

Is there a right to abortion?

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I would like to approach this subject from two angles. To what extent does Maltese law, supreme or ordinary, protect the life of the unborn, if at all?; and secondly, what are the juridical positions and opinions on the international plane particularly before the European Court of Human rights which applies the European Convention on Human Rights?

Since both our Constitution and the European Convention form part of Maltese law, such an examination is obligatory.

Maltese law is definitely pro-life. ¹Abortion is still considered a crime in Malta punishable with imprisonment, though I must say I do not recollect any case where a woman who terminated her pregnancy in Malta was ever sent to prison. Any person assisting a woman to perform an abortion is also guilty of a crime.²

I would like to mention some cases and examples to illustrate my point. When the death penalty was still on the Maltese statute book, a pregnant woman was never executed since her execution would bring about the death of her unborn child.

¹ Criminal Code (Chapter 9 Laws of Malta) 241.(1) Whosoever, by any food, drink, medicine, or by violence, or by any other means whatsoever, shall cause the miscarriage of any woman with child, whether the woman be consenting or not, shall, on conviction, be liable to imprisonment for a term from eighteen months to three years.(2) The same punishment shall be awarded against any woman who shall procure her own miscarriage, or who shall have consented to the use of the means by which the miscarriage is procured.

² *Ibid* 243. Any physician, surgeon, obstetrician, or apothecary, who shall have knowingly prescribed or administered the means whereby the miscarriage is procured, shall, on conviction, be liable to imprisonment for a term from eighteen months to four years, and to perpetual interdiction from the exercise of his profession.

Contrary to popular belief, it is not a crime to abort as an indirect consequence of saving the life of the mother. In 2022 a controversial bill ³was introduced in the Maltese Parliament to make this clear in black and white since there was no provision on the matter in our written law although the courts never found guilt in such cases. One can describe the Bill as controversial because in its original form it envisaged the possibility of allowing abortion not only where the life of the woman was at risk but also her health whether physical or mental.⁴ Public uproar, protests and pressure led the government to change the Bill to limit the legality of abortion only where the life of the mother was at risk.⁵

The most forceful clear and eloquent proclamation by our courts in favour of the life of the unborn child is found in a judgment of 2000 in the *Persiano* case.⁶ A Moroccan woman living in Malta irregularly was made pregnant by her partner, a Maltese national. The Police immigration authorities sought to deport her to Morocco. Her partner requested a warrant of prohibitory injunction to stop the *Police from deporting his pregnant partner claiming that a potential citizen of Malta and exempt person would lose his rights – mainly that of not being deported- apart from the fact that peer family pressure would induce his partner to perform an abortion in Morocco to avoid family shame.*

The Court ruled that the unborn child has rights including that of not being deported as a potential Maltese citizen and exempt person. It stated that:

³ Bill No 28 of 2022(Fourteenth Legislature) .

⁴ *Exceptions to articles 241(2) and 243. 243B.*

Clause 2 : No offence under article 241(2) or article 243 shall be committed when the termination of a pregnancy results from a medical intervention aimed at protecting the health of a pregnant woman suffering from a medical complication which may put her life at risk **or her health in grave jeopardy.**".(emphasis added) .

⁵ ACT No. XXII of 2023: "*Exceptions to articles 241(2) and 243. 243B.* No offence under sub-article (2) of article 241 or article 243 shall be committed when the cessation of a pregnancy or damage to the foetus results from a medical intervention carried out for the purpose of saving the life and protecting the health of a pregnant woman suffering from a medical complication which may put her life at immediate risk or her health in grave jeopardy which may lead to death:

⁶ *Emilio Persiano vs Commissioner of Police* (First Hall Civil Court)(FH)(24 August 2000)Warrant No. 2836/2000)(Mr. Justice G. Caruana Demajo) .

The consequence of the fact that an unborn child- *mulieris portio est* - is that to protect the rights of the child even the mother cannot be expelled once the wo cannot be torn asunder .

In another case *VC v DC* ⁷the court issued a provisional prohibitory injunction not to allow a pregnant woman form leaving the island since her partner alleged that she intended to commit abortion abroad.

It is clear, however, that though abortion is illegal in Malta, such prohibition under criminal law does not have extra territorial effect. So inciting or encouraging a person to perform an abortion in Malta is a crime; but doing the same thing for someone to commit an abortion aboard, is not.

This is the position up to date of Maltese law. Malta has resisted calls by different international ngo's and institutions to introduce abortion. ⁸

Position under international law.

The only binding international human right instrument which is applied in Malta and forms part of the Maltese legal system is the European Convention on Human rights of 1950, a treaty which is part of the *corpus iuris* not of the EU, but of the Council of Europe. The Convention is applied by an international court namely the European Court of Human Rights sitting in Strasbourg, whose decisions are binding in the sense that a country which has signed the Convention is internationally bound to abide by the decisions of the Court. Now it is pertinent to point out that, as stated by Professor Grigor Puppink⁹:

1. The Convention does not exclude pre-natal life from its scope of protection and the Court has never excluded pre natal life from its field of application;
2. The Convention does not contain nor create a right to abortion;

⁷ (FH)(31 December 1997(Warrant No 6192/97)(Mr. Justice G. Valenzia).

⁸⁸ See Report by Commissioner for Human Rights of the Council of Europe on Malta – 10 November 2017.

⁹ Grigor Puppink *Abortion and the European Convention on Human Rights Irish Journal of Legal Studies* Vol. 3(2) :142

3. In most European national legislation, abortion is a derogation to the protection granted in principle, to the life of the unborn,;
4. If the State allows abortion in its national legislation, it remains subject, under the Convention, to protect and respect competing rights and interests ; those rights and interests weigh on both sides of the balance in restricting the scope of the derogation as well as in supporting it;
5. Finally, abortion on demand is a blind spot in the case se law of the Court and draws the conclusion that this practice violates the Convention, because it harms interests and rights guaranteed by it without any proportionate justification.

Nor do other international human rights instrument recognize abortion as a human right. Indeed , the Preamble of the 1989 Convention on the Rights of the Child declares that “the child by reason of his physical and mental immaturity needs special safeguards and care, including appropriate legal protection before as well as after birth” and the 1969 American Convention on Human Rights in article 4(1) declares that “every person has the right to have his life respected and that this right sis protected by law and in general from the moment of conception. “

In *Vo v France*¹⁰ , the European Court of Human Rights declared that:

the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere, notwithstanding an evolutive interpretation of the Convention, a “living instrument which must be interpreted in the light of present-day conditions” (see *Tyrer v. the United Kingdom*, judgment of 25 April 1978, Series A no. 26, pp. 15-16, § 31, and subsequent case-law). The reasons for that conclusion are, firstly, that the issue of such protection has not been resolved within the majority of the Contracting States themselves, in France in particular, where it is the subject of debate (see paragraph 83 below) and, secondly, that there is no European consensus on the scientific and legal definition of the beginning of life (see paragraph 84 below).

¹⁰ ECTrtHR(8 July 2004)(*Application no. 53924/00*)

The Court washed its hands of determining whether human life as such was protected before birth ruling that there were sufficient safeguards in favour of a woman who had her pregnancy negligently terminated in a hospital.

Till now no European Court has never ruled that prohibiting abortion as is the case of Malta is necessarily contrary to art. 8 of the Convention so long as there is some kind of balance . So prohibiting abortion even when there is a real risk to the life of the mother would amount to a breach of art 2 and 3 of the Convention.

Nor has it however ruled that allowing abortion is necessarily in violation of art 2, so long as there are substantial and procedural safeguards to balance the rights of the child and the mother.

This position follows recent developments in the United States. In the famous or notorious (depending on your views on abortion) case of *Roe vs Wade* ¹¹the Supreme Court of the United States of America ruled that in the first three months of a pregnancy no law in any state of the US could prohibit abortion. In the second trimester it could regulate it ; and in the third, it could prohibit it altogether . Thereby a constitutional right to abortion in the first two trimesters was recognized.

However in *Dobbs*¹² the court held that the United States Constitution does not confer a right to abortion. The court's decision overruled both *Roe v. Wade* (1973) and *Planned Parenthood v. Casey* (1992), devolving to state governments the authority to regulate any aspect of abortion that federal law does not pre-empt, as "direct control of medical practice in the states is beyond the power of the federal government" and the federal government has no general police power over health, education, and welfare.

¹¹ US Supreme Court (1973)(410 US 113

¹² *Dobbs vs. Jackson Women's Health Organization* (24 June 2022)(19-1392, 597 US

Abortion and the European Union

Abortion according to the Treaties setting up and regulating the EU is a matter left exclusively in the hands of the member states for the EU remains an organization of sovereign states. This however does not mean that slight inroads are not attempted to circumvent this rule. Once the matter is in the hands of the EU states, there is the need of unanimity to provide for an EU law on abortion. Attempts have been made to stealthily abortion such as access to abortion when a pregnancy arises out of a crime (rape or incest) as part of a seemingly harmless Directive on Victims' Rights¹³; or a citizen's initiative¹⁴ which is currently being proposed for the Commission to finance abortions from a country where abortion is restricted to another member state which has more liberal laws.

Abortion and freedom of conscience

The Court has recognized that there is a right of health professionals not to perform abortion. In *R.R v Poland* (2011)¹⁵ the Court acknowledged "the freedom of conscience of health professionals in the professional context in relation to abortion.

The problem which arose in the United Kingdom is the following: at which stage does this right apply? Since abortion is a process and not an instantaneous act, does the freedom cover the different stages leading to abortion or only the moment when the pregnancy is wilfully terminated? In the UK, refusals are not permissible in emergency situations [Abortion Act 1967, s4(2)]; also, they are only valid in relation to direct provision of care and, in such instances, referral must be made to an alternative willing and capable provider.¹⁶

¹³ Proposal for a Directive amending Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA

¹⁴ The 'My Voice, My Choice: For Safe And Accessible Abortion' initiative was submitted to the European Commission on 1 September 2025, after having gathered 1,124,513 verified statements

¹⁵ EcrHR (26 May 2011) (*Application no. 27617/04*).

¹⁶ See General Medical Council UK: *Personal Beliefs and Medical Practice* Para 12, Patients have a right to information about their condition and the options open to them. If you have a conscientious objection to a

This matter came up for consideration in the classical judgment on this point that of *Grimmark v Sweden* (43726/17) decided by the European Court of Human Rights on 11 February 2020. As shall be stated, what is grave and serious in this case, was not only that it was decided against applicant nurses, but that it amounted to a blocking at a preliminary stage of admissibility, from the case to be decided as is normally done by a seven-member court. Instead three judges buried the case declaring it to be inadmissible.

That such decision be taken on such an important moral and legal matter and belief relating to abortion was unusual, when one compares this case to less serious ones such a wearing certain attire, or refusing certain food. In that case applicant was nurse at a Swedish hospital . She was employed permanently as a nurse in a geriatric hospital. She then trained as a midwife, her studies being subsidized by the County. During her traineeship course she informed her employer that her conscience did not permit her to participate in any abortion procedure Her traineeship salary was withdrawn and she was not allowed to participate at the hospital as part of her studies.

She then applied in another clinic. She immediately informed her employer that she would not participate in abortions; she was told that this was permissible for her summer job ; then, all of a sudden, such permission was withdrawn even though there was a shortage of midwives . She was then accepted at another hospital for 6 months in spite of her objections to abortion, though she was ready to take care of women seeking an abortion but not participate in the process itself. However, even this employment was terminated when she publicly expressed in an interview her pro-life position on abortion, and her employer offered counselling so that she would change her position and views on abortion.

treatment or procedure that may be clinically appropriate for the patient, you must do the following.(a) Tell the patient that you do not provide the particular treatment or procedure, being careful not to cause distress. You may wish to mention the reason for your objection, but you must be careful not to imply any judgement of the patient.(b) Tell the patient that they have a right to discuss their condition and the options for treatment (including the option that you object to) with another practitioner who does not hold the same objection as you and can advise them about the treatment or procedure you object to.(c) Make sure that the patient has enough information to arrange to see another medical professionals who does not hold the same objection as you.

The Court observes that Sweden provides nationwide abortion services and therefore has a positive obligation to organise its health system in a way as to ensure that the effective exercise of freedom of conscience of health professionals in the professional context does not prevent the provision of such services. The requirement that all midwives should be able to perform all duties inherent to the vacant posts was not disproportionate or unjustified. Employers have, under Swedish law, great flexibility in deciding how work is to be organised and the right to request that employees perform all duties inherent to the post. When concluding an employment contract, employees inherently accept these duties.

Conclusion

In spite of the prevailing mood in favour of abortion, no fundamental right has been recognized on the international plane even if some countries consider it within their own territory as a fundamental right such as France. Efforts to include such right in the EU Charter of Human Rights have not yet proven to be successful; and in any case unanimity is required for such a change.