

The politics of abortion

Conor Gearty – article for The Tablet, August 2004

For many years, every week without fail, this magazine used to contain an advertisement close to the front cover, drawing attention to the right to life in Article 2 of the European Convention on Human Rights, and claiming that the rights of the unborn child were being habitually disregarded by Britain's liberal abortion laws. When the Human Rights Act came into force in 2000, it was widely expected that a case challenging this legal situation before the domestic courts would eventually be thrown up. This has not yet happened, and it may never now do so, following a decision last month by the European Court of Human Rights. After dodging the issue for years, the Strasbourg court has finally ruled on the breadth of Article 2 in relation to the unborn, and the verdict is (slightly indecisively) against.

The case did not involve an ordinary termination, and its facts were particularly harrowing. Two women named Mrs Vo were attending the same general hospital in Lyon at the same time, the first for a medical examination scheduled during the sixth month of her pregnancy, the second to have a coil removed. When the latter was called, the former went forward, and a combination of the wrong Mrs Vo's poor French together with the doctor's negligence meant that an attempt was then made to remove a non-existent coil. Mrs Vo's amniotic sac was pierced and as a result she was later forced to terminate her pregnancy. After many legal vicissitudes, the most authoritative French court, the Court of Cassation, ruled that the charge of unintentional homicide could not be brought because no "life" had truly been lost. The issue before the Grand Chamber of the European Court, comprising no fewer than seventeen judges, was whether France's failure to extend the law on unintentional homicide to the unborn violated the State's Article 2-based obligation to respect life. Mrs Vo's application was defeated, and France was found not to have acted incompatibly with the Convention, by no fewer than fourteen votes to three.

The main judgment of the Court, representing the views of eight of the seventeen judges, took the cautious view that the issue was such a controversial one, with such widely differing views held across Europe, that the best thing for the Court to do was to accord each State a degree of autonomy, or a "margin of appreciation" as it is called, to work out the right legal position for itself. So on this view Article 2 did not apply. The eight then went on to say, however, that they did not want to rule conclusively in the abstract on the Article 2 point but that even if it was engaged here, on the facts it had not been breached: there had been

disciplinary action against the doctor and a civil action had been possible. A criminal prosecution was not an essential pre-requisite to compliance with Article 2 where the killing had not been intentional: there were other ways a State could show respect for life without throwing wrongdoers in jail. Five of the judges would not have even discussed the notional applicability of Article 2; as Judge Rozakis put it, in a separate concurring opinion which was joined by four of his colleagues, “[e]ven if one accepts that life begins before birth, that does not automatically and unconditionally confer on this form of human life a right to life equivalent to the corresponding right of a child after its birth.” These judges were critical of their eight colleagues who had, in their opinion, dodged the implication of their reasoning which had clearly been that Article 2 did not apply. One judge, Judge Costa thought that Article 2 was indeed engaged but that it had not been breached, for the reasons the eight had given. Only three of the judges thought both that Article 2 applied and that it had been breached.

This leaves a majority of thirteen to four in favour of the inapplicability of Article 2, albeit with eight of this thirteen slightly hedging their bets in a way that five of the remaining six did not like. But on any reading, on such a strong set of facts, this is a clear “no entry” sign as far as domestic human rights law and abortion is concerned. The judgment will be a disappointment to the many Catholics and others who have sought to limit, or even eliminate, Britain’s wide abortion laws by means of a judicial rather than a legislative route. They should not be too disappointed however, since the regulation of abortion is surely a quintessentially political rather than a legal matter. As the European Court of Human Rights itself noted, there are widely differing and bitterly held views on the issue that range across Europe’s many political divides. The subject has become a litmus test for large numbers of feminists in a way that – whether “pro-life” campaigners like it or not – has introduced new dimensions into the discussion. The pace of scientific change in the area is such that a judicial ruling might quickly find itself out of date. More to the point from the “pro-life” perspective, the political argument has been moving its way in recent years, as an ever widening number of people become aware of what abortion, particularly the kind of late abortions permitted in Britain, actually entails.

There is a lesson here from the most unlikely of places and times, the “pro-choice” movement in the United States in the late 1960s and early 1970s. The law on abortion was being gradually liberalised in a slowly increasing number of states when the decision of *Roe v Wade* briskly declared in 1973 that, after all, termination was a constitutional right. Suddenly there was no need to bother any more with any of the dull and dreary persuasion that had previously been thought to be essential to any change of this momentous a nature

in a democracy. This judicial attempt to use America's equivalent of "human rights" to close down the debate had exactly the opposite effect, with the "pro-life" movement filling the political vacuum that had been left by the departure of the over-confident "pro-choicers" and then turning their attention on the courts and the need to influence outcomes in these fora as well. The result has been a politicisation of the judicial branch in the United States that many, of all political and theological persuasions, have come to regret. Who knows what might have happened if the "pro-choice" group had eschewed the short-cut of constitutional rights and stuck with the hard political slog; their results might have been less dramatic than what was achieved in *Roe v Wade*, but they would also surely have been less divisive and, as a result, more enduring. The European Court of Human Rights has usefully reminded us all that in a democracy there is no substitute for politics.