# ABORTION – POLITICAL CONSTRUCT OR MORAL ISSUE?

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*This paper analyzes the history of abortion and factors that influenced the legalization of abortion in Western society. The question is raised whether abortion should, according to its definition as an objective good or evil, be prohibited or legitimized, or will the legal framework on abortion be regulated as a political construct, independently of the objective moral nature of abortion. The possibility of finding the right answer to the abortion debate is analysed. Conclusion is drawn as to whether abortion can be justified by a political goal, or is it a moral issue independent of politics.*

*Key words: abortion; moral; law; philosophical and legal theories; truth*

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## 1. INTRODUCTION

Abortion is a political, medical, social, legal and economic issue.[1] The legal regulation of abortion requires the clarification of a series of previous legal, social and philosophical-anthropological questions, of which the fundamental question is whether a human embryo is a person and if so, is abortion, instead of an assumed expression of privacy, the murder of a person. An important question regarding abortion is whether the legal issues are essentially questions of moral principles or legal strategy.[2] Theoretical disagreement about the basis of law, the question of what law is or should be, whether it includes morality or not, leads to disagreement about issues like abortion or racial segregation.[3] Can abortion be justified by a political goal, or is it a moral issue independent of politics, so it will be regulated that way in a positive legal framework? In order to properly understand the nature of abortion, we should place it in an appropriate socio-historical perspective.

## 2. HISTORY

In history, abortion has been understood differently, in accordance with different philosophical, theological and medical knowledge of a particular time. For generations, lawyers have interpreted the status of the human embryo/fetus differently.[4] In times when the human embryo was considered an animated life,

1 See more about this in: Kurjak, A.; Stanojević, M.; Barišić, P.; Ferhatović, A.; Gajović, S.; Hrabar, D., *Facts and doubts on the beginning of human life – scientific, legal, philosophical and religious controversies*, Journal of Perinatal Medicine, *vol*. 51, no. 1, 2023, pp. 39 – 50, https://doi.org/10.1515/jpm-2022-0337 (Accessed: 25 May 2023); Hrabar, D., *Pravo na pobačaj – pravne i nepravne dvojbe*, Zbornik Pravnog fakulteta u Zagrebu, *vol*. 65, no. 6, 2015, pp. 791 – 831; Matulić, T., *Pobačaj: Drama savjesti*, Centar za bioetiku, Zagreb, 2019; Beckwith, F. J., *Defending life – a moral and legal case against abortion choice*, Cambridge University Press, Cambridge, 2007; Cazor, C., *The Ethics of abortion: Women's rights, human life and the question of justice*, Routledge, New York, 2011; Dworkin, R., *Life's dominion: An argument about abortion, euthanasia, and individual freedom*, Alfred A. Knopf, New York, 1993; Ferree, M. M.; Gamson, W. A.; Gerhards, J.; Rucht, D., *Shaping Abortion Discourse, Democracy and the public sphere in Germany and the United States*, Cambridge University Press, Cambridge, 2002.

2 Cf. Dworkin, R., *Shvaćanje prava ozbiljno,* Kruzak, Zagreb, 2003, pp. 12 – 17.

3 Cf. Dworkin, R., *The Semantic Sting*, in: Himma, E. K. (ed.), *The Nature of Law: Philosophical Issues in Conceptual Jurisprudence and Legal Theory*, Foundation Press, New York, 2011, p. 242.

4 Cf. Muller, W. P., *The criminalization of abortion in the West*, Cornell University Press, London, 2012, p. 116.

abortion was a crime against the human being.[5] Hammurabi's code punished abortion, even if it was involuntary and accidental. The ancient Egyptians believed that life begins at birth.[6] In ancient Greece, Solon and Lycurgus considered abortion a crime that deserved punishment.[7] According to Stoic philosophy, the fetus was not considered a human being. It was believed that a child gets a soul at birth and becomes a person. The aforementioned understanding led to frequent abortions and infanticide, as well as to the aversion of Roman women giving birth in Ancient Rome.[8] In contrast, Justinian's Christian Roman law punished abortion and treated it as murder.[9] In the last phase of the Roman Empire, the fetus was considered as a being that is separate from the mother, which became one of the religious and ethical standards of Western civilization.[10] In the early Middle Ages, the Church had a particularly significant role in the debate on abortion, which was "also a matter of family honor and social reputation, although the above is not documented", according to Mistry.[11]

During the Middle Ages, from the 13th to the 17th century, common law in Europe established the rule that pregnancy exists when it is visible or when a woman declares that she is pregnant, since primitive medical "technology" did not allow determining the existence of a child. Only from the moment when a woman ascertained that she was pregnant, the abortion was considered murder.[12] At that time, doctors dealt exclusively with the treatment of diseases, not "parenthood planning", and reproduction in Europe was dependent on external factors such as war, plague, famine.[13] The Code *Constitutio criminalis Carolina*, which was enacted in 1532 by Charles V, Holy Roman Emperor,

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5 Cf. Ziebertz, H. G.; Zaccaria, F., *Euthanasia, Abortion, Death Penalty and Religion – The Right to Life and its Limitations*, Springer, Berlin, 2019, p. 109.

6 Cf. Slabbert, M. N., *The Fetus and Embryo: Legal Status and Personhood*, South African Journal of Bioethics and Law, *vol*. 1, 1997, p. 239, and Riddle, J. M., *Eve's Herbs: A history of contraception and abortion in the West*, Harvard University Press, Cambridge, 1997, p. 70.

7 Cf. Lasić, S., *Pravo na rođenje u učenju Crkve*, Tonimir, Zagreb, 2009, p. 59.

8 Cf. *ibid.,* pp. 47 and 59.

9 Cf. Slabbert, *op. cit.* note 6, p. 239.

10 Cf. Curran, W. J., *An Historical Perspective on the Law of Personality and Status with Special Regard to the Human Fetus and the Rights of Women*, Health and Society, *vol*. 61, no. 1, 1983, p. 59.

11 Mistry, Z., *Abortion in the early middle ages C 500-900*, York Medieval Press, Boydell and Brewer, Suffolk, 2015, p. 298.

12 Cf. Hammack, J. J., *Imagining brave new world: Towards nuanced discourse of fetal personhood*, Women's Rights Law Reporter, *vol*. 35, no. 3-4, 2014, p. 359.

13 Cf. Riddle, *op. cit.* note 6, pp. 122 and 169.

prescribed the death penalty for abortion.[14] In England, in 1803, the *Malicious Shooting or Stabbing Act* prescribed the death penalty for a person who causes or performs an abortion after the mother felt movement.[15] In Enlightenment France, abortion was a crime that was punished with a sentence of 20 years of hard prison for anyone who enables a woman to have an abortion.[16] Austria only abolished the death penalty for abortion in 1787, which was prescribed for a woman and any person who helps her to have an abortion. Prussia defended the general rights of man and the human embryo/fetus in the *Allgemeines Landrecht* in 1794. In the period of the middle to late 19th century, common law in the Europe abandoned the distinction between the period before and after the movement of the human fetus.[17] In the United Kingdom, until 1948, abortion was punishable by life imprisonment. In the USA, until 1821, according to common law, abortion was allowed until the moment the mother felt the first movement, and with the progress of medicine in the mid-19th century and the knowledge that the human embryo/fetus is alive before the mother feels movement, scientists and doctors advocated for the restriction of abortion even before that moment.[18] During the 19th century, doctors adhered to the Hippocratic Oath, expressing clear resistance to performing abortions.[19] An 1857 American Medical Association Committee Report attributed the practice of abortion to "widespread popular ignorance of the true nature of the crime, and the belief that the fetus is not alive until the mother feels movement."[20] In the mid-to-late 19th century, states legalized abortion as murder, regardless of the moment the mother felt the movement of the unborn human, which is why the human embryo/fetus was protected at every stage of development, based on medical evidence that human life begins at conception.[21] Legal theory continued to condemn "criminal abortion" in the USA and UK during the decades

14 Cf. https://pages.uoregon.edu/dluebke/Witches442/ConstitutioCriminalis.html, see par. 8, 35 (Accessed: 27 July 2023).

15 Cf. https://statutes.org.uk/site/the-statutes/nineteenth-century/43-geo-3-c-58-lord-ellenboroughs-act-1803/, see part I. (Accessed: 27 July 2023).

16 Cf. Riddle, *op. cit.* note 6, p. 208.

17 Cf. Tribe, L. H., *Abortion: The Clash of Absolutes*, W. W. Norton and Company, New York, London, 1990, p. 34.

18 Cf. Dunaway, R., *Personhood Strategy: A State's Prerogative to Take Back Abortion Law*, Willamette Law Review, *vol*. 47, no. 2, 2011, p. 337.

19 Cf. Tribe, *op. cit.* note 17, pp. 28 – 30.

20 Johnson, A., *Abortion, Personhood, and Privacy in Texas*, Texas Law Review, *vol*. 68, no. 7, 1990, pp. 1523 – 1524.

21 Cf. Forsythe, C. D.; Arago, K., *Roe v. Wade and the Legal Implications of State Constitutional Personhood Amendments*, Notre Dame Journal of Law, *vol*. 30, no. 2, 2016, p. 281; Riddle, *op. cit.* note 6, p. 209.

before World War II until the general reform movement and liberalization in 1965.[22] After World War II, in the late 1940s, ten Nazi leaders were convicted of criminal acts of incitement to abortion.[23] Part of the Nürnberg Records refers to the human embryo/fetus which is considered a subject to which legal protection belongs.[24] Historian Hunt, in his research on the Nürnberg Trials, states that "the condemnation of abortion did not apply only to forced, but also to voluntary abortions."[25] The decriminalization of abortion was condemned in the Nürnberg Trials as incitement to abortion, and Nazi directives on the decriminalization of abortion were given as evidence of crimes against humanity.[26] In 1947, the British Medical Association condemned abortion, and the doctors who performed it were considered war criminals and persons without moral and professional conscience.[27] It is possible that the influence of new ideologies led to the fact that abortion, from a criminal offense and a conviction in the Nürnberg Trials in the post-war period, became a right that is treated like, for example, going to the dentist.

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22 Cf. Curran, *op. cit.* note 10, p. 72. During the 60s and 70s, many Western countries legalize abortion. Germany (although emphasizing the right of the embryo as an independent human being subject to constitutional protection) in 1975, England in 1967, USA in 1973, France in 1975, Italy in 1978. Scandinavian countries took a neutral approach of bureaucratic form. Ireland, Belgium and Switzerland did not radically change the legal approach to abortion in the 70s and 80s. Switzerland liberalized abortion back in the 1940s of the 20th century.

23 Cf. Puppinck, G., *Abortion and the European Convention of Human Rights*, Irish Journal of Legal Studies, *vol*. 3, no. 2, 2013, p. 176. For more details see: Hunt, J., *Abortion and the Nürnberg prosecutions - a deeper analysis*, in: Koterski, J. W. (ed.), *Life and Learning VII: Proceedings of the Seventh University Faculty for Life Conference*, University Faculty for Life, Washington, 1998.

24 Cf. Joseph, R., *Human rights and the unborn child*, Martinus Nijhoff Publishers, Leiden, Boston, 2009, p. 10.

25 *Ibid.*, p. 10. Joseph states that Richard Hildebrandt and Otto Hofmann were sentenced after World War II to 25 years in prison (Hofmann) and death (Hildebrandt) for, among other things, coercion and instigation of abortion.

26 Cf. *ibid*., pp. 73 and 145. Joseph states that in the Nürnberg Trials abortion was treated as a violation of the right to life and freedom of a human being, and that the Nazis considered abortion as an act of murder. For more details see: Schuster, E., *The Nürnberg Code: Hippocratic ethics and human rights*, Lancet, *vol*. 351, 1998, and Telman, J., *Abortion and Women's Legal Personhood in Germany: A Contribution to the Feminist Theory of the State*, Review of Law and Social Change, *vol*. 24, 1998, p. 93. Telman states that the Abortion Act in post-war Germany maintained the acceptance of responsibility for the actions of the Nazi government, as well as the rejection of the view that there are less valuable human lives. The exception was East Germany, which was not held responsible for the actions of Hitler's government, but abortion was regulated in accordance with ideological and economic goals.

27 Cf. Joseph, *op. cit.* note 24, p. 191.

### 2.1. The road to the legalization of abortion in communism and factors in the legalization of abortion in Western society

The Soviet Union was the first country in the 20th century which legalized abortion and made it available on demand.[28] Marxist society considered the legalization of abortion as a tool that enables the realization of women as workers.[29] Lenin legalized abortion by decree of the Commissar for Health and Justice in 1920, with the alleged aim of liberating the Soviet woman and proclaiming her equality with men. Stalin's Constitution (1936) prohibited abortion (until 1953, when the ban was lifted).[30] In communist Yugoslavia and then in the Socialist Republic of Croatia, legal regulation of abortion "reflected the socialist goal of including women in the context of self-governing economic production".[31] In the communist regime, economic interests and collective goals were put before individual ones, which was and is today, of direct influence on the moral and then legal status of the human embryo/fetus, and then on the question of the possibility of abortion.

In Western society in the twentieth century, the situation was not different from the communist regime, as far as the legalization of abortion is concerned. Many factors influenced its legalization. Solinger believes that "The Great Depression consolidated the link between the economy and reproduction because the reproduction of socially and economically unfit women caused social and economic problems."[32] In the 30s of 20th century, poverty, along with the population theory, is cited as one of the main reasons in favour of the legalization of abortion, so a low percentage of births is considered the key to economic prosperity and equality.[33] In the 40s and 50s of 20th century, the focus in the

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28 Cf. Avdeev, A.; Blum, A.; Troitskaya, I., *The history of abortion statistics in Russia and the USSR from 1900 to 1991*, Population: An English Selection, *vol*. 7, 1995, p. 42.

29 Cf. Valjan, V., *Bioetika,* Svjetlo riječi, Sarajevo, Zagreb, 2004, p. 161. On the contrary, Selanec, who cites various examples of the "different" status of women compared to man in the socialist system. See: Selanec, G., *A Betrayed Ideal: The Problem of Enforcement of EU Sex Equality Guarantees in the CEE Post-socialist Legal Systems*, University of Michigan Law School, Michigan, 2012, pp. 13 – 62. Selanec states that "true socialism insisted that some differences between man and women are too obvious to be denied and ignored", p. 14.

30 Cf. Laun, A., *Pitanje moralne teologije danas*, Herder and CO, Beč, 1992, p. 52.

31 Popović, P., *Kritika koncepcije pravednosti usvojene u Rješenju Ustavnog suda o tzv. "Zakonu o pobačaju"*, Bogoslovska smotra, *vol*. 88, no. 1, 2018, p. 132.

32 Solinger, R., *Pregnancy and power*, New York University Press, New York, London, 2005, p. 116.

33 Cf. Tribe, *op. cit.* note 17, pp. 35 and 41, and Reagan, J. L., *When abortion was a crime*, University of California Press, Oakland, 1997, p. 230. Solinger, *ibid*., pp. 164 – 167,

abortion debate has shifted to psychiatric reasons. The concept of health is changing in such a way that it "includes the entire mental state of a woman".[34] Just as doctors had a great influence on legal restrictions on abortion in the 19th century, they had an equal influence in the fight for its legalization. Dr. Nathanson, one of the leading men of NARAL, the movement in the USA for the legalization of abortion, claims that the most successful tactic for the legalization of abortion was "convincing liberal intellectuals of the guilt of the church hierarchy for imposing dogmatic views on the secular state expressing opposition to the legalization of abortion".[35] Noonan cites population growth, the pill, and a changed valuation of sexuality as factors that influenced the legalization of abortion.[36] The changed valuation of sexuality is a consequence of the global cultural and social upheaval in relation to the role of women in society, which occurred in the 60s of the 20th century.[37] Sexuality reformers used "the tactic of treating women as victims of men's lust on the one hand and seekers of self-awareness on the other", states Reagan.[38] The question of the role of women in society is still a significant factor influencing the social attitude towards the issue of abortion availability.

Activism and the media in Western society are also one of the factors of the change in the social evaluation of abortion. Marx Ferree and Anthony Gamson analyzed public debates in Germany and the USA and concluded that the media is the main spreader of change and key factor in times when the cultural code is questioned, in a way that it changes the standard language and consciousness of people.[39] According to Ferree and Gamson, as well as Tozzi, the

189 – 190. Solinger states that in the late 1950s Malthus' theory of overcrowding was associated with the fertile female body. Special efforts were made to prevent pregnancies among women from Latin America.

34 Tribe, *op. cit.* note 17, pp. 36 – 37. A tragic case that influenced the legalization of abortion is the case of "Thalidomide", a drug that in the late 50s and early 60s led to the birth of many children with deformities in Europe.

35 As cited in Bellulo, E., *Samo žene mogu odlučiti o pobačaju?*, Spectrum, *vol*. 3-4, no. 1-2, 2014, p. 107, and Ziegler, M., *Women's Rights on the Right: The History and Stakes of Modern Pro-Life Feminism*, Berkeley Journal of Gender, Law and Justice, *vol*. 28, no. 2, 2013, p. 251. Ziegler says NARAL leader Larry Lader advised colleagues to promote the view that the anti-abortion position is that of a "religious minority" that has no right to force the majority to think the same way.

36 As cited in Glendon, A. M., *Abortion and divorce in western law*, Harvard University Press, Cambridge, 1986, p. 11.

37 Cf. Stettner, S.; Burnett, K.; Hay, T., *Abortion: History, Politics, and Reproductive Justice after Morgentaler*, University of British Columbia Press, Toronto, 2017, p. 134.

38 Reagan, *op. cit.* note 33, pp. 9, 92 and 230.

39 Cf. Ferree *et al*., *op. cit.* note 1, p. 10

international movement for the legalization of abortion was based on several key premises: words have no intrinsic meaning, language is subject to change, objective truth does not exist, and the agents of social change are the so-called experts and unelected activists.[40] That the media is the main promoter of certain ideologies and thus of abortion in the period before and after the Second World War, was also confirmed by the testimony of Dr. Erich Wetzel, one of the Nazi ideologues, who described the way in which newspapers, radio, films, pamphlets and lectures are used to instill the idea "that it is harmful to have several children because of the costs they bring and that it is necessary to establish facilities for performing abortions that women would practice voluntarily and doctors perform without regard to professional ethics".[41] Reagan considers the legalization of abortion a clear example of how "private activities" can reshape public opinion, the results of which, according to Nossiff, "the political oligarchy wants to control".[42] Therefore, we can conclude that media support, along with other factors, significantly contributed not only to the legalization of abortion, but that it is also considered a measure of the democracy of society, even though "it remains unclear with what legitimacy the media take a position according to which it privileges one, conditionally speaking, the pro-choice side and deprivileges the other, pro-life side?"[43]

## 3. LAW AND MORALITY

Throughout history, abortion has been regulated differently, in accordance with different philosophical theories of a particular time. Positive legal framework is based on previously established philosophical guidelines. Legal theory cannot exist without a reminder of ethics or political philosophy in general, where ethical philosophy expands into political philosophy.[44] Is political philosophy, which finds its expression in law, an expression of objective morality or a construct that comes from a completely independent argument that Dworkin derives from political theory?[45] Dworkin advocates the concept of law as an integrative system in which cases are resolved by interpreting the political stru-

40 Cf. *ibid.*, pp. 6 – 16, and Tozzi, P. A, *Sovereignties: Evaluating claims for a "Right to Abortion" under International law*, in: Stepkowski, A. (ed.), *Protection of human life in its early stage*, Peter Lang, Frankfurt am Main, 2014, pp. 60 – 61.

41 Joseph, *op. cit.* note 24, p. 190

42 Reagan, *op. cit.* note 33, p. 2, and Nossiff, R., *Before Roe, Abortion policy in the States*, Temple University Press, Philadelphia, 2000, p. 28.

43 Ferree *et al.*, *op. cit.* note 1, pp. 6 – 16.

44 Cf. Finnis, J., *Philosophy of Law*, Oxford University Press, Oxford, 2011, p. 111.

45 Cf. Soper, P., *Why an Unjust Law is not Law at all*, *op. cit.* note 3, p. 122.

cture and finding the best justification in the principles of political morality.[46] But how to find the best political justification? The fact is that the inspiration for Hitler's Nazi legal system came from the philosophy of Fichte and Nietzsche.[47] The above in itself points to the importance of finding an answer to the question of which ethical theory is correct for application in a positive legal framework. To answer that question, it is necessary to study the factors and mechanisms by which a certain ethical and then political theory is imposed as dominant in a society. The relationship between the legal framework and ethical theory is determined by the decisions of political structures on moral and ethical issues and is a complex issue of pluralism within which different value-system exist, but this is not "an insurmountable obstacle to the fact that there is an argument between good and evil".[48]

### 3.1. Natural law theory, positivism, legal realism and postmodernism

Natural law theory dictates that positive law (which refers to the nature of things) derives from the very nature of things. The theory of natural law brings the objectivity of morality into legal objectivity, in contrast to the positive – legal theory, which starts from the fact that the legal content is created by social practice and therefore represents an expression of social, political interests and circumstances. In natural-law theory, natural is used to designate criteria or standards that are normative before all political choices, *a priori* standards that are not the product of collective choice, and are revealed by human reason and cannot be revoked. Instead, these standards confirm the requirements of logic, and therefore law must harmonize with them in order to be valid.[49] Some of

[46] See Dworkin, *op. cit.* note 2, pp. 127 – 132.

[47] Cf. Sluga, H., *Heidegger's Crisis: Philosophy and Politics in Nazi Germany*, Harvard University Press, Cambridge, 1993, pp. 30 – 31, 42 and 75. Sluga states that Nietzsche was said to be the philosophical and political hero of Adolf Hitler. Nietzsche was considered an important critic of Judeo-Christian values and morality in general. The army took over the rhetoric of the aforementioned German philosophers.

[48] Aramini, M., *Uvod u bioetiku*, Kršćanska sadašnjost, Zagreb, 2009, p. 54.

[49] Cf. Finnis, *op. cit.* note 44, pp. 91 – 93. The idea of the existence of natural law originated from antiquity, lived in the Middle Ages as Catholic natural law, and during the Reformation and Counter-Reformation it was the subject of the modern philosophy of law and the basis of the teachings of the rationalists. Likewise Hart, H. L. A., *The Concept of Law*, Oxford University Press, Oxford, 2012, pp. 155 – 158. Hart speaks of two constants in the natural law tradition: the Thomistic, which discovers the principles of morality and justice through human reason and its source is God, and another, according to which human laws that are against these principles are not legally valid according to "*lex iniusta non est lex*".

the prominent natural law theoreticians are, among others, Aquinas, Moore, Soper, Finnis and Fuller. Although the term natural law is generally associated with the teachings of the Roman Catholic Church, all advocates of natural law are not theists, and therefore neither Christians nor Catholics, which is very important in the context of the concept of the person, and then of abortion, because the arguments which are based on natural law theory and which speak in favour of the personality of the human embryo and fetus, and reveal the nature of abortion, are often characterized as religious.[50]

Positivism is the dominant legal theory in the second half of the 19th century. It is characterized by the separation of law and morality as two different philosophies. For positivists, subjective rights cannot depend on moral facts, nor do moral arguments establish subjective rights.[51] Positivism finds the conditions for the legal validity of norms in social facts related to human actions, beliefs and activities. Famous positivists are theoreticians such as Austin, Kelsen and Hart. In the second part of the 20th century, legal realism appeared, according to which the law is a set of standards originating from conventions, orders or other social facts.[52] Famous legal realists are Jerome Frank, Alf Ross, Vilhelm Lundstedt. In the 20th century, postmodernism appeared with the representatives of Derrida, Lyotard and Foucault, who challenged law as a rational, coherent or just system, and questioned most, if not all, assumptions of legal reasoning.

### 3.2. Applicability of different theories

Theoreticians discuss the question whether law is related to morality or is an expression of social practice or is an irrational system. Greenberg considers questionable the claim that empirical facts are the only determinants of the content of law.[53] Raz states that "for positivists, the moral value of law depends on the circumstances of the society in which it is applied, so no morality is the social morality of a population, until it is generally accepted in that population."[54] This would mean that generally accepted social morality is actually

50 See Haldane, J., *Faithful reason: Essays catholic and philosophical*, Routledge, New York, 2004, pp. 131 – 133. Some of the greatest theoreticians of natural law were not Catholics, such as the Anglican Richard Hooker, Hugo Grotius, the Presbyterian Scottish philosophers and the English legal theorist William Blackstone.

51 Cf. Dworkin, *op. cit.* note 2, p. 378.

52 See also: Himma, E. K., *The Nature of Law: Philosophical Issues in Conceptual Jurisprudence and Legal Theory*, Foundation Press, New York, 2011, p. 165.

53 Cf. Greenberg, M., *A metaphisical basis for Dworkinian constructivism*, in: *ibid*., p. 157.

54 Raz, J., *Legal positivism and the sources of law*, in: *ibid*., p. 263.

a social practice. However, social practice needs to be evaluated, in order to determine whether it is in accordance with natural laws and empirical facts, in the part where it refers to natural rights. That is why Greenberg is right when he claims that "social practices alone cannot determine the contribution to the content of law, but value facts are necessary and are evidence of objective moral values".[55] If practices were the only determinant of law, then it remains unclear why the Nazi system is not still positive valid system today. How to prohibit murder if we do not value it as morally bad? It is not enough to tautologically conclude that it is murder, because there is no criterion why we punish it. Kelsen's theory of law as a social phenomenon completely different from nature, interprets that it is not possible to answer the question of what morality is, that is justice, because the content of justice cannot be reached by rational knowledge, since it is on the other side of reality.[56] If the content of justice, as Kelsen claims, is beyond reality, then there is no mechanism by which slavery, Nazism, communism or apartheid would be unjust. Are unjust laws even valid positive law? Hart proposes that the term "law" should be synonymous with positive law[57], while Fuller finds it "disturbing that law includes all positive laws, however evil, and excludes natural law as an independent source of legal obligation or a filter for denouncing evil positive laws, since it is clear that Nazi laws were law, although completely immoral."[58]

Apart from Nazism, apartheid was also a positivist system that denied natural law theory. It is clear that such laws were bad, and this conclusion can only be reached through an evaluative-normative process. Descriptions of norms are important, but they do not provide an answer as to why a law is good or bad. It is a significant, but also neglected question, why we consider a certain law to be just and good. Aquinas believed that "the principles of natural law specify the basic forms of good and bad that are in the domain of reason and *per se* obvious, and therefore it is not necessary to explain the way in which the evil ideologies of an individual society generate legal rules, but they should be rejected as inconsistent with the minimum requirements of justice, especially when it comes to great and obvious mistakes of which no one can be excused

55 Greenberg, *op. cit.* note 53, p. 165.

56 Cf. Kelsen, H., *Čista teorija prava*, Naklada Breza, Zagreb, 2012, pp. 18 – 23.

57 As cited in Posner, R., *The problems of Jurisprudence*, Harvard University Press, Cambridge, 1993, p. 229.

58 Fuller, L. L., *The Morality of Law*, Yale University Press, London, 1964, pp. 161 – 169. Fuller cites the racist laws of the South African Republic, the law of Nazi Germany, and the communists who tried to abolish God, marriage and the family, also with law.

for not knowing."[59] Nazi Germany had a positive legal system, but its provisions contrary to natural law were not to be applied, as proved in the Nüremberg trial. Otto Hoffmann, a member of the SS in Nazi Germany, testified that he worked in good faith and in accordance with the regulations, that is, the killing programs.[60] If the positivist claim about law as a social fact is correct, and law is, as Coleman states, "a human artifact that serves various interests and an institutional expression of political morality", then Otto Hoffmann only carried out activities that were an expression of political morality.[61] "Nazi-like laws are binding in a technical sense, but do not provide moral reasons for action", concludes Finnis.[62] Law as an expression of exclusively social circumstances is conditioned by power, and then also by economic interests, which could justify slavery and abortion (if it is the murder of a human being) and characterize it as a sociological determinant separated from value judgment. Changes of law and therefore of rights, which are the consequence of social changes, come by themselves, but it is necessary to distinguish between the areas and branches of the law that are conditioned by social changes, from natural rights that remain the same regardless of social changes, and if we change them, it almost always ends up adding up bad consequences at the end of the era. An example of this is the Dred Scott judgment of the Supreme Court of the United States of America (hereinafter: USA), which separated law from morality, in such a way that the question of whether a slave was a person was not considered a moral question. The legal norm in the respective areas is not exclusively technical, but also includes a moral dimension. It is not possible to comprehensively mark a social practice as morally neutral, and thus the legal framework that regulates it, because it is obvious that some social behaviours have moral implications, such as theft, lies, murders.

Furthermore, legal standards become cultural standards in such a way that the normative framework indicates whether an act is prohibited or not. That is why, for example, a law that legalizes murder, pedophilia and sodomy as a permissible practice is not morally neutral, and its implementation becomes a cultural "reach" over time. Therefore, the complete exclusion of morality from the legal system is dangerous because it opens up the possibility of violating justice to the extreme, as was the case with communism and Nazism. On the

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59 Finnis, J., *Natural law and natural rights*, Oxford University Press, Oxford, 2011, p. 33.

60 Joseph, *op. cit.* note 24, p. 316.

61 Coleman, J., *Two versions of the practical difference thesis*, *op. cit.* note 3, p. 323. Likewise Hart, *op. cit.* note 49, p. 236.

62 Finnis, *op. cit.* note 44, p. 93.

other hand, the equalization of law and morality implies the legal imposition of moral excellence that could be in conflict with individual value-systems. Where is the border? We can look for the border between law and morality in Fuller's theory of the morality of obligation and the morality of aspiration, according to which the morality of obligation is connected with the relationship between man and society, while the morality of aspiration is a question of the relationship between man and God. The line of demarcation between the morality of obligation and the morality of aspiration is a foundation that should not be crossed.[63] But the rough division into natural-law and positivist systems causes ambiguities. The inclusion of natural law theory in the positivist system does not mean that all legal requirements are also moral.[64] The status of a human being and the question of its life is certainly a question of natural law and the nature of things, while the question of punishment for a traffic violation is not. That is why the "either – or" solution is not adapted to legal needs and the natural state of affairs. The role of the legal system is to ensure the minimum which is necessary for the functioning of society, which includes, for example, the prohibition of murder and theft. The prohibition of murder is a moral issue, but the natural law still says nothing about how to regulate punishment because it represents an exclusively social category, which implies that there are social norms that are not related to the issue of morality. But those that are, represent the minimum for the purpose of society's survival. In doing so, natural law would be the standard by which the legitimacy of the system is measured.[65] Positive law, in the part that refers to natural-law issues, should be harmonized with the nature of things (prohibition of killing a human being), while in the part that refers to positive law (question of punishment), it can be harmonized with circumstances that do not relate to the nature of things, but are an expression of social circumstances. Thus, we cannot simply mark abortion as an expression of social practice, without valuing it. If we take into account the possibility that an individual judge, as well as the whole society, can be wrong about legal facts in a certain period (as in the case of slavery), the questioning of the relationship between law and morality becomes even more important.

What about the other dominant theories? Can we say that law and morality are constructions and question their rationality and coherence, in accordance with poststructuralist theory? By denying the role of reason in law, the values we construct will be an expression of power and interests unrelated to any natu-

63 Cf. Finnis, *op. cit.* note 59, pp. 10 – 14 and 28.

64 Cf. Finnis, *op. cit.* note 44, p. 112.

65 Cf. Ramet, S., *Postkomunistička Europa i tradicija prirodnog prava*, Alineja, Zagreb, 2004, p. 11.

ral state of affairs, which will make it redundant to determine who is considered a human being and a human person, and then what the nature of abortion is. "General requirements of reason are fundamental goods, principles of logic, that are presupposed to any practical explanations, because it is not difficult to state that there are many different faiths, but not many different logics."[66]

So, in order for law not to become an expression of irrationalism and voluntarism, we will agree with Vrban that "logic, as a universal norm of rationality, could be an instrument of rational discussion of values."[67]

## 4. ABORTION AS A MORAL-LEGAL ISSUE

Should abortion, according to its definition as an objective good or evil, be prohibited or legitimized, or will the legal framework on abortion be regulated as a political construct, independently of the objective moral nature of abortion? "Since the nature of law has changed over the centuries, and especially the role of human reason in law and culture, a legal solution to abortion is more difficult to achieve today", concludes Nikas.[68] However, the solution to the question of abortion cannot be sought in the theoretical "abstraction" that is most often used by totalitarian systems, which enables the interpretation of terms in accordance with the realization of political interests. Abortion is not a value-neutral issue, since it involves the issue of disposing of the life and bodily integrity of another human being, therefore it needs to be regulated in accordance with clear parameters that prevent arbitrary interpretations and contradictions.[69] The legal standard on abortion is a reflection of the moral vision of the community. The legal regulation of abortion belongs to the field of normative legal theory, that is, the establishment of legal norms from the aspect of political morality and moral legitimacy, but only after determining the content that is the subject of empirical legal theory.[70] The legal status of the human embryo and fetus, crucial for the legal regulation of the question of abortion, will be an expression of political and moral philosophy, philosophical theories about human nature, while the conceptual part (concepts such as person, human being, privacy) will include the philosophy of language, logic and

66 Finnis, *op. cit.* note 59, p. 371.

67 Vrban, D., *Metodologija prava i pravna tehnika*, Pravni fakultet Osijek, Osijek, 2013, pp. 115 – 117.

68 Nikas, T. N., *The Crisis of Reason in Western Jurisprudence and the Weakening of Life Protection*, *op. cit.* note 40, p. 82.

69 Cf. Fuller, *op. cit.* note 58, pp. 40 – 44 and 104.

70 Cf. Himma, *op. cit.* note 52, p. 1.

metaphysics. Given that the fundamental understanding of man presupposes anthropology, i.e. a defined vision of man, which presupposes ethics, which in turn presupposes ontology, discovering the legal status of human embryos and fetus is a rather complex task.[71]

In analysing these complex issues, the question of truth arises, and the possibility of finding the right answer to the abortion debate. How to get to the truth about the concept of a person and solve the question of the nature of abortion?

## 5. SEARCHING FOR THE TRUTH

"*Amicus Plato, sed magis amica veritas*", says the Latin translation of Aristotle. Determining the criteria of truth in law is a complex philosophical and legal issue that builds on the general philosophical issues of ways of knowing, acquiring knowledge and awareness about the subject.[72] The question of arriving to the truth is one of the disputed questions of philosophy. It includes the questions of whether there is one truth or more, subjective or objective, abstract or concrete, as well as a number of related theories.[73] What factors determine whether a statement is true or false? Dworkin asks "can any statement be true unless there is some procedure for proving its truth, in such a way that every rational person must admit that it is true?"[74]

Man's first encounter with truth is the achievement of logical truth, which is found in everything real as *veritas logica*.[75] According to the classic definition of truth "*adaequatio rei et intellectus*", truth belongs primarily to expressions, judgments and assertions that express the objective state of affairs.[76] Human cognition is a synthesis of experience and belief, whereby experience is an *a posteriori* moment and belief is an *a priori* moment in the structure of cognition.[77]

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71 Cf. Matulić, T., *Bioetički izazovi kloniranja čovjeka*, Glas Koncila, Zagreb, 2006, p. 143.

72 Cf. Vrban, *op. cit.* note 67, p. 21.

73 Cf. *ibid.*, p. 15.

74 Dworkin, *op. cit.* note 2, p. 8.

75 Cf. Belić, M., *Ontologija. Biti a ne ne-biti – što to znači?*, Filozofsko-teološki institut Družbe Isusove, Zagreb, 2007, pp. 149 – 150. *Adaequatio intellectus ad rem* is the definition of truth from 9th century.

76 Cf. *ibid.*, p. 149. Belić states that an object can coincide with reason in two senses: the first is *per se*, which means according to that reason on which the existence of beings depends, and the second is *per accidens seu secundum quid*, which means according to recognition and acceptance.

77 Cf. Weissmahr, B., *Ontologija*, Filozofsko-teološki institut Družbe Isusove, Zagreb, 2013, pp. 51 – 55 and 65. Weissmahr states that metaphysics is not possible with-

Therefore, we can conclude that experience and belief demonstrate the truth, which objectively exists as *veritas logica*. Truth exists independently of our recognition and knowledge. Truth is not a mysterious abstract entity, but with truth we confirm or deny propositions. Aristotle considered a proposition to be true if all the facts are in accordance with it, and if the proposition is false, disagreement soon arises.[78] Aristotle argued that it is impossible for the same thing to belong to the same thing and not belong at the same time, because what is, cannot, if it is a certain being, not be, or what is, given that it is a uniquely determined something, not be.[79] Everything that does not involve a contradiction is metaphysically possible, that's why not a single case of a contradiction that exists in reality is known.[80] If there are no paradoxical phenomena, then even abortion cannot be simultaneously good and bad, and a human embryo/fetus both be and not be a human being, that is, a person. They exist as such independently of our knowledge. The above conclusion is in accordance with the theory of moral realism, which is based on the understanding that the world possesses good and bad, mind-independent moral properties.[81] According to moral realism, abortion, if it is evil, is evil not because someone thinks or prefers it, but because of the objective determinants of the act of abortion. Mathematics is two plus two, according to Dworkin, so it does not depend on one's interpretation whether abortion is an intrinsically evil act[82], nor whether every human being is also a person. "Killing an innocent person is bad because of the characteristics of that act, taken in light of the underlying moral principle that justifies that moral judgment."[83] How do we know that killing a human being is objectively determined to be intrinsically evil? According to Kant's theory of morality, the mind plays a significant role in moral judgment, so moral evil is defined as objective evil in the judgment of the mind and as subjective evil in the sphere of sensibility.[84] In this way, we realize that it is not good to kill a

out experience, and knowledge in metaphysical statements comes through the experience of the self-presence of our self, a transcendental experience.

78 Cf. Aristotel, *Nikomahova etika*, Biblioteka "Politička misao", Zagreb, 1982, p. 12.

79 Cf. Lukasiewicz, J., *O stavu protuslovlja kod Aristotela*, in: Gregorić, P.; Grgić, F. (eds.), *Aristotelova Metafizika: Zbirka rasprava*, Kruzak, Zagreb, 2003, pp. 128 – 137.

80 Cf. Belić, *op. cit.* note 75, p. 79, and Weissmahr, *op. cit.* note 77, p. 145.

81 Cf. Himma, *op. cit.* note 52, p. 433.

82 Cf. Dworkin, *op. cit.* note 2, p. 27.

83 Boyle, J., *On the most fundamental principle*, in: Keown, J.; George, R. P. (eds.), *Reason, morality and the law: The Philosophy of John Finnis*, Oxford University Press, Oxford, 2013, p. 56.

84 Čović, A., *Etika i bioetika*, Pergamena, Zagreb, 2004, p. 111. Kant's two levels of moral value: the first is legality, which means that the action is objectively aligned with the moral law, while the second level of action is not only objectively deter-

human being.

The relativistic conception of morality, on the other hand, implies that the content of moral values is not in their objective validity, but in believing in them and accepting them.[85] On a relativistic basis, Posner concludes that moral theory cannot solve the issue of abortion because moral relativism means that some believe that a human embryo/fetus is a human being, while others believe that laws that criminalize abortion reduce a woman to a slave, so the solution to abortion does not depend only on arguments but also on previous beliefs.[86] But if what Posner claims is true, then the understanding of a person during slavery and Nazism would depend on previous beliefs, which we cannot consider correct. If there is no truth in morality, then even intolerant demands are legitimate because there is no basis for them to be considered wrong. One of the most famous meta-ethical arguments against moral realism, originally called the "argument from queerness", was given by Mackie, who claims that "moral properties are not like others and we have in principle no way to discover them", so he concludes that objective truth does not exist.[87] But Mackie's claim implies that we do not have criteria that would prohibit or allow certain human actions, so murder, theft and similar criminal acts could be allowed. How exactly is Mackie's claim true, that is, how exactly is he privileged in knowing the truth that he claims cannot be known?[88] If there is no objective truth, then moral relativism is not true either.[89] Furthermore, if slavery is unjust, then it is unjust because of a moral fact, and it does not depend on popular belief or moral sentiments whether or not it is unjust. Otherwise, we will question the fact that Mother Teresa is better than Hitler, and that rape and cannibalism are

mined by the moral law, but also subjectively done out of a sense of respect for the moral law.

85 Likewise: Bach-Golecka, D., *To be or not to be – a parent? Abortion and the right to life within the European legal system context*, *op. cit.* note 40, p. 206. See also: Gerhard, E., *Universal human rights and moral diversity*, in: Gerhard, E.; Heilinger, J. C. (eds.), *The Philosophy of Human Rights: Contemporary Controversies*, De Gruyter, Stuttgart, 2012, pp. 238 – 239.

86 Cf. Posner, R., *The Problematics of Moral and Legal Theory*, The Belknap Press, London, 2002, pp. 50 and 67.

87 Cf. Mackie, J. L., *Skeptical and non – skeptical theories of objectivity in morality*, *op. cit.* note 3, p. 417.

88 Likewise, Dworkin, R., as cited in Himma, E. K., *Legal objectivity*, *ibid*., p. 393. In his criticism of Mackie, Dworkin points out that complete scepticism about morality is impossible because the claim that there are no objective moral values is a substantive moral claim.

89 Likewise Beckwith, F. J., *Defending life – a moral and legal case against abortion choice*, Cambridge University Press, Cambridge, 2007, p. 7.

always the wrong choice.[90]

The acceptability or unacceptability of a phenomenon in the community is subjected to a validation process, so is abortion.[91] However, in all civilized societies and cultures, goods such as life and health are recognized as intrinsically valuable and their justification by relativistic demands is not allowed. Therefore, if it is established that a human embryo/fetus is a human being, i.e. a person with the right to life, then it is an objective fact.

## 6. CONCLUSION

Resolving the issue of abortion as a social and natural issue is complicated, apart from political circumstances, also because of the fact that it is a multidisciplinary issue that requires knowledge of philosophical and political theories. It is a complex issue which legal regulation involves biological and philosophical concepts such as who is human and who is a person. The mentioned terms are immutable facts that do not depend on social circumstances. Therefore, legal regulation itself should follow the nature of things.

The legal regulation of abortion is not morally neutral, since it includes disposal of the life of a human being. The issue of protecting the life of a human being represents the minimum of morality included in the legal system, and is not considered an issue discussed within the framework of pluralism, since the protection of life is a fundamental universal human right enshrined in all civilized systems.

[90] *Ibid.*, pp. 9 – 10.

[91] See more about ethics and criteria for determining a morally correct attitude in: Matulić, T., *Bioetika,* Glas koncila, Zagreb, 2012, pp. 84 – 107.

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Sažetak

**Katarina Peročević***

POBAČAJ – POLITIČKI KONSTRUKT ILI MORALNO PITANJE?

*Ovaj rad analizira povijest pobačaja i čimbenike legalizacije pobačaja u zapadnom društvu. Postavlja se pitanje treba li pobačaj, prema njegovoj definiciji kao objektivnog dobra ili zla, zabraniti ili ozakoniti ili će se pravni okvir o pobačaju regulirati kao politički konstrukt, neovisno o objektivnoj moralnoj prirodi pobačaja. Analizira se mogućnost pronalaženja pravog odgovora na raspravu o pobačaju. Izvodi se zaključak može li se pobačaj opravdati političkim ciljem ili je to moralno pitanje neovisno o politici.*

*Ključne riječi: pobačaj, moral, pravo, filozofske i pravne teorije, istina*

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