In Defence of a More Sophisticated and Nuanced Approach: A brief response to Gregor Puppinck’s *EJIL:Talk!* blog post on abortion

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The primary purpose of this response is to re-evaluate the jurisprudence of the ECtHR on abortion, which we found to be misrepresented in [Mr Puppinck’s *EJIL: Talk!* piece of 23 February 2013](http://www.ejiltalk.org/abortion-on-demand-and-the-european-convention-on-human-rights/). Even though the Court has admittedly not recognised a general right to abortion, it has systematically been pressing more conservative Member-States to respect their own legislation and relax the absolute prohibition of abortion under certain circumstances. While the Court may have been too shy in its push for expanded protection of women’s reproductive rights instead of having a more muscular approach, the trend is visible and is gaining momentum. In this context, it is vital to appreciate the rulings of both domestic courts and the ECtHR on this issue in their entirety in order to have a comprehensive understanding of the current legal concerns and potential future solutions. The international human rights project seeks to provide fundamental freedoms and rights for each and all of us; Mr Puppinck’s attitude towards the ‘free will of women’ combined with his (mis)representation of abortion is not only unconstructive but also lacking in legal insight and nuance.

In the late 2012 [*P. and S. v. Poland*](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114098#{"itemid":["001-114098"]})case, the Court stated that Poland’s failure to protect a 14-year-old rape victim from harassment due to her decision to have an abortion (available under Polish law in the circumstances) and the fact that legal proceedings were initiated against her for “illicit sexual relations” amounted to a violation of Art. 3 regarding inhuman and degrading treatment along with a violation of her right to privacy and family life (Article 8) and liberty and security (Art. 5 par. 1). With particular reference to article 8, though it “cannot be interpreted as conferring a right to abortion”, the Court “found that the prohibition of abortion when sought for reasons of health and/or well-being falls within the scope of the right to respect for one’s private life and accordingly of Article 8” (*P. and S. v. Poland*, para 96, referencing *A., B. and C. v. Ireland* paras. 245 and 214). Moreover, the Court considered that “the 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” (*P. and S. v. Poland*, para 99).

The common thread in the *P. and S. case* and the Court’s previous decision in [*A., B. and C. v. Ireland*](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-102332)is that in both cases, unlike Mr Puppinck’s suggestions [elsewhere](http://www.turtlebayandbeyond.org/2012/abortion/how-the-council-of-europe-is-imposing-abortion-on-ireland-and-poland/), the Court is *not* imposing *new or expanded obligations* upon the Member-State; rather, it is re-affirming obligations and rights protections which already form part of domestic legislation. Both in Ireland and in Poland narrow exceptions to the prohibition of abortion are part of national jurisprudence. In the case of Ireland, the 1992 Supreme Court decision in the [*Attorney General v. X*](http://www.supremecourt.ie/supremecourt/sclibrary3.nsf/pagecurrent/9FA0AA8E8D261FC48025765C0042F6B3?opendocument&l=en) *allows for an abortion in limited circumstances* *where there is a real and substantial risk to the life of the mother if the termination is not affected* (in this particular case the risk was suicide); the issue is rather that this ruling of the Irish Supreme Court has not yet been transposed into ordinary legislation that would settle the exact procedural and substantive requirements for a lawful pregnancy termination and provide medical professionals with certainty as to how to proceed. As abortion is a criminal offence punishable by life imprisonment under Irish criminal law, the need to clarify the legal and medical framework and clearly outline the circumstances where a medical termination or abortion can be performed without the risk of a criminal prosecution is palpable. In the *P. and S. case*, an official permission of abortion had been obtained as the pregnancy was the result of a rape; however, the State failed to provide the minimum acceptable conditions necessary for a safe and respectful execution of the procedure.

Admittedly, the question whether the accessibility to an abortion constitutes a right under the Convention remains a thought-provoking one. In this context, Mr Puppinck resorts to an originalistic reading of the Convention stating that “when the Convention was drafted, abortion on demandwas widely recognised as a crime (*[Brüggemann and Scheuten v. Federal Republic of Germany](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-74824" \t "_blank)*)”, an argument that is utilised to support the view that no such right could have been established or developed by the Convention. However such an interpretation disregards the inherent intent and nature of the Convention to promote and protect human rights, which has been consistently re-affirmed by the European Court of Human Rights; the Court’s statement in the [*Tyrer v. UK*](http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-57587)case (para 31) that “the Convention is a living instrument… which must be interpreted in the light of the present day conditions” is perhaps one of the most well-known and quoted statements of the Court. The evolving interpretation of the Convention is well illustrated in the approach towards homosexuality, which captures the advancement of LGBT rights in relation to privacy (*Dudgeon, Norris*, *Modinos* cases).

In general, as stated in [*Airey v. Ireland*](http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-57420) (para 24) “the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective”. Thus, with reference to abortion, it is striking that Mr Puppinck then implies that the Court is sitting in the corner patiently waiting for a father or grandparent to file a complaint, which would offer the Court the opportunity to declare that “abortion on demand” (which is not clearly defined in his piece) is a (theoretical) violation of articles 2, 3, or 8. Moreover, the issue of a father’s objection to the termination of a pregnancy was addressed in [*H. v. Norway*](http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-1759)and declared inadmissible by the Commission. In that case the Commission found that “any interpretation of the potential father's right under [articles 8 and 9] in connection with an abortion which the mother intends to have performed on her, must first of all take into account her rights, she being the person primarily concerned by the pregnancy and its continuation or termination” (para 4). In relation to the alleged discrimination under article 14 between parents, the Commission found that the father’s situation was not analogous to the mother’s (para 6).

The right to life of the foetus and when this right may be said to begin (whether from the first moment of conception or afterwards) is a key element in Mr Puppinck’s piece. It is important to note at this juncture that the Court has been notoriously reluctant in ruling on this issue and has afforded the discretion to each individual Member-State to determine when *human* life begins within domestic legislation. In [*Vo v. France*](http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-61887)*,* the Court states that “the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere, notwithstanding an evolutive interpretation of the Convention, a “living instrument” (quoting *Tyrer*)” (para 82). The two reasons for this were, firstly, that “the issue of such protection has not been resolved within the majority of the Contracting States themselves”, and secondly, that “there is no European consensus on the scientific and legal definition of the beginning of life” (*ibid*).

The court has generally referred back to Member-States through the margin of appreciation doctrine when delicate religious, moral and political questions have been at stake. In [*Handyside v UK*](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57499#{"itemid":["001-57499"]}) (para 48) the Court found that the State had a legitimate aim to ‘protect morals’, and that the national authorities were better placed to decide on questions of ethical content. However, the existence of competing rights to balance is a challenge that the Court has engaged with constructively. In [*Open Door and Dublin Well Woman v Ireland*](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57789) the Court “considered that the restraining of the provisions of information to pregnant women about abortion facilities abroad violated Art. 10”, employing the principles of proportionality and necessity in evaluating how national authorities balance the rights of the unborn vis-à-vis the Convention rights applicable ordinarily to all persons in being (para 69 and 70). Importantly, the Court has considered the balance of conflicting rights with respect to the intent and protections afforded under the ECHR, as stated in *[A. B. and C. v. Ireland](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-102332" \t "_blank) (*para 237 and 238;): “the margin of appreciation is not unlimited (…) as to how it balances the conflicting rights” and “the Court must supervise whether the interference constitutes a proportionate balancing of the competing interests involved”*.* For instance, in *Open Door and Dublin Well Woman*, in discussing Art 10 with regards to information on abortion services, the Court recalled *Handyside*: freedom of expression is also applicable to "information" or "ideas" (like abortion) that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" (para 71). Mr Puppinck would, we are sure, agree that the Court is unlikely to voluntarily depart from upholding the values of a democratic society.

The very nature of the margin of appreciation doctrine would suggest that the Court strives and will continue to strive for a more sophisticated approach in allowing for a degree of variation between Member-States on complex ethical questions, while at the same time trying to uphold the Convention rights for all individuals concerned – regardless of how liberal or conservative their national laws may be. However, this approach is still highly ambiguous, as discussed recently in a [case note to *A. B. and C*. by de Londras and Dzehtsiarou](http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=8825908); by accepting the force of a ‘trumping internal consensus’ (i.e. an alleged moral value of the State that overrides the European consensus), the Court seems to defer completely to State discretion on certain sensitive matters instead of “laying down the exact parameters of Convention rights in contentious areas”.

In the context of the abortion debate, it is crucial to appreciate the nuanced and comprehensive jurisprudence of the European Court taken as a whole and note the Court’s consistent efforts – if not quite yet successes – in taking into account domestically sensitive issues while balancing the rights afforded to all under the ECHR. While the Court has refrained from recognising a right to abortion under the ECtHR (*[Silva Monteiro Martins Ribeiro v. Portugal](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-67313" \t "_blank)*), it has at least sought to provide guidance on this issue and reaffirm rights currently existent in domestic legislation where these rights have not received effective implementation.