Constitutionalising a Right to Abortion: Unveiling its Transformative Potential Amidst Challenges in Europe

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Enshrining a right to abortion in the constitution – functions and effects of constitutionalisation – the fundamental nature of abortion and its link to core principles of constitutionalism – the instrumental-procedural function of constitutionalisation – limits to protection of abortion rights at the level of the European Court of Human Rights – unpredictability of judicial interpretation of fundamental rights – constitutional design pathways to specify the content and scope of a right to abortion – the potential of the standstill principle

Introduction

Several calls for a constitutional right to abortion have emerged in European jurisdictions in response to the United States Supreme Court's ruling in *Dobbs* v *Jackson Women's Health Organisation* (2022). In this landmark judgment, the Court unequivocally rejected an interpretation of the Constitution that would imply a right to abortion, opting instead to delegate the authority to regulate abortion to the individual states and their representatives.[1] The decision overruled long-standing precedent, primarily established by *Roe* v *Wade* (1973) and *Planned Parenthood* v *Casey* (1992).[2]

[1] *Dobbs* v *Jackson Women's Health Organization*, No. 19-1392, 597 U.S. (2022).
[2] *Roe* v *Wade*, 410 U.S. 113 (1973); *Planned Parenthood* v *Casey*, 505 U.S. 833 (1992).

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Commentators had long forecasted a setback in abortion rights in the US, attributing it to judicial activism in an increasingly conservative Court.[3] In Europe, the rise of far right and religious extremist movements has similarly fuelled concerns over drawbacks of established abortion rights.[4] Collectively, these dynamics have heightened vigilance and prompted calls for a solidification of the right to abortion at the European supranational and national level. In the EU, the European Parliament recently cautioned against global threats to abortion rights and urged the recognition of the right to abortion in the EU Charter of Fundamental Rights.[5] At the national level, including in France,[6] Belgium,[7] Norway,[8] and Sweden,[9] various efforts to enshrine a right to abortion in constitutions were made. In France, these efforts were crowned with success: on

[3]Both *Roe* and *Dobbs* were subjected to judicial activism criticisms; T. Nichols, 'Roe was Flawed. Dobbs is Worse', *The Atlantic*, 27 June 2022, https://www.theatlantic.com/newsletters/archive/2022/06/dobbs-conservative-justices-activist-court-roe-overturned/661410/, visited 29 August 2024.

[4]N. Datta, 'Tip of the Iceberg: Religious Extremist Funders against Human Rights for Sexuality and Reproductive Health in Europe' (European Parliamentary Forum for Sexual & Reproductive Rights 2021), https://www.epfweb.org/sites/default/files/2021-08/Tip%20of%20the%20Iceberg%20August%202021%20Final.pdf, visited 29 August 2024.

[5]European Parliamentary Resolution, 'Global Threats to Abortion Rights: the Possible Overturning of Abortion Rights in the US by the Supreme Court', 9 June 2022, P9_TA(2022)0243, https://www.europarl.europa.eu/doceo/document/TA-9-2022-0243_EN.html; European Parliament Resolution, 'Including the Right to Abortion in the EU Fundamental Rights Charter', 11 April 2024, B9-0205/2024, https://www.europarl.europa.eu/doceo/document/TA-9-2024-0286_EN.html, both visited 29 August 2024.

[6]French legislative proposal n° 293 was eventually thoroughly debated and amended in both National Assembly and the Senate: Proposition de loi constitutionnelle visant à protéger et à garantir le droit fondamental à l'interruption volontaire de grossesse', http://www.senat.fr/dossier-legislatif/ppl22-143.html, visited 29 August 2024.

[7]Proposition de révision de l'Article 22 de la Constitution en vue de reconnaître le droit à l'interruption volontaire de grossesse/Voorstel tot herziening van artikel 22 van de Grondwet met het oog op de erkenning van het recht op vrijwillige zwangerschapsafbreking, Parl.doc. 55 2832/001 (2021-2022), 28 June 2022, https://www.dekamer.be/kvvcr/showpage.cfm?section=flwb&language=nl&cfm=/site/wwwcfm/flwb/flwbn.cfm?dossierID=2832&legislat=55&inst=K, visited 29 August 2024.

[8]Grunnlovsforslag om ny § 103 (om rett til frivillig å avbryte eget svangerskap) [*Constitutional proposal on new section 103 (on the right to voluntarily terminate one's own pregnancy*], Dokument 12:1 S (2022–2023), https://www.stortinget.no/no/Saker-og-publikasjoner/Publikasjoner/Grunnlovsforslag/2022-20232/dok12-202223-001/, visited 29 August 2024.

[9]Press Release Justice Department, 'Regeringen tillsätter en grundlagskommitté som ska utreda några frågor om grundläggande fri- och rättigheter' [*The government appoints a constitutional committee to investigate some questions about fundamental freedoms and rights*], https://www.regeringen.se/pressmeddelanden/2023/06/regeringen-tillsatter-en-grundlagskommitte-som-ska-utreda-nagra-fragor-om-grundlaggande-fri–och-rattigheter/, visited 29 August 2024.

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the symbolic date of 8 March 2024, the freedom to have an abortion was recognised in the French Constitution.[10]

Despite its eventual adoption, the constitutional reform in France was preceded by controversial debates and multiple amendments. Similarly, in other countries that are contemplating constitutional reform, the subject of embedding abortion rights in the constitution does not fail to attract scrutiny. Legal scholars and various legal and policy bodies have particularly questioned the necessity, suitability, and added value of constitutionalising[11] a right to abortion within European-national contexts.

In this article, we begin by reviewing these controversies, including potential limitations of constitutionalisation identified in wider scholarship on abortion law. We then examine the validity of opposition to constitutionalisation by uncovering the functions that constitutionalisation of a right to abortion would fulfil, guiding our conclusions on the added value of an explicit constitutional right to abortion. Building on the previous two sections, the third section explores various constitutional design challenges and pathways associated with the constitutionalisation of a right to abortion, based on a comparative case study focusing on Belgium.

Our findings suggest that constitutionalisation of a right to abortion would fulfil an important symbolic function in that it reflects the fundamental nature of reproductive rights, including abortion. In addition, constitutionalising a right to abortion *could* procedurally succeed in limiting the interpretative margin afforded to future interpreters of constitutional norms, reducing the risk at exacerbation of a right which, by its very nature, remains controversial and vulnerable. However, as we will demonstrate, the extent to which this limiting potential is realised and the added value of constitutionalisation achieved will be highly dependent on the constitutional design, for which we identify and discuss various options.

Challenges to constitutionalisation of a right to abortion

Various criticisms of enshrining abortion rights in constitutions have been raised in recent months by scholars, political bodies and legal authorities. In France, for

[10]Loi constitutionnelle du 8 mars 2024 relative à la liberté de recourir à l'interruption volontaire de grossesse, Journal officiel, 9 March 2024.

[11]Although the term 'constitutionalisation' can be more broadly and differently understood (*see*, for instance, M. Loughlin, 'What is Constitutionalizing?', in P. Dobner and M. Loughlin (eds.), *The Twilight of Constitutionalism?* (Oxford University Press 2010) p. 47), we deploy it specifically to refer to the inclusion of the subject of abortion within the text of a national Constitution (thus using the term 'Constitution' in its strict formal sense).

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instance, the Senate's Commission of Laws[12] contended that the existing legal safeguards for abortion were sufficiently satisfactory, pointing to the French statutory abortion legislation and the rulings of the French Constitutional Council.[13] Referring to the fact that the French Constitutional Council had previously acknowledged the freedom to terminate a pregnancy as a facet of women's liberty protected under the French Declaration of the Rights of Man and Citizen (1789), the Commission of Laws concluded that there was 'a high likelihood' that the Council would deem restrictions on voluntary termination of pregnancy to be in violation of the Constitution. Further, the Commission of Laws added that it would be inopportune to launch a debate on a matter that is not currently under threat in France, especially considering the weighty procedure of constitutionalisation. Among professors in public law, Anne Levade largely agrees with the Commission, stressing three main differences between the French and US context that, in her view, render constitutionalisation in France superfluous: in France, the law rather than jurisprudence guarantees the right to abortion; the Constitutional Council gives members of parliament a wide margin of discretion on social issues; and no strong anti-abortion groups exist.[14] A revision of the French Constitution in reaction to a decision of the US Supreme Court would, therefore, be incongruous. Furthermore, Charvin points towards the alterability of the constitutional text, warning that 'claiming that a constitutional freedom is "irreversible" is as naive as it is dangerous', 'since what can be done can also be undone'.[15] He also cautions that over-inclusiveness of constitutions risks diminishing the normative relevance of the Constitution.[16]

Lessons from abortion debates beyond the French context may also advise against excessive constitutionalisation optimism. The Irish case, for instance, demonstrates how the insertion of the subject of abortion into the realm of constitutional debate may result in solidifying abortion prohibitions, rather than rights. In 1983, a two-thirds majority in an Irish public referendum supported the

[12]This Commission, comprised of politicians, is one of the French Senate's seven standing commissions. It plays a key role in the drafting of legislation by holding hearings and proposing amendments.

[13]Commission des Lois (Sénat), 'L'essentiel sur la proposition de loi constitutionnelle visant à protéger et à garantir le droit fondamental à l'interruption volontaire de grossesse et à la contraception', 12 October 2022, https://www.senat.fr/lessentiel/ppl21-872.pdf, visited 29 August 2024.

[14]A. Levade, 'Inscrire le droit à l'avortement dans notre Constitution, une proposition ni justifiée ni pertinente', *Le club des juristes*, 27 June 2022, https://www.leclubdesjuristes.com/justice/inscrire-le-droit-a-lavortement-dans-notre-constitution-une-proposition-ni-justifiee-ni-pertinente-par-anne-levade-professeur-de-droit-public-a-luniversite-paris-1-pantheon-sorbonne-membre-du-c-908/, visited 29 August 2024 (authors' translation).

[15]B. Charvin, 'Is France Desacralizing its Constitution?', *Verfassungblog*, 16 November 2023, https://verfassungsblog.de/is-france-desacralizing-its-constitution/, visited 29 August 2024.

[16]Ibid.

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insertion of abortion into the Irish Constitution in a restrictive sense. Indeed, 'constitutionalisation' in the Irish case meant that a ban on abortion was voted into the Eighth Amendment of the Constitution, effectively depoliticising the question and making future attempts to liberalise abortion access highly complex.[17] These perspectives on the Irish case reflect the argument of the French Commission of Laws, warning that inserting abortion in the constitutional debate could 'backfire against the right it means to protect'. These warnings capture a political rather than a legal risk: indeed, the effect of solidifying and protecting a right from political interference would be much welcomed by abortion proponents if the process of constitutionalisation resulted in positive protections rather than negative restrictions on access to abortion.

A different kind of weakness associated with constitutionalisation is worth mentioning here, although it pertains as much to a constitutional as to a statutory recognition of abortion rights. Specifically, formal abortion rights may fail to address the precise needs and lived experiences of abortion-seekers, especially those most vulnerable. Among others, West argues that marginalised groups need more than a minimalist legalistic response, and that reproductive justice might be better achieved through ordinary political means rather than through constitutional adjudication.[18] For instance, the constitutionalisation of a right to abortion may not adequately serve pregnant people's autonomy and broader reproductive justice as long as medically unnecessary restrictions and procedural hurdles remain in place in statutory law or abortion practice (such as mandatory waiting periods or high procedure costs).[19] These criticisms underline that (constitutional) rights-based approaches to abortion should, at least, bear in mind the social rights dimension, be coupled with justice-based measures to facilitate effective abortion access for all and health policies accompanied by adequate budgets.

Finally, proposals to constitutionalise abortion rights in European nations also face legal-technical challenges. The Belgian 'Scientific Committee for the Evaluation of Abortion Law and Practice' that was appointed by the Federal Government to formulate recommendations on abortion, for instance, emphasised the need for cautious deliberation of the novel constitutional phrase to prevent mere symbolism and ambiguity.[20] In France, an important

[17]T. Reidy, 'Constitutionalising Abortion: Consequences for Politics and Policy', 34 *King's Law Journal* (2023) p. 251; D. Kenny, 'Abortion, the Irish Constitution, and Constitutional Change', 5 *Revista de Investigacoes Constitutcionais* (2018) p. 270.

[18]R. West, 'From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights', 118 *Yale Law Journal* (2009) p. 1394.

[19]We thank the reviewer for bringing this important nuance to our attention.

[20]Scientific Committee for the evaluation of abortion law and practice in Belgium, 'Study and Evaluation of the Abortion Law and Practice in Belgium', April 2023, p. 97-103 (Dutch version), https://vlir.be/nieuws/studie-en-evaluatie-van-de-abortuswet-en-praktijk-in-belgie/, visited 29

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constitutional design question pertained to *where* in the Constitution a right or freedom to terminate a pregnancy would be best situated.[21]

In the next sections, we undertake an examination of the validity of raised objections and challenges to the constitutionalisation of abortion and, where feasible, propose some solutions to surmount them. As 'constitutionalisation is ... best understood by reference to the related concepts of constitution and constitutionalism',[22] our inquiry commences by investigating the common functions of constitutions from a broader theoretical perspective. Subsequently, we engage with the question of the added value of the constitutionalisation of abortion in light of these functions. In a final section, we present a case study of Belgium that enables us to better identify and comprehend the constitutional design pathways associated with constitutionalising a right to abortion. That final section first situates the topic in the Belgian law and context, after which it addresses the positioning, nature, and scope of a potential future constitutional right to abortion. To build on the Belgian case and to enrich our analysis beyond this national case study, we incorporate comparative constitutional law insights from France and the US.

The functions of the Constitution and the added value of constitutionalising a right to abortion

Arguments advocating support for the constitutionalisation of the right to abortion are developed, at least partially, on the basis of the legal, instrumental and symbolic functions of constitutions.[23] Similarly, opposition to a constitutional right to abortion reflects conceptions about what constitutions can or cannot do. In this section, we consider two main functions of constitutions, situating them first in the general theory on constitutionalism and subsequently linking them to the abortion debate in the context of Europe. This exercise demonstrates what, at least from a constitutional law perspective, may be seen as the added value of a constitutional right to abortion. Conducting this exercise also helps us to identify

August 2024. The authors of this paper were either consulted by this Scientific Committee or assisted in drafting the report's chapter on a constitutional right to abortion, explaining some analogies between said chapter and this article.

[21]French Council of State, Avis n° 4076677, December 2023, p. 3-4.

[22]Loughlin, *supra* n. 11, p. 47.

[23]Scholars expressing support for constitutionalisation of abortion include S. Hennette-Vauchez et al., 'Pourquoi et comment constitutionnaliser le droit à l'avortement', *La Revue des droits de l'homme - Actualités Droits-Libertés* [online] (2022); M. Mesnil, 'Variations autour de la constitutionnalisation du droit à l'IVG', 48 *La Semaine Juridique* (2022) p. 1351; S. Wattier, 'Faut-il constitutionnaliser le droit à l'avortement? : Réflexions au départ de l'expérience des États-Unis', 6921 *Journal des Tribunaux* (2022) p. 832.

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and overcome the constitutional design challenges associated with abortion, as will be explored in the final section below.

The symbolic or substantive function of constitutionalisation: reflecting the fundamental nature of rights

Theories of constitutionalism distinguish between the formal sense of the constitution (a set of rules that cannot be modified by regular legislation) and the substantive sense of the constitution (the most essential rules safeguarding individual and collective self-determination – including fundamental rights). The identification of these 'most essential rules' deserving of constitutionalisation in the formal sense falls under the authority of the constituent power. While some scholars consider that constitutionalism is only about the procedural dimension, other theories of constitutionalism offer a more substantive content.[24] Departing from these theories, we identify in the following sections core substantive principles of constitutionalism and examine how they may ground the fundamental nature of abortion rights.

Abortion rights and, more broadly, reproductive rights are frequently built upon the idea of **liberty** or **individual freedom**, one of the very foundations of modern constitutionalism. Landmark cases such as *Roe* (US) and *Morgentaler* (Canada) were rooted in a vision of personal liberty. Departing from the latter case, however, Lessard argues that reconception of personal liberty is needed to accord with the premises of feminist writings, entailing 'a different view of the state, one in which state power is the mediator and facilitator of rights rather than antithetical to freedom' and one in which 'rights are no longer abstractly defined spheres of non-interference but rather are contingent on situation and relationship'. This 'shift in the view of the self as embedded in social relations rather than abstract and unencumbered' requires that 'particular and "private" experiences of disempowerment within the inviolable spheres of classical legal consciousness and at the hands of private power, be given relevance in the determination of rights'.[25]

Others argue that abortion rights are inherent to **equality**. Cook and Dickens consider that '[t]he power a state claims to conscript women to give their bodies against their will to deliver children at its legal demand confirms that women are only lesser or second-class citizens'.[26] For them, abortion-related discrimination

[24]D. Grimm, 'The Achievement of Constitutionalism', in Dobner and Loughlin (eds.), *supra* n. 11, p. 10-11.

[25]H. Lessard, 'Relationship, Particularity, and Change: Reflections on R. v. Morgentaler and Feminist Approaches to Liberty', 36 *McGill Law Journal* (1991) p. 263 at p. 306.

[26]R.J. Cook and B.M. Dickens, 'Human Rights Dynamics of Abortion Law Reform', 25 *Human Rights Quarterly* (2003) p. 1 at p. 43.

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on grounds of sex and gender is often linked with other unjustified distinctions in treatment on other grounds (race, ethnicity, social status, age) – a situation of intersectional discrimination which 'illustrates the pervasive violation of the right to equality that creates the subordinate status that many women occupy in their families, communities, wider societies, and legal systems'.[27] From this perspective, dtates may be considered to discriminate against women if, without objective and reasonable justification, they 'fail to treat women according to their different reproductive function'.[28] Despite the potential of the equality argument, in most jurisdictions abortion faces greater difficulty in being viewed by the judiciary as an issue of equality than as a question of liberty or privacy.[29]

Building on the vision that reproductive rights are an essential aspect of liberty and/or of equality, some scholars configure these rights as **democratic rights**, intrinsically linked to **citizenship** and the social contract.[30] According to Hennette-Vauchez, Roman and Slama, most constitutions' silence on issues of reproduction (including abortion) paradoxically neglects the fact that the existence of the political community – which is founded by the social contract formalised through the Constitution – is itself highly dependent on the reproductive work carried out by women.[31] Therefore, these scholars view the insertion of matters of reproduction (including abortion) into the Constitution as a way to break with the gendered order of the modern constitutionalist paradigm. Along the same lines of reasoning, some feminist scholars seem to consider reproductive rights so essential that, in their absence, one could not rightfully speak of a constituent power. We can find traces of this way of thinking in the writings of Hester Lessard and Joanna Erdman, who 'link the private right of reproductive freedom to the heart of the democratic political tradition', seeing it as 'a prerequisite of legitimate government no less than the traditional civil and political rights of man'.[32] Accordingly, restrictions on reproductive self-determination may not solely be perceived as violations of equality or of liberty, but also of (a lack of) citizenship rights. This political understanding of abortion rights has far-reaching consequences: instead of thinking about abortion and reproductive liberty as questions excluded from the state and therefore privatised, thinking about abortion rights as democratic rights implies thinking about those

[27]Ibid., p. 35.

[28]Ibid.

[29]R.B. Siegel, 'The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restriction', 3 *University of Illinois Law Review* (2007) p. 1050. For her proposal to consider sex equality in the reproductive liberty cases *see* p. 1050-1052.

[30]Lessard, *supra* n. 25, p. 263.

[31]Hennette-Vauchez et al., *supra* n. 23.

[32]J.N. Erdman, 'Constitutionalizing Abortion Rights in Canada', 49 *Ottawa Law Review* (2017-2018) p. 256-257.

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rights 'as a collective struggle in society'.[33] In the same line of reasoning, the gaps in the majority of the world's constitutions with regard to reproductive rights (including abortion) may be considered 'products of times ... when women lacked or lack the political power of full citizenship to overcome patriarchal governments'.[34] It is correctly argued that 'abortion is safest where women are more respected as citizens of the countries in which they live'.[35]

The foregoing discussion serves to underline that reproductive rights are not mere trivial rights whose constitutional inclusion can be dismissed easily by the argument of constitutional over-inclusiveness or the absence of tangible political treats in a country. Instead, reproductive rights bear an essential relationship to core substantive principles of constitutionalism such as equality, liberty and citizenship, which support, from a substantive and symbolically affirmative point of view, their inclusion in the constitutional catalogue of fundamental rights.

The instrumental or procedural function of constitutionalisation: strengthening the legal protection level of rights

A constitution also fulfils instrumental procedural functions.[36] Constitutionalisation of fundamental rights implies thinking about rights and freedoms as 'values constituting subjective rights intended to be disseminated throughout the legal order by means of constitutionality control mechanisms'[37] and as defining 'constitutional axiology that is intended to be imposed on all constituted powers'.[38] This function stands at the centre of argumentation in favour of the constitutionalisation of a right to abortion: the idea is to enshrine an overriding right/freedom that all subordinate powers must uphold. In the following paragraphs we critically analyse a key challenge raised to this procedural argument in European settings, namely, that abortion rights are already sufficiently protected by fundamental constitutional and/or supranational rights standards. To do so, we examine the presence of these overriding fundamental rights in the national and supranational context of Europe and the manner in which prominent courts have interpreted and applied these standards to the question of abortion. This enables us to develop a perspective on whether an explicit constitutional right to abortion would add any value, in the procedural sense, in terms of strengthening abortion rights.

[33]Ibid.
[34]Cook and Dickens, *supra* n. 26, p. 44.
[35]Ibid., p. 45.
[36]Loughlin, *supra* n. 11, p. 50.
[37]V. Champeil-Desplats, *Théorie générale des droits et libertés. Perspective analytique* (Dalloz 2019) p. 173.
[38]Ibid.

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In contrast to other regions in the world, the role of constitutional law in establishing abortion rights has been relatively limited in Europe.[39] Most abortion 'rights' in the European context stem from statutory abortion law or are carved out as exceptions to criminal law prohibitions. While it is not uncommon for the domestic constitutional courts of European states to declare legal frameworks regulating abortion in conformity with the constitutions of those states, these do not necessarily establish an explicit constitutional right to abortion. Moreover, explicit references to abortion in written constitutions were entirely absent from European constitutions until France adopted constitutional reform in March 2024. Some European constitutions, however, did already recognise rights to sexual and/or reproductive decision-making or health – rights that *may* include abortion but do not always translate into concrete protections for abortion.[40] Particular mention should be made of the 1974 Yugoslav Constitution, which was the first to recognise a right to family planning. After the fall of communism, several Eastern European countries retained similar provisions in their constitutions. A reference to reproductive decision-making is, for instance, still enshrined in the Slovenian Constitution, which determines that 'Everyone shall be free to decide whether to bear children'. Notwithstanding the importance of these rare references to reproductive health or decision-making in European constitutions, none of these effectively recognise a duty to protect or fulfil abortion services as a component of the right to sexual and reproductive health.[41]

Other, more broad fundamental rights that are commonly present in European constitutions may be linked to abortion by means of judicial interpretation, such as the right to equality, autonomy, privacy, integrity, dignity, etc. However, the extent to which fundamental rights are considered to ground abortion rights by

[39]On rare occasions, constitutional courts in Europe have weighed in substantively on the matter of abortion. For instance, the German Constitutional Court has held that the foetus' life is constitutionally valued and abortion should be principally prohibited, while simultaneously recognising that some indications may relieve doctors and women from prosecution: derived from two important decisions by the German Federal Constitutional Court: BVerfG, 25 February 1975, 39 BVerfGE 1; BVerfG, 28 May 1993, 88 BVerfG 203. German criminal abortion regulation resides in the Strafgesetzburch §218-219, https://www.buzer.de/s1.htm?g=StGB&a=218-219b, visited 29 August 2024.

[40]Illustrations outside of Europe include, for instance, the Mexican Constitution, guaranteeing that '(e)very person has the right to decide, in a free, responsible and informed manner, about the number of children desired and the timing between each of them.'; the South African Constitution guaranteeing that '(e)veryone has the right to bodily and psychological integrity, which includes the right ... to make decisions concerning reproduction'; the Nepali Constitution, listing the 'woman's right to reproductive health'.

[41]L.B. Pizzarossa and K. Perehudoff, 'Global Survey of National Constitutions: Mapping Constitutional Commitments to Sexual and Reproductive Health and Rights', 19 *Health and Human Rights* (2017) p. 279.

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the domestic judiciary is highly dependent on the composition of the court and judicial approaches to interpretation. Moreover, supranational case law may limit or instruct the interpretation of core fundamental rights at the domestic level. More specifically, in interpreting the ECHR, the European Court of Human Rights has repeatedly held that, while abortion laws and restrictions touch upon the sphere of the right to private life, the right to private life does not contain a right to abortion.[42] In *A, B, C* v *Ireland* and more recently in *M.L.* v *Poland,* the Court reiterated its long-held position that 'Article 8 cannot be interpreted as meaning that pregnancy and termination pertain uniquely to the woman's private life', given that 'her private life becomes closely connected with the developing foetus'.[43] As pointed out in legal doctrine, it is unclear why this connection 'should cast doubt about the private life nature of pregnancy itself' and why the balancing between the private life right of the mother and the interests of the foetus should be differently framed than the usual balancing performed under Article 8(2) of the ECHR.[44] After all, the Court has clearly held that the prohibition of termination of pregnancy sought for reasons of maternal health, social well-being, or foetal anomaly (which covers most reasons for abortions) constitutes an interference with privacy rights. This suggests that there may, in fact, be a right to abortion under Article 8 ECHR, although it is not an absolute right.[45] The key question for the judiciary boils down to establishing whether the disputed abortion regulation amounts to an *(un)justified* interference under Article 8(2) of the ECHR.[46] In conducting this exercise in the past, the Court has upheld some of Europe's strictest abortion laws, finding no breach of the right to respect for private life and relying on a broad margin of appreciation for States to regulate the matter. For instance, in *A, B, and C* v *Ireland*, the Court deemed Ireland's highly restrictive abortion law justifiable, suggesting that the alleged internal (restrictive) consensus in the country could take precedence over the European (more liberal) consensus.[47] The Court came to this conclusion by explicit reference to 'the lengthy, complex and sensitive debate in Ireland' as well as the 'profound moral values concerning the nature of life which were reflected in

[42]ECtHR 16 December 2010, No. 25579/05, *A, B and C* v *Ireland*, paras. 213-214; ECtHR 14 December 2023, No. 40119/21, *M.L.* v *Poland*, paras. 93-94.

[43]Ibid., *A, B and C*, para. 213.

[44]E. Wicks, 'A, B, C v Ireland: Abortion Law under the European Convention on Human Rights', 11 *Human Rights Law Review* (2011) p. 559-560.

[45]The dissenting opinion by ECtHR judges Wojtyczek and Paczolay in *M.L.* v *Poland* (2023) also points out this contradiction (para. 3).

[46]*See*, for instance, *A, B and C* v *Ireland*, *supra* n. 42, para. 216; para. 218 ff.

[47]F. de Londras and K. Dzehtsiarou, 'II. Grand Chamber of the European Court of Human Rights, A, B & C v Ireland, Decision of 17 December 2010', 62 *International & Comparative Law Quarterly* (2013) p. 250.

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the stance of the majority of the Irish people against abortion'.[48] While the absence of such deeply held views on the immorality of abortion in most European jurisdictions minimises the threat that abortion bans in these states would be upheld by the European Court of Human Rights, the level of permissible state interference with Article 8 of the ECHR remains unknowable.[49] After all, the Court has not explicitly addressed the appropriateness of most of the substantive abortion restrictions, such as maximum gestational age limits and procedural barriers, that currently lie at the centre of many abortion debates in European jurisdictions.[50]

Bearing in mind the national legislator's wide margin of appreciation to determine the permissibility of abortion, a similarly reserved attitude from domestic constitutional courts could, perhaps, be anticipated when faced with addressing the compatibility between regressions of abortion rights and 'broader' fundamental rights, such as the right to privacy, bodily integrity, autonomy, or equality. This need not, per the definition, be the case: constitutional courts may also establish a greater protection for abortion than is currently observed at the European Court of Human Rights. In fact, there are reasons to suspect that domestic constitutional courts in Europe would be less reluctant than the Strasbourg Court to find fundamental rights violations when assessing initiatives to roll back abortion rights. Unlike the European Court of Human Rights, domestic courts must not weigh in on the presence or absence of the so-called European consensus; they do not have to respect states' sovereignty. At the same time, however, constitutional courts may feel constrained from going against democratically adopted legislation and instead opt to reproduce the hands-off approach of the European Court of Human Rights in the name of a certain approach to separation of powers.

More recently, both the US and Polish constitutional courts' decisions on abortion served as powerful reminders of the leeway that courts possess when

[48]*A, B and C* v *Ireland*, *supra* n. 42, paras. 222-227; paras. 239-241.

[49]*See*, for instance, the deviating perspectives of ECtHR case law submitted by European legal scholars as amicus briefs to the US Supreme Court in *Dobbs* v *Jackson*: 'Amicus brief of European legal scholars as amici curiae in support of neither party', https://www.supremecourt.gov/DocketPDF/19/19-1392/185153/20210728162714090_European%20Legal%20Scholars%20Amici%20Brief.pdf; 'Amicus brief of European law professors as amici curiae in support of respondents', https://www.supremecourt.gov/DocketPDF/19/19-1392/193093/20210920192331848_Brief%20of%20Amici%20Curiae%20European%20Law%20Professors%20iso%20Respondents.pdf; 'Amicus brief of the European centre for law and justice in support of petitioners', https://www.supremecourt.gov/DocketPDF/19/19-1392/185175/20210729084523486_ACLJ%20Amicus%20Dobbs%20v.%20JWHO%207.29.21%20FINAL%20TO%20FILE.pdf, all visited 29 August 2024.

[50]Art. 8 ECHR would, however, protect against an abortion ban without exceptions for severe risk to the life of the pregnant individual. *See* former European Commission of Human Rights in ECHR 13 May 1980, No. 8416/78, *W.P.* v *United Kingdom*, paras. 19-20.

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interpreting fundamental rights and their relationship to abortion. In the case of the US, Murray and Siegel blame judge Roberts' Supreme Court's enabling of a 'jurisprudence of masculinity' and its selective commitment to originalism. They underline the critical fact that the historical constitutional moments that were valued by the Court's originalism were essentially moments in which women were excluded from political participation, lawmaking and public life.[51]

In relation to the Polish Constitutional Tribunal's decision to hold unconstitutional the foetal anomaly ground for abortion, criticisms revolve both around the fact that the deciding court was problematically composed and that the substance of the decision embodied judicial activism, 'going well beyond what the Constitution explicitly says'.[52] In its most recent abortion case, the European Court of Human Rights weighed in solely on the argument about the composition of the Polish Court.[53] The Court reiterated that the Polish Constitutional Tribunal was composed in violation of basic rule of law principles, compromising the legitimacy of the Tribunal bench that had introduced the impugned abortion restriction. The European Court of Human Rights, therefore, found that the interference with the rights of a pregnant person who was denied abortion access could not be regarded as lawful in terms of Article 8, because it had not been issued by a body compatible with the rule of law requirements. While this decision by the Strasbourg court offers crucial safeguards against potential drawbacks of abortion rights stemming from illegitimate anti-abortion courts and political bodies, the European Court of Human Rights again refrained from judging substance, i.e. the question whether the prohibition of abortion for foetal anomalies is justified under the ECHR. It also found inadmissible the claim that the denial of abortion for foetal anomaly under Polish law could amount to a form of inhuman and degrading treatment under Article 3 of the ECHR, despite convincing case details and instructive findings from the UN Human Rights Committee possibly supporting a different conclusion.[54]

These reflections on the recent US, European Court of Human Rights and Polish abortion decisions lead us to formulate a general warning about relying on judicial interpretation of supranational and constitutional fundamental rights to protect abortion rights. No interpretation of constitutional provisions is self-

[51]R.B. Siegel, 'Commentary. How "History and Tradition" Perpetuates Inequality: Dobbs on Abortion's Nineteenth-century Criminalization', 60 *Houston Law Review* (2023) p. 936; M. Murray, 'Children of Men: The Roberts Court's Jurisprudence of Masculinity', 60 *Houston Law Review* (2023), p. 803.

[52]A. Gliszczyńska-Grabias and W. Sadurski, 'The Judgment That Wasn't (But Which Nearly Brought Poland to a Standstill): "Judgment" of the Polish Constitutional Tribunal of 22 October 2020, K1/20', 17 *EuConst* (2021) p. 139.

[53]*M.L.* v *Poland*, *supra* n. 42.

[54]*See* Concurring Opinion by Judges Jelić, Felici And Wennerström in *M.L.* v *Poland*, *supra* n. 42.

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evident; in fact, it is rather complicated to consider that there are 'reasonable' and 'unreasonable' interpretations.[55] Generally speaking, constitutional provisions remain resources available to their interpreters[56] – here we endorse the interpretive scepticism that characterises all legal realist theories. According to the weak version of realism, every provision expresses several norms, and every person called upon to take a decision on the basis of a provision chooses, at the end of an act of will, the norm with which he will justify his decision.[57] For authors who defend a strong version of realism, interpreters of constitutional provisions are not (*de jure*) legally obliged to interpret a provision in one way or another, as they themselves determine the legally binding meaning of a provision.[58] In fact, it has yet to be demonstrated 'that there are factors that compel constitutional judges to resort to specific methods of interpreting rights and freedoms'.[59]

To conclude, no constitutional provision can be given an assured meaning independently of the subsequent stages of authentic interpretation. And it has been demonstrated, especially in the US context, that certain methods of interpretation can be used in contradictory and gendered ways. Therefore, the discussion on a formal constitutionalisation of the right to abortion must be situated on the scale of maximising or minimising the possible constraint exerted, depending on the constitutional design adopted, on its future interpreter – whether judiciary, executive or legislative power. This conception of textual constraint will be our grid for analysing current or proposed

[55]*See* the debate about the interpretation of the text of the French Senate: O. Beaud, 'Pour une interprétation raisonnable de la disposition votée par le Sénat sur la constitutionnalisation du droit à l'IVG', *JP Blog*, 18 February 2023, https://blog.juspoliticum.com/2023/02/18/pour-une-interpretation-raisonnable-de-la-disposition-votee-par-le-senat-sur-la-constitutionnalisation-du-droit-a-livg-par-olivier-beaud/; S. Hennette-Vauchez, 'Raisons et déraison dans l'interprétation de la Constitution', *JP Blog*, 14 March 2023, https://blog.juspoliticum.com/2023/03/14/raisons-et-deraison-dans-linterpretation-de-la-constitution-par-stephanie-hennette-vauchez/; O. Beaud, 'Réplique à une réponse. Contenu et portée d'une controverse sur la constitutionnalisation du droit de recourir à l'lavortement', *JP Blog*, 1 April 2023, https://blog.juspoliticum.com/2023/04/01/replique-a-une-reponse-contenu-et-portee-dune-controverse-sur-la-constitutionnalisation-du-droit-de-recourir-a-lavortement-par-olivier-beaud/, all visited 29 August 2024.

[56]M. Barberis, 'El Realismo Jurídico Europeo-Continental', transl. A.N. Vaquero, in J.L. Fabra Zamora and Á. Núñez Vaquero (eds.), *Enciclopedia de filosofía y teoría del derecho: Volume 1* (Univversidad Nacional Autónoma de México 2015) p. 237.

[57]R. Guastini, 'Le réalisme juridique redéfini', 19 *Revus* (2013) p. 116; R. Guastini, 'Rule-scepticism Restated', in L. Green and B. Leiter (eds.), *Oxford Studies in Philosophy of Law: Volume 1* (Oxford University Press 2011) p. 138.

[58]M. Troper, *Pour une théorie juridique de l'Etat* [*For a Legal Theory of the State]* (PUF 1994); M. Troper, *La théorie du droit, le droit, l'Etat* (PUF 2001); A. Le Pillouer, 'Indétermination du langage et indétermination du droit', 9 *Droit & Philosophie* (2017) p. 19.

[59]V. Champeil-Desplats, 'Existe-t-il une spécificité des méthodes d'inteprétation des droits et libertés par les juges constitutionnels ?', 1 *Revue française de droit constitutionnel* (2023), p. 43.

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constitutional provisions on abortion in the next section, which explores constitutional design pathways and challenges through the lens of a Belgian case study. We focus on Belgium, first, because the Belgian case is emblematic of the procedural and substantive issues relating to the constitutionalisation of abortion. Second, any legal scholarship on the Belgian case remains immediately relevant to policy debates, since a recent political decision on constitutional law reform in the country enabled constitutional reform of abortion-related articles in the next legislature.[60] Finally, the Belgian case study aligns with the legal expertise of the two authors, which concerns, on the one hand, Belgian abortion law, and on the other hand, Belgian constitutional law. Despite a focus on Belgium, the case discussion entails crucial comparative law insights, underscoring the subject's relevance to legal and policy debates in several other countries.

Constitutional design pathways and challenges: a Belgian comparative case study

Background to the Belgian abortion debate and law

Belgium joined the ranks of European countries legalising abortion relatively late, with the passing of federal legislation in 1990. The Act on Termination of Pregnancy maintained abortion as a crime under the Criminal Code but listed specific grounds for lawful termination of pregnancy as an exception to criminality. Among these conditions were a 12-week[61] abortion limit up to which abortion was allowed for a pregnant woman finding herself in a 'state of distress'; medical grounds that permit access to abortion after that limit; a six-day waiting period; and obligatory information to be provided by health professionals prior to performing an abortion. In 2018, the 'state of distress' criterion was removed, and the abortion regulation moved from the Criminal Code to a separate statutory Act on Voluntary Termination of Pregnancy.[62] In recent years, several initiatives have been proposed to further liberalise both the procedural and temporal aspects of the Belgian abortion law. These – so-far unsuccessful – initiatives included a heavily debated

[60]'Akkoord over herziening grondwet: staatshervorming en verankering abortus mogelijk' [*Agreement about reform constitution: state reform and enshrinement abortion possible*], *De Standaard*, 3 May 2024, https://www.standaard.be/cnt/dmf20240503_93888079, visited 29 August 2024.

[61]In contrast to most jurisdictions, in Belgian law the 12-week pregnancy is dated from conception rather than from the theoretical first day of the last menstrual period, accounting for a two-week difference in calculation.

[62]Nevertheless, criminal sanctions were maintained in the law for both pregnant individuals and abortion providers who violate the legal conditions: T. Vansweevelt et al., 'De Abortuswet 2018: over symbolische verbeteringen en openstaande knelpunten' [*The 2018 Abortion Act: about symbolic improvements and remaining bottlenecks*], 4 *TGZ* (2018) p. 220.

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parliamentary Bill seeking to extend the abortion limit from 12 to 18 weeks' pregnancy and to shorten the waiting period from six days to 48 hours.[63]

The Belgian Constitutional Court has never affirmed the presence of an explicit constitutional right to abortion. In a negative sense, however, the Court has argued that the abortion laws of 1990 and 2018 do not infringe upon alleged constitutional rights of the unborn. According to the Court, the Constitution itself and relevant international treaties do not establish that human beings, from conception, are entitled to the protection guaranteed by these legal instruments in the same way as living persons.[64] In its review of the 2018 relaxations of the abortion law, the Constitutional Court also briefly restated the position of the European Court of Human Rights that abortion 'touches upon' the private life of the pregnant woman, although not exclusively.[65] This right should be weighed against competing rights and freedoms, including those of the unborn child. The Constitutional Court applied this test to the amendments brought forward by the 2018 Act on Voluntary Termination of Pregnancy, concluding that they maintain a fair balance between the fundamental rights of the pregnant woman and the ethical concerns that the state must uphold.[66] This case law may lead some to conclude that access to abortion is already protected under the right to respect for private life, as enshrined in Article 22 of the Belgian Constitution, thereby rendering an explicit constitutional right to abortion superfluous. However, as the Constitutional Court has not been called upon to rule on the constitutionality of regressions in the law, this ultimately remains a vulnerable hypothesis.

[63]Wetsvoorstel tot tot versoepeling van de voorwaarden om tot een zwangerschapsafbreking over te gaan/Proposition de loi visant à assouplir les conditions pour recourir à l'interruption volontaire de grossesse [*Bill amending various legal provisions in order to relax the conditions to voluntary termination of pregnancy*], Parl.doc. 55 0158/009 (2019-2020), (Text approved after second reading sess.), https://www.dekamer.be/FLWB/PDF/55/0158/55K0158009.pdf, visited 29 August 2024.

[64]Former Belgian Court of Arbitration, No. 39/91, 19 December 1991, 6.B.3; Belgian Constitutional Court, No. 122/2020, 24 September 2020, B.5.1.

[65]Ibid., B.27.1.

[66]Ibid., B.27.3. Moreover, the Belgian Council of State was asked to review the parliamentary Bill which sought to further liberalise the 2018 abortion legislation. The Council of State deduced from ECtHR case law that 'the right to respect for private life . . . implies that every woman has the right to respect for her decision to become a mother or not and that her decision whether or not to terminate her pregnancy belongs to the sphere of private life and personal autonomy' [authors' translation]. It concluded that the legislator, who pursued the objective of strengthening the right of the woman to terminate her pregnancy, acted in accordance with the broad margin of appreciation afforded to him. *See* Belgian Council of State, Advisory Opinion No. 66.881/AV/AG, 24 February 2020 (in Dutch and French), http://www.raadvst-consetat.be/dbx/adviezen/66881.pdf#search=66.881%2FAV%2FAG, visited 29 August 2024.

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At the time of writing, a proposal from the Ecolo-Green faction to enshrine a right to abortion in the Constitution is pending in Belgian Federal Parliament.[67] The amendment adds a phrase to Article 22 of the Constitution containing the right to respect for privacy and family life, stating that that right comprises 'a right to voluntary termination of pregnancy'. The proposal, which is the first of its kind in Belgium, came in direct response to the US Supreme Court decision in *Dobbs*.[68] The explanatory memorandum to the proposal is centred around arguments of legal and political vulnerability of the statutory abortion legislation, reflecting the procedural-instrumental function of the Constitution.

Positioning the right in the Constitution

The question of where in the Constitution to place a right to abortion is not simply technical or an issue of aesthetics. The position of a right or freedom in the Constitution may have a considerabe impact on the constraints on judicial interpretation. In Belgian legal commentary, two main approaches to situating the right in the Constitution have been identified.[69] The first approach is the one proposed by the pending legislative proposal, which introduces a right to voluntary termination of pregnancy as a paragraph under the right to respect for private life. In the preamble of the proposal, the positioning of the right was explicitly motivated by the intention to reflect the principles established in Article 8 of the ECHR. Precisely due to the European Court of Human Rights' assessment of abortion laws considering the right to respect for private life, this right serves as a logical principle under which the topic of abortion could formally appear. However, lessons from constitutionalisation efforts in the US illustrate that this advantage may be a blessing in disguise. For instance, in discussing an initiative to enshrine a right to abortion in the Californian State Constitution,[70]

[67]Proposal to review Article 22 of the Constitution, *supra* n. 7.

[68]*See*, nonetheless, a reference in the legislative proposal's preamble to the initiative from sociology professor Mark Elchardus in the Chamber of Representatives (2018) to amend Art. 22 to include a right to physical integrity and self-determination, which includes the right to euthanasia and abortion: Inleidend verslag op parlementair initiatief: Het karakter van de Staat en de fundamentele. waarden van de samenleving/Rapport introductif d'initiative parlementaire: Le caractère de l'État et les valeurs. fondamentales de la société [*Introductory report on parliamentary initiative: the character of the state and its fundamental values of society*], Parl.doc. 54 2914/001, https://www.dekamer.be/FLWB/PDF/54/2914/54K2914001.pdf, p. 266, visited 29 August 2024.

[69]C. Romainville and T. Moonen, in S. Romans, 'Moet recht op abortus even gewaarborgd zijn als vrije meningsuiting' [*Must right to abortion be safeguarded to the same extent as the freedom of speech*], *De Tijd*, 28 June 2022, https://www.tijd.be/politiek-economie/belgie/federaal/moet-recht-op-abortus-even-gewaarborgd-zijn-als-vrije-meningsuiting/10398572.html, visited 29 August 2024.

[70]The Californian proposal known as SCA 10 reads: '(t)he state shall not deny or interfere with an individual's reproductive freedom in their most intimate decisions, which includes their fundamental

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legal observers discerned a substantial risk that 'the new California constitutional provision will either be interpreted by courts to have no effect, or that its underpinnings will be erased'.[71] The risk discerned by legal scholars needs to be understood in light of the *Dobbs* judgment, in which the federal Supreme Court repealed its earlier jurisprudence which had found a right to abortion in the (unwritten) privacy and liberty rights covered by the 'due process' clause of the Constitution's Fourteenth Amendment. Indeed, while the Californian proposal clearly confirmed a right to abortion, it also read that the novel right intended 'to further the constitutional right to privacy . . . '. Hence, the warning expressed here is that, when constitutional rights to abortion at the state level rely on the same foundation of privacy rights which have already been rejected by a higher Court, 'the state constitutional protection for reproductive liberty [is] vulnerable to the same judicial reinterpretation that federal abortion doctrine . . . faces'.[72] Therefore, Macbeth and Bernal propose that the novel constitutional right to abortion better specifies the rights and limitations that the constitutional right entails.[73] This is where an analogy with higher European supranational norms and jurisprudence may be discerned. As previously discussed, the European Court of Human Rights denies an explicit right to abortion and perpetuates doubt over which abortion regulations constitute an (unjustified) interference with Article 8. The constituent power risks reproducing this ambiguity when departing from the same privacy foundation as the European Court of Human Rights, unless it is able to transcend the legal ambiguity in some way (*see* below).

In addition to including abortion as a right under the right to respect for privacy in the Belgian Constitution, suggestions have been made to connect the right to social, economic, and cultural rights.[74] Article 23 of the Belgian Constitution, which safeguards 'the right to a dignified life', non-exhaustively enumerates certain economic, social, and cultural rights. This enumeration encompasses specific rights, including the right to work, the right to social security, protection of health and of social, medical, and legal assistance, and the right to cultural and social development (Article 23, 1°-6° Constitution). Abortion regulations not only touch upon private life, but also upon the human

right to choose to have an abortion and their fundamental right to choose or refuse contraceptives. This section is intended to further the constitutional right to privacy guaranteed by Section 1, and the constitutional right to not be denied equal protection guaranteed by Section 7. . . . '. *See* https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SCA10, visited 29 August 2024.

[71]A. Macbeth and E. Bernal, 'Fix the Fatal Flaw in SCA 10', *SCOCA Blog*, 22 June 2022, http://scocablog.com/fix-the-fatal-flaw-in-sca-10, visited 29 August 2024.

[72]Ibid.

[73]Ibid.

[74]*See*, for instance, Scientific Committee for the evaluation of abortion law and practice in Belgium, *supra* n. 20, p. 98-103.

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dignity of a pregnant person's life, her well-being, and her moral and material self-development in society. Moreover, abortion access is also frequently approached as a matter of healthcare and medical assistance.[75] Thus, an explicit inclusion of a fundamental right to abortion in Article 23 of the Constitution appears thematically justified. Another advantage of this position is that, unlike Article 22, Article 23's style of enumeration allows the addition of a right as specific as abortion. Moreover, if a right to abortion were enshrined in Article 23, pregnant individuals' subjective right to abortion could still be mobilised through Article 22 of the Constitution, as currently happens. In any event, the Belgian Constitutional Court frequently reads Article 23 of the Constitution in conjunction with Article 8 ECHR, confirming the interconnectedness between the right to a dignified life and the right to respect for private life.[76] Nevertheless, it must be added that the social, economic, and cultural rights embedded in Article 23 of the Constitution are, in principle, perceived to lack direct effect for individual rights-bearers. In this sense, the recognition of the right to abortion under Article 23 of the Belgian Constitution could be perceived inadequate by those who wish to establish an autonomous right to termination of pregnancy for the individual seeking it, and not only progressive, positive obligations for the state to realise abortion access. However, as will be addressed in the next section, it may be possible and recommended for the constituent power to specify the precise nature and content of the obligations that accompany the constitutional right under Article 23. This kind of precision would further maximise interpretative constraints on constitutional interpreters and more clearly delineate the positive obligations of the state.

Nature of the constitutional right

Right versus freedom: A debate on the projected right to abortion emerged in jurisdictions dealing with the topic, in addition to the debate on its positioning in the Constitution. In France, after the National Assembly initially approved a right to voluntary termination of pregnancy, the Senate amended this to a proposal stating that '(t)he law establishes the conditions under which a woman can

[75]Analogous to the discussion of Art. 22, this may lead some to conclude that abortion access is currently already protected under Art 23, 2° which safeguards the protection of health and medical assistance. Yet, despite abortion touching upon issues of health and medical intervention, the status of abortion as a matter of health(care) remains scrutinised since it is not a therapeutic act, according to the definition.

[76]For an application of this line of reasoning in the context of euthanasia, *see* Belgian Constitutional Court, No. 153/2015, 29 October 2015, B.10.2 (in Dutch and French).

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exercise the *freedom* to end her pregnancy'. Notably, this 'compromise proposal'[77] replaced an initial right to voluntarily terminate a pregnancy, by a woman's freedom to end her pregnancy.[78] In terminological terms, this distinction of words could lead to particularly important consequences: the term 'right' implies a positive obligation that the state must do everything to implement it,[79] whereas the term 'freedom' covers a less compelling and determined concept. However, as various authors have pointed out, from the point of view of legal protection and guarantees, the distinction is of little importance: there are rights that are very poorly protected and freedoms that are much better protected.[80] The French Conseil d'État, in its opinion, considered that 'in view of the case law of the Constitutional Council, which does not retain a different interpretation of the terms of law and liberty in this matter, the consecration of a right to resort to voluntary interruption of pregnancy would not have a different scope from the proclamation of a liberty'.[81] In his report made on behalf of the competent commission and relating to the freedom to resort to voluntary termination of pregnancy, the deputy Mr Gouffier Valente writes that:

> the constitutional experts consulted … also believe that the choice between the terms 'right' and 'freedom' is of little importance, noting that some freedoms are better protected than rights and *vice versa*. The choice to refer to the term 'freedom' is also guided by the fact that it is exercised under conditions and limits provided by law. Moreover, the two drafts adopted by Parliament agreed on recalling the competence of the legislator to guarantee this right.[82]

Moreover, we observe that the chosen terminology may even intertwine, as reflected in the Michigan Constitution which recognises 'a fundamental *right* to reproductive *freedom*'.

[77]Vie Publique, Panorama des Lois, 'Proposition de loi constitutionnelle visant à protéger et à garantir le droit fondamental à l'interruption volontaire de grossesse', 9 March 2023, https://www.vie-publique.fr/loi/287299-proposition-de-loi-droit-ivg-dans-la-constitution, visited 29 August 2024.

[78]Beaud, *supra* n. 55; Hennette-Vauchez et al., *supra* n. 23.

[79]J. Bénézit, 'IVG dans la Constitution: "liberté" ou "droit", qu'est-ce que cela peut changer', *Le Monde*, 2 February 2023, https://www.lemonde.fr/politique/article/2023/02/02/ivg-dans-la-constitution-liberte-ou-droit-qu-est-ce-que-cela-peut-changer_6160318_823448.html, visited 29 August 2024.

[80]N. Bajos et al., 'Le droit à l'IVG dans la Constitution, une "arnaque à la liberté"', *Le Monde*, 14 February 2023, https://www.lemonde.fr/idees/article/2023/02/14/le-droit-a-l-ivg-dans-la-constitution-une-arnaque-a-la-liberte_6161725_3232.html, visited 29 August 2024.

[81]Conseil d'État, n°407667, 7 December 2023, §13.

[82]Rapport fait au nom de la commission des lois constitutionnelles, de la législation et de l'administration générale de la République, sur le projet de loi constitutionnelle relatif à la liberté de recourir à l'interruption volontaire de grossesse, by M. Guillaume Gouffier Valente, Assemblée nationale, n°2070, p. 29.

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Despite the relatively mild impact of the distinction between right and freedom, the alternative phrasing of the French Senate has been described as deceptive.[83] Indeed, not only did the new phrasing move the status from right to a guaranteed freedom; it also moved the focus of the proposal to the legislator's authority to control, rather to its duty to protect, abortion access. The French wording ultimately chosen, and the decision to anchor it in a provision centring the competence of the legislature to delineate the freedom, are not elements that have significantly maximised the textual constraint exerted on the future interpreter of the provision.

In Belgium, the preamble to the legislative proposal seeking to amend the Constitution only briefly addresses the nature of the respective amendment. It reiterates that, in previous parliamentary initiatives, it has been the explicit aim of the Parliament to recognise a *right* to voluntary termination of pregnancy. The preamble subsequently refers to a quote from the parliamentary proceedings preceding the 2018 amended abortion law, which reads:

> After so many years, another important step [will] be taken in the depenalization of abortion: the *right* to abortion will become a fact, provided certain conditions are respected. Indeed, we must avoid derailments and ensure that the balance is respected between, on the one hand, the indisputable *right* of women to dispose of their own bodies and the *freedom* to decide when they become mothers, and, on the other hand, the ethical dimension.[84]

Despite the rights- and freedom-based framing of the proposed constitutional amendment, the preamble emphasises the legislator's intention to enshrine a *qualified* right instead of an absolute right to abortion. This qualified nature is not surprising in itself: qualification is inherent to most fundamental rights, including to Article 22 of the Belgian Constitution that ensures everyone's rights to privacy and family life *only insofar* as these have not been limited by the law. In this sense, the Belgian proposal aligns with the European Court of Human Rights' and Belgian Constitutional Court's approaches, leaving room for a balancing between the right to privacy and other values by the state when regulating abortion. It may, thus, be argued that this Belgian proposal does not significantly delineate constitutional interpretation beyond what is generally expected from state powers who conduct or review this balancing exercise under the right to privacy (*see* 'Scope of the constitutional right' below).

[83]Bajos et al., *supra* n. 80. Nevertheless, the text complementing the proposal states that its aim is to define the competence of the legislator regarding termination of pregnancy 'in order to protect' the constitutional liberty.

[84]Proposal to review Article 22 of the Constitution, *supra* n. 7, p. 6.

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Positive versus negative obligations: The discussion on the nature of the right to abortion also requires clarity regarding the distinction between negative obligations (obligations to respect and not interfere with the exercise of rights) and positive obligations (obligations to protect the holders of fundamental rights or their interests against interference by third parties, and to fulfil, practically, the fundamental rights). Classical doctrines establish an equivalence between negative obligations and first-generation rights, and positive obligations and second-generation rights. These doctrines held for a long time that, unlike positive obligations, negative obligations are immediate: no further intervention of a legislature is needed for these obligations to deploy their effect and be enforced. In contrast, individuals generally cannot immediately rely on positive obligations ; they only have a 'progressive' effect.[85]

This classic approach has been fundamentally challenged in recent decades: all human rights entail negative obligations and positive obligations and, irrespective of whether it is a 'first generation' or 'second generation' right, the inclusion of a fundamental right in a constitutional or international binding text entails an obligation for the public authorities, and specifically for the legislator, to act.[86] Moreover, certain positive obligations can have a direct effect, thereby challenging the absoluteness of the principle of non-direct effect. De Schutter, for instance, considers the distinction artificial, as the categorisation of obligations as negative or positive depends on the specific legal order and is inherently relative, reversible, and context-dependent.[87] Ultimately, it is often the role of the judiciary to qualify an obligation arising from a right as 'positive' or 'negative', considering elements such as the context, the intention of the drafters of the norm, or its formulation.[88]

Nonetheless, the distinction between positive and negative obligations still underlies much legal reasoning. In the specific context of abortion regulations and restrictions, we note that the European Court of Human Rights has developed its

[85]P. Alston and F. Quinn, 'The Nature and Scope of State's Parties Obligations under the International Covenant on Economic, Social and Cultural Rights, 9 *Human Rights Quarterly* (1987) p. 156; M. Sepúlveda Carmona, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia 2003).

[86]J. Wouters and D. Van Eeckhoutte, *Doorwerking van internationaal recht in de Belgische rechtsorde* [*Effect of International Law in the Belgian Legal Order*] (Intersentia 2006) p. 4-14.

[87]O. De Schutter, *Fonction de juger et droits fondamentaux. Transformation du contrôle juridictionnel dans les ordres juridiques américain et européens* (Bruylant 1999) p. 142 ff, 366 ff.

[88]M. Beijer, 'A Critical Appraisal of the Development of Positive Obligations under the European Convention on Human Rights', in M. Beijer, *Limits of Fundamental Rights Protection by the EU: The Scope for the Development of Positive Obligations* (Intersentia 2017) p. 71; H. Dumont and I. Hachez, 'Les obligations positives déduites du droit international des droits de l'homme : dans quelles limites ?', in Y. Cartuyvels et al. (eds.), *Les droits de l'homme, bouclier ou épée du droit pénal ?* (Presses de l'Université Saint-Louis 2007).

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case law on the basis of both positive and negative obligations. As discussed above, much leeway is granted to states to determine whether and under what circumstances they wish to interfere with the right to privacy through abortion restrictions, reflecting rather limited negative obligations. However, through its procedural reading of Article 8, the European Court of Human Rights stresses positive obligations that arise once abortion is (partially) legalised. In the latter case, the legal framework devised for this purpose should be shaped in a coherent manner to allow *effective* access to abortion services. We note that any interpretation of abortion laws is bound by this case law on procedural, positive obligations, *regardless* of whether a right to abortion is implemented in the Constitution.

In constitutionalising a right to abortion, the constituent may underline the importance of this case law and further specify the negative and positive obligations it attaches to the constitutional right. For instance, one of the earlier, French proposals guaranteed not only a right to abortion (and contraception), but also specified that the law must safeguard 'free and effective access' to those rights. The result of such specification is the reduction of the interpretive leeway enabled by the phrasing of the constitutional right. In addition, this phrasing better answers to the reproductive justice challenges highlighted in the initial section of this article, demanding not just abortion *rights* but also equitable abortion *access*. Specifying the obligations (positive and/or negative) implied by constitutional recognition of a right to abortion as well as these obligations' nature (immediate or progressive, implying a direct effect or not) can be achieved either in the text or in the parliamentary proceedings.

Scope of the constitutional right

Subject of the constitutional right: An interrogation of the constitutional right's scope benefits from being situated in a debate on maximising the possible textual constraint exerted, according to the formulation chosen, on its future interpreter. In the next sections, we explore different approaches to delineating the substantive subject and the temporal scope of the right.

Initiatives could target the act of 'abortion'/'termination of pregnancy' as the subject of constitutionalisation. This was the case not only in the Belgian legal proposal, but also in initiatives launched in Sweden, Norway, and France. However, a broader right or a set of related rights could also be the subject of constitutionalisation without silencing the matter of abortion. This approach has been adopted by California and Michigan, where State Constitutions now recognise the 'right to reproductive freedom' and list abortion as an element of that right. Legal commentary has previously emphasised the benefits of expanding

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the constitutional right to encompass topics beyond abortion.[89] Although, from a political perspective, a broader right would complicate reaching a consensus, the legal principle of equality requires similar situations to be treated alike. Hence, when considering a constitutional right to abortion, it would be opportune to determine if analogies exist and whether these deserve equal fundamental protection in the Constitution. For instance, the legislator could seek to determine the potential fundamental nature of other issues related to bodily autonomy and health (e.g. euthanasia) or reproductive and sexual health (e.g. contraception). It should, nevertheless, be borne in mind that general provisions that stay silent on abortion carry a greater risk that the interpreter would not consider abortion rights under them. Specifically mentioning abortion in the written Constitution, or alternatively, in the preamble to the constitutional amendment, significantly reduces this risk. Irrespective of the approach taken, a proper definition and understanding of the subject matter (e.g. the term 'abortion') is needed. This is especially relevant since various definitions of the term abortion may be used in practice, law, and literature, which may entail 'inherent' limitations on access.[90]

Besides reflecting on the substantive act that is to be enshrined as a fundamental right in the Constitution, one must critically address who is recognised as right- or duty-bearer. The novel French constitutional right, for instance, emphasises both the legislator's duty to delineate the conditions for abortion and the freedom guaranteed to the woman to have a voluntary abortion. With regard to the focus on the 'woman', we highlight that growing academic discourse underlines the importance of deploying gender-neutral language in abortion law and law in general.[91] The Belgian proposal bears a lesser risk at denying trans-, nonbinary and gender-expansive people with uteruses who are in

[89]Wattier, *supra* n. 23, p. 836; Hennette-Vauchez et al., *supra* n. 23, p. 10-11.

[90]In particular, perceived 'inherent' limitations seem to impact which abortion methods can be used and up to what gestational age limit abortion can be performed. In Belgium, for instance, a debate exists on the temporal limitations in the term 'abortion', which has been outlined by various Belgian legal scholars in Dutch and French, and in English by F. De Meyer, 'Late Termination of Pregnancy in Belgium: Exploring Its Legality and Scope', 27 *European Journal of Health Law* (2020) p. 9. *See also* A. Kavanagh et al., '"Abortion" or "Termination of Pregnancy"? Views from Abortion Care Providers in Scotland, UK', 44 *BMJ Sexual & Reproductive Health* (2018) p. 122; T. Johnson et al., 'Language Matters: Legislation, Medical Practice, and the Classification of Abortion Procedures', 105 *Obstetrics & Gynecology* (2005) p. 201.

[91]M. Cavanaugh, '"More Than a Woman to Me": The Need for Gender Inclusive Language in Court Opinions and Statutes Relating to Abortion and Reproductive Health', 102 *Nebraska Law Review* (2023) p. 453; M. Mousmouti, *Gender Sensitive Lawmaking in Theory and Practice* (Routledge 2024).

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need of an abortion, since it reads that *everyone's* right to respect for private life includes a right to voluntary termination of pregnancy.[92]

Temporal scope of the constitutional right: In the same line of reasoning, interpretational challenges to the temporal scope of the right could emerge. Despite often going unnoticed, the Belgian Act on Voluntary Termination of Pregnancy regulates both abortion upon request and abortion on medical grounds, with the latter being permitted without end limit. The term 'voluntary termination of pregnancy' thus encompasses pregnancy terminations regardless of the context or timing behind the request. A pertinent question that has arisen in debates in the US is whether a constitutional recognition of abortion would, thus, endorse abortion at any point in pregnancy.[93] Put differently, this raises the question whether statutory restrictions on late abortion violate the Constitution once a constitutional right to 'voluntary termination of pregnancy' is introduced.

Regulations that establish an absolute right to abortion regardless of timing are uncommon, although some examples exist outside of Europe.[94] According to the hierarchy of norms, what is enshrined in a constitution takes precedence over, or guides the interpretation of, statutory abortion regulation. Hence, when the Constitution not only entails a right to abortion but also specifies conditions for access, such as maximum gestational age limits or justification grounds, these would replace the statutory abortion legislation. However, when these limitations are not incorporated in the constitutional provision, statutory legislation will qualify the right (*see* below). Ultimately, challenges may still be brought before the judiciary to evoke an assessment of whether statutory legislation presents a reasoned, proportional, and fair balance between competing rights and interests. Although it is likely that both the Belgian Constitutional Court and the European Court of Human Rights would uphold the legislator's wide margin of appreciation to regulate access to abortion as the pregnancy advances, the European Court of Human Rights' repeated calls for a 'fair balance' between privacy rights and competing rights and interests might hinder the complete

[92]H. Moseson et al., 'Abortion Experiences and Preferences of Transgender, Nonbinary, and Gender-expansive People in the United States', 4 *American Journal of Obstetrics and Gynecology* (2021) p. 376e1.

[93]A. Dembosky, 'Abortion is on the California Ballot. But Does that Mean at Any Point in Pregnancy?', *NPR*, 24 October 2022, https://www.npr.org/sections/health-shots/2022/10/24/1129112123/abortion-is-on-the-california-ballot-but-does-that-mean-at-any-point-in-pregnanc, visited 29 August 2024.

[94]At the time of writing, jurisdictions that do not stipulate a maximum gestational age limit for abortion include the Australian Capital Territory (AUS), as well as the US States such as Alaska, Colorado, District of Columbia, New Jersey, New Mexico, Oregon, and Vermont. Canada has no federal abortion legislation, which theoretically makes abortion available upon request at all stages of pregnancy. Despite the absence of legal temporal limitations, medical guidelines, policies, and restrictions in practice often impede access to late-term procedures in these jurisdictions.

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legalisation of elective abortion up to birth, as such a law could be construed as rejecting that balance.[95] Therefore, the claim that an unspecified constitutional right to abortion would generate or support an unlimited right to abortion regardless of timing should be nuanced in the European context. Extensions of gestational age limits on abortion, including the in Belgium proposed extension of the abortion limit from 12 to 18 weeks, are probably compatible with supranational and constitutional jurisprudence. However, this compatibility and subsequent legitimacy of gestational age limits does not *depend* on the presence of a constitutional right to abortion: even without a constitutional right to abortion, various time limits adopted in statutory legislation may reflect a proportional balancing.

Pathways to specify the right's content: Applying a measure of precision in the process of constitutionalisation could mitigate the ambiguity that a constitutional right to abortion faces. This, in turn, could diminish the risk of a too narrow judicial and political interpretation of the right. To achieve this aim, several strategies can be employed.

First, the derived constituent power could tie a standstill obligation to the constitutional right to abortion. According to the Belgian Constitutional Court, this obligation 'prohibits the competent legislator from significantly reducing, without reasonable justification, the level of protection afforded by the applicable legislation'.[96] This course of action has the advantage, from an abortion-supportive perspective, that it allows the legislator to flexibly amend the modalities of the abortion regulation while avoiding easy, significant tightening. By obliging the legislator to provide justifications, the standstill principle helps make decision-making more informed and considered.[97] In addition, this pathway could be useful if the legislator wishes to avoid inserting too much detail in the text of the Constitution, as the *status quo* of abortion access would determine the content of the right. Some of the proposals seeking to constitutionalise a right to abortion in European countries reflect the commitment to a standstill principle in their preambles. For instance, the legislative proposal adopted in the French Senate stated that it had the effect of preserving the legislative branch's capability to regulate the matter, whilst prohibiting it from repealing or severely undermining the liberty it guarantees. In Belgium, the preamble to the legislative proposal states that 'including the right to voluntary termination of pregnancy under article 22 of the Constitution has the

[95]*See*, for instance, references to the fair balance in ECtHR 8 July 2004, No. 53924/00, *Vo* v *France*, para. 79, referring to ECtHR 5 September 2002, No. 50490/99, *Boso* v *Italy*.

[96]Belgian Constitutional Court, No. 69/2023, 27 April 2023, B.6.2 (authors' translation).

[97]D. Dumont, 'Le principe de standstill comme instrument de rationalisation du processus législatif en matière sociale. Un plaidoyer illustré (Première partie)', 30 *Journal des tribunaux* (2019) p. 601.

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benefit that it brings about a standstill with regards to the positive obligations of the State to safeguard that right'. In our view, however, the standstill effect brought about by recognising abortion as an aspect of the constitutional right to privacy should not be overestimated. After all, the Belgian Constitution's right to (respect for) private life is not inherently or automatically characterised by a standstill obligation. If the right to abortion were to be situated under the right to privacy, it seems that legal certainty would benefit from a formal and explicit recognition of a standstill obligation accompanying the constitutional right to abortion. Certain terms in the wording of the text or parliamentary proceedings would make it possible to identify a clear standstill effect induced by the fundamental right to abortion.

Unlike Article 22 of the Constitution, the fundamental socio-economic and cultural rights embedded in Article 23 already contain a standstill obligation, which has been unanimously recognised by Belgian case law.[98] Consequently, if a right to abortion were to be listed under Article 23, it would automatically impose a standstill duty on all matters relating to abortion access. However, the standstill effect of Article 23 is often presented as a counterweight to the lack of direct effect associated with social, economic, and cultural rights, as mentioned above. If the Belgian legislator includes the constitutional right to abortion in the list of socio-economic and cultural rights, it must consider the appropriateness of this pre-existing balance between the (lack of) direct effect and the standstill effect in the context of abortion.

Regardless of where the right to abortion and its attached standstill commitment would be situated, we note that the irreversibility characterising the standstill obligation is not absolute. Some authors who have thoroughly studied the principle suggest that it has been reduced to little more than an obligation of justification weighing on the legislator, while still authorising substantial regressions of certain rights as far as there are valid grounds for doing so in the general interest.[99] Therefore, the legislator may also consider an alternative strategy, which is to include in the text of the constitutional article the fundamental aspects of abortion access it wishes to constitutionally protect. When these specifications are included in the text of the Constitution, all initiatives seeking to either restrict or liberalise them would be subject to the heavier constitutional amendment procedure. More detailed formulations do not necessarily contradict the spirit of the Belgian Constitution. In fact, while the original wording of the Constitution in 1831 aimed for absoluteness,[100] only

[98] *See also* on the general recognition of the standstill principle for all rights under Art. 23: Belgian Constitutional Court, No. 62/2016, 28 April 2016, B.6.2.

[99] *Supra* n. 97, p. 627.

[100] G. Rosoux, *Vers une 'dématérialisation' des droits fondamentaux ?* (Larcier 2015) p. 731 ff.

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provisions formulated with sufficient precision have retained a near-absolute character through judicial interpretation. Hence, the more precisely rights are formulated, the less their interpretation appears to be relativised.[101] This specification approach is more commonly seen in US initiatives. For instance, the Michigan State Constitution meticulously outlines the substantive conditions on abortion, as well as the level of permitted state interference with the right to abortion.[102]

> Every individual has a fundamental right to reproductive freedom, which entails the right to make and effectuate decisions about all matters relating to pregnancy, including but not limited to prenatal care, childbirth, postpartum care, contraception, sterilization, abortion care, miscarriage management, and infertility care. An individual's *right to reproductive freedom shall not be denied, burdened, nor infringed upon unless justified by a compelling state interest achieved by the least restrictive means*. Notwithstanding the above, *the state may regulate the provision of abortion care after fetal viability,* provided that in no circumstance shall the state prohibit an abortion that, in the professional judgment of an attending health care professional, is *medically indicated to protect the life or physical or mental health of the pregnant individual* . . . .[103]

Although the specification approach demonstrated by the Michigan Constitution effectively mitigates the risk of statutory and judicial carve-outs of the right to abortion, it also comes with its drawbacks. First, its extensive level of detail may drastically complicate the attainment of a political consensus. Second, constitutionalisation of the substantive conditions for legal abortion sets these conditions more in stone at a time where public and political debate on their appropriateness appears to be evolving. Particularly in Belgium, the 12-week time limit on abortion remains a highly controversial topic, so that the incorporation of this limit in the constitutional text could be a red flag for some. The specification challenges would also arise when contemplating the constitutional recognition of a broader right such as a 'right to reproductive autonomy'. Considering these pitfalls, the recognition of a standstill obligation appears to be a more realistic and suitable approach, at least to reflect certain aspects of existing abortion rights and services. Bearing in mind the relative irreversibility associated with the standstill

[101]R. Delforge et al., 'L'absence d'état d'urgence en droit constitutionnel belge', in F. Bouhon et al. (eds.), *Le droit public belge face à la crise du COVID-19* (Larcier 2020) p. 26 at p. 36.

[102]This phrasing largely solidifies the Supreme Court's central holdings in *Roe* v *Wade* (1973) and *Casey* v *Planned Parenthood* (1992), which put forward foetal viability (situated at 24 weeks pregnancy) as a temporal benchmark and introduced an 'undue burden' test for state regulation of abortion before viability. The Court defined an undue burden as a 'substantial obstacle in the path of a woman seeking an abortion'.

[103]Art. 1, section 28 Michigan Constitution (emphasis added).

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principle, it is advised that the legislator considers which elements of current abortion access require stronger, constitutional protection, and if such protection weighs up against the described disadvantages of constitutional solidification.

In line with this strategy, one could also rely on the essence of the fundamental right – and to the related concepts of 'core content' or 'substance'. As Alexy argues, '(t)he principled nature of constitutional rights givers raises not only to the idea that constitutional rights are limited and limitable in the light of countervailing principles, but also that their limiting and limitability is itself limited'.[104] The concept of 'substance' is used by the European Court of Human Rights to fix the 'limit on limits' by identifying the inalienable elements of a fundamental right that cannot suffer restrictions.[105] But, this concept of 'substance' or 'hard core' confers a great deal of interpretative freedom on those who interpret it. To overcome the problems raised in practice by the theory of 'substance',[106] it is crucial for the constituent power to specify the core's content material scope of the right to abortion. Within that perspective, legislators could highlight, during parliamentary proceedings or in the text, the aspects of current legal and practical abortion access that they deem crucial and irreversible for the enjoyment of the fundamental right, i.e. the core content of that right. Those aspects could then be considered as inalienable, as constitutive of the 'essence' of abortion right. Examples of such measures include preventing the withdrawal of funding for abortion and family planning centres, ensuring that enough providers are trained, safeguarding affordable access to services, etc.

Conclusion

Various initiatives to enshrine a right to abortion in domestic constitutions have recently emerged in the European arena. These initiatives have faced challenges not solely on ideological grounds, but also based on perceptions of political threat and of what constitutions can do. This article first focused on the substantive component or function of constitutions. It highlighted that, while abortion rights in most of Europe may not be as profoundly threatened as in other parts of the world, formal

[104]R. Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2002) p. 192. *See also* K. Lenaerts: 'The concept of the essence of a fundamental right operates as a constant reminder that our core values are absolute and, as such, are not subject to balancing' in 'Limits on Limitations: The Essence of Fundamental Rights in the EU', 20 *German Law Journal* (2019) p. 793.

[105]This idea, that no limitation on a right may be interpreted or applied in such a way as to compromise the essence of the right in question, is also reflected in Art. 4 of the International Covenant on Economic, Social and Cultural Rights and Art. 52 Charter. *See* on this concept of 'core content' or of 'essence': S. Van Drooghenbroeck and C. Riczallah, 'The ECHR and the Essence of Fundamental Rights: Searching for Sugar in Hot Milk?', 20 *German Law Journal* (2019) p. 907.

[106]Delforge et al., *supra* n. 101.

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constitutionalisation serves to reflect and affirm the essential and fundamental status of these rights in society. Illustrated by feminist legal scholarship, this fundamental nature was traced back to the abortion issue's deeper relation to key substantive principles of constitutionalism, including equality, citizenship, and liberty, supporting its insertion in the catalogue of constitutional rights.

This symbolic or substantive function of constitutionalisation has received limited attention in abortion constitutionalisation debates. Instead, proposals to constitutionalise abortion rights in Europe have primarily been grounded upon the instrumental-procedural function of constitutions. Constitutionalisation can indeed elevate a right's status from subordinate to supreme, obligating all subordinate norms to adhere to it and reducing the risk of retraction of established abortion rights within a legal order. Despite claims that abortion rights may already be sufficiently protected by (constitutional and supranational) rights norms in European countries, this article reiterated that the European Court of Human Rights' protection of abortion access remains limited. The wide margin of appreciation afforded to states by the Court leaves ample room for current and future constitutional legislators to extensively prohibit abortion on certain grounds/with certain limits. This observation, combined with the fragility of statutory abortion legislation in times of political crisis and the unpredictability of judicial interpretation, supports the grounding of constitutional safeguards at the national level for instrumental-procedural purposes. At the same time, however, it raises questions about the added benefit of introducing a constitutional right to abortion *without* thorough reflection on its substance and its relation to other fundamental rights. Crucially, this article identifies the risk that adopting a constitutional right to abortion, especially when linked to the right to respect for privacy, could replicate the ambiguity seen in the case law of the European Court of Human Rights.

Drawing from a Belgian-comparative case study, this paper identified pathways to mitigate the risk of merely symbolic constitutionalisation of the right to abortion, legal uncertainty, and continued vulnerability to future restrictions. First, thoughtful consideration of the subject of the constitutional right is crucial. This involves contemplating the terminology used and transcending the singular focus on abortion. The preference is towards enshrining a broader right or including comparable rights in the Constitution to avoid unequal treatment under the law, while remaining sufficiently explicit about abortion. Second, clarifying the nature and effects of the obligations arising from the new constitutional right is recommended. A third related recommendation is to introduce a measure of precision regarding the scope of the right. This could be achieved by recognising direct effect for certain elements of the right and attaching a standstill obligation to (certain elements of) the right, which would deter legislators from substantially reducing the established level of (statutory)

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abortion rights and services without there being valid grounds for doing so in the general interest. Alternatively, the legislator may not only enshrine a right to abortion, but also meticulously outline the fundamental aspects of this right in the constitutional text itself. Despite the ability of the latter approach to clearly delineate the margin of interpretation beyond the European Court of Human Rights' central holding, the recognition of a standstill obligation was identified as the more suitable and politically achievable approach.

The constitutionalisation of abortion rights does not introduce an absolute, unlimited right to abortion. After all, our account demonstrates that both the discussed constitutionalisation initiatives in European countries and the European Court of Human Rights emphasise the qualified nature of the right to abortion. A standstill principle would further help shape minimum access to abortion granted by the right, although it will not resolve all questions regarding the constitutionality of (future) statutory abortion legislation. Statutory abortion legislation may still be scrutinised by higher courts determining whether it aligns with the 'fair balance test'. Finally, those contemplating constitutionalisation must be aware that a constitutional right to abortion paired with a standstill obligation may not fully realise reproductive justice if practical and procedural barriers continue to impede access. A standstill obligation would, nonetheless, instruct domestic constitutional courts to hold unconstitutional all fundamental setbacks of established abortion rights that do not meet compelling state interests. This appears to be the main aim of those seeking constitutionalisation and reinforces the relevance of the standstill principle in the context of a constitutional right to abortion, or alternatively, of a broader right to reproductive liberty.

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