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Strasbourg, 29 January 2021

Subject: ***Amicus curiae*** **brief**
Case no. III/01838/2020, introduced in October 2020

Mr. President,

On behalf of the *European Centre for Law and Justice* (ECLJ), I have the honour to submit to you our *amicus curiae* brief in the above-mentioned case.

We thank the Court for giving us the opportunity to submit these observations and hope that they will be of assistance to the Court.

Sincerely yours,

AMICUS CURIAE BRIEF

submitted to the Constitutional Court of Hungary

in the case no. III/01838/2020

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January 2021

CENTRE EUROPÉEN POUR LA JUSTICE ET LES DROITS DE L'HOMME

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Introduction

Facts and procedure

On 15 October 2020, the Budapest-Capital Regional Court filed a judicial initiative to the Hungarian Constitutional Court (N° III/01838/2020), regarding a lawsuit in a tort law case. In the lawsuit, the parents of a disabled child (the plaintiff) sued a hospital (the defendant) for damages and compensation for a "wrongful birth" of their child, who had a congenital disorder.

To decide on the case, the Budapest-Capital Regional Court had to apply a provision that it finds unconstitutional. The case not only consists of a civil law issue and a matter of evidence, but also became a constitutional matter. That is why the Budapest-Capital Regional Court seeks the position of the Constitutional Court about the conformity of this rule with the Constitution, which suspends the lawsuit.

The provision at the heart of this case is that of Hungary's Act LXXIX of 1992 ("Act LXXIX") on the Protection of Fetal Life provides that the pregnancy can be terminated until the 20th week (or the 24th week in case of prolonged diagnostical procedure) if the probability for a genetic or teratological harm of the foetus is above 50%.

According to the Budapest-Capital Regional Court, this provision is unconstitutional. Indeed, the Fundamental Law of Hungary provides that "*Every human being shall have the right to life and human dignity; the life of the foetus shall be protected from the moment of conception*" (Article II). That is why the Court argues that the foetus should be provided with the same rights as any other person. With Act LXXIX, the legislative body had not provided the right amount of protection to the foetus.

Issue raised by the case

Is Act LXXIX unconstitutional, as the Budapest-Capital Regional Court explained? The question will be at the heart of the Constitutional Court judgment.

This issue amounts to the following question: is eugenic abortion, based on a 50% chance of having a child with a disability, compatible with the protection of the life of the foetus from the moment of conception?

Common sense implies that the answer be no. The life of the foetus depends on the pregnancy, so terminating the pregnancy does not protect the life of the foetus. Put most simply, killing a foetus cannot be the way of protecting his or her life. It is a question of basic logical reasoning.

Act LXXIX is thus unconstitutional and should be replaced by a ban of eugenic abortion.

Aim of this *amicus brief*

The European Centre for Law and Justice (ECLJ), as an international NGO dedicated to the promotion and protection of Human Rights in Europe, has been authorized to submit an *amicus curiae* brief to the Hungarian Constitutional Court. The ECLJ wishes to present to the Court elements of European and International law allowing for a comprehensive analysis of the issue at stake,

considering that Hungary, as a State ruled by law, "*shall ensure that Hungarian law is in conformity with international law*" (Article Q § 2 of the Fundamental Law).

This brief demonstrates that Human Rights Law does not create any right to abortion (I) and prohibits eugenic abortion (II). This statement is true both for the European and for the United Nations conventional systems.

I- Abortion and Human Rights Law

1. The protection of prenatal human life

The international Human Rights instruments recognize the protection of life as a primary right[1] and do not exclude explicitly children before birth from the protection of this right.

The European Convention of Human Rights contains no *ratione temporis* limitation on the scope of the right to life (Article 2): it protects everyone.[2] The European Court of Human Rights (ECHR) itself has never redefined (as to reduce) the scope of Article 2: it has never excluded in principle prenatal life (nor the end of life) from its field of application.[3]

The Court allows the States to determine the starting point of the right to life in their internal legal order and has never judged that, under the scope of article 2 of the Convention, the unborn child was not a person. The Court has always refused, ever since the cases *Brüggemann and Scheuten v. Federal Republic of Germany*[4] and H. v. Norway,[5] to exclude, as a matter of principle, the unborn child from the scope of the protection of the Convention and to declare that he is not a person in the regard of article 2 of the Convention. Here is a subtlety that needs to be made clear to understand well the articulation between national and conventional orders: the Court allows the States to not give, in their nation law, a total protection *rationae temporis* to prenatal life, but in the conventional order, the Court does not deprive prenatal life from any protection, for, contrary to national laws which allow abortion up to a certain point, "*Article 2 of the Convention is silent as to the temporal limitations of the right to life*"[6] and the Court never judged that the unborn child was not a person. Had the Convention not protected prenatal life, there would be no point in recognising a margin of appreciation to the States, for every margin is necessarily referring to a pre-existing obligation. Indeed

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[1] The United States Declaration of Independence 1776, the Universal Declaration of Human Rights 1948, the International Covenant on Civil and Political Rights 1966, the United Nations Declaration of the Rights of the Child 1959, the Convention on the Rights of the Child 1989, the Declaration of the Rights and Duties of Man 1948, the African Charter on Human and Peoples Rights1981, the American Convention on Human Rights 1969, the Declaration of Human Rights in Islam, 1990.

[2] *Pretty v. UK*, No. 2346/02, Judgment of 29April 2002, § 39; This is confirmed by the Consultative Assembly's preparatory work in 1949, which clearly shows that these are rights that one enjoys just because one exists: "*the Committee of Ministers has asked us to establish a list of rights which man, as a human being, would naturally enjoy*". Preparatory work, vol. II, p. 89.

[3] *Boso v. Italy*, No. 50490/99, decision of 5 September 2002: "*In the Court's opinion, such provisions strike a fair balance between, on the one hand, the need to ensure protection of the foetus and, on the other, the woman's interests*" "and *Vo v. France*, No. 53924/00, [GC], Judgment of July 8, 2004, § § 86 and 95 "*the unborn child's lack of a clear legal status does not necessarily deprive it of all protection under French law. However, in the circumstances of the present case, the life of the foetus was intimately connected with that of the mother and could be protected through her"* and *"even assuming that Article 2 was applicable in the instant case (see No. 85 above), there has been no violation of Article 2 of the Convention*".

[4] *Brüggemann and Scheuten v. Federal Republic of Germany*, No. 6959/75, Report of the Commission, 12 July 1977, § 60.

[5] H. v. Norway, No. 17004/90, Decision of inadmissibility of the former Commission of 19 May 1992, p. 167 (hereinafter *H. v. Norway.)*

[6] *Vo v. France*, [GC], No. 53924/00, 8 July 2004, (hereinafter *Vo v. France*) No. 75.

the Court does not declare unfounded the requests that invoke Article 2 for the benefit of stillborn babies.[7]

In *Vo v. France* the Grand Chamber[8] stressed that "*it may be regarded as common ground between States that the embryo/foetus belongs to the human race*" and that the "*potentiality of that being and its capacity to become a person ... require[s] protection in the name of human dignity*".[9] Therefore, for the Court, it can be "*legitimate for a State to choose to consider the unborn to be such a person and to aim to protect that life*".[10] This determination is initially a question of fact: the determination of the beginning of life.[11]

The Grand Chamber of the European Court of Justice (ECJ), in *Oliver Brüstle v. Greenpeace eV* (C 34/10), went further. It decided on 18 October 2011 to define the embryo as follows: "*every human ova must, from the stage of fertilization, be considered a "human embryo" (...), since this fertilization is likely to trigger the development process of a human being*"(§ 35). In this case, the ECJ has clearly established the principle of the legal protection of dignity and integrity of the human embryo.

International law also protects human prenatal life. The Convention on the Rights of the Child of 20 November 1989 recalls the principle according to which "*the child, because of his lack of physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as after birth*."

2. Abortion is not a right but a violation of, or a derogation to the right to life

The potential applicability of Article 2 to prenatal life is an obstacle in particular that abortion becomes an autonomous conventional right. Indeed, the question of the status of the unborn child affects necessarily those of abortion and the rights of the embryo. The Grand Chamber infers that link when it states that "*the margin of appreciation accorded to a State's protection of the unborn necessarily translates into a margin of appreciation for that State as to how it balances the conflicting rights of the mother.*"[12] Then it is logical that "*It follows that, even if it appears from the national laws referred to that most Contracting Parties [allow…] abortion, this consensus cannot be a decisive factor in the Court's examination […] notwithstanding an evolutive interpretation of the Convention*" (§ 237) This "consensus" in favour of allowing abortion does not solve the distinct and previous issue of the legal status of the unborn child that falls within the internal order and on which, however, there would be no consensus for the Court.

Moreover, this absence of a right to abortion under the Convention is perfectly established and accepted by the very people who want such a right to be established[13]. Along its jurisprudence, the Court detailed that the Convention does not guarantee a right to undergo an abortion[14] nor a right to practise[15] it, nor even a right to contribute with impunity to its being practised abroad.[16] Finally, the

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[7] *Mehmet Şentürk and Bekir Şentürk v. Turkey*, No. 13423/09, 9 April 2013, § 107
[8] *Vo v. France*, No. 85.
[9] *Idem.*
[10] *A. B. C.*, §No. 222, confirms *Vo*.
[11] Laurent Sermet, « Le droit de l'enfant à naître et la Convention européenne des droits de l'homme », in Joël Benoît d'Onorio, *Le respect de la vie en droit français,* Tequi, p. 170.
[12] *A. B. C.,* § 237.
[13] Ch. Zampas and J. M. Gher, "Abortion as a Human Right —International and Regional Standards", *Human Rights Law Review,* 8:2(2008), p. 287; D. Fenwick, "The modern abortion jurisprudence under Article 8 of the ECHR", *Medical Law International,* 2012 12, 249, 2013, p. 263.
[14] *Silva Monteiro Martins Ribeiro v. Portugal*, No. 16471/02, Dec., 26 Oct. 2004.
[15] *Jean-Jacques Amy v. Belgique,* No. 11684/85, 5 Oct. 1988.
[16] *Jerzy Tokarczyk v. Pologne*, No. 51792/99, Dec., 31 Jan. 2002

prohibition of abortion itself by a State does not violate the Convention.[17] As regards the autonomy of the woman, whose respect is guaranteed by article 8 relating to the protection of private life, the Court repeated, since the *A. B. and C. v. Ireland*[18] case that "*Article 8 cannot, [...] be interpreted as conferring a right to abortion*".[19]
In addition, in some countries, such as Germany, abortion remains formally illegal and is only allowed in respect of certain conditions. In this case, the Court held that such tolerance does not amount to an authorization granted by law nor an internal "right" which could be invoked before the Court.[20]

In international law, there is no "*right to abortion*" or "*sexual and reproductive rights*." On 23 September 2019, on the occasion of the United Nations' General Assembly, 19 States, including Hungary, made a joint statement to remind this.[21]

3. State's obligation regarding abortion

Abortion is not reduced to a confrontation between the rights of the mother and those of the preborn child. As the Court has repeatedly stressed "*whenever a woman is pregnant, her private life becomes closely connected with the developing fœtus*".[22] In fact, "*the pregnancy cannot be regarded as relating solely to the sphere of private life*"[23] of women, and "*Article 8.1 cannot be interpreted as meaning that pregnancy and abortion are, in principle, only a matter within the mother's private life*."[24]
In the process of the State's appreciation of the various legitimate interests, a fundamental right, such as the right to life, cannot be subordinated or put on the same level as a right which is not guaranteed by the European Convention.[25] The ECtHR has already had the opportunity to identify a number of fundamental rights and "*legitimate interests involved*" that the State must consider and respect while regulating the access to abortion.
In addition to the right to life[26] and other interests of the unborn child[27], the Court has identified to date the legitimate interests of the society to limit the number of abortions,[28] protect morality[29] and fight against eugenics.[30] In the scope of Articles 3 and 8 of the Convention, the Court applied, before birth, the prohibition of torture and inhuman and degrading treatments[31] in cases where the father denounced the torture suffered by his children during an abortion[32] and the violation to the respect of their family life.

[17] See particularly *A. B. C.* where B. and C. unsuccessfully challenged the prohibition of abortion for motive of health and well-being.
[18] *A. B. C.*, § 214.
[19] *A., B. and C. v. Ireland*, §No. 214.
[20] *Noel De Bruin v. The Netherlands*, No. 9765/09, Dec., 13 September 2013, § 57.
[21] See: Grégor Puppinck, "An alliance Against Abortion ", ECLJ, October 2019.
[22] *A., B. C.*, § 213.
[23] *Brüggemann*, §§ 59- 61 and *Boso v. Italy*,
[24] *Brüggemann*, § 61
[25] *Chassagnou et al. v. France* [GC], Nos. 25088/94, 2833/95 and 2844/95, judgment of 29 April 1999, § 113: "*where restrictions are imposed on a right or freedom guaranteed by the Convention in order to protect "rights and freedoms" not, as such, enunciated therein. In such a case only indisputable imperatives can justify interference with enjoyment of a Convention right*";
[26] *H. v. Norway*, No. 17004/90, judgment of the former Commission of 19 May 1992, *Boso v. Italy*, No. 50490/99, decision of 5 September 2002 and *Vo v. France,* No. 53924/00, [GC], judgment of 8 July 2004, §§ 86 and 95.
[27] *Open Door qnd Dublin Well Woman v. Ireland*, judgment of 29 October 1992, § 63, and *A., B. and C. v. Ireland*, No. 25579/05, [GC], judgment of 16 December 2010, §§ 222 and 227;
[28] *Odievre v. France,* GC, No. 42326/98, 13February 2003, § 45
[29] *Open Door and Dublin Well Woman v. Ireland,* No. 14234/88; 14235/88, 29 Oct 1992, § 63; *A.B.C.* § 222-227.
[30] *Costa and Pavan v. Italy*
[31] *Boso v. Italy*
[32] H. v. Norway; *Boso v. Italy*, No. 50490/99, Dec., 5 Sept. 2002.

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The ECtHR also recognizes that the right to respect for family life of the "*potential father*"[33] and potential grandmother[34] was affected by the abortion of their child or grandchild. The Court also recognized the obligation of the State to inform women about the risks of abortion.[35] One can also consider that States have the obligation to prevent forced and coerced abortions, and selective abortions.[36] The Court also recognized that other rights may be affected in specific situations, such as freedom of conscience for healthcare professionals[37] and the autonomy and ethics of medical institutions.[38]

At the International Conference on Population and Development (ICPD) in Cairo in 1994, governments committed to "*reduce the recourse to abortion*" and to "*take appropriate steps to help women avoid abortion*".[39]

States which protect unborn lives by forbidding abortion uphold the entire scope of the right to life. They fully respect their obligations in human rights law.

II- Eugenic abortion and Human Rights Law

1. The prohibition of eugenics

Prohibition of eugenics is the basis of medical law which is founded on the principles of the therapeutic purpose of medicine. The purpose of medicine is to heal; it is not to eliminate the sick or to make science progress at the expense of patients. This was a stark reminder during the Nuremberg trials. This principle is reflected in particular by the well-established principle[40] of the primacy of man over the interests of science and society.

Article 3 of the Charter of Fundamental Rights, on "*the right to personal integrity*," states that "*in the fields of medicine and biology, the following must be respected in particular (...) the prohibition of eugenic practices, in particular those aiming at the selection of persons*." The words "*in particular"* indicates that it is eugenics as such that is forbidden, and that this prohibition is not conditioned to the purpose of selecting persons. This Article 3 of the Charter also applies before birth, as evidenced by the following provision on the prohibition of reproductive cloning of human beings, and the interpretation made by the Grand Chamber of the European Court of Justice in the *Brüstle* case.

More generally, the Oviedo Convention on Human Rights and Biomedicine states that "*Any form of discrimination against a person because of his or her genetic heritage is prohibited*" (Article 11). Similarly, the Universal Declaration on Human Genome and Human Rights[41] states: "*everyone has a right to respect for their dignity and for their rights regardless of their genetic characteristics*" (Art. 2) and therefore, "*no one shall be subjected to discrimination based on genetic characteristics that is intended to infringe or has the effect of infringing human rights, fundamental freedoms and human dignity*" (Article 6).

[33] *X. v. UK*
[34] *P. and S. v. Poland*
[35] *Csoma v. Roumania*, No. 8759/05, 15 Jan. 2013
[36] Resolution APCE 1829 and Recommendation 1979 on sex-selective abortions of 3 October 2011
[37] *Tysiac,* § 121 ; *R. R.,* § 206
[38] *Rommelfanger v.FRG,* No. 12242/86, Com., Dec., 6 Sept. 1989.
[39] Programme of Action of the International Conference on Population and Development of the United Nations, Cairo, 5-13 September 1994, §§ 7.24 and 8.25
[40] See Article 2 of the Oviedo Convention.
[41] Adopted within UNESCO 11November 1997.

2. Eugenic abortion recognized as a violation of the rights of persons with disabilities

In its comments on the draft General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, the United Nations Committee on the Rights of Persons (CRPD) with Disabilities declared explicitly that: "Laws which explicitly allow for abortion on grounds of impairment violate the Convention on the Rights of Persons with Disabilities (Art. 4, 5, 8)".[42] *Indeed, it violates many provisions of the Convention, including the prohibition of discrimination on the basis of disability.*
The CRPD further explained that this type of abortion is often based on inaccurate diagnosis and that "*even if it is not false, the assessment perpetuates notions of* ***stereotyping disability as incompatible with a good life*****.**"[43] In fact, screening for genetic diseases in order to eliminate the foetuses rather than to cure them, constitutes a systemic incitement to discrimination and violence on the grounds of health, disability and physical characteristics of the disabled persons. The victims of this structural incentive are not only the embryos and foetuses aborted or destroyed, but also those who survived this screening-elimination procedure, and who are considered socially guilty of being born. This stigma is a violation of the rights of the disabled persons.[44]

The parents should also be protected from medical and social pressures, and must be given clear information on the health of the baby, on the illness in question, the living conditions of infected people, and the consequences for their relatives as well as specific assistance available. Meetings with the families of disabled or sick children or with associations should be organised for them to share their experiences, including their difficulties and happy moments.

3. "Liberal eugenics" is contrary to the dignity of disabled and sick persons

When the foetus is identified as having a disability before his birth, he is most often eliminated; this increases the pressure on women and couples who, on the contrary, wish to keep the child. This pressure comes from medical professionals, relatives and, on a larger scale, society.
As an illustration, the UN *Special Rapporteur on the rights of persons with disabilities* denounced in 2017 the fact that *"girls and young women with disabilities are frequently pressured to end their pregnancies owing to negative stereotypes about their parenting skills and eugenics-based concerns about giving birth to a child with disabilities."*[45]

In her 2019 annual report presented during March 2020 session of the Human Rights Council, the UN Special Rapporteur on the rights of persons with disabilities condemned "liberal eugenics." It is worth quoting at length from this report:

> *"When discussing issues such as prenatal testing, selective abortion and pre-implantation genetic diagnosis, there is a shared concern among disability rights activists that bioethical analyses are often used to give an ethical justification to a new form of eugenics, often referred to as "liberal" eugenics. Contrary to the eugenics movement, liberal eugenics aims to expand reproductive choices for individuals, including the possibility of genetic enhancement. While there may be no State-sponsored coercive eugenics programmes, in a context of widespread prejudice and discrimination against persons with disabilities, the aggregate effect of many individual choices are likely to*

[42] Committee on the Rights of Persons with Disabilities, Comments on the draft General Comment No. 36 of the Human Rights Committee on article 6 of the International Covenant on Civil and Political Rights, § 1.
[43] *Ibid*.
[44] See in particular the Declaration of the Rights of Mentally Retarded Persons, proclaimed by the UN General Assembly in its resolution 2856 (XXVI) of 20 December 1971;
[45] A/72/133 Report of the Special Rapporteur on the rights of persons with disabilities, §31

produce eugenic outcomes. Indeed, ableist social norms and market pressures make it imperative to have the "best possible child" with the best possible chances at life. Some utilitarian bioethicists have further argued that genetic enhancement is a moral obligation and that it is ethical to give parents the option to euthanize their newborns with disabilities. (§21)"

"Such practices may reinforce and socially validate the message that persons with disabilities ought not to have been born. Legislative frameworks that extend the time frame for a lawful abortion or, exceptionally, permit abortion in the presence of fetal impairment aggravate this message. In addition, as the consequence is a smaller number of persons with disabilities being born, some fear a reduction in disability advocacy and social support for persons with disabilities. Furthermore, health policies and abortion laws that perpetuate deep-rooted stereotypes and stigma against persons with disabilities also undermine women's reproductive autonomy and choice. (§32)"

"While the eugenic programmes of the late nineteenth and early twentieth centuries have disappeared, eugenic aspirations persist in current debates related to medical and scientific practice concerning disability, such as prevention, normalizing therapies and assisted dying." (§73)

Be it imposed by a totalitarian State or encouraged by a liberal society, as in many countries today, eugenics have the same result because it is based on the same premise: a materialist conception of the human being whose dignity is reduced to his physical and intellectual capacities. This conception of humanity, for which the disabled foetus would not be worthy of protection, was precisely condemned in 1948 when the universality of human dignity was affirmed.

Dignity is said to be "inherent" to the human being, because it qualifies the human nature shared by every human being, whatever their physical and cultural characteristics. Dignity is not attached to the capacities of a person, but to the shared human nature only, to the fact of "being human". Thus, this dignity is absolute, non-contingent and universal. Human rights' authority and universality also derive from the dignity of human nature.

Conclusion

In order to protect every foetus from the moment of conception, as required by the Fundamental Law of Hungary, abortion needs to be banned. Such a legislative change would be compatible with Human Rights Law, as we can conclude from the *amicus brief*.

This conclusion is consistent with the official interpretation of Human Rights Law by Hungary. The government indeed signed and promoted on October 22, 2020, the *Geneva Consensus Declaration on Promoting Women's Health and Strengthening Families*. Through this text, Hungary and 34 other States recall, *inter alia*, that the right to life is inherent to the human person and that children need special protection before birth[46].

Moreover, as shown by this *amicus brief*: regarding eugenic abortions, not only is its prohibition compatible with Human Rights Law, but it is even a positive obligation of States to prohibit it.

[46] See: Nicolas Bauer, "The Geneva Consensus Declaration: An Unprecedented International Pro-Life Coalition", ECLJ, January 2021.

Recently, the Polish Constitutional Court relied both on the Polish Constitution and on International Law to repeal the provision of the 1993 Polish law allowing eugenic abortion[47].

Hungary's Act LXXIX of 1992, in that it allows eugenic abortion, contradicts both the Fundamental Law of Hungary and Human Rights Law.

According to the Fundamental Law of Hungary, the Constitutional Court "*shall examine any law for conflict with any international treaties*" (Article 24 § 2.f) and "*may, within its powers set out in paragraph (2) f), annul any law or any provision of a law which conflicts with an international treaty*" (Article 24 § 3.c).

That is why at least for a question of International Law, the Hungarian Constitutional Court ought to declare Act LXXIX unconstitutional.

[47] Constitutional Tribunal of Poland, case K 1/20, judgment of October 22nd, 2020. See: Grégor Puppinck, "Poland: The Constitutional Court Repeals Eugenic Abortion", ECLJ, October 2020.

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