REPRODUCTIVE RIGHTS BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS: STATES' DISCRETION OR EUROPEAN SUPERVISION?

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3. Between law, morality and bioethical issues

The previous paragraphs have analysed the legal basis which the ECtHR has relied upon when dealing with questions regarding abortion and MAP. On the other hand, these issues imply profound moral and philosophical considerations concerning the beginning of life. These different positions are contextualised in an intense debate concerning bioethical\textsuperscript{33} issues and are reflected in the different national legislation of the Member States of the CoE. For this reason, it is useful to try to understand the rationale which divides some states, while unifying others, in choices pertaining to the reproductive field.

Early forms of ethical thinking related to health are traced back to antiquity\textsuperscript{34}, while the modern/contemporary discipline has emerged during the 1970s, due to the technological improvements in the medical practice\textsuperscript{35}. In this period issues concerning law and bioethics were raised. The relationship between these two disciplines is complex, since legal decisions concerning bioethics issues have to deal with the moral relativism of a given society. Therefore, in this framework bioethics has the twofold goal of detecting the profound reasons that guide moral beliefs and that of trying to build a consensus in highly differentiated societies governed by plural views in the field of morality. Thus, bioethics can be considered the "bridge" which links moral/philosophical stances and the norms that regulate the practices in this field\textsuperscript{36}.

The following paragraphs will analyse the principal moral stances which have guided European states in the regulation of matters concerning respectively the voluntary termination of pregnancy and the MAP.

\textsuperscript{33} Bioethics concerns the moral dilemmas stemming from the advances in medicine and scientific research. Indeed, the term \textit{bio}, meaning life, combined with ethics tries to determine the "right" or "wrong" moral conduct with regard to life and death issues. This dissertation will not concentrate on the so-called death issues (euthanasia), but only on the beginning-of-life issues.

\textsuperscript{34} The first forms of ethical thinking are dated back to the Hippocrates "oath" (V-III century BCE), whose main principle was "First, do no harm". After the arrival of Christianity, the oath was modified in order to adapt it to the principles promoted by the Christian faith, such as compassion and charity. The first modern forms of ethical thinking arose during the Enlightenment period and the secularization process.


\textsuperscript{35} Nowadays the influence of the past is still vivid and physicians operating in the bioethical field should respect the maxim "primum non nocere". See Brownsword Roger, \textit{Bioethics: Bridging from Morality to Law?}, in Freeman Michael (ed.), Law and Bioethics: Current Legal Issues, 2008, Vol. 11, p. 14.

\textsuperscript{36} In Brownsword's wording, there are a "number of competing master criteria of rightness". The author in his discussion endorses the conclusions presented in the Nuffield Council on Bioethics' report: "Critical Care Decisions in Fetal and Neonatal Medicine: Ethical Issues". Ibid. pp. 13-15.
3.1. The abortion debate: "pro-life" versus "pro-choice"

The moral debate about abortion has begun in the United States following the landmark decision of the Supreme Court in Roe v. Wade\(^{37}\), which has divided the US society in two opposite fronts, namely pro-choice and pro-life groups. The rationale behind these views is also shared by the ethical debate that has taken place in Europe. This distinction, even if convenient to structure the debate, is imprecise, inasmuch as it does not include all the different undertones which animate the discussion.

The pro-life group supports the view that life begins at the moment of conception, hence the unborn is entitled to the right to life. Consequently, the voluntary termination of pregnancy is considered as "murder"\(^{38}\). This view is influenced by the moral prescriptions of the religions that are prevalent in Europe, in particular the Roman Catholic Church and the Orthodox Church, since the Lutheran and Protestant Churches are generally more "liberal" in this regard. Moreover, this position considers mother's womb as a means through which attain a higher purpose, the conception of a new life. Accordingly, the mother should have no power in deciding issues concerning the termination of pregnancy\(^{39}\). It also advocates for the conferral of more rights upon the father, who is directly involved and conditioned by these decisions.

Abortion is not conceived as a private/personal issue, but it is rather considered a public matter, which implies social acceptance and judgement. In order to sustain their views, pro-life supporters have focused on the possible negative effects that abortion can provoke on

\( ^{37}\) In Roe v. Wade case (1973) the US Supreme Court declared unconstitutional any law of the federal states which did not permit abortion in the first two trimesters of the pregnancy in order to pursue the aim of protecting the life of the foetus. The case generated intense reactions by the public and it raised a passionate debate. See Dworkin Ronald, Life's dominion. An argument about abortion, euthanasia and individual freedom, London Harper Collins, 1993, p. 7.


\( ^{39}\) According to the Committee on Equal Opportunities for Women and Men, religion continues to play an important role in the formation of policies that directly or indirectly affect women's decisions in the reproductive field. In practise women's rights are limited in order to accommodate moral provisions, due to the different role attributed to men and women by religious beliefs. According to this view, women are considered as having the primary role and duty of being "mothers". This results in the discrimination of women and perpetuation of patriarchal values by states and society itself. See Report of the Committee on Equal Opportunities for Women and Men, Women and Religion in Europe, Doc. 10670, 16 September 2005. Available at: http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=11127&Language=EN#P94_13696.
women's psychological condition, namely post-abortion syndrome.\textsuperscript{40}

In this framework, it is noteworthy to analyse the position of the Roman Catholic Church, given its strong influence on Europe. Its official position with regard to abortion is expressly stated in the Pope's Ioannes Paulus II Encyclical "Evangelicum vitae" (1995), which upholds the "sacred value of the human life from its very beginning until its end". It is clear that the term "very beginning" refers to the moment of conception and that the term "death" refers to the natural death. The right to abortion, permitted by some states on specific grounds, is considered as a new threat to the right to life, a "moral evil" in violation to the divine commandment "you shall not kill". The position of the Catholic Church becomes more severe when it affirms the immorality of those states which label with the term "rights" what once were considered as "crimes". The Catholic Church depicts abortion legislations as influenced by the so-called "culture of death". It also considers international institutions morally guilty for the promotion of what it calls as the "conspiracy against life."\textsuperscript{41}

Conversely, the pro-choice group claims that the right to a safe abortion should be comprised within the human rights of the individual. This consideration is based on the fact that in places where abortion is illegal, women have to resort to unsafe abortions that could and usually does impinge on their right to life or right to health. According to the Committee on Equal Opportunities for Women and Men, laws prohibiting abortion are not only discriminatory, but are also denigrating towards women, who are not considered capable of making this sort of decisions. Laws banning abortion are deemed in violation of women's rights and consequently they undermine their independence and equality to men.\textsuperscript{42}

The feminist movement has unsurprisingly been one of the most fierce defenders of abortion rights. Feminist scholars advocate for this right by virtue of the fact that a woman is the best agent in order to make a complex decision on this regard. The freedom to make reproductive decisions is not a separate or abstract problem, but is linked to the achievement of other purposes, such as self-fulfilment or the responsibility towards other family members. Feminists deem women capable of making moral and responsible decisions while faced with

\textsuperscript{40} See supra N. 38.
\textsuperscript{42} See supra N. 39.
an abortion dilemma. In order to make "procreative decisions", women have to make "mothering decisions", that include not only considerations about the best choice for themselves and the "intrauterine life". Indeed, women are also concerned about the consequences of their choices upon other people. Society regards women as firstly "potential mothers". This social attribution homologizes women even if they do not intend to remain pregnant, bringing about social and economic consequences on their regard. Mothering decisions are experienced differently from different women, and even if women contemplate abortion among their reproductive decisions, this does not mean that they do not attach any value to the "intrauterine life".

Mothering decisions are experienced differently especially by men, given the lack of an analogous biological process for them. According to Hanigsberg, "bodily integrity", meaning the emblematic understanding of the body and control over it, is interpreted differently depending on the cultural background. This concept is fundamental to the identity and dignity of a person, who in order to realise self-aspirations, should decide autonomously over it. The law has an important role in shaping this idea and generally men's bodily integrity is considered differently in comparison to the application of the same concept on women. In legislations where abortion is prohibited, women cannot make fully autonomous decisions, that are limited by the impositions of other persons. Subsequently, women are separated by their wombs, that serve society purposes. This sort of women subordination should be addressed by the different legislations that should take into account women's needs.

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43 See supra N. 37, pp. 57-58.
44 According to Hanigsberg, disadvantage in the labor market is one of the primary consequences. Furthermore, she has stated that even worse from a moral point of view are considered those women who decide to not bear a child, since they do not correspond to the society's projection of them, thus being considered anomalous.
45 Ibid.