VO V. FRANCE AND FETAL RIGHTS: THE DECISION NOT TO DECIDE*

In *Vo v. France*, the Grand Chamber of seventeen judges of the European Court of Human Rights ("ECHR") evaded the controversial issue of whether a fetus is a person for the purposes of article 2 of the European Convention on Human Rights (the "Convention"), which protects the right to life.[1] The troubling conclusion to be drawn from *Vo* is that there is no clear resolution to the status of the fetus. But the role of a judge sitting on the ECHR is to interpret the Convention, and that responsibility does not change according to the difficulty or the implications of an issue. In *Vo*, the ECHR judges failed to address the main issue at bar, and in so doing may have side-stepped their judicial role to interpret the language of the Convention. The Court chose the easier path of holding that even if article 2 applied, France had not violated its provisions. If the judges had instead considered the question of the status of the fetus in light of other international treaties and the intent of the drafters of the Convention, they might have found that fetal life is not encompassed within the meaning of article 2.

In 1991, the applicant, Mrs. Thi-Nho Vo, had a medical checkup at the Lyons General Hospital in Lyons, France. She was then about five months pregnant. The doctor, confusing the applicant with another patient of a similar name, Mrs. Thi Thanh Van Vo, performed the medical procedure intended for the other patient—the removal of a contraceptive coil. During the erroneous procedure, the doctor negligently pierced the applicant's amniotic sac, requiring her to undergo a therapeutic abortion.

Following the heartbreaking error, the applicant and her partner filed a criminal complaint alleging unintentional injury to the applicant and unintentional homicide of her child. In 1996, ruling on the charge of unintentional homicide, the Lyons Criminal Court acquitted the doctor, finding that "a 20 to 21 week-old foetus is not viable and is not a 'human person' or 'another'" for purposes of the French Criminal Code.[2] The Lyons Court of Appeal overturned the decision a year later, finding that "established scientific fact and elementary common sense all dictate that a negligent act or omission causing the death of a 20- to 24 week-old foetus in perfect health should be classified as unintentional homicide."[3] In 1999, the Court of Cassation, France's highest court, reversed the decision of the Lyons Court of Appeal

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1. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, art. 2, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) [hereinafter European Convention].

2. Vo v. France, No. 53924/00, ¶ 19 (Eur. Ct. H.R. July 8, 2004) (citation omitted), *available at* http://www.echr.coe.int.

3. *Id.* ¶ 21 (citation omitted).

and reinstated the doctor's acquittal. Construing the criminal statutes strictly, the Court of Cassation found that the charges against the doctor did not fall under the Criminal Code because the fetus is not a person under the Code and because protection of fetuses is governed by provisions specifically addressing embryos and fetuses.[4]

Finding no remedy in the French courts, the applicant filed a claim in 1999 with the ECHR, alleging that France had violated article 2 of the European Convention on Human Rights. The first sentence of article 2 provides that "[e]veryone's right to life shall be protected by law."[5] Under article 2, states parties to the Convention are obliged to protect life through preventive and punitive criminal law, as well as through law enforcement measures.[6] The applicant claimed that the Convention imposed on France a positive obligation to enact criminal legislation preventing and punishing the unintentional homicide of a fetus. The applicant further argued that because France lacked such criminal legislation, it was in breach of the Convention. The French government responded by arguing that article 2 does not protect the fetus's right to life because the word "everyone" applies only to born persons, as illustrated by the exceptions listed in article 2(2):

> Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
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> (a) in defence of any person from unlawful violence;
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> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
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> (c) in action lawfully taken for the purpose of quelling a riot or insurrection.[7]

The government also contended that even if article 2 applied, adequate administrative remedies were available in France to fulfill its article 2 obligations.[8]

In deciding this case, the ECHR declined to decide whether a fetus is protected under article 2. Instead, the Court relied on a former decision holding that "where the right to life ha[s] been infringed unintentionally" a criminal law remedy may be unnecessary as long as an adequate remedy is provided.[9] The Court held by a vote of 14-3 that even if article 2 was applicable to this

4. *Id.* ¶ 29 (citation omitted).
5. European Convention, *supra* note 1, art. 2.
6. *See id.*; *Vo*, No. 53924/00, ¶ 49.
7. European Convention, *supra* note 1, art. 2(2).
8. *Vo*, No. 53924/00, ¶ 59.
9. *Id.* ¶ 49 (citation omitted).

case, it was not violated because France had provided sufficient administrative remedies to the applicant.[10]

While pro-choice organizations have celebrated the holding as a refusal to extend the right to life to a fetus,[11] their interpretation is arguably mistaken. In reality, the Court failed to decide whether a fetus falls under "everyone" for the purposes of article 2 protection. Since questions of the fetus's legal status and of when life begins remain disputed in France and among European nations,[12] the Court found it "neither desirable, nor even possible . . . to answer in the abstract" the question of whether a fetus constitutes a person in this case.[13] Rather than ruling on the fetus's status, the Court stated that the French administrative remedies were sufficient, and moreover that the mother had no cause of action on the fetus's behalf because "the life of the foetus was intimately connected with that of the mother and could be protected through her."[14]

Rather than deciding if article 2 applied, the majority of the Grand Chamber deferred to the national legislature, citing as its chief reason the lack of European consensus. In doing so, the ECHR judges may have avoided a controversial ruling, but they have also failed to perform their judicial duty. A supranational court of forty-five member states has a great responsibility in being charged with deciding cases that will influence the diversity of European legal cultures. The present question has no easy answer. Yet the judges on the ECHR are responsible for interpreting the Convention and its additional protocols.

Additionally, all nine judges who wrote or joined the concurring and dissenting opinions felt that the question of whether a fetus falls under article 2's protection *is* within the province of the Court to determine. In a concurring opinion, Judge Costa stated:

> It is the task of lawyers, and in particular judges, especially human-rights judges, to identify the notions . . . that correspond to the words or expressions in the relevant legal instruments . . . . Why should the Court not deal with the terms "everyone" and the "right to life" . . . in the same way it has done from its inception with the terms "civil rights and obligations," "criminal charges" and "tribu-

10. *Id.* ¶ 85. The Court noted that the applicant had the option of bringing an action for damages in administrative courts. Had she proved the doctor's medical negligence, she would have been able to recover money damages. Unfortunately, the applicant is barred by France's statute of limitations from pursuing this course of action.

11. *See, e.g.*, CENTER FOR REPRODUCTIVE RIGHTS, REPRODUCTIVE RIGHTS IN THE EUROPEAN COURT OF HUMAN RIGHTS 7 (2004) (noting "[i]n *Vo v. France* (2004), the Court again refused to extend the right to life to fetuses").

12. *Id.* at 1 (noting that whereas most countries in Western Europe allow women access to abortions, Ireland, Malta, Poland, and Portugal have severe restrictions on abortions).

13. *Vo*, No. 53924/00, ¶ 85.

14. *Id.* ¶ 86. Unlike abortion legislation, which governs cases where the interests of the mother and the fetus are presumably at odds, this case deals with a scenario in which the mother's interests are aligned with the further development of her fetus.

> nals," even if we are here concerned with philosophical, not technical, concepts?[15]

The ECHR should have fulfilled its responsibility by looking to the Convention and its protocols to interpret the scope of "everyone" in article 2.

Concurring Judge Costa and dissenting Judges Ress and Mularoni did examine the word "everyone"; they found article 2 applicable and sought to extend its protection to the fetus.[16] After reviewing scientific advances that enable the fetus to reach viability earlier, national legislation and debates about embryonic research and abortion, and their personal beliefs about when life begins, these judges concluded that life begins before birth and that article 2 therefore protects the fetus.

To support the universality of his argument, Judge Ress argued that without the assumption that the fetus is a life to be protected, abortion legislation would be unnecessary. The judges also argued that the fetus could be encompassed within article 2 without rendering abortion illegal in Europe. Judge Costa wrote that countries could recognize a non-absolute right to life for the fetus, thus balancing the interests of the fetus and mother.[17] He cited as an example the 1990 French decision by the *Conseil d'État* holding that the French Voluntary Termination of Pregnancy Act was compatible with article 2.[18] Overall, Judges Costa, Ress, and Mularoni would have found article 2 applicable to fetuses and would have permitted states to derogate from the protections afforded the fetus "within a regulated framework" allowing for abortions.[19]

These judges' assertions are problematic, however, because they impose a blanket law on diverse European jurisdictions without authority from the Convention. The states bound by the Convention have divergent domestic abortion laws and provisions protecting the fetus and embryo. It would be almost impossible to harmonize the varying views of how to extend article 2 to protect the fetus. Joined by Judges Caflisch, Fischbach, Lorenzen, and Thomassen, Judge Rozakis presented a more practical compromise on fetal protection. He examined scientific, legal, and moral developments throughout Europe and noted that "the unborn life is already considered to be worthy of protection," but protection that is "distinct from that given to a child after birth, and far narrower in scope."[20] Similar judicial attempts to harmonize the interpretation of the Convention with the domestic sovereignty of member states should be encouraged, as they preserve the space for domestically legislated choices on fetal protection and do not elevate the Court to a

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15. *Id.* Annex (b), ¶ 7 (separate opinion of Judge Costa).
16. *Id.* Annex (b), ¶ 3. Judge Costa wrote a concurring opinion because he agreed with the majority that France satisfied its positive obligations under article 2 of the Convention.
17. *Id.* Annex (b), ¶ 12.
18. *Id.* Annex (b), ¶ 11.
19. *Id.* Annex (b), ¶ 17.
20. *Id.* Annex (a), ¶ 47 (separate opinion of Judge Rozakis).

position of dictating the moral choices made by forty-five national communities.[21]

Furthermore, the Court is responsible for interpreting the text of the Convention and nothing in the language or history of the document suggests the drafters intended to extend article 2 protection to the fetus. Article 31(1) of the Vienna Convention on the Law of Treaties instructs that a treaty be interpreted according to the ordinary meaning of its terms in their context, and in light of the treaty's object and purpose.[22] The Convention itself encourages examination of its whole text; where ambiguity remains, supplementary materials such as preparatory work should be consulted. Since the *travaux préparatoires* of the Convention do not define what the states parties meant by "everyone" and "life,"[23] the ECHR judges must look to the language and structure of article 2 and the Convention.

The second paragraph of article 2 specifies three circumstances where deprivations of life do not violate the article, none of which refer to abortion. Member states that have laws permitting abortion, therefore, could not have ratified the Convention without reservation if they had interpreted the article as protecting the life of the fetus. In fact, holding that article 2 applies to the fetus might render abortion and contraception laws in thirty-nine member states incompatible with the Convention.[24] Interpreting article 2 this way would also raise questions about legal protection for the mother in situations where the lives of the mother and unborn fetus are considered to be on equal legal ground.

Critics might argue that a decision against the applicability of article 2 to the fetus would itself impose a moral judgment on member communities—but this holding need not carry this implication or result. The decision could be understood as merely stating that article 2 was not written with the intention of protecting the fetus.[25] This interpretation is consistent with international treaties and state practice. Treaties such as the International Conference on Population and Development in Cairo, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Fourth World Conference on Women in Beijing include provisions for reproductive choice that would conflict with establishing a right to life for the fetus. The fact that no right to life for the fetus was incorporated into those treaties weighs in favor of not incorporating one here.

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21. *See id.* Annex (b), ¶ 4. In fact, Judge Costa explicitly states that "it is not the Court's role as a collegiate body to consider cases from a primarily ethical or philosophical standpoint," but feels that as an individual judge writing a concurrence, he has more leeway to express his own opinion.

22. The Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 340.

23. *Vo*, No. 53924/00, Annex (d), ¶ 68 (dissenting opinion of Judge Mularoni).

24. *Id.* ¶¶ 62, 68. All of the member states of the Council of Europe allow for the voluntary termination of a pregnancy during the first trimester except for Andorra, Ireland, Liechtenstien, Malta, Poland, and San Marino.

25. If the member states wish to extend protection to the fetus, they can always add a protocol employing more careful language so as not to encroach upon the rights of the mother.

The continued legitimacy of the corpus of international laws depends in part on exercising sound principles of treaty construction. States will not be as interested in relinquishing their sovereignty to bodies such as the ECHR when the terms of the underlying treaty are vague and indeterminate. The ECHR should have exercised its authority to hold decisively that article 2 does not apply to the fetus. Not only would this holding be clearer than the present one, but it would also address the Court's responsibility to interpret the terms of the Convention. The Court's continued reluctance to do so invites parties to litigate the same issue over and over again.

The *Vo* case is a tragic story of how a mother found no remedy for the loss of her five-month old fetus. Her choice to press criminal charges is difficult to bear, since it turned out that her only hope of redress in France was a civil action. But these facts should not cloud the development of sound legal principles addressing the question of article 2's protection. The French Court of Cassation ruled that France's Criminal Code was not written in order to protect the fetus from unintentional homicide. The ECHR should have likewise held that article 2 was not written in order to protect the fetus from a deprivation of life. The majority hinted at this conclusion in its holding:

> At best, it could be regarded as common ground between States that the embryo/foetus belongs to the human race. The potentiality of that being and its capacity to become a person . . . require protection in the name of human dignity, without making it a "person" with the "right to life" for the purposes of [a]rticle 2.[26]

Regrettably, the Court retreated from a clear statement of this underlying principle and left the question for another day, ensuring continuing confusion for future cases.

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26. *Vo*, No. 53924/00, ¶ 84.