OBSERVATIONS RELATING TO THIRD PARTY INTERVENTION

submitted to the
European Court of Human Rights

in the case of

M. P. & others v. Romania
(n° 39974/10)

Strasbourg, October 15, 2012,

Grégor Puppinck, Director

Andreea Popescu, lawyer

The present case concerns three applicants: a couple and their son, conceived by artificial insemination, born without tibia. They believe they have a right to compensation because of the pain suffered by the child since his birth, along with the pain endured by the parents since the birth. The mother of the child claims to not have had the right to abort, as she would have done if, during her pregnancy, she had been informed by her doctors of the illness of the son she was expecting. In the application to institute proceeding, the applicants claimed *"a fundamental human right to not be the result of medical malpractice",* a right which, according to them, *"falls within the category of rights covered by the right to life (Article 2 of the Convention) and the right to respect for private and family life (Article 8 of the Convention)"* as today*, "artificial insemination allows couples to realise a desire accepted usually as natural, but for these applicants unrealisiable by natural means"* and that *"the technology involved and necessary, exercises rigorous control, as opposed the unpredictable nature of natural procreation."*
In other words, the Court once again, must handle a request founded solely on the alleged right to a "healthy child". Only with the existence, implicitly or explicitly, of this right can one deduce a positive obligation on the State to provide the resources to avoid the birth of a disabled child, and to compensate the parents in cases where the birth was not avoided.

The observations were outlined as follows:

- In relation to Article 2 of the Convention, it is important to note that this article does not guarantee a right to not be born, but a right to life and this article is found to not apply in this instance (I).
- As for Article 8 of the Convention, the complaints of the applicants are neither clear nor supported. The applicants do not indicate for what reasons they consider that their rights have been violated. One can envisage two possibilities: however, for many reasons which will be set out in what follows, none of them led to a violation of Article 8 of the Convention (II).
- The positive obligations enforced on a state in relation to Article 8 of the Convention do not extend to impose on a state the obligation to establish a compensatory system to handle the damage of being born or the damage of an undesired birth in order to protect the right to private and family life of the applicants (III).

1. <u>Article 2 of the Convention does not guarantee a right to not live (wrongful life)</u>

A. The child is not the result of a medical error

Contrary to the claims of the applicants, there is no link between the possible mistake of doctors and the disability of the child. If there was a mistake, it only concerned the screening of the disease. The disability of the child was not caused by an act or omission of the doctors, as it was a pre-existing condition. Even if he was screened before the birth, the doctors could not treat the child before his birth. As can be seen in the Court of Appeal of Bucharest: "*it is clear, in relation to the child, that there is no causal link between the illegal event and the impaired offspring, as, if the doctor had seen the irregularity of the sonogram, the result would have been the termination of the pregnancy. In this situation one can not estimate whether the child would have been better off not being born than being born with "tibia agenesis", as the right to life is of utmost importance and the nature of the deformity does not substantially affect its quality of life. In this sense, it*

emerges from sections of the file that the deformity that the child suffers could be corrected in the future with surgical intervention".

1. The Convention guarantees the right to life

The Convention protects all human life as established in Article 2, the right of "*everyone*" within the jurisdiction of a Member State to have their life protected "*by the law*"[1]. This requires that a state "*not only abstains from inciting death in a voluntary or irregular manner"* (a negative obligation on a state to not interfere), *"but also, to take the necessary measures to protect the lives of people within their jurisdiction"* (a positive obligation on the state involving the guarantee of effective enjoyment of the right to life of individuals)[2]. A state avails of a certain margin of appreciation in determining the resources which are to be put in place in order to fulfil this obligation. The Convention does not contain a temporal limitation in relation the right to life: it protects *"everyone"*[3], throughout the duration of their lives, from the moment of conception until their death.
As the Court indicated in the case of *Vo v. France, "Article 2 of the Convention is silent as to the temporal limitations of the right to life and, in particular, does not define "everyone" ("toute personne") whose "life" is protected by the Convention."*[4]. The Court itself has never redefined (to reduce) the scope of application of Article 2: it has never excluded, in principle, prenatal life from its scope of application[5]. The "*principle of sanctity of life*"[6] was recognised by the Court, who notably stated that *"the right to life constitutes an inalienable attribute of a person and a supreme value on a human rights level".*[7] This is because life is a right in itself before it is a right of a person themselves or of society, which is protected by the Convention. It is for this reason that the applicants could not affirm being subjected to harm by the birth of their disabled child, unless one adopts an alternative view of life, a utilitarian and unequal view in which the ontological value of a person is determined by society. This is precisely the type of notion that led to the establishment of human rights and the Convention after the war. The value and dignity of a life is not dependant on the health, or the race or the gender of the person in question.

---

[1] *Pretty v. United Kingdom*, no. 2346/02, 29, April, 2002, para 39.
[2] *H. v. Norway*, no. 17004/90, Former Commission decision of 19, May, 1992, *L.C.B. v. U.K.* , 9 June, 1998, para 36 and *Pretty v. U.K.* , no. 2346/02, 29 April 2002, para 38.
[3] This is confirmed by the preparatory work by the Consultative Assembly of 1949, which clearly shows that these are rights that one has simply because of existence: *"The Committee of Ministers has asked us to prepare a list rights which man, as a human being should naturally enjoy."* Preparatory work, vol. II, p. 89
[4] *Vo v. France*, no. 53924/00, GC, 8 July, 2004, para 75.
[5] *Boso v. Italy* no. 50490/99, decision of the 5 September,2002 : "*In the eyes of the Court, such a forecast, strikes a fair balance between the need to protect the foetus and the interests of the woman"* and *Vo v. France, No*. 53924/00, [GC], 8 July 2004, para 86 and 95: *"In the absence of clear legal status of the unborn child, it does not mean to restrict all protection under French law. However, in the circumstances of this case, the life of the foetus was intimately linked to that of his mother and could be protected through it*" and "*even assuming that Article 2 of the Convention is applicable in here, the Court concludes that there has been no violation of Article 2 of the Convention "*
[6] *Pretty v.United Kingdom*, no. 2346/02, 29 April 2002, para 65
[7] *Pretty v. United Kingdom*, no. 2346/02, 29 April 2002, para 65 ; *McCann & others v. United Kingdom*, 27 September 1995, para 147 et *Streletz, Kessler et Krenz v. Germany*, [GC], no. 34044/96, 35532/97 et no. 44801/98, para 92-94.

2. The Convention does not contain a right to not be born

The European Court, like national law, (see annexe of comparative law) does not recognise, for obvious reasons, a right to non-existence, as it could be a violation of the right of a person to existence.
The conclusion of the Court in the case of *Pretty* could be applied, by extension, to the facts of this case: "*the consistent emphasis in all the cases before the Court has been the obligation of the State to protect life."* The right to life *"is unconcerned with issues to do with the quality of living or what a person chooses to do with his or her life (…) Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life. The Court accordingly finds that no right to die, whether at the hands of a third person or with the assistance of a public authority, can be derived from Article 2 of the Convention."*[8]. For the same reason *"pregnancy cannot be said to pertain uniquely to the sphere of private life"*[9].

In the present case, the child was not the holder of a right to not be born or to not be born with a disability or a right to a certain quality of life after birth, in order to consider his own birth harmful to him[10].

2. The right to life of the child was completely protected from 14 weeks

The child did not hold the right to not be born; contrary to this, from 14 weeks old, after surpassing the legal limit of abortion, the unborn child held a complete right to life by virtue of Romanian law. This implies that, for Romania, the obligation to enforce protection, is linked to the life of a person who is fragile and vulnerable. In compliance with its jurisprudence, the Court therefore, must recognise in this case the applicability of Article 2 from 14 weeks on, and deduce the state was subject to positive and negative obligations to the unborn child under this Article.

II. Article 8 of the Convention does not give parents the right to chose to not give birth to a disabled child (wrongful birth)

The claims of the applicants were not precise or backed up. Therefore, one can deduce two hypotheses:

- **The birth of a child without tibia is disputed (1);**
- **The fact that the applicant could not abort is disputed (2).**

1. The first hypothese: respect for their right to private and family life was violated by the birth of the child without tibia

[8] *Pretty v. United Kingdom*, no. 2346/02, 29 April 2002, para39 et 40.
[9] *Bruggemann et Scheuten v. Germany*, no. 6959/75, Former Commission decision 12 July 1977, p. 138,para 59, 60 et 61 and *Boso v. Italy*, no.50490/99, 5 September 2002.
[10] *Pretty v. United Kingdom*, no.2346/02, 29 April 2002, para 39

One can understand that the disability of their second child had a damaging effect on the right to private and family life of the applicants. It must be clarified that these consequences were not a result of the birth of the child, but as a result of the disability he suffered from.
However, without clarification from the applicants, one can not know for certain what exactly this violation consisted of. If this aspect were to be allowed to fall under the scope of Article 8 of the Convention, again it would be necessary that the circumstances of this case resulted in the finding of a violation. However, in this case, the responsibility of the state can not be involved for many reasons:

a) The applicants resorting to the use of artificial insemination is not a deciding factor

The only reason that the applicants used artificial insemination, which involves using the gametes from the couple, was to overcome the infertility of the father which was suspected by the doctors. They did not resort to this technique to avoid a genetic problem and to genetically select, from the embryos, a healthy child. Artificial insemination does not prevent the transmission of genetic diseases. If the applicants had wanted to avoid the birth of a child with a genetic disease, they would have had to resort to *in vitro* fertilisation and pre-implantation screening.
MAP could not be held responsible for the disability of a child. And so, the fact that the pregnancy of the applicant was as a result of a technique of medically assisted procreation (MAP) and not a natural procreation, separates the reasonability of the state and the doctors who practice MAP.

b) The radiologists had a form of obligation

When possible, from the 13^{th}-14^{th} week of the pregnancy, the screening for this condition does not depend solely on the competence of the doctors, but also the risks of the ultrasound. The radiologists E.S and D.A. were bound by an obligation of means and not to the result. This obligation stretches to medical knowledge and the techniques available in Romania at the time. Their obligation is to monitor the pregnancy and its development, not to diagnose and treat an undetectable disease, in certain cases, by the ultrasound. None of them succeeded in detecting the disease, as the results and the interpretation of the tests did not depend solely on their diligence, but also on many other factors such as the quality of the technique used, the position of the foetus, the thickness of the abdominal wall….additionally, the tests do not specifically indicate the existence of the condition, but rather the risk of the disease.
Finally and most importantly, the radiologists cannot be held responsible for the birth of the child.

c) The information received by the applicant in relation to the risk of the disease was adequate

The doctor, A.V., who welcomed the applicant for the artificial insemination, correctly informed her about the risks of illness for her child. The information given by the doctor was adequate, given what the applicant had said to her (she had not submitted medical details related to the disease of her first child or her illness anytime in the follow up) and the inexistence at the time of genetic and molecular testing to screen for *tibia agenesis.* These tests are still not available in Romania. The burden of proof relating to the lack of information falls upon the applicant and she has not proven otherwise before the domestic courts.

d) The applicants are not and are no longer victims

With regard to the child, he is not a victim within the Convention, as on one hand, he did not have a right to not be born with or without a disability or a right not to live. Secondly, since his birth, his disability has been provided for by the state. This help from the state has taken the form of medical treatments and necessary prosthetics to overcome the absence of tibia, the child has received two prosthetics a year since 2004, the last one in 2012. Additionally, in cases of disability, the state also provides financial assistance[11]. In any event, the protection of the unborn child is insured by the protection of the mother[12], who in this case took civil action against the doctors and received a payment of damages for the moral pain suffered.
With regard to the parents, whether they had a right or not to not give birth to a disabled child, they can no longer claim to be victims under the Convention, seeing as the domestic courts, following a fair procedure and being diligent in their decision making[13], recognised and rectified the alleged violation[14], noting the negligence of the radiologist E.S. and allotting 5,000 euro to the applicants for moral hurt suffered, all held that the applicants had a personal role of responsibility in their situation[15]. Their claim for material damages was rejected, as on one hand, the state had covered and continues to cover, by means of a social security system, the medical expenses and prosthetics which had assisted and continued to assist their child and secondly, as the existence of further expenses was unsupported[16].

e) Complaint of the 4th instance

In relation to the dissatisfaction of the applicants concerning the sum allotted by the domestic courts in the name of moral harm suffered and the rejection of their claim for material damages, it is important to note that this is a complaint of "*the 4th instance*", as it is not for to the court to stand in for internal authorities, who are *"evidently better placed than an international court to evaluate, in the light of local legal traditions, the particular context of the legal dispute submitted to them and the various competing rights and interests*"[17], and establish in their place the amount allotted to the applicants.

2. The second hypotheses: the respect for private and family life of the applicants was violated as the applicant did not abort

As a preliminary note, we turn the attention of the Court towards the position of the father: could he claim his rights were affected by the fact that his wife did not abort their child? The father has a right to be involved in the decision of his wife in

[11] The child receives double the monthly allowance for children, home help; his mother receives compensation to deal with him, as well as various discounts including transport.
[12] In the case of *Vo v. France*, no. 53924/00, 8 July 2004, para 91-95, the Court found that the action for damages of the parents was sufficient to protect the right to life of the unborn child.
[13] *Jensen v. Denmark*, no. 48470/99, 20 September, 2001.
[14] *Scordino v. Italy* (no. 1) [GC], no. 36813/97, 29 March 2006, para 178 and following para193.
[15] *Paşa et Erkan Erol v. Turkey*, no. 51358/99, 12 December, 2006.
[16] *Freimanis et Līdums v. Latvia*, no. 74860/01, 9 February 2006, para 68
[17] *Pla et Puncernau v. Andora*, no. 69498/01, 13 July 2004, para 46.

relation to abortion[18], could he claim to have a personal interest guaranteed by the Convention in the carrying out of an abortion on a 3rd person, as the Court derived from the recognition in the case of *P. and S. v. Poland* (n.57375/08) of the benefit to the mother?

a) The Convention does not contain a right to abortion

In relation to the law on abortion, the Grand Chamber stated clearly that "*Article 8 of the Convention can not be interpreted as conferring a right to abortion"*[19]. Additionally, the Court held inadmissible many decisions directed against the national legal limitations where the right to abort is not recognised[20].
If the power of the Court is real, it is not without limits, it can not go on to create a new right unheard of within the Convention[21]. In all hypotheses, the Court can not interpret the Convention *contra legem* by recognising a law diametrically opposed to the right guaranteed by the Convention. In this regard, the Convention "*has to be read as a whole";* it can not, in one section, impose an obligation to protect life by law and while imposing the opposite right in another section[22].

b) The applicant no longer had the right to abort under domestic law

The Court of Appeal of Bucharest erroneously linked the negligence of the radiologist E.S. to the applicants access to abortion, as conforming with Romanian law[23], after the 14th week of pregnancy the applicant can not gain access to an abortion unless *"the termination of the pregnancy is necessary to save her life, the health or bodily integrity of the pregnant woman is in grave and imminent danger and she can not be protected in another way*" or if it is "*necessary for therapeutic reasons"*.

- As regards to the "*life, heath or bodily integrity of the pregnant woman*" nothing can be shown to prove she was put in danger by the unborn child due to the *tibia agenesis.*

- As regards the therapeutic reasons, these must be defined by an authority competent in the area, namely the College of Doctors of Romania, a definition formulated by their then president M. Vasile Arastasoaie, states that a disability does not constitute a reason for a termination of a pregnancy after the 14th week[24]. According to Romanian law and medical ethics, *tibia agenesis* not a disability serious enough to justify an

[18] *X. v. Austria*, no. 7075/1975, Commission decision of 10 December, 1976, *X. v. Norway* no. 867/1960, Commission decision 9 May 1961 et *Boso v. Italy*, no. 50490/99, 5 September 2002, *mutatis mutandis, X v. United Kingdom*, no. 8416/1979, Commission decision of 13 May 1980.

[19] *A., B. and C. v. Ireland* , no.25579/05, [GC], 16 December 2010, para 214.
[20] For example, in case no. 16471/02 Maria *do Ceu Silva Monteiro Martins Ribeiro v. Portugal* 26 October 2004, the Court held inadmissible a complaint against "*the Portuguese law on abortion and voluntary termination of pregnancy, as such, [because it would be contrary] to a certain number of provisions of the Convention because it prohibits abortion on request of the pregnant woman.*'
[21] *Johnston& others v. Ireland*, no. 9697/82, 18 December 1986, para 53.
[22] *Haas v. Switzerland*, no. 31322/07, 20 January 2011, para 54 .
[23] Article 185 of the Code Penal relating to abortion.
[24] Statement of President of the College of Doctors of Romania, M. Vasile Aratasoaie in the journal Jurnalul National, 27 April, 2011.

abortion outside the legal time period. This stance falls into line with the solutions retained in the majority of European states for whom abortion held to be therapeutic is admissible only on the condition that the disease suffered by the unborn child is incurable and particularly serious. However, it is clear tibia agenesis is not an incurable disease, or of particular seriousness; the unborn child is perfectly viable, and his tibia can be replaced with a prosthetic, as was otherwise the case.

- However, the applicant, it seems, decided to do ultrasounds only during the 24th and the 32nd weeks of the pregnancy (6th to the 8th month), even though the child was already viable, and was well after the legal time constraint on abortion within Romania; the applicant, thus, no longer had the option of aborting. The ethical and legal responsibility of the doctors could perhaps have been called into question if they had carried out such a late abortion.

c) The Convention does not guarantee a right to a healthy child

The desire of the applicants to have a healthy child can not be elevated to be considered a right. To accept a right for couples to have a healthy child through the use of prenatal screening is contrary to the Convention and constitutes an inconsiderate extension within the scope of Article 8. This would unavoidably oblige European states to allow prenatal screening with a eugenic aim.

d) The Convention opposes all supposed rights to eugenics

The prohibition of eugenics is founded on medical law where one finds a principle of therapeutic purpose of medicine. The purpose of medicine is to treat, not to eliminate the diseases or make scientific progress at the expense of patients. This well established principle[25] is notably the pre-eminence of being human in the interests of science and society.

Within European law, Article 3 of the Charter of Fundamental Rights, relating to "*the right to personal integrity*", indicates that "*in the medical and biological scope, the banning of eugenic practices must be notably respected, notably those with the aim of selecting people"*. The adverb *notably* indicates that while eugenics as such is prohibited, this prohibition is not influenced by the aim of selecting people. Article 3 of the Charter applies also before birth, as seen in the evidence of the disposition relative to the prohibition of reproductive cloning of human beings and the interpretation which was given by the Grand Chamber of the ECJ in the case of *Brüstle*[26].

On a national level, eugenics is also largely prohibited. In this way, for example, French law imposes a principle of respect for the human integrity, which prohibits, among other things, eugenics, which is considered as a "*crime against humanity*".

The Convention of Oviedo laid down the following principle: "*Tests which are predictive of genetic diseases or which serve either to identify the subject as a carrier of a gene responsible for a disease or to detect a genetic predisposition or susceptibility to a disease may be performed only for health purposes or for scientific research linked to health purposes, and subject to appropriate genetic counselling."* (Article 12). Similarly, the

[25] See Article 2 of the Convention of Oviedo.
[26] *Olivier Brüstle v. Greenpeace,* 18th October, 2011.

Recommendations of the APCE no. 1046 of 1986[27] states that "*all intervention on the living embryo in utero or in vitro or on a foetus in utero or the exterior of the uterus for diagnostic purposes other than those foreseen by the national legislator, are not legal unless the purpose is well-being of the unborn child and favours its development"*.

e) The prohibition of discrimination for reasons of heritage genetics[28]

The Convention of Oviedo states that "*all forms of discrimination against a person for reasons of genetic heritage are prohibited"* (Article 11). Likewise, the Universal Declaration on the Human Genome and Human Rights[29] states: *"Everyone has a right to respect for their dignity and for their rights regardless of their genetic characteristics"* (Article 2) and consequently, *"No one shall be subjected to discrimination based on genetic characteristics that are intended to infringe or has the effect of infringing human rights, fundamental freedoms and human dignity"* (Article 6). It is necessary that the dispositions of the Convention of Oviedo discuss explicitly prenatal life and human embryos so as to protect them.

f) The stigmatisation attached to disabled people and their families

The screening for genetic diseases so as, not to treat them but to potentially eliminate the person being screened constitutes a structural incitement for discrimination and violence against people because of their health, disabilities and their physical disabilities. The victims of this structural incitement are not just those who are destroyed or aborted, but equally the people who survive this process of elimination by screening, and those who are considered sociably capable of being born, as a result of a medical error, as in this case. This stigmatisation is a violation of the rights of disabled people[30]. Action is currently being taken, introduced by the families of those who suffer from Down syndrome, against the speeches stigmatised to incite the suppression of those who suffer from Down syndrome[31].

---

[27] Recommendation relating to the use of embryos and human foetus with diagnostic, therapeutic, scientific, industrial and commercial purposes confirmed the principle.

[28] Article 6 of the Universal Declaration on the Human Genome and Human Rights of the UNESCO (11th of November, 1997), Article 11 of the Convention of Oviedo, Committee on Bioethics (DH-BIO) a group who work to protect the embryo and the human foetus (DH-BIO-GT3), 19th of June, 2003

[29] Adopted by the UNESCO on the 11th of November, 1997.

[30] See specifically the Declaration on the Rights of Mentally Retarded Persons, issued by the General Assembly of the United Nations in its resolution 2856 (XXXVI) on the 20th of December, 1971.

[31] See, for example, action taken against the critic of a Bucharest hospital for having stated in a journal, after the abortion of a Down syndrome child, that *"a Down Syndrome child is dead to society. In other words, he torments his parents for at least 20 years"*, the Court granted the action. Judgment of the Court of First Instance of Bucharest, no. 786 on the 27th of January, 2012.

III. The positive obligations on a state in relation to Article 8 of the Convention

A. The setting up of a legal arsenal adequate and sufficient to protect the private and family life of the applicants

Under Article 8 of the Convention, the state has an obligation to protect individuals against arbitrary interferences by public authorities[32] and to take measures to insure effective respect for private and family life[33], all of which mixes an equal balance between the ranges of conflicting issues. And so, the obligation is on the state to resume setting up *"adequate and effective means to ensure compliance with its positive obligations.*"[34] In this case, on point of facts, Romania prepared a clear legal setting, sufficient and adequate to satisfy the rights of the applicant in terms of health. This legal framework established the rights of the patients[35], the obligations and responsibilities of doctors[36], including monitoring during the pregnancy, conditions of engagement of a tort against doctors[37], conditions under which an applicant may have a legal abortion[38] and the pick up charge of a disabled child of applicants on the state[39].

This legal framework also allowed the applicants to take their action and to obtain, following a fair trial, moral damages for the negligence of the doctor E.S. They also benefitted from the state's aid for those who are disabled[40].

B. The setting up of a damages system is not required by the Convention

Article 8 does not include a right to receive damages[41] in the absence of an injustice, however the disease is not an injustice. In this case, the damages were not given contrary to an injustice, but given in accordance with social solidarity. It has entered the scope of social rights, which the Convention does not guarantee directly.

Furthermore, in a similar case[42], the former Commission accepted the impossibility for those concerned to claim compensation for not being born is not contrary to the Convention. In affirming

---

[32] *Sijakova & others v. The Former Yugoslav Republic of Macedonia*, no. 67914/01, 6th of March, 2003.
[33] *Dickson v. United Kingdom*, no. 44362/04, 4th of December, 2007, para 70.
[34] *Ignaccolo-Zenide v. Romania*, no. 31679/96, 25 janvier 2000, para108.
[35] See particularly, Articles 6,8,12,13,26,27,28 and 37 of the law no. 46/2003 on the rights of patients.
[36] See particularly, The Code of Medical Ethics at the time.
[37] Articles 998-1000 of the *Code Civil.*
[38] See particularly, Article 185 of the *Code Penal* and the position of the College of Doctors of Romania.
[39] See particularly, law no.53/1992 (the first law that regulates the social protection of persons with disabilities) Government Ordinance no. 30/2004 on free medical assistance, medications and prosthetics enjoyed by certain categories of persons (including the applicant) and other standards such as Government Emergency Ordinance no. 12/2001 and the Government Ordinance no. 216/2001 on the protection of the child, Law no. 71/2002 and Government Ordinance no. 218/2002 on education, law no. 519/2002 on health, law no. 84/1995 on education, government strategy on the field of protection of children in difficulty 2001-2004, the order of the Minister for Health and Family and the State Secretary of the National Authority for Child Protection and Adoption n°. 705/12.709/2002.
[40] *Draon v. France*, [GC], no. 1513/03, 6th of October, 2005, para114
[41] *August v. United Kingdom*, no.36505/02, 21, January, 2003
[42] *Reeve v. United Kingdom*, no. 24844/94, Commission decision on the 30th of November, 1994.

this question over the margin of appreciation of the state, considering the moral and ethic order it implies, it observed that within internal law doctors do not have an obligation towards an unborn child to destroy its life, all the more it is contrary to the public order. Following this, the future Commission held that this impossibility follows the legitimate aim to preserve the right to life. It then, considered that this impossibility was proportionate to the aim pursued, seeing that the responsibilities of doctors to be engaged in all inadequate acts which affect a disabled child and which affect his parents, could ask for compensation for the damage suffered and for the cost of medicine.

On this matter, there is no consensus between Member States[43] (Also see comparative law on the question of annexe). In supposing that a state has an obligation deriving from the Convention which institutes a type of system of compensation, it enjoys a large margin of appreciation[44]. In fact, "*while the questions of general politics are in play, under which profound divergences could reasonably exist in a democratic state, the role of the national decision-maker is given particular importance"*[45] "*to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals.*[46]" "*it is not to substitute itself for the competent national authorities in determining the most appropriate policy for regulating matters of artificial procreation.*" [47] or "*to appreciate the opportunity to establish a type of regime, or what might be the best policy in this difficult social domain*"[48]. The Court held in other cases that it was legal on the part of the state, it did not reoccupy, "*on the plan of principles, the well-being of every child where possible elaborates and applies a policy: the conception of a child constitutes the same objective in this exercise. (…) the state has a positive obligation to guarantee the effective protection of children"*[49] or to hold to the reasoning of the general interest, like ethics (the necessity to pronounce on a fundamental social choice), the equity and the good organisation of the health system[50] or the "*worrying response on the balance between the price considered as damages necessary to rectify and the outrageous legal responsibility put on medical bodies"*[51].

[43] There is no consensus among member countries of the Council of Europe with regard to the prejudice of being born and the loss of unwanted birth. The damage of being born is not recognised, given that the child can not claim to have a right not to exist (Portugal, Netherlands), the non-existence of having no value (Netherlands), the existence of a child can not be considered harmful as humans must except life (Germany), the child has the right to be born and does not have a right not to be born if it is unhealthy (Italy) (England and Wales). Those who may claim injury as a result of unwanted birth, distinguish between mental damages and material damages. Mental damages are rewarded to the parents (Netherlands and Italy), only to the woman (Germany, England, Wales). The damage covers all costs including special costs (Netherlands, Germany, Italy), solely the harm suffered by the parents, the child with a disability receives support from the national services (France) or only the cost associated with pregnancy (England and Wales).

[44] *Evans v. United Kingdom,* no.6339/05, 10th of April, 2007, para 82, *Knect v. Romania*, 2nd of October, 2012.

[45] *James&others v. United Kingdom* , 21st of February, 1986, series A no. 98 p. 32, para 46, in which the Court compliance with the Convention in the fact that "the legislator has a wide scope within which to conduct an economic and social policy"

[46] *Abdulaziz, Cabales et Balkandali v. United Kingdom*, 28th of May, 1985, para 67, *Zehnalova et Zehnal*, *Draon v. France* para111-116, *Levenez v. France*.

[47] *S. H.& others v. Austria* [GC], no. 57813/00, para 92.

[48] *Mutatis mutandis, Powell et Rayner v. United Kingdom*, no. 9310/81, 21st of Febuary,1990, para 44

[49] *L.C.B. v. United Kingdom*, 9th of June,1998, para 36, Reports of Judgments and Decisions 1998-III, *Osman v. United Kingdom*, 28th of October, 1998, para 115-116, *Z & others v. United Kingdom* [GC], no. 29392/95, para 73, ECHR 2001-V, *Dickson v. United Kingdom* no. 44362/04, 4th of December, 2007, para76 .

[50] *Draon v. France*, GC, no. 1513/03, 6th of October, 2005, para 77.

[51] *Vo v. France,* no. 53924/00, 8th July, 2004, para 93.

Behind the plan of an opposable right to a healthy child and compensation in contrary cases, there is the idea that society, by the combined effects of human rights and science, has to protect everyone against natural risks and destiny, perceived as injustices, the violations of a right to health and the command of its existence (autonomy). This aspiration is located in the right to health in totalising logic which tends to ensure each person's quality of life, and insures against possible misfortunes. This genuine right to happiness and health would have two sides: one would be prevention against disease and disabilities; the other, compensation against the risk, that is to say, against the failure to master the danger. But we would be in a "global" society, which takes charge of every aspect of our existence, and those conceived by medicine as a tool to manage life, and not as an art seen "solely" to treat ourselves.

The hope of always mastering our own existence leads, paradoxically, to us depending more on external resources. Article 8, which protects private life, was also in effect, paradoxical, in creating at the expense of the state, obligations which continue to expand. The state, rather than work to disengage itself from the private life of its citizens, began instead to invest more interest in giving each one the means to master their existence.

That being so, the Court would benefit from recalling the reality that:

- Article 2 does not contain a right to not be born
- Article 8 does not contain a right to not be born not handicapped, or right to abort
- The Convention does not contain the "right to health", but international law recognises a "right to the protection of health"[52].

[52] Article 25-1 of the Universal Declaration of Human Rights, 10th of December, 1948; Article 11 of European Social Charter , 18th of October, 1961; Article 12-1 of the International Covenant on Economic, Social and Cultural Rights, 16th of December, 1966; Article 35 of the Charter of Fundamental Rights of the European Union.