

## **The Clash on Abortion Rights within Malta and Poland: is Article 3 the Secret Weapon to establish a Right to Abortion?**

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## ABSTRACT

The thesis focuses on the precarious balance between women's right to self-determination concerning abortion and the State's protection of its societal morals and the rights and freedoms of others. It aims to determine whether Article 3 of the European Convention of Human Rights offers a pathway toward establishing the right to abortion within European. Specifically, it searches for an answer to the following question: “*How can the Court address the restriction of legal abortion as a violation of Article 3 of the European Convention on Human Rights under the meaning of degrading treatment?*”. The hypothesis assumes that the Court will only see an Article 3 violation on the restriction of access to legal abortion when the human dignity of the applicant is infringed. The research comprises a literature review on human dignity, Article 8 of the ECHR, the prohibition of ill-treatment, and the domestic abortion legislation in Malta and Poland. Followed by a comparative study of abortion cases on the grounds of ill-treatment by the European Court of Human Rights and the Human Rights Committee. Finally, the study concludes that the Court could address the restriction by focusing on the self-determination and human dignity of the woman and adopting the Human Rights Committee's method.

## TABLE OF ABBREVIATIONS

CEDAW	Committee on the Elimination of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
COE	Council of Europe
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
MoA	Margin of Appreciation
UN	United Nations
UNCAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

## INTRODUCTION

In June 2021, the European Parliament passed a resolution proclaiming safe access to abortion as a human right.<sup>1</sup> It implored the European Union member states, mainly Malta and Poland, to ensure safe and legal access to abortion on request without strings attached.<sup>2</sup> The resolution paired with the United States' situation, where anti-abortion activists aim to overturn *Roe v. Wade*<sup>3</sup>, is a wake-up call that not all women in the EU have access to abortion. De facto, legal abortion is not guaranteed on the European continent, and neither is access to lawful abortion. Moreover, it is not self-evident to assume that a region that preaches on its respect for human rights has countries that actively gatekeep women's reproductive rights. Both Malta and Poland have restrictive abortion regimes, with Malta prohibiting the act, while Poland allows exceptions when it comes to rape, incest, and when it threatens the health or life of the pregnant person.<sup>4</sup> Furthermore, the European Parliament called for the European Union and its Member States to include and thus enshrine the right to abortion in the Charter of Fundamental Rights of the European Union.

Furthermore, French President Macron spoke of his ambitions during the beginning of France's six-month tenure as the presidency of the Council of the European Union. There, he announced the intent to enshrine the right to abortion within the EU's Charter of Fundamental Rights, or at least recognize the right.<sup>5</sup>

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<sup>1</sup> European Parliament, 'Report on the situation of sexual and reproductive health and rights in the EU, in the frame of women's health (2020/2215(INI))' (*European Parliament*, 21 May 2021) <[https://www.europarl.europa.eu/doceo/document/A-9-2021-0169\\_EN.html](https://www.europarl.europa.eu/doceo/document/A-9-2021-0169_EN.html)> accessed 18 February 2022.

<sup>2</sup> Maïa De La Baume, 'European Parliament declares abortion access a human right' (*Politico*, 24 June 2021) <<https://www.politico.eu/article/meps-adopt-divisive-text-on-abortion/>> accessed 31 October 2021.

<sup>3</sup> *Roe v Wade* (1973) 410 U.S. 113.

<sup>4</sup> De La Baume (n 2).

<sup>5</sup> European Parliament, 'Motion for a Resolution on global threats to abortion rights: the possible overturning of abortion rights in the US by the Supreme Court (2022/2665(RSP))' (*European Parliament*, 6 June 2021) <[https://www.europarl.europa.eu/doceo/document/B-9-2022-0299\\_EN.html](https://www.europarl.europa.eu/doceo/document/B-9-2022-0299_EN.html)> accessed 17 June 2022.

It is remarkable to note that all progressive advancements toward the right to abortion within the European continent happened through the EU institutions and its key players. Nevertheless, when it comes to human rights, Europe's principal actor is the European Court of Human Rights and the accompanying European Convention on Human Rights. Therefore, the thesis aims to dig into the possible progressive parts of the Court's case-law and interpretation. However, the ECtHR's status quo appears to be at a standstill: caught between the doctrine of subsidiarity, and the margin of appreciation on the one hand, and the individual's right to self-determination included in the right to respect for private life guaranteed by Article 8, on the other hand. To evade the jurisprudential deadlock under Article 8, the thesis ambitions to challenge abortion restrictions through Article 3: the prohibition of ill-treatment. The main issue of litigating a possible right to abortion under Article 8 is its standing as a qualified right, which allows room for State restrictions. Case-law shows that the Court prefers to judge abortion restrictions under Article 8; however, that opens the door to the limitation clause accompanied by the margin of appreciation. Thus, the use of Article 3, a non-derogatory absolute right, can recalibrate the Court's approach to abortion legislation in Europe.

The research question: *“How can the Court address the restriction of legal abortion as a violation of Article 3 of the European Convention on Human Rights under the meaning of degrading treatment?”* holds a high social relevance in the current political landscape. A positive answer could lead to a new path towards legal abortion in Council of Europe member states, which contracting parties must follow under Article 1 of the ECHR. Moreover, the right to abortion would derive from human dignity, the underlying foundation of both human rights and the absolute Article 3 right. Regardless, a negative answer keeps the status quo alive; however, it is not necessarily the end. The dynamic and evolutive interpretation utilized by the ECtHR can bring a positive response to the research question in the future with changed societal conditions. Finally, the hypothesis assumes that the Court will rule an Article 3 breach

on the restriction of access to legal abortion when the applicant is in a situation violating their human dignity.

The thesis will consist of five parts, namely: human dignity, Article 8 of the ECHR, the prohibition of torture, the abortion legislation in Malta and Poland, and finally, an analysis of abortion cases on the ground of ill-treatment. First, it starts with the role of human dignity within the abortion framework, followed by Article 8 and its relation to abortion cases under the ECtHR. Then, the focus will be on the prohibition of torture under the International Covenant on Civil and Political Rights and the ECtHR's dimension of torture. Furthermore, the thesis will analyze the domestic legislation of both Malta and Poland as the two EU countries with strict abortion regulations. Lastly, I will analyze abortion cases on the grounds of ill-treatment from the ECtHR and Human Rights Committee, who is responsible for the ICCPR; and finally, compare the two authorities against one another. Nonetheless, it is significant to note that the thesis is primarily of speculative nature.



# HUMAN DIGNITY

Human dignity is a contested concept with no official definition; however, it has an air of neutrality due to its place in human rights documents. Regardless, cultures and societies give meaning to the word fitting to their values, but there is consensus on the essence of human dignity.<sup>6</sup> Following the UDHR preamble, human dignity is inherent to humans, belonging to the heart of humanity and intertwined with human existence. Dignity is an intrinsic worth that one has by being born human; consequently, it cannot be disconnected from the human condition,<sup>7</sup> making everyone in possession of human dignity. Furthermore, individuals are incapable of losing or being stripped of their dignity; thus, even criminals retain it after heinous crimes. Secondly, the intrinsic worth bestowed on humanity should be recognized and respected by others.<sup>8</sup> Thirdly, the State should exist for the well-being of the individual to recognize their intrinsic worth.<sup>9</sup>

The Kantian view of human dignity requires individuals to be treated as an end in themselves because of their intrinsic worth, not as a means to achieve something; otherwise, they are objectified.<sup>10</sup> Under this notion, women who want to terminate but are forced to continue the pregnancy are reduced to their reproductive organs: they are their uterus. Thus, unwanted pregnancy denies women their bodily autonomy, commodifying them into human incubators. Additionally, their self-realization is denied because pregnancy alters their physical boundaries, and personal investment cannot be achieved.

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<sup>6</sup> David Luban, 'Human Dignity, Humiliation, And Torture' (2009) 19(3) Kennedy Institute of Ethics Journal.

<sup>7</sup> Robert Andorno, 'Human Dignity and Human Rights as a Common Ground for a Global Bioethics' (2009) 34 (3) Journal of Medicine and Philosophy.

<sup>8</sup> Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) European Journal of International Law.

<sup>9</sup> Ibid.

<sup>10</sup> Immanuel Kant, *Groundwork of The Metaphysics Of Morals* (11th edn, Mary Gregor (ed & tr), Cambridge University Press 2006).

The notion of human dignity is present in the International Covenant on Civil and Political Rights,<sup>11</sup> ECtHR case-law,<sup>12</sup> and is the foundation of the European Convention on Human Rights' spirit.<sup>13</sup> Moreover, self-determination is an aspect of dignity;<sup>14</sup> represented in ECtHR jurisprudence.<sup>15</sup> However, translated to the abortion framework, self-determination would entail women's right to shape their path, including when or if they want children since their lives are altered and their bodies occupied. By being forced to carry a child against one's will, women are denied the opportunity to answer the fundamental questions on their lives, which human dignity allows.<sup>16</sup> Furthermore, it has already been acknowledged that decisions on abortion touch the sphere of dignity and self-determination: 'Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision ... whether to end her pregnancy'.<sup>17</sup> In addition, in *Evans v. the United Kingdom*, ECtHR found that the decision to become a parent or not falls under private life of Article 8,<sup>18</sup> which constitutes self-determination over one's life.

Lastly, torture perpetually violates human dignity because it seeks to subject an individual to suffering and break them. Consequently, it denies victims the intrinsic worth associated with humanity even though it must be respected: to be treated as an end, not a means. Furthermore, the commodification of the victim is paramount in torture's definition.<sup>19</sup> Under ICCPR's prohibition of torture, there is no categorization between the levels of suffering,<sup>20</sup> while the

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<sup>11</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

<sup>12</sup> *Beizaras and Levickas v Lithuania* App no 41288/15 (ECtHR, 14 May 2020).

<sup>13</sup> European Court of Human Rights Registry, 'Guide on Article 8 of the European Convention on Human Rights – Right to respect for private and family life, home and correspondence' (*Council of Europe*, 31 August 2021) <[https://www.echr.coe.int/Documents/Guide\\_Art\\_8\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf)> accessed 14 May para 76.

<sup>14</sup> Isabella Moore, 'Indignity In Unwanted Pregnancy: Denial Of Abortion As Cruel, Inhuman And Degrading Treatment' (2019) 23(6) *The International Journal of Human Rights*.

<sup>15</sup> *Pretty v the United Kingdom* App no 2346/02 (ECtHR, 29 July 2002) para 61.

<sup>16</sup> Moore (n 14).

<sup>17</sup> *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986).

<sup>18</sup> *Evans v the United Kingdom* App no 6339/05 (ECtHR, 10 April 2007) para 71.

<sup>19</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) (UNCAT) art 1(1).

<sup>20</sup> ICCPR art 7.

ECHR does classify ill-treatment based on the intensity.<sup>21</sup> However, the lowest level, degrading treatment, has an element of instrumentalization, where individuals are used in a way that is not respectful of their humanity as an objective.<sup>22</sup> Therefore, degrading treatment can be connected to denying women access to abortion and reducing them to reproductive instruments.

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<sup>21</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 3.

<sup>22</sup> Moore (n 14).

## ARTICLE 8 ‘RIGHT TO RESPECT FOR PRIVATE LIFE’ OF THE ECHR

Article 8 of the Convention protects the right to respect the private and family life, home, and correspondence of the individual.<sup>23</sup> Consequently, the complaint must demonstrate that it contains one of the four interests to invoke it.<sup>24</sup> Generally, the scope of Article 8 is interpreted broadly by the Court.<sup>25</sup> Moreover, Article 8's principal purpose is to protect individuals from arbitrary interference by the public authority against their private and family life, home, and correspondence,<sup>26</sup> which is a negative obligation for the State. Nevertheless, the article also enforced positive obligations on the Member States, such as implementing measures to secure the respect of private life.<sup>27</sup> When assessing the State's obligations, there must be regard for a fair balance between the competing rights of the individual and society, where the legitimate aims of paragraph two hold relevance.<sup>28</sup> Furthermore, the second paragraph of Article 8 states the exception for the State's negative obligation, which allows it when it is per domestic law, a necessity within democratic society for reasons ‘of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others’.<sup>29</sup> The Court requires that any interference observes domestic law, with the legislation being compatible with the rule of law,<sup>30</sup> and it also must be clear, foreseeable, and accessible for individuals.<sup>31</sup> If the State's intervention was not according to national law, the Court rules a violation of Article 8, disregarding the other aspects.<sup>32</sup> Additionally, with the legitimate aim, the State must

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<sup>23</sup> ECHR art 8(1).

<sup>24</sup> European Court of Human Rights Registry (n 13) para 1.

<sup>25</sup> Ibid para 2.

<sup>26</sup> *Libert v France* App no 588/13 (ECtHR, 22 February 2018) para 40-42.

<sup>27</sup> *Evans* (n 18) para 75.

<sup>28</sup> *Hämäläinen v Finland* App no 37359/09 (ECtHR, 16 July 2014) para 65.

<sup>29</sup> ECHR art 8(2).

<sup>30</sup> *Big Brother Watch and Others v the United Kingdom* App no 58170/13 (ECtHR, 25 May 2021) para 332.

<sup>31</sup> *Silver and Others v the United Kingdom* Series A no. 61 (ECtHR, 5 March 1983) para 87.

<sup>32</sup> *Mozer v the Republic of Moldova and Russia* App no 11138/10 (ECtHR, 23 February 2016).

demonstrate that its interference sought a justification from the second paragraph.<sup>33</sup> Lastly, the Court determines the interests of the State against those of the applicant to see whether the intervention was necessary for democratic society; however, necessary equals the existence of a pressing social need and must be proportionate to the pursued legitimate aim.<sup>34</sup>

### **Abortion framework**

The Strasbourg Court noted that the prohibition of abortion in circumstances of health and/or the wellbeing of the pregnant person is within the scope of an individual's private life; thus, Article 8 applies.<sup>35</sup> Additionally, the Court stated that the decision to become a parent or not falls within the notion of personal life under Article 8.<sup>36</sup> Accordingly, private life includes the individual's bodily and psychological integrity and aspects of their physical and social identity.<sup>37</sup> Likewise, it covers personal development in terms of personality and autonomy. In general, the jurisprudence shows that the Court places importance on privacy and related values under Article 8. Therefore, the wide range of private life can be categorized into three groups: physical, psychological, or moral integrity of the individual, the individual's privacy, and their identity and autonomy. Moreover, the ECtHR places abortion cases under the physical, psychological, or moral integrity of the individual. In the abortion cases under Article 8, the Court gave the States a wide margin of appreciation due to the legitimate aim of the protection of morals on the substantive part. However, in the three Polish cases, the ECtHR did rule a violation of Article 8 based on the procedural aspect. Furthermore, the State must provide a framework and enforcement mechanism to protect the rights of the individual and the

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<sup>33</sup> Ibid.

<sup>34</sup> *Piechowicz v Poland* App no 20071/07 (ECtHR, 17 July 2012) para 212.

<sup>35</sup> *A, B and C v Ireland* App no 25579/05 (ECtHR, 16 December 2010) para 214 and 245.

<sup>36</sup> *R.R. v. Poland* App no 27617/04 (ECtHR, 28 November 2011) para 180.

<sup>37</sup> *Denisov v Ukraine* App no 76639/11 (ECtHR, 25 September 2018) para 95.

implementation of measures.<sup>38</sup> Once the State adopts regulations allowing abortion, the framework must take all legitimate interests into account and be effective.<sup>39</sup>

Consequently, unless the State's legal framework is ineffective in abortion cases, there is no violation of Article 8 due to the margin of appreciation. However, the State's margin is restricted when a significant element of an individual's identity is at stake,<sup>40</sup> including their personal autonomy,<sup>41</sup> the right to establish their identity,<sup>42</sup> and the fulfillment and development of their personality.<sup>43</sup> The Court found that an individual's ability to exercise a deliberate choice concerning the fate of their embryo concerned the right to self-determination and belonged to an intimate aspect of personal life.<sup>44</sup> Moreover, reproductivity is one of the essential bodily functions of human beings; thus, if forced sterilization impacts several aspects of one's personality integrity, including well-being and family life,<sup>45</sup> than so does forced pregnancy because it disregards the autonomy of both individuals. Furthermore, the ECtHR has previously recognized that the right of the fetus is limited by the mother's rights and interests;<sup>46</sup> hence, it does not outweigh the interests of the pregnant woman.<sup>47</sup> Lastly, the Court acknowledged that an individual could withdraw its consent on the usage of embryos; thus, an individual can choose whether to become a parent or not.<sup>48</sup> In addition, when it comes to abortion, the mother's rights outranks the father's because the mother is the person primarily affected by the pregnancy; thus, also its continuation or termination.<sup>49</sup>

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<sup>38</sup> *R.R.* (n 36) para 184.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Fedotova and Others v Russia* App nos 40792/10 and 30538/14 and 43439/14 (ECtHR, 22 November 2021) para 47.

<sup>41</sup> *Goodwin v the United Kingdom* App no 17488/90 (ECtHR, 27 March 1996) para 90.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Brüggemann and Scheuten v Germany* App no 6959/75 (19 May 1976).

<sup>44</sup> *Parrillo v. Italy* App no 46470/11 (ECtHR, 27 August 2015) para 153.

<sup>45</sup> *V.C. v Slovakia* App no 18968/07 (ECtHR, 8 February 2012) para 106.

<sup>46</sup> *Vo v France* no 53924/00 (ECtHR, 8 July 2004) para 80.

<sup>47</sup> *Paton v United Kingdom* (1980) 19 DR 244.

<sup>48</sup> *Evans* (n 18).

<sup>49</sup> *Paton* (n 47).

## Margin of Appreciation

The European Court of Human Rights provides States with a margin of appreciation, which refers to an area of discretion given to the contracting parties in fulfilling their Convention obligations and can range from broad to almost non-existent.<sup>50</sup> Under this approach, based on the principle of subsidiarity, domestic authorities are better placed to make decisions on the balance between individual rights and the interests of a democratic society;<sup>51</sup> thus, the Court defers to the State. The MoA is entrenched in the Court's jurisprudence while finally having a textual basis in the Convention due to Protocol 15. The principle was best explained in *Handyside v. the United Kingdom*<sup>52</sup>:

[I]t is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time ... By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them. ... Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of "necessity" in this context. Consequently, Article 10 para. 2 (art. 10-2) leaves to the Contracting States a margin of appreciation.<sup>53</sup>

<sup>50</sup> Bríd Ní Ghráinne and Aisling McMahon, 'ABORTION IN NORTHERN IRELAND AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS: REFLECTIONS FROM THE UK SUPREME COURT' (2019) 68(2) International and Comparative Law Quarterly.

<sup>51</sup> Daniel Fenwick, 'The Modern Abortion Jurisprudence Under Article 8 Of The European Convention On Human Rights' (2013) 12(3-4) Medical Law International.

<sup>52</sup> *Handyside v The United Kingdom* App no 5493/72 (ECtHR, 7 December 1976) para 48.

<sup>53</sup> *Ibid* para 48.

Furthermore, there are several factors influencing the width of the MoA, namely, the right at issue, the level of European consensus, and the legitimate aim of the State.<sup>54</sup> Cases concerning sensitive issues, such as morals, ethics, national security,<sup>55</sup> and economic policy<sup>56</sup>, usually enjoy a wide margin of appreciation. Regardless, the State's maneuvering room can be narrowed. The first factor is the right at play; thus, when it affects a substantial part of a person's existence or identity,<sup>57</sup> the margin will typically be narrower. Secondly, the level of common ground between CoE member States also influences the width.<sup>58</sup> When a significant majority of the States have a similar approach to an issue, the Court commonly narrows the margin; however, when there is barely any consensus, the MoA will be broader. Nonetheless, complete uniformity is not a condition to constrict the State's discretion.<sup>59</sup>

For abortion, the Court gives States a wide margin due to the sensitivity of the issue and the role of public morals. Furthermore, the MoA given to Ireland in *ABC*<sup>60</sup> trapped the Strasbourg Court for future cases concerning abortion since they established a broad scope due to a lack of European consensus, which was based on the beginning of life.<sup>61</sup> Nonetheless, not all judges agreed, with some arguing that there was a common ground where the rights of pregnant women to health and well-being outweighed the protection of the fetus.<sup>62</sup> Moreover, while the beginning of life is not explicitly mentioned everywhere, it is implicit in national abortion laws due to the woman's health and/or autonomy being placed above fetal protection in some

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<sup>54</sup> Julia Kapelańska-Pręgowska, 'The Scales of the European Court of Human Rights' (2021) Health and Human Rights Journal.

<sup>55</sup> *Leander v Sweden* App no 9248/81 (ECtHR, 26 March 1987).

<sup>56</sup> *Tre Traktörer Aktiebolag v Sweden* App no 10873/84 (ECtHR, 7 July 1989).

<sup>57</sup> *Dudgeon v The United Kingdom* no 7525/76 (ECtHR, 22 October 1981) para 41.

<sup>58</sup> Kapelańska-Pręgowska (n 54).

<sup>59</sup> *Ibid.*

<sup>60</sup> *A, B and C* (n 35).

<sup>61</sup> Kapelańska-Pręgowska (n 54).

<sup>62</sup> Fenwick (n 51).



gestational stages.<sup>63</sup> Therefore, Ireland's prohibition of abortion based on moral values should have been narrowed.

## Conclusion

In conclusion, while Article 8 is best aligned to solve the restrictions on abortion by the State, the Court has locked themselves in by their judgment in *ABC v. Ireland*. The European consensus on abortion on request went ignored; instead, the focus was on the beginning of life, which has no common ground. Regardless, I believe that the ECtHR chose this option, so States would not be offended. Moreover, it further received a large margin of appreciation because of the issue's sensitivity; therefore, the protection of public morals. However, jurisprudence states that the margin is smaller when it touches on elements of an individual's identity,<sup>64</sup> which includes the question of parenthood. Nevertheless, path dependency brought the Court into a deadlock that they can't evade through the qualified right. Consequently, it would be better to look in the direction of an absolute right, such as the prohibition of torture, where the State cannot overpower the Strasbourg Court.

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<sup>63</sup> Daniel Fenwick, 'Abortion Jurisprudence' At Strasbourg: Deferential, Avoidant And Normatively Neutral?' (2014) 34(2) Legal Studies.

<sup>64</sup> *Fedotova and Others v Russia* App (n 40).

## **PROTECTION AGAINST TORTURE AND CRUEL, INHUMAN OR DEGRADING TREATMENT**

The prohibition of torture is *jus cogens*, which means that no derogation of this norm is permitted; thus, it also implies the protection against torture by states. However, torture is the most severe form of ill-treatment that violates an individual's human dignity; hence, acts must meet several conditions to be recognized as torture.<sup>65</sup> Nevertheless, the UNCAT has little relevance for the thesis since it does not prohibit inhuman or degrading treatment, two forms of ill-treatment that are less severe, where the lack of access to abortion could be within the scope. The prohibition of ill-treatment is recognized under several treaties but based on the case-law, only the International Covenant on Civil and Political Rights and the European Convention on Human Rights are applicable for the research into European abortion rights.

The relation between ill-treatment and the lack of legal abortion goes back to human dignity as an underlying value of the prohibition of ill-treatment. Dignity is an individual's intrinsic worth that must be respected, while the Kantian version requires individuals to be treated as an end in themselves and not a means. Therefore, the lack of legal access to abortion violates human dignity because not every pregnant person wants to continue their pregnancy. Making them carry the child until birth against their will takes away their self-determination and reduces them to human incubators. Accordingly, they are not treated as an end since that would respect their choice; instead, they serve as a means of procreation and are instrumentalized by others. Consequently, the violation of their human dignity equals the subjection to ill-treatment, making it a violation of the prohibition of ill-treatment. Nevertheless, the subjection to ill-treatment is the clearest in extreme cases, such as the pregnancies caused by criminal acts, the risk to the mother's health, fetal abnormalities, and when the fetus is non-viable. In these cases,

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<sup>65</sup> UNCAT art 1(1).

it is easier to accept that the circumstances of the pregnancy lead to human suffering because it clashes less with an individual's morals than the situation where the mother does not want a child. Moreover, abortion-related issues in the European Union are best addressed by the prohibition of ill-treatment because, unlike the right to privacy, it is an absolute right and does not grant states a margin of appreciation. Therefore, it is the only right under the ECHR where the Court can award a right to legal abortion through its interpretations. Regardless, a right to abortion is not likely because it is a too progressive statement for the Court; however, it could allow the right to abortion in the extreme cases as described above.

### **International Covenant on Civil and Political Rights**

The ICCPR, which came into effect in 1976, does not offer a definition for torture or the other forms of ill-treatment. However, a General Comment in 1982 from the Human Rights Committee, the treaty body for the ICCPR, cleared up the scope of the article, noting that the required protection against torture goes beyond the traditional understanding of the term while also declaring that distinctions between the forms of ill-treatment were not necessary.<sup>66</sup> The Committee's case-law confirmed this by not categorizing violations of Article 7 under the types of ill-treatment.<sup>67</sup> In 1992, the Committee issued a new General Comment, replacing the previous one, thereby applying a revised scope of protection.<sup>68</sup> The General Comment declared that:

The Covenant does not contain any definition of the concepts covered by article 7, nor does the Committee consider it necessary to draw up a list of prohibited acts or to

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<sup>66</sup> UN Human Rights Committee, 'CCPR General Comment No. 7: Article 7 (Prohibition of Torture or Cruel, Inhuman or Degrading Treatment or Punishment)' (1982) UN Doc HRI/GEN/1/Rev.9 (Vol. I).

<sup>67</sup> Nigel S. Rodley, 'The Definition(s) of Torture in International Law' (2002) 55(1) Current Legal Problems.

<sup>68</sup> Ibid.

establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied.<sup>69</sup>

Furthermore, the Human Rights Committee also stated that acts contrary to Article 7 do not solely have to cause physical pain; treatment that invokes mental suffering for the victim also falls under the prohibition.<sup>70</sup> Under the psychological suffering, the HRC accepts indirect torture, which are feelings of anguish, stress, and uncertainty suffered by third parties (indirect victims);<sup>71</sup> however, for now, this has applied to close relatives in cases of detention or disappearance of persons.<sup>72</sup> Moreover, Article 7 states that no person should be subject to non-consensual medical or scientific experimentation; however, the Committee further elaborates that persons incapable of giving valid permission should receive special protection, notably focusing on those in detention.<sup>73</sup> Additionally, there is a reaffirmation that no derogation is allowed from Article 7 in times of war or public emergency, and the provision itself does not allow limitation, thus excluding any restriction to the right under any circumstances.<sup>74</sup> Lastly, according to the General Comment, the Article aims 'to protect both the dignity and the physical and mental integrity of the individual'.<sup>75</sup> Furthermore, to comply with its obligation to protect, the State must put a protective framework in place through legislative or other measures that safeguard individuals from ill-treatment imposed by officials and non-state actors. Nonetheless, the Committee has yet to decide, in a particular case, whether the failure of implementing such measures would constitute a violation of Article 7.<sup>76</sup>

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<sup>69</sup> UN Human Rights Committee, 'CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)' (1992) UN Doc HRI/GEN/1/Rev.1 para 4.

<sup>70</sup> Ibid para 5.

<sup>71</sup> Alice Edwards, 'The 'Feminizing' of Torture under International Human Rights Law' (2006) 19(2) Leiden Journal of International Law.

<sup>72</sup> *Almeida de Quinteros v. Uruguay* (21 July 1983) Communication No. 107/1981 CCPR/C/19/D/107/1981 para 14.

<sup>73</sup> ICCPR art 4.

<sup>74</sup> HRC (n 69) para 3.

<sup>75</sup> Ibid para 2.

<sup>76</sup> Edwards (n 71).

### Article 3 ‘Prohibition of Ill-treatment’ of the ECHR

The European Court of Human Rights has repeatedly reiterated throughout its case-law that Article 3 enshrines one of the most fundamental values within a democratic society,<sup>77</sup> that is, the prohibition of ill-treatment. The Convention states that ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment’.<sup>78</sup> Therefore, the ECHR shows similarity with the ICCPR in that they both prohibit all forms of ill-treatment under the same article. Moreover, the ECtHR and the HRC have dealt with abortion cases under their equivalent prohibition of ill-treatment, making them suitable for comparative analysis.

### *General Considerations*

When taking Article 3 into account, the method to realize the object and purpose of the Convention, namely, ‘the maintenance and further realisation of Human Rights and Fundamental Freedoms’<sup>79</sup> gives grounds for an evolutive and dynamic understanding that guides the Court in its interpretations. Furthermore, Article 3 is an unqualified right because the provision does not leave room for the interests of others to be balanced against the individual's right.<sup>80</sup> In addition, it is an absolute right, which may not be restricted or derogated from. The second paragraph of Article 15 of the ECHR states that no derogation of Article 3 is permissible under any circumstances.<sup>81</sup> Therefore, the lack of limitations allows that there is never a justification for the violation of Article 3.<sup>82</sup> Consequently, there is no place for the margin of appreciation concerning the prohibition of ill-treatment.

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<sup>77</sup> *Soering v. the United Kingdom* App no 14038/88 (ECtHR, 7 July 1989) para 87.

<sup>78</sup> ECHR art 3.

<sup>79</sup> ECHR preamble.

<sup>80</sup> Aisling Reidy, *The prohibition of torture: A guide to the implementation of Article 3 of the European Convention on Human Rights* (Human rights handbooks No. 6, Council of Europe 2003).

<sup>81</sup> ECHR art 15(2).

<sup>82</sup> Reidy (n 80).

Generally, due to the way Article 3 is formulated, the apparent obligation imposed on the State is a negative one, namely refraining State agents from inflicting ill-treatment on people within their jurisdiction. However, based on the case-law the jurisdiction of states goes beyond the territorial sense;<sup>83</sup> thus, an extra-territorial effect is applied when it involves State agents. Moreover, Article 3 also implies positive obligations for the State: they must have a regulatory protective framework embedded in domestic law, the duty to conduct an effective investigation into arguable claims of a violation similar to the treatment in Article 3, and lastly, the State must take protective measures for specific individuals who are at risk of ill-treatment or worse.<sup>84</sup>

Not all cases of ill-treatment fall under the scope of Article 3; instead, the Court has stated that ill-treatment must reach a minimum level of severity to be considered within the provision's.<sup>85</sup> Nonetheless, the ECtHR has admitted that the line between a violation and merely harmful treatment can be hard to establish.<sup>86</sup> In addition, the assessment of the minimum level of severity is relative, making it dependent on the case's circumstances, for instance, 'the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.'. <sup>87</sup> Moreover, other factors can also influence the assessment: the nature and context of the treatment along with the manner of execution;<sup>88</sup> the vulnerability of the victim;<sup>89</sup> and the purpose of the ill-treatment with its intention.<sup>90</sup> However, the now-defunct Commission has previously acknowledged that behavior classifying as ill-treatment varies from location to location.<sup>91</sup> Hence, they admitted to cultural differences between European

<sup>83</sup> *Al-Skeini and Others v. the United Kingdom* App no 55721/07 (ECtHR, 7 July 2011) para 74.

<sup>84</sup> *X and Others v Bulgaria* App no 22457/16 (ECtHR, 2 February 2021) para 178.

<sup>85</sup> *Ireland v. The United Kingdom* App no 5310/71 (ECtHR, 18 January 1978) para 162.

<sup>86</sup> *McCallum v. the United Kingdom* App no 9511/81 (ECtHR, 30 August 1990).

<sup>87</sup> *Ireland* (n 85).

<sup>88</sup> *Soering* (n 77).

<sup>89</sup> *Khlaifia and Others v. Italy* App no 16483/12 (ECtHR, 15 December 2016) para 160.

<sup>90</sup> *Ibid.*

<sup>91</sup> *Greek Case* nos 3321/67; 3322/67; 3323/67; 3344/67 (Commission Decision, 31 May 1968).

societies and even within the society.<sup>92</sup> Furthermore, in *Selmouni v. France*, the Court remarked that the hierarchy between the classifications of ill-treatment is fluid.<sup>93</sup> This statement is related to the Convention as a living instrument that needs to be interpreted according to present-day circumstances; it must follow societal progress and not live in the past.<sup>94</sup> Therefore, due to the dynamic interpretation, the ECtHR noted that acts could have a different classification in the future.<sup>95</sup> Lastly, the Court believes that the changes and commonly accepted standards of the member states should influence their assessment of a violation or not in the case of Article 3, which was first articulated in *Tyrer v. UK*.<sup>96</sup>

## Definitions

Under the provision, there are three ways to classify ill-treatment; however, the mistreatment must first achieve the minimum level of severity. From thereon, each concept denotes a progression of the intensity of suffering, with torture as the most severe treatment, followed by inhuman treatment, and lastly, degrading treatment which has the lowest threshold to achieve.

The drafters of the Convention aimed to attach a special stigma to *torture* to distinguish it from inhuman or degrading treatment, thereby emphasizing the seriousness of torture.<sup>97</sup> Hence, torture has been defined by the Court as 'deliberate inhuman treatment causing very serious and cruel suffering'.<sup>98</sup> From the definition, it is understood that deliberate stands for the requirement that the suffering was caused intentionally.<sup>99</sup> Moreover, the ECtHR endorsed the definition of torture from the UNCAT.<sup>100</sup> The elements of torture that distinguish it from other

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<sup>92</sup> Reidy (n 80).

<sup>93</sup> *Selmouni v. France* App no 25803/94 (ECtHR, 28 July 1999) para 101.

<sup>94</sup> Yutaka Arai-Yokoi, 'Grading Scale of Degradation: Identifying the Threshold of Degrading Treatment or Punishment under Article 3 ECHR' (2003) 21(3) Netherlands Quarterly of Human Rights.

<sup>95</sup> *Selmouni* (n 93).

<sup>96</sup> *Tyrer v. the United Kingdom* App no 5856/72 (ECtHR, 25 April 1978) para 31.

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ireland* (n 85) para 167.

<sup>99</sup> Arai-Yokoi (n 94).

<sup>100</sup> *Salman v. Turkey* App no 21986/93 (ECtHR, 27 June 2000) para 114.

forms of ill-treatment, according to the UNCAT's definition, are the severeness of suffering, the deliberate infliction of torment, and the purposive nature of the act.<sup>101</sup> Based on the Court's endorsement, the assumption exists that they agree with those three elements as the fundamental components of torture. The first element, the infliction of severe suffering, relates to the level of intensity because the torment must meet the highest threshold. Due to the nature of torture, both physical pain and psychological suffering fall under it;<sup>102</sup> however, the Strasbourg Court has not recognized the concept of psychological torture, unlike its colleagues.<sup>103</sup> Intention, the second aspect, was already present in the definition used by the Court. It differentiates torture from inhuman treatment because this form was done deliberately, seeking to gravely harm.<sup>104</sup> Finally, there is a purposive element, which claims that torture is performed with a specific goal in mind, for example, acquiring secret information that prisoners refuse to give up.<sup>105</sup> Moreover, both the intentional and the purposive elements have been confirmed in *Ilhan v. Turkey*: the Court reiterated that torture is 'the intentional infliction of severe pain or suffering with the aim, inter alia, of obtaining information, inflicting punishment or intimidating'.<sup>106</sup> However, the Court's case-law does not determine whether torture has to be premeditated to be classified under that.<sup>107</sup>

The Court described *inhuman treatment* as 'the infliction of intense physical and mental suffering'.<sup>108</sup> Likewise, treatment is inhuman when applied for a long duration; it was

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<sup>101</sup> UNCAT art 1.

<sup>102</sup> *Gäfgen v. Germany* App no 22978/05 (ECtHR, 1 June 2010) para 108.

<sup>103</sup> *Arai-Yokoi* (n 94).

<sup>104</sup> *Reidy* (n 80).

<sup>105</sup> *Ibid.*

<sup>106</sup> *Ilhan v. Turkey* App no 22277/93 (ECtHR, 27 June 2000) para 85.

<sup>107</sup> *Arai-Yokoi* (n 94).

<sup>108</sup> *Ireland* (n 85) para 162-164.



premeditated, or the victim suffered grave bodily injuries.<sup>109</sup> However, the suffering does not necessarily have to lead to physical harm.<sup>110</sup>

The least severe form of ill-treatment, *degrading treatment*, is defined as 'ill-treatment designed to arouse in victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical and moral resistance' by the Court.<sup>111</sup> When assessing whether treatment is degrading within the scope of Article 3, the Court must take into account whether the purpose of said treatment was to humiliate the victim.<sup>112</sup> Nonetheless, the absence of intent to debase the victim does not necessarily rule out a violation of Article 3.<sup>113</sup> Moreover, the examination of subjection to degrading treatment is subjective since it suffices before the Court that the victim themselves feels humiliated;<sup>114</sup> outsiders do not have to agree because the victim's experience is enough. In addition, publicity may have relevance in reviewing treatment incompatible with Article 3; yet, the lack of attention does not stop the act from falling within the scope.<sup>115</sup> The role of mental effects on the victim is significant with the degrading treatment since it primarily depends on the psychological process the victim undergoes during and after the act. Furthermore, the Court investigates the impact on the victim's human dignity;<sup>116</sup> however, it causes a lack of objective uniformity for assessing degrading treatment.<sup>117</sup>

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<sup>109</sup> *Labita v. Italy* App no 26772/95 (ECtHR, 6 April 2000) para 120; *Kudla v. Poland* App no 30210/96 (ECtHR, 26 October 2000) para 92.

<sup>110</sup> *Ireland* (n 85) para 167.

<sup>111</sup> *Ibid* para 164.

<sup>112</sup> *Reidy* (n 80).

<sup>113</sup> *Ilaşcu and Others v. Moldova and Russia* App no 48787/99 (ECtHR, 8 July 2004) para 425; *Gäfgen* (n 102).

<sup>114</sup> *Costello-Roberts v. the United Kingdom* App no 13134/87 (ECtHR, 25 March 1993) para 30.

<sup>115</sup> *Tyrer* (n 96) para 32.

<sup>116</sup> Karsten Poetschke and Fu Weiwei and Joseph Howard, 'Of Life and Torture: Differences in the 'Mistreatment-Threshold' for the Invocation of Article 2 and 3 of the European Convention on Human Rights' (2010) SSRN Electronic Journal <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1729757](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1729757)>.

<sup>117</sup> *Arai-Yokoi* (n 94).

## REPRODUCTIVE RIGHTS OF WOMEN IN MALTA AND POLAND

In Europe, six countries have highly restrictive abortion regulations: Andorra, Liechtenstein, Malta, Monaco, Poland, and San Marino.<sup>118</sup> These States do not authorize abortion based on request or social grounds, with Andorra, Malta, and San Marino even prohibiting abortion in general.<sup>119</sup> In the case of Liechtenstein and Poland, abortion is allowed when the woman's life is at risk or when the pregnancy was caused by sexual assault, whereas Monaco also allows abortion with fetal anomalies.<sup>120</sup>

The States are all members of the Council of Europe;<sup>121</sup> thus, the ECHR and by proximity, the standards developed in Article 3 jurisprudence are therefore binding. Nonetheless, there is no right to abortion in the Convention or implied in the case-law, making the condition of being a CoE member futile. However, two States are part of the European Union, where recent developments have formed, leading to believe that the EU wishes to see a right to abortion. The first development is the European Parliament expressing that interfering with abortion is a human rights breach.<sup>122</sup> The second was the European Parliament's intent to recognize the right to abortion in the Charter of Fundamental Rights of the EU as a reaction on the possible overturn of *Roe v. Wade* by the United States Supreme Court.<sup>123</sup> Therefore, due to the momentum, the thesis will focus on the two EU countries with strict abortion laws: Malta and

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<sup>118</sup> Center for Reproductive Rights, 'European Abortion Laws' (*Reproductive Rights*, December 2020) <<https://reproductiverights.org/wp-content/uploads/2020/12/European-abortion-law-a-comparative-review.pdf>> accessed 31 October 2021.

<sup>119</sup> Ibid.

<sup>120</sup> Ibid.

<sup>121</sup> Council of Europe, 'Our member States' (*Council of Europe*) <<https://www.coe.int/en/web/about-us/our-member-states>> accessed 19 February 2022.

<sup>122</sup> De La Baume (n 2).

<sup>123</sup> European Parliament (n 5).

Poland. While the other countries have a relationship with the EU, it is more connected to trade and freedom of movement.

## **Legal Framework of the Right to Abortion in Malta**

Malta's abortion regulations belong to the most unyielding in the world. It is the only state within the EU that prohibits the procedure entirely. Consequently, there is no right to abortion; thus, pregnant people are not entitled to human dignity since their self-determination and autonomy are taken by the government. How can a person be respected when they have no choice over their body, treated as if they need the guidance of a patronizing society. Instead, Malta criminalized abortion under Chapter 9 of the Maltese Criminal Code.<sup>124</sup> According to Article 241(1), whoever purposefully provokes a miscarriage 'is liable to imprisonment'.<sup>125</sup> Moreover, Article 241(2) of the Criminal Code also states, 'The same punishment shall be awarded against any woman who shall procure her own miscarriage, or who shall have consented to the use of the means by which the miscarriage is procured'.<sup>126</sup> While the provisions refrain from using the term abortion, it is not hard to conclude it is indeed abortion since the procedure is criminalized even for medical personnel who act as an accomplice to the pregnant person. These professionals face longer imprisonment than regular citizens and can lose their medical license.<sup>127</sup> Thus, if someone seeks to terminate their pregnancy, they must go abroad to escape imprisonment or order abortion medication online.<sup>128</sup> Again, their choices are limited to continuing the pregnancy against their wishes or finding clandestine methods to

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<sup>124</sup> More specifically, the relevant provisions describing abortion regulation in Malta can be found under Sub-title VII 'Of Abortion, of the Administration or Supplying of Substances Poisonous or Injurious to Health, and of the Spreading of Disease' of Title VIII of Part II 'of crimes and punishments' belonging to Chapter 9 of the Criminal Code.

<sup>125</sup> Criminal Code [Malta] 1854, art 241(1).

<sup>126</sup> Criminal Code [Malta] 1854, art 241(2).

<sup>127</sup> Gilbert Gravino and Liza Caruana-Finkel, 'Abortion and Methods of Reproductive Planning: the Views of Malta's Medical Doctor Cohort' (2019) 27(1) Sexual and Reproductive Health Matters.

<sup>128</sup> Erin Ogunkeye, 'Fighting for abortion rights in Malta, the EU's last country with a total ban' (*France24*, 5 October 2021) <<https://www.france24.com/en/tv-shows/perspective/20211005-fighting-for-abortion-rights-in-malta-the-eu-s-last-country-with-a-total-ban>> accessed 25 January 2022.

remove the fetus, often with risk to their health, disrespecting one's human dignity. While the abortion ban hinders Maltese women from acquiring treatment, statistics reveal that the number of obtaining an abortion between Malta and other European countries does not differ much.<sup>129</sup> Although traveling abroad to receive abortion healthcare exists, human rights actors such as the Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Discrimination against Women have urged Malta to reconsider its abortion restrictions.<sup>130</sup> The legal framework allows no exceptions, with former Commissioner for Human Rights Muižnieks commenting that the total ban went against international human rights law and should be remedied.<sup>131</sup> Furthermore, CESCR saw concern in the prohibition of abortion, encouraging Malta to install exceptions for therapeutic abortion and when the pregnancy was the consequence of criminal acts.<sup>132</sup> These opinions were shared by CEDAW, who also acknowledged that the disciplinary provisions in the legislation were better off removed.<sup>133</sup> However, the first-ever legislative proposal to decriminalize abortion came in May 2021, suggesting the removal of three Criminal Code articles.<sup>134</sup> These articles entail the procuring of a miscarriage, the liability for willful homicide or bodily harm for assistance with abortion, and the conscious administration of means that can induce miscarriage by medical

<sup>129</sup> Rebecca Iversen, '300 to 400 Maltese women go abroad for an abortion each year - AD chairperson' (*Independent*, 4 February 2018) <<https://www.independent.com.mt/articles/2018-02-04/local-news/300-to-400-Maltese-women-go-abroad-for-an-abortion-each-year-AD-chairperson-6736184440>> accessed 25 January 2022.

<sup>130</sup> UN Committee for the Elimination of All Forms of Discrimination against Women, forty-seventh session 4 – 22 October 2010 'Concluding Observations of the Committee on the Elimination of Discrimination against Women: Malta' (9 November 2010) UN Doc CEDAW/C/MLT/CO/4; UN Committee on Economic, Social and Cultural Rights, Thirty-third session 8-26 November 2004 'Concluding observations of the Committee on Economic, Social and Cultural Rights: Malta' (14 December 2004) UN Doc E/C.12/1/Add.101.

<sup>131</sup> Nils Muižnieks, 'Need to reform abortion law - Nils Muižnieks' (*Times of Malta*, 26 February 2018) <<https://timesofmalta.com/articles/view/need-to-reform-abortion-law-nils-muiznieks.671761>> accessed 25 January 2022.

<sup>132</sup> World Health Organization 'Global Abortion Policies Database [Malta]' (*WHO*, 22 April 2020) <<https://abortion-policies.srhr.org/country/malta/>> accessed 25 January 2022.

<sup>133</sup> Ibid.

<sup>134</sup> Ivan Martin, 'MP Marlene Farrugia presents bill to decriminalise abortion' (*Times of Malta*, 12 May 2021) <<https://timesofmalta.com/articles/view/mp-proposes-bill-decriminalising-abortion.871381>> accessed 15 May 2022. Bill included in article.

professionals.<sup>135</sup> Instead, their replacement would be an article prescribing imprisonment for executing forced abortion.<sup>136</sup> The Criminal Code does not define forced abortion; however, considering the context, it most likely describes abortion in general since the country criminalized it. Moreover, the proposal for partial decriminalization is unlikely to come to fruition; regardless, it has opened the debate in society and could be the beginning of small changes.<sup>137</sup>

### *Practice of the Legal Framework in Malta*

Malta has a total prohibition of abortion; therefore, the Maltese Criminal Code has no exceptions, not even in the case of life endangerment of the woman. However, in practice, medical practitioners do terminate pregnancies that are a risk to the mother while forbidden by domestic law.<sup>138</sup> While the country has the EU's strictest abortion legislation, there has not been a court case concerning abortion in the past five years, nor has anyone been imprisoned for obtaining an abortion in the last twenty-five years.<sup>139</sup> Regardless, Maltese women who desire an abortion either go to abortion clinics abroad or order illegal abortion pills online.<sup>140</sup> Going abroad is the most favored option by the Maltese since it is the safest,<sup>141</sup> and they cannot be prosecuted since Maltese law only applies to its territory.<sup>142</sup> Yet, the Covid-19 pandemic complicated matters with the lockdown, making it impossible for women to go abroad. Thus,

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<sup>135</sup> EURACTIV, 'Malta MP tables historic bill to decriminalise abortion' (*Euroactiv*, 13 May 2021) <<https://www.euractiv.com/section/politics/news/malta-mp-tables-historic-bill-to-decriminalise-abortion/>> accessed 26 January 2022.

<sup>136</sup> Ibid.

<sup>137</sup> AP, 'Proposal to decriminalise abortion in Malta sparks debate' (*Euronews*, 27 May 2021) <<https://www.euronews.com/2021/05/27/proposal-to-decriminalise-abortion-in-malta-sparks-debate>> accessed 26 January 2022.

<sup>138</sup> Family Law, 'FAQs Abortion in Malta' (*Family Law Malta*) <<https://family-law.com.mt/faqs/abortion>> accessed 5 March 2022.

<sup>139</sup> Doctors For Choice, 'Malta Abortion Law' (*Doctors For Choice Malta*) <<https://www.doctorsforchoice.mt/abortion-law>> accessed 5 March 2022.

<sup>140</sup> FPAS, 'Abortion in Malta: The Facts, Your Options, and How to Get Help' (*FPAS Malta*) <<https://www.fpas.mt/abortion>> accessed 5 March 2022.

<sup>141</sup> Sophia Smith-Galer, 'Covid: Locked-down women turn to pills amid Malta abortion ban' (*BBC*, 9 January 2021) <<https://www.bbc.com/news/world-europe-55579339>> accessed 5 March 2022.

<sup>142</sup> Doctors For Choice (n 139).

they were reduced to ordering abortion pills online, which is a risk because both the possession of the medicine and taking it are illegal.<sup>143</sup> While no woman has been taken to court for taking the pill,<sup>144</sup> they are still afraid of criminalization, even at the risk of their mental health.<sup>145</sup> Moreover, prohibiting abortion forces women to endure physical and psychological trauma by carrying a non-viable fetus.<sup>146</sup>

### **Legal Framework of the Right to Abortion in Poland**

Unlike Malta, the Polish abortion framework has gone through several changes, especially in the last few years. Simultaneously, these legislative transformations created political outbursts in the form of protests, receiving substantial media attention. The first mention of abortion in Poland was between 1929 to 1932, resulting in a provision in the Criminal Code of 1932.<sup>147</sup> It declared abortion legal if the woman's health was at risk and when the pregnancy was caused by a crime.<sup>148</sup> In 1956, a liberal version of the abortion law replaced its predecessor, where abortion became decriminalized for social reasons.<sup>149</sup> Catholic circles, however, were not in favor; nonetheless, the law passed through the argument of a high mortality rate due to unsafe abortions.<sup>150</sup> Moreover, 1959 introduced abortion on request that no longer required women to consult with doctors to acquire an abortion.<sup>151</sup> Thus, abortion became a widely used practice. Nonetheless, between 1988 to 1993, several attempts were made to challenge the 1956 law, supported by the Roman Catholic Church.<sup>152</sup> Yet, all bills failed, including a proposed national

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<sup>143</sup> Smith-Galer (n 141).

<sup>144</sup> FPAS (n 140).

<sup>145</sup> Sarah Carabott, 'I was a walking grave: women describe impact of Malta's abortion ban' (*Times of Malta*, 9 August 2021) <<https://timesofmalta.com/articles/view/i-was-a-walking-grave-women-describe-impact-of-maltas-abortion-ban.892069>> accessed 5 March 2022.

<sup>146</sup> Ibid.

<sup>147</sup> Wanda Nowicka, 'The Struggle for Abortion Rights in Poland' (*Sxpolitics*, 2007) <[https://www.sxpolitics.org/frontlines/book/pdf/capitulo5\\_poland.pdf](https://www.sxpolitics.org/frontlines/book/pdf/capitulo5_poland.pdf)> accessed 27 January 2022.

<sup>148</sup> Ibid.

<sup>149</sup> Ibid.

<sup>150</sup> Ibid.

<sup>151</sup> Ibid.

<sup>152</sup> Ibid.

referendum on abortion.<sup>153</sup> Ultimately, the Act on Family Planning, Human Embryo Protection and Conditions of Permissibility of Abortion passed through Parliament in 1993.<sup>154</sup> The legislation made abortion illegal on social grounds; thus, women in burdensome socio-economic backgrounds were no longer viable to receive legal abortions. Additionally, therapeutic abortion and abortion on criminal charges became inaccessible while legally still allowed. These circumstances did not stop abortions; instead, women found other methods. Moreover, it became evident that physicians played a significant role in implementing the law, with some even providing illegal abortions in their clinics.<sup>155</sup> The Polish abortion legislation was liberalized again in 1996 under pro-choice parliamentarians, with an amendment to the 1993 abortion law.<sup>156</sup> It authorized abortion for women on social grounds similar to 1932.<sup>157</sup> Regardless, the liberalization was a short-lived affair since it was overruled by the Constitutional Court, deeming it unconstitutional.<sup>158</sup> Furthermore, the judgment was easily accepted by the newly elected right-wing parliament.<sup>159</sup> However, the Polish Constitution has no mention of abortion, but Article 38 does mention the protection of every human being's life.<sup>160</sup> With the legislation reverted to its 1993 version, exceptions to the abortion ban only happened in select cases:

Section 4(a) of the 1993 Act permits termination of pregnancy to be carried out by a physician where the pregnancy endangers the mother's life or health, where there is a high risk that the foetus will be severely and irreversibly damaged, or where there are

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<sup>153</sup> Ibid.

<sup>154</sup> Elizabeth J. Ireland, *Do Not Abort the Mission: An Analysis of the European Court of Human Rights Case of R.R. v. Poland*, 38 N.C. J. INT'L L. 651 (2012).

<sup>155</sup> Nowicka (n 147).

<sup>156</sup> Ireland (n 154).

<sup>157</sup> Ibid.

<sup>158</sup> Ibid.

<sup>159</sup> Nowicka (n 147).

<sup>160</sup> Ireland (n 154).

strong grounds for believing that pregnancy is a result of a criminal act (e.g. rape or incest).<sup>161</sup>

Moreover, a violation of the Act is a criminal offense, where the pregnant person is not criminally liable, while people who assist with acquiring the abortion are and risk a prison sentence.<sup>162</sup> In comparison, pregnant people in Malta who obtain an abortion are criminally accountable for the offense and can face a prison sentence; the same punishment goes for people who assist with acquiring the abortion.<sup>163</sup> Hence, Malta has a stricter abortion legislation than Poland. Nonetheless, physicians who do not support abortion can refuse to perform one or be involved with diagnoses that lead towards terminations based on the ground of conscience.<sup>164</sup> Therefore, it can be concluded that the society and healthcare personnel stand divided on the issue. The latest developments in Poland's abortion framework happened in 2020 but had their conclusion in 2021. The conservative government repeatedly attempted to ban abortion, causing multiple human rights actors to call out the State.<sup>165</sup> Ultimately, the Constitutional Court judged that abortion because of severe damage to the fetus or an incurable disease threatening the fetus' life was unconstitutional after the bill failed in Parliament.<sup>166</sup> The latest abortion legislation in Poland officially came into force in January 2021.

### *Practice of the Legal Framework in Poland*

The rate of abortions in Poland has sharply declined since 1985, with less than 200 abortions per year; however, these numbers do not report unauthorized abortions.<sup>167</sup> Regardless, the new

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<sup>161</sup> Nicolette Priaulx, 'Testing the Margin of Appreciation: Therapeutic Abortion, Reproductive 'Rights' and the Intriguing Case of Tysi c V. Poland' (2008) 15(4) European Journal of Health Law.

<sup>162</sup> Ibid.

<sup>163</sup> Criminal Code [Malta] 1854, art 241.

<sup>164</sup> Fenwick (n 51).

<sup>165</sup> Kapelańska-Pręgowska (n 54).

<sup>166</sup> Human Rights Watch, 'Poland: A Year On, Abortion Ruling Harms Women' (HRW, 19 October 2021) <<https://www.hrw.org/news/2021/10/19/poland-year-abortion-ruling-harms-women>> accessed 24 November 2021.

<sup>167</sup> Priaulx (n 161).



legislation now prohibits abortion on the grounds of fetal defect or incurable disease that threatens the fetus; thereby, narrowing Poland's few legal options Poland.<sup>168</sup> The legal options stipulated in the 1993 Act were endangerment of the mother's life or health, pregnancy conditions with a high risk of a severely and irreversibly damaged fetus, and a situation with strong grounds to believe that the pregnancy was caused by a criminal act. Consequently, with one exception removed, pregnant people in Poland must continue their pregnancy even if the fetus has significantly lower survival chances, often paired with a low quality of life. However, the legitimacy of the ruling is doubted by the European Commission because the Polish Constitutional Tribunal is no longer an independent branch as required by the Rule of Law; instead, it is politically compromised by the ruling majority.<sup>169</sup> Moreover, the options against it are scarce. Nonetheless, many Polish women have since then filed a complaint with the ECtHR to challenge the government.<sup>170</sup> The question that follows is whether a win in such a case before the Court will be groundbreaking enough to trigger a change in legislation. After all, the Polish government has yet to implement the judgments made by the ECtHR in relation to the effective access to lawful abortion,<sup>171</sup> which implies that the State goes against its law order. The government failed, or rather refused to provide accessibility to the practice of legal abortion and address the poor treatment and medical hurdles potential abortion patients had to face.<sup>172</sup> Therefore, the CoE's Committee of Ministers issued a resolution strongly urging the Polish government to comply with the judgments by the Strasbourg Court.<sup>173</sup> Nevertheless, even with the European Parliament's insistence and the Committee of Ministers, lawful

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<sup>168</sup> Human Rights Watch (n 166).

<sup>169</sup> European Commission, 'Rule of Law: European Commission acts to defend judicial independence in Poland' (*European Commission*, 20 December 2017) <[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_17\\_5367](https://ec.europa.eu/commission/presscorner/detail/en/IP_17_5367)> accessed 3 March 2022.

<sup>170</sup> Ibid.

<sup>171</sup> Center for Reproductive Rights, 'Poland Called on to Implement Long-Overdue Abortion Measures' (*Reproductiverights*, 4 January 2021) <<https://reproductiverights.org/poland-called-on-to-implement-long-overdue-abortion-measures/>> accessed 29 January 2022.

<sup>172</sup> Ibid.

<sup>173</sup> Committee of Ministers, 'Interim Resolution CM/ResDH(2021)44' (*Council of Europe*, 11 March 2021) <[https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=0900001680a1bdc4](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a1bdc4)> accessed 28 January 2022.

termination is almost impossible to acquire, forcing women to jump through all kinds of hurdles. Furthermore, with the tightening of legislation, the situation is even more precarious. For instance, in January 2022, a pregnant woman became the victim of Poland's strict regulations, neglecting her right to health in favor of the fetus' health. Specifically, the victim died of sepsis, related to a fetal disease, after doctors failed to extract the dead fetus for the possibility that the twin would survive.<sup>174</sup> Seemingly, she could have lived under the previous legislation that allowed abortion in case of fetal malfunction. Additionally, pregnant women from rape already struggle with obtaining an abortion certificate due to the criminal investigation requiring proof; however, the situation has deteriorated, with raped Ukrainian refugees being denied a termination since they have no evidence.<sup>175</sup> Finally, with the current government, it is highly implausible that abortion legislation will become liberal again. Hence, the strict laws are there to stay unless a more progressive administration takes over or the right to abortion is promised in hierarchically superior law.

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<sup>174</sup> Euronews, 'Polish activists condemn abortion law after death of another pregnant woman' (*Euronews*, 26 January 2022) <<https://www.euronews.com/2022/01/26/polish-activists-condemn-abortion-law-after-death-of-another-pregnant-woman>> accessed 26 January 2022.

<sup>175</sup> Isabella Bengoechea and Alannah Francis, 'Pregnant Ukrainian refugees struggle to access abortion after escaping war for Poland' (*iNews*, 16 April 2022) <<https://inews.co.uk/news/pregnant-ukrainian-refugees-struggle-to-access-abortion-after-escaping-war-for-poland-1579458>> accessed 12 May 2022.

# ANALYSIS OF ABORTION CASES ON THE GROUNDS OF ILL-TREATMENT

## European Court of Human Rights

When it comes to complaints involving abortion, the Strasbourg Court prefers to make a judgment based on Article 8 of the ECHR, namely the right to respect for private and family life. However, in some circumstances, they have adjudicated complaints based on Article 3, which states the prohibition of ill-treatment. Therefore, Articles 3 and 8's principles will be explained to follow along with the Court's assessments in the two cases below.

When assessing Article 3, the Court always addresses the general principles elaborated in the case-law. First, the impugned treatment must meet the minimum level of severity; however, this assessment is relative, depending on the circumstances of each case.<sup>176</sup> Secondly, there are layers to ill-treatment, with each concept denoting an advancement in the intensity of suffering. The lowest is degrading treatment, generating feelings of fear, humiliation, and anguish within victims.<sup>177</sup> The next is inhuman treatment, where physical or mental suffering is applied for a long duration or consists of grave bodily injuries.<sup>178</sup> Lastly, torture is the deliberate use of inhuman treatment against persons to cause very serious and cruel suffering.<sup>179</sup>

The general purpose of Article 8 is the individual's protection from arbitrary interference by authorities unless it is "in accordance with the law" and "necessary in a democratic society" for a reason listed in the second paragraph.<sup>180</sup> However, the Court has since clarified that 'necessary' demands a pressing need behind the interference and its proportionality to the

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<sup>176</sup> *Ireland* (n 85).

<sup>177</sup> *Ibid* para 167.

<sup>178</sup> *Ibid*; *Kudła* (n 109).

<sup>179</sup> *Ireland* (n 85) para 167.

<sup>180</sup> ECHR art 8(2).

legitimate aims.<sup>181</sup> Furthermore, Article 8 includes negative and positive obligations for the State. Under the positive obligations, the ECtHR notes securing the right to 'effective' respect for the physical and psychological integrity of an individual under Article 8,<sup>182</sup> while Article 3 provides the prevention of ill-treatment.<sup>183</sup> Nonetheless, the ECtHR does not recognize a right to abortion; however, termination related to health issues falls within the scope. Therefore, States are obligated to provide a regulatory framework of enforcement mechanisms that protect the individuals' rights and implementation of measures when needed. Regardless, the lack of European consensus on the beginning of life affords states a wide margin of appreciation;<sup>184</sup> thus, discretion is given to the domestic level. Moreover, with the negative obligation, States enjoy a MoA with the legal framework of when abortion is permitted; however, once given, States cannot create their legal framework in a way that would limit the effectiveness of the rights, on the ground of the ECtHR's belief that the Convention intended to guarantee practical and effective rights.<sup>185</sup>

### ***R.R. v. Poland***

#### **CASE FACTS.**

The case of *R.R. v. Poland*<sup>186</sup> was decided by the ECtHR in 2011; however, the circumstances took place between December 2001 and October 2008.<sup>187</sup> The pregnant applicant received the news that the fetus might be affected with malformations and wanted an abortion if those apprehensions were proven true.<sup>188</sup> Moreover, several physicians had confirmed the probability that the fetus suffered from fetal anomalies; consequently, genetic tests were required to verify

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<sup>181</sup> *Dudgeon v. The United Kingdom* no 7525/76 (ECtHR, 22 October 1981) para 51.

<sup>182</sup> *S. and Marper v. The United Kingdom* nos 30562/04 and 30566/04 (ECtHR, 4 December 2008).

<sup>183</sup> *A. v The United Kingdom* App no 100/1997/884/1096 (ECtHR, 23 September 1998).

<sup>184</sup> *Vo* (n 46).

<sup>185</sup> *Airey v Ireland* no 6289/73 (ECtHR, 9 October 1979); *Tysiac v Poland* App no 5410/03 (ECtHR, 24 September 2007).

<sup>186</sup> *R.R.* (n 36).

<sup>187</sup> *Ibid* para 7; 58.

<sup>188</sup> *Ibid* para 9.

the suspicion.<sup>189</sup> The applicant met with a specialist who confirmed a need for genetic testing, but it required a formal referral by the family doctor. However, her doctor refused to issue a referral because they believed the fetal condition was not severe enough to qualify for abortion under domestic law.<sup>190</sup> Thus, a situation began where the applicant was continuously referred for genetic testing, but no physician wanted to perform the examination. Finally, the applicant went to the hospital without a referral as an emergency patient, which allowed the execution of the much-needed genetic test.<sup>191</sup> The applicant complained that there was a lack of adequate treatment from the doctors, believing that they were intentionally delaying her case, so she would be unable to meet the deadline for obtaining a lawful abortion.<sup>192</sup> However, the test results confirmed Turner syndrome; thus, the applicant requested an abortion, which the hospital rejected because the legal time limit had passed.<sup>193</sup> Subsequently, the applicant initiated criminal proceedings against those in charge of her case. She argued that the doctors failed to perform tests within the timeframe; therefore, denying her information on the fetus' health and obstructing the right to self-determination concerning the termination of her pregnancy, according to national law.<sup>194</sup> Additionally, the patient felt humiliated by the physicians' conduct,<sup>195</sup> which the Polish Supreme Court noted. Furthermore, the Supreme Court also observed that genetic testing was the only method to trace fetal anomalies, which doctors should have known and executed.<sup>196</sup> Therefore, the applicant's rights were breached by the medics who hindered the test.<sup>197</sup> Finally, under Polish law, the applicant was entitled to

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<sup>189</sup> Ibid para 12; 13.

<sup>190</sup> Ibid para 14.

<sup>191</sup> Ibid para 28.

<sup>192</sup> Ibid para 32.

<sup>193</sup> Ibid para 33.

<sup>194</sup> Ibid para 38; 43.

<sup>195</sup> Ibid.

<sup>196</sup> Ibid para 52.

<sup>197</sup> Ibid para 54.

receive information about the fetus, and if physicians had moral objections, they were required to refer the patient to another practitioner that would effectively offer the service.<sup>198</sup>

As previously mentioned, the Polish domestic law authorized abortion for applicant R.R in accordance with the *1993 Family Planning Act*<sup>199</sup>. Her specific circumstance, namely a high risk of a severely damaged fetus, was one of the exceptions to pregnancy termination if it stayed within the time limit. Moreover, the Act also ensures access to prenatal information and testing, specifically in cases where there is a suspicion of malformation of the fetus.<sup>200</sup> However, the case illustrates that access to prenatal examinations is not always done or opposed by the physicians because it could lead to possible termination.<sup>201</sup>

### ARTICLE 3.

The Court's assessment of *R.R. v. Poland*'s circumstances shows that the threshold of the minimum level of severity has been met. It considered the applicant's fears for the fetus' health justified because a scan documented the likelihood of malformation; thus, she was vulnerable due to the distress surrounding the uncertainty of the fetus.<sup>202</sup> Moreover, she repeatedly tried to access genetic tests to dispel her fears, as recommended by doctors, and was led to believe that she would receive those necessary tests.<sup>203</sup> However, the physicians prevented those attempts through procrastination, confusion, and lack of information given to the applicant.<sup>204</sup> Additionally, there were no technical or material issues;<sup>205</sup> thus, the obstruction was relatively arbitrary. Hence, forcing the applicant to live weeks in uncertainty regarding her future familial prospects while disregarding her feelings and neglecting the time aspect needed for her

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<sup>198</sup> Ibid para 52.

<sup>199</sup> The Family Planning, Human Embryo Protection and Conditions of Permissibility of Abortion Act of 7 January 1993.

<sup>200</sup> Ibid.

<sup>201</sup> *Ireland* (n 85) para 14.

<sup>202</sup> Ibid para 153; 159.

<sup>203</sup> Ibid.

<sup>204</sup> Ibid para 153.

<sup>205</sup> Ibid para 155.

remaining available options.<sup>206</sup> The Court saw the lack of effective access to medical diagnostic services and failure of her early request for said entitled procedure as aggravating circumstances to her anguish, primarily since these services were available if there were no hindering doctors.<sup>207</sup> Furthermore, the obstruction by the physicians opposed the *1993 Act*, which obligated the Polish State to ensure access to prenatal information and testing.<sup>208</sup> It also breached domestic law that allowed pregnant women information over the fetus' health.<sup>209</sup> Finally, the Court also agreed with the Polish Supreme Court that R.R was a victim of humiliation.<sup>210</sup>

## ARTICLE 8.

In the assessment, the Court noted that the issue was not the lack of access to lawful abortion; instead, the matter was the timely access to testing that may have led to lawful termination of pregnancy.<sup>211</sup> The fetus' health is part of the woman's right to health information and falls within the scope of private life under Article 8. Furthermore, effective access to health information is critical since it could lead to the applicant's exercise of personal autonomy based on said information.<sup>212</sup> Moreover, concerning abortion, timely access is crucial because any delay reduces the possibilities for lawful termination for women, which the Court reaffirmed.<sup>213</sup> However, the applicant had trouble obtaining that right due to the artificially created delay by the medical professionals, which the Polish Supreme criticized.<sup>214</sup> Accordingly, the ECtHR saw relevance in this assessment by the highest domestic legal authority for its own case appraisal.<sup>215</sup> Nevertheless, when the applicant received her results, the option for abortion was

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<sup>206</sup> Ibid para 159.

<sup>207</sup> Ibid para 160.

<sup>208</sup> Ibid para 156.

<sup>209</sup> Ibid para 157.

<sup>210</sup> Ibid para 160.

<sup>211</sup> Ibid para 196.

<sup>212</sup> Ibid para 198.

<sup>213</sup> Ibid para 203.

<sup>214</sup> Ibid.

<sup>215</sup> Ibid.

too late; thus, there was no longer a lawful path.<sup>216</sup> Lastly, in *Tysic v. Poland*, the Court had already stated that the State is obligated to create a framework where pregnant women can exercise their right of access to lawful abortion, which it reaffirmed here.<sup>217</sup> In addition, States must organize their healthcare system so that nothing prevents the patients from receiving access to services they are entitled to under domestic legislation.<sup>218</sup>

### ***P. and S. v. Poland***

#### **CASE FACTS.**

The case of *P. and S. v. Poland*<sup>219</sup> finished before the ECtHR in 2013, while the events took place from April 2008 until September 2009.<sup>220</sup> The case, however, involved two applicants, but only P as the pregnant person is relevant for the analysis. The first applicant, P, was a raped minor who got pregnant and wished to have an abortion.<sup>221</sup> Due to the domestic law's exception that allows abortion in case of rape, P received a certificate stating that her pregnancy was caused by an unlawful criminal act; therefore, with the certification, she could legally obtain an abortion.<sup>222</sup> Regardless, her attempts to acquire an abortion were boycotted. Moreover, there were various efforts to force the applicant into continuing the pregnancy, with the hospital even issuing a press release; thus, sharing the personal information of the underage victim of a sexual offense.<sup>223</sup> Subsequently, the applicant left for Warsaw, away from home, to obtain the lawful termination but underwent harassment at the hospital; simultaneously, there were also outsider attempts to persuade P into changing her mind about the abortion. As a reaction to the pestering, the applicant left with her parents; was tormented on the way home by anti-abortion activists,

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<sup>216</sup> Ibid para 204.

<sup>217</sup> Ibid para 200.

<sup>218</sup> Ibid para 206.

<sup>219</sup> *P. and S. v Poland* App no 57375/08 (ECtHR, 30 January 2013).

<sup>220</sup> Ibid para 6; 49.

<sup>221</sup> Ibid para 8.

<sup>222</sup> Ibid para 10.

<sup>223</sup> Ibid para 23.



who claimed the parents were abducting their child since they no longer had parental rights.<sup>224</sup> The mother responded by calling the police for help, who took the family to the police station.<sup>225</sup> At the police station, they found out the parental rights were indeed restricted;<sup>226</sup> thus, P was transferred to a juvenile shelter with no access to her parents;<sup>227</sup> however, the parental rights were later restored.<sup>228</sup> Furthermore, the applicant's mother filed a complaint with the Ministry of Health, requesting aid for the lawful abortion that her daughter was entitled to, eventually receiving help after some complications.<sup>229</sup> Although the issues were resolved, and P could undergo the termination; it happened clandestinely far from the safety of her home while her personal information was leaked.<sup>230</sup> Finally, a criminal proceeding was started against P, blaming her for committing a criminal offense while she was the unwilling party, namely the victim of rape.<sup>231</sup> However, the proceedings were discontinued because the court confirmed that P was a victim and not a perpetrator.<sup>232</sup> Furthermore, other criminal proceedings were initiated against other parties, who complicated P's access to a lawful abortion in accordance with the law.

The termination of pregnancy in the case of *P. and S. v. Poland* was lawful according to the *1993 Family Planning Act*. The Act stated that physicians are allowed to perform abortions when there are grounds to suppose that the pregnancy was caused by an unlawful act, such as incest or rape.<sup>233</sup> P received a certificate stating that her pregnancy was the result of rape; therefore, it went beyond suspicions: there was evidence.<sup>234</sup> Nonetheless, as the Court

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<sup>224</sup> Ibid para 28.

<sup>225</sup> Ibid.

<sup>226</sup> Ibid para 29.

<sup>227</sup> Ibid para 30.

<sup>228</sup> Ibid para 38.

<sup>229</sup> Ibid para 39.

<sup>230</sup> Ibid para 40; 41.

<sup>231</sup> Ibid para 42; 43.

<sup>232</sup> Ibid para 43.

<sup>233</sup> 1993 Family Planning Act.

<sup>234</sup> *P. and S.* (n 219) para 10.

established in *Tysiāc v. Poland*<sup>235</sup>, this case also revolved around the unresolved lack of access to lawful termination of pregnancy in Poland.<sup>236</sup>

### ARTICLE 3.

In *P. and S. v. Poland*, the Court placed grave significance on the applicant's vulnerability due to her status as a minor and sexual abuse victim.<sup>237</sup> In numerous situations, through texts as well as in person, outsiders had pressured the applicant into continuing the pregnancy with a lack of consideration for her opinion or feelings.<sup>238</sup> Furthermore, the authorities failed to protect her from this harassment, with no regard for her vulnerable position and even escalated the situation by denying police protection.<sup>239</sup> The ECtHR found a lack of understanding towards the applicant and her precarious situation because the authorities initiated a criminal investigation against her while evidence established her as a sexual abuse victim,<sup>240</sup> such as bruises on her body.<sup>241</sup> Nevertheless, even though the investigation had been dropped, the Court still believed there was a fundamental lack of awareness for P her position.<sup>242</sup> The Strasbourg Court concluded that there was no regard for the applicant's vulnerability and feelings.<sup>243</sup> Finally, the Court concluded that the behavior exuded by the authorities towards the applicant was despicable and distressing; consequently, the suffering P had undergone reached the minimum threshold of severity and was a violation of Article 3.<sup>244</sup>

### ARTICLE 8.

In *P. and S. v. Poland*, the Court divided their assessment under Article 8: failure to comply with positive obligations and disclosure of personal data. The Court noted that the abortion was

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<sup>235</sup> *Tysiāc* (n 185).

<sup>236</sup> *P. and S.* (n 219) para 21.

<sup>237</sup> *Ibid* para 161; 162.

<sup>238</sup> *Ibid* para 163; 164.

<sup>239</sup> *Ibid* para 164.

<sup>240</sup> *Ibid* para 165.

<sup>241</sup> *Ibid* para 161.

<sup>242</sup> *Ibid*.

<sup>243</sup> *Ibid* para 166.

<sup>244</sup> *Ibid* para 168.

lawful; however, the applicant had difficulties acquiring access to it.<sup>245</sup> Furthermore, the applicant did not receive objective medical advice that would have considered her opinions.<sup>246</sup> Related is the Court's view that effective access to information on legal abortion is relevant for the exercise of personal autonomy since the choice of parenthood falls under private life guaranteed by Article 8.<sup>247</sup> Moreover, the aspect of time is of great importance with lawful pregnancy termination. According to the Court, States must organize their healthcare system so that there are no obstacles to obtaining access to services they are entitled to because of doctors' freedom of conscience.<sup>248</sup> Polish law created a mechanism to resolve such issues, but the Court did not find compliance with the procedural requirements in this case.<sup>249</sup> On the disclosure of personal data, the Court held that its protection is fundamental to the enjoyment of the right to private life and that exposure could negatively affect someone.<sup>250</sup> After the press release was published by the public hospital, which the State is responsible for,<sup>251</sup> third parties contacted the applicant, making the information detailed enough to establish her whereabouts.<sup>252</sup> Thus, the Court concluded there was an interference, which was neither lawful nor served legitimate interest.<sup>253</sup> Furthermore, as there was no legitimate aim or legal basis for the interference, there is no need to look into the necessity for a democratic society.<sup>254</sup> Consequently, based on both the failure to comply with positive obligations and the unlawful interference, Article 8 was violated by Poland.<sup>255</sup>

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<sup>245</sup> Ibid para 102; 108.

<sup>246</sup> Ibid para 108.

<sup>247</sup> Ibid para 111.

<sup>248</sup> Ibid para 106.

<sup>249</sup> Ibid para 107.

<sup>250</sup> Ibid para 128.

<sup>251</sup> Ibid para 129.

<sup>252</sup> Ibid para 130.

<sup>253</sup> Ibid para 135.

<sup>254</sup> Ibid para 136.

<sup>255</sup> Ibid para 137.

### ***R.R. v. Poland and P. and S. v. Poland analysis***

The claims brought by the applicants under Article 3 are not related to the (possible) forced pregnancy, nor are they discussed by the Court under the idea that a woman could be humiliated by the prospect of carrying an unwanted pregnancy to term. Moreover, ECtHR jurisprudence stated that treatment that brings feelings of inferiority to the victim could fall under degrading treatment.<sup>256</sup> In addition, subjection to ill-treatment for a long duration can be considered inhuman.<sup>257</sup> Unwanted pregnancy can make a woman feel inferior to men within a male-dominated society because she is reduced to an incubator;<sup>258</sup> thus, feelings of humiliation rise since she is forced to act against her will and can do nothing against it. Furthermore, pregnancy generally lasts nine months, prolonging the humiliation for a long time compared to catcalling. Therefore, unwanted pregnancy would fall within the scope of degrading and inhuman treatment. Nevertheless, the Court focused on the lack of abortion access; in particular, the disapproval and prevention by the physicians. In *P. and S. v. Poland*, there was additional harassment by outsiders and a lack of protection. Related to the events was the vulnerability of both applicants, which the ECtHR held in high regard and might have gravely influenced the decision. Lastly, the Court utilizes the evolutive interpretation since mental suffering is equal to its physical counterpart and was the primary element in both cases to categorize the applicants' suffering as reaching the minimum threshold of severity under Article 3.

For Article 8, it appears that the lack of access to lawful abortion was assessed rather than the personal choice of becoming a parent, which falls under the private life sphere of the article.

<sup>259</sup> The State's obstruction to the access of legal pregnancy termination, in both cases, went against the 1993 Act. Furthermore, the angle of becoming a parent on one's terms applies to

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<sup>256</sup> *Ireland* (n 85) para 167.

<sup>257</sup> *Labita* (n 109).

<sup>258</sup> Abeda Sultana, 'Patriarchy And Women's Subordination: A Theoretical Analysis' (2012) 4 Arts Faculty Journal.

<sup>259</sup> *Evans* (n 18).

both cases because, while it is a sensitive issue, taking care of a disabled child requires great effort and changes one's life, which not everyone is willing to do. Moreover, the Court concentrated on the effectiveness of the procedural framework since the Convention protects effective rights, not solely theoretical. Lastly, in *P. and S.*, the ECtHR also assessed the disclosure of personal data; however, it seemingly played a more significant role under Article 3 since it worsened the applicant's circumstances.

In conclusion, there were many similarities between the cases under the Court's assessment. Under Article 3, both were judged on the circumstances: prevention of lawful abortion and genetic testing. Moreover, their vulnerable position as raped minor and distressed pregnant woman with a deadline aggravated the circumstances. Under Article 8, the Court concentrated on the procedural aspect, namely, lack of lawful access. Additionally, the ECtHR's decisions fell in line with *Tysiąc v. Poland*, even though they acknowledged the cases differed. Overall, the Court does not consider the impact of having an unwanted child on the individual and the repercussions on the individual's private life; instead, their restrictive approach, focusing on the legal framework, benefits States since the strict abortion legislation can stay. Thus, their morals outweigh the dignity of women.

### **United Nations Human Rights Committee**

The Human Rights Committee, as the interpretative body of the ICCPR, has dealt with abortion cases on four separate occasions.<sup>260</sup> In each case, the Committee judged on Articles 7 and 17 of the Covenant,<sup>261</sup> which respectively are the prohibition of ill-treatment and the right to private life. Moreover, these two articles were violated in each instance, making the HRC more

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<sup>260</sup> *K.L. v. Peru* (24 October 2005) Communication No. 1153/2003 CCPR/C/85/D/1153/2003; *V.D.A. v. Argentina* (29 March 2011) Communication No. 1608/2007 CCPR/C/101/D/1608/2007; *Mellet v. Ireland* (31 March 2016) Communication No. 2324/2013 CCPR/C/116/D/2324/2013. *Whelan v. Ireland* (17 March 2017) Communication No. 2425/2014 CCPR/C/119/D/2425/2014.

<sup>261</sup> *Ibid.*

progressive than the ECtHR on the issue of abortion. Consequently, it is significant to see how they approach these cases and examine whether the Strasbourg Court can take over their method. Thus, ensuring that they no longer bend to the morals of the State and instead protect the individual's right to self-determination. Regardless, such a jump is unlikely; alternatively, the influence of the Committee could and should lead to a right to effective and legal access to abortion in circumstances that could amount to the ill-treatment of the pregnant person. After all, the Polish legislation no longer allows abortion because of fetal malformations, while Malta has a total prohibition of abortion.

The influence of the HRC, and by association with the ICCPR, is not unreasonable since the ECtHR is more receptive to the Covenant than other treaties in its decisions.<sup>262</sup> Nonetheless, while the HRC's views are non-binding, they provide authoritative and determinative interpretations of the ICCPR due to its mandate.<sup>263</sup> Moreover, the members hold recognized competence in human rights and are experts in international law: hence, their views are subsidiary sources of international law.<sup>264</sup> These arguments support that the ECtHR can follow the approach of the HRC because the Convention should be interpreted according to international law's relevant rules.<sup>265</sup> Finally, there is precedence that the Court has relied on the HRC's views before when a similarity exists between the content of the equal rights.<sup>266</sup>

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<sup>262</sup> *Ní Ghráinne and McMahon* (n 50).

<sup>263</sup> *Ibid.*

<sup>264</sup> *Ibid.*

<sup>265</sup> *Brid Ní Ghráinne and Aisling McMahon*, 'Access To Abortion In Cases Of Fatal Foetal Abnormality: A New Direction For The European Court Of Human Rights?' [2019] *Human Rights Law Review*.

<sup>266</sup> *Py v France* App No 66289/01 (ECtHR, 1 November 2005)

## *Mellet v. Ireland*

### THE FACTS OF THE CASE AND THE COMPLAINT

The Human Rights Committee adopted the views on the *Mellet v. Ireland*<sup>267</sup> case in March 2016. In contrast, the communication of the complaint was November 2013,<sup>268</sup> and the facts happened between November and December 2011.<sup>269</sup> The communication's author, Mellet, received the information in early November that the fetus she was carrying had congenital heart defects; however, at that time, it was uncertain if the fetal impairment was fatal.<sup>270</sup> Nonetheless, even in the case of fatality, pregnancy termination was not available in Ireland; thus, the doctor said that women in similar situations decide to travel.<sup>271</sup> However, unbeknownst to her, the doctor alluded to abortion providers in the United Kingdom by opting for the words 'to travel'.<sup>272</sup> After additional examination, Mellet was informed that the fetus would die shortly after birth or in the womb; consequently, the midwife told the author that she could carry to term with the fetus most likely dying before birth or could travel abroad.<sup>273</sup> Yet, the midwife failed to inform her of the real meaning behind traveling and did not give further information; instead, she gave the advice to contact a family planning organization for information.<sup>274</sup> Furthermore, the hospital did not refer her to abortion providers since that was not in line with Irish law; instead, she acquired help from the family planning organization, which brought her in contact with the abortion clinic.<sup>275</sup> Since Irish law allowed medical aftercare when a woman miscarried, Mellet first went to her doctor to determine if the fetus had died to continue her care in Ireland; however, a fetal heartbeat was detected.<sup>276</sup> As a result, the doctor tried to

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<sup>267</sup> *Mellet* (n 260).

<sup>268</sup> *Ibid* 1.

<sup>269</sup> *Ibid* para 2.1; 2.5.

<sup>270</sup> *Ibid* para 2.1.

<sup>271</sup> *Ibid*.

<sup>272</sup> *Ibid*.

<sup>273</sup> *Ibid* para 2.2.

<sup>274</sup> *Ibid*.

<sup>275</sup> *Ibid*.

<sup>276</sup> *Ibid* para 2.3.

discourage her in the form of emotional manipulation from going abroad to seek an abortion.<sup>277</sup> Ultimately, the author went to the United Kingdom to initiate the abortion process and where she delivered her stillborn child; however, due to a lack of monetary resources, she had to fly back home 12 hours after the birth while still weak and bleeding.<sup>278</sup> While the Irish State allows women to terminate their pregnancy abroad, they do not assist them whatsoever; thus, making the pregnant women pay for the procedure and everything that comes with it.<sup>279</sup> Moreover, women who suffer a stillbirth, including women who opt out of abortion abroad, receive counseling from hospitals, while those who seek abortion do not.<sup>280</sup> Mellet did not receive aftercare in Ireland even though she felt like it was needed to cope with the pregnancy loss and the trauma she endured to obtain an abortion.<sup>281</sup> Lastly, she claimed that her loss would have been easier to accept if there was no pain and shame in going abroad to have a termination.<sup>282</sup>

## HRC'S ASSESSMENT

In its assessment, the Committee considered Articles 7, 17, and 26 of the Covenant. Under Article 7, the prohibition of torture, the HRC stated that acts conforming to domestic legislation can still violate the article.<sup>283</sup> Moreover, the Committee believed that the State subjected Mellet to intense physical and mental suffering;<sup>284</sup> therefore, violating article 7.<sup>285</sup> The decision was based on the applicant's highly vulnerable status as a pregnant woman with a non-viable pregnancy, whose physical and psychological anguish was exacerbated by the lack of support from the Irish abortion framework.<sup>286</sup> Ultimately, she had to go abroad to terminate; was

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<sup>277</sup> Ibid.

<sup>278</sup> Ibid para 2.4.

<sup>279</sup> Ibid.

<sup>280</sup> Ibid para 2.5.

<sup>281</sup> Ibid.

<sup>282</sup> Ibid.

<sup>283</sup> Ibid para 7.4.

<sup>284</sup> Ibid.

<sup>285</sup> Ibid para 7.6.

<sup>286</sup> Ibid para 7.4.



separated from familial support and paying herself; returned not fully recuperated while feeling shame connected to the criminalization of abortion in her home country; and lastly, when she came back, the State did not provide her with bereavement care.<sup>287</sup> Furthermore, the HRC acknowledged that her negative experiences could have been avoided if there existed no prohibition on abortion in her circumstances.<sup>288</sup> Additionally, the Committee deemed that the suffering was exacerbated by the obstacles faced during the information process on the medical options.<sup>289</sup> Under Article 17, jurisprudence states that women's decision to request an abortion is within the scope,<sup>290</sup> namely the prohibition of arbitrary or unlawful interference in private life. While Ireland's interference with the discontinuance of Mellet's non-viable pregnancy was lawful,<sup>291</sup> the Committee decided that the intervention was unreasonable and arbitrary.<sup>292</sup> Consequently, a violation of Article 17.<sup>293</sup> It reasoned that the balance between the fetus' protection and the woman's right could not be justified because the pregnancy was not viable, and the remaining options were the source of Mellet's suffering.<sup>294</sup> Moreover, the travel abroad to terminate had negative consequences that could have been avoided if the termination was allowed in Ireland.<sup>295</sup> Lastly, the HRC noticed how pregnant women with a fetus having fatal impairment are treated differently based on whether or not they abort the fetus.<sup>296</sup> Those who carry to term or miscarriage receive medical attention and bereavement care in Ireland, while those opting to terminate are on their own: from expenses to dealing with the psychological burdens.<sup>297</sup> Moreover, they recognized Mellet's claim that the criminalization of abortion

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<sup>287</sup> Ibid.

<sup>288</sup> Ibid.

<sup>289</sup> Ibid para 7.5.

<sup>290</sup> Ibid para 7.7.

<sup>291</sup> Ibid.

<sup>292</sup> Ibid para 7.8.

<sup>293</sup> Ibid.

<sup>294</sup> Ibid.

<sup>295</sup> Ibid.

<sup>296</sup> Ibid para 7.10.

<sup>297</sup> Ibid.

stereotyped her with the reproductive role, which led to sex discrimination.<sup>298</sup> It also remarked how the differential treatment between women who abort and those who don't, with similarly situated women, was not reasonable, objective, or had a legitimate purpose.<sup>299</sup> Accordingly, the Committee concluded that Article 26, equality before the law, was violated.<sup>300</sup>

### ***Whelan v. Ireland***

#### **THE FACTS OF THE CASE AND THE COMPLAINT**

The views on *Whelan v. Ireland*<sup>301</sup> were adopted in March 2017, while the author submitted in April 2014 on circumstances from January 2010.<sup>302</sup> During the twentieth week of pregnancy, Whelan learned that her fetus was affected by a brain malformation, with only 3 percent of fetuses surviving up to birth.<sup>303</sup> Moreover, the doctor told the author that the fetus was likely to die in the womb and that if she managed to carry the fetus to term, it would pass away during birth or shortly after.<sup>304</sup> Nonetheless, the obstetrician said that other countries would allow pregnancy termination, but not Ireland.<sup>305</sup> Furthermore, the author received no information on options for the pregnancy and its diagnosis; instead, the physician said that the pregnancy would continue its course.<sup>306</sup> Whelan underwent an additional scan that confirmed the earlier diagnosis, and again, she received no further information on what to do in her case.<sup>307</sup> However, the doctor gave her a report of the scan if she decided to travel and answered when asked what good locations were to travel.<sup>308</sup> There was no discussion on having an abortion abroad, but the author claimed that discussing the topic or even asking questions felt illegal, and she feared

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<sup>298</sup> Ibid para 7.11.

<sup>299</sup> Ibid.

<sup>300</sup> Ibid.

<sup>301</sup> *Whelan* (n 260).

<sup>302</sup> Ibid 1; para 2.1; 2.4.

<sup>303</sup> Ibid para 2.1.

<sup>304</sup> Ibid.

<sup>305</sup> Ibid.

<sup>306</sup> Ibid.

<sup>307</sup> Ibid para 2.2.

<sup>308</sup> Ibid.

that she would not receive help.<sup>309</sup> Additionally, Whelan received more information on the fetus and was told that its condition was not viable.<sup>310</sup> The author felt incapable of continuing the pregnancy, only for her child to suffer and die, while the continuance would bring her mental suffering; thus, she decided to terminate.<sup>311</sup> Consequently, she contacted several pregnancy agencies; however, they could not assist her since the pregnancy was further along than 13 weeks.<sup>312</sup> Therefore, Whelan felt lost and alone with no help.<sup>313</sup> Regardless, with the help of a friend, she contacted a hospital in the UK and got an appointment there, but the request for her medical records complicated the matter.<sup>314</sup> The author had no fax machine; then went to the Irish hospital where the fetal abnormality diagnosis was confirmed; there, she had to deal with staff who were insensitive towards her and her situation.<sup>315</sup> Eventually, Whelan found a doctor who helped, but she needed the help of an acquaintance to fax the medical records; however, she feared judgment from them for choosing an abortion.<sup>316</sup> While arranging her journey to the UK, the author had no time to deal with her grief.<sup>317</sup> When she finally left the country, she felt like a criminal.<sup>318</sup> At the hospital, she underwent testing that restated the fatal diagnosis and received an injection to stop the fetus' heartbeat.<sup>319</sup> Furthermore, she had a stillbirth and spent the night in the hospital where she could hold the child and say goodbye.<sup>320</sup> The next day, she received information about bereavement counseling, but there was no information for Ireland.<sup>321</sup> Whelan had to leave the baby's remains in the UK but was

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<sup>309</sup> Ibid.

<sup>310</sup> Ibid.

<sup>311</sup> Ibid para 2.3.

<sup>312</sup> Ibid.

<sup>313</sup> Ibid.

<sup>314</sup> Ibid.

<sup>315</sup> Ibid.

<sup>316</sup> Ibid.

<sup>317</sup> Ibid para 2.4.

<sup>318</sup> Ibid.

<sup>319</sup> Ibid.

<sup>320</sup> Ibid.

<sup>321</sup> Ibid.

heartbroken to leave them behind when returning home,<sup>322</sup> which was when she finally had time to grieve.<sup>323</sup> It angered the author that she had to leave Ireland in her situation, which was also demeaning.<sup>324</sup> After a week, she went back to work, so her job was not at risk, and she was not entitled to paid maternity leave.<sup>325</sup> Eventually, the cremated remains of the baby were delivered to the author.<sup>326</sup> When she went to see her general practitioner, there was sympathy and no judgment from the doctor; however, she was not offered any counseling to deal with her grief.<sup>327</sup> Nevertheless, Whelan felt isolated and suffered from despair because of the traumatic experiences she endured.<sup>328</sup>

### **HRC'S ASSESSMENT**

The Committee assessed Articles 7, 17, and 26 of the Covenant. First, they ruled a violation of Article 7 since the State directly caused severe anguish to the author.<sup>329</sup> They also reiterated that lawfulness under domestic law does not imply that it cannot infringe the article.<sup>330</sup> The HRC noted Whelan's vulnerable status as a woman carrying a non-viable pregnancy, who had her physical and mental situation worsened by the treatment of Irish healthcare providers and Irish legislation.<sup>331</sup> The applicant felt abandoned by the medical care system, which did not provide information on her options, while the State made her choose between continuing the pregnancy of a dying fetus or traveling abroad for an abortion, isolated from support and self-paying for the treatment, while suffering shame from the Irish abortion stigma, and the lack of bereavement counseling.<sup>332</sup> Moreover, the Committee recognized that the negative experiences

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<sup>322</sup> Ibid para 2.5.

<sup>323</sup> Ibid para 2.6.

<sup>324</sup> Ibid.

<sup>325</sup> Ibid.

<sup>326</sup> Ibid para 2.5.

<sup>327</sup> Ibid para 2.6.

<sup>328</sup> Ibid.

<sup>329</sup> Ibid para 7.7.

<sup>330</sup> Ibid para 7.4.

<sup>331</sup> Ibid para 7.5.

<sup>332</sup> Ibid.

were possibly avoidable if there was no abortion prohibition for situations like Whelan's.<sup>333</sup> In addition, the HRC felt that the obstacles the author faced while gathering information on her medical options further deepened the suffering.<sup>334</sup> Under Article 17, the Committee decided that the interference by Ireland in Whelan's decision to terminate her non-viable pregnancy was arbitrary due to its unreasonableness; thus, it violated the author's right to privacy.<sup>335</sup> They considered that the balancing act by Ireland between the dying fetus and the woman was not justified.<sup>336</sup> Furthermore, they referred to *Mellet v. Ireland*, which dealt with similar situations, where the prevention by the Irish State also caused the author mental suffering even though the fetus was non-viable.<sup>337</sup> Finally, the Committee acknowledged how there was differential treatment between women who continued their non-viable pregnancy versus those who chose to abort since only those who kept the dying fetus received medical and bereavement care from the State.<sup>338</sup> In contrast, those terminating were left to deal with expenses and mental anguish that came with the travel abroad.<sup>339</sup> Furthermore, the HRC noted the author's claim that she was denied medical services, needed to maintain her autonomy, dignity, and integrity, because of her sex since men were not expected to disregard their health and go abroad to have procedures concerning their reproductive functions.<sup>340</sup> Additionally, the criminalization of abortion subjected Whelan to stereotypes where women are reduced to maternal creatures.<sup>341</sup> Hence, Article 26 of the Covenant was violated.<sup>342</sup>

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<sup>333</sup> Ibid.

<sup>334</sup> Ibid para 7.6.

<sup>335</sup> Ibid para 7.9.

<sup>336</sup> Ibid.

<sup>337</sup> Ibid.

<sup>338</sup> Ibid para 7.11.

<sup>339</sup> Ibid.

<sup>340</sup> Ibid para 7.12.

<sup>341</sup> Ibid.

<sup>342</sup> Ibid.

### ***Mellet and Whelan analysis***

The claims by Mellet and Whelan against Ireland were almost identical: both complained about the prohibition on abortion when the fetus was non-viable and how it led to their suffering. The Committee only examined Articles 7, 17, and 26 while neglecting articles 2(1), 3, and 19 based on the other articles' findings.

Under article 7, the views stated that they were vulnerable because of their non-viable pregnancy as the consequences of the Irish abortion ban aggravated their suffering. Furthermore, the Committee noted that the negative experiences were avoidable; thus, it implies that the HRC condemns the abortion ban for non-viable pregnancies. However, the Committee placed significance on the non-viability of the fetus, which could indicate that they would not see a violation of Article 7 if the fetus had survivable malformations or was just healthy. Therefore, the HRC focused on the extremes and not the general idea of continuing a pregnancy against the individual's will.

For Article 17, the Committee balanced the right of the individual against the right of the fetus, deciding that the State violated the right to privacy by interfering with both authors. The finding was logical since the pregnancies were non-viable; therefore, there was no valid reason to continue the pregnancy since giving rights to dying fetuses is pointless. Additionally, the pregnancy continuation would have only prolonged the traumatic experience for the author.

Finally, the Committee adopted the view that the State discriminated against women who terminated their non-viable pregnancy in comparison to women who miscarried or had a newborn death. Moreover, the HRC believed this distinction was not reasonable, objective, or had a legitimate purpose. While the differential treatment assessment is correct, they disregarded the sex discrimination and gender-based stereotyping argument that subjected them to discrimination according to the women. Thus, they did not investigate the possible

underlying reason for the State's abortion ban: gender discrimination, inherent in a male-dominated society.

In conclusion, the Human Rights Committee's views were progressive; however, they seemed apprehensive about going all the way. At first glance, the statements benefit women's self-determination regarding abortion, but it is all specific to the circumstances. Regardless, the views are a step in the right direction to a right to abortion.

### **Comparative analysis between ECtHR and HRC**

The Committee used a similar approach to the ECtHR when ruling on a violation of Article 7 by focusing on the vulnerability of pregnant women. It held that the mental suffering of the applicants was intensified by the external circumstances directly caused by the State, while the Strasbourg Court did the same by concentrating on the lack of lawful access and insolence by State agents. However, the Committee found that the negative experiences could have been avoided if there was no prohibition on abortion in the specific situations of the authors. In contrast, the prevention of access to lawful termination was caused by the State agents, not the domestic legislation. Moreover, the Committee saw the absence of information as an additional layer of suffering, while in R.R., the Court saw the lack of information as part of the vulnerable situation of the applicant. Furthermore, neither the ECtHR nor the HRC considered the prohibition of ill-treatment based on the forced pregnancies the State tried to achieve on the women.

The difference in the right to privacy is the most intriguing since they both deal with the article but have distinct outcomes. Where the Court ruled a violation on the procedural aspect, it had no issue with the substantive element due to the margin of appreciation awarded to Poland. Contrarily, the Committee evaluated solely whether the State's interference was arbitrary and

unreasonable. The ECtHR did not even attempt to balance the rights, whereas the HRC did and saw the irrationality in the State's argument. However, the domestic circumstances were vastly different: Ireland did not allow abortion for non-viable fetuses, while Poland did during the cases.

The Strasbourg Court did not judge its cases based on the discrimination clause in conjunction with Article 8, while the HRC did adopt a view on discrimination. However, the cause of the difference is the circumstances. The Polish cases did not have a comparator because it was focused on the lack of lawful access and the suffering it caused. In contrast, the anguish was heightened by the lack of aftercare, which the Irish State did give to women who did not abort; thus, there was a clear example of discrimination with a similarly situated comparator.

## **Conclusion**

In conclusion, there are many distinctions between the Human Rights Committee and the European Court of Human Rights approach to abortion cases. Nevertheless, when it comes to the prohibition of ill-treatment, the method is the same: namely, the focus on the aggravating circumstances on top of the vulnerable positions. However, while the cases and domestic situations were vastly different in the past, the situation has changed. Nowadays, Poland prohibits abortion when there are fetal anomalies, like Ireland's old legislation. Therefore, the Strasbourg Court can take inspiration from the Committee's views on Ireland since it has happened before. While it will not lead to the right to abortion, it could force the hand of Poland and Malta to allow abortion in specific circumstances that subject the pregnant woman to ill-treatment and/or are unreasonable when balancing the mother's rights against the fetus' rights.



## CONCLUSION

To conclude the thesis, we must answer the research question: “*How can the Court address the restriction of legal abortion as a violation of Article 3 of the European Convention on Human Rights under the meaning of degrading treatment?*”. However, first, we must draw some conclusions which will guide us toward the solution. First, we found that human dignity is an underlying element in the prohibition of ill-treatment because subjecting an individual to ill-treatment is denying them their intrinsic worth. In addition, by denying individuals their self-determination concerning abortion matters, they are reduced to an instrument that is there for the benefit of others, which again violates human dignity. Moreover, interfering in one's self-determination falls within the scope of the right to privacy. However, under Article 8 of the ECHR, the right to respect for private life, the State receives a margin of appreciation when interfering with women's decision for pregnancy termination. Thus, this path towards the right to legal abortion is blocked and cannot be overridden. Consequently, we move to the prohibition of ill-treatment, which is an absolute right under the ECHR. Under Article 3, there have been two cases where lack of access to legal abortion amounted to suffering that violated the article; however, these focused on the vulnerability of the victims and their aggravating circumstances. Nonetheless, these decisions by the Court showed that they were not willing to consider the angle of pregnancy against the individual's will as a violation of ill-treatment, even though it fits the Court-created definition of degrading treatment. Furthermore, the ECtHR was not alone in its focus on the vulnerability and aggravating circumstances of the victim to find a violation of ill-treatment since the Human Rights Committee applied the same method. Regardless, unlike the Strasbourg Court, the HRC did see a violation of the right to privacy with State interference in the mother's decision of abortion; however, it was in the instance of a non-viable fetus. The ICCPR treaty body decided the State's balancing act of the individual's rights against the fetus' was unreasonable; thus, they properly evaluated the State's

interpretation and subsequent decision. Therefore, the HRC is more progressive on abortion matters than the ECtHR since they immediately defer to the margin of appreciation in the case of private life. Nonetheless, the Court has been influenced by the HRC before; thus, taking inspiration from their method would be possible since there is precedent.

Therefore, the European Court of Human Rights can address the restriction of legal abortion as a violation of Article 3 of the ECHR under the meaning of degrading treatment by taking inspiration from the Human Rights Committee. It can adopt and adjust the Committee's evaluation method on the state's balancing act for the prohibition of ill-treatment when looking into the lack of legal abortion. Moreover, this could lead to the lack of abortion in cases of fetal abnormality, rape, incest, and the risk of the mother's life amounting to suffering that violates Article 3, particularly degrading treatment, since these situations humiliate the pregnant person and debase their human dignity. Consequently, the Court would be able to address the abortion framework in Malta and Poland while bringing victims of the legislation justice when they complain to the Court. Finally, this path may not lead to the right to legal abortion; it is a step forward in the right direction.

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