A, B & C V. IRELAND: THE UNBORN AND AN APPRECIATION OF THE MARGIN OF APPRECIATION

Shaun de Freitas and Ewelina Ochab[*]

ABSTRACT

On December 16, 2010, the Grand Chamber of the European Court of Human Rights ("ECtHR") in *A, B & C v. Ireland* ("*ABC*") found that it was not for the Court to decide on the validity of Ireland's legislation which prohibited abortions except in instances where the pregnant woman's life is threatened. According to *ABC*, the 'margin of appreciation' allows the Court to not take a specific view on matters related to the termination of the unborn. As expected, the *ABC* ruling received criticism from supporters of a more unlimited choice, allowing for pregnant women to decide to have an abortion. This article is an appraisement of *ABC*'s 'broad' application of the 'margin of appreciation,' and specifically argues that, against the background of differences and complexities related to the status of the unborn, the ECtHR needs to follow a strictly cautionary approach. In this also lies an argument that regional human rights courts should take a cautionary approach when dealing with morally inclined human rights matters in general.

1. *Introduction*

A, B & C v. Ireland ("*ABC*")[1] arose from an application lodged on July 15, 2005 to the European Court of Human Rights ("ECtHR"), which was directly referred to the Grand Chambers for a hearing that commenced December 9, 2009. The third applicant,[2] C,' complained that the restriction

[*] The authors would like to thank Paul Coleman, Ian Lee and Andrew Legg for their comments on earlier drafts. Shaun de Freitas BProc, LLB, LLM, Associate Professor, Faculty of Law, University of the Free State. Ewelina Ochab German-Polish Law School Diploma (Humboldt, Berlin), LLB (University of Kent), Post-graduate Diploma (City Law School, London), Barrister, Inner Temple Member, Blackstone Legal Scholar.

[1] A, B & C v. Ireland, App. No. 25579/05, Eur. Ct. H.R. (2010), HUDOC, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{"dmdocnumber": ["878721"],"itemid":["001-102332"]}.

[2] The third applicant, before commencing chemotherapy treatment for cancer, asked her doctor about the implications of her illness relating to her desire to have children. The doctor advised her that it was not possible to predict the effect pregnancy would have on the cancer, but, if she did become pregnant, it would be dangerous for the fetus if she underwent chemotherapy during the first trimester. Eventually the cancer went into remission and the applicant unintentionally became pregnant. She was

on abortion and the lack of clear legal guidelines regarding the circumstances in which a woman may have an abortion to save her life infringed upon her right to life under Article 2 of the European Convention on Human Rights ("ECHR"). All three applicants[3] A,' 'B' and 'C,' complained that the restriction on abortion stigmatized and humiliated them, and risked damaging their health in breach of Article 3 of the ECHR (which deals with torture and inhuman or degrading treatment or punishment).

They further complained, in the context of Article 8 of the ECHR (regarding right to respect for family and private life), that the national law on abortion was not sufficiently clear and precise. Specifically, they argued that the Constitutional term 'unborn' was vague and the law's criminal prohibition was open to different interpretations.[4] The fact that women

unaware of this fact when she underwent a series of tests, contraindicated during pregnancy, to determine her current state of health. When she discovered she was pregnant, she was unable to find a doctor willing to determine whether her life would be at risk if she continued to term or to give her clear advice as to how the fetus might have been affected by the tests she had undergone. Given the uncertainty about the risks involved, the applicant decided to have an abortion in the United Kingdom. Although her pregnancy was at a very early stage, she could not have a medical abortion (where drugs are used to induce miscarriage), because she could not find a clinic which would provide this treatment to a non-resident due to the need for follow-up. Instead, she had to wait for eight weeks until a surgical abortion was possible, which caused her emotional distress and fear for her health. On returning to Ireland after the abortion, the applicant suffered the complications of an incomplete abortion, including prolonged bleeding and infection. *Id.* paras. 22-26.

[3] The first applicant, 'A,' was unmarried, unemployed, and living in poverty at the time of the events in question. She became pregnant unintentionally, believing that her partner was infertile. She had four young children, all at that time in foster care as a result of problems the applicant had experienced as an alcoholic. During the year preceding her fifth pregnancy, the applicant had remained sober and had been in constant contact with social workers with a view to regaining custody of her children. She considered that a further child at this critical moment in her life would jeopardize the successful reunification of her existing family, so she decided to travel to England to have an abortion. The United Kingdom National Health Service refused to carry out the operation at public expense and she had to borrow the money from a money lender for treatment in a private clinic. Her difficulty in raising the money delayed the abortion by three weeks. She had to travel to England alone, in secrecy and with no money to spare, without alerting the social workers and without missing a contact visit with her children. On her return to Ireland, she experienced pain, nausea, and bleeding for eight to nine weeks, but was afraid to seek medical advice because of the prohibition on abortion. *Id.* paras. 13-17. The second applicant, 'B,' was single when she became pregnant unintentionally. She had taken emergency contraception (the "morning-after pill") the day after the unprotected intercourse, but she was advised by two different doctors that this had not only failed to prevent the pregnancy, but had also given rise to a substantial risk that it would be an ectopic pregnancy, where the fetus develops outside the uterus. The applicant was not prepared to become a single parent or to run the risks associated with an ectopic pregnancy, so she travelled to England for an abortion. On her return to Ireland she started passing blood clots and, since she was unsure whether or not this was normal and she could not seek medical advice in Ireland, she returned to the clinic in England for a check-up two weeks after the abortion. The impossibility for her to have an abortion in Ireland made the procedure unnecessarily expensive, complicated, and traumatic. *Id.* paras. 18-21.

[4] Irish courts relied upon relevant court decisions and various pieces of domestic legislation, including the Constitution. "A referendum was held in 1983 resulting in the adoption of a provision

could, provided they had sufficient resources, travel outside Ireland to have an abortion defeated the purpose of the restriction, and the fact that abortion was available in Ireland only in very limited circumstances was disproportionate and excessive.

Additionally, the applicants viewed Ireland's restriction on abortion as a breach of Article 14 of the ECHR (discrimination on specific grounds, such as gender), in that it had placed an excessive burden on them, as women; particularly on the first applicant, a poor woman who had more difficulty traveling.[5] On December 16, 2010, the Grand Chamber reviewing *ABC* ruled that, among other things, it was not for the Court to decide the validity of Ireland's legislation which prohibits abortions except in instances where the pregnant woman's life is threatened.[6] According to *ABC*'s holding, the margin of appreciation allows the Court to avoid taking a specific view on moral issues related to the termination of the unborn, specifically where a pregnant woman claims inhumane treatment and violation of privacy in an attempt to qualify her right to have an abortion.[7]

As expected, *ABC*'s ruling received criticism from those who supported pregnant women having the choice to get an abortion to preserve their health and well-being. This article is an assessment of *ABC*'s 'broad' application of the 'margin of appreciation,' specifically arguing that the morality involved and the indeterminate character of the status of the unborn necessitate that the ECtHR follow a strictly cautionary approach, which is of relevance to any regional human rights court.

This article begins by emphasizing the issues raised by *ABC* and then provides a detailed analysis of the mechanism of the margin of appreciation. This necessitates an engagement with the ECHR, as well as the interpretation of rights it provides. Also included is a critical look at ascribing an absolutist approach to some rights, followed by discussion on the matter of 'original intention' of the ECHR. The idea of evolutive interpretation will also be investigated in order to caution against its dangers. This article then explores the importance of the mechanism of the margin of appreciation in resolving

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which became Article 40.3.3 of the Irish Constitution, the Eighth Amendment (53.67% of the electorate voted with 841,233 votes in favor and 416,136 against)." *Id.* para. 36. This Article, a self-executing provision of the Constitution not requiring legislation to give it effect, reads as follows: "The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right." *Id.* In 2002, a third referendum on abortion was called to decide on the proposed Twenty-fifth Amendment of the Constitution, the Protection of Human Life in Pregnancy Act. *Id.* para. 50. This Act proposed to permit abortions to be lawfully provided in Ireland at specific institutions, but only when, in the opinion of the doctor, it was necessary to prevent a real risk of loss of the woman's life, other than self-destruction. *Id.* para. 52.

[5] *Id.* para. 14.

[6] *See id.* para. 213.

[7] *Id.*

the conflicts between the ECtHR and domestic courts, and also considers the importance of striking a balance between the national and the supranational judicial scene. Last, but not least, this article engages the question of the status of the unborn as viewed by the ECtHR and by international law in general. While the ECtHR in *ABC* did not deal with the status of the unborn, this article discusses the reasoning behind that decision as well as its possible consequences.

2. ABC on the unborn and the margin of appreciation

ABC emphasized that Article 8 of the ECHR cannot be interpreted to mean that pregnancy and its termination pertain uniquely to a woman's private life. Particularly in the sense that whenever a woman is pregnant her private life becomes closely connected with the developing fetus. According to *ABC*, a woman's right to respect for her private life must be weighed against other competing rights, including those of the unborn child.[8] Thus, Article 8 cannot be interpreted as conferring a right to abortion. However, according to *ABC* Ireland's prohibition of abortions, including those performed to preserve a mother's health and/or well-being, about which the first and second applicants complained, and the third applicant alleged the inability to establish her qualification for a lawful abortion in Ireland, comes within the scope of their rights in terms of Article 8.[9]

In its analysis (pertaining to the complaints of the first and second applicants regarding Article 8[10]) of whether Ireland's restrictive approach towards abortions constituted a 'legitimate aim', *ABC* stated, "[t]he impugned restrictions in the present case . . . were based on profound moral values concerning the nature of life which were reflected in the stance of the majority of the Irish people against abortion during the 1983 referendum . . . ."[11] In determining whether the interference was "necessary in a democratic society" against the background of Article 8, *ABC* proclaimed that "the State authorities are, in principle, in a better position than the international judge to give an opinion, not only on the 'exact content of the requirements of morals' in their country, but also on the necessity of a restriction intended to meet them."[12] The Court decided that due to the substantive sensitivity of the

[8] *Id.*

[9] *Id.* para. 214.

[10] *Id.* (*ABC* stated that the difference in the substantive complaints of the first and second applicants, on the one hand, and that of the third applicant on the other, required a separate determination of the question of whether Article 8 had been breached).

[11] *Id.* para. 226.

[12] *Id.* para. 232.

moral issues raised by the question of abortion, a broad margin of appreciation was to be accorded to Ireland in its determination of whether it had struck a fair balance between the protection of the right to life of the unborn, which reflected the public interest in Ireland, and the conflicting Article 8 rights of the first and second applicants.[13]

ABC, referring to *Vo v. France*,[14] ruled that deciding when the right to life begins[15] comes within the states' margin of appreciation due to the dissensus on the issue emanating from different scientific and legal approaches and the fact that the rights claimed on behalf of the fetus and those of the mother are inextricably interconnected.[16] Consequently, *ABC* did not believe that Ireland's prohibition of abortion for reasons of health and well-being, justified by the profound moral views of the Irish people regarding the nature of the life of the unborn and its protection, exceeded the margin of appreciation accorded to the Irish state. Rather, according to *ABC*, Ireland's prohibition struck a fair balance between the respect for the private lives and rights of the first and second applicants and the rights invoked on behalf of the unborn.[17]

Regarding the third applicant, *ABC* found that the Irish authorities had failed to comply with their positive obligation to secure an effective respect for her private life. The court reasoned that the absence of any implementing legislative or regulatory regime providing an accessible and effective procedure meant that the third applicant was prevented from establishing whether she qualified for a lawful abortion in Ireland, in accordance with Ireland's Constitution.[18] Therefore, the Court found that there had been a violation of Article 8 of the Convention in this respect.[19]

There are those of the view that:

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[13] *Id.* para. 233.

[14] Vo v. France, App. No. 53924/00, Eur. H.R. Rep. (2004), HUDOC, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61887.

[15] And consequently, whether Article 2 of the ECHR provides protection to the unborn.

[16] A, B & C, App. No. 25579/05, Eur. Ct. H.R. para. 237 (The Court also took into account that a choice had emerged, in that women seeking abortion on these grounds could lawfully travel abroad to have the abortion performed. Furthermore, women seeking abortion could lawfully access appropriate information about abortion, as well as abortion-related health care and, in particular, post-abortion care. *Id.* para. 239.).

[17] *Id.* para. 241.

[18] *Id.* para. 267.

[19] *Id.* para. 268.

> … this decision raises questions on the ECtHR interpretation of the margin of appreciation in cases which concern a moral issue such as abortion. The doctrine should not be used as a mechanism to avoid making decisions which may be seen as controversial in the home jurisdiction. There is an emerging consensus on abortion to protect the health and well-being of the mother in Europe. Thus it is unclear why A and B's applications did not succeed. This decision will thus only assist the medical profession in cases where the mother's life is at risk. However where the health and well-being of the mother is at risk, and she is not in a position to voluntarily travel abroad for an abortion, she has no option but to return to the Courts.[20]

The view above that "an emerging consensus on abortion to protect the health and well-being of the mother in Europe" as qualification for having A and B's applications succeed lacks a deeper analysis of the nature of the ECHR and the ECtHR.

Concerning the ECHR, Wolfgang Friedman commented that the right of an individual to bring complaints, culminating in the compulsory jurisdiction by a supranational court, against violations of his or her rights by the state of his or her own nationality, is a derogation from the principle of absolute state sovereignty over national citizens. The extension of this revolutionary principle to a wider community is dependent on the degree to which a wider circle of nations may be drawn together by common values and purposes to an extent sufficient to make a supranational jurisdiction.[21]

As celebratory as this may be for the furtherance of human rights protection, this 'revolutionary development' that Friedmann speaks of must be approached with caution. These 'common values and purposes' should not imply the exclusion of more specific interpretations by member states themselves. Specifically, foundational human rights norms included in the ECHR which have been allocated a limited literal formulation, such as that pertaining to the right to life. *ABC* is a good example of a cautionary approach in this regard, with the margin of appreciation doctrine playing an integral role. The scope of influence of the ECtHR's creative interpretation on other jurisdictions should not be underestimated. This article next scrutinizes the importance of the margin of appreciation and addresses potential problems that may appear when applying the margin of appreciation.

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[20] Ciara Staunton, As *Easy as A, B and C: Will A, B and C v. Ireland be Ireland's Wake-up Call for Abortion Rights?*, 18 EUR. J. HEALTH L. 205, 219 (2011); *See also* Paolo Ronchi, *A, B and C v Ireland: Europe's Roe v. Wade Still Has to Wait*, 127 LQR 365 (2011).

[21] WOLFGANG FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 244 (1964).

3. Interpretation, morals and the margin of appreciation

Looking at *ABC*, it is impossible not to refer to the issue of morality, which in turn provides us with a more nuanced understanding of the approach *ABC* took regarding the margin of appreciation. What makes one act moral in this specific time and place and what makes it immoral under different circumstances? *ABC* refused to answer this question with regard to the parameters of the termination of the unborn. The ECtHR shifted this burden to the domestic courts, arguing that they are in a better position to answer this question. In this regard, the decision of the ECtHR, and the recognition of their judicial weakness seems plausible. Such a decision also has a substantial impact on the applicability of the ECHR's rights throughout member states.

The Preamble of the ECHR indicates that its aim is in "securing the universal and effective recognition and observance of the rights therein declared" and in achieving a "greater unity between its members," as well as in pursuing the "maintenance and further realization of human rights and fundamental freedoms."[22] The Preamble recognizes that the ECHR's rights will be maintained by "an effective political democracy," as well as "by a common understanding and observance of the Human Rights upon which they depend."[23] Lastly, the Preamble refers to its member states as "countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration."[24] In summary, the ECHR's Preamble does not indicate that the Convention's rights are universal or that they should be applied univocally. Scrutinizing the wording used therein, it appears that the ECHR's rights are more of a framework that should aim towards "greater unity," but not absolute unity.[25] The member states are "like-minded" though, not single-minded, and therefore some differences in reading and applying were foreseen from the very beginning.[26] Also, the Preamble contains no reference to a common morality throughout the member states.[27]

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[22] The European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, pmbl. (Hereinafter ECHR).

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *See id.*

There is an express reference to morality in the body of the ECHR as an exception to the strict adherence to the rights it contains.[28] The structure of the ECHR indicates that morality cannot be imposed, and was not intended to be imposed, leaving this matter to the discretion of the member states. An evolutive interpretation of the ECHR, while it can attach additional meaning to the words used, cannot change the qualification of the rights or the status of the rights from a relative to an absolute understanding. Also of interest is that, as far as the issue of abortion is concerned, the text of the ECHR does not make any reference to abortion or the unborn while the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, for example, refers expressly to cases qualifying a lawful abortion by the member state.[29]

Scrutinizing the wording of the ECHR, one has to agree that it sets out basic rights that are very vague and broad. The idea behind it was to establish some fundamental rights-frameworks that would be incorporated by the member states and adapted according to their own constitutional traditions. Through such incorporation/adaptation, the rights mentioned in the ECHR should then become the member states' own rights.[30] Having the general framework, the member states should then adjust it to the context of each specific state by filling it with their own domestic law, traditions, and sense of morality. Such an understanding of the ECHR allows member states to analyze it in the light of their own history, traditions and morals without forcing them to apply a unitary interpretation or morality. While it must be emphasized that, generally speaking, vague and broad frameworks are at risk of potential abuse because of evolutive interpretation, in the case of so many contextually diverse member states, the vagueness is necessary, if not crucial.

Considering the construction of the ECHR's rights, the mere establishment of a breach does not imply that the member state shall

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[28] *See id.* art. 8(2) (Article 8(2) expressly refers to morality as a limitation to the right provided in Art. 8(1): "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."); *See also id.*, arts. 6(1), 9(2), 10(2), 11(2), and 39(3).

[29] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, art. 14(2)(c), Jul. 11, 2003, *available at* http://www.africa-union.org/root/au/Documents/Treaties/Text/Protocol%20on%20the%20Rights%20of%20Women.pdf.

[30] Paul Gallagher, *The European Convention on Human Rights and the Margin of Appreciation* 2 (UCD Working Papers in Law, Criminology & Socio-Legal Studies Research Paper No. 52/2011), *available at* http://ssrn.com/abstract=1982661.

be liable for it. As confirmed from the ECHR's text, the majority of its rights are not absolute. The text of the ECHR already prescribes a situation in which the rights will be limited. As far as Article 8 is concerned, subsection 2 of the Article indicates possible exceptions; for example, "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."[31] While some of those conditions are relatively easy to scrutinize via reference to legal provisions in the state, as well as the legislator's aim behind the enactment of such legislation, it is the proportionality test that might be problematic.

The proportionality test requires the ECtHR to scrutinize and balance conflicting rights. As far as *ABC* was concerned, the woman's right to respect for her private life had to be weighed against other competing rights and freedoms invoked, including those of the unborn.[32] However, balancing conflicting rights often includes references to moral issues, shifting the nature of the test from a purely legal to moral. The doctrine of the margin of appreciation is of major, if not crucial, importance in order to adequately serve the ECHR rights in question. Additionally, as expressly indicated in Article 8(2), limitations might be imposed in order to protect morals.[33] Consequently, in the case of *ABC*, the question of morality appears twice: first, whether the domestic legislation prohibiting abortion as a limitation under Article 8(2) aims to protect morals in the state and secondly, whether the rights of the applicants outweigh the rights of the unborn (status of the unborn).[34]

While one of the most important aims of the ECHR was to establish similar legal frameworks for all member states, the states were nevertheless not deprived of their sovereignty. The doctrine of the margin of appreciation emphasizes the importance of the sovereignty of the states, their unique characteristics, and autonomous privileges. The margin of appreciation is commonly used in cases where there is no recognized European consensus.

Additionally, the margin of appreciation is crucial in dealing with moral issues. This is because a moral view on a specific matter comprises an abstract and indeterminate dimension being elucidated

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[31] ECHR, *supra* note 22, art. 8(2).

[32] *A, B & C*, App. No. 25579/05, Eur. Ct. H.R., para. 213.

[33] ECHR, *supra* note 22, art. 8(2).

[34] *See generally A, B & C*, App. No. 25579/05, Eur. Ct. H.R.

by, among other things, the societal background and context of the specific state. It is therefore plausible that the margin of appreciation is prescribed a higher degree of relevance for sensitive areas, such as issues related to public morals.[35] The margin of appreciation is often compared to a design allowing flexibility in resolving disputes emerging from diversity, for example different political, cultural, and religious traditions of individual member states.[36] Its major aim is to strike a balance between national sovereignty and international supervision.[37]

The rationale behind this doctrine is that national courts and judges are in a better position to read and apply ECHR law in the light of their constitutional tradition or the needs of people living in that specific state.[38] While general frameworks for the member states are useful and desirable on one hand, on the other hand a strict adherence to those frameworks, without leaving any discretion to the national courts, might neglect the needs of the very diverse ECHR member states and might consequently do more harm than good.[39] Of equal concern is the evolutive approach to interpretation, which often neglects the original intention of the ECHR.

The ECHR is referred to as a 'living document' that requires an evolutive interpretation, particularly in light of contemporary social conditions.[40] This would also mean that the interpretation of the ECHR is temporary, constantly changing, and adjusting to the social and/or political conditions. Considering the 59 years that the ECHR has been in force, there is agreement that the interpretation of the rights of the ECHR has changed over the years and may not have reached its final interpretation yet. Consequently, the application of evolutive interpretation can cause much confusion as well as significant discrepancy, neglecting the original meaning and aim of the ECHR. Furthermore, as far as evolutive interpretation is concerned, particularly regarding the rights provided by the ECHR, "once expanded beyond the traditional core of fundamental liberties,

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[35] Onder Bakiricioglu, *The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases*, 8 GERMAN L. J. 711, 721 (2007).

[36] *Id.* at 711.

[37] Ignacio de la Rasilla del Moral, *The Increasingly Marginal Appreciation of the Margin-of-Appreciation Doctrine,* 7 GERMAN L. J. 611, 615 (2006).

[38] Bakiricioglu, *supra* note 35, at 711.

[39] Tyrer v. United Kingdom, A26, 1978, 1979-80, 2 EHRR 1 (using the term first); *See* PIETER VAN DIJK AND FRIED VAN HOOF, THEORY AND PRACTICE AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS 84 (Kluwer Law International ed., 1998).

[40] Gallagher, *supra* note 30, at 2.

there is no obvious reason for limiting the number and range of interests, claims and entitlements that can be dressed up as human rights."[41] *ABC* is highly relevant in this regard, especially considering the interpretation of the scope and applicability of Article 8. While originally Article 8 was used to protect family life (as a unit as well as relationships between family members), privacy, home and correspondence, in adherence to the textual interpretation, its spectrum has expanded substantially.[42]

As indicated by *ABC*, Article 8 does indeed include the reproductive rights of women,[43] yet there is no emphasis on the 'meaning in practice' of the reproductive rights of women. While it could be argued that women should have the right to decide whether to have a child or when to have a child, that was not *ABC*'s underlying issue. The reproductive rights of women referred to in *ABC* were more far-reaching and concerned the right to abortion. The Court shifted the public focus from the issue of abortion to the decision-making rights of women without clarifying that the issue in *ABC* included the right to abort a pregnancy as part of reproductive rights.[44]

There is a substantial difference between merely deciding if and when to become pregnant and whether, if already pregnant, to continue the pregnancy. Considering the current state of the interpretation of the ECHR's rights as applied in *ABC*, the Right to Private Life gives a right not only to decide 'if and when' but also whether to continue the pregnancy or to abort. The Chamber was very careful with the words it used and did not say directly that Article 8 includes the right to abortion.[45] The judgment contains no statement clearly indicating that the Chamber supported abortion. Yet, the judgment needs to be read as a whole in the light of all circumstances of the case as well as the arguments submitted by the applicants. The Chamber skillfully avoided the use of the word 'abortion' and instead referred to women's reproductive rights and the right to respect for their private lives. It is concerning where such 'creative' interpretation will take us in the future. The margin of

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[41] DOMINIC RAAB, THE ASSAULT ON LIBERTY: WHAT WENT WRONG WITH RIGHTS 117 (2009).

[42] *See* NIHAL JAYAWICKRAMA, THE JUDICIAL APPLICATION OF HUMAN RIGHTS LAW: NATIONAL, REGIONAL AND INTERNATIONAL JURISPRUDENCE 613 (2002).

[43] *See* A, B & C, App. No. 25579/05, Eur. Ct. H.R. para. 212.

[44] *Id.* para. 214.

[45] *Id.*

appreciation is a safeguard against the overactive courts in a broad, evolutive interpretation of ECHR rights.[46]

Emily Wada describes the margin of appreciation as a self-imposed mechanism of judicial restraint,[47] as it has been implemented by the ECtHR, to limit its role to that of supervisor in light of the principle of subsidiarity.[48] Wada discusses the doctrine further in light of the presence, or lack thereof, of a uniform consensus across member states on contentious issues.[49] Janneke Gerards notes the ECtHR's fragility, and hence the need for the Court to tread carefully in order to ensure good relations with member states, and therefore their compliance.[50] Key moral issues, like abortion, have been determined by the Court to have a wider margin.[51] Paolo Carozza comments that the margin of appreciation doctrine "overtly injects a certain degree of relativity into the application of the [ECHR]'s norms, and has thus been considered the cornerstone of the [ECHR]'s respect for diversity of nations."[52]

According to Gerards, the ECtHR reiterates the doctrine of the margin of appreciation, including its background, "in almost every case placed before it and it commonly explains the reasons why the various factors result in a particular scope of the margin of

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[46] Gallagher, *supra* note 30, at 4.

[47] *See* Emily Wada, *A Pretty Picture: The Margin of Appreciation and the Right to Assisted Suicide, 27 LOY. L. A. INT'L & COMP. L. REV. 275* (2005).

[48] *See Who We Are*, COUNCIL OF EUROPE, http://www.coe.int/aboutcoe/index.asp?page=quiSommesNous (The Council of Europe website defines this as being a principle which allows each member state to have the task of deciding democratically, what is appropriate for itself. It sees member states as being in the best position to determine what is 'necessary' according to the local issues, rather than international courts. Thus, the Court is not a 'Supreme Court' of appeal but rather a supervisor of member states, to ensure that member states are acting within the margin of appreciation, which is indeed not limited.).

[49] *Wada, supra* note 47, at 275.

[50] Janneke Gerards, *Pluralism, Deference and the Margin of Appreciation Doctrine*, 17 EUR. L. J. 80, 104 (2011).

[51] *See* Bakircioglu, *supra* note 35, at 727; *see also* Eva Brems, *The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights*, 56 HJIL 240 (1996), *available at* http://www.zaoerv.de/56_1996/56_1996_1_2_a_240_314.pdf (This source provides a list of important factors taken into consideration by the ECtHR in deciding in the application of the margin of appreciation, and whether such application requires a wide or narrow approach. Brems states that "the idea is that the more important a right is, the smaller the margin granted to the national authorities to interpret or restrict it. The ultimate consequence of this line of reasoning is that with regard to the most important articles of the Convention, in particular 2 and 3, no margin is left to the national authorities." *Id.* at 264.).

[52] Paolo G. Carozza, *Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights*, 73 NOTRE DAME L. REV. 1217, 1220 (1998).

appreciation in each individual case."[53] He adds, "[t]his makes the doctrine into a very flexible tool that may moreover provide useful information to the national authorities as to their room for manoeuvre. As a judicial instrument to negotiate with problems of pluralism, it is therefore very attractive indeed."[54] Gerards also contends that the ECtHR should not substitute a national legislature's opinion for its own. Further, he claims it is important to guarantee fundamental rights in a manner that matches the differences between national traditions and perceptions, which allows for cultural variation.[55]

Considering that the margin of appreciation partially limits the unitary application of ECHR rights, it has many enemies. Some have argued that excessive use of the mechanism contradicts the idea behind having a harmonious legal framework within the member states.[56] Critics have also argued that the margin of appreciation opens doors to abuse by limiting the exercise of human rights.[57] Quite the contrary, the margin of appreciation allows a proper application and execution of human rights in that ECHR rights are adapted to the domestic legal system and so transform them into national human rights. Thus, the margin of appreciation allows a realistic relationship between member states and the ECHR. In order for human rights to work, they have to be integrated with the constitutional tradition and morals of the individual state.

As previously explained, the ECHR's rights are not absolute and the limitations of human rights are incorporated in the body of the ECHR. The ECHR's construction, to include prescribed limitation and discretion to the member states regarding their implementation of it, as well as the discretion of the ECtHR regarding the use of a broad margin of appreciation, makes the unitary application of ECHR rights impossible, yet not unreasonable. It might even be argued that the discrepancies caused by interpretation and application of ECHR rights are more reasonable than adherence to the artificial European consensus on moral issues.

Comparing *ABC*'s emphasis on the morality of the issue at hand, and the Court's view that a wide application of the margin of interpretation is the appropriate approach given the circumstances, with that of the general function and expectations of the margin of

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[53] Gerards, *supra* note 50, at 116.

[54] *Id.* at 116-17.

[55] *Id.* at 104.

[56] Bakiricioglu, *supra* note 35, at 731.

[57] de la Rasilla del Moral, *supra* note 37, at 612.

appreciation doctrine, indicates that there is an acceptable, inextricable relationship between a wide application of the margin of appreciation and the determination of the status of the unborn. In the next section, it is argued that due to the complexity of the status of the unborn the *ABC* ruling pertaining to the claims by the first and second applicants was the proper approach to take.

4. The status of the unborn

A submission was made in *ABC* that some argue that conventional law does not impose rigid standards as requirements for member states on moral questions, although certain minimum standards for the protection of fundamental rights are stipulated.[58] In addition, it was submitted to *ABC* that member states are provided a wide margin of discretion, depending on the nature of the right, the nature of the issues at stake and the importance of those issues, as well as the existence or absence of international law or consensus on the topic.[59]

The contemporary jurisprudential milieu reflects diverse narratives on the status of the unborn. Narratives which epitomize, for example, the restructuring of criminal codes in order to protect the unborn from violent actions and bioethical efforts related to the human embryo. International human rights instruments reflect, on the one hand, a vague understanding of the legal status of the unborn,[60] while on the other hand one finds that some instruments clearly support the protection of the unborn.[61] Sixty-nine states (including Ireland) prohibit abortion entirely or allow it only in cases

[58] *See* A, B & *C*, EUR. CT. H.R., para. 235.

[59] Submission to EUR. CT. H.R. in relation to the case of A, B &C v. Ireland , by the ECLJ, at 18 (On behalf of joint written observations of third party interveners: Kathy Sinnott, Member of European Parliament, Ireland South; The Alliance Defense Fund on Behalf of the Family Research Council, Washington D.C., United States; The Society for the Protection of Unborn Children, London, November 14, 2008).

[60] This is indicative of the sensitivity towards an absolute negation of the protection of the unborn.

[61] *See* RITA JOSEPH, HUMAN RIGHTS AND THE UNBORN CHILD 3, 45, 81-82, 103, 108, 135, 193, 195 (2009); Melody N. Slabbert, *The Position of the Human Embryo and Foetus in International Law and its Relevance for the South African Context*, 32 CILSA 336 (1999); JUDE IBEGBU, RIGHTS OF THE UNBORN CHILD IN INTERNATIONAL LAW 117, 119-20 (2000); Niels Petersen, *The Legal Status of the Human Embryo In Vitro: General Human Rights Instruments*, 65 HEIDELBERG J. INT'L L. 450, 457 (2005); Patrick Flood, *Is International Law on the Side of the Unborn Child?*, NAT'L CATH. BIOETHICS Q. 73, 76 (2007).

where the mother's life is threatened.[62] Four have some type of prohibition.[63]

Michael Perry observes that in virtually all liberal democratic societies there is a deep and widespread dissensus about the moral status of the human fetus in its earliest stages of development.[64] Perry adds that there is little, if any, reason to doubt that this dissensus will be enduring.[65] In fact, there is a varied understanding on the status of the unborn not only within Western human rights jurisprudence and societal views, but also in Eastern and African cultures, and non-religious circles. Judge Ress' dissent in *Vo v. France*[66] is interesting because he asserts that, "[h]istorically, lawyers have understood the notion of 'everyone' as including the human being before birth and, above all, the notion of 'life' as covering all human life commencing with conception, that is to say from the moment an *independent existence* develops until it ends with death, birth being but a stage in that development."[67]

The above-mentioned differences and consequent complexities related to the status of the unborn, as well as the wording of Article 2 of the ECHR, strengthen the understanding that Article 2 does not present any negative component requiring a state to deny the right to life to the unborn. As submitted to *ABC*, an Article 2 claim to expand abortion cannot be considered if it raises no issue separate from an Article 3 claim of torture or inhuman treatment.[68] Also, Article 2 should only accommodate abortion where the life of the pregnant woman is seriously threatened or in similar defensive matters. This complexity related to the clarification of Article 2, and consequently the status of the unborn, confirms the 'importance of the right in question' as well as the 'exceptional character of a situation' as important factors to be taken into consideration regarding the margin

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[62] *See* Submission to EUR. CT. H.R., *supra* note 59, at 30.

[63] Malta, Andorra, Monaco and San Marino. *See Vo v. France*, *supra* note 14, at 62.

[64] MICHAEL J. PERRY, TOWARD A THEORY OF HUMAN RIGHTS: RELIGION, LAW, COURTS 61-62 (2006).

[65] *Id.*

[66] *Vo*, App. No. 53924/00, Eur. H.R. Rep. para. 4 (Ress, J., dissenting).

[67] Alastair Mowbray, *Institutional Developments and Recent Strasbourg Cases*, 5 HUM. RTS. L. REV. 169, 176 (2005).

[68] *See* Submission to EUR. CT. H.R., *supra* note 59, at 16 (Here reference was made to *Öcalan v. Turkey* (2005) 41 EHRR 985 and *D v. United Kingdom,* 24 EHRR 425 (1997). The said observations state, "Moreover, Ireland does not diminish the right to life of women – it gives full and equal treatment to their and their children's right to life. And the unborn's right to life as understood by Ireland allows abortive actions to save the lives of women." *Id.*).

of appreciation. These have also been identified as important factors by the ECtHR.

According to Eva Brems, "in the very beginning of the development of the idea of a domestic margin of appreciation, the European Commission for Human Rights, which was the initial promotor of the doctrine, linked the concept with that of the interpretation of vague and general concepts."[69] As stated earlier, Article 2 of the ECHR is certainly a vague and general concept when it comes to confirming whether the unborn is part of it or not. In this regard, it is also important to emphasize that there is no negative component in Article 2 requiring a state to deny the unborn the right to life in order to vindicate the right to life of women.[70]

Janneke Gerards observed that some of the ECtHR's judges have contended that the 'better placed argument' should be the only factor applied in deciding about the margin of appreciation.[71] This factor is of special relevance when ruling on measures relating to particularly sensitive, complex, or moral issues.[72] According to Aaron Ostrovsky, "[h]uman rights rhetoric often contains a strong moral or ethical dimension: the idea that there is a core 'good' which is superior to, and outweighs, cultural differences. In this vein, human rights lawyers often work to persuade tribunals to an essentially moral position."[73] Anne-Marie Slaughter commented that even where a body of supranational law is formally binding, the ECtHR has no coercive power to compel adherence. Rather, they must rely on persuasion.[74]

When it comes to deciding on the morality of the termination of the unborn, there is no persuasive argument that the unborn is not a human life. If human rights tribunals want to try to legitimize their decisions, which "often means taking into account cultural differences

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[69] Brems, *supra* note 51, at 294.

[70] Submission to EUR. CT. H.R., *supra* note 44, at 16.

[71] Gerards, *supra* note 50, at 110 (Gerards further observes that the ECtHR, "leaves a wide margin of appreciation . . . in cases requiring a difficult balance to be struck between conflicting fundamental rights and interests; in cases demanding highly technical and specialist expertise; or in cases where specific historical circumstances . . . make it difficult for the court to understand the need for certain restrictions." *Id.* at 110-11. The seeking of a determination as to the status of the unborn should certainly not be excluded from this equation.).

[72] *Id.* at 111.

[73] Aaron A. Ostrovsky, *What's So Funny About Peace, Love, and Understanding? How the Margin of Appreciation Doctrine Preserves Core Human Rights Within Cultural Diversity and Legitimises International Human Rights Tribunals*, 1 HANSE L. REV. 47, 57 (2005).

[74] Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 125 (1994).

which would seem to dilute an essentially moral position,"[75] then *ABC* was correct in applying a wider margin of appreciation due to the complexity of having to clarify the precise nature of the unborn and/or the morality of terminating the unborn. Ostrovsky also commented that in "allowing a margin of appreciation, a tribunal says to a State, we will trust *your* conception of core rights and allow them to fit into the greater concept of core rights, but only until there is a clear collision between the two."[76] Applying this test to *ABC*, there is no clear collision between Ireland's view on the status of the unborn against the background of the core right to life in Article 2 of the ECHR and the 'greater concept' of the right to life reflected by that Article. In *ABC*, the margin of appreciation was applied in order to allow for divergent interpretations of the meaning of life under Article 2 of the ECHR. This allows for the text to respond flexibly to divergent needs within divergent cultures and views on the all important yet complex determination regarding the nature of human life. There is substantial uncertainty whether a pregnant woman wanting an abortion and calling upon the protection of Article 8 of the ECHR, for reasons of health and well-being *per se*, should present no protection for the unborn.

The ECtHR and the Commission's records regarding cases directly linked to the unborn are indicative of an avoidance of making a concerted effort towards clarifying the status of the unborn. For example, Wolfgang Freeman observed that although confronted with the issue in 1992, the ECtHR avoided defining whether "everyone's right to life" includes the unborn child.[77] Another example is Katherine O'Donovan's observation that the ECtHR decided *Vo v. France* in a neutral stance,[78] again avoiding answering the question of

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[75] Ostrovsky, *supra* note 73, at 57.

[76] *Id.* at 58.

[77] Open Door and Dublin Well Woman v. Ireland, App. No. 14234/88, Eur. Ct. H.R. (1992), HUDOC, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57789; Katherine Freeman, *The unborn child and the European Convention on Human Rights: To whom does 'everyone's right to life' belong?*, 8 EMORY INT'L L. REV. 616 (1994); *See also id.* at 627, 631, 639-40, 646.

[78] Katherine O'Donovan, *Taking a Neutral Stance on the Legal Protection of the Fetus: Vo v France*, 14 MED. L. REV. 115 (2006) (The Court acknowledged that: ". . .it has yet to determine the issue of the 'beginning' of 'everyone's right to life' within the meaning of the provision, and whether the unborn should have such a right." *Vo v. France*, *supra* note 11, para. 75. Furthermore, the court stated 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 which must be interpreted in the light of present-day conditions' . . . The reasons for that conclusion are, firstly, that the issue of such protection has not been resolved within the majority of the contracting states themselves, in France in particular, where it is the subject of debate and, secondly, that there is no European consensus on the scientific and legal definition of the beginning of life." *Vo v. France*, *supra* note 11, para. 82.).

the legal status of the unborn.[79] This confirms the complexity of the issue at hand, consequently qualifying the importance of the ECtHR's application of a wide interpretive approach to the margin of appreciation against the background of *ABC*.

It is this moral complexity related to the status of the unborn that resulted in *ABC* excluding any relevance consensus among member states regarding the interpretation of the ECHR, *ABC* having interpreted Article 8 of the ECHR as not conferring a right to abortion.[80] Paolo Carozza stated that following the 'consensual' route has its dangers as it can lead to a 'vulgar form of positivism.'[81] Carozza added that the ECHR surely does not support the negation of all national differences, but instead sets a minimum level of compatibility.[82] Also in *Vo*, the Court emphasized that, concerning the status of the unborn, there is no such consensus among the states. It said, "the issue of such protection has not been resolved within the majority of the Contracting States themselves, in France in particular, where it is the subject of debate and, secondly, that there is no European consensus on the scientific and legal definition of the beginning of life."[83] This potential power lying in consensus to create universal norms pertaining to complex issues such as those related to the beginning of life needs to be cautioned against and *ABC* took the correct stance. It would be apt to briefly comment here on the problematic nature of consensus as authoritative norm against the background of the ECtHR.

While the European consensus was successfully rebutted in the body of *ABC*'s judgment, some of its concurring opinions strongly

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[79] *See* Barbara Hewson, *Dancing on the Head of a Pin? Foetal Life and the European Convention,* 13 FEMINIST LEGAL STUD. 363, 365 (2005).

[80] *See* A, B & C, App. No. 25579/05, Eur. Ct. H.R. para. 214; para. 7 (Geoghegan, J., concurring).

[81] Carozza, *supra* note 52, at 1228.

[82] *Id.* (Carozza also foresees problems in this regard when considering the inclusion of states outside of Western Europe which have much more divergent domestic legal, social, and political traditions. *Id.* at 1231); *See* Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards,* 31 N.Y.U. J. INT'L L. & POL. 843, 852 (1999); *See also* de la Rasilla del Moral, *supra* note 37, at 617 (regarding the absence to date of a profound and detailed comparative research to the common ground or patterns. The lack of European consensus on the status of the unborn and abortion is not surprising considering the diversity among the member states due to their different constitutional systems and traditions.); GEORGE LETSAS, THE ECHR AS A LIVING INSTRUMENT: ITS MEANING AND LEGITIMACY, THE EUROPEAN COURT OF HUMAN RIGHTS IN A NATIONAL, EUROPEAN AND GLOBAL CONTEXT 7 (2012); Kanstantsin Dzehtsiarou, *European Consensus: A Way of Reasoning* 1 (UCD Working Papers in Law, Criminology & Socio-Legal Studies, Research Paper No. 11/2009), *available at* http://ssrn.com/abstract=1411063 (emphasizing that the ECHR does not provide any specification on the European consensus.).

[83] *Vo*, App. No. 53924/00, Eur. H.R. Rep., para. 82.

disagreed.[84] The mere establishment of the definition of European consensus is highly problematic. It is often referred to as a common ground or a similar pattern of practice across the member states.[85] The existence of such a similar pattern or common ground would result in the ECtHR having more discretion in deciding whether to make a decision on highly problematic issues, which are often outside its expertise or knowledge. While it could be argued that consensus aims at a unification of law and its application across the member states, this argument fails on one major point. No profound and detailed comparative research has ever been provided on this common ground or patterns.[86] The mere fact that the parliaments in the majority of member states have legalized abortion does not reflect European consensus.[87]

The question is whether European consensus on matters of moral concern requires an all-inclusive support by the states or whether any kind of majority consensus would be sufficient. It is clear that as far as the member states are concerned, there is no absolutely inclusive consensus regarding the nature of the unborn and its moral dimension. On the other hand, if a majority of the member states would amount to consensus, the question would be whether the opposing countries as the minority could be forced to implement the majority's consensual vote regarding a specific moral understanding. In other words, the question here would be whether a specific moral approach can ever be forcibly imposed on a state.

There is a plethora of literature and case law pointing out the erroneousness of the idea of European consensus. Such cases as Handyside v. UK[88] or Otto-Preminger-Institut v. Austria[89] indicate that while it is impossible to establish a European consensus in cases raising sensitive moral issues, it will be up to the national courts to deal with such issues, since they are better equipped to scrutinize them in light of their own national identities. As far as the status of the unborn is concerned there is no European consensus on the scientific and legal definition of the beginning of life, as emphasized in *Vo v. France*.[90] Consequently, since there is no consensus on the

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[84] Bakiricioglu, *supra* note 35, at 728 (*ABC* concurring opinions).

[85] de la Rasilla del Moral, *supra* note 37, at 617.

[86] *Id.*

[87] Dzehtsiarou, *supra* note 82, at 13.

[88] *See* Handyside v. U.K., App. No. 5493/72, Eur. Ct. H. R. (1976), *available at* http://www.unhcr.org/refworld/docid/3ae6b6fb8.html.

[89] *See* Otto-Preminger-Institut v. Austria, App. No. 13470/87, Eur. Ct. H. R. (1994), HUDOC, http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{%22itemid%22:[%22001-57897%22]}.

[90] *See Vo*, App. No. 53924/00, Eur. H.R. Rep. para. 82.

status of the unborn, it is impossible to establish consensus regarding abortion, as these issues are closely connected. While it is highly unlikely that a consensus between the member states will ever be possible, it appears that the higher standard of 'consensus' in regard to the status of the unborn has been shifted to a lower standard of 'trend' or 'pattern' among member states. Bearing this in mind, *ABC* rightly avoided merely following the illusionary patterns or common grounds that do not necessarily reflect European consensus.

The ECtHR refused to deal with the question of the status of the unborn, labeling this a moral issue and shifting the burden onto domestic courts. However, it should be emphasized that the ECtHR in *Vo v. France* did explicitly recognize the possibility that the unborn might be a human being, unlike *ABC*. A similar possibility was recognized in *X v. United Kingdom*,[91] where the Commission emphasized that Article 2 lacks any mention of abortion and the possible implications that carries. The Commission indicated three options when interpreting Article 2: as not covering the unborn, as covering the unborn with limitations, or as absolutely covering the unborn.[92] The Commission excluded the possibility of an absolute protection stating that this "would mean that the 'unborn life' of the [fetus] would be regarded as being of a higher value than the life of the pregnant woman."[93] It has been argued that such an understanding of Article 2 was not intended by the founders of the ECHR at the time of its drafting, since at that time member states allowed abortion in order to save the life of the mother.[94] The recognition of the limited rights of the fetus under Article 2 was also recognized in *H v. Norway*.[95]

CONCLUSION

Ann Glendon referred to the collective wisdom of the wide variety of legal systems represented by the judges serving on the ECtHR.[96] In *ABC*, there were eleven votes to six that the rights

[91] *See* X v. U.K., App. No. 7215/75, Eur. H.R. Rep. (1981).

[92] *See* DOUWE KORFF, COUNCIL OF EUR., THE RIGHT TO LIFE: A GUIDE TO THE IMPLEMENTATION OF ARTICLE 2 OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS, HUMAN RIGHTS HANDBOOKS NO. 8, at 10 (2006), *available at* http://echr.coe.int/NR/rdonlyres/16D05FDF-4831-47EC-AE6D-A2C760B0B630/0/DG2ENHRHAND082006.pdf.

[93] *X v. U.K.*, App. No. 7215/75, Eur. H.R. Rep., at 19.

[94] KORFF, *supra* note 92, at 10.

[95] *See* H v. Norway, App. No. 17004/90, 73 EUR. COMM'N H.R. DEC. & REP. 155 (1992).

[96] Slaughter, *supra* note 74, at 132-33.

provided to the first and second applications by Article 8, and Article 13 in conjunction with Article 8, had not been violated.[97] This is a convincing reflection of the angle taken by the 'collective wisdom' of the wide variety of legal systems represented by the judges serving on the ECtHR, in following a broad approach to the margin of interpretation regarding the protection of the unborn, requiring appreciation. *ABC* also made it clear that a prohibition of abortion to protect unborn life is not automatically justified under the ECHR, whether on the basis of unqualified deference to the protection of the unborn or on the basis that an expectant mother's right of respect for her private life is of a lesser stature.[98]

The margin of appreciation performs a useful role inside the European Convention's human rights protection system. It provides an elegant solution for the tension existing between national and European legal rules within a supranational judicial system so that it is not necessary to completely subordinate one to the other.[99] However, Eva Brems warned that it is important to control the use of the margin of appreciation to avoid its becoming a door through which arbitrariness and uncertainty can enter the European Convention.[100] The margin of appreciation has a fundamental role to play in maintaining a balanced relationship between the poles of universalism and relativism. For complex matters, such as the determination of the legal status of the unborn, the ECtHR allowed for the subservience of universalism to that of relativism in determining whether the unborn should be protected for reasons of health and well-being *per se*. This does not mean that there should be no universalist angle providing a minimal level to balance the woman's need for protection with that of the unborn.

There is more of a consensus and less contentiousness on the view that where the woman's life is threatened by the continued protection of the unborn, or where inhumane treatment is incurred against the woman, then the termination of the unborn should be allowed. This should also be followed in matters which Michael Paulsen refers to as cases for reasons of "self-defense," for example, rape, incest, and

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[97] *See* A, B & C, App. No. 25579/05, Eur. Ct. H.R., para. 242.

[98] *Id.* para. 238.

[99] THE EUROPEAN CONVENTION FOR PROTECTION OF HUMAN RIGHTS: INTERNATIONAL PROTECTION VERSUS NATIONAL RESTRICTIONS 319 (Mireille Delmas-Marty ed., Christine Chodkiewicz trans., 1992); *see also* Brems, *supra* note 51, at 312-13.

[100] Brems, *supra* note 51, at 313.

serious fetal defect.[101] This is supported by the concurring opinions of Judges López Guerra and Casadevall, who stated that, "[w]hile bearing in mind the State's margin of appreciation, the degree of intensity and gravity of the present dangers to the woman's health or well-being must be taken into account case by case, in order to appraise whether the prohibition falls within that margin of appreciation."[102] In this way, a nuanced approach to the balancing of interests of the pregnant woman and those of the unborn is attained, and the universalist call for the protection of basic interests in the face of gross adversity is brought to the fore. The view that the health and well-being of the pregnant woman *per se*, as an unlimited interest qualifying abortion will result in an arbitrary and insensitive deification of the universalist claim. It may be that due to the specificity of moral communities, among others, the concept of human dignity as a transcendent value which gives an aspirational flavor to human rights can result in relativistic insights that are acceptable. *ABC* is a prime example of a ruling on something more initial than human dignity, as an essential part of the argument entails the determination of when human dignity is established in the biological development of a human being.

There is also the risk of the current and popular inter-judicial use of human rights jurisprudence in the context of national and regional human rights legal systems.[103] The attractiveness for other courts regarding the human rights jurisprudence of a regional human rights court such as the ECtHR, provides added responsibility for the ECtHR to be wary of probing too deeply into matters of moral concern, such as abortion. *ABC's* application of the margin of appreciation provided a wise solution for the possible tension that may exist in a supranational judicial system between national and regional rules and kept the variety of opinions, including the different interpretations of Article 2, regarding the legal status of the unborn intact.

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[101] Michael S. Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1020-21 (2003).

[102] A, B & C, App. No. 25579/05, Eur. Ct. H.R. para. 3 (Casadevall, J., Guerrab, J., concurring); (Additionally stating, "[I]t cannot be excluded that in other cases, in which there are grave dangers to health or the well-being of the woman wishing to have an abortion, the State's prohibition of abortion could be considered disproportionate and beyond its margin of appreciation." *Id.* para. 5.)

[103] *See* Slaughter, *supra* note 74, at 106 (According to J. G. Merrills, the jurisprudence of the ECtHR can even play an important role in the formulation of treaties. This adds to the heightened responsibility of the ECtHR to not take too rigid a view on such a contentious and complex matter as the legal nature of the unborn.).

ABC also ensured, by means of the margin of appreciation, that little tension exists between itself and the judiciary beyond Europe, and that courts around the world would not be tempted to follow an unbalanced approach regarding the relationship between the rights of the woman and fetal interests. This temptation to view the findings of a regional human rights court, such as the ECtHR, in moral issues as 'global' or 'universal' overlooks the possible subjectivity that could accompany such findings in moral and contentious matters.[104] If *ABC* had not applied a wide approach to the margin of appreciation, then the norm that the health and well-being of the woman as qualifier for abortion *per se* would have run the risk of becoming not only a supra-national, but also a supra-regional norm, through the workings of the courts in general. Such a 'superficialization' of the status of the unborn would be contrary to a nuanced sense of worth that should be awarded to the unborn. For the ECtHR to have done otherwise would, at worst, be opposed to the accommodation of the possibility of the unborn being human, and consequently the usurping of respect for the individual and humanity. At the basis of this understanding lies the concern for the protection of mankind, something which is inextricably connected to the question of the beginning of life, the parameters of human dignity and of being human.

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[104] *See* Kenneth Anderson, *Foreign Law and the U.S. Constitution*, 131 POL'Y REV. 33, 35-36 (2005) (Referring to the United States Supreme Court case, *Roper v. Simmons*, 543 U.S. 551 (2005), Anderson commented, "A certain sleight-of-hand is involved in much discussion of the 'universal' values the Court has grown fond of citing in the abstract. An unstated, unargued-for assumption in much of this rhetoric is that 'global' and 'international' are the same as 'universal.' It presumes, in other words, that if one's position can be described as 'global' or 'international' or 'transnational' because it transcends mere geography and mere borders, it is 'universal' in the moral sense of applicable to all, free of particular interests, free of prejudice and attachments, impartial and disinterested and hence suitable to judge as between others' particular interests. But why assume that the views of those who live globally, internationally, or transnationally are indeed morally universal? Why assume that they have no particular interests and no partiality?"*Id.*).