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THE RIGHT TO ABORTION AND THE POSSIBLE EFFECTS OF THE DOBBS DECISION ON CONTEMPORARY LEGAL TRENDS¹

Abstract

As a remarkably delicate issue, termination of pregnancy remains even today, in the second decade of the 21st century, firmly in the public eye. Nevertheless, in terms of legal regulation of abortion, over the last 50 years, we have witnessed continuous liberalization of abortion legislation. This contemporary trend of liberalization has been manifested mainly in Europe, in which most countries have legalized abortion on

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demand in the second half of the 20th century while constitutional courts of a number of European countries have upheld the constitutionality of such liberalized laws. However, in the aftermath of the United States Supreme Court ruling from 24 June 2022 in the Dobbs case, whereby it overturned constitutional protection of the right to abortion, essentially delegating abortion-related regulation to federal states, the question arose of (im)possible effects of this decision on said contemporary legal trends on the global, European and national levels. With that in mind, this paper aims to analyze comparative legal solutions and recent constitutional court case law of individual states, as well as the jurisprudence of the European Court of Human Rights, in order to assess possible changes in contemporary legal trends regarding termination of pregnancy.

KEYWORDS

abortion, right, Europe, USA, Dobbs

SŁOWA KLUCZOWE

aborcja, prawo, Europa, USA, Dobbs

1. INTRODUCTION

As a remarkably delicate issue, termination of pregnancy remains even today, in the second decade of the 21st century, firmly in the public eye. Nevertheless, in terms of legal regulation of abortion, over the last 50 years, we have witnessed continuous liberalization of abortion legislation. This contemporary trend of liberalization has manifested mainly in Europe, in which most countries have legalized abortion on demand in the second half of the 20th century, while constitutional courts of a number of European countries have upheld the constitutionality of such liberalized laws.² However, in the aftermath of the United States Supreme Court ruling from 24 June 2022 in the Dobbs case, whereby it overturned constitutional protection of the right to abortion, essentially delegating abortion-related regulation to federal states, the question arose of (im)possible effects of this decision on said contemporary legal trends on the global, European and national levels. With that in mind, this paper aims to analyze comparative legal solutions and recent constitutional court case law of individual states, as well as the jurisprudence of the European Court of Human Rights, in order to assess possible changes in contemporary legal trends regarding termination of pregnancy.

² A. Blagojević, I. Tucak, *Rethinking the Right to Abortion*, "Balkan Social Science Review" 2020, Vol. 15, p. 136.

The article is laid out in four parts. The first part deals with the abortion legislation of selected European countries and the decisions of their constitutional courts in which such legislation is questioned. The second part analyzes the jurisprudence of the European Court of Human Rights regarding the right to abortion. The third examines whether conservative trends, which curtail women's right to abortion, particularly in the wake of the controversial decision by the US Supreme Court in the Dobbs case, could spill over to Europe. The fourth part contains final considerations on the future of the right to abortion.

2. ABORTION LEGISLATION AND CONSTITUTIONAL COURT CASE LAW OF EUROPEAN STATES

Although some authors consider abortion legislation in Europe "quite diversified",³ the fact is that a vast majority of European countries witness a high degree of "moral",⁴ but also legal compromise regarding granting women the right to abortion.⁵ "Diversity", as such, exists in procedural aspects of exercising this right. The general trend of liberalizing abortion legislation in Europe has been present since the 1960s. Until then, abortion was banned in most countries.⁶

Although legal rules have in this matter long relied on religious ones, while abortion was, additionally, considered contrary to the principles of the medical profession, the beginnings of abortion prohibition in the criminal law of European countries can be traced back to the 19th century, alongside the aim of protecting the woman's life in the medical procedure that was very risky and dangerous throughout most of history.⁷

However, since the 1960s, which witnessed burgeoning debate on human freedom and autonomy against the backdrop of liberalist concepts,⁸ a number of Western European countries have faced rising social and political pressure

³ F. Fabbrini, *The European Court of Human Rights, the EU Charter of Fundamental Rights and the Right to Abortion: Roe v. Wade on the Other Side of the Atlantic?*, "Columbia Journal of European Law" 2011, Vol. 18, p. 8; M. Buijsen, *On Interpretation and Appreciation. A European Human Rights Perspective on Dobbs*, "Cambridge Quarterly of Healthcare Ethics" 2023, p. 324.

⁴ A. Allen, *Privacy and Medicine*, *The Stanford Encyclopedia of Philosophy* (Spring 2021 Edition), E. N. Zalta (ed.), 2021, <https://plato.stanford.edu/archives/spr2021/entries/privacy-medicine/> (accessed 15 January 2023).

⁵ I. Tucak, A. Blagojević, *Abortion in Europe*, "EU and Comparative Law Issues and Challenges (ECLIC)" 2020, Issue 4, p. 1139.

⁶ *Ibid.*

⁷ G. Williams, *The Fetus and the 'Right to Life'*, "Cambridge Law Journal" 1994, Vol. 53, No. 1, p. 72; I. Tucak, A. Blagojević, *op. cit.* (n. 5), p. 1139.

⁸ D. Ritossa, *Prijepori o pravu na pobačaj u Republici Hrvatskoj*, "Zbornik Pravnog fakulteta Sveučilišta u Rijeci" 2005, Vol. 26, No. 2, p. 971.

towards decriminalizing and liberalizing abortion.⁹ Such debate and pressures have set off a “wave” of abortion legalization, starting with the United Kingdom, Scandinavian countries, Austria, France, West Germany, Italy, and the Netherlands.¹⁰ In subsequent “waves” of reform, abortion was legalized in almost all European countries, with the exception of countries like Malta, Andorra, San Marino and Vatican City that have a total abortion ban, and a few countries with strict abortion laws (Poland, Monaco, Liechtenstein, and the Faroe Islands). Still, it should be noted that restrictive laws and practices of these countries have been subject to criticism by a number of international bodies (for example, relevant committees of the United Nations – The Human Rights Committee and Committee for Eliminating all Forms of Discrimination against Women), and some of them have already been involved in cases before the European Court of Human Rights (Poland in particular).¹¹

In the vast majority of European countries, liberal abortion laws permit termination of pregnancy on demand, tying it to an early (usually 10-14 weeks), or later stage of pregnancy in some circumstances.¹² Despite this general, gradual trend of liberalizing abortion legislation in Europe in the last few decades,¹³ there is a number of countries which did not follow this general trajectory, and which eventually tightened their abortion laws, as was the case in Ireland in the early 1980s, or Poland, which adopted one of the most restrictive abortion laws in Europe in the early 1990s, having abandoned the liberal abortion laws it had during communism,¹⁴ and additionally tightened it in 2021 during the recent pandemic.¹⁵

Concerning legal terminology, we must note that most countries, when regulating abortion, do not consider this right a proper right or a right in the strict sense, implying a correlative duty of the other party in a legal relationship.¹⁶ Legal regulation does not allow absolute permissibility of abortion, but instead places certain legally defined criteria and restrictions related to its performance.¹⁷ Among countries in which abortion is permitted, there is a clear “overlapping consensus” when it comes to allowing access to abortion in situations where a woman’s life is endangered, when the pregnancy is a result of sexual violence, and when continuation of pregnancy would present a serious burden for the woman.¹⁸

⁹ F. Fabbrini, *op. cit.* (n. 3), p. 9.

¹⁰ *Ibid.*

¹¹ M. Buijsen, *op. cit.* (n. 3), p. 333.

¹² I. Tucak, A. Blagojević, *op. cit.* (n. 5), p. 1138.

¹³ F. Fabbrini, *op. cit.* (n. 3), p. 10.

¹⁴ *Ibid.*

¹⁵ M. Buijsen, *op. cit.* (n. 3), p. 324.

¹⁶ I. Tucak, A. Blagojević, *op. cit.* (n. 5), pp. 1137-1138.

¹⁷ D. Ritossa, *op. cit.* (n. 8), p. 972.

¹⁸ R. Dixon, M. Craven Nussbaum, *Abortion, Dignity and a Capabilities Approach*, “Public Law and Legal Theory Working Papers”, 2011, No. 345, p. 7.

In parallel to the liberalization of abortion legislation from the 1970s onwards, debate on the constitutionality of new legislative solutions intensified in a series of cases before constitutional courts and, starting in the 1990s, such cases have increasingly appeared at the level of European courts.¹⁹ The central questions are when life begins, who are the holders of the right to life, and whether the fetus can be counted among them.

The right to life, as a fundamental human right, is guaranteed by numerous international documents concerning human rights (above all, we refer to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, and the (European) Convention for the Protection of Human Rights and Fundamental Freedoms), but proclaiming fundamental human rights in these documents entails vague and generic formulations, stemming from the nomotechnical nature of such provisions.²⁰ Consequently, formulations such as “everyone” or “every human being has the right to life” are given with no further definition or clarification.²¹

Still, from an analysis of available preparatory materials in the negotiation process of adopting fundamental international documents, it is evident that the purpose of the Universal Declaration of Human Rights, and the Convention on the Rights of the Child, was not to regulate the right to life of unborn persons. Nor did the authors of the Convention for the Protection of Human Rights and Fundamental Freedoms discuss the extension of the right to life to unborn persons.²² On the other hand, the Convention on the Protection of Human Rights and the Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (1997) contains provisions related to the human genome and the prenatal phase (Chapter IV), but this Convention also employs general formulations such as “all” and “everyone” in the context of guaranteeing protection of dignity and identity of human beings.²³

Similar to the provisions of international documents, constitutional texts of most European countries eschew precise formulations in the context of guaranteeing the right to life, and make no explicit mention of the terms “embryo” or “fetus”. The Constitution of the Republic of Croatia also contains the generic formulation “every” (“Every human being has the right to life”, Article 21). An interesting thing to note is that, even though the Constitution of the Federal Republic of Croatia from 1974 contained a provision on reproductive rights (Article 272 contained a guarantee of the human right to freely decide on bearing children),

¹⁹ F. Fabbrini, *op. cit.* (n. 3), p. 22.

²⁰ D. Ritossa, *op. cit.* (n. 8), p. 985.

²¹ I. Tucak, A. Blagojević, *op. cit.* (n. 5), p. 1140.

²² R. Copelon, C. Zampas, E. Brusie, J. DeVore, *Human Rights Begin at Birth: International Law and the Claim of Fetal Rights*, “Reproductive Health Matters” 2005, Vol. 13, No. 26, pp. 122-123.

²³ I. Tucak, A. Blagojević, *op. cit.* (n. 5), pp. 1144-1145.

it was omitted in the new Constitution.²⁴ Unlike most European constitutions, three constitutions of “new democracies” contain provisions on the protection of life before birth (Constitution of Hungary in Article 2; Constitution of the Czech Republic in Chapter 2, Article 6; and the Constitution of Slovakia in Article 15), but constitutional court case law makes clear that constitutional courts of these countries do not accord special right to life to unborn beings, but consider unborn life to have an inherent objective value, enjoying special protection of the state.²⁵

An interesting counterexample is that of the Federal Republic of Germany, whose Basic Law did not contain an explicit provision on the right to life of unborn beings, but the Federal Constitutional Court decided in 1975 that the formulation “every person” from Article 2, paragraph 2 of the Basic Law (“Every person shall have the right to life and physical integrity”) encompasses all human individuals regardless of the phase of their development,²⁶ including the unborn ones. The Federal Constitutional Court concluded that the state’s duty to protect the right to life of unborn persons stems from Article 1, paragraph 1 of the Basic Law, obliging the state to respect and protect human dignity. Exceptions to the application of the balancing test, in situations of undue and unreasonable burden for the woman, were found constitutionally acceptable by this Court’s second decision from 1993.²⁷

Comparative constitutional court case law has shown that constitutional courts, in their decisions on the constitutionality of abortion legislation, have tried to strike a fair balance between conflicting rights of the woman to seek and achieve termination of pregnancy on the one hand, and the right of the fetus to be born, on the other. In some decisions, third-party interests are also considered – those of the state, as was the case in the German Federal Constitutional Court’s aforementioned decision.²⁸

Italian, Austrian, and French constitutional courts came to the conclusion, in the mid-1970s, that the conflict of interest between the pregnant woman and the fetus should be resolved in favor of the woman, because a pregnant woman is a human being, while the fetus is yet to become one.²⁹

²⁴ D. Ritossa, *op. cit.* (n. 8), p. 982; I. Tucak, A. Blagojević, *op. cit.* (n. 5), p. 1143.

²⁵ Ruling of the Constitutional Court of the Republic of Croatia No. U-I-60/1991 *et al.* of 21 February 2017 and the dissenting opinion (*Rješenje Ustavnog suda Republike Hrvatske, broj: U-I-60/1991. i dr. od 21. veljače 2017. i izdvojeno mišljenje*) (hereinafter: Ruling of the Croatian Constitutional Court, 2017), Official Gazette, No. 25/17, paragraphs 31.4-31.5.3.; A. Blagojević, I. Tucak, *op. cit.* (n. 2), pp. 139-140.

²⁶ D. Ritossa, *op. cit.* (n. 8), p. 990; I. Tucak, A. Blagojević, *op. cit.* (n. 5), p. 1144.

²⁷ Ruling of the Croatian Constitutional Court, 2017, paragraphs 31.4-31.5.3., A. Blagojević, I. Tucak, *op. cit.* (n. 2), pp. 139-140.

²⁸ Ruling of the Croatian Constitutional Court, 2017, *op. cit.* (n. 25), p. 70; A. Blagojević, I. Tucak, *op. cit.* (n. 2), pp. 138-139.

²⁹ Ruling of the Croatian Constitutional Court, 2017, *op. cit.* (n. 25), paragraphs 31.4-31.5.3.

In 1991, the Hungarian constitutional court established that the decision on whether the fetus is a human being falls within the competence of the Parliament, and that the state is obliged to protect life from its very beginning, while also stating that a complete ban on abortion would be unconstitutional because it would deny entirely the woman's right to self-determination.³⁰

In recent years, particularly in the last two decades, developed European democracies have upheld the constitutionality of the new abortion legislation (Portugal, Spain, France), which is based on the "periodic model" and abandons mandatory counselling of pregnant women, essentially making such counselling elective.³¹

In its decision from 2007, the Constitutional Court of the Slovak Republic found a solution to the conflict between the constitutionally guaranteed value (unborn human life) and the restricted fundamental right (a woman's right to privacy) by stating that the *nasciturus* is not subject to the fundamental right to life (although it can become such by the act of being liveborn), and that the constitutional right of unborn human life can only be protected to the extent that it does not endanger the essence of a woman's liberty and her right to privacy.³²

The Constitutional Court of the Republic of Croatia has also, in its Ruling from 2017, concluded that a woman's right to the so-called "reproductive self-determination"³³ is entailed in the right to privacy (Article 35 of the Croatian Constitution), in which a woman's right to her physical and mental integrity is inherent,³⁴ while an unborn being, as a value protected by the Constitution, enjoys constitutional protection of the right to life to the extent that it does not impinge upon the woman's right to privacy.³⁵

All the constitutional courts are consistent in their view that the answer to the question of when life begins is not within their competence, but the Parliament's.³⁶ In this context, the Constitutional Court of the Republic of Croatia, in its Ruling from 2017, ordered the Croatian Parliament to enact a new law on abortion within the following two years, which it should, in accordance with the Constitutional Court's adjudications constitutionalizing the periodic model of pregnan-

³⁰ Ruling of the Croatian Constitutional Court, 2017, *op. cit.* (n. 25), paragraph 18.

³¹ B. Kostadinov, *Konstitucionalizacija periodnog modela prekida trudnoće u Republici Hrvatskoj*, Informator, 2017, p. 2, https://www.pravo.unizg.hr/_download/repository/Kostadinov__Konstitucionalizacija_periodnog_modela_prekida_trudnoce_u_RH%5B1%5D.pdf (accessed 15 January 2023).

³² Ruling of the Croatian Constitutional Court, 2017, *op. cit.* (n. 25), paragraph 17.

³³ P. Popović, *Kritika koncepcije pravednosti usvojene u rješenju Ustavnog suda u tzv. "Zakonu o pobačaju"*, "Bogoslovska smotra" 2018, 88, 1, p. 135.

³⁴ Ruling of the Croatian Constitutional Court, 2017, *op. cit.* (n. 25), paragraph 44.1.

³⁵ Ruling of the Croatian Constitutional Court, 2017, *op. cit.* (n. 25), paragraph 45; A. Blagojević, I. Tucak, *op. cit.* (n. 2), pp. 148-149.

³⁶ A. Blagojević, I. Tucak, *op. cit.* (n. 2), p. 149.

cy,³⁷ nomotechnically update the relevant law from 1978 (Act on Health Measures for the Realization of the Right to Freely Decide on Childbirth), while adhering to the Constitutional Court's assessment that the legislative solution did not harm the fair balance between a woman's constitutional rights to privacy, liberty, personality, and the public interest of protecting the life of unborn beings, guaranteed by the Constitution as a constitutional value.³⁸ It is a well-known fact that the Croatian legislator has not, to this date (beginning of 2023), acted on this order, even though decisions of the Constitutional court are binding for all, including the highest state authorities.³⁹

3. THE JURISPRUDENCE OF EUROPEAN COURTS

Although the competences related to abortion regulation are primarily in the purview of member states,⁴⁰ the last four decades saw the development of a relatively rich jurisprudence of European courts in this area, particularly the European Court of Human Rights. So, it is fair to say that "isolationism is impossible" in this area,⁴¹ especially considering the pressures supranational law (EU law and the Council of Europe) exerts on member states that place harsh restrictions on access to abortion.⁴²

At the time of the adoption of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms, abortion was not yet legalized in any of the signatory states,⁴³ and thus the Convention did not include explicit provisions related to abortion or the right to life of the unborn. Consequently, some other provisions of the Convention, notably those related to the guarantee of the right to life (Article 2), the right to private and family life (Article 8), and recently also those related to prohibition of torture and inhuman or degrading treatment or punishment (Article 3), have eventually become the most relevant in the context of assessing abortion legislation before the European Court of Human Rights.⁴⁴

This Court was not in the position to review national legislation until 1998, when the Convention was amended by the 11th Protocol. In matters of abortion,

³⁷ B. Kostadinov, *op. cit.* (n. 31), p. 1.

³⁸ Ruling of the Croatian Constitutional Court, 2017, *op. cit.* (n. 25), paragraph 46; A. Blagojević, I. Tucak, *op. cit.* (n. 2), p. 149.

³⁹ More on this topic, see: A. Blagojević, I. Tucak, n. 2., pp. 147-149.

⁴⁰ F. Fabbrini, *op. cit.* (n. 3), p. 22; I. Tucak, A. Blagojević, *op. cit.* (n. 5), p. 1137.

⁴¹ D. Cole, "Going to Ireland": *Irish Abortion Law and the European Community*, 17 "Hastings International and Comparative Law Review" 1994, Vol. 17, pp. 113-115.

⁴² F. Fabbrini, *op. cit.* (n. 3), p. 2; I. Tucak, A. Blagojević, *op. cit.* (n. 5), p. 1137.

⁴³ F. Fabbrini, *op. cit.* (n. 3), p. 27; I. Tucak, A. Blagojević, *op. cit.* (n. 5), p. 1144.

⁴⁴ I. Tucak, A. Blagojević, *op. cit.* (n. 5), pp. 1146-1158.

the jurisprudence of the European Court of Human Rights is based on decisions of the Commission for Human Rights, which discussed abortion in the context of Article 8, with regard to the pregnant woman, and Article 2, with regard to the fetus.⁴⁵

Until the early 1980s, the Commission declined to examine the conformity of abortion legislation with Article 2 of the Convention (in cases *X v. Germany*, 1961, and *X v. Austria*, 1976), but then it changed course regarding German abortion legislation. In the cases *Brüggeman and Scheuten v. Germany* (1981), the Commission found that provisions of German legislation were not in contradiction to the Convention, i.e., that the right to life has priority over the right to privacy.⁴⁶ The Commission recognized a violation to the woman's right to privacy, but did not further discuss the justification for restricting this right.⁴⁷ The problem with this reasoning stems from a "lack of clarity"⁴⁸ and "the Commission's hurried and superficial conclusions",⁴⁹ as a result of failure to apply the balancing test and the test of proportionality in the context of assessing restrictions to the right to privacy.⁵⁰

Since its first decision concerning the violation of the right to life (*McCann and Others v. the United Kingdom*, 1995), the European Court of Human Rights has produced a rich case law related to abortion, with intense developments in the last two decades. Analysis of abortion-related decisions shows that Poland was involved in the greatest number of cases, shortly followed by Ireland.⁵¹ Despite its relatively abundant case law, this Court has not yet interpreted the concept of "life". Instead, with respect to the lack of scientific and legal consensus on the beginning of life, it has approached the subject with a fair amount of consideration.⁵² Accordingly, the Court has in its current case law refrained from deciding whether or not the right to abortion was protected by the Convention for the Protection of Human Rights and Fundamental Freedoms, and whether or not national legislation should allow abortion.⁵³ By avoiding an explicit standpoint, the Court has left the decision to the states' courts, giving them wide discretion in this area.⁵⁴ Along with the interpretative, dynamic, and evolutive approach of the

⁴⁵ R. Scott, *Risks, Reasons and Rights: The European Convention on Human Rights and English Abortion Law*, "Medical Law Review" 2015, Vol. 24, No. 1, p. 4; I. Tucak, A. Blagojević, *op. cit.* (n. 5), p. 1146.

⁴⁶ D. Ritossa, *op. cit.* (n. 8), p. 992.

⁴⁷ *Ibid.*

⁴⁸ R. Scott, *op. cit.* (n. 45), p. 5.

⁴⁹ D. Ritossa, *op. cit.* (n. 8), p. 992.

⁵⁰ *Ibid.*

⁵¹ M. Buijsen, *op. cit.* (n. 3), p. 7.

⁵² I. Tucak, A. Blagojević, *op. cit.* (n. 5), pp. 1150-1151.

⁵³ C. Zampas, J. M. Gher, *Abortion as Human Right – International and Regional Standards*, "Human Rights Law Review" 2008, Vol. 8, p. 264.

⁵⁴ F. Fabbrini, *op. cit.* (n. 3), p. 30.

European Court of Human Rights, known as the “living instrument” doctrine, it is specifically its “margin of appreciation doctrine” that carries weight in cases related to abortion.⁵⁵

Within its “margin of appreciation doctrine”, the Court applies the test of proportionality in each respective case, as its “core interpretative principle”,⁵⁶ in order to assess whether or not a state has achieved a fair balance between protecting an individual right and protecting public interest,⁵⁷ i.e., whether the state’s interference was lawful, necessary, and with legitimate aim. A wide margin of appreciation is chiefly allowed in areas where there is no consensus among states.⁵⁸

In relation to Article 2 (the right to life), the European Court of Human Rights has decided in a series of cases, notably *Vo v. France* (2004), in which it consolidated its existing case law related to Article 2 and abortion, emphasizing the lack of consensus on the nature and status of the fetus, and rejected the argument that the fetus could be considered a person for the purposes of the Convention’s provisions.⁵⁹ In addition, the Court concluded that even if the unborn child has a “right” to life, this right is implicitly limited by the rights and interests of the mother (*Vo v. France*, paragraph 80).⁶⁰

Notwithstanding the above, the Court acknowledged that the unborn child is beginning to receive some protection in the light of advances in science and medicine, but went no further than to state that the potential of this being, the fetus, is at best such as to be regarded as belonging to the human race, without making it a person with the right to life for the purposes of Article 2. (*Vo v. France*, paragraph 84).

In relation to Article 8 (the right to private and family life), states have the negative obligation not to interfere unjustifiably in this right, as well as the positive obligation to respect it.⁶¹ In terms of negative obligations, the Court regularly assesses the justifiability of state interference, undertaking an analysis to determine whether the interference was lawful, whether it had a legitimate aim, and whether it was necessary in a democratic society.⁶²

In the context of positive obligations, the Court has, in several cases (for example, *Tysiqc v. Poland*; *P. and S. v. Poland*; *A. B. and C. v. Ireland*), emphasized that a woman’s right to lawful abortion must not be illusory.⁶³ In other

⁵⁵ M. Buijsen, *op. cit.* (n. 3), p. 2.

⁵⁶ *Ibid.*, p. 7.

⁵⁷ Ruling of the Croatian Constitutional Court, 2017, *op. cit.* (n. 25), paragraph 69.

⁵⁸ M. Buijsen, *op. cit.* (n. 3), p. 7.

⁵⁹ F. Fabbrini, *op. cit.* (n. 3), p. 31.

⁶⁰ For more about this case, see: I. Tucak, A. Blagojević, n. 5, pp. 1150-1151.

⁶¹ R. Scott, *op. cit.* (n. 45), p. 6. For more on this topic, see: I. Tucak, A. Blagojević, n. 5, pp. 1147-1149.

⁶² R. Scott, *op. cit.* (n. 45), p. 7.

⁶³ C. Zampas, J. M. Gher, *op. cit.* (n. 53), p. 279.

words, when a state adopts regulations allowing abortion, it must also create a corresponding “procedural framework” whereby a pregnant woman will be able to actually exercise her right to access lawful termination of pregnancy (*P. and S. v. Poland*, paragraph 99).⁶⁴

This positive obligation of the state is also emphasized in several recent decisions of the European Court of Human Rights, in the context of the right to conscientious objection (*Steen v. Sweden*, 2020; and *Grimmark v. Sweden*, 2020), in which the Court pointed out the state’s obligation to ensure that the health system functions in a way that prevents conscientious objection of medical professionals from interfering with services they are required to provide and to which patients, in this case women, are entitled.⁶⁵

In the light of recent events related to restricting the already rigid conditions for termination of pregnancy, and also considering the fact that cases against this state have established a violation of Article 3 of the Convention, i.e., prohibition of torture and inhuman or degrading treatment or punishment (which is, unlike Article 8, a non-derogable, absolute right), the case law of the European Court of Human Rights related to Poland deserves special attention.⁶⁶

To this date, Poland has lost important cases before this Court (*R.R. v. Poland; Tysiąc v. Poland; and P. and S. v. Poland*), in which, apart from the aforementioned Article 3, violations of Article 8 and Article 5 were found (the right to liberty and security).⁶⁷

Although the Polish authorities have been reminded on several occasions by the Committee of Ministers of the Council of Europe of their obligations to introduce the necessary legal changes and adopt “clear and effective procedures for women to access lawful abortion”, there are still no results.⁶⁸ At the beginning of 2020, the European Court of Human Rights requested a statement from the Polish authorities regarding new cases concerning the inability to access lawful abortion (*K. B. v. Poland; K.C. v. Poland; A.L.-B. v. Poland*).⁶⁹

Unlike the European Court of Human Rights’ rich jurisprudence concerning abortion, the Court of Justice of the European Union has comparably few cases

⁶⁴ See also: D. Fenwick, ‘Abortion jurisprudence’ at Strasbourg: deferential, avoidant and normatively neutral?, “Legal Studies” 2014, Vol. 34, No. 2, p. 229; F. Fabbrini, *op. cit.* (n. 3), pp. 34-35; I. Tucak, A. Blagojević, *op. cit.* (n. 5), p. 1162.

⁶⁵ I. Tucak, A. Blagojević, *op. cit.* (n. 5), pp. 1156-1158.

⁶⁶ See more on cases against Poland in: I. Tucak, A. Blagojević, *op. cit.* (n. 5), pp. 1154-1157.

⁶⁷ M. Buchloc, *Abortion Law and Human Rights in Poland: The Closing of the Jurisprudential Horizon*, “Hague Journal on the Rule of Law” 2022, Vol. 14, No. 1, p. 79.

⁶⁸ See, for example, Interim Resolution CM/ResDH (2021) 44, Execution of the judgements of the European Court of Human Rights *Tysiąc, R. R. and P. and S. against Poland*, adopted by the Committee of Ministers on 11 March 2021, available on: https://search.coe.int/cm/Pages/result_details.aspx?Objec-tID=0900001680a1bdc4, (accessed 4 April 2023).

⁶⁹ M. Buchloc, *op. cit.* (n. 67), p. 79.

dealing with this matter.⁷⁰ Notable examples are *The Society for the Protection of Unborn Children Ireland Ltd v. Stephen Grogan and others* (1991), in which this Court concluded that abortion constitutes a service for the purposes of EU law, and is thus subject to EU supervision,⁷¹ and *Oliver Brüstle v. Greenpeace e. V.* (2011), in which this court tackled the question of when life begins. In the latter case, the court concluded that a human cell may be considered a human embryo as soon as it is fertilized, but at the same time fell short of recognizing this definition as universally accepted, by expressly stating that this definition is provided “within the meaning of and for the purposes of the application of” Article 6(2) (c) of the Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions (See Ruling of the Croatian Constitutional Court, 2017, paragraph 43).

4. (IM)POSSIBLE EFFECTS OF THE *DOBBS* DECISION IN EUROPE

As we have pointed out above, Poland is a notable exception to the trend of liberalization of abortion legislation in Europe. For women seeking abortion, the situation further deteriorated after a judgment by the Polish Constitutional Tribunal of 22 October 2020, which declared unconstitutional one of three legal exceptions to the ban on abortion. Abortion in cases of fetal abnormality has thus become illegal in Poland, but it remains available to women when the pregnancy is a result of the criminal offense of rape or incest, and when the pregnancy endangers the woman's life or health. The judgment came into force on 27 January 2021.⁷²

This has caused a backlash not only in Poland, but throughout Europe. In mid-2021, the European Court of Human Rights contacted the Polish authorities regarding new complaints received against Poland after the Tribunal's Judgment.⁷³ In these complaints, the applicants claim that the judgment violates their rights to private life (Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms) and to the freedom from degrading treatment (Article 3 of said Convention).⁷⁴ In the course of time, the Court received around 1,000 similar complaints.⁷⁵ We should note that the European Parliament, on 11 November

⁷⁰ See more about the jurisprudence of the European Court of Justice in: I. Tucak, A. Blagojević, *op. cit.* (n. 5), pp. 1158-1161.

⁷¹ F. Fabbrini, *op. cit.* (n. 3), p. 34.

⁷² M. Buijsen, *op. cit.* (n. 3), p. 324.

⁷³ M. Buchloc, *op. cit.* (n. 67), p. 79.

⁷⁴ M. Buijsen, *op. cit.* (n. 3), p. 324.

⁷⁵ M. Buchloc, *op. cit.* (n. 67), p. 79.

2021, adopted a special resolution dedicated to the first anniversary of the *de facto* abortion ban in Poland.⁷⁶

In the context of conservative trends, another development of note is the recent turn of events in Hungary, a country where abortion before the 12th week of pregnancy has been legal since 1953, with an allowed exception in cases of fetal defects, in which women may abort even after that time limit.⁷⁷ In September 2022, however, the Hungarian government issued a decree obliging doctors to provide to women “a clearly identifiable indication of fetal vital signs”,⁷⁸ before the abortion procedure is to begin. The effects of this change on women seeking abortion remain to be seen. Its purpose, on the other hand, is clear: to deter women from having an abortion. The decree is modeled after the so-called “fetal heartbeat laws” in the United States, which require pregnant women to listen to an ultrasound monitor before the abortion procedure.⁷⁹

The fact remains that, despite these notable exceptions of Poland and possibly Hungary, Europe has, for decades, witnessed a continued trend toward liberalizing abortion legislation. However, the US Supreme Court’s ruling in the *Dobbs* case raised the question of the (im)possible influences of this decision on the said European trend.

In June 2022, the US Supreme Court overturned *Roe v. Wade* (1973), which guaranteed women the right to abortion as a constitutional right until “fetal viability” (the moment when the fetus is capable of surviving outside the mother’s body), which effectively means that the right to abortion was constitutionally protected until the 23rd or the 24th week of pregnancy (*Roe*, 163–164). In the *Dobbs v. Jackson Women’s Health Organization* case, the US Supreme Court applied a “textualist and originalist approach to the Constitution” in terms of the existence of a constitutional right of women to abortion. According to the majority opinion in the *Dobbs* case, previous court decisions in matters of abortion were “egregiously wrong”,⁸⁰ thereby justifying abandoning the rule of *stare decisis* and deciding that the Constitution does not confer a right to abortion.

The Supreme Court has in this case questioned the constitutionality of the so-called Gestational Age Act, passed by the Mississippi Legislature in March 2018, whereby the constitutionally allowed period for performing abortions was shortened from the first 23 or 24 weeks to 15 weeks of pregnancy. After the

⁷⁶ European Parliament resolution of 11 November 2021 on the first anniversary of the *de facto* abortion ban in Poland (2021/2925(RSP)), https://www.europarl.europa.eu/doceo/document/TA-9-2021-0455_EN.html (accessed 11 June 2023).

⁷⁷ O. Dyer, *Hungary requires doctors to present women with fetal vital signs before abortion*, “British Medical Journal” 2022, 378.

⁷⁸ M. Buijsen, *op. cit.* (n. 3), p. 324.; O. Dyer, *op. cit.* (n. 77).

⁷⁹ O. Dyer, *op. cit.* (n. 77).

⁸⁰ M. Buijsen, *op. cit.* (n. 3), pp. 324-325.

15th week, abortion was only allowed in exceptional cases of medical emergency or severe fetal abnormality.⁸¹

The majority opinion in the *Dobbs* case stated that the decision in the *Roe* case resulted from the Supreme Court unjustifiably taking on the role of the legislator, and thus endangering the democratic process.⁸² Many theoreticians of constitutional law find it questionable to interpret constitutional provisions on the basis of their authors' intentions, exact wording, and history.⁸³ Given that the US Constitution does not explicitly grant the right to abortion, the Supreme Court had to determine whether this right was implied. The majority opinion in the *Dobbs* case rejected the reasoning of precedent decisions, not only the aforementioned *Roe* case, but also the *Planned Parenthood v. Casey* case (1992), the latter recognizing abortion as a liberty protected by the Due Process Clause of the Fourteenth Amendment.⁸⁴

The *Dobbs* ruling was soon met with a strong reaction by EU institutions and their leaders.⁸⁵ In its resolution condemning the *Dobbs* case and the practice of impeding access to lawful abortion in some member states, the European Parliament called for the right to lawful and safe abortion to be included in the Charter of Fundamental Rights of the European Union.⁸⁶

Despite fears of the effects of the *Dobbs* decision spilling over to the rest of the world, Europe in particular, recent events regarding the right to abortion in France, Malta, and San Marino do not testify to further hindering access to abortion, but instead herald a new turn: France could soon become the first country in the world to include the right to abortion in its constitution. In February 2023, the French Senate approved a bill that should make this possible, after the National Assembly previously adopted it in November 2022, but with an interesting difference. The text approved by the Senate is an amendment to Article 34 of the Constitution, cited under Title V, the part that regulates the relationship between the parliament and the government and uses the word "freedom" of the woman to end her pregnancy. The text of the National Assembly, on the other hand, refers to Article 66 of the Constitution, under Title VIII – On Judicial Authority, and pertains to the judicial authority as a "guardian of the freedom of the individual"

⁸¹ *Ibid.*, p. 324.

⁸² *Ibid.*, p. 325.

⁸³ *Ibid.*, p. 326.

⁸⁴ *Ibid.*, pp. 325-326.

⁸⁵ I. Isailović, *Dobbs in the EU: Not Just an American Story*, VerfBlog, 2022, <https://verfassungsblog.de/dobbs-in-the-eu/> (accessed 20 January 2023).

⁸⁶ European Parliament's resolution on the US Supreme Court decision to overturn abortion rights in the United States and the need to safeguard abortion rights and women's health in the EU. https://www.europarl.europa.eu/doceo/document/B-9-2022-0367_EN.html#_ftnref1 (accessed 11 June 2023).

(Article 66, paragraph 2), using the term “right” of the woman to end her pregnancy.⁸⁷

In Croatia, similar initiatives appeared from some of the opposition parties. The opposition’s Social Democratic Party club of representatives has been particularly active in this regard. On 30 September 2020, it has submitted a proposal for a more liberal law on the medical procedure of abortion, requesting its enactment under urgent procedure,⁸⁸ and in July 2022, together with other left and liberal parties, asked for the inclusion of the right to abortion in the Croatian Constitution.⁸⁹

In Croatia, despite a liberal legal framework, and as a result of a considerable share of medical professionals citing conscientious objection to performing abortions, access to lawful and safe abortion is brought into question.

In September 2022, the parliament of the microstate San Marino lifted the complete ban on abortion, following a referendum in which 77 percent of citizens voted to allow abortion before the 12th week of pregnancy.⁹⁰ This Catholic country had previously criminalized abortion in all circumstances. After it lifted the ban, only Malta and Andorra remain among countries in which abortion is illegal.⁹¹ However, the Maltese parliament is currently also considering lifting the absolute ban on abortion,⁹² and is discussing an amendment to the Criminal Code that would allow abortion in cases where there is serious danger to the mother’s life and health.⁹³

In conclusion, the process of liberalizing European abortion legislation continues. This has still not convinced the European Court of Human Rights to rec-

⁸⁷ Radio France Internationale (RFI), *France a step closer to adding abortion rights to constitution*, 2023, <https://www.rfi.fr/en/france/20230202-france-moves-closer-to-adding-abortion-rights-in-constitution-after-senate-approves-text> (accessed 11 April 2023).

⁸⁸ Hrvatski sabor, *Prijedlog zakona o medicinskom postupku prekida trudnoće, s Konačnim prijedlogom zakona*, 2020, https://sabor.hr/sites/default/files/uploads/sabor/2020-10-01/100508/PZ_35.pdf (accessed 11 April 2023).

⁸⁹ Hrvatska radio televizija, *Lijeva oporba i liberali traže da se pravo na pobačaj uvrsti u Ustav*, 2022, <https://vijesti.hrt.hr/hrvatska/lijeva-oporba-salje-zahtjev-za-promjene-ustava-traze-da-se-uvrsti-pravo-na-pobacaj-8402579> (accessed 11 April 2023).

⁹⁰ M. Buijsen, *op. cit.* (n. 3), p. 333; Euronews, *San Marino legalises abortion, one year after landmark referendum*, 2022, <https://www.euronews.com/2022/09/01/san-marino-legalises-abortion-one-year-after-landmark-referendum> (accessed 11 April 2023).

⁹¹ Euronews, *op. cit.* (n. 90)

⁹² M. Buijsen, *op. cit.* (n. 3), p. 333

⁹³ M. Calleja, *Fearne expects abortion bill amendments to pass before summer*, 2023, https://www.maltatoday.com.mt/news/national/122855/fearne_expects_abortion_bill_amendments_to_pass_before_summer (accessed 11 June 2023); Agence France-Presse, *Woman in Malta charged in court for having abortion*, 2023, <https://www.theguardian.com/world/2023/jun/01/woman-malta-charged-in-court-for-having-abortion-pro-choice-condemn-rare-enforcement-total-ban-termination> (accessed 11 June 2023).

ognize the right to abortion as a right protected by the European Convention. Its most recent decision testifies as much.

In early June 2023, in the case of *A.M. and Others v. Poland* (application No. 4188/21, 4957/21, 5014/21, 5523/21, 5876/21, 6114/21, 6217/21, 8857/21), which dealt with restrictions to the right to abortion in Poland in cases of fetal abnormalities, as mentioned at the beginning of this section of the paper, the European Court of Human Rights has unanimously declared the applications inadmissible in its final decision. The case concerned eight applications by Polish citizens born between 1980 and 1993, who cited violation of Article 8 of the Convention (respect for private and family life), stating that they are, as women of childbearing age, potential victims of the new Polish legislation. The Court explained in its decision that “the applicants had failed to provide any convincing evidence that they had been at real risk of being directly affected by the amendments introduced by the Constitutional Court’s judgment of 22 October 2020. In particular, they had not provided any medical evidence or evidence as to their potentially running a higher risk of foetal abnormalities. Nor had they produced any documents relating to their personal circumstances, making it impossible to assess their individual situations”.⁹⁴

In response to the applicants’ claims that prohibiting abortion in cases of fetal abnormality poses a risk to their life and health, the Court pointed out that Poland still has a law in force from 1993, which allows abortion in cases where the mother’s life and health are threatened (section 4a (1)1 of the 1993 Act).

The Court thus concluded that the change in the Polish legislative framework regarding abortion could have “consequences for the applicants which were hypothetical, and were too remote and abstract for them to arguably claim to be ‘victims’ within the meaning of Article 34”.

We have yet to see how the situation will unfold concerning the remaining 1,000 cases against Poland after its removal of the possibility of abortion in case of fetal abnormalities.

5. CONCLUDING REMARKS

Although abortion in Europe was in the exclusive purview of individual states until the 1990s, European courts, particularly the European Court of Human Rights, have gradually developed a series of “substantive checks and procedural

⁹⁴ European Court of Human Rights (2023). Group of abortion rights cases against Poland declared inadmissible, press release. URL: [<https://www.politico.eu/wp-content/uploads/2023/06/08/Decision-A.M.-v.-Poland-eight-abortion-rights-cases-inadmissible.pdf>] (accessed 30 June 2023).

balances”,⁹⁵ which limit the freedom of member states in this area. With time, a “solid jurisprudential framework” was created,⁹⁶ requiring states to ensure adequate procedural mechanisms that safeguard the right to abortion from becoming illusory, but in reality, many problems of “complexity and inconsistency” persist⁹⁷ in this area, and many theoretical and practical aspects of the issue of abortion remain unresolved.⁹⁸

Member States have a great deal of autonomy in the legal regulation of abortion, but once abortion is legalized, they are obliged to create an effective procedural framework. However, focusing on these procedural aspects, while avoiding tackling substantial questions, such as when life begins and whether a pregnant woman has the right to abortion, is legitimate ground for criticism of the European Court of Human Rights’ approach.⁹⁹

Incoming cases before the European Court of Human Rights against Poland are an opportunity for this Court to take a step forward. In this context, it would be wise to consider the critical remarks of some authors who suggest, for example, that this Court should establish that states with restrictive abortion regimes directly discriminate against women, because they subject them to different treatment simply because only women can be pregnant.¹⁰⁰ Others suggest that, in its abortion-related decisions, the European Court of Human Justice should not give states such a wide margin of appreciation in terms of interpreting Conventional standards, but only in implementing these standards, and that its decisions should not be informed by consensus, but by the values of autonomy, dignity, and equality.¹⁰¹

In any case, strengthening the European human rights framework by recognizing the right to abortion as a fundamental right on the European level,¹⁰² which requires a more active involvement of European courts, hand in hand with liberalizing national abortion legislations, seem like the only possible structural answers to threats to a “substantive vision of equality”,¹⁰³ which every state and the European community at large are obliged to protect.

A final point to note is that the weakening of the right to abortion before the European Court of Human Rights is not possible in the way it occurred with the US Supreme Court. As pointed out by Buijsen, the European Court of Human

⁹⁵ F. Fabbrini, *op. cit.* (n. 3), p. 35.

⁹⁶ *Ibid.*, p. 34.

⁹⁷ *Ibid.*, p. 35.

⁹⁸ For more on this topic, see: I. Tucak, A. Blagojević, *op. cit.* (n. 5), pp. 1161-1169.

⁹⁹ For more on this topic, see: I. Tucak, A. Blagojević, *op. cit.* (n. 5), pp. 1161-1169.

¹⁰⁰ D. Fenwick, *op. cit.* (n. 64), p. 235.; I. Tucak, A. Blagojević, *op. cit.* (n. 5), p. 1170.

¹⁰¹ I. Radačić, I., *The margin of appreciation, consensus, morality and the rights of vulnerable groups*, “Zbornik Pravnog fakulteta Sveučilišta u Rijeci” 2010, Vol. 31, br. 1., p. 600; I. Tucak, A. Blagojević, *op. cit.* (n. 5), pp. 1168-1169.

¹⁰² I. Tucak, A. Blagojević, *op. cit.* (n. 5), p. 1170.

¹⁰³ I. Isailović, *op. cit.* (n. 85), p. 3.

Rights may not, like the US Supreme Court, proclaim its own decisions as “egregiously wrong” (*Dobbs*, 44), because, by its own standards, the European Court of Human Rights considers all of its decisions correct. Interpretation and application of the Convention is done “in the light of present-day conditions”.¹⁰⁴ In other words, historical and textual methods carry little weight, giving way to the dominant “dynamic” and “evolutive” methods in seeking to achieve “the object and purpose” of the European Court of Human Rights.¹⁰⁵ The intentions of its authors have, in terms of interpreting the Convention, always been fairly insignificant.¹⁰⁶

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¹⁰⁴ M. Buijsen, *op. cit.* (n. 3), p. 325.

¹⁰⁵ *Ibid.*, p. 327.

¹⁰⁶ *Ibid.*, p. 332.

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