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DOI
10.17176/20220819-181647-0

Publication date
2022

Document Version
Other version

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Link to publication

Citation for published version (APA):
Isailović, I. (2022). Dobbs in the EU: Not Just An American Story. Web publication or website, Verfassungsblog. https://doi.org/10.17176/20220819-181647-0

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Download date:10 Oct 2026

Dobbs in the EU

Ivana Isailovi# 2022-08-19T15:46:30

EU leaders and institutions have reacted strongly to the US Supreme Court's ruling in *Dobbs*, which overturned *Roe v. Wade* and held that the right to abortion was not consitutionally protected. Shortly after the decision was made public, the European Parliament adopted a resolution condemning *Dobbs*, and calling for the right to abortion to be included in the Charter of Fundamental Rights of the European Union. Including a right to abortion in the Charter of Fundamental Rights of the European Union may take years, and may never happen, as amendments to the Charter will require the ratification by each Member State. The impulse behind the resolution is, however, entirely justified. Despite the fact that Member States have overall liberalized their legal regimes regulating abortion, many legal and informal obstacles still remain on the ground. Rather than seeing *Dobbs* as an 'American phenomenon', as a specific, historically-situated product of the ongoing US 'culture wars,' it should serve as a reminder that the right to abortion remains fragile in the European Union, too.

Dobbs and the Backliding of the Right to Abortion in the US

While the US Supreme Court's ruling in *Dobbs* was expected, the decision still comes as a great shock. *Dobbs* takes away a fundamental right. It strikes a blow to gender equality and pregnant persons' right to decide over their bodies. Its consequences will be devastating, not only for those who are seeking abortion, but also for those who experience miscarriage, and complications related to pregnancy. The situation in Texas, where a restrictive law was adopted in September 2021 banning abortions after 6 weeks, gives a preview of what is happening throughout the country. The situation is particularly concerning for marginalized populations, poorer, rural and racialized women, who as Aziza Ahmed and Michel Goodwin show, did not have access to abortion and healthcare even when abortion was constitutionally protected, and have over the past decades faced increasing state surveillance and criminalization of their pregnancies.

In the aftermath of *Dobbs*, solidarity networks have been set up across states within and outside the US, and some companies are offering to cover employees' travel costs if they need to seek abortion out of state. On the legal front, Rachel Rebouché and her co-authors argue that *Dobbs* will give rise to interjurisdictional conflicts, as states move to enact extraterritorial laws both expanding and precluding abortion access. Parallelly to the confusion created by the extraterritorial reach of these laws, authors argue that federal land can provide shelter for abortion services.

Transnational Anti-abortion Groups' Mobilizations Within the EU

Dobbs is a reminder that the right to abortion remains fragile in the EU, too, and that marginalized communities are the first ones to suffer from the lack of abortion access, and will likely bear the brunt of any future legal change that seeks to further restrict it. There are many reasons to be concerned about the access to abortion in the EU: restrictive laws are still being adopted, abortion is still stigmatized, while the practice of conscientious objection, biased counseling, and other obstacles threaten the right to access abortion on the ground. These laws and practices significantly constrain the right over one's body, health and sexuality, reproducing harmful gender stereotypes and undermining gender equality.

Dobbs was decided in a context in which well-organized transnational movements are opposing gender equality and LGBTQI-rights in the name of their fight against a so-called "gender ideology". In recent years, political scientists showed that conservative transnational groups are diffused throughout Europe: from France and Italy to Germany, Slovenia and Croatia. They have documented their campaigns and unveiled similarities between different mobilizations.

The European Parliament acknowledges this in its resolution, emphasizing that "non-governmental organisations (NGOs) and conservative think tanks belonging to the US Christian right have been funding the anti-choice movement globally" and that the overturn of *Roe v. Wade* "may embolden or encourage anti-choice movements to put pressure on governments and courts outside the US to roll back abortion rights." Like in the US, anti-abortion transnational groups in the EU mobilize legal and policy arguments to restrict the right to end one's pregnancy (on the influence of anti-abortion movements see also the report by the French Parliament).

Restrictive Abortion Laws in Poland and the Limits of the Human Rights Framework

In 2020, Poland, which already had some of the most restrictive laws on abortion, enacted a nearly total ban on abortion, provoking massive demonstrations. The new law eliminates the possibility to end one's pregnancy in case of fetal health issues. Abortion is now allowed only in the first 12 weeks in case of rape or incest, or if the pregnant patient's life is in danger, but on the ground, procedures are so cumbersome that it is very hard to access legal abortion. Given the restrictive legal framework, many have raised concerns over the situation of Ukrainian refugees who were raped, as getting an abortion in these circumstances is virtually impossible.

In addition, Poland adopted a new regulation enabling data collection concerning pregnancies. According to many, this is likely to increase the government's surveillance, and the data collected may be used in criminal proceedings. All of these legal changes are happening in a context in which activists are facing criminal charges for facilitating abortion.

The Polish abortion ban is under examination by the European Court of Human Rights, but it is not clear whether the ruling will benefit the plaintiffs. Although in prior cases, the Court found that Poland has breached the right to private life and the prohibition of cruel and inhuman treatment, it has left a significant margin of appreciation to states. According to the Court, the decision when life begins is within states' margin of appreciation, so states enjoy a broad leeway when deciding when abortion is permitted. The Convention does not confer a right to abortion.

Under the Convention, states need to make accessible abortion regulated by law. In its *P. and S. v. Poland* decision (2012), the Court noted that "once the state, acting within its limits of appreciation, adopts statutory regulations allowing abortion in some situations, it must not structure its legal framework in a way which would limit real possibilities to obtain an abortion." In other words, once the state has enacted a law regulating abortion, it needs to make the procedure accessible. The human rights framework therefore does not guarantee a *thick* understanding of a right to an abortion, and tends to give priority to states' substantive choices.

Biased and Unnecessary Mandatory Counseling Protecting the "Unborn Life" in Germany

Besides the case of Poland, which is highly publicized, reproductive rights are under threat elsewhere in the EU, too. Under the German Criminal Code, receiving, performing or assisting an abortion is a criminal offense unless specific conditions are met (e.g. the abortion is medically necessary to save the patient's life, if the pregnancy is caused by a crime, or in case of exceptional hardship). The criminalization of abortion stigmatizes the procedure, and the law has a 'chilling effect' on physicians, while the new generation of doctors is not always trained to perform it. Some doctors have even reported that they have been targeted by anti-abortions groups who organize protests in front of the clinics and marches across cities, and attack them on social media.

More fundamentally, the legal framework favors the protection of the "unborn life" instead of patients' rights over their bodies (it is however clear that the argument according to which there is a "symmetrical balance" between the right of the pregnant person and a "right of the fetus" has no support in international human rights law). The two major decisions from the German Federal Constitutional Court (from 1976 and 1993) both emphasized the right to life and human dignity of the fetus, making pregnant persons' rights a marginal concern. Patients still need to undergo mandatory counseling designed to protect the unborn life and which is "guided by efforts to encourage the woman to continue the pregnancy". According to the law "[t]he woman must …be aware that the unborn child has its own right to life with respect to her at every stage of the pregnancy and that a termination of pregnancy can therefore only be considered in exceptional circumstances". Abortion is also conditioned upon a mandatory 3-day waiting period. This framework is medically unnecessary (see CEDAW Committee's concluding observations from 2017) and explicitely designed to influence patients to continue their pregnancy.

These kinds of obstacles are not only in force in Germany. In a study from 2015, the Center for Reproductive Rights documented the adoption of legislation mandating mandatory waiting periods, biased counselling and information requirements as pre-conditions for patients to access lawful abortion in states in Central and Eastern Europe, including EU Member States Romania and Slovakia (e.g. councillors present abortion as 'murder'). Although, as the report notes, some of these countries were historically some of the first ones to legalize abortion, these measures have been designed to create new barriers for accessing abortion, while entrenching harmful gender stereotypes about women's roles, and stigma around abortion.

France, Italy and Croatia: Conscientious Objection as a Major Threat to Reproductive Rights

In France, the closing of abortion facilities and the fact that only a small number of physicians practices abortion have made the access to abortion more challenging, despite a liberal legal framework. Geographical inequalities persist: in some parts of the country, more than 40% of patients had access to abortion outside the region in which they live. This disproportionally impacts economically vulnerable women and women living in French overseas territories, most likely (in the absence of official data disaggregated by race) women of color. According to a recent study from 2020, they are predominantly the ones seeking to terminate their pregnancies. Moreover, the recent massive entry of the far right in parliament has only increased concerns among activists.

Today, one of the major threats to reproductive rights is the use of conscientious objection by medical staff. In an interview from 2018, the President of the syndicate of French gynecologists said that they [the gynecologists] are not here to suppress the prenatal life ("*une vie à naître*"). He expressed disagreements with the argument that an abortion is not a murder, and also said that he does not practice abortion anymore, exercising his conscientious objection.

According to international human rights instruments, states need to grant access to abortion in case of the use of conscientious objection, and if necessary, refer the patient to another practitioner (see also CEDAW's 2013 concluding observations concerning Hungary). In some EU Member States, however, the majority of practitioners refuse to practice abortion or acts associated with it.

For instance, in Croatia, at least half of gynecologists working in public hospitals seem to refuse to practice abortion, even though they might not do so in private clinics (see also the report by the Croatian ombudsman). The Yugoslav law from 1978 transposed into Croatian law after the country's independence is still in force. In socialist Yugoslavia, abortion was accepted for socio-economic reasons since 1952, and it was the predominant method of birth control. For decades, conservative groups close to the Catholic Church have tried to undermine it. As a result of this and other barriers, patients travel to Slovenia, or are sent to Serbia or Bosnia, depending on where they live.

Similarly, in Italy, the number of doctors practicing conscientious objection is on the rise: around 69% of gynecologists refuse to perform abortion, with variations between the regions. Even though in Italy practicing the conscientious objection is regulated, and hospitals, and ultimately regions need to ensure that abortion is accessible, pregnant patients still face significant obstacles on the ground, as hospitals are unable to find non-objecting staff, and those who still practice abortion experience discrimination (see the European Committee on Social Rights' decisions in relation to Italy's violation of the European Social Charter).

Structural Responses Are Needed to Undo the Unequal Reproductive and Sexual Order

The right to terminate a pregnancy has never been only about the right to health or the right to privacy. More fundamentally, it is about a substantive vision of equality that a society should foster and protect. Abortion laws, along with other repressive laws targeting women, have been used to enforce an unequal reproductive and sexual order, control sexuality and reproduction, and distribute power, material benefits and opportunities. In other words, laws restricting the right to terminate a pregnancy are central to the gendered violence pervasive in our societies. It is historically connected to attempts to eradicate the control women have acquired over their bodies. This is, of course nothing new: in Europe in the 16th and 17th century, 'reproductive crimes' were punished through witch hunts, as documented by Silvia Federici in her book the Caliban and the Witch.

Strengthening the human rights framework and liberalizing domestic legal regimes in the EU is only one way to tackle the multi-layered obstacles pregnant people face when trying to access abortion. Structural responses at different institutional levels are needed to challenge harmful gender stereotypes and make the right to terminate a pregnancy a reality on the ground throughout the EU.

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