RULING OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF CROATIA
No: U-I-60/1991 and others of 21 February 2017

SUMMARY

The Constitutional Court did not accept proposals to review conformity with the Constitution of the Act on Medical Measures for the Exercise of the Right to the Freedom of Choice in Childbearing (Official Gazette Nos: 18/78, 31/86, 47/89 and 88/09, hereinafter: Act), submitted by seven proponents.

The Constitutional Court instructed the Croatian Parliament to pass a new law within two years, in accordance with the findings of the Constitutional Court provided in the statement of reasons of this ruling.

I. INTRODUCTION

Moral Issues

Termination of pregnancy is not only complex but also controversial issue that cannot, and may not, be approached one-sidedly. It causes deep schisms and debates in all societies. This is understandable, given that the matter involves a deeply moral, worldview, ethical, philosophical, medical, scientific, religious, and legal issue. So, no wonder that no consensus has been reached on the issue for as long as anyone can remember.

The "heart of the problem", especially if it is observed from the legislative aspect, lies in the fact that it is an attempt to resolve a primordially moral and worldview issue by regulating it via a (coercive) legal standard. However, moral views (especially if they are intertwined with someone's religious beliefs) can be in conflict, even mutually exclusive. It is a matter of morals, ethics, and faith, as understood and examined by each individual further to his/her right to self-determination. It is, thus, illusory to expect that legislative regulation of this issue would resolve all dilemmas and schisms that it incites in society. The complexity and sensitivity of the relationship between law and morality is reflected in and encumbers the resolution of the issue of termination of pregnancy.

It is often ignored that the moral views cannot always, and do not necessarily have to be translated into legal norms, and that moral duties, even if they are legally regulated, go beyond the framework of law. Moral duties, thus, cannot be exclusive grounds for the legal regulation of a certain issue. Termination of pregnancy is, first and foremost, a moral issue that concerns not only the conscience, right and dignity of a woman (who wants or intents to terminate her pregnancy), but it is also reflected in the position of a particular social community towards the ethical acceptability or unacceptability of

someone's act (public morality), philosophical and ethical views on the right to protection and the right to dignity of a human being even before birth, etc.

It is no wonder that the issue of termination of pregnancy causes deep schisms and debates in all societies.

However, it could be stated that at national and global level two mutually morally opposed "tribes" (groups) had formed: those against "the right to abortion" who chose to refer to themselves as "*pro-life*", and those who advocate abortion, who call themselves "*pro-choice*"; the two groups have been accepted with such names even in international documents. Moral arguments of these two groups can be summarised as follows:

Advocates of the position "*pro-life*" believe that life begins at the time of conception, and the embryo is a human being that must enjoy all human rights, including the right to life. A mother's body is only "a place where the unborn child grows and feeds", so the woman has no right to decide herself about the life of the unborn child. Termination of pregnancy is murder, a violent end of human life.

Advocates of the position "*pro-choice*" believe that the right of the woman to terminate her pregnancy is a fundamental human right deriving from the right of the woman to life, self-determination, dignity, and health. Restrictive laws that ban the termination of pregnancy only expose women to increased health risks and they are discriminatory. They will not dissuade women from terminating (unwanted) pregnancies, but only force them to use alternative solutions, thus jeopardising their life and health. Given that a woman's right to reproductive self-determination is a fundamental human right, they deem the prohibition of termination of pregnancy impermissible.

International Documents

Numerous international documents protect the right to life of all human beings, as a fundamental human right, which is above all other rights and a precondition for the exercise of all other rights. However, they fail to provide an answer to the question when life begins. In other words, they do not provide an answer to the question when an unborn human being becomes a person.

For example, Article 1 of the Universal Declaration of Human Rights states that "all human beings are born free and equal in dignity and rights", while Article 3 proscribes that "everyone has the right to life".

Article 2 paragraph 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention) prescribes that everyone's right to life is to be protected by law.

Article 1 of the Convention on Human Rights and Biomedicine states that the purpose of the Convention is to protect the dignity and identity of all human beings, while Article 2 stipulates that the interests and welfare of the human being shall prevail over the sole interest of society and science.

Jurisprudence of the European Court of Human Rights and Court of Justice of the European Union

In the interpretation and application of international documents there is certain corpus of case-law, in particular jurisprudence of the European Court of Human Rights in Strasbourg (hereinafter: ECHR). However, the case-law concerned fails to provide an answer to the question when an unborn human being becomes a person. On the contrary, the ECHR points out that a certain progress has been made, but that it can still not be talked about the existence of generally accepted positions that would be binding on all states as shared heritage.

In reviewing national legislation, i.e. legal solutions applicable in individual cases, the ECHR starts with Article 2 of the Convention which protects the life of everyone, but an unborn (child) is not regarded as a "person" directly protected under Article 2 of the Convention. Furthermore, it takes into account that there is no consensus regarding the matter among the Member States, so it is neither desirable nor possible to talk in abstract terms whether an unborn child is a person within the meaning of Article 2 of the Convention.

The ECHR starts from the fact that an "unborn" has begun to receive some protection in the light of scientific progress and potential consequences of research in the field of genetic engineering, medically assisted procreation, and embryo experimentation, but it remains within the finding that at best it may be regarded as common grounds between the States that the embryo/foetus belongs to the human race. The potentiality of that being and its capacity to become a person that enjoys certain civil rights (e.g. inheritance and gifts) require protection in the name of human dignity, without making it a “person” with the “right to life” for the purposes of Article 2 of the Convention (*Vo vs. France* (2000) §§ 84 and 85).

Therefore, even under the presumption that it can be considered that that foetus enjoys the rights guaranteed in Article 2 of the Convention, an assessment of a violation of his rights depends on particular circumstances of each individual case, i.e. whether the national legislation on the termination of pregnancy strikes a fair balance between the need to ensure protection of the foetus on one hand, and the rights and interests of the woman on the other. The ECHR examines termination of pregnancy in relation to the woman's rights and interests within the scope of Article 8 of the Convention.

Further to the above, in its examination of national legislation the ECHR carries out the proportionality test to determine whether the state, within its wide margin of

appreciation, has struck a fair balance between the protection of individual rights and public interest, i.e. between the right of the woman to freedom of choice, protection of her dignity and privacy, and public interest to protect life of an unborn human being.

In doing so, the ECHR acknowledges that in most states of the Council of Europe there is (some) consensus towards liberalisation of the termination of pregnancy and that most states in their legislation resolve the opposing rights of the foetus and of the woman (mother) in favour of easier access to termination of pregnancy.

The Court of Justice of the European Union (hereinafter: CJEU) so far tackled this issue in a decision *Oliver Brüstle vs Greenpeace* eV of 2011. It found that every cell, must, as soon as fertilised, be regarded as a "human embryo" within the meaning and for the purposes of Article 6(2)(c) of the Directive 98/44/EC of the European Parliament on the legal protection of biotechnological inventions, as by the fertilisation commences the process of development of a human being. Thus, it cannot be regarded that the CJEU answered the question when the life begins neither in scientific nor legal meaning.

Legislative solutions in European countries

Almost all countries of the Council of Europe/ European Union allow termination of pregnancy, with minor or major restrictions. Most European countries allow it on request and/or for widely-established health and socioeconomic reasons.

Ireland allows the termination of pregnancy solely and exclusively if a woman's life is endangered. In Poland, it is allowed only for reasons permitted by law, when there is a risk to woman's life or health or foetal defects. Malta and Andorra do not allow it even for these reasons (i.e. the termination of pregnancy is absolutely forbidden).

European countries that allow the termination of pregnancy on request link it with the earlier stages of pregnancy (usually before the end of the 10th, 12th or 14th week, so-called periodic model of termination of pregnancy). For example, in Portugal the termination of pregnancy on request can be performed in the first 10 weeks of pregnancy, in Spain in the first 14 weeks, in France and Slovakia in the first 12 weeks, in Sweden in the first 18 weeks of pregnancy, etc. States which allow the termination of pregnancy on request, but link it with specific, widely-established health and socioeconomic reasons, also allow it in the earlier stages of pregnancy. Thus, for example, in the Netherlands and the UK pregnancy can be terminated before the end of the 24th week of pregnancy, and in Italy before the 12th week.

Under legislation of the countries allowing the termination of pregnancy, after expiration of the period in which the termination on request can be legally carried out, with or without socioeconomic reasons, health professionals may terminate pregnancy also in later stages of pregnancy, when there is a risk to woman's life or health or there are severe or fatal foetal defects.

Constitutional solutions and jurisprudence of European Constitutional Courts

From legislative and constitutional law point of view, the issue of termination of pregnancy came into focus especially in the last decade of the last century, and it is still on the table.

Comparative analysis of European constitutions showed that almost no European constitution acknowledges either explicitly or implicitly separate right to life before birth. Ireland is the only country whose Constitution entails the provision that explicitly recognises the right to life to unborn beings. The Constitutions of several states (Czech Republic, Hungary and Slovak Republic) entail provisions relating to prenatal life (protection of life before birth), and stipulate that human life deserves protection before the birth. However, the Constitutional Courts of these states found that these constitutional provisions cannot be interpreted as establishing or acknowledging a special right to life of an unborn, but as a constitutional value that enjoys special protection of the state. Basic Law of the Federal Republic of Germany (*Grundgesetz für die Bundesrepublik Deutschland*) of 23 May 1949, revised by Article 1 of the Act on Revisions and Amendments to the Basic Law of 23 December 2014 (I, p. 2438), entails no provisions on prenatal life. However, the Federal Constitutional Court of Germany in decision No 39 BVerfGE1, 1975 interpreted the notion "everyone" in Article 2 paragraph 2 of the Basic Law so that it covers all human individuals irrespective of the stage of their development, and that the life, in the sense of historical existence of a human individual, exists according to an indubitable biological and physiological knowledge from the 14th day of the conception.

The Constitutional Courts of several European countries (France, Germany, Portugal, Slovakia and Spain) were in a position to review the constitutionality of national criminal laws which prohibited termination of pregnancy (which was a criminal offence with a few exceptions), or more recently, laws that allowed the termination of pregnancy on woman's request until certain stages of pregnancy, and after this period subject to approval of a competent authority for particular reasons (risk to woman's life and health, foetal defects, etc.). The Constitutional Courts did not find that the legislative solutions allowing the termination of pregnancy were in themselves in breach of constitution. They pointed out legislator's wide margin of appreciation in striking a fair balance between the right of a (pregnant) woman to self-determination, freedom of choice, protection of dignity and privacy, on the one hand, and public interest to protect the life of an unborn being as a special constitutional value, on the other. Accordingly, the review of constitutionality of a law depends on whether the legislator has struck a fair balance between the opposing rights and interests.

Legislative reservation

The Constitutional Courts are united and consistent in their position that the answer to the question when life begins is within the competence of the legislator, provided that

the legislator finds the answer to it is essential or purposeful in terms of the permissibility or impermissibility of termination of pregnancy. In other words, that the answer to the question enters the area of responsibility of the legislator, and not of the constitutional court as the guardian of the constitution and of values protected in the constitution (legislative reservation).

II. FINDINGS OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF CROATIA

Disputed Act

Article 1 of the impugned Act, which sets out its aim and purpose, lays down that, *inter alia*, it recognises the right to make free decisions regarding giving birth. The right is not absolute, i.e., it may be restricted by law in order to protect the health (of a pregnant woman - Article 2). Article 25 of the Act confirms that the protection of the life and health of a pregnant woman is of primary importance; it states that termination of pregnancy must be performed or completed regardless of the criteria and procedures laid down in the Act if there is an immediate threat to the life or health of a pregnant woman or if the termination of pregnancy has already started.

Article 15 of the Act defines termination of pregnancy as a medical procedure that may be performed before the end of the 10th week of the date of conception and, after that, only subject to the approval of a commission in accordance with the terms and procedures set out in law.

Termination of pregnancy is performed at the request of a pregnant woman if no more than 10 weeks have passed from the date of conception. In other cases, termination of pregnancy may be performed only if a commission issues its approval, in accordance with the terms and procedures laid down by law (Articles 15.2 and 15.3 of the Act).

Applicants' objections

The proposals for the review of conformity of the Act with the Constitution were submitted by seven proponents.

The proponents identified two basic, mutually connected, objections. The first consisted of claims that the impugned Act was unconstitutional because following the promulgation of the 1990 Constitution, the 1974 Constitution of the former Socialist Republic of Croatia, and consequently Article 272, pursuant to which the Act had been passed, ceased to have effect. In other words, the impugned Act became unconstitutional in its entirety after the termination of validity of the constitutional basis on which it was passed.

The second objection was that the Act was not in conformity with the Constitution in force, especially its Article 21, prescribing that each human being has the right to life. The proponents based their arguments on the fact that the right to life was beyond any doubt a fundamental human right that was above and before all other human rights and that the term “human being” in Article 21.1 of the Constitution included both an unborn and a born human being. They hold that the embryo is a human being, equal in dignity with other human beings, and is a subject of the right to life guaranteed by the Constitution. In view of the indisputable fact that the unborn child is a legal subject, any indication of a threshold in pregnancy relating to the permission for or the prohibition of the termination of pregnancy is superfluous. The constitutional right to life may not be annulled by an imaginary right of the mother to terminate her pregnancy. There is no special right to termination of pregnancy, yet the desire of the woman to terminate pregnancy is transformed into a right, while the termination of pregnancy is detrimental to society in its totality and to the public order.

a) *Findings in relation to the first objection (unconstitutionality on the grounds of the termination of the existence of the constitutional basis on which the impugned Act was adopted)*

The Constitutional Court found that the impugned Act had been enacted pursuant to the 1974 Constitution of the former Socialist Republic of Croatia (hereinafter: SRC Constitution), which is no longer in force. In force is the 1990 Constitution, promulgated and entered into force on 22 December 1990.

The 1990 Constitution does not include a provision that would be the same or similar to the one in Article 272 of the SRC Constitution, which laid down that the right to make free decisions concerning the birth of children may be restricted only to protect health. Thus, in further course of the constitutional court proceedings, the Constitutional Court had to answer the question, put forward by some proponents as a kind of preliminary question, if after the termination of the validity of the earlier Constitution, the Act enacted on the basis of that Constitution automatically ceased to be valid.

It is indisputable that some legal institutes or notions from the Act are still grounded on the concepts that no longer exist in the constitutional order of the Republic of Croatia (e.g. organisations of associated labour). The impugned Act has not been aligned with the Constitution.

The Republic of Croatia, in accordance with the principle of state continuity and succession in relation to the former Socialist Republic of Croatia and the former Socialist Federative Republic of Yugoslavia, basically accepted the legislation and other acts of those states until the adoption of new legislation or their alignment with its own legal order.

In Report no. U-X-838/2012 of 15 February 2012 (Official Gazette No 20/12), addressed to the Croatian Parliament, the Constitutional Court took the position

concerning the hierarchy of constitutional laws for the implementation of the Constitution in the system of legal standards and concerning the legal force (of a binding nature) of the time limits laid down in those constitutional laws to align “old” laws with the Constitution. In relation to the prescribed time limits for alignment, it found that they were not preclusive but instructive in character, so the fact that certain laws were adopted according to the “old” Constitution, which was valid before the adoption of the “new” 1990 Constitution, does not mean in itself that they become unconstitutional and cease to be valid, but that their conformity or non-conformity with the “new” Constitution is subject to re-examination on a case-by-case basis.

By applying the said principle views to the case at hand it follows that, given that by not removing the impugned Act from the legal order of the Republic of Croatia so far, the legislator has accepted its existence in the legal order despite of its formal non-alignment with the Constitution. Hence, it has accepted the presumption of its alignment, and consequently also its alignment with the Constitution. Therefore, it is the Constitutional Court who is competent to decide on the alignment or non-alignment with the Constitution of the impugned Act in the procedure for the review of constitutionality.

Further to the foregoing, the Constitutional Court held that the fact that the Act was not brought into conformity with the “new” Constitution was not sufficient in itself to declare that the Act was unconstitutional. In other words, in the procedure of the review of an Act’s constitutionality or unconstitutionality, the Constitutional Court acts as if it were adopted pursuant to the “new” Constitution.

b) Findings in relation to the second objection (non-conformity with the 1990 Constitution)

The Constitutional Court was expected to resolve the dispute, determine when life begins and, thus, act as an arbiter between the two sides: the one believing that life begins at conception, so that the unborn being is protected by Article 21 of the Constitution from the moment of conception and excluding “right of the woman to termination of pregnancy”, and the one believing that life begins at birth, so that the unborn being is outside the scope protection of Article 21 of the Constitution, in which case the rights of the woman take precedence.

In reviewing the constitutionality of the impugned Act, the Constitutional Court started from its view that the constitutional provisions must be interpreted in the light of the entire legal order. Therefore, the provisions of the Constitution must be interpreted in a way to take into consideration the comprehensive legal order consolidated in the Constitution, so that its interpretation arises from the totality of relations established by the Constitution. The Constitution makes an integral whole. Consequently, no constitutional provision should be interpreted so as to produce unconstitutional consequences.

The Constitutional Court reiterated that the right to life is a precondition for all other rights because all other human rights and freedoms arise from it. Article 21 which states in paragraph 1 that each human being has the right to life is the first article of Section 2 “Personal and Political Liberties and Rights” of Title III “Protection of Human Rights and Fundamental Freedoms”.

Further to the foregoing, the Constitution guarantees the right to life for “each human being”. However, it does not elaborate on what is meant by the term “human being”, i.e., whether it includes, in addition to someone who was born and who indubitably has legal subjectivity, unborn beings.

Further, the rights to liberty and personality are fundamental human rights. The Constitution includes the principle of the inviolability of liberty and personality (Article 22 of the Constitution), which may be restricted only under the conditions set out in the Constitution.

In addition, the Constitution guarantees respect and legal protection of each person’s private and family life and dignity (Article 35 of the Constitution; hereinafter: the right to private life).

The right to private life guaranteed in Article 35 of the Constitution includes the right of each person to the freedom of decision-making, self-determination, and dignity. Therefore, the right to private life is an inherent right of a woman to her own spiritual and physical integrity, which includes her decision whether to conceive and how her pregnancy is to progress. By staying pregnant (either planned or unplanned, voluntarily or as a consequence of violence), a woman does not waive her right to self-determination. Any restriction of the right of a woman to decide in her autonomous self-realisation, including whether she wishes or does not wish to bring pregnancy to term, represents interference in her constitutional right to private life.

Therefore, interference with the right to private life is permitted only if it is in conformity with law. The law must follow certain legitimate aims and must be necessary for the protection of those aims in a democratic society. Interference with someone’s private life must be the result of a crucial societal need to protect a legitimate aim, or more of them, and must be an appropriate means to protect the achievement of such aims.

Starting from the given views, the Constitutional Court found that an unborn being, as a value protected by the Constitution, enjoys constitutional protection under Article 21 of the Constitution only to the extent that such protection is not in conflict with a woman’s right to private life. The right to life of an unborn being in that sense is not protected to have an advantage over or greater protection than a woman’s right to a private life. In that sense, the legislator enjoys freedom of discretion in striking a fair balance between a woman’s right to free decision-making and private life, on one hand, and the public interest in ensuring the protection of an unborn being, on the other.

Accordingly, the Constitutional Court recalled that, according to the case law of the ECtHR, although termination of pregnancy is included in the domain of a woman's private life, it should not be understood as a family planning measure or as a means of contraception.

The Constitutional Court pointed out that the question of "when life begins" is not within the jurisdiction of the Constitutional Court. The Constitutional Court should examine the legislation regulating the question of termination of pregnancy in order to establish whether it is in conformity with the constitutional principles and values, i.e., whether it strikes a fair balance between the opposing rights and interests inevitable in complex cases such as this— a woman's right to decide whether to terminate her pregnancy and the interest of society to protect the life of an unborn being. In other words, the task of the Constitutional Court is to examine if the legislator has properly balanced their rights and interests within its wide margin of appreciation.

Starting from the given principle views, the Constitutional Court found that the legislative solution according to which termination of pregnancy may be performed at a request of the woman before the end of the 10th week of pregnancy is in conformity with the Constitution (after that term, subject to a consent by the competent authorities, it is permissible only if it is based on medical indications that there is no other way to save the woman's life or not to endanger her health during pregnancy, birth or after birth, if it can be expected that the child will be born with serious physical or mental defects, if conception was the result of certain criminal offences [Article 22 of the Act], i.e., where there is immediate danger to the life or health of the pregnant woman or if the procedure to terminate pregnancy had already been started [Article 25 of the Act]).

Finally, the Constitutional Court found that the challenged legislative solution did not disturb a fair balance between the constitutional right of the woman to private life (Article 35 of the Constitution) and to liberty and personality (Article 22 of the Constitution), on the one hand, and public interest to ensure protection of unborn human beings guaranteed by the Constitution as a constitutionally protected value (Article 21 of the Constitution), on the other.

c) Instructions of the Constitutional Court to the Croatian Parliament

The Constitutional Court instructed the Croatian Parliament to pass a new law within two years, in accordance with the following findings:

1. The impugned Act has not been formally aligned with the Constitution because it entails certain legal institutes or notions that no longer exist in the constitutional order of the Republic of Croatia (e.g. criminal provisions set in the former currency (dinar), organisations of associated labour);

2. Since after the adoption of the 1990 Constitution, a completely new legal and institutional framework for health, social, scientific and educational systems has been adopted. These systems are based on a different set of value bases and principles, they are in line with the Constitution and with international standards, and with progress in science and medicine, followed by changes in the systems of health care, education, and the social policy.

Thus, it is up to the legislator, subject to essential legislative changes arising from the above reasons, to stipulate educational and preventive measures in the new Act to make termination of pregnancy an exception.

Within its wide margin of appreciation, the legislator is free to determine measures that it finds purposeful to promote sexually responsible behaviour and the responsibility of both men and women in the prevention of unwanted pregnancies through educational and preventive programmes (e.g., reproduction and sexuality education). Furthermore, the legislator may, in order to enable women to make their own decisions about pregnancy and motherhood, set a reasonable period of deliberation before a decision on termination of pregnancy or continuation of pregnancy is made (e.g., counselling centres and health care during pregnancy and birth, employment rights of pregnant women and mothers, availability of pre-school facilities, centres that provide adequate contraception and information about safe sex, and centres with counselling before and after pregnancy). It is up to the legislator whether the new act will regulate the issue of the costs of termination of pregnancy (whether and under what circumstances the woman bears the costs or whether the costs are secured from the state budget), the question of conscientious objection of physicians who do not wish to terminate pregnancies, etc.