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REQUIREMENTS OF INFORMED CONSENT IN THE REPRODUCTIVE SPHERE UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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INTRODUCTION

Abortion is a complex issue which concerns a wide spectrum of questions invoked in behalf unborn children, mothers, fathers, and society. Many aspects of those questions arise from religion, philosophy, ethics, sociology, medicine, biology, and law. This paper analyzesrequirements of informed consent withinthe reproductive sphere safeguarded under the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention").Here, attention is given to requirements of providing pregnant women with informed consent preceding anabortion.

Although neither a human right nor a tool of family planning, abortion, according to the European Court of Human Rights ("the Court"), falls within the scope of reproductive choice; therefore, certain aspects of access to abortion are safeguarded under human rights provisions.[1] The Court found that a Council of Europe Member State is under a positive obligation to create a procedural framework enabling a pregnant woman to effectively exercise her right of access to lawful abortion, only when a Member State, acting within its limits of appreciation, adopts statutory regulations allowing abortion in some situations.[2] The requirement of informed consent, as an aspect of

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[1]BodilNorberg, *The Right to Abortion in the Council of Europe System*. FACULTY OF LAW: LUND UNIVERSITY, 1, 41-42 (2013).

[2]GrégorPuppinck Ph.D., *Abortion and the European Convention on Human Rights*, IRISH JOURNAL OF LEGAL STUDIES VOL. 3(2), 142,158 (2013).

reproductive choice recognized or indicated by the Court, is crucial for exercise of free will.[3]

When deciding on questions of free will exercise in the reproductive sphere, the Court applies a "sufficient involvement" test, which requires Council of Europe Member States to create a procedural framework enabling pregnant women to obtain whole information on health risks that the continuation or termination of a pregnancy may present.[4] In the end, denial of medical services was found as non-compliant with the Convention.[5]

In Part One, this article examines general regulations and originsof informed consent. Two provisions of informed consent are examined.The first provision requiresdisclosure to a patient of the nature and possible consequences of medical procedures;the second provision requires that consent is freely given. Part Twoconcretizes requirements of the first provision within the reproductive sphere. Through examination of Convention case law, it is determined that the first provision requires information on health risksbe disclosed to a mother, as well as biological and medical information of afetus. Information on health risks towardsa mother encompasses information on threats to a mother's health, which may result from pregnancy and birth, as well as threats to a mother's health, which may result from an abortion. Beside immediate and direct consequences that arise from abortion, indirect and delayed consequences have been identified as information that must be disclosed. Biological and medical information on a fetus encompasses information on fetus health condition, as well as ethical information regarding its belonging to the human race and afforded human rights protections.When a Member State adopts statutory regulations allowing abortion on the grounds of fetal abnormality, full disclosure to the mother includes the health of the unborn child, whichenables the mother to exercise one of the legally permissible options. Since one of those options is to carrya pregnancy to term and give birth to a child, it is here argued that information provided to the mother must include the fetus' belonging to the human race and

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[3]*Id.*
[4]*Id.*
[5]*Id.*

the fact that as such, theunborn child enjoys human rights protectionsand guarantees.

In Part Three, requirements of freely-given consent in the reproductive sphere are considered. Since these requirements are closely connected to personal autonomy and human dignity, they are examined from the perspective of Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms.This discussion aims to describe the objective and subjective elements that need to be fulfilled in order to satisfy requirements of freely consent for compliance under Article 3 provisions. One of the specific questions of informed consent addressed herein concerns autonomy of the minors in the field of reproduction and the authorization of their parents. Thus, this paper describesthe scope and sort of Member States' obligations regarding the information disclosure appropriate to provide sufficient involvement of a woman in the decision-making process ("required explanation") surrounding abortion.

I. GENERAL REMARKS ON INFORMED CONSENT

Thestarting point in the protectionof a mother's free will is therequest for informed consent to be obtained priorto medical interventionin the reproductive sphere. Since informed consent is a legal principle, it first needs to be briefly explained. Various sources are relevant for understanding legal standards of informed consent. The Nuremberg Code, adopted in 1947, and the World Medical Association's Declaration of Helsinki are basic and reliable international statements on the duties of doctors.[6]The Declaration of Helsinki states,"If at all possible, consistent with the patient's psychology, the doctor should obtain the patient's freely given consent after the patient has been given a full explanation . . . Consent should, as a rule, be obtained in writing . . ."[7]

One regional document[8]regulating informed consent is the Convention for the Protection of Human Rights and Dignity of the

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[6]Helsinki Declaration cited A.G.M. Campbell, *Infants, Children, and Informed Consent*, 3 BRIT. MED. J. 334, 335 (1974).

[7]*Id*.

[8]*See* Rep. of the Comm. on the Elimination of Discrimination against Women, 20th Sess., Jan. 19-Feb. 5, 1999, U.N. Doc. A/54/38/Rev.1; GAOR, 54th Sess., Supp. No. 10 (1999).; Rep. on the Comm. on the Elimination of Discrimination against Women, 41st Sess., June 30-July 18, 2008, U.N.Doc. A/63/38,

Human Being with Regard to the Application of Biology and Medicine ("Oviedo Convention").[9]As recapitulated by the Court,[10] the relevant provisions of the Oviedo Convention were introduced under Article 5 asthe "[g]eneralrule." According to the relevant parts of the Explanatory Report,Article 5affirms at the international level an already well-established rule that no one may be forced to undergo an intervention without his or her consent.[11] Human beings must therefore be able freely to give or refuse their consent to any intervention involving their person. The Explanatory Report furthermore underlines that this rule makes clear patients' autonomy in their relationship with health care professionals and restrains the paternalistic approaches that might ignore the wish of the patient.[12] Thepatient's consent is considered free and informed if it is given based on objective information from a responsible health care professional, and includes the nature and the potential consequences of a planned intervention or its alternatives, absent pressure from any individual.[13]

Article 5, paragraph 2, of the Oviedo Convention contains the most important aspects of the information that should precede the intervention, but it is not an exhaustive list: informed consent may imply additional elements, depending on the circumstances.[14] In order for their consent to be valid, the persons in question must have been informed about the relevant facts regarding the intervention contemplated.[15]This information mustinclude the purpose, the nature and consequences of the intervention, and the risks involved.[16] Information on the risks involved in the intervention or other alternative courses of action must cover not

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GAOR, 63rd Sess., Supp. No. 38 (2008).; European Consultation on the Rights of Patients, Mar. 28 – Mar. 1994, *A Declaration on the Promotion of Patients' Rights in Europe*, World Health Organization (June 28, 1994).; E.S.C. Res. 2005/33, U.N. Doc. 33 C/RES/2005/15 (Oct. 19, 2005).

[9]Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, Apr. 4, 1997, E.T.S. No. 164 [hereinafter Oviedo Convention], *available at* http://www.conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=164&CM=8&DF=10/10/2014&CL=ENG.

[10]*See V.C. v. Slovakia*, App. No. 18968/07, at paras. 76-87, 106-120, Eur. Ct. H.R. (2011).

[11]*Id*.

[12]*Id*.

[13]*Id*.

[14] *Oviedo Convention, supra* note 9 at 1.

[15]*Id*.

[16]*Id*.

only the risks inherent in the type of intervention contemplated, but also any risks related to the individual characteristics of each patient, such as age or the existence of other pathologies.[17] Moreover, this information must be sufficiently clear and suitably-worded for the person who is to undergo the interventionthrough the use of terms she can understand.[18] As Article 5 reads:

> An intervention in the health field may only be carried out after the person concerned has given free and informed consent to it.
>
> This person shall beforehand be given appropriate information as to the purpose and nature of the intervention as well as on its consequences and risks.The person concerned may freely withdraw consent at any time.[19]

Typically, standards of informed consent require that health professionals, before any diagnostic or therapeutic procedure is carried out which may have any reasonable possibility of harm to the patient, explain to the patient what is involved in order to secure the understanding consent of the patient to proceed.[20]Much of the literature on informed consent deals with the special problems of particularly vulnerable groups from whom it is difficult to secure full, free, informed, and knowing consent. The classes normally referred to include pregnant women.[21]The standards of informed consent involve two main provisions: the first provision, which facilitates informed consent, requiresgiving each patient afull explanation and the second provision requiresfreely-given consent by the patient.

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[17]*Id*.
[18]*Id*. at Chap.2, art. 5, sec. 35.
[19]*Id*.
[20] J. M.D. Kirby, *Informed Consent: What Does it Mean?*, 9 J. MED. ETHICS, 69-75 (1983), *available at* http://www.jstor.org/stable/27716147; *See* http://www.michaelkirby.com.au/images/stories/speeches/1980s/vol11/1983/436-Aus_Society_for_Psychosomatic_Obstetrics_and_Gynaecology___Issues_of_Informed_Consent.pdf
[21]*Id.*

II. REQUIRED EXPLANATION IN REPRODUCTIVE SPHERE - FIRST PROVISION OF INFORMED CONSENT

Providing full explanation to a patient of the nature and possible consequences of the procedure is compulsory in legislation of Member States.[22]On anational scale, an omission of the full explanation amounts tomedical negligence, subject to civil actions orcriminal charges. In the view of the Court, Article 8 is relevant for complaints aboutthe insufficient availability of health care services.[23] Omission to provide adequate explanation before obtaining consent falls within the scope of Article 8 of the Convention,[24] which safeguards the right to respect for private and family life, and reads:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[25]

Extensively, certain aspects of explanation fall within the scope of Article 10, whichprovides a right to freedom of expression and includes the freedom to receive information.[26] But, when medical intervention occurred without the patient having been duly informed in advance by doctors, the State Party concerned was liable under Article 8.[27] In general, the Court has underlined that it is important for individuals facing

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[22]*See Calvelli I Ciglio v. Italy*, App. No. 32967/96, at paras. 32-36, Eur. Ct. H.R (2002); *Erikson v. Italy*, App. No. 37900/97, Eur. Ct. H.R (1999), *Powell v. The United Kingdom* (dec.), App. No. 45305/99, Eur. Ct. H.R (2000); see also *Isiltan v. Turkey*, App. No. 20948/92, Eur. Comm'n H.R. Dec. & Rep. 35 (1995).
[23]*Nitecki v. Poland* (dec.), App. No. 65653/01, Eur. Ct. H.R 21 (2002); *Pentiacova and Others v. Moldova* (dec.), App. No. 14462/03, Eur. Ct. H.R (2005).
[24]*See Codarcea v. Romania*, App. No. 31675/04, at § 101; *Pretty v. the United Kingdom*, App. No. 2346/02, at paras. 61 and 63, 2002-III Eur. Ct. HR.
[25]*Id*.
[26]*Open Door and Dublin Well Woman v. Ireland*, App. No. 14234/88 and 14235/88, 29 October 1992.
[27]*Trocellier v. France*, App. No. 75725/01, at § 4, 2006-XIV Eur. Ct. HR; *Vo v. France,* App. No. 53924/00, at § 89, 2004-VIII Eur. Ct. HR; *Codarcea v. Romania,* App. No. 31675/04, at § 105; and *Pretty v. the United Kingdom*, App. No. 2346/02, at § 63, 2002-III Eur. Ct. HR.

healthrisks to have access to information enabling them to assess those risks. Since, in the context of pregnancy, effective access to relevant information on the health risks to the mother and the condition of the fetus' health was judicially recognized as embodying personal autonomy,[28]when the State allows abortion,[29]it is important to discussboth factors. The following discussion attempts to describe thescope and quality of informationappropriate to provide sufficient involvement of the woman in the decision-making process ("required explanation").[30]

A. Health Risks forMothers

Under the health risks and complications towardsa mother, therequired explanation concerns threat to the mother's health which arisefrom pregnancy, its continuation, birth, ortermination.[31]It is stressed that the establishment of such relevant risks to a woman's life caused by her pregnancy clearly concerns fundamental values and essential aspects of her right to respect for her private life.[32]In the case law,these are the questions concerning an individual's access to information about her own health.[33]The law must provide effective procedural mechanisms capable of determining whether the conditions existing for obtaining a lawful abortion on grounds of danger to the mother's health orby addressing the mother's fearsregarding the condition of the fetus.[34]It also requires information be obtained in a timely manner.[35]

III. THREATS TO A MOTHER'S HEALTH IN PREGNANCY AND LABOR

Pregnancy affects the physical and mental health of a woman.Under exceptional circumstances these might be declared harmful.[36] Although approaches to the question of protection for the

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[28]*R.R. v. Poland,* App. No. 27617/04, at § 197. Eur. Ct. HR (2011).
[29]*See generally*Ligia M. De Jesus, *Treaty Interpretation of the right to life before birth by Latin American and Caribbean States*, 26 EMORY INT'L L. REV. 619, 619-622 (2012).
[30]*Id*.
[31]*Tysiac v. Poland,* App. No. 5410/03, at paras. 117, 119-124, Eur. Ct. HR (2007).
[32]*Id*.
[33]*Id*.
[34]*Id*.
[35]*R.R. v. Poland,supra* note 28, App. No. 27617/04, at § 148-162. Eur. Ct. HR (2011).
[36]*Tysiac v. Poland,supra* note 31, at 119-124.

unborn are various under the national legislations in Europe, national statutory regulations of allMember States have recognized side-effects as grounds for access to abortion.[37]

In *Tysiąc vPoland*,[38] there were indications that delivery might endanger the health of the applicant,whose health eventually deteriorated badly;however, this was not dispositive for the Court. Rather, the Court stressed its function not to determine the correctness of the doctors' clinical judgment or to speculate upon their conclusions as to whether her pregnancy would lead to the deterioration of her eyesight in the future.[39] In this case, the Court considered whether an individual, with regard to the particular circumstances of the case and notably the nature of the decisions to be made, had been involved in the decision-making process, seen as a whole, to a degree sufficient to provide her with the requisite protection of her interests.[40]The Court concluded that Poland had not complied with the positive obligations to safeguard the applicant's right to respect for her private life in the context of a controversy over whether she was entitled to a therapeutic abortion. The state failed to provide timely information on the risks to the mother's health that the delivery might present and,consequently, thesufficient involvement of the applicant in the decision-making process.[41]

IV. THREAT TO MOTHER'S HEALTH—ABORTION

In *Csomav.Roumania*,[42]a case ofmedical negligence, the Court discussed aspects of information disclosure and consent including the obligation to provide a relevant explanation to the patient regarding an abortion technique and its side effects on health and exceptions froman obligation to provide a full explanation to the patient. In *Csoma*, the abortion applicant, a nurse by profession, learned during the sixteenth week of pregnancy that the fetus was diagnosed with hydrocephalus.[43]As

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[37]*Id*.
[38]*Id.*
[39]*Id*.
[40]*Id*.
[41]*Id*.
[42]*Csoma v Roumania*, App. No. 8759/05, Eur. Ct. H.R. (2013).
[43]*Id*.

a result, shedecided that the pregnancy should be interrupted.[44]The abortion was performed by injecting concentrated glucose into her stomach. After the injection, the fetus stopped moving. Three days later, while she was still in bed in the ward and without being taken to the surgery room, she expelled the fetus. She then started bleeding profusely and was diagnosed with disseminated intravascular coagulation (DIC). Relevant exceptions in this case discussed by applicant herself,[45]concern'emergency,' 'only one course,' and 'patient knowledge.'[46]The court considered whether the termination of pregnancy was urgent and the procedure imposed upon her could be qualified as 'only one course.' Emergency is a narrow exception to the requirement ofproviding full information to the patient prior to consent given for the procedure. The 'emergency' exception requires that medical intervention must be immediate and the patient in such a condition of conscience which prevents her from expressing valid consent. This exception may be applied if the medical intervention is of extreme urgency.[47]Close to this exception is the'only one course' exception.[48]Similar to the 'emergency'exception, there is no obligation to secure informed consent where there is only one possible course open to the medical practitioner.[49]In this case, since termination of the pregnancy did not correspond to the requirements of the 'emergency' exception, the'only one course' exceptionwas excluded by the Court.[50]

In *Csoma*, the imposed method of pregnancy termination was not considered her only course.[51] Since the applicant was a nurse by profession the'patient knowledge' exception applied.[52] Under this exception, it is not necessary to secure specific consent where the patient has full knowledge of the procedure, including its risks and possibilities, either by reason of previous discussions, her own expertise, or otherwise.[53]The government argued that the applicant was "fully aware

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[44]*Id*.
[45]*Id*. at paras. 17, 35.
[46] Kirby, *supra* note 20, at 69-75.
[47]*Csoma v Roumania*, *supra* note 42, at § 51.
[48]*Id*.
[49]*Id*.
[50]*Id*.
[51]*Id*.
[52]*Id*.
[53]*Id*. at § 34-36.

of the nature of the procedure to be performed," asserting she had "both known the fetus' condition" and, as a nurse, had "extensive medical knowledge."[54] The court did not accept the government's position, "according to which the fact that the applicant was a trained nurse dispensed the doctor from following established procedures and informing her of the risks involved in the procedure."[55]

Further, the Court examined "whether the remedies at the applicant's disposal were sufficient to provide her redress for the loss suffered as a result of the medical procedure.[56]" In its examination of the case, the Court referred to "procedural shortcomings" of the intervention (lack of the compulsory written consent in the medical records), and whether a civil action against the doctor and the hospital could have constituted an effective remedy.[57] It is important to note here that apparent procedural shortcomings did not qualify as medical negligence according to the Romanian authorities.[58] On the other hand, "procedural shortcomings" were enough for the Court to treat this failure as medical negligence. Therefore,the Courtintroduced a general requirement for national authorities dealing with medical negligence.[59]The court reasoned, "The foregoing considerations are sufficient to enable theCourt to conclude that by not involving the applicant in the choice of medical treatment and by not informing her properly of the risks involved in the medical procedure, the applicant suffered an infringement of her right to private life."[60]

In order to satisfy the sufficient involvement test, the required explanation shouldinclude information relevant for the mother's health. In *Csoma v. Romania*, the Courtalso dealt with thedirect and prompt health implications of abortion anddemonstrated the high standards of required information disclosure national authorities need to comply with.Prior to an abortion,information about indirect or residual consequences of abortion should be provided.For example, there are studies showing that among young women "[t]he suicide rate associated with birth was 5.9 per

[54]*Id.* at § 37.
[55]*Id.* at § 50.
[56]*Id.* at § 50-51.
[57]*Id.* at § 60.
[58]*Id.* at § 14.
[59]*Id.* at § 61.
[60]*Id.* at § 68

100,000 births and for associated abortions was 34.7 per 100,000 abortions."[61]"[O]ver 80% [of abortions associated with suicide] were performed because of social reasons."[62]It has been concluded that the increased risk for suicide after an abortion is an indication of one of the harmful effects of induced abortion on mental health.[63]Elsewhere, researchers concluded that the elevated risk to women after terminated pregnanciesshould be recognized in the provisions of healthcare and social services agreements.[64]

A. Biological and Medical Information on the Fetus

Biological and medical information on a fetus encompasses both information on the health of the fetus as well as ethical considerations regarding its belonging to the human race and afforded human rights protections. Both of these considerations are recognized by the Court.

First, disclosure regarding the health of the fetus isalready considered compulsory when domestic law allows abortion on grounds offetal abnormality. All relevant information can have a significant impact on the decision-making process and should be provided in a timely manner, thus enabling women to lawfully provide consentunder applicable statutory regulations.

Second, disclosure of ethical considerations has not been compulsory to date, although such considerations have been recognizedby judges of the Court as relevant.[65] In recognizing the relevancy of these considerations, the Court "opted for a neutral stance"[66]that permitsdivergence inapproaches taken by Member States when determining whether unborn children belong to the human race.[67]However, since this information isrelevant to the decision-making process,required disclosures and explanations should include

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[61] Mika Gissler, et. al., *Suicides after pregnancy in Finland, 1987-94: register linkage study*, BMJ 1996; 313: 1431 (Dec. 2013), available at http://www.bmj.com/content/313/7070/1431.
[62]*Id*.
[63]*Id.*
[64] Mika Gissler, et. al., Injury deaths, Suicides and Homicides Associated with Pregnancy, Finland 1987-2000, EUROPEAN J. PUBLIC HEALTH 15(5), at 459-63.
[65]*See* Vo v. France, 2004-VIII Eur. Ct. H.R. 67, 86–91, *available at* http://www.echr.coe.int/Documents/Reports_Recueil_2004-VIII.pdf.
[66]*Id.* at 115 (Rozakis, J., separate opinion).
[67]*Id*. at 105.

information on the viabilityand the current stage of the fetus'development, as well as the child's belonging to the human race and those protectionsafforded under international agreements recognizing human rights.

V. MALFORMATION

To constitute grounds for a late-term abortion, typically,[68]it must be established that the "pregnancy or childbirth entails a serious threat to. the woman's life [or] conditions entailing a serious threat to the woman's physical or mental health have been diagnosed, including serious abnormalities or malformations of the fetus."[69] Therefore, a right to decide on the continuation or termination of pregnancy is "not absolute" in this regard.[70]In the context of access to abortion, relevant procedures should guarantee to a pregnant woman the possibility to be heard in person and to have her views considered. The competent body or person should also issue written grounds for its decision.[71] In other words, if the domestic law allows abortion in cases of fetal abnormality, there must be an adequate legal and procedural framework to guarantee that relevant, full, and reliable information on the fetus' health is available to pregnant women.[72] Retrospective measures (civil law remedies) alone were not sufficient to provide appropriate protection of personal rights of a pregnant woman in the context of a controversy concerning the determination of access to a lawful abortion. Unlike those clear Convention standards, most of the States failed to define the degree of fetus abnormality needed to constitute defenses for abortion.[73] This omission of national statutory regulation places handling practitioners into vulnerable situations since erroneous professional judgments may

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[68]*See*ALBINESER& HANS-GEORG KOCH, ABORTION AND THE LAW265–67, 266 n.202 (Emily Silverman trans., 2005).

[69]*See e.g.* Boso v. Italy, 2002-VII Eur. Ct. H.R. 457 (the Court citing relevant Italian law), *available at* http://www.echr.coe.int/Documents/Reports_Recueil_2002-VII.pdf.

[70]R.R. v. Poland, 2011-III Eur. Ct. H.R. 247–248, *available at* http://www.echr.coe.int/Documents/Reports_Recueil_2011-III.pdf.

[71]*Tysiac v. Poland,* App. No. 5410/03, *supra* note 31, at paras. 117, Eur. Ct. H.R. (2007).

[72]*R.R. v. Poland,* App. No. 27617/04, *supra* note 28, at § 200. Eur. Ct. H.R. (2011).

[73] Roman law intended to define malformation degree required to qualify newborn child as monster, which did not enjoy protection of its life. *See* XII *TabularumLeges, Tabula IV* [The Law of the Twelve Tables, Table IV].

make them subject to civil actions for wrongful life or to criminal changes where abortion is criminalized. Lack of precise norms requires medical practitioners to either take risks and make positive prognoses whichmay not be reliable since some malformations are visible only after birth, or to presume substantial risks when a positive diagnosis is not possible. Certain jurisdictions suggest such presumptions,[74] enabling medical practitioners to avoid civil actions. Elsewhere it is possible to euthanize a newborn on groundsthat a post-birth analysis may detect disability.[75]Further, a lack of precise normsexacerbates a problem alreadywidespread in practice; it also necessitates further discussion on its moral and ethical justifications.

The Court dealt with the timeliness of information disclosure about fetus health in *R.R.v Poland*.[76] In this case, the applicant had been "denied adequate and timely medical care in the form of prenatal genetic examinations,"[77] which were prescribed by law and applicable under the circumstances of this case. "Such testing would have made it possible to establish whether in her case the conditions existed for a lawful termination of pregnancy within the meaning of [national legislation]."[78]Therefore, access to a full and reliable explanation of the fetus' health was not only important for the comfort of the pregnant woman but also a necessary prerequisite for a lawful abortion. Denial of adequate and timely medical testing was characterized by the Courtas breach of Article 8 of the Convention.The court also concluded that unlawful deprivation of medical services to a pregnant woman, which are proscribed by the law,is humiliating, causing suffering enough to "reach[] the minimum threshold of severity under Article 3 of the Convention."[79]

From*M.P. and Others v Romania*,[80] which is currently pending before Court, one may expect further clarification on the definition of just what information must be disclosed in a timely manner. In this case, two

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[74]Rosamund K. Scott, *Prenatal Screening, Autonomy and Reasons: The Relationship Between the Law of Abortion and Wrongful Birth*, 11 MED. L. REV. 265, 271 (2003).
[75]Eduard Verhagen & Pieter J. J. Sauer, *The Groningen Protocol-Euthanasia in Severely Ill Newborns*, 352 New Eng. J. Med., 296 (2005).
[76]*R.R. v. Poland,* App. No. 27617/04, *supra* note 28, at paras. 148-162. Eur. Ct. HR (2011).
[77]*Id.* at § 176.
[78]*Id*.
[79]*Id*. at § 161.
[80] M.P. v Romania, App. No. 39974/10, Eur. Ct. H.R. (2010) ¶ 40, *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-111723.

applicants filed a complaint under Article 8 of the Convention alleging that the birth of a child with a disability, as a result of medical negligence, infringed upon their right to the protection of their private and family life. The medical negligence in question concerns the failure to discover the malformation and failure to properly inform applicants, which would have enabled them to make an informed decision about terminating the pregnancy. The Court will likely refrain from providing a general answer regarding whether a substantial risk of wrongful birth should be recognized as an exception to the rule in States where access to abortion is limited. However, the Court could decide thatthe child's conditionis a decisive factor in this case. When required by law, the Court cannot neglect to address the issue of whether a health condition is of such gravity to endanger the woman's physical or mental health.

The Court may also address whether adequate and timely medical testing incorporates an obligation to discover fetus malformation since the decision to carryout the pregnancy often depends on it. Timing is a critical factor in a woman's decision about whether to terminate a pregnancy.[81] In *Evans v the United Kingdom*,[82]the Court held thatdisclosure of timely information on the condition of the fetus is one of the basic conditions for properly exercising theright to 'private life,' which encompasses elements such as the right to respect for the decisions both to have and not to have a child.

Appropriately describing the content of the required informationmay alsobe linked toa medical practitioner's obligation to discover malformation, depending on the law of each State, as explained in *A. K. v Latvia*.[83]Here, the Court could have answered how far a medical practitioner is expected to go in order to discover fetus malformation but refrained from doing so for procedural inconsistencies.[84]In this case doctor issued a referral for the applicant to undergo an alpha-fetoprotein (AFP) test. Later, the applicant gave birth to a daughter suffering from Down's syndrome. Under State law, the pregnant women must be given

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[81]P. and S. v. Poland, App. no. 57375/08, at § 111, Eur. Ct. H.R. (2012)

[82] Evans v. United Kingdom, 43, at § 71 Eur. Ct. H.R. 21 (2007)

[83] A.K. v. Latvia, App. No. 33011/08, 2011 Eur. Ct. H.R., at § 15 Eur. Ct. H.R., *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145005; *see id*., (Kalaydjieva, J., separate opinion).

[84]*See id*. (Mahoney, J., dissenting).

an AFP test.[85]The Court, having already used 'conditional applicability' of the Convention in situations when the State failed to implement its own legislation in regard to Article 8,[86] it is possible that if it had found that the State failed to provide complete antenatal care, as prescribed by the domestic law, it would be enough to constitute abreach of the applicant's rights.

Further, the intent of this provision is to preserve the physical and mental health of mothers.Therefore, mere eugenics was not directly introduced as abortion defense. Although eugenics as grounds for abortion could be analogously found at the regional scale in the COE Resolution 1829 (2011), it could also be observed in regard to universal instruments such as the Rome Statute and its prohibition against genocide.[87]Application was logged before the International Criminal Court, which claims that abortion on grounds of chromosomal disorder stands against prohibition on genocide since it prevents births within the certain group.[88]

Treatment based on disability stands against universal[89] and regional[90] human rights guarantees. Those guarantees should be applicable starting from the prenatal period. Under national statutory regulations of most States, killing afetus after a certain point of gestation constitutes the*actus reus* of a criminal offense. However, at the same point in gestation, killing a fetus with an abnormality is allowed. Typically, protections to disabled persons are afforded only after birth. The scope of their rights is unjustifiably narrower. Discussions on this issue are not new,[91] and there are national legislators which reviewing statutory regulation in this light.[92] Some other characteristics of the unborn were

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[85]*Id*. at § 33.
[86] A, B and C v. Ireland, 53, at § 277, Eur. Ct. H.R. 13 (2010).
[87]*Rome Statute of the International Criminal Court*, Article 6 (2011) http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf.
[88]Savings Down,http://www.savingdowns.com/action-so-far/#ICC
[89]Article 7 of the Convention on the Rights of Persons with Disabilities, http://www.un.org/disabilities/default.asp?id=267 (last visited Oct. 16, 2013). *See also* Convention on the Rights of the Child, http://www.ohchr.org/en/professionalinterest/pages/crc.aspx.
[90]Parliamentary Assembly, *Recommendation 874 (1979) on a European Charter on the Rights of the Child*, http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta79/erec874.htm#1.
[91]*See* RITA JOSEPH, HUMAN RIGHTS AND THE UNBORN CHILD 141-179 (Koninklijke Brill, 2009).
[92] Graciela Rodriguez-Ferrand, *Spain: Abortion Reform Proposed*, http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205403834_text.

already recognized at the regional level as prohibited to be taken as a ground for abortion or *in vitro* created embryo destruction.[93] True, this source allows abortion and destruction if there is a potential disability but conceptual novelty is in prohibiting gender to be taken as grounds for it. Further developments should stream toward exclusion of all other discriminative abortion defenses including any kind of abnormality.

VI. HUMAN BEING

This aspect of required explanation has been discussed since Convention institutions recognized that embryo/fetus*belongs* to the human race and should be *protected* as such.[94]An unborn child's belonging to the human race and the requirement for its human rights protection amount to two aspects of this part of theexplanation. The question here is not whether the Convention safeguards unborn life, but whether the required explanation encompasses information on an unborn child'sbelonging to the human race, and if so, to what extent.

First, the distinctionbetween an unbornbelonging to the human race and its legal status recognition must be made. In *PatonvUnited Kingdom,*[95]the Commission discussed the meaning of the terms 'everyone' and 'life' used in Article 2 and Convention in general. The distinction made by the Commission on this occasion between those two terms is of the greatest importance, not just in regard to required explanation.[96] It indicates that term 'everyone', refers to someone's personality recognition before the law (*personhood*),[97] it reflects the legal capacity recognized before national law. Term 'life' refers to biological fact and Convention positions on it.[98] Recognition of this biological fact was done separately from recognition of person's legal capacity. Further, the Court recognized that prenatal life requires protection 'in the name of human dignity,

[93]EUR. CONSULT. ASS. DEB. (Oct. 3, 2011)
[94]*Vo v. France,* App. No. 53924/00, at § 4, 2004-VIII Eur. Ct. H.R.
[95]*Paton v. United Kingdom*, App. No. 8416/78, Eur. Comm'n H.R. Dec. & Rep. (1980).
[96]*See* Aurora Plomer, *A Foetal Right to Life? The Case of Vo v France*, 5:2 Hum.Rts. L. Rev. 311, 317, 319 (2005) (for critical view on such position of the Commission).
[97]*See also* Elizabeth Wicks, The Meaning of 'Life': Dignity and the Right to Life in International Human Rights Treaties, 12:2 Hum. Rts. L. Rev. 209 (2012).
[98]*Id.*

implying that a "person" has to "right to life," for the purposes of Article 2.[99]

Protections to the right to life afforded under the Convention may be reasonably inferred from the biological fact of life, which dorequireprotection.[100] However, that such protection is not to be excluded is understoodat two levels.[101]First, the absolute right to life protection afforded to already-born human beings and the "other is a lesser protection given to all human life, from conception onwards, on the basis of human dignity."[102] Therefore,arguments for unborn life protection, at least, for life in its initial gestational stages, is becoming more and more ideologically attached to protection of dignity than to an explicit protection of the right to life. In general, protection of the right to life for unborn childrenmight be regarded as subject to implied limitations rather than as non-existent. In this respect certain States impose obligations upon practitioners forproviding information on alternative solutions available to a woman in conflicted situations.

It could be considered from the Court's case law that information on alternatives to the proposed procedure together with health status constitutes the substance of required explanation.[103]Considering the importance of this information in the decision-making process it is not to be excluded that the Court will soon have to respond on allegations that omission to provide it falls within the scope of Article 8. Decisions of the involved partiescould be much different after obtaining this part of the explanation. Bearing in mind strict standards in the protection of free will in reproductive sphere, any restriction on information is hardly justified. A woman's right to confront her reasons for the abortion requestin every aspect of the explanation should be primarily safeguarded. It is arguable to claim that woman deprived of such information was 'able to exercise free power of choice, without the intervention of any element of force, fraud, deceit; and had sufficient knowledge and comprehension of the elements of the subject matter involved as to enable her to make an understanding and enlightened decision' as the Nuremberg Code requires.

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[99]*Vo v. France,* App. No. 53924/00, at § 4, 2004-VIII Eur. Ct. H.R.
[100]Wicks, *supra* note 51, at 209.
[101] *Id.*
[102] *Id.*
[103]*See V.C. v. Slovakia*, App. No. 18968/07,*supra* note 10, at § 76-87, 106-120, Eur. Ct. H.R. (2011).

A. Specific Aspect of Required Explanation—Prohibition against Information Withholding

The Court had already stated that when State fail to provide the applicants with access to information that would have allowed them to assess the risk they might run from living in a town exposed to a severe environmental hazard, such failure gave rise to a violation of Article 8.[104] Similarly, the Court found a violation of Article 8 in which an applicant was denied access to portions of their military medical records which might have assisted them in assessing radiation levels in the areas in which they were stationed during the tests, and might have served to reassure them.[105]

In *K.H. and othersvSlovakia*[106]Court clearly laid down that full information on reproductive status needs to be available to the patient and after the medical intervention was performed. In this case the applicants suspected that the reason for their infertility might be that a sterilization procedure was performed on them during their caesarean delivery. They were denied to make photocopies of their medical file based on national legislation. The Court considered that point to be determined was whether in that respect the authorities of the respondent State complied with their positive obligation and, in particular, whether the reasons invoked for such a refusal were sufficiently compelling to outweigh the Article 8 right of the applicants to obtain copies of their medical records.[107]

Because of the particular importance of requested data for the applicant's reproductive status, since the Court was not in a position to see how denial of such information could prevent abuse, it found that there had been violation of Article 8.[108] The violation in question does not arise out of a failure to supply information or refusal to supply it since State made it available to the applicants.[109]It arose out of the unjustified and arbitrary restrictions on the applicants' capacity to control that information critical to the women's health.[110]

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[104]*Guerra and Others v. Italy*, App. No. 116/1996/735/932, Eur. Ct. H.R. (1998) 19
[105]*McGinley and Egan v. United Kingdom*, App. No. 21825/93 27 Eur. Ct. H.R. (1999).
[106]*KH v. Slovakia*, 49, App. No. 32881/04, Eur. Ct. H.R. (2009).
[107]*Id.* at § 49.
[108]*Id.*
[109]*Id.*
[110]*Id.*

B. Specific Question of Required Explanation—Father

In *Paton v. United Kingdom*[111]the then existing Commissionunderlined that a father may claim to be a victim, under the Convention, in the event of pregnancy termination. Standing as a victim provides him with the power to directly invoke his own rights.[112]A father's rights, which he may invoke,mainly inhere in the provisions of Article 8.[113]Accordingly, he should be afforded with the power to be involved in the decision-making process on pregnancy and its termination to a certainextent.[114] One of the aspects of thefather's abilityto be involved in the decision-making process is to obtain the required explanation and to undergo psychological counseling, if needed. Beside legal reasons, there are also medical reasons for such claim. Namely, there are studies which show that a male partner often suffers from different sorts of psychological distress prior to and after an abortion was performed.[115]

Although Convention institutions recognized certain scope of a father's capacity in respect to protection of his own rights, it is hard to argue that it entitles him to prevent mothers from having her pregnancy terminated.[116] The limits of his ability to decide on the matter are stated in paragraph 2 of Article 8 and case law.[117] Depriving a father of a chance to be heard and involved when deciding on pregnancy interruption, for reasons which are not linked to the mother's life, health and well-being (in the initial stage of pregnancy) infringe his rights under Article 8.

VII. FREELY GIVEN CONSENT IN THE REPRODUCTIVE SPHERE—SECOND PROVISION OF INFORMED CONSENT

A. Reference to Nature and Gravity of Coercion and Infringement on Freedom of Choice

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[111]*Paton v. United Kingdom*, App. No. 8416/78, Eur. Comm'n H.R. Dec. & Rep. (1980).
[112]*Id*.
[113]*Id*.
[114]*Id*. at ¶ 25.
[115]*See* Zoe Bradshaw & Pauline Slade, *The Effects of Induced Abortion on Emotional Experiences and Relationships: A Critical Review of the Literature*, 23:7 Clinical Psychology Review 932 (2003).
[116]Paton v. United Kingdom, at ¶ 3.
[117]Bradshaw & Slade, *The Effects of Induced Abortion on Emotional Experiences and Relationships: A Critical Review of the Literature*, 2:8.

Standards of freely given consent in the reproductive sphere were introduced into international law when the question of forced abortions and sterilizationswas asserted before the Nuremberg military tribunals. This meant that only pure free will deprived of any external influences does not constitute coercion i.e. forced abortion. Nazi leaders were indicted for both 'encouraging and compelling abortions'.[118]Therefore, creatingan unfavorable atmosphere toward pregnancy, which was founded for disrespect of free will, led to not onlyfree of physical coercion, but also voluntary abortions that were undertaken by indictment and judicial process.[119] If those standards are used to test and evaluate the nature and gravity of force which needs to be imposed upon a pregnant woman to constitute coercion, it follows that force doesn't need to be physically or irresistible to constitute infringement of her freedom which previously was qualified as a crime against humanity.[120] In regard to the use of force in reproductive sphere toward forced abortions, the European Parliament adopted a Resolution which 'condemns the practice of forced abortions and sterilizations globally, especially in the context of the one-child policy.'

B. Meaning of Freely Given Consent under the Convention

Further meaning of freely given consent was researched through its judicial recognition before the Court. Since freely given consent is a tool of free will exercised closely and connected to personal autonomy and human dignity, it has been safeguarded under the Article 3 of the Convention, which prohibits against torture and in the relevant part reads:

'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

Herein, attention was brought on safeguarding provisions of Article 3, which were laid down in cases considering sterilizations performed mostly over minor women of Roma ethnic origin in the states' hospitals (Slovakian cases).

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[118]John Hunt, *Abortion and the Nuremberg Prosecutors: A Deeper Analysis*, http://www.uffl.org/vol%207/hunt7.pdf

[119] Jeffrey C. Tuomala, *Nuremberg and the Crime of Abortion*, 42 U. TOL. L. REV. 283 (2011).

[120] Trails of war criminals before the Nuremberg military tribunals under Control council law Application No 10, *The RuSHA case*, *The POHL case*, Vol. 5, pp 95-112.

In*V C.v.Slovakia,*[121] the applicant was asked to sign the typed words 'Patient requests sterilization' while she was in a supine position and in pain resulting from several hours' labor. She was prompted to sign the document after being told by medical staff that she or her baby would die in the event of a further pregnancy. In those circumstances and from the documents submitted to it, the Court considered that it does not appear the applicant was fully informed about her health status, the proposed procedure, and the alternatives to it. Further, the Court considers that asking the applicant to consent to such an intervention while she was in labor and shortly before performing a Caesarean section clearly did not permit her to take a decision of her own free will, after consideration of all the relevant issues and, as she may have wished, after having reflected on the implications and discussed the matter with her partner.[122] Thus, the Court considered that the sterilization procedure, including the manner in which the applicant was requested to agree to it, was liable to arouse in her feelings of fear, anguish and inferiority and to entail lasting suffering. Although there was no indication the medical staff acted with the intention of ill-treating the applicant, they nevertheless displayed gross disregard for her right to autonomy and choice as a patient. In this case, disrespect of the applicant's autonomy in the field of her reproductive choice, which was infringed after improper obtained consent, constituted a breach of Article 3.

As compared to *A. B and Cv.Ireland*[123]where applicants also complained under the Article 3, in this case theCourt found that ill-treatment occurred based on a threefold reason. First, ill-treatment of the applicant was entirely attributable to the State. Second, time, which was left to the applicant withprior medical intervention to consider her possibilities and interests, was too short. Express intervention left the applicant without possibilities to consider her options and make a decision according to her interests. Third, consequences of the intervention affected the applicant by irreversible results of the serious gravity in respect of her age and social ambience. On this occasion, the Court also noted that circumstances under which consent was obtained could play an important role in determining its validity.

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[121]*See V.C. v. Slovakia*, App. No. 18968/07,*supra* note 10, at § 76-87, 106-120, Eur. Ct. H.R. (2011).
[122] *Id.*
[123] *A, B and C v. Ireland*, 53, *supra* note 86, at paras. 124-26, Eur. Ct. H.R. 13 (2010).

In*N.B. v. Slovakia*,[124] a minor was sterilized after giving birth to her second child without consultations or without the presence of her legal guardianson documentation which contains signatures from herself and the doctor. The procedure was carried out immediately after she had delivered a child via a caesarean section on the basis of mentioned consent which she had been asked to give while in labor.[125]According to relevant national legislation, consent to medical procedures of a particularly serious character which substantially affected a person's future life was to be given by their representative upon the recommendation of a group of at least three experts.[126]Those shortcomings of medical procedure were attached to Article 3 guarantees by the applicant.[127]

In its response to complaints under the Article 3, the Government argued it had been established in the course of the delivery that the applicant's uterus was seriously damaged to an extent which had been justified, from the medical point of view, as a hysterectomy.[128]It is to note here that medical intervention which is therapeutic necessity cannot be regarded as inhuman or degrading.[129] However, similar to its standing in the*V C.v.Slovakia*,[130] the Court considered that the doctors had decided the procedure necessary because the applicant's life and health would be seriously threatened in the event of her further pregnancy cannot affect the position. The Court found that by removing one of the important capacities of the applicant and making her formally agree to such a serious medical procedure while in labor - when her cognitive abilities were affected by medication, and then wrongfully indicating that the procedure was indispensable for preserving her life - violated the applicant's physical integrity and human dignity.[131]

Therefore, the treatment to which the applicant was subjected as described above attained the threshold of severity required to bring it within the scope of Article 3.[132] Besides substantive breach of Article 3, the

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[124]*N.B. v. Slovakia*, App. No. 29518/10, Eur. Ct. H.R. (2012)
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129]*Herczegfalvi v. Austria*, 244 (Ser. A) Eur. Ct. H.R. (1992).
[130]*V.C. v. Slovakia*, App. No. 18968/07,*supra* note 10, at § 76-87, 106-120, Eur. Ct. H.R. (2011).
[131]*N.B. v. Slovakia*, App. No. 29518/10, *supra* note 124, at para. 77 Eur. Ct. H.R. (2012)
[132] *Id.* at paras. 13, 15.

Court also found a breach of Article 8 of the Convention.[133]In this case, pressing situations were confirmed as improper for consent obtaining. A person affected by medication, under the ongoing naturally caused pain, cannot be considered as a competent patient to give free consent for such radical interventions in her personal autonomy. Enough time needs to be left to the patient to consider her options, weigh her interest, and make a decision.

In *I.G. and othersv.Slovakia,*[134] the first applicant, a minor, was sterilized during Caesarean section. She was asked to sign a document which allegedly stated that all women who undergo Caesarean section needed to provide their signatures.[135] She had suffered serious complications and learned about the sterilization three years later.[136] The second applicant was also a minor who argued that neither she nor her legal representatives received informed consent to such medical intervention (which was required by national statutory).[137] After her partner learned she was infertile, he left her.[138] A specific situation of the third applicant is in when she submitted and signed the document but without understanding its contents.[139] Unfortunately, she died during the judicial proceedings and her children were not given victim standing to pursue the proceedings before the Court.[140] The first and second applicant argued their signatures on the sterilization request forms could not be considered valid and, in any event, did not constitute informed consent to the procedure.[141]

In regard to the first and second applicant, similar to its findings in previously mentioned *N.B. v. Slovakia*, the Court found the sterilization of the applicants, then below the age of majority, had been carried out without the proper consent of the applicants and/or their representatives.[142] Such a procedure was found incompatible with the

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[133] *Id.*
[134] *I.G. v. Slovakia*, App. No. 15966/04, 2012-II Eur. Ct. H.R.
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *Id.*

requirement of respect for the applicant's human freedom and dignity.[143] Their sterilization was not life-saving intervention, and neither the applicant's nor their legal representative informed consent had been obtained prior to it.[144] Consequently, the Court held it violated substantive provisions of Article 3 of the Convention.[145]

In addition, when deciding on whether informed consent was proper the Court does not directly refer to its compliance with national statutory provisions. National statutory isto be taken into account as formal provision of free consent but not as decisive element to confirm its validity. Procedural shortcomings in its obtaining could be differently qualified by the Court as compared to national bodies. In *I.G. and othersv.Slovakia,* the Court separated the fact the applicant's informed consent had not been obtained prior to intervention; there was no informed consent obtained from the representative.[146]It could be considered that the Court left opened possibilities for different decisions in this respectin the event of prior consent obtaining from a minor. Also, a new aspect in consent safeguarding was laid down on this occasion. Unlike the previously mentioned *N.B.v.Slovakia* and *V C.v.Slovakia* in this case, the Court found a breach of procedural provisions of Article 3. The Court decided that the way in which the domestic authorities proceeded with the case was not compatible with the requirement of promptness and reasonable expedition.

Also it should be noted here that in the Slovakian cases, the government argued that medical intervention was necessary in order to preserve health and, in some cases, lives of applicants which would be seriously threatened in the event of a further pregnancy. However, the Court was not qualified with such interventions as life-saving under the possible exceptions from consent obtaining. Therefore, thelack of freely given consent was found to stand against Convention guarantees under Article 3 and 8. It could be considered the Court had laid down stricter

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[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] George Bradbury Little, *Comparing German and English Law on Non-Consensual Sterilisation: A Difference in Approach*, 5 MED. L. REV269, 274-5 (2012) (Certain jurisdictions introduces 'sterilisationcarer' and involvement of the Guardianship Court for incapacitated patients which "is designed to prevent a conflict arising between the interests of the ward and the interests of immediate carers").

rules in regards to consent to medical intervention in reproductive sphere than it did in regard to other medical interventions. In general, when medical intervention is therapeutically necessary it will not amount to the breach of Article 3 guarantees.[147] From the other side, the Court was not questioning therapeutic necessity of medical intervention into reproductive sphere. But mere necessity was not enough to justify it in respect to Article 3 guarantees. The Court declared that freely given consent prior to medical intervention into the reproductive sphere is required; the only exceptions are life-saving interventions. Therefore, therapeutic necessity was recognized as a very narrow exception from obtaining consent.[148] However, the application of this exception in respect to a competent patient who withholds her consent might be questionable.[149]

C. Reference to Specific Question of Freely Given Consent—Minors

Pregnant minors have limited legal capacity and consent in the reproductive sphere. In general, there are concerns regarding the issue of minors' ability to understand the implications of consenting to (medical intervention) abortion. This ability is determinative to a minors' capacity,[150] which some authors recognize it as the age of 'medical majority'.[151]Regional norms on this issue could be found in Article 6 § 2 of the Oviedo Convention which reads as follows:

> Where, according to law, a minor does not have the capacity to consent to an intervention, the intervention may only be carried out with the authorization of his or her representative or an authority or a person or body provided for by law. The opinion of the minor shall be taken into consideration as an increasingly determining

[147] Elizabeth Wicks, The Right to Refuse Treatment Under the European Convention on Human Rights, 9 MED. L. REV17 (2001).
[148]*Id*. at 28-30.
[149]*Id*.
[150]*See*, Stephen Gilmore and Jonathan Herring, 'No" is the Hardest Word: Consent and Children's Autonomy, 23 CHILD. FAM. L. Q.3 (2011); Cf. Emma Cave & Julie Wallbank, Minors' Capacity to Refuse Treatment: A Reply to Gilmore and Herring, 20 MED. L. REV447, 429-438 (2012).
[151]LoesStultiëns, Tom Goffin, Pascal Borry, Kris Dierickx, Herman Nys, *Minors and Informed Consent: A Comparative Approach*, 14 EUR. J. HEALTH L. 21, 22 (2007).

> factor in proportion to his or her age and degree of maturity.

Questionsdiscussed belowconcernthe scope of minors' autonomy and the ability of their parents and third parties to intervene in their reproductive decisions.According to the Explanatory Report of the Oviedo Convention, it is not the purpose of that Convention to introduce a single system for the whole of Europe. In Article 6 § 2, reference is made to domestic law: it is up to each country to determine in domestic law whether or not persons are capable of consenting to a health care intervention taking account of the need to deprive persons of their capacity for autonomy only where it is necessary in their best interests.[152] Parents have a duty to provide proper medical care for their children. However, it is difficult to determine scope of parental obligation in this sensitive area because it is hard to define strict limits between coercion and legitimate interests. The issue here is when theparents' roles transform from 'respect' to 'disrespect'.

This question affects the States' regional obligations since it has positive and negative obligations to safeguard and respect private lifeunder the Convention. Such obligationsrequire the State to consider various legitimate interests of the parents' and a child's autonomy. In reference to the Strasbourg case law, Conventional institutions stated that pregnancy and its interruption do not pertain uniquely to the sphere of the mother's private life.[153]Accordingly, pregnancy and its' interruption fall within the scope of the father's private life aswell as her parents. In theCourt's case law,'private life'includes gender identification, sexual orientation, and sexual life.[154]'Private life' is a broad concept, encompassing, *inter alia*, the right to personal autonomy and personal development. It is generally difficult for the State to enforce appropriate measuresto protect individuals' private rights,[155]and to establish effective respect for their physical and psychological integrity.[156]It could be

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[152]*SeeExplanatory Report to the Oviedo Convention*, 1996 O.J. at para 42.

[153]Brüggemann v. Germany, App. No. 6979/75, 1977 Eur. Comm'n on H.R. 100.

[154] Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. 18-9 (1981), and Laskey v. United Kingdom, 1997-I Eur. Ct. H.R. 131.

[155] Airey v. Ireland, 32 Eur. Ct. H.R. 14 (1979); McGinley and Egan v. United Kingdom, 1998-III Eur. Ct. H.R. 8. *See also,* Roche v. United Kingdom, 2005-X Eur. Ct. H.R. 51.

[156] Glass v. United Kingdom, 2004-II Eur. Ct. H.R. 16; *See also* Sentges v. the Netherlands, 2003-II Eur. Ct. H.R; Pentiacova v. Moldova, 2005-IV Eur. Ct. H.R. 12; Odièvre v. France, 2006-I Eur. Ct. H.R.

considered that the notion of 'respect' is not clear-cut in the Court's case law.[157]Still, there may be positive obligations inherent in effective 'respect' for private life. This involves the adoption of measures designed to secure respect for private life even in the sphere of relations between individuals, including both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights, and the implementation, where appropriate, of specific measures.[158] Certain limitations on parental interference in the live of minors have arisen from this positive obligation. The State has the duty to act, in the end, and safeguard a minor's autonomy. Parental rights, when appropriate, can be restricted. Therefore, the States enjoy certain margins of appreciation in this field.[159] To a certain extent,those questions were invoked before the Court in *P. and S.v.Poland*.[160] In that case, a pregnancy resulted from an act of rape. According to the national legislation in Poland, this fell within the grounds of lawful abortion.[161]The applicant, a young minor, and her mother decided an abortion would be the best option because the pregnancy was the result of forced intercourse.[162] The applicant wished to pursue her education.[163] Her pregnancy would hinder her ability to continue her educational goals.[164]

As disclosed in this case, the will of the minor is inconsistent. The first applicant was surrounded by people opposed to her decision to terminate her pregnancy.[165] Her own opinion was different to her parents' opinion. In respect to minors, standards of consent cannot be equally applied to minors as those applied to minors' immaturity. The Court held that legal guardianship cannotrely on the relationship between parents of a minor and a minor in order to grant parents the right to make decisions concerning the minor's reproductive choices. The minor's personal autonomy must be taken into consideration in this sphere. This

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[157]Bensaid v. United Kingdom, 2001-III Eur. Ct. H.R. 3-4.
[158] X and Y v. The Netherlands, 91 Eur. Ct. H.R. 7 (1985).
[159] Keegan v. Ireland, App. No. 2901994, at § 19, Eur. Ct. H.R. (1994) *See also*Różański v. Poland, at § 61, 2006-I Eur. Ct. H.R. 11.
[160]P. & S. v. Poland, App. no. 57375/08, at § 37, Eur. Ct. H.R. (2012)
[161] *Id.*
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *Id.*

consideration applies also in a situation where abortion is predicted as a possible option.[166]

In the present case, the Court recognizes interests and life prospects of the mother, including her decision on whether or not she wishes to carry the pregnancy to term. The Court considered it has not been shown that the legal setting in Poland allowed for the second applicant's concerns to be properly addressed in a way that would respect her views and attitudes, and which would balance them in a fair and respectful manner against the interests of her pregnant daughter.[167] The Court held that Article 8 of the Convention[168] was breached because the authorities failed to comply with their positive obligation to ensure respect for the applicants' private lives. There was a great degree of influence exerted upon the pregnant minor by the medical staff and priest. This degree of influence was regarded as pressure in the context of Article 3 provisions.[169] The first applicant was contacted by various persons who tried to exert similar kinds of pressure on her which qualified as harassment. The government was responsible for not preventing it.

It could be considered that the course taken by the Court in this case indicates that a minor's autonomy in the reproductive sphere supersedes the interests of parents. Parents can only consent to treatment that is in the best interests of their child and may not ordinarily refuse treatment that could jeopardize their child's long-term welfare.[170]Certain legislations developed a range of non-exhaustive factors that must be taken into account when determining the welfare of a child.[171] This includes:

> (a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding); (b) his physical, emotional, and educational needs; (c) the likely effect on him of any change in his circumstances; (d) his age, sex, background,

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[166]*Id.* at § 109.
[167]*Id.*
[168]*Id.* at § 112.
[169]*Id.*
[170] Rob Heywood, Parents and Medical Professionals: Conflict, Cooperation, and Best Interests, 20MED. L. REV. 29, 33 (2012).
[171]*See* Children Act 1989, 1989, c.41, § 1(3).

> and any characteristics of his which the Court considers relevant; (e) any harm which he has suffered or is at risk of suffering; (f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs; (g) the range of powers available to the court under this Act in the proceedings in question.[172]

Parents cannot impose their children to medical treatment in the reproductive sphere which minors do not wish.[173]Since national courts have not found coercion, the present involvement of the parents in the decision-making process was not found as an illegitimate interference. There was interference of third parties involved in this sensitive area yet, national authorities have not found coercion. Consequently, together with other circumstances, there was abreach in the Article 3 guarantees.

CONCLUSION

Standards of informed consent are being introduced into international law in light of the existing issues of forced abortions and sterilizations. It had occurred during the Nuremberg trials and the Nuremberg Code, which was adopted in 1947. It laid down strict universal requirements of free will and safeguards in the reproductive sphere. Certain general elements of prohibited coercion infringing free will could be drawn from Nuremberg sources. Prohibited coercive elements include the use of physical force, the threat of placing a woman or her child in disadvantaged position, and encouraging abortion. On such basis, instruments on universal and regional scales were developed. The purpose of informed consent in the reproductive sphere is to provide a patient with all relevant information on reasonable risks that includes diagnostic or a therapeutic procedures that may have on his or her health. This would enable a patient to make decisions according to his or hers interests. Informed consent contains two provisions: the first provision

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[172]Heywood, *supra* note 170, at 29, 33.

[173]Emma Cave & Julie Wallbank, *Minors' Capacity to Refuse Treatment: A Reply to Gilmore and Herring*, 20 MED. L. REV447, 449 (2012).

holds informed consent as the acquisition of a *full* explanation and the second provision is *freely* given consent.

A full explanation is safeguarded through civil law and criminal law remedies at national level since it falls within the scope of medical negligence regulation. It is safeguarded at the regional level through provisions Article 6 and 8 of the Oviedo Convention. States are required to insure access to information enabling a patient to assess the risks he or she has to face. In the reproductive context, States are also required to insure access to relevant information on the health risks on the mother and information on the condition of the fetus' health when the State, acting within its limits, adopts statutory regulations allowing abortion on the grounds of fetal abnormality.

Given the potential health risks and complications on the mother, an explanation concerning the threat to the mother's health arising from the pregnancy, its continuation, birth, or termination is required. To obtain a lawful abortion on the grounds of danger to the mother's health or fetus, the law must provide effective procedural mechanisms that are capable to determine whether the conditions exists. To make a decision, timely information is required. The information should unequivocally repel the risk to a mothers' health, which might arise from the pregnancy or birth. It also should encompass information on direct and prompt side effects of abortion on a mothers' physical health and its subsequent consequences on mothers' mental health. This paper discussed the health risks and threats to a mothers' life, which might arise from pregnancy, but are not often addressed. A reason for this is because the operation of relevant risk toward mother's life is very narrow in the eye of the Court. The criteria for determining the relevant risks to a mother's life was indirectly introduced in *A, B and C v Ireland.* In that case, one of the applicants feared that her pregnancy posed a risk to her life, and sought relief under Article 2. In its decision, the Court referred to *L.C.B. v the United Kingdom* and *Osman v the United Kingdom*,[174] as cases addressing the test under which it was determined that no evidence of any relevant risk to the applicant's life existed. Both cases, pointed by the Court, concerned the scope of the States' positive obligations to take preventive measures to protect life. The Court hSince the Court did not find a

[174] L.C.B. v. United Kingdom, 1998 Eur. Ct. H.R. 1403; *See also,* Osman v. United Kingdom, 2006-I Eur. Ct. H.R.

violation of Article 2, it was not possible to decide whether there was a relevant risk that would favor grounds for an abortion. But common grounds of those cases could be used as reference to it. In this wide approach, there was a lack of certain causal links between the alleged States' omission and consequences, and lack of certainty that available measures would effectively prevent negative consequences. In order to prove abortion is justified, there needs to be a causal link between pregnancy and/or birth and health complications of such gravity which could lead to the fatal consequences. In addition, an abortion was the only course of action that could prevent the fatal consequences.

Despite the lack of any effective domestic procedure for establishing relevant risk, no matter whether it was followed with any health consequences, the Court qualified this as a breach of Article 8 provisions,[175] not Article 2. As Zampas&Ghernoted, the Court has never confirmed whether the threat of suicide embodies a relevant risk.[176]

Required explanation also extends to obligations to provide biological and medical information on the fetus. Explanation should encompass information on the fetus' health condition and its' belonging to human race. Both of those are equally relevant for decision. When the State adopts statutory regulations allowing abortion on the grounds of fetal abnormality, it is required to provide full and reliable information on the fetus' health through adequate and timely medical testing because it is a necessary prerequisite for a legally permitted possibility. Still, such regulation does not impose an obligation to terminate the life of an unborn child. Since fetal abnormality does not prevent the mother to exercise the positive aspect of her reproductive choice (to have a child), denial of information that an unborn child belongs to human race and is protected as such under the human rights, could equally constitute breach of her rights under Article 8. The Court found that restrictions on information reduces the mothers' ability to dispose of her capacityand, considering importance of information in this field, defenses for restrictions are very narrow. Omission to provide information that an unborn child belongs to the human race and enjoys the protection under

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[175] A, B and C v. Ireland, 53,*supra* note 86, at paras. 250, 267, Eur. Ct. H.R. 13 (2010).

[176]Christina Zampas and Jaime M. Gher,*Abortion as a Human Right - International and Regional Standards*, 8(2) HUM. RTS. L. REV. 249, 262 (2008).

human rights deprives the mother from the ability to dispose of her capacity in the direction she chooses. In the field of prohibition against discrimination at regional and national levels, prohibition against genocide upon further operation of abnormality as abortion defense is in question.

It could be argued that information on alternatives to the proposed procedure together with health and biological status amounts substance of required explanation. The scope of the protection of the patient's right to consent recognized by the Court was explicit and fair in regards to the obligation to provide a full explanation before obtaining consent. In the *KnechtvRomania,*[177] another aspect of contest was involved, i.e. the right to choose a proper medical practitioner. The applicant believed she was entitled to be assisted for future IVF procedures by doctors of her choice, in whom she trusted. A reason for distrust toward available Clinic was previous experience of two unsuccessful IVF procedures which were occurred there. But, mere previous experience was not enough for the Court to consider it is provided with sufficient evidence an applicant would not be able to have her interest accommodated in relation to the desired IVF procedure. Therefore, the Court held that the Statesbetween the competing interests. There was no appearance of a failure to respect the applicant's right to private life.

In examining whether both provisions of inform consent are met, the Court's main question is whether a person was provided with the required and timely information enabling her to be involved in the decision-making process sufficient to protect her interests. Another issue concerns the father's ability to be involved in the decision-making process which was assumed,[178]and recognized,[179]by the Conventional institutions. The Convention requires the father to be given an explanation of the medical situation and options, and undergo psychological counseling if he applies for it.

Freely given consent is closely interconnected to personal autonomy and human dignity. Therefore, it is safeguarded under provisions of Article 3 of the Convention,requiring consent be obtained in the proper manner and from a competent person. The proper manner

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[177] Knecht v. Romania, 2012-III Eur. Ct. H.R.

[178]*See,* Bruggemann v. Germany, App. No. 6959/75 Eur. Comm'n. H.R. Dec. & Rep. (1997)

[179]Paton v. United Kingdom, App. No. 8416/78Eur. Comm'n H.R. Dec. & Rep. 26, (1980).

is defined as excluding all pressing situations that could produce feelings of fear, anguish and inferiority at the patient. Required duration of formal procedure prior to medical intervention is long enough for an enabling woman to make decisions of her own free will. After considering all the relevant issues, consent obtained in the proper manner is further defined as reflecting on the implications and discussing the matter with her partner. Furthermore, an informed person must be competent. This does not require a person to have the age of majority. It requires a patient to understand the consequences of such radical interventions into her personal autonomy, and her cognitive abilities are not affected by any medications or pain. When examining whether informed consent was properly obtained, the Court will refer to national statutory regulations. However, such regulations will not be conclusive in the Court's determination on whether a patient gave her informed consent. There is a possibility the Court will require higher standards of inform consent that the national statutory provides. It is not unusual for the Court, especially in the field of medical negligence, to examine the qualifications of procedural shortcomings created at the national level that are imposed uniform standards upon national institutions.

It can be argued the Court established stricter requirements of consent to medical intervention in the reproductive sphere than it did in regard to other medical interventions. In general, therapeutic necessity is not considered a breach of Article 3 guarantees. Mere necessity is not enough to justify intervention in the reproductive sphere. Therapeutic necessity was recognized as a very narrow exception in the acquisition of informed legal consent.

The requirements of freely given consent are different in the case of minors' reproductive spheres. Due to the prevalent immaturity in minors, their will is constantly subject to influence exerted on them by their parents, friends, media, school, etc. Concerns have arisen in regards to the scope of the minor's autonomy and their parents', and third parties' ability to intervene into their reproductive sphere. A more specific issue here rises when determining what point the role of third parties changes from 'respect' to 'disrespect'. The Court has yet to determine the boundaries of which parties other than minors will be allowed to interfere with a minor's will. In this regard, the State has the duty to safeguard the minor's autonomy. Positive obligations inherent in Article 8 requires adoption of measures designed to secure respect for private life, even in

the sphere of relations between individuals including enforcement and protection of individuals' rights, and the implementation of specific measures. If the State finds it appropriate, those measures could include restrictions on parental rights. In reaching a solution to this conflict, the Court indicated that a minor's autonomy in the reproductive sphere enjoys precedence over considerable interests of parents while interests of third parties are not recognized. Importance of a minor's autonomy in this sphere was also indicated in *I.G. and others v Slovakia,* where the Court had to determine whether the inform consent was obtained from minor or a representative of the minor. Further extension of such standing could rapidly decrease parental rights of living children *autonomous* and *emancipated* but without substantive security. The present afforded autonomy enables a minor to effectively exercise and make decisions on their reproductive option since parents or third parties are not provided with the power to make a minor undergo therapeutic or any other kind of pregnancy interruption.