

The Right on Abortion:

**Comparative Approach Concerning
Croatia, Federal Republic of Germany, and US**

Dalida Rittossa

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*The Right on Abortion:
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TABLE OF CONTENTS

INTRODUCTION.....	3.
EXECUTIVE SUMMARY.....	10.
I. PHILOSOPHICAL BACKGROUND OF THE ABORTION ISSUE.....	13.
1. ABORTION FROM THE POINT OF VIEW OF THE FETUS.....	13.
2. ABORTION FROM THE POINT OF VIEW OF THE MOTHER.....	17.
3. RONALD DWORKIN'S THEORY OF INTRINSIC VALUE OF HUMAN LIFE.....	22.
II. ABORTION LAW IN AMERICA.....	26.
1. PRE-ROE V. WADE PERIOD.....	26.
2. ROE V. WADE - THE REVOLUTIONARY TURNING POINT IN ABORTION LAWS.....	33.
3. DOE V. BOLTON - ROE'S SUPPLEMENT.....	43.
4. THE RULE OF PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA V. CASEY - A NEW CONSTITUTIONAL FRAMEWORK.....	47.
5. PARTICULAR LIMITATIONS AND RESTRICTIONS ON ABORTIONS.....	51.
5.1 The Consent of the Woman herself.....	51.
5.2 The Parental Consent.....	55.
5.3 The Spousal Consent.....	62.
6. ABORTION CONTROVERSY AS PART OF AMERICAN EXPERIENCE.....	67.
III. LEGAL REGULATION OF ABORTION IN GERMANY.....	70.
1. HISTORY OF LEGAL REGULATION.....	70.
2. THE 1975 DECISION OF THE CONSTITUTIONAL COURT.....	77.
2.1 The Rights of Unborn Life.....	77.
2.2 The State's Obligation to Protect Unborn Life.....	81.
2.3 The Balance of the Rights of the Fetus v. Rights of the Mother.....	86.
2.4 Controversies of the 1975 Constitutional Court Decision.....	90.
3. BRUGGEMANN AND SCHEUTEN V. FEDERAL REPUBLIC OF GERMANY.....	97.
4. THE SECOND ABORTION DECISION OF 28 MAY 1993.....	102.
4.1 Abortion as a Special Issue After the Unification.....	102.
4.2 Brief Amici Curiae.....	106.
4.3 The Rights of the Unborn Life.....	110.

4.4 The State’s Obligation to Protect the Unborn Life.....111.

4.5 Right to Life v. Right to Self-Determination.....114.

4.6 Counseling Model as a Proper Solution?.....117.

5. WHAT CAN WE CONCLUDE FROM THE GERMAN EXPERIENCE?.....119.

IV. ABORTION CONTROVERSY IN CROATIA.....123.

1. HISTORY OF LEGAL REGULATION.....123.

2. THE ACT ON THE HEALTH MEASURES FOR THE EXERCISING OF THE
RIGHT TO FREE DECISION-MAKING ABOUT GIVING BIRTH.....126.

3. ABORTION AND THE MENTALITY OF CROATIAN SOCIETY.....131.

4. BILL ON ABORTION, NO.230.....136.

5. FINAL REMARKS.....141.

CONCLUSION.....143.

BIBLIOGRAPHY.....145.

INTRODUCTION

Abortion is one of the subjects that have been discussed extensively in both academic and popular literature. It is reasonable, therefore, to try to present the outcome of abortion dilemma which could possibly be expected to emerge in the Republic of Croatia by comparative legal analysis. During the last ten years, it was possible to hear that Croatian legal codes do not handle abortion very well. *Pro* and *Contra* opinions concerning legal reformations have left a common impression that legal experts and politicians reached the “one-way street” regarding this issue.¹ The problem was not only unresolved, but perhaps not susceptible to resolution in any definitive sense. The resurrection of religious beliefs and conservative affirmation in all spheres of community life performed a constant attack at the 1978 liberal law which concerns the reproductive rights. Traditional moral thoughts have been advocated as the proper foundation for moral life of Croatian citizens. Nevertheless, no public official, religious leader or other public person directly involved revealed the secret why there is the need to proceed with legal changes concerning the abortion, what is the philosophical background of the abortion issue and what kind of legal tradition Croatia has, if any, regarding reproductive rights. The problem is serious because the lack of information caused contradictory perceptions of Croats who predominantly agree with the assertion that abortion is the

¹ Jadranka Dizdarevic-Stojkanovic, *Reproductive Health Care Situation in Bosnia and Herzegovina*, 8 MED.&L., WORLD ASS'N FOR MED.L. 201, 213 (1999).

taking of a human life; however, only 24.9% of them hold that abortion should be forbidden by law.²

Bearing in mind the above mentioned circumstances, the comparative legal analysis seems to be a suitable means to attempt to propose the solution for abortion issues in this transitional country. Wider attention should be given to this legal method "...by showing how awareness of foreign experiences can illuminate our own situation and contribute in a modest way to our own law reform methods."³ I need to stress that I am not proposing the invention of a supranational model of abortion regulations or the unification of the existing procreative legal acts. I do not devote my attention to this kind of issue with the idea to find blueprint in a foreign legislation and to squeeze it within the lines of Croatian abortion regulations. In my opinion, a comparative method of legal analysis is suitable to replace a controlled experimentation in law, which is hardly ever possible, and to enable a deeper understanding of the abortion issue. The hope is that history and comparison will give us an insight into our own situation and help us to propose an adequate solution.

The vast majority of legal scholars emphasizes the substantial difference among legal systems of Common Law and Continental countries. Cross-national comparisons showed that European legal culture is a firm hybrid of the received Roman law, Germanic customs, canon law and the law merchant.⁴ A common Western legal inheritance concerning the abortion is most clearly presented with the development of

² Stjepan Baloban & Gordan Crpic, *Pobacaj I mentalitet u drustvu*, 68 BOGOSLOVSKA SMOTRA 641, 647 (1998).

³ MARRY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 3 (Harvard University Press, ed., 1987)

⁴ *See id.*

this dilemma in Germany. My aim has been to confront it with the United States' legal experience concerning abortion by using a comparative and historical legal method. I will make an inquiry into how legal rules on the termination of pregnancy actually operate in practice to see them in their full social context. The objective is to prove, despite very different substantive rules, the similarities behind formal differences. The universality of the abortion issue illuminates the complex interactions among law, behaviour and ideas. It witnesses about connections between legal and social change.⁵ Having this in mind, I will give my best to prove how both countries are heading towards substantive liberalization of the abortion laws. Nevertheless, despite such tendencies, the state started to take responsibility to protect prenatal life. As *Casey* explained, the state has a compelling interest to intervene by restricting the abortions. The lower level of scrutiny is needed because the right to privacy is not the basic constitutional right anymore.⁶ On the other hand, this obligation does not only involve the imposing of legal restrictions, rather it contents the duty to provide adequate education, easy accessible contraceptives and different sorts of facilities for mothers and children. It is evident that Croatia has one of the most liberal laws on abortion in Europe and because there is no need to liberalize it in any other way, my opinion is that the second part of development concerning the state obligation towards potential life is yet to come. Even in case of amending the current law on abortion, possible restrictions will not be substantial. Public opinion is habituated to have easy access to abortion, and what is more important, it is aware of the fact that liberal legal approach had positively influenced the rates of illegally performed terminations of pregnancy, the cases of abortion resulting in death and the number of

⁵ ANDRAS SAJO, Reader for the Law and Society course, CEU 1999-2000

⁶ INTERNATIONAL ENCYCLOPEDIA OF LAWS, MEDICAL LAW § 14, at 123 (Kluwer Law

abortions itself. This statistical data witnesses about the same conclusion that “bad laws are sometimes the best laws”.⁷ All information has been collected and published by Non-Governmental Organizations who participated in *Brief Amici Curiae* for the procedure of 28 May, 1993, before the Constitutional Court of the Federal Republic of Germany.⁸

Table 1

	Years	No. of Deaths	Mortality Rate Per 100.000 Abortions
West Germany	1976-77	10	14.9
	1978-83	11	2.2
	1984-91	14	2.1
USA	1963-68	7	72
	1970-73	139	6.9
	1974-77	82	1.9
	1978-79	27	0.9
	1980-85	54	0.6

Note, The data set forth herein confirm that restrictive abortion laws are associated with high rates of unsafe abortion leading to ill health, infertility, and death. Liberalization of abortion laws reduces mortality for illegal abortion as it has been shown after Roe v. Wade, 1973 US Supreme Court case and 1975 German Constitutional Court decision.

International eds., 2nd ed. 1998)

⁷ Peter Singer, *Prekid trudnoce I eticka usporedba vrijednosti*, 84 3. PROGRAM HRVATSKOG RADIJA [Third Channel of the Croatian Radio] 59, 62 (1991).

⁸ Brief Amici Curiae of The Center for Reproductive Law and Policy, The Allan Guttmacher Institute, The Population Council, International Planned Parenthood Federation, Family Planing International Assistance, International Projects Assistance Service, Catholics for a Free Choice, The Transnational Family Research Institute, and The Network of East-West women, *2BvF 4/92 and 5/92 Procedure before the Bundersverfassungsgericht of Federal Republic of Germany* (1992)

Table 2

	Year	Percent at more than 12 weeks Gestation
West Germany	1976	44.5
	1980	25.9
	1984	19.2
	1987	19.4
USA	1973	14.5
	1977	8.9
	1980	8.7
	1985	8.9

Note, the high mortality rates may be an indirect result of the delays in obtaining abortions due to restrictive abortion laws.

Table 3

	1979	1998
Number of Abortions Performed	51549	10036
Adolescents	7%	3%
Women between 20-29 years	52%	36%
Women between 30-39 years	34%	45%
Women between 40-49 years	5%	11%

Note, the liberal abortion law in Croatia influenced a rapid decrease of the number of abortions performed. Moreover, with its educational policy of using contraception, it influenced a drop of abortions performed by adolescents.⁹

⁹ Interview with Mr.Sc.Dr. Lada Magic, *Abortion, Yes or No?*, 4 LADY, Apr. 2000, at 23.

Comparative legal experience has shown that procreative legal rules were created with a crucial concern of how to explain basic procreative principles not only in legal, but in philosophical and medical terms also. For example, the right to life of the unborn child has been confronted with the woman's right to choose abortion as an option in the German Constitutional Court judgments.¹⁰ The US Supreme Court judges made inquiries whether a fetus is a person in constitutional terms.¹¹ The Croatian legislator still accepts the procreative rights as part of the legal system.¹² Nevertheless, the law itself is silent about the legal nature of this right. The previous Constitution of the Socialist Republic of Croatia contained the provision which declared these rights as fundamental. The Founding Fathers of the 1990 Croatian Constitution had rejected to incorporate such provision into the new constitution and the only relevant norm is the one which recognizes the right to life of every human being as part of the Article 21. Therefore, I have felt a strong need to explain the basic philosophical terms concerning the rights related to abortion issues. The first thesis chapter is dedicated to these attempts. The second chapter deals with the development of the abortion controversy in the US. It covers historical background, main US Supreme Court decisions and particular limits and restrictions on abortion. In chapter III, the German legal situation concerning termination of pregnancy is discussed. It explains the historical development, two main Constitutional Court decisions and the position of the European Commission on Human Rights in *Brugemann and Scheuten*

¹⁰ DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 338 and 352 (Duke University Press, 2d ed. 1989)

¹¹ *See, e.g., Roe v. Wade*, 420 U.S. 113, 11 (1973) (Blackmun, J., opinion of the Court), (visited Jan. 10, 2000) <[wysiwyg://147/http://caselaw.find...ase.pl?court=us&vol=410&invol=113](http://caselaw.find.ase.pl?court=us&vol=410&invol=113)>

¹² *Zakon o zdravstvenim mjerama za ostavriavanje prava na slobodno odlucivanje o radanju djece* [The Act on the Health Measures for the Exercising of the Right to Free Decision-Making about Giving Birth.], art. 1, *Narodne Novine* [N.N.], Issue No. 18, (1978).

case. Finally, in Chapter IV special attention has been devoted to historical and legal analysis of the abortion controversy in Croatia.

EXECUTIVE SUMMARY

I. Introduction

The actuality of the abortion issue is explained in this chapter. The author expresses his determination to explore philosophical and historical background of this problem in United States and Germany emphasising the legal development of abortion regulations. The comparative legal method was used as a proper means to illuminate Croatian controversial situation concerning the termination of pregnancy and to contribute in a modest way to probable law reforms. The objective of this thesis is to prove, despite very different substantive rules of abortion regulations in these countries, the similarities behind formal differences which witness about the universality of abortion dilemmas. Bearing this in mind, it is possible to propose suitable legal solutions and to foresee the development of this issue in the Republic of Croatia.

II. Executive Summary

III. Abortion Law in United States

The author presents the historical background of abortion regulations stressing it as one of the arguments used by Justice Blackmun in the opinion of the Court in *Roe v. Wade* case. She continues with the critical examination of this decision and explains its influence upon *Doe v. Bolton* case as its supplement. The Court's reasoning in *Casey* has been sharply criticized as a failed attempt to invent something what the judges called a reaffirmation of "essential holding". The author argues that *Roe* has been overruled by rejection of the trimester test, enacting the undue burden test as an appropriate standard

of the Court's review of the state legislation and the extension of state's interest in the potential life during the whole gestational period. Particular limitations and restrictions on abortions were presented, such as the consent to have an abortion of the woman herself, parental and spousal consent. In the concluding subchapter, the author describes the American experience of the abortion controversy as a constant judicial compromising.

IV. Legal Regulations of Abortion in Germany

The author starts dealing with the abortion issue in Germany by describing the development of the legal regulations concerned with the termination of pregnancy. She focuses on the 1975 decision of the Constitutional Court exploring how the Court interpreted the rights of the unborn life, the state's obligation to protect such a life and how the Court balanced the rights of the fetus versus rights of the mother. The 1975 decision raised several unresolved issues and one of them was that the Court was able to proclaim that the fetus is a human being and consequently that it is entitled to constitutional rights protection. Nevertheless, the terms "unborn life", "germinating life" and "incipient life" were left without precise definition. Furthermore, the concept of the objective constitutional value was used as a vehicle for transferring to the Federal Constitutional Court specific legislative functions. The European Commission on Human Rights attitude towards abortion was expressed in *Brugemen and Sxheuten versus Federal Republic of Germany* decision. The second abortion decision of 25 May 1993 was the reaction to abortion as a special issue after the Unification. The author again discusses the rights of the unborn life, the state's obligation to protect it and confronting the right to life with the right to self-determination. Finally, she argues whether the counseling model was a proper solution for abortion regulations.

V. Abortion Regulations as a Part of Croatian Legal Experience

The history of legal regulations was presented in the first subchapter with special attention given to religious influence. The 1978 Act on reproductive rights was criticized in the sense whether it is still an appropriate legal source to regulate the termination of pregnancy in today's Croatia. It was indispensable to explore the revival of abortion discussion as a consequence of transitional changes which influenced the emerging of a conservative approach within the mentality of Croatian society. No.230 Bill on Abortion presents best such attitude with the additional remark that it was proposed to Croatian Parliament with particular aim to attract public attention during the electoral campaign for the elections for the second house of Parliament. The author concludes that bearing in mind the poor public approval of the Bill proposed and the fact that the vast majority of Croats gave their consent to abortion as being justified, it seems reasonable to leave abortion regulations as they are.

VI. Conclusion

Legal development of abortion regulations in the US and Germany was going through the process of liberalization which demanded the changing of conservative attitude as necessary. The 1978 Croatian Act concerning procreative rights is one of the most liberal European laws and there is no need to make it more liberal. Moreover, the dispute whether we should prescribe the role of the moral arbiter to the Parliament or not has been resolved in favor of public opinion. The Croatian legislator will not be faced with a need to choose whether or not to compromise in a near future. There are no doubts that any attempt to pronounce the termination of pregnancy as illegal will be strongly opposed.

I. PHILOSOPHICAL BACKGROUND OF THE ABORTION ISSUE

1. ABORTION FROM THE POINT OF VIEW OF THE FETUS

The fundamental values involved in the abortion dilemma cannot be discussed without a closer look into philosophical and moral background of the abortion. There are numerous parties involved (pregnant woman, unborn child, father, parents of a pregnant minor and a physician) and there are different arguments which support their legally protected interests or rights. We cannot defend any abortion position if we do not understand the content of these rights or if we do not comprehend the hierarchical connection between them. It is not possible to argue that *pro life* position should be accepted as official standing of the legislature without knowing whether a fetus should be considered as a human being or not. On the other hand, a *pro choice* defender should be familiar with the theory of *self-determination of woman*. Therefore, philosophical scrutiny is indispensable before entering any legal discussion on abortion.

The first step of such theoretical analysis is to determine the status of the fetus. Only after that can we impose a desirable balance between claims of the mother and possible claims connected with the fetus. Legal scholars have not yet found out the common opinion about what kind of inquiry we should make regarding the fetus. Is it a human life or should we apply a higher test of considering the fetus a person? Justice Blackmun in *Roe v. Wade* had based his holding on *the test of personhood* and he concluded that from Constitutional provisions it is not possible to defend the position that a fetus is a person because it lacks the capacity to act as a rational human being - for

example, it cannot exercise the right to vote.¹³ The person is held responsible for his/her actions and she or he has moral obligations. However, Machteld Nijsten had stressed that this test is the opposite to the pure biological criterion of a fetus as a protected human life.¹⁴ There is no doubt that it is a human life because it is conceived by human parents and accordingly, it should be always protected leaving no place for abortion. Nevertheless, the acceptance of the notion that all people are genetic humans confuses the moral and genetic sense of the word “human”. Persons are those who have a special moral status and a right to life, not genetic human creations. This is the reason why we need the second moral category of human beings.

“A human being is a member of the biological species *homo sapiens* and has certain natural and inherent rights, such as the right to life, but no moral obligations.”¹⁵

Nevertheless, the criterion presented did not give the final answer to abortion dilemma because there is a number of options concerning the moment when the fetus becomes a human being. *Pro life* defenders with religious teaching of the Catholic Church in front, strongly defend the position that from the *moment of conception* onwards an unborn child is a unique individual creature. This argument is not only theological but genetical also because the real value of this point of gestation is fetal genetic code which determines individual personality. *The argument of continuity* explains that the unborn goes through different phases of development acquiring structures and new characteristics.¹⁶ Every next characteristic can be considered as a point necessary to

¹³ See, e.g., *Roe v. Wade*, 420 U.S. 113, 11 (1973) (Blackmun J., opinion of the Court), (visited Jan. 10, 2000) <wysiwyg://147/http://caselaw.find...ase.pl?court=us&rol=410&invol=113>

¹⁴ MACHTELD NIJSTEN, *ABORTION AND CONSTITUTIONAL LAW, A COMPARATIVE EUROPEAN-AMERICAN STUDY* 50 (European University Institute ed., 1990)

¹⁵ See *id.* at 51

¹⁶ See *id.* at 59-60

become a human being, such as fetal brain activity or its capacity to feel or affect. Nevertheless, all these phases in human being development did not introduce anything crucial to the perfect explanation of our problem. *The moment of quickening* is the first decisive stage in pregnancy. The fetal movement is the first sign of its communication with environment. Only at that moment can the fetus be perceived by the mother and others by ordinary means. Moreover, the ability to move is one of essential characteristics of human beings. Because of this visible interaction between the fetus and others, the common law system of American Colonies contained the rule which had forbidden abortion after this precise moment.¹⁷ *The fetal viability* is the most changing criterion because an unborn child is capable of separate and independent existence regardless the fact that it is still inside mother's womb.¹⁸ The US Supreme Court affirmed several times in its constitutional practice that at the moment of viability the state is free to prohibit the abortion except when it is necessary to protect the mother's health and life.¹⁹

All mentioned stages of gestation have in common the fact that fetus develops through them. No one can assert that any of these points, except viability and birth, can be said to be something more than a developed stage of potential personhood. The argument of potential personhood explains why a fetus deserves to be treated as a member of the moral community. If fetuses are allowed to grow and develop, in other words if they are not aborted, they will eventually gain all characteristic of descriptive persons.²⁰ However, the problem remains because there is no precise answer how much

¹⁷ See, e.g., *Roe v. Wade*, 420 U.S. 113, 11 (1973) (Blackmun J., opinion of the Court), *supra* note 1, at 15

¹⁸ NIJSTEN, *supra* note 2, at 59-64

¹⁹ For any further information, see US Supreme Court decision concerning the issue of procreative choices.

²⁰ BONNIE STEINBOCK, *LIFE BEFORE BIRTH, THE MORAL AND LEGAL STATUS OF EMBRYOS AND FETUSES* 55 (Oxford University Press ed., 1992)

actualization of potentiality of a person is necessary to prohibit abortion. Also, even if a fetus has potentiality to become a person one day, it does not mean that it has an interest to do so. According to the *interest principle*, only beings with interests can have rights. Consequently, as Michael Tooleys teaches, a fetus is not a subject of consciousness, it does not have any interest at all and so cannot have an interest, not to mention the right, in its own continued existence.²¹ Moreover, to assert that someone or something is a potential person, does not mean that it is a person. If we think about potential persons as a kind of persons, we are ascribing to potential persons rights of other persons which is definitely, a logical error.²² Furthermore, the idea of potentiality of personhood negates the individual nature of each abortion case. The theoretical approach should not treat abortion as a uniform category because each woman has different reasons for having an abortion. There is a huge difference when abortion is needed because pregnancy presents the threat to mother's health and life or when woman rejects the pregnancy because it imposes major changes in her life-style.

What emerges from this presentation is that there is no rationally precise answer to the question when the fetus becomes a human being and therefore has a right to life. As Bonnie Steinbock stressed, "...there is no nonarbitrary, morally relevant postfertilization event that marks the beginning of a human life." To conclude, the problem of abortion from the point of view of the fetus has no right solution. It can only be solved by a compromise between different moral values.

²¹ *See id.* at 55-57

²² *See id.* at 59

2. ABORTION FROM THE POINT OF VIEW OF THE MOTHER

The woman's right to abortion has been explained differently by diverse legal systems. Various fundamental values have been invoked as a basis for this woman's right. For example, the US Supreme Court in *Roe* decision based its holding on the right to privacy. Through the years, the problem has been consistent because of the very broad meaning of the privacy term. As a consequence, privacy can be considered to be the "right to selective disclosure" to determine oneself when, how, and to what extent information about oneself is communicated to others.²³ The other way to define privacy is to accept a criterion of seclusion as "the right to be let alone".²⁴ Furthermore, the privacy can be presented through the concept of intimacy. Then, this is "the right to make decisions for oneself within the sphere of personal intimacy as to have free access to contraceptives or the right to marry the person of one's choice."²⁵ The approach which was last mentioned is the most interesting for our problem of abortion.

What is crucial for the right to privacy is an essential element that we here deal with the cases where there is a great need to exclude all others. The private sphere consists of actions that are of no public concern. Freedom to intimate association began when, for the first time, individuals had free hands to decide about procreation. Nijsten expressed the opinion that contraceptive freedom involves privacy in the same manner as abortion decisions. It does not mean that these two values are exactly identical. The moral and legal status of the fetus differentiates them. If the unborn is accepted to be a human

²³ NIJSTEN, *supra* note 2, at 71, footnote 84.

²⁴ In *Eisenstadt v. Baird*, justice Brennan while delivering opinion for the Court had stressed that "If the right of privacy means anything, it is the right of the individual... to be free from governmental intrusion into matters so fundamentally affecting a person...", *See, e.g., Eisenstadt v. Baird*, 405 U.S. 438 (1972) (Brennan, J., opinion of the Court), (visited Jan. 10, 2000)

<wysiwyg://5/http://caselaw.findla...ase.pl?court=US%rol=405&invol=438>

²⁵ NIJSTEN, *supra* note 2, at 71

being from the moment of conception, the abortion is not legally permissible but a free use of contraceptives could be. Furthermore, another difference between contraceptive freedom and abortion freedom is a notion that abortion should not be considered to be a contraceptive method. Moreover, the termination of pregnancy is still rather a woman's issue. The US Supreme Court stressed several times while considering possible father's rights that state cannot enforce any such right because it lacks itself the right to subsidize or restrain the pregnant woman's decision which is a matter of her privacy.²⁶

If we keep in mind the recent definition of the freedom of religion, especially the negative effect of it, than we should invoke the mother's right to exercise freely her religious beliefs as a basis for her right to abortion. The European Court for Human Rights and especially the German Federal Constitutional Court had accepted the negative interpretation of religious rights.²⁷ Every individual has not only the right to believe but also he or she is free not to have any religious beliefs. In other words, the mother's opinion as a non-believer that a fetus is not a human being from the moment of conception and consequently, that she is allowed to have abortion, is of equal logical weight and should be taken into consideration. The principle of secular state should defend this constitutional interpretation.

The method of determination when abortion is acceptable introduces the woman's right to limit childbearing. A duty to procreate is no longer her main obligation towards the community. She has the right not to be forced to bear a child in special circumstances when the unborn presents the threat. There are clearly distinguished cases when a fetus is

²⁶ See, e.g., *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976)

²⁷ COLE DURHAIM, Reader for the Freedom of Religion course, CEU 1999-2000

the agent of threat, for example when, because of pregnancy, life or health of the mother is in danger (medical indication) or when pregnancy results from rape or incest (ethical indication). The relationship between the fetus and the mother is particularly burdensome and involuntary. The abortion could be considered as justified because nothing can prevent a woman from enjoyment of her physical and mental well-being. She cannot be forced to give birth to a child who has been forced upon her without her voluntary act. Eugenic indications permit the termination of pregnancy to avoid the birth of a deformed child. It is unlikely that such a child would have a worthwhile life or be glad to be alive. The care and education of such a child would be more than difficult and over-demanding. An exception to permit abortion also exists when social and economic circumstances of the mother's life do not permit her to give the child a reasonable life and future.²⁸ Social indication has been exposed to great criticism because the meaning of this indication can be easily extended to encompass all kind of reasons for obtaining an abortion. The clear contradiction exists especially when the right to life of an unborn child is legally enforced and in the same time when such broad definition of social indication is accepted as its exception. The 1993 abortion decision of the German Constitutional Court is a perfect example of incoherent values protection. The fetus has a right to life because it is considered to be a human being at 14th day after conception. However, on the other hand, the woman has the right to demand abortion by invoking a broadly defined social indication. Purely logical inconsistency of constitutional values has resulted in confusion that we do not know what is impermissible.

²⁸ The indicational principle has been accepted as a constitutional solution for problem of abortion in the German Constitutional Court decision, Judgment of May 28, 1993, BverfG, 88 BverfGE 203-205 (F.R.G.)

Judith Jarvis Thomson tried to give possible solution for this philosophical contradiction.²⁹ Moreover, she argued that even if we granted the personhood to the fetus, abortion would not be necessarily wrong. The common opinion expressed in the syllogism:

1) Fetus has the right to life

2) Abortion kills the fetus

Therefore, abortion violates the right to life of the fetus;

cannot be defended if we bear in mind the nature of the right to life itself. Having such right does not entitle a person to do whatever is necessary to preserve his or her life, and in particular does not entitle to use another person's body.³⁰ For more detailed explanation, Thomson had created the fantastic example of an unconscious violinist who was plugged onto another person's kidney circular system for nine months. Plugging him was the only solution to preserve his life and although such rescuing was "outrageous", the violinist could not be disconnected from the kidnapped person because it would kill him. Or? If not, it seems that in such circumstances it would be acceptable to terminate the life of an innocent person because it is not a case of violation of his right to life. Thomson's central thought is that the right to life does not necessarily include getting whatever we need to live, especially it does not imply a right to use another person's body. Nevertheless, this reasoning unfortunately disregards the fact that a pregnant woman can be identified with the kidnapped person only when pregnancy has resulted from the act of rape. In most cases pregnancy includes woman's own voluntary action

²⁹ JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* 4 (Harvard University Press ed., 1992)

³⁰ *See id.* at 66

and someone can argue that fetus does have a right to use the pregnant woman's body because she is partly responsible for its existence. Thomson's analysis apparently justifies abortion only in a relatively narrow range of cases.

What follows from the above presented analysis is the conclusion that we cannot treat abortion controversy without combining two factors: the woman's rights concerning her procreative decisions and the status of the unborn. If we consider the philosophical background of abortion only from the point of view of the pregnant woman, we will be faced with the vulnerability of the claim that fetus lacks moral status because of the argument of potential personhood. On the other hand, the indication model which includes the exception of social circumstances can seriously endanger logical coherency of constitutional rights hierarchy. Furthermore, the woman's right to privacy is not immune to the objection that this right is artificially created as not being mentioned in the Constitution. To conclude, the strongest argument for logically cogent abortion policy combines both these approaches.

3. RONALD DWORKIN'S THEORY OF INTRINSIC VALUE OF HUMAN LIFE

In the previous chapter I have discussed the undeniable truth that it is necessary to maintain legal coherency while enacting legal provisions concerning abortion. It would be a pure act of ignorance to claim that the fetus as a person has the right to life and at the same time to allow easy access to abortion. Ronald Dworkin has been aware of this controversy. Moreover, he has described the uncompromising position of *pro-life* and *pro-choice* groups as “...conventional, pessimistic understanding of the character of the abortion argument...” which is “widespread intellectual confusion.”³¹ He bore in mind both issues, the moral status of the fetus and the woman's rights in making procreative choices.

The derivative objection to abortion presupposes that the fetus, like any other member of moral community, has interests of its own, including the interest in remaining alive, and is entitled to the protection of government.³² The derivative claimer sees the fetus to be a complete moral person from the moment of conception. Consequently, the unborn has the right to live and abortion is a murder or nearly as wrong as a murder. Dworkin did not accept such extreme controversial position for numerous reasons. He argues that not everything that can be destroyed has an interest in not being destroyed.³³ For example, it would be wrong to smash a beautiful sculpture because it would violate the value embodied in great works of art. Also, it would harm the interests of people who

³¹ RONALD DWORKIN, LIFE DOMAIN, AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 10 (Alfred A. Knopfed ed., 1993)

³² RONALD DWORKIN, FREEDOM'S LAW, THE MORAL READING OF THE AMERICAN CONSTITUTION 84 (Oxford University Press ed., 1996)

³³ DWORKIN, *supra* note 19, at 15

find pleasure in observing or studying masterpieces. Nevertheless, that sculpture is still without interests. Even if something is alive and is in the process of developing into something more mature or beautiful (see the example with baby-carrot or caterpillar), it is not enough to declare that it has the interest in staying alive. The same line of argument can be applied to developing human beings.³⁴ The fact that something might, if treated in the right way, develop into a human being, is not enough for that something to have interests. The reason is obvious: only something that has, or has had some form of consciousness (some mental as well as physical life) can have interests of its own. Dworkin concludes that the present definition of violability is an appropriate solution as to when to accept such interests of fetuses.³⁵ Before that point in gestation, the fetus is too immature and undeveloped, not to mention its dependency on the mother's body, to be considered as existing. The mere fact that it obtains the capability to develop into a human individual is often confused with the philosophical truth that only if a creature exists, only then past events can be against his interests. To explain it more directly, today, it is against my interest to kill me. Nevertheless, it does not mean that it was against myself to abort pre-viable fetus which has developed into me because obviously, in that time I did not exist. Dworkin concluded that it would not be against anyone's interest to abort because there would never have been anyone whose interest can be harmed. "Whether abortion is against the interests of fetuses must depend on whether the fetus itself has interests at the time the abortion is performed, not whether interests will develop if no abortion takes place."³⁶

³⁴ *See id.*, at 16

³⁵ DWORKIN, *supra* note 20, at 55

³⁶ DWORKIN, *supra* note 19, at 17-19