductive health services in instances that threaten the woman's life is revealing since both rights are protected under the ECHR.

As discussed in Chapter 3, the ECtHR has arguably already recognised that an abortion regime may violate rights under the Convention, if in *practice* extremely restrictive as under the Medical Indications model[17] operative in Poland. Further impetus to create such recognition in relation to protection of the right to life is provided by the HRC which has noted that the restrictive regime in Poland 'incites women to seek unsafe, illegal abortion, with attendant risks to life and health'.[18] In considering the Polish regime the HRC noted that though abortion was *de jure*

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12 CEDAW Article 12(1) enjoins state parties to 'eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning' see also General Recommendation No 24 in Compilation of General Comments (n 11) at 280 para 27 and Concluding observations of CEDAW regarding Lithuania 16 June 2000 A/55/38 at para 158.

13 ICESCR Article 12(1): 'State Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health' as interpreted by the CESCR: Poland , 16 June 1998 E/C.12/1/Add.26 at para 12.

14 E/C.12/1/Add.82 at para 29.

15 See eg Brazil, 29-30, U.N. Doc. CEDAW/C/BRA/6 (2007); Chile, 20, U.N. Doc. CEDAW/C/CHI/CO/4 (2006).

16 General Recommendation No 24 in Compilation of General Comments (n 11) at 276 para 11.

17 See chapter 2 pp 6-8.

18 ICCPR Poland 1999 (n 11) at para 11.

available in certain circumstances (as described in Chapter 2),[19] the attitude of doctors in conjunction with the criminal regime, and the prevalence of conscientious objection, created a regime that was in practice extremely restrictive.[20]

The right to health

The ECHR does not recognise a general right to health; therefore the right to health recognised by CEDAW[21] and the ICESCR[22] as requiring access to therapeutic abortion services[23] can only be recognised partially by the Court where the Articles of the Convention touch on healthcare services, a matter returned to in Chapter 5. Both CEDAW and the CESCR recognise that denial of abortion services has an adverse impact on equal access to healthcare regardless of gender, and this issue has also received recognition from commentators;[24] this approach could be conceptualised under the ECHR as a breach of Article 14,[25] coupled with another Article (most obviously Articles 8 or 3 as they relate to physical and mental integrity). The CEDAW Committee has recognised that punitive provisions and reporting requirements that prevent women from seeking medical treatment where abortion is conducted illegally or outside the state in question violate the right to health.[26] The CEDAW Committee has applied this in relation to Ireland, stating in its Concluding Recommendation in 1999 that it was concerned in the light of the right to health that 'with very limited exceptions, abortion remained illegal in Ireland', forcing women

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19 At pp 6-7.

20 ICCPR Poland 1999 (n 11) at para 11.

21 Article 12(1).

22 Article 12(1) sets out the right to 'enjoyment of the highest possible standards of physical and mental health' and Article 3 sets out the right of equality in enjoying the rights set out in the other Articles; these provisions have been interpreted to require recognition of women's reproductive health by the Committee on Economic, Social and Cultural Rights, General Comment 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art 3) 34th Session 2005) U.N. Doc E/C.12/2005/4.

23 For example, of high rates of abortion – see concluding observations of CEDAW regarding the Czech Republic 14 May 1998 A/53/38 at para 197.

24 See eg R Sifris 'Restrictive Regulation of abortion and the right to health' (2010) 18 Med L Rev 185, 207 commenting on the special relationship between gender equality and reproductive health. See further chapter 6 pp 3-4.

25 Article 14 prohibits discrimination in the enjoyment of any right protected by the Convention. See Chapter 5 pp 19-23.

26 See eg Brazil, 29-30, U.N. Doc. CEDAW/C/BRA/6 (2007); Chile, 20, U.N. Doc. CEDAW/C/CHI/CO/4 (2006).

seeking an abortion to travel abroad.[27] It further found that this situation created hardship for vulnerable groups, such as female asylum seekers, who cannot leave the territory of the State. The Committee subsequently reiterated this point in 2005.[28]

The CEDAW Committee[29] and CESCR[30] have interpreted the right to health as requiring effective access to abortion to avert risks to health (even where no risk to life arises), as discussed above in relation to the right to life. In relation to Poland the CESCR has recommended that access to abortion services where already legal on health grounds should not be hindered by the reluctance of the medical establishment to provide such services.[31] In that regard it requires that the medical profession is fully informed about the scope of Polish law and that information on the implementation of legislation to enhance the availability of abortion is made available in the next report.[32] These conclusions bear similarity to the position of the ECtHR in *Tysiąc v Poland*;[33] Amnesty also raised the matter of the judgment in its submission to the Committee:[34] there is therefore a strong argument that Article 8 as interpreted by the ECtHR in *Tysiąc v Poland* can be conceived of as protecting women's right to health in this context.

The ICCPR provides a model of partial recognition of the right to reproductive health care in terms of various civil rights, which the ECHR could adopt. The HRC interpreted the application of various guarantees, including the right to life (see above), freedom from torture or inhuman and degrading treatment (Article 7), privacy (Article 17) and the rights of children (Article 24), to cover the health of the woman in relation to therapeutic abortion in the case of *KL v Peru* (2005).[35] KL was in effect forced to undergo an anencephalic pregnancy which caused her severe emotional

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27 Ireland. 25/06/99 A/54/38,paras.161-201.

28 Thirty-third session 5-22 July 2005 at para 38.

29 See e.g. Democratic Republic of Congo, 36, U.N. Doc. CEDAW/C/COD/CO/5 (2006).

30 Committee on Economic, Social and Cultural Rights, General Comment 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art 3) 34th Session 2005) U.N. Doc E/C.12/2005/4.

31 Concluding Observations of the CESCR regarding Poland 6 Nov 2009 E/C.12/Co/5 at para 28.

32 Concluding Observations of the CESCR regarding Poland 6 Nov 2009 E/C.12/Co/5 at para 28.

33 *Tysiąc v Poland* (App no 5410/03) (2007) 45 EHRR 42; see further Chapter 3 pp 4-7.

34 Amnesty International Oct 2009 EUR 37/002/2009 see at <http://www.amnesty.org> accessed 29.09.10.

35 *KL v Peru* (1153/2003), CC{R/DC/85/D/1153/2003 (2005); 13 IHRR (2006).

trauma due to being denied an abortion by reason of foetal impairment in Peru. Peru's exception to its criminal prohibition of abortion explicitly covers health,[36] but the state hospitals were not prepared to accept that her situation satisfied the narrow legal exception in Peruvian law allowing abortion to protect the health or life of the mother.[37] In this respect the facts of *KL* bear similarity to those the ECtHR was faced with in *D v Ireland* (admissibility) discussed further in Chapter 5.[38]

The HRC's most far-reaching finding in *KL* was that a failure to provide a therapeutic abortion caused KL suffering which constituted inhuman and degrading treatment (Article 7),[39] thus indicating that provision of abortion to avert a threat to a woman's physical or mental health in similar circumstances is required since the Article, paralleling Article 3 ECHR, is not qualified.[40] (An HRC Concluding Observation to Ireland in 2000 before *KL* linked the issue of forcing women to undergo pregnancies due to restrictive laws with the obligations under Article 7.)[41] A violation of KL's privacy (Article 17) was found on the basis that KL was legally entitled to an abortion and therefore the refusal to grant her an abortion was not justified within that article. The finding that there was an unlawful denial of access to an abortion was based on the World Health Organisation's interpretation of 'health', referred to in the Peruvian law, which includes mental health. While the application of Article 17 could arguably be found not to relate directly to health, this decision demonstrates that the Article protects patient autonomy, with far-reaching implications in relation to abortion, since it demanded a widening of the Peruvian exception to include mental health. As regards Article 24, a violation was found on the basis that the state had failed to address KL's special status as a female minor, due to the barriers that were created to her ability to access a legal abortion, tending to expose adolescent girls in particular to rights' violations. A breach of Article 2 was found due to the lack of procedural mechanisms to prevent or address the violations.

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36 Health Code of 18 March 1969 arts 19-23. Legislation cited by International Federation of Professional Abortion FIAPAC 'Abortion Law of Each Nation State' available at <http://www.fiapac.org>.

37 *KL v Peru* (n 35) at paras 2.4 and 2.5.

38 *D v Ireland* (Admissibility) (App no 26499) (2006) 43 EHRR SE 16 see Ch 5 text to note 68.

39 *KL v Peru* (n 35) at para 6.3.

40 JM Gher and C Zampas 'Abortion as a Human Right: International and Regional Standards' (2008) 8 HRLR 249, 270.

41 29 March 2000 CCPR/C/21/Rev.1/Add.10 at para 24.

The recognition by the CESCR and CEDAW Committee that the right to health requires that the medical establishment ensures the provision of abortions where they are legally available accords with the approach in *KL v Peru.* In this respect there is considerable similarity in approach to that of the ECtHR in relation to the right to respect for private life (Article 8) in the case of *Tysiąc v Poland*.[42] However, the HRC in *KL v Peru* in interpreting Article 7 – freedom from inhuman or degrading treatment – in this circumstance went further in that it recognised that even where abortion is not *de jure* available it should be provided as part of a substantive positive obligation to provide protection from inhuman and degrading treatment. This argument was raised in *Tysiąc* under Article 3 ECHR but was not considered by the Court.[43]

The right to be free from inhuman or degrading treatment

This right is explicitly recognised by the ECHR under Article 3; thus the ECtHR could interpret this Article to require the state to prevent the humiliation and degradation of women where abortion services are denied in certain circumstances such as those of rape or fatal foetal disability. This would accord with the interpretation of the equivalent Article of the ICCPR (Article 7).[44] The HRC has registered concern at Ireland's prohibition on abortion which applies where the pregnancy was a result of rape.[45] In *KL v Peru,* as indicated,[46] the HRC gave detailed consideration to the issue of humiliation where a woman is forced to undergo a pregnancy in which the foetus is fatally disabled, as in an anencephalic pregnancy, coming to the conclusion that this may amount to inhuman and degrading treatment. The recognition by both CEDAW[47] and the ICESCR[48] that a lack of an exception to a

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42 *Tysiąc v Poland* (n 2). See chapter 3 pp 4-7.

43 *Tysiąc v Poland* (n 2) at para 64-8.

44 Concluding Observations of the HRC regarding Peru 15 November 2000 CCPR/CO/70/PER. The HRC has confirmed that abortion is relevant to Article 7 by General Comment No. 28 which states that full compliance with the Article requires that states report on whether they provide access to legal abortion for women pregnant due to rape: Compilation of General Comments (n 11) General Comment 28 at para 11.

45 Concluding Observations of the HRC regarding Ireland: 24 July 2000 A/55/40 at para 23 and 30 July 2008 CCPR/C/IRL/CO/3 at para 13.

46 *KL v Peru* (n 35) at para 6.3 see above p 5.

47 Concluding Observations of CEDAW regarding Jordan, 27 January 2000 A/55/38 at para 246. It has encouraged the reintroduction of 'legislation to permit termination of pregnancy in cases of rape, incest

prohibition on abortion for rape or fatal foetal abnormality breaches the right to health adds further weight to this interpretation of inhuman and degrading treatment, in particular where abortion is criminalised in these circumstances.[49] There has been recognition that impediments to access to abortion where it is legal in these circumstances breaches this right by the HRC,[50] and the right to health by the CESCR. The CESCR has identified various impermissible impediments to abortion services where legal in these circumstances, such as 'misinformation, lack of clear guidelines, abusive behaviour directed at rape victims by public prosecutors and health personnel'.[51]

Rights to 'privacy', autonomy (including reproductive self-determination), dignity

The ICCPR protects by Article 9(1) the right to 'liberty and security of the person'; this right has been interpreted in national jurisdictions such as Canada[52] to prevent excessive state interference with reproductive choices. However, neither the ICCPR nor CEDAW at present recognise explicitly that a women's choice to terminate her pregnancy could be viewed as an aspect of her right to control over her liberty. Nor have their provisions been interpreted to require such recognition. That accords with the approach under the ECHR which, while recognising the potential relevance of sexual autonomy as part of the right to respect for private life in the abortion context under Article 8, does not at present consider that it requires abortion on request.[53]

At the 1994 International Conference on Population and Development in Cairo the representatives agreed that women needed to be empowered to take charge of their reproductive lives, and that unsafe abortion is a public health concern.

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and congenital abnormality of the foetus' in relation to one state party: Sri Lanka, 283, U.N. Doc. A/57/38, Part I (2002).

48 See eg Concluding Observations of CESCR regarding Malta 14 December 2004 E/C.12/Add. 101 at para 41.

49 Concluding Observations of CEDAW regarding Nepal, 25 June 1999 25/06/1999 CEDAW A/54/38 at para 147.

50 *KL v Peru* (n 35) at para 6.3.

51 Concluding Observations of the CESCR regarding Mexico, 9 June 2006 E/C 12/Mex/Co/6 at para 25.

52 Article 7 of the Canadian Charter of Rights and Freedoms as interpreted in *R v Morgantalor* (1988) 44 DLR (4th) 385.

53 *Brüggemann and Scheuten v The Federal Republic of Germany* (Decision) (App no 6959/75) (1977) 5 DR 103 at para 55. See chapter 3 pp 1-2.

Following the Cairo conference, in 1995, at the World Conference on Women in Beijing, governments pledged to guarantee reproductive rights for all women. The United Nations and regional human rights bodies began to urge governments to respect and ensure women's reproductive rights, based on the idea of reproductive self-determination. Women in Africa and those with disabilities have obtained recognition of a right to control their reproductive lives in two new human rights agreements - the 2008 UN Disability Rights Convention and the 2005 Protocol on the Rights of Women in Africa.

The right to life of the foetus

There are few examples in human rights law of provision of a right to life that may be claimed on behalf of the foetus. However, there are exceptions in national Constitutions, in particular in countries which follow the Roman Catholic tradition. In international human rights law the Universal Declaration of Human Rights, the first treaty to set out a right to life (Article 3), arguably excludes the unborn from the ambit of the right,[54] while the majority of Treaties that set out a right to life leave the matter open, apart from the American Convention on Human Rights, which by Article 4 paragraph 1 protects the right to life 'in general, from the moment of conception'.

The right to life set out in the ICCPR does not explicitly rule out its application to the foetus – it applies to every 'human being'. However, it is arguable from a historical analysis of the purpose of the ICCPR that this right is implicitly not intended to apply from conception since in the drafting of the Article such an amendment was rejected.[55] This accords with the encouragement given by the HRC to state parties with restrictive abortion laws to liberalise their laws, despite the fact that these restrictive laws are based on protection for the foetus from conception as in Ireland.[56] The French courts have upheld the permissive French abortion laws as in accordance

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54 By Article 1 of The Universal Declaration of Human Rights: 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.' See further Gher & Zampas 'Abortion as a Human Right' (n 40) at 263-4.

55 Gher & Zampas 'Abortion as a Human Right' (n 40) 263-4; also see GA OR Annex, 12th Session (1597). Agenda Item 33 at 96, A/C.3/L.654 at para 113.

56 Article 40.3.3 of the Irish Constitution.

with the requirements of Article 6.[57] As discussed in Chapter 3, the Strasbourg Court in relation to Article 2 ECHR, the interpretation of the right to life as including the foetus does not appear to accord with the decisions in the cases on abortion services. The stance taken by certain human rights bodies to availability of abortion where pregnancy is the result of rape, discussed above, gives supports to this stance. Impliedly, if states are encouraged to provide an exception to allow abortion in a case of rape, the state is not according a status to the life of the foetus that is equal to the status accorded to the life of the woman.

Conclusion

It is clear that there is growing support for the recognition of rights to provision of abortion services in international human rights law. The African Charter is the only instrument to recognize such rights explicitly; however, interpretations of the other Treaties by their reporting and enforcement mechanisms have brought the provisions closer to providing such recognition. The most far-reaching developments have occurred in relation to the 'right to health' and rights in the healthcare context. The conclusion of the CESCR and HRC in this regard echoes the reasoning of the Strasbourg Court in *Tysiąc*[58] to an extent, but the HRC appears to recognize that provision of abortion where it is *not* already legal is encompassed by the right to be free from inhuman and degrading treatment in the healthcare setting, and therefore goes beyond the stance of the Strasbourg Court in *Tysiąc*. The HRC's stance provides a firm basis in international human rights law for the outcome of *Tysiąc* and confirms that the decision is one with further implications for development of rights to the provision of abortion services. The general trend under the Treaties discussed appears to be towards recognition that excessive restriction of women's reproductive choices, as in Poland and Ireland, leads to various forms of suffering and detriment for women that should be viewed as a human rights issue. Thus there is considerable support in international law for development of the jurisprudence of the ECtHR to recognize health based human rights implications of the lack of provision of abortion services,

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57 Judgement of 21 Dec 1990, 7 Revue Française de Droit Administratif 208 (1991).

58 *Tysiąc v Poland* (n 2) see chapter 3 pp 4-7.

and the Court may develop an argument based on such support in the application of *ABC v Ireland*,[59] as discussed in the next chapter.

Further developments could provide a model for future recognition of rights other than in the sphere of healthcare. The developments under the Treaties towards recognition that interference with women's right to life occurs where abortion services are denied in certain circumstances, an issue not yet raised before the ECHR but which is raised before the Grand Chamber in *ABC*,[60] could provide a model for the Court to recognize such rights in future. This is especially so in relation to Poland where concerns over high rates of maternal mortality associated with the restrictive abortion regime have been highlighted by various treaty monitoring bodies. CEDAW has emphasised, in relation to life and health (in which it is joined by the CESCR), and in relation to degrading treatment, that denial of abortion services can produce a disproportionate burden upon women that amounts to discrimination in that it denies women access to full healthcare provision, a point that is raised in the pending application at Strasbourg of *Z v Poland*.[61] The manifest trend in international human rights law is therefore to emphasize the rights of the woman rather than those of the foetus, but no modern Treaty explicitly sets this out. The current stance of the ECtHR on foetal rights is therefore not anomalous in failing to determine whether the foetus is protected: that does not appear to pose a bar to the development of rights to abortion services in international human rights law.

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59 *ABC v Ireland* (Statement of Facts) (App no 25579/05), lodged 15 July 2005.

60 *ABC v Ireland* (Statement of Facts) (n 59) COMPLAINTS para 1. See chapter 5 pp 4-7.

61 *Z v Poland* (Statement of Facts) (App no 46132/08), lodged 16 September 2008 see chapter 5 text to note 83.

Chapter 5 : The future development of rights of access to abortion and to full associated healthcare services for women under the ECHR

This chapter considers the potential for the development of the Convention rights at Strasbourg as a means of extending access to abortion and related healthcare services in restrictive abortion regimes. It further examines the possible role, if any, of the Convention in relation to denial of full healthcare services to women (for conditions unrelated to pregnancy) due to their reproductive function. A range of claims arising in relation to the restrictive abortion regimes as set out in Chapter 2, are considered, taking account of the current Strasbourg jurisprudence, relevant Strasbourg principles and the growing tendency to conceptualise these issues as breaches of human rights in international human rights law, discussed in Chapter 4. The discussion will also take full account of the implications of the case of *Tysiąc v Poland*[1] in relation to Article 8 of the Convention. The chapter will also consider potential arguments that the states in question could raise to deny claimed positive obligations in this context under Convention rights or, where the right in question provides for this, to justify the infringement. Thus, arguments in relation to the possible interaction with the 'right to life' of the foetus and the relevance of the margin of appreciation doctrine will be considered together.

The obligations that might potentially be found to arise under the Convention will be considered in particular in relation to a case that is currently before the Grand Chamber, *ABC v Ireland,*[2] a case that is potentially the most significant one by far to arise in the abortion context at Strasbourg. The focus on the possible outcomes in that case is intended to demonstrate the potential applicability of such obligations to domestic laws that prohibit or severely restrict availability of abortion. A further reason for this approach is that if this case passes the admissibility stage, it would provide the Grand Chamber with the most significant opportunity in recent years to consider in detail whether rights of access to abortion and to relevant health care provisions are required in some circumstances by the Convention, thus potentially giving much greater clarity to the emergent Convention jurisprudence on this issue.

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1 *Tysiąc v Poland* (App no 5410/03) (2007) 45 EHRR 42.

2 *ABC v Ireland* (Statement of Facts) (App no 25579/05), lodged 15 July 2005.

The margin of appreciation doctrine and a foetal 'right to life' under the Convention

Strasbourg's analysis of potential state interference with positive obligations recognised under the Convention Articles,[3] and the justifications for interference set out in paragraph 2 of Articles 8-11 of the Convention,[4] can be particularly affected by reference to the state's 'margin of appreciation'.[5] This term, touched on in Chapter 1, describes the mechanism by which Strasbourg will defer to member states on, *inter alia,* grounds of especial cultural sensitivity in relation to the protection of rights, although the Court has emphasised that it must still consider whether the 'actual measures of "interference" they take are relevant and sufficient'.[6]

The Court affirmed the relevance of the state's margin of appreciation in relation to the matter of the beginning of life for the purposes of Article 2 in *Vo v France*[7] and *Evans v United Kingdom.*[8] That stance implies that it may be within a state's margin of appreciation to protect the foetus from conception as if it were a 'person' and thus to determine that in any balancing act between the right to life of the foetus and rights of the woman – aside from her right to life – the life of the foetus would prevail. If that stance were to be unequivocally adopted, it would seem that Strasbourg could not recognise forms of access to abortion and (possibly) to related services as giving rise to Convention obligations where claims were made against states with restrictive abortion regimes based on the protection of foetal life. Following that stance, Strasbourg would have to accept that a determination to afford such protection, whatever the adverse consequences for women in terms of risks to health or even life, was within the state's margin of appreciation. The Court *could* have declined to decide *Tysiąc v Poland* on that basis, but did not, which appears inconsistent with the

3 See eg *Abdulaziz, Cabales, Balkandali v UK* (A/94) (1985) 7 EHRR 741 at para 67.
4 *Handyside v United Kingdom* (A/24) (1976) 1 EHRR 737 paras 48-9.
5 *Handyside v United Kingdom* (n 4) at paras 48-9.
6 *Handyside v United Kingdom* (n 4) at para 50.
7 *Vo v France* (App no 53924/00) (2004) 40 EHRR 12 at para 82.
8 *Evans v United Kingdom* (App no 6339/05); (2006) 43 EHRR 21 at para 54.

principle from *Vo* and *Evans*.[9] However, as one academic commentator has noted, it is arguable that Poland was considered to have given up its margin of appreciation in relation to the provision of abortion by providing for abortion in the circumstances in question in law.[10] If so, that would confine findings of rights' violations to the *procedural* implementation of a particular abortion regime since that implementation would fall outside the margin of appreciation conceded to the state. As the European Centre for Law and Justice, a Christian legal centre, have argued in their written observations to the Court, opposing both the admissibility and substance of the application in *ABC v Ireland,* that would mean that the Court had no role in relation to regimes that adopt a Prohibition model, most notably Ireland.[11]

However, even if that interpretation of the impact of the margin of appreciation doctrine was accepted, it does not necessarily follow that states adopting a Prohibition model can avoid the Convention entirely on that basis. Ireland is intending to argue in *ABC* that unlike Poland it does not accept the legitimacy of abortion and therefore its decision to accord foetal life virtually equal status with the life of the mother must remain undisturbed since it has not over-stepped its margin of appreciation. The flaw in that argument is that in practice, the Irish state *does* oversee an abortion regime – albeit one that is based on women travelling to England for abortions or on allowing abortion to save the life of the mother. The Court has already required Ireland, despite its explicit constitutional provision,[12] to partially dismantle one aspect of the Prohibition model it adopts – the suppression of certain information relating to abortion abroad, in *Open Door Counselling v Ireland*.[13] Although the Court did not consider the abortion context in that case in any depth it found it relevant to a finding of a violation of Article 10 that Ireland permitted travelling abroad for an abortion and

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9 The margin of appreciation is applied in this fashion by Judge Borreggo Borreggo: see *Tysiąc v Poland* (n 1) The Dissenting Opinion of Judge Borreggo Borreggo at para 8.

10 N Priaulx 'Testing the Margin of Appreciation: Therapeutic Abortion, Reproductive 'Rights' and the Intriguing Case of Tysiąc v Poland' (2008) 15 EJHL 361, 372.

11 Written Observations by the European Centre for Law and Justice Application No. 25579/05 before the European Convention on Human Rights Third Section: A.,B.,C. v Ireland. See at: <http://downloads.frc.org/EF/EF08K11.pdf> accessed 29.09.10.

12 The Court rejected the argument that Article 10 should be viewed in light of Article 2 in accordance with Ireland's constitutional stance on the basis that the state's discretion in the field of morals was not unlimited *Open Door Counselling and Dublin Well Woman v Ireland* (App no 14234/88) (1992) 15 EHRR 44 at paras 67-69, also see R Lawson 'The Irish Abortion Cases: European Limits to National Sovereignty? EJHL 1 167 at pp 177-80.

13 *Open Door Counselling v Ireland* (n 12).

thus that Irish women were accessing services that were in a sense lawful.[14] As a result the measures employed were viewed as disproportionate to the aim pursued under Article 10(2) despite being designed to uphold the Irish prohibition. Thus the margin of appreciation accorded to Ireland to protect foetal life was diminished. There is also the possibility that another aspect of the Irish prohibition – the lack of co-ordination of medical care between England and Ireland – could be found to fall outside Ireland's margin of appreciation and thereby to fall foul of requirements under positive obligations raised under various Articles of the Convention, as argued by the applicants in *ABC*.

Most significantly, Ireland's procedural mechanisms for determining when the accepted exception to preserve the life of the mother can be activated (ie the process of obtaining a diagnosis of certain medical conditions) and ensuring that it can be applied effectively, appear to fall outside her margin of appreciation. In other words, Ireland can be viewed, following *Tysiąc*, as having placed the *efficacy* of access to abortion, within the lawful exception, outside her margin of appreciation. Thus the Court has a role in relation to monitoring that efficacy, but not in relation to creating new exceptions to the prohibition. But even that interpretation of the impact of the margin of appreciation doctrine would leave the Court with a great deal of leeway to seek to impose improvements on the Irish system – as explored below. Such improvements form the central arguments in *ABC*. Clearly, the legal advisors to the applicants consider that concentration on the *procedural* aspects of the Irish system would, following *Tysiąc*, provide the best chance of mounting successful Convention claims since argument based on the margin of appreciation doctrine would be less likely to stifle them. In other words, the advisors may consider that, strategically, claims based on such aspects might meet with acceptance of the idea that Ireland has over-stepped its margin of appreciation in failing to remove barriers in the way of accessing abortions within Ireland that are lawfully available.

Much more controversially, it can be argued that in any event the findings of the Court in *Vo* and *Evans* are in fact inconsistent with the fundamental rationale of the Convention since they would lead to a disregard for forms of suffering for one group

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14 *Open Door Counselling v Ireland* (n 12) at para 72.

of citizens which have the appearance of rights-violations. They imply that Strasbourg would have no role where one group, on grounds of gender, is in effect subjected to (often extreme forms of) adverse treatment, due to a Constitutional value. In both *Vo* and *Evans* Strasbourg was not faced with a clash between the claimed rights of the mother and the foetus. In a genuine clashing rights case, where those claimed rights are clearly opposed, Strasbourg might be prepared to take a different stance towards the application of the margin of appreciation doctrine. Strasbourg is not bound by its own decisions and its stance as to the extent of the margin of appreciation conceded in relation to a particular emergent right has been subject to change, a matter that is discussed below. The authority of a Grand Chamber judgment is also viewed as greater than that of a Chamber.[15] It would therefore be open to the Grand Chamber in *ABC* to find that since the consensus in Europe, as considered in Chapter 2, and under international human rights law, as discussed in Chapter 3, is to allow abortion to prevent serious risks to the mother's health, in cases of rape or in respect of extreme foetal disability, Ireland has over-stepped its margin of appreciation in refusing to allow abortion in any of those circumstances. Therefore, the discussion below will proceed on the basis that employment of the margin of appreciation doctrine need not preclude acceptance of substantive obligations in relation to restrictive abortion regimes, thus accepting creation of a right of access to abortion services, even where that involves disregard of a Constitutionally accepted right to life of the foetus.

Clearly, the Grand Chamber could only determine the case in relation to the claims raised before it, but *ABC* does raise the issue of access to abortion to avert a serious risk to health on the facts in relation to B and C. If the Grand Chamber adopted the stance that a certain margin of appreciation should be accorded to Ireland to determine that the right to life of the foetus should be protected from conception *subject to* an Article 8 (or, possibly, 3) obligation to make provision for abortion to avert a serious risk to the health of the mother, that finding would then open the way to successful future claims based on rape or, possibly, severe foetal disability. In effect, such a finding in *ABC* would make it clear that the margin of appreciation conceded to Ireland on the issue of a foetal right to life, was fairly narrow.

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[15] See the view expressed on this point in the House of Lords in *Secretary of State for the Home Department v AF (no 3)* [2009] UKHL 28; [2009] WLR 74 at para 108 per Lord Carswell.

The case of *ABC v Ireland*

Facts

A decision in *ABC* is expected in late 2010; the hearing before the Grand Chamber commenced in December 2009. *ABC v Ireland,*[16] if it is declared admissible, would require the Chamber to consider in detail the application of rights of the Convention to various adverse effects on women in a regime adopting a model of prohibition. The claims include rights of access to abortion services in the healthcare context, and extend to claims to access to abortion itself where Ireland appears to prohibit it; the applicants are bringing these claims under Article 8, and/or Articles 2, 3, 14. The case is brought by three women who travelled from Ireland to obtain abortions in England for various reasons. None of the applicants conceived intentionally; all failed to receive medical advice and abortion aftercare in Ireland in relation to health problems arising from the abortions due, they allege, to the Irish prohibition and the criminal penalties, since they did not wish to disclose the fact of having had an abortion. In each instance accessing an abortion was made more difficult due to the need to travel to England.

The first applicant, A, believed at the time of becoming pregnant that her partner was infertile; she already had four young children, all of them in care, but was seeking to establish the reunification of her family. She considered that having a fifth child would jeopardise that successful reunification. The NHS refused to perform the abortion at public expense; she therefore had to raise the funds privately, delaying the abortion by three weeks. She had to travel to England alone, in secrecy and without alerting the social workers or missing a contact visit with her children. On return she suffered pain, nausea and prolonged bleeding but was afraid to seek medical advice in Ireland in the context of the criminal prohibition.

The second applicant, B, faced the risk of an ectopic pregnancy which can be lethal and which virtually always means that the foetus cannot survive. She was informed

16 *ABC v Ireland* (Statement of Facts) (n 2). The case will probably be decided in late 2010 or early 2011; it has not yet been declared admissible. The hearing on admissibility (significantly) is to come before the Grand Chamber (it was moved directly from a hearing by the ordinary Court in June 2009); the hearings began in December 2009.

that her use of emergency contraception had created the risk of such a pregnancy; she was not prepared to become pregnant at that time or to run the risks associated with an ectopic pregnancy, and travelled to England for an abortion. After having an abortion in the UK and returning to Ireland she passed blood clots which she was afraid to have examined – so again she did not obtain access to abortion after-care.

The third applicant, C, had been having chemotherapy treatment for cancer for three years, and underwent tests relating to the cancer at a point when she did not know that she was pregnant. She was unable to find a doctor willing to make a determination as to whether her life would be placed at risk if she continued to term, or as to the significance of the threat to the foetus due to the tests. She could not have a medical abortion at a very early stage of the pregnancy in the UK because she could not find a clinic that would provide this procedure for a non-resident due to the need for follow-up care. Thus she had to wait another 8 weeks for a surgical abortion, causing her emotional distress. On her return to Ireland she suffered the complications of an incomplete abortion, including prolonged bleeding and infection, but was deterred from seeking medical care.

Thus, in addition to medical complications and health concerns, each woman suffered hardship and distress in having to travel abroad for an abortion. As regards aftercare, the Irish Medical Council's Guide to Ethical Conduct and Behaviour states:

> …we recognise our responsibility to provide aftercare for women who decide to leave the State for termination of pregnancy. We recommend that full support and follow up services be made available for all women whose pregnancies have been terminated, whatever the circumstances.[17]

Nevertheless, it appears that in practice women do not consider that they can seek such aftercare. This appears to be due to the stigma attached to abortion and to the severity and fact of the criminal context.

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[17] Medical Council, A Guide to Ethical Conduct and Behaviour, 6th Edition (2004) para 2.5 available at <http://www.medicalcouncil.ie/Professional-Standards/Professional-Conduct-Ethics/> accessed 29.09.10.

Admissibility

It is possible that *ABC v Ireland* may be found to be inadmissible (Article 35) on the basis of failure to exhaust domestic remedies, as occurred in the case of *D v Ireland.*[18] The Irish Supreme Court can consider any case involving interplay between the rights of the mother to her own independence and bodily integrity and the rights of the foetus, and no interpretation of the Constitution is intended to be final for all time. Thus, leeway might exist, allowing the Supreme Court to have considered at least the cases of C and B. The Strasbourg Court in *D v Ireland* referred to its statement in *Selmouni v France*[19] that Article 35 is designed to give states the opportunity to prevent or remedy rights violations in domestic law – the requirement to test the domestic remedies. The Strasbourg Court in *D* further referred[20] to the comments of the Chief Justice of the Irish Supreme Court in *Attorney-General v X*,[21] to the effect that the issue raised in *D* was 'peculiarly appropriate and illuminating in the interpretation of [the Eighth Amendment] which deals with the intimate human problem of the right of the unborn to life and its relationship to the right of the mother of an unborn child to her life.' The Irish European Convention on Human Rights Act 2003 also provides a mechanism by which applicants can plead their Convention rights in domestic courts. To protect confidentiality, the Publicity Rule in Ireland allows persons to apply for *in camera* (not public) proceedings, and certain practices in Irish judicial procedure allow for women seeking abortions to keep their identities secret. Taking all these factors into account, a case can be made for the non-admissibility of at least some of the claims in *ABC.*

However, the cases of A, B and C are, to varying extents, distinguishable from that in *D* on the admissibility issue since the applicants were not confronted with the extremely unusual and exceptionally distressing circumstances that faced D. Certain claims in *ABC v Ireland* directly challenge Ireland's general prohibition of abortion, and the related impact on healthcare services, and do not seek to make an inroad into it through an implied exception relating to the status of foetuses suffering from

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18 *D v Ireland* (Admissibility) (App no 26499/02) (2006) 43 EHRR SE 16.
19 *Selmouni v France* (App no 25803/94) at para 74.
20 *D v Ireland (Admissibility)* (n 18) at para 90.
21 *Attorney General v X* [1992] 1 IR 1 at 147; see chapter 2 p 10.

abnormalities incompatible with survival, as in the *D* case.[22] On the other hand, two of the claims do appear to rely partially on an existing exception. The Grand Chamber may be persuaded that insofar as B and C rest their claim on an obligation to provide access to abortion to avert a potentially serious risk to health, they could not have found meaningful relief in the Irish courts since no exception exists relating to a threat to the health of the mother, whereas in *D* the Irish government recognised the possibility that an implied exception might apply in her near-unique circumstances. The government would be very hard-pressed to argue that an exception would apply in the far broader circumstances of *A*. A further factor that might influence the Court is that if it was prepared indefinitely to accept that a very doubtfully applicable remedy must be exhausted, applicants could be placed in a position of prolonged uncertainty in which they could obtain no remedy domestically or at Strasbourg. In other words, if the Grand Chamber took a very state-friendly stance towards admissibility the Irish government would be able to take advantage of a position whereby they hold out a remedy as potentially available domestically which in practice would almost certainly be denied, in order to stifle Strasbourg claims which could lead to real relief for women.

Possibly the cases of B and C might be found partially inadmissible on the basis that Ireland does provide for abortion where the life of the mother may be at risk – in both it was arguable that that was the case. So it could be argued that the doubt should have been resolved domestically. On the other hand, in both cases the risk to life was unclear – due, it seems, to medical obstructiveness – and could be viewed as low; a case could readily be made that Ireland does not appear in practice to make any provision for abortion unless the risk to the mother's life is far more clearly established. The applicants B and C are also arguing that there was no likelihood of obtaining a domestic remedy in respect of abortion to alleviate a risk to health, an argument that the state is unlikely to be able to refute. One further aspect of all three cases is likely to be found admissible. The applicants are all raising questions of the lack of certainty as to whether abortion aftercare is *in practice* available in Ireland without risking extreme stigma and other possible adverse consequences. Arguably,

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[22] S Bottinni 'Europe's Rebellious Daughter: will Ireland be forced to conform its abortion laws to that of its neighbours?' (2007) 49 Journal of Church and State 211, 243.

no timely applicable court procedure was available in the circumstances the applicants were in that would have allowed domestic resolution of those issues.

There are at present signs that the case is unlikely to be dismissed as wholly inadmissible. Before the lower Chamber reached a decision, the matter was referred to the Grand Chamber. That was a highly unusual development in the process of a case and a signal that the Court may be preparing to issue what it considers to be an historic decision. It would be unlikely that all nineteen judges would be gathered together merely to dismiss the case for lack of jurisdiction. This chapter turns to considering the specific claims being raised in *ABC,* the implications of the possible outcomes for future cases, and certain further possible and pending claims.

Protection of physical/mental wellbeing or autonomy: development of rights of access to abortion services and to healthcare under Article 8

Preliminary comments

The obligation, which can include both negative and positive aspects, to respect private life under Article 8(1)[23] has been found to mean that a breach of Article 8 may arise where the state has put in place a legal framework denying respect for autonomy in relation to intimate aspects of private life, in particular physical integrity and sexual life.[24] This stance has been taken despite the wide discretion at times afforded to the state regarding its choice of measures intended to protect the rights of others or morals:[25] in the case of *Dudgeon*[26] the Court considered that there had to be

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23 Positive obligations require the state to go beyond merely abstaining from interference, but instead to adopt measures that secure the right protected. See eg *Van Kück v Germany* (App no 35968/97) (2003) 37 EHRR 51 at para 70. The justification for the imposition of such obligations., referred to in *Tysiąc v Poland* (n 1) at para 115, is that the Convention guarantees rights that 'are not theoretical or illusory but practical and effective' (*Ilhan v Turkey* (App no 22277/93) (2002) 34 EHRR 869 at para 91).

24 For example, Article 8 has been found to cover obligations on the state to respect homosexual orientation and therefore penalising homosexual practices created a breach of Article 8, regardless of the enforcement of the penalty: *Dudgeon v United Kingdom* (App no 7525/76) (1982) 4 EHRR 149 at para 41 and see *van Kück v Germany* (n 23) in which the Court found that requirements attached to medical insurance which prevented transsexual reassignment surgery being covered by the scheme were disproportionate.

25 *Andersson (Margaretta) v Sweden* (App no 12963/87) (1992) EHRR 615; *Muller v Switzerland* (App no 10737/84) (1988) 13 EHRR 212.

26 *Dudgeon v United Kingdom* (n 23).

sufficiently serious reasons for penalising the practice, going beyond a popular conception of the practice as immoral.[27] This stance may also, in certain circumstances, found the imposition of positive obligations; Strasbourg has applied this approach to the issue of abortion, as described in Chapter 3,[28] in relation to the freedom to develop sexual relationships, a point accepted by the Court in relation to pregnancy in *Brüggemann v Germany*,[29] and in relation to physical wellbeing in *Tysiąc v Poland*.[30]

However, although Convention case-law on positive obligations to secure 'personal autonomy' in relation to medical interventions or as an aspect of personal development could potentially found recognition of a 'right of access to abortion', as the applicants argued in *Brüggemann*, it is suggested that at present that step would be viewed as far too controversial and as inconsistent with the application of the margin of appreciation doctrine in this context. Thus, the Court is likely to decide the matter in part in relation to the narrower positive obligation – to ensure effective access to lawful abortion – recognised in *Tysiąc*. It may go further and decide that a lawful exception to save the life of the mother must be broadened to include an exception for the avoidance of serious health risks.

In *Brüggemann* it was suggested on behalf of the state that it was relevant to the issue of proportionality that Germany had provided for lawful abortion in the cases of danger to life or health, foetal disability and rape since that position showed sufficient respect for the 'private life' elements of abortion.[31] Therefore the Court is unlikely to find that a regime that makes such provision but otherwise restricts the *choice* of the woman would infringe Article 8.[32] That is probably correct at present. However, that case was decided almost 30 years ago and in light of the evolving nature of the

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27 *Dudgeon v United Kingdom* (n 23) at para 60.

28 Pp 1-2 and 4-7.

29 *Brüggemann and Scheuten v The Federal Republic of Germany* (Decision) (App no 6959/75) (1977) 5 DR 103 at para 55; see also *Dudgeon v United Kingdom* (n 23) at para 41.

30 *Tysiąc v Poland* (n 1) at paras 106 and 109. See also *Dickson v United Kingdom* (GC) (App no 44362/04) (2008) 46 EHRR 41 at para 60 and *S H and others v Austria* (App no 57813/00) at para 58.

31 *Brüggemann and Scheuten v Germany* (n 29) at para 62. This point was not determinative.

32 M Krzyanowska-Mierzewska 'How to Use the European Convention for the Protection of Human rights and Fundamental Freedoms in Matters of Reproductive Law: The Case Law of the European Court of Human Rights <http://www.astra.org.pl/astra_guide.htm> accessed 29.09.10 Pt III.

Convention the Court has leeway in future to alter that stance. Thus at the present time it will be argued below, especially in relation to the claims in *ABC*, that no free-standing 'right to abortion' is likely to be recognised yet based on *choice*, under Article 8. But the narrower positive obligations that might be recognised could include: a positive obligation to ensure that abortion that is already lawfully available, even in a regime relying on the Prohibition model, is available in practice; an obligation to ensure that medical treatment that is lawfully available, including abortion aftercare, is made effectively available; an obligation to allow abortion to prevent serious risks to the health of the mother without imposing on her the necessity of travelling abroad or seeking an illegal abortion. On that basis the value of autonomy under Article 8 would receive indirect recognition.

The application of the rule from Tysiąc

The applicant in *Tysiąc* argued under Article 8 that her moral and physical integrity had been interfered with due to Poland's lack of provision of lawful abortion in her circumstances. But Strasbourg confined the finding of a breach of Article 8 to the failure to provide timely, effective and impartial procedures to obtain redress where abortion was denied though legally permitted. Tysiąc appeared to fulfil the domestic requirements for abortion, although medical opinion was divided and the precise level of risk of damage to her eyesight needed to trigger the exception was unclear – one aspect of her complaint.[33] Thus one implication of this case for states in fulfilling their Article 8 obligations in relation to *access* to abortion is that the obligation was found to be linked to the pre-existing legal regime in the state in question, rather than requiring a 'free-standing' right of access to abortion. That interpretation would accord with the fact that the case did not ultimately require Poland to change the law regarding access to abortion although the case did require that there should be effective access under that law.[34] It follows that where states set out indications *in law*, in particular statutory provisions as in Poland, as to health-based grounds for

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33 In Polish law that it 'constitutes a threat to ... the health of the pregnant woman' see *Tysiąc v Poland* (n 1) at para 36 *et seq* also see chapter 2 note 33. The application of this exception to Tysiąc was confirmed by a doctor other than the one involved in finally certifying the abortion at a state hospital.

34 It is not possible to be certain at present that this has occurred see chapter 2 text to note 46; see also W Nowicka (ed) *Reproductive Rights in Poland – the effects of the anti-abortion law* (Mar 2008) Bondor 'Analysis of court cases' at p 63 <http://www.federa.org.pl/publikacje/report%20Federa_eng_NET.PDF> accessed 29.09.10.

legal abortion, these require legal clarity and an effective and timely review procedure to determine their applicability in practice. Women, in other words, must be able to use the provisions to avoid the healthcare risks they were apparently intended to protect against – they must not provide a phantom access to abortion only. This point has also been raised in relation to the exception in the Polish statutory framework regulating abortion allowing for abortion in respect of foetal disability in an application post-*Tysiąc*: *RR v Poland*[35] (the facts of which are discussed in relation to Article 3 below).

Thus the interpretation of Article 8 that the Court adopted in *Tysiąc v Poland* does not translate very readily or directly to states adopting the Prohibition model, such as Ireland. Under that model in Ireland legal exceptions are not set out under statute or in the Constitution, and only one exception, to save the life of the mother, is accorded any recognition, via a court ruling. However, it is submitted that uncertainty created for women in relation to access to abortion services to preserve women's health in regimes adopting *any* form of legal regulation of abortion is within the obligation recognised in *Tysiąc v Poland*. In other words, if Ireland purports to provide abortion aftercare, purports to allow abortion abroad and to save the life of the mother, effective access to such provision should be ensured (although this argument could pose a problem in relation to admissibility – see above).[36] It is further possible that Article 8 obligations to respect physical integrity could extend to a requirement that existing exceptions under general legal principles (for example those recognised by the Irish Constitutional Court) in states adopting a Prohibition model should be clarified, even broadened slightly, to include those seeking domestic abortion, as was argued by the applicants in *D v Ireland,* where an existing exception (implied or express) might be applicable.[37] It is clear that the inherently vague exception to the application of the criminal law relevant in the *ABC* case creates a 'situation of prolonged uncertainty'. This forms part of the basis for the applicants' case under Article 8 in *ABC* 'since the Constitutional term 'unborn' is vague and since the

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35 *RR v Poland* (App no 27617/04) (2008) 47 EHRR SE14 (communicated cases); The Center for Reproductive Rights are collaborating in the case: see at <http://reproductiverights.org/en/case/rr-v-poland> accessed 29.09.10.

36 Pp 5-6.

37 See above pp 5-6.

criminal prohibition is open to different interpretations.'[38] The women were placed in a position where they were afraid to seek to access a range of abortion-related services due to their fear that merely seeking to do so might expose them to the risk of imposition of criminal liability; those who could potentially offer the services appeared to be in the same position.

Thus, the Grand Chamber in the cases of *B* and *C* could apply the rule as to *effective* access from *Tysiąc*[39] to the situation in Ireland. As a result it might be found that Ireland must ensure that the criminal prohibition on performing abortions does not inhibit doctors from diagnosing a risk to life or deter women from seeking medical help. The Court in *Tysiąc* considered that the Polish laws against abortion had had a 'chilling effect' on doctors who might otherwise have approved an abortion for health reasons. B and C can similarly argue that there is a chilling effect on doctors in Ireland since even where a mother's life is threatened, doctors may show reluctance to find that that is the case. Questions are also likely to be raised as to the likelihood that abortion would have been available in either case in Ireland if a *degree* of risk to life had been found, although in both cases the risk appeared to be fairly small. The Court might be prepared to find that Ireland must also clarify that issue – since both women appear to have assumed that although there appeared to be some risk to their lives, they would be unable to access abortion except by travelling abroad. C in particular was unable to find a doctor willing to determine whether her life was at risk in order for her to activate the exception in Ireland and obtain an abortion. The result of any such determination in this case at Strasbourg could be that in effect the exception in relation to the risk to life in Ireland is broadened to include cases of serious risks to health where the possibility of a risk to life could not be ruled out.

A breach of Article 8 could therefore be found in *ABC* in relation to B and C on the basis that Ireland must make clearer and more effective provision for access to abortion where a serious risk to the mother's health arises that may be life-threatening. That would constitute some broadening of the recognition of access to abortion under Article 8 that was accepted in *Tysiąc* due to the different nature of the

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38 *ABC v Ireland* (Statement of Facts) (n 2) COMPLAINTS para 3.

39 *Tysiąc v Poland* (n 1).

restrictive Irish regime – since it is based on a prohibition. In *Tysiąc,* as discussed in Chapter 3, the Court found that '[o]nce the legislature decides to allow abortion, it must not structure its legal framework in a way which would limit real possibilities to obtain it.'[40] But the underlying premise behind that finding from *Tysiąc* was that Polish law recognises the legitimacy of abortion in principle and accepts that the foetus's life is not of equal status to that of the mother. That is not the case in Ireland but, nevertheless, it does purport to allow abortion in the one circumstance of risk to the mother's life, which might have applied in B and C's cases. Thus, the finding from *Tysiąc* could be applied to Ireland without necessarily requiring that Ireland's position as to the status of the foetus should change.

Abortion aftercare in Ireland

The Grand Chamber in the *ABC* case could also apply the *Tysiąc* interpretation of the requirements of the positive obligation to secure physical/mental integrity under Article 8 to find that Ireland is required to clear up the fear and uncertainty surrounding the question of access to aftercare services due to the criminal prohibition. Thus Article 8 may be found to require in relation to all three applicants that the use of the criminal prohibition should be clarified to make it much clearer that it does not affect abortion aftercare or continuity of medical care between the providing abortion clinic abroad and medical services in Ireland. These points could also be raised under Article 8 read with Article 14 (considered below). If a woman presented herself to a hospital suffering from pain and bleeding or passing blood clots due, for example, to heavy periods or the menopause, treatment would normally be available. Thus the Court might be prepared to find in relation to all three applicants that where a medical procedure is generally available to the population, a breach of Article 8 will arise if, though 'legal', it is not in practice made accessible to women where it concerns abortion aftercare. Account would probably be taken of the failure of the state to address the underlying reluctance of doctors to provide such aftercare or of women to access it. Such a finding would constitute an application of the *Tysiąc* rule since, as indicated above, Ireland does *purport* to provide abortion aftercare when a woman has travelled abroad for an abortion. It is submitted that this healthcare

40 *Tysiąc v Poland* (n 1) at para 116.

aspect of the claim in *ABC* is the most likely to succeed, since it addresses the core of the applicant's complaints which relate to the lack of provision for medical care for those who have undergone an abortion, rather than to the further matter (which is additionally politically and ethically controversial) of broadening access to abortion in Ireland. As discussed above, Strasbourg might maintain the stance that the latter issue remains within Ireland's margin of appreciation.

An obligation under Article 8 to create availability of abortion outside a current state exception?

The previously stated position of the Court is that, unlike Treaties that protect social or cultural rights, the Convention does not provide for any specific *general* level of healthcare among contracting parties, since such matters ultimately fall within the state's margin of appreciation,[41] and, as discussed in Chapter 2, the jurisprudence provides little support for placing an obligation on the state to legalise termination of pregnancy. However, there has been recent development as to the nature of the positive obligations placed on the state, amounting to a demand to provide certain medical procedures in specific circumstances. In *Dickson*[42] the Grand Chamber decided that a violation of Article 8 had arisen where artificial insemination facilities were denied to a prisoner, on the basis that a failure to strike a fair balance between the interests involved was apparent. The Court came to this determination without deciding whether this was a positive or negative obligation.[43] That stance contrasted with the reasoning of the 4th Chamber in that case[44] to the effect that the withdrawal of such facilities would have related to the imposition of a positive obligation which the state did not have to undertake to avoid a violation of Article 8; it was found that the balancing of the interests that was undertaken was within the state's margin of appreciation.[45] While the significance of the judgment should not be overstated – the Grand Chamber repeatedly emphasised the importance of the context of

41 *Tysiąc v Poland* (n 1) at para 109. See further Krzyanowska-Mierzewska 'How to use the European Convention' (n 32) Pt III.
42 *Dickson v United Kingdom* (GC) (n 30).
43 *Dickson v United Kingdom* (2007) 44 EHRR 21 at para 40.
44 *Dickson v United Kingdom* (n 43).
45 *Dickson v United Kingdom* (n 43) at paras 26-40.

imprisonment[46] – this case casts some doubt on the general reluctance to recognise positive obligations to make medical procedures available under Article 8.[47]

The Chamber *could* take a far more radical step in *ABC* than that proposed above which is to find under Article 8 that Ireland should provide for abortion where a serious, non-life threatening risk to the mother's health arises (which may have been the case in relation to C). While this goes beyond the main rule from *Tysiąc*, since Ireland does not *already* provide for access to abortion in that circumstance, this arguably reflects the Court's particular concern in *Tysiąc* for the preservation of physical integrity, which may even extend to a requirement for provision of therapeutic abortion where, due to adoption of a Prohibition model, there is no 'balancing of privacy and public interest'.[48] Such an approach would arguably imply that Ireland should accept the legitimacy of abortion in principle. Thus the Court could recognise for the first time that an obligation arises that requires that abortion is made available as a medical procedure in order to secure the physical integrity of a state's citizens where no provision is *already* made to do so. The applicants in *ABC* have not limited their claim to the *application* of exceptions already recognised in case law, but complain further that 'the fact that abortion was available in Ireland only in very limited circumstances was disproportionate and excessive'.[49]

The Court might prefer to avoid the question of whether Article 8 requires that some degree of access to abortion should be made available *outside* the circumstances specified by the state as allowing it to occur by finding that to be a matter beyond the scope of its enquiry, as it did in *Tysiąc*.[50] It is submitted that that would be a stance of expedience rather than a principled rejection of such an obligation that would rule out its future emergence.[51] The Court as a rule avoids deciding more than it needs to in

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46 *Dickson v United Kingdom* (GC) (n 30) at para 68.

47 See eg *Brüggemann and Scheuten v Germany* (n 29) and the approach of the Court in *Dickson v United Kingdom* (n 43) at para 40.

48 See chapter 3 pp 5-7, *Tysiąc v Poland* (n 1) at para 107 and Priaulx 'Testing the Margin of Appreciation' (n 10) at p 376.

49 *ABC v Ireland* (Statement of Facts) (n 2) COMLPAINTS para 3.

50 *Tysiąc v Poland* (n 1) at para 106.

51 See further chapter 6 pp 4-5.

order to determine the question it confronts in the particular instance before it.[52] In *Tysiąc,* the Court had available to it a *different* and less controversial route to a finding of a breach of Article 8, as described above. But if, as in the case of Ireland, the state does not purport to provide access to an abortion in the compelling circumstance of averting a real risk to health, the Court would be unable to evade this issue. Women who have a settled determination on health or other grounds to avoid an unwanted pregnancy denied legal abortion domestically are in effect forced to undergo illegal, often unsafe, domestic abortions or travel abroad – as the 3 applicants in *ABC* did. Forced travel abroad may create severe stress and entail a delayed abortion; health care provision may also be impaired – the key issue in *ABC*. The Court may also be influenced by the general context of prevalent illegal abortion, as some have argued the Court was in *Tysiąc,*[53] which includes physical suffering, an adverse impact on health and even death.[54] As discussed in Chapter 3,[55] it is arguable that the Court came close to recognising impliedly a right of access to abortion in *Tysiąc*: bearing the general position as to access in Europe in mind, and the severe consequences for women if abortion is not domestically available, there are grounds for considering – as mentioned above – that states in that situation might be found to have over-stepped their margin of appreciation in prohibiting abortion. (Such claims could also be developed in relation to Article 3, which will be discussed below.) Taking all these matters into account, a bold Grand Chamber in *ABC could* impose on Ireland an obligation under Article 8 to allow access to abortion to avoid a very serious risk to the mother's health, even where her life was not in danger.[56]

Article 8: the question of abortion on 'social grounds' and the need to travel abroad

The situation of applicant A in *ABC v Ireland* (see above) raises the even more controversial issue of access to abortion on social grounds. The Grand Chamber could

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52 See *Gillan v UK* (App no 4158/05) (2010) 50 EHRR 45 in which the Court did not determine the issue in front of it under Article 5, leaving that issue open, since it could determine the issue under Article 8.

53 See chapter 3 p 6; see also *Tysiąc v Poland* (n 1) Dissenting opinion of Judge Borreggo Borreggo at para 3, Priaulx 'Testing the Margin of Appreciation' (n 10) at p 375 and Cornides 'Human Rights Pitted Against Man' (2008) 12 Int J HR 107, 130.

54 Amnesty International Oct 2009 EUR 37/002/2009, see at <http://www.amnesty.org> accessed 29.09.10.

55 Pp 6-7.

56 A future case could raise the question of access in cases of rape, regardless of the issue of suicide.

apply this extended interpretation of the approach of the Court in *Tysiąc* to find that Ireland should provide access to abortion in her circumstances. Such a finding would demand that Ireland create a further new, extremely controversial exception to the prohibition on abortion, allowing access to abortion on *social* grounds. That would demand a radical change to its Constitutional protection for the foetus. While a general right to certain medical procedures may be clearly beyond the scope of the Convention, in specific cases rights of access may be found, as in *Dickson*. Early termination is a good example of a medical procedure that is denied in most circumstances in Poland and Ireland, but not on the grounds of resource, and which is available in the rest of Europe. Therefore it is arguably an exceptional instance by analogy with the prohibition on artificial insemination at issue in *Dickson*. That argument could be supported on the basis that vulnerable and poor women – who are less able to travel for or to pay for an abortion – are disproportionately affected by the prohibition, a feature of A's case. However, the Grand Chamber would be unlikely to embark on a course that could create such a dramatic, direct confrontation with Ireland and would be more likely to view the decision not to provide for abortion on social grounds as within its margin of appreciation, allowing it some scope to protect a foetal right to life. It is much more likely to take a restrained approach; it might therefore be prepared only to find that Ireland had breached its positive obligations under Article 8 by failing to facilitate her travel to the UK by providing public funds for women at a certain level of poverty, on the basis that since travelling for abortion is permitted, it should be capable of being accorded to women regardless of their economic position.

Justifying lack of access to abortion under Article 8(2)

So far the question of proportionality under Art 8(2) has not been raised at Strasbourg in the context of a woman's claim to access abortion: in *Tysiąc* the claim was determined within the ambit of Article 8(1). As far as Ireland is concerned, reliance on Article 8(2) in an instance in which a woman's health was potentially seriously affected by a failure to provide an abortion, as in the cases of B and C, would only be likely to succeed if Ireland persuaded the Grand Chamber to accept that the foetus has a right to life within Article 2. It would be unlikely to accept that argument since making such a finding would place all the laws allowing access to abortion in Europe

in jeopardy. That evasive stance would be in line with *Vo*[57] and with *Open Door*,[58] in relation to Article 10(2), in which the Court avoided answering the government's argument that the foetus was an 'other' subject to such protection. A further possibility would be to recognise an interest of the foetus that could be captured by the term 'rights of others' in Art 8(2) without making a specific determination as to the nature of the right. Strasbourg typically employs a generous interpretation of what may constitute a 'legitimate aim' under the broad exceptions listed in paragraph 2 of Articles 8-11[59] and could therefore leave the question of the particular 'right' in question open. The right of 'others' in question arguably need not be a Convention right possessed by the foetus – it could merely refer to foetal interests or to general rights to healthcare aimed at protecting pregnancy.[60] An alternative justificatory ground under Article 8(2) that is potentially relevant is that of the protection of morals. In *Open Door* the ECtHR held that the Irish restrictions on provision of information in relation to abortion services abroad had the legitimate aim of the protection of morals in that the question of foetal life related to a 'profound moral value'.[61]

But these lesser justifications would be unlikely, on grounds of necessity, to be capable of overcoming a right of access to abortion under Article 8(1): for instance, the protection of morals has never been considered by the Court to merit restriction of physical liberty or fundamental choice in relation to bodily integrity.[62] In the case of *Open Door* itself this legitimate aim was deemed on grounds of proportionality not to require an absolute ban on publication and dissemination of details of abortion agencies abroad. It is reasonably clear that, as emphasised in the dissenting opinion of JES Fawcett in *Brüggemann*, in the absence of a reliance on 'a foetal right to life', no other sufficiently weighty interest would be available to displace the interest of the woman in being able to end a pregnancy.[63] Thus these justifications would carry little

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57 *Vo v France* (n 7).

58 *Open Door Counselling v Ireland* (n 12).

59 See e.g. Harris, O'Boyle & Warbrick *Law of the European Convention on Human Rights* (2nd edn, Oxford OUP, 2009) at p 407.

60 See e.g. *Olsson v Sweden* (App no 13441/87) (1994) 11 EHRR 259 at para 119.

61 *Open Door Counselling v Ireland* (n 12) at para 63.

62 See in particular *Dudgeon v United Kingdom* (n 23) at para 37.

63 *Brüggemann and Scheuten v Germany* (n 29) Dissenting Opinion of Mr JES Fawcett para 5-6.

weight in relation to the claims of B and C to obtain access to an effective medical procedure to determine whether a risk to life or a serious risk to health arose, assuming that those claims were accepted as within the ambit of Art 8(1). The challenge of A relates to the social and familial impact of an unwanted pregnancy, and thus a wider margin of appreciation would probably be conceded to the state in determining that such a claim fell outside the ambit of Art 8(1), as discussed above. Assuming that it was found that Ireland was under an obligation to facilitate travel, the interests discussed could potentially have some weight. Nevertheless, it would be difficult to establish that an implicit requirement to travel secretly for a termination, and creation of a delay in accessing an abortion, could be viewed as a proportionate restriction. It would be hard to establish a rational connection between creating delay in accessing an abortion, and seeking to afford protection to the interests of the foetus.

A further point that may be raised in *ABC,* or could be raised in future applications, arises in relation to the exceptionally draconian nature of the penalties available for abortion in Ireland, which include life imprisonment for the woman. If the Irish government argues that the criminal penalties are intended to protect the rights of others under Art 8(2), the Court may concede a broad margin of appreciation to Ireland on grounds of the religiously controversial nature of the issue, but the law might nevertheless be found to fail to satisfy the demands of proportionality under Article 8(2). This would be likely to be the case even if in practice life imprisonment was not imposed.[64]

Freedom from inhuman and degrading treatment: developments under Article 3

Strasbourg has not yet accepted that effectively forcing a woman to go through a pregnancy resulting from rape, or where the foetus is fatally disabled, or where her health will be severely placed at risk, as can occur in restrictive regimes, whether provided for in law or not, amounts to Article 3 treatment. As was discussed in the previous Chapter it is a feature of international human rights law that the Article 3

64 See *Dudgeon v United Kingdom* (n 23) at para 41.

guarantee can be interpreted to encapsulate the distress and humiliation[65] engendered by the denial of abortion services in certain situations such as rape or fatal foetal impairment. There is also some support for this argument where the woman as a result suffers severe impairment of health, as argued by the applicant in *Tysiąc*.[66] Thus, it is possible that Strasbourg might be prepared to take this step. The ECtHR has confirmed that this Article can found positive obligations to prevent inhuman or degrading treatment.[67]

If the Court accepted a positive obligation to set up a legal framework for abortion regulation that provided for abortion where the consequences for the woman of an unwanted pregnancy amounted to Art 3 treatment, then regimes that adopt a Prohibition model of abortion, as in Ireland, could readily be found to breach Article 3. This would establish a 'right of access to abortion,' under the Convention, albeit in very narrow circumstances, based on a failure of the state to fulfil its positive obligations under Article 3. An argument of this nature was raised at Strasbourg in *D v Ireland* (admissibility).[68] In that case the applicant found after a scan that one of the twins she was carrying had died while the other was suffering from a severe foetal abnormality which limited survival outside the womb to an average of 6 days (anencephaly – lack of a brain). She did not embark on any course of domestic litigation since the only analogous case law related to the threat of suicide where the woman had been raped.[69] Having obtained an abortion in England, she was unable to access full medical after-care, including genetic counselling, in Ireland, due to restrictions linked to the Irish prohibition and the criminal penalties relating to it. She complained at Strasbourg that the prohibition had led to violation of her rights under

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65 The ECtHR has recognised that degrading treatment includes 'feelings of fear, anguish and inferiority capable of humiliating and debasing them' *Kudla v Poland* (GC) (App no 30210/96) 35 EHRR 198 at para 92.

66 *Tysiąc v Poland* (n 1) at para 64-8.

67 See eg *Aksoy v Turkey* (App no 21987/93) (1997) EHRR 553 and C Ovey and R White Jacobs & White *The European Convention on Human Rights* (4th edn, Oxford: OUP, 2006) at pp 84-5 on the duty to investigate allegations of ill treatment.

68 See *D v Ireland* (Admissibility) (n 18). See commentary on the facts of this case B Hewson 'Ireland's Cruel and Unusual Abortion Law' <http://www.spiked-online.com/index.php/site/article/3363/> accessed 29.09.10.

69 *D v Ireland* (Admissibility) (n 18) para 91.

Articles 3 in relation to the mental suffering she was forced to endure,[70] but as mentioned above, the claim was found inadmissible.

However, the acceptance of an obligation under Article 3 to provide access to abortion in very narrow circumstances, requiring the creation of a new legal exception in Ireland is unlikely to be recognised, for example, in the circumstances of *ABC* – not because it is out of line with Convention principles, but due to the fact that *in practice,* even though a legal prohibition is in place, the woman will often access an abortion abroad, as in Ireland, and the Court does not therefore *have* to adopt such a controversial position as to find a violation under Article 3.[71] The Court is more likely to recognise a less controversial Article 3 obligation – the requirement of a legal framework to ensure that women can obtain after-abortion services that are legally available in the state. The ECtHR has acknowledged positive obligations under this Article in relation to the requirement of the proper *investigation* of rape in *MC v Bulgaria,*[72] thus recognising the seriousness of the humiliation and distress caused by rape. This finding therefore provides support for acceptance of other analogous positive obligations, possibly including ineffective provision of abortion aftercare where the abortion was undertaken in stressful conditions and/or to avoid serious health risks. Further, in a suitable case an analogy could be drawn between the suffering caused to the woman by the state's lack of an effective legal framework for prosecuting rapists and the suffering caused by the state's lack of a legal framework to address the effects of rape – including denying access to abortion where the pregnancy is the result of rape.

The application of *RR v Poland* submitted to the Court in 2004[73] claims that a positive obligation should be recognised under Article 3 to ensure that diagnostic tests to establish foetal disability should be available in practice in order to bring a woman within the Polish exception and permit abortion, depending on the results. In *RR* the applicant was informed on the basis of an initial ultrasound test that the foetus might be suffering from Turner's syndrome; she required a further genetic examination but

70 *D v Ireland* (Admissibility) (n 18) para 75.

71 See *Tysiąc v Poland* (n 1) at para 64-8.

72 *MC v Bulgaria* (App no 39272/98) (2005) 40 EHRR 20 at paras 182-7.

73 *RR v Poland* (n 35); The Center for Reproductive Rights is collaborating in the case: see at <http://reproductiverights.org/en/case/rr-v-poland> accessed 29.09.10.

she was unable to gain a referral by her local physician for this test and was subsequently refused testing in public hospitals until admitted as an emergency patient in the 23rd week of her pregnancy. By the time she was able to gain permission for an abortion on the ground of foetal disability it was unlawful in Polish law to have one, and she was also unable to gain domestic redress. Her argument is being brought under the 'degrading treatment' head of Art 3. If successful, as the Polish Federation for Women and Family Planning argue,[74] her claim would place greater pressure on Poland than *Tysiąc* did to undergo more far-reaching reforms to its medical framework allowing for abortion, within its accepted exceptions.

Protection for the life of the woman: Article 2

A breach of Article 2 of the ECHR could be claimed where a woman's life was put in danger by preventing her from having an abortion, both in so far as a prohibition could be considered as having that direct result,[75] and in so far as the state would be failing in its positive obligation to protect the lives of its citizens.[76] Clearly, these issues would arise in a non-abstract sense[77] if, for example, a pregnant woman suffered a complication threatening her life that could only be resolved by aborting the foetus. Denial of healthcare which is 'available to the general population' and which could save the life of a person who was denied it was held to be capable of breaching Article 2 in *Cyprus v Turkey*.[78]

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74 Polish Federation for Women and Family Planning W Nowicka (ed) *Reproductive Rights in Poland – the effects of the anti-abortion law* (Mar 2008) <http://www.federa.org.pl/publikacje/report%20Federa_eng_NET.PDF> at p 62.

75 Article 2(1) provides: 'Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law'. Agents of the state (ie those preventing a doctor carrying out an illegal abortion eg the police) would in effect be killing the woman by preventing the abortion taking place. It may however be more suitable to consider the issue as a matter of the positive obligations of the state to secure the life of its citizens.

76 See *LCB v United Kingdom* (App no 23413/94) (1998) 27 EHRR 212; *Oneryildiz v Turkey* (App 48939/99) (2005) 41 EHRR 325.

77 The Court does not receive abstract applications as to the applicability of law in general – such applications are deemed 'manifestly inapplicable' under Article 35(1). See in relation to abortion *X v Norway* (App no 867/60) (1961) 4 Yearbook 270 and *X v Austria* (App no 7045/75) decision of 10th December 1976.

78 *Cyprus v Turkey (*App no 25781/94) (2002) 35 EHRR 30 at 219; *Nitecki vPoland,* (Admissibility) (App no 65653/01), decision of 21st March 2002 cited in Krzyanowska-Mierzewska 'How to use the European Convention' (n 32) at Pt III 2.

Article 2 has been held to impose certain procedural obligations in relation to the creation of risks to life. Such obligations have been held to arise in relation to the provision of healthcare and the requirement to undertake effective investigations into the cause of death:

> The positive obligations [under Article 2] require States to make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patients' lives. They also require an effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable.[79]

This obligation could arise in relation to denial of abortion as a form of healthcare where a risk exists to the health or life of the mother, potentially including a risk of suicide.[80] In procedural terms, if deaths are caused directly by state agents in the context of, for example, a hostage situation, there must be a clear and accessible basis in law for the action taken.[81] By analogy, in the context of *positive* obligations under Article 2, an obligation to provide readily available medical care to safeguard life could be extended to require state regulations intended to obviate risk to life to be effective. Such positive obligation could take the form of a requirement to adopt an effective legal framework that protects the life of pregnant women whose lives are threatened by their pregnancy. Where any provision available was rendered ineffective due to prevalent anti-abortion attitudes in the medical establishment engendered by restrictive regimes (e.g. the 'chilling effects' referred to in *Tysiąc* and claimed in *ABC*)[82] the state would under this argument have to take steps to address the inefficacy. The applicant presented her case on that basis in the recent application to the Court in *Z v Poland*,[83] sponsored by the Centre for Reproductive Rights, and currently pending before the Court. The application involves a pregnant woman who

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79 *Byrzykowski v Poland* (App no 11562/05) (2008) 46 EHRR 32 at para 105 – 106.

80 On measures to prevent loss of life see further *Tavares v France* (Admissibility) (App no 16593/90) and R Cook, B Dickens and M Fathalla *Reproductive health and human rights: Integrating medicine ethics and law* (Oxford: OUP, 2003) at p 26.

81 See Article 2(2) – this point is considered briefly in the case of *McCann* (App no 18984/91) (1996) 21 EHRR 97 at para 154.

82 *Tysiąc v Poland* (n 1) at para 116; *ABC v Ireland* (Statement of Facts) (n 2) COMPLAINTS para 3. See also chapter 3 pp 4-7.

83 *Z v Poland* (Statement of Facts) (App no 46132/08), lodged 16 September 2008.

died as a result of an ulcerative colitis; it is alleged in the claim that doctors failed to perform further examinations on her which would have improved their attempts to fight this disease. The applicant's argument (the case is being brought by her mother) is that they failed to do so due to her pregnancy since they were reluctant to perform further examinations that would have involved endangering the foetus.

Further, where a state has determined that a pregnant woman is permitted to have an abortion where her life is threatened it may be argued as an aspect of a positive obligation under Article 2 that this exception to a general prohibition should be clearly defined. This has particular relevance in the abortion context to the issue of suicide.[84] Procedural obligations, at a minimum, require that deaths caused directly by state agents[85] must be able to be investigated by an effective court procedure;[86] by analogy, a procedure should arguably be available allowing a woman at risk of suicide who has been refused an abortion to challenge the refusal. An analogous issue is raised by the third applicant in *ABC*, who suffered from cancer and required chemotherapy. She is claiming that the 'lack of clear legal guidelines regarding the circumstances in which a woman may have an abortion to save her life' infringed her rights under Article 2.[87] This would be the first time that the Court has considered such a claim in relation to abortion; the key question concerning the success of this aspect of the application is whether the Grand Chamber considers that this actually concerns the applicant on the facts – so it is not an abstract question. The Chamber is likely to conclude that the lack of clear guidelines did not in C's case expose her to a risk of death, due to the possibility of obtaining an abortion in England. However, the Court could be moved by general consideration of the situation of women in Ireland, as arguably it was in *Tysiąc*, and therefore read into the facts the likelihood that the failure to accord her an abortion led to a significant risk to her life. Despite this, it is

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84 International human rights treaties have highlighted the problem of maternal mortality due to suicide where pregnancy in extreme circumstances such as rape is prohibited: chapter 4 pp 1-4; see also in relation to Irish law chapter 2 pp 11-12.

85 Under Protocol 6 (peacetime) and 13 (generally) the member state is not permitted to use the death penalty. Killing by state agents potentially breaches Article 2, but Article 2 contains exceptions in para 2 in which causing death is permitted in narrow circumstances.

86 The Court held in *McCann v United Kingdom* (A/324) (1996) 21 EHRR 47 that the procedures in relation to the investigation of suspicious deaths need to be effective in order to satisfy the requirements of A2(2). This reasoning could be transposed into cases of positive obligations under Article 2 in relation to the ambit of the right.

87 *ABC v Ireland* (n 2) COMPLAINTS para 1.

more likely in relation to C that the Chamber would opt for a solution under a qualified Article such as Article 8, as discussed above. If it did decide that Article 2 applied then, as discussed, it is clearly arguable that in failing to set out clear legal guidelines the Irish government failed to meet the standards required by its positive obligations under Article 2.

Freedom from discrimination: potential developments under Article 14 read with Articles 2, 3, 8

In restrictive abortion regimes it is argued that women suffer discriminatory limitation of access to healthcare services on grounds of gender since in such regimes there is evidence of a reluctance of doctors to diagnose certain conditions or treat pregnant women for them, where the foetus could be threatened; this argument was made in the application of *RR v Poland*[88] by the International Reproductive and Sexual Health Law Programme. This has been further recognised by the Committee of Ministers of the Council of Europe which by Principle 10 indicates that prenatal genetic diagnosis, a healthcare service intimately linked with abortion services, must be supplied without discrimination.[89] Further, since pregnancy is unique to women, but can pose severe health risks to them, denial of abortion/related healthcare services can be viewed as a form of discriminatory treatment. As emphasised by CEDAW in its General Recommendation 24, 'denial of health needs specific to women constitutes a form of discrimination against women'.[90]

Article 14 provides that 'the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex…'. Article 14 is therefore *prima facie* applicable to the denial of abortion-related or other healthcare services which affect only women, or where denial of diagnostic tests or treatment for non-pregnancy related conditions occurs due to women's reproductive function. However, Article 14 does not provide a free standing right – it must be read 'with' another Article of the Convention. It is not necessary for there to be a *breach* of

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88 Written Comments by the International Reproductive and Sexual Health Law Programme, University of Toronto, Faculty of Law 28th September 2007 *R.R. v Poland* (App no 27617/04) at p 1.

89 Committee of Ministers of the Council of Europe, Recommendation No.R(90)13, 21 June 1990.

90 Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies HRI/GEN/1/Rev. 7 (2004) HRC General Recommendation No 24 UN Doc A/54/38 at 5.

the accompanying Article; rather, the claim must merely fall within the ambit of that Article.[91] As indicated above, restrictive abortion regimes are associated with a number of potential violations of women's Convention rights. *Tysiąc* and *Brüggemann*[92] made it clear that restrictive access to abortion can found an Article 8 claim – in other words, the adverse impact on women can fall within the ambit of Art 8(1).

The comparator problem in this context

Case law on Article 14 at Strasbourg relies on adverting to a comparator to establish that a difference of treatment has occurred.[93] That requirement causes a problem in relation to certain solely pregnancy-related issues, such as access to abortion, since there is no obvious male equivalent to a pregnant woman and therefore no 'persons in relevantly similar situations' are available, as case-law requires.[94] However, where the discrimination relates to general provision of healthcare services denied to a woman due to risk to her pregnancy, the comparator would arguably be a man accessing similar healthcare services. This argument is given some support on the basis that the Court has so far rejected the argument that differing treatment on grounds of gender is justified merely by reference to differing reproductive functions in other contexts.[95] In relation to access specifically to abortion services it might be argued that identifying a direct comparator is inappropriate and so the Court should have regard to the general context of discrimination. Court jurisprudence in relation to Article 14 is not consistent in relation to the requirement of a comparator – while it is always necessary to demonstrate differential treatment between two classes that does not always require a detailed analysis of whether the applicant is in a relevantly analogous situation.[96]

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91 See further *Abdulaziz* (n 3), at para 82; R Wintemute, 'Within the Ambit: How Big Is the ''Gap'' in Article 14 European Convention on Human Rights?'; A Baker 'The Enjoyment of Rights and Freedoms: A New Conception of the 'Ambit' under Article 14 ECHR' (2006) 69 MLR 714.

92 *Brüggemann and Scheuten v Germany* (n 29). See also *Tysiąc v Poland* (n 1) at paras 107-110.

93 *Lithgow and others v United Kingdom,* (App nos 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81, 9405/81) (1986) 9 EHRR 329. *Rasmussen v Denmark* (A/87); (1984) 7 EHRR 371.

94 *Zarb Adami v Malta* (App no 17209) (2006) 44 EHRR 49 at para 71. This requirement has provoked criticism of the Court's jurisprudence on gender by feminist commentators who advert to the lack of protection against gender-based discrimination in the reproductive context: see eg I Radacic 'Gender Equality Jurisprudence of the European Court of Human Rights' (2008) 19 EJIL 841.

95 *Van Raalte v The Netherlands* (App no 20060/92) (1997) 24 EHRR 503.

96 *Pine Valley Developments Ltd v Ireland* (A/222) (1991) 14 EHRR 319 at paras 14-17.

Therefore an applicant could argue that the ground of discrimination was the fact of her pregnancy on the basis that only women can become pregnant, echoing the stance under EU law in relation to access to employment in which pregnancy is a prohibited ground of discrimination in itself and thus reliance on male comparators has long been abandoned.[97]

The concept of discrimination

If the comparator hurdle could be overcome, depending on the specifics of the claim, it would also be necessary to consider the concept of 'discrimination' in Article 14: it has been found to denote a difference of treatment without objective and reasonable justification – i.e. treatment failing to pursue a 'legitimate aim' or where the means employed were disproportionate to the aim.[98] Member states have been allowed only a narrowed margin of appreciation as regards gender – it has been recognised that only 'very weighty reasons' would satisfy the Court that a difference of treatment could be justified based on this ground.[99]

The accompanying Article

Articles 8, 3 and 2 are most likely to be found applicable in this context in relation to the provision of healthcare services on the basis, as demonstrated above, that those Articles have been interpreted to include positive obligations, although it is only in relation to Article 8 that the Court has confirmed that domestic access to healthcare can be required in certain circumstances by such an obligation. The requirement of access to abortion services in reliance on Articles 8 and 14 was raised in *Tysiąc* by the Centre for Reproductive Rights which stated in its Amici brief to the Court[100] that:

> Poland's failure to take effective legal, policy and administrative measures to ensure that women can exercise their legal right to abortion in practice

97 Directive 92/85/EC Pregnancy and Maternity. See also *Webb v EMO Cargo (no 2)* [1994] ECR I-3567 (C-32/93).

98 *Fretté v France* (App no 35415/97) (2004) 38 EHRR 438 at para 71; *Lithgow v United Kingdom* (1986) 8 EHRR 329 at para 177.

99 *Abdulaziz v United Kingdom* (n 3) at para 78.

100 *Tysiąc v Poland* (App no 5410/03) Written Comments by Center for Reproductive Rights, 21 Sept 2005 at para 43.

> disproportionately disadvantages women over men and violates women's right to non-discrimination in the enjoyment of their other human rights.[101]

This argument was not considered by the Court although it did not dismiss the point; rather, it was not thought that the question of discrimination raised issues going beyond the primary Article 8 claim.[102] An argument of this type was also raised by the International Reproductive and Sexual Health Law Programme in its submission to the Court in the application of *RR v Poland*: it argued that the Court should find a violation of Article 14 read with Articles 8 and 3 due to the 'historical patterns of paternalism and sexism in the delivery of reproductive health services'.[103]

A difference of treatment on grounds of gender could be argued to occur where the state interferes with or fails to provide for the full provision of healthcare services due to pregnancy. The denial of full health-care to women due to their reproductive function was a theme in Chapters 2 and 4, and as argued above may fall within the *ambit* of Article 8(1). Such denial appears to occur in restrictive abortion regimes; for example, diagnostic tests or treatment for serious conditions (unrelated to pregnancy) may be refused where a foetus could be put at risk. The applicant in *Z v Poland*[104] (see above) is making this point in relation to the failure of Poland to establish an appropriate framework to regulate the doctors' right to refuse care on moral or religious grounds.[105] Failure to carry out tests or treatment may be due to institutional obstruction stemming from doctors' religious beliefs and/or from an inhibiting general criminal context. The principle of effective access to services also applies in relation to carrying out diagnoses to establish that the 'medical indications' allowing for an abortion for health reasons are present. This principle arises in the application of *RR v*

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101 On this point the Center for Reproductive Rights referred further to arguments raised in international law – see R Cook and B Dickens *Considerations for Formulating Reproductive Health Laws* (2nd edn, Geneva: WHO, Occasional Paper No. 3, 2000) at p 34.

102 *Tysiąc v Poland* (n 1) at para 147.

103 Written Comments by the International Reproductive and Sexual Health Law Programme (n 88) at p 1.

104 *Z v Poland* (Statement of Facts) (n 83) COMPLAINTS para 6.

105 The challenge is intended to ensure that the Polish government guarantees an adequate number of healthcare workers who are willing to provide all legal services and that patients receive timely referrals to those workers. It is also asking the Court to affirm that conscientious objection may not be invoked by institutions such as hospitals. See at <http://reproductiverights.org/en/case/z-v-poland-european-court-of-human-rights> accessed 29.09.10.

Poland[106] in relation to foetal disability and arose in the case of *Tysiąc v Poland* in relation to health risks. It would also apply to tests to establish that a woman falls within a general legal exemption from the criminal liability for abortion recognised under a Prohibition model, as is the case in relation to C (risk to life and chemotherapy treatment) in the *ABC* case. For Article 14 purposes, the comparator could be a man who would be able to obtain unimpeded access to tests or treatment for similar or analogous conditions affecting his health. The question of proportionality would be determined in the same way as discussed above in relation to the same issue under Article 8(2).

A further Article 14 argument could be raised in relation to effective failure to provide healthcare services to remedy conditions linked to illegal/extra-territorial abortion, including abortion after-care in respect of all three applicants in *ABC*, or genetic counselling as in *D v Ireland*.[107] Where a man suffering from symptoms such as pain and bleeding after a minor operation would have access to medical treatment, it would arguably be discriminatory to deny it to women or to inhibit them from seeking it in the aftermath of an abortion abroad (where they could not access aftercare in the hospital or clinic that had performed the abortion, as was the case in respect of all 3 applicants in *ABC*, due to the need to return to Ireland). This is one of the key grounds of the claim being made in that case; the Grand Chamber could determine the question of lack of aftercare under Article 8 alone, but greater pressure would be placed on Ireland if the regime was also found to create discrimination on grounds of gender.

Future claims under Article 8 read with 14 that address the matter of *de jure* access to abortion should not be ruled out despite their being unlikely in the short-term due to the tentative approach adopted by the Court so far. Such a claim could proceed on similar grounds to those discussed above – to the effect that legal restriction of abortion where necessary to protect health was discriminatory in that such restrictions did not apply to other forms of healthcare. Alternatively, a still more radical argument could be advanced that would found a 'right of access to abortion' under these

106 *RR v Poland* (n 35).
107 *D v Ireland* (Admissibility) (n 18).

Articles: for example that a regime that restricts access to abortion at all stages of gestational development is inherently discriminatory on grounds of gender in that it denies 'personal autonomy' (for instance in relation to the development of personal relations – see *Brüggemann and Scheuten*)[108] to fertile women through legal penalties directed at them or designed to deny access to facilities, by, for example, prosecuting service providers.

Analogous emergent rights

There are indications as discussed that recognition of a right of access to abortion and associated healthcare services under certain Convention Articles may be in the process of emerging. An analogy is offered by the transsexual cases at Strasbourg which present a model of eventual acceptance of a right by hesitant, incremental steps in the social context. UK law did not give full expression to the fundamental interest of individuals in determining their own identity. Initially the Court tended to find no violation where transsexuals were not accommodated by member states – despite recognizing sexual identity as a part of private life under Art 8 – due to a reluctance to impose positive obligations and a lack of European-wide consensus.[109] This position was developed to one where a peculiar lack of accommodation could create a breach of Art 8, as in *B v France* where the breach was found since the civil position of transsexuals in terms of recognition of sexual identity in France was worse than that pertaining in the UK.[110] At this interim stage, while not embracing a fully fledged right, the Court demonstrated that it was open to the possibility of doing so; judges were sensitive to the general legal status of transsexuals, and arguably receptive to accepting reform.[111] This was finally developed into an outright acceptance of sexual identity as a fully fledged right under Art 8 in *Goodwin v UK*.[112] Acceptance in *Goodwin* of a right to sexual identity meant that transsexuals were accommodated

108 *Brüggemann and Scheuten v Germany* (n 29) at para 55.

109 *Rees v UK* (App no 9532/81) (1986) 9 EHRR 56 and *Cossey v UK* (App no 10843/84) (1991) 13 EHRR 622. A similar application also failed in *Sheffield and Horsham v UK* (App no 22885/93) (1999) 27 EHRR 163.

110 *B v France* (App no 10179/82) (1993) 16 EHRR 1.

111 *Sheffield and Horsham v UK* (n 109) at para 60.

112 *Goodwin v United Kingdom* (App no 28957/95) (2002) 35 EHRR 18 at para 85.

within the legal system on the terms they had argued for – i.e. recognised legally as being members of their new gender after reassignment.

The Court in *Goodwin* noted that there was 'clear and uncontested evidence of a continuing international trend in favour, not only of increased social acceptance of transsexuals but also of legal recognition of the new sexual identity of post-operative transsexuals'. Clearly, there is general legal recognition in Europe of rights of access to abortion services and, since a number of countries allow abortion on request (see Chapter 3), abortion rights could be said to be generally recognised with only a few exceptions in Europe.[113] It was also noted in *Goodwin* that the UK Government was currently discussing proposals that would have facilitated the amendment of records so that transsexuals might be recognised.[114] The Court made the point that respect for dignity and autonomy underlies the Convention rights, especially Article 8. In the *Goodwin* case these foundational values led to acceptance of control over identity. In relation to the right of transsexuals to marry the Court argued that the right itself was not within the state's margin of appreciation, even if the conditions under which it was recognised were, despite the fact that the majority of states failed to provide for transsexual marriage rights.

Similarly, the development of Article 8 and 14 jurisprudence to protect the right of gay people to engage in homosexual practice without interference (*Dudgeon v United Kingdom*)[115] was followed by recognition of the right to be free from discrimination on that ground in relation to adoption in *EB v France.*[116] Six years prior to *EB* the Court had narrowly held in *Fretté v France*[117] that restriction on gay adoption with the aim of protecting the child's welfare was within the state's margin of appreciation, paying particular regard to the lack of a uniform approach to the issue.[118] As seen

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113 Eg *Tysiąc v Poland* (n 1) at para 103.

114 *Goodwin v United Kingdom* (n 112) at para 86.

115 *Dudgeon v United Kingdom* (n 23).

116 *EB v France* (App no 43546/02) 47 EHRR 21. The French adoption board had emphasised the gay 'lifestyle' of the woman in choosing to refuse her request for adoption a distinction which the Court held was impermissible at para 96.

117 *Fretté v France* (App no 36515/97) 38 EHRR 438.

118 *EB v France* (n 116) at para 41. The primary distinction drawn between the two cases, which were decided within 6 years of each other, was the lack of an express reference to 'homosexual lifestyle' in the latter case. *EB v France* (n 116) at para 74-8.

above in relation to transsexuals, the Court altered its position primarily to bring the Convention into line with modern attitudes – highlighting that the Convention is a 'living instrument'.[119] As in *Tysiąc*[120] the Court's approach in *EB* avoided the central question whether homosexual adoption is *required* by the Convention, but stressed that the important principle of non-discrimination was at issue in the case;[121] thus the Court followed a line of jurisprudence upholding the rights of homosexuals against the policy of certain contracting parties – establishing a significant role for the Court in extending gay rights.

Conclusions

As in the above examples of analogous emergent rights, the Court may be approaching a position on abortion where it is prepared to safeguard, even if indirectly, some concept of reproductive autonomy under Convention rights, even in this difficult sphere, in particular as regards abortion in the first trimester. At present it may be most likely to find a violation of Article 8 (or possibly 2) where there is already state provision for abortion, albeit on narrow grounds, which appears to be ineffective, placing women's health or life at risk – a relatively slight incremental step from the outcome of *Tysiąc*. It may also be prepared to go further and find that impaired access to general healthcare services and/or to abortion aftercare due to a very restrictive approach to abortion, may lead to a breach of Article 8, possibly read with Article 14, as is argued in *ABC*.[122] However, it is less likely to confront the question, posed in *ABC*, of whether abortion should be available to obviate a serious risk to the mother's health, where her life would not be placed at risk otherwise, thus pressurising Ireland to introduce a new exception to its prohibition and amending its Constitution in order to avoid being in breach of Article 8. This cannot necessarily be ruled out, however, on the basis of the margin of appreciation, since the cases establishing the relevance of the doctrine – *Paton*[123] and *Vo*[124] – were cases in which the applicant sought to restrict or penalize abortion. In contrast, in *Tysiąc* and *Open*

119 See eg *Tyrer vthe United Kingdom* (A/26) 1979-89 2 EHRR 1 at para 31.
120 *Tysiąc v Poland* (n 1).
121 *Tysiąc v Poland* (n 1) at para 71.
122 *ABC v Ireland* (n 2) COMPLAINTS para 4.
123 *Paton v United Kingdom* (App no 8416/78) (1981) 3 EHRR 408.
124 *Vo v France* (n 7).

Door[125] the Court refused to extend the margin of appreciation doctrine to this issue. It is therefore arguable that the momentum at Strasbourg is currently one in favour of provision of access to abortion since cases involving the *extension* of 'abortion rights', not their limitation, elicit a more expansive response.

ABC v Ireland has the potential to ensure that the Court confronts this issue more directly, as it has done in other cases concerning the evolutive development of Article 8 rights, including *Goodwin*[126] and *EB*. As Chapter 4 explained, in so doing it would reflect general trends in international human rights law, and in particular the stance of CEDAW as to the impact on women of restrictive abortion regimes. The conceptualisation of reproductive rights as human rights is still an emergent trend but, as Chapter 4 explained, it appears to be quite firmly rooted in recent developments in the international human rights law field in general. If the Grand Chamber does deliver an historic decision in *ABC*, seeking a radical overhaul of Ireland's restrictive regime, it would be bringing itself more closely into line with that current tendency. It is thus possible that *ABC v Ireland* could become, in effect, the '*Roe v Wade'*[127] of Europe in relation to the handful of states with very restrictive abortion regimes: however, it has been pointed out that the Grand Chamber has bases for finding breaches of the ECHR, but without putting Ireland in the position where, to address a breach of one or more Convention rights, it would have to create a new exception allowing access to abortion.

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125 *Open Door Counselling v Ireland* (n 12).

126 *Goodwin v United Kingdom* (n 112).

127 410 U.S. 113 (1973); that was a landmark decision in which the Supreme Court of the United States accepted that prohibition of abortion except on limited grounds was contrary to the constitutional guarantee of privacy. See further chapter 6 p 1.

Chapter 6 : Conclusions

The opportunity for Strasbourg to recognise abortion rights under the Convention was missed in *Brüggemann v Germany*[1] 30 years ago, contrasting tellingly with the famous *Roe v Wade*[2] judgment by the American Supreme Court four years earlier. In that case the Supreme Court held that the constitutional guarantee of privacy[3] as part of its protection for procreative autonomy[4] encompassed the decision to have an abortion. It held that state regulation affecting the availability of abortion was legitimate in so far as it was intended to protect the health of the women before viability and only after viability could it be justified by reference to the potentiality of human life.[5] In contrast in *Brüggemann* the Commission accepted that abortion involved the right to the private life in terms of intimate sexual relations, but was not prepared to draw from that the conclusion that at certain stages of foetal development the mother had a 'right' to choose an abortion.[6] After *Brüggemann* when the issue of abortion has arisen, as this thesis has shown, Convention institutions have either found doubtful grounds for declaring the case inadmissible (*D v Ireland*)[7] or have avoided making a determination as to the more far-reaching claims (*Tysiąc*).[8]

However, the approach of the ECtHR to the issue of access to abortion is necessarily somewhat more tentative than the approach in national jurisdictions such as America.[9] The matter of abortion can be intimately linked to issues of national sovereignty, particularly so in relation to Ireland which enshrines protection of the foetus

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1 *Brüggemann and Scheuten v Germany* (Decision) (App no 6959/75) (1977) 5 DR 103.

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

3 Under the 14th Amendment. Recognised in *Griswold v Connecticut* 381 US 479 (1965).

4 *Eisenstadt v Baird* 405 US 438, 453 (1965).

5 *Roe v Wade* 410 U.S. 113 (1973) at pp 147-164.

6 *Brüggemann and Scheuten v Germany* (n 1) at paras 55, 61-6.

7 *D v Ireland* (Admissibility) (App no 26499) (2006) 43 EHRR SE 16.

8 *Tysiąc v Poland* (App no 5410/03) (2007) 45 EHRR 42.

9 Due in part to the volume of applications the ECtHR arguably has to adopt a general role in overseeing national law and policy whereas national constitutional courts are more able to pass judgment on specifics see eg W Sadurski 'Partnering with Strasbourg: constitutionalism, the accession of Central and East European states to the Council of Europe, and the idea of pilot judgments' (2009) 9 HRL Rev 397, 446-51 and Harris, O'Boyle & Warbrick *Law of the European Convention on Human Rights* (2nd edn, Oxford OUP, 2009) at p 34-6.

specifically in its constitution[10] and, together with Malta, has negotiated special exceptions for their regimes in EU law.[11] Furthermore, abortion is a religiously, politically and theoretically controversial matter, as the Court has acknowledged.[12] Therefore the 'politics' of the Court as a European institution encourages an evasive stance and this explains the meagre and timid jurisprudence on abortion-related issues.

The Court's stance so far is therefore one that that avoids the issue of creation of 'abortion rights', as recognised in *Roe v Wade*, but in *Open Door*[13] and *Tysiąc* it demonstrated that it is prepared find a rights violation in respect of less far-reaching claims relating to abortion services arising from very restrictive abortion regimes. The violation of Article 8 suffered by Alicia Tysiąc – the 'fear and distress' caused by the failure of Poland's restrictive abortion regime to operate clearly and effectively – has been described by the leading commentator as one of the key causes of suffering for women seeking to access legal abortions in such regimes.[14] Nevertheless, the Court's acceptance that the suffering of women caused by restrictive abortion regimes can be conceptualised as rights violations has been equivocal – its boldest decision, *Tysiąc,* turned most obviously on the question of procedure, rather than evincing any determination to address the substantive failings of the Polish regime, which lead many women to seek illegal abortions.[15]

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10 Art 40.3.3 of the Irish Constitution. See further R Lawson 'The Irish Abortion Cases: European Limits to National Sovereignty?' (1994) 1 EJHL 167, 177-80 and Written Observations by the European Centre for Law and Justice for Application No 25579/05 before the European Court of Human Rights Third Session *ABC v Ireland* (App no 25579/05) filed on 14 November 2008 esp at paras 7-9 and 18; see also before the Grand Chamber: Joint Written Observations of Third Party Interveners: The Alliance Defence Fund on Behalf of the Family Research Council Washington DC United States; The European Centre for Law and Justice on Behalf of Kathy Sinnott; The Society for the Protection of Unborn Children, London filed on 10 September 2009 at para 9.

11 Protocol No 17 Annexed to the Treaty of the European Union and to the Treaties establishing the European Communities. Malta has similarly entered an exception: Protocol No 3 of the Treaty of Accession 2003. See further N Shuibhne 'Margins of appreciation: national values, fundamental rights and EC free movement law' (2009) 34 EL Rev 230, 249.

12 *Vo v France* (App no 53924/00) (2005) 40 EHRR 12 at para 82.

13 *Open Door Counselling Ltd and Dublin Well Women Centre Ltd and others v Ireland* (App No 14234/88) (1993) 15 EHRR 244.

14 N Priaulx 'Testing the Margin of Appreciation: Therapeutic Abortion, Reproductive 'Rights' and the Intriguing Case of *Tysiąc v Poland*' (2008) 15 EJHL 361, 377 citing R Cook, J Erdman and B Dickens 'Achieving Transparency in Implementing Abortion Laws' (2005) Int J of Gynaecology & Obstetrics 157.

15 See further J Gher & C Zampas 'Abortion as a Human Right: International and regional standards' (2008) HRL Rev 8(2) 249 at 279.

The narrow basis for the finding of a breach of Article 8 in *Tysiąc* meant that the decision could be met by a response that had a marginal impact on the abortion regime in Poland,[16] barely alleviating the suffering of women there. Concerns have been raised in relation to the effectiveness of the measures employed by Poland as the response to the *Tysiąc* decision; in particular it has been pointed out that the measures adopted do not address the specific circumstance of abortion,[17] allowing women who come within the exceptions accepted by Poland as permitting an abortion can obtain one in practice. Thus the measures adopted as a 'response' to *Tysiąc* are likely to be of little effect in aiding women in Alicia Tysiąc's situation. Undoubtedly, Poland's minimal response stemmed in part from the equivocal nature of the decision. A similar response was evident in Ireland after the *Open Door* case[18] because it concerned the rights of the *provider* of the service rather than the woman. Also, as Chapter 2 points out, the provision of further information came with a price since it appears that Irish women are also given misleading information as to the dangers of abortion.

However, despite the fact that the Court, perhaps due to the sensitivity of the issue, presented the case as one relating to general medical procedure in *Tysiąc,* it is contended that it was clearly concerned with rights violations in Poland stemming from its abortion regime.[19] The Court's findings should be viewed in light of institutional developments in the Council of Europe indicating that members should be concerned about certain forms of restrictive abortion regulation.[20] The focus in the *Tysiąc* judgement was on the general context of abortion regulation in Poland[21] and of particular import is the fact that the violation was sustained by a *woman* seeking an

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16 See chapter 2 p 8.

17 Amnesty International Oct 2009 EUR 37/002/2009, see at <http://www.amnesty.org> accessed 29.09.10.

18 Human Rights Watch 'A State of Isolation: The State of Abortion for Women in Ireland' (Jan 2010) at p 1-2 <http://www.hrw.org/en/reports/2010/01/28/state-isolation> accessed 29.09.10.

19 See eg Priaulx 'Testing the Margin of Appreciation' (n 14) at p 372-3.

20 Doc 11537 (8 April 2008) Access to Safe and Legal Abortion in Europe Rapporteur: G Wurm Committee on Equal Opportunities for Women and Men April 2008 at Pt A Paras 4 and 7.

21 *Tysiąc v Poland* (n 8) at para 114-30.

abortion within the regime. As Priaulx has argued,[22] the *Tysiąc* case tests the outer limits of the discretion that the Court is prepared to concede to restrictive regimes.

Despite the apparent limitation of the *Tysiąc* decision to procedure, in so far as it addresses the disparity between the legal oversight and practical implementation of restrictive abortion regimes, it provides a basis for substantive recognition that Convention rights may encapsulate other forms of women's suffering in such regimes. Regulation of abortion within restrictive regimes inevitably demonstrates a disparity between the *legal* permission or exemption from punishment under which a woman may access abortion services, and the practice of (usually) medical personnel who control this access; they are in effect acting as the guardians of women's rights. In Poland and Ireland, for example, the Catholic doctrine on foetal life as beginning from conception gains a great deal of acceptance in the population, and therefore medical personnel may use their position to deny women's rights in relation to abortion and associated services. This is particularly evident in relation to reluctance to diagnose a condition that might lead a woman to seek an abortion, one of the key issues raised in *ABC v Ireland*.[23] A violation of Article 8 is most likely to be found in *ABC* in relation to the issue of obstructiveness of medical personnel, since such a finding would still allow the Court to maintain its evasive stance on 'abortion rights' and would not require it to take a clear stance on the status of the foetus. Therefore *Tysiąc* may be considered a 'breakthrough' case, creating the basis for future decisions recognising emergent rights of women in restrictive abortion regimes in line with the incremental development the Court has recognised in other sensitive areas.

While the *Tysiąc* judgement is an important first step, it did not touch on the key matter of discrimination on grounds of gender in restrictive abortion regimes. The Strasbourg Court has been trenchantly criticised by some feminist commentators for its lack of receptivity to the most severe forms of gender-based discrimination in the reproductive context,[24] but in the years since *Brüggemann* the Court has been able to avoid considering the application of such arguments in relation to abortion. Recently

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22 Priaulx 'Testing the Margin of Appreciation' (n 14).

23 *ABC v Ireland* (Statement of Facts) (App no 25579/05), lodged 15 July 2005 COMPLAINTS para 3.

24 See eg I Radacic 'Gender Equality Jurisprudence of the European Court of Human Rights' (2008) 19 EJIL 841, 856-7. See further Priaulx 'Testing the Margin of Appreciation' (n 14) at 379.

Priaulx has criticised the *Tysiąc* judgement as failing to deal with this substantive issue which would have had far more significance, she argues, for women generally as part of an overall goal of advancing gender equality, but particularly so for women in Poland.[25] In this respect the ECHR is out of line with international human rights law which is increasingly conceptualising forms of restrictive regulation that affect women's access to healthcare as particularly invidious forms of discrimination,[26] recognising that it restricts women's full participation in 'social, political and economic activities'.[27] The recognition that women, in being denied effective respect for their legal rights under restrictive abortion regimes, suffer discrimination based on gender contrary to Article 14 would be a symbolic affirmation that such regimes uniquely affect *women's* rights. The case of *ABC* represents a real possibility that the Court will address this weakness since so doing would not affect the Court's stance in relation to the rights of the foetus: no right of access to abortion need be contemplated since the discrimination could be found to relate to the particular types of harm and distress that result from ineffective abortion regulation.

The preceding discussion has assumed that the position of the Court as regards the role of the margin of appreciation doctrine in relation to the beginning of life or 'foetal status' under the Convention, as evinced by the statements made in *Vo* and in *Evans,* is tenable and could justifiably restrict the applicability of the Convention to restrictive abortion regimes. It is, however, the conclusion of this thesis that conceding an unlimited margin of appreciation to the state to determine the point at which life begins is not possible for an instrument of human rights protection. Firstly, foetal status, central to the justification for restrictive abortion regulation, is not straightforwardly a matter of protection of 'rights' by the Convention; rather, it poses the question of what a being under the Convention is in the first place. It is not logically consistent to use a theory of subsidiarity which refers to the *way* member states protect the rights under the Convention to justify non-interference of the Court

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25 Priaulx 'Testing the Margin of Appreciation' (n14) at 378.

26 For example, the Convention for the Elimination of Discrimination Against Women and the International Convention on Social and Economic rights; see further chapter 4 pp 4-5. As Rebecca Cook has argued, barriers to safe abortion are usually part of a wider scheme of neglect: R Cook and B Dickens 'Human Rights Dynamics of Abortion Law Reform' (Feb 2003) HRQ 25 1 p 58 *et seq*; R Cook and S Howard 'Accommodating Women's Differences under the Women's Anti-Discrimination Convention' (2007) Emory LJ 56 at 1041.

27 Cook and Howard 'Accommodating Women's Differences' (n 26) at 1044.

with a question of *whether* direct protection under the Convention is permissible as the Court sought to do in *Vo v France*.[28] This has certain similarities with the argument that states had a latitude to treat the foetus as a constitutional person in the United States before *Roe v Wade* (and therefore that the case was wrongly decided)[29] which Dworkin convincingly rebutted on similar grounds.[30]

Secondly, as conceded by the Commission in *Paton v UK,* the 'everyone' in Article 2 could not be construed as intended to refer to the foetus, bearing in mind the nature of that Article and the Convention as a whole (although it held that such an interpretation could not necessarily be excluded).[31] Furthermore, the definition of 'life' assumed by the Commission in that case was qualified so that the woman's right to life automatically prevailed over that of the foetus, which would also suggest that the foetus could not be made the subject of the *direct* protection of that Article since a truly separate being could never automatically find its right to life trumped by another's *equal* right to life. Thirdly, the argument that abstract philosophical disagreement about the beginning of life, as raised in *Vo v France,*[32] should deprive the Convention of a role is weakened in relation to regimes such as Ireland left with archaic and particularly extreme laws due to political stagnation; as the Irish Constitutional Review Group states: '[p]hilosophers and scientists may continue to debate when human life begins but the law must define what it intends to protect'.[33]

Therefore the conclusion that the Court reached in *Vo* is not sound – the member states' decision as to *when* life begins for the purpose of Article 2 is not, on this argument, within their margin of appreciation. This is surely accurate as it would imply that a Convention signatory could define the basis of legal personality under the

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28 A Plomer 'A foetal Right to life? The case of *Vo v France* (2005) HRL Rev 311 at 331. The margin of appreciation doctrine employed by the Court has been criticised generally for being *ad hoc* see eg A Lester 'Universality Versus Subsidiarity: A Reply' (1998) 1 EHRLR 73.

29 R Dworkin *Life's Dominion An Argument about abortion and euthanasia* (Harper Collins, 1993) at p 114.

30 In *Life's Dominion* (n 29) at p 114 arguing that states cannot have the ability to adjust the 'constitutional population' as that begs the question of the whole constitutional arrangement.

31 Referring to Article 6(1) as it applied to access to a court, considered in *Reeve v United Kingdom* (App no 24844/94) Commission Decision of 30th November 1994.

32 *Vo v France* (n 12) at para 82.

33 Constitutional Review Group Report 1996 "The Right to Life (Unborn and Mother)" Arts 40-44 at p 252 cited in S Donnelly 'A, B and C v Ireland: will the European Court of Human Rights address Ireland's Restrictive Abortion Law?' (2010) 1 MLJI 16, 20.

Convention to exclude certain people arbitrarily. The Court in *Vo* should therefore be interpreted in abortion cases as conceding a general margin of appreciation as to the way the state protects the foetus *indirectly* under Convention Articles, or alternatively as a justification for infringement 'necessary in a democratic society'; the separate matter of when life is protected under the Convention is simply indeterminate.

Unlike the situation in *Brüggemann,*[34] 30 years ago, European abortion regimes are now more readily capable of being considered generally justifiable under the Convention *without* direct protection for the foetus at an early stage of gestational development. For instance, counselling and consent requirements could be justified by reference to indirect protection of foetal life under the Convention, either due to the profound moral status of the foetus[35] or to protection for the rights of others, including those of the women themselves, as was found in *Roe v Wade*.[36] These requirements would not justify interference with women's fundamental rights, such as the fundamental liberty to determine the disposal of one's body, which are involved in the termination of pregnancy.

In light of this, despite the relative stagnation of the Convention institutions on the substantive issue since the Commission decision in *Brüggemann,* the Convention is an institution capable of extending recognition of rights violations in restrictive abortion regimes that derive *directly* from denial of access to abortion services. The Court may be likely to develop protection for women in this context in an incremental fashion analogous to the emergence of protection for transsexual and homosexual persons. For example, a decision in relation to Ireland, raised in the *ABC*[37] case, but unlikely to succeed in light of *Vo* and the tentative procedural approach in *Tysiąc*,[38] could require Ireland to provide a *domestic* abortion regime – thus, it could find that the (unofficial) requirement that Irish women must travel abroad for an abortion violates a

34 *Brüggemann and Scheuten v Germany* (n 1).

35 For instance recognition of the profound status of the moral view that the foetus is a human being referred to by the European Centre for Law and Justice in its 2008 brief to the Court on *ABC* (n 23) at para 14 referring to *Vo v France* (n 12) at para 82. Ronald Dworkin makes a similar argument in relation to the potential 'detached' interest in foetal life – i.e. an interest not based on a being with interests conceptualised as human rights – that could justify certain burdens on the availability of abortion: see *Life's Dominion* (n 29) at p 149-51.

36 *Roe v Wade* (n 5) at p 164-5.

37 *ABC v Ireland* (n 23).

38 *Tysiąc v Poland* (n 8).

Convention guarantee. While this issue concerns the matter of substantive access to abortion, it is not one that lies entirely outside the approach in *Tysiąc* and *Open Door*[39] in that the right to have an abortion without state interference is enjoyed by the elements of the Irish population with the means to travel. It does not therefore impose new rights in practice, but it would require the creation of a new legal right to have an abortion in Ireland. This obligation, most relevant to jurisprudence under Articles 3 and 8, is more likely to be found in relation to fundamental indications such as pregnancy due to rape or fatal foetal disability at first, but it could extend to risks to health as is claimed by the applicants in *ABC v Ireland*.

The ideal development in terms of protection of women's rights in restrictive regimes, however, is for Strasbourg to abandon entirely its tentative procedural approach[40] and decide, as in *Roe v Wade*, that access to abortion is required in states where it is currently denied both in law and fact. That is most likely to be recognised in relation to narrow and profound indications as was found in 2006 by the Human Rights Committee of the International Covenant on Civil and Political Rights in *KL v Peru*[41] in relation to fatal foetal impairment, but there is no reason to find that abortion on 'demand' (with or without a counselling requirement) could not be encompassed by the woman's right to private life, as the Commission contemplated in *Brüggemann,* and as has been the approach in the courts of a number of national jurisdictions. A substantive development is the only way to genuinely defend women's rights in restrictive abortion regimes. While the Court's decision in *Tysiąc* shows the first signs that the Convention can be relied on to check a nascent revival in Europe, based on Catholicism, of anti-abortion sentiment, the Convention mechanism has the potential to protect women to a much greater extent.

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39 *Open Door Counselling v Ireland* (n 13).

40 See in relation to Poland in general M Dembour and M Krzyzanowska-Mierzewska 'Ten years on: the voluminous and interesting Polish case law' (2004) 5 EHRLR esp 528-9 and 543. See also M Dembour *Who Believes in Human Rights? Reflections on the European Convention* (CUP 2006) p 206. By procedural it is meant a type of constitutional adjudication on the basis of the narrow conception of the 'rule of law' as requiring fairness in legal procedures, typically in the criminal context see eg V Ramraj 'Four Models of Due Process' (2004) 2 ICLJ 492, 497 *et seq*.

41 *KL v Peru* (1153/2003), CC{R/DC/85/D/1153/2003 (2005); 13 IHRR (2006); see chapter 4 pp 5-6.

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