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# CONSTITUTIONAL COURT OF THE REPUBLIC OF CROATIA AND THE „*ABORTION DECISION*“ – CONTEXT, IMPLICATIONS, AND CHALLENGES TO IMPLEMENTATION



**-Abstract-**

Authors discuss the context, implications, and major challenges of implementing the Croatian Constitutional Court's historic 2017 „Abortion decision“. Twenty-six years after it was originally challenged, the socialist era abortion-enabling 1978 law withstood the test of constitutionality against a new constitutional and value order introduced by the 1990 Croatian constitution. This preservation and constitutionalization of the periodic abortion model drew on a systemic and teleological interpretation of constitutional guarantees of the rule of law (regarding contestation of the law's formal constitutionality, seeing as it predated the new Constitution), equality, freedom and personhood, protection of dignity, privacy, family life, and freedom of thought, conscience, and religion. It thus authoritatively protected a woman's right to terminate her pregnancy on demand, while simultaneously relegating to the Parliament the option of exactly pinpointing the start of „life “and underlining the necessity of modernizing this almost 50-years-old piece of legislation. However, such a parliamentary mandate to complete the constitutional architecture of the right to freely decide on childbirth comes with a few issues and potential problems. This paper thus intends to highlight the major challenges in implementing the Court's decision, the foremost among them: issue of conscientious appeal. The authors discuss the remit of this phenomenon, identifying its „hard limits “and expounding on limitations and conditions that will have to accompany its future regulation. The potential abuse of power inherent in the right to conscientious appeal and its potential to impose a health practitioner's private opinion on other citizens and thus disable access to a legal health service will, the authors hold, be a true litmus-paper of the future abortion legislation's constitutionality.

**Keywords**: post-socialist constitutionality, Constitutional Court of the Republic of Croatia, dignity, equality, privacy, abortion, conscientious appeal

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# I. INTRODUCTION

The socialist-era Act on Health Measures Supporting the Realization of the Right to Free Decision-Making Regarding Childbirth[1] of 1978 was challenged before the Constitutional Court in 1991, not even a year after the adoption of the Croatian democratic Constitution.[2] The decision of the Constitutional Court[3] was reached *26 years* later, its quarter-of-a-century shelving obviously having been influenced by extra-legal circumstances. Unlike e.g. Slovenia[4], Croatia did not preserve the express freedom to decide on childbirth in its new democratic constitution. In recent years, publicly-aired testimonies of politicians and legal professionals who participated in outlining the new Constitution in 1990 revealed that the original draft actually carried-over the socialist Constitution's "*right to freely decide on childbirth*" in a would-be new Art. 66, thus creating an express and unequivocal exception to the (newly introduced) obligation for the state to create "*conditions [which will guarantee] every unborn child's right to life*" (proposed Art. 64. par. 2).[5] The constitutional commission soon gave up on both the express guarantee of the right to abortion, and on the proposed reference to unborn children. As revealed by the ex-Chief Justice of the Supreme Court, the former was removed from the draft on the insistence of the President of the Republic, urged by the Catholic Church in Croatia[6], taking however with it also the latter. The ruling party's proposal to frame Art. 21 as "*Every man has the right to life from conception to natural death*" was also rejected by the Constitutional Commission as potentially (and unacceptably) prohibitive of abortion.[7] The finally adopted version of Art. 21 thus settled on a

[1] Official Gazette of the Republic of Croatia (hereinafter: **O.G.**), nos. 18/78, 31/86, 47/89 i 88/09 [*Zakon o zdravstvenim mjerama za ostvarivanje prava na slobodno odlučivanje o rađanju djece*]. Croatia allowed abortion by Art. 272 of its 1974 socialist Constitution, implementing Art. 191 of the Constitution of the Socialist Federal Republic of Yugoslavia (SFRY - the first country in the world to guarantee this right on a constitutional level; see Sara Rožman, Geneza pravice do umetne prekinitve nosečnosti v nekdanji Jugoslaviji, 3 Ars et humanitas 301, 313 (2009)).

[2] The Constitution of the Republic of Croatia [*Ustav Republike Hrvatske*], O.G. nos. 56/90, 135/97, 8/98 – *consolidated version*, 113/2000, 124/2000 – *consolidated version*, 28/2001, 41/2001 – *consolidated version*, 55/2001 – *correction*, 76/2010, 85/2010 – *consolidated version* and 5/2014 – *Decision of the Constitutional Court of the Republic of Croatia declaring a successful amendment of the Art. 62 of the Constitution anent the popularly-initiated constitutional referendum of 1 December 2013*).

[3] Decision no. U-I-60/1991 et al., 21 February 2017, O.G. no. 25/2017. Hereinafter, „**the Decision**". The Decision was extensively based on the brief of the Court-appointed *amica curiae* Biljana Kostadinov, addressing the constitutional issues in question.

[4] See Art. 55 of the 1991 Constitution of Slovenia, O.G. nos. 33/91-I, 42/97 – UZS68, 66/00 – UZ80, 24/03 – UZ3a, 47, 68, 69/04 – UZ14, 69/04 – UZ43, 69/04 – UZ50, 68/06 – UZ121,140,143, 47/13 – UZ148, 47/13 – UZ90,97,99, 75/16 – UZ70a and 92/21 – UZ62a). The right to abortion is an express part of the 1990-1991 Constitutional Commission's interpretation of the Constitution, along with the right to prevention of pregnancy - Metka Mencin, V bojih za dostopnost varnega abortusa, in Pravica do abortusa 149, 153 (Ana Kralj et al., 2021), p. 156.

[5] Scan of the relevant page from the original draft – Ante Radić, „Ukinuta sloboda izbora: Kako je pravo na pobačaj misteriozno nestalo iz nacrta prvog hrvatskog Ustava" [*Freedom of choice terminated: How the right to abortion mysteriously vanished from the Croatian Constitution's draft*], 7 March 2017, at https://lupiga.com/vijesti/ukinuta-sloboda-izbora-kako-je-pravo-na-pobacaj-misteriozno-nestalo-iz-nacrta-prvog-hrvatskog-ustava?page=3 (accessed 23 May 2022).

[6] Krunislav Olujić, in „Bolno pitanje već 30 godina – Tvorac prvog Ustava tvrdi da je pravo na pobačaj preko noći uklonjeno" [*A painfull issue for over 30 years – The maker of the first Constitution claims tat the right to abortion was removed overnight*], 20 May 2022, at https://net.hr/danas/hrvatska/krunislav-olujic-tvrdi-da-je-pravo-na-pobacaj-bilo-u-prvom-ustavu-rh-ali-je-na-zahtjev-kaptola-uklonjeno-dcf534a2-d7bd-11ec-b884-625f77fa319f (accessed 23 May 2022).

[7] Phonogram of the Constitutional Commission's session from 3 December 1990 (19 days prior to the adoption of the Constitution!) – Ivanka Toma, Arsen Bauk spustio udruzi "U ime obitelji" [*Arsen Bauk puts the 'In the name of the*

neutral and noticeably reduced "*every human being has the right to life*" formula. Given that the European Court of Human Rights (ECtHR) never interpreted the analogous provision of the European Convention on Human Rights (ECHR) as enveloping the unborn[8], Art. 21 has in the past 32 years never been interpreted by the Constitutional Court to extend to life inside the womb.

Regardless of such constitutional restraint, detractors from the woman's right to choose attempted to contest the 1978 Act – retained even after Croatia's secession from the SFRY on 25 June 1991 - against the new value- (not just legal) order. Responding to their challenge, the Constitutional Court emphasized that voiding the Act simply because the 1990 Constitution does not contain a provision like the 1974 Constitution's Art. 272 would be contrary to rule of law and would jeopardize legal security and continuity (§37 of the Decision). The "new" Constitution "leans into" the "old" one, enabling an organic flow of constitutionality. This means that a particular provision of an (in this case, organic) law may only be voided expressly, by the Parliament or the Constitutional Court (ibid.).

On merits, the Decision rejected applicants' claims that the Act was in violation of the Constitution *in toto* and/or of its Art. 2 [state sovereignty], 3 [fundamental values of the constitutional order], 14 [equality], 16 [proportionality], 21 [right to life], 22 [freedom and personhood], 35 [dignity, privacy, and family life] and 38 [freedom of thought]. It confirmed the Act's guarantee of an unimpeded access to abortion within the first 10 weeks of gestation (i.e., 12 weeks of pregnancy) as a proportional exercise of the legislative mandate to reconcile the mutually opposed women's rights to privacy, freedom, and personhood, and the "constitutional value" of preserving life (including *in utero*). In weighing these two constitutional "goods" up against the fulcrum of dignity[9], the Court thus accepted the comparatively increasing willingness to construct women as full and equal citizens. This evolution marks a "breaking point in the development of the new model of judicial review of abortion legislation based on proportionality"[10]: in the words of the Portuguese Constitutional Court, "The axiological weight of the principle of human dignity does not fall on the side of intrauterine life, *exclusively* [emphasis added]. It also falls on the constitutional legal position of the woman" (par. 11.4.11.).[11] This solidified the periodic model of pregnancy termination, while committing the Croatian Parliament to proscribe the related procedure and detailed timeframe within two years, i.e. by end-February 2019. That deadline has come and passed without any legislative action, so Croatia is still awaiting the implementation of the Court's mandate that an updated Act proscribe purposeful educational and preventive programs (i.e. by including topic of reproductive and sexual health within the school curriculum and thus promoting responsible sexual conduct and equal responsibilities of both women and men in prevention of unwanted pregnancies). Along with that inconspicuous mandate, the Parliament can also consider some highly sensitive and precarious issues like instituting an "appropriate

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*family' NGO down*], Jutarnji list, 27 October 2016, at: https://www.jutarnji.hr/vijesti/hrvatska/arsen-bauk-spustio-udruzi-u-ime-obitelji-zavirio-u-saborski-arhiv-pa-im-pokazao-kako-je-hdz-1990.-odbio-u-ustav-unijeti-da-zivot-pocinje-zacecem-5191935 (accessed 29 May 2022).

[8] See decisions like *Boso v. Italy*, app. no. 50490/99 from 5 September 2002, and *Vo v. France,* app. no. 53924/00 from 8 July 2004 (recapitulating the ECtHR's previous decisions and reaching its current stance that reaching a conclusion on the personhood of the unborn is not „*preferable*" - §85).

[9] Ana Horvat Vuković, Symposium–The Croatian Constitutional Court's Abortion Decision: A Nominal Win for Reproductive Freedom, Int'l J. Const. L. Blog, June 16, 2019, at: http://www.iconnectblog.com/2019/06/symposium–the-croatian-constitutional-court's-abortion-decision:-a-nominal-win-for-reproductive-freedom (accessed 29 May 2022).

[10] Verónica Undurraga, Criminalisation under scrutiny: how constitutional courts are changing the narrative by using public health evidence in abortion cases, Sexual and Reproductive Health Matters, 27 (1), 2019, p. 48.

[11] Tribunal Constitucional Portugal, Acórdão no. 75/2010, of 23 February 2010, Diário da República no. 60/2010.

deliberation period" that would precede a pregnant woman's definitive decision on termination (or continuation) of pregnancy, whereby the pregnant woman would be offered information on pregnancy and services at her disposal should she decide to deliver the baby (Decision, at §50). The Court also specifically relegated the issue of costs to the legislature (whether and under what conditions they would be borne by the State) as well as the question of demarcation of limits to the (on principle and generally construed) constitutionally guaranteed right to conscientious appeal (*ibid.*).

## II. THE DECISION

The Court's Decision was reached after an extensive consideration of international human rights documents – most notably the ECHR and ECtHR's jurisprudence - as well as comparative constitutional litigation in Germany, Hungary, Slovakia, and Spain. The abovementioned constitutional law professor Biljana Kostadinov's brief also cited French and Portuguese constitutional jurisprudence, forming a cross-jurisdictional lattice informing the Constitutional Court's interpretation of the Croatian constitutional provisions.

In interpreting Constitution's Art. 21 and the right to life of every "human being", the Court accepted ECtHR's conclusion of the practical mootness of an exact pinpointing of the beginning of "life" and personhood of a "human being" (Decision, §27.1-2). Following the example of the e.g. Slovak Constitutional Court, the Decision expanded the remit of Art. 21 and found that its negative right to life also implies additional positive obligations for the Croatian State. It is these positive obligations that give rise to a general construction of preservation/promotion of life as a "constitutional value" and a public interest in itself. This enabled the Court to enter in a balancing act between such a constitutional value on the one hand, and the woman's right to privacy (Art. 35) and freedom and personhood (Art. 22) on the other. Their respective value was weighed against the fulcrum of dignity (Decision, §41.2), ensuring preservation of the core of each of these juxtaposed constitutional goods and preventing obliteration of either of them.[12]

Most importantly, the fact that the Court unequivocally upheld the contested Act and relegated the issue of the inception of "life" and full personhood of the "human being" to the Parliament (Decision, §45.1) means that the outcome of the litigation in question could not have been influenced by the Parliament's response. Even in the most unlikely case where "life" would be defined as beginning at conception, Art. 21 will remain a *limited* right to be counter-weighed in a proportionality analysis which cannot result in a prohibition of abortion. The fact that such an attempt would, in fact, annihilate the very core of women's right to self-determination, dignity, equality, freedom and personhood means that such a prohibition could not be instituted even by a constitutional referendum.[13] The end-result would therefore have been unchanged even had

[12] Horvat Vuković, Symposium, op.cit.

[13] Chief Justice Šeparović has stated that the Constitutional Court „would not allow" a prohibition of abortion or a lowering of the 12-weeks threshold: „[They] cannot be touched". NB that he is referring to amendments to the Act itself, not to the Constitution. However, we hold that a constitutional amendment negating a woman's right to resist forced cooptation of her body would be akin to involuntary servitude, and that as such it is irreconcilable with a host of constitutional provisions as well as with the constitutional value order *in toto.* An attempt to defy the Court's interpretation of the Constitution would thus be violative of Croatia's constitutional identity as well (already an established and well-developed concept in Croatian constitutional law). See Miroslav Šeparović: The Constitutional Court would not allow a prohibition of abortion. Nor would it allow a referendum on this subject [*Miroslav Šeparović: Zabranu pobačaja Ustavni sud ne bi dopustio. Ni referendum na tu temu*], Novi list, 21 January 2019, at

Articles 22 and 35 not been counterbalanced against Art. 21's positive aspect (the State's obligation to protect life as a "constitutional value"), but against its *negative* aspect (in the – unlikely - event that the *nasciturus* is granted an independent right to life).[14]

While the 44-year-old Act must certainly be brought in line with current achievements in (reproductive) medicine, the cited mandate to complete the periodic model legal architecture opens additional issues which could jeopardize the substance of the nominally affirmed right to abortion. An obligation to shoulder the financial burden of abortion that would be insensitive to socio-economic indexation of the women seeking abortion would prove to be indirectly discriminatory to indigent women. An anti-subordination reading of the constitutional right to equality (Art. 14) would, in fact, call for a completely **public funding** of abortions such as was instituted in Portugal in 2016.[15] Similar regulations are also in place in Belgium[16], Denmark[17], Finland[18], Greece[19], Italy[20], Norway[21] and Spain.[22] In the current, 1978 Act, public funding is expressly provided only for women whose IUD failed to prevent a pregnancy (Art. 41. par. 2). Of course, abortion is also publicly funded whenever done past the 12-weeks-of-pregnancy mark (this involves medical or criminological indications – Art. 22, in connection to Art. 41. par. 2). In connection to such anti-subordination undertones, the **equality framework** should in general be primarily indicated as the general, overarching bedrock of the right to abortion has become painfully clear in 2022, after the unprecedented 2 May 2022 leak of US Supreme Court Justice Samuel Alito's draft majority opinion in the *Dobbs* case[23], which repudiated the "fundamental" nature of the 14th Amendment right to privacy on which freedom of choice has been predicated since 1973 and *Roe v. Wade*.[24] A number of eminent US constitutional scholars have advanced such an idea of reconceptualizing

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https://www.novilist.hr/novosti/hrvatska/miroslav-separovic-zabranu-pobacaja-ustavni-sud-ne-bi-dopustio-ni-referendum-na-tu-temu/ (accessed 20 May 2022).

[14] Horvat Vuković, Symposium, op.cit.

[15] Lei no. 3/2016, Diário da República no. 41/2016, Série I de 2016-02-29, pp. 635 – 635, repealing Lei no. 134/2015 on the payment of user fees for voluntary termination of pregnancy. This act also removed a previous provision on compulsory pre-abortion counselling.

[16] When performed (as most abortions in Belgium are) in a private abortion clinic with a signed agreement with the national social security institute – International Planned Parenthood Federation (IPPF), Abortion legislation in Europe, Brussels, January 2009, p. 11.

[17] Except in the Faroe Islands, where the woman bears all the costs involved – IPPF (op.cit.), p. 21.

[18] The patient only pays for the out-patient hospital visit – IPPF (op.cit.), p. 27.

[19] However, most abortions are performed privately in outpatient clinics, to avoid the delays associated with the state healthcare system – IPPF (op.cit.), p. 34.

[20] However, the number of objecting medical professionals is almost absolute in some Italian regions, and illegal abortions are therefore still numerous – pp. 43-44.

[21] IPPF (op.cit.), p. 62.

[22] In Andalusia, abortion is free even when performed in private clinics. However, as in Italy, the numbers of objecting medical professionals are rampant and a negligible number of abortions is actually carried out in public hospitals – IPPF (op.cit.), pp. 74-75. In fact, five out of seventeen autonomous regions in Spain have zero public hospitals performing abortions,

[23] *Dobbs v. Jackson Women's Health Organization,* docket no, 19-1392, argued 1 December 1 2021, regarding the challenge to a Mississippi statue that would ban abortion after 15 weeks. The draft, circulated between the Justices on 10 February 2022, is a scathing repudiation of *Roe v. Wade* and its progeny, and has incited public outrage, massive protests, and even picketing of the conservative Justices' residences. Its 98 pages are available on https://www.politico.com/news/2022/05/02/read-justice-alito-initial-abortion-opinion-overturn-roe-v-wade-pdf-00029504 (accessed 23 May 2022).

[24] *Roe v. Wade*, 410 U.S. 113 (1973). *Roe*'s trimester model was replaced by the fetal viability threshold (23-24 weeks of gestation, sometimes – as in Croatia - conservatively estimated at 22 weeks) in *Planned Parenthood v. Casey,* 505 U.S. 833 (1992).

the doctrinal foundations of the right to abortion[25], tying it to the right to equality in an equal citizenship reading which would have prevented the now (it seems) imminent slide to the obliteration of US women's reproductive freedoms and rights. According to the Guttmacher Institute[26], some 25+ US states will either enact new, revive pre-1973 laws, or trigger post-1973 dormant laws and deny the right to abortion. The "fall" of the right to privacy will in this way also jeopardize access to birth control, since it will allow federal states to idiosyncratically determine IUDs as "abortifacients", given that they would be free to define "life" as beginning at conception.[27]

The procedural framework for the nominally protected right to abortion could work to circumvent the Constitution, should the Parliament institute overly long **waiting periods** that would delay a woman's final decision. In comparative law, the legislative desire to promote opting-in regarding motherhood has imbued this deliberative period with some highly-patronizing and from the standpoint of Croatian constitutional law irreconcilable obligations such as to have "information" hoisted upon pregnant women by requiring that they undergo an ultrasound before terminating their pregnancy. As of 2022, such laws are in force in seventeen U.S. states, with six of them requiring the provider to both show and describe the image in detail.[28] In 2019, the Supreme Court refused to hear a challenge on one such (Kentucky) law, allowing the contested act to go into effect.[29] In comparison, no EU state has instituted such an obligation, with Slovakia coming closest with a rejection of such a bill in 2019.[30] Also irreconcilable with the Croatian Constitution would be to construe the consultation process as explicitly **dissuading** regarding the pregnant woman's intent to terminate her pregnancy. For that matter, even an obligatory counselling of any kind (in the sense of a **forced participation**) would also be barred[31] by the Court's Decision and by a systemic and teleological reading of the Constitution's devotion to protection of dignity and right to self-determination. In this sense, the Croatian Constitution shares in the stance voiced by the

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[25] See e.g. Cass R. Sunstein, Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy), 92 Columbia Law Review 1 (1992); Neil S. Siegel & Reva B. Siegel, Equality Arguments for Abortion Rights, 60 UCLA Law Review Discourse 160-170 (2013); Reva Siegel, Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 Stanford Law Review 261 (1992); Jeb Rubenfeld, The Right of Privacy, 102 Harvard Law Review 737 (1989); Kenneth Karst, Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 Harvard Law Review (1977); Jack M. Balkin, Abortion and Original Meaning, 24 Constitutional Commentary 291 (2007).

[26] Elizabeth Nash, Lauren Cross, 26 States Are Certain or Likely to Ban Abortion Without *Roe*: Here's Which Ones and Why, Guttmacher Institute, 28 October 2021 (updated on 19 April 2022), at https://www.guttmacher.org/article/2021/10/26-states-are-certain-or-likely-ban-abortion-without-roe-heres-which-ones-and-why (accessed 23 May 2022).

[27] As the IUD fails to prevent fertilization of the egg itself, and only prevents its successful implantation within the uterine wall's endometrium, Louisiana already plans to outlaw it – see Bill HB813 (Abolition of Abortion in Louisiana Act of 2022) at https://www.legis.la.gov/legis/BillInfo.aspx?s=22RS&b=HB813&sbi=y (accessed 23 May 2022).

[28] Guttmacher institute, Requirements for Ultrasound table, at: https://www.guttmacher.org/state-policy/explore/requirements-ultrasound (updated on 1 March 2022; accessed 17 March 2022). In addition to the mentioned six states, such laws were also passed in N. Carolina and Oklahoma but are however permanently enjoined by court orders declaring their unconstitutionality.

[29] *EMW Women's Surgical Center v. Meier,* No. 19-417, petition for certiorari denied on 9 December 2019.

[30] Proposal 145 would also have required abortion providers to produce false information such as warning of „severe abortion psychological consequences or an increased risk of breast cancer and infertility" – Olga Pietruchova, Access to Abortion Services for Women in the EU, paper commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs - Slovakia, PE 659.922, October 2020, p. 16.

[31] Biljana Kostadinov, Konstitucionalizacija periodnog modela prekida trudnoće u Republici Hrvatskoj [*Constitutionalizing the Periodic Abortion Model in the Republic of Croatia*], Informator no. 6461 from 13 March 2017.

Constitutional Court of Portugal which distanced itself from the German Federal Constitutional Court's 1993 Decision and confirmed that women are responsible, and sure, in their reasons for seeking an abortion. The idea of equal citizenship militates against efforts that would thwart women's freedom to implement decisions about their own lives, precluding the infantilizing and paternalistic "German model" that has thankfully been abandoned over the past decade or so.[32] In keeping with the renunciation of the dissuading counseling model even among traditionally Catholic states (Portugal, Spain) and with the rising number of European constitutional courts that have switched from "save the fetus" discourse to one honoring *both* women's rights and the inherent value of preserving life[33], even the German model has adopted the right of a pregnant woman to remain anonymous to her counselling provider and to not be forced to cooperate or talk during this process.[34]

At the moment of writing, the 2-year grace period allowed to the Croatian Parliament has been exceeded by more than three years. The only noteworthy attempts to pass a new Act came from the opposition, which unsuccessfully proposed a Medical Procedure for Pregnancy Termination Bill in March 2019. The bill was resubmitted in October 2020 and has waited to be debated until 12 May 2022. The Parliament refused to vote it into law a day later.[35] The proposal would have made abortion (as well as contraception!) free of costs, except when offered by private sector providers (Art. 28).[36] It would also have regulated the practice of conscientious appeal in a way that would have explicitly finally obliged hospitals to have an adequate number of staff prepared to perform the termination of pregnancies at all times.[37] However, the Bill would inexplicably also have enabled pharmacists to invoke the conscientious appeal (Art. 27), enlarging the number of active objectors in a country that's already walking on the razor's edge where accessibility of a nominally existent right to abortion is concerned.

Given the lack of legislative mobilization on the matter of updating the 1978 Act *per* the instructions of the Constitutional Court, there is ample room for concluding that the conservative, yet EU-integration-affirming government welcomes this *status quo* and promotes it through this "silent strike" in the policy/legislative agenda, enabling the 1978 Act to continue to be positive law. In the meantime, the Homeland War (1990-1995) war hero Predrag (Fred) Matić successfully advocated for (as rapporteur for the European Parliament's Committee on Women's Rights and Gender Equality) and finally authored the *Resolution on the situation of sexual and reproductive*

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[32] Croatian Constitutional Court's Decision §5.1, citing Professor Kostadinov's brief.

[33] Kostadinov, op.cit.

[34] Law on the Prevention and Management of Pregnancy Conflicts (Pregnancy Conflict Law - SchKG) [*Gesetz zur Vermeidung und Bewältigung von Schwangerschaftskonflikten (Schwangerschaftskonfliktgesetz - SchKG)],* BGBI. I p. 1398 of 27 July 1992, last amended by Article 13a of the law of 14 December 2019 (BGBI. I p. 2789), §5.2(1) and §6.2.

[35] Bill no. 597, 7 March 2019, at: https://www.sabor.hr/sites/default/files/uploads/sabor/2019-03-07/144101/PZ_597.pdf. The parliamentary discussions began in February 2020, almost a year after the bill was introduced. They lasted for 2 days – on 5 February and again on 26 February, after which they were discontinued. After the parliamentary elections in July 2020, the act was re-submitted to the new Parliament as Bill no. 35, on 1 October 2020 - at: https://www.sabor.hr/sites/default/files/uploads/sabor/2020-10-01/100508/PZ_35.pdf (both files accessed 18 March 2022). The data on the May 2022 debate and voting is accessible at https://www.sabor.hr/prijedlog-zakona-o-medicinskom-postupku-prekida-trudnoce-s-konacnim-prijedlogom-zakona-hitni-0?t=130671&tid=210323 (accessed 23 May 2022).

[36] That latter option is a radical shift from the previous 44 years of public sector's monopoly on providing abortions, meant to counteract the rampant practice of conscientious appeal among ObGyns and anesthesiologists in Croatia's public hospitals – see *infra.*

[37] Ibid., p. 8.

*health and rights in the EU, in the frame of women's health*[38] - the first EP report specifically dedicated to sexual and reproductive health and rights in a decade. The Resolution was carried by 378 votes in favor, including 36 votes from the European People's Party MPs, proving that management of the joint European project is not just a "domain" of large EU members and that reproductive rights are not a two-dimensional issue or a pawn in the so-called "culture wars". The symbolic role of the Resolution is important since it sent a clear signal on the state of EU's "moral constitution", given that reproductive health is an issue of constitutional (not family or penal) law.[39] It can also be seen as the EU's claim to be the leader of the free world regarding protection of fundamental rights and freedoms.[40] The implicit reference to the *de facto* preclusion of abortion in Poland tacitly conveys the message that reproductive rights, as a facet of the axiomatic principles of equality, dignity and right to self-determination, legitimizes orders as democratic or, conversely, illiberal and authoritarian. The Resolution also deals with the phenomenon of conscientious appeal, the "Achilles' heel" of the Croatian regulation of sexual and reproductive freedom, making it clear that the *State* must stand accountable for reconciling the (understandable) inner ethical conflicts in medical professionals regarding the termination of pregnancy, and women's right to freely decide on their bodily, emotional, and spiritual integrity.

## III. CROATIAN MEDICAL PROFESSIONALS' CONSCIENTIOUS APPEAL TO ABORTIONS: THE MAJOR CHALLENGE TO IMPLEMENTATION OF THE CONSTITUTIONAL COURT'S 2017 DECISION

### 3.1. Conscientious appeal as a facet of the Croatian Constitution

Contemporary constitutionalism recognizes dignity and freedom – along with their corollaries of personal autonomy and self-determination - as "the" foundational values and sources of all law and constitutionality. In expressly guaranteeing the right to conscientious appeal, the Croatian Constitution relies on Article 9 of the ECHR, protecting (naturally) not only the deeply held ethical beliefs of the religious citizens but impressing the importance of individual morality, whether motivated by pious reasons or not. While the constitutional Art. 47 pertains to military service specifically[41], Art. 40 states: "*Freedom of conscience and religion and the freedom to demonstrate religious or other convictions shall be guaranteed*". With the ECHR as a quasi-constitutional source of law in the Republic of Croatia, the reference to freedom of conviction includes the protection of atheism, skepticism etc. However, the Constitution does not, and cannot, contain absolute, "*ace of trumps*"[42] fundamental rights that would be limitless in all their facets and with the widest possible scopes. As any other fundamental right, the Article 40 right is amenable to a

[38] 2020/2215(INI), from 24 June 2021.

[39] Dragan Đurić, Ana Horvat Vuković: The new and improved Croatian "Abortion law" must regulate the conscientious appeal in a strict manner [*Novi i poboljšani hrvatski zakon 'o pobačaju' mora strogo regulirati priziv savjesti*], *Nacional*, 8 July 2021, at: https://www.nacional.hr/ana-horvat-vukovic-2021-porucila-novi-i-poboljsani-hrvatski-zakon-o-pobacaju-mora-strogo-regulirati-priziv-savjesti/ (accessed 20 May 2022).

[40] Ibid.

[41] The ECtHR protected the right to conscientious appeal exclusively in this area until 2013. The 2000 Charter of Fundamental Rights of the EU refers to the legislative autonomy of each EU Member State in this regard.

[42] Meaning that "*not every trump is an ace of trumps (i.e. insurmountable or insuperable). Depending on the concrete situation, every trump is capable of being overridden. This can only mean that what trumps do is raise the bar and elevate the stakes involved. They are burdens to those who wish to override them. Rights that are trumps deserve deference by definition and should not be so easily set aside on consequentialist grounds as other rights or interests. Nevertheless, they are defeasible*" - João Costa-Neto, Rights as Trumps and Balancing: Reconciling the Irreconcilable, Revista Direito GV, São Paulo 11(1), 2015, p. 168.

proportionality analysis and has its "*hard limit*" – the practical concordance with the Constitution's value order and other fundamental rights and freedoms. Practically speaking, in this "*Abwägung*" or mutual weighing-up of otherwise coordinated "constitutional goods", it must sometimes be suppressed and cannot enjoy the full protection of the State. A right, after all, is a product of a relationship between persons, where one owes another a duty of action or inaction[43] - the so-called "absolute rights" are only "apparently absolute" and can be no more than "generalized predictive conclusion[s] of proportionality analysis".[44]

These facts are on occasion misunderstood, giving rise to claims about some direct conflict between the right to conscientious appeal on the one hand and the "right to abortion" on the other, and utilizing a combative analogy in asking which of these rights is "stronger".[45] However, this is not an arm-wrestling match on the constitutional level, and constitutional lawyers need to be precise in demarcating the points of intersection of these two individual requests addressed *to the State.*[46] The right to conscientious appeal authorizes medical professionals to require reasonable accommodation[47] of their core beliefs about the sanctity of life. The intersection of the constitutional rights to healthcare, equality, dignity, freedom, and privacy, resulting in the right to abortion, authorizes pregnant women to require that the State enables a free and unimpeded access to abortion. These two separate, vertical requests addressed to the State are only at odds in those healthcare systems where the State *fails* in its duties to systematically meet and satisfy its constitutional obligations. Much the same as family planning, healthcare planning must equally be responsible and informed.

3.2. What are the parameters for state's policy planning and implementation in this regard, having established that there is no such thing as an absolute right unamenable to being limited on the basis of a proportionality analysis?

Regarding the pregnant women's rights, they give rise to reciprocal duties on the part of the State, in the sense of women's positive rights to require the state to hold space for a meaningful exercise of their rights to privacy, dignity, freedom and equality. This, in turn, requires that the State ensure that abortion is accessible, efficient, not cost-prohibitive (removing indirect discrimination of indigent women) and geographically diversified (removing indirect discrimination of rural women). The primary responsibility in this regard lies with the State, to implement a human resources policy that accounts for the potential of suboptimal or even completely denied medical service in institutions and/or geographic areas where there is a failure to provide enough non-objecting medical professionals.

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[43] Grégoire Webber, Proportionality and Absolute Rights, Queen's University Faculty of Law, Research Paper Series, 2015-073, May 2016, p. 7.

[44] I.e. the outcome of a proportionality analysis is exceedingly often in the favor of that right – but not necessarily so – ibid., p. 6.

[45] For such a constitutionally unsupported view of the dynamic of rights and end-values involved, see e.g. Mato Palić: Priziv savjesti ima prednost u odnosu na pravo žene na pobačaj [*Mato Palić: Conscientious appeal takes precedence over the woman's right to an abortion*], 15 May 2019, at: https://www.tportal.hr/vijesti/clanak/palic-priziv-savjesti-ima-prednost-u-odnosu-na-pravo-zene-na-pobacaj-20190515 (accessed 25 May 2022).

[46] Ana Horvat Vuković, Constitution of the Republic of Croatia and conscientious appeal in provision of health services [*Ustav Republike Hrvatske i priziv savjesti u pružanju zdravstvenih usluga*], in: Bačić, A. (ed.), Ustavne promjene i političke nagodbe – Republika Hrvatska između ustavne demokracije i populizma [*Constitutional amendments and political deals – Republic of Croatia in between constitutional democracy and populism*], Croatian Academy of Arts and Sciences, Zagreb, 2021.

[47] Adriana Lamačková, Conscientious Objection in Reproductive Health Care: Analysis of *Pichon and Sajous v. France*, 15 European Journal of Health Law (2008) 7

Regarding the individual medical professionals, their legal situation is triangulated against three principal points:

a) their negative right to not be forced to perform services incompatible with their personal code of ethics is rendered null in cases of **emergencies**, where the patients' rights take absolute precedence[48];

b) barring such situations, the medical professionals enjoy the right to **reasonable accommodation** of their beliefs. The "reasonability" benchmark implies the State's authority to hold space for the practice of medical professionals' conscientious appeal in all cases where this does not incur significant costs for the public healthcare system. The corollaries, however, are that the medical professionals are also under a converse duty to limit the externalization of their personally held beliefs by referring the abortion-seeking woman to a non-objecting provider *tout de suite*. Any other behavior would have to be interpreted as constituting direct sex discrimination prohibited by the Act on Combating Discrimination[49], Act on Gender Equality[50] as well as EU Directive 2004/113/EZ.[51] They also must inform the abortion-seeking woman of their objection, as well as their superiors. These obligations are codified in law in Croatia[52], and do not unduly burden the medical professionals' right to appeal (i.e. they do not encroach on the core of their negative right). Regarding the issue of costs incurred by a medical professional's conscientious appeal, the emotional, dignitary and psychological effects cannot be discarded and must be borne in mind when regulating the exact scope of this right. These are the fundamental reasons behind the Croatian legislator's choice to allow for this singular exception to a general rule that one's publicly funded profession must be discharged fully and without exceptions. Seeing as objection to performing abortion entails the question of sanctity of life, this is the only moral dilemma acute enough to justify the potential psychological damage and violation of the "customer's" dignity inherent in the implied moral condemnation of their request to avail themselves of a *legally-guaranteed* right. There is no other context where the Article 40 right would trump other constitutionally guaranteed rights – not for pharmacists issuing birth control or "the morning after" pills[53], nor for registrars officiating weddings between same-sex couples or counsellors offering psychosexual therapy to same-sex couples[54], bakers decorating cakes for rainbow families or same-sex marriages etc. This

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[48] Physicians Act, O.G. 121/03 and 117/08, Art. 20; Dental Medicine Act, O.G. 121/03, 117/08, 120/09 and 46/21, Art. 26; and Nursing Act, O.G. 121/03, 117/08 and 57/11, Art. 3. From the O.G. numbers, one may easily conclude all three Acts, along with the rights to conscientious appeal, were adopted by the same legislature. In addition, see Art. 12 of the Pharmacists' Ethics and Deontology Code (18 April 1996) and Art. 2. pt. 20 of the Midwives' Ethical Code (27 January 2010). Regarding the latter, research shows that some 13.5% of midwives invoke a conscientious appeal, but that a high 51% of them would do so if they were sure that it would not have a negative impact on their employment relationship – Croatian Chamber of Midwives, Priziv savjesti u primaljstvu [*Conscientious Appeal in Midwifery*], 26 March 2019, at https://www.komora-primalja.hr/datoteke/Priziv%20savjesti%20HKP.pdf (accessed 26 May 2022).

[49] O.G. 85/08 and 112/12.

[50] O.G. 82/08 and 69/17.

[51] Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services

[52] Ibid., regarding the three cited Acts of the Croatian Parliament. The Pharmacists' Code, however, contains no further provisions other than guaranteeing the general right to a conscientious appeal whenever this does not jeopardize a patient's life and health.

[53] On this, see ECtHR case *Pichon and Sajous v. France,* app. no. 49853/99, of 9 October 2001.

[54] Respectively, cases *Ladele* and *McFarlane*, joined in the case *Eweida and others v. the United Kingdom*, apps. no.51671/10 and 36516/10, of 15 January 2013.

also means that, while medical professionals involved with abortion may claim the right to conscientious appeal in Croatia, only those among them that are *immediately* involved with pregnancy termination *per se* can claim the Article 40 right. This excludes not only personnel with ancillary roles such as midwives or administrative staff, but also physicians when they only provide medication abortions and/or follow up on the woman's post-abortion-pill status by control ultrasounds.

c) Given the utmost importance of the endangered rights, in cases where the state would be unable to satisfy its obligations to both the objecting medical professionals and pregnant women, and would be faced with a virtual negation of the women's right to timely and efficient healthcare (i.e. abortion on demand), the reasonable accommodation necessarily meets its endpoint. In other words, since there is no "right to" a particular employment or career, when employing an objecting medical professional would compromise the State's duty to ensure the protection of patients' right to a timely, equal, and efficient service, they may legally be refused for employment or have their employment contracts terminated. In this sense, see the groundbreaking decision by the ECtHR in cases *Grimmark*[55] and *Steen* against Sweden[56], where the Court negated a violation of ECHR Art. 9 by Sweden's refusal to offer accommodation to the involved midwives' conscientious appeals. The practical implications for the Croatian legal system, where conscientious appeal is a constitutional right, are that should the cost of reasonable accommodation for the public healthcare system start to become disproportional in terms of difficulties in organizing work or meeting the financial expense of having to bring in external contractors (i.e. unobjecting physicians from other hospitals)[57], the objecting physician could foreseeably be fired or transferred to another place of work in order to enable the state to meet its positive obligations stemming from ECHR's Art. 8 and the Constitution's Arts. 22 and 35. Equally, a prospective employee who confesses to be unable to carry the full workload for which they would be retained may well be disqualified from employment – again, if and only if the existing organization of work in the given public healthcare institution precludes an increase in the number of its objecting medical personnel. This particular proportionality analysis will, of course, differently impact large urban areas and smaller/geographically isolated hospitals,

3.3. "*Theoretical and illusory*" or "*practical and effective*"[58] - does the widespread use of conscientious appeal render abortion only a nominal right in Croatia?

According to the Ombudsperson for Gender Equality, almost 60% (58.8%) of all ObGyns in Croatia invoke their constitutional right to conscientious appeal.[59] Due to the State's 30-year long abdication from its duty to organize an equal, just and effective healthcare system regarding the access to abortion, there are now whole public hospitals that invoke *institutional* immunity from their legal duty to provide abortions, and have zero available ObGyns ready to perform them – we

[55] *Grimmark v. Sweden,* app. no. 43726/17, of 11 February 2020.
[56] *Steen v. Sweden,* app. no. 62309/17, of 11 February 2020.
[57] Research conducted by investigative reporters in 2019 revealed that only two hospitals (out of the total of seven that invoke institutional conscientious appeal) honor this obligation – see Danka Derifaj, Potraga istražila: U 20 posto bolnica koje su na popisu da ih rade – pobačaje ne radi nitko od zaposlenih, *RTL.hr*, 11 February 2019, at: https://www.rtl.hr/vijesti/potraga/potraga-istrazila-u-20-posto-bolnica-koje-su-na-popisu-da-ih-rade-pobacaje-ne-radi-nitko-od-zaposlenih-23ad6bec-b9f2-11ec-ab15-0242ac120046 (accessed 20 May 2022).
[58] *Airey v. Ireland,* 32 Eur Ct HR Ser A (1979): [1979] 2 E.H.R.R. 305, § 24.
[59] Gender Equality Ombudsperson, Report for 2018, March 2019, p. 318.

are talking about hospitals in Našice, Požega, Vinkovci, Virovitica, Zagreb (hospital "Sveti duh", or – translated – "Holy Spirit"), Nova Gradiška, and Special Hospital Medico in Rijeka.[60] All of these hospitals are nonetheless included in the list of the thirty abortion-providing medical institutions published by the Ministry of Health[61], making it increasingly difficult for women know where to turn to in case of need for an abortion without wasting precious time.[62]
In some hospitals, like in Požega and Dubrovnik, anesthesiologists also invoke the appeal, meaning that abortions are sometimes conducted *sans* any type of pain management.[63] Such institutional microclimate is continuously reproduced by a setting where physicians are "enticed" to avail themselves of their constitutional Art. 40 right, prompting some to title such opportunistic caving in under peer pressure "the talked-into" appeal.[64] There was no registry of appealing medical personnel before May 2022, when the Minister of Health Vili Beroš finally requested that the Ministry acquire and pool the relevant data from public hospitals, following the public furor over the "*Čavajda case*" (see *infra*). A potential workaround regarding the widespread practice of invoking the appeal may present itself in the shape of medication abortions – these are on the rise, with now 10 hospitals offering it up to 9 weeks of gestation.[65] However, during the pandemic access to this type of abortion has been almost precluded.[66] The average price of both types of abortion – surgical and medication – is relatively high[67], making it cost-prohibitive for women who are most at risk (indigent and/or unemployed, victims of partner sexual abuse etc.).

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[60] The public hospital in Rijeka, however, has zero objecting physicians – ObGyns or anesthesiologists. Research on the institutional objections was conducted in 2020 by the Platform for Reproductive Freedom – see its press release "Ako to napravite, nećete moći noćima spavati – pobačaj u Hrvatskoj nedostupan i skup" ["*If you do it, you will not be able to sleep for nights on end – Abortion in Croatia is inaccessible and expensive*], *Libela,* 28 April 2020, at https://www.libela.org/vijesti/10660-ako-to-napravite-necete-moci-nocima-spavati-pobacaj-u-hrvatskoj-nedostupan-i-sku/ (accessed 20 May 2022).
[61] The list is downloadable at: https://zdravlje.gov.hr/kontakti/kontakti-zdravstvenih-ustanova/1478.
[62] In this regard, the non-governmental sector was left to pick up the slack, and organizations like the Platform for Reproductive Justice (https://www.reproduktivna-pravda.hr/) and Brave sisters (https://hrabra.com/) work on providing current and correct data to women in need as well as on offering practical support and advocacy during the whole process of obtaining an abortion for women who need it (the Brave sisters' network is currently 48 sisters strong).
[63] See the testimony of the Chamber of Midwives President Barbara Finderle, recalling the experience of an ObGyn from Rijeka (a 100% appeal-free hospital) during their rotation as the „external contractor" tasked with performing abortions in the southernmost Croatian city of Dubrovnik – Romana Kovačević Barišić, Zbog priziva savjesti ženi pobačaj radili na živo [*Due to conscientious appeal, abortion performed without any pain medication*], Večernji list, 25 March 2019.
[64] Gorjana Gjurić, Priziv savjesti i nagovor savjesti u ratu oko pobačaja [*Conscientious Appeal and "Talked-into" Appeal in the War Regarding Abortion*], *Libela,* 4 November 2014, at https://www.libela.org/sa-stavom/5621-prigovor-savjesti-i-nagovor-savjesti-u-ratu-oko-pobacaja/ (accessed 26 May 2022).
[65] These are hospitals in Dubrovnik, Karlovac, Pula, Sisak, Varaždin, Zabok, Zadar, Zagreb (hospital "Sestre Milosrdnice", a.k.a. "Sisters of Mercy"; and Special hospital Podobnik), and Rijeka – data pooled by the Platform for Reproductive Freedom, at: https://www.reproduktivna-pravda.hr/dostupnost-pobacaja-u-republici-hrvatskoj/ (accessed 27 May 2022).
[66] Sanja Kovačević, Medikamentozni pobačaj: Drugi *lockdown* opet tjera žene da pomoć potraže u Sloveniji i BiH [*Medication abortion: The second lockdown once again forces women to seek help in Slovenia and Bosnia and Herzegovina*], Reci.hr, 3 December 2020, at: https://reci.hr/novi-zivot/reproduktivno-zdravlje/medikamentozni-pobacaj-drugi-lockdown-opet-tjera-zene-da-pomoc-potraze-u-sloveniji-i-bih/ (accessed 20 May 2022).
[67] The lowest price for a surgical abortion goes from 1800-1950kn (Osijek, Bjelovar, Gospić), rising to 3000kn in Dubrovnik. Medication abortion costs around 1500kn (950kn for Pula), which makes it much more affordable than the surgical variant, but only up to 9 weeks of gestation – see the source referenced in fn. 66. For comparison, the minimum wage has been set at 3750kn (Government Decree of 28 October 2021, O.G. 117/2021), for some 52.000 workers. In addition to this, there is more than 100.000 workers that surpass that minimum wage by just a fraction –

The increasing stigma around abortion among obstetricians manifested itself in another area in May 2022, with a public outcry over the case of a 26-weeks-pregnant woman seeking abortion of her terminally ill fetus. Her plight galvanized the nation, giving rise to coordinated mass protests in major cities under the slogan "DOSTA!" ("*Enough already*!") and bringing about some seminal breakthroughs in the general area of abortion law in Croatia. Namely, having had her unborn child diagnosed with a galloping malignant tumor (teratoma) in addition to hydrocephalus, the woman requested her pregnancy to be terminated in order to spare her family as well as her unborn child the unnecessary pain and suffering. Seeing as she was illegally not advised of such a right by her ObGyn, she was only able to make this request due to the fact that she retained a lawyer, shocked to have been laconically sent to "have this dealt with in Slovenia".[68] Namely, there is not a single Croatian physician educated to terminate a pregnancy past 22 weeks of gestation (the current fetal viability threshold for healthy pregnancies), preventing Ms. Čavajda to claim her legal rights. Those are, regarding Art. 15 of the 1978 Act, to terminate a pregnancy even after 12 weeks of gestation when "based on medical indications and the current state of medicine it is to be expected that the baby would be born with severe congenital physical or psychological defects".
Having her request (*per* Art. 23 of the 1978 Act) for an abortion rejected by commissions in four Zagreb (Croatia's capital) hospitals, she appealed their decision pursuant to Art. 24 of the 1978 Act. While the decision issued on 11 May was ultimately in her favor, recognizing her constitutional and legal right to have her pregnancy terminated, the unavailability of a single ObGyn educated to perform this particular procedure forced her to finally obtain it in Slovenia, at the University Center in Ljubljana. The aforementioned authoritative 11 May decision put to rest the issue of whether the 1978 Act can really be interpreted as allowing abortions past the fetal viability mark (22 weeks of gestation).[69] After this case, it is clear that abortion (when predicated upon medical indications confirmed by the relevant commission *per* abovementioned Arts. 23-24) is allowed and protected at *any* stage of pregnancy. After some confusion as to whether the State would reimburse her for the 5.000€ expense incurred by having had to seek medical assistance in a foreign state, it was announced on 18 May that the State budget will, in fact, cover the travelling and procedure costs[70], making the publicly raised over 30.000€ for this purpose not necessary after

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Hrvatska je peta najgora po visini minimalne place u EU [*Croatia among the top 5 EU with lowest salaries*], RTL.hr, 29 January 2022, at https://www.rtl.hr/vijesti/hrvatska/na-minimalcu-od-3915-kuna-cak-52-tisuce-radnika-hrvatska-je-peta-najgora-po-visini-minimalne-place-u-eu-1ebe2efc-b9f5-11ec-9a91-0242ac120046 (accessed 27 May 2022). We should add the 7.5% unemployment rate to that already high number (data for March 2022).

[68] Some ten Croatian women seek abortion in Slovenia each year, where conscientious appeal is almost non-existent and physicians are educated to perform abortions even past 22nd weeks of gestation – Slovenski liječnik o prekidu trudnoće: Postupak ide jako brzo [*Slovenian doctor on termination of pregnancy: The procedure is fast*], Večernji list, 6 May 2022, at: https://www.vecernji.hr/vijesti/slovenski-lijecnik-o-prekidu-trudnoce-iz-hrvatske-imamo-10-slucajeva-godisnje-postupak-ide-jako-brzo-1584391 (accessed 20 May 2022).

[69] On this point, see the Director of the largest Zagreb hospital Rebro, Ante Čorušić, erroneously claim this to be „euthanasia" precluded by Croatian laws – Čorušić o Čavajdi [*Čorušić on Čavajda*], Večernji list, 10 May 2022. That there is no obstacle to obtaining abortions even after the 22 week mark has been the unanimous stance of those constitutional law professors who spoke out publicly on the case: see opinions of Professors Sanja Barić (Rijeka - https://www.novilist.hr/novosti/hrvatska/sanja-baric-o-mirelinom-slucaju-odluka-je-na-majci-a-ne-na-komisiji-ili-raznim-dusebriznicima/, 8 May 2022), Anita Blagojević (Osijek - https://www.glas-slavonije.hr/493893/1/Blagojevic-U-slucaju-Mirele-Cavajda-ispunjeni-svi-pravni-uvjeti-za-prekid-trudnoce, 12 May 2022) and Ana Horvat Vuković (Zagreb - https://hr.n1info.com/vijesti/profesorica-ustavnog-prava-cavajda-moze-tuziti-odgovorne-to-je-minimum/, 14 May 2022).

[70] HZZO odobrio podmirenje troškova za Mirelu Čavajdu [*Croatian Health Insurance Fund Allowed Reimbursment of Costs to Mirela Čavajda*], Index, 18 May 2022, at: https://www.index.hr/vijesti/clanak/hzzo-odobrio-podmirenje-troskova-za-mirelu-cavajdu/2365184.aspx (accessed 27 May 2022).

all.[71] This final decision by the Croatian Health Insurance Fund laid to rest any lingering doubts about late-term abortions being legal and available to Croatian women, whenever the indications are medically verified and the procedure completed under the stipulated legislative conditions.

## IV. CONCLUSION

Almost three and a half years have passed since the expiry of the deadline given by the Croatian Constitutional Court to the Croatian Parliament to modernize the existing abortion legislation. The only notable attempt during this time was the opposition's bill, shot down in May 2022, with the Prime Minister remarking laconically that if the Court could have waited for 26 years to decide on the constitutionality of the relevant law, the Government can also bide its time in following up on its reconstruction.[72] The stance that the "Government has no intention to amend the Abortion law at this time…[since] nothing substantive would change, anyway" was, it must be said, welcomed by the liberal forces in the Croatian society, wary of the parliamentary compromises and the potential innovations that the revamped Act might come to include (e.g. the waiting period, mandatory counselling etc.). Of course, any amendments to the existing framework would be subject to strict scrutiny before the Constitutional Court, which will continue to monitor the safeguarding of the precarious balance between the woman's constitutional right to equality, dignity and privacy, and the overarching value of protecting "life".

This paper has attempted to highlight the major challenge in implementing the Court's decision, namely the issue of conscientious appeal. It has discussed its prevalence among Croatian ObGyns, anesthesiologists and midwives, and expounded on its imitations. As implicitly confirmed by the Constitutional Court in its 2017 decision, the issue of conscientious appeal is under-regulated and under the dominant influence of ideology, culture and traditionalism. The potential abuse of power inherent in the right to conscientious appeal and its potential to impose a health practitioner's private opinion on other citizens and thus disable access to a legal health service warrants, in our opinion, a narrowly tailored framework which must ensure that the two respective rights (the health practitioners' right to their moral self-determination, and the woman's right to choose) do not overpower one another. This task before the State has sadly yet to be honored, creating a situation where the nominal right to abortion is in reality all but precluded, violating the State's positive obligations under Art. 8 ECHR.

As we have shown, the future regulation of the right to conscientious appeal will have to focus on the sanctity of life, as the only area where the absence of a pan-European consensus and the magnitude of the societal schism potentially offsets the fact that invoking this appeal holds a stigmatizing meaning and inflicts psychological damage for a - thus created - class of second-rate citizens. The right to such appeal for medical professionals will have to include the following: a register of objecting personnel, to prevent the misuse of the appeal as well as to enable healthcare institutions to organize their work in a seamless and legal manner. The institutional conscientious appeal must, in this regard, be explicitly precluded, and the institutions prompted to follow the law by – if must be - imposing pecuniary and other sanctions. Should the organization of work so

[71] More than 220.000kn was donated by almost 1500 citizens within the first 40 hours (7 May – 9 May) of the crowdfunding campaign started by the "Solidarna" Foundation for Human Rights and Solidarity - https://solidarna.hr/u-48-sati-prikupljeno-220-68731-hrk-za-mirelu/ (accessed 27 May 2022).

[72] Milan Pavičić, Šef Ustavnog suda: 'Očekujemo od Sabora da donese novi Zakon, kako bi pobačaj bio izuzetak' [*Chief Justice of the Constitutional Court: We expect the Parliament to adopt the new Law, so that abortion may become an exception*], Telegram, 10 May 2022, at: https://www.telegram.hr/politika-kriminal/sef-ustavnog-suda-ocekujemo-od-sabora-da-donese-novi-zakon-kako-bi-pobacaj-bio-izuzetak/ (accessed 20 May 2022).

require, the prospective worker may well be disqualified from employment, or an existing worker have their employment contract terminated, if and when it becomes apparent that the accommodation of their objection imposes a disproportionately heavy financial/HR burden. The list of the abortion-providing institutions must be accurate at all times, and contain all the relevant data such as costs, conditions and contact information. The institutions offering medication abortion must also realize that this area offers no opportunity to invoke the appeal, seeing as there is no immediate nexus between the physician prescribing the abortifacients and termination of the pregnancy.

Recognizing that both of the contrapuntal rights (the right to a conscientious appeal and the woman's right to choose) share a coordinated position in the constitutional framework, and that neither can apodictically be said to be "stronger" than the other, it remains that we conclude that the State is the one tasked with protecting both, to the maximum objectively feasible extent. However, as there is no such thing as a right unamenable to limitations, the former will have to yield in all situations where its invocation would endanger the woman's rights to self-determination. A closely tailored regulation of the future modernized abortion legislation will thus have to provide a setting where this mutual weighing-up will be an exception rather than the rule, honoring the Constitution's unyielding commitment to safeguarding fundamental human dignity.

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