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Review article

ABORTION AS A NATURAL OR POLITICAL ISSUE IN CROATIAN CONSTITUTIONAL JUDICIAL PRACTICE

Dubravka HRABAR
Faculty of Law, University of Zagreb
Trg Republike Hrvatske 3, HR – 10 000 Zagreb
dubravka.hrabar@pravo.hr

Katarina PEROČEVIĆ
Ministry of Foreign and European Affairs
Trg Nikole Šubića Zrinskog 7-8, HR – 10 000 Zagreb
katarinaperocevic@gmail.com

Abstract

This article analyses some parts of the Decision No. U-I-60/1991 et al., in which the Constitutional Court of the Republic of Croatia decided on the question of the constitutionality of the Act on Health Measures in Implementation of the Right to Freely Decide on Childbirth i.e., on the right to abortion. The points of the Decision No. U-I-60/1991 et al. related to the issue of the moral aspect of abortion, values related to the question of abortion and conclusions of the Constitutional Court of the Republic of Croatia on the legal status of the human embryo/foetus and the woman's right to privacy, are analysed in detail. The conclusion is drawn as to whether the Constitutional Court of the Republic of Croatia brought Decision No. U-I-60/1991 et al. in compliance with expert opinions and scientific facts or whether it was guided by ideology and political circumstances.

Key words: abortion, human embryo/foetus, morality, privacy.

Introduction

Although four years have already passed since the adoption of the Constitutional Court's Decision No. U-I-60/1991 et al. (hereinafter: Decision)[1], and taking into account the fact that the Constitutional Court of the Republic of Croatia (hereinafter Constitutional Court) had failed to decide on it for a quarter of a century, it is still intriguing today, all the more so because the Constitutional Court's Decision suffers from serious complaints about its establishment in the Constitution. When analysing the Constitutional Court decisions in demanding cases, which include abortion, an important question arises as to whether the decisions are made to achieve political goals or in compliance with scientifically proven facts, i.e., whether abortion is a matter of social strategy or a morally independent issue. The issue of abortion as a social or natural issue is a separate question, although related to the issue of legal evaluation of arguments presented in support of or against abortion. Resolving the issue of abortion as a social and natural issue is complicated, apart from political circumstances, it is a multidisciplinary issue that requires knowledge of philosophical and political theories.[2]

When passing the Decision, were the judges of the Constitutional Court guided by principles and judicial restraint, bearing in mind scientific facts, that is, expert opinions, did political or moral theory underpin the value patterns? Or did they act as activists, guided by interests and ideological goals? Which goal did the Constitutional Court seek to achieve Is the Decision logical and does it reflect the requirement of consistency of the legal system?

1. Decision No. U-I-60/1991 et al.

The Constitutional Court ruled on two fundamental objections of the applicant of the constitutional complaint. The plaintiffs first complaint is that the unconstitutionality of the Act on Health Measures in Implementation of the Right to Freely Decide on Childbirth (hereinafter: AHM)[3] stems from the fact

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1 USTAVNI SUD REPUBLIKE HRVATSKE, *Rješenje Ustavnog suda Republike Hrvatske broj U-I-60/1991 i dr. od 21. veljače 2017. i Izdvojeno mišljenje*, https://narodne-novine.nn.hr/clanci/sluzbeni/2017_03_25_564.html (Accessed: 25. V. 2023).

2 See more about this in: Asim KURJAK – Milan STANOJEVIĆ – Pavo BARIŠIĆ – Amila FERHATOVIĆ – Srećko GAJOVIĆ – Dubravka HRABAR, Facts and doubts on the beginning of human life – scientific, legal, philosophical and religious controversies, in: *Journal of Perinatal Medicine* 51 (2023) 1, 39-50, https://doi.org/10.1515/jpm-2022-0337 (Accessed: 25. V. 2023).

3 Cf. HRVATSKI SABOR, *Zakon o zdravstvenim mjerama za ostvarivanje prava na slobodno odlučivanje o rađanju djece*, in: *Narodne novine*, No. 18/1978.

that with the promulgation of the Constitution of the Republic of Croatia, the Constitution of the Socialist Federal Republic of Yugoslavia[4] ceased to be valid, and with it Article 191, which stated: »It is the right of a person to freely decide on the birth of children. This right can be limited only for health protection«, on the basis of which the AHM was passed. The complainants claimed that with the termination of validity of the constitutional basis on the ground of which the contested AHM was adopted, rendered the Act completely unconstitutional. The second fundamental complaint of the applicant is that the AHM is not in compliance with Article 21 of the Constitution, which stipulates that every human being has the right to life, and an embryo is a human being equal in dignity to other beings, and at the same time the subject of the right to life as guaranteed by the Constitution.

The Constitutional Court evaluated the following constitutional provisions: Article 21 of the Constitution of the Republic of Croatia: »Each human being has the right to life«, Article 22 of the Constitution of the Republic of Croatia: »Human liberty and personality shall be inviolable«, Article 35 of the Constitution of the Republic of Croatia »Respect for and legal protection of each person's private and family life, dignity, reputation shall be guaranteed.«[5]

Considering the multidisciplinary nature of the topic, the Constitutional Court consulted medical faculties in the Republic of Croatia, chairs of family and constitutional law at the Faculties of Law in the Republic of Croatia, theologians, experts in medical ethics. Comparative legislation, specifically international and regional documents, as well as judgments of constitutional courts of some EU member states were extensively discussed in the Decision.

On 21 February 2017, the Constitutional Court by a majority of votes (12:1) issued a Decision not to accept the proposal to initiate the procedure for the assessment of compliance of the AHM with the Constitution, but obliged the Croatian Parliament to pass a new Act within two (2) years. It asserted that certain legal institutes and concepts from the AHM no longer exist, thus rendering the Act is not formally in compliance with the Constitution of the Republic of Croatia (point 49 of the Decision). The Constitutional Court considered that given that the AHM is based on old value bases and principles that differ from today's, it is necessary to modernize it (point 50 of the Decision).

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[4] Cf. SAVEZNA SKUPŠTINA, *Ustav Socijalističke Federativne Republike Jugoslavije*, in: *Službeni list SFRJ*, No. 9/1974.

[5] HRVATSKI SABOR, *Ustav Republike Hrvatske*, in: *Narodne novine*, No. 56/1990, 135/1997, 8/1998, 113/2000, 124/2000, 28/2001, 41/2001, 55/2001, 76/2010 and 5/2014, Article 21, 22, 35.

2. Public and private moral

One of the basic and very demanding issues is the legal (i.e., judicial) assessment of moral issues. To assess whether something is aligned with morality, with the morality of a specific society and a specific time, dogmatic skills, extensive knowledge and a solid foundation for legal-logical interpretations in accordance with a legal positivist approach are needed. This is because morality should be contained in every legal norm, which is advocated by many theoreticians, such as Aquinas, Moore, Soper, Finnis and Fuller.

The Constitutional Court states in point 22 that »moral attitudes can be in conflict and that each individual judges moral and ethical issues in accordance with his right to self-determination.«[6] The above statement is correct in cases when the courts decide on issues that belong to the domain of private morality, but not in public law issues. Considering that the question of the moral and legal status of a human being, a human embryo/foetus, is not a part of the subjective and private domain, but a public one, and cannot be compared with questions such as religious affiliation, relation towards sexuality and similar personal and moral questions, the statement of the Constitutional Court is inapplicable to the issue of abortion regulation. The killing of a human being or the system of slavery, on a moral level, is not equal to the question of whether someone helps the poor or behaves sexually freely. The moral fact that it is unacceptable to rape a woman cannot be justified by a different value-system. The issue of human life is not just one of the rights whose respect is subjectively decided.[7] The conclusion of the Constitutional Court is aligned with the understanding of theorist Singer, who classifies abortion as »an area of private morality in which the law shall not interfere, but shall be tolerated as a different moral value-system.«[8] Protection of human life is a public issue, as is protection from violence, prohibition of torture and similar natural-legal issues. The status of the human embryo/foetus, which primarily implies the fundamental right to life, cannot be threatened by a subjectivist value-system that the state should support through the public system.[9] Consequently, it is not correct to claim that issues of morality and ethics are ex-

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6 USTAVNI SUD REPUBLIKE HRVATSKE, *Rješenje Ustavnog suda Republike Hrvatske broj U-I-60/1991 i dr. od 21. veljače 2017. i Izdvojeno mišljenje*, point 22.

7 Similarly, Nada GOSIĆ, *Bioetika in vivo*, Zagreb, 2005, 175, which argues that no man can claim that he can kill another by imagining that he is acting rightly on the basis of an isolated and exclusive autonomous-individualistic desire.

8 Peter SINGER, *Praktična etika*, Zagreb, 2003, 110.

9 See more about the status of the human embryo and foetus in: Tonči MATULIĆ, *Pobačaj. Drama savjesti*, Zagreb, 2019, 35-181.

clusively in the domain of the individual, and even less so is abortion, which would belong to the domain of public service. Therefore, the opinion of the Constitutional Court expressed in this way fails to meet the requirements of the separation between public and private spheres.

In point 22, the Constitutional Court asserts that »as moral attitudes cannot always be translated into legal norms, moral duties exceed the limits of the law...they cannot be the exclusive basis for the legal determination of an issue.«[10] The issue of the possible murder of a human being is a moral issue that enters into the area of legal regulation because it is about the minimum of morality that belongs to the legal domain, that is, the moral duty that consists in the prohibition of killing a human being. By stating that »morality cannot be the exclusive basis for regulating an issue«, the Constitutional Court relativizes morality in a way that in reality conditions it politically, just as the US Supreme Court did in the *Dred Scott* case.[11] The legal system does not exclude morality in its entirety. An exclusively positive-legal approach, which implies a complete separation of morality from the law, was denied even in the Nürnberg Trials, when it was determined what horrors it can lead to. The regulation of abortion is a moral issue that consequently requires a value determination in compliance with a positive legal rule that legalizes or prohibits it. In the same point, the Constitutional Court claims that »termination of pregnancy is a moral issue that not only concerns the dignity of a woman ... termination of pregnancy is reflected in the attitude of the social community on its ethical acceptability or unacceptability, philosophical and ethical attitudes on the right to protection and the right to dignity of a human being.«[12] The acceptability or unacceptability of a phenomenon in the community is subjected to a validation process.[13] If this is not the case and the social acceptability of a phenomenon in a pluralistic society is not subjected to criticism and the discovery of the natural order of reality, then how can we deny communism, Nazism, fascism, slavery, apartheid, which were not socially seen as moral evil at the time of their existence? Therefore, it is clear from history that the murder of human beings by their dehumanization can be imposed as a socially acceptable attitude. The status of the human embryo/foetus imposes the need to protect

[10] USTAVNI SUD REPUBLIKE HRVATSKE, *Rješenje Ustavnog suda Republike Hrvatske broj U-I-60/1991 i dr. od 21. veljače 2017. i Izdvojeno mišljenje*, point 22.

[11] U.S. SUPREME COURT, *Dred Scott v. Sandford*, 6. III. 1857.

[12] USTAVNI SUD REPUBLIKE HRVATSKE, *Rješenje Ustavnog suda Republike Hrvatske broj U-I-60/1991 i dr. od 21. veljače 2017. i Izdvojeno mišljenje*, point 22.

[13] See more about ethics and criteria for determining a morally correct attitude in: Tonči MATULIĆ, *Bioetika,* Zagreb, 2012, 84-107.

its life. Furthermore, the Constitutional Court relates the concept of dignity with a woman's autonomy in the context of abortion, which is not in compliance with the concept of dignity. A woman's dignity does not depend on the provision of medical services because her dignity is not extrinsic. Moreover, liberal theorists talk about abortion as a »lesser evil« and not an expression of a woman's dignity. The concept of dignity in the context of abortion can only refer to the dignity of the human embryo/foetus.

In point 41, the Constitutional Court states that it is »expected to arbitrate between two parties, the one that considers that life begins at conception and is within the domain of Article 21, and the other that considers that life begins at birth.«[14] The claim that the Constitutional Court is expected to arbitrate is an arbitrary conclusion that refers to the achievement of political goals, and not to respect for the rules of the profession. The function of the Constitutional Court is not to »reconcile« conflicting parties, but to determine the facts, analyse expert opinions, along with knowledge of political and moral philosophy. Otherwise, the discussion on abortion could also be conducted at the Conciliation Court. Arbitrating between the two parties, as stated by the Constitutional Court, would mean finding a compromise, which renders the adoption of a Decision by the Constitutional Court unnecessary, because a compromise solution does not require previous analysis of the case in question, such as determining the previous parameters in the discussion on abortion, such as the philosophical – anthropological status of the human embryo/foetus, the theory of human rights, the concept of privacy within the legal framework. Regardless of the established facts, the need to consensualize opposing views will lead to a theoretical »balancing« of the philosophical-anthropological status of the human embryo and the woman's request for an abortion. Practically, such balancing is not possible because it is about two conflicting demands and rights (since abortion represents the end of the life of a human embryo/foetus, not half or a little life). Instead of the above, it is necessary to decide for one or the other and face the consequences that arise from such a decision. The goal of the Constitutional Court was consensus, the harmonization of opposing viewpoints. Would the Constitutional Court conclude the same in every situation of conflicting opinions, such as for example the issue of slavery or the status of indigenous people? There is no compromise on the level of fundamental rights that derive from human nature, although to some extent pluralism can

[14] USTAVNI SUD REPUBLIKE HRVATSKE, *Rješenje Ustavnog suda Republike Hrvatske broj U-I-60/1991 i dr. od 21. veljače 2017. i Izdvojeno mišljenje*, point 41.

be treated as a desirable consequence of the fact that fundamental values can be realized in a different but equally good way.[15] It does not follow that a compromise in killing/destruction of the human embryo/foetus, as some partial solution, is acceptable. Fundamental rights do not imply compromises, such as those of the Nazi system. If intentional abortion is an intrinsically evil act and its execution constitutes murder, which can be concluded given that it leads to the end of an innocent human life and as there is a need for its prevention, then its positive – legal solution should uphold the natural state of affairs, as well as taking into account the social factors that influence it, primarily the fact that it is most often the result of a woman's unfavourable economic and social situation.

A similar relativization of facts of the Constitutional Court is evident in point 23, in which the Constitutional Court specifies that »every reasonable legislator should strive to not deepen, but mitigate social divisions with his legislative decisions, and bring closer and harmonize the values and attitudes represented by individual social groups.«[16] It is a similar approach as in the previously analysed point 41, hence instead of arbitration, Constitutional Court deliberates on harmonizing values and mitigating divisions. The above means that regardless of the objective state of affairs, a »just solution« should be found that will reconcile the conflicting parties. Such a thesis represents Rawls's concept of justice, which »gives priority to what is right over the idea of the conception of good.«[17] This means that the concept of good (the good of human life with intrinsic dignity in compliance with the natural-law understanding) is excluded if it does not fit into the concept of justice. Thus, a society that adheres to a certain comprehensive doctrine (philosophical or individual worldviews) is considered unjust.[18] »Justice« becomes a political criterion, which makes it unnecessary to evaluate the legal system, because political criteria can be used to deviate from natural reality, if it is for the purpose of achieving some interest. It is about ethical pluralism, which represents a neutral model of bioethics that does not impose values on anyone, but limits

[15] Cf. John HALDANE, *Faithful reason: Essays catholic and philosophical*, New York, 2004, 143.

[16] USTAVNI SUD REPUBLIKE HRVATSKE, *Rješenje Ustavnog suda Republike Hrvatske broj U-I-60/1991 i dr. od 21. veljače 2017. i Izdvojeno mišljenje,* point 23.

[17] Petar POPOVIĆ, Kritika koncepcije pravednosti usvojene u rješenju Ustavnog suda u tzv. »Zakonu o pobačaju«, in: *Bogoslovska smotra*, 88 (2018) 1, 131-155, here 140.

[18] See also Charles COVELL, *The Defense of Natural Law: a Study of the Ideas of Law and Justice in the Writings of Lon L. Fuller, Michael Oakeshott, F.A. Hayek, Ronald Dworkin, and John Finnis*, New York, 1992, 140-141.

itself to setting procedural rules.[19] Law then does not depend on the truth for the purpose of realizing the common good, but is reduced to a purely procedural mechanism of seeking consensus.[20] Popović points out that there is a shift from a realistic and objective to an abstract and subjective understanding, whereby all arguments are placed behind the veil of ignorance, and opposing views are harmonized into the permissibility of abortion.[21] Tolerance is imposed as a key value of a pluralistic society, although a completely tolerant society, aimed at reducing conflict, rather than establishing the truth, means renouncing all values because it equates them all.[22] Absolute, total and complete tolerance is impossible because it allows everything and thus creates chaos because it is clear that for the sake of harmonizing values, we cannot tolerate slavery, nor can we tolerate murder. Some moral questions inevitably represent a particular approach because they can be answered through positive legal legislation either by denying or affirming, therefore the statement of the Constitutional Court about the need to harmonize values that are irreconcilable is not correct.

In point 22.1, the Constitutional Court lists the viewpoints of pro-life advocates, concluding that »it seems that in this group the moral viewpoints are also conditioned by the religious beliefs of its advocates.«[23] »It seems« is an inappropriate expression of the Constitutional Court (which is also repeated in point 41), bearing in mind that it should not make conclusions based on appearances, but should justify them based on facts. What exactly does the statement that »moral views are also conditioned by religious beliefs« mean? »From the perspective of religion, moral law is also God's law, but from the perspective of social philosophy, it is not necessary for moral considerations to be equated with God's commands.«[24] Puppinck explains the difference between moral and religious beliefs in the way that religious belief results from religious prescriptions, for which individual conscience needs an act of faith and does not rely on reason, while moral conviction is the result of reason, that is, a rational procedure that excludes religion or cult, and seeks to be ob-

[19] See also Michele ARAMINI, *Uvod u bioetiku*, Zagreb, 2009, 52. Mark GOODALE, *Human rights: An Anthropological Reader*, New Yersey, 2009, 110.

[20] Cf. Elio SGRECCIA, *Manuale di Bioetica – Fondamenti ed etica biomedica*, Milano, 1994, 70-71.

[21] Cf. Petar POPOVIĆ, Kritika koncepcije pravednosti usvojene u rješenju Ustavnog suda u tzv. »Zakonu o pobačaju«, 149, 152.

[22] Cf. Michele ARAMINI, *Uvod u bioetiku*, 52.

[23] USTAVNI SUD REPUBLIKE HRVATSKE, *Rješenje Ustavnog suda Republike Hrvatske broj U-I-60/1991 i dr. od 21. veljače 2017. i Izdvojeno mišljenje*, point 22. 1.

[24] John HALDANE, *Faithful reason: Essays catholic and philosophical*, 176.

jectively justified.[25] Labelling objective moral conviction with the argument of religion means that we consider objective moral convictions, such as the prohibition of murder, theft, etc., as a religious dogma.[26] Such labelling of objective morality becomes secular dogma. In this way, we open ourselves up to the possibility of excluding the objective moral belief from the discussion, marking it as a religious dogma, since, in a secular pluralistic society, the religious value-system represents an individual and thus cannot be dominant in positive legal legislation.[27] At the same time, any theological arguments, concludes Matulić, are considered exclusively a private matter in the *de facto* space of the public and state, which is a privileged place for non-Christian, identified with neoliberal, whereby the only public metaphysics remains the secularized, as ideological, because if it were not, then religious metaphysics would not bother it.[28] The modern and postmodern understanding of human life, person and dignity, connected with biological facts about the human being, is a question that is problematized within the framework of pluralism in such a way that the philosophical, that is, the metaphysical dimension is negated and reductionist approach imposes a perspective in which any attempt to include metaphysics would be equated with a religious dimension, which is why only by excluding it, the approach to valuing human life would be considered secular. In order to avoid the above, we must accept the fact that the question of the status of the human embryo/foetus is not a question of religion, but rather of science and philosophy, although the conclusions of both fields (religion and science) may coincide. The conclusion of the Constitutional Court on the cited point is not based on arguments, yet its arbitrariness is obvious, in the phrase »it seems«, which in itself destabilizes and makes argumentation impossible.

3. Legal basis and system values

Analysing the first of the two fundamental objections, which refers to the termination of the validity of the constitutional basis on the ground of which the

[25] Cf. Grégor PUPPINCK, Conscientious Objection and Human Rights: A Systematic Analysis, in: *Brill Research Perspectives in Law and Religion*, 1 (2017) 1, 1-75, here 46-47, https://doi.org/10.1163/24682993-12340001 (Accessed: 25. V. 2023).

[26] See more about this in Damir Šehić, *Teološko-bioetičko vrjednovanje ustavnosudskih odluka o pobačaju*, Zagreb, 2021.

[27] Cf. Michael COUGHLAN, *The Vatican, the Law and the Human Embryo,* London, 1992, 112. Coughlan is one of the theoreticians who claims that the concept of an objective moral law is a recipe for a religious rule, not a society of rational arguments.

[28] Cf. Tonči MATULIĆ, *Bioetički izazovi kloniranja čovjeka,* Zagreb, 2006, 164.

AHM was passed, the Constitutional Court concludes in point 37 that »the fact that the Act remained non-compliant with the new Constitution is not in itself sufficient to establish its inconsistency with the Constitution, as well as the fact that the Act was adopted at the time of a different constitutional and legal arrangement...because the opposite implies bringing legal certainty and continuity into question.«[29] It is a contradictory conclusion that non-compliance does not imply disagreement, because the terms (not only in the linguistic sense) non-compliance and disagreement are almost synonymous. Furthermore, continuity *per se* does not constitute value. Analysing the values of totalitarian systems, such as communist and Nazi, it is clear that continuity is not always an advantage, even though change should be justified. If continuity is a value *per se*, it is unnecessary to review the acts because, based on the principle of continuity, we can conclude, regardless of the outcome of the evaluative normative process, that they should be left in force. The principle of legal continuity is particularly inapplicable in a situation where two diametrically opposed constitutional arrangements are involved, and an act being decided on, contains value implications, unlike, for example, an act that regulates issues of traffic violations. Changing the value system implies the value deconstruction of the old system and the creation of a new one, which will be reflected in the Act that also contains moral issues, that is, issues that include a value element. The Constitutional Court itself confirms the same in point 49.1, in which it states »since the adoption of the Constitution in 1990, a completely new legal and institutional framework of the health, social, scientific and educational system has been built, which is based on other value bases and principles... 'the obsoleteness' of the disputed Act is obvious, i.e., the necessity of its 'modernization'.«[30] Given that the values and institutions within the communist system are not in balance with the new values, the principle of continuity is inapplicable as a justification for determining the conformity of the contested Act with the Constitution of the Republic of Croatia. The Constitutional Court's Decision is contradictory *in se* because in point 37 it claims one thing, in point 49.1. it asserts another and in point 38 (*infra*) third.

The rule of law, which means »a system of political power based on respect for the constitution, acts and other regulations, both by citizens and by the holders of state power«[31] and the requirement of coherence, require the es-

[29] USTAVNI SUD REPUBLIKE HRVATSKE, *Rješenje Ustavnog suda Republike Hrvatske broj U-I-60/1991 i dr. od 21. veljače 2017. i Izdvojeno mišljenje,* point 37.

[30] *Ibid.,* point 49. 1.

[31] Branko SMERDEL, *Ustavno uređenje Europske Hrvatske,* Zagreb, 2020, 9.

tablishment of a legal basis for the purpose of assessing the conformity of laws with the Constitution. The fact that the new Constitution does not contain a legal basis on the ground of which the AHM was passed, calls into question the legitimacy of the law. In point 38, the Constitutional Court sets forth the rule of law as the highest value of the constitutional order, and therefore imposes the determination of the legal basis as one of the most important issues within the framework of the assessment of the conformity of acts with the Constitution. The Constitutional Court itself states in the same point 38 that »pursuant to Article 5, Paragraph 1 of the Constitution, in the Republic of Croatia every act shall be in compliance with the Constitution.«[32] According to what criteria is the AHM in compliance with the Constitution if there is no legal basis in the new Constitution? The important fact is that every bill in the Republic of Croatia shall contain a legal basis without which the legislative body does not consider the bill, therefore if there was no legal basis for promulgating the law, such a law would be considered unconstitutional.[33] If in the Socialist Federal Republic of Yugoslavia there was a legal basis (in the formal sense, in the material sense it should still be examined) on the ground of which the AHM was passed, can it be negated in a democratic society? The Constitutional Court refers to the reason of legal certainty, because of which the AHM would not be inconsistent with the Constitution of the Republic of Croatia, which is paradoxical if we take into account that the legal basis on which the Act is passed is a confirmation of legal certainty. The AHM is formally incompatible with the Constitution because it fails to respect the law-making procedure which stipulates that the basis must be stated in the bill, and the legal basis does not exist in the current Constitution of the Republic of Croatia. The material inconsistency of the AHM results from the inconsistency of the previous values on the basis of which it was adopted with the current one, which makes the law substantively inconsistent with the Constitution of the Republic of Croatia.[34]

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[32] USTAVNI SUD REPUBLIKE HRVATSKE, *Rješenje Ustavnog suda Republike Hrvatske broj U-I-60/1991 i dr. od 21. veljače 2017. i Izdvojeno mišljenje*, point 38.

[33] On the contrary, Kostadinov asserts in the expert opinion given on the occasion of the constitutionality assessment of the AHM that the request for Act to be declared unconstitutional due to the absence of a constitutional basis for its adoption is contrary to the constitutional principle of the rule of law. Kostadinov did not get into the heart of the problem. Cf. USTAVNI SUD REPUBLIKE HRVATSKE, *Rješenje Ustavnog suda Republike Hrvatske broj U-I-60/1991 i dr. od 21. veljače 2017. i Izdvojeno mišljenje*, point 5. 1.

[34] »The principle of constitutionality in the narrower, legally technical sense requires that Acts shall be in compliance with the provisions of the Constitution, and considering that the AHM was adopted at a time of a different socio-political system, which was also reflected in different legal and constitutional provisions, it does not comply with

4. Compliance of the Act on Health Measures in Implementation of the Right to Freely Decide on Childbirth with Article 21 of the Constitution of the Republic of Croatia

The second fundamental objection of the applicants of the constitutional complaint is that the Act is not in compliance with Article 21 of the Constitution, which stipulates that each human being has the right to life. An embryo is a human being, therefore a subject of the right to life as guaranteed by the Constitution. The Constitution of the Republic of Croatia lays down in Article 3 that »freedom, equality... are the highest values of the constitutional order of the Republic of Croatia and the basis for the interpretation of the Constitution«,[35] and in Article 14 it stipulates that »all persons shall be equal before the law«,[36] hence it was necessary to determine whether the term »all« and »equality« applies to the human embryo/foetus. »Article 3 of the Constitution defines the highest values of the constitutional order.«[37] If equality is the highest value, would it not require determining to whom everything applies and whether a certain group of human beings is excluded from it? Although, as Dworkin concludes, »constitutional provisions on freedom and equality are abstract«,[38] can both Article 14 and Article 21 be understood as if the creators of the Constitution of the Republic of Croatia wished to exclude the human embryo/foetus from its scope? In this context, we should analyse this context the intention of the framers of the Croatian Constitution.

4.1. The intention of the framers of the Constitution

Article 21 of the Constitution of the Republic of Croatia which stipulates that »Each human being has the right to life« requires an analysis of who is includ-

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The Constitution of the Republic of Croatia, that is, with the provisions of Article 21, Paragraph 1 of the Constitution...« »Now, when new acts are passed, they shall be in compliance with the existing, not the previous Constitution, and the answer should be sought in, for example, the death penalty. The death penalty had existed in SFRY. Since the provision on the death penalty was deleted from the new Constitution, the Criminal Code containing the provision on the permissibility of the death penalty would be unconstitutional.« Dubravka HRABAR, Pravo na pobačaj – pravne i nepravne dvojbe, in: *Zbornik Pravnog fakulteta u Zagrebu*, 65 (2015) 6, 791-831, here 798.

35 HRVATSKI SABOR, *Ustav Republike Hrvatske*, Article 3.

36 *Ibid.*, Article 14.

37 Branko SMERDEL, Republic of Croatia, in: Leonard BESSELINK – Paul BOVEND'EERT, Hansko BROEKSTEEG – Roel DE LANGE – Wim VOERMANS (eds.), *Constitutional Law of the EU Member States*, London, 2014, 203.

38 Ronald DWORKIN, *Taking Rights Seriously*, Zagreb, 2003, 149.

ed in the term »each« human being, whether some category of human beings is excluded, what is the purpose and social value function of that Article. One of the ways of finding the answer is by attempting to understand the intention of the constitutional creators, that is, the creators of the aforementioned rule. Balkin calls the application of the original text and principles to current circumstances »a conversation between old and new generations«, according to which »living constitutionalism and fidelity to the original meaning of constitutional terms, would represent two sides of the same coin.«[39] Legal regulation requires the interpretation of new social circumstances. In order to determine the original intention of the framer of the constitution, it is necessary to analyse whether the principle of equality and the value of human life, visible from the text, structure and history of the Constitution of the Republic of Croatia, are threatened by the AHM and who did the Croatian Constitution creators understand by the term human being, that is, did they wish to exclude human embryo/foetus from that concept.

The Constitution of the Republic of Croatia does not grant the right to abortion, and the right to privacy, which is inappropriately attempted to relate to the right to abortion in theory, is listed as hierarchically only in the seventh place among personality rights in the Civil Obligations Act, in contrast to the right to life, the first and highest personality right, whose carrier is a human embryo/foetus.[40] Analysing the rule of the protection of life of each human being from Article 21 of the Constitution of the Republic of Croatia and the fundamental principle of equality, it cannot be determined whether were written with the intention of excluding a certain category of human beings, more precisely the human embryo/foetus. Our Constitution creators did not differentiate between human and personal life, nor did they limit the subjectivity of human life in any way. On the other hand, Article 191 of the Constitution of SFRY that stipulates that »it is the human right to freely decide on family planning«[41] was not transferred in any form to the text of the Constitution of the Republic of Croatia.

There is a possibility that the creators of the Constitution of the Republic of Croatia sought to deliberately bypass such a difficult issue as the subjectiv-

[39] Jack M. BALKIN, Abortion and Original Meaning, in: *Yale Law School*, 24 (2007) 2, 291-352, here 352.

[40] Cf. HRVATSKI SABOR, *Zakon o obveznim odnosima*, in: *Narodne novine,* No. 35/05, 41/08, 125/11, 78/15, 29/18, Article 19, Paragraph 2. Cf. Marko PETRAK, Ius vivendi, in: *Novi informator*, 20. III. 2017, 3.

[41] SAVEZNA SKUPŠTINA, *Ustav Socijalističke Federativne Republike Jugoslavije*, Article 191.

ity of the unborn, or else they overlooked the consequences brought about by such an Article 21.

4.2. Unconstitutional consequences

In point 41.1, the Constitutional Court states that »no provision may be interpreted in such a way so as to produce unconstitutional consequences, nor may it be taken out of context and independently interpreted, including Article 21 of the Constitution of the Republic of Croatia.«[42] In the context of the unconstitutional consequences, the Constitutional Court fails to mention the provision on the right to privacy, on which the mother's request for an abortion would be based, but exclusively Article 21 of the Constitution of the Republic of Croatia. The above confirms that the approach of the Constitutional Court to these two, relatively speaking opposing rights, is different. The Constitutional Court fails to analyse what is meant by unconstitutional consequences, and is it clear how the protection of a human being's life, as a fundamental human right, can be contextualized and interpreted. The phrase »unconstitutional consequences« encompasses a wide range of possible consequences, and it remains unclear under which criteria the protection of the right to life would produce consequences that would be unconstitutional, what they would be and why they outweigh the right to life of a human being.

In point 41.2, the Constitutional Court states that »human dignity is fully protected, non-derogable... derogation from this rule is not permitted... and human rights form an integrated system for the protection of dignity.«[43] Human dignity is the basis for protecting the lives of all human beings. Therefore, there are no derogations from the rule of protecting the dignity of a human being, and including a human embryo/foetus because it is undoubtedly a human being. With that provision, the Constitutional Court recognizes the intrinsic dignity of every human being, which also means the human embryo/foetus. In point 42, the Constitutional Court concludes that »The Constitution of the Republic of Croatia guarantees each human being the right to life, a right that is a prerequisite for all other rights, but the Constitution itself does not contain a definition and does not elaborate on the concept of a human being, that is, does it include born persons (human), which undoubtedly have

[42] USTAVNI SUD REPUBLIKE HRVATSKE, *Rješenje Ustavnog suda Republike Hrvatske broj U-I-60/1991 i dr. od 21. veljače 2017. i Izdvojeno mišljenje*, point 41. 1.

[43] *Ibid.*, point 41. 2.

legal subjectivity and unborn human beings.«[44] A born person is a man, and a man is every human being, including the unborn. By the very fact that a human embryo is a human being, it is also a human because it cannot be a human being and not be a human, that is, a person. Persons are not divided according to the criteria of humanity or inhumanity, moreover every person is a person regardless of their characteristics and any criteria of a theoreticians. It is clear that the Constitution of the Republic of Croatia does not and should not elaborate on definitions, especially complex ones such as the philosophical concept of a person (it does not elaborate on the legal one either), but in case of doubt to whom the term refers, it is necessary to take into account and analyse scientific and expert opinions, unless it has an activist approach in solving a complex issue. The Constitution of the Republic of Croatia does not elaborate on the right to privacy, much less on the request for an abortion that would allegedly stem from it. If the Constitutional Court claims that the issue of the right to life is not within its competence, a request for privacy would be even less. Ascertaining the status of a human being, determined by the historical-legal method, is the most important question by which the darkness or light of epochs and communities was measured. If there is a doubt about such an important question, should it not then be explicitly stated that »Each human being has the right to life, except...« (with a clear explanation of the criteria), even more so taking the statements of the Constitutional Court that dignity is non-derogable and that the right to life is a prerequisite for all other rights.

In point 43, the Constitutional Court states »the right to freedom and personality as fundamental rights«[45], in point 44, it claims that »the Constitution guarantees respect and legal protection of personal and family life and dignity«,[46] and finally in point 44.1, it asserts that »The right to privacy guaranteed by Article 35 of the Constitution includes everyone's right to freedom of decision and self-determination. Therefore, the right to privacy is inherent in a woman's right to her own spiritual and physical integrity, which includes the decision whether to conceive a child and how her pregnancy will develop« and »any limitation of a woman's decision-making in autonomous self-realization, including whether she wants to carry the pregnancy to term, represented an interference with her constitutional right to privacy, unless it is a direct social need.«[47] The Constitutional Court fails to analyse both the con-

[44] *Ibid*., point 42.
[45] *Ibid*., point 43.
[46] *Ibid*., point 44.
[47] *Ibid*., point 44. 1.

cept of privacy, and autonomy. A woman's decision to have an abortion cannot include the public health system, because pregnancy, medically determined, is not a disease that can be treated by abortion, nor does the private in this context include the public. The decision whether a woman will conceive a child has nothing to do with the state that should provide service that is not medical but is based on desire, paradoxically invoking privacy. The Constitutional Court brings conclusions with the introduction of value and even metaphysical terms such as »spiritual integrity«, without specifying what they would entail. It is also not clear why is the freedom of abortion in the domain of bodily integrity. To be »one« again, and not »one in the other«? The contradiction of relating abortion with personal and family life, as well as self-determination, is also evident in point 50, in which the Constitutional Court obliges the legislator to determine preventive measures to make termination of pregnancy an exception. Why, if »termination of pregnancy« is solely a matter of self-realization of a woman and protection of her spiritual and physical integrity, and if the human embryo/foetus is not a person and a subject?

The Constitutional Court ignores the issue of the status of the human embryo/foetus, and thus its existence and the right to life, in order to achieve the goal of autonomy, which is imposed as a supreme value. The Constitutional Court arbitrarily determines the limit up to which autonomy exceeds the right to life, because by failing to determine the status of a human embryo/foetus, it is not even possible otherwise. Likewise, in point 45, the Constitutional Court states that »the legislator has the freedom of discretion in achieving a fair balance between a woman's right to freedom of decision and privacy, on the one hand, and the public interest in ensuring the protection of the unborn being, on the other hand«,[48] although it is clear that by failing to determine the status of the human embryo/foetus, it is not possible to determine the protection, much less succeed in its accuracy. The Constitutional Court could not have balanced the above-mentioned demands and rights because it had failed to elaborate the previous parameters for this. With that provision, the Constitutional Court called into question the earlier provision that the right to life is protected except in strictly defined cases and that dignity is non-derogable. If there is a public interest in the protection of the unborn being, it surely outweighs the private interest of the individual. Otherwise, each individual, invoking autonomy, could threaten the public interest. In point 45.1. the Court argues that »it is within the competence of the Constitutional Court to review

[48] *Ibid*., point 45.

the legislation regulating the issue of termination of pregnancy, in order to assess whether it is in compliance with constitutional principles and values.«[49] Which values did the Constitutional Court take into account, apart from the previously mentioned need to harmonize positions? Article 3 of the Constitution of the Republic of Croatia states that »Freedom, equal rights, national and gender equality, peace-making, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, the rule of law and a democratic multiparty system are the highest values of the constitutional order of the Republic of Croatia«[50] Gender equality is not achieved through abortion, nor is equality, because, after all, a man cannot conceive, or even abort. The value of freedom and privacy is not related to abortion. Respect for human rights includes respect for the right to life of every human being, which is a human embryo and foetus. Therefore, the right to life cannot belong to it for example, from the tenth or twelfth week, and not before, because it is a human being, not something or nothing. Is the value of human life not the greatest value, from which the Constitutional Court distances itself, putting it under the jurisdiction of the legislator in point 45.1? The Constitutional Court does not even respect the value of the rule of law because it legitimizes an Act that does not contain a legal basis. In point 45, the Constitutional Court determines that »an unborn being, as a value protected by the Constitution, enjoys constitutional protection in the sense of Article 21 of the Constitution only to the extent that it does not conflict with a woman's right to privacy«,[51] noting in point 45.1 that »the question of when life begins is not within the jurisdiction of the Constitutional Court« but rather the question of «...whether a balance has been achieved between conflicting rights and interests.«[52] If we take into account the fact that the Constitutional Court in its Decision fails to elaborate or clarify the parameters by which it was guided when making its decision, except for the principle of justice which is inappropriate in the given context because without clarified previous definitions it is not possible to arrive at an answer about a just solution, then it is clear that the requirement of achieving a fair balance cannot be met. The criterion of »just balance« is very doubtful, as it is not clear who determines what is just. The category of human embryo/foetus as a constitutionally protected value is a vague category from which it

[49] *Ibid.*, point 45. 1.
[50] HRVATSKI SABOR, *Ustav Republike Hrvatske*, Article 3.
[51] USTAVNI SUD REPUBLIKE HRVATSKE, *Rješenje Ustavnog suda Republike Hrvatske broj U-I-60/1991 i dr. od 21. veljače 2017. i Izdvojeno mišljenje*, point 45.
[52] *Ibid.*, point 45. 1.

is not possible to conclude what level of protection it would entail. The creation of new legal categories necessarily requires an explanation of the reasons for their application, as well as the consequences they produce. Apart from the fact that the phrase constitutionally protected value is not clear, it is also unclear why exactly the human embryo/foetus represents a constitutionally protected value and based on which philosophical-anthropological and legal parameters. If the Constitutional Court does not determine who has the status of a person, and then a legal subjectivity, on what basis does it determine who represents a constitutionally protected value? Is the human embryo thus reduced to the level of an animal, an artificial intelligence or an image?

Such a solution, the application of which is abstract, meets the needs of achieving political goals. By not recognizing the human embryo as a medically proven human being with intrinsic value, the Constitutional Court equates it with plants and animals, thereby opening the possibility of arbitrarily excluding other categories from subjectivity in the future. In point 46, the Constitutional Court states that »the legislative decision is in compliance with the Constitution according to which termination of pregnancy can be performed at the request of the woman until the end of the tenth week of pregnancy« and that »the disputed legislative decision did not disturb the fair balance between the constitutional right of a woman to privacy (Article 35 of the Constitution) and freedom and personality (Article 22 of the Constitution), on the one hand, and the public interest in protecting the lives of unborn beings, which the Constitution guarantees as a value protected by the Constitution (Article 21 of the Constitution), on the other hand«[53], which represents the conclusion that is in direct contradiction with point 42, in which it concludes that »the right to life is a prerequisite for all other rights.«[54] The right to life implies the right to be born, while the right to live implies the right to »maintain« life. A born person has the right to live, not to the life it already possesses, while an unborn man has the right to be born. A balance between the right to life and »a woman's constitutional right to privacy« is not possible. One cancels out the other. Petrak concludes that »the right to life belongs to the *nasciturus* from conception, which is why the possibility of terminating a pregnancy before the end of the tenth week is *contra constitutionem*, because a pregnant woman has the right to life and death over the conceived child until the tenth week, whereby the facts of the Civil Obligations Act, which does not distinguish between the

[53] *Ibid.,* point 46.
[54] *Ibid.,* point 42.

period before and after 10 weeks, and which in that aspect governs the very foundations of the status rights of natural persons, are ignored.«[55] After all, the legal fiction of *nasciturus* (*pro iam nato habetur*) is not limited to the weeks of intrauterine life. If a woman has the right to privacy, why does that right disappear in the tenth week and what is the legal status of the father of an unborn human from the tenth week? The Constitutional Court does not elaborate on the legal status of the father, although his role in parenting is equal to that of the mother. If the human embryo/foetus has the right to life, why does it only become a person, a legal subject in the tenth week, under which criteria, if the definition of a person is in the domain of the legislative body? The Constitutional Court fails to provide a single legal criterion for which the balance point would be in the tenth week of a woman's pregnancy. With the aforementioned assertion, the Constitutional Court annulled all earlier relevant provisions of the legislation and analysis of the concepts of the right to life and dignity.

In point 47, the Constitutional Court concludes that »the AHM is not inconsistent with Articles 2, 3, 14, 16, 21, 22, 35 and 38 of the Constitution, nor with the Constitution as a whole.«[56] The Constitutional Court concludes that although, as it was ascertained, there is no legal basis for AHM in the new Constitution. Furthermore, Article 15 of the AHM (termination of pregnancy can be carried out up to ten weeks from the day of conception) is not in compliance with Article 3[57] of the Constitution because it violates the principle of freedom and equality of human beings, treating the human embryo/foetus as a thing. The same Article is contrary to Article 21 that each human being has a right to life, because it violates the right to life of a human being, and to Article 14, Paragraph 2, about equality of all before the law. Freedom can be limited solely to protect the legal order, morals and public health.[58] The freedom to abort a child, that is abortion on demand, does not belong to any category.

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55 Marko PETRAK, Ius vivendi, 3.

56 USTAVNI SUD REPUBLIKE HRVATSKE, *Rješenje Ustavnog suda Republike Hrvatske broj U-I-60/1991 i dr. od 21. veljače 2017. i Izdvojeno mišljenje*, point 47.

57 »Freedom, equal rights, national and gender equality, peace-making, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, the rule of law and a democratic multiparty system are the highest values of the constitutional order of the Republic of Croatia.« HRVATSKI SABOR, *Ustav Republike Hrvatske*, Article 3.

58 »Freedoms and rights may only be curtailed by law in order to protect the freedoms and rights of others, the legal order, and public morals and health. Any restriction of freedoms or rights shall be proportionate to the nature of the need to do so in each individual case.« HRVATSKI SABOR, *Ustav Republike Hrvatske*, Article 16, Paragraph 1.

Abortion does not constitute freedom defined in Article 22.[59] The freedom to abort a human embryo/foetus is not an expression of equality of gender either (Article 3). The term equality of gender should not be interpreted in a way that one gender has greater rights than the other, but that each has rights in accordance with biological possibilities, including in the area of family life. Abortion cannot be related to dignity and personal and family life from Article 35[60], because there would be no need for its prevention. Moreover, a woman's dignity does not depend on the provision of medical services because her dignity is not extrinsic. Furthermore, liberal theorists discuss about abortion as a »lesser evil« and not an expression of a woman's dignity. The concept of dignity in the context of abortion can only refer to the dignity of the human embryo/foetus.

Conclusion

The Constitutional Court failed to analyse the status of the human embryo/foetus, and bioethical questions multiply in line with technological development. By focusing exclusively on the existing positive – legal legislation of this complex issue, which does not solve the issue of abortion, yet ensures the *status quo*, the need of clearly ascertaining the rights of the subjects involved, such as the human embryo/foetus, mother, father, doctor and finally the state, is avoided. The conclusion about the non-existence of a unified position, and the very fact of complexity, without discussing the real nature of the problem (what is privacy and who is a person with the right to life), ignoring scientifically proven facts about the parameters crucial for the regulation itself, points to political conditioning when solving the issue of abortion. The political goal and interested-base problem solving, regardless of the established nature of the matter, is historically and legally unacceptable and calls into question the foundations of the international human rights system. Popović concludes that it is a surprising marginalization of natural-scientific evidence of medical ethics and the expert opinions of the chair of family law in the Decision of the Constitutional Court.[61]

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[59] »Human liberty and personality shall be inviolable.« HRVATSKI SABOR, *Ustav Republike Hrvatske*, Article 22.

[60] »Respect for and legal protection of each person's private and family life, dignity, reputation shall be guaranteed.« HRVATSKI SABOR, *Ustav Republike Hrvatske*, Article 35.

[61] Cf. Petar POPOVIĆ, Kritika koncepcije pravednosti usvojene u rješenju Ustavnog suda u tzv. »Zakonu o pobačaju«, 148.

The Constitutional Court chose an activist approach when solving the issue of abortion, guided by the principle of justice in order to »reduce conflict« in society, which is why the interpretations of fundamental rights are contradictory, the status of the human embryo/foetus in the legal system of the Republic of Croatia remains inconsistent, conclusions about the status of the human embryo/foetus remain unclear in application (constitutionally protected value), which is why the entire solution is unprofessional, as is some of the terminology used by the Constitutional Court. As Smerdel states, the Constitution is »a dam, an obstacle that provides protection.«[62] The Constitutional Court is »an independent body of experts with broad competences, the most important of which are: evaluation of the constitutionality of acts and the protection of fundamental human rights and freedoms in proceedings initiated by a constitutional lawsuit.«[63] Therefore it is somewhat worrying that the Decision is not of great value for solving the problem of abortion. The Decision was made with »limited insight into the issue«[64] of abortion. The Constitutional Court's Decision failed to reduce divisions in society, they still exist because an approach that denies the need to determine the true state of affairs cannot even achieve this.

[62] Branko SMERDEL, Predgovor, in: Tomislav GALOVIĆ, (ed.), *Hrvatski ustav i njegov »Krčki nacrt« (1990.)*, Krk, 2018, 16.

[63] Branko SMERDEL, Republic of Croatia, 223.

[64] Branko SMERDEL, The Republic of Croatia: three fundamental constitutional choices, in: *Croatian Political Science Review*, 1 (1992) 1, 60-78, here 62.

Sažetak

POBAČAJ KAO NARAVNO ILI POLITIČKO PITANJE U HRVATSKOJ USTAVNOSUDSKOJ PRAKSI

Dubravka HRABAR
Pravni fakultet Sveučilišta u Zagrebu
Trg Republike Hrvatske 3, HR – 10 000 Zagreb
dubravka.hrabar@pravo.hr

Katarina PEROČEVIĆ
Ministarstvo vanjskih i europskih poslova
Trg Nikole Šubića Zrinskog 7-8, HR – 10 000 Zagreb
katarinaperocevic@gmail.com

U ovom radu analiziraju se pojedini dijelovi Rješenja broj U-I-60/1991 i dr. u kojem je Ustavni sud Republike Hrvatske odlučivao o suglasnosti Zakona o zdravstvenim mjerama za slobodno odlučivanje o rađanju s Ustavom RH.
Detaljno su analizirane točke Rješenja broj U-I-60/1991 i dr. koje se odnose na pitanje moralnog aspekta pobačaja, vrijednosti vezane uz pitanje pobačaja, zaključci o pravnom statusu ljudskog embrija i fetusa te pravu žene na privatnost.
Donosi se zaključak o tome je li Ustavni sud RH donio Rješenje broj: U-I-60/1991 i dr. u skladu sa stručnim stajalištima i znanstvenim činjenicama.

Ključne riječi: *pobačaj, ljudski embrij i fetus, moral, privatnost.*