

The Right to Abortion – Between the Need for Protection at the European Level and Respect for the Constitutional Traditions of the Member States

Abstract

This article examines the regulation of abortion within the European legal order, highlighting the interaction between the jurisprudence of the European Court of Human Rights (ECHR), the Court of Justice of the European Union (CJEU), and the concept of national constitutional identity. While no explicit right to abortion is enshrined at the EU level, the ECHR has developed an extensive jurisprudence based on Article 8 of the Convention (right to private life), granting states a wide margin of appreciation. At the same time, constitutional identity allows Member States to preserve national traditions, creating tensions with the EU's common values enshrined in Article 2 TEU. This study analyses relevant case law and doctrinal perspectives, illustrating how abortion regulation exemplifies the dialectic between the preservation of constitutional traditions and the need for uniform protection at the EU level.

Keywords: abortion, EU law, constitutional identity, margin of appreciation, Court of Justice of the European Union, European Court of Human Rights

I Introduction

The issue of the right to abortion, beyond its moral considerations, has long constituted one of the most sensitive and controversial topics at the European level from the legal perspective of bodily autonomy. In the absence of explicit recognition at the level of the European Union, the regulation of abortion remains within the competence of the Member States, influenced

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by respect for their own constitutional identity, the fundamental values of the Union, as well as by the case law developed by the European Court of Human Rights.

In recent decades, two apparently contradictory trends have emerged. At one level, we may note the case law of the European Court of Human Rights, which although it does not enshrine an absolute right to abortion, guarantees, through Article 8 of the Convention, a woman's right to private life, thereby imposing on States positive obligations to ensure effective access to abortion when it is permitted by national legislation.

At another level, given that it remains a sensitive issue within the legal order of the European Union, this regulatory competence continues to rest at the national level, falling potentially under the umbrella of constitutional identity.

Nevertheless, the conservative position of the Constitutional Court of Poland of 22 October 2020,¹ which considerably restricted the circumstances in which women could resort to abortion, followed by the judgment of the Supreme Court of the United States of 24 June 2022,² which abandoned the federal guarantee of the right to abortion, together with the restrictive legislative approaches adopted in Malta and Hungary, underscores the fragility and precariousness of the protection of this right at the global level.

In this context, the ongoing initiatives within the European Union aimed at the explicit recognition of the right to abortion in the Charter of Fundamental Rights represent a significant step towards strengthening a high and uniform level of protection at the European level.

This study explores how a coherent European normative framework for safeguarding the right to abortion can coexist with the Member States' prerogative to define, in line with their constitutional identities, the scope and substance of this protection.

From a methodological point of view, the study aligns the case law of the Court of Justice of the European Union and the relevant legal doctrine with constitutional practice in the field of fundamental rights protection concerning bodily autonomy, while also seeking to highlight and give value to the concept of constitutional identity. At the same time, the study employs comparative elements of legislation and constitutional orientation from various Member States.

II A historic success marked by a dramatic setback

The preservation and protection of bodily integrity is a principle frequently invoked in both law and morality. It is a normative principle that seeks to constrain what we are allowed to do to human bodies or their constituent parts.

¹ Constitutional Tribunal of Poland, case K 1/20, 16 October (2020).

² *Case Dobbs v. Jackson Women's Health Organization*, 597 U.S. (2022).

Bodily autonomy, as an expression of personal freedom and dignity, derives from the Kantian philosophy of natural rights,³ being subsequently enshrined in positive law as an integral part of the right to private life and physical integrity.

A contemporary view of this philosophical conception shows us that the respect for a liberal constitutional democracy requires respect for individual liberty and, implicitly, protection of women's bodily freedom, being associated with the idea that dignity and personal freedom cannot be guaranteed in the absence of the recognition of the right to self-determination over one's own body.

The right to abortion has a complex history, marked by major changes over the centuries, depending on the cultural, religious, and political context of each society. In Europe, the evolution of this right is closely connected to the feminist movements and social reforms of the 19th and 20th centuries, which culminated in the progressive recognition of reproductive rights as an essential part of women's fundamental rights.⁴

In the United States, the evolution of this right was marked by the decision *Roe v. Wade*,⁵ which established that the right to abortion forms part of the right to privacy deriving from the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.

Recently, the situation in the United States was marked by a significant legal setback generated by the case *Dobbs v. Jackson Women's Health Organization*.⁶ This decision was a dramatic shock concerning the federal protection of the right to abortion, abandoning the precedent set in *Roe v. Wade*. Basing itself on the lack of an explicit historical tradition regarding the right to abortion, the Supreme Court of the United States examined whether the right to obtain an abortion was deeply rooted in the nation's history and tradition. However, given that the U.S. Constitution did not expressly regulate the right to abortion, although this had previously been implied by reference to its inclusion within the category of liberties protected by the Fourteenth Amendment, the Court held that this right is not protected at the federal level and requires distinct protection within each individual state of the federation.

With regard to the European framework, we note not only a lack of unitary legislation, but also some unfavourable perspectives in some EU countries. At the same time, the ECtHR has not seemed very willing to indirectly recognise abortion as a fundamental right.

³ Helga Varden, 'A Feminist, Kantian Conception of the Right to Bodily Integrity: The Cases of Abortion and Homosexuality' in A.M. Viens, *The right to bodily integrity* (Routledge 2014, London).

⁴ Reva B. Siegel, 'Abortion and the "Woman Question": Forty Years of Debate' (2014) 89 (4) *Indiana Law Journal* Article 1, 1365–1980, available at: <<https://www.repository.law.indiana.edu/ilj/vol89/iss4/1>> accessed 31 October 2025.

⁵ *Roe v. Wade*, 410 U.S. 113 (1973).

⁶ Case *Dobbs v. Jackson Women's Health Organization*, 597 U.S. (2022).

III The perspective of the European Court of Human Rights on the right to abortion

Except for in France (the situation which will be detailed below), no other national constitution from the EU space guarantees women's freedom to have an abortion. Although the European Convention on Human Rights does not expressly enshrine the right to abortion, the case law of the European Court of Human Rights has, over time, outlined a complex interpretative framework in which this liberty was placed at the intersection of several conventional provisions.

First of all, the question of the applicability of Article 2 of the European Convention on Human Rights,⁷ which protects the right to life, has been raised, with numerous cases invoking the hypothesis of extending this guarantee also to prenatal life. However, the Court has consistently refused to grant the foetus the status of a 'person' in the strict sense of the Convention, preferring instead to leave to the States a margin of appreciation in defining the beginning of life, while emphasising that the legitimate interests of protecting prenatal life must be balanced with the respect for a woman's right to private life, as enshrined in Article 8 of the European Convention on Human Rights.⁸ According to this logic, the right to reproductive self-determination is subsumed under the broader sphere of private life, encompassing essential dimensions of bodily autonomy and physical and psychological integrity.

Moreover, the Court has also analysed the issue of abortion from the perspective of Article 3 of the European Convention on Human Rights⁹ concerning the prohibition of inhuman or degrading treatment, especially in cases where administrative or legislative obstacles have caused women physical or psychological suffering of particular intensity. At the same time, in certain cases, Article 10 of the European Convention on Human Rights¹⁰ has been used to protect freedom of expression and information in relation to access to information regarding abortion procedures, while Article 9 of the European Convention on Human Rights¹¹ has opened the way to analysis from the perspective of freedom of thought, conscience, and religion, taking into account the conscientious objection of doctors and the conflict of values between individual moral beliefs and the national legislative framework.

As we shall see in what follows, throughout its case law, the Court has not contested that national authorities enjoy a broad margin of appreciation when it comes to moral issues, especially in sensitive areas such as the one examined here, which involve fundamental views about the essence of human life. The Court has repeatedly emphasised that no single, uniform conception of morality can be identified at the level of the Member States, and

⁷ *Vo v. France*, Application no. 53924/00, ECtHR, 8 July 2004.

⁸ *A, B and C v. IRELAND*, Application no. 25579/05, ECtHR, 16 December 2010.

⁹ *R.R. v. POLAND*, Application no. 27617/04, ECtHR, 26 May 2011.

¹⁰ *Open Door and Dublin Well Woman v. IRELAND*, Application no. 14235/88, ECtHR, 29 October 1992.

¹¹ *Grimmark v. Sweden*, Application no. 43726/17, ECtHR, 11 February 2020.

that national authorities are, in general, better placed than an international court to assess the content of moral requirements and the ‘necessity’ of imposing restrictions or sanctions intended to ensure their observance.¹²

Among the first cases examined by the European Commission of Human Rights,¹³ we find a refusal of the European Court of Human Rights to extend the protection of Article 2 of the European Convention on Human Rights to the foetus, establishing that it is not a ‘person’ within the meaning of the Convention.¹⁴ This restrictive and conservative interpretation relied on the absence of a European consensus regarding the date from which the foetus requires legal protection and left to the States the freedom to decide about this moment. At the same time, it raised the issue of balancing the interests of the State in protecting prenatal life and the rights of the woman. Later, in the case *Vo v. France*, the Court confirmed this approach, highlighting the lack of a European consensus on the legal status of the foetus and, consequently, the necessity of leaving a margin of appreciation to the States.

The dimension of private life was analysed as early as 1977,¹⁵ when the Court recognised that pregnancy does not belong exclusively to the private sphere, since a woman’s private life is closely linked to the development of the foetus. Nevertheless, any restriction on abortion constitutes an interference with private life and must satisfy the proportionality test. In case *A., B. and C. v. Ireland*,¹⁶ the Court sanctioned the absence of a clear normative framework enabling a woman suffering from cancer to establish whether the pregnancy endangered her life. Thus, Article 8 was interpreted not only from the perspective of abstaining from interfering with a right, but also as a source of positive obligations incumbent upon States.

As regards the applicability of Article 10 of the European Convention on Human Rights, the Court held that a prohibition imposed on NGOs preventing them from providing information about abortion procedures carried out abroad, even in the context of protecting public morals, constituted an unjustified interference with the right to freedom of expression.¹⁷

In a significant number of cases against Poland, the Court identified serious gaps in the normative and procedural framework. In the case *Tysi c v. Poland*,¹⁸ the lack of clear domestic procedures for authorising a therapeutic abortion led to the irreversible deterioration of the applicant’s eyesight, as she had no possibility to terminate the pregnancy. Also worth mentioning is the case of *P. and S. v. Poland*,¹⁹ in which the Court found a violation of Article 8 of the European Convention on Human Rights, given that the

¹² *Open Door and Dublin Well Woman v. IRELAND*, Application no. 14235/88, ECtHR, 29 October 1992.

¹³ *X v. Norway*, Application no. 867/60, ECtHR, 3 April 1967.

¹⁴ *Paton v. United Kingdom*, Application no. 8416/78, ECtHR, 13 May 1980.

¹⁵ *Bruggemann and Scheuten v. Federal Republic of Germany*, Application no. 6959/75, ECtHR, 12 July 1977.

¹⁶ *A., B and C v. Ireland*, Application 25579/05, ECtHR, 16 December 2010.

¹⁷ *Open Door and Dublin Well Woman v. IRELAND*, Application no. 14235/88, ECtHR, 29 October 1992.

¹⁸ *Tysi c v. Poland*, Application no. 5410/03, ECtHR, 20 March 2007.

¹⁹ *P. and S. v. POLAND*, Application no. 57375/08. ECtHR, 30 October 2012.

bureaucratic obstacles and psychological pressure exerted on a 15-year-old rape victim made it extremely difficult for her to obtain an abortion. Likewise, in case *R.R. v. Poland*,²⁰ the hindrance of access to genetic testing and, consequently, the determination that the legal time limit for abortion had been exceeded, amounted to degrading treatment within the meaning of Article 3 of the European Convention on Human Rights.

The case of Poland, in particular, underscores States' obligation to ensure an effective procedural framework and genuine access to reproductive rights, beyond mere legislative statements.

Nevertheless, by the decision of the Polish Constitutional Tribunal (K 1/20),²¹ cases in which access to abortion was possible were restricted only to situations of rape, incest, or danger to the life or health of the mother; the legal provision allowing abortion in cases of foetal malformations was declared unconstitutional. Unfortunately, in the judgment *M.L. v. Poland*,²² delivered after this decision, the ECtHR found a violation of Article 8 on the grounds of the lack of an independent and impartial tribunal due to the irregularity in the appointment of certain judges to the Constitutional Tribunal, avoiding a more detailed analysis of the proportionality of the restriction of this right from the perspective of Article 8 ECHR.

Moving further in the analysis of the ECtHR case law, we note another interesting issue, namely the matter of the freedom of conscience of medical personnel in the context of refusing to perform an abortion. In the cases of *Grimmark v. Sweden*²³ and *Steen v. Sweden*,²⁴ the Court did not consider that the refusal of hospitals to employ nurses who were unwilling to participate in abortion procedures amounted to a violation of Article 9 of the Convention, taking into account that the absence of a conscience clause in Swedish legislation pursued a legitimate aim, namely, ensuring women's effective access to medical services.

Following the analysis of the ECtHR judgments, it is observed that the right to abortion does not enjoy direct recognition in the text of the Convention; however, the European Court of Human Rights has progressively developed a set of indirect guarantees concerning the exercise of this right, based on Articles 3, 8, 9, and 10. Even though States continue to enjoy a wide margin of appreciation, this power is increasingly conditioned by the existence of transparent procedures, effective access to medical information, and the provision of efficient mechanisms to protect women's integrity, both physical and psychological. Over time, an evolving case law has emerged that gradually consolidates reproductive autonomy as an integral part of private life and personal dignity. And although there is no formal recognition of the right to abortion, the Court operates with a minimal European standard, implicitly recognised in the field of reproductive rights, namely the existence of minimum

²⁰ *R.R. v. POLAND*, Application no. 27617/04, ECtHR, 26 May 2011.

²¹ Judgement of the Polish Constitutional Tribunal of 22 October 2020 (K 1/20).

²² *M.L. v. Poland*, Application no. 40119/21, ECtHR, 14 December 2023.

²³ *Grimmark v Sweden*, Application no. 43726/17, ECtHR, 14 June 2017.

²⁴ *Sten v Sweden*, Application no. 62309/17, ECtHR, 11 February 2020.

procedural guarantees and a clear normative framework that entails the transformation of negative obligations into positive duties of regulation and effective protection of these rights.

As we can see from the aforementioned case law, the ECtHR does not guarantee a right to abortion. However, certain nuances must be noted to illustrate the manner in which the Court approaches national legislation: once a Member State's legal framework allows women access to abortion, that framework must also ensure the effective exercise of this right, rather than leaving it as a merely illusory component.²⁵ Moreover, an analysis of the Court's case law allows us to conclude that the question of access to and the right to abortion must be examined in light of the various interests at stake: firstly, there is the interest of the pregnant woman – which carries the greatest weight – albeit it finds its limits in other competing interests, such as those of the foetus or of society as a whole.

IV The right to abortion between Member State competence, EU law, and the protection offered by the Court of Justice of the European Union

Liberal constitutional systems are characterised, among other things, by the enshrinement and guarantee of fundamental rights and, implicitly, by the respect for the principle of individual autonomy, the respect for human dignity, and the guarantee of personal freedom.

In Europe, in theory, the majority of the Member States of the European Union allow abortion. In practice, however, there are divergent approaches among the Member States, which impose conditions of varying levels of strictness on the exercise of this right. Such restrictions can be explained by the European Union's lack of competence in the field of abortion, meaning that no legal recognition of this freedom can be found within the EU framework.

In the Charter of Fundamental Rights of the European Union, although we do not find explicit reflection of the protection of the right to abortion, several articles may nevertheless serve as an indirect foundation for the protection of reproductive autonomy, namely Article 1, which enshrines the inviolability of human dignity, Article 3, which enshrines the right to physical and mental integrity, and Article 7, which enshrines the right to respect for private and family life.

The interpretation of these provisions remains reserved for the CJEU, but the Court has been cautious not to be drawn into direct case law on abortion, precisely because of its sensitive nature and the diversity of national constitutional traditions.

Nevertheless, the CJEU has sporadically addressed the issue of abortion, leaving the regulation of access to termination of pregnancy to national competence.

²⁵ See, for example, the cases *Tysi c v. Poland*; *R.R. v. Poland*; *A, B and C v. Ireland*.

In Case C-159/90,²⁶ the CJEU classified legal abortion as a service within the meaning of the Treaties, but since this component does not fall within its field of competence, it emphasised that the Member States are solely responsible for regulating this matter.

The case *Brüstle v. Greenpeace*,²⁷ although it does not concern the right to abortion but rather the legal protection of embryos in the context of biotechnological patents, it is worth mentioning as the first recognition of legal protection afforded to the embryo from the stage of fertilisation. Nevertheless, the judgment was marked by the Court's reluctance to enter an area traditionally left to the Member States.

Examining the legislation on abortion in the EU Member States, we encounter a mosaic that reveals the different conceptions of the States regarding, on the one hand, the protection of the foetus and, on the other hand, the mother's right to bodily integrity.

Poland provides an illustrative example. The restriction of access to abortion following the aforementioned decision of the Constitutional Court²⁸ was perceived as an infringement of women's autonomy. However, the Polish government justified the measure by reference to its own constitutional values, invoking the principle of the protection of life from conception.²⁹ At present, debates continue regarding the necessity of legalising abortion.

Equally, recent legislation in Hungary deserves to be mentioned, namely Decree 29/2022. (IX. 12.), known as the 'foetal heartbeat' law, which introduced a requirement for the termination of pregnancy: specifically, the pregnant woman must be shown 'foetal vital signs', meaning that she must listen to the heartbeat of the foetus.³⁰

Last but not least, Malta is a case worth discussing, given the fact that it has recently allowed some relaxation regarding the freedom to have an abortion,³¹ thus positioning itself – in terms of the approach taken – in the opposite direction of that observed in the United States or Hungary.³²

At the opposite pole, in France, a remarkable legislative development can be observed, materialised through the explicit inclusion of the right to abortion in the Constitution. In March 2024, France adopted a significant constitutional reform that guarantees the protection of the right to voluntary termination of pregnancy, thus expressing a firm response to international trends towards the restriction of reproductive rights. This

²⁶ C.J.C.E., Judgment of the Court of 4 October 1991, Case C-159/90, *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others*, ECLI:EU: C:1991:378.

²⁷ C.J.U.E., Judgment of the Court (Grand Chamber) of 18 October 2011, Case C-34/10 *Oliver Brüstle v Greenpeace eV*, ECLI:EU: C:2011:669.

²⁸ Judgement of the Polish Constitutional Tribunal of 22 October 2020 (K 1/20).

²⁹ Anna Śledzińska-Simon, 'Abortion and abuses of constitutional review in the trajectory of Polish constitutionalism' [2025] *International Journal of Constitutional Law* 1–24; DOI: <https://doi.org/10.1093/icon/moaf027>

³⁰ Ivett Szalma, Alexandra Sipos, A comparative analysis across reproduction policy fields in Hungary (2024), In book: *Reproduction Policy in the Twenty-First Century*, DOI: <https://doi.org/10.4337/9781035324163.00017>

³¹ Bill Application no. 28, Criminal Code of Malta (Amendment Application no. 3) Bill.

³² Decree 29/2022. (IX. 12.) Minister of Interior Affairs.

incorporation becomes part of France's constitutional identity and confers upon this right enhanced legal value, since any modification thereof would require revision of the fundamental text of the State.

All these aspects draw our attention to the urgent need to establish legislative uniformity, at least at the level of the EU, in order to effectively ensure consistent protection of this fundamental right. A common abortion policy may take on new dimensions given the growing interest in this subject, particularly from the European Parliament.

V Potential conflict between the common values of European Union law and the constitutional identity of the Member States

Recognising the importance of protecting this right, at the level of the European Parliament we observe timid yet necessary attempts to deepen its recognition. Among the first steps in this regard, we recall Resolution 1607 of the Parliamentary Assembly of the Council of Europe, which expresses concern regarding the numerous restrictions limiting real access to safe, financially accessible, acceptable, and women-oriented abortion services in many European States. Within this document, the fundamental right of every person, especially of women, to respect for physical integrity and to the freedom to decide over one's own body is reaffirmed. The Resolution also emphasises that the pregnant woman must have the final say in decisions relating to abortion.³³

The Resolution of the European Parliament of 26 November 2020 on the de facto ban on the right to abortion in Poland states that women's rights are fundamental rights and that EU institutions and Member States have a legal obligation to uphold and protect them in accordance with the Treaties, the Charter of Fundamental Rights, and international law. The Resolution notes that the excessive and unjustified restrictions imposed on access to abortion generated by the judgment of the Polish Constitutional Court violate the inherent and inalienable dignity of women and run counter to the Charter.³⁴

In reaction to the worrying trend that emerged after the decision of the Supreme Court of the United States to overturn *Roe v. Wade*, the European Parliament adopted the Resolution of 7 July 2022³⁵ that highlights the need to ensure the right to abortion and women's health in the EU and calls on the EU and its Member States to legally recognise

³³ Resolution 1607 (2008) of the Parliamentary Assembly available at <<https://pace.coe.int/fr/files/17638/html>> accessed 31 October 2025.

³⁴ European Parliament resolution of 26 November 2020 on the de facto ban on the right to abortion in Poland (2020/2876(RSP)) available at <https://www.europarl.europa.eu/doceo/document/TA-9-2020-11-26_RO.html#sdocta13> accessed 31 October 2025.

³⁵ European Parliament resolution of 7 July 2022 on the US Supreme Court decision to overturn abortion rights in the United States and the need to safeguard abortion rights and women's health in the EU, available at <https://www.europarl.europa.eu/doceo/document/TA-9-2022-0302_EN.html> accessed 31 October 2025.

abortion. At the same time, it emphasised the necessity of including this right in the Universal Declaration of Human Rights.

Recently, following the situation in Poland and the favourable enshrinement of this right in France, the European Parliament adopted the Resolution of 11 April 2024,³⁶ by which the European Council was urged to launch a Convention for the revision of the Treaties and to adopt the proposal included in its Resolution of 22 November 2023 to add to the Charter of Fundamental Rights of the European Union the right to legal and safe abortion, the proposed amendment to Article 3 being as follows: ‘Everyone has the right to bodily autonomy, to free, informed, full and universal access to sexual and reproductive health and related rights, as well as to all related healthcare services, without discrimination, including access to legal and safe abortion.’

Until the adoption of a specific legislative act, the aforementioned resolutions do not directly influence the national legislation of the Member States of the European Union due to their non-binding character. These resolutions instead represent a political stance and a symbolic message, without the power to constitute a legal instrument usable in combating restrictive or abusive policies regarding the right to abortion. They express the will and orientation of the European Parliament but clearly require implementation.

At the same time, it is worth mentioning Resolution 2439 (2022) of the Parliamentary Assembly of the Council of Europe³⁷ which condemns the intensification of anti-abortion harassment in Member States – a phenomenon targeting both women seeking termination of pregnancy and medical personnel, pro-choice activists, and organisations defending reproductive rights. The document underlines that such actions – including intimidation, disinformation, verbal and physical violence, judicial pressure, and stigmatising campaigns – constitute a violation of fundamental rights and impair effective access to safe and legal abortion.

The Assembly warns that anti-abortion harassment erodes the rule of law, infringes freedoms protected by international law (such as the right to respect for private life and freedom of expression), and may, in certain circumstances, amount to inhuman or degrading treatment.

The resolution calls on Member States to adopt concrete measures, such as penalising the obstruction of access to abortion, creating ‘safe zones’ around medical facilities, combating disinformation, ensuring comprehensive sexuality education, and protecting healthcare workers and defenders of women’s rights. The document also reaffirms the importance of real and safe access to reproductive healthcare services as part of States’ human rights obligations.

³⁶ European Parliament resolution of 11 April 2024 on including the right to abortion in the EU Fundamental Rights Charter (2024/2655(RSP)) available at <https://www.europarl.europa.eu/doceo/document/TA-9-2024-0286_EN.html> accessed 31 October 2025.

³⁷ Resolution 2439 (2022), text adopted by the Standing Committee, acting on behalf of the Assembly, on 31 May 2022 (see Doc. 15459, report of the Committee on Equality and Non-Discrimination).

It is worth mentioning that, correlatively with women's freedom to resort to terminating a pregnancy, certain states have introduced the legal possibility of raising a conscientious objection to performing the respective procedures.³⁸

In the analysed context, conscientious objection is reflected in various national regulations. Thus, in Sweden, Finland, and Iceland, health professionals are generally not permitted to invoke conscientious objection in order to refuse to provide medical services that fall within their duties. On the other hand, Norway allows medical staff to refuse to participate in abortions, while family doctors do not formally benefit from this right. Nevertheless, there are cases where some family doctors have indirectly avoided issuing referrals for the termination of pregnancy.³⁹

Although it is unlikely that the Parliamentary initiative will attract a similarly unanimous stance from the Member States, the moment is of historical significance. We cannot deny that debates in the European Parliament may shape the European Union's lines of action, at times placing the Union in the uncomfortable position of a mere passive observer *vis-à-vis* the highly diverse national policies of the Member States. At the same time, although debates within the European Parliament can serve as a reliable barometer of the dynamics of European values, it should be noted that the Member States are unlikely to receive with unanimous openness any proposal to amend the Charter of Fundamental Rights of the European Union so as to include a right to abortion.

In this regard, one should recall the case of Ireland, which sought to resist the influence of European law in the domain of bodily autonomy both during the Maastricht Treaty negotiations – by securing a protocol specifically designed to protect its prohibition on abortion – and again in 2008, when, at Ireland's request, the European Council approved a declaration confirming that the Treaty would not affect Ireland's ban on abortion.⁴⁰

In the current context of the European Union, where legislative harmonisation concerning the protection of reproductive rights is conceivable, it is foreseeable that some Member States will invoke the protection of their constitutional identity to justify restrictive regulations on abortion. Such positions may clash with the Union's fundamental values – such as gender equality and respect for human dignity – thereby generating tensions between national competences and EU legislation.

Julian Scholtes argues that a state's constitutional identity should be understood through two dimensions: first, the unamendability of certain constitutional provisions – namely, the 'hard core' of the constitution that precludes revisions infringing upon those provisions deemed most important to the nation; and second, constitutional culture, that is,

³⁸ J. Gašperin Wischhoff, *National Constitutional Identity* (Nomos 2025, Baden-Baden), DOI: <https://doi.org/10.5771/9783748949701>

³⁹ Ibid 388.

⁴⁰ Federico Fabbrini, 'How EU Membership Transformed Ireland's Socio-Legal Norms: The Case of Abortion' *VerfBlog* (29 March 2023), DOI: <https://doi.org/10.17176/20230329-195110-0>

the reflection through a local, national lens of a people's common sense and shared values within the concept of national identity, which thereby acquires normative force.⁴¹

However, how far can Member States press the invocation of constitutional identity? Authors such as Federico Fabbrini and András Sajó warn against the arbitrary use of this notion – one they regard as vague – in light of the absence of a reliable source for identifying constitutional identity, which currently varies with the jurisprudence of each constitutional court and may contribute to the erosion of the European project.⁴² Nor should we overlook the contentious identity-based claims of Poland and Hungary that have involved deploying constitutional identity as a defensive instrument against the European legal order and the rule of law.⁴³

In this context, it should not be overlooked that, although Member States have frequently invoked the need to protect their own constitutional identities, the Court of Justice of the European Union has recently indicated that the EU itself possesses an identity whose core lies in Article 2 T.E.U.⁴⁴ Article 2 refers to respect for human rights, and the European Parliament has underscored the need to enshrine a right to abortion in the Charter of Fundamental Rights precisely in view of the threats to human rights, including sexual and reproductive rights. The European Parliament has opened the way to this approach by reframing the issue of abortion through the lens of fundamental rights and anchoring its argumentation both in Article 2 TEU and in the provisions of the Charter of Fundamental Rights of the European Union.⁴⁵

Lastly, it is worth highlighting the European Citizens' Initiative 'My Voice, My Choice – For Safe and Accessible Abortion', launched in 2024, which represents a firm plea for the fundamental right to reproductive health and the bodily autonomy of women. The initiative conveys a collective call for the elimination of legislative and social barriers that restrict access to safe and affordable abortion services. This initiative promotes a common standard for the protection of women's lives and health, affirming that access to abortion is not merely a medical matter, but also an expression of individual freedom and self-determination. Its concrete objective is to obtain financial support for Member States willing to provide legal and safe abortion services for any person in Europe who does not yet have access to them.⁴⁶

⁴¹ J. Scholtes, 'Abusing Constitutional Identity' (2021) 22 (4) German Law Journal 534–556.

⁴² Federico Fabbrini, András Sajó, 'The dangers of constitutional identity' (2019) 25 (4) European Law Journal 457, DOI: <https://doi.org/10.1111/eulj.12332>

⁴³ T. Drinóczi, A. Bień-Kacala, 'Illiberal Constitutionalism: The Case of Hungary and Poland' (2019) 20 (8) German Law Journal 1140–1166, DOI: <https://doi.org/10.1017/glj.2019.83>

⁴⁴ Judgment – 05/06/2023 – Case C-204/21 *Commission v Poland (Indépendance et vie privée des juges)*, ECLI:EU:C:2023:442.

⁴⁵ L. Peroni, M. Bucholc, 'Towards a common EU-abortion policy? The European Parliament's resolutions on abortion as a human rights issue' (2025) 31 (1–2) European Law Journal 63–80, DOI: <https://doi.org/10.1111/eulj.70005>

⁴⁶ Initiative available at <https://citizens-initiative.europa.eu/initiatives/details/2024/000004_en> accessed 31 October 2025.

The ‘My Voice, My Choice: For Safe and Accessible Abortion’ initiative was submitted to the European Commission on 1 September 2025, and on 1 October 2025, the organisers presented the objectives of their initiative during a meeting with European Commission officials.⁴⁷

Yet how far can the argument of invoking constitutional identity be taken before the Court of Justice of the European Union, when the reduction of the protection of this right collides with the fundamental values of the Union, such as human dignity? We consider that the integration of the right to abortion into the Charter of Fundamental Rights of the Union and its clear and direct protection by the CJEU should not be hindered by potential claims based on national constitutional identity. This fundamental right, anchored in the essential values of the Union, must prevail over such exceptions invoked on identity-based grounds, following the remarkable model of France in constitutionalising the right to abortion.

⁴⁷ Information available at <https://commission.europa.eu/european-citizens-initiative/meeting-organisers-european-citizens-initiative-my-voice-my-choice-safe-and-accessible-abortion-2025-10-01_en> accessed 31 October 2025.