EÖTVÖS LORÁND UNIVERSITY, BUDAPEST

EUROPEAN MASTER'S PROGRAMME IN HUMAN RIGHTS AND DEMOCRATISATION
A.Y. 2021/2022

Bringing Ginsburg to Strasbourg:
An Analysis of Abortion as a Gender Equality Right under the European Court of Human Rights

AUTHOR: MARGOT PIJNENBURG
SUPERVISOR: ORSOLYA SALÁT

TABLE OF CONTENTS

ABSTRACT

In June 2022, the Supreme Court of the United States overturned *Roe v. Wade,* the landmark decision that guaranteed women their constitutional right to abortion. One of the main reasons for this decision was its constitutional basis: the right to liberty, as embedded in the Due Process Clause of the United States Constitution, does not include a right to abortion according to the majority opinion. That the right to abortion was founded on a highly unstable constitutional basis, had been asserted by many feminist legal theorists in the 70s and 80s who argued that abortion is first and foremost a matter of gender equality, not a right to liberty. In Europe, the overturn of *Roe v. Wade* has created a counterreaction that seeks to anchor women's right to choose in national and supranational legislation. An important actor in this endeavor is the European Court of Human Rights as the judicial body appointed to interpret the corner stone of European human rights law, the European Convention on Human Rights. As in *Roe v. Wade,* the European Court of Human Rights conceptualizes abortion as a right to respect for private life, but has not yet found a right to abortion embedded in Article 8. The alarming fragility of the liberty argument as a basis for the right to abortion, demonstrated by the overturn of *Roe v. Wade,* pleads for the European Court of Human Rights to consider a different basis for the right to abortion: the prohibition of gender-based discrimination under Article 14. This work asks the question of how the European Court of Human Rights could conceptualize abortion as a gender equality right under its jurisprudential framework on equality, gender and reproduction. The body of American feminist legal theory, consisting of the writings of Ruth Bader Ginsburg, Catherine MacKinnon and Reva Siegel, will be used to support the argument of abortion as a gender equality right. This work will then argue why and how the European Court of Human Rights already has the adequate jurisprudential framework with which to rule that anti-abortion laws and attitudes constitute gender-based discrimination under Article 14. To demonstrate what such a ruling would look like, this work will conclude by rewriting *P. & S. v. Poland* from a gender perspective, in which the Court would rule that Poland's anti-abortion laws and attitudes violate women's right to equality.

ACKNOWLEDGEMENTS

The deepest thanks go out to my parents and my sister, without whose support none of this would have been imaginable. Thank you for giving me the chance to conclude my academic life with such an indelible year of study in Venice and Budapest.

I thank Prof Orsolya Salát for her guidance and above all, her patience with me when I could not decide on the topic. Thank you for thinking with me and supporting my ideas.

Grazie mille to my dear friends from the Master's program for making this the great year that it was. The endless audio messages that compensated for your absence while we were scattered over Europe, never failed to encourage me and bring a huge smile to my face. Grazie mille anche a Tati per essere stata la migliore coinquillina in Venezia. I am grateful to those I have met in Budapest for the soft landing you have given me during the second semester. Thank you to my friends at home for sending your love from afar and keeping me busy as a tour guide in Venice, when I really should have been studying.

"I didn't change the Constitution; the equality principle was there from the start. I just was an advocate for seeing its full realization." – Ruth Bader Ginsburg [1]

INTRODUCTION

On June 24th, the United States Supreme Court delivered the long-awaited decision that overturned *Roe v. Wade.* [2] For women living in those states that intend to ban or highly restrict abortion access, this decision means that an important right has been taken away. Ruth Bader Ginsburg, former Supreme Court judge and legal scholar, had been aware of the jeopardy that *Roe v. Wade* was in since its naissance in 1973. To her, the right to abortion would have been on much firmer ground had it been spoken of as a gender[3] equality right, instead of a right covered by the right to privacy. Ginsburg's anxieties on the decision have been proven legitimate with *Dobbs v. Jackson Women's Health Organization.* The decision caused an uproar of both outrage and delight in the United States, where the future of abortion rights is all but certain.

In Europe, the debate on abortion has been fueled as well. The overturn of *Roe v. Wade* has generated a renewed realization that reproductive rights that took decades to obtain, can be eliminated instantaneously. Warned by the possible transitoriness of abortion rights, several governments have loosened their abortion laws. [4] The European Parliament made a significant

[1] "Interview with Supreme Court Justice Ruth Bader Ginsburg", interview by John Hockenberry, 16 September 2013, transcript, The Takeaway Archive, https://www.wnycstudios.org/podcasts/takeaway/segments/transcript-interview-justice-ruth-bader-ginsburg

[2] *Dobbs v. Jackson Women's Health Organization,* 597 U.S.__(2022)

[3] In this work, the words *sex* and *gender* will be used interchangeably, as they are in the works cited in this thesis

[4] The Netherlands offers an example of such a counter-reaction; from January 1st 2023, women in want of an abortion will no longer be submitted to the mandatory five day waiting period. *See Kamerstukken II*, 2021/22, 35737

step by adopting a resolution that called for the right to abortion to be added to the Charter of Fundamental Rights of the European Union. [5]

Evidently, Europe is presented with an opportunity to consolidate the right to abortion in national and supranational legislations and demonstrates a willingness to do so. Heeding Ginsburg's premonitions on the correct and incorrect rights on which to found abortion access, deeper reflections are necessary to avoid the sudden overturn of such rights. The European Court of Human Rights (henceforth: the Court) undoubtedly plays a critical role in this regard. As the judicial body in charge of interpreting the European Convention on Human Rights (henceforth: the Convention), the Court is given the mandate to decide which rights are protected under the Convention and which are not. Consolidating the right to abortion in the European human rights law is therefore hardly imaginably without its recognition under the Convention. Furthermore, the Court gives meaning to the rights embedded in the Convention and as such, decides to a large extend the narrative around these rights. The same is true for reproductive rights. The language that the Court uses in speaking of these rights does not only relate to the framework of articles in which they found them – although, as the overturn of *Roe v. Wade* demonstrates, the legal foundation of a right may prove to be decisive for its survival – but also influences the discourse that surrounds them. The difference between conceptualizing the right to abortion as a right to privacy or respect for private life and a gender equality right should not be underestimated, as both tell different tales of women's lived experiences and of what is at stake for women when denied abortion access.

This work will examine the benefits of an equality language in detail. *Roe v. Wade*, and the American body of feminist legal theory that discusses the landmark decision, has been chosen for this work, not in the least due to the vastness of this body of work, but mostly because of the cautionary tale that *Roe v. Wade* has proven to be after June 2022. The aim of this work is therefore to argue that the right to abortion under the Convention should be considered as a gender equality right, in order to give the right the strong basis it needs and moreover the language it deserves to be spoken in.

The idea that the inaccessibility of abortion services can constitute gender-based discrimination has started in the theoretical, academical realm. Slowly but steadily, it is seeping into pleadings and is echoed more and more in the rulings of the courts. This work will trace

[5] European Parliament, "Include the Right to Abortion in the EU Charter of Fundamental Rights, demands MEPs" press release, July 7th, 2022, https://www.europarl.europa.eu/news/en/press-room/20220701IPR34349/include-the-right-to-abortion-in-eu-charter-of-fundamental-rights-demand-meps

this process, from feminist theoretical works to international human rights case law, to finally envision how this processual line would continue in the European Court of Human Rights. This work will argue, that the Court, based on its own jurisprudence on the equality principle under Article 14 and supported by the literature on the connection between the equality principle and reproductive issues, would be well able to accept a claim under Article 14 in abortion cases and fully employ the range of the article. In other words, the Court would then use their established reasonings on substantive equality and apply it to abortion cases. It would then conclude that anti-abortion laws and attitudes violates women's rights to equal treatment and amounts to gender-based discrimination. Anti-abortion laws include states' restrictive or limiting abortion legislation, meaning those legislations that either ban abortion or only allow abortion in few circumstance, as well as authorities' attitudes towards abortion-seeking women. In the latter case, authorities would actively prevent or fail to guarantee a woman's access to abortion services, even when she is legally entitled to them according to the state's legislation.

Chapter One will outline the body of feminist legal theory established in the United States of America. These theories are mainly constituted of the works Ruth Bader Ginsburg and legal scholars Sylvia Law and Reva Siegel. Each of these works highlight in one way or another the equality dimension of abortion. Their arguments form the foundation for the following chapters. The body of feminist legal theory furthermore connects to American jurisprudence on reproductive issues which will be discussed as well, with a strong focus on the landmark case *Roe v. Wade.*

Chapter Two examines the Court's previous decisions on reproductive issues, focusing on abortion cases in particular. It will discuss the current position of abortion in the Court's jurisprudential framework, focusing on Article 2, the right to life, Article 8, the right to respect for private life and Article 3, the prohibition of torture.

Chapter Three will then place the arguments of Chapter One into the Court's legal framework. The aim of this chapter is to see if and how the Court can approach abortion from a gender equality perspective.

Chapter Four will then conclude the work with a feminist re-writing of *P. and S. v Poland.* A feminist re-writing is applied to envision how the Court could speak of abortion in a different language than one of solely liberty and privacy, and how it can do so from a feminist perspective. It imagines what a court decision on abortion would look like, had it been decided by those feminist legal scholars whose work is discussed in Chapter One and would it have used the equality jurisprudence discussed in Chapter Three. This re-writing serves as a final integration of this work's components, incorporating the observations of Chapter Three which

in turn have been informed by the observations found in feminist legal theory as described in Chapter One.

1.

THE LAND OF THE FREE: THE EQUALITY DOCTRINE AND ABORTION IN FEMINIST LEGAL THEORY IN THE UNITED STATES

1.1. FEMINIST LEGAL THEORY: AN INTRODUCTION

In the United States, the 1970s, 1980s and 1990s marked an upsurge in what was known as feminist legal theory or feminist jurisprudence, an intellectual branch of legal theory interested in women's perspective on law and jurisprudence. [6] The movement grew significantly as more women choose to pursue a legal education and legal professions. [7] Feminist legal theory, along with the other branches of Critical Race Theory and queer theory[8], endeavors to challenge the view on law as a neutral code and to perceive the law through the eyes of those who had little input in its creation. It discards the notion that the law reflects a universal, unbiased and objective truth and replaces it with the understanding that the law is tailored to and favors those that have designed them. Men are considered both the maker and the subject of the law. In order to make room for a new, feminist perspective, feminist legal theorists employ feminist legal methods. As one of these methods, Bartlett identifies asking the "woman question", as solution to the above-mentioned false neutrality of the law. [9] Asking the "woman question" means uncovering the implications of seemingly neutral laws – or, as Bartlett describes it, even 'male' - for women, to then consider how these laws might be changed to suit the lived experiences of women better.

Offering a gender perspective allowed feminist legal theorists to lay bare those issues that the law had previously seemed blind for, such as sexual harassment and domestic violence. [10]

[6] Bartlett & Kennedy, "Introduction" in *Feminist Legal Theory: Readings in Law and Gender* (New York: Routledge, 1991), 1
[7] Martha Albertson Fineman, "Feminist Legal Theory", in *Journal of Gender, Social Policy and the Law* 13, no. 1 (2005), 15
[8] Ann Scales, *Legal Feminism: Activism, Lawyering, and Legal Theory* (New York: New York University Press, 2006)., 1
[9] Bartlett, "Feminist Legal Methods", in *Feminist Legal Theory: Readings in Law and Gender,* 371
[10] Fineman, "Feminist Legal Theory", 18

These issues concerned women disproportionally. Early feminist legal theorists sought to reform the relevant legislation to attain gender equality. [11] The ideal of gender equality versus differences, or a "symmetrical approach" versus an "asymmetrical approach"[12] forms a conundrum for feminist legal theorists. [13] Disagreement arose around questions on what it means to be equal, to whom should women want to become equal and which differences should be reflected by the law and which should not? One group of feminist legal theorists argue that equality should entail that men and women are treated the same and any differences between the sexes should be left unrecognized so as not to reinforce stereotypes and generalizations. Their approach to gender equality can be described as symmetrical: women should strive to gain an equal status to men, should assimilate to them. [14] This entails that legislation aimed at treating women differently from men, on the basis of protective reasons such as legislation, was deemed detrimental to gender equality. [15] Another group of feminist legal theorists see the recognition of gender differences as vital to obtaining gender equality through the law. As men and women have different lived realities, it is necessary for legislations to take these differences into account and establish formal equality through corrective mechanisms. These feminist legal theorists argue that without this recognition, laws would remain male-biased while claiming to be neutral. In line with this reasoning on sexual difference and formal equality, feminists have advocated for affirmative or positive action policies to rectify gender imbalances. [16] Theirs is an asymmetrical approach to gender equality. [17]

1.2. THE EQUALITY DOCTRINE AND REPRODUCTION

Why does the concept of sex equality give rise to such debate? As Catherine MacKinnon summarizes it, "[a] built-in tension exists between this concept of equality, which presupposes sameness, and this concept of sex, which presupposes difference. Sex equality thus becomes a contradiction in terms, something of an oxymoron, which may suggest why we are having such a difficult time getting it"[18]. Sameness and difference are difficult concepts to marry.

---

[11] Fineman, "Feminist Legal Theory", 15
[12] Christine A. Littleton, "Reconstructing Sex Equality", in *Feminist Legal Theory: Readings in Law and Gender*, 35
[13] Bartlett & Kennedy, "Introduction", in *Feminist Legal Theory: Readings in Law and Gender*, 5
[14] Littleton, "Reconstructing Sex Equality", in *Feminist Legal theory: Readings in Law and Gender*, 35
[15] Fineman, "Feminist Legal Theory", 16
[16] Ibid., 19
[17] Littleton, "Reconstructing Sex Equality", in *Feminist Legal theory: Readings in Law and Gender*, 36
[18] Catherine MacKinnon, "Difference and Dominance" in *Feminist Legal Theory: Readings in Law and Gender*, 81

Additionally difficult is to *whom* women should desire to be equal, or according to the equality doctrine, the same. An obvious comparator would be men, but this conclusion is problematic as well as it automatically begs the question whether women should *want* to be equal to men. [19] Denying this demand for equality to men would be legitimate solely on the basis of avoiding "phallocentrism"[20], the reaffirmation of men as the legal standard.

Especially problematic is the application of the equality doctrine to those issues that apply to *only* women. Choosing men as the comparator becomes significantly less apparent regarding situations such as pregnancy and other reproductive matters. In other words, the symmetrical approach preferred by many feminist legal theorists, that unintentionally assigns a role to "[t]he phallocentricity of equality"[21], provides an unsatisfactory solution to those situations where man cannot function as the comparator. As Law articulates it:

> "[P]regnancy, abortion, reproduction, and creation of another human being are special-very special. Women have these experiences. Men do not. An equality doctrine that ignores the unique quality of these experiences implicitly says that women can claim equality only insofar as they are like men. Such a doctrine demands that women deny an important aspect of who they are. Such a doctrine is, to say the least, reified" [22]

Pregnancy and the way the Supreme Court has dissected, interpreted and classified the legal framework around it, has troubled feminist legal theorists. Not only is becoming pregnant a natural, biological phenomenon only women can experience, it is additionally undeniably disabling in due course. The inability to work or perform certain types of labor inevitably requires a legal framework to 'protect' women in the workplace. This legal 'protection' sometimes necessarily means a disadvantaged position for pregnant women. Such was the case for the applicants in *Cleveland Board of Education v. LaFleur*. The applicants were required to lay down their work as school teachers, and take unpaid maternity leave five months before the expected birth date, and could not return until three months after giving birth, the next semester had begun *and* could provide a certificate demonstrating that they were in good health. [23] The school argued that such provisions were necessary because, among other reasons, "at least some teachers become physically incapable of adequately performing certain of their duties during the latter part of pregnancy" and to "protect the health of the teacher and her unborn child"[24]. [1]

[19] Bartlett & Kennedy, "Introduction" in *Feminist Legal Theory: Readings in Law and Gender,* 5
[20] Christine Littleton, "Reconstructing Sexual Equality", in *Feminist Legal Theory: Readings in Law and Gender,* 40
[21] Ibid., 42
[22] Sylvia Law, "Rethinking Sex and the Constitution" in *University of Pennsylvania Law Review* 132 (1984), 1007
[23] *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974)
[24] Ibid., para. 9

It is important to note in this regard that while the Court did conclude that the school's provisions on pregnancy violated the Fourteenth Amendment, it did not do so on the basis of sex discrimination. This argument was however brought forward by the school teachers, but was put aside by the Court. Rather, they agreed that the school's provisions violated the Due Process Clause of the Fourteenth Amendment. [25]

Finally, in *Geduldig v. Aiello* that same year, the Court could no longer avoid making a conclusive statement on the question whether pregnancy-based distinctions amounted to sex discrimination and came to the highly contested conclusion that pregnancy-based discrimination is not sex discrimination. [26] *Geduldig v. Aiello* concerned four women claiming that the exclusion of disabilities caused by pregnancy from disability insurance systems amounted to discrimination. [27] On the question whether it amounted specifically to sex-based discrimination, the Supreme Court concluded that indeed, only women are able to become pregnant, the insurance program had not made any classifications based on sex. The proper comparator in this case should, according to the Court, not be men and women but rather the group of pregnant women and the group of those who were not pregnant which consisted of both men *and* women. [28] The same line of reasoning was applied in *General Electric Company v. Gilbert,* where the Supreme Court reiterated that pregnancy-based discrimination has no relation to sex discrimination. [29]

The above-mentioned cases all concerned legislation treating women unfavorably, one way or another, on the basis of pregnancy. In *Miller Wohl Co v. Commissioner of Labor and Industry,* however, the Miller-Wohl Company was accused of not treating a pregnant employee more favorable according to the Montana law which prohibited companies from firing pregnant female employees and requiring companies to provide adequate maternity leave. [30] The Miller-Wohl Company asserted, having fired a pregnant women, that the Montana law was not in line with the objective of the Pregnancy Discrimination Act, which sought to treat pregnant employees neither more nor less favorably compared to other employees. [31] For feminist legal theorists, the issue of more or less favorable treatment for pregnant women functions as one of

[25] *Ibid*., para. 33
[26] *Geduldig v. Aiello*, 417 U.S. 484 (1974)
[27] *Ibid*., para. 10
[28] *Ibid.*, para. 20
[29] *General Electric Company v. Gilbert,* 429 U.S. 125 (1976), para. 135
[30] *Miller-Wohl Co. v. Commissioner of Labor & Industry, State of Montana,* 515 F. Supp. 1264 (D. Mont. 1981). *See also* Wendy Williams, "Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate", in *NYU Review of Law & Social Change* 13, no. 2 (1984), 328
[31] Wendy Williams, "The Equality Crisis: Some Reflections on Culture, Courts and Feminism" in *Feminist Legal Theory: Readings in Law and Gender,* 25

the most illustrative manifestations of the sameness versus difference conundrum. The question on how laws should be formulated when applied to pregnancy is not easily answered and provides arguably unsatisfactory solutions no matter how it is answered. Feminists in favor of the symmetrical approach highlight the importance of equality. Equality denounces special treatment for women and so, naturally, pregnant employees should not be granted extra legal protection on the basis of the unique circumstances of their sex. As Williams puts it, "[t]he same doctrinal approach that permits pregnancy to be treated worse than other disabilities is the same one that will allow the state constitutional freedom to create special benefits for pregnant women"[32]. In other words, a difference in treatment, be it more or less favorable one, is a loss for women's equality to men. Feminists in favor of the asymmetrical approach however argue that situations such as pregnancy signify exactly those experiences that *only* women have and that therefore, it is right to adjust the legal framework to these unique experiences. [33] Law for example has argued that:

> "An equality doctrine that ignores the unique quality of these experiences implicitly says that women can claim equality only insofar as they are like men. Such a doctrine demands that women deny an important aspect of who they are […]. Further, deny as we might, the reality remains that only women experience pregnancy. If women are to achieve fully equal status in American society, including a sharing of power traditionally held by men, and retain control of their bodies, our understanding of sex equality must encompass a strong constitutional equality guarantee that requires "radically increasing the options available to each individual, and more importantly, allowing the human personality to break out of the present dichotomized system." [34]

Only women's reproductive capacities provide – according to Law – reasonable ground for laws to make any sex distinctions. Other distinctions unrelated to reproductivity are reliant on generalizations that shape and reinforce gender hierarchies and have therefore no justification. [35] Several other feminist legal theorists, such as Herma Kay, concur with Law's perception of the equality principle and pregnancy. To Kay, a woman's pregnancy may naturally affect her ability to work in detrimental ways, meaning that in order to maintain equal working opportunities – since men will never experience such disadvantages prior to having children – it is vital to ensure safeguards for pregnant women when needed. [36] Both Kay and Law propose conditional approaches to the asymmetrical equality doctrine by asserting that only concerning

[32] Ibid., 26
[33] *See e.g.* Sylvia Law, "Rethinking Sex and the Constitution" and Herma Hill Kay, "Equality and Difference: The Case of Pregnancy," in *Berkeley Women's Law Journal*, 1 (1984)
[34] Law, "Rethinking Sex and the Constitution", 1007
[35] Ibid., 1008
[36] Kay, "Equality and Difference: The Case of Pregnancy", 27

women's unique reproductive capacities is it allowed and indeed just for the law to distinguish between men and women.

MacKinnon finally rejects the discussion on gender differences in general, arguing that neither the notion of sameness nor difference are useful tools for feminist legal theorists in evaluating and criticizing legislation in the light of the equality principle. Both approaches place men as the "measure of all things"[37]:

> "Under the sameness standard, women are measured according to our correspondence with man, our equality judged by our proximity to his measure. Under the difference standard, we are measured according to our lack of correspondence with him, our womanhood judged by our distance from his measure. Gender neutrality is thus simply the male standard, and the special protection rule is simply the female standard, but do not be deceived: masculinity, or maleness, is the referent for both."[38]

Rather, MacKinnon emphasizes the significance of women's subordination. The proposed *dominance approach* criticizes the idea of gender differences as a given in life to which the law should adapt. If there are any differences between men and women, MacKinnon argues, it is because women's societal subordination and gender hierarchies has fabricated them. [39] Equality should be perceived as answering to the "question of hierarchy, which—as power succeeds in constructing social perception and social reality—derivatively becomes a categorical distinction, a difference"[40]. Differences follow power relations rather than existing eo ipso.

1.3. RUTH BADER GINSBURG ET ALIA: ABORTION AND EQUALITY

A discussion on the tensions that pregnancy causes for the equality principle is important in the light of abortion. The Supreme Court's conclusion in *Geduldig v. Aiello* that pregnancy-based classifications are not equal to sex classifications naturally meant that other reproductive issues, such as abortions, also fell out of the scope of sex discrimination. Claiming that access to abortion services were a matter of sex equality was thus made significantly more challenging. [41] It disallowed the analogy of abortion as a sex equality principle. Ginsburg too observed the

[37] Catherine MacKinnon, "Difference and Dominance: On Sex Discrimination" in *Feminist Legal Theory: Readings in Law and Gender*, 82
[38] Ibid.
[39] Ibid., 85
[40] Ibid., 87
[41] Sylvia Law, "Rethinking Sex and the Constitution" in *Feminist Legal Theory: Readings in Law and Gender*, 985

connection between the Supreme Court's view on pregnancy-based classifications and abortion:

> "The High Court has not yet perceived the full dimension of current controversy surrounding gender-based discrimination. […] Not only the sex discrimination cases, but the cases on contraception, abortion, and illegitimacy as well, present various faces of a single issue: the roles women are to play in society. Are women to have the opportunity to participate in full partnership with men in the nation's social, political, and economic life? This is a constitutional issue, […] surely one of the most important in this final quarter of the twentieth century"[42]

Stating that it is a "constitutional issue", Ginsburg refers to the need for an equality framework in which to conceptualize women's reproductive needs. Ginsburg asserts that women's prospects of living in full social, political and economic equality to men depend on the law's perception on reproductive autonomy. [43] In order to use this framework of equality however, it would have been necessary for courts to identify reproductive issues as sex issues, concerning *only* women due to their reproductive capacities. Unsurprisingly then, Ginsburg was critical towards *Geduldig v. Aiello,* wondering: "Is the answer that pregnancy can't happen to man, therefore pregnancy classifications can't discriminate on the basis of sex? Or because they affect women exclusively do pregnancy classifications merit particularly careful inspection?"[44]

Ginsburg observes:

> "the Supreme Court either does not see, or is unwilling to acknowledge, all of these cases as part and parcel of a single large issue. Precedent to date generally places explicit gender-based differentials, illegitimacy, pregnancy, and abortion in separate cubbyholes. *Roe v. Wade* […] for example, barely mention women's rights. They are not tied to equal protection or equal rights theory. Rather, the Supreme Court anchored stringent review to concepts of personal privacy or autonomy derived from the due process guarantee"[45]

The framework that Ginsburg proposes, one that uses the language of sex equality, has evidently not been used by the Supreme Court in *Roe v. Wade*. [46] The 1973 *Roe v. Wade* decision by the Supreme Court marked a revolutionary moment in time for women's reproductive rights in the United States. Jane Roe – an pseudonym – sought to terminate her pregnancy. Living in Dallas,

[42] Ruth Bader Ginsburg, "Sex Equality and the Constitution: The State of the Art", in *Women's Rights Law Reporter* 4, no. 3 (1978), 143–44
[43] Ruth Bader Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade," in *North Carolina Law Review* 63, no. 2 (1985), 375
[44] Ruth Bader Ginsburg, "Gender in the Supreme Court: The 1973 and 1974 Terms" in *The Supreme Court Review* (1975), 8
[45] Ruth Bader Ginsburg, "Sex Equality and the Constitution: The State of the Art", 144
[46] *Roe v. Wade*, 410 U.S. 113 (1973)

Texas, she was prevented from obtaining access to abortion services as Texas criminal law only allowed for abortions in the case of a medical advice when the mother's life is in danger. [47] Roe claimed that the denial by Texas of a safe abortion by a competent and licensed physician was incompatible with the United States constitution. To support her claim, Roe relied on her right of personal privacy as embedded in the First, Fourth, Fifth, Ninth and Fourteenth Amendments. [48] The Supreme Court, having sketched the landscape of abortion laws throughout history and in the United States at the time of the adjudication, agreed with Roe. It finds that the right of privacy, derived from the Due Process Clause of the Fourteenth Amendment, encompasses the freedom to decide on the termination of a pregnancy. The Due Process Clause states: "...nor shall any State deprive any person of life, liberty, or property, without due process of law."[49] The Supreme Court furthermore noted:

> "[s]pecific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved."[50]

The language used to illustrate the situation of women unable to have a desired abortion centers around detriments, burdens, distress and psychological difficulties. The Supreme Court adds however that the right of women to privacy does not entail that States are not allowed to impose restrictions on the access to abortion services. [51] Thus, although the applicants were right in asserting that abortion accessibility falls within the scope of the right of privacy, they were wrong to assert that the right of privacy offers an absolute right to bodily integrity. Abortion regulations "must be considered against important state interests […]". [52] It is worth mentioning here that Justice Rehnquist, one of the two dissenting judges, disagreed with the majority in its decision on the applicability of the right of privacy. [53] Justice Rehnquist is of the opinion that the Fourteenth Amendment did not intend a right to privacy per se, but was rather supposed to be interpreted as it reads: "[…] nor shall any state deprive any person of life, liberty, or property,

[47] *Ibid.*, para. 6
[48] *Ibid.*, para. 9
[49] U.S. Const. amend. XIV, para. 1
[50] Ibid., para. 77
[51] Ibid., para. 78
[52] Ibid., para. 79
[53] Ibid., para. 127

without due process of law"[54]. 'Liberty', Justice Rehnquist argues, does not encompass privacy as meant by the majority, i.e. a limited right to bodily autonomy.

While applauded en masse by those who have long desired and fought for the Supreme Court's affirmation of women's rights to abortion access, *Roe v. Wade* has received criticism concerning the use of a 'privacy' language. Ginsburg has devoted a significant amount of thought as to the more correct language, which she deems to be the language of sex equality.

In *Some Thoughts on Equality and Autonomy in Relation to Roe v. Wade,* Ginsburg focusses her criticism on the Supreme Court's referral to the relation between a female patient in want of an abortion, and her physician. The Supreme Court evidently employed a "patient-physician autonomy constitutional dimension to the abortion issue"[55] in which the denial of an abortion for which the physician had given a medical approval, would violate the autonomy in this relation. The decision to have an abortion is "[…] primarily, a medical decision, and basic responsibility for it must rest with the physician"[56]. In this regard, *Roe v. Wade* can be said to protect the right of the physician to advice and treat his or her patients according to his or her medical expertise, rather than a woman's right to choose whether or not to have children. *Roe v. Wade* situated the right to abortion in the legal framework of negative rights, as a matter of privacy. [57] Henceforth, it was to be classified as a right from which the government should keep its hands off, just as it should with other classical negative rights such as the right to freedom of expression and freedom of assembly. This language, to Ginsburg, set *Roe v. Wade* up as a target for the criticism it received and allowed for the pro-life movements that found a cause for mobilization in the decision. [58] The use of a gender equality language would have helped in avoiding both. [59] Ginsburg' criticism is thus focused on two aspects of the federal right to abortion: its constitutional basis and its linguistic basis.

Firstly, concerning the legitimacy of *Roe v. Wade,* Ginsburg was of the opinion that the Equal Protection Clause of the Fourteenth Amendment would provide a far stronger constitutional basis for the right to abortion then the Due Process Clause. [60] The Equal Protection Clause provides that the provides equal protection to everyone. [61] Gender-based distinctions are, under the Equal Protection Clause, to be reviewed by the Supreme Court with

[54] U.S. Const. amend. XIV, para. 1
[55] Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade.", 385
[56] *Roe v. Wade*, para. 106
[57] Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade", 384
[58] Ibid., 376 & 381
[59] Ibid., 385
[60] Ruth Bader Ginsburg, "Speaking in a Judicial Voice" in *New York University Law Review* 67, no. 6 (1992), 1200
[61] U.S. Const. amend. XIV, para. 1

"strict scrutiny"[62]. Equal protection, rather than liberty, would form a sounds foundation for the right to abortion because of the Supreme Court's strict review it demands.

In June 2022, with the deliverance of *Dobbs v. Jackson Women's Health Organization,* Ginsburg was arguably proven right. The majority opinion main grievance regarding *Roe v. Wade* was the fact that it had conceptualized the right to abortion as a right to liberty. [63] 'Liberty' under the Due Process Clause, it argued, cannot be interpreted as to encompass a right to abortion. It is neither mentioned in the Constitution nor is it "rooted in the Nation's history and tradition"[64]. Justice Thomas emphasizes this point in his concurring opinion and adds that another reason that the Due Process Clause does not encompass a right to abortion is that this clause guarantees a due process, but not substantive rights. [65] It does not, in other words, guarantee that liberty interests cannot be infringed at all.

Whether *Roe v. Wade* would not have been overturned had it established the right to abortion as an equality right, cannot be said with certainty however. The majority opinion made short work with the idea of the Equal Protection clause as the constitutional foundation. Referring to *Geduldig v. Aiello,* it stated that, since abortion is to be seen as a medical procedure unrelated to the sex of the patient, it cannot be reviewed under the Equal Protection Clause, nor with the ensuing heightened scrutiny. [66]

Perhaps more importantly than legal arguments however, Ginsburg saw much in the authority in language that the equality doctrine carries. The equality doctrine would have done justice to that which is at stake from women unable to control their reproductivity: her equal position to men, the "autonomous charge of her full life's course, […] her ability to stand in relation to man, society, and the state as an independent, self-sustaining, equal citizen"[67]. While voiced only "gingerly"[68] and "with trepidation"[69] in *Some Thoughts on Equality and Autonomy in Relation to Roe v. Wade,* the idea of abortion access as a matter of sex equality was further elaborated on by Ginsburg herself in dissenting opinions as Justice to the Supreme Court. In reaction to *Planned Parenthood of Southeastern Pennsylvania v. Casey* (henceforth: *Casey),* a case that upheld the decision of *Roe v. Wade,* and added that states are allowed to impose restriction to the access of abortion if they do not impose a "undue burden"[70] on the woman's

[62] *See e.g. Craig v. Boren,* 429 U.S. 190 (1976)
[63] *Dobbs v. Jackson Women's Health Organization,* 597 U.S.__(2022), para. 2
[64] *Ibid.*
[65] *Ibid.* (Justice Thomas, concurring opinion)
[66] *Ibid.*
[67] Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade", 383
[68] Ibid., 385
[69] Ibid.
[70] *Planned Parenthood v. Casey,* 505 U.S. 833 (1992), para. 878

right to choose, Ginsburg observed that this case moved away from the focus on the patient-physician autonomy towards a morel central role of the woman's autonomy. [71] The restrictions on abortion access in casu were posed by the Pennsylvania Abortion Control Act of 1982, which required inter alia that minors could demonstrate that one of their parents had consented to the abortion and of married women that the husband had been notified of the abortion. [72] In answering questions regarding *Casey* in Ginsburg's Senate confirmations hearing in 1993, she responded:

> "[y]ou asked me about my thinking on equal protection versus individual autonomy. My answer is that both are implicated. It is a decision she must make for herself. When Government controls that decision for her, she is being treated as less than a fully adult human responsible for her own choices. […] I will rest my answer on the Casey decision, which recognizes that it is her body, her life, and men, to that extent, are not similarly situated. They don't bear the child. […] It is essential to woman's equality with man that she be the decisionmaker, that her choice be controlling. If you impose restraints that impede her choice, you are disadvantaging her because of her sex. […]."[73]

In her response, Ginsburg not only reiterated the importance of a sex equality language when discussing the right to abortion, but also a language on women's dignity, autonomy and responsibility. Indeed, the Supreme Court mentioned the notions of autonomy, dignity and liberty in *Casey* several times, whereas no reference was made to autonomy nor dignity in *Roe v. Wade.* For example, in *Casey* the Supreme Court stated that decisions on marriage, children and child-birth are of a private nature that naturally compels the State to refrain from interference, as these choices are "central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life". [74] The right to abortion, the Supreme Court underlined, was intrinsically linked to the "destiny of the woman"[75] which must be assessed "to a large extent on her own conception of her spiritual imperatives and her place in society"[76].

Later, in her dissenting opinion on *Gonzales v. Carhart,* Ginsburg repeated the Supreme Court's message in *Casey,* namely the importance of access to abortion services for women's

[71] Senate, Congress. "Supreme Court Nomination Hearings 103-482 - Hearings on the Nomination of Ruth Bader Ginsburg to be Associate Justice of the Supreme Court of the United States, July 20, 21, 22, and 23, 1993". Government. U.S. Government Printing Office, July 20, 1993, 150
[72] *Planned Parenthood v. Casey*, para. 844
[73] Senate, Congress. "Supreme Court Nomination Hearings 103-482", 207
[74] *Planned Parenthood v. Casey*, para. 851
[75] *Ibid.*, para. 852
[76] *Ibid.*

autonomy, dignity, liberty and equality, the "ability of women to participate equally in the economic and social life of the Nation […] facilitated by their ability to control their reproductive lives"[77]. [78] *Gonzales v. Carhart* concerned the Supreme Court's decision on the Partial-Birth Abortion Ban, passed by Congress and signed by the President, which entailed a ban on an abortion method frequently used in the second trimester. [79] Ginsburg saw proof in the Supreme Court's wording that *Casey* opened the way for her preferred language on abortion rights, rather than the previously used privacy framework. She says, "[t]hus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."[80]

Additionally notable in Ginsburg's dissenting opinion on *Gonzales v. Carhart* is her harsh critique on the majority opinion's view on abortion restrictions. The majority opinion commented on the "difficult and painful moral decision"[81] between having or not having an abortion, and observed that the Partial-Birth Abortion Ban acknowledges this dilemma and how "[r]espect for human life finds an ultimate expression in the bonds of love the mother has for her child"[82]. The majority opinion goes on to state that "[w]hile we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. […] [D]epression and loss of esteem can follow"[83]. In other words, the Supreme Court concluded that restrictive abortion access or the information doctors are to give women in want of an abortion was allowed and indeed sometimes preferred, as it could prevent regret and the ensuing mental detriments this may cause for women. Ginsburg was quick to pick up on the Supreme Court's stereotypical perception of women and "their fragile emotional state"[84]. She stated: "[…] the Court deprives women of the right to make an autonomous choice, even at the expense of their safety. This way of thinking reflects ancient notions about women's place in the family and under the Constitution's ideas that have long since been discredited"[85]. Founding her statement on the ancient notions on the proper place for women, she points towards two Supreme Court decisions that justified and underlined the limited role of women in society on the basis of their physique,

[77] *Ibid*., para. 857
[78] *Gonzales v. Carhart*, 550 U.S. 124 (2007) (Ginsburg, R.B., dissenting), para. 169
[79] *Ibid.*, para. 135
[80] *Ibid*., para. 172
[81] *Ibid.*, para. 159
[82] *Ibid.*
[83] *Ibid.*
[84] *Ibid*., para. 183
[85] *Ibid*., para. 184-185

reproductive capabilities and duties, frailness and life destiny. [86] These notions have been contradicted by the Supreme Court, she argues, referring to more recent decisions were the Supreme Court explicitly said that women's emancipation in society demands that the Supreme Court refrains from relying on broad, generalizing statements on women's nature and capacities may not form the basis of their decisions. In other words, Ginsburg revealed the Supreme Court's arguably outdated desire to protect women, since they are deemed incapable of making heavy decisions for themselves. Evidently, Ginsburg connected the right to abortion to the right to equality and equal opportunities. Denial of abortion services limits women in their freedom in ways men never experience, meaning that their right to equality is compromised.

Ginsburg's – revolutionary – reframing of abortion rights are embedded in the dissenting opinions, essays and speeches referred to above. This reframing was inspired by and inspired in turn other feminist legal theorists. In her dissenting opinion on *Gonzales v. Carhart,* Ginsburg refers to both Reva Siegel and Sylvia Law. Siegel's body of feminist legal theory on the importance of an equality language for abortion rights is as vast as it is profound. Siegel points out that, while state regulations that differ between men and women on the basis of stereotypes or generalized notions of either the man's or the woman's place in society, have been justly criticized and overruled, the same cannot yet be said about those regulations aimed solely on women's reproductive capacities. [87] Restrictions on reproductive services are however, Siegel states, constituted on the basis of sex, and should be perceived being discriminatory towards women, not seldomly due to stereotypical notions of women.

Both Ginsburg and Siegel's advocacy on equality arguments rests on the notion that women, when denied access to abortion services, are unable to participate in society on an equal basis and are deprived of equal freedom, dignity, and autonomy. Siegel focusses her equality argument more on the discriminatory and subordinating effects that strict abortion regulations have on women. It is the state action, she argues, not nature, which has burdened women with forced pregnancies. [88]

Siegel observes that the two values of the equal protection jurisprudence, based on the Equal Protection Clause in the Fourteenth Amendment. The first value, the antidiscrimination value, dictates that no state action shall be based on prejudices, generalizations or stereotypes on certain marginalized groups as this reasoning would diminish their dignity and humanity. [89]

[86] *Ibid*., para. 185
[87] Reva Siegel, "Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection" in *Stanford Law Review* 44, no. 2 (1992), 264
[88] Ibid., 350
[89] Ibid., 353

Antisubordination values secondly govern that legislation should not place marginalized groups in subordinate positions that have a harmful effect on them and their enjoyment of a dignified existence. The Equal Protection Clause effectively prohibits the use of stereotypes as a basis for legislation, but antisubordination values tend to be neglected in assessing state action. To Siegel, both the antidiscrimination as well as the antisubordination perspectives should be employed when assessing and criticizing abortion laws: not only should those laws be criticized that are founded on gender-based stereotypes, but similarly those inflicting subordinating harm on women. [90] From the perspective of these two values, restrictive abortion laws are incompatible with the equality principle. Regarding antidiscriminatory values firstly, restrictive abortion laws convey and enforce stereotypical, gender-based notions on the role of women as mothers. [91] While these notions have been scrutinized by the Supreme Court in the past as impermissible foundations for legislation – Siegel refers to inter alia *Mississippi University for Women v. Hogan* stating that "archaic and stereotypic notions"[92] or "traditional, often inaccurate, assumptions about the proper roles of men and women"[93] are illegitimate foundations for legislation to be based upon – restrictive abortion laws continue to employ these notions about woman's role. From a historical perspective, such laws demonstrate a continuum: both in the nineteenth century as in the present, laws restricting abortion access attempt to re-emphasize a separate sphere ideology where the lives of women take place inside the home, as mothers raising children. [94] Access to abortion services would entail that women turn away from this gender role. Siegel therefore observes that laws restricting this access ultimately have as their objective to "[compel] women to continue pregnancies they wish to terminate."[95] The fact that legislators refrain from explicitly expressing this objective but rather justify restrictive legislation on the premise of protection of unborn life is insufficient evidence according to Siegel to assert that this is not indeed the objective. As for many legislators, and indeed according to popular opinion, pregnancies caused by rape or incest are thought to be undesirable to the woman to such an extent, that abortion is allowed. [96] The exemption of rape or incest from an abortion ban is illustrative of how legislators are more concerned with 'punishing' women's behavior than the unborn life. Rape, after all, is a traumatic event that overcomes the women – by definition – against her will and in which she has no fault. Sexual intercourse –

[90] Ibid., 354
[91] Ibid., 355-356
[92] *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), para. 725
[93] *Ibid.*, para. 726
[94] Siegel, "Reasoning from the Body", 356
[95] Ibid., 359
[96] Ibid., 361

outside rape - that causes pregnancies are however perceived as a women's fault, for which women can be denied access to abortion by legislators "because they assume that any pregnant woman who does not wish to be pregnant has committed some sexual indiscretion properly punishable by compelling pregnancy itself" and "because it betrays a lack of maternal solicitude in women."[97] Abortion laws based on these notions are contrary to the antidiscrimination premise of equality laws. Restrictive abortion laws are furthermore contrary to the antisubordination principle of equality laws, as compelled pregnancies force women in to subordinating status of childbearing and childrearing. [98] The same legislators that design these abortion laws then refrain from designing laws that would relieve women of this subordinate status, through laws ensuring work equality or the participation of the father in the childrearing. [99] Restrictive abortion laws thus both reflect and enforce gender stereotypes.

Although already weaved through the previous description of the equality doctrine in relation to reproductive rights, it is worth lining out shortly how Law perceives abortion as an equality principle. Law argues that laws concerning physical characteristics that belong to either sex – although mostly women's – can be assessed in the light of the equality principle in three ways. [100] The law can either be perceived to cause no sex discrimination at all, as was expressed in *Geduldig.* That is to say, the law concerning pregnancy – a sex-based physical characteristic – was concluded not to distinguish on the basis of sex. Secondly, the law can be assessed the same way as other sex-based laws. This entails that laws based on sexual characteristics such as reproductive capacity of women would be assessed according to the current gender equality framework. As described above, this is an Aristotelian framework in which equal cases are treated alike and unequal cases unlike, creating an unsatisfying outcome for those characteristics that only women have. Finally, laws can be tested to the equality principle according to a new equality framework. This approach is endorsed by MacKinnon, who is heavily in favor of assessing laws based on sexual characteristics in light of the equality doctrine, not on the basis of difference but on hierarchy.

Law proposes another equality test to be applied to laws on reproduction as a separate category of sex-based laws:

> "I propose that laws governing reproductive biology should be scrutinized by courts to ensure that (1) the law has no significant impact in perpetuating either the oppression of

[97] Ibid.
[98] Ibid., 371-377
[99] Ibid., 377
[100] Law, "Rethinking Sex and the Constitution", 1003

> women or culturally imposed sex-role constraints on individual freedom or (2) if the law has this impact, it is justified as the best means of serving a compelling state purpose"[101]

This test allows for sexual biology-based laws to be tested to the equality principle without becoming trapped by the Aristotelian interpretation of equality. These laws can then be tested to the equality principle through the recognition that sex biology-based laws affect men and women differently and are likely to place women in a disadvantaged or oppressing position. Regarding the issue of abortion, it is evident to Law that abortion laws, clearly sex biology-based legislations, affect only women. The denial of access to abortion then limits women's individual freedoms and burdens them disproportionally with an unwanted pregnancy. [102] In other words, it oppresses them and restrictive abortion laws do not pass Law's proposed equality test. [103]

Lastly, it is important to draw the attention shortly back to MacKinnon's work regarding abortion, when discussing the doctrine and Law's proposed test. MacKinnon, an opposer of the sameness versus difference dichotomy and an advocate for the antisubordination approach, naturally categorized abortion bans as subordinating laws. She states:

> "[N]o men are denied abortions; gender comparisons are therefore unavailable or strained. So sexuality and procreation become happy differences or unhappy differences but never imposed inequalities. […] [N]or is criminalizing or refusing to fund a medical procedure that only women need [regarded as state action that discriminates on the basis of sex]. First there must be similarly situated men with whom to compare. Men's comparative lack of sexual and reproductive violation is not visible as a lack because it is relatively unthinkable that men would be hurt in these ways. As a result, when sex inequality is most extreme […] it drops off the sex inequality map."[104]

In other words, MacKinnon too sees abortion as a sex equality right and reproduction legislation – containing "ostensibly gender-neutral terms, like abortion"[105] that made the Supreme Court deny that it they were sex-based classifications - as legislation that disadvantage women. She laments the unwillingness to perceive "reproductive exploitation"[106] – which arguably

[101] Ibid., 1008-1009
[102] Ibid., 1017
[103] Ibid., 1020, 1028
[104] Catherine MacKinnon, "Reflections on Sex Equality under Law" in *The Yale Law Journal* 100, no. 5 (1991), 1297
[105] Ibid., 1300
[106] Ibid., 1299

encompasses forced pregnancies – as equality issues instead of solely as liberty or privacy issues.

1.4. CONCLUSION

This chapter has given an overview the body of American feminist legal theory and their considerations on reproduction. In the light of what we know today, it is bittersweet to notice the already present suspicions towards the foundation of *Roe v. Wade* among feminist legal theorists. The constitutional right to abortion should not (only) be a right to liberty, but (also) a right to gender equality. However, as to *what* equality should look like, feminist legal theorists are divided between an asymmetrical and a symmetrical approach to equality. These approaches are distances even further from each other when applied to reproduction. A red thread can be seen in the works of these feminist legal theorists however: a strong argumentation for a gender equality approach to abortion. Ruth Bader Ginsburg has been at the forefront of this argumentation. Particularly concerned with *Roe v. Wade,* she was a fierce advocate for the equality principle in relation to abortion. Disagreeing with the Supreme Court's focus on the physician's rights, Ginsburg proposed to consider abortion as a necessary medical service for women if they are to have an equal position to men in society. Abortion access is vital in granting women equality, dignity and autonomy. Her arguments were mainly directed towards the gender stereotypical and controlling implications of anti-abortion laws and attitudes.

Her work is supported by Reva Siegel, who adds an antisubordination component to the arguments. The inaccessibility of abortion places women in a subordinate position from which equal protection laws ought to prevent her. Regarding antisubordination arguments, the works of Law and MacKinnon offer great insights.

The central thought of these works – that abortion is a gender equality right – will be woven through this thesis, to support the application of this thought to the European Court of Human Rights.

2.

ABORTION AND THE EUROPEAN COURT OF HUMAN RIGHTS

2.1. THE EUROPEAN CONVENTION OF HUMAN RIGHTS CURRENT JURISPRUDENTIAL FRAMEWORK ON ABORTION

Despite the magnitude of the topic in bioethical, political and legal debates, its jurisprudence on abortion within the European Court of Human Rights remains limited. When met with abortion cases, the Court has shown an increased willingness to accept applicant's claim to different rights under the Convention. The right to respect for private life under Article is the preferred right for the Court to find a violation of, but claims to the prohibition of torture under Article 3 have been accepted as well. The purpose of the chapter is therefore to provide an overview of the Court's reasonings on Article 2, Article 8 and Article 3 in order to discuss how and with which reasonings the Court could accept a violation of Article 14, the prohibition of discrimination, in these same cases.

2.1.1. ARTICLE 2 ECHR

One of the corner stones of the Court's jurisprudence on abortion is *Vo v. France*, although this case was not directly related to abortion, which was delivered the Court in 2004. [107] The Court considered mainly the scope of Article 2, the right to life. In answering to the claim of Mrs. Vo, whose pregnancy was involuntarily terminated as a result of a medical mistake during a regular pregnancy check, that the termination resulted in the homicide of her baby, the Court was required to assess whether Article 2 extends the right to life for 'everyone' to a fetus. The Court concluded that a fetus is not a "person" and therefore falls outside of the scope of Article 2. [108]

[107] *Vo v. France*, no. 53924/00, ECHR 2004
[108] *Ibid.*, para. 80

While this reasoning would suggest the Court's favorability towards abortion, it was quick to add that member states enjoy a margin of appreciation in deciding from which moment on they wish to grant a right to life to a fetus. The Court refrained from providing any decisive conclusion, since "[…] the issue of such protection has not been resolved within the majority of the Contracting States themselves[…] and […] there is no European consensus on the scientific and legal definition of the beginning of life […]"[109]. Previously, in *Boso v Italy*, the Court used the same approach to the contested case of fetal life and decided to leave unanswered the question of whether Article 2 implies a right to life for a fetus. [110] The case concerned an applicant who invoked Article 2 to claim that his wife had violated their fetus' right to life when she terminated her pregnancy against the will of the applicant, the Court disagreed with the applicant. However, in its disagreement, the Court merely stated that it finds that Italy had not discretion in striking a fair balance between the woman's interest and the protection of the fetus. [111] Here too, no concrete statements were made on the scope of Article 2, except that the article might encompass a right to life for fetuses but that such a right was not violated in the present case.

Certainly, Article 2 of the Convention has been assigned only a marginalized role in the abortion debate by the Court, having never been accepted as a ground for the full protection of fetal life to the extent that it overrules women's rights to autonomy.

2.1.2. ARTICLE 8 ECHR

Similarly to the American jurisprudence, the right to access to abortion services has been conceptualized mostly in the language of the right to privacy. In the Convention, this right is expressed by Article 8 and is worded as the right to respect for private life. In many situations, applicants may refer to this right, ranging from data protection[112] to noise disturbance[113]. In general, Article 8 sees to the right to private and family life, home and correspondence. [114] The right to respect for private life commands states to refrain from interfering with the lives of

[109] *Ibid.,* para. 82.
[110] *Boso v. Italy,* no. 50490/99, ECHR 2002 (translation)
[111] *Ibid.,* para. 1
[112] *See e.g. Z v. Finland*, no. 22009/93, ECHR 1997
[113] *See e.g. Apanasewicz v. Poland*, no. 6854/07, ECHR 2011
[114] European Court of Human Rights, "Guide on Article 8 of the European Convention on Human Rights: Rights to respect for private and family life, home and correspondence", www.echr.coe.int, August 31, 2021, 7

individuals. It is therefore largely a negative right in the sense that it usually disallows the state from acting - arbitrarily - rather than acting positively on individuals. [115]

So far, the Court has maneuvered around the question of whether Article 8, which encompasses the right to bodily integrity and autonomy, equally entails that women are entitled to abortions when desired. Instead, the Court noted that States enjoy a margin of appreciation when establishing when the right to life begins. [116] States should enjoy this freedom due to the lack of a European consensus on the moment of the beginning of life. In other words, States enjoy a margin of appreciation in balancing on the one hand, the interests of the woman wishing to terminate her pregnancy, and, on the other, 'the right of the unborn life'. [117] Thus, whether States have breached the right to respect to private life or not depends on whether they have succeeded in striking a fair balance between the two interests.

In *A, B and C v. Ireland, Tysiąç v. Poland, R.R. v. Poland* and *P and S v. Poland,* the Court agreed with the applicants that Article 8 encompasses the right to personal autonomy and development, physical integrity as well as "decisions both to have and not to have a child or to become genetic parents"[118]. It furthermore agreed that an abortion ban for women seeking abortion services for medical reasons or reasons on well-being, amounted to an interference of the right to respect for private life. However, in *A, B and C v. Ireland,* the Court found that the rights under Article 8 of the first two applicants, A and B, were not violated. [119]*A, B and C v. Ireland* concerned three Irish women in want of an abortion, arguing that Ireland violated their rights under the Convention by criminalizing abortions and forcing women to travel to the United Kingdom to obtain the desired abortion. By rejecting the claim under Article 8, the Court concluded that Ireland was not under the obligation to legalize abortion. Concerning the third applicant, applicant C, the Court did find that Article 8 had been violated. [120] Applicant C sought an abortion on the grounds of a risk to her health, as she suffered from a rare form of cancer. In her regard, the Court concluded that Ireland failed in their positive obligation under Article 8 to ensure that the woman could investigate whether she would be able to have a legal abortion in Ireland. [121]

[115] *See e.g. Libert v. France*, no. 588/13, ECHR 2018, para. 40-42. *See also Marckx v Belgium*, no. 6833/74, ECHR 1979, para. 31, in which the Court stated that Article 8 compels States to act positively in certain cases.
[116] *See e.g. Vo v. France*, no. 53924/00, ECHR 2004, 82
[117] *See e.g. Boso v. Italy*, no. 50490/99, ECHR 2002 (translation)
[118] *A, B and C v. Ireland*, no. 25579/05, ECHR 2010, para. 212
[119] *Ibid.*, para. 242
[120] *Ibid.*, para. 268
[121] *Ibid.*, para. 267

Under this same reasoning, the Court found that Article 8 had been violated in following cases regarding access to abortion services. *Tysiaç v. Poland,* firstly, concerned a Polish woman – suffering from a severe eye dysfunction – who was refused a termination of her pregnancy despite the risk of health that the pregnancy caused. [122] The woman carried the pregnancy to term after receiving a rejection from a clinic in Warsaw, after which her eye sight deteriorated even further. The Court reiterated that states were under a positive obligation according to Article 8 to secure the respect for someone's private life. [123] Secondly, *R.R. v. Poland* concerned a pregnant woman whose fetus was discovered to have a severe and dangerous malformation. The woman wished an abortion if prenatal genetic tests confirmed the malformation, but was refused a referral by her doctor and the tests were repeatedly postponed. By the time the woman was able to have the test – which confirmed the fetal impairment – the fetus was considered viable meaning that an abortion was prohibited. Under Polish law at that time however, an abortion would have been legal before viability as it was confirmed to have a severe fetal impairment. The woman suspected the doctors postponing the possibility for a prenatal genetic test intentionally, as they were aware of her intentions to have an abortion if the malformation was confirmed. She was forced to carry out her pregnancy and gave birth to a daughter with Turner syndrome. [124] Considering Article 8, the Court observed again that Poland was under the positive obligation to ensure that the applicant was able to medically establish whether she was entitled to a legal abortion and that Poland had failed in this obligation. [125] Finally, the same line of reasoning was followed regarding Article 8 in *P and S .v Poland.* In *P and S v. Poland,* it was a fourteen year old girl, 'P', who had become pregnant as a result of rape and wished to have an abortion. As she was a minor and had become pregnant as a result of illegal sexual conduct, the Polish Law on Family Planning allowed, as one of the exceptions to the abortion ban, an abortion. However, the girl was met with objecting doctors, harassment by a priest insisting on the carrying out of the pregnancy, and delay in the medical procedure. [126] The circumstances of the case, according to the Court, "resulted in a striking discordance between the theoretical right to such an abortion on the grounds referred to in that provision and the reality of its practical implementation"[127].

[122] *Tysiaç v. Poland,* no. 5410/03, ECHR 2007
[123] *Ibid.,* para. 129
[124] *R.R. v. Poland,* no. 27617/04, ECHR 2011, para. 6-37
[125] *Ibid.,* para. 214
[126] *Ibid.,* para. 11-28
[127] *P. & S. v. Poland,* no. 57375/08, ECHR 2012, para. 111

In all four cases therefore, the States had exceeded the breadth of their margin of appreciation, as they had failed in striking a fair balance between the interest of the pregnant woman and what they perceived as a weighty interest of the fetus. The decision of the Court was arguably limited to a *procedural* evaluation of the States' failure to provide abortions to those who were legally allowed one under the national legislation. Applicants who were clearly not entitled to legal abortions but still accused their State of failing in the positive obligation to offer them abortion services, were rejected in their claims by the Court. This way, the Court left unanswered the substantial question of whether under the European Convention on Human Rights, women do indeed have a *right* to an abortion. [128] Nor was there any mention of values such as bodily autonomy and dignity, whereas the Court did refer to these in earlier decisions on euthanasia. [129] As Daniel Fenwick observes:

> "The cases are unusual in that, despite bearing a similarity to cases outside the abortion context dealing with positive obligations under Article 8(1), the central concern was not, apparently, with the harm inflicted upon the applicants, but with the balance effected by the state in practice between the applicants' interests and the protection for the 'right to life of the unborn'. […] the issue has been viewed as a medical one in the sense that the practitioners involved were guardians of the legal entitlement to abortion, so the procedures involved had to be effective and available"[130]

Symmetry between the Court's jurisprudence on abortion and that of the Supreme Court in *Roe v. Wade* can be clearly seen here. Both lines of reasoning place abortion in the realm of the right to privacy or respect for private life. Under this right then, the central figure is not the woman whose right to bodily autonomy was compromised, but rather the physician who was impeded in providing the woman the necessary – and in the cases presented before the Court, legal – health care. The word 'physician' is mentioned forty-eight times in the decision, the word 'woman' forty-four times. Furthermore, in *Roe v. Wade* too, neither 'autonomy' nor 'integrity', 'equality' or 'dignity' is ever mentioned.

Another important similarity is the Court's balancing act between the interests of the woman in question and the protection of unborn life. Under Article 8 and the margin of appreciation provided to them, it is up to the States towards which end they wish the balance to shift, provided that the balance remains fair. The liberty approach entails that, while women have a privacy interest, this interest is balanced out by the state's interest in determining whether

[128] Daniel Fenwick, "The Modern Abortion Jurisprudence under Article 8 of the European Convention on Human Rights" in *Medical Law International* 12, no. 3-4 (2013), 274
[129] Ibid., 274
[130] Ibid., 265

and when women may have an abortion. *Roe v. Wade* used the same line of reasoning. Since "[t]he pregnant woman cannot be isolated in her privacy"[131], the State has "a compelling interest in protecting […] life from and after conception."[132]

A significant difference between the jurisprudence of the Court and *Roe* can be identified as well however; *Roe v. Wade* established a jurisprudential right to abortion in the United States, whereas the jurisprudence of the Court has thus far not established a "right to choose an abortion". [133] This difference can largely be explained by the different constitutional nature of both courts. The Supreme Court evidently fulfills the role of highest judicial institution in the United States to whom is clearly assigned the responsibility of overseeing cases related to the Constitution or federal laws. [134] While it is asserted that the European Court has by now started to fulfill a role as a European equivalent to the Supreme Court – it being described as a "European supreme human rights court"[135] – with the highest jurisdictional power over the interpretation of European human rights law, the Court is nevertheless situated differently. The Court remains a supranational judicial body and is in this capacity bound to navigate between Scylla and Charybdis, between excessive legal interpretation and legal passivity. It is to decide over, and consequently, interpret the European human rights law in such a manner that substance is given to the Convention for those who seek its protection, while on the other hand refraining from delivering those decisions that could contradict the national legislation of member states who can withdraw from the Council of Europe out of dissatisfaction with an overly activist Court. In other words:

> "The ECtHR needs to reconcile this constitutive constraint with its raison d'être which is the protection of human rights in Europe. Together with those legal constraints, the respect of the institution of the Court and the execution of its judgements also depends on social constraints, i.e. the perceptions of legitimacy of the ECtHR according to state actors"[136].

To navigate safely, the Court opts for judicial minimalism, a strategy through which the Court confines itself to deciding only on the circumstances of a particular case rather than a larger,

---

[131] *Roe v. Wade*, 410 U.S. 113, 153 (1973), para. 90
[132] *Ibid.*
[133] Ibid., 273
[134] "About the Court", Supreme Court of the United States, accessed May 26th, 2022, https://www.supremecourt.gov/about/about.aspx
[135] Mikael Rask Madsen, "From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics" in *Law and Social Inquiry* 32, no. 1 (2007), 154
[136] Audrey Lebret, "The European Court of Human Rights and the framing of Reproductive Rights" in *Droits Fondamentaux* 18 (2020), 39

theoretical issue. Judicial minimalism ensures that the Court makes no controversial, broad statements that could upset member states. [137] For decisions on reproductive issues such as abortion, this entails that the Court reviews only whether procedural obligations, rather than substantial obligations, have been violated, and if a substantial review is necessary, does so in the most non-controversial way. [138] *Tysiaç v Poland* demonstrates how the Court opts for a procedural discussion on abortion. While it has consistently refrained from proclaiming that the Convention provides a 'right' to abortion – as it did in *A, B and C v Ireland* for instance – it has proclaimed that when a member states legally allows an abortion, the access to abortion services should be effective in practice.

Several reasonings can argue both against and in favor of judicial minimalism by the Court. Favorable for this approach is the readiness with which the opinions of the Court is accepted. In other words, a minimalist decision gives little reason for dissenting opinions and thus gives a strong foundation to the decision, despite its minimalistic implications. [139] In *Tysiaç v Poland* for example, this allowed for the Court to nevertheless find a violation of the right to respect for private life, without dissatisfying many judges. This approach was underlined by Judge Borello, who, in a separate opinion emphasized that:

> "In this case the Court was neither concerned with any abstract right to abortion, nor, equally so, with any fundamental human right to abortion lying low somewhere in the penumbral fringes of the Convention […] The Court was only called upon to decide whether, in cases of conflicting views (between a pregnant woman and doctors, or between the doctors themselves) as to whether the conditions to obtain a legal abortion were satisfied or not, effective mechanisms capable of determining the issue were in place. My vote for finding a violation goes no further than that."[140]

Arguing against judicial minimalism in the context of abortion is the peril of unnecessary conservatism and restraint regarding issues such as abortion. When the majority of states have already endorsed either through their national legislation or through international law, their stance towards these issues, it is unfitting for the Court to refrain from labelling abortion access a right, when clearly, it is so already. [141]

Conclusively it can be said that, like in *Roe v. Wade,* the Court favors the use of a privacy or private life doctrine when speaking of abortion. In four of the most important cases on abortion – *A, B and C v. Ireland, Tysiaç v. Poland, R.R. v. Poland* and *P. and S. v. Poland* – the

[137] Ibid., 47
[138] Ibid., 48
[139] Ibid., 49
[140] *Tysiaç v. Poland,* no. 5410/03, ECHR 2007 (Judge Bonello, J., separate opinion)
[141] *See e.g.* Lebret, "The European Court of Human Rights and the framing of Reproductive Rights", 51

Court accepted the applicant's assertions that Article 8 is applicable to the inaccessibility of abortion services. However, here too, the Court avoids answering whether Article 8 entails that women have a right to abortion. Instead, due to the Court's attempt to balance on the abortion debate, the question of an Article 8 violation depends on the States' balancing act based on their assigned margin of appreciation. Again similar to *Roe v. Wade* then, the privacy doctrine creates a rather unsatisfactory narrative on the equal position, dignity and autonomy of women, and leaves them still without a concrete right to abortion under the Convention.

2.1.3. ARTICLE 3

Regarding Article 3 however, the Court has come to considerably bolder conclusions in *R.R. v. Poland.* In this case, the Court ruled that a States' failure to offer the possibility of a timely abortion and repeatedly deny information and examination, amounts to inhumane and degrading treatment. The applicant complained that she had been treated "in a dismissive and contemptuous manner"[142] by the doctors when they had failed to provide the treatment she was entitled to, in a timely manner, and that they were "repeatedly criticizing her for her efforts to have prenatal tests carried out and for the fact that she had envisaged an abortion[…]"[143]. The Court acknowledged the woman's "situation of great vulnerability"[144], the "weeks of painful uncertainty" and the "acute anguish" she suffered. The Court was therefore of the view that the woman as "so shabbily treated"[145] and "humiliated" that the refusal of adequate medical care amounted to a violation of Article 3. [146]

Later, in *P. & S. v. Poland,* the Court accepted again that failing to provide adequate abortion services can amount to inhuman or degrading treatment. [147] The Court ruled that, considering the multiple circumstances such as the "procrastination, confusion and lack of proper and objective counselling and information"[148] that the girl was subjected to by the authorities, her rights under Article 3 had been breached.

Article 3 was also invoked in *A, B and C v. Ireland* in 2011, but unsuccessfully in this case. Regarding the prohibition of torture specifically, they argued that "[…] that the criminalization of abortion was discriminatory (crude stereotyping and prejudice against women), caused an

[142] *R.R. v. Poland,* no. 27617/04, ECHR 2011, para. 145
[143] *Ibid.*
[144] *Ibid.* para. 159
[145] *Ibid.*, para. 160
[146] *Ibid.*, para. 161
[147] *P. & S. v. Poland,* no. 57375/08, ECHR 2012, para. 157-169
[148] *Ibid.*, para. 167

affront to women's dignity and stigmatized women, increasing feelings of anxiety"[149]. Furthermore, the woman argued that "the two options open to women – overcoming taboos to seek an abortion abroad and aftercare at home or maintaining the pregnancy in their situations – were degrading and a deliberate affront to their dignity."[150] The State, they pointed out, had been "[…] under a positive obligation to protect them from such hardship and degrading treatment". The argument was refuted however on the grounds that the minimum level of severity necessary for a violation of Article 3 had not been met. [151] The same was true in *Tysiaç v. Poland.* [152]

Evidently, the Court's conclusions in *R.R. v. Poland* and *P. & S. v. Poland* illustrates an arguably revolutionarily departure from its stance towards the applicability of Article 3 in relation to abortion as expressed in *A, B and C v. Ireland* and *Tysiaç v. Poland*. No longer indifferent towards the possibility of restrictive abortion laws amounting to inhuman or degrading treatment, the Court accepted the applicant's view on Article 3 in reproduction cases. These decisions indicate an "engendering of suffering"[153], as Zureick describes it. Zureick demonstrates that human rights bodies have gradually come to accept the notion that both de facto – meaning the denial of abortion services even when it would have been allowed such as in both *R.R* and *P. and S.* - and de jure – meaning restrictive abortion laws in general – can qualify as cruel, inhuman or degrading treatment. [154] Abortion, she further argues, belongs to those issues that were once considered outside of the scope of the prohibition of torture, such as rape and female genital mutilation. [155] Additionally, abortion was perceived as a matter of national legislation and that every member state should be able to decide for themselves. Decisions such as *R.R. v. Poland* and *P and S v. Poland* however indicate that the Court now perceives the restriction of abortion services as an issue relevant to European human rights law. To Zureick, these decisions point towards a broader understanding of female-specific forms of pain and suffering. [156]A feminist perspective on Article 3 brings to light those issues that are of significance in their lives, to encompass those experiences – particularly around reproduction or gender-based violence – that men do not experience.

[149] *Ibid.,* para. 162
[150] *Ibid.*
[151] *Ibid.,* para. 164
[152] *Tysiaç v. Poland,* no. 5410/03, ECHR 2007, para. 62-66
[153] Alyson Zureick, "(En)gendering Suffering: Denial of Abortion as a Form of Cruel, Inhuman, or Degrading Treatment", in *Fordham International Law Journal* 38, no. 1 (2015)
[154] Ibid., 100
[155] Ibid., 101
[156] Ibid., 104

Possibly, the recognition of a violation of Article 3 in *R.R. v. Poland* and *P and S v. Poland* is attributable to the fact that both cases concerned Polish abortion law and that in both cases, the applicants' situations allowed for legal abortions under the – restrictive - Polish legal framework. [157] Mostly the latter contributed to the further exploration of the meaning and scope of female-specific suffering. That is to say, since both applicants were legally entitled to having an abortion under the Polish legal framework, the Court had the possibility to investigate more substantively how the "frustration of their ability to make important decisions about their bodies and their futures"[158] impacted the women mentally.

While the attribution of a feminist interpretation by the Court to torture and cruel, inhuman or degrading treatment is arguably laudable and revolutionary, it falls prey to the same narrative that Siegel indicated earlier. In this narrative, an abortion would as an exception be considered a 'right' for women in the case of rape, i.e. in cases where the woman did not consent nor to the sex nor to the resulting pregnancy. She is portrayed as an innocent woman, deserving of an abortion, deserving of bodily autonomy since it this very bodily autonomy had been taken away from here previously. [159] Women who voluntarily engaged in sexual activity and became unwantedly pregnant cannot count on the same grant of autonomy under this narrative. The line of reasoning regarding Article 3 that the Court set out at present therefore lacks a complete comprehension of what it means to grant women a right to bodily autonomy. Furthermore, it lacks a complete comprehension of which circumstances may cause unwantedly pregnant women to feel degraded or inhumanly treated. Fearing for one's own physical health because of the pregnancy is one of those circumstances, as it was in *Tysiaç*. As Zureick states, had the Court taken into consideration the wide range of autonomy interests that unwantedly pregnant women may have, it would have considered the inability to terminate a pregnancy that causes serious health risks for the woman to violate Article 3. [160]

Here, Zureick furthermore draws a comparison between the Court's statement on *V.C. v. Slovakia* and *N.B. v. Slovakia* – cases that concerned forced sterilization – and abortion. Forced sterilization was considered to "[…] arouse in [the women] feelings of fear, anguish and inferiority and to entail lasting suffering"[161], causing "depressive and pessimistic moods [that] could be linked to her inability to conceive"[162] and "entailed mental suffering"[163]. A comparison

[157] Ibid., 123-124
[158] Ibid., 124
[159] Ibid., 136
[160] Ibid., 137
[161] *V.C. v Slovakia*, no. 18968/07, ECHR 2009, para. 118
[162] *N.B. v Slovakia*, no. 29518/10, ECHR 2012, para. 80
[163] *Ibid.*

with abortion can easily be drawn; in both cases, reproductive choices are significantly impaired, resulting in a loss of bodily autonomy. It is therefore not unimaginable that mental deteriorations such as depression, fear and feelings of inferiority occur to women who are forced to carry out unwanted pregnancies, in the same way as they do to women who have been subjected to forced sterilization. [164]

In October 2020, the Polish Constitutional Court declared that eugenic abortions – abortions on the basis of serious fetal disabilities, one of the three grounds on which abortion was allowed in Poland – was unconstitutional. [165] In reaction to the ruling, the Court has received a large amount of applications directed to the Government of Poland. [166] Here too, the applicants argue that the decision by the Polish Constitutional Court amounts to a violation of Article 3, complaining "of the distress caused by the prospect of their being forced to give birth to an ill or dead child"[167]. The claims brought forward in these cases resembles those of *A, B and C v. Ireland,* insofar as they refer to a States' restrictive abortion laws rather than a States' refusal.

2.2. CONCLUSION

This chapter has mapped out the Court's jurisprudence on abortion through a focus on three different articles of the Convention: Article 2, Article 8 and Article 3. On Article 2, only a brief reflection was necessary to point out that while the article has been brought up in abortion cases, this has never amounted to a recognition by the Court of a right to life for the fetus. On Articles 8 and 3 however, the Court found that anti-abortion laws and attitudes could violate women's rights to respect for private life or freedom from torture.

The Court's gravitation towards Article 8 as the preferred right to find a violation of, is similar to that of *Roe v. Wade*. These similarities bring that light that, like in *Roe v. Wade*, the right to respect for private life does not function as an all too satisfactory basis for the right to abortion. It is, paradoxically, inherent to liberty that is not boundless. Liberty arguments on

[164] Zureick, "(En)Gendering Suffering", 138
[165] Monica Pronczuk, "Poland Court Ruling Effectively Bans Legal Abortions" in *The New York Times,* October 22, 2020
[166] *See K.B. and three other applicants v. Poland,* no. 1819/21, ECHR 2021 and *K.C. and three other applicants v. Poland,* no. 3639/21, ECHR 2021
[167] Ibid.

abortion naturally entail that on the other side of the woman's interests, another – the state's – is placed. This balancing act can hardly safeguard women's right to abortion.

This chapter has however also pointed out how the Court succeeded in connecting abortion to another right: that of freedom from torture. In doing so, it has taken an important step in recognizing the gender dimension of the rights protected by the Convention. This offers a promising ground on which to assume that the Court could employ the same line of reasoning, but on Article 14.

3.

GETTING IT RIGHT: ABORTION AS A GENDER EQUALITY RIGHT UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

3.1. INTRODUCTION

This chapter applies the theory discussed in Chapter One to the Court. It will discuss the extent to which the Court is able to apply a gender equality approach to abortion, using the arguments brought forward by Ruth Bader Ginsburg and others, as well as its own body of jurisprudence on equality.

Applicants have repeatedly brought forward a claim on Article 14 in cases on abortion and in other reproduction cases, but thus far without much success. This chapter will discuss these claims, their reasonings and the Court's reluctance to connect abortion to gender equality. To investigate the potentiality of the Court accepting a claim on Article 14, the existing equality doctrine of the Court will be described, with a focus on the question of comparability. To assess whether the Court could accept a violation of Article 14 in relation to abortion, this question will thus be focused on. Alternatives to this question will be reviewed, using feminist legal theory as well as case law of other international human rights bodies and judicial bodies. Conclusively, this chapter will argue that the Court already has in place the necessary jurisprudence and can already draw upon the jurisprudence of other judicial bodies and committees, as well as literature, to speak of abortion as a gender equality right.

3.2. ARTICLE 14 IN REPRODUCTION CASES: A SHORT OVERVIEW

In *A, B and C v. Ireland*, the applicants not only argued that their rights under Article 3 and 8 had been violated. They also argued that Ireland's restriction on abortion access violated their right to freedom from discrimination as embedded in Article 14, as Irelands legislation placed "an excessive burden on them as women and, in particular, on the first applicant as an

impoverished woman"[168]. *A, B and C v. Ireland* thus stands alone in bringing forward this claim. In none of the other Court cases related to abortion have the applicants argued that under Article 14, their right to equal treatment had been violated as a result of restrictive abortion laws. In *Tysiąç v. Poland*, the applicant also referred to Article 14, however not to argue that the Polish authorities had discriminated against her on the basis of her sex by denying her access to abortion services, but rather on the basis of her disability regarding her involvement in an investigation procedure. [169]

In answer to the applications assertion in *A, B and C v. Ireland,* the Court provided a brief conclusion. It stated that it had already provided a reasoning with regard to the arguments related to Article 8 and that providing a reasoning with regard to Article 14 was therefore unnecessary. The Court referred to its decision in *Open Door and Dublin Well Woman v. Ireland,* a case concerning two organizations providing counseling to pregnant women that found themselves constrained by Irish law in providing information on abortion services and thought the right to provide information, the right to respect for private life and the right to equal treatment under the violated. [170] Under Article 14 in conjunction with Article 8 and Article 10, both organizations stated that firstly, women were discriminated against "since men were not denied information "critical to their reproductive and health choices""[171] and secondly, that the constraint on the distribution of information discriminated on the basis of political opinion "since those who seek to counsel against abortion are permitted to express their views without restriction"[172]. These claims were a novelty at the Court, a fact emphasized by the Court itself[173], but in this case too, the Court nevertheless found no reason to dwell on the idea of possible discrimination too long and concluded that there had already been found a breach on Article 10 and that no further considerations regarding Article 14 were necessary. [174]

Regarding reproductive issues in particular, it is not unusual for the Court to reflect only briefly on claims of discrimination. In *Evans v. United Kingdom* too, a substantial discussion is lacking. The circumstances leading to the case in question can be summarized as the following. *Evans v. United Kingdom* revolved around an ex-couple fundamental disagreement on the 'use' of woman's eggs which were fertilized with the man's sperm. [175] The man strongly opposed

[168] *A, B and C v. Ireland,* no. 25579/05, ECHR 2010, para. 269
[169] *Tysiąç v. Poland,* no. 5410/03, ECHR 2007, para. 139
[170] *Open Door and Dublin Well Woman v Ireland,* no. 14234/88; 14235/88, ECHR 1992
[171] *Ibid.,* para. 81
[172] *Ibid.*
[173] *Ibid.,* para. 83
[174] *Ibid.*
[175] *Evans v United Kingdom* [GC], no. 6339/05, ECHR 2007

the implantation of the fertilized egg in woman's uterus, stating that he did not want to become a parent to the woman's child any longer. He withdrew his consent to the implantation in the uterus, a possibility granted to him under Human Fertilization and Embryology Act of 1990. To the woman however, having suffered from ovary cancer and having had her ovaries removed, the fertilized eggs were her last chance of having genetically related children. [176] Both relied on Article 8 in their argumentation, with the man referring to the right to respect for private life in his right *not* to become a parent and the woman in her right to become a genetically related parent. [177] Evidently, both claims to Article 8 were irreconcilable. [178] The Court rules in favor of the man whose possibility to withdraw his consent were granted by the relevant law, whose wording was known to the woman beforehand. [179]

Besides claiming a violation on her right to respect for private life, the woman also argued that she had been discriminated against. [180] Whether this discrimination would occur on the basis of disability or on the basis of sex is a matter of discussion throughout the case and will be analyzed later. The woman asserts that, while 'healthy' women, not in need of medically assisted reproduction and as such, not in need of the sperm donor's consent, she was. Once the eggs of these women were fertilized in her womb, the sperm donor could not and would not withdraw their consent to become a parent and these women would never have to take the man's will into account. Evans however, having no other choice but to resort to medically assisted reproduction and have her eggs fertilized outside of her womb, *was* subjected to the man's will. She considered this situation to be discriminatory. The Court however found it unnecessary to further discuss the above-mentioned steps of Article 14. Since the Court had already found a reasonable and objective justification for the breach of Article 8, the same justification applied to Article 14. [181] In its reasoning, the Court mostly refused to answer the question on the 'proper comparator', meaning the group to which the situation of the woman should be compared in assessing whether there has been a breach of Article 14. This element of the assessment will be explained in more detail later.

In all the above-mentioned cases, the arguments on discrimination can be considered illuminating, informative and highly interesting from a legal perspective. Especially the

[176] *Ibid.*, para. 13-17
[177] *Ibid.*, para. 57
[178] *Ibid.*, para. 73
[179] *Ibid.*, para. 92
[180] *Ibid.*, para. 93. Although the ground of discrimination is not mentioned specifically in the case, the applicant meant either discrimination on the basis of gender or on the basis of disability. This becomes clear from the Court's acceptance of 'healthy' women instead of men as the proper comparator.
[181] *Ibid.*, para. 96

argument brought forward in *Open Door and Dublin Well Woman v. Ireland* on the inequality between men and women regarding the information they receive on their needed reproductive and health services, is exemplary of an argument similar to Ginsburg's. However, arguments relating to Article 14 are consistently met with reluctance of the Court to consider the matter in detail. Consequently, little of meaning can be distilled about the equality dimension of reproductive issues brought before the Court. The approach frequently employed by the Court is fitting to the dilemma it faces as described earlier. As the Court has thus far avoided the question of whether a right to abortion exist under the Convention, proclaiming that the denial of access to abortion services would constitute discrimination on the basis of sex seems an unlikely scenario now or in the near future. Still, arguing that the denial of access to abortion services violates the rights of women to equal treatment under Article 14 is by no means an inconceivable argumentation for the Court to eventually accept. Not only the arguments put forward by Ginsburg and other feminist legal theorists support this idea, but also the broader jurisprudence of the Court on discrimination under Article 14. The following will describe the Court's equality jurisprudence under Article 14, with a particular focus on the question of comparability.

3.3. EQUALITY AND NON-DISCRIMINATION UNDER THE EUROPEAN COURT OF HUMAN RIGHTS

Article 14 is a parasitic right, meaning that it can only be considered by the Court in conjunction with another article of the Convention as the wording of Article 14 proclaim that the rights of the Convention shall be enjoyed without discrimination. This does not necessarily mean that the Court can only decide on a breach of Article 14 when the article it is connected to has been breached, although the Court has certainly employed this approach several times as explained above. [182] States are in other words obliged to guarantee the principle of non-discrimination beyond the rights mentioned in the Convention and the Protocols, when they have gone beyond their obligations under these articles and provide more rights. [183] In other words, once a State provides a certain right under its national legislation, it should ensure that this right is enjoyed free from discrimination. Furthermore, Article 14 is supported by Article

[182] Sandra Fredman, "Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights" in *Human Rights Law Review* 16 (2016), 275
[183] *E.B. v France* [GC], no. 43546/02, ECHR 2008, para. 47–48

1 of the Protocol 12 which adds an emphasis on the general right to equality to Article 14's prohibition of discrimination. [184]

When met with an argument on Article 14, the Court discusses four questions. [185] The first concerns the question of applicability. It discusses whether, as mentioned above, the complaint on discrimination falls within the scope of one of the other articles in the Convention or the Protocols. [186] Secondly, the Court considers whether the alleged discrimination has occurred on one of the grounds mentioned in the provision. [187] This includes at least 'sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property or birth' but may include other grounds as well. Third, the Court answers the question of whether the applicant can reasonably compare themselves to the group compared to whom they claim to have been treated unequally. [188] Lastly, the Court decides whether an objective and reasonable justification for the unequal treatment exists. [189]

Especially the third question on comparability is an interesting question to focus on in light of sex equality. It asks whether the applicant is right in claiming that the group they appoint as having been treated more favorably, is the group to which the applicant can compare themselves. The 'proper' comparator is that group to which the applicant is in a 'similar situation'. [190] The test functions as a method to decide whether the difference in treatment was in fact based on one of the grounds falling within the scope of Article 14 and not on any other characteristic that distinguishes that applicant from the group to which they compare themselves with. Assessing which situations are analogous to each other is not an easy endeavor. Unfortunately, the Court has never laid out more concrete, comprehensive criteria for identifying the comparator. [191] In *Fabian v Hungary*, the Court provided some clarification, stating that:

> "the elements which characterize different situations, and determine their comparability, must be assessed in the light of the subject-matter and purpose of the measure which makes the distinction in question". [192]

[184] Bernadatte Rainey, Pamela McCormick and Clare Ovey, "Chapter 24: 'Equality and non-discrimination'" in *Jacobs, White and Ovey: The European Convention on Human Rights* (Oxford: Oxford University Press, 2021), 674-675
[185] Ibid., 647
[186] Ibid., 653
[187] Ibid., 655
[188] Ibid., 657
[189] Ibid., 660
[190] *Marckx v. Belgium*, no. 6833/74, ECHR 1979
[191] Janneke Gerards, *Judicial Review in Equal Treatment Cases* (Leiden: Martinus Nijhoff Publishers, 2005), 128
[192] *Fabian v. Hungary*, no. 78117/13, ECHR 2017, para. 121

Furthermore, the situation of the comparator does not have to be *identical* to the one of the applicant's. [193]

The question of comparability has played a significant role in several cases related to either gender or reproductive issues. In *Evans v. United Kingdom* for example, as mentioned before, it was argued by the applicant that the proper comparator are 'healthy' women, able to reproduce naturally. The dissenting judges however concluded that a more accurate comparator in this case would actually be an infertile man. [194] Indeed, they even considered that because of the woman's biological capacity for reproduction, it is not a question of whether men and women are in equal situations and should therefore be treated equally but rather that they are in unequal situations and that unequal treatment is therefore in order. [195] This approach is reminiscent of *Thlimmenos v. Greece.* [196] In the *Thlimmenos* case, the Court expressed that "the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification *fail to treat differently persons whose situations are significantly different"*[197] In the proceedings before the Court of Appeal however, several judges argued that the comparison should rather be between women who was also used an IVF treatment but whose partner had not withdrawn consent and women such as Evans whose partner had. [198] Thus, three different comparator identities have been brought forward in different stages of Evans's appeal. The first comparator identity is naturally conceiving women, the second is men and the third is women seeking IVF treatment whose partners have not withdrawn consent on becoming a parent.

The conundrum of analogous situations that stood central in *Evans v. United Kingdom* lays bare a core issue regarding pregnancy and equality. It begs the question whether or not women are comparable with men when it comes to reproduction, or if pregnant women are comparable with non-pregnant women. As Ford concludes, both questions re-emphasize the 'uniqueness' of pregnancy, a narrative that feminists fear will "threaten to isolate pregnant women from the very analogies that might be able to guarantee them their fundamental right"[199]. This point is reminiscent of the fears expressed by the feminist legal theorists mentioned in Chapter Two. It circles back to the conundrum that these feminist legal theorists disagreed on, namely whether

[193] *Ibid.*, para. 113
[194] *Ibid.,* para. 15
[195] *Ibid.*
[196] *Thlimmenos v. Greece*, no. 34369/97, ECHR 2000
[197] *Ibid.*, para. 138 (emphasis added)
[198] *Evans v United Kingdom* [GC], no. 6339/05, ECHR 2007, para. 27
[199] Mary Ford, "Evans v. United Kingdom: What Implications for the Jurisprudence of Pregnancy?" in *Human Rights Law Review* 8, no. 1 (2008), 184

women should be treated differently because of, or the same despite their reproductive capabilities, and who in fact *is* in an analogous situation compared to (pregnant) women. The acceptance of the 'uniqueness' narrative of pregnancy makes it virtually impossible to treat like cases alike, or in other words, consider pregnancy as any other medical 'issue' and pregnant women as any other medical patient. [200] This narrative may become "detrimental to the legal status of pregnant women"[201] if it prevents a successful argument on Article 14 in abortion cases. That is to say, no gender-based discrimination claim on the denial of abortion services can succeed if the 'uniqueness' of pregnancy prevents the appointment of a proper comparator with which pregnancy and pregnant women can be compared. As it is considered 'unique', it is needless to say that men can exempt as proper comparators since they lack the reproductive capacity to become pregnant. It then becomes virtually impossible to claim that the denial of abortion services to women discriminates them on the basis of sex. If, however, pregnancy is regarded as a medical condition like any other, men *can* be appointed as the proper comparator. Men and women would then be considered in analogous situations in so far as they both require reproductive health services that, as was already argued in *Open Door and Dublin Well Woman v Ireland* by the applicant who stated that the denial of abortion services is discriminatory against women since men do not face the same barriers for their reproductive and health choices.

The question of comparability is not always given a significant role or indeed any role at all in all cases. At times, the Court does not discuss the question at all. This is the case in indirect discrimination cases where a certain, at face-value neutral requirement disadvantages one group more disproportionately than others. [202] Comparability is similarly left undiscussed when the case concerns stereotyping. [203] This was the approach used in *Carvalho Pinto de Sousa Morais v Portugal*, a case concerning a women who, as a result of a failed surgery, was unable to have sexual relations due to the physical pain that the failed surgery had caused. [204] However, the compensation she received for the caused damage was considerably less than a man would have received in her situation. The domestic court justified this discrepancy partly by stating that since the woman was "already 50 years old and had two children"[205], sex was not as important for the woman as it may have once been. The Court concluded that the reduction of the damage

[200] Mary Ford, "A Property Model of Pregnancy" in *International Journal of Law in Context* 1, no. 3 (2005), 285
[201] Ibid.
[202] Rainey, McCormick and Ovey, "Chapter 24: 'Equality and non-discrimination'", 659
[203] Ibid.
[204] *Carvalho Pinto de Sousa Morais v Portugal*, no. 17484/15, ECHR 2017
[205] *Ibid.*, para. 16

compensation was based on both intersectional discrimination on the basis of both age and sex. [206] It stated that:

> "[the] assumption [that sexuality is not as important for a fifty-year old woman and mother of two children as for someone of a younger age] reflects a traditional idea of female sexuality as being essentially linked to child-bearing purposes and thus ignores its physical and psychological relevance for the self-fulfillment of women as people"[207]

It referred among others to the 1970 UN Convention on the Elimination of all Forms of Discrimination against Women, which Portugal had ratified, as well as the Concluding Observations by the Committee on the Elimination of Discrimination Against Women (henceforth: CEDAW Committee) on Portugal's need to reduce the discriminatory gender stereotypes still prevalent in the state. [208]

Even though the Court made no mention of who the proper comparator in this case would be, it did refer to two other cases that were similar to the woman's, except that the applicants were men of the same age as the woman. In these cases, the Supreme Court of Justice of Portugal considered that since the men were not able to have "normal sexual relations", this had "affected their self-esteem and resulted in a "tremendous blow" and "severe mental trauma"[209]. Evidently then, while the Court saw no need to point out a proper comparator, men were treated more favorably then women in this case. That the Court found it irrelevant to point out a proper comparator was emphasized in the eloquent concurring opinion of Judge Yudkivska, where she said:

> "In the case at hand we do not require a long list of similar cases for comparison in order to find discrimination, the language of the judgment of 9 October 2014 being discriminatory in and of itself. It does not refer to any differential physical needs of men and women, but to the persistent perception that the primary focus of a woman's sexual life is the reproductive function"[210]

The Court's use of the equality doctrine thus varies considerably. A movement from formal to substantive equality is visible, as well as a growing recognition how different sorts of inequalities – such as those based on stereotypes – may demand different sorts of testing models. This is demonstrated mostly in the Court's occasional rejection of the comparability

[206] *Ibid.*, para. 52
[207] *Ibid.*
[208] *Ibid.*, para. 25 and 54
[209] *Ibid.*, para. 55
[210] *Ibid.*, (Judge Yudkivska, dissenting opinion), 24-25

test. The following will place abortion in the Court's interpretation of the equality principle, using its jurisprudence on formal and substantive equality, the question of comparability and its perceptions of gender discrimination to assess how abortion as a gender equality right would fit in this framework.

3.4. ABORTION AS A GENDER EQUALITY RIGHT UNDER THE EUROPEAN COURT OF HUMAN RIGHTS

What would it look like if the Court conceptualizes abortion a gender equality right under the Convention? How is one to understand the situation of women in this regard? Are they in analogous situations to men in the sense that both have reproductive and health needs, but only women's are consistently regulated, obstructed and denied? Or are women to be seen as a unique category to which there is no equal, since only women are able to become pregnant and bear children? In the first case, it would be necessary to argue that men and women are equally situated in terms of their reproductive capabilities. Regarding reproductive issues however, it is easily imaginable that the Court would find that men are not proper comparators since their reproductive capabilities are simply not the same.

Furthermore, this approach would lead to the uncomfortable situation expressed by Law as explained in Chapter Two. As Law perceived, women would only be able to demand equal treatment in so far as they can demonstrate that men are in the same situation, making men once more the norm. Having reproductive freedom requires an insight that moves beyond this dichotomy, in order to value women's capabilities, and the freedoms that should be tied to these, even when men do not have the same capabilities and therefore, freedoms. In the latter case, the approach of *Thlimmenos v. Greece* would suit. As men and women are in unequal situations regarding reproduction then, they would have to be treated unequally. There are some arguments in favor of this approach. The foremost would be that in the *Thlimmenos* case, the Court recognized that Article 14 does not only prohibit formal inequality, but also substantive inequality. [211] Substantive equality is the counterpart of formal equality. Where formal equality means that equal cases are treated equally and unequal cases unequally, and aims to ensure an equality in treatment, substantive equality demands an equality in outcome. [212] Formal and substantive equality are strongly connected to the dichotomy of sameness and difference that forms such a point of contention for feminist legal theorists. Arguing that women are situated

[211] Gerards, *Judicial Review in Equal Treatment Cases,* 116
[212] Geards, *Judicial Review in Equal Treatment Cases,* 15

unequally in comparison to men in their reproductive capability gives women a special status. Based on this special status, women are treated unfavorably as they are denied reproductive health services and disproportionally bear the burden of sexual activity. To compensate for the disadvantage that only they receive due to their unequal situation, states should grant the right to abortion. This approach however leads to the unsatisfactory and unhelpful categorization of pregnant women as 'unique', as explained above through the words of Ford.

Moving away from the comparability test altogether would provide a suitable solution. As Peroni and Timmer argue in their comment on *Bah v. UK:*

> "What is most worrying about a comparator-approach is that it obscures what discrimination law should be about: addressing disadvantage and subordination of certain disfavored groups. The comparator-approach gets us stuck in a sameness/difference ideology that – as feminist legal theorists already recognized two decades ago – impedes progress towards substantive equality. The focus should not be on whether an applicant was treated differently, but on more substantive questions such as whether her dignity was breached, or whether the rule perpetuates subordination of a vulnerable group. In short, the comparator-approach epitomizes equality at its most formal."[213]

As Peroni and Timmer already suggest, their reasoning on the comparability test suits the perspective of feminist legal theorists such as MacKinnon, who argue against the sameness versus difference dichotomy in reproduction cases and instead suggest a substantive equality approach which allows us to consider the subordinating, stereotypical effects of reproduction legislation.

Reproductive issues – "laden with misogyny"[214] – thus require a different way of reviewing the prohibition of discrimination under Article 14 altogether. As explained above, if abortion is perceived as a gender equality right under Article 14, it is not entirely unthinkable that it would pass the comparability test, either on the basis of the symmetrical approach or the asymmetrical approach. According to the former, women would be equally situated as men in the sense that they both have sexual lives and reproductive capabilities and should therefore be treated the same. It would follow from this line of reasoning that since men face no control over or repercussions for their sexual lives and reproductive capabilities, neither should women. According to the asymmetrical approach then, women would be categorized as unequally

[213] Lourdes Peroni and Alexandra Timmer, "Bah v. UK: On Immigration, Discrimination and Worrisome Reasoning" in *Strasbourg Observer*, October 12, 2011, https://strasbourgobservers.com/2011/10/12/bah-v-uk-on-immigration-discrimination-and-worrisome-reasoning/
[214] MacKinnon, Reflections on Sex Equality under Law", 1297

situated to men because of their unique reproductive capabilities, and should be compensated so as to equalize their unequal positions. A more favorable solution would be to not apply this test in cases of reproductive issues of this nature and to rather focus on the group that is subordinated or, in wording more fitting to the Court but still true to those of MacKinnon, disadvantaged in the balance of power. It is important to point out that this approach would not differ substantially from the asymmetrical approach, and therefore that of *Thlimmenos v. Greece.* Both approaches aim towards substantive equality in the shape of what Sandra Fredman describes as the redistributive dimension of substantive equality. The aim of the redistributive dimension is to redress disadvantage, either material or "non-material disadvantages, such as subordination and imbalances in power, whether within the family or outside of it"[215]. The approach towards abortion as a sex equality right as argued for in this work can clearly be situated here on the map of substantive equality dimensions. It additionally fits Fredman's categorization of the recognition dimension which aims to "capture the familiar association of the right to equality with dignity" whereby "[i]nstead of an open-ended conception of dignity, this dimension of substantive equality specifies the wrong to be addressed as stigma, stereotyping, prejudice and violence based on a protected characteristic"[216]

The approach explained and suggested in this work furthermore shows similarities to the 'test of disadvantage' that Janneke Gerards offers as an alternative to the comparability test. [217] Again, the disadvantage resulting from the treatment would be central to the discrimination claim. Whether or not applicant – in the case of abortion rights, women – can reasonably compare themselves to another group – men – would be unimportant. Rather, it is only necessary to demonstrate that one group or an individual belonging to a certain group is burdened with a disadvantage, one "resulting from the difference in treatment that has the result that a particular person or group has less chances or possibilities than others to develop itself and realize its desires and ambitions"[218].

In conclusion, the approach suggested here is, in a sense, a variation on that of *Thlimmenos v. Greece.* To conceptualize abortion as a gender equality right, it would rely its substantive equality jurisprudence. It would then not apply the comparability test, but would rather consider the disadvantaging, stereotyping and harmful effects of anti-abortion laws and attitudes. Equality in this sense would then employ an antisubordination approach, reminiscent of what

[215] Fredman, "Emerging from the Shadows", 282
[216] Ibid.
[217] Gerads, *Judicial Review in Equal Treatment Cases,* 76
[218] Ibid.

Siegel, MacKinnon and other feminist legal theorists have pointed out. What is then aimed for by an equality approach is the abolishment of women's subordinate societal position that deprives them from their dignity, liberty and autonomy.

3.4.1. LESSONS LEARNED: REPRODUCTION CASES AND THE EQUALITY DOCTRINE ACCORDING TO OTHER (QUASI-) JUDICIAL BODIES

A similar rejection of men as a comparator have been demonstrated by other (quasi-) judicial bodies in the past, either within the European context or outside. The decisions delivered by these bodies provide insightful considerations on the interpretation of equality doctrines. In *Dekker v. Stichting Vormingscentrum*, a case brought before the European Court of Justice in 1991. [219] Dekker, rejected for employment on the basis of her pregnancy, argued before the European Court of Justice that her rights under Council Directive 76/207/EEC – the Equal Treatment Directive – had been breached. Here, the defendant argued that their company could not have discriminated on the basis of sex, when the circumstances of the case involved only one sex. Their motives for refusing the woman were therefore purely of a financial or administrative nature. [220] Upon answering this question, the European Court of Justice answered briefly that the absence of male candidates does not change the fact that the Directive does not allow employers to reject pregnant women for employment. [221] Pregnancy as a ground for refusal is connected to their sex and the refusal therefore amounts to sex-based discrimination. The *Dekker* case establishes at least two highly important considerations. The first is that the European Court of Justice takes a different approach than the Supreme Court did in *Geduldig v. Aiello* by concluding that pregnancy-based discrimination *is* equal discrimination on the basis of sex. Furthermore, the European Court of Justice concluded that to find direct sex discrimination does not require the comparator to be a man or indeed require any comparator at all. This approach, whereby the test of comparability is given no role, equal to those cases that concern stereotypes, could prove a useful approach with which to conceptualize abortion as a gender equality right under Article 14 as well.

The United Nations Human Rights Committee (henceforth: the Committee) found themselves confronted with the same comparability conundrum. Clearly finding it appropriate to discuss the authors' discrimination claims but not wanting to appoint men as the comparator,

[219] Case C-177/88, *Dekker v. Stichting Vormingscentrum* [1990], I-*03941*
[220] *Ibid.*, para. 16
[221] *Ibid.*, para. 17

the Committee choose an approach similar to the one chosen in *Evans v. United Kingdom.* In *Mellet v. Ireland* and *Whelan v. Ireland,* the authors claimed that their rights under the International Covenant on Civil and Political Rights (henceforth: the ICCPR) – among others their right to equal enjoyment of other rights on the basis of sex under Article 2 paragraph 1, Article 3 and Article 26 – had been violated due to Ireland's abortion ban. [222] The women had been in want of an abortion after receiving the diagnosis of fetal impairments. They argued that they were unable to enjoy their right to freedom from cruel, inhuman and degrading treatment under Article 7, their right to privacy under Article 17 and their right to have access to information under Article 19, on the basis of their sex. Their plea was directly aimed at Ireland's criminalization of abortion, rather than, as in the earlier discussed cases brought before the European Court of Human Rights, at the proceedings of their obtainment of a legal abortion. Central to their discrimination claim was that "Ireland's criminalization of abortion subjected her to a gender-based stereotype of the reproductive role of women primarily as mothers, and that stereotyping her as a reproductive instrument subjected her to discrimination"[223] and that:

> "[c]riminalization of abortion on the grounds of fatal fetal impairment disproportionately affected the author because she was a woman who needed this medical procedure in order to preserve her dignity, physical and psychological integrity, and autonomy […]. The Irish abortion ban traumatizes and 'punishes' women who are in need of terminating their non-viable pregnancies. *Male patients in Ireland are not subjected to such vulnerabilities as the author when seeking necessary medical care*"[224]

The Committee was welcoming to the discrimination claim, but considered that the proper comparator to these women were not men but rather women who did wish to carry their pregnancy to term after discovering a fetal impairment and consequently received full protection of the health-care system. [225] Women such as the applicants, who do wish to terminate their pregnancy due to fetal impairments, are left to their own financial devices, having to travel to obtain the abortion and are denied medical care and counselling. The finding of the Committee resembles the reasonings in *Evans v. United Kingdom* in its visible struggles with the comparability question and its subsequent conclusion that not men, but other pregnant women are the analogous group with which to compare. Still, the Committee hinted its approval

[222] Human Rights Committee, *Mellet v. Ireland*, Communication no. 2324/2013, CCPR/C/116/D/2324/2013 and Human Rights Committee, *Whelan v. Ireland,* Communication no. 2425/2014, CCPR/C/119/D/2425/2014
[223] Human Rights Committee, *Whelan v. Ireland,* Communication no. 2425/2014, CCPR/C/119/D/2425/2014, para. 7.11
[224] Human Rights Committee, *Mellet v. Ireland,* Communication no. 2324/2013, CCPR/C/116/D/2324/2013, para. 3.16 (emphasis added)
[225] *Ibid.*, para. 7.10 and 7.11

of the author's discrimination claim by stating that it 'notes' their argument on gender based discrimination upon being denied abortion services. [226]

The notion that abortion is a gender equality right is thus all but novel. It does not live only on paper, in the minds of feminist legal theorists. Equality arguments are slowly making their appearance in cases related to abortion in judicial bodies and committees other than the Court in Strasbourg. Some international human rights bodies have embraced this notion already in their documents and judgements, or have at least come close to an acceptance. As explained earlier, *Mellet v. Ireland* and *Wehlan v. Ireland* are illustrative of how the Committee has shown itself open to the notion of an equality discourse on abortion access. In the separate opinion to *Wehlan v. Ireland,* Committee member Yadh Ben Achour made it clear that he would have hoped to see the Committee accept the author's claim that male patients were the proper comparator. [227] Denying women access to abortion services and consequently denying them their right to choose, discriminates them directly on the basis of their sex in comparison with men who never find themselves obstructed in receiving reproductive health care, nor are they obliged to travel to another country to receive needed care. This standpoint was echoed by Committee member Sarah Cleveland in *Mellet v. Ireland* in her eloquent individual opinion. [228] She commented that "[w]omen's unique reproductive biology traditionally has been one of the primary grounds for de jure and de facto discrimination against women"[229]. She furthermore argued that "Ireland's near-comprehensive criminalization of abortion services denies access to reproductive medical services that only women need, and imposes no equivalent burden on men's access to reproductive health care"[230] and, that restrictive abortion laws are "based on traditional stereotypes regarding the reproductive role of women, by placing the woman's reproductive function above her physical and mental health and autonomy."[231]

Sarah Cleveland clearly expresses how substantive equality is a useful approach with which to include reproductive issues in the equality doctrine. To do so, she states, it is highly unnecessary to consider whether or not men are similarly situated and to then, when it is clear that they are not, for they never could be due to biological differences, conclude that abortion

---

[226] *See e.g.* Human Rights Committee, *Whelan v. Ireland,* Communication no. 2425/2014, CCPR/C/119/D/2425/2014, para. 7.12
[227] *Ibid.*, (Committee member Yadh Ben Achour, separate opinion), para. 2
[228] Human Rights Committee, *Mellet v Ireland,* Communication no. 2324/2013, CCPR/C/116/D/2324/2013 (Sarah Cleveland, individual opinion)
[229] *Ibid.*, para. 12
[230] *Ibid.*, para. 13
[231] *Ibid.*, para. 14

falls outside the gender equality doctrine. [232] She reiterates that it has long been established by the Committee as well as the CEDAW Committee, that the right to equality encompasses not only formal equality but substantive equality as well. [233] Cleveland concludes that, considering the substantive equality approach, states may be obliged to treat women differently due to their biological capacity for pregnancy, if this prevents discrimination in effect.

To support this argument, Sarah Cleveland refers to several provisions and documents. Article 26 ICCPR and General Comment no. 18 and no. 28 speak of discrimination as meaning "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women […] on a basis of equality of men and women […]"[234], and the prevention of discrimination may require "positive measures in all areas so as to achieve the effective and equal empowerment of women."[235] Substantive equality is evidently recognized broadly by the Human Rights Committee and it is equally evident to see that, even though the Committee opted for female comparators, the Committee seemed to steer towards applying a substantive equality approach on the issue of abortion. [236] At the very least, the Committee reiterated their own acceptance of the notion of substantive equality and the necessity of the approach in accommodating for women's biological differences to men to prevent subordination and inequality.

Considerable willingness has been demonstrated by the CEDAW Committee in their promising observations regarding abortion and gender-based discrimination in *L.C. v Peru.* [237] Regarding the facts of the case, *L.C. v Peru* highly resembles *P. & S. v Poland.* The CEDAW Committee dedicated substantial considerations to the claim. The CEDAW Committee declared that the author in *L.C. v Peru* – a young girl whose request for an abortion, after being raped, becoming pregnant and attempting suicide, was repeatedly delayed – was discriminated against according to Article 12 of the Convention on the Elimination of All Forms of Discrimination against Women and General Recommendation No. 24. [238] Article 12 proclaims that "States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to

[232] *Ibid.*, para. 6
[233] *Ibid.*, para. 8-11
[234] United Nations Human Rights Committee, *General Comment No. 18, Nondiscrimination* (1994), para. 6-7
[235] United Nations Human Rights Committee, *General Comment No. 28, Equality of rights between men and women (article 3)* (2000), para. 3
[236] Katazyna Sękowska-Kozłowska, "A tough job: recognizing access to abortion as a matter of equality. A commentary on the views of the UN Human Rights Committee in the cases of Mellet v. Ireland and Whelan v. Ireland" in *Reproductive Health Matters* 26, no. 54 (2018), 29
[237] Committee on the Elimination of Discrimination against Women, *L.C. v Peru,* Communication no. 22/2009, CEDAW/C/50/D/22/2009.
[238] *Ibid.*, para. 8.11

health care services, including those related to family planning". To this, General Recommendation No. 24 adds that "[i]t is discriminatory for a State party to refuse to provide legally for the performance of certain reproductive health services for women"[239]. Another notable aspect of the CEDAW committee's observations is its acceptance of the author's claim on Article 5 of the Convention on the Elimination of All Forms of Discrimination against Women which calls upon States to eliminate gender stereotypes against women. The CEDAW Committee considered that the delay of the surgery that the girl needed after her suicide attempt, which was refused by the doctors to protect the fetus, was based on gender stereotypical notions that the girl's health was not as important as the fetus'. [240]

These bodies have taken the necessary step in perceiving human rights from a gender-sensitive perspective. Their observation that abortion inaccessibility can constitute gender-based discrimination adds to the discourse on women's reproductive rights that not only their liberty or autonomy is at stake, but also the right to freedom from gender stereotypes, their dignity and their equality. In conceptualizing abortion as a gender equality right, the Court would do the same.

In past decisions, the Court too has shown an increased willingness to interpret the provisions of the Convention from a gender perspective. This is clearest in *Opuz v. Turkey*, where it found that domestic abuse violates the prohibition of discrimination under Article 14. [241] The case marked the first time that the Court connected gender-based violence to gender discrimination. [242] The Court ruled that gender-based violence – consisting in *Opuz v. Turkey* of beating, battering and threatening[243] - is a form of discrimination. [244] In support of this conclusion, the Court refers to other legal instruments and bodies within international law, which it said it "cannot disregard when it is called upon to clarify the scope of a Convention provision […]"[245] It reiterates that the CEDAW already considered gender-based violence discriminatory. [246]

---

[239] Committee on the Elimination of Discrimination against Women, *General Recommendation No. 24*, A/54/38 (1999), para. 11
[240] Committee on the Elimination of Discrimination against Women, *L.C. v Peru,* Communication no. 22/2009, CEDAW/C/50/D/22/2009, para. 8.15
[241] *Opuz v. Turkey,* no. 33401/02, ECHR 2009
[242] Liira Oja & Alicia Ely Yamin, ""Woman" in the European Human Rights System: How is the Reproductive Rights Jurisprudence of the European Court of Human Rights Constructing Narratives of Women's Citizenship?" in *Columbia Journal of Gender and Law* 32, no. 1 (2016), 91
[243] *Opuz v. Turkey,* para. 9-52
[244] *Ibid.*, para. 191
[245] *Ibid.*, para. 184
[246] *Ibid.*, para. 187

Opuz v. Turkey is undoubtedly an enrichment of the Court's equality jurisprudence and its interpretation of gender-based discrimination. Particularly notable is the Court's choice to discuss Article 14 at all. As in *Evans v. United Kingdom,* it could have said to, after already finding a violation of Articles 2 and 3, consider it unnecessary to further discuss Article 14. [247] Instead, the Court decided to highlight the connection between gender-based violence and discrimination in order to "[…] draw attention to the status of women in Turkey and to the many forms of discrimination to which they are subjected. To put it bluntly: the Court wanted to make a case against the discrimination of women in that society."[248] The Court's additional considerations on Article 14 provide a necessary gender dimension to the other rights discussed in *Opuz v. Turkey.* It allowed the Court to state that, while the right to life and the prohibition of torture had indeed been violated, this had occurred in a gender discriminatory manner. In short, the Court showed "a real sensitivity to the need to understand gender equality in a multi-dimensional way."[249]

Regarding abortion cases, the Court could demonstrate the same willingness to involve a gender perspective to the rights of the Convention. By discussing Article 14 in relation to Article 8, it would then argue that the right to respect for private life is violated by anti-abortion laws and attitudes and that this constitutes gender-based discrimination.

3.4.2. DOING JUSTICE: EQUALITY, DIGNITY AND LIBERTY

Considering the above, the European Court of Human Rights has and has had in the past, the necessary jurisprudential framework with which to conceptualize abortion as a gender equality right under the Convention. In any future case brought before the Court that concerns abortion, and in which the applicant again claims that an abortion ban or restriction violated her right under Article 14, the Court may very well take the step to speak of abortion in the language of equality. The question then remains as to why it would be important for the Court to do so. The following will outline the urgency of establishing the right to abortion as a gender equality right.

The first argument in favor of conceptualizing abortion as a gender equality right is of a legal nature and concerns simply the difference in the Court's review between Article 8 and

[247] Marta Cartabia, "The European Court of Human Rights: Judging nondiscrimination" in *The Author* 9, no. 3-4 (2011), 811
[248] Ibid.
[249] Fredman, "Emerging from the Shadows", 292

Article 14. Upon finding an interference with Article 8, the Court will consider whether the interference was in accordance with the law, served a legitimate aim and was necessary in a democratic society. [250] As explained earlier furthermore, the Court may grant a wide margin of appreciation to States to tailor their legislation to their own national context. The breadth of this margin is considerably wide when no consensus exists among the member states of the Council of Europe, as was the case according to the Court regarding the beginning of life. [251] In *A, B and C v. Ireland* then, the Court emphasized the wide margin of appreciation enjoyed by Ireland in deciding their own legislation on abortion. A broad margin was apparently in order as it concerned a fair balance test under Article 8. [252] For an interference with Article 14 in conjunction with another right of the Convention, the Court applies a similar test to assess whether the difference in treatment is justified. [253] However, when the difference in treatment is based on gender, the member states enjoy no margin of appreciation. [254] Furthermore, it is far more difficult for states to deliver an objective and reasonable justification that the Court can accept. At the basis of this reasoning lies the Court's increased attention to gender equality. As the Court has stated itself:

> "The Court further reiterates that the advancement of gender equality is today a major goal in the member States of the Council of Europe and very weighty reasons would have to be put forward before such a difference of treatment could be regarded as compatible with the Convention […] In particular, references to traditions, general assumptions or prevailing social attitudes in a particular country are insufficient justification for a difference in treatment on grounds of sex. For example, States are prevented from imposing traditions that derive from the man's primordial role and the woman's secondary role in the family."[255]

---

[250] European Court of Human Rights, "Guide on Article 8 of the European Convention on Human Rights", 10-13
[251] How the Court came to the conclusion that no such consensus existed, as it did in *Vo v. France* and *A, B and C v. Ireland,* can be contested however. Cosentino (Chiara Cosentino, "Safe and Legal Abortion: An Emerging Human Right? The Long-lasting Dispute with State Sovereignty in ECHR Jurisprudence" in *Human Rights Law Review* 15 (2015)) argued that the Court came to this conclusion because it focused on the fetus' 'right' to life rather than the woman's right to choose (578). Concerning the fetus' 'right' to life, there is indeed no scientific or legal definition. On women's rights however, there is. Focusing on the latter would have allowed the Court to come to the conclusion that, since among the member states of the Council of Europe, the Convention on the Elimination of All Forms of Discrimination Against Women is ratified and as explained earlier, access to abortion services is recognized as a right under this convention. Furthermore, while morally and philosophically there undoubtedly exist disagreements, there would have been legal documents and definitions available to the Court to establish that under international human rights law, the fetus is granted no rights (579). Instead, the Court chose to accept Ireland's moral views on the fetus' 'right' to life. The dissenting judges argued the same in their dissenting opinion on *A, B and C v Ireland,* saying: "there is an undeniably strong consensus among European States […] to the effect that, regardless of the answer to be given to the scientific, religious or philosophical question of the beginning of life, the right to life of the mother, and, in most countries' legislation, her wellbeing and health, are considered more valuable than the right to life of the fetus" (*A, B and C v Ireland,* no. 25579/05, ECHR 2010 (dissenting opinion, Judges Rozakis, Tulkens, Fura, Hirvelä, Malinverni and Poalelungi), 84)
[252] *A, B and C v. Ireland,* no. 25579/05, ECHR 2010, para. 238
[253] Rainey, McCormick and Ovey, "Chapter 24: 'Equality and non-discrimination'", 660
[254] Ibid., 661
[255] *Konstantin Markin v Russia* [GC], no. 30078/06, ECHR 2012, para. 127

This difference in the margin afforded to member states and the weight of the reasons that need to be put forward functions as an argument in favor of conceptualizing abortion as a gender equality right. Ultimately, it reiterates how Article 8 is an insufficiently fitting legal basis upon which to ground the right to abortion.

Clearly, legal language matters. Whether a right, or a claim to a right, is founded on one article or another can make a significant difference. Different articles bring with them different justification schemes and different margins. However, the language used by the Court is also important outside of its legal merits. The Court plays a decisive role in creating and transforming discourses around the rights of individuals under the Convention. In this capacity, the Court can impactfully expand the discourse around women's reproductive rights, the equality, dignity, and autonomy they are granted under the Convention and the gender-specific damage that is inflicted upon them when they are denied their rights. [256]

As follows from the works of the feminist legal theorists described in Chapter One, invoking the equality principle in the domain of abortion, rather than focusing on the right to privacy, provides the Court with a much more adequate way of conceptualizing women's reproductive rights and to root reproductive rights more strongly in the Convention and the Court's jurisprudence. Reasoning on the basis of the right to privacy does too little to fully encompass the gender dimension that abortion cases merit. Instead, a gender equality language enables the Court to review the consequences that anti-abortion laws and attitudes have on women's rights as a whole, including women's dignity, autonomy or liberty and right to be free from stereotypes. It should be noted in this regard that under Article 8, the concepts of dignity and autonomy play a recurring role by all means. Indeed, in *Lacatus v. Switzerland* for example, human dignity played a key role in the Court's ruling on a case concerning the fining and imprisoning of a woman for begging. [257] In *Christine Goodwin v. United Kingdom,* the Court reiterated that "[u]nder Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees"[258].
However, the right to respect for private life often neglects to make a connection between the right to equality, albeit because the Court decides not to discuss claims on Article 14. This thought will be further examined below.

[256] *See e.g.* Oja & Yamin, ""Woman" in the European Human Rights System", 63 & 66
[257] *Lacatus v. Switzerland,* no. 14065/15, ECHR 2021, para. 115, in which the Court proclaimed that "the penalty imposed had infringed the applicant's *human dignity and impaired the very essence of the rights protected by Article 8*" (emphasis added)
[258] *Christine Goodwin v. United Kingdom,* no. 28957/95, ECHR 2002, para. 90

Thus, in conceptualizing the right to abortion access as a gender equality right, the Court would fully recognize how the infringement of women's dignity and autonomy is ultimately the result of the subordinate position that discrimination on reproductive issues brings. The gender equality doctrine is inextricably linked to these aspects of women's interests. This interconnectedness between dignity, equality and freedom is best explained by Susanne Baer's proposition of a triangle. [259] Baer lays out an explanation of the three concepts and explains how they have been interpreted as being separate from each other. As a result of this disjunction, the three concepts have been interpreted inadequately. [260] Furthermore, the concepts are placed in a hierarchical pyramid in which either liberty or equality is chosen as the right at stake and both are supported by the notion of dignity. [261] The concepts are in other words in conflict with each other.

Liberty, largely relating to freedom of self-determination, has become a highly preferred right in liberal democracies. [262] *Roe v. Wade* and the Court's decision on abortion cases are illustrative of the willingness with which claims on liberty and privacy are accepted. The hierarchical pyramid in which liberty, equality and dignity are placed, makes for the prioritization of liberty interests and the disregard for equality interests in that same case, for it is perceived that only one right can be at stake and this is preferably the right to liberty. In the Court this has meant that in claiming a violation of Article 8 in abortion cases, applicants have run the risk of isolating liberty from equality altogether, making a successful claim on the former while losing the opportunity to also involve the latter. Baer reacts that the concept of liberty cannot function as a proper basis for a right by itself: "[l]iberty makes sense only in close connection to equality, and it is inherently based on recognition of dignity, understood as self-determination"[263].

Equality moreover has never been understood as a self-standing right under the Convention, but nevertheless plays a key role in every fundamental rights claim. [264] Equality too cannot serve as a basis for fundamental rights on its own, especially considering the different interpretations and uses derived from equality. In the "triangulated interpretation"[265] that Baer submits, equality would not be about "equalization, symmetry, or formalism but about the

[259] Susanne Baer, "Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism" in *University of Toronto Law Journal* 59, no. 4 (2009)
[260] Ibid., 418
[261] Ibid., 421
[262] Ibid., 448
[263] Ibid., 449
[264] Ibid., 451
[265] Ibid., 420

inherently liberal right to be different without suffering as a consequence of that difference […]"[266]. This reasoning also closely resembles the antisubordination approach of MacKinnon. Baer too argues that equality is better understood as substantive equality, as "right against discriminatory disadvantages"[267], as "a right to respect and recognition, enabling people to exercise their right to self-determination and to lead a dignified life"[268].

Dignity, lastly, is in turn too narrowly defined and trumped by either equality or liberty principles. Dignity, Baer argues, has become a concept devoid of meaning and consequently provided meaning to through too many different interpretations. [269] According to Baer then, it is better that judicial bodies do not refer to human dignity as a foundational concept in abortion cases "since it does not guide us to adequately address claims of people in need of protection in complex cases."[270]

In conclusion, Baer again refers to the idea of a triangle that is well suited to have the three concepts inform and support each other, without separation. She summarizes the benefit of this idea by stating:

> "Dignity, liberty, and equality are cornerstones of constitutionalism. When we think of fundamental rights, we should consider all three of them in relation to one another. Because of equality and liberty, dignity is not a status such as dignitas or a moralistic vision of dignified behaviour. Because of dignity, equality is not symmetry but the right to be different, free from subordination; and because of liberty, equality is the claim to make different uses of one's liberties and not suffer from that"[271]

It is clear to see how reproductive issues embody all three concepts and how Baer's triangle can be a useful tool in analyzing how the Court should conceptualize abortion as a gender equality right, combining the three concepts, and how this would benefit the narrative around women's reproductive rights. It is equally clear that employing Baer's triangle does not necessarily entail that the Court should approach abortion only as an issue of equality, and by no means as an issue of liberty of privacy. Rather, as Baer points out, these two rights would have equal standing along with the concept of dignity. Siegel too articulated how using the language of gender equality can bring to light "liberty concerns at the heart of the sex

[266] Ibid., 453
[267] Ibid., 463
[268] Ibid., 453
[269] Ibid., 465
[270] Ibid., 466
[271] Ibid., 467

equality cases in the very act of recognizing equality concerns at the root of the liberty cases."[272]

The Court could then accept a claim on an Article 14 violation as well as an Article 8 violation, and consider that anti-abortion laws and attitudes violate women's right to liberty, in the sense of self-determination over her body and the course of her life, as well as her right to equal treatment in the sense of freedom from subordination, and in this violation as a whole, she is denied dignity as a human being. The Court too, then, cannot review abortion cases solely on the basis of its infringement of women's liberty under Article 8. Concluding that states have either violated their negative obligation or failed in their positive obligation to grant women freedom and privacy under Article 8 and to 'leave them be', is insufficient to comprehensively protect their reproductive rights. It is vital to involve Article 14 to establish a holistic review of the effect of anti-abortion laws and attitudes on women's reproductive rights.

Another contribution of the involvement of Article 14 in the Court's decision is the opportunity of reviewing the gender stereotypical implications of restrictive abortion laws and attitudes. While the Court has discussed gender stereotypes in relation to Article 8 in the past[273], Article 14 encompasses par excellence the suitable right – freedom from discrimination – to review gender stereotypes that play a role in abortion cases. [274] The Court would then be allowed to comment on these laws' reinforcement of traditional gender roles of women in society as child-bearers and child-rearers, forced into the role of mothers, deprived of full autonomy over their own bodies and reproduction. These laws perpetuate the harmful narrative around women as being inextricably connected to their reproductive capacities and motherhood which places them in a highly disadvantaged position. This narrative in turn obstructs the full enjoyment of their rights and their equal opportunities in life.

In conclusion, the embeddedness of women's reproductive rights in the Convention would merit greatly from the equality doctrine. The role of language in this regard cannot be underestimated. As Oja & Yamin conclude:

> "Indeed, […] language is itself an exercise of power and if the Court were to use reproductive rights language explicitly, it would begin to lay ground for different narratives regarding women's identities and citizenship by emphasizing the structural discrimination underlying restrictive abortion laws, domestic violence, denial of home birth, and forced sterilizations. In this way, it could create the architecture for new

[272] Reva Siegel, "Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression" in *Emory Law Journal* 56, no. 4 (2007), 831
[273] *See e.g. J.L. v. Italy*, no. 5671/16, ECHR 2021
[274] *See e.g. Konstantin Markin v Russia* [GC], no. 30078/06, ECHR 2012

> transformative narratives based on substantive equality, and women's rights as full and equal members of society, defined by their humanity and not by their sexuality or reproductive capacities"[275]

To this can be added that to articulate women's reproductive rights in the language of equality adds a gender dimension to the right to autonomy, liberty and bodily integrity. In turn, a gender dimension is given to human rights in general. Arguably, the rights protected by the Convention would prove useless to women if they do not provide her with the right to autonomy and equality, due to a lack of gender sensitivity. Without the use of the equality doctrine, no such a holistic approach is reachable.

3.5. CONCLUSION

Justice Thomas argued in his concurring opinion to *Dobbs v. Jackson Women's Health Organization:*

> "Respondents and the United States propose no fewer than three different interests that supposedly spring from the Due Process Clause. They include "bodily integrity," "personal autonomy […]" and "women's equal citizenship" […]. That 50 years have passed since Roe and abortion advocates still cannot coherently articulate the right (or rights) at stake proves the obvious: The right to abortion is ultimately a policy goal in desperate search of a constitutional justification."[276]

Justice Thomas is not incorrect in concluding that the right to abortion is in search of a constitutional justification, although arguably not desperately, but urgently. Constitutional justifications are easily found in equality rights. Indeed, the right to abortion is in *need* of equality as its constitutional justification, as it provides the strong legal basis and language it needs for its sustainability.

This chapter centered on placing abortion in the equality framework of the European Convention on Human Rights. Through an analysis of the Court's jurisprudence on equality, particularly regarding the question of comparability, it has been shown that the Court too faced difficulties with the sameness/difference conundrum that the feminist legal scholars in Chapter One took up the pen for. In reproduction cases, it is evident that neither men nor women are suitable groups to compare with, which has moved the Court to abandon this step in the review altogether. Instead, a more laudable alternative has been employed, in which the Court finds that the mere gender-stereotypical basis of a difference in treatment is enough to consider it

[275] Oja & Yamin, ""Woman" in the European Human Rights System", 94
[276] *Dobbs v. Jackson Women's Health Organization*, (Justice Thomas, concurring opinion)

gender-discriminatory. This alternative is laudable in the sense that it allows for a much more adequate review of reproduction cases. It is therefore a promising model of review if one is to argue that the prohibition of discrimination under Article 14 entails a right to abortion. Continuing this line of reasoning namely, the Court could argue that anti-abortion laws and attitudes violate Article 14 as they create a substantive inequality, which places women in a subordinate societal position, enforces gender stereotypes and denies women the triangulated right to equality, liberty and dignity.

4.

A FEMINIST REWRITING OF ABORTION CASES AT THE EUROPEAN COURT OF HUMAN RIGHTS: AN EQUALITY RIGHT

4.1. A SHORT INTRODUCTION TO FEMINIST REWRITING

Having drawn up an elaborate account of key works within feminist legal theory, different argumentations on the connection between abortion and gender equality, the Court's jurisprudence on abortion and on equality and the need for a language change, this chapter will weave the foregoing together in a feminist rewriting of *A, B and C v Ireland*.

Feminist rewriting of jurisprudence can be defined as applying a feminist perspective, using feminist methods and theories, to existing jurisprudence to came to a gender sensitive decision that does justice to women. [277] The desire to rewrite, from a feminist point of view, decisions that appear to reflect the law neutrally and universally but in reality perpetuate a male perspective, has prompted several feminist rewriting projects. One example is *Feminist Judgements: From Theory to Practice,* a collaboration of feminist legal scholars rewriting English cases into feminist decisions. [278] Other examples are the rewritings of *Brown v The Board of Education*[279] and *Roe v. Wade*[280]. An important feature of feminist rewritings is its capacity to demonstrate alternative outcomes to a case. In turn, they demonstrate that the current outcome of the case is nothing else than just another interpretation of the facts and application of the law. It is not a given or set in stone, nor is it indisputably neutral. In fact, decisions can be influenced by the judges' own perspective, biases and choices. Feminist rewritings aim to

[277] Linda Berger, Kathryn Stanchi & Bridget Crawford, "Rewriting Judicial Opinions and the Feminist Scholarly Project" in *Scholarly Works,* 1146 (2018), 2
[278] Rosemary Hunger, Claire McGlynn & Erika Rackley, *Feminist Judgements: From Theory to Practice* (Oxford: Hart Publising, 2010)
[279] Jack Balkin, *What* Brown v. Board of Education *Should Have Said: The Nation's Top Legal Experts Rewrite America's Landmark Civil Rights Decisions* (New York: New York University Press, 2002)
[280] Jack Balkin, *What* Roe v Wade *Should Have Said: The Nation's Top Legal Experts Rewrite America's Landmark Civil Rights Decisions* (New York: New York University Press, 2005)

dispute the illusion of neutrality by demonstrating how, using different methods and theories, the outcome of the case would have been differently. Indeed, it claims that a different outcome would have been necessary to do justice to the lived experiences of women and other marginalized groups. [281] Feminist rewritings bring questions to light as to how feminist theories would and should take shape in decisions. Also, what language on the rights of women would be found in these decisions, had they been written from a feminist perspective? And how would this legal language in turn construct the discourse on women's rights? [282]

The feminist theories laid out in the previous chapters of this work illustrate how the, in abortion cases, the focus on a privacy language has left much to be desired regarding the representation of women's reproductive rights. The ECtHR cases concerning abortion, such as *A, B and C v. Ireland,* presented valuable opportunities to strongly embed reproductive rights in the Convention and to conclude that they are without a doubt human rights. Instead, the Court opted for unfortunately weak considerations around the right of the unborn child and the margin of appreciation that States enjoy to protect this 'right' as they see fit. Furthermore, insofar as the right to respect for private life roots women's reproductive rights in the Convention, it does so very weakly. As argued throughout this work, anchoring women's reproductive rights in the Convention as a right to equal treatment as well as a right to respect for private life would do greater justice to women. It has moreover been argued that the Convention in its present form accommodates for such an interpretation of Article 14 and that the Court, upon receiving a claim on Article 14 by an application in an abortion case, would be suited to accept such a claim. This feminist rewriting is thus aimed at creating such a decision, using the feminist theories presented in this work. The case of *P and S v. Poland* will be rewritten from a feminist perspective. This case is particularly suited for rewriting, given the many aspects of the case that should have persuaded the applicant to present a claim on discrimination and consequently, the Court to accept this claim. It should be noted in this regard that several of the case law mentioned in the rewriting did not yet exist at the time of *P and S v. Poland*. The rewriting should therefore be read as a rewriting of the Court's decision, had it been delivered today. It should furthermore be noted that *P and S v. Poland* reviewed whether the attitudes and actions of the Polish authorities failed to guarantee the first applicant the safe abortion that she was entitled to. Thus, while the Court does not direct its judgement directly towards Poland's highly restrictive abortion legislation, it is direct to the authorities actions and lack thereof. Naturally,

[281] Berger, Stanchi & Crawford, "Rewriting Judicial Opinions and the Feminist Scholarly Project", 4
[282] Ibid., 5-6

the arguments presented in this work are applicable to limiting or restrictive abortion legislation as well as authorities' attitudes towards abortion.

4.1. P. AND S. V POLAND – REWRITTEN

IV. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 8 AS REGARDS THE DETERMINATION OF ACCESS TO LAWFUL ABORTION

138. In their application, the applicants furthermore complained that the facts of the case gave rise to a breach of Article 14 in conjunction with Article 8 of the Convention. They submitted that the facts of the case had given rise to a breach of the first applicant's right to freedom from discrimination on the basis of her sex for she was repeatedly and consistently denied the reproductive health care she was in need of.

Article 14 of the Convention, in so far as relevant, reads as follows:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status"

A. Admissibility

140. The Court notes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

141. The applicants contend that as a result of the inaccessibility of abortion services and the interference of the Catholic priest, the applicants assert that the first applicant suffered from gender-based discrimination. This discrimination consisted of gender stereotypical views and

subordinating behaviors towards women regarding their reproductive and maternal role as well as the unjust precedence given to the fetus over the first applicant's dignity and autonomy. Furthermore, the applicants argue that the first applicant was denied a timely, legal abortion that she was in need of as a woman and that no man would be denied reproductive medical care if needed. The treatment received by the first applicant in her process to obtain an abortion was gender-based and constituted as discrimination under Article 14 according to the applicants.

[…]

2. The Court's assessment

145. Given that the complaints under Article 8 and Article 14 are inextricably linked and that the Court has already concluded on a violation of Article 8, the Court finds it necessary to likewise review the claim under Article 14.

146. The Court reiterates that the advancement of gender equality is today a major goal for the member states of the Council of Europe and very weighty reasons would have to be put forward before such a difference of treatment could be regarded as compatible with the Convention (see *Konstantin Markin v. Russia*, no. 30078/06, § 127, ECHR 2012).

147. According to the standard case-law of the Court furthermore, it is necessary for a breach of Article 14 that there has occurred a difference in treatment in persons in analogous or similar situations (see *Marckx v. Belgium*, no. 6833/74, § 32, EHRR 1979). The difference in treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized. Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment (see, inter alia, *Burden v. United Kingdom*, no. 13378/05, § 60, ECHR 2008). The equal treatment doctrine developed by the Court's jurisprudence encompasses both formal and substantive equal treatment, meaning that member states may be under the negative or positive obligation to prevent both direct and indirect discrimination (see *D.H. and Others v. The Czech Republic*, no. 57325/00, § 175, ECHR 2007). Consequently, Article 14 does not prohibit member states from treating groups differently in

order to correct "factual inequalities" between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article (see, inter alia, *Thlimmenos v. Greece*, no. 34369/97, § 44, ECHR 2000-IV).

148. In the present case the Court observes that the first applicant, while entitled to a legal abortion under Polish law since her pregnancy was a result of rape, was repeatedly and consistently denied reproductive health care. The Court observes that the applicants were sent to three different hospitals and were met with sharp resistance by the doctors, who provided misleading information and subjective advice or objected to performing abortions. The Court furthermore notes that the first applicant was compelled to speak with a Catholic priest and face unsolicited advice on the continuation of the pregnancy. The harassment continued as others entered into the hospital to speak to the first applicant to persuade her into continuing the pregnancy.

149. The Court observes that women's reproductive capabilities can be perceived as constituting "factual inequalities". Considering that limited or restricted access to abortion services burdens women disproportionately in relation to men with the consequences of sexual relations and that this burden, if not corrected, may result in an unequal and subordinate position for women in society. As a consequence of restrictive or limiting legislation on abortion access, women are unable to enjoy reproductive freedoms. The Court acknowledges that to deny women the necessary abortion services as part of their reproductive health care is an affront to their human dignity and bodily autonomy. Respect for human dignity and human freedom, the Court reiterates, form the very essence of the Convention (see *Christine Goodwin v. United Kingdom*, no. 28957/95, § 90, ECHR 2002). Receiving adequate reproductive health care, including naturally abortion services, is a condition sine qua non for the realization of women's human dignity and autonomy as it provides women full control over their reproduction. The Court acknowledges that women's human dignity and autonomy is inextricably linked to their right to equal enjoyment of the rights under the Convention and that these three fundamental rights should be taken into consideration as a unity. For this reason, it finds it important to examine not only whether a violation of Article 8 has occurred, but also whether a violation of Article 14 in conjunction with Article 8 has occurred. The right to respect for private life, if it is to have a substantial meaning, should ever be enjoyed without discrimination. In conclusion, the Court finds that to achieve gender equality, it is no longer sustainable that women are denied abortion services, either by restriction or by limitation through either law or attitudes. The Court therefore cannot but note that any restriction or limitation faced by women in receiving the

needed reproductive health care disadvantages her on the basis of her gender and are therefore discriminatory under Article 14.

150. Having regarded the facts of the case, the Court furthermore observes that the first applicant was met with a significant amount of interference and harassment by the Catholic priest, the doctors and anti-abortion activists whose main interest was to persuade the applicant to continue her unwanted pregnancy. This interference and harassment paid no regard to the first applicant's wishes and desires concerning her body and the course of her life, and evidently held in severely low esteem the first applicant's capability to decide competently and individually on her own reproduction. The Court therefore perceives that these considerations are a reflection of traditional gender stereotypes on the roles of women in society in which women are to bear the consequences of sexual relations, including rape, and bring to term unwanted pregnancies. Neither does the Court accept the perception of the health and condition of women as subordinate to the protection of the fetus' life.

151. The Court has already established that traditional gender stereotypes cannot function as a sufficient justification for a difference in treatment (see *Konstantin Markin v. Russia*, no. 30078/06, § 143, ECHR 2012).

152. Regarding these considerations, the Court reiterates that they echo those of other international human rights bodies regarding the discriminatory effect of restrictive or limited abortion legislation on women (see, inter alia, CEDAW, General Recommendation No. 24 on Article 12 of the Convention (women and health) (1999), §§ 14, 31(c); L.C. v. Peru (2011), CEDAW/C/50/D/22/2009, § 8.16; HRC, Mellet v. Ireland (2016), CCPR/C/116/D/2324/2013, § 7.11; Whelan v. Ireland (2017), CCPR/C/119/D/2425/2014, § 7.12).

153. As a final observation, the Court finds it in order to point out that it did not find it necessary to decide on the proper comparator in this case. While it is true that women are denied reproductive health care to an extent that men are never, the Court finds it undesirable to regard women's reproductive capabilities as unique and in doing so, reproduce essentialist notions on sex differences. Regarding reproductive issues, the comparison of women between men results in unsatisfactory conclusions on differences and similarities. To the Court's view, these considerations are unnecessary. Rather, it is enough that the practice of the Polish authorities, due to discriminatory visions on women's reproductive lives and roles in society, failed to protect the first applicant from the subordinating and disadvantaging effects that abortion restrictions have on women (see, inter alia, *Carvalho Pinto de Sousa Morais v. Portugal*, no. 17484/15, ECHR 2017).

154. In view of the foregoing considerations, the Court concludes that there has therefore been a violation of Article 14 of the Convention taken in conjunction with Article 8.

CONCLUSION

The sun has set on the federal right to abortion for many women in the United States. In Europe, the opposite may very well be true. The fragility of long-established rights has turned the attention of many to reproductive rights. Undeniably, there is momentum to consolidate the right to abortion in Europe in various ways, through varies institutions and judicial bodies that the continent is rich in. In this regard, the European Court of Human Rights should be called upon to move away from its previous hesitation and decide that the European Convention on Human Rights, a tremendously powerful human rights treaty – protects the right to abortion. Such a decision would be very much in line with the European Parliament's statement as well as the considerations of other (quasi-) judicial bodies within and outside Europe.

The momentum caused by the overturn of *Roe v. Wade,* makes it necessary to reflect on this particular case, and the premonitions of those feminist legal theorists that discussed it. These premonitions convey a clear message: that anti-abortion laws and attitudes violate women's right to equality. The idea of this thesis stems from the demand to heed to these premonitions, examine closely what constitutes as a just and firm basis for the right to abortion and in what language we should speak of this right. The aim of this thesis was then to apply the equality approach argued for by American feminist legal theorists to the European Court of Human Rights. What would their interpretation of this approach look like, in the light of their jurisprudence on equality and reproduction?

To perform this application, the work of several important American feminist legal theorists needed to be carefully mapped out. This work – of which the writings and thinking of Ruth Bader Ginsburg take up a large part – delivers the powerful plea for the reconceptualization of abortion as a gender equality right, instead of solely a right to liberty.

While this conclusion is found in the writings of all these feminist legal theorists, different perceptions of what equality should look like are reflected in each of them. Some argue for a symmetrical approach, while others support the asymmetrical approach. Regarding reproduction, both these approaches offer unsatisfactory conclusions on what equality should look like regarding that which only women face: becoming pregnant and wanting an abortion.

This work has therefore taken up the antidiscrimination and antisubordination approach: these approaches hover between sameness and difference, between seeing the need to grant women protection because of their unique reproductive capabilities, and placing them on equal footing to men in the reproductive health care that they should receive. Rather, the subordinating and discriminatory effects of state regulations on abortion access are central: it is the factual inequality and subordination that women are subjected to when denied this access through the obstacles they face to participate in society on an equal basis, to control their own lives and to have their dignity, autonomy and liberty acknowledged, that make abortion a matter of equality. It is discriminatory *because* men do not face similar denials of reproductive health care but also *despite* the fact that men are not similarly placed regarding reproduction. It suffices that gender roles-affirming abortion bans and restrictions violate women's right to equality, as well as their liberty interests.

These theories form tremendously useful insights for the European Court of Human Rights in their abortion jurisprudence. In this thesis, two key arguments in favor of the equality approach to abortion have been distinguished: one legal and one linguistic. The legal argument argues in favor of the equality approach because of the stronger basis it provides. The review model of Article 8, as with *Roe v. Wade* regarding the Due Process Clause, allows state the freedom to balance the interest of women to the state's interest or the right to the fetus if it recognizes such a right. Again similar to the American legal system, the article guaranteeing the right to equal treatment, Article 14, employs a review model that allows a difference in treatment only when 'very weighty reasons' have been put forward. Justifying gender-based unequal treatment requires member states to rely on considerably strong reasons. This speaks for the authority of Article 14: the right to equality leaves no room for balancing acts, but rather decides that discrimination on the basis of gender is rarely tolerable. The authority of the provision is connected to the importance of the discourse that rights create: finding a violation of the right to respect for private life says too little about women's interest in choosing whether or not to be pregnant, while an equality violation speaks volumes. It does not, in other words, employ a gender perspective to human rights. The way forward for the Court is therefore to triangulate equality, liberty and dignity. Through this triangulation, the three concepts would inform each other, with each concept doing justice to the discourse on women's right to choose.

This work has demonstrated that the Court is capable of accepting a claim on Article 14 in abortion cases. Its jurisprudential framework has the capacity to adopt the antisubordination and antidiscrimination approach explained throughout this thesis, based on inter alia *Thlimmenos v. Greece, Opuz v. Turkey* and *Carvalho Pinto de Sousa Morais v. Portugal*. The

Court's jurisprudence allows it to move beyond the question of comparability in cases where the sameness versus difference conundrum offers no satisfactory outcome for equality issues. This is especially true for reproduction cases. The alternatives offered in feminist legal theory could then be taken up by the Court, to find that the inaccessibility of abortion services denies women an equal societal position, freedom from gender stereotypes and the right to bodily autonomy and dignity.

The European Convention on Human Rights cannot protect women's rights if it does not consider the gender dimension of its provisions. Consequently, the European Court of Human Rights cannot give the Convention this gender dimension if it does not recognize reproduction cases as matters of equality. Abortion is essential to women's equality. *Roe v. Wade* should have recognized that. The European Convention on Human Rights still can.

BIBLIOGRAPHY

BOOKS AND ARTICLES

Baer, Susanne. "Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism" in *University of Toronto Law Journal* 59, no. 4 (2009): 417-468.

Balkin, Jack. *What* Brown v. Board of Education *Should Have Said: The Nation's Top Legal Experts Rewrite America's Landmark Civil Rights Decisions,* New York: New York University Press, 2002.

Balkin, Jack. *What* Roe v Wade *Should Have Said: The Nation's Top Legal Experts Rewrite America's Landmark Civil Rights Decisions,* New York: New York University Press, 2005.

Berger, Linda, Stanchi, Kathryn & Crawford, Bridget. "Rewriting Judicial Opinions and the Feminist Scholarly Project" in *Scholarly Works* 94, no. 1(2018): 1-11.

Cartabia, Martha. "The European Court of Human Rights: Judging nondiscrimination" in *The Author* 9, no. 3-4 (2011): 808-814.

Cosentino, Chiara. "Safe and Legal Abortion: An Emerging Human Right? The Long-lasting Dispute with State Sovereignty in ECHR Jurisprudence" in *Human Rights Law Review* 15 (2015): 569-589.

European Parliament. "Include the Right to Abortion in the EU Charter of Fundamental Rights, demands MEPs". Press release, July 7th, 2022. https://www.europarl.europa.eu/news/en/press-room/20220701IPR34349/include-the-right-to-abortion-in-eu-charter-of-fundamental-rights-demand-meps.

Fenwick, Daniel. "The Modern Abortion Jurisprudence under Article 8 of the European Convention on Human Rights" in *Medical Law International* 12, no. 3-4 (2013): 249-276.

Fineman, Martha Albertson. "Feminist Legal Theory", in *Journal of Gender, Social Policy and the Law* 13, no. 1 (2005): 13-23.

Ford, Mary. "A Property Model of Pregnancy" in *International Journal of Law in Context* 1, no. 3 (2005): 261-293.

Ford, Mary. "Evans v. United Kingdom: What Implications for the Jurisprudence of Pregnancy?" in *Human Rights Law Review* 8, no. 1 (2008): 171-184.

Gerards, Janneke. *Judicial Review in Equal Treatment Cases*. Leiden: Martinus Nijhoff Publishers, 2005.

Ginsburg, Ruth Bader, "Speaking in a Judicial Voice" in *New York University Law Review* 67, no. 6 (1992): 1185-1209.

Ginsburg, Ruth Bader. "Gender in the Supreme Court: The 1973 and 1974 Terms" in *The Supreme Court Review* (1975): 1-8.

Ginsburg, Ruth Bader. "Sex Equality and the Constitution: The State of the Art", in *Women's Rights Law Reporter* 4, no. 3 (1978): 143–44.

Ginsburg, Ruth Bader. "Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade," in *North Carolina Law Review* 63, no. 2 (1984): 375-386.

Herma Hill Kay. "Equality and Difference: The Case of Pregnancy," in *Berkeley Women's Law Journal*, 1 (1984): 1-38.

Hunger, Rosemary, McGlynn, Claire & Rackley, Erika. *Feminist Judgements: From Theory to Practice*. Oxford: Hart Publishing, 2010.

Katharine T. Bartlett & Rosanne Kennedy (eds). *Feminist Legal Theory: Readings in Law and Gender*. New York: Routledge, 1991.

Law, Sylvia. "Rethinking Sex and the Constitution" in *University of Pennsylvania Law Review* 132 (1984): 955-1040.

Lebret, Audrey. "The European Court of Human Rights and the framing of Reproductive Rights" in *Droits Fondamentaux* 18 (2020).

MacKinnon, Catherine. "Reflections on Sex Equality under Law" in *The Yale Law Journal* 100, no. 5 (1991): 1281-1328.

Madsen, Mikael Rask. “From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics” in *Law and Social Inquiry* 32, no. 1 (2007): 137-159.

Oja, Liira & Yamin, Alicia Ely. “”Woman” in the European Human Rights System: How is the Reproductive Rights Jurisprudence of the European Court of Human Rights Constructing Narratives of Women’s Citizenship?” in *Columbia Journal of Gender and Law* 32, no. 1 (2016): 62-95.

Peroni, Lourdesand & Timmer, Alexandra. “Bah v. UK: On Immigration, Discrimination and Worrisome Reasoning” in *Strasbourg Observer,* October 12 2011. https://strasbourgobservers.com/2011/10/12/bah-v-uk-on-immigration-discrimination-and-worrisome-reasoning/.

Pronczuk, Monica. “Poland Court Ruling Effectively Bans Legal Abortions” in *The New York Times,* October 22, 2020

Rainey, Bernadette & McCormick, Pamela and Ovey, Clare. *Jacobs, White and Ovey: The European Convention on Human Rights*. Oxford: Oxford University Press, 2021.

Sandra Fredman, “Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights” in *Human Rights Law Review* 16 (2016): 273-301.

Scales, Ann. *Legal Feminism: Activism, Lawyering, and Legal Theory* (New York: New York University Press, 2006).

Sękowska-Kozłowska, Katazyna. “A Tough Job: Recognizing Access to Abortion as a Matter of Equality. A Commentary on the Views of the UN Human Rights Committee in the Cases of Mellet v. Ireland and Whelan v. Ireland” in *Reproductive Health Matters* 26, no. 54 (2018): 25-31.

Senate, Congress. "Supreme Court Nomination Hearings 103-482 - Hearings on the Nomination of Ruth Bader Ginsburg to be Associate Justice of the Supreme Court of the United States, July 20, 21, 22, and 23, 1993". Government. U.S. Government Printing Office, July 20, 1993.

Siegel, Reva. “Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection” in *Stanford Law Review* 44, no. 2 (1992): 261-381.

Wendy Williams. "Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate", in *NYU Review of Law & Social Change* 13, no. 2 (1984): 325-380.

Zureick, Alyson. "(En)gendering Suffering: Denial of Abortion as a Form of Cruel, Inhuman, or Degrading Treatment", in *Fordham International Law Journal* 38, no. 1 (2015): 99-140.

CASE LAW

THE EUROPEAN COURT OF HUMAN RIGHTS

A, B and C v. Ireland, no. 25579/05, ECHR 2010

Apanasewicz v. Poland, no. 6854/07, ECHR 2011

Boso v. Italy, no. 50490/99, ECHR 2002

Burden v. United Kingdom, no. 13378/05, ECHR 2008

Carvalho Pinto de Sousa Morais v. Portugal, no. 17484/15, ECHR 2017

Christine Goodwin v. United Kingdom, no. 28957/95, ECHR 2002

D.H. and Others v. The Czech Republic, no. 57325/00, ECHR 2007

E.B. v France [GC], no. 43546/02, ECHR 2008

Evans v United Kingdom [GC], no. 6339/05, ECHR 2007

Fabian v. Hungary, no. 78117/13, ECHR 2017

K.B. and three other applicants v. Poland, no. 1819/21, ECHR 2021

K.C. and three other applicants v. Poland, no. 3639/21, ECHR 2021

Konstantin Markin v Russia [GC], no. 30078/06, ECHR 2012

Lacatus v. Switzerland, no. 14065/15, ECHR 2021

Libert v. France, no. 588/13, ECHR 2018

Marckx v. Belgium, no. 6833/74, ECHR 1979

N.B. v Slovakia, no. 29518/10, ECHR 2012

Open Door and Dublin Well Woman v Ireland, no. 14234/88; 14235/88, ECHR 1992

Opuz v. Turkey, no. 33401/02, ECHR 2009

P. & S. v. Poland, no. 57375/08, ECHR 2012

R.R. v. Poland, no. 27617/04, ECHR 2011

Thlimmenos v. Greece, no. 34369/97, ECHR 2000

Tysiąç v. Poland, no. 5410/03, ECHR 2007

V.C. v Slovakia, no. 18968/07, ECHR 2009
Vo v. France, no. 53924/00, ECHR 2004
Z v. Finland, no. 22009/93, ECHR 1997

THE EUROPEAN COURT OF JUSTICE

Case C-177/88, *Dekker v. Stichting Vormingscentrum* [1990], I-*03941*

THE UNITED STATES

Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974)
Craig v. Boren, 429 U.S. 190 (1976)
Dobbs v. Jackson Women's Health Organization, 597 U.S.__(2022)
Geduldig v. Aiello, 417 U.S. 484 (1974)
General Electric Company v. Gilbert, 429 U.S. 125 (1976)
Gonzales v. Carhart, 550 U.S. 124 (2007)
Miller-Wohl Co. v. Commissioner of Labor & Industry, State of Montana, 515 F. Supp. 1264 (D. Mont. 1981)
Mississippi University for Women v. Hogan, 458 U.S. 718 (1982)
Planned Parenthood v. Casey, 505 U.S. 833 (1992)
Roe v. Wade, 410 U.S. 113 (1973)

OTHER BODIES

Committee on the Elimination of Discrimination against Women, *L.C. v Peru*, Communication no. 22/2009, CEDAW/C/50/D/22/2009
Human Rights Committee, *Mellet v. Ireland*, Communication no. 2324/2013, CCPR/C/116/D/2324/2013
Human Rights Committee, *Whelan v. Ireland*, Communication no. 2425/2014, CCPR/C/119/D/2425/2014

OTHER DOCUMENTS

European Court of Human Rights. "Guide on Article 8 of the European Convention on Human Rights: Rights to respect for private and family life, home and correspondence". August 31, 2021. www.echr.coe.int (accessed May 3rd, 2022).

The Supreme Court of the United States. "About the Court". https://www.supremecourt.gov/about/about.aspx (accessed May 26th, 2022).

Ginsburg, Ruth Bader. "Interview with Supreme Court Justice Ruth Bader Ginsburg". Interview by John Hockenberry. 16 September 2013. Transcript, The Takeaway Archive, https://www.wnycstudios.org/podcasts/takeaway/segments/transcript-interview-justice-ruth-bader-ginsburg.

United Nations Human Rights Committee. *General Comment No. 18, Nondiscrimination,* 37th session, adopted 10 November 1994, UN doc CCPR/C/21/Rev.1/Add.1, https://www.refworld.org/docid/453883fa8.html (accessed June 5th, 2022).

United Nations Human Rights Committee. *General Comment No. 28, Equality of rights between men and women (article 3),* 68th session, adopted 29 March 2000, UN doc CCPR/C/21/Rev.1/Add.10, https://www.ohchr.org/en/resources/educators/human-rights-education-training/b-general-comment-no-28-equality-rights-between-men-and-women-article-3-2000 (accessed June 5th, 2022).

Committee on the Elimination of Discrimination against Women. *General Recommendation, No. 24,* 20th session, 1999, UN doc A/54/38, https://www.refworld.org/docid/453882a73.html (accessed June 6th, 2022).