



**THE SPANISH BILL ON “THE PROTECTION OF THE LIFE OF THE
UNBORN CHILD AND THE RIGHTS OF THE PREGNANT WOMAN”
ANALYSIS IN THE LIGHT OF EUROPEAN LAW**

Grégor Puppinck¹,

15th January 2014.

Abstract: this article analyses the main provisions of the Spanish Bill, comparing the law in force in other European countries as well as the case law of the European Court of Human Rights (ECtHR). It shows, on the one hand, that this text does not violate any international or European norm and on the other, that both the criticism of the "pro-abortion" movement and the optimism of the "pro-life" movement are excessive. Beyond the law, this Bill reflects a new political trend in the West which no longer considers abortion as a "freedom and progress", but as a violence which needs to be limited. However, the future application of this Bill remains unpredictable and will depend largely on political and cultural circumstances.

¹ Doctor of Law, Director of the European Centre for Law and Justice (ECLJ). Study carried out with the help of Christophe Foltzenlogel, jurist.

On 20th December 2013, the Spanish Council of Ministers adopted a Bill named "[the protection of the life of the unborn and the rights of the pregnant woman](#)"² seeking to protect both the life of the unborn child and the rights to life and to health of the pregnant woman. This Bill, if adopted, will replace Act no. 2/201 on "[sexual and reproductive health and abortion](#)" of 3rd March 2010 which has been greatly criticised since its enactment: one million people protested against this Act in October 2009³.

The Spanish Act of 2010, modifying the previous Act of 1985, presents abortion as a right and a freedom and no longer as an exception to the right to life of the child. Under this Act, adopted by the Government of Mr. Zapatero, abortion is available on demand during the first 14 weeks of pregnancy.⁴ Abortion is further possible up until the 22nd week in the case of "*serious risk to the life or health of the mother or of the foetus*"; however, due to the absence of a real control mechanism, abortion has in fact become available on demand up until 22 weeks. Finally, in cases of serious and incurable disease at diagnosis, an abortion can be performed until the end of pregnancy provided that this disease is certified by a committee of physicians, who may belong to the clinic performing the abortion in question⁵. Furthermore, this 2010 Act allowed underage girls to abort anonymously and heavily restricted the right to conscientious objection of medical staff. In short, the 2010 Act aimed to extend and facilitate abortion, which became a "right" in itself, and went so far as to restrict the rights of third parties. In addition, this Act has allowed the appearance of unacceptable practices such as the development of a quasi-industry surrounding abortion, taking place in specialised private institutions, some of which carry out lucrative late-term abortions⁶ on an international "cliente".

The objective of the new Bill of 20th December 2013 is to end this logic of "abortion as an individual freedom" and to rebalance the rights of those involved, namely those of the unborn child and its mother, as well as those of the parents (in cases of an abortion involving a minor), medical staff and of society as a whole.

This Bill is not based on the idea that there exists, or not, a right to abortion, but on the important reality of the real existence of the unborn child: a living human being who exists before birth and deserves protection. This fact is often ignored or undervalued by

² Ministerio de Justicia "[Anteproyecto de ley orgánica para la protección de la vida del concebido y de los derechos de la mujer embarazada](#)".

³ [Un million de manifestants anti-avortement défilent à Madrid](#), *Lexpress.fr*, 18 October 2009.

⁴ Articles 13 and 14, under Title II.

⁵ Article 15, §§ b) et c): b) Que no se superen las veintidós semanas de gestación y siempre que exista riesgo de graves anomalías en el feto y así conste en un dictamen emitido con anterioridad a la intervención por dos médicos especialistas distintos del que la practique o dirija.

c) Cuando se detecten anomalías fetales incompatibles con la vida y así conste en un dictamen emitido con anterioridad por un médico o médica especialista, distinto del que practique la intervención, o cuando se detecte en el feto una enfermedad extremadamente grave e incurable en el momento del diagnóstico y así lo confirme un comité clínico.

⁶ An abortion at 22 weeks costs €1,200 by the [private clinic Centro Medico Arago](#).

those who view abortion primarily as a personal freedom. The existence of this living human being - although still in gestation - excludes the possibility that a person can have absolute power over its life, and therefore can have a fundamental right to abortion. The starting point of this Bill therefore makes it impossible to assert a right to abortion. However, it intends to take into account the rights of all those involved in abortion whereas the 2010 Act gave a large priority to those of the mother. It is therefore about finding a better balance between the various competing rights and interests.

The result of this search for balance is that the life of an unborn child cannot be sacrificed without a proportionate reason. On the other hand, when there are no grounds justifying a request for abortion, the human life cannot be sacrificed, but must be protected and welcomed, with the support of society. As a result, the Bill has the effect of abolishing abortion "on demand".

The Bill clarifies the circumstances and conditions under which an abortion can be performed. Specifically, the text provides that abortion is decriminalised when practiced:

- in the case of rape, during the first twelve weeks of pregnancy;
- during the first 22 weeks of pregnancy, if the case of necessity is verified by an independent medical committee, and if no other solution can be found in a medical setting or otherwise, to prevent a serious threat to the life or the physical or mental health of the pregnant woman. This serious threat to the mental health of the mother can result from a malformation of the child such as to cause his death during pregnancy or shortly after birth. The time limit of 22 weeks of pregnancy corresponds to the threshold of viability of the child set by the World Health Organisation;
- until the end of pregnancy when the child has an abnormality "incompatible with life", undiagnosed during the first 22 weeks, or when the continuation of pregnancy poses a critical risk to the mother, on medical verification.

In addition, the Bill restores several rights and obligations removed under the Act of 2010, in particular the fundamental right of medical staff to conscientious objection, the right of parents to be aware of the pregnancy of their minor daughter, the obligation to provide the pregnant woman with relevant information and the reflection period. Finally, it prohibits pro-abortion advertising.

This Bill goes against the dominant thinking inherited from the late 1960s and constitutes a policy reversal. Even though spectacular, this change has fuelled a new trend, which is realistic and progressive, and moves to replace the policy of "systematic abortion." This policy is in the process of establishing itself in Europe and the United States where several states have recently discussed and often adopted new laws improving the protection of human life. This is the case in: the UK where the question of shortening the legal limit for abortion is often raised⁷; in Switzerland, which is preparing to vote in a

⁷ The Guardian, [The abortion debate: the statistics](#), 8 October 2012.

referendum on the abolition of public funding of abortion⁸; in Russia, which adopted legislation strengthening the rights of the mother and child; in Poland⁹ where the Parliament adopted at first reading new restrictions on abortion; in Latvia and Lithuania¹⁰ where the Parliament is currently considering the abolition of abortion on demand; in Hungary, which in 2011 adopted laws to protect the family and the human embryo¹¹; in Turkey;¹² in Macedonia, which adopted a law in this sense¹³ on 10th June 2013; and even in Norway¹⁴ which recently lowered the legal time limit for abortion, fully guaranteeing the right to life of the child after 22 weeks. This trend is even more pronounced in the United States where a true cultural transition is taking place. Thus, between 2010 and 2013, U.S. states have adopted 205 new restrictions on abortion, which is more than in the previous ten years¹⁵. In particular, abortion after 20 weeks has been banned in a dozen states¹⁶, the protection of unborn children with disabilities has been strengthened, stricter conditions have been imposed on clinics and there has been further regulation of chemical abortion. North Dakota has reduced the legal time limit to six weeks. In the same way, the number of states hostile to abortion has doubled between 2000 and 2013 from 13 to 27¹⁷. Finally, only 12% of the U.S. population still feels that abortion is morally acceptable, as opposed to 49%¹⁸ who consider it immoral. The change is as profound as it is spectacular. So, after having rather extensively liberalised the practice of abortion, Western countries now seem to consider abortion more as an issue than as a freedom and the solution to the social problems of the mother. This new policy does not merely aim to improve the protection of the lives of unborn children. It also aims to support pregnant women and break their solitude in facing an unexpected pregnancy, to make adults more responsible, to support families as well as supporting the demographics and the economy. This policy does not intend to eliminate abortion, but wishes to reduce the number only to exceptional cases linked to the health of the mother. This trend is partly motivated by a desire to sustain demographics, but also, probably, by a "progress of conscience" about the nature of prenatal life and abortion. Advances in biology contribute to an awareness of the concrete existence of every person from before his birth. As for the violence and suffering caused by the act of abortion itself, the militant discourse supporting abortion offers no response. New generations of doctors are

⁸ A popular [initiative referendum](#) on "*Financing abortion is a private matter*" will be voted on 9 February 2014.

⁹ Olivier Bault, "[Le parlement polonais va-t-il restreindre encore plus les possibilités d'avorter ?](#)", NDF, 11 October 2012; Family Planning, "[Pologne: nouvelle attaque contre le droit à l'avortement](#)", 24 September 2013.

¹⁰ "[Lituanie : le Parlement va débattre de l'interdiction de l'avortement](#)", *LePoint.fr*, 28 May 2013.

¹¹ Corentin Léotard « [Une remise en cause du droit à l'avortement en Hongrie ?](#) » *HU-lala*, 18 April 2011.

¹² « [Turquie: une restriction de l'avortement?](#) », *Le Figaro*, 30 May 2012.

¹³ Planning Familial, « [Le droit à l'avortement régresse en Macédoine](#) », *Le Courrier des Balkans* < [Macédoine : le gouvernement s'attaque au droit à l'avortement](#) ».

¹⁴ *Dagbladet.no*, [Abort etter uke 22 blir forbudt](#), 2 January 2014.

¹⁵ Guttmacher Institute, [More State Abortion Restrictions Were Enacted in 2011–2013 Than in the Entire Previous Decade](#), 2 January 2014; S. Kliff, [States passed 205 abortion restrictions in three years. That's totally unprecedented](#), *The Washington Post*, 3 January 2014.

¹⁶ Until 2010, abortion was legal everywhere beyond 20 weeks.

¹⁷ Guttmacher Institute, [Laws Affecting Reproductive Health and Rights: 2013 State Policy Review](#).

¹⁸ See the [survey for the Huffington Post by Omnibus Poll](#) in June 2013.

less and less accepting of abortion. The idea, inherited from the sexual revolution of the 1960s, that abortion is a "progress and freedom" is questioned; no doubt this is a generational phenomenon, the new generation having neither the same experience nor the same values as those of 1968. Thus, after several decades of intensive practice, the experience has lead governments to try another policy.

Spain is currently the subject of strong criticism, as were other European governments keen to restrict abortion. Amongst these governments, some have resisted criticism and managed to adopt their Bill, others have succumbed to the pressure, such as Turkey. It is probably in order to answer these criticisms that the Spanish Minister for Justice, Alberto Ruiz Gallardon, will soon come to Brussels; but his intention is primarily to explain and to promote this new policy in Europe. He is "*confident that this initiative will be followed by the other parliaments of other European nations.*"¹⁹

This article presents and analyses in further detail the key provisions of the Spanish Bill and compares them with the law in force in other countries as well as the case law of the European Court of Human Rights (ECtHR). This analysis relies principally on the comparative law information collected by the ECLJ and by the International Planned Parenthood Federation (IPPF)²⁰, as well as the article on [Abortion and the European Court of Human Rights](#) published in July 2013 in the Irish Journal of Legal Studies²¹. European Union law will not be considered in this article because the question of abortion and "sexual and reproductive health" does not fall under within the competence of the Union, but that of the Member States.

This analysis successively covers: the recognition of the unborn child, the absence of a right to abortion, the legal time limit on abortion, the medical procedure, eugenics, information and the reflection period, underage pregnancy, the sanctions in the event of an illegal abortion, the prohibition of pro-abortion advertising and the right of conscientious objection.

This analysis concludes that both the criticisms of those who are "pro-abortion" and the optimism of those who are "pro-life" are excessive. Legally, this Bill does not violate any European or international norm. On the contrary, the text is aligned with the European "standard" whereas the Act of 2010 was not. The decision to reinstate the prohibition of abortion on demand remains to this day within the minority in Europe, but it is not unique and does not violate the commitments of Spain.

However, the future application of this Bill remains unpredictable and depends largely on the political and cultural circumstances. Just like the Zapatero government wanted to create a "right to abortion" in Spanish culture, the current government wants to promote a culture which protects the life of unborn children, strengthens the responsibility of adults

¹⁹ "[La loi espagnole sur l'avortement "va s'étendre en Europe"](#)" 7sur7.be, 27 December 2013.

²⁰ [Abortion: Legislation in Europe](#), IPPF, Updated May 2012.

²¹ See also the abbreviated version [Abortion on Demand and the European Convention on Human Rights](#); February 2013, *EJIL Talk!*

and responds positively, by means other than abortion, to the difficulties of pregnant women.

Ultimately, it is on the political and cultural field that the debate over abortion and the protection of life play out. The current debate surrounding the adoption of this Bill is therefore of fundamental importance.

ANALYSIS

1. The recognition of the unborn child

As its title indicates, the Bill seeks to protect both the life of the unborn child and the rights of the pregnant woman by balancing them depending on the circumstances. The Bill recognises as a fundamental prerequisite, the very existence of the unborn child. It is recognised not as a person but as a "*bien jurídico protegido por la Constitución*", a legal subject worthy of protection because of its own nature, and benefiting from "*right to life and physical and moral integrity*"²² guaranteed by Article 15 of the Spanish Constitution.

The value and dignity of the unborn child are widely recognised in European legislation, without which it would be possible to abort without cause until the end of pregnancy. This value and dignity are often subject to specific protection. Thus, for example, the Italian legislation recognises the human embryo as a "subject" just like his mother;²³ several European constitutions guarantee the right to life from conception.²⁴ It is not necessary in order to be considered a "subject" to be a fully formed physical person or to have legal capacity. Similarly, the Grand Chamber of the Court of Justice of the European Union (Luxembourg) held in its judgment *Brüstle / Greenpeace eV*, C-34/10, 18 October 2011 that the human embryo deserves to be legally protected under the respect for human dignity and the right to bodily integrity. The European Court of Human Rights, while recognising that it is "*impossible to answer the question of whether the unborn child is a "person" within the meaning of Article 2 of the Convention*"²⁵, stressed that a State may "*legitimately elect to treat the unborn child as a person and protect its life.*"²⁶ As for the Parliamentary Assembly of the Council of Europe, it already affirmed in 1979 "*the rights of every child to life from the moment of conception*"²⁷, it

²² "*El Anteproyecto de Ley Orgánica, consecuente con la doctrina fijada por el Tribunal Constitucional, garantiza la protección de la vida del concebido no nacido como bien jurídico protegido por el artículo 15 de la Constitución*", Cf. The explanatory memorandum of the bill.

²³ Law no. 40/2004.

²⁴ This is notably the case in Hungary and Ireland.

²⁵ *A. B. C., v. Ireland*, [GC], No. 25579/05, 16 December 2010, § 237. Henceforth *A. B. C.*

²⁶ *A. B. C.*, § 222, confirming *Vo.*

²⁷ Recommendation 874 (1979) of the Parliamentary Assembly of the Council of Europe on a European Charter on the Rights of the Child.

also added in 1986 that "*human embryos and foetuses must be treated in all circumstances with the respect due to human dignity.*"²⁸

Spain is certainly allowed to explicitly recognise the unborn child and to recognise his "*right to life and physical and moral integrity.*" However, Spain can, as do other European countries, regulate the scope of the right to life in terms of the competing rights of the mother. The Government clarifies in the sense that "*the protection of the life of the unborn child doesn't have an absolute character if it conflicts with the life and dignity of women, which are more important*"²⁹. It follows that in case of necessity for the mother, the life of the unborn child may be sacrificed. In no case does this law require that either the life or even the health of the mother, are to be sacrificed for those of her child. Being placed under the paradigm of "competing rights to maternal preference", the provisions of the Bill are obvious. If the health of the woman is in danger, her right to health prevails over the right to life of the child. On the other hand, if her health is not threatened, the right to life of the unborn child prevails which inevitably puts an end to abortion on demand.

2. The absence of a right to abortion

In the majority of European countries, abortion is not a right in itself but an exception to the right to life of the unborn child. In international³⁰ and European law³¹ there is no "right to abortion" that would oblige a State to legalise abortion. There is only the right to life and health of every human being, which can possibly justify an abortion when the pregnancy endangers the life of the mother. This right to life is itself accompanied by the rights of pregnant women and families to receive the support of society. There is on the other hand a consensus as to the need to fight against abortion, in particular by developing a policy of prevention. The Cairo Conference of 1994 asserted that "*abortion should in no case be promoted as a method of family planning*" and strongly invited all governments to "*strengthen their commitment to the health of the woman (...) and to reduce the recourse to abortion*" knowing that "*everything should be done to eliminate the need to resort to abortion.*"³² Similarly, the Parliamentary

²⁸ Recommendation 1046 (1986) on the use of human embryos and foetuses for diagnostic, therapeutic, scientific, industrial and commercial purposes.

²⁹ "No obstante, en línea con esa misma doctrina, señala que la protección de la vida del "nasciturus" no tiene un carácter absoluto si entra en colisión con la vida y la dignidad más esencial de la mujer, derechos estos también reconocidos en la Carta Magna". Extract from: "Informe sobre el anteproyecto de Ley de Protección de vida del concebido", Friday, 20 December 2013. <http://www.lamoncloa.gob.es/ConsejodeMinistros/Enlaces/201213EnlaceAborto.htm>

³⁰ See inter alia, the San Jose Declaration of 25 March 2011 which highlights that no UN treaty or international order, nor a judgment of an international court guarantees such a "right."

³¹ *A. B. C., v. Ireland*, [GC], No. 25579/05, 16 December 2010, §214. "Article 8 cannot, accordingly, be interpreted as conferring a right to abortion."

³² Programme of Action, § 8.25. Report of the International Conference on Population and Development, Cairo, 5-13 September 1994, United Nations, New York, 1995. Available at the following address: http://www.unfpa.org/webdav/site/global/shared/documents/publications/2004/icpd_fre.pdf.

Assembly of the Council of Europe in its Resolution 1607 of 16 April 2008 reaffirmed that "*abortion must, as far as possible, be avoided.*"

Questioned about the existence of a right to abortion in July 2013, the Committee of Ministers of the Council of Europe said that "*owing to a lack of consensus, it has not been possible to adopt a reply to Written Question*"³³ Similarly, on 10th December 2013 the European Parliament rejected a draft Resolution which wished to affirm the existence of a right to abortion.³⁴ Finally, the Commission has often had occasion to clarify that the regulation of abortion is not within the competences of the European Union.³⁵ The absence of a right to abortion under the European Convention on Human Rights is well established and accepted even by those who seek the establishment of such a right³⁶. Through its case law, the European Court has stated that the Convention does not guarantee a right to an abortion³⁷, or the right to practice³⁸ or even take part in the realisation of an abortion abroad with impunity.³⁹ Finally, the prohibition of abortion by a State in itself does not violate the Convention.⁴⁰ Regarding the woman's autonomy, respect for which is guaranteed by Article 8 relating to the protection of private life, the Court has repeated since the judgment *A.B. C. v. Ireland*⁴¹, that "*Article 8 can not ... be interpreted as establishing a right to abortion.*"⁴² In fact, abortion was widely prohibited in Europe during the drafting of the European Convention on Human Rights⁴³ and remains prohibited in many countries, including in Europe.

If the national legislature decides to allow abortion, the Court considers that it "*enjoys a wide discretion to define the circumstances in which it permits abortion*"⁴⁴ but "*the appropriate legal framework must provide a consistency and allow to take into account the different legitimate interests involved appropriately and in accordance with obligations under the Convention.*"⁴⁵ Thus, the Convention neither requires nor opposes the legalisation of abortion, but if necessary, the legal framework for abortion must

³³ [Response by the Committee of Ministers of the Council of Europe](#), 3 July 2013 to the Written Question No. 633: "Does the European Convention on Human Rights set out a right to abortion?"

³⁴ Motion for a resolution and [Report no. 2013/2040\(INI\) on Sexual and Reproductive Health and Rights](#), 3 December 2013.

³⁵ "*Considering the ethical, social and cultural dimension of abortions, it is for Member States to develop and implement their policies and legal frameworks.*" Answer given by Mr Dalli on behalf of the Commission, 30 April 2012, [E-002933/2012](#).

³⁶ Ch. Zampas et J. M. Gher, "Abortion as a Human Right —International and Regional Standards", *Human Rights Law Review*, 8:2(2008), p. 287; D. Fenwick, "The modern abortion jurisprudence under Article 8 of the ECHR", *Medical Law International*, 2012 12, 249, 2013, p. 263.

³⁷ *Silva Monteiro Martins Ribeiro v. Portugal*, No. 16471/02, 26 October 2004.

³⁸ *Jean-Jacques Amy v. Belgium*, No. 11684/85, 5 October 1988.

³⁹ *Jerzy Tokarczyk c. Poland*, No. 51792/99, 31 January 2002.

⁴⁰ See in particular *A. B. and C. A and B applicants who unsuccessfully challenged the prohibition of abortion for reasons of health and well-being*.

⁴¹ *A.B.C.*, § 214.

⁴² *P. and S. v. Poland*, No. 57375/08, 30 October 2012, 6.

⁴³ *Brüggemann and Scheuten v. RFA*, No. 6959/75, 12 July 1977, §64, non-official translation, henceforth *Brüggemann*.

⁴⁴ *A.B.C.*, § 249.

⁴⁵ *A. B. C.*, § 249, *R. R. v. Poland*, No. 27617/04, 26 May 2011, § 187; *P. and S. v. Poland*, § 99; *Tysiac v. Poland*, No. 5410/03, 20 March 2007, § 116, henceforth *Tysiac*.

comply with the Convention. When a case is brought before the Court, its duty is to "*supervise whether the interference [that is national law] constitutes a proportionate balancing of the competing interests involved.*"⁴⁶ This is the pivotal principle of reasoning developed by the Court, it is based on continuing case law: "*it follows ... that the solution is always determined by the confrontation of different rights or freedoms, which are sometimes* *contradictory.*"⁴⁷

The ECtHR rejects the unilateral logic of a "right to abortion" and looks for a proportionate balancing of the competing rights, freedoms and interests. In the course of its case law, the ECtHR has clarified that these rights, freedoms and interests are those of the unborn child, the pregnant woman, the father and other family members of the child, medical staff and society as a whole. It is this balancing of rights that justifies the prohibition of "abortion on demand", because such an abortion is not justified by any serious objective reason, it infringes on the life of the unborn child for no other reason than the will of the woman. It is also this balancing of rights which justifies the prohibition of late, forced⁴⁸ or sex-selective abortions.⁴⁹

Some European countries prohibit abortion or reserve its practice to more limited circumstances than those foreseen by the Spanish Bill, and yet, their legislation does not contravene any European norm *per se*.

Today, no fewer than 14 members of the Council of Europe prohibit abortion on demand. These countries, namely Belgium, Cyprus, Finland, France, Hungary, Italy, Ireland, Luxembourg, Malta, Monaco, Poland, Portugal, the United Kingdom and San Marino, impose conditions on the practice of abortion. In mandatory law, abortion cannot therefore be obtained by a simple request in these countries. These conditions may be more or less strict and interpreted more or less widely. The condition which lends itself the most to an extensive interpretation is the existence of a *situation of distress* or a risk to the *psychological health* of the woman as this can be the subject of a subjective assessment. It is therefore the form of assessment of the conditions of access to abortion which renders the protection of life in the face of abortion on demand theoretical, as in France, or effective, as in Poland or Ireland.

3. The legal time limit for an abortion

The Bill allows abortion during a period of gestation more or less extended depending on the circumstances:

⁴⁶ A.B.C., § 238.

⁴⁷ *Vo*, § 80.

⁴⁸ [Résolution n°2012/2712\(RSP\), sur le scandale suscité par un avortement forcé en Chine](#), adopted 5th July 2012.

⁴⁹ PACE Resolution 1829 (2011) and Recommendation 1979 (2011) on Prenatal sex selection of 3 October 2011.

- In the case of pregnancy caused by rape, the proposed limit is 12 weeks: this corresponds with the limit practiced in about half of European countries.⁵⁰
- In the case of a risk to the mother's life, the Bill explicitly allows, as in almost all other European countries, the practice of an abortion until the end of pregnancy.
- The Spanish Bill allows abortion until the end of pregnancy when the child is not viable. This permission is not routine. Thus, Armenia, Austria, Czech Republic, Denmark, Estonia, Latvia, Lithuania, the Netherlands, Poland and the Ukraine no longer allow abortion after a certain time.⁵¹
- The Bill allows abortion until the 22nd week of pregnancy in the case of serious danger to the physical or psychological health of the mother. Only 6 of the 47 Member States of the Council of Europe allow abortion until 20-22 weeks for a psychological reason⁵² and six others do not provide a limit in the case of serious danger⁵³. The Spanish Bill is therefore more liberal than the majority of European States in these circumstances. Yet, this ground for an abortion is the most difficult to assess because it can be highly subjective and relative. There exists neither a *right to health*, nor a positive definition of what is health (it is only illnesses which are defined). This is even more pronounced as regards psychological health, thereby allowing the criteria of psychological health to be applicable in an extensive fashion.

Thus in Belgium and France, the fact that the mother claims to be in a "*state of distress*" due to or during pregnancy allows abortion up to the 12th week. This Bill could in the future be applied in an extensive manner; it would then have the effect of extending the statutory limit for abortion from 14 to 22 weeks. Everything will depend on the political will of future governments, respect by the medical staff of the conditions imposed by the legislature, and the interpretation by judges of the concept of "serious danger." The examples of France and Belgium show that the requirements of such criteria may be gradually reduced to nothing.

Spanish law would be more consistent and prudent, if it applied in the case of danger to mental health the time limit prescribed in cases of rape, namely 12 weeks. Indeed, if abortion in cases of rape is allowed, it is in fact because of its psychological effects on the mother⁵⁴.

- Finally, the Bill allows abortion until the 22nd week in the case of malformation or an illness of the child that is "incompatible with life". 11 Member States of the

⁵⁰ [Abortion: Legislation in Europe](#), IPPF, Updated May 2012.

⁵¹ According to the above document.

⁵² These are Armenia (22 weeks), Austria (second trimester), Denmark (second trimester), Lithuania (22 weeks), Serbia (20 weeks) and the Ukraine (22 weeks). Iceland allows abortion up to 16 weeks for this reason.

⁵³ These are Cyprus, Germany, Greece, Switzerland, Tajikistan and the United Kingdom.

⁵⁴ Concerning the case of a risk of suicide, although having its origin in the psyche of the woman, it puts her life in danger and can therefore be considered as falling within the category of a risk to the life of the woman.

European Union⁵⁵ provide for the possibility of an abortion between 20 and 24 weeks in this case. However, they do not necessarily require that the illness be of a certain degree of seriousness. The Spanish Bill is similar to Italian legislation. The Italian Act No. 194/1978 decriminalising abortion has not kept the illness of the child as a reason for abortion. It is only if the illness will lead to a physical or psychological damage to the mother that it can be used as a reason to justify the eventual abortion.

4. The medical procedure

The Bill attempts to prevent an overly extensive interpretation of the law by defining the nature of the *danger* that may justify an abortion, and the conditions for its establishment: there is a serious danger to the life or health of the woman "*when the pregnancy may cause material injury to her health, permanent or sustainable, according to current medical knowledge.*" This harm "*must be properly certified in a reasoned report and established by two specialists in the field of the pathology causing danger to women.*" The text adds that in order to ensure independence, these two doctors must "*be different from the one that will practice abortion or under whose direction it will take place, and have no occupation in the establishment in which the abortion will be performed*" (art. 145 bis, 1.a.). The 2010 Act did not guarantee the independence and seriousness of this procedure because the person supervising the abortion and the person carrying it out could be part of the same establishment and thus the same service. The ECtHR clarified this matter so that when a State decides to allow abortion, there is no obligation to make it accessible to everyone, but it must establish an accessible procedure allowing women who are considering an abortion to find out if they fulfil the legal and medical conditions⁵⁶.

5. Eugenics

The Bill aims to protect unborn children with disabilities and only allows an abortion when their disability is "*incompatible with life*", that is to say, when suffering from an abnormality that "*is foreseeable at the time of diagnosis, is usually associated with the death of the foetus or newborn during the neonatal period, even if in exceptional circumstances survival may be extended.*" This must be certified by a medical specialist independent from the establishment practicing the abortion. Interpreted strictly, this provision protects the unborn child affected by a malformation or illness "compatible with life" from abortion.

⁵⁵ These are: Austria, Denmark, Estonia, Finland, Greece, Hungary, Latvia, Lithuania, Portugal, Czech Republic and Sweden. Source: idem.

⁵⁶ *Tysiac v. Poland*; *R. R. v. Poland*, previously cited.

The government justified this provision by its wish to give an effective significance to the prohibition of eugenics. Eugenics has been strongly condemned since the Second World War and is subject to prohibitions, without these being truly effective. The Spanish government refers itself to the UN Convention on the Rights of Persons with Disabilities, stating that *"the right to life is inherent in the human beings and [that the Member States] shall take all necessary measures to ensure to persons with disabilities the enjoyment of life, on an equal basis with others"* (Article 10).

Other international documents guarantee the right to life and forbid discrimination on the grounds of genetic heritage, notably the UNESCO Universal Declaration on the Human Genome and Human Rights of 11th November 1997, the Convention on the Rights of the Child and the Convention on Human Rights and Biomedicine (Convention of Oviedo (Article 11). In fact, the Spanish Government interprets these provisions strictly and applies them in good faith; it intends to give an example of a progressive and genuinely humanist policy in regard to disabled people.

6. Information and the reflection period

The Bill further provides an obligation to inform the pregnant woman of the help and solutions available to her and to set a reflection period of seven days before the abortion. This information focuses in particular on social welfare as well as the possibility to place the child with social services or to give them up for adoption. A social worker must certify that this information has been given. Such obligations of disclosure and reflection are very common in European legislation: their primary aim is to protect the pregnant woman against a hasty decision that she might regret. This period is the same in France, Russia as well as in Albania. It also exists in Belgium, Italy, the Netherlands and Portugal. The period lasts at least one week and can be extended up to two weeks in Denmark.⁵⁷ In the United States, 26 states also provide a minimum period of reflection⁵⁸. As for the content of the information that must be given, the Court has recently ruled that states have the obligation to inform the pregnant woman, in particular of the risks posed by abortion.⁵⁹ Recently, some European countries have planned or decided⁶⁰ to include an ultrasound of the child in the information to be passed on to the woman, in order to help her to realise in concrete terms, the significance of her decision. The obligation to inform, in particular in relation to social welfare, is one of the aspects of the of the States' more general obligation to protect and assist pregnant women and their families. Thus, in the International Covenant on Economic, Social and Cultural Rights, the States recognise that *"protection and [the] widest possible assistance should be accorded to the family"* (Art. 10.1) and that *"special protection should be accorded to mothers during a reasonable period before and after childbirth"* (Art. 10.2).

⁵⁷ [Abortion: Legislation in Europe](#), IPPF, Updated May 2012, page 66.

⁵⁸ Guttmacher Institute, [State policies in brief](#), 1st January 2014.

⁵⁹ *Csoma v. Romania*, No. 8759/05, 15 January 2013.

⁶⁰ It is at least the case in both Macedonia and Russia.

7. Pregnancy in underage girls and third party consent

The Bill does not consider that the young age of a pregnant girl is, in itself, grounds for an abortion. One may consider, however, that the pregnancy will be judged as being possibly susceptible to cause, according to the circumstances, a risk to the psychological health of the young girl. In this case, if an abortion is being considered, the Bill distinguishes between two situations according to the age of the young girl:

- if she is between 16 and 18, the decision must be taken by the underage girl, with the *agreement* of her parents,
- if she is younger than 16 the decision must be taken with the *consent* of her parents.

However, if serious reasons prevent or recommend against consulting the parents and the legal representatives of the young girl, or in case of disagreement between or with the parents, a judge will decide.

The Bill, therefore, restores the principle of the right of parents to be aware of the pregnancy of their minor daughter, without going as far as giving them the right to prevent a possible abortion. This right, which was denied by the 2010 Act, exists in principle, because the protection of the physical and moral health of children is part of the primary and natural responsibility of parents.⁶¹ It is explicitly guaranteed in numerous jurisdictions.⁶² The legislation on abortion of 23 European countries explicitly require the consent of the parents when the young girl is between 16 and 18 years old, and four others require the consent when she is 14 or 15⁶³ years old. This is not to say that in other countries the consent of the parents is not required because in principle no medical intervention can be undertaken on a minor without the agreement of the parents or of a representative.

Recently, the ECtHR ruled that the rights of parents - in particular the right to respect for family life - are directly involved in the situation of an abortion performed on their minor daughter.⁶⁴ Some European countries are currently examining how to better take into account the rights and responsibilities of the father of the unborn child. The ECtHR considers the latter as a “*potential father*” and recognises that, before the courts, he may claim to be the victim of a violation of his private and family life due to the abortion practiced on his unborn child by his partner.⁶⁵

⁶¹ [Convention on the Rights of the Child](#), of 20 November 1989, Article 2.

⁶² Law no. 2001-588 of 4 July 2001 relating to abortion and contraception.

⁶³ In the United States, 39 States require the involvement of the parents according to the Guttmacher Institute, State Policy Brief 2013.

⁶⁴ *P. and S. v. Poland*, previously cited.

⁶⁵ *Boso v. Italy*, No. 50490/99, 5 September 2002, see also *X. v. the United Kingdom*, No. 8416/78, 13 May 1980.

The Spanish Bill, which does not require the *consent* of the parent from the age of 16 and even allows the circumvention of its discovery, and entrusts where necessary, to the judge the responsibility to make the final decision, and is therefore facilitates more abortion than the majority of European legislation.

8. Sanctions in the case of an illegal abortion

The Bill provides for a prison sentence from one to three years against practitioners in the case of the illegal practice of abortion, but categorically excludes any sanction against a pregnant woman who obtains an abortion illegally, especially abroad⁶⁶. The new draft law considers women exposed to abortion as victims who should not be punished, and never as the guilty party⁶⁷. These provisions are lenient, as the majority of European countries punish illegal abortion with larger penalties. Doctors risk between three and eight years in prison in the Czech Republic⁶⁸ and between two and five years in France⁶⁹ if they commit or participate in an illegal abortion.

9. The prohibition of pro-abortion advertising

The Bill henceforth prohibits pro-abortion advertising because it is not a “good for consumption”, according to the turn of phrase of the Spanish Minister for Justice. Such a prohibition does not pose any difficulties; several European countries have⁷⁰, or have had⁷¹, such a ban. This provision aims to bring the practice of abortion within the medical, and no longer the commercial, domain.

10. The right to conscientious objection

Finally, the Bill strengthens the right to conscientious objection for medical personnel which was greatly reduced following the 2010 Act. The ECLJ has also prepared a report for the Council of Europe on this subject in 2011.⁷²

⁶⁶ The law of 2010 was not very protective of the unborn child and punished illegal abortions with a fine.

⁶⁷ [Gallardón asegura que la mujer es víctima del aborto y nunca será culpable](#), lainformacion.com, 17/12/13

⁶⁸ [Article 228 of Criminal Code](#).

⁶⁹ Articles L. 2222-1 to 4 of the Code of Public Health.

⁷⁰ On 25 November 2013, Vladimir Putin signed a decree adding medical services of abortion to the list of services whose advertising is prohibited by Federal Law on Advertising http://prokuror.kaluga.ru/prok/monitoring_zakonodatelstva/monitoring_zakonodatelstva_s_25_29112013/

⁷¹ The French law no. 2001-588 of 4 July 2001 relating to abortion and contraception removes criminal penalties in the case of advertising in favour of abortion.

⁷² ANDOC & ECLJ, *Informe sobre vulneraciones al derecho de objeción de conciencia de los profesionales de la sanidad pública en España*, Consejo de Europa, 22 de junio de 2011. http://eclj.org/pdf/Memo_CouncilofEurope_20110615.pdf

The 2010 Act in fact subjected the exercise of right to conscientious objection to a prior administrative authorisation. The doctors had to declare themselves as conscientious objectors to the administration which was allocated the power to refuse the registration of some doctors (including anaesthetists) on the grounds that they would not be sufficiently involved in the procedure. The administration thus had at their disposal a register of conscientious objectors and additionally made career advancement dependent in particular on the number of prescribed or performed abortions.⁷³ Finally, some autonomous communities, such as Andalusia recruit within the Health Service on the condition of not being a conscientious objector.⁷⁴ The Bill reaffirms the freedom of conscience of health workers by setting down as a principle that *"health workers, whether independent or employees, have the right to exercise conscientious objection in order to refrain from participating or cooperating in an abortion."* The Bill adds that *"the refusal to participate or cooperate in an abortion is an individual decision of the health professional which must be made in advance and in writing."*

Health personnel are not required to inform their employer of their objection prior to their employment in an institution practicing abortion (in order to avoid discrimination in recruitment), but in the week following their recruitment (in order to facilitate the organisation of services). Finally, the Bill narrowly defines the scope of the objection, on the one hand by excluding administrative staff and also by putting in place the obligation that health professionals who are conscientious objectors provide care for women before and after their abortion.

In terms of European and international law, the right to conscientious objection in relation to abortion is recognised and guaranteed in almost all European national laws⁷⁵. It is the principal form of the exercise of freedom of conscience. Thus, for example, in the Helsinki Final Act of 1975, the States committed to recognising and respecting the *"freedom of the individual"* to act *"according to the dictates of his own conscience"*, and similarly, the Charter of Fundamental Rights of the European Union recognises the *"right to conscientious objection"* (Art. 10 § 2). The European Court of Human Rights has repeatedly affirmed the obligation of the State to *"ensure the effective exercise of the freedom of conscience of health care professionals in their professional environment."*⁷⁶ According to the Court, it is for the State to allow *"patients to access the services to which they are entitled under the applicable law"* in organising the health care system, but without obliging conscientious objectors to perform abortions. Also, on several occasions, the Parliamentary Assembly of the Council of Europe has vigorously

⁷³ The "certification of professional skills program" is the national program of career management for health professionals. Among the rating criteria of health professionals the number of abortions performed annually or prescribed is featured, thus causing discrimination against staff who are conscientious objectors.

⁷⁴ Cf ANDOC Report – ECLJ, above cited.

⁷⁵ ECLJ, *Memorandum on the Proposed Pace's Resolution on "Women's Access to Lawful Medical Care: The Problem of Unregulated Use of Conscientious Objection"*. September 2010. [English](#).

⁷⁶ ECtHR, *R. R. v. Poland*, 26 May 2011.

reaffirmed this right of both individuals and institutions, in particular by Resolution 1763 of 7th October 2010 on “*the right to conscientious objection in lawful medical care*”⁷⁷

Compared with other European laws, the protection of freedom of conscience of medical personnel remains rather weak in Spain. Indeed, the Bill provides that the exercise of the right to conscientious objection is subject to a prior declaration requirement. Consequently, any person who has not declared himself to be a conscientious objector within the very short time limit of a week, can no longer claim their right to conscientious objection. However, it is problematic to provide that a person can be thus deprived of the exercise of a fundamental liberty on the simple grounds of administration. In no instance should the fact of not having made the anterior declaration have the effect of requiring a person to participate in an abortion that his conscience condemns. The desire to ensure the proper functioning of abortion services cannot go that far and neither can it go so far as to require any person to participate in the preparation of an abortion. In certain circumstances, preparing a person to have an abortion means already having taken part. Furthermore, by stating that the right to conscientious objection is an individual right, the Bill appears to exclude private health facilities, including those with a Catholic ethos, from accessing this right. However, EU law and many national laws recognise the right of the directors of these institutions to refuse to host the practice of abortion. This right, recognised by the ECtHR⁷⁸ and the European Union⁷⁹, is based on freedom of conscience and religion which are also enjoyed collectively by institutions based on a religious ethos or belief. A private institution, particularly one with a Catholic ethos, has the right to refuse that acts contrary to their ethos or their religious doctrine are practiced within it. Thus, in the United States, no less than 43 states allow private and/or public institutions to refuse the practice of abortions⁸⁰.

Conclusion

Following this analysis, it must be concluded that this Bill will not violate any international or European norm, it is aligned to the European standards in this area which the 2010 Act had removed. This Spanish Bill falls within a new policy trend moving towards the improvement of the legal protection of unborn children in relation to abortion. This political trend has recently become the majority opinion in the United States⁸¹. In Europe, it has only just begun to assert itself.

The future application of this Bill remains unpredictable and depends largely on the political and cultural circumstances because, in reality, it is on the cultural and political terrain that the debate surrounding abortion and the protection of life is played out. Just

⁷⁷ Thus, in Resolution 1763 of 7 October, on “*The right to conscientious objection in lawful medical care*” The Assembly declared that “*No person, hospital or institution shall be coerced, held liable or discriminated against in any manner because of a refusal to perform, accommodate, assist or submit to an abortion, the performance of a human miscarriage, or euthanasia or any act which could cause the death of a human foetus or embryo, for any reason*”.

⁷⁸ *Rommelfanger v. R.F.A.*, no 12242/86, 6 September 1989.

⁷⁹ Directive 78/2000/EC of the Council of 27 November 2000 establishing a general framework for equal treatment in employment and occupation;

⁸⁰ Gutmacher Institute, *State policies in brief*, 1st January 2014

⁸¹ See the [survey for the Huffington Post by Omnibus Poll](#) in June 2013.

like the Zapatero government wanted to create a "right to abortion" in Spanish culture, the current government wants to create and develop a culture that protects the life of unborn children and restores the responsibility of adults.

In Spain, as in the rest of Europe, the abortion rate is very high and constitutes a public health problem⁸². The question is whether this Bill will be accompanied by a cultural change, if a realisation by society of its responsibility to protect and support life will be added to the current understanding of the humanity of unborn life and the violence of abortion. The majority of abortions are caused by socio-economic difficulties, particularly related to financial resources, housing, employment⁸³ or resulting from pressure from the father. Rather than encouraging abortion as the main solution to these problems, especially in a time of crisis, society and governments should fulfil their social responsibilities. Such a law can only reduce the abortion rate if society and governments engage in policies to prevent abortion, giving women and couples the means to fulfil their responsibilities. The responsibility of welcoming new life should not weigh only on the mother but also on the father, and more broadly on the whole of society whose vitality is assured by the renewal of generations.

⁸² International Planned Parenthood Association IPPF, *L'avortement en Europe et en Espagne en 2010*.

⁸³ According to the Guttmacher institute, http://www.guttmacher.org/pubs/fb_induced_abortion.html.