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# Human Rights Pitted Against Man

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By Jakob Cornides, Brussels

**°107°** *On the basis of two examples (Opinion 4.2005 of the EU Network of Experts on Fundamental Rights and the ECHR Decision in the case of Tysiac v. Poland), this article shows that there is an increasing estrangement between a new voluntaristic doctrine of 'Human Rights' and the most basic precepts of ethical reason. This novel doctrine is not based on the concept of an objective and inalienable Natural Law, but on the radical ideology of certain NGOs and international bureaucracies, which pretend having authority to 'make' new human rights, thereby assuming the role of supreme global law-makers. This power shift to the unelected, if not halted, could seriously damage or even destroy the credibility the concept of Human Rights is enjoying worldwide.*

## 1. INTRODUCTORY REMARK

It was just a few weeks before his death that Pope John Paul II, in a book that was heralded as his “spiritual legacy” to the world, made one of the most controversial statements of his pontificate: looking back on a century whose totalitarian ideologies [i.e. Nazism and Communism] had caused bloodshed and suffering unprecedented in human history, he deemed it necessary to warn against a “*new ideology of evil, perhaps more insidious and hidden than its predecessors which attempts to pit even Human Rights against the family and against man*”<sup>1</sup>. Surprising and shocking as these words may be, they should not be taken lightly. Of course, drawing a parallel between Nazism, Communism and any other kind of social doctrine is always a dangerous venture: in most cases such comparisons dramatically raise emotions without adding much substance to the argument. Yet when such a statement is made by a person of such immense moral stature as John Paul II, it is not easily discarded.

Is it possible to pit Human Rights against man? Who does so, and how? What are the doctrines of this “*evil ideology*”, which, according to the late pontiff, not only deserves being put into the same basket with Nazism and Communism, but is even “*more insidious*” than these? How is it propagated?

Lately, there has been some occasion to reflect upon what the pontiff may have had in mind. In this article, I will discuss two recent examples of how international expert groups and decision making bodies are advancing a new doctrine on Human Rights: the Legal Opinion Nr. 4.2005 on “*the compatibility with fundamental rights and the law of the EU of the right to religious conscientious objection as provided in existing or possible future concordats concluded between EU Member States and the Holy See*”, published **°108°** in December 2005

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<sup>1</sup> John Paul II, *Memory and Identity*, (2005)

by an EU Network of Independent Experts on Fundamental Rights<sup>2</sup>, and the Decision of the European Court on Human Rights in the case of Alicja Tysi c against Poland<sup>3</sup>, issued in March 2007.

Both cases have in common that, more or less overtly, access to abortion is recognised as a new “Human Right”, which apparently is of such high rank that it even supersedes other (more classical, and generally recognised) Human Rights, such as the Freedom of Conscience (of medical practitioners) or the Right to Life (of the unborn child). Both the Legal Opinion of the Network of Experts and the Decision of the ECHR were the subject of some public debate although, regrettably, the issue did not find such attention in the larger public as would correspond to its fundamental importance. Unsurprisingly, both the Legal Opinion and the Decision were hailed as a major breakthrough by pro-abortion activists. Yet the jubilant statements made at this and similar occasions are, in a certain sense, revelatory:

*“The ECHR held ... for the first time that governments have a duty to establish mechanisms for ensuring ... access to abortion where it is legal”<sup>4</sup>*

*“The UN Human Rights Committee handed down ... a landmark decision .... The decision is the Committee’s first on abortion as well as the first by an international or regional human rights body to hold a state accountable for failing to ensure access to legal abortion services”<sup>5</sup>*

Even those actively militating to promote abortion into the rank of a “Human Right” are perfectly aware that such a Human Right does not yet exist now, and that it would be *new*. Indeed, for (at least) twenty centuries abortion has been considered a crime, not a right, and it still continues being considered a crime in most countries of the world – including the EU Member States. Certainly, a Right to Abortion was not in the bargain when the reference documents on Human Rights (such as the D claration des droits de l’homme et du citoyen, the European Convention of Fundamental Liberties and Human Rights, or the UN Human Rights Charter) were written, nor was it the subject of any new international convention concluded in more recent times. Moreover, it is hardly likely that such a new treaty recognising abortion as a Fundamental Right could

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<sup>2</sup> *Opinion of the EU network of independent experts in fundamental rights on the right to conscientious objection and the conclusion by EU Member States of Concordats with the Holy See* (14 December 2005). CFR-CDF Opinion 4.2005 (available on the internet website of the European Commission at [http://europa.eu.int/comm/justice\\_home/cfr\\_cdf/list\\_opinions\\_en.htm](http://europa.eu.int/comm/justice_home/cfr_cdf/list_opinions_en.htm)), hereafter referred to as “the Opinion”

<sup>3</sup> *Tysi c vs. Poland*, Application 5410/03

<sup>4</sup> *“Center Applauds Landmark Abortion Decision by ECHR”* (Press Release by the “Center for Reproductive Rights on 22 March 2007, concerning the ECHR’s Decision in the Tysi c Case). The Center for Reproductive Rights is an NGO the stated mission of which is to “*advance reproductive freedom as a fundamental right that all governments are legally obligated to protect, respect and fulfill*”. The term “*reproductive freedom*” means that “*women will be free to decide whether and when to have children; whether they will have access to (...) abortion*”; therefore, the term “*reproductive rights*”, when used by this movement, includes “*the right to safe, accessible and legal abortion*”, which, it is suggested, should not be subject to any restrictions at all. Consequently, the movement advocates the completely unrestricted liberalisation of abortion, and systematically lobbies against whatever restriction (e.g. time-limits, prohibition of partial-birth-abortion, limitation of abortion to specific circumstances such as rape or incest) any country will impose in its legislation. (The quotations are taken from the organisation’s above-mentioned website.)

<sup>5</sup> *Pardiss Kebriaei, UN Human Rights Committee Decision in K.L. v Peru*, Interights Bulletin vol 15 (2006) No 3, p 151. The Decision at question is found in Communication n  1153/2003, *Karen Noelia Llanto y Huam n v. Peru*, final views of 17 November 2005 (CCPR/C/85/D/1153/2003).

be adopted in any meaningful international forum, given that it would clearly be incompatible with the moral precepts of practically all of the world's major religious traditions and that, mindful of these, a considerable number of countries would never agree to it.

It should be noted that abortion is but one of several areas where such a slow "evolution" of Human Rights Doctrine is taking place. Similar developments can be observed with regard to gay rights, euthanasia, cloning, the use of embryonic stem cells, and so forth. The fundamental question raised by cases such as those discussed below is thus not limited to the abortion issue - it concerns the credibility of the concept of "Human Rights" as such, including the international, governmental and non-governmental institutional framework that has developed around them: What is the ontological basis of "Human Rights"? Is it at all possible to "make" new Human Rights<sup>6</sup>? Would this not logically imply that it must be possible, too, to abrogate the existing ones? If so, who can legitimately pretend to do so? Are the values that the innovators attempt to impose on us the result of a legitimate political process, or of a consistent philosophical reflection? Or do they just reflect the political agenda of a small and self-referential elite of enlightened **o109o** technocrats that have somehow succeeded in occupying all available seats in all relevant committees and expert groups and now pretend to speak with universal authority? Who has appointed these experts? And why should we believe in what they are saying?

I am not sure I know the answer to all these questions. But I believe that these questions must be asked, and that, not being myself a professional "Human Rights Expert", I may be better placed to ask them than those who are. I thus invite my readers to take a close look both at the EU Network of Experts and the ECHR: maybe, they will share my astonishment and my concerns...

## 2. CONSCIENCE CLAUSES IN CONCORDATS

### 2.1. Legal Opinion 4.2005, its main findings and impact

On 14 December 2005, an advisory body of the EU called "*The EU Network of Independent Experts in Fundamental Rights*" issued a Legal Opinion on "*the right to conscientious objection and the conclusion by EU Member States of Concordats with the Holy See*". The subject matter was not of a purely academic interest; instead, the study had been commissioned by the European Commission at the urgent request of the European Parliament. The Parliament's concern with the issue had, in turn, been occasioned by a clause in a draft agreement then under negotiation between the Slovak Republic and the Holy See, according which both contracting parties would commit themselves to "*recognise the freedom of conscience regarding human life, human dignity, the meaning of human life, family and marriage, and the right of everyone to freely exercise objection of conscience in relation to these universal human values.*" The draft agreement also contained a clause providing that the right to exercise objection of conscience shall apply, inter alia, to "*performing certain acts in the area of healthcare, in particular acts related to artificial abortion, artificial or assisted fertilisation, experiments*

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<sup>6</sup> On 18 October 2005 a group of Members of the European Parliament organised a hearing titled "*Abortion – Making it a Right for all Women in the EU*". The content of the hearing as well as the title given to it suggest that the organisers consider it their task to "make" new (Human?) Rights and to impose them on EU Member States and third countries.

*with and handling of human organs, human embryos and human sex cells, euthanasia, cloning, sterilisation or contraception”.*<sup>7</sup>

The Network rendered a thoroughly negative opinion on this clause. It warned that, by imposing restrictions to access to counselling in the field of reproductive health and to access to certain medical services, including in particular abortion and contraception, the clause could violate obligations arising from the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Elimination of All Forms of Discrimination against Women, and EU Directive 2004/113/EC of 13th December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services. In other words: the freedom of conscience of medical practitioners is superseded by what the Network explicitly calls *“the right to have access to lawful abortion services”*.<sup>8</sup>

Moreover, the Experts identified a risk of *“discrimination between different religious faiths”*.<sup>9</sup>

Even though the Opinion issued by the Network has no binding legal effect at all, there can be no doubt that, quite irrespective of the quality of the arguments put forward, it derives considerable authority from the fact that (a) it was commissioned by the EU Institutions, and (b) the officious character of the Network itself. Indeed, the immediate political consequence was that the Slovak government broke up in a quarrel over whether the negotiations with the Holy See should be continued or shelved. Ultimately, the National Assembly was dissolved and anticipated elections were held, following which - to the utter dismay of many in the EU political caste – a bizarre new government coalition has been formed by left-wing and right-wing populist movements, and the moderate parties (those who had negotiated the debated concordat) reduced to the role of opposition. Surely, human rights have their price – but whether the downfall of a moderate government and its replacement by extremists is a reasonable price to be paid for preventing that State from adopting a too far-reaching conscience clause remains to be answered...

Commissioning an expert opinion on a seemingly innocuous conscience clause contained in a draft concordat, which in substance does not differ from what similar legislation foresees in nearly all EU Member States<sup>10</sup>, can by no means be considered a routine course of action. One is thus tempted to wonder which reasons may have motivated the European Parliament and the Commission to take such an unusual step. Were there any substantial reasons for believing that violations of fundamental rights were imminent, or had already taken place? Had the EU Institutions received any complaints, informing them of such human

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<sup>7</sup> The full text of the draft was annexed to the Opinion as Appendix 1. The quotations refer to Articles 2 and 4 (1) of the draft Agreement.

<sup>8</sup> cf. the Opinion, p.17

<sup>9</sup> cf. the Opinion, p.31

<sup>10</sup> The Opinion, pp.8-14, gives an overview over the relevant provisions existing in the Member States of the EU.

rights violations? Or was this just a pre-emptive measure, designed to discredit a policy some in the Commission and the Parliament happen not to sympathise with? Not only the role certain radical pro-abortion lobbies appear to have played in the mobilisation of the EU Institutions<sup>11</sup>, but also the way in which the request for the Legal Opinion was drafted, shed a rather queer light on the whole course of events. For, contrary to what both the request addressed by the European Commission to the Expert's Network and the heading of the Opinion issued by the Network suggest, the link between concordats and provisions on conscientious objection is rather feeble – or, in truth, inexistent. Whereas there are provisions governing the exercise of conscientious objection in the statute books of all EU Member States, only very few of them are contained in, or determined by, concordats concluded between these states and the Holy See. Of these conscience clauses contained in concordats, all address possible exemptions from the obligation to serve in the armed forces, whereas *not a single one* (the draft agreement with Slovakia excepted) has any bearing on the issues of abortion, euthanasia, cloning, or other medical practices. Furthermore, it should be noted that – with the sole exception of one clause contained in the concordat between the Holy See and Latvia, which exempts students of the Major Seminary of Riga from military service - all provisions on conscientious objection existing in any of the EU Member States can be invoked by *everyone*, not only by Catholics. Moreover, these provisions do not only allow invoking to reasons of conscience motivated by a religious faith (catholic or other), but any kind of conscientious objection.

Yet the Opinion of the Expert Network deals *exclusively* with possible problems arising from provisions governing the right of *medical practitioners* to invoke conscientious objection with regard to certain medical practices and, indeed, narrows its focus still further to address only the conflict of interest between doctors invoking such objection of conscience and women wishing to have an *abortion*. There is no relevant provision in any of the existing concordats concluded by an EU Member State, yet there are *many* such provisions in the *domestic* legislations of all EU Member States. The Network's Opinion sets its focus on *these* provisions, irrespective of where they are found, and at the same

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<sup>11</sup> This is, indeed, what one is lead to conclude when reading the website of the “Center for Reproductive Rights” (<http://www.reproductiverights.org/worldwide.html>), which, shortly after the Opinion had been issued (March 2006), exhibited the following comment: “*The Network's interest in conscientious objection arose from advocacy efforts at the European Parliament, led by Pro-Choice Slovakia and Catholics for a Free Choice, aimed at curbing the Slovak Republic's pending concordant (sic!) with the Holy See on conscientious objection, the most extensive concordant (sic!) with a European country on this subject to date. These efforts led to the Parliament's request to the Network for an opinion on the pending concordant's (sic!) compliance with the EU Charter on Fundamental Rights. The opinion of the Network is highly significant because it applies not only to the Slovak Republic's pending concordant (sic!) with the Holy See on conscientious objection, but to all member state laws and policies on the subject matter.*”

The involved organisations, “Pro-Choice Slovakia” and “Catholics for a Free Choice”, must without doubt be described as radical pro-abortionist groups. “Catholics for a Free Choice” advocates “*the right of all women to follow their conscience when deciding about abortion*”, which, it appears, should not be subject to restriction of whatever kind. The advocating of completely unrestricted liberalisation of abortion goes far beyond what is currently foreseen in *any* country of the world (including the US and the EU) and cannot therefore be described as advocacy for respecting an existing “standard” in Human Rights. What is intended by these group is not the protection of existing, but the making of *new* “Human Rights”. The same is true of the “Center for Reproductive Rights” (cf. supra, Footnote 4). It is quite astonishing to read that the political Institutions of the EU, which at other occasions exhibit the greatest concern over their “religious and philosophical impartiality”, act at the instigation of such radical groups. Do they share the stated political objectives of these movements? Have they got any political mandate for promoting their goals?

time fails to deal with such conscience clauses as are *really* contained in concordats.

What are the reasons for this camouflage? Why do the authors of the study find it necessary to disguise their true intention behind a smoke screen of pretended concerns over certain rural areas in Slovakia facing the risk of an undersupply of medical services, or over the followers of different religious faiths facing discrimination?

**°111°** In the Network's Opinion, these concerns are set out as follows:

*“Approximately 70% of the population in the Republic of Slovakia is catholic. There is a risk that the recognition of a right to exercise objection of conscience in the field of reproductive healthcare will make it in practice impossible or very difficult for women to receive advice or treatment in this field, especially in the rural areas.*

(...)

*Another potential difficulty relates to the prohibition of discrimination between different religious faiths. (...)Although Article 24 of the Slovak Constitution recognizes to all a right to freedom of thought, conscience, religion and belief, the Draft Treaty, if and when it will be ratified, would place the Catholic faith in a specific position by affording a reinforced protection of the right to exercise objection of conscience to the followers of that faith.”<sup>12</sup>*

#### 2.1.1. *Access to healthcare put at a risk?*

The above-quoted passage fallaciously attempts to make the reader believe that the conscience clause at question could generally result in preventing women from having access to (reproductive) *healthcare, advice, and treatment*. Yet in fact the issue here is access to (non-therapeutic) *abortion*, which does not fall into any of these categories.

Apart from this, there are no convincing reasons for believing that, because 70 % of a country's population are Catholic, an equal proportion of medical practitioners will categorically refuse to perform abortions (provided, of course, that these are lawful). It is far from certain, even improbable, that the problem for which a remedy is sought exists *in reality*. There is not the faintest trace of evidence that women seeking (lawful) abortion had been exposed to unreasonable burdens going beyond the need of travelling to the next district town. There do not seem to have been any complaints – if there were, the Opinion makes no allusion to them<sup>13</sup>.

#### 2.1.2. *Discrimination of religious minorities?*

Still more astonishing is the concern that the conscience clause in the draft concordat could lead to a discrimination of non-catholic medical

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<sup>12</sup> Both quotes are taken from p. 31 of the Opinion

<sup>13</sup> The only concrete instance quoted in the Opinion is the case that, at the time, was pending before the European Court of Human Rights (*Tysi c vs. Poland*, Application 5410/03), which concerns Poland, not Slovakia. Cf. *infra*

practitioners. Where are the complaints of non-Catholic doctors compelled against their will to perform abortions on end while their Catholic colleagues, through the use of conscience clauses available only for them, are allowed to smirkingly stay away from this nasty business? Have the EU Expert Network, or their sponsors, received a single complaint of *this* kind? I would be curious to read it. But even if such discrimination were found to exist, the commendable remedy would be to extend the benefits of freedom of conscience to all doctors, not to withdraw them from all.

As a matter of fact, the concern over a possible discrimination between different faiths is invalidated already by the wording of the draft concordat<sup>14</sup>, which clearly states that the right to invoke objection of conscience should be available to *everyone*, not only to Catholics. This also corresponds to the interest of both parties: while there is no reason to suggest that the Slovak Republic would limit the availability of the conscience clause only to Catholic doctors, it is even more obvious that the Holy See, whose opposition to abortion and other practices covered by the clause at question is notorious, would strive to ensure that all who so wish may invoke the clause. At the same time, the clause at question does not prevent any medical practitioner from **°112°** performing abortions, if these are lawful. The Network's reasons for believing that the provision could lead to any kind of discrimination remain thus in complete obscurity.

It is true that, generally speaking, the provisions contained in a concordat affect Catholics more than others. Yet the very provision to which the Network refers as a source for possible "discrimination" is clearly of advantage to *all* medical practitioners, irrespective of their faith. If a completely neutral provision, irrespective of its content and only because it is contained in a concordat, is suspected to discriminate in favour of Catholics, then the mere fact of concluding concordats must be considered discriminatory. The ultimate, but absurd, consequence of the argument, if thought to its end, is that EU Member States must once and for all times cease to conclude treaties with the Holy See.

## 2.2. Conscientious Objection = Religious Belief?

Yet the focus of the Opinion is set on conscience clauses, not on concordats. The question is only: why are such clauses, if contained in a draft concordat, suddenly considered a serious menace to Human Rights, while similar clauses, contained in the domestic legislation of Member States, never have raised such concerns?

Definitely, there is a clear underlying tendency in the Network's Opinion to attribute a medical practitioner's conscientious objection against abortion and other debated practices to his or her "*religious convictions*". These, in turn, are surreptitiously presented as something subjective, irrational, not verifiable. At the same time, a woman's decision to have her pregnancy terminated instead of

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<sup>14</sup> cf. Article 2 of the draft Agreement (Appendix 1 of the Opinion)

carrying it to end is also presented as a purely subjective “choice”, based on a different kind of “convictions”, which cannot be challenged by any objective reasoning and must be accepted as legitimate by everyone. Facing these two opposing “philosophical convictions”, the Network’s seemingly “objective”, “neutral” attitude is to put both at the same level and say that both must be respected. What is completely set aside is that non-believers also have consciences and, at times, conscientious objections. Are these, too, irrational? The arbitrary overstating of the “religious” aspect of conscientious objections drives the debate into a wrong direction: those invoking such objections are portrayed as obscurantist zealots, with whom no reasonable exchange of arguments is possible, and for whom, very graciously, special arrangements are made - under the proviso, of course, that the interests of the enlightened mainstream of society are not affected in any tangible way.

This certainly looks like a good strategy for avoiding a substantial debate over what is really at question here: whether abortion is right or wrong and whether having conscientious objections is not, at times, more reasonable than not having them. The entire domain of moral and philosophical reasoning is discarded as something subjective: *de gustibus non disputandum est*. However, there are two flaws in this approach. The first is that, if negative moral judgments on abortion are nothing but one “philosophical conviction” among many others, the same must be true of every moral judgment on any other issue (including on the Iraq war, the Nazi Holocaust, capital punishment or committing tax fraud). The result would be a complete dissolution of all moral reasoning: our laws would no more be based on reason, but only on power. The second flaw is that, if all moral judgments stand on the same level of subjectivity, there is no apparent reason why a woman’s choice to have abortion should be given prevalence over a doctor’s not to perform abortion. As a result of its own strategy of putting off moral judgments as subjective and thereby avoiding a substantial debate on abortion, the Network of Experts is **°113°** therefore unable to give any reasonable justification for its own point of view. This will be shown in more detail below.

The moral judgment according which the life of one human being must not be sacrificed in favour of lower-ranking interests of another human being is certainly not to be shrugged off as “religious belief”. Nor is respect for every human being’s right to life superstitious. In fact, it is nothing but elementary ethical reason which makes us understand that the right to life is the most important and most fundamental of all Fundamental Rights: otherwise, all other rights of a man could be cancelled out simply by not protecting his right to life. It is therefore logical, not superstitious, to attribute the same value to the life of a child as to the life of its father or mother, and it is contrary to logical reasoning to make any other assumption.

### **2.3. Is there a “Right to Abortion”? What is its substance?**

Medical practitioners invoking conscientious objections against partaking in abortions certainly need not be afraid of having to defend their point of view in a fair debate. But no such debate is allowed to take place. Instead, the Expert’s Network simply limits itself to presenting the usual canon of arguments that has, in past decades, been used to justify the legalisation of abortions (without wasting a thought on possible counter-arguments). The shocking novelty lies not in the arguments that are used, but in the purpose that is pursued. The aim no longer is to justify the legalisation (i.e. toleration) of abortion, but to define “access

to *lawful abortion services*” as a subjective right, a *fundamental* right of pregnant women, superseding other fundamental rights, including the freedom of conscience of doctors and nurses. According to this novel doctrine, it is no longer those practising abortion who are under suspicion of violating Human Rights, but those not willing to partake in the act.

It should be noted here that the concept of a “*right to have access to lawful abortion services*” is ambiguous, given that it could mean two different things: (a) that abortion should, at least in certain circumstances, be lawful (i.e. not prohibited or at least not punishable), or (b) that, where abortion is lawful, women should have a subjective right to it, guaranteeing them the factual availability of such “*lawful abortions*”. As we shall see in the further course of this analysis, the arguments put forward by the Network in view of this “Right to Abortion” suffer from the same kind of ambiguity: while the Network asserts to prove (b), most of its arguments rather seem to be directed at (a).

In order to disentangle this confusion, it seems appropriate, without too much entering into the details of the different legal situations in different countries, to clarify that in *all* western countries, abortion is still in principle considered a serious crime and sanctioned with severe penalties. In many countries, abortion, albeit unlawful, is *under certain conditions* exempted from criminal prosecution. In other countries, abortion is under certain conditions not only exempted from prosecution, but even considered lawful.<sup>15</sup> Where such an exemption exists, however, it usually is limited to situations where the life or health of the pregnant woman is at risk, where the pregnancy is the result of a criminal act, or where the foetus is suffering from grave anomalies. The legal situation in different EU countries is, however, far from uniform. Whereas some countries flatter themselves to have introduced “*liberal*” rules, others (e.g. Malta, Ireland) continue maintaining more restrictive regulation. Poland has, in 1993 replaced a “*liberal*” law (dating from the communist era) by a more restrictive one<sup>16</sup>, whereas in Germany re-unification provided an occasion to **§114** extend the “*liberal*” approach existing in ex-communist Eastern Germany to the western part of the country, making abortion generally and unconditionally available during the first three months of a pregnancy<sup>17</sup>. In this context it should also be noted that, where abortion is available under certain conditions, much depends on how these restrictions are applied in practise, which makes it very difficult to draw comparisons. In some countries, legislation may seem restrictive, whereas in fact it is not; in other countries the opposite is the case. For example, in Germany the termination of a pregnancy is, after the first three months, available only in cases where the foetus suffers from a genetic defect or where the pregnancy poses a

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<sup>15</sup> One example for a country where the legislation in force makes such a differentiation is Germany. Article 218a, paragraph 2, of the Criminal Code explicitly defines abortions in certain circumstances as “not unlawful”, whence it must be concluded that they are unlawful in all other cases. If, by contrast, the requirements set out in § 218, paragraph 1 of the Criminal Code are met, abortion is, albeit unlawful, not subject to criminal prosecution.

<sup>16</sup> Ustawa z dnia 7 stycznia 1993 r. o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży (Law of 7 January 1993 on Family Planning, the Protection of Human Embryos and the Conditions for Lawful Abortion), Dz.U.No.17/1993, Pos. 78

<sup>17</sup> cf. Article 218 of the Criminal Code. The only condition is that the pregnant woman must obtain a certificate stating that, prior to the abortion, she has consulted a counselling institution certified by the State.

direct and imminent threat for the health of the pregnant woman – but in fact, it is very easy to obtain an opinion from a medical doctor stating that one of these conditions is met: it usually suffices to say that the continuation of the pregnancy would affect the woman’s mental health (by causing “distress”, “anguish” or “despair”). In Poland, by contrast, the words “direct and imminent threat” are understood to mean what they say: a mere risk of disadvantageous consequences for the pregnant woman’s health is not considered sufficient.

From the typology sketched out above, it can be seen that the concept of “lawful abortions” does exist in certain countries. However, the legislative situation is far from uniform even within the EU, and it is even less uniform when the survey is extended to non-western countries. Given the absence of convergence with regard to the *scope* of a right to lawful abortion, there seems to be no ground for assertions presupposing an international convergence of views on the *substance* of such a right. That abortion *should* under certain conditions be considered lawful may be a view held by many, but it is far away from being generally accepted as legal standard.

### 2.3.1. *A subjective right derived from mere impunity?*

Thus, if the Network intended to say that a “*right to have access to lawful abortion services?*” is generally recognised, such an assertion would be plainly wrong. If the intention was to say that such a right *should* be recognised, the case remains to be made.

However, the point the Network attempts to make seems to be a completely different one: *if and where*, and to the extent that, abortion is lawful, there is a subjective right for women to have access to such lawful abortion. This right would, in cases of conflict, supersede a conscience clause invoked by a medical practitioner. The arguments used to sustain this view are essentially the following:

- (1) Too restrictive legislation on abortion may constrain women to recur to illegal abortion, which, in turn, would put at risk their own “Right to Life”.
- (2) A pregnant woman should have a right to abortion at least in certain specific circumstances, including when the continuation of the pregnancy could put her health at a serious risk.
- (3) Denying to a woman the effective possibility to abort in circumstances where abortion is lawful under the regulations of the State concerned may moreover amount to the infliction of inhuman and degrading treatment.
- (4) It is discriminatory for a state to refuse to legally provide for the performance of certain reproductive health services for women.
- (5) In several European countries, if national legislation provides that under certain circumstances abortion is “lawful”, women who are denied access to such “lawful” **01150** abortion have a right to file a complaint against this denial. According to the Network, this “Right to Review” indicates the recognition of a “Right to Abortion” in these countries.

As it will be seen below, some of these arguments are, from the outset, inadequate to meet their stated purpose. Arguments (1), (2) and (4) seem to address the question whether abortion should, at least to some extent, be legalised, which simply is not the question at issue here. Only arguments (3) and (5) are clearly related to the point the Network attempts to make, i.e. that from the lawfulness of abortion there follows a subjective right to have effective access to it. Quite obviously, this is not one stringent chain of argumentation that could be invalidated by refuting the weakest argument in that chain; rather, we are confronted with five different arguments, unrelated from, and not depending on, each other, and each requiring to be evaluated on its own merit.

#### 2.3.1.1. The “Right to Abortion” derived from the “Right to Life”?

According to the Network, *“there appears to be an emerging consensus that, where the regulation of abortion is too restrictive, and especially where abortion is made criminal in all circumstances or only with too narrow exceptions, the practice of illegal abortions performed in unsafe conditions may threaten the right to life, guaranteed in particular under Article 6 of the International Covenant on Civil and Political Rights.”*<sup>18</sup> For this, the Network finds support in the reports of the UN Human Rights Committee. Yet the argument seems highly questionable both in legal and factual terms.

In the first place, one is tempted to wonder what an “emerging consensus” is. If the consensus is still in the process of “emerging”, then in reality there is *no* consensus. Moreover, it would be worthwhile to find out, among *whom* this consensus is emerging.

Secondly, it should be obvious that the purpose and intention of a law prohibiting or restricting abortion is that no abortion takes place, *not* that abortions take place clandestinely. It is plainly absurd to impute the responsibility for the negative consequences of any illegal act to the state legislator forbidding it. Indeed, this kind of argument makes me think of an arsonist who, having burned his fingers in the course of setting fire on his neighbour’s house, complains about having been compelled to act clandestinely. Of course there can be no doubt that arsonists could perform their purposes in greater safety if arson was not prohibited – but would *this* really be a sufficient reason for “liberalising” arson? If not, why should an argument that would not be accepted with regard to any other crime be accepted in the context of abortion?

Thirdly, the argument appears to be based on the assumption that, irrespective of whether they are legal or not, the amount of abortions will always remain the same, and that, far from reducing the incidence of abortions, prohibiting abortions

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<sup>18</sup> Cf. the Opinion, p.19

would only lead to abortions taking place illegally under unsafe conditions instead of legally under safe conditions, causing the death of many women. This, however, is, at best, a mere assumption. Of course, the Network quotes some estimations evidencing the high incidence of illegal abortion in a country where legislation is “too restrictive”. But these estimations concern Poland, not Slovakia, and they diverge so grossly from each other that the only valid conclusion any serious-minded reader can draw from them is that, in fact, we have no clue at all about how frequent illegal abortions really are.<sup>19</sup> Yet in order to make **°116°** the point the Network attempts to make - i.e. that a too restrictive legislation poses *a risk to health* for women – it would by no means suffice to show that the total number of abortions has remained high after more restrictive legislation has been introduced. Indeed, the argument would need to be supported by data showing that clandestine abortions are significantly more dangerous than “legal” ones, and that significantly more women are dying from botched abortions if they are illegal than if they are legal. Moreover, it would be necessary to produce some evidence that the number of lives saved through legalising abortion outweighs the number of lives lost through additional abortions (it should, after all, not be forgotten that *each* abortion, be it lawful or not, means killing a child...).

The data quoted in the Opinion fails to provide any of this information: it is not only imprecise (and of questionable origin)<sup>20</sup>, but, in addition, also completely irrelevant. The

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<sup>19</sup> The Opinion, at p. 18, quotes the alleged annual number of illegal abortions in Poland: 50.000 to 70.000 cases per annum according to the Polish government, whereas estimates presented by the Polish Federation for Woman and Family Planning, a pro-abortion lobby group, range at between 80.000 and 200.000 annual cases. According to UN data, Poland has 38.5 million inhabitants, and roughly 365.000 births per year. The assumption that as much as 35% of all pregnancies (200.000 of 565.000) in this country could be terminated by an illegal abortion does not seem very plausible. In this context, it should be noted, that, according to official statistics, the number of “lawful” abortions has been reduced to ca. 200 annually since a restrictive law has been introduced in 1993. Obviously, the political interest of pro-abortion groups is to show that the incidence of abortion has nevertheless remained the same, or even increased - otherwise, they would have to recognise that prohibiting abortion saves human lives. No surprise therefore, that of the estimations quoted by the Network, the higher numbers (three to four times higher than those submitted by the Polish Government) have been introduced into the debate by a radical pro-abortion lobby group.

<sup>20</sup> The manipulation of statistics relating to the number of illegal abortions and the number of deaths and injuries they are causing is a classical strategy of pro-abortion lobbies. The purpose usually is to prove that the number of abortions remains the same, irrespective of whether there is a legal ban on abortion or not; therefore, it is argued, it is better to “*make abortion legal, but safe*”. Why do I believe that such statistics are usually not credible? For two reasons. Firstly, because, since illegal abortions usually take place in secret, it remains unclear how reliable data can be collected. Secondly, there is ample evidence that wrong numbers have been used in the past and continue being used for pro-abortionist-propaganda. Some of this evidence comes from the pro-abortion-campaigners themselves: for example, Bernard Nathanson, founder of NARAL (National Association for the Repeal of the Abortion Laws) and mastermind of the public relations campaign which, in 1973, preceded the Roe v Wade Decision of the US Supreme Court, wrote: “*We aroused enough sympathy to sell our program of permissive abortion by fabricating the number of illegal abortions done annually in the U.S. The actual figure was approaching 100,000 but the figure we gave to the media repeatedly was 1,000,000. Repeating the big lie often enough convinces the public. The number of women dying from illegal abortions was around 200-250 annually. The figure we constantly fed to the media was 10,000.*”

argument put forward by the Network is thus unsupported by any evidence, based purely on assumptions and conjectures, which, in addition, run contrary to common sense.<sup>21</sup>

Finally, it seems that the argument is also completely unrelated to the subject matter of the Opinion. It gives (unconvincing) reasons why abortion should be legal, but does not even attempt to show why, from a law legalising abortion, there should arise an obligation for any legal practitioner to provide it.

2.3.1.2. “Right to Abortion” in cases of imminent threat for the health of a pregnant woman?

The second argument made by the Network is that abortion should be lawful at least in cases where the continuation of the pregnancy would put the health of the pregnant woman at a serious risk. This reflects the state of legislation in many western countries. However, the relevant provisions and, even more so, their practical application differ widely from one country to another: in some countries, *every* health risk seems sufficient to justify an abortion (but is there any pregnancy *not* associated with health risks?), whereas in other countries abortion is licit only in circumstances where the continuation of the pregnancy would really be life-threatening.

In order to evidence the nefarious consequences the “abusive” invocation of conscientious objection may have for pregnant women, the Network quotes the case of Alicja Tysi c, which was then pending before the European Court of Human Rights<sup>22</sup>, and which will be discussed in more detail further below. For the time being, it suffices to say that, whatever one may think about that case, it is completely unrelated to the point the Network was going to prove. For the doctor consulted by Mrs. Tysi c did *not* invoke a conscience clause – instead, he refused to perform the requested abortion because he *considered it to be illegal* under the circumstances. This judgment turned out to be correct not only in the legal sense. Indeed, the doctor’s refusal to perform an abortion saved the life of a young girl to which Mrs. Tysi c gave birth; moreover, it later turned out that no

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<sup>21</sup> It appears commonsense that criminal sanctions do have a steering impact on the actual behaviour of people – and that this is indeed one of their purposes. Otherwise, it would be difficult to understand why so many people (often the same as those opposing the idea that abortion should be put under a criminal sanction!) are calling for sanctions for homophobia, or smoking in public places, or speeding: Is it not because they believe that criminal sanctions help eradicating the behaviour they believe should be eradicated? In that case, why would the threat of sanctions help fighting against all other misdemeanours, but not against abortion?

<sup>22</sup> Cf. the Opinion, pp. 18, 19

causal link existed between the pregnancy and the deterioration of Mrs. Tysi c's health.

It thus seems that, far from supporting the position adopted by the Network, the Tysi c case shows that the decision to kill a young child in order to minimise "health risks" for the mother should not be taken carelessly. The "health risks" often turn out hypothetical, whereas the fact that each abortion kills an unborn child is real.

### 2.3.1.3. Inhuman and degrading treatment?

The third argument made by the EU experts is that, in circumstances where abortion is lawful, denying to a woman the effective possibility to terminate pregnancy may amount to the infliction of an inhuman and degrading  117  treatment. On this, the Network quotes an opinion recently adopted by the UN Human Rights Committee in the case of a Peruvian woman, aged 17, who, being pregnant with a fatally impaired child, was "*denied access to abortion in circumstances where the interruption of pregnancy was lawful under Peruvian law*".<sup>23</sup> The UN Human Rights Committee chastised Peru for having violated a number of provisions of the International Covenant on Civil and Political Rights: Article 2, in the absence of effective remedies against the refusal by the director of the public hospital to perform the abortion requested, Article 7, because of the inhuman and degrading nature of the treatment inflicted upon the woman, who was "*forced to carry a fatally impaired foetus to term*", Article 17, because of the invasion of her privacy this amounted to, and Article 24, because she was denied the special protection of her rights due to a minor.<sup>24</sup>

However, despite stemming from such authoritative a source as the UN Human Rights Committee, the argument remains unconvincing.

In the first place, it must be noted that the Network again fails to provide the full details of the case it quotes – and again omits to mention some important facts. Whoever looks up the full record of the case will find that the doctor refused to perform the requested abortion *because he considered it to be unlawful* in the given circumstances. Now, it might be that he was mistaken in that assessment – but in that case it would seem more appropriate to criticise the doctor for his wrong diagnosis rather than the State for having violated Human Rights. In any case, the refusal clearly was not arbitrary, nor did the doctor invoke any objections of conscience. He just

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<sup>23</sup> quote taken from the Opinion, p. 20

<sup>24</sup> *Karen Noelia Llantoy Huam n v. Peru* (cf. supra, Footnote 5)

did not want to perform an (apparently) illegal abortion, for which he would have risked being sent to jail. Thus, the case could be used to evidence the need for a review process in cases where a wrong diagnosis is made, or in an argument over whether and under which circumstances abortion should be lawful – but not in an Opinion concerning the right of medical practitioners to invoke conscientious objection.

Apart from that, the interpretation made of the terms “*denial of access*” and “*inhuman and degrading treatment*” remains highly questionable. Firstly, it seems inappropriate to speak of “*inflicting inhuman and degrading treatment*” when, in fact, the reproach is that the pregnant woman does not undergo any treatment at all. Secondly, it is quite unclear – regrettably, no reasons are provided for this assessment – why it should be “*inhuman and degrading*” to give birth to an impaired child, even if that impairment is so severe that the child must be expected to die soon after birth. In fact, it is far from certain that, in such circumstances, a mother would cope more easily with an abortion than with the delivery of a (fatally) impaired child – except for the reason that, if no abortion takes place, the child may stay alive for years, requiring care and attention from its mother<sup>25</sup>. Thus, irrespective of the long or short life expectancy of the baby, the fundamental issue in such cases is not the pregnant woman’s dignity or the doctor’s conscientious objections, but whether or not we accept the presence of handicapped persons in our society. Very regrettably, both the UN Human Rights Committee and the EU Experts Network seem to think that handicapped children have no right to life and should be eliminated before birth. No explanation, however, is given as to how they reconcile this view with the Human Rights they are supposed to protect.

Last but not least, both the EU Network and the UN Committee fail to differentiate between cases where a woman is *prevented* from having abortion (e.g. by locking her up in her room and thus depriving her of her liberty) and cases where her desire for abortion is *not actively promoted* (e.g. if a medical practitioner refuses to perform the **°118°** abortion). Given the

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<sup>25</sup> In the case quoted by the Network (see preceding footnote), the child suffered from anencephalia, an anomaly in which the foetus lacks most or all of the forebrain. There is no treatment against this extremely severe impairment. Yet the statement that “*such children are either stillborn or die soon after birth*” (cf. Kebriai, op.cit (Footnote 5)) is simply wrong. While it is true in the case at question the child did die soon after birth, there are cases where children suffering from exactly the same impairment have lived for many years. For example, cf. Sophie Chevillard Lutz, *Philippine – La force d’une vie fragile*, Editions de l’Emmanuel (Paris, 2007): in this book, a young mother tells the story of her daughter, who suffers from anencephalia. Despite predictions that the girl was going to die immediately after birth, the woman (for reasons of conscience) did not want to have an abortion. Her daughter it is now seven years old. The predictions some doctors make with regard to the life expectancy of “fatally” impaired children are, it appears, not always very reliable. There is reason to believe that such predictions are often the result of wishful thinking, or constitute an attempt to ease the conscience.

considerable difference between these two scenarios, the undifferentiated use of terms like “denial of access” or “forcing someone to carry pregnancy to term” clearly carries the risk of manipulating the debate.

#### 2.3.1.4. Is pregnancy a disease?

The Network draws further support for the concept of a “Right to Abortion” from a Recommendation, adopted by the UN Committee on the Elimination of Discrimination against Women, stating that “*measures to eliminate discrimination against women are considered to be inappropriate if a health care system lacks services to prevent, detect and treat illnesses specific to women. It is discriminatory for a State party to refuse to legally provide for the performance of certain reproductive health services for women. For instance, if health service providers refuse to perform such services based on conscientious objection, measures should be introduced to ensure that women are referred to alternative health providers.*”<sup>26</sup>

Again the terminology used is ambiguous: nowhere is there any mention of abortion. The interpretation the EU Network gives to the quotation presupposes considering pregnancy an “*illness specific to women*”, and abortion as its “*treatment*”. Likewise, “*reproductive health*” means not, as one might believe, the health of the sexual organs, or of the progeny, but the elimination of the progeny by violent means. This is certainly not in conformity with the usual meaning of these terms. It seems as if the Network was assiduously trying to find in these words a meaning they simply do not have.

#### 2.3.1.5. Legal provisions protecting access to “lawful abortion”

The fifth argument used by the EU Network points at the fact that, “*in a number of European States, a right to review has been recognized to women who are denied the possibility to seek abortion, in conditions which ensure the effectiveness of that right, where it is recognized under national legislation.*” This reflects, according to the Network, “*a common understanding of the need to protect women’s right to legal abortion in situations where a health-care provider denies such a request.*”<sup>27</sup>

Yet once more, the argument seems to completely miss the point it is supposed to make. The legal provisions to which the Network refers here provide a possibility to review a doctor’s assessment of whether the conditions of a lawful abortion are met or not. Given that, in the countries at question, abortion is lawful (or exempt from prosecution) only under specific circumstances, it is in the interest of both

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<sup>26</sup> General Recommendation No. 24 (20th session, 1999) (art.12 : Women and health) (UN doc. A/54/38/Rev.1), quoted on p. 20 of the Opinion

<sup>27</sup> the Opinion, p. 20

the woman seeking abortion and the medical practitioner to carefully examine whether the conditions are met (e.g.: is the foetus really severely impaired? Does the continuation of the pregnancy really pose a serious health risk?) in order to avoid running the risk of criminal sanctions. The provisions at question provide a possibility to review a *wrong diagnosis*<sup>28</sup>, but they do not have the purpose of second-guessing an *objection of conscience*. These two different issues should not be mixed up. A medical diagnosis is accessible to external review, whereas a decision of conscience is not.

Just for the sake of completeness I should mention that, even if it had the meaning the Network erroneously ascribes to it, the legislation of ten small countries (five of which formerly were part of Yugoslavia)<sup>29</sup> would in any case not suffice to give evidence of “*a common understanding*” on a more than regional level. **°119°**

### 2.3.2. *Practical impact of the “Right to Abortion”*

Going beyond the mere affirmation of a “Right to Abortion”, the EU Network seems to consider that this right, in case of conflict, has prevalence over the right to conscientious objection. This is surprising, given that the latter is recognised, by the same Network, as “*a dimension of freedom of thought*”<sup>30</sup>, which, as all know, enjoys the status of a fundamental right. It seems thus that the newly discovered “Right to Abortion” is immediately promoted to become the most fundamental of rights - a *lex suprema* overriding, where necessary, all other fundamental rights.

On this basis, the Network draws some practical conclusions:

*“...in circumstances where abortion is legal, no woman shall be deprived from having effective access to the medical service of abortion. In the view of the Network, this implies that the State concerned must ensure, first, that an effective remedy should be open to challenge any refusal to provide abortion; second, that an obligation will be imposed on the health care practitioner exercising his or her right to religious conscientious objection to refer the woman seeking abortion to another qualified health care practitioner who will agree to perform the abortion; third, that another qualified health care practitioner will be indeed available, including in rural areas or in areas which are geographically remote from the centre.”*<sup>31</sup>

In other words, the Opinion of the EU Network postulates:

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<sup>28</sup> This is recognised even by the Network itself when it says, at p. 21: “*The abortion laws of (...) permit a woman requesting abortion after the prescribed gestational limit for abortion without restriction to appeal a rejection of her request if a dispute is likely to occur over **whether the conditions for abortion exist, such as when pregnancy poses a risk to a woman’s health***”.

<sup>29</sup> Cf. the Opinion, p.21

<sup>30</sup> Cf. the Opinion, p.15

<sup>31</sup> the Opinion, p.20

- an obligation for the state to *ensure the availability* of abortion (whereas, so far, states have only been *tolerating* it); and
- an obligation for medical practitioners to *co-operate* in abortions even in spite of any reserves of conscience they may have.

The responsibility to guarantee the “effective access to abortion” is shifted on the shoulders of the medical practitioner: if he does not accept to do the job himself, he is put under the obligation of finding another practitioner who agrees to do it. This means, in turn, that if he does not find another practitioner, he is obliged to perform the abortion himself. With or without obligation, it is clear that referring somebody to a medical practitioner willing to perform an abortion is a way of co-operating in that abortion<sup>32</sup>. An obligation to refer women to an abortionist would therefore mean that medical practitioners could only choose *how* co-operate in abortions, but there would be no freedom to decide *whether or not* they want to do so. In spite of the lip-service the Network pays to freedom of conscience, this would mean to eradicate it.

#### 2.4. Contractual freedom and the medical profession

Yet it seems that the arguments used by the Network to extrapolate these conclusions from Human Rights are not only rather far-fetched, but also that they stand in complete contradiction with the *current legal situation* in all countries of the world, with the exception maybe of the People’s Republic of China.<sup>33</sup>

As it has been pointed out above, the illegality of abortion still must be considered the rule, to which the legality (or exemption from prosecution) of abortion, under strictly circumscribed conditions, is the exception. The consequence of abortion being lawful (or exempt from prosecution) is that women having abortion, or medical practitioners performing it, °120° face no risk of criminal prosecution. But this does not allow concluding on an obligation of the state, and much less of third persons, to ensure the availability of abortions.

To clarify this point, it suffices to consider, instead of abortion, the case of another type of surgical intervention, for example that new kind of laser-coordinated eye surgery used to repair myopia or hyperopia. In spite of frequent

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<sup>32</sup> In that context, it should be noted that Pope John Paul II prohibited German Catholics to participate in the counselling system for women seeking lawful abortion, established by the German legislation. The law foresees that, in order for an abortion to be lawful, the pregnant woman must consult receive compulsory counselling from an agreed consultancy, on the implications of abortion and on alternative solutions. At the end of such a consultation, the counsellor issues a certificate which serves as a proof that the counselling has taken place, and thus constitutes a necessary condition for any abortion to become lawful. The prohibition for Catholics to participate in this kind of counselling was based on the rationale that issuing the required certificate would mean to cooperate in the abortion. A fortiori, the same would apply to medical practitioners referring a pregnant woman to a colleague willing to perform abortions.

<sup>33</sup> China has a national policy of coercive family planning, which aims to prevent women from giving birth to more than one child. This policy is enforced not only with financial sanctions, but also through coercive abortions. I may suppose that, in a country where women can be forced to undergo abortion, medical practitioners can be forced to perform it...

criticism voiced by certain experts regarding the risks associated with such interventions, there can be no doubt as to their lawfulness. Yet by no means does it follow that, because such surgery is legal, the state should be obliged to install the necessary facilities all over the country in order to make it easily available for everyone. Even less does it follow that individual medical practitioners are obliged to perform such surgery on any person requesting him to do so. A doctor, like any other professional, enjoys the contractual freedom which is at the very heart of both our legal and economic system.

It is true that among the generally recognised Human Rights there also is a “Right to Health”<sup>34</sup>. This, however, obliges only the state, not individual medical practitioners. And it only says that states have the obligation to adopt policies that are in the interest of their inhabitants, including policies conducive to the highest attainable standard of physical and mental health, without discrimination of any kind. It does not confer to individual persons a right to receive any specific medical counselling or treatment at the expense of the state. Even less does it contain an obligation for the state to provide for the availability of abortion, given that, as it has been pointed out, abortion is not a *therapy*, and certainly not an element of basic *healthcare*.

It is a precept of professional ethics that obliges medical practitioners to unconditionally provide treatment in cases of urgency, i.e. when there is an imminent threat for the health or the life of a person. A similar, but more general, obligation to provide help in cases of imminent danger applies also to any other person. The performance of abortion, however, can fall under this obligation only in cases where (1) abortion does have a “therapeutic” purpose and (2) the continuation of the pregnancy would pose the life of the woman under a serious threat that cannot be resolved in any other way. In all other cases, the obligation to co-operate in abortions which the EU Network intends to impose on medical practitioners would amount to nothing else than an *obligation to contract*, for which there seems to exist no legal basis whatsoever. Far from being an “international standard” or “emerging consensus”, such an obligation *does not exist anywhere in the world*.

It follows that the purpose of those conscience clauses allowing medical practitioners to refuse performing abortion (or other acts) on the grounds of conscientious objection is not to protect them against their potential clients (who, as has become clear, have in any case no power to compel them), but against their *employers*, i.e. the management of the hospitals or ambulatories in which they are employed. In a larger sense, they also impose obligations on the state, which, for example, must not include abortion, euthanasia, cloning etc. into the compulsory training schedule of those wishing to exercise a medical profession, or make the readiness to perform such acts a condition for being admitted to medical practice, or for getting a contract with the public health service. The objective of such provisions is to prevent any kind of discrimination against medical practitioners not wishing to perform abortions. This means in practice that a doctor applying for a vacant job in a hospital cannot be obliged (and must, in the course of the selection process, not be asked) to make any commitment that he will agree to perform abortions (or other acts covered by a

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<sup>34</sup> Cf., inter alia, the Universal Declaration of Human Rights, Article 25 and the International Covenant on Economic, Social and Cultural Rights, Articles 7, 11, and 12

conscience clause), but that he **°121°** remains free to invoke objections of conscience at any time, without being exposed to any sanction or disadvantage.<sup>35</sup>

## 2.5. In good faith?

From what has been said above, it follows clearly that a “Right to Abortion” does not - and cannot - exist. Such a “Right to Abortion” would not only be at variance with the moral precepts of all the major cultural traditions in the world, but also with the current legislation in practically all countries, including the EU Member States. Even less is there any basis for the conclusion that there is an obligation for the state, or of third persons, to *guarantee the availability* of abortion.

One could stop at this point if the Opinion issued by the EU Network could be considered an exceptional blunder, devoid of practical consequences, concocted by some academics isolated in their ivory tower. Yet the situation appears to be much worse than that. There are good reasons to believe that the Network has *intentionally* delivered this false “expertise”, and that, instead of defending a concept of “Human Rights” as it results from international law and is generally accepted, the Network actually tries to impose a *new* doctrine, assuming the role of an unofficial and unelected legislator.

These are, admittedly, very severe reproaches. How do I come to make them?

There are – at least – three reasons. One is that, as we have seen, the Network is blind on one eye, and overly sharp-sighted on the other one. It does not hesitate to enter into the most hypothetical and far-fetched assumptions, provided they lend support to the view it apparently had decided to adopt already before examining the issue, while discarding everything that might lead to different conclusions. In the Network’s view, the *assumption* that, in a country where laws on abortion are “too restrictive”, women *might* recur to illegal abortions, and that illegal abortions *might* be more dangerous than legal ones, and that therefore more women *might* die following the procedure than if it was legal, is (despite the fact that they themselves act in violation of the law) sufficient to evidence a violation of these women’s Right to Life, while the simple *fact* that each abortion kills an unborn child is not even worth mentioning. None of these assumptions are evidenced by any reliable data; instead, the Network prefers relying on vague estimates even where hard facts should be available.

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<sup>35</sup> This applies at least to medical practitioners and staff employed in state-run hospitals and ambulatories. In the same vein, it would be a clear violation of equal treatment principles (e.g. Directive 2000/78/EC) if a public healthcare system made the reimbursement of medical treatment provided by a medical practitioner depend on whether that practitioner is willing to practise abortions (or other acts covered by a conscience clause). There is, of course, some reason to doubt whether such equal treatment principles would apply in all their strictness to privately-run clinics *specializing* in the provision of abortions, where doctors applying for a job must be expected to know that they will be required little else than this. Yet, given that in the vast majority of cases abortions are not “lawful” (but just exempted from criminal prosecution), the establishment of such specialised institutions would raise some further questions. On the one hand, it would appear problematic to accept the existence of such establishments, which, in order to be economically viable, would commit unlawful acts on a commercial scale and with a lucrative purpose. On the other hand, if a clause in a labour contract obliging him, when requested, to practise abortions could be enforced against a medical practitioner, this would seem at odds with the general principle that a contractual obligation to commit unlawful acts can under no circumstance be enforced.

The second reason is the systematic use of manipulative language: abortion is a “*health service*”, pregnancy is an “*illness specific to women*”, terminating pregnancy means “*to restore reproductive health*”, asking a doctor to annihilate one’s own progeny is a “*reproductive right*”. Respecting a ban on abortion means to “*inflict inhuman and degrading treatment*” on women, respecting reasons of conscience is “*discrimination*” of those who do not have any conscience.<sup>36</sup> This kind of enlightened newspeak gives me the impression that the authors of the Opinion were intending to obfuscate reality rather than bringing it to light.

The third reason is that the Network’s reasoning consists of nothing but the selective and uncritical quotation of statements that, as it seems, happen to coincide with the Experts’ own ideology. The reader is led to believe that the statements and views referred in the Opinion are universally accepted (which they are not), and that no divergent views have ever been voiced (which also is not the case). The Network apparently has not even bothered to acquaint itself with the positions of the Slovak government or of the Holy See, which is the absolute minimum of what one would expect *independent* experts to do. Even more astounding, if not scandalous, is the fact that a large portion **°122°** of the Opinion is directly taken over from one written submission made by a radical pro-abortionist movement<sup>37</sup>, whereas no account at all is taken of the views of pro-life groups.<sup>38</sup>

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<sup>36</sup> These are but a few examples for the Network’s deceptive semantics, basically drawn from sections 2.3.1.3 and 2.3.1.4 supra. The absolute and unrivalled masterpiece of acrobatic dialectics is found on page 23 of the Opinion. Here, the Network first quotes Article 12(2)(a) of the International Covenant on Economic, Social and Cultural Rights, which, according to the relevant UN Committee, requires States to “*take measures for the reduction of the stillbirth rate and of infant mortality and for the healthy development of the child*”. In a second step, it quotes the same UN Committee as saying that this “*may be understood as requiring measures to improve ... sexual and reproductive health services... including access to family planning*”. In a third step, it says that “*reproductive health*” means “*the right to decide if and when to reproduce*”. From this, in several further steps, it concludes that States should “*refrain from limiting access to contraceptives and other means of maintaining sexual and reproductive health*” and “*from censoring, withholding or misrepresenting health-related information...*”. Despite not stating this overtly, the Network interprets such “*other means to maintain reproductive health*” to include abortion, and thus reaches the astounding conclusion that **legalising abortion is one of the remedies required for the reduction of the stillbirth rate and of infant mortality!** In other words: if children are killed before birth, this will prevent them from being stillborn or dying in infant age, as well as from suffering from any other unhealthy development. The cynicism and intellectual dishonesty of this reasoning is unprecedented and truly breathtaking: it is difficult to imagine any crime against humanity (the Holocaust and the GULAG included, the victims of which certainly have been prevented from dying a natural death...) that could not be justified with arguments of this strange kind. The saddening fact that the Network was able to build its argument on texts adopted by UN Committees, far from lending authority to the Network’s reasoning, undermines the credibility of the UN as a guardian of Human Rights.

<sup>37</sup> The movement at question is the “Center for Reproductive Rights” (cf. supra, Footnote 4). The paper from which the EU Expert Network draws its quotations is an amicus curiae brief submitted by the Center for Reproductive Rights to the ECHR in the above mentioned case *Tysi c vs. Poland*, Application 5410/03. Of that submission, two pages have been directly included into the Opinion, and six further pages have been added as an appendix. Given that, as we have noted above, the *Tysi c* case is unrelated to the issue of conscientious objection, it is all the more astonishing that this submission was quoted in such an extensive manner.

<sup>38</sup> Cf. p 4 of the Opinion: “*This opinion (...) benefited from the contributions of certain nongovernmental organisations (...). Still other non-governmental organisations submitted information to the Network for which the Network is particularly grateful.*” In fact, only *one single* submission appears to have received consideration: that of the “Center for Reproductive Rights”. It is not clear which other NGOs, if any, have been invited to submit information.

## 2.6. Two remarks concerning the mandate and modus operandi of the EU Network

By reading a legal opinion that is tainted with such enormous deficiencies and biases, one learns nothing about the subject of the study, but a lot about its authors and their sponsors. Apparently, the purpose pursued by the Network was not to provide an objective and impartial assessment on a complex issue, but to pass off as generally accepted doctrine something that, in fact, represents only the views of a small, but vociferous, lobby. Inevitably, this raises questions with regard to the legitimacy of this expert group. Even under normal circumstances, holding a position that allows exerting control over the interpretation of, and the public discourse on, Human Rights means to wield considerable political power. If, then, such a position is used to impose, on a continental scale, the novel socio-political ideas of a radical lobby group on an unsuspecting public, the providing of “expertise” surreptitiously turns into an unofficial, yet very efficient, way of law-making. It would by far exceed the scope of this article to comment, in this regard, on all and every institution having a say on Human Rights. Of course, the fact that the EU Network was able to draw support for its reasoning from documents adopted by certain UN Committees<sup>39</sup> shows that similar criticism could be addressed to these<sup>40</sup>. And, certainly, the role of certain NGOs would also require some examination. Yet this analysis concerns an Opinion published by the EU Network of Independent Experts in Fundamental Rights, and I therefore limit myself to examining the mandate, composition and functioning of this Network.

### 2.6.1. *A question of competence*

With regard to the composition and the mandate of the Network, information is available on the internet homepage of the European Commission<sup>41</sup>. According to that information, the Network has been set up by the Commission in 2002, following a recommendation in the European Parliament's report on the state of fundamental rights in the European Union.<sup>42</sup> The Network is composed of 25 Experts (one from each Member State) and a “*specialist for Justice and Home Affairs*”. In addition, the homepage mentions a coordinator and an assistant coordinator, both employed at the University of Louvain/Leuven (Belgium). The mandate of the Network comprises the drafting of an annual report of the state of fundamental rights in the European Union and its Member States, assessing the application of each of the rights set out in the European Union's Charter of Fundamental Rights. In addition, the Network, when requested, provides the Commission with

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<sup>39</sup> Notably the Human Rights Committee (cf. p. 17 of the Opinion), the Committee on the Elimination of Discrimination against Women (cf. p. 20), and the Committee on Economic, Social and Cultural Rights (cf. p. 23).

<sup>40</sup> For a more detailed analysis of the UN and the ideology it promotes see: Marguerite A. Peeters, *Hijacking Democracy: The Power Shift to the Unelected*, American Enterprise Institute Press (2002) (an updated version of this is available at [http://www.aci.org/docLib/20030103\\_hijackingdemocracy.pdf](http://www.aci.org/docLib/20030103_hijackingdemocracy.pdf)), Michel Schooyans, *La Face cachée de l'ONU*, (Paris, 2000)

<sup>41</sup> [http://europa.eu.int/comm/justice\\_home/cfr\\_cdf/index\\_en.htm#](http://europa.eu.int/comm/justice_home/cfr_cdf/index_en.htm#)

<sup>42</sup> *Report on the state of fundamental rights in the European Union (2000)*, 2000/2231(INI)

specific information and opinions on fundamental rights issues, and assists the Commission and the Parliament in developing European Union policy on fundamental rights.

The mandate of the Network must thus be seen in the context of the mandate of the Institutions that have set it up. This raises some questions. In the current state of affairs, the European Union as such has no, or at best very limited, competences in the Human Rights domain. By Article 6 (2) of the EU Treaty the Union *itself* is bound to respect fundamental rights – but this applies only to whatever action the EU takes within its own scope of competence. In no way does this provision confer to the EU a competence to monitor the application of fundamental rights by Member States in *their* scope of competence, or to **°123°** define a policy on fundamental rights to which all Member States must sign up. Article 7 of the EU Treaty foresees a specific procedure to be followed in the case of there being *a clear risk of a serious breach* by a Member State of fundamental rights. In that case, the *Council* can make appropriate recommendations and, if these are not followed, suspend certain of the rights deriving from the application of this Treaty to the Member State in question. This clause, however, applies only in the case of a *general disrespect* for fundamental rights and mandates an assessment of the *general political situation* in a country, the main purpose being to prevent the kind of rash and imprudent action that was taken in 2000 against the newly formed Austrian Government. The provision does not confer to either the Commission or the Parliament a competence to monitor any specific measures adopted by a Member State, if these fall outside the scope of the EU Treaty.

In addition, the EU Charter of Fundamental Rights, to which the mandate of the Network makes specific reference, has not yet entered into force. Being an integral part of the Constitutional Treaty that was rejected in popular votes in France and the Netherlands, it shares the fate of that Treaty. It is not clear why a Network of Experts assessing the application of the Charter is needed, if this Charter is, for the time being, a legal nothing.<sup>43</sup>

Against this background, it seems rather uncertain whether there is any valid legal base for the current mandate of the Network. Of course, the EU Institutions must (and do) have the right to procure whatever expertise they may find necessary for the fulfilment of their various tasks, including through a standing experts' network. And of course the EU Institutions may, in view of some of their tasks (for example, foreign policy or negotiations on enlargement, for which respect of human rights is an important criterion), require expertise on

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<sup>43</sup> The Charter was signed and proclaimed by the Presidents of the European Parliament, the Council and the Commission at the European Council meeting in Nice on 7 December 2000. This, however, corresponds neither to any of the law-making procedures foreseen in the EU Treaty and used to adopt measures secondary Community Law (Regulations, Directives, Decisions), nor does it suffice to comply with the domestic rules applied by EU Member States when signing up to an international treaty. The signature of the Charter was therefore a solemnity of symbolic value, while in a purely legal perspective the Charter must continue to be considered a nonentity. This will change only if and when the Charter, in one way or the other, is incorporated into the primary law of the EU.

fundamental rights issues. But what authorises them to commission expert opinions on issues that stand in no context at all with what the EU Treaty stipulates as their field of activity – for example, the conclusion of concordats by Member States? Was there any reason for believing that, in the case at question here, Slovakia was engaged in committing *a serious breach* of fundamental rights as set out in Article 7 of the EU Treaty? Why, then, was the procedure set out in that article not followed? In the absence of answers to these questions, it seems that the Network of Experts is flying in the legal vacuum.

#### 2.6.2. *The functioning of the Network*

If the Institutions of the EU, in matters that (contrary to the conclusion of concordats by Member States) fall within their competence as set out by the EU Treaty, face a need for expertise in the field of Human Rights not available in-house, the question remains how this should be procured.

Without doubt, the best solution would be to entertain an intensive and open exchange with academics and with civil society. Obtaining expertise, in that context, would mean to become acquainted with *all* relevant points of view with regard to a specific issue, and with *all* arguments speaking against and in favour of each of them. This expertise would allow the political institutions to make the best available decision. Even if the members of a standing Network of Experts may indeed be renowned experts, the organisational dependence of political institutions like the European Commission and the European Parliament inevitably leads to their mandate acquiring somewhat of a political taste.<sup>44</sup> It simply cannot be considered conducive to expertise of high quality if a small number of scholars is granted a specific and exclusive status of politically certified “experts”, to whom alone the political institutions will listen. In the long run, this clearly risks leading to the **°124°** monopolisation of the debate by a small, but immensely powerful, oligarchy of experts which will begin with filtering out, and end up with remaining fully unaware, of any facts and views that do not coincide with their own prejudices. Or to put it in other words: the political institutions, when listening to such “experts”, are listening to themselves. As we have seen, the Opinion of the EU Network discussed above provides a telling example for the risk of such intellectual self-confinement.

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<sup>44</sup> The name given to the Network suggests that the members of the Network are „independent“. No information, however, is made available to the public as to what exactly this means. One can guess that independence could mean that the opinions expressed by the experts do not necessarily reflect those of the European Commission, the European Parliament, or of the governments of their respective countries. Yet it is unclear by whom, and on the basis of which criteria, the experts have been selected – was there an open tendering procedure, or have they been nominated by Member States? Have the Experts been freely selected by the Commission or the Parliament (maybe after consultation with NGOs such as the “Center for Reproductive Rights” or “Catholics for a Free Choice”?), or do they themselves decide who is co-opted into their Network? Also, it remains unclear under which circumstances and following which procedure an expert can be excluded from the Network. Last but not least, it is unclear how the experts are remunerated.

In addition, it is not even clear whether the views and opinions of the Network are shared by all of its members, or whether (and between which positions) they represent a compromise. If the Network was a law court or a political institution, with its authority directly derived from the institutional context, one could see some justification for the application of a principle of collegiality, obliging all members to stand behind the Network's position. The credibility of an experts' opinion, by contrast, is impaired if that opinion is, in fact, attributable to no one or if, in some way or the other, opinions that are not shared by all members of the network, are passed off as unanimous views. This was precisely what happened in the case of Opinion 4.2005 on conscience clauses in concordats. Following the publication of the Opinion, Bruno Nascimbene, the Italian member of the Network, made a public statement<sup>45</sup> in which he expressed his "*perplexity and dissent*" with regard to the contents of the Opinion, which he characterised as "*preposterous*". "*No reasonable person*", Nascimbene said, "*can think that, in a society inspired by the values of freedom and western democracy, doctors and nurses who consider abortion to be homicide can be obliged to practise it. If a gap is broken into the freedom of conscience, we may be heading down a very dangerous lane...*"<sup>46</sup> He went on saying that he had not been consulted on the Opinion and that, had he been consulted, he would not have agreed to it.

So we have at least one member of the Network saying that the position adopted by the Network can be shared by "*no reasonable person*". This raises some questions with the internal *modus operandi* of the Network. According to one account, the text of Opinion 4.2005 was drafted by the President of the Network, Prof. Olivier De Schutter alone, while the other members of the Network were only allowed to provide factual information on how the matter of conscientious objection was dealt with in the legislation of their respective countries – but they were neither informed about the position the Opinion was going to take, nor had they any possibility to oppose it<sup>47</sup>. It thus seems that not only the concept of "Human Rights" has been hijacked by the EU Network of Experts, but that the Network itself has been hijacked by one single of its members. This, together with the great influence a radical pro-abortion group seems to exert over the mind of this member of the Network, makes me believe that the European Commission should dissolve the Network as quickly as possible.<sup>48</sup>

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<sup>45</sup> An extract of this statement (in Italian) was published in Newsletter 12/2006 of the *Centro Europeo di Studi su Popolazione, Ambiente e Sviluppo* (CESPAS). It is available on the internet at [www.cespas.org](http://www.cespas.org)

<sup>46</sup> "...nessuna persona ragionevole può pensare che in una società ispirata ai valori della libertà e della democrazia occidentale si possano obbligare medici, infermieri, anestesisti che ritengono che l'aborto sia un omicidio a praticarlo. Se si crea una breccia nella libertà di coscienza si può imboccare una strada molto pericolosa."

<sup>47</sup> CESPAS-Newsletter 11/2006, [www.cespas.org](http://www.cespas.org). While I am not able to ascertain the veracity of this account, I do believe there is a need for Mr. De Schutter and all the other members of the Network to explain in full detail how the text of the Opinion was drafted, who was consulted and who was not. In the Opinion itself, it is mentioned that a draft was discussed at a meeting of the Network on 17 October 2005.

<sup>48</sup> The political mandate of the Network had been limited to a 4 years period ending in September 2006. So, far, this mandate has not been renewed. It remains unclear whether a new mandate will be given to the Network, especially given that the new EU Fundamental Rights Agency (FRA, seated in Vienna) has been

### 3. “BLIND WOMAN DENIED ACCESS TO LEGAL ABORTION” – THE TYSIAĆ CASE

#### 3.1. The facts of the case

I should begin my comments on the case of Alicja Tysić against Poland<sup>49</sup> by saying that, regrettably, the coverage of the mass media has given misleading, if not completely false, accounts about the merits of the Decision, as well as of the facts underlying it. Even reputed newspapers such as the Guardian<sup>50</sup> or the Frankfurter Allgemeine Zeitung<sup>51</sup> reported that Poland had been condemned by the ECHR because Mrs. Tysić had been <sup>o</sup>125<sup>o</sup> denied access to abortion despite the fact that, in her case, abortion would have been lawful even under the restrictive provisions of the relevant Polish legislation and that, due to this, she had suffered a severe deterioration of her eyesight.<sup>52</sup> The EU Network of Experts on Fundamental Rights even (erroneously) quoted the case as a lead case evidencing the nefarious effects of “*religious conscientious objection*” in cases where they are lawful.<sup>53</sup>

Whoever makes the effort of reading the Decision itself (and the statement of facts contained therein, which, I trust, is accurate), will find that the facts were somewhat different.

Mrs. Alicja Tysić is a Polish woman born in 1971. She suffers from a severe impairment of her eyesight. When in 2000 she became pregnant with her third child (the first two having both been delivered by caesarean section), she was worried that, under the strain caused by a third delivery, her eyesight could further deteriorate. She therefore decided to consult her doctors. She was examined by three different ophthalmologists, who all concurred in the view that due to pathological changes in the applicant's retina, the pregnancy and delivery did constitute a risk to her eyesight. However, all three refused to issue a certificate for the pregnancy to be terminated, despite the applicant's requests, because they did not believe that there was no other way to avoid the health risk, which, in addition, they did not consider severe enough to justify an abortion. Not happy with this assessment, Mrs Tysić sought further medical advice from a general practitioner, who, at her request, issued a certificate stating that the third pregnancy constituted a threat to Mrs. Tysić's health as there was a risk of rupture of the uterus, given her two previous deliveries by caesarean section.

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set up in the meantime and seems to fulfil similar tasks. Regrettably, there is not much reason for expecting that the expertise delivered by the new agency will be much different from the output of the Network. Cf. Gabriel Toggenburg, Die Grundrechteagentur der Europäischen Union, MenschenRechtsMagazin 1/2007, p.86

<sup>49</sup> European Court of Human Rights, Judgment in the case of Alicja Tysić against Poland (Application 5410/03, 20 March 2007, hereinafter referred to as “the Decision”)

<sup>50</sup> *Court censures Poland for denying abortion rights* - The Guardian, 21 March 2007

<sup>51</sup> *Legale Abtreibung verweigert: Der Fall Alicja Tysić* – Frankfurter Allgemeine Zeitung, 17 April 2007, p.33

<sup>52</sup> The same incorrect account was given by the notorious “Center for Reproductive Rights” in its press release on the case, speaking of “*a woman who nearly went blind because she was forced to carry to end a pregnancy that threatened her health*”.

<sup>53</sup> Cf. supra (2.3.1.2)

Mrs Tysi c understood that on the basis of this certificate she would be able to terminate her pregnancy lawfully<sup>54</sup>. She therefore contacted a state hospital, the Clinic of Gynaecology and Obstetrics in Warsaw, in the area to which she was assigned on the basis of her residence, with a view to obtaining the termination of her pregnancy. There she was examined by the head of the Gynaecology and Obstetrics Department of the Clinic, Dr. D. However, when Mrs. Tysi c exhibited the certificate issued by her general practitioner, Dr. D told her that in his view there was no risk for a further deterioration of her eyesight if she delivered through caesarean section (which, according to him, was no problem), and that the conditions to terminate her pregnancy lawfully were not met. He took the certificate and invalidated it by writing a note on its back in which he stated his reasons for not performing the requested abortion. This note was co-signed by an endocrinologist who had also been consulted.

Mrs Tysi c did not make any further efforts to have her pregnancy terminated. In November 2000, she delivered the child by caesarean section. Today, the child is seven years old and in good health. However, six weeks after the delivery, Mrs Tysi c suffered a sudden deterioration of her eyesight, which she imputed on the fact that her pregnancy had not been interrupted. She therefore lodged a criminal complaint against Dr D., alleging that he had inflicted grievous bodily harm on her by preventing her from having access to abortion. The prosecutor investigating the case heard evidence from the ophthalmologists who had examined the applicant during her pregnancy. Moreover, he requested the preparation of an expert report by a panel of three medical experts (ophthalmologist, gynaecologist and specialist in forensic medicine). The *unanimous* opinion of all these medical experts was that Mrs. Tysi c's pregnancies and deliveries had *not* affected the deterioration of her eyesight. The prosecutor therefore decided to discontinue the investigation. This decision was appealed against by Mrs. Tysi c, but upheld by the Warsaw Regional Prosecutor and, later on, by the Warsaw- r dmie cie District Court. Furthermore, Mrs. Tysi c attempted to bring disciplinary proceedings against Dr D. However, ** 126 ** those proceedings were finally discontinued, the competent authorities of the Chamber of Physicians finding that there had been no professional negligence.

### 3.2. The Decision by the ECHR

Not satisfied with this outcome, Mrs. Tysi c filed an application with the ECHR, alleging that there had been a violation of Articles 3, 8, 13 and 14 of the European Convention on Human Rights. While the Court dismissed the complaint with regard to the alleged violation of Articles 3, 13 and 14, it found Poland guilty of having violated Article 8 of the Convention, i.e. the applicant's Right to Respect for her Private Life.

According to the Court, the Right to Respect for Private life was violated because the applicant, whose *"fears cannot said to have been irrational"*<sup>55</sup>, had *"suffered severe distress and anguish when contemplating the possible negative consequences of her pregnancy and upcoming delivery for her health"* in a *"situation of prolonged uncertainty"* as a

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<sup>54</sup> cf. Law of 7 January 1993 on Family Planning, the Protection of Human Embryos and the Conditions for Lawful Abortion, Article 4 (a)(1)(1): *"An abortion can be carried out only by a physician where ... pregnancy endangers the mother's life or health"*

<sup>55</sup> cf. par 119 of the Decision

consequence of the relevant Polish legislation not foreseeing “any effective mechanisms capable of determining whether the conditions for obtaining a lawful abortion had been met in her case”<sup>56</sup>. The procedure for obtaining a lawful abortion (as set out in an Ordinance of the Ministry of Health) was not sufficient to safeguard the applicant’s rights because it “does not provide for any particular procedural framework” allowing to address a “disagreement (...) between the pregnant woman and her doctors, or between the doctors themselves”<sup>57</sup>. In other words: the Court did not find that Dr. D.’s refusal to perform an abortion was unlawful – but it criticises that there was no procedure available to overturn it.

The Polish government has announced its intention to file an appeal against this Decision to the Grand Chamber of the ECHR: The case is therefore still pending.

### 3.3. A Brief Comment

The Tysi c Decision definitely looks like an attempt to promulgate a full-fledged “Right to Abortion” – not openly, but through the backdoor. Despite asserting that the Court’s task “is not to examine whether the Convention guarantees a right to have an abortion”<sup>58</sup>, the formal requirements imposed on legislators wishing to foresee legal restrictions to abortion are so far-reaching that any regulation other than one granting unrestricted access to abortion becomes technically impossible. Thus, the Decision does something different than it pretends to. It is difficult to believe that this is the meaning the authors of the Convention attributed to Article 8 when they drafted it in 1950.

Given the facts of the case, it is not possible to argue that Dr. D’s assessment (according which the legal conditions for “therapeutic” abortion were not met) had been wrong. Indeed, as one of the Judges, Javier Borrego Borrego pointed out in his Dissenting Opinion, “before the delivery, five experts (three ophthalmologists, one gynaecologist and one endocrinologist) did not think that the woman’s health might be threatened by the pregnancy and the delivery. After the delivery, the three ophthalmologists and a panel of three medical experts (ophthalmologist, gynaecologist and forensic pathologist) concluded that ‘the applicant’s pregnancies and deliveries had not affected the deterioration of her eyesight’”<sup>59</sup>. ¶127° Against this background, the Court’s observation “that a disagreement arose between [the applicant’s] doctors”<sup>60</sup> requires some clarification: “On the one hand, eight specialists unanimously declared that they had not found any threat or any link between the pregnancy and delivery and the deterioration of the applicant’s eyesight. On the other hand, a general practitioner issued a certificate as if she were an expert in three medical specialities: gynaecology, ophthalmology and psychiatry, and in a totum revolutum, advised abortion”<sup>61</sup>.

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<sup>56</sup> cf. par 124 of the Decision

<sup>57</sup> cf. par 121 of the Decision

<sup>58</sup> cf. par 104 of the Decision

<sup>59</sup> Dissenting Opinion of Judge Borrego Borrego, par 10

<sup>60</sup> cf. par 119 of the Decision

<sup>61</sup> Borrego Borrego, par 10

In this situation, it remains completely obscure how a “*particular procedural framework*” to review the gynaecologist’s assessment could ever have led to the applicant getting access to “*lawful abortion*”. At best, such procedure would have not put an end, but further prolonged the “*prolonged uncertainty*”<sup>62</sup> and the “*severe distress*” suffered by the applicant. In addition, contrary to the Court’s findings, there *was* a “review procedure”: the gynaecologist and the endocrinologist reviewed the assessment made by the general practitioner - and overruled it. Thus I wonder whether the Court’s concern over the unavailability of a review procedure is not, in fact, a regret over the *availability* of such a procedure in Polish law.

What would a review procedure have to look like in order to satisfy the ECHR? Apparently, it must be one where the assessment of one single general practitioner suffices to overrule the opinions of eight specialists. It must be one where only decisions adverse to “therapeutic abortion” can be reviewed, whereas the decision that abortion would be licit cannot. It must be a procedure guaranteeing that the subjective “fears”, “distress” and “anguish” of a pregnant woman, even if unfounded, outweigh the right to life of her child. I fail to see how such a procedure could be established in any other way than by allowing abortion on demand, i.e. without any restriction and during the whole term of pregnancy. This, it appears, is the law the ECHR is attempting to impose on the Signatory States of the Convention, even if it avoids to openly say so<sup>63</sup>.

Remarkably, the Court did not even try to explain how all this follows from Article 8 of the Convention. The Decision only contains a brief summary of “General Principles” that, in previous case law, have been extrapolated from Article 8: the individual must be “*protected against arbitrary interference by public authorities*”; any interference must therefore be “*in accordance with the law*” and “*necessary in a democratic society*”. It is also mentioned that “*there may also be positive obligations*” for a State to protect the respect for private life (but these obligations are not explained in detail). Furthermore, it is said that “*the boundaries between the State’s positive and negative obligations do not lend themselves to precise definition*” (sic!) and that the “*notion of ‘respect’ [for private life] is not clear-cut*” (sic!). Finally, it is observed that “*the Convention is intended to guarantee not rights that are theoretical or illusory, but rights that are practical and effective*”<sup>64</sup>. Yet in the entire text of the Decision there is absolutely no explanation how all these principles (which, with all due respect, seem rather commonplace) relate to the concrete case of Mrs Tysi c: neither is it shown that the doctors refusal to perform an abortion was arbitrary, nor that it was contrary to the law, nor that it was not necessary in a democratic society to protect the life of an unborn child. The Court simply has failed to establish any link between the facts and the law.

I suppose that young Julia Tysi c, the applicant’s daughter, must be very glad that the “procedural framework” requested by the Court, was not in place at the

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<sup>62</sup> It is indeed totally unclear what the Court means by this “prolonged uncertainty”. If the uncertainty was about whether abortion was lawful in the specific case, it would certainly be inappropriate to give the blame to the gynaecologist who, without unnecessary delay, made a decision that was in full compliance with the law. Also, it is not clear, how and by whom this uncertainty was “prolonged”.

<sup>63</sup> In the same sense Borrego Borrego, par 13

<sup>64</sup> cf. par 109 – 113 of the Decision

time when her <sup>°128°</sup> mother was pregnant. So must many other Polish children whose mothers, due to what the Court calls a violation of the European Convention on Human Rights, had no access to abortion.

#### 4. HUMAN RIGHTS FALLEN IN DECADENCE

Who can deny that the concept of Human Rights is in a deep crisis today? This crisis is characterised not by a lack of institutions and NGOs militating for (or paying lip-service to) the respect of Human Rights, but by the fact that Human-Rights-related vocabulary is nowadays used by whoever wants to push through a political agenda. At times, the agenda is questionable, and so are the lobbies behind them, even if they talk a lot about Human Rights. In the name of Human Rights, wars are waged, weapons are produced and sold, and ... children are killed in their mothers' wombs.

The decadence into which Human rights have fallen is attributable to an increasing estrangement between modern Human-Rights-talk and the perennial insights of moral philosophy, including classical (graeco-roman) and Christian thought as well as the philosophy of the era of Enlightenment. There is no common understanding of Human Rights any more, which, in turn makes it possible to manipulate them. Today's innovators, while claiming to fight for the good cause of "enlightenment", use obscure and dishonest strategies to attain their objective. They have made a habit of using manipulative and misleading language, obfuscating and denying reality, inventing and distorting statistics, putting subjective sentiments in the place of objective facts. Their talking and writing is not characterised by transparency, but by falsehood, mimicry and waffle; like all hypocrites, they hide their true intentions. Instead of saying that *they want* to impose new laws (like "abortion on demand", or "gay marriage") on society, they pretend that International Law *obliges them* to do so, and that the new laws they are making represent the true and original sense of the relevant Conventions, which, for unclear reasons, has remained hidden until today. Their reading of the law is based neither on a consistent theory of natural law (which they oppose as a matter of principle), nor on a strict reliance on the wording of the provisions at question (which would also, in most cases, not lend any support to the conclusions they want to reach). Indeed, they make up their methodology according to their needs: they do not hesitate to use the most temerarious syllogisms if they believe it might help them in promoting their ideology, they silently pass over the clear wording of the law if it stands in their way. There is a serious risk that they will transform their false concept of Human Rights into a vehicle of political power, placing their partisans in relevant UN Committees or EU Expert Networks, only to pass off their extravagant and novel inventions as the newest "*emerging consensus*" on Human Rights.

Of course, the problem is at least in part institutional. The Tysi c Decision does raise serious questions with regard to the institutional role of the ECHR, the selection and training of its Judges, and their philosophical backgrounds, just as Opinion 4.2005 on Conscience Clauses in Concordats raises questions regarding the EU Network of Experts. While the Network, if dissolved, would probably not be missed by anyone, the ECHR cannot simply be done without. But the ECHR, too, needs to undergo reform if it wants to retain the respect and confidence of citizens.

Rather than institutional, however, the crisis is civilisational. If our society was not so oblivious of its own roots, it would never accept the theories of today's innovators on what <sup>°129°</sup> is, and what is not, to be considered a Human Right. In order to defend Human Rights against such distortion, we urgently must recall to our conscience that

they have their roots in the doctrine of Natural Law, and that whatever has no such roots cannot be a Human Right. As Cicero wrote more than 2000 years ago:

*“The true law is determined by right reason. It is congruent with nature, omnipresent, constant and eternal .... There is no exemption from this law, nor can it be abrogated in part or as a whole, nor can the senate nor a popular vote absolve us from it. It is not necessary to ask Sextus Aelius for an interpretation or explanation of this law, nor will there be one law in Rome and another in Athens, one law now and another one later on. All nations will at all times stand under this single, eternal, immutable law.”*<sup>65</sup>

If “Human Rights” are something else than an arbitrary human invention that, at any time, can be replaced by another arbitrary human invention, then we can be sure that abortion will never be a “Human Right”, but the contrary of one. Regrettably, however, the novel doctrines promoted by certain pressure groups certainly have the effect of bringing respectable institutions, such as the UN, the EU, the ECHR and the European Convention on Human Rights, and even the concept of “Human Rights” in its entirety, into discredit. The “Right to Abortion” was certainly not among the rights Polish or Slovak dissidents were striving for when they risked their freedom and their lives in their fight to free their countries from communist rule. Indeed, if abortion is a Human Right, then the Soviet Union, which in 1923 was the first country in the world to legalise it, must have been a real *champion* of Human Rights, and all those dissidents must have erred when they refused to gladly submit to such benevolent rule. Who can be surprised, then, at the deep distrust Poland has expressed with regard to the new EU Charter on Fundamental Rights, stating in a Declaration<sup>66</sup> that according to the interpretation it intends giving to the Charter, the latter “*does not affect in any way the right of Member States to legislate in the sphere of public morality, family law, as well as the protection of human dignity and respect for human physical and moral integrity*”? Who can be surprised at the increasing distrust many Europeans express with regard to the EU, when institutions such as the ECHR (or semi-official institutions such as the EU Network of Experts) are assuming the role of supreme law-makers? And who can be surprised when EU policy on human rights has no credibility, or when western criticism on not respecting human rights is laughed off by many countries?

We seem to have handed over too much power to self-styled “human rights experts”. It was naïve to believe they were not going to abuse it.

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<sup>65</sup> De re publica, III, 22/33: *Est quidem vera lex recta ratio, naturae congruens, diffusa in omnis, constans, sempiterna (...)* *Huic legi nec obrogari fas est, neque derogari aliquid ex hac licet, neque tota abrogari potest, nec vero aut per senatum aut per populum solvi hac lege possumus, neque est quaerendus explanator aut interpres Sextus Aelius, nec erit alia lex Romae alia Athenis, alia nunc alia posthac, sed et omnes gentes et omni tempore una lex et sempiterna et immutabilis continebit.*

<sup>66</sup> Conference of the Representatives of the Governments of the Member States of the EU, Document CIG 3/07 (Note of the Presidency, dated 23 July 2007), page 63