WRITTEN OBSERVATIONS

Submitted to the European Court of Human Rights

in the cases

K.C., K.B. and A.L. - B. v. Poland

(n^{os} 3639/21, 4188/21, 5876/21, 6030/21, 1819/21, 3682/21, 4957/21, 6217/21, 3801/21, 4218/21, 5114/21, 5390/21)

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Summary of the observations

These twelve applications instrumentalise the Court for political purposes by introducing an *actio popularis* against the ban on eugenic abortion in Poland. They promote eugenics, systemic stereotyping, and discrimination against people with disabilities. These applications should have been rejected by a single judge. This led former ECHR judges Javier Borrego-Borrego and Boštjan Zupančič to intervene alongside the ECLJ.

These applications are clearly inadmissible.
These applications are based on **fear and rejection of disability** and are an affront to people with disabilities who are stigmatised and discriminated against.

These applications violate the basic rules of admissibility, as the applicants have brought none of their cases before any domestic court to complain about their fear of disability. The reality of their anxiety was not established. Moreover, abortion was not the only nor the best response to the anxiety caused by fear of disability. It is possible to overcome this fear without eliminating disabled unborn children. Finally, a Polish doctor or judge may still allow a woman to abort her child if the child's disability endangered the mother's mental health.

Eugenic abortion is contrary to human rights.
Because of the very nature of the act of abortion, it can never be a right or a freedom. Poland, within its margin of appreciation, recognises the unborn child as a subject of law and grants them legal protection from conception. By granting the child the right to non-discrimination on the grounds of disability, Poland is bringing itself into line with the most recent developments in international law, which prohibit the mentioning of disability as a specific ground for abortion.

Finally, it is not the fear of disability that constitutes torture within the meaning of the Convention, but the suffering inflicted on unborn children by their eugenic abortion, which most often happens later in the pregnancy.

Procedure

The twelve applicants lodged their applications with the Court in December 2020 or January 2021, having been invited to do so by the Federation for Women and Family Planning (FEDERA) and the Helsinki Foundation for Human Rights (HFHR)[15]. The applicants argue that the ban on eugenic abortion violates their right to respect for their private lives and the prohibition of inhuman and degrading treatment under Articles 8 and 3 of the Convention respectively.

[15] Helsinki Foundation Rights Human: "Complaints of the International Bodies Protection Rights Human a so-called. predicate TK in On Abortion." (Online) ; Paulina Nowosielska, "With Abortion of the European Court? No Will to solution Easy," *Gazette Legal*, 2 February 2021 ; "Abortion in Poland. From the Eu Court has arrived thousand Complaints from Polish women – News," *News In Onet*, July 8 2021. See also this page on the FEDERA website : "Women's collective complaint: lodge an application to the European court of human rights in Strasbourg against the ruling of the constitutional tribunal on abortion."

Incompatibility* ratione materiae *of the applications with the Convention

The European Convention guarantees the right to life, not to abortion, let alone eugenic abortion which discriminates against people with disabilities.

The European Convention does not either offer any protection against the stress and anguish of expecting a disabled child, and not being able to abort him. The claims are therefore manifestly unfounded.

Lack of victim status

Should the Court find these applications admissible, it should be noted that none of the applicants has sought to have a eugenic abortion in Poland, and thus have it refused. None of the applicants is an actual victim, or even a potential victim, as those who are pregnant are expecting a healthy child. Moreover, at the time the applications were filed and thus the facts of the case, eugenic abortion was not yet prohibited in Poland. The relationship between the applicants' situation and the ban on eugenic abortion is therefore based on mere conjecture, which is not sufficient to recognise them as potential victims[16]. The applicants were therefore not "victims" of the ban within the meaning of Article 34 of the European Convention.

Moreover, even if one of the applicants had been pregnant with a disabled child when she filed her application with the Court, the mother cannot, without distortion, be considered a victim of her child's life and disability.

Non-exhaustion of remedies

The applicants did not lodge applications before the domestic courts, even though these could be successful. Indeed, assuming that the applicants' anxiety about disability were really "torture," the domestic court could apply the exception provided for in the Family Planning Act of 7 January 1993 in the event of a threat to the pregnant woman's health as a result of that anxiety.

In fact, the present applications constitute an *actio popularis*, *i.e.*, an application brought by persons who are not victims and who are instrumentalising the Court with the aim of changing domestic legislation. Article 34 of the Convention does not recognise[17] nor admit[18] *actio popularis* and "*it does not permit individuals to complain against a law in abstracto simply because they feel that it contravenes the Convention*."[19] It does not allow for a direct challenge before the Court of national provisions on the grounds that they might, potentially, prove unfavourable to the applicant. Such an appeal violates the subsidiary and judicial - not political - character of the European Court.

These applications are therefore manifestly inadmissible and must be dismissed.

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[16] *Senator lines Ltd v. 15 member states* (dec.) [GC], No. 56672/00, 10 March 2004.
[17] *Klass and Others v. Germany*, No. 5029/71, 6 September 1978, § 33; *Georgian Labour Party v. Georgia* (Dec.), 8 July 2008, No. 9103/04 ; *Burden v. United Kingdom* [GC], No 13378/05, 29 April 2008, § 33.
[18] *Perez v. France* [GC], No. 47287/99, 12 February 2004, § 70.
[19] *Norris v. Ireland*, No. 8225/78, 26 October 1988, § 31 ; *Monnat v. Switzerland*, No 73604/01, 21 September 2006, §§ 31-32 ; *Dudgeon c. R-U*, No. 7525/76, 22 October 1981, §§ 40-41.

No interference

Should these applications be declared admissible, the prohibition of eugenic abortion does not constitute an interference with nor a violation of the applicants' rights under the Convention. We shall recall A.) the absence of a right to abortion under the Convention and B.) the obligation under international law to remove the reference to "disability" as a specific ground for legal abortion. Finally, we shall show that C.) the prohibition of torture and inhuman and degrading treatment requires not the legalisation of eugenic abortion, but its prohibition, especially when one considers the fact that it is usually performed late in life, when the foetus can feel pain. In the absence of interference with a Convention right, there is no need to question its legal basis, purpose, and proportionality.

The real question in relation to eugenic abortion is whether its practice - and not its prohibition - is consistent with human rights.

A. <u>The absence of a right to abortion under the Convention</u>

1. Abortion cannot be an individual freedom or a human right

As long as the embryo or foetus is recognised as a living being "belonging to the human species"[20] abortion can neither be a freedom nor a right, but at most a derogation from the right to life, permitted as a lesser evil.

a. *Abortion cannot be an individual freedom*

A freedom consists in the exercise of a natural faculty of the person, such as the faculties to think, to express oneself, to move or to found a family. The Convention protects the exercise of these natural faculties against arbitrary interference by the State. These freedoms, like all freedoms, are limited by "others," whether it be the rights of third parties, public health, or public safety. Abortion is not a natural faculty, but a medical act. Moreover, unlike freedoms that find their limits outside themselves, "in others," abortion finds its limit in itself, because it concerns "others." Now, only power can be exercised over others, not freedom. Thus, as soon as one recognises the existence of the foetus as a human reality, even if only potential, distinct in certain respects from the woman who carries him, it is impossible to describe abortion as a "freedom." Moreover, in practice, no one can have an abortion "freely": there are always material, if not legal, conditions.

To argue that abortion is a freedom necessarily implies the error of ignoring the alterity and humanity of the human embryo and foetus.

b. *Abortion cannot be a right*

The Convention mainly guarantees freedoms, in the form of the "right to respect for the freedom to," considering that the State has a duty not to interfere with the proper exercise of the natural faculties of the person. As there is no freedom to abort, there can be no right to respect for the freedom to abort.

[20] *Vo v. France*, [GC], No. 53924/00, 8 July 2004, § 84.

Every individual right implies the existence of a correlative duty of the State towards that person. The state not only has a duty to respect freedoms, it also has obligations arising from its own function, including ensuring peace and justice. Thus, the right to a fair trial is based on the state's duty to ensure justice. In the case of abortion, however, there is no state duty that could imply a correlative and general right to abortion, considering that the state has, first and foremost, a duty to protect the lives of its citizens. It is only when the life of the mother is in danger that the question of abortion, as a possible component of the right to care, arises.

More fundamentally, one must remember that the object of a right is necessarily an act that is good in itself, and fair, such as caring for a child and his mother. An act such as abortion cannot be desired for its own sake (unlike true rights), but only as a lesser evil, by way of derogation, and in view of a good proportionate to the evil consented to, such as the life of the mother. Therefore, abortion is, legally, never designed as a right, but always as a derogation, subject to conditions, to the right to life. To declare abortion as a right, and no longer as a derogation, would have the effect of breaking the coherence of human rights and introducing contradiction into them by opposing, in particular, the "right" to abortion to those of the medical professions, or to those of disabled people.

Moreover, the recognition of a right to abortion would undermine the universal anthropological foundation of human rights because it implies replacing the inherent dignity of the human being (whatever his or her condition) by the individual will as the ultimate foundation of human rights. The purpose of human rights is to place the respect for dignity above the will, whether it be the will of the sovereign or that of individuals. To place the individual will at the foundation of human rights is a return to the positivism against which human rights were established.

The theoretical impossibility of abortion being an individual freedom or a human right is verified in practice: abortion is at most an exception to the right to life.

Indeed, no state involved in the drafting of the European Convention on Human Rights allowed abortion at the time, which was, on the contrary, criminally condemned. In 1979, the Parliamentary Assembly of the Council of Europe (PACE) still recognised "The rights of every child to life from the moment of conception"[21] and stressed, a few years later, "that, from the moment of fertilisation of the ovule, human life develops in a continuous pattern."

At the same time, the World Medical Association[22] took the initiative to update the Hippocratic Oath by adding a Geneva Oath in 1948 in the spirit of the San Francisco Charter. In this text, physicians promise to maintain "the utmost respect for human life from its start" and to refuse to allow "considerations of religion, nationality, race, party politics or social standing to intervene between my duty and my patient."[23]

[21] APCE, Recommendation 874 (1979) of 4 October 1979 on a European Charter on the Rights of the Child.
[22] APCE, Recommendation 1046 (1986) of 24 September 1986 relating to the use of human embryos and fetuses for diagnostic, therapeutic, scientific, industrial and commercial purposes.
[23] The World Medical Association (WMA) is a Confederation of Professional Associations established in 1947 in the spirit of the Charter of the United Nations and the two Nuremberg Trials. It aims "*to ensure the independence of physicians, and to work for the highest possible standards of ethical behaviour and care by physicians, at all times. This was particularly important to physicians after the Second World War*."

2. The Convention and the Court do not explicitly exclude the unborn child from the scope of the Convention

The Court has never held that - in the order of the Convention - the unborn child be not a person. Cautiously, it has always refused, since *Brüggemann and Scheuten v FRG*[24] and *R. H. v. Norway*[25] to exclude the unborn from the field of application of the Convention and to declare that he/she be not a person within the meaning of the Convention. declare that the latter is not a person within the meaning of Article 2 of the Convention, considering that "Article 2 of the Convention is silent as to the temporal limitations of the right to life."[26] President Jean-Paul Costa explained "*Had Article 2 been considered to be entirely inapplicable, there would have been no point – and this applies to the present case also – in examining the question of foetal protection and the possible violation of Article 2, or in using this reasoning to find that there had been no violation of that provision.*"[27] It must be noted that the Court examines the harm to the life of unborn children on the basis of Article 2.[28] Moreover, the Court has already applied other treaty provisions before birth, in particular Articles 3 and 8, in cases where the father complained about the torture suffered by the child during the abortion[29] and the violation of the respect for their family life.[30]

It is because the Court has never explicitly excluded the unborn child from its protection that Article 8 of the Convention, which guarantees the right to personal autonomy, "cannot … be interpreted as conferring a right to abortion."[31] Indeed, the unborn children would have to be set to naught in order to have a right to power over their lives. In its jurisprudence, the European Court has stipulated that the Convention guarantees neither the right to have an abortion[32] nor the right to practise one[33]. It does not even grant the right to have an abortion in another country with impunity.[34] The Court has also ruled that the prohibition of abortion does not violate the Convention.[35] There is thus no right to abortion under the European Convention. Thus, there is no right to abortion under the European Convention.

Although the Court does not exclude, as a matter of principle, the unborn child from the scope of the Convention, it does allow States, within their margin of appreciation, to determine in their domestic legal order "when the right to life begins"[36] and therefore of its protection. As a result, it is "legitimate for a State to choose to consider the unborn to be such a person and to aim to protect that life."[37] The Court thus refers the question of the starting point of life and its protection to domestic legal orders. The fact that most European States permit abortion is

[24] *Brüggemann and Scheuten c. Federal Republic of Germany*, No. 6959/75, 19 May 1976, § 60.
[25] *H. v. Norway* (Dec.), No. 17004/90, 19 May 1992, p. 167.
[26] *Vo, op. cit.*, § 75.
[27] Separate Opinion *Vo, op. cit.*, § 11.
[28] See for example *Şentürk v. Turkey*, No 13423/09, 9 April 2013, § 107.
[29] *H. v. Norway, op. cit.*
[30] *Ibid*; *Boso v. Italy*, 50490/99, 5 September 2002.
[31] *A, B and C v. Ireland* [GC], No 25579/05, 16 December 2010, § 214; *P. and S. v. Poland*, No. 57375/08, 30 October 2012, § 96.
[32] *Silva Monteiro Martins Ribeiro v. Portugal*, No. 16471/02, 26 October 2004.
[33] *Jean-Jacques Amy v. Belgium*, No 11684/85, 5 October 1988.
[34] *Jerzy Tokarczyk v. Poland*, No. 51792/99, 31 January 2002.
[35] See notably in *A, B and C v. Ireland op. cit.*, applicants A and B who unsuccessfully challenged the ban on abortion on grounds of health and welfare.
[36] *Vo, op. cit.*, § 82.
[37] *A, B and* C, *op. cit*, § 222, confirming *Vo, op. cit.*

separate from, and has no effect on, the freedom of States to determine the starting point of the right to life and its protection.

3. States may recognise the unborn child as a "person" within the meaning of the Convention, as part of their margin of appreciation

Poland has chosen to recognise the unborn children as subjects of law and grants them legal protection from the moment of conception. Article 1 of the Act of 7 January 1993 on family planning, the protection of the human foetus and the conditions for carrying out abortions provides that "The right to life shall be protected, including during the prenatal phase, within the limits set by law."[38] This recognition has constitutional value and is based on Articles 30[39] and 38[40] of the Constitution, which respectively guarantee the inalienable dignity of the human being and the right to life. The statement of this legal protection from the moment of conception does not date from the judgment of October 2020 (case K 1/20) but confirms the judgment of 28 May 1997 (case K 26/96), in which the Constitutional Court stated that "From its beginning, human life thus becomes a constitutionally protected value. This also applies to the prenatal phase" (3) and that "life, including prenatal life, is one of the fundamental constitutional values" (4.1). Thus, on 22 October 2020, the Constitutional Court "confirmed that human life is a value at every phase of development and, as a value deriving from the provisions of the Constitution, it must be protected by the legislator." (§ 151), before concluding that "the unborn child, as a human being - a human - endowed with inherent and inalienable dignity, is a subject with a right to life, and therefore the legal system - in accordance with Article 38 of the Constitution - must guarantee him appropriate protection of this essential interest without which his nature as a subject of law would be denied" (§ 151). Since Poland recognises the child as a "subject of law" from before birth, it is legitimate to grant him or her the protection of his or her life and dignity, and even the protection of the European Convention, in accordance with the doctrine of the conditional applicability of the Convention.

This choice of the Polish legislator is not unique. It is also the case, notably, of Italy, which recognises the embryo as a "subject" (Act No. 40/2004) and of the CJEU, which, in the *Brüstle/Greenpeace eV* judgment, C-34/10, of 18 October 2011, recognised that from the moment of conception, the human embryo enjoys the protection accorded to a human being.

Poland's choice is in line with Article 53 of the Convention recalling the principle that States are free to provide a higher degree of protection of human rights,[41] as well as with Article 27 of the Oviedo Convention stating that none of the provisions of the Convention may be interpreted "as limiting or otherwise affecting the possibility for a Party to grant a wider measure of protection with regard to the application of biology and medicine than is stipulated

[38] "This provision must ... be read in a declarative manner": see Constitutional Court, judgment of 22 October 2020, case K 1/20, § 146.
[39] Art. 30 of the Polish Constitution: "The inherent and inalienable dignity of man is the source of the freedoms and rights of man and of the citizen. It is inviolable and its respect and protection are the duty of the public authorities."
[40] Art. 38 of the Polish Constitution: "The Republic of Poland guarantees every man the legal protection of life."
[41] European Convention on Human Rights, art. 53, "Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party."

in this Convention." Obviously, Poland can grant more extensive protection to the unborn child than the minimum required by the Court. A consensus in favour of less protection cannot force a State to reduce the protection it grants. The reference to consensus can only serve to raise the overall level of protection of rights, not to reduce it.[42]

4. If States decide to legalise abortion, they must do so within a legal framework that respects the other principles, rights and freedoms guaranteed by the Convention, including the protection against non-discrimination

While states may legalise abortion, the protection of life and the prevention of abortion are international obligations. Indeed, at the 1994 Cairo Conference, governments committed to "take appropriate steps to help women avoid abortion, which should in no case be promoted as a method of family planning" (7.24) and to "reduce the recourse to abortion" (8.25). This commitment was renewed the following year at the Fourth World Conference on Women, with states affirming that "every effort should be made to eliminate the need for abortion" (§ 160.k).[43] PACE also called on European states "promote a more pro-family attitude in public information campaigns and provide counselling and practical support to help women where the reason for wanting an abortion is family or financial pressure" (PACE, 2008).

While, according to the European Court, "a broad margin of appreciation is accorded to the State as to the decision about the circumstances in which an abortion will be permitted,"[44] the legal framework devised for this purpose should be "shaped in a coherent manner which allows the different legitimate interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention."[45] Thus, if a State decides to allow abortion, then its legal framework must comply with the Convention. When dealing with a particular case, it is then for the Court to "supervise whether the interference constitutes a proportionate balancing of the competing interests involved."[46]

The Court has already identified several competing rights and interests in the case of abortion. Abortion is not simply a question of the rights of the mother versus the rights of the unborn child. As the Court has repeatedly emphasised, "The woman's right to respect for her private life must be weighed against other competing rights and freedoms invoked including those of the unborn child."[47] Indeed, "pregnancy cannot be said to pertain uniquely to the sphere of private life"[48] of the woman, and "Article 8 § 1 cannot be interpreted as meaning that pregnancy and its termination are, as a principle, solely a matter of the private life of the mother."[49]

[42] *Bayev and Others v. Russia*, No. 67667/09, 20 June 2017, § 70.
[43] Programme of Action of the United Nations International Conference on Population and Development, Cairo, 5-13 September 1994.
[44] *A., B. and C.*, *op. cit.*, § 249.
[45] *Ibid*, § 249; *R. R. v. Poland*, No. 27617/04, 26 May 2011, § 187; *P. and S. v. Poland op. cit.*, § 99; *Tysiac v. Poland*, No. 5410/03, 20 March 2007, § 116.
[46] *A., B. and C.*, *op. cit.*, § 238.
[47] *Tysiac*, *op. cit.*, § 106; *Vo*, *op. cit.* §§ 76, 80 et 82; *A., B. and C.*, *op. cit.*, § 213.
[48] *Brüggemann*, *op. cit.*, §§ 59- 61 and *Boso*, *op. cit.*
[49] *Ibid*, § 61.

Other legitimate rights and interests are at stake. In addition to those of the unborn child,[50] the Court has been able to identify the legitimate interest of society in limiting the number of abortions[51] or in protecting morals.[52] Within the scope of Articles 3 and 8 of the Convention, the Court applies the prohibition of torture and inhuman and degrading treatment[53] from before birth. It also recognises that the right to respect for the family life of the "potential father"[54] and the potential grandmother[55] is affected by the abortion of their child or grandchild. The Court also recognised the State's obligation to inform women of the risks associated with abortion.[56] It also recognised that other rights may be affected in specific situations, such as the freedom of conscience of health professionals[57] and the autonomy and ethics of medical institutions.[58]

B. Abortion on the grounds of disability violates the principle of non-discrimination

The principle of non-discrimination applies almost autonomously, without the need to demonstrate a violation of the Convention, as long as the matter in question "falls" within the scope of the Convention.[59] It is therefore not necessary to consider the foetus a person under the Convention in order to apply the principle of non-discrimination to the practice of abortion on grounds of disability. It is sufficient to consider that their life, and this practice, fall within the scope of the Convention, which is the case.

According to the **UN Committee on the Rights of Persons with Disabilities** (CRPD), "Laws that explicitly permit abortion on the basis of disability violate the Convention on the Rights of Persons with Disabilities," in particular because such abortion "perpetuates notions of stereotyping disability as incompatible with a good life."[60] For the Committee, abortion on the grounds of disability is in itself discrimination that stigmatises people with disabilities.

Since 2011, this Committee has already ruled regarding Spain, Austria and Hungary that fetal impairment should not be the subject of a specific abortion regime, particularly with regard to the legal time limit which, in some countries, can be very late in case of disability.[61] The Committee also recommended that the United Kingdom "amend its abortion law

[50] *Tysiac*, *op. cit.*, § 106 ; *Vo*, *op. cit.* §§ 76, 80 et 82; *A., B. and C.*, *op. cit.*, § 213.
[51] *Odièvre v. France* [GC], No. 42326/98, 13 February 2003, § 45.
[52] *Open Door and Dublin Well Woman v. Irlande,* Nos. 14234/88, 14235/88, 29 October 1992, § 63; *A., B. and C.*, *op. cit.*, §§ 222-227.
[53] See *Boso*, *op. cit.*
[54] *X. v. The United Kingdom*, No 7215/75, 5 November 1981.
[55] *P. and S.*, *op. cit.*
[56] *Csoma v. Romania*, No. 8759/05, 15 January 2013.
[57] *Tysiac*, *op. cit.*, § 121 ; *R. R.*, *op. cit.*, § 206.
[58] *Rommelfanger v. The Federal Republic of Germany* (Dec.), No. 12242/86, 6 September 1989.
[59] See, for example, *Sommerfeld v. Germany* [GC], No. 31871/96, 8 July 2003. § 53; *A.H. and Others v. Russia*, Nos. 6033/13 and 15 Others, 17 January 2017, § 380.
[60] Committee on the Rights of Persons with Disabilities (CRPD), Comments on the draft General Comment No. 36 of the Human Rights Committee on article 6 of the International Covenant on Civil and Political Rights, 2018.
[61] CRPD, Conclusion of the comments on Spain, 2011, § 17 and § 18; Conclusion of comments on Austria, 2013, § 14 and § 15 ; Conclusion of the comments on Hungary, 2012, § 17 and § 18.

accordingly," finding that "Women's rights to reproductive and sexual autonomy should be respected without legalizing selective abortion on the ground of foetal deficiency."[62]

This position is in line with the intention of the drafters of the Convention on the Rights of Persons with Disabilities, but also of the Universal Declaration of Human Rights. Indeed, during the drafting of the Universal Declaration, the Danish diplomat Bodil Begtrup, recommended providing for exceptions to the respect for the right to life in order to allow "the prevention of the birth of mentally handicapped children" and of children "born of parents suffering from mental illness."[63] This proposal was rejected, notably because of its similarity to Nazi legislation.

Even more explicitly, the **UN Special Rapporteur on the Rights of Persons with Disabilities**, Ms. Catalina Devandas Aguilar, denounced in her 2020[64] report to the Human Rights Council the ideology that there are "Lives not worth living," echoing the title of Binding and Hoche's famous 1920 book that founded Nazi eugenics policy. Ms. Devandas Aguilar herself has spina bifida, a major cause for abortion. She was herself one of the main drafters of the Convention on the Rights of Persons with Disabilities.

The Convention on the Rights of Persons with Disabilities, for example, opposes disability or health status as a specific ground for abortion, as this constitutes discrimination on the basis of disability. Abortion legislation must apply equally to unborn children, regardless of their health status. There must be equal treatment, whether access to abortion is restricted, as in Poland, or very broad, notably regarding time limits. However, the CRPD notes that this prohibition is binding on the State, but does not prevent parents from aborting a child, considering the child's disability, especially when the child's disability endangers the life or health of the mother.

The position of the CRPD does not differ from that of the Polish Constitutional Court, which in its judgment of October 22, 2020, affirmed in substance that the mere fact of an incurable disability or illness of the child in the prenatal phase, linked to considerations of a eugenic nature or relating to the possible discomfort of the life of the sick child, cannot alone decide on the admissibility of the abortion.[65]

It can be observed that the same approach is taken by the Committee on the Elimination of Discrimination against Women (CEDAW) against sex-selective abortion (gendercide),[66] which is condemned as discrimination.

The **United Nations Human Rights Committee** has changed its position on eugenic abortion, gradually abandoning the reference to disability as a specific ground for exception to abortion, in favour of the reference to non-viability alone. Indeed, its previous position was

[62] CRPD, Conclusion of the comments on the United Kingdom and Northern Ireland, 2017, §12 and §13.
[63] UN Women, Proposal of the Working Group of the Commission on the Status of Women, Travaux préparatoires, E/CN.4/SR.35, p. 1266.
[64] Human Rights Council, 43rd session, 24 February-20 March 2020, Report of the Special Rapporteur on the rights of persons with disabilities, doc. A/HRC/43/41.
[65] See Constitutional Court, judgment of 22 October 2020, case K 1/20, § 163.
[66] Committee on the Elimination of Discrimination against Women, Concluding Observations: China, §17-18, UN. UN Doc. CEDAW/C/CHN/CO/6 (2006); Carole J. Petersen, Justice Reproductive, Public Policy, and Abortion on the Basis of Fetal Impairment: Lessons from International Human Rights Law and the Potential Impact of the Convention on the Rights of Persons with Disabilities, 28 J.L. & Health 121 (2015) available at http://engagedscholarship.csuohio.edu/jlh/vol28/iss1/7

that States are not under a treaty obligation to legalize abortion, but must make exceptions "in cases of rape, incest, danger to the life or health of the mother, or fetal unviability due to an abnormality."[67] In more recent Observations, the Human Rights Committee no longer refers to malformation, indicating that abortion should be possible when the child is "non-viable."[68]

The Human Rights Committee's position falls short of the requirements of the Committee on the Rights of Persons with Disabilities, which opposes the view that lethal foetal impairment should be a specific ground for abortion, noting that "*Even if the condition is considered fatal, there is still a decision made on the basis of impairment. Often it cannot be said if an impairment is fatal. Experience shows that assessments on impairment conditions are often false*."[69]

The Polish government seems to want to align with the position of the Human Rights Committee, since on October 30, 2020, it introduced a bill providing for the possibility of abortion in case of non-viability of the foetus.

It should also be noted that in its October 2020 decision, the Constitutional Court encouraged the legislator to introduce measures to support families raising a disabled child. It did judge that "*The legislator cannot place the burden of raising a child with a serious and irreversible disability or an incurable disease on the mother alone, since it is primarily the responsibility of the public authorities and society as a whole to care for people in the most difficult situations*" (§ 184).
In addition to financial aid for people with disabilities, particularly within the framework of the "Rodzina 500 +"[70] program, awareness-raising campaigns are underway, with the support of the Government, to promote the reception, training, employment and non-discrimination of people with disabilities. This is particularly the case with the campaigns "Stop Barierom," "Niewidzialna Niepełnosprawność" (Invisible Disability), "Poczta Polska bez barier."

C. The prohibition of torture requires the prohibition of late eugenic abortion

1. The applicants' distress is not torture within the meaning of the Convention

The applicants' anguish is caused by their fear of disability

The applicants' distress is caused by their fear of disability, not by the prohibition of eugenic abortion. The fact that some people suffer from a characteristic of their (potential) children, be it disability, sex, colour or other, is not caused by the absence of a right to abort children with that characteristic, but by the intolerance and discrimination, encouraged by society, regarding

[67] Human Rights Committee, Conclusion of the comments on Honduras, 2017, § 17.
[68] Human Rights Committee, Conclusions of the observations on Jordan, 2017, § 21; Conclusion of observations on Mauritius, 2017, § 16; Conclusion of comments on Cameroon, 2017, § 22; Conclusion of the observations on DRC, 2017, § 22; Conclusion of the observations on the Dominican Republic, 2017, § 16.
[69] CRPD, Comments on the draft General Comment No. 36 of the Human Rights Committee on article 6 of the International Covenant on Civil and Political Rights, 2018.
[70] See, for example. Marlena Słupińska-Strysik, « 500 plus for the disabled », 4 May 2021 (Online); Luiza Bebłot, « Instead of 500+ even 1500+. Who can benefit from the changes? », Good morning tvn, 29 January 2021 : https://dziendobry.tvn.pl/newsy/1500-na-dziecko-niepelnosprawne-poslowie-proponuja-zmiane-w-programie-500-da326705-5317578.

disability. Before the fear of disability, it is not the disabled who should be eliminated, but the prejudices.

Contrary to what the applicants argue, abortion is not the only response to the fear of disability, let alone a response required by human rights. On the contrary, in response to the fear of disability, Poland has engaged in awareness campaigns.

The applicants' anxiety is not attributable to the state

The applicants' anxiety is caused by the fear of having a disabled child; however, this fear, as well as the disability, is not attributable to the State.

Moreover, pregnancy is not an inevitability from which the State has an obligation to protect women. The State, on the other hand, following the prohibition of eugenic abortion, has considerably increased public aid to disabled people and their relatives. Abortion is not the only answer to disability.

The applicants' distress is relative

The applicants have not provided any evidence of their distress, nor any objective elements that would make it possible to evaluate it and show that it reaches the threshold required for the application of article 3. First, it should be recalled that for there to be a violation of the applicants' rights protected under article 3, there must first have an ill-treatment. The applicants were not denied any medical care, nor were they denied any abortion. The applicants are therefore not victims of treatment prohibited by Article 3.

Moreover, ill-treatment must reach a minimum threshold of severity to fall within the scope of Article 3.[71] In general, such treatment involve bodily harm or severe physical or mental suffering.[72] Below such consequences, the Court has sometimes been able to qualify treatment as "degrading" by assessing not only the treatment itself but also its subjective consequences. In this case, to be qualified as "degrading," the treatment must at least "arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance."[73] Moreover, for the Court, Article 3 is "one of the most fundamental values of democratic societies."[74]

In *A, B and C v. Ireland*, the Grand Chamber held that legal restrictions on abortion, including its prohibition, could not in themselves fall under Article 3.[75] The applicants' complaints under Article 3 of the Convention were then rejected as manifestly unfounded.

Nor did the applicants provide any evidence that the suffering caused to the woman by the possibility of the birth of a disabled child was worse than that suffered by the child during the

[71] *Muršić v. Croatia* [GC], No. 7334/13, 20 October 2016, § 97.
[72] *Ibid.*, § 98.
[73] *Ibid. S*ee also, notably, *Idalov v. Russia*, [GC], No. 5826/03, 22 May 2012, § 92; *Pretty v. The United Kingdom*, No. 2346/02, 29 April 2002, § 52, as well as *Ananyev and Others v. Russia*, No. 42525/07 and 60800/08, 10 January 2012, § 140, and *Varga and others c. Hungary*, No. 73957/01, 10 March 2015, § 70.
[74] *Bouyid v. Belgium* [GC], n° 23380/09, 2015, § 81.
[75] *A, B and C, op. cit.*, § 165.

late-term abortion (see below). In this regard, the Court has already considered that the psychological impact of the abortion is "this is by its nature subjective, personal and not susceptible to clear documentary evidence or objective proof."[76] On the other hand, the suffering suffered by the foetus is scientifically established.

Moreover, unlike the applicants' claim, there is testimonies from parents that it is less violent for the children and their parents to let the child be born and die naturally.

Fathers are ignored in these applications

The petitioners act before the Court as if the hypothetical children were fatherless. However, a father may take responsibility and support his wife in fostering a disabled child, just as he may suffer terribly from the woman's unilateral decision to abort their child. The father may also offer to raise the disabled child on his own if the mother does not want it.

2. The suffering caused by late-term abortion is torture

The prohibition of torture and inhuman treatment does not require the legalization of abortion, but rather its prohibition, especially when one considers the conditions of eugenic abortion, which is most often performed late in life, after the diagnosis of disability.

a. Article 3 protection benefits the unborn child

In the case of *H. v. Norway*,[77] the former European Commission, when seized by a father complaining of the suffering inflicted on his unborn child by the latter's abortion, agreed to apply Article 3 to the child. It considered the application unfounded for lack of proof of suffering of the foetus: "the Commission has not been presented with any material which could substantiate the applicant's allegations of pain inflicted upon the fetus . . . Having regard to the abortion procedure as described therein the Commission does not find that the case discloses any appearance of a violation of Article 3."

This suffering of the foetus is nowadays scientifically proven, especially in the case of eugenic abortion, which is generally performed late in pregnancy, up to the time of delivery.

b. Late-term abortion is torture

Late-term abortion is technically difficult to perform (at 20 weeks, the complication rate is ten times higher than before 10 weeks, according to official statistics in the United Kingdom)[78] and sometimes viable babies who were supposed to be aborted are born alive. After 21 weeks, some can breathe without help for a long time. Being born alive after an abortion is not unusual. This possibility is listed in the WHO list of diseases in Chapter XVI, *Certain conditions originating in the perinatal period*, rubrique P96-4, *Termination of pregnancy affecting fœtus and newborn*.[79]

[76] *Ibid*, § 126.
[77] *H. v. Norway*, *op. cit.*
[78] Ministry of Health, United Kingdom, "*Abortion Statistics, England and Wales: 2011*", National Statistics, May 2012, p. 22, chart 8.
[79] The document is available on the WHO website.

When a pregnancy is terminated at sixteen weeks or more, the method used is often to induce birth. Most of the time, the baby's heart stops during the contractions, and he is born dead. However, some babies do survive labour, and the number increases with gestational age. From 22-24 weeks, since it is common for the baby to be born alive, most often foeticide is performed, with an injection into the cord or sometimes directly into the baby's heart, preceded or not by anaesthesia, to stop the heart. This is a technically difficult procedure, which can therefore have a high failure rate. According to one study, the success rate is 87 %, in other words, there are 13 % of "failures" in which the child is born alive and sometimes viable.[80] In this case, the baby is abandoned to death, or killed, usually by asphyxia or by injection of anaesthetic used for the epidural.

In some countries, such as the United Kingdom, the Netherlands and Canada, the "dilatation and evacuation" method is used.[81] It consists of dilating the cervix and then extracting the foetal limbs with forceps. If there was no prior injection to cause foeticide (as in England), or if the injection did not cause the death of the foetus, this means that the foetus was alive while it was being dismembered.

Other scientific studies also show that the foetus is responsive to touch by 8 weeks, and he feels suffering by the 14th week.[82] At 20 weeks it has the "physical structures necessary to experience pain."[83] Researchers "have observed that the foetus reacts to intrahepatic vein needling with vigorous body and breathing movements, which are not present during placental cord insertion needling."[84] A study published in 2020 in the Journal of Medical Ethics proves that the foetus can feel pain as early as the fourth month of pregnancy. Its lead author, Prof. Stuart Derbyshire, has worked as a consultant for Planned Parenthood and the *Pro-choice forum* in the United Kingdom.[85] Another study, published in 2020 in *Nature*, confirms the ability of foetuses to feel pain, even in the absence of cerebral cortex, as long as the subcortical structures for pain perception are present.[86]

Foetal and even embryonic suffering in mammals is recognized in European law. Directive 2010/63/EU on the protection of animals used for scientific purposes[87] recognizes that "scientific knowledge is available" that "foetal forms of mammals" have "the capacity … to sense and express pain, suffering, distress and lasting harm." This justifies applying the protection of Directive 2010/63/EU to them from before birth. Thus, late-term abortion, performed on humans, would not be accepted if it were performed on animals.

[80] Nucatola D, Roth N, Gatter M., "Une étude pilote randomisée sur l'efficacité et les profils d'effets secondaires de deux doses de digoxine comme féticide lorsqu'elles sont administrées par voie intra-amniotique ou intrafœtale avant un avortement chirurgical du deuxième trimestre.", janvier 2010 81(1):67-74.
[81] Ministry of Health, United Kingdom, "*Abortion Statistics, England and Wales: 2013*", National Statistics, Table 7a p. 25, published in 2014.
[82] *Pain of the Unborn: Hearing before the Subcomm. on the Constitution, Comm. on the Judiciary House of Rep.*, 109e Congress, 1st Session, No. 109-57, 15 (1er November 2005); Pain-capable Unborn Child Protection Act, H.R. 36, 114e Congress, 1st Session, §2 (6) (14 May 2015).
[83] Glover V. "The fetus may feel pain from 20 weeks"; in *The Fetal Pain Controversy, Conscience*. 25:3 (2004) 35-37.
[84] Anand KJS & Hickey PR, *Pain and its Effects in the Human Neonate and Fetus*, 317 NEW ENGL. J. MED. 21, 1321-1329 (1987); *see also* Vivette Glover & Nicholas M. Fisk, *Fetal Pain: Implications for Research and Practice*, 106 BRIT. J. OBSTETRICS & GYNAECOLOGY 881 (1999).
[85] Derbyshire SWG, Bockmann JC., Reconsidering foetal pain, J Med Ethics 2020;46:3–6.
[86] Bellieni, C.V. "Analgesia for fetal pain during prenatal surgery: 10 years of progress", Pediatric Ressource (2020) (online).
[87] Directive 2010/63/EU of the European Parliament and of the Council of 22 September 2010 on the protection of animals used for scientific purposes, OJEU 20 October 2010, L 276/33.