

*Philippe Pellet*<sup>1</sup>

# Evolution of the Right to Life

## Consequences of this Evolution on Human Rights and Freedoms

### French Case Study<sup>2</sup>

*After the horrors of the Second World War, European countries established a new political and legal framework with the aim of protecting individuals against the excesses of the State and preventing such horrors from happening again. This new order was launched by the Council of Europe, founded in 1949 with the aim of promoting human rights and democracy throughout Europe. The Council's first task was to draft the European Convention on Human Rights, adopted on 4 November 1950, inspired by the 1948 Universal Declaration of Human Rights. This undertaking aimed at reinforcing human rights by making them binding in order to avoid the violation of the fundamental rights and freedoms by the States. But a shift occurred in the early 1970s with the legalisation of abortion which was the starting point of an evolution of the conception of the first of the human rights – the right to life –, and of the human person. One by one, this process led to the creation of new rights. The analysis of this evolution through the example of France, “the Country of Human Rights”, allows to highlight the mechanisms which, in this country, led to the redefinition of rights and fundamental freedoms under the aegis of the European Court of Human Rights, the reference in the matter in Europe.*

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<sup>1</sup> Research Assistant, University of Public Service, Research Institute for Religion and Society; doctoral student, University of Public Service, Doctoral School of Public Administration, e-mail: [pellet.philippe@uni-nke.hu](mailto:pellet.philippe@uni-nke.hu)

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## Introduction

After the horrors of the Second World War, the United Nations and the Council of Europe worked to build a new moral order aimed at strengthening human rights and the protection of individuals from the excesses of the State. Several texts inspired by the Declaration of the Rights of Man and of the Citizen of 1789 have been published after the war:

- the 1948 Universal Declaration of Human Rights, drafted under the aegis of the United Nations
- the European Convention on Human Rights<sup>3</sup> adopted in 1950 by the Council of Europe
- and later, the Charter of Fundamental Rights of the European Union proclaimed at the European Council of Nice on 7 December 2000, enshrining the fundamental rights of people within the Union

In Europe, the political reorganisation of the continent was initiated under the impulse of Winston Churchill, who, in his address in Zurich on 19 September 1946, invited the European countries to form the *United States of Europe* in order to prevent the recurrence of “all crimes and follies of the past”, recalling that Europe was “the foundation of Christian faith and ethics, the origin of most of the culture, arts, philosophy and science both of ancient and modern times”.<sup>4</sup> He proposed that “the first practical step will be to form a Council of Europe”. This was founded on 5 May 1949 in London by ten countries<sup>5</sup> with the aim of promoting human rights and democracy throughout Europe. The first task of the Council was to draft the Convention for the Protection of Human Rights and Fundamental Freedoms, better known by its usual name, the European Convention on Human Rights (the Convention), adopted on 4 November 1950 and ratified in 1953. This Convention refers in its very first lines to the Universal Declaration of Human Rights of 1948, but the notable difference is that the Convention aims to make human rights binding through the creation of a European Court with jurisdiction to judge and condemn the State Parties to the Convention that violate the principles of the Convention.

During the negotiations for the founding of the Council of Europe, the mention of Christianity and religion in the founding Act of the Council was discussed. The first version of the Preamble, based on the resolutions adopted at the Congress of Europe held in The Hague in May 1948 under the presidency of Winston Churchill, mentioned the traditions of Christian civilisation, but in the end reference to Christianity or religion appears neither in the Founding Act of the Council of Europe signed in London on 5 May 1949, nor in the Convention adopted in 1950. The warnings of Pope Pius XII were therefore ignored, in particular those expressed in his speech of 11 November 1948 to the participants in the Second International Congress of the European Federalist Union:

<sup>3</sup> This is the usual name of the Convention, its official name is “Convention for the Protection of Human Rights and Fundamental Freedoms”.

<sup>4</sup> Winston Churchill, *speech delivered at the University of Zurich, 19 September 1946* (<https://rm.coe.int/16806981f3>).

<sup>5</sup> The United Kingdom, France, the three Benelux countries, Ireland, Italy, Norway, Sweden and Denmark.



If Europe is to emerge from this situation, must it not re-establish the link between religion and civilization? That is why we were very pleased to read, at the head of the resolution of the Cultural Commission following the Congress of The Hague last May, the mention of the “common heritage of Christian civilization”. However, this is not yet enough until we go as far as the express recognition of the rights of God and his law, or at least of natural law, the solid foundation on which human rights are anchored. Isolated from religion, how can these rights and all freedoms ensure unity, order and peace?<sup>6</sup>

Thus, the 1950 Convention does not refer to any transcendent morality, nor even to Europe’s Christian heritage. Later, during the preparation of the draft Constitution for the European Union (EU) in 2004, it was at the insistence request of French President Jacques Chirac, invoking the principle of *laïcité* and the refusal to privilege one religion over another, that the reference to Europe’s Christian roots was removed from the draft Preamble, which consequently appears neither in the Treaty of the European Union ratified in 2008 in Lisbon, nor in the Charter of Fundamental Rights of the EU.

The objective of this article is to show, based on French cases, how, in the absence of a higher moral grounding, one of the most important rights, the right to life, has been weakened in favour of a new right, “the right to self-determination”. The article shows the key role played by the legalisation of abortion in this evolution, as well as by the emergence of new philosophical thoughts redefining the concept of *Personhood*.

## The evolution of the right to life

The Council of Europe considers the right to life to be one of the most important rights: “Without the right to life it is impossible to enjoy the other rights”, as it states on its website.<sup>7</sup> It is not by chance that the right to life is the first right that appears in the European Convention on Human Rights, in Article 2: “Everyone’s right to life shall be protected by law.”

### *How the legalisation of abortion has undermined the right to life*

We will show how, in France, the so-called “Veil Law” of 1974 legalising abortion was the starting point of a progressive weakening of the right to life in favour of a strengthening and redefinition of the freedom of the individual. Indeed, by the legalisation of abortion, two fundamental principles come into conflict: the protection of life and freedom, in this instance the “woman’s freedom to her body”. Somehow this contradiction had to be resolved. In this respect, the analysis of the successive changes in the legislation

<sup>6</sup> Address given by Pope Pius XII to participants at the Congress of the Union of European Federalists (11 November 1948). Documents Pontificaux 1948. 403–407 ([www.vatican.va/content/pius-xii/fr/speeches/1948/documents/hf\\_p-xii\\_spe\\_19481111\\_nous-sommes.html](http://www.vatican.va/content/pius-xii/fr/speeches/1948/documents/hf_p-xii_spe_19481111_nous-sommes.html)).

<sup>7</sup> Council of Europe website, *European Convention on Human Rights* ([www.coe.int/en/web/human-rights-convention/life](http://www.coe.int/en/web/human-rights-convention/life)).



on abortion in France from 1975 to the present day is instructive, because it allows to analyse how, in the “Country of Human Rights”, these two fundamental principles, the right to life and freedom of the individual, have evolved over the last fifty years.

### The French context in the 1970s

According to the French Penal Code in force since 1810, abortion or causing abortion was a crime punishable by prison (Article 317 of the Penal Code). This did not prevent many women from having clandestine abortions – according to some studies published in the early 1970s, about 300,000 abortions were performed annually in France.

Faced with growing demands for abortion liberalisation since the late 1960s, Valéry Giscard d’Estaing, during his campaign for the presidency of the Republic in 1974, promised to pass a law on the voluntary interruption of pregnancy. Once elected, he appointed Simone Veil as Minister of Health to bring the bill before the National Assembly. The Veil Law was adopted in December 1974 and validated by the Constitutional Council on 15 January 1975.

### The original spirit of the abortion law in France

In coherence with the Universal Declaration of Human Rights and the European Convention on Human Rights, the Veil Law proclaimed in its very first article that “the law guarantees respect for every human being from the beginning of life”, but it added immediately after that “this principle may not be infringed except in cases of necessity and according to the conditions defined by this law”. Three “cases of necessity” are provided for in the law:

- a situation of distress of the pregnant woman (Article 2)
- the case where the continuation of the pregnancy seriously endangers the health of the woman (Article 5)
- if there is a high probability that the unborn child is affected by a particularly serious condition recognised as incurable at the time of the diagnosis (Article 5)

The Veil Law does not repeal Article 317 of the 1810 Penal Code, it merely grants an exception to this principle for extreme cases. Far from making abortion a right, it continued to define it as a crime, specifying that only in certain exceptional circumstances would it not be prosecuted. Basically, abortion or causing an abortion remained a crime. The purpose of the law was to put an end to a dramatic and disorderly situation, because the reality was that several hundred thousand women were having clandestine abortions every year, often in deplorable sanitary conditions and in great human distress. The main objective of the law was to allow a woman in distress to see a doctor in a legal setting, who would try to dissuade her, in particular by informing her about the existing means



to keep her child. “Abortion must remain the exception, the last resort for situations with no way out”, declared Simone Veil during the debates in the National Assembly.<sup>8</sup>

Thus, in the spirit of the Veil Law, a woman’s freedom to have an abortion was extremely restricted. The right of every human being to life, including the unborn child, was guaranteed by Article 1 of the law, “the law guarantees respect for every human being from the beginning of life”, a principle that could only be violated in exceptional cases.

But over the years, the right to life has gradually faded away in the face of freedom of the individual, reinforced by a new right, “the right to self-determination”.

## The freedom of the individual

Progressively, by successive legislative changes of the Veil Law, the right to life has been reduced to the benefit of the woman’s right to her body. Here are the main steps.

In 1994, the fundamental principle of the right to life stated in Article 1 of the Veil Law was modified.<sup>9</sup> “The law guarantees respect for every human being from the beginning of life” was replaced by: “The law ensures the primacy of the person, prohibits any attack on the dignity of the person and guarantees respect for the human being from the beginning of his life.” Despite the apparent similarity between the old and new wording, there are two fundamental differences:

- The first text speaks only of the human being, while the second introduces the person. What is a person? In France, the unborn child is not a legal person. In the new formulation, it is therefore implicitly the woman who, as a person, has primacy and dignity, not the human being that was conceived in her.
- Secondly, the first text expresses respect for life from its beginning, which implies absolute respect for human life, whatever its stage. The second text speaks of the respect for human being from the beginning of *his* life. It is no longer the protection of the human being from the beginning of life, which undoubtedly begins at conception, but from the beginning of *his* life, which is not the same thing and opens up a debate on the moment when a human being begins his life.

Another step was taken when a law enacted in 1992<sup>10</sup> came into force on 1 March 1994, repealing Article 317 of the Penal Code, which since 1810 defined abortion or cause abortion as a crime and delict. The repealed article was replaced by two new articles, 223-10 and 223-11, condemning abortion made without the consent of the person

<sup>8</sup> Journal Officiel de la République Française, Débats parlementaires, Assemblée Nationale, Compte Rendu intégral de la 1<sup>ère</sup> séance du 26 novembre 1974.

<sup>9</sup> By Law No. 94-653 of 29 July 1994 on the respect of the human body.

<sup>10</sup> Law No. 92-1336 of 16 December 1992 relating to the entry into force of the new penal code and to the modification of certain provisions of penal law and penal procedure made necessary by this entry into force.



concerned (Article 223-10) and the practice of abortion outside the frame of the law (Article 223-11). Some may say that this amounts to the same thing. The difference may indeed seem minimal, but the change is not insignificant with respect to the violation of respect for life. There is in fact a reversal of priority: before March 1994, abortion was a crime, for which the law provided certain strictly defined exceptions; from March 1994 onwards, the law authorises abortion under certain conditions, and the offence now concerns abortions carried out without the mother's consent or outside the framework of the law. The fundamental condemnation of abortion thus disappeared in 1994. Later, in 2001, the offence of incitement to abortion was also abolished.<sup>11</sup>

In addition, several decisions of the French Constitutional Council have also greatly contributed to the evolution of the conception of freedom. For example, in June 2001, the Council established that the freedom to have an abortion is a component of the freedom of women under Article 2 of the Declaration of the Rights of Man and of the Citizen of 1789 and linked this freedom to the principle of “safeguarding the dignity of the human person against all forms of degradation”, which the Council had previously elevated to the rank of constitutional value in a decision of July 1994.

### *Weakening of the freedom of expression*

In parallel with the reduction of the crime of abortion or causing an abortion and the abolition of the offence of incitement to abortion, the *offence of obstruction* of abortion was introduced for the first time in 1993.<sup>12</sup> The offence of obstruction initially concerned only the disruption of access to abortion facilities and the use of threats or intimidation against their employees and against women willing to abort in these facilities. Later, the list of acts constituting an offence of obstruction was expanded:

- exercise of moral and psychological pressure on women who come to have an abortion or on the staff of the institutions, and extension of the offence to cases of obstruction or attempted obstruction towards women's entourage (2001)<sup>13</sup>
- extension of the offence to cases of obstructing or attempting to obstruct women who come to the facility for information (2014)<sup>14</sup>
- extension of the offence of obstruction to any means, “including electronically or online, including the dissemination or transmission of allegations or indications likely to intentionally mislead, for the purpose of deterrence, about the characteristics or medical consequences of a voluntary interruption of pregnancy” (2017)<sup>15</sup>

The erosion of the right to life has thus been accompanied by a limitation of the freedom of expression of opinions in favour of the respect of the right to life for unborn human beings.

<sup>11</sup> By Law No. 2001-588 of 4 July 2001 on voluntary interruption of pregnancy and contraception.

<sup>12</sup> By Law No. 93-121 of 27 January 1993, Article 37.

<sup>13</sup> Law No. 2001-588 of 4 July 2001 on voluntary interruption of pregnancy and contraception, Article 17.

<sup>14</sup> Law No. 2014-873 of 4 August 2014 for real equality between women and men, Article 24.

<sup>15</sup> Law No. 2017-347 of 20 March 2017 (single article).



How this reduction of the right to life in favour of a woman's right to her body and to the detriment of freedom of expression has occurred? It is through an evolution of the concept of personhood that this change could take place. An analysis of the mechanisms of evolution of the concept of personhood even reveals that the aim of this shift was to resolve the conflict between protection of life and freedom of the person, in order to make abortion morally acceptable. We develop this analysis in the next chapter.

## The Personhood

### *Does the unborn child have the right to life?*

Consideration for the unborn child has drastically changed over time.

In France, a declaration of human rights was established in 1946 as part of the preparation of the new constitution establishing the 4<sup>th</sup> Republic. The constitutional law adopted on 19 April 1946 by the National Constituent Assembly stipulated in its Article 23: "The protection of health *from conception*, the benefit of all hygiene measures and of all the care that science allows are guaranteed to all and ensured by the Nation."<sup>16</sup> This shows that in the spirit of the time, the child had a right to health protection both before and after birth.

At the international level, the United Nations General Assembly Resolution of November 1959 on the Declaration of the Rights of the Child proclaims in its preamble 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*."<sup>17</sup>

Thus, until the late 1950s, it was commonly recognised that the unborn child should have the same protection and right to life as any human being already born. The 1974 Veil Law legalising abortion in exceptional cases also formulated this fundamental principle in its very first article cited above. But since those years the concept of personhood has evolved.

In the previous paragraph we have already seen how, in France, the unnoticed addition of a tiny three-letter word in the article of the law on the right to life<sup>18</sup> opened the possibility of a relativisation of this right, allowing the question to be asked about when a person's life begins.

Let us now look at the European Convention on Human Rights. In its Article 2, concerning the right to life, it is *everyone* whose life is protected: "*Everyone's* right to life

<sup>16</sup> Emphasis added.

<sup>17</sup> Declaration of the Rights of the Child adopted by the United Nations General Assembly in 1959 (emphasis added).

<sup>18</sup> "The law guarantees the respect of every human being from the beginning of life" of Law No. 75-17 of 17 January 1975 became "the law guarantees the respect of every human being from the beginning of *his* life" (emphasis added) with the entry into force of Law No. 94-653 of 29 July 1994 relative to the respect of the human body.



shall be protected by law”.<sup>19</sup> The question is therefore who is the “everyone”<sup>20</sup> referred to in Article 2 benefiting from the right to life. The European Court of Human Rights (the European Court, ECHR) in its guide on Article 2 provides the following answer to that question:

Article 2 of the Convention is silent as to the temporal limitations of the right to life and, in particular, does not define “everyone” (“*toute personne*”<sup>21</sup>) whose “life” is protected by the Convention [...]. The Court, having regard to the absence of any European consensus on the scientific and legal definition of the beginning of life, held that the issue of when the right to life begins comes within the margin of appreciation which it generally considers that States should enjoy in this sphere.<sup>22</sup>

The Court therefore refrains from defining when a person’s life begins, and thus refuses to determine who, among human beings, benefits from the right to life enshrined in the Convention. It sounds odd that an international institution responsible for ensuring the protection of human rights refuses to define who is protected by the right to life. All the more so since, as previously mentioned, the Council of Europe and the European Convention were created in the aftermath of the Second World War with the aim of enshrining and making binding on States human rights and in particular the absolute right to life of every human being, in order to prevent the recurrence of horrors committed against individuals in Europe. It is therefore questionable whether in this instance the ECHR, by letting the States decide which categories of persons benefit from the right to life enshrined in Article 2 of the Convention, has adequately fulfilled its role of guarantor of human rights against abuses by the State.

The ECHR’s refusal to define when a human life begins stems from the case law established by the Court in its *VO v. France* Judgment No. 53924/00 of 8 July 2004. *VO v. France* concerns a woman named Thi-Nho Vo, who in 1991 had to undergo a therapeutic abortion when she was six months pregnant, due to a medical error by her gynaecologist. The doctor was indicted for injury and manslaughter. In a judgment of 3 June 1996, the Lyon criminal court acquitted the doctor. On 13 March 1997, the Lyon Court of Appeal overturned the judgment of the criminal court, found the doctor guilty of manslaughter and sentenced him to six months’ suspended imprisonment and a 10,000 franc fine. But in June 1999, the Court of Cassation overturned the decision of the Court of Appeal on the grounds that the facts in question did not fall within the scope of the provisions relating to involuntary manslaughter, thus refusing to consider the foetus a human being under criminal law. In December 1999, Mrs. Vo appealed to the ECHR. Invoking Article 2 of the Convention, she denounced the refusal of the authorities to qualify as involuntary manslaughter the attack on the life of her unborn child.

<sup>19</sup> Emphasis added.

<sup>20</sup> In French, which, along with English, is the official language of the Council of Europe, Article 2 refers to the *person*. It reads as follows: “Le droit de *toute personne* à la vie est protégé par la loi” (emphasis added), the literal translation of which is: “The right of every person to life shall be protected by law.”

<sup>21</sup> In French in the text.

<sup>22</sup> ECHR 2022a: 18.





It is instructive to read in the Judgment of the ECHR that the President of the Grand Chamber of the Court granted two non-governmental organisations (NGOs), *Family Planning Association* (FPA) and *Center for Reproductive Rights* (CRR), permission to intervene in the proceedings as third parties. However, the case was not strictly speaking within their competence because it concerned a dispute between a pregnant woman and her gynaecologist, who had committed a medical error causing the death of her child, of which she had been pregnant for six months. It is well known that these two NGOs militate in favour of the right to abortion, and it is very clear from the arguments put forward by these two NGOs, which were transcribed in the 8 July 2004 Judgment,<sup>23</sup> that their objective was to prevent the judges from making a decision that would call into question the legalisation of abortion already in force in most European countries at that time. As proof, let us quote two extracts from the intervention of these NGOs:

Granting a foetus the same rights as a person would place unreasonable limitations on the Article 2 rights of persons already born, the CRR saw no reason to depart from that conclusion unless the right to abortion in all Council of Europe member States were to be called into question<sup>24</sup> (excerpt from CRR's intervention).

Recent evidence showed that voluntary termination of pregnancy on request in the first trimester was now widely accepted across Europe, as was termination on certain grounds in the second trimester. If Article 2 were interpreted as applying to the unborn from the moment of conception, as contended by the applicant, the Court would be calling into question the laws on abortion enacted in most Contracting States. Furthermore, that would render illegal the majority of methods of contraception currently in use throughout Europe, since they acted or could act after conception to prevent implantation. There would therefore be devastating implications in terms of both individual choices and lives and social policy<sup>25</sup> (excerpt from FPA's intervention).

It is obvious that if the ECHR judges had declared that the unborn child is a *personne* as referred to in Article 2 of the Convention, this would have led to a challenge to the legalisation of abortion. This case shows that it was the desire to protect the legal liberalisation of abortion that directly led the ECHR, whose jurisprudence is binding on all countries of the Council of Europe, to refuse to define who is the *personne* for whom the Convention guarantees the right to life.

This 2004 judgment constitutes a major break with the initial spirit of the Convention and other international legal instruments which had granted fundamental rights to every human being regardless of the stage of human life.

<sup>23</sup> *VO v. France* judgment of 8 July 2004. 29–32 (<https://hudoc.echr.coe.int/fre#%7B%22languageisocode%22:%5B%22ENG%22%5D,%22appno%22:%5B%2253924/00%22%5D,%22documentcollectionid%22:%5B%22GRANDCHAMBER%22%5D,%22itemid%22:%5B%22001-61887%22%5D%7D>).

<sup>24</sup> *Ibid.* 29.

<sup>25</sup> *Ibid.* 31.



## *Evolution of the concept of Personhood*

Like any concept, the meaning of what it means to be a human being, an individual, or a person is the subject of philosophical debate. The purpose here is not to present in detail the different philosophical ideas about what a human being or a person is, but to show how emerging philosophical theories about the human being can influence the conception of the right to life.

The debate is not new: for Basil of Caesarea (4<sup>th</sup> century), the soul enters the body at conception. Thomas Aquinas (13<sup>th</sup> century) considered that this occurs between the 40<sup>th</sup> and the 80<sup>th</sup> day of gestation, while according to Augustine of Hippo (5<sup>th</sup> century), it is at the first breath. But traditionally, it is the personhood that has been considered the highest moral status, because the person is a being endowed with reason.

What is a person? Let us quote as an example the famous definition of *person* stated by the English philosopher of the 17<sup>th</sup> century John Locke:

A thinking intelligent being, that has reason and reflection, and can consider itself as itself, the same thinking thing, in different times and places.<sup>26</sup>

On the basis of this definition, it is not clear that *personhood* can be granted to human beings who are in a coma, to embryos, foetuses, infants, or to the mentally disabled. But in giving this definition, John Locke's intention was not to give less protection to human beings based on their personhood. Indeed, Locke suggests that if a being is a human, intentionally killing him is murder.<sup>27</sup>

John Locke's concept of the person was taken up and developed in the 1970s by the Australian philosopher Peter Singer, the founder father of anti-speciesism, whose ideas have since spread widely in Western countries, mainly in Anglo-Saxon countries but also more recently in France.<sup>28</sup> But there is a major difference between Locke and Singer, for the latter does not consider human life to have absolute value, but rather teaches that what is most valuable is the life of the person; therefore, the definition of the person is paramount to his ethics. For him, it is the concept of personhood that is decisive in assessing the right to life of a living being.<sup>29</sup> In his book *Questions of Practical Ethics*, he made the following statement:

There could be a person who is not a member of our species. There could also be members of our species who are not persons.<sup>30</sup>

<sup>26</sup> LOCKE 1999 [1690]: 318.

<sup>27</sup> HYMERS 1999: 126–127.

<sup>28</sup> An article entitled *Les dangers de l'antispécisme* [The Dangers of Anti-speciesism] in *La Nef Magazine* states that "Anti-speciesism has the wind in its sails in universities, even if its arrival in France is a bit late compared to the audience it finds in the Anglo-Saxon world" (La Nef 2021).

<sup>29</sup> HYMERS 1999: 127.

<sup>30</sup> SINGER 1993: 76.



Thus, the philosophical thought developed by Peter Singer would allow to justify that some human beings may be eliminated, depending on their status in relation to personhood.

The progression of such philosophical thoughts redefining the person, by gradually becoming part of the collective unconscious, contribute to making new rights morally acceptable, such as the “right to die with dignity”. This right makes it possible to justify the practice of euthanasia, which has already been legalised in four countries of the European Union.<sup>31</sup> The legalisation of euthanasia is currently under consideration in France. There is thus a progression in the conception of human rights. Practices that were considered unacceptable fifty years ago are today becoming Rights. As of proof, let us examine the minutes of the 1974 debates on the Veil Law, where we can read the intervention of a deputy strongly opposed to the legalisation of abortion, Jean Foyer, who declared:

You are embarking on a path whose consequences can be foreseen. You are going to lead the Parliament to infringe on the respect of human life, and I fear that this infringement will be followed by many others. [...] Later, when in a depopulated France, the number of old people and people with disabilities will have become unbearable, we will explain to our successors that a diminished or slowed down life is no longer a true human life and that it is no longer worth living.<sup>32</sup>

The minutes report the behaviour of the left-wing deputies<sup>33</sup> (who were in favour of the Veil Law), expressing their indignation that Foyer could imagine that the legalisation of abortion would later lead to considering the life of the elderly and disabled a diminished life no longer worth living. Today, it is the deputies of the left who are calling for the decriminalisation of euthanasia.

## New rights

### *The right to self-determination*

The “right to self-determination” of the individual was established by the Strasbourg Court through the jurisprudence created by its Judgement *Pretty v. United Kingdom* 2346/02 of 29 April 2002, by linking it to the right to respect for private life set out in

<sup>31</sup> To date, the following four countries in the European Union have legalised euthanasia: the Netherlands in 2001, Belgium in 2002, Luxembourg in 2009 and Spain in 2021.

<sup>32</sup> Speech of Jean Foyer during the session of 26 November 1974 (Assemblée Nationale 1<sup>ère</sup> séance du 26 November 1974. 7010–7012, [www.assemblee-nationale.fr/histoire/interruption/1974-11-26-1.pdf](http://www.assemblee-nationale.fr/histoire/interruption/1974-11-26-1.pdf)).

<sup>33</sup> On page 7012, the following comment is made about the reaction of the deputies after Foyer’s remarks about the elderly and the handicapped: “Interruptions on the benches of the Socialists and the Left Radicals and the Communists.”



Article 8 of the Convention: “Everyone has the right to respect for his private and family life, his home and his correspondence.” The ECHR Guide on Article 8 of the Convention explains that:

There is a general acknowledgment in the Court’s case-law under Article 8 of the importance of privacy and the values to which it relates. These values include, among others, well-being and dignity, personality development or the *right to self-determination*.<sup>34</sup>

The right to self-determination “confers the power of self-determination, that is, the power to choose, among several options, the one that corresponds to one’s personal aspirations”.<sup>35</sup>

In France, the right to self-determination found a concrete application in 2014 with the removal of the exceptionality of abortion from the law. Until then, the law limited the possibility of abortion to situations of distress: “A pregnant woman whose condition places her *in a situation of distress* may ask a doctor to terminate her pregnancy.”<sup>36</sup> The 2014 amendment removed the reference to the situation of distress and replaced it with the sole will of the woman: “A pregnant woman *who does not want to continue a pregnancy* may ask a physician to terminate her pregnancy.”<sup>37</sup>

This change, which was validated by the judges of the French Constitutional Council, constituted in France a major step towards the right to self-determination of the individual – in this instance that of the pregnant woman – because from then on it was only according to her will that she could decide whether or not to continue her pregnancy, to the detriment of the protection of human life, despite it had been declared in the original law on the voluntary interruption of pregnancy in 1974.

Such a development of the right to self-determination has changed mentalities and opened the way to the claim of new rights by individuals.

But these new rights are not without effect on some of the fundamental rights and freedoms as originally conceived by the Convention, in particular freedom of expression and freedom of conscience.

### *How the right to self-determination threatens freedom of conscience*

Some individual choices require the intervention of a third party. This is the case with abortion or active assistance in dying, for which the intervention of a healthcare worker performing an act that eliminates a human life is required. Aware that committing such acts may be contrary to the conscience of some people, the legislator introduced the “Conscience Clause” guaranteeing, for example, the freedom of doctors and midwives not to perform an abortion. However, the conscience clause is increasingly under threat.

<sup>34</sup> ECHR 2022b: 29 (emphasis added).

<sup>35</sup> FERRIE 2018.

<sup>36</sup> Article 4 of Law No. 75-17 of 17 January 1975 relating to the voluntary interruption of pregnancy (emphasis added).

<sup>37</sup> Article 24 of Law No. 2014-873 of 4 August 2014 for real equality between women and men (emphasis added).



In case of abortion, if it still holds in France, it is regularly challenged. For example, on the occasion of the last modification of the Veil Law in March 2022 aiming at reinforcing the right to abortion, the conscience clause specific to abortion introduced in 1974 by the Veil Law was planned to be deleted in the bill, but it was finally maintained in the final text.<sup>38</sup>

Apart from the case of abortion, there are now situations where the conscience clause is no longer respected. This is the case, for example, for pharmacists, several of whom have been condemned in France for having chosen not to sell Intrauterine devices (IUDs) or “morning-after pills” because of the potentially abortifacient effects of these products. As for gynaecologists and midwives, the choice of these pharmacists was motivated by the desire not to participate in the interruption of a life of a human being, so it is a legitimate case of conscientious objection.

Another case is that of homosexual marriage. Since the law opening marriage to same-sex couples in France,<sup>39</sup> civil registrars in charge of celebrating marriages are exposed to penalties of five years in prison and 75,000 euros in fines in case of refusal to celebrate a marriage of two people of the same sex, as was clearly specified by the Minister of the Interior in a Circular of 13 June 2013: “If the reason for the refusal is due to the sexual orientation of the spouses, the civil registrar is exposed to the penalties of five years’ imprisonment and a fine of 75,000 euros provided for in Article 432-7 of the Penal Code for the crime of discrimination.”<sup>40</sup>

What is the ECHR’ view on these cases? In October 2018, it ruled inadmissible the application of 146 French mayors and deputy mayors denouncing the infringement of their freedom of conscience by the obligation to marry same-sex couples.<sup>41</sup> Regarding pharmacists, one of them, Mr. Bruno Pichon, filed an appeal with the ECHR in 2018 following his conviction in 2016 for refusing to sell IUDs. The ECHR considered his application inadmissible.<sup>42</sup>

Yet in many instances, the right to conscientious objection has been widely recognised by the ECHR. But the recent ECHR decisions mentioned above suggest that the ECHR’s position on the conscience clause may be starting to change. A recent ruling seems to confirm this trend: in 2020, an appeal was filed by two Swedish midwives who could not practice their profession because their requests not to perform abortions were systematically rejected by their employers, refusals validated by the Swedish authorities, which is one of the few countries in the European Union not to recognise the right of conscientious objection to abortion. The ECHR, seized by the two women, agreed with the Swedish authorities, judging that the obligation to perform abortion pursues “the legitimate objective of protecting the health of women seeking abortion”,

<sup>38</sup> Law No. 2022-295 of 2 March 2022.

<sup>39</sup> Law No. 2013-404 of 17 May 2013.

<sup>40</sup> Circular of 13 June 2013 on the consequences of the illegal refusal to celebrate a marriage by a civil registrar ([www.legifrance.gouv.fr/circulaire/id/37118](http://www.legifrance.gouv.fr/circulaire/id/37118)).

<sup>41</sup> PUPPINCK 2012.

<sup>42</sup> European Centre for Law and Justice 2018.



and considering that it is necessary to oblige these two midwives to perform abortion so that this practice is available on the whole Swedish territory.<sup>43</sup>

### *The process of enshrining new rights*

With the advent of the right to self-determination, the individual becomes the sole master of morality in his or her private life. When individuals or groups of individuals (often representing minorities) consider that their right to self-determination is not respected, they can bring their case before the European Court.

The Court considers the Convention to be a “living instrument” to be interpreted “in the light of present-day conditions”, as it points out in a document available on its website presenting the Convention:

What gives the Convention its strength and makes it extremely modern is the way the Court interprets it: dynamically, in the light of present-day conditions. By its case-law the Court has extended the rights set out in the Convention, such that its provisions apply today to situations that were totally unforeseeable and unimaginable at the time it was first adopted.<sup>44</sup>

The possibility for any individual or group of individuals to bring a case before the European Court, combined with the philosophy of the ECHR that human rights and freedoms must be evolving and adapted to the mores of our time, means that the claims of individuals, if considered justified by the judges of the Strasbourg Court, are elevated to the rank of fundamental rights through the Court’s case law. This process leads to the creation of new rights enshrined by the European Court on the basis of the wishes of the individual endowed with the right to self-determination. Now, as it is human nature that man never feels fully satisfied, he or she demands, and ultimately obtains, more and more new rights, such as the right to marry a person of the same sex, the right to choose his or her gender and to change sex, the right to a child, the right to select his or her child thanks to the progress of artificial procreation, the right to program one’s death:

While the human rights of 1948 reflected natural rights, the affirmation of individualism has generated new anti-natural rights, such as the right to euthanasia or abortion, leading in turn to the emergence of transhuman rights that today guarantee the power to redefine nature, such as the right to eugenics, to a child, or to a change of sex.<sup>45</sup>

<sup>43</sup> Grimmark v. Sweden Decision No. 43726/17 of 11 February 2020 (<https://hudoc.echr.coe.int/fre#%7B%22languageisocode%22:%5B%22ENG%22%5D,%22appno%22:%5B%2243726/17%22%5D,%22documentcollectionid%22:%5B%22CLIN%22%5D,%22itemid%22:%5B%22002-12769%22%5D%7D>); PUPPINCK 2020; European Institute of Bioethics 2020.

<sup>44</sup> ECHR 2022c: 7.

<sup>45</sup> PUPPINCK 2018: 11.



## Final remarks

We have seen, through the example of France, how rights have evolved since the Veil Law of 1974 by a chain of causes and effects. The legalisation of abortion weakened the right to life in favour of the freedom of the individual to live according to his or her own choices, which was later reinforced by the right to self-determination.

This evolution has been possible with the consent of the European Court of Human Rights, which is *the* reference in terms of human rights in Europe. The ECHR, which proclaimed itself the “Conscience of Europe” on the occasion of its fiftieth anniversary,<sup>46</sup> considers that human rights must evolve to adapt to new living conditions.

The term “human rights” has been retained, but its meaning has changed to encompass new rights that have been established on the basis of individual and minority claims. These new rights are inscribed on the sacred tables of fundamental rights and their questioning is therefore not tolerated.

The paradox is that the protection of the rights of the individual results in the violation of human rights and freedoms as they were originally conceived. This is in particular the case for freedom of conscience and freedom of expression, which are increasingly undermined, because the creation of new rights is accompanied by an obligation for all to recognise them, and a ban on criticising and hindering them. For example, in France, the aforementioned offence of obstruction increasingly limits the right to express an opinion against abortion. This is also the case for the right to life, which, as we have seen in this paper, has been eroded in favour of the right to self-determination of the individual.

Today, it is therefore from the will of individuals that new fundamental rights are determined. Individual claims are constantly evolving, because, without transcendent morality, the power of the individual is limitless.

What is not debatable (God, life, nature, the common good and even culture) is now relativized and what is purely a matter of will and contingent choice is absolutized. Indeed, the new morality is that of the all-powerful will that sovereignly decides on good and evil according to the desire of small minorities that make up the opinion. It is a morality by definition unstable, moving and potentially tyrannical, since it is man who subjectively decides its content (or a parliamentary majority of circumstance) whereas traditional morality was inscribed in the nature of things and was thus given to us without possibility of shaping it to our liking. A morality which leans on the divine or the nature imposes a limit to the power of the man, it is an indispensable protection to avoid the totalitarian slip of the democracy, from where the necessity to work to rehabilitate the natural moral law.<sup>47</sup>

Without limits imposed by a higher moral law, the individual becomes the slave of his passions. The paradox is thus that by wanting to free himself from any external pressure, the individual becomes prisoner of his interior pressures.<sup>48</sup> To try to free himself from

<sup>46</sup> ECHR 2004.

<sup>47</sup> GEFROY 2019.

<sup>48</sup> BRAGUE 2019: 95–96.



it, he is engaged in a flight forward, always looking for new rights to satisfy his desires, believing that progress will bring him salvation.

Haven't the international institutions created after World War II to control the States become in their turn powerful organisations that transgress human rights? With full sovereignty to define morality, and with full powers to control its application, these international institutions could well be in the process of leading us towards a new type of totalitarianism, as it happened with Nation States in the 20<sup>th</sup> century.

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