

**Expert opinion  
to the Constitutional Court  
of the Republic of Croatia**

**in reviewing the constitutionality of  
the Act on Health Measures for the Realization of  
the Right to Freely Decide on the Childbirth  
(NN 18/78)**

---

November 2016





## Table of contents

1. Introductory remarks: interest of the applicant, the legal issue
2. International standards on the scope of the right to life
  - 2.1. Global standards
  - 2.2. Standards of the European Convention on Human Rights
3. International standards regarding women's human rights
  - 3.1. Jurisprudence of the UN Committees
  - 3.2. Practice of The European Court for Human Rights and the European Commission for Human Rights
    - 3.2.1. *Restrictive laws*
    - 3.2.2. *Restrictive practices*
4. Comparative jurisprudence
  - 4.1 Abortion laws
  - 4.2. Jurisprudence of constitutional courts
5. Consequences of restrictive abortion laws
6. Conclusion

## 1. Introductory remarks: interest of the applicant, the legal issue

This expert opinion is submitted by CESI - Center for Education, Counselling and Research, an organisation engaged in reproductive and sexual health topics which advocates for improvements in social position of women as well as full implementation of laws and international instruments aimed at human rights protection. CESI is internationally recognized organisation for the protection of reproductive rights that cooperates with many similar international organisations, and is also a member of the ASTRA Central and Eastern European Women's Network for Sexual and Reproductive Rights and Health. CESI advocates compliance with international standards for the protection of sexual and reproductive rights. In 2007, in cooperation with the International Centre for the Legal Protection of Human Rights (Interights) and the Center for Reproductive Rights, CESI filed a complaint with the European Social Committee in relation to sexual education. Last year, together with Roda association and the Center for Reproductive Rights, CESI submitted a Shadow Report to the UN Committee on the Elimination of Discrimination against Women (CEDAW) regarding Croatia's compliance with reproductive rights.

Human rights experts Ivana Radačić and Karolina Wieckiewicz participated in compilation of this expert opinion. Ivana Radačić PhD, Senior Research Associate (International Law, Gender Studies) at the Ivo Pilar Institute of Social Sciences, an internationally recognized expert on human rights who worked as a lawyer at the European Court of Human Rights was primarily responsible for the part related to international law<sup>1</sup>. Karolina Więckiewicz, consultant and expert in reproductive rights with professional experience in Polish organisations engaged in protection of reproductive rights was primarily responsible for the part about comparative legal solutions and Polish experiences.

In drafting this document we consulted expert opinions and written comments created by the Center for Reproductive Rights, International Women's Human Rights Clinic at the University of New York, the Slovak Family Planning Association and SLOVAK PROCHOICE association to the Slovak Constitutional Court (with their approval).<sup>2</sup>

The expert opinion reviews the arguments of the allegations made in the request for constitutional review of the Act on Health Measures for the Realization of the Right to Freely Decide on the Childbirth (NN 18/78) which state that the Act violates Article 21 of the Constitution of the Republic of Croatia and Article 3 of the Universal Declaration of Human Rights. It shows that allegations are unsubstantiated, and that such interpretation of the Constitution would not be in accordance with international human rights standards, comparative European legislation and recent practice of the constitutional courts in Europe. Repeal of the Act would be contrary to positive trend towards liberalised abortion laws in Europe (and the world) and would further undermine women's rights protected by the international law and the Constitution. In addition, repealing of the Act would endanger the health and lives of women, undermine gender equality principle and thus would have negative consequences on the whole of society.

---

<sup>1</sup> See Radačić, I. (2017). Regulacija pobačaja - praksa Europske komisije za ljudska prava i Europskog suda za ljudska prava u svjetlu globalnih standarda. (*Regulation of Abortion - Practice of the European Commission on Human Rights and the European Court of Human Rights*). *Zagrebačka pravna revija* 5(3).

<sup>2</sup> PL ÚS/12.01 conformity of Act No. 73/1986 Coll. on artificial interruption of pregnancy as amended by the Act No. 419/1991 Coll. with the Constitution, available at: [http://www.reproductiverights.org/sites/default/files/documents/Slovakia\\_CC\\_Brief\\_ENG.pdf](http://www.reproductiverights.org/sites/default/files/documents/Slovakia_CC_Brief_ENG.pdf)

This expert opinion is divided into five parts. The first part considers the interpretation of the right to life in international law followed by the analysis of standards for the protection of reproductive rights set by the committees which monitor main UN conventions on human rights, the European Court of Human Rights and the European Commission of Human Rights. The expert opinion then provides an overview of recent trends in comparative law and constitutional jurisprudence in terms of abortion regulation and protection of prenatal life, with an emphasis on European solutions. Fourth part considers possible legal and practical consequences of the repeal of the Act. It concludes that the interpretation of the right to life in a way that includes the foetus and the consequent repealing of the law would be contrary to international standards, trends in comparative law and would have negative consequences on the health and lives of women.

## 2. International standards on the scope of the right to life

### 2.1. Global standards

The right to life is guaranteed by the Universal Declaration of Human Rights<sup>3</sup> and the International Covenant on Civil and Political Rights within United Nations.<sup>4</sup> In addition, the Convention on the Rights of the Child<sup>5</sup> guarantees children the right to life. Documents specified apply only to people who are already born, as can be seen from the preparatory material that preceded the adoption of the conventions,<sup>6</sup> as well as interpretations of the committees responsible for monitoring their implementation in the Member States.<sup>7</sup>

Article 1 of the *Universal Declaration of Human Rights* (UDHR) states that ‘all human beings are *born* free and equal in dignity and rights’. The *travaux preparatoires* indicate that the word ‘born’ was used intentionally, while representative of France confirmed that the rights set forth in the Declaration are ‘inherent from the moment of birth’.<sup>8</sup> Analysis of the preparatory material shows that the drafters specifically rejected a proposal to provide protection to prenatal life or recognise the right to life prior to birth from the moment of conception.<sup>9</sup> Accordingly, the term ‘everyone’ in the Article 3 of the UDHR applies only to people who are born, respectively, that the foetus does not have the right to life.

The term ‘every human being’ in the Article 6 of the *International Covenant on Civil and Political Rights* also does not include the foetus. In fact, analysis of the preparatory material shows that the amendment which stipulated ‘everyone is guaranteed the right to life from the moment of conception.’ was rejected.<sup>10</sup> Article 6 was adopted by a vote of 55 in favour, 17 abstentions and no votes against.<sup>11</sup> Furthermore, the practice of the Human Rights Committee, which monitors the Covenant’s implementation indicates that the foetus does not have the right to life. The Committee has consistently emphasized the

---

<sup>3</sup> U.N. Doc. A/810 (1948).

<sup>4</sup> U.N. Doc. A/6546 (1966).

<sup>5</sup> U.N. Doc. A/44/99 (1989).

<sup>6</sup> Coopelon, R., Zampas, C., Brisie, E. and Devore, J. (2005). Human Rights Begin at Birth: International Law and the Claim of Fetal Rights, *Reproductive Health Matters*, 13(26), 120-129.

<sup>7</sup> The committees (bodies comprised of independent experts) consider periodic reports of member countries and make decisions in individual complaints, some of which can exercise investigations. They also make general recommendations/comments that explain the extent in certain rights and obligations of the countries. See: <http://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx>

<sup>8</sup> U.N. Doc. A/PV/99 (1948), para. 116

<sup>9</sup> *Ibid.*, para. 110-124.

<sup>10</sup> U.N. Doc. A/C.3/L.654 (1957), para. 96; U.N. Doc. A/3764 (1957), para. 113

<sup>11</sup> U.N. Doc. A/3764 (1957), para. 119 (q).

threat to women's lives posed by illegal and unsafe abortions<sup>12</sup> and has called upon countries to liberalise laws and decriminalise abortion.<sup>13</sup> The practice of the Committee will be discussed further in the section referring to women's rights.

*The Convention on the Rights of the Child* also does not provide any protection for the right to life prior to birth. Inclusion of the phrase concerning prenatal life in the preamble<sup>14</sup> refers to the state's obligation to protect the child's capacity to survive and develop after birth through provision of protection and support to pregnant women by means of, for example, health measures related to prenatal care. As the provision's history of adoption shows, it does not affect the women's rights to execute abortions.<sup>15</sup> The Vatican, that proposed this provision stated that: 'the purpose of the amendment was not to preclude the possibility of an abortion'.<sup>16</sup> The amendment was adopted by a working group who explained that '...[it] does not intend to prejudice the interpretation of Article 1[that defines a child] or any other provision of the Convention by State Parties'.<sup>17</sup> Preamble's provision does not, therefore, affect common interpretation of the term child, which refers only to people who are born. Practice of the Committee on the Rights of the Child, which monitors the implementation of the Convention rejected any assertion that the Convention acknowledges a right to life prior to birth. In fact, the Committee consistently promotes access to abortion among adolescents and demands access to safe abortion regardless of whether abortion is legal in a particular country.<sup>18</sup> The practice of the Committee will be reviewed more thoroughly in the part related to women's rights.

## 2.2. Standards of the European Convention on Human Rights

*The European Convention for the Protection of Human Rights* (ECHR) was adopted as a first step towards the collective implementation of rights guaranteed by the Universal Declaration of Human Rights (UDHR).<sup>19</sup> ECHR drafters have not therefore discussed whether the Convention rights are applicable prenatally, but have already adopted the UDHR language ('everyone') that is interpreted in a way to firmly and definitively excludes the foetus.

The Convention bodies (the Commission and the Court)<sup>20</sup> refused to acknowledge the foetus as a subject of the right to life. Considering that the foetal life is intimately connected with the life of a pregnant woman, they deemed that, by giving the absolute right to life to a foetus, they would have restricted women's rights disproportionately, which is contrary to the purpose of the Convention. In specific cases, they discussed

---

<sup>12</sup> The Committee for Human Rights (2000). *General Comment no. 28: Equality of rights between men and women*, para. 10. U.N. Doc. CCPR/C/21/Rev.1/Add.10.

<sup>13</sup> Committee on the Elimination of All Forms of Discrimination against Women (2014). *Concluding Observations: Poland*. U.N. Doc. CEDAW/C/POL/CO/7-8

<sup>14</sup> The Preamble states that 'the child, by reason of his physical and mental immaturity, needs special safeguard and care, including appropriate legal protection, before as well as after birth', as indicated in the Declaration of the Rights of the Child. *Ibid*.

<sup>15</sup> UN Commission on Human Rights (1980). *The issue of the Convention on the Rights of the Child: report of the working group*. Doc. E/CN.4/L/1542.

<sup>16</sup> UNICEF (2007), *Implementation Handbook for the Convention on the Rights of the Child*

<sup>17</sup> UN Commission on Human Rights (1989), *The report of the working group on the draft Convention on the Rights of the Child*. U.N. Doc. E/CN.4/1989/48, p. 10.

<sup>18</sup> *General comment No. 15 (2013)* on the right of the child to the enjoyment of the highest attainable standard of health, para. 70. U.N. Doc. CRC/C/GC/15.

<sup>19</sup> 312 U.N.T.S. 221 (1950).

<sup>20</sup> By November 1, 1998 when the Protocol 11 came into force (CETS No. 155), the Commission, the Court and the Committee of Ministers were responsible for the interpretation of the Convention. Later on, the interpretation has been exclusively in the domain of the Court.

whether the country had achieved a fair balance between woman's rights and any possible foetal rights.

Directly relevant cases are those that were filed by the partners of pregnant women who opposed abortion and argued that the laws on abortion were in violation of Article 2 of the Convention which guarantees the right to life. In *X v. the United Kingdom* at issue was abortion due to medical indications in the 10<sup>th</sup> week of pregnancy,<sup>21</sup> and in *R.H. v. Norway* abortion due to social indications in the 14<sup>th</sup> week of pregnancy that has been performed by inducing labour.<sup>22</sup> The case of *Boso v. Italy* does not mention the week and reasons why abortion was performed, but it was performed in accordance with the law that allows abortion for the broadly-defined medical reasons (including social indications) until the 12<sup>th</sup> week of pregnancy, and thereafter to protect life and/or health of the pregnant woman as well as in cases of foetal abnormalities.<sup>23</sup>

The question of a possible right to life before birth has been reviewed thoroughly in *X*. The Commission considered common interpretation of the terms 'everyone' and 'life' in the context of Article 2 ('right to life is protected by law') and the Convention in general, in accordance with its purpose. It concluded that the term 'everyone' does not include 'the unborn'.<sup>24</sup> It also excluded the possibility that the foetus had an unlimited right as contrary to the purpose of the ECHR, recognizing that such an option would endanger women's rights since the life of the foetus is 'intimately connected to pregnant women's life' (para. 19). In relation to the other two options (the foetus has no right, or it has a limited right) the Commission did not specifically decide, but considered as to whether Article 2 could be applicable in this particular case. It concluded that the law which allows abortion in the early stages of pregnancy due to medical reasons did not violate Article 2 since 'the abortion is covered by an implied limitation, protecting the life and health of the woman at that stage, of the right to life of the foetus'.

This formula was also applied in other two cases. In both cases, the Convention bodies concluded that the state had not acted beyond its margin of appreciation 'in such sensitive area', and that it had achieved balance between 'the need to ensure protection of the foetus and, on the other, the woman's interests,' although laws were quite different and included a law allowing abortion on demand. The Convention bodies, therefore, considered such laws to be compatible with the Convention.<sup>25</sup>

The question of application of the right to life to foetus was addressed in the case of *Vo v. France* that concerned unintended pregnancy termination as a result of medical negligence.<sup>26</sup> The applicant argued that the fact that the doctor had not been punished for manslaughter constituted a violation of the right to life of the foetus. By restating the principles concerning cases of intentional abortions, the Court concluded that the foetus was not a person who had the right to life according to Article 2, although it required protection in the name of human dignity. In this particular case, the Court considered that it did not have to answer whether 'the involuntary termination of pregnancy' falls within the scope of Article 2, considering that there were no failures even if the Article 2 was applicable. The state had provided for a system of disciplinary penalties through civil law.

---

<sup>21</sup> No. 8416/78, 3 EHRR 408 (decision).

<sup>22</sup> No. 17004/90, 73 DR 155 (decision).

<sup>23</sup> No. 50490/99, ECHR 2002-VII (decision).

<sup>24</sup> The opposite argument by Hrabar, who refers to the interpretation of Puppink (who is her only one, though secondary, source of interpretation of the Convention), is not conclusive. Hrabar, D. (2015). Pravo na pobačaj - pravne i nepravne dvojbe. *Zbornik Pravnog fakulteta Sveučilišta u Zagrebu*, 65(6), 791-831, pp. 807-808.

<sup>25</sup> Contrary to the allegations made by Hrabar, they never indicated that the abortion on demand would violate the Convention. Hrabar, D. (2015). Pravo na pobačaj - pravne i nepravne dvojbe. Ibid, pp. 809.

<sup>26</sup> The case arose from an incident involving a French doctor who mistakenly ruptured a pregnant woman's amniotic sac when he mistook her for another patient who was not pregnant. *Vo v. France*, No. 53924/00 ECHR 2004-VIII (Grand Chamber).

The final case that raised the issue of foetal rights was *Evans v. the United Kingdom*.<sup>27</sup> The applicant argued that destruction of embryos created by in vitro fertilization after her former partner withdraw his consent for implantation would result in violation of Article 2 of the Convention. The Court again refused to extend Article 2 to embryos. With reference to the lack of European consensus on scientific or legal definition on beginning of life, the Court left the states a wide margin of appreciation. It held that the provision of English law which does not grant the embryo independent rights or interests does not violate the Convention.

Foetal rights issues have implicitly emerged in cases filed by women who argued that laws on abortion or their implementation violated their rights. Those issues will be analysed in the part dealing with women's rights. It should be noted that in these cases the Commission and the Court stated that the foetus was not the subject of the Convention rights, neither under Article 2 nor Article 8 (right to private life, which may be restricted in order to protect the rights of others). In conclusion, the ECHR does not protect foetal rights since both the Court and the Commission refused to declare liberal abortion laws contrary to the Convention.

### 3. International standards regarding women's human rights

While the foetus is not the subject of human rights, women's rights are considered to be 'inalienable, integral and indivisible' part of universal human rights.<sup>28</sup> They include reproductive rights, which refers to the right of couples and individuals to decide freely on whether or not they would have children and the timing and spacing as well as to provide them with information and means to make such decisions (reproductive self-determination right) without discrimination, compulsion and violence, as well as the right to the highest standard of reproductive and sexual health (reproductive health rights).<sup>29</sup> Although there is no separate instrument that protects reproductive rights, they are implicitly contained in the rights guaranteed through global and regional treaties, as stated in the the International Conference on Population and Development Programme of Action,<sup>30</sup> and seen from the jurisprudence of international bodies for human rights protection.<sup>31</sup> Right to life, freedom from torture, the right to privacy, freedom from discrimination and the right to health are some of implicated rights.

The right to reproductive self-determination is explicitly mentioned in the *UN Convention on the Elimination of All Forms of Discrimination against Women*. Article 16 of the Convention guarantees women 'the same rights to decide freely and responsibly on the number and age spacing of their children as well as to have access to the information, education and means to enable them to exercise these rights.'<sup>32</sup> Article 12, paragraph 1, grants them the access to 'health care services, including those related to family planning.'" The *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* contains a comprehensive provision on reproductive rights that guarantees availability of abortion in the following situations: when the pregnancy

---

<sup>27</sup> No. 6339/05. ECHR 2006 and ECHR 2007 (Grand Chamber).

<sup>28</sup> *Vienna Declaration and Programme of Action*, para. 18. U.N. Doc. A/CONF.157/23 (1993).

<sup>29</sup> *Programme of Action of the International Conference on Population and Development* para. 7.3, U.N. Doc A/CONF.171/13/Rev.1 (1994).

<sup>30</sup> *Ibid.*

<sup>31</sup> Center for Reproductive Rights (2015). *Breaking Ground: Treaty Monitoring Bodies on Reproductive Rights*. Available at: [http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/GLP\\_TMB\\_Booklet\\_Final\\_Web.pdf](http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/GLP_TMB_Booklet_Final_Web.pdf)

<sup>32</sup> *UN Convention on the Elimination of All Forms of Discrimination against Women* (2009). Zagreb: Gender Equality Office, Government of the Republic of Croatia.

endangers the mental or physical health of the ‘mother’ or the life of the ‘mother’ or the foetus, as well as in cases of rape, incest and sexual abuse.<sup>33</sup>

The UN Committees also require that abortion is legal and available in these situations<sup>34</sup> and recommend for indications to be interpreted in a broad sense.<sup>35</sup> They have criticized countries where abortion is permitted in those situations and recommended a change of practice and/or law.<sup>36</sup> In cases of adolescent pregnancies, the Committee on the Rights of the Child has recommended decriminalisation of abortion in all circumstances,<sup>37</sup> while the Committee on the Elimination of All Forms of Discrimination against Women has recommended repealing of any penal measures against women who perform abortions.<sup>38</sup> The Committees have consistently pointed to correlation between restrictive abortion laws and maternal mortality rate.<sup>39</sup> Restrictive laws on abortion are therefore considered as violations of a number of civil and political, social and economic rights, as well as violation of gender equality principle. Special rapporteur on everyone’s right to the enjoyment of the highest attainable standard of physical and mental health recognized in his annual report that restrictive laws on abortion have a negative impact on ‘dignity and autonomy of women.’<sup>40</sup> Special rapporteur on torture and other cruel, inhuman or degrading treatment or punishment stated in his report that utilization of reproductive rights is necessary in order to ensure that women are free from torture or inhuman and degrading treatment.<sup>41</sup> The following section provides an analysis of relevant general comments/recommendations and decisions on individual complaints of the specific committees.

### 3.1. Jurisprudence of the UN Committees

In the General Comment No. 28 concerning equality of rights between men and women, the UN Human Rights Committee stated that restrictive abortion laws endanger women’s rights to life and that unavailability of abortion in cases where conception is a result of sexual violence violates freedom from torture as well as that the obligation to report women who have conducted an abortion violates the right to privacy.<sup>42</sup>

---

<sup>33</sup> Article 14: Health and reproductive rights. Protocol (entered into force on November 25, 2005) CAB/LEG/66.6

<sup>34</sup> See, e.g. the following concluding comments on the reports of the Member States: The Committee on the Elimination of All Forms of Discrimination against Women (2016). *Concluding comments: Haiti*, para. 34 (c). U.N. Doc. CEDAW/C/HTI/CO/8-9; Human Rights Committee (2015). *Concluding comments: San Marino*, para. 15. U.N. Doc. CCPR/C/SMR/CO/3, The Committee on Economic, Social and Cultural Rights (2010). *Concluding comments: Dominican Republic*. U.N. Doc. E/C.12/DOM/CO/3; no decisions on individual complaints: Human Rights Committee (2011) *L. M. T. v. Argentina*, No. 1608/07, U.N. Doc. CCPR/C/101/D/1608/2007; Human Rights Committee (2016) *Amanda Jane Mellet v. Ireland*, No. 2324/2013. U.N. Doc. CCOR/ C/116/D/2324/2013; The Committee against Torture (2009): *Annual report*. U.N. Doc. CAT A/64/44.

<sup>35</sup> See, e.g. Human Rights Committee (2009). *K. L. v Peru*, No. 1253/2003, U.N. Doc. CCPR/C/85/D/1153/2003.

<sup>36</sup> See, e.g. The Committee on the Elimination of All Forms of Discrimination against Women (2014). *Concluding Observations: Poland* U.N. Doc. CEDAW/C/POL/CO/7-8; The Committee on the Elimination of All Forms of Discrimination against Women (2012). *Concluding comments: New Zealand*. U.N. Doc. CEDAW/C/NZL/CO/7; The Committee against Torture (2013). *Concluding Observations: Poland*. U.N. Doc. CAT/C/POL/CO/5-6.

<sup>37</sup> See, e.g. The Committee on the Rights of the Child (2016). *Concluding Observations: Benin*, para. 57 (c). U.N. Doc. CRC/C/BEN/CO/3-5; *Concluding Observations: Haiti* (2016), para. 51 (c). U.N. Doc. CRC/C/HTI/CO/2-3.

<sup>38</sup> *Concluding observations: Peru* (2014), para. 36. U.N. Doc. CEDAW/C/PER/CO/7-8.

<sup>39</sup> See, e.g. The Committee on Economic, Social and Cultural Rights (2016). *General Comment No. 22 on the right to sexual and reproductive health*, para. 10. U.N. Doc. E/C.12/GC/22; Committee on the Rights of the Child (2015). *Concluding Observations: Brazil*, para. 59. U.N. Doc. CRC/C/BRA/CO/2-4; Committee on the Elimination of All Forms of Discrimination against Women (2015). *Concluding Observations: Gambia*, para. 36 (c). U.N. Doc. CEDAW/C/GMB/CO/4-5.

<sup>40</sup> *Report to Human Rights Council* (2015), para. 55. UN Doc. A/HRC/20/33

<sup>41</sup> *Report of the Special Rapporteur to the UN on Torture* (2013), para. 50. UN Doc. A/HRC/22/53

<sup>42</sup> Human Rights Committee (2000). *General Comment No. 28: Equality of Rights Between Men and Women*, para. 10, 11 and 20, U.N. Doc. CCPR/C/21/Rev.1/Add.10.

The Committee had the opportunity to decide on individual complaints referring to unavailability of abortion on three occasions. In the case of *KL v. Peru*, a 17-year-old pregnant girl wanted to have an abortion due to foetal encephalopathy.<sup>43</sup> Although the abortion was permitted in cases of endangerment to the pregnant woman's health (but not due to the foetal deformity), she was denied the right to an abortion and had to give birth. The child lived only for four days, which had consequences for her mental health. The Committee held that denying access to legal abortion constituted violation of the freedom from torture and other cruel, inhumane and degrading treatment or punishment, the right to privacy and special protection and care afforded to minors.

The case of *L.M.R. v. Argentina*<sup>44</sup> concerned a young girl with intellectual difficulties who got pregnant due to sexual assault. Although abortion in cases of sexual assault on people with intellectual disabilities is legal after reporting the crime, without specific court or any other permission, and without any time limit or specifying the method of abortion, she was denied legal abortion. The civil courts had issued an injunction against abortion, which was annulled by the Supreme Court of Buenos Aires. Nevertheless, the hospital refused to perform the abortion due to substantial pressure from anti-abortion groups, so L.M.R. had an illegal abortion with the help of women's groups. In the case of *L.M.R. v. Argentina* the Committee found a violation of the right to be free from torture or cruel, inhuman or degrading treatment and the right to privacy and the right to effective remedy.

The case of *Amanda Jane Mellet v. Ireland*<sup>45</sup> concerned an unavailability of legal abortion in Ireland in case of foetal abnormality. Mrs. Mellet therefore travelled to Great Britain to obtain a legal abortion which had negative effects on her mental health (she was separated from her family, had to return to Ireland before she fully recovered, she was stigmatized) and additionally caused financial burdens. In this case, the Committee found violations to her right to be free from torture or cruel, inhuman or degrading treatment, freedom from discrimination and her right to privacy and consequently required liberalisation of abortion laws in Ireland.

In the General Comment No. 14 regarding the Right to the Enjoyment of the Highest Attainable Standard of Health, *the Committee on Economic, Social and Cultural Rights* emphasized that the right to health encompasses availability of high-standard medical care including services in the area of sexuality and reproductive rights and the annulment of all obstacles to accessibility of such services.<sup>46</sup> In the General Comment No. 22 on the Right to Sexual and Reproductive Health, the Committee recommended that states should be working towards decreasing the number of unwanted pregnancies and unsafe abortions through legal and policy measures to guarantee all individuals access to affordable, safe and effective contraceptives and comprehensive sexuality education, to liberalise restrictive abortion laws and grant women and girls access to safe abortion<sup>47</sup>. The states must secure availability, accessibility and good quality of abortion services and quality post-abortion care.<sup>48</sup> All barriers to accessibility and availability such as third party authorization biased counselling or obligatory waiting periods should be eliminated.<sup>49</sup>

---

<sup>43</sup> *K. L. v. Peru* (2009). No. 1253/2003, U.N. Doc. CCPR/C/85/D/1153/2003.

<sup>44</sup> *L. M. R. v. Argentina* (2011). No. 1608/07, U.N. Doc. CCPR/C/101/D/1608/2007.

<sup>45</sup> *Amanda Jane Mellet v. Ireland* (2016). no. 2324/2013. U.N. Doc. CCOR/ C/116/D/2324/2013.

<sup>46</sup> *General Comment No. 14. The Right to the Highest Attainable Standard of Health* (2000), para. 21. U.N. Doc. E/C.12/2000/4.

<sup>47</sup> *General Comment No. 22. on The Right to Sexual and Reproductive Health* (2016), para. 28. U.N. Doc. E/C.12/GC/22

<sup>48</sup> *Ibid*, para. 11-21.

<sup>49</sup> *Ibid*, para. 41.

In the General Comment No. 15 on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health, *the Committee on the Rights of the Child* emphasized that this right also includes access to services related to sexual and reproductive health. States should make abortion accessible and decriminalise it in all circumstances of underage pregnancies<sup>50</sup>

The **Committee on the Elimination of Discrimination against Women** refers to women's rights to reproductive self-determination in two recommendations. In the *General Recommendation No. 21: Equality in Marriage and Family Relations*, the Committee stated that women should have the exclusive right to decide for themselves if whether or not to give birth, and that this right should not be limited by husbands, partners or governments.<sup>51</sup> In the *General Recommendation No. 24 on the Right to Health* the Committee stated that the states should eliminate obstacles to accessibility of reproductive health care services required by women. Afore mentioned refers to laws that penalize women or criminalise medical treatments required only by women. Unavailability of services required only by women is regarded as discrimination by the Committee.<sup>52</sup>

The same Committee decided in the case of *L.C. v. Peru*<sup>53</sup>, where the complainant conceived at the age of 13 as a result of sexual assault. She tried to commit suicide and badly injured her spine during the attempt. Even though doctors concluded that her spine needed to be realigned immediately, they postponed the operation because she was pregnant. The complainant filed for abortion which was legal in case when the pregnant woman's health and life were at risk. However, the hospital refused to perform the abortion. Only after L.C. had a miscarriage and she underwent spinal surgery four months after it was recommended. She remained paralyzed from the neck down. The Committee found violations of the right to health, freedom of gender stereotypes and the right to a remedy. It also recommended Peru to change the abortion law to allow abortion in cases of rape and sexual assault as well as to make abortion available when a pregnant women's health is endangered.

### **3.2. Practice of the European Court for Human rights and the European Commission for Human Rights**

The Commission and the Court had the opportunity to decide on the cases that criticised abortion laws as well as those that criticized practical implementation of laws. These cases raised a question whether the European Court of Human Rights grants (and in which cases) abortion rights and whether the states are obliged to ensure access to legal abortion in practice. Both questions have been considered in the context of Article 8 that grants the right to private life (negative and positive obligations).

#### **3.2.1. Restrictive laws**

Two cases criticized abortion laws. In *Brüggemann and Scheuten v. Germany*, the law defined abortion as a criminal offence, not criminalised in situations of distress for the

---

<sup>50</sup> *General Comment No. 15. on the right of the child to the enjoyment of the highest attainable standard of health* (2013). U.N. Doc. CRC/C/GC/15.

<sup>51</sup> *General Comment No. 21: Equality in Marriage and Family Relations* (1994), para. 22, U.N. Doc. A/49/38.

<sup>52</sup> *General Comment No 24: Women and Health* (1999), para. 11 and 14. U.N. Doc. A/54/38/Rev.1.

<sup>53</sup> *L.C. v. Peru* (2011), no. 22/2009, U.N. Doc. CEDAW/C/50/D/22/2009.

pregnant woman.<sup>54</sup> In *A., B. and C. v. Ireland*,<sup>55</sup> the provision of the Constitution allowed abortion only in cases where pregnancy posed a threat to life of a pregnant woman. The Commission immediately recognized that regulation of abortion belongs to the sphere of the private life and can be considered as interference with the woman's private life. Nevertheless, it held that in this particular case there had been no interference, as in its view German law took account of woman's private life, allowing abortion in situations of distress of a pregnant woman. In the Irish case, the Court held that there was interference with the private life of applicants, although it did not find violation of the right, underline the importance of this issue in Ireland as well as the availability of information on abortion, post-abortion care in Ireland and possibilities of travelling abroad for an abortion. However, the Court emphasised that the prohibition of abortion on account of the protection of prenatal life is not automatically justified and that women's rights to health shall not be regarded as of a lower rank.

### 3.2.2. Restrictive practices

The case of *A., B. and C.* also raised the question about availability of an abortion in legally foreseen, life threatening instances. In Polish cases the question arose about availability of abortion in legally foreseen cases of: threat to health of a pregnant woman (*Tysiak*),<sup>56</sup> rape (*P. And S.*)<sup>57</sup> and foetal deformity (*R. and R.*).<sup>58</sup> In this cases the Court emphasised that the margin of appreciation narrows down once the state regulates abortion; a State must not structure its legal framework so as to limit real possibilities of obtaining a lawful abortion. In this respect, it has to set up a framework for deciding on abortion admissibility. These procedures must allow pregnant women to freely express their views. In the case of minors, the right to express opinion must be extended to their guardians, and there must be a mechanism for solving eventual conflicts of opinion between a minor and her guardian, all in the best interest of the child. Decision making bodies must provide written reasons and the procedure must be executed timely in order to exclude possible damage of a late abortion. In addition, in cases where abortion is allowed in cases of foetal abnormality, there must be a framework that grants pregnant women access to relevant, complete and reliable information about the health state of their foetus. Moreover, implementation of the right to conscientious objection cannot result in restricting the availability of abortion. Finally, as the Court emphasized, 'regulations on abortion must - in case of a therapeutic abortion - also be assessed against the positive obligations of the State to secure the physical integrity of mothers-to-be.'<sup>59</sup>

In conclusion, although Convention authorities have not clearly defined their view on abortion rights in a way the UN bodies have, they emphasized that prohibition of abortion on account of protection of prenatal life cannot be automatic and that all states have an obligation to ensure physical integrity of the pregnant women. On the other hand, the Court clearly took a firm stand towards ensuring availability of legal abortion in practice through implementation of effective and timely decision-making procedures, in which a pregnant woman must be able to be involved.

---

<sup>54</sup> No. 6959/75, 3 EHRR 244 (decision).

<sup>55</sup> No. 25579/05, ECHR 2010 (Grand Chamber).

<sup>56</sup> No. 5410/03, ECHR 2007.

<sup>57</sup> No. 57375/08, ECHR 2012.

<sup>58</sup> No. 27617/04, ECHR 2011.

<sup>59</sup> No. 5410/03, ECHR 2007, para. 114.

## 4. Comparative jurisprudence

### 4.1. Abortion laws

During the last 20 years abortion laws have been liberalised in more than 30 states.<sup>60</sup> Abortion is completely illegal or legal only in cases of life threatening circumstances for pregnant woman in 66 countries, in which 25,5% of the world's population lives. In 59 countries in which 13,8% of the world's population lives, abortion is legal if it is clear that pregnancy poses a threat for the life or health of the pregnant woman. Due to social and economic reasons, abortion is legal in 13 countries in which 21,3% of the world's population lives. The most liberal abortion laws are enforced in 61 countries; 39,5% of the world's population lives there.<sup>61</sup> Countries allowing abortion without restrictions are positioned in the Global North and most European countries belong to that group.

In most European countries (27) women have access to abortion on demand at the early stages of pregnancy.<sup>62</sup> In six countries, abortion on demand is legal up to the 10th week of pregnancy,<sup>63</sup> in 17 countries up to the 12th week,<sup>64</sup> in two up to the 14th,<sup>65</sup> in one up to the 18th week,<sup>66</sup> and in one up to the 24<sup>th</sup> week.<sup>67</sup> After these time limits, abortion is allowed only in specific situations (threat to health or life, foetal deformity). In 22 countries women are not required to explain their reasons for performing abortion,<sup>68</sup> in three countries, they need to provide reference to their hardship,<sup>69</sup> while in one they are required to provide reference to unfavourable social, economic or family circumstances,<sup>70</sup> and in one there have to be a 'grave crisis situation' for the mother.<sup>71</sup> In 13 countries, there are no procedural requirements whatsoever,<sup>72</sup> while in some countries women are required to undergo counselling or a waiting period has to pass prior to performing abortion. In three more countries in Europe<sup>73</sup> laws are implemented in a way that allows women to carry out abortions because of their personal reasons, although they do not provide abortion on demand. Only five European countries do not provide legal options for abortion on demand or in cases of unfavourable circumstances for pregnant woman.<sup>74</sup> Nevertheless, in almost all European countries there is a possibility for a woman to perform an abortion if abortion poses a threat to her life or her health, in cases of sexual violence or foetal deformity. Only in one country<sup>75</sup> abortion is absolutely illegal, while in two of them<sup>76</sup> it is available only if a pregnant women's life is at stake. This short overview shows support for the legal solutions that provide for abortion on demand at early stages of pregnancy, as is the case with the Croatian legislation.

---

<sup>60</sup> Center for Reproductive Rights (2014). *Abortion worldwide: 20 years of reform*.

<sup>61</sup> Center for Reproductive Rights (2014). *The World's Abortion Laws*.

<sup>62</sup> Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Czech Republic, Denmark, Estonia, France, Greece, Croatia, Italy, Latvia, Lithuania, Luxembourg, Macedonia, Netherlands, Norway, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland.

<sup>63</sup> Bosnia and Herzegovina, Croatia, Macedonia, Portugal, Serbia, Slovenia.

<sup>64</sup> Austria, Belgium, Bulgaria, Czech Republic, Denmark, Estonia, France, Greece, Italy, Latvia, Lithuania, Luxembourg, Hungary, Germany, Norway, Slovakia, Switzerland.

<sup>65</sup> Romania, Spain.

<sup>66</sup> Sweden.

<sup>67</sup> The Netherlands.

<sup>68</sup> Austria, Bosnia, Bulgaria, Czech Republic, Denmark, Estonia, France, Greece, Croatia, Latvia, Lithuania, Luxembourg, Macedonia, Germany, Norway, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain, Sweden.

<sup>69</sup> Belgium, Netherlands, Romania.

<sup>70</sup> Italy.

<sup>71</sup> Hungary.

<sup>72</sup> Bosnia and Herzegovina, Bulgaria, Czech Republic, Denmark, France, Croatia, Lithuania, Norway, Romania, Serbia, Slovakia, Slovenia, Sweden.

<sup>73</sup> Finland, Iceland, United Kingdom.

<sup>74</sup> Ireland, Cyprus, Malta, Poland, Northern Ireland.

<sup>75</sup> Malta.

<sup>76</sup> Ireland, Northern Ireland.

## 4.2. Jurisprudence of constitutional courts

The constitutional law jurisprudence started developing in the 1970's with the wave of liberalisation of abortion legislation.<sup>77</sup> Even then some courts in Europe (Austria, the Netherlands and France) refused to grant a foetus any rights.<sup>78</sup> Recent European constitutional courts abortion jurisprudence indicates more understanding for women's rights,<sup>79</sup> which is the starting point of the Constitutional Court of the USA,<sup>80</sup> as well as the Constitutional Court of South African Republic.<sup>81</sup> Even the Constitutional Court of Germany modified its decision of 1975 that was based on the priority of the 'the foetal right to a life'. In 1933 judgement the Court stated that foetus does not need to be protected by criminalisation of abortion on demand, but by mandatory counselling as such attitude 'shows respect for a women as an autonomous human being.'<sup>82</sup>

Recently, the Constitutional courts in Slovakia and Portugal refused to give foetus constitutional rights; as they considered protection of prenatal life as a question of constitutional values and not rights. Reviewing the constitutionality of the law that permits abortion on demand in early stages of pregnancy, the Constitutional Court of Slovakia stated that interference in a pregnant women's decision on abortion is in fact interference with her private life. It held that the woman's right to privacy could only be limited through setting the procedures and the time limits for abortion.<sup>83</sup> It have concluded that the law on abortion did not violate the Constitution which, unlike the Constitution of the Republic of Croatia, contains a provision stating that human life is worthy of protection even before birth. By refusing to interpret that provision in a manner that grants the right to life to foetus, the Constitutional Court emphasised that the foetus should be protected through adequate protection measures for women (in the field of health, social and labour law policies), and not through measures against them. For the Constitutional Court, protection of prenatal life was not the only or primary constitutional value: woman's right to reproductive self-determination was entitled to absolute and equal protection in the constitutional order; in order to exercise this right, woman must be able to freely decide on abortion. Abortion is, therefore, considered as a constitutional right, at least within a certain time period of pregnancy.

In the year 2010, the Constitutional Court of Portugal also adjudicated that abortion on demand was in accordance with the Constitution.<sup>84</sup> It considered that the protection of prenatal life could not be achieved through criminalisation of abortion, but required the state to work towards reducing risk factors through education and social policies that support willingness to continue pregnancy (by providing decent living and working conditions, measures to balance work and family life). The Court indicated that the best

---

<sup>77</sup> Siegel, R. (2014). The Constitutionalisation of Abortion. U: R. J. Cook, Erdman, N. J. and Dickens, B. M. (ed). *Abortion Law in Transnational Perspective: Cases and Controversies*. Philadelphia: Pennsylvania University Press;

<sup>78</sup> In Austria and the Netherlands constitutional courts rejected the request to review the constitutionality of liberal laws, holding, inter alia, that the Constitution should not be interpreted in terms of protecting the rights of the unborn. In 1975, the French Constitutional Court confirmed the French legislation regulating the right to abortion, implicitly adopting the view that the foetus is not a child who is entitled to constitutional protection.

<sup>79</sup> Siegel, op. cit. (note 75).

<sup>80</sup> In 1973, the US Supreme Court in the case of *Roe v. Wade* expressly ruled that the personality depends on birth, causing that the fetus is not a 'person' entitled to constitutional protection. The views expressed in this case the Supreme Court of the United States confirmed on several occasions, the most recent in the case of *Stenberg v. Carhart*, which overturned the state law under which certain methods of abortion were prohibited because the legislature failed to take into account the protection of women's health. See *Written Comments by Center for Reproductive Rights et al* (2007).

<sup>81</sup> In the case *The Association of Christian Lawyers and Others v. Minister of Health and others*, the High court confirmed constitutionality of the law that allows abortion on demand during early months of pregnancy. 50 BMLR 241 (1998). *Ibid*.

<sup>82</sup> Siegel. op. cit. (note 75), p. 25.

<sup>83</sup> Lamačková, A. (2014). *Women's Rights in the Abortion Decision of the Slovak Constitutional Court*. U: R. Cook, R. and assoc., op. cit. (note 75).

<sup>84</sup> Rubio-Marin, R. (2014). *Abortion in Portugal: New Trends in European Constitutionalism*. U: Cook, R. J. and assoc., op. cit. (note 75).

way to protect prenatal life was to protect the one that already exists. Furthermore, it considered that the abortion law which allows abortion on demand during the first three months of pregnancy (with obligatory impartial counselling) did not violate the Constitution. This brief overview of recent trends in the constitutional jurisprudence in Europe also speaks in favour of the constitutionality of Croatian law.

## 5. Consequences of restrictive abortion laws

Consequences of restrictive laws also speak in favour of current Croatian law on abortion. Restrictive laws on abortion affect the rate of mortality and morbidity due to unsafe abortions, while they are not efficient in reducing the rate of abortion.<sup>85</sup> In countries where abortion is permitted for the broadest possible reasons, unsafe abortions and mortality rate are reduced to a minimum.<sup>86</sup> Abortion rate, mortality and morbidity due to unsafe abortions are the lowest in Western Europe, where the laws that regulate abortion are the most permissive.<sup>87</sup>

Restrictive laws directly cause a higher rate of unsafe abortions which, primarily, affects young and poor women.<sup>88</sup> According to assessments made by the World Health Organization (WHO), around 22 million unsafe abortions are performed annually,<sup>89</sup> and 98% of those take place in developing countries that have restrictive abortion laws.<sup>90</sup> Around 47,000 lethal outcomes related to child birth are a consequence of unsafe abortion complications, while 8,5 million women annually suffers complications due to unsafe abortions and they require health care.<sup>91</sup>

Unsafe abortions result in life-threatening complications such as haemorrhage, infection, genital trauma, perforated uterus and poisoning due to ingestion of harmful substances. Further, the prospect of prosecution will deter women and girls from seeking emergency medical services necessitated by abortion complications. They often lack financial resources, do not think their complications are serious, but they also fear abuse, mistreatment or legal penalties.<sup>92</sup> The costs of treating complications due to unsafe abortion are tremendous and include much more than direct costs of post-abortion medical insurance services.<sup>93</sup> The WHO considers that nearly all deaths and disability resulting from unsafe abortion 'could have been prevented through sexual education, family planning, and provision of safe, legal induced abortion and care for complications of abortion.'<sup>94</sup> International Federation of Gynaecology and Obstetrics (FIGO) considers that safe abortion

---

<sup>85</sup> WHO (2012). *Safe abortion: Technical and policy guidance for health systems* (2<sup>nd</sup> edition).

<sup>86</sup> Ibid.

<sup>87</sup> Ibid. Center for Reproductive Rights (2015). *The World's Abortion Laws*.

<sup>88</sup> Poor women have poor access to family-planning services. Besides that, due to their dependence on the public health institutions for treatment in cases of emergency, poor women and those who provide them with services of illegal abortions are disproportionately often persecution targets. See, for example, the Committee against Torture (2014). Concluding Observations: Chile. U.N. Doc. CAT/C/CR/32/5.

<sup>89</sup> Estimate for 2008 according to WHO (2011). *Unsafe abortion: global and regional estimates of the incidence of unsafe abortion and associated mortality in 2008* (6<sup>th</sup> edition).

<sup>90</sup> WHO (2012). *Safe abortion: technical and policy guidance for health systems* (2<sup>nd</sup> edition), p. 17.

<sup>91</sup> Ibid.

<sup>92</sup> Ibid, p. 20.

<sup>93</sup> Ibid, p. 26.

<sup>94</sup> Ibid, p. 1.

should be provided in order to respect women's rights to autonomy and prevention of unsafe abortions.<sup>95</sup>

Experience of Romania in the period between 1966 and 1989 illustrates what happens when women have difficult access to safe and legal abortion. The mortality rate of women associated with abortion increased from 20 per 100 000 live births in 1965 to 150 per 100,000 live births in 1983, which was 10 times higher than in other European countries.<sup>96</sup> Around 10, 000 women have died between 1965 and 1989 due to illegal abortion complications.<sup>97</sup> In the mid 1980's, illegal abortions were responsible for 86% of the maternal deaths which is the highest mortality rate of pregnant women due to illegal abortions in the world and substantially higher than in developing countries.<sup>98</sup> Moreover, in the same period, between 150,000 and 200,000 children were placed in orphanages.<sup>99</sup> Finally, application of this law violated the right to women's private life since women had monthly examinations in order to determine whether they were pregnant, and those who were subjected to surveillance. In the first year after abortion prohibition was repealed in Romania (1989), the mortality rate of pregnant women was diminished and it was reduced more than 16 times by 2002. These dramatic changes in family planning policy and availability of abortion enables further analysis of proximate causes and clearly show that legal abortions reduces death rate of pregnant women.<sup>100</sup>

Polish experience is also indicative of the consequences of restrictive abortion laws. Since 1993 Poland has prohibited abortion on demand and allowed abortion in case of medical indications (related to the health of the pregnant women or foetus) or when the pregnancy is the result of a criminal act.<sup>101</sup> However, prohibition of abortions outside of these circumstances does not affect choices of women who decide to terminate unwanted pregnancy. Non-governmental organizations estimate that 200,000 women decide to have abortion on demand annually, while official statistical indicators in Poland regarding abortions remain at 641 (2010) and 977 (2014).

Women who want to terminate unwanted pregnancies choose one of these three solutions: unsafe and illegal abortion performed by a doctor, termination of pregnancy with abortion pills or performing abortion abroad (mainly Slovakia and Germany).<sup>102</sup> There are no provisions about post-abortion care in the law that regulates abortion nor in the Law on Health Services so this service is often unavailable, especially in cases of illegal abortions. Moreover, criminalization of abortion outside of the statutory circumstances affects the availability of legal abortion, it has a deterrent effect (so-called *chilling effect*), since the doctors and hospital directors fear possible criminal proceedings.<sup>103</sup> Therefore, medical staff often set additional requirements for an abortion to take place (additional documents, Ethic Committee certificates).<sup>104</sup> Additionally, the right to

---

<sup>95</sup> FIGO Committee for the Ethical Aspects of Human Reproduction and Women's Health (2012). *Ethical Issues in Obstetrics and Gynecology*, p. 132.

<sup>96</sup> WHO (1997). *Unsafe Abortion: Global and regional estimates of incidence of a mortality due to unsafe abortion with a listing of available country data* (3<sup>rd</sup> edition).

<sup>97</sup> Stephenson, P., Wagner, M. Baidea, M. and F. Serbanescu, F. (1992). The Public Health Consequences of Restricted Induced Abortion -- Lessons from Romania. *American Journal of Public Health* 82 (10). 1328-1331.

<sup>98</sup> Jacobson, J. L. (1990), *Worldwatch Paper 97: The Global Politics of Abortion*, p. 41.

<sup>99</sup> Stephenson, P. and assoc., op. cit. (note 97).

<sup>100</sup> Grimes, D., Benson, J. Singh, S. and assoc. (2006). Unsafe abortion: the preventable pandemic. *Lancet* 368(9550), 1908-1919.

<sup>101</sup> The Law on Family Planning, Protection of the Human Fetus and the Admissibility of Abortion (1993), legal magazine 1993, no. 17

<sup>102</sup> Grzywacz, A., Więckiewicz, K. i Zimniewska, M. (2013), *20 years on the Law on abortion in Poland - report*, available at: [http://www.federa.org.pl/dokumenty\\_pdf/raporty/raport\\_federacja\\_2013.pdf](http://www.federa.org.pl/dokumenty_pdf/raporty/raport_federacja_2013.pdf)

<sup>103</sup> That was noticed by European Human rights Court *Tysiack, R.R. and P. and S. v. Poland*, see part 3.2.2 of this document

<sup>104</sup> Cheltstowska, A., Dziewanowska, M. i Więckiewicz, K. (2016), *Access to legal abortion in Polish hospitals - report*, available at: [http://www.federa.org.pl/dokumenty\\_pdf/kontrola\\_praw\\_kobiet.pdf](http://www.federa.org.pl/dokumenty_pdf/kontrola_praw_kobiet.pdf)

conscientious objection is often misused and is therefore impossible to perform abortion in some provinces.<sup>105</sup> Afore mentioned shows that repeal the abortion on demand, in addition to limiting women's autonomy, has a negative effect on the availability of abortion in cases prescribed by law while it has not proven itself effective in reducing the number of abortions.

Apart from the fact that restrictive laws on abortion increase the number of unsafe abortions and thus endanger women, women's health and lives may be at risk in circumstances where pregnant women's illness requires treatment that poses a danger to the foetus, where pregnancy can seriously aggravate the illness or the treatment that can save a pregnant woman's life includes an abortion. In fact, in countries that have restrictive laws, doctors sometimes refuse to conduct timely diagnosis and necessary treatment.<sup>106</sup> Denial of timely medical procedures related to incomplete miscarriages and ectopic pregnancies which can result in death is particularly concerning.<sup>107</sup>

Furthermore, the interpretation of the right to life in a way that includes the foetus would create tremendous ethical problems regarding patient-doctor relationship. There is a possibility of creating a rivalry in case the interest of the foetus is taken into account separately from the pregnant woman. From the doctor's perspective, treating the foetus as a patient with its own rights may lead to the conflict of interests, to the extent that the interests of the foetus (the patient) are given priority or are weighted against the interests of the pregnant woman.<sup>108</sup> Abortion could be prosecuted as a murder, while the woman who aborted and her doctor her doctor could be sanctioned. Access to basic obstetric services could be reduced if doctors considered that any medical negligence could be prosecuted as manslaughter. This interpretation of prenatal life could thus jeopardize already existing standards in prenatal care. Forcing women into treatment methods they disagree with as well as denial of important information about dangers that medical procedures can pose and all the possibilities at women's disposal could threaten the ethical principle of informed consent.<sup>109</sup>

Additionally, by giving the right to life to a foetus, a pregnant woman could be treated by law as a container, she could be examined and punished for any activity that could jeopardize the continuation of pregnancy or her foetus such as noncompliance with medical advice, smoking, physical and sexual activity or continuation of employment. Pregnant women could be forced into Caesarean section and other invasive surgical procedures in order to protect the foetus.<sup>110</sup> As specified by the Canadian Supreme Court, foetal rights would had granted frightening range of potential restriction to women's autonomy; it would have enabled men who are possible fathers, the state and even the foetus or its self-proclaimed representative<sup>111</sup> to sue the woman for deciding on abortion

---

<sup>105</sup> Gorczyca, A. (2016), *Legal abortion? Not in Podkarpaciu*, available at: <http://rzeszow.wyborcza.pl/rzeszow/1,34975,20050830,legalna-aborcja-nie-na-podkarpaciu.html>

<sup>106</sup> See, e.g., the European Court for Human Rights (2011). *R.R. v. Poland*. No 27617/04. The Committee on the Elimination of Discrimination against Women (2009). *L.C. v. Peru*, no. 22/2009 (2011). UN Doc CEDAW/C150/D/22/2009.

<sup>107</sup> In Ireland in 2012., prolonging of abortion to the 17<sup>th</sup> week due to identified heartbeat of the fetus led to death of Savita Halappanavar. *Savita Halappanavar death: nine members of medical team disciplined* (September 11, 2014), available at: [www.theguardian.com/world/2014/sep/11/savita-halappanavar-abortion-ireland-medical-team-disciplined](http://www.theguardian.com/world/2014/sep/11/savita-halappanavar-abortion-ireland-medical-team-disciplined).

<sup>108</sup> Dickens, B. and Cook, R. (2003). Ethical and legal approaches to "the fetal patient," *International Journal of Gynecology & Obstetrics*, 83, 85-91, p. 87.

<sup>109</sup> The European Human Rights Court, *Open Door Counselling and Dublin Well Woman v. Ireland*, No. 14234/88 and 144235/88, Series A, 264 A (1992).

<sup>110</sup> In its guidelines, FIGO states that no woman should be forced to undergo any medical or surgical procedure in order to preserve the health or life of the fetus as it would constitute a violation of her autonomy and basic human rights. FIGO Committee for the Ethical Aspects of Human Reproduction and Women's Health (2012). *Ethical Issues in Obstetrics and Gynecology*, p. 90.

<sup>111</sup> *Winnipeg Child Family Services against G.* 3 S.C.R. 925 (1997).

or taking any kind of action for which it could be argued that had the impact on the foetus survival. Spontaneous abortion that occurs in many pregnancies would become suspicious, as happened in Nepal and El Salvador.<sup>112</sup> In El Salvador prisons, there are currently about 25 women convicted of murder for the 'crime of miscarriage'.<sup>113</sup>

## 6. Conclusion

In this expert opinion we analysed international legal standards and comparative jurisprudence regarding the regulation of abortion and we have considered the consequences of restrictions of abortion. Analysis of international standards showed that the foetus does not have a status of the subject of human right. The preparatory material of the documents that guarantee the right to life show that this issue was discussed and that it was decided that rights belong only to born person, while the practice of the committees in charge of monitoring the implementation of conventions in the member states set standards for the protection of reproductive rights, which include decriminalisation of abortion. The international human rights standards therefore refers to the conclusion that Croatian law is constitutional. The same conclusion arises from the analysis of comparative laws and constitutional practices in Europe. The majority of European countries allow abortion on demand in the early stages of pregnancy. Moreover, recent constitutional practice brings attention to women's rights. Most constitutional courts that have decided on abortion have refused to give the foetus the status of the subject of constitutional rights.

Finally, the consequences of restrictive laws speak in favour of legislative solution that permits abortion on demand. Restrictive laws on abortion are one of the leading causes of maternal mortality. Therefore, we submit that the Constitutional Court of the Republic of Croatia should confirm the constitutionality of the Act on Health Measures for the Realization of the Right to Freely Decide on the Childbirth.

---

<sup>112</sup> Center for Reproductive Rights (2002). *Abortion in Nepal, Women Imprisoned*, Center for Reproductive Rights (2015). *New Human Rights Case Filed On Behalf of Salvadoran Women Who Miscarried and Are Wrongfully Imprisoned*.

<sup>113</sup> *El Salvador - where women are jailed for 40 years for a 'crime' of having a miscarriage* (May 28, 2016), available at: <http://www.independent.co.uk/news/world/americas/el-salvador-where-women-are-jailed-for-40-years-for-the-crime-of-having-a-miscarriage-a7053501.html>.

**Supported by a grant from the Open Society Initiative for Europe within  
the Open Society Foundations.**



---

Nova cesta 4, 10 000 Zagreb  
Tel: +385 (0)1 24 22 800  
GSM: +385 (0)95 903 5442  
Fax: +385 (0)1 24 22 801  
E-mail: [cesi@cesi.hr](mailto:cesi@cesi.hr)  
Web: [www.cesi.hr](http://www.cesi.hr)  
FB: CentarCESI  
Soundcloud: CentarCESI  
Youtube: Ravnopravnost