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Constitutionalisation of the Right to Abortion

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Abstract: *Enshrining the right to abortion in the constitution represented an ideal in many states that faced this issue or restrictions that led to the loss of human life. The phenomenon gained momentum in the European space after the decision of the Supreme Court of the United States in the Dobbs v Jackson Women's Health (Dobbs v Jackson Women's Health Organization, 2022). I mentioned the decision, by which the Court annulled the right to abortion, offering the possibility to waive this right to the national authorities. The rise of extremist religious groups in the European space made the right to abortion a controversial subject, which is why the phenomenon was left to the discretion of the national state from a decision-making perspective.*

However, in the EU, the European Parliament alerted in time the threats posed to the rights to abortion requesting that this right be introduced in the EU Convention of Rights (European Parliament Resolution, 2022; European Parliament Resolution, 2024)

Rounding off the decision to implement the right to abortion in the constitution generated at the national level a real debate for and against, which in the European space ended with some changes such as states that have adopted this right: France (French legislative proposal no. 293, 2023), Belgium (Parl. doc. 55 2832/001 (2021-2022), Norway, and Sweden (Press release Department of Justice, 2023).

Against this reaction, legal experts questioned the necessity, adequacy and added value of the constitutionalisation (Dobner M. Loughlin, 2010) of a right to abortion in European-national contexts.

Keywords: *European Parliament Resolution; constitutionalisation of the right to abortion; cultural rights; European Court of Human Rights.*

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Introduction

This article is a reflection of the possible possibilities of introducing the right to abortion into the fundamental law of the states. Moreover, the pro and con opinions developed by the specialized literature in relation to the limits and excess of the implementation of this right lead to a trend whereby the legal imposes itself on the demographic, omitting the essential, namely the individual will of each woman.

The first aspect covered is the pros and cons aspect of the phenomenon of constitutionalising the right to abortion, then an identification within the framework of fundamental rights and last but not least, the positioning of the right in the context of the elements of the Convention.

The constitutionalization of the right to abortion defines an important element, in what the category of personal rights means, specifically the right to reproduction, which can never be developed individually, uniquely, but only cumulatively with the right to dignity, the right to life, the right to personal life. In addition, the constitutionalization of a right to abortion from a procedural point of view requires the interpretative establishment of the legal norm, indirectly offering risk variants with respect to this interpretation.

Pros and cons regarding the constitutionalisation of the right to abortion

Since 1998, the Center for Reproductive Rights has created a resource to be able to promote the right to abortion as a fundamental human right. As a result of the studies, it was found that: 24 countries do not allow abortion under any circumstances, even if the woman's life is endangered; 41 countries allow abortion only if the patient's life is endangered; 48 states allow for therapeutic reasons; 13 countries allow abortion because they consider the potential impact of the pregnancy, from an economic and social point of view and the last category is represented by countries that accept abortion on demand (The World's Abortion Laws, 2023).

The idea of constitutionalising the right to vote was widely developed in France, where the Law Commission approached the subject from a visionary perspective, establishing guarantees regarding the right to terminate pregnancy. France becomes the first country in the world to explicitly include the voluntary termination of pregnancy (abortion) in its Constitution, in stark contrast to many other countries where this right is on the backslide.

The Senate Laws Committee argued that French legislation supports the introduction of the right to abortion, and the arguments are sufficient. In the situation where the French Constitutional Council was aware of the existence of the right to terminate a pregnancy as a woman's individual opinion, a paradigm protected by the French Declaration of the Rights of Man and of the Citizen 1789 (Hunt, 2015), the Law Commission summarized that there is "a high probability" for the French Constitutional Council to find that the limits of the termination of pregnancy arise through a violation of the constitutional norms.

Another reason that emphasised the fact that it is not an imperative necessity established regarding the constitutionalisation of the right to abortion is the fact that not so much the legislation as the French jurisprudence allows the right to abortion contradictory to the USA jurisprudence which has clear limits in this matter.

The Irish case argues that bringing the topic of abortion into the realm of constitutional discussion may lead to the strengthening of abortion bans rather than rights. It is known that the 1983 referendum, with a two-thirds majority, supported the inclusion of abortion in the Irish Constitution for sanctioning purposes. In this case, a current was created whereby the constitutionalisation of the right to abortion in Ireland became inaccessible, making future attempts to liberalise access to abortion extremely complex.

These situations create political limits and not legal limits, and the effect of strengthening and guaranteeing a right against political interference would be emphasized by abortion supporters if the constitutionalization process aimed to access the positive obligations and not the negative restrictions that define this right.

The constitutionalisation of the right to abortion does not always bring the expected satisfaction in legal terms when the effect is conditioned by intrinsic reasons.

The international literature in this sense notes that the constitutionalization of the right to abortion does not always adequately serve the autonomy of pregnant women and reproductive justice in a broad sense as long as conditions of medical legality are imposed that advance the concrete meaning of the said right. (high costs, procedural medical assistance, etc.) (De Meyer & Romainville, 2024)

The evaluation of the noted criticisms emphasizes that rights-based (constitutional) approaches to abortion must take into account the complexity of social rights, and socially allocated measures must be connected with judicial measures to create effective access to abortion for

any woman, regardless of her social condition and implicitly health policies accompanied by adequate budgets.

Another aspect that is required in the methodological establishment of the constitutionalisation of the right to abortion in European countries is the legal-technical challenges. The creation of interdisciplinary bodies to establish the form of "implementation" of the right to abortion in the Constitution is also a legal challenge. Thus, the "Scientific Committee for the Evaluation of Abortion Law and Practice" in Belgium, a body appointed by the Government mentioned the need to implement clear terms that define the right to abortion from a constitutional perspective (Scientific Committee for the Evaluation of Abortion Law and Practice in Belgium, April 2023)

In France, an important issue of constitutional design concerned *where* in the Constitution it should be placed the respective abortion right to rights or the freedom to terminate a pregnancy another aspect that presented arguments for and against in French legislation.

The constitutionalisation of the right to abortion as a reflection of fundamental rights

Starting from constitutional theories such as that the Constitution must be viewed from a formal point of view - a group of constitutional legal norms that protect the citizen and that ensure legislative comfort by guaranteeing his rights - the insertion of the right to abortion opens a new stage in what it means to classify rights. Based on the presented theories, the theme of the constitutionalization of the right to abortion induces the aspect of supremacy of a complex of personal rights of the individual.

The concept of the right to abortion has its origin in reproductive rights, formed on the idea of freedom. In this regard, we recall famous cases such as Roe (USA) and Morgentaler (Canada), which originated in the violation of the right to personal freedom. More in this sense, Lessard (1991, 263-306) mentions the reconceptualisation of individual freedom that involves "a different vision of the state, one in which state power is the mediator and facilitator of rights rather than antithetical to freedom" and the other where "rights are no longer abstractly defined spheres of non-interference, but rather are conditioned by situation and relationship".

Another concept being floated is that abortion rights are inherent inequality. In the view of Cook & Dickens (2003), the woman represents the lower class individual, so the consecration of the right to abortion is managed from the perspective related to different indices based on discrimination treatments - religion, social status, that "illustrates the widespread violation of the right to equality that creates the subordinate

status that many women occupy in their families, communities, wider societies and legal systems" (Cook & Dickens, 2003).

A third variant defines reproductive rights as democratic rights consecrated to citizenship. According to Hennette-Vauchez, Roman and Slama, the majority lack of the theme reproductive rights (including abortion) in constitutions paradoxically demonstrates that society does not support this right. (Hennette-Vauchez et al., 2022; Wattier, 2022).

Consequently, these doctrinaires of constitutionalism see the insertion of reproductive issues (including abortion) in the Constitution as being a major futuristic change for modern society.

We emphasize that reproductive rights are not part of the category of trivial rights by which the refusal to be part of the constitution can be justified by omission or legislative derogations.

Procedural aspect regarding the constitutionalisation of the right to abortion

A constitution will always be seen as a procedural instrument through which a state will develop its rights. The constitutionalisation of reproductive rights, of which the right to abortion is a part, means knowledge "constitutive values of subjective rights intended to be disseminated throughout the legal order by means of constitutionality control mechanisms" (Champeil-Desplats, 2019, 173) and as "constitutional axiology that it is desired to be imposed on all constituted powers" (Champeil-Desplats, 2019, 174).

The role of abortion rights in the European space was relatively limited. Most "abortion rights" in the European space come from health laws or come as exceptions from the prohibitions of the criminal law.

The establishment of the right to abortion through the decisions of the Constitutional Courts of the European states does not mean that this right can be declared constitutional. Despite all these references to the right to abortion, it was not indicated in many European constitutions, France being one of the countries that joined the category of states with a reformed constitution that adopted this right in 2024. But we must not forget that in some European constitutions, the rights to make sexual, or reproductive or health decisions - do not expressly stipulate the inclusion of the right to abortion.[1]

[1] For example, the Mexican Constitution, which guarantees that "(e) each person has the right to decide, in a free, responsible and informed manner, the number of children he wishes and the time between each of them"; The South African Constitution, which guarantees that "(e) every person has the right to bodily and psychological integrity, which includes the right … to make decisions about reproduction"; The Nepalese constitution, which enumerates "a woman's right to reproductive health".

The first constitutions to mention the right to family planning is the 1974 Constitution of Yugoslavia, and today, some constitutions retain the tone of communist constitutions that make references to reproductive decision-making, such as the Slovenian Constitution however, no European constitution recognizes the protection aspect of abortion services as an element of the health.

At the same time, supranational jurisprudence can limit or interpret fundamental rights in the internal space of states. Through the European Court of Justice's interpretation of the right to abortion, it was found that this right is clearly imposed in national legislation, being a constitutional obligation (ECHR, 2010; ECHR, 2023).

Interpretation of Judgment *A, B, C* v. *Ireland* or Judgment *ML / Poland*, by which the Court, was motivated on the theme that termination of pregnancy is an action related to the medical aspects of the mother's diagnosis social situation or fetal anomaly (reasons for abortion) constitutes an interference with the right to private life. In this situation, the existence of the right to abortion can be invoked based on art. 8 (ECHR, 2010).

In the context established by the jurisprudence, the assessment score of the right to abortion, boils down to the activity of the constitutional courts, which connect this right with other rights such as the right to dignity, bodily integrity, constituting a complete map of the landscape of the human personality.

Positioning of the right in the Constitution

The placement of a right or freedom in the Constitution considerably impacts the constraints of judicial interpretation. In this sense, we mention the change made in the Belgian constitution that links the right to abortion to the right to life. Thus art. 23 of the Belgian Constitution, which protects the "right to a dignified life", mentions some civil rights The enumeration deviates from the initial aspect reflecting an absolute right to other types of rights such as the right to work, the right to social security, health protection and social, medical and legal assistance and the right to cultural and social development (Article 23, European Union Agency for Fundamental Rights. (n.d.).

In this context, the abortion rules do not only refer to private life, but also to the dignity and sense of a pregnant person, to the economic and financial situation, which define social identity.

In addition, access to abortion is addressed as a medicated aspect, being established in most states using medical legislation that confers strict

limitations on the timing or access to this right. The constitutionalisation of this right would enshrine a freedom through the normative hierarchy.

According to ECHR jurisprudence, the right to abortion has always been connected with other rights, such as the right to life, the right to dignity, the right to family life, etc.

As such, there is a wide margin of appreciation for the national legislature in determining the permissibility of abortion; a similar reserved attitude allows him to achieve a regressive interpretation between the right to abortion and other constitutional rights.

This allows domestic legislators such as constitutional courts to establish greater protection for abortion than the approach taken by the European Court of Human Rights.

The literature mentions that the constitutional courts of the European states are less restrictive than the Strasbourg Court which was referred to the violation of fundamental rights. The European measures given by the jurisprudence solutions can bring constraints in the sphere of the national legislation (De Meyer & Romainville, 2024, 28).

Consecration of the "right to abortion" by art. 23 of the Belgian Constitution seems thematically justified because its invocation is imposed by the legislator's connection with Art. 8 regarding the right to a dignified life ECHR, and the right to respect private life.

The positioning of the right to abortion in the national constitutions can only be achieved in the circumstances of establishing the positive and negative obligations that the nature of this right dictates and that it attaches to the constitutional right.

In this sense, we recall the previous French concepts of guaranteeing not only the right to contraception, but also the mention that the law must guarantee "free and effective access" to these rights. The result of these clarifications guarantees positive and negative obligations, but it also removes the margin of legislative interpretation.

Conclusions

In the European arena, various initiatives have been developed to enshrine the right to abortion in the internal constitutions, a fact that led to different forms of interpretation of the phenomenon, establishing in this sense not the existential aspect of the right to abortion but indirectly and the way of its access. In the European space, states have different approaches motivated by ideological elements, determined by their own constitutions, and the right to abortion does not seem to be threatened.

In Europe, the constitutionalisation of the right to abortion was primarily based on the instrumental-procedural function of the constitutions.

Constitutionalisation enshrines the status the status of the right to abortion from a lower level to a higher level.

Although in Europe, indirectly, each state has adjacent legislation that protects the right to abortion, the need for constitutionalisation has shown that the protection of the European Court of Human Rights regarding access to abortion remains limited.

The constitutionalisation of the right to abortion does not introduce the absolute character of this right but undoubtedly specifies the limits of application through adjacent norms.

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