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Right to Abortion: a new Fundamental Right?

From a Resolution to an EU Fundamental Right

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ABSTRACT

In reaction to the U.S. Supreme Court decision to overturn Roe vs. Wade in 2022, the EU Parliament calls in its resolution P9_TA(2022)0302 for the right to abortion to be included in the EU Charter of Fundamental Rights. This work analyses the quality of the proposal by the EU Parliament against criteria set up by Philipp Alston.

This thesis also investigates why abortion is still regarded as a sensitive issue today, before it illustrates how the ECJ and ECtHR have dealt with abortion in the past, citing and summarizing the most important case law on the matter. The analysis of the case law is subject matter in numerous Articles in academic literature – but whether the EU resolution P9_TA(2022)0302 offers a potential solution has not been assessed. In order to answer this question, this thesis uses the doctrinal research method, focusing on EU primary law, the case law of the ECJ and the ECtHR, the forementioned EU resolution and related academic literature.

Finally, it will be concluded that the right to abortion does in fact fulfill most of the criteria for setting up a new EU fundamental right. However, the specific proposal by the EU Parliament is unlikely to meet broad approval by EU Member States. Moreover, the EU currently lacks competence to enshrine the right to abortion into the Charter of Fundamental Rights. Ultimately, it is concluded that the resolution is more of a symbolic gesture than a proposal which can be actually implemented in practice.

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ACKNOWLEDGEMENTS

For my sisters.

I. Introduction

The following thesis will deal with the right to abortion. "Not another thesis on abortion!", one might exclaim. The topic seems hackneyed, over-discussed, the subject of numerous philosophical, religious, feminist, legal and medical discussions and papers - while there is still no solution or agreement on how to deal with it from a human rights perspective. Is there anything left to say?

The way a state regulates the right to abortion in its national laws - or criminalizes abortion - seems to be an indicator of how liberal or conservative the current political climate in a state is. For decades, one could see a worldwide trend for states to liberalize abortion laws: For example, the right to abortion was recognized as a constitutional right in the U.S. for about 50 years.[1] Also, the "Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa" of 2005 includes a right to abortion under Article 14 (2) in cases of sexual assault, rape and incest and where the continued pregnancy endangers the mental and physical health or the life of the mother.[2] Moreover, as of today, abortions can be accessed legally on request at least in the first trimester of pregnancy in most Member States of the European Union[3].[4]

But, after this long episode of a more liberal approach, a worldwide backward trend is emerging, that can also be contextualized within the general rise of conservative and right-wing political parties.[5] In 2020, for example, the Polish Constitutional Court declared one of the three grounds on which women[6] can legally have an abortion in Poland to be unconstitutional.[7] Furthermore, the current Italian prime minister Georgia Meloni expressed in her 2022 election campaign the

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[1] Janice Hopkins Tanne, "US Supreme Court ends constitutional right to abortion," *BMJ: British Medical Journal* (2022); 377:o1575, accessed July 4, 2023, doi: https://doi.org/10.1136/bmj.o1575.

[2]Molly Joyce, "The Human Rights Aspects of Abortion," *Hibernian Law Journal* 16 (2017): 27-41 (38); Christina Zampas & Jaime M. Gher, "Abortion as a Human Right – International and Regional Standards," *Human Rights Law Review*, Volume 8, Issue 2, (2008): 249-294 (250), accessed July 11, 2023, https://doi.org/10.1093/hrlr/ngn008.

[3] In the following: EU.

[4] "European Abortion Laws: A Comparative Overview," Center for Reproductive Rights, accessed July 7, 2023, https://reproductiverights.org/european-abortion-laws-comparative-overview/.

[5] For example in Italy. See Andrea Carlo, "Getting an abortion in Italy can be difficult. Is it about to get much tougher?" euronews, September 29, 2022, accessed July 7, 2023, https://www.euronews.com/my-europe/2022/08/04/getting-an-abortion-in-italy-can-be-difficult-is-it-about-to-get-much-tougher. See also Gregor Puppinck, "Abortion in European Law: Human Rights, Social Rights and the New Cultural Trend," *Ave Maria International Law Journal, Volume* 4, No. 1, (2015): 29-43 (38), accessed July 11, 2023, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2664972.

[6] The author is aware that not only women can bear children. For simplification, the word "women" is used in this thesis. This shall include all people who can become pregnant.

[7] Ewa Łętowska, "A Tragic Constitutional Court Judgment on Abortion," *Verfassungsblog,* November 12, 2020, accessed July 4, 2023, https://verfassungsblog.de/a-tragic-constitutional-court-judgment-on-abortion/.

intention to significantly limit Italian abortion laws.[8] Finally, the U.S. Supreme Court's decision of June 2022 to no longer recognize abortion as a federal constitutional right has received worldwide attention. Is it acceptable from a human rights perspective for the right to abortion to be subject to such political fluctuations? Or should it be guaranteed regardless of such shifts inherent in political discourse?

There are now clear political reactions to these recent conservative developments and decisions - for example from French President Emmanuel Macron. On 8 February 2023, he announced his intent to enshrine a right to abortion in the French constitution.[9] Macron explained that, in his view, the right to abortion is not a law but rather a freedom, thereby clearly focusing on the human rights aspect of the debate. He also stated that "Courts in other countries in the world have returned to the question of women's rights because reactionary ideologues are seeking their revenge on the lawyers and activists who once made them retreat." [10]

Furthermore, on 7 July 2022, the European Parliament passed resolution P9_TA(2022)0302 "on the U.S. 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", proposing that a right to abortion should be enshrined in the European Charter of Fundamental Rights[11].[12] While some have welcomed the resolution, others have taken a clear stand against it, calling it "fatal", "deadly" and "polarizing, when the EU is supposed to bring unity[13]". And indeed, the motto of the EU is "United in Diversity" - which also best describes the EU's approach to ethics.[14]

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[8] Angela Giuffrida,"Italy's Giorgia Meloni denies she is anti-women as credentials questioned," *The Guardian*, September 29, 2022, accessed July 7, 2023, https://www.theguardian.com/world/2022/sep/29/giorgia-meloni-italian-women-abortion-pink-quotas.

[9] Roger Cohen, "Macron Calls for Enshrining Right to Abortion in French Constitution," *New York Times*, March 08, 2023, accessed July 4 2023, https://www.nytimes.com/2023/03/08/world/europe/abortion-france-macron.html.

[10] Ibid.

[11] In the following: CFR.

[12] European Parliament Resolution on 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, P9_TA(2022)0302, adopted July 7, 2022, accessed July 4, 2023, https://www.europarl.europa.eu/doceo/document/TA-9-2022-0302_EN.pdf.

[13] Stephan Baier, "Die Abtreibungs-Ideologie macht blind," *die Tagespost,* January 17, 2023, last accessed July 7, 2023, https://www.die-tagespost.de/politik/die-abtreibungs-ideologie-macht-blind-art-235086.

[14] Markus Frischhut, ""EU": Short for "Ethical" Union? The Role of Ethics in European Union Law," *ZaöRV* 75 (2015): 531-577 (532).

Conversely, a proposal similar to the just mentioned resolution was already made by the Council of Europe[15] in 2008.[16] In the said resolution 1607 (2008)[17], the Parliamentary Assembly invites (as the resolution is not legally binding) its Member States to both decriminalize abortion and to guarantee women a right to legal and safe abortion.[18] It is interesting that both the EU and the CoE, which each provide quite similar human rights documents, have adopted resolutions in this respect. This may also be due to the fact that the two courts, the European Court of Human Rights[19] and the European Court of Justice[20], which are supposed to monitor Member States compliance with fundamental human rights, have so far been very reluctant to read a right to abortion into the European Convention of Human Rights[21] or CFR. This hesitation of both European courts is analyzed and discussed in the fourth chapter of this thesis, in particular with a focus on the Margin of Appreciation Doctrine of the ECtHR.

Based on this analysis, this thesis assesses whether the proposal to enshrine a right to abortion in the CFR may be necessary to close an existing gap in human rights protection at the European level or whether a restraint at the supranational level is appropriate on an issue which is still regarded as morally highly sensitive by many Member States. In order to answer this, the second chapter briefly summarizes the content of the EU Parliament's resolution on the matter. Afterwards, the following third chapter outlines the reasons why abortion is still considered a particularly sensitive issue today. In chapter five it will then be analyzed what the legal nature of the CFR is - are the rights contained therein human rights or quasi-constitutional rights?

Moreover, this work considers that human right treaties are on the one hand intended to always evolve and adapt to current developments and trends, while on the other hand the term "human rights" is in danger to be devalued if it encompasses too many rights that are not essential enough to be human rights. Therefore, the fifth chapter of the thesis deals with the question what criteria should be met for the establishment of a new fundamental right and if those are met in the EU Parliament's resolution P9_TA(2022)0302. Finally, this work discusses whether an implementation would be practically possible, especially with regard to the question if the

[15] In the following: CoE.
[16] Joyce, "The Human Rights Aspects of Abortion," 38.
[17] Parliamentary Assembly of the Council of Europe Resolution 1607 on Access to safe and legal abortion in Europe, adopted on April 16, 2008, accessed July 4, 2023, http://assembly.coe.intlnwlxml/XRef/Xref-XML2HTML-EN.aspfileid=17638&lang=en.
[18] Zampas & Gher, "Abortion as a Human Right," 251.
[19] In the following: ECtHR.
[20] In the following: ECJ.
[21] In the following: ECHR.

EU has the necessary competences to do so. During the Covid 19 pandemic, questions of how broad the extent of the EU's complimentary competence in the area of health is and whether the EU should be granted more competences in this field arose once again.[22] Could the right to abortion fall under the shared complimentary competence of health, Art. 168 TFEU, so that the EU indeed has a competence to pass regulations on abortion?

The thesis primarily uses the doctrinal research method: The research focuses on EU primary law, the case law of the ECJ and the ECtHR, the forementioned EU resolution and related academic literature. In addition, this work takes comparative studies comparing the number of abortions in EU Member States with more liberal abortion laws and those with abortion bans into account.

II. The Resolution

The background of the resolution P9_TA(2022)0302 is the decision of the U.S. Supreme Court, which has resulted in the ending of the federal constitutional right to abortion in the U.S. Considering the global interest in this ruling, the EU Parliament states that there is a need to safeguard abortion rights and women's health at European level by amending the CFR. The resolution refers in a legal context to (inter alia) the ECHR, the UN - Convention on Elimination of all Forms of Discrimination against Women[23] of 1979 and the CFR.[24]

In the EU, legal access to safe abortion is restricted or not possible in the following countries: Poland, Malta, Slovakia, Hungary, Italy, and Croatia. According to the EU Parliament, this is not in accordance with WHO evidence and recommendations. Furthermore, the EU Parliament points out that restrictions and bans on the right to abortion may have severe consequences - especially for individuals in vulnerable situations and disproportionately for people living in poverty. The EU Parliament states that abortion bans are a form of violence against women and girls: Not only would studies show that in countries that ban abortion women's lives and physical integrity are at risk, but this may also lead to a "cycle of poverty," as women who

[22] Amalie Holmgaard Mersh, "COVID-19 could be incentive to give EU more health powers," *EURACTIV*, March 03, 2022, last accessed July 4 2023, https://www.euractiv.com/section/health-consumers/news/covid-19-could-be-incentive-to-give-eu-more-health-powers/.
[23] In the following: CEDAW.
[24] European Parliament Resolution P9_TA(2022)0302.

experience an unwanted pregnancy may be more likely to not complete professional trainings or university studies.[25]

From a purely legal point of view, the EU Parliament states that in case of abortion bans and restrictions it would no longer be possible to effectively exercise the following rights guaranteed in the CFR: Human Dignity, Personal Autonomy, Equality and Physical Integrity.[26]

According to the resolution P9_TA(2022)0302, Article 7 CFR shall be amended as follows:

Article 7a (new):
Article 7a
Right to abortion
Everyone has the right to safe and legal abortion.

In this context, it should be kept in mind that a resolution by the EU Parliament is not legally binding and furthermore has no legal basis in the treaties. Resolutions are of a rather political nature and serve an orientation function for the political direction of the EU.[27] So far, neither the EU Parliament nor the EU Council have taken any further steps following this non - binding resolution. At this point, the EU Council would be in charge to introduce further measures.

III. Abortion as a Particular Sensitive Issue

Before it is discussed how the existing European human rights system currently deals with abortion, it is necessary to analyze why abortion is considered as such a particularly "sensitive[28]" issue.

At present, there are more and more rights that are being added to the catalogue of human rights, as well as new conventions that are adopted by the United Nations[29], like CEDAW, a convention especially set up in order to promote women's rights, or, as Hunt and Gruszczynski

[25] European Parliament Resolution P9_TA(2022)0302, at [E].
[26] Ibid., at [I].
[27] "Das Europalexikon: Entschließung", Seeger, accessed July 9, 2023, https://www.bpb.de/kurz-knapp/lexika/das-europalexikon/176817/entschliessung/.
[28] Frischhut, ""EU": Short for "Ethical" Union?," 532.
[29] In the following: UN.

put it, "the central United Nations treaty on women's rights[30]". However, what has remained untouched so far, is the right for women to terminate a pregnancy early. CEDAW contains some provisions concerning the reproductive freedom of women, but no explicit right to abortion. And because some interpret Articles 12.1[31], 14.2 (a)[32] and (b)[33] and Article 16 (e)[34] as granting an implicit right to abortion, many countries have placed reservations to it.[35] As an introduction to this thesis, it is briefly outlined here what the background to the ongoing debate and reluctance of states on abortion is. The following quotation from the ECtHR from its famous A., B. and C. vs. Ireland decision shall be prefaced: "There can be no doubt as to the acute sensitivity of the moral and ethical issues raised by the question of abortion or as to the importance of the public interest at stake."[36]

To understand the discussion, the historical context is crucial. At the time when most human rights conventions were adopted, abortion was still treated as a criminal offence by the contracting parties – in order to protect the life of the unborn. [37] Another reason was that, for a long time, the view prevailed in society (and still prevails in some countries today) that women's main task was to bear and raise children.[38] Traditionally, abortion has therefore not been seen as a freedom or even as a human rights issue – but rather as a criminal matter.[39]

Furthermore, the debate was (and still is to some extent) dominated by moral, cultural and religious arguments.[40] Only later, especially with the adoption of CEDAW in 1979, were health and reproductive aspects added to the discussion. The tone of the debate moved slightly away from the religious and moral context towards an emphasis on reproductive freedom and the

[30] Kate Hunt & Mike Gruszczynski, "The Ratification of CEDAW and the Liberalization of Abortion Laws," *Politics & Gender*, 15(4) (2019), 722–745 (726), accessed July 11, 2023, doi: doi:10.1017/S1743923X18000442.
[31] Provision regarding the Elimination of discrimination against women in the field of health care; including those related to family planning.
[32] Provision providing women the right to participate in the elaboration and implementation of development planning at all levels.
[33] Provision providing women the right to have access to adequate health care facilities, including information, counselling and services in. family planning.
[34] Obliges contracting states to grant women the same rights as men to decide on the number and spacing of their children.
[35] Hunt & Gruszczynski, "The Ratification of CEDAW," 729-730.
[36] *A., B. and C. v. Ireland*, App. No. 25579/05 (ECtHR, 16 December 2010), para.233.
[37] Joyce sees abortion as a "Health Right", see in Joyce, "The Human Rights Aspects of Abortion," 27; Puppinck, "Abortion in European Law," 30.
[38] Rebecca J. Cook, "International Protection of Women's Reproductive Rights," *New York University Journal of International Law and Politics* 24, No. 2 (Winter 1992): 645-728 (645), Accessed July 11, 2023, PMID: 11656212.
[39] Joyce, "The Human Rights Aspects of Abortion," 27.
[40] Ibid.

right to health.[41] Today, some even argue against this background that abortion should be a human right. [42] At the same time, others still see abortion as a "social problem" rather than a right or individual freedom.[43] They emphasize the fact that states have a legal duty to protect life, including the life of the fetus – although it is not clear to which extent.[44] It is interesting to note in this respect that both supporters and opponents of abortion can draw arguments from human rights and that those arguments do not necessarily work exclusively in one direction.[45]

IV. European Human Rights Law and Abortion: A Review

1. Introduction to the European Human Rights System

The European Human Rights system can be described as a "multilevel constitutional architecture[46]": On the lowest level are the domestic fundamental rights, most of them enshrined in the national constitutions of each state. On the supranational level of the EU, you can find the fundamental rights codified in the CFR and, above that, there is human rights protection on the international level under the ECHR and UNCHR.[47] It is a complex, multi-layered system, flanked by institutions appointed to protect and enforce the respective human rights guarantees. At each of these levels, abortion bans and very restrictive abortion laws have been subject to judicial decisions. Abortion is considered to be a morally highly sensitive issue[48], which is even more challenging to address in such a multi-layered system, and the question whether a right to abortion could be derived from the CFR or ECtHR has not been answered yet.

Although the ECJ and ECtHR originally had quite different functions - the ECtHR serving as an international human rights tribunal, while the ECJ was mainly set up to interpret EU law in order to guarantee and strengthen the common market - this distinction of functions was changed a little when the Treaty of Lisbon and the CFR entered into force. From 2009 on, the

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[41] For example, Cook makes reference to the health aspect, see in Cook, "International Protection of Women's Reproductive Rights," 648.
[42] Joyce sees abortion as a "Health right", see in Joyce, "The Human Rights Aspects of Abortion", 28.
[43] Puppinck, ″Abortion in European Law", 29.
[44] Ibid., 36.
[45] Bérengère Marques-Pereira, *Abortion in the European Union: Actors, Issues and Discourse,* (London: Foundation for European Progressive Studies and the Karl Renner Institute in association with London Publishing Partnership, 2023), 89, accessed July 9, 2023, https://feps-europe.eu/publication/abortion-in-the-european-union/.
[46] Federico Fabbrini, "The European Court of Human Rights, the EU Charter of Fundamental Rights, and the Right to Abortion: Roe v. Wade on the Other Side of the Atlantic," *Columbia Journal of European Law* 18, No. 1 (Fall 2011): 1-54 (4), Accessed July 11, 2023, https://ssrn.com/abstract=2578665.
[47] Ibid., 4.
[48] Frischhut, ""EU": Short for "Ethical" Union?," 532.

ECJ was granted the competence to review whether state measures were in line with fundamental rights. Moreover, the rights guaranteed under the ECHR and ECJ are almost identical.[49] It could therefore be perceived that ECJ and ECtHR would have an overlapping jurisdiction in the field of human rights. However, one of the biggest differences is that the ECJ only has jurisdiction when measures of Member States fall under EU law, whereas the ECtHR has the competence to review if national law complies with the rights guaranteed under the ECHR.[50] Furthermore, is should be noted that a mere 19 out of the 47 contracting parties of the CoE are also members of the EU.[51]

Against this background, it is not surprising that academic literature often analyzes whether and to what extent the ECtHR and the ECJ influence each other's decisions.[52] This phenomenon is described as "judicial dialogue", which can take many different forms - the most straightforward, however, being the citation of each other's case law.[53] It is interesting to note that according to 52 (3) CFR the ECJ is even legally obligated to take into account decisions of the ECtHR in the field of human rights[54]: "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention." But, according to sentence 2 of the provision, this "{…} shall not prevent Union law providing more extensive protection." Up until now, however, no such "judicial dialogue" could be identified in connection with judgments concerning abortion bans and/or severe restrictions. On the one hand, this may be due to the fact that the ECJ has not had to deal with the issue in its jurisprudence to a great extent so far (except in Grogan, more on that below) and that it is primarily the ECJ that refers to case law of the ECtHR, not vice versa.[55] On the other hand, this is probably also due to the cautious approach of both courts on the issue, also described by Gerards as them "trying not to immerse {…, themselves} in the deep and cold waters of abortion regulation too quickly[56]" - an approach which hardly offers content or merits that could actually be cross-referenced.

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[49] Amalie Frese & Henrik Palmer Olsen, "Spelling It out - Convergence and Divergence in the Judicial Dialogue between CJEU and ECtHR," *Nordic Journal of International Law* 88, no. 3 (August 2019): 429-458 (435), Accessed July 11, 2023, doi: https://doi.org/10.1163/15718107-08803001.
[50] Ibid.
[51] Ibid., 437.
[52] Ibid., 435.
[53] Ibid., 437.
[54] Ibid., 435.
[55] Ibid., 458.
[56] Janneke Gerards, "Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights," *Human Rights Law Review*, 18, (2018): 495-515 (507), accessed July 11, 2023, doi: https://doi.org/10.1093/hrlr/ngy017.

In the following, it will be explained how both the ECtHR and the ECJ on the supranational level have so far been reluctant to resolve the issue in one direction or the other under their respective applicable human rights regimes. Especially the ECtHR has mainly limited itself to procedural aspects of abortion laws. Furthermore, it will be explained why the ECtHR's usual approach to dealing with complex issues has not been used in abortion cases to its usual extent or in its usual form. This reluctance both on the supranational and international level may have created an uncertainty which disproportionately affects women (more on that below).[57]

This chapter will first briefly summarize and then critically analyze the case law by both ECJ and ECtHR regarding the question whether there is a right to abortion under European Human Rights Law. Particular emphasis is placed on the principles of Margin of Appreciation doctrine and the European Consensus, before it is discussed whether this approach by the courts may still be compatible with the - ever evolving - human rights understanding today.

2. The ECJ and Abortion

a) About the ECJ and the CFR

The ECJ, established in 1952 and located in Luxembourg, ensures that EU law is interpreted and applied in the same way in every EU Member State, securing that all Member States and EU institutions respect EU law, see Art. 19 TEU.[58] It currently has 27 judges - one judge per member state.[59] The ECJ has the highest judicial power in all matters of Union law.[60]

The ECJ was originally not set up as a human rights tribunal.[61] Instead, the EU and the ECJ were (mainly) set up in order to promote an internal market and economic integration.[62] In 2009, when the Treaty of Lisbon entered into force, the CFR also became legally binding. With this came a shift of "the theoretical underpinnings of the ECJ's oversight from an internal

[57] Daniel Fenwick, "Abortion Jurisprudence at Strasbourg: Deferential, Avoidant and Normatively Neutral," *Legal Studies* 34, no. 2 (2014): 214-241 (230). Accessed July 11, 2023. doi:10.1111/lest.12012.
[58] Frese & Olsen, "Spelling It out," 432.
[59] Klaus-Dieter Borchardt, 7th ed., *Die rechtlichen Grundlagen der Europäischen Union*, (Wien: Facultas Verlags- und Buchhandels AG, Stuttgart: UTB, 2020), para.387.
[60] Ibid., para.394.
[61] Aida Torres Perez, "The Federalizing Force of the EU Charter of Fundamental Rights," *International Journal of Constitutional Law* Volume 15, no. 4 (2017): 1080-1097 (1092), accessed July 11, 2023, https://doi.org/10.1093/icon/mox075.
[62] Frese & Olsen, "Spelling It out," 430.

market paradigm toward a fundamental rights paradigm[63]".[64] However, the rights enshrined in the CFR had already been developed before in case law of the ECJ and trough the "ongoing interaction" between national courts and the ECJ.[65]

The CFR has the same legal value as the EU treaties (primary law).[66] Originally only applicable to EU institutions, the CFR has later been "progressively addressed to state action {…}"[67]. By some, it is considered to be "one of the most advanced human rights instruments worldwide"[68].

According to the first and second recital of the CFR, the CFR is "based on common values" and "spiritual and moral heritage" of its Member States.[69] However, the CFR requires the EU to respect "the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States", see the third recital of the CFR.[70] Also, according to Article 22 CFR, "The Union shall respect cultural, religious and linguistic diversity".
The CFR only applies when state action falls within the scope of EU law, Article 51 (1) CFR.[71] Furthermore, according to Article 51 (2) CFR the "{…} Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties." The reluctance of the EU Member States toward the charter as expressed in Article 51 (2) can also be seen in the additional protocols which some states obtained in order to limit its applicability: In light of the Grogan decision (more on that below) and out of fear that the ECJ may actually review (inter alia) national abortion laws under the CRF, Protocol No. 30 "on the application of the CFR" was added to the EU treaties, making exceptions for Poland and the U.K. Protocol No. 30 states that the CFR does not extend the competences of the ECJ or any domestic court to find that laws, regulations or administrative provisions, practices or action of those states do not comply with the CFR. Especially Poland opted for the protocol in order to protect its restrictive abortion laws from any supervision by the ECJ. When Malta became a member of the EU in 2004, it was also granted a special protocol, Protocol No. 7, under which Malta's abortion laws were to be excluded from the jurisdiction of the ECJ.[72] However, some

[63] Fabbrini, "Roe v. Wade on the Other Side of the Atlantic," 45; Frischhut, ″"EU": Short for "Ethical" Union?," 534.
[64] Frischhut, ""EU": Short for "Ethical" Union?," 534; Paul Kearns, "The EU and Human Rights: An Unlikely Evolution," *Amicus Curiae* 79 (2009), 3-5 (3), accessed July 11, 2023, https://sas-space.sas.ac.uk/2561/.
[65] Perez, "The Federalizing Force of the EU Charter," 1080-1081.
[66] Fabbrini, "Roe v. Wade on the Other Side of the Atlantic," 44.
[67] Perez, "The Federalizing Force of the EU Charter," 1082.
[68] Fabbrini, "Roe v. Wade on the Other Side of the Atlantic," 44.
[69] Frischhut, ""EU": Short for "Ethical" Union?," 532.
[70] Ibid., 532.
[71] Perez, "The Federalizing Force of the EU Charter," 1082.
[72] Fabbrini, "Roe v. Wade on the Other Side of the Atlantic," 45-46.

legal scholars consider these protocols to be merely political statements which are not legally binding, given the binding-nature of the CFR and its status as primary law.[73]

b) The Grogan Case: Abortion as a Service under EU Law

In the just mentioned Grogan case[74] of 1991 – decided before the CFR was adopted - the ECJ acknowledged that abortion, if performed in accordance with the law of the state in which it is carried out, constitutes a service within the meaning of EU law. The conclusion that abortion is a medical service is also (partly) argued in academic literature.[75]

The case had arisen in Ireland and subsequently the High Court of Ireland had referred questions to the ECJ on the interpretation of EU law.[76] Mainly, the ECJ had to assess whether an Irish prohibition of sharing information about legal abortion services in other EU Member States conflicted with community law.[77] Background of this was that Irish students, Stephen Grogan and others, had distributed information in Ireland about EU Member States where abortion could be accessed legally – while having no links or associations with those abortion clinics in other Member States.[78] At that time, Ireland had a very strict abortion regime, legally allowing for abortion only when the life of the mother was at risk.

Although stating that lawful abortion services indeed constitute a service under EU law because abortion is a medical activity[79], the court upheld the concrete Irish prohibition since the sharing of the information was "merely a manifestation of freedom of expression" and other Member States had no involvement in the distribution of information.[80] With regard to the arguments made by the "Society for the Protection of Unborn Children Ireland Ltd", one of the parties of the domestic proceedings, which claimed abortion to be "grossly immoral" and "involves destruction of a life" and could therefore not be regarded as a service, the ECJ stated that "whatever the merits of those arguments on the moral plane, they cannot influence the answer to the national court's first question {regarding whether abortion constitutes a service}".[81]

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[73] Fabbrini, "Roe v. Wade on the Other Side of the Atlantic," 47.
[74] C-159/90, SPUC (Ireland) Ltd v. Stephen Grogan and Others, 1991, ECLI:EU:C:1991:378.
[75] Cook, "International Protection of Women's Reproductive Rights," 648.
[76] C-159/90, SPUC (Ireland) Ltd v. Stephen Grogan and Others, 1991, ECLI:EU:C:1991:378, para.1.
[77] Fabbrini, "Roe v. Wade on the Other Side of the Atlantic," 17.
[78] C-159/90, SPUC (Ireland) Ltd v. Stephen Grogan and Others, 1991, ECLI:EU:C:1991:378, para.2-6.
[79] C-159/90, SPUC (Ireland) Ltd v. Stephen Grogan and Others, 1991, ECLI:EU:C:1991:378, para.18-21.
[80] Ibid., para.25-26.
[81] Ibid., para.20.

However, what the ECJ left unanswered is whether the Irish prohibition would be compatible with community law if not Irish student associations but the providers of abortion services themselves would have shared the information.[82] According to Federico Fabbrini, this omission of the court made clear that Irelands measures on abortion were not just a matter of Irish law but may also pose infringements of EU law.[83] Fabbrini further argues that if the ECJ had to decide on the Grogan case today, now that the binding CFR is adopted, the ECJ would need to decide on the fundamental rights issues of the case – and not simply dwell on economic aspects.[84] He considers that the adoption of the CFR changed the "theoretical underpinnings of the ECJ's oversight from an internal market paradigm toward a fundamental rights paradigm[85]". He adds that the fact that some Member States like Poland and Malta opted for additional protocols in order to limit the applicability of the CFR is proof that the ECJ with – now - the CFR at hand has the competence to decide on domestic abortion laws from a fundamental rights perspective.[86]

c) Article 21 CFR - Equality without Discrimination

The Articles of the CFR which may interfere with strict abortion bans and heavy restrictions on the access to abortion are right to life (Article 2), private life (Article 7) and equality without discrimination (Article 21).[87] In the following, particular emphasis lies on Article 21 CFR, as it had implications for the aforementioned Grogan case: Fabbrini draws attention to a possible violation of Article 21 CFR in relation to the Grogan decision – an argument which was similarly raised by the claimants in the A., B. and C. v. Ireland decision of the ECtHR[88] in connection with Article 14 ECHR (Prohibition of Discrimination (more on this further below). Article 21 CFR guarantees equality, by (inter alia) prohibiting any discrimination on grounds of property.[89]

In the opinion of AG Mr. Van Gerven, the Irish abortion (de facto) ban concerned in Grogan was not disproportionate since women were still able to travel abroad in order to have legal access to abortion services.[90] Fabbrini points out that this argumentation poses a clear

[82] Fabbrini, "Roe v. Wade on the Other Side of the Atlantic," 18.
[83] Ibid., 44.
[84] Ibid., 45.
[85] Ibid.
[86] Ibid.
[87] Ibid., 44.
[88] *A., B. and C. v. Ireland*, App. No. 25579/05 (ECtHR, 16 December 2010), para.269.
[89] Fabbrini, "Roe v. Wade on the Other Side of the Atlantic," 50.
[90] Opinion of. Advocate Gen. Van Gerven, June 11, 1991, Case C-159/90, SPUC v. Grogan, [1990] E.C.R. 1-4703, 4732, para.29; Fabbrini, "Roe v. Wade on the Other Side of the Atlantic," 49.

discrimination against people who are financially less stable and therefore cannot afford to travel to another EU Member State.[91] In his words: "This situation is clearly discriminatory, as the undue burden of an unwanted pregnancy is only imposed on low-income women."[92] He therefore argues that today, a decision similar to Grogan - which was made before the binding CFR came into force – would need to take Article 21 CFR into account, and would most definitely have a different outcome.[93]

However, as explained above, the CFR also asks the EU to respect the diversity and particularities of its Member States. The fact that no right to abortion was initially included in the CFR may also indicate that the handling of this issue should be left to the Member States - as it is an ethically and morally sensitive topic. It is precisely these decisions in the field of ethics and morals that are supposed to be respected by the EU according to the preamble of the CFR.

In conclusion, it can be argued that on the one hand, some of the rights of the CFR have implications for the question of a right to abortion. One may even argue that some of the rights codified in the CFR are only empty shells when they do not grant a (limited) right to abortion under certain circumstances and in certain (life-threating) cases – for example the right to life, in case the life of the women is in danger if she continues the pregnancy. On the other hand, according to the third recital of the CFR (inter alia), the EU is obligated to respect the decisions of its Member States in particularly sensitive areas and to leave them a margin of discretion in these fields.

3. The ECtHR and Abortion

Since a description of the facts of the full body of ECtHR case law would go beyond the scope of this thesis, reference is made to some of the in-depth academic literature analyzing ECtHR abortion related case-law[94]. In the following, the main focus is on the relevant legal aspects and merits of the case law. Moreover, the reason why the case law by the ECtHR is mentioned here

[91] Fabbrini, "Roe v. Wade on the Other Side of the Atlantic," 49.
[92] Ibid., 49.
[93] Ibid., 45 and 50-51.
[94] For example: Elizabeth Wicks, "A, B, C v Ireland: Abortion Law under the European Convention on Human Rights," *Human Rights Law Review*, Volume 11, Issue 3, (2011): 556–566, accessed July 11, 2023, doi:10.1093/hrlr/ngr015; Daniel Fenwick, "The modern abortion jurisprudence under Article 8 of the European Convention on Human Rights," *Medical Law International* 12(3–4), 249–276, accessed July 9, 2023, doi: https://doi.org/10.1177/0968533212466658.

– although the thesis primarily deals with an EU-resolution - is because according to 52 (3) CFR the ECJ is legally obliged to take decisions of the ECtHR in the field of human rights[95] into account. The EU is therefore strongly influenced by the case law of the ECtHR.

Unlike the ECJ, the ECtHR was originally set up as a Human Rights Tribunal. The CoE was adopted in 1950, after World War II, in order to prevent further human rights violations and to support common democratic values in Europe. [96] According to paragraph 19 ECHR the ECtHR has to "ensure the observance of the engagements undertaken by the high Contracting Parties in the Convention and the Protocols hereto {…}".

At the time the convention was adopted, abortion was considered to be a criminal issue by all signatory parties.[97] Therefore it can be assumed that originally it was not the aim of the drafters to enshrine into the text any limitation on the domestic powers to regulate an early termination of pregnancy.[98] Conversely, as the ECtHR has repeatedly stated, the ECHR is a flexible instrument and its articles are ever evolving, adapting to current developments.[99] In this way, the convention "reflects state practice" [100]. Some argue that a human rights convention like the ECHR, in order to remain useful, "{…} must stay in line with modern thought on individual rights and on sociological theory".[101] And, especially in the context of abortion, there have been significant developments since 1950, as abortion is now legal in the majority of the State Parties - at least under certain conditions, mainly in the early stages of pregnancy. As a consequence, the ECtHR has in the past assessed a number of provisions of the ECtHR for their compatibility with abortion bans or severe restrictions on access to abortion.[102]

In the following, the Articles of the ECHR which have been repeatedly tested by the ECtHR and in academic literature for compatibility with abortion bans and restrictions will be summarized. Under the ECHR, Articles which have the most implications in the abortion context are Article 8, Article 3 and Article 2, while in more recent academic literature, gender-

[95] Frese & Olsen, "Spelling It Out," 435.
[96] Ibid., 430.
[97] Fabbrini, "Roe v. Wade on the Other Side of the Atlantic," 19.
[98] Ibid.
[99] *Tyrer v. The United Kingdom*, App. No. 5856/72 (ECtHR, 25 April 1978) para.31.
[100] Orlaith Meaney, "The European Court of Human Rights and Abortion: A Right or Moral Issue?: Assessing Whether the Recent Expansion of Abortion Legislation on the Island of Ireland Increases the Likelihood of the Recognition of a Right to Abortion under the European Convention on Human Rights," *Hibernian Law Journal* 20 (2021): 67-91 (76).
[101] Ralph Beddard, 3rd ed., *Human Rights and Europe*, (Cambridge: Grotius Publications Limited, 1993), 71.
[102] Fabbrini, "Roe v. Wade on the Other Side of the Atlantic," 19.

based discrimination issues are further discussed under Article 14 in connection with Article 8 or 3.[103]

a) Article 8 ECHR – Right to respect for private and family Life

In the most prominent ECtHR judgements[104] concerning abortion – being A., B. and C. vs. Ireland[105], RR v. Poland[106] and Tysiqc v Poland[107] - Article 8 played the very central role. The provision requires states to respect the right to private and family life, but leaves it to the interpretation of the ECtHR what exactly falls under the broad term[108] "private life" and under the scope of Article 8.[109] The court repeated that "private life includes a person's physical and psychological integrity"[110] and stated that therefore laws regulating the access to abortion do fall under the scope of Article 8. Accordingly, the court decided that bans and restrictions on abortion may pose an interference with women's private life.[111] But, according to paragraph 2 of Article 8, an interference with the right to private life may be justified if a legitimate aim is being pursued, the interference is prescribed by law and necessary in a democratic society.[112]

The ECtHR grants states a broad Margin of Appreciation in determining what is a legitimate aim and what is necessary in a democratic society – especially in connection with abortion laws.[113] By following this approach, the ECtHR for example accepted Irelands once very strict abortion regime in A., B. and C. vs. Ireland since the legislation was justified with the aim to protect the life of the unborn.[114] Following this approach, under the given circumstances, the court declared that "{…} Article 8 cannot, accordingly, be interpreted as conferring a right to abortion, {…}".[115] Yet, some argue[116] that the court also deliberately did not constitute an unlimited leeway for state parties to protect the unborn under the ECHR either. This approach of the court can be explained as follows: While the ECtHR states that Article 8 does not confer

[103] For example, in: Fenwick, "Abortion Jurisprudence at Strasbourg".
[104] According to Fenwick, "The modern abortion jurisprudence under Article 8," 250.
[105] *A., B. and C. v. Ireland*, App. No. 25579/05 (ECtHR, 16 December 2010).
[106] *R.R. v Poland*, App. No. 27617/04 (ECtHR, 28 November 2011).
[107] *Tysiqc v. Poland*, App. No. 5410/03 (ECtHR, 20 March 2007).
[108] *Tysiqc v. Poland*, para.107.
[109] Meaney, "The European Court of Human Rights and Abortion," 71.
[110] *Tysiqc v. Poland*, para.107.
[111] Gerards, "Margin of Appreciation and Incrementalism," 508.
[112] Fenwick, "The modern abortion jurisprudence under Article 8," 251.
[113] More on that "Margin of Appreciation doctrine" below.
[114] Fenwick, "The modern abortion jurisprudence under Article 8," 268.
[115] *A., B. and C. v. Ireland*, para.214.
[116] For example, Fenwick, "Abortion Jurisprudence at Strasbourg," 229.

an unlimited right to abortion, the court also states that the protection of the life of the unborn cannot provide an unrestricted justification for states to prohibit abortions under any circumstances. In this way, the ECtHR does not ultimately decide on how the right to self-determination of the pregnant person should be balanced against the right to life of the unborn under the convention.

The ECtHR further found that Article 8 does not contain purely negative obligations, but "that the state is also under a positive obligation to secure to its citizens their right to effective respect for this integrity".[117] This means that a state has on the one hand the negative obligation to restrain from interfering with private life but on the other hand also the obligation to take measures in order to ensure that private life is protected and that Article 8 can be fully exercised by its citizens. States may fulfill this positive obligation by, for example, amending the law. In connection with abortion issues, the ECtHR has declared that a state failed to fulfill its positive obligation under Article 8 in cases where abortion was allowed by domestic law but abortion services were unavailable in practice: The court has declared that if a state legally allows for abortion by its domestic law, abortion must also be accessible in practice and the state must take all measures to ensure that this right can also be fully exercised: In A., B. and C. vs Ireland for example, the ECtHR has stated that "(…) the uncertainty generated by the lack of legislative implementation of Article 40.3.3, and more particularly by the lack of effective and accessible procedures to establish a right to an abortion under that provision, has resulted in a striking discordance between the theoretical right to a lawful abortion in Ireland on the ground of a relevant risk to a woman's life and the reality of its practical implementation"[118]. Based on this statement, the ECtHR found a breach of the procedural aspect of Article 8 in A., B. and C. vs Ireland.

Daniel Fenwick further argues that one could consider an infringement of Article 8 ECHR under another aspect: Article 8 ECHR protects the right to health. However, if women seek to terminate a pregnancy but this is not legally permissible or is even criminalized in their own country, and they have to travel to another European member state, this may lead to severe

[117] *Tysiąc v. Poland*, para.107; Federico Fabbrini, "The Last Holdout: Ireland, the Right to Abortion and the European Federal Human Rights System," *Dublin University Law Journal* 42, no. 1 (2019): 21-62 (40), accessed July 11, 2023, https://ssrn.com/abstract=3249400.
[118] *A., B. and C. v. Ireland*, para.264.

psychological stress and tension, which could also manifest itself in a severe physical way.[119] Also Molly Joyce considers abortion as a "a reproductive right and therefore a "health right"[120]".

b) Article 2 ECHR – Right to Life

The question if a right to abortion can be deferred from Article 2 ECHR, for example when the life of the pregnant person is in danger if the pregnancy is not terminated early, cannot be answered without determining to what extent Article 2 (1) protects the life of the unborn.[121] The ECtHR has not yet decided on this issue but leaves the states a Margin of Appreciation to determine when the life of the unborn begins.[122] Against this background, Article 2 ECHR has so far played a rather marginalized role in ECtHRs case law regarding abortion.

Furthermore, in A., B. and C. vs. Ireland, the ECtHR ruled that there was no violation of Article 2 ECtHR since the pregnant person who needed an abortion in order to save her life was able to travel to another state where she would have safe and legal access to abortion.[123] This argument will be further discussed below.

c) Article 3 ECHR – Prohibition of Torture

The opinion of the court on a possible violation of Article 3 ECHR has changed marginally over time: While in A., B. and C. vs Ireland the court ruled that the minimum level of severity had not been met[124], in R.R. v. Poland the court did find a violation of Article 3: The ECtHR stated that the pregnant person concerned was in a very vulnerable position and had been humiliated.[125] Still, it has to be noted, that in the case of R.R. v. Poland a domestic right to abortion existed but abortion was simply not accessible in practice, giving the ECtHR a ground to decide on the issue by focusing on procedural aspects (as explained above).

[119] Fenwick, "Abortion Jurisprudence at Strasbourg," 231.
[120] Joyce, "The Human Rights Aspects of Abortion," 28.
[121] See on this topic: Christoph Grabenwarter, *European Convention on Human Rights - Commentary -,* (München: Beck, 2014), 14.
[122] *Vo vs. France*, App. No. 53924/00 (ECtHR, 8 July 2004) para.81.
[123] *A., B. and C. v. Ireland*, para.158.
[124] Ibid., para.164.
[125] *R.R. v. Poland*, para.153 ff.

d) Article 14 - Prohibition of Discrimination

Both in applications before the ECtHR[126] and also in academic literature, it is discussed whether abortion bans may constitute a violation of Article 14 ECHR, mainly on the grounds that they disadvantage women because of the mere fact that only women can get pregnant.[127] Nevertheless, the ECtHR has barely - in some cases not at all – taken a position on this argument - although it has expressed in the past that it especially wants to combat gender discrimination.[128] Nevertheless, in A., B. and C. v. Ireland, all arguments of the applicants that related to discrimination were only addressed under Article 8 ECHR.[129] Also in Open Door and Dublin Well Woman v. Ireland[130] the applicants arguments regarding discrimination were only dealt with by the court in relation to Article 10 ECHR.[131]

It is repeatedly pointed out and heavily criticized that both the ECJ and the ECtHR uphold abortion bans and / or very restrictive abortion laws on grounds that pregnant women have the possibility to travel abroad to have an abortion legally and safely – Fabbrini even points out that this argument "shaped the jurisprudence of the European supranational courts[132]". The resulting implications and whether Article 21 CFR may even constitute a duty for the EU to grant limited access to abortion on a supranational level, will be discussed further below.

e) The Margin of Appreciation Doctrine, Subsidiary Principle and European Consensus

In all judgements concerning the abortion issue, the ECtHR has made use of its Margin of Appreciation doctrine. It can be described by the discretion which national authorities enjoy when fulfilling their obligations under the ECHR and by implementing ECHR rights.[133]
Originally, the doctrine found no mention in the text of the convention and was only developed in the case law of the ECtHR. But later, on 1 August 2021, protocol no. 15 came into force, enshrining the Margin of Appreciation doctrine as well as the subsidiary principle, "which puts

[126] For example, *in A, B and C v. Ireland*, para.269.
[127] For example, in Fenwick, "Abortion Jurisprudence at Strasbourg," 234 and Fabbrini, "Roe v. Wade on the Other Side of the Atlantic," 50.
[128] Fenwick, "Abortion Jurisprudence at Strasbourg," 234-235.
[129] *A, B and C v. Ireland*, para.269.
[130] *Open Door and Dublin Well Woman v Ireland*, App. No. 14234/88, 14235/88 (ECtHR, 29 October 1992).
[131] Ibid., para.81-83.
[132] Fabbrini, "Roe v. Wade on the Other Side of the Atlantic," 48.
[133] "THE MARGIN OF APPRECIATION", Council of Europe, accessed July 9, 2023, https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp.

primary responsibility for protection of human rights on national authorities[134]" into the preamble of the ECHR. With the adoption of Protocol 15, the doctrine was ultimately confirmed in the legal text of the convention. Thereby, the importance of the Margin of Appreciation for the jurisprudence of the ECtHR was further emphasized.

The doctrine reflects "{…} the status {of the ECtHR} as an international tribunal, emphasizing its subsidiary role to national mechanisms in the securing of rights"[135]. The ECtHR is deemed as being the "secondary interpreter" of the ECHR after the contracting states itself.[136] It is an international court, which only has power to decide on human rights issues if strict criteria are met. For example, one prominent admissibility criterion is the exhaustion of domestic remedies, meaning that an applicant must first go through all national available remedies before being able to bring a case to the ECtHR (Article 35 (1) ECHR). It secures that the ECtHR only plays a subsidiary role when it comes to human rights protection and that issues should first be negotiated in states themselves.

The extent of the Margin of Appreciation may differ from broad to narrow to even non-existent.[137] For example, the importance of a right and the consequences for the individual are important indicators in determining how broad the margin should be.[138] On the one hand, when "the protection of morals is at issue"[139], the discretion of states becomes wider, which leads to limiting the level of scrutiny applied by the ECtHR when deciding if states comply with obligations under the ECHR.

On the other hand, discretion enjoyed by Member States is reduced if the court is able to identify a so-called European Consensus: If the ECtHR can detect a certain trend on a human right related issue in Europe - by comparing both laws and practices of states (comparative law

[134] Aaron A. Ostrovsky, "What's so Funny About Peace, Love, and Understanding? How the Margin of Appreciation Doctrine Preserves Core Human Rights within Cultural Diversity and Legitimises International Human Rights Tribunals," *Hanse Law Review*, Vol. 1, 47-64, 2005 (49).
[135] Meaney, "The European Court of Human Rights and Abortion," 74.
[136] Ostrovsky, "What's so Funny About Peace, Love, and Understanding?," 47.
[137] Fenwick, "The modern abortion jurisprudence under Article 8," 251.
[138] Douglas Lee Donoho, "Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity within Universal Human Rights," *Emory International Law Review* 15, no. 2 (Fall 2001): 391-466 (452-453), accessed July 11, 2023, http://works.bepress.com/douglas_donoho/11/.
[139] Meaney, "The European Court of Human Rights and Abortion," 74.

method[140])[141] - this usually leads to a limitation on the discretion of states.[142] The consensus is assessed by the court as part of its proportionality test.[143] An existing European Consensus usually limits the Margin of Appreciation that states enjoy, but it also serves other functions, which Dzehtsiarou summarizes as follows: to legitimize the judgments of the ECtHR, to persuade the involved parties to accept and execute the judgment (as the ECtHR does not have any executive powers), to avoid arbitrary decision-making and also as a tool to interpret the convention.[144] In the following, the single functions of the European Consensus are briefly explained.

As stated above, the European Consensus provides ground for a dynamic interpretation of the ECHR.[145] In the case of Tyrer v. The United Kingdom[146], the ECtHR has said its interpretation of the convention "{…}cannot but be influenced by the developments and commonly accepted standards {…} of the Member States of the Council of Europe {…}"[147].The ECtHR has stated that the ECHR is a "living instrument {…} which must be interpreted in the light of present day conditions"[148]. In this way, the ECHR "reflects state practice and thus leads to judgments being more likely to be accepted as legitimate" [149].

Furthermore, the European Consensus is used to legitimize the judgments of the ECtHR: As just explained, the ECHR is a "living instrument". One of the ECtHR judges Dzehtsiarou interviewed for his analysis explained that "If {the convention was} interpreted in that way as it would have been interpreted in the [19]50s it would be a dead instrument.[150]" So, necessarily, the Convention needs to adapt. The European Consensus is therefore used to legitimatize this new interpretation of the ECtHR.[151]

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[140] Kanstantsin Dzehtsiarou, "European Consensus: Perceptions of the ECtHR judges," in *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge: Cambridge University Press, 2015), 177, accessed July 9, 2023. doi:10.1017/CBO9781139644471.008.
[141] Alexander Morawa, "The 'Common European Approach', 'International Trends', and the Evolution of Human Rights Law. A Comment on Goodwin and I v. the United Kingdom," *German Law Journal* 3, No. 8 (2002): E4. doi:10.1017/S2071832200015248, para. 29.
[142] Meaney, "The European Court of Human Rights and Abortion," 76.
[143] Ibid.
[144] Dzehtsiarou, "European Consensus: Perceptions of the ECtHR judges," 184.
[145] Morawa, "The 'Common European Approach'," para.29.
[146] *Tyrer v. The United Kingdom.*
[147] Ibid., para.31.
[148] Ibid.
[149] Meaney, "The European Court of Human Rights and Abortion," 76.
[150] Dzehtsiarou, "Perceptions of the ECtHR judges,"184.
[151] Ibid.,185.

Also, if a strong European Consensus is reflected in a judgment, the parties may be persuaded to accept the judgment.[152]

Moreover, the assessing of the European Consensus shall prevent the impression of arbitrary decision–making by giving factual reasons to judgments.[153] The ECtHR wants to avoid that the parties believe that a judgment is grounded in personal moral views of the judges.[154] By assessing the European Consensus, the ECtHR shows that it knows "what is going on in Europe" and reflects this knowledge in its judgments.[155]

f) Deviation from the Usual Approach in Abortion cases

The ECtHR has granted the states discretion whether and under which circumstances they will allow for abortion. But, the issue of abortion falls into a gap the ECtHR has so far refused to close: On the one hand, a few contracting parties still uphold strong morally, culturally and especially religiously based concerns on the abortion issue. On the other hand, hardly any other topic raises the question of whether bans, criminalization or restrictions on actions do not manifestly conflict with international human rights law, which has led, among other reasons, to almost all states in Europe allowing for abortion in limited ways and under certain circumstances.[156] The approach of the ECtHR in abortion cases is particularly surprising, as it is a least debatable whether abortion is still regarded as such a highly moral issue or taboo in most states, with the vast majority granting at least limited abortion rights to women.

Still, the ECtHR suspended in its case law on abortion its usual approach of referring to a strong European Consensus: Instead, the ECtHR left it to the states to balance the mother's rights against the protection of the life of the unborn. One of the ECtHR judges, Judge Garlicki, stated in this relation that consensus "depends on the nature of the problem. In most cases, if there is a common ground then I think that the States should not depart too much from this. But I also can imagine that there are some important values for a judge, whether it be, for example, abortion, capital punishment, some elements of human dignity. If there is some kind of fundamental conflict between values and a position of even the majority of European

[152] Dzehtsiarou, "Perceptions of the ECtHR judges," 185.
[153] Ibid.,186.
[154] Ibid.,185.
[155] Ibid., 186.
[156] Donoho, "Autonomy, Self-Governance, and the Margin of Appreciation," 396.

legislators, I would stick to the values. However, this is only in an extreme situation which is, by definition, very rare."[157]

For example, in A., B. and C. vs Ireland the ECtHR did not follow its usual approach to reduce the Margin of Appreciation if there is a strong European Consensus on an issue: While noting that a "substantial majority" of states had more liberal abortion laws than Ireland, the court decided that the consensus did not narrow the discretion in this case.[158] The reason the ECtHR gave for this differing approach was that the European Consensus was only "specific to the issue of availability of abortion and not a consensus on when life begins."[159]

g) Margin of Appreciation and European Consensus: Necessary tools for a supranational court or overcome principles? A discussion

For 60 years, there was a widespread trend towards liberal abortion laws in Europe, as the Center for Reproductive Rights shows in its comparative overview of 27 June 2022.[160] According to the Center for Reproductive Rights, abortions are now legal in almost all European countries - only a very small number of states still have very restrictive laws. In the EU, Malta and Poland are especially worth mentioning.

It is questionable whether the disregard for the European Consensus in abortion cases is still acceptable and reasonable today. Especially since the European Consensus is supposed to avoid arbitrary decision-making, to legitimate the court's judgement with the will of the majority of the contracting states and to exclude the moral ideas of individual judges in the decision-making process, it does seem, indeed very arbitrary, in view of such a strong consensus in Europe on the abortion issue, that the ECtHR does still refrain from deciding on the matter.

Furthermore, not only but especially in the context of abortion, the Margin of Appreciation doctrine has been partly approved and partly criticized in academic literature:

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[157] Dzehtsiarou, "European Consensus: Perceptions of the ECtHR judges," 190-191.
[158] *A., B. and C. v. Ireland*, para.235; Meaney, "The European Court of Human Rights and Abortion," 78.
[159] Meaney, "The European Court of Human Rights and Abortion," 79.
[160] "European Abortion Laws: A Comparative Overview," Center for Reproductive Rights, accessed July 4, 2023, https://reproductiverights.org/european-abortion-laws-comparative-overview/.

Meaney, for example, argues that the Margin of Appreciation doctrine is mainly used for "legitimacy justifications"[161]. As an international court, the ECtHR would strongly depend on states' cooperation and states' acceptance of its judgements – by some, international courts as the ECtHR are even described as "fragile".[162] To grant the states a wide Margin of Appreciation would prevent the ECtHR from much external criticism.[163] Fenwick further notes that the ECtHR uses the doctrine of the Margin of Appreciation and principle of subsidiarity in order "to avoid confronting the competing normative values".[164] But, as a result, this "tiptoeing" would lead to "inconsistent decision making[165]" by the court and would in the end prevent effective human rights protection. This clearly runs counter to the ECtHR's declared aim of using the Margin of Appreciation together with the European Consensus to avoid arbitrary decision-making (as explained above). Especially in the context of abortion, the Margin of Appreciation would lack a clear scope.[166]

Additionally, Williams considers the ECHR to be not only a legal document, but also a "moral declaration".[167] While stating that it may be "tempting" for an international court to grant state parties a broad Margin of Appreciation on the abortion issue, he argues that this may also be dangerous: If the ECtHR allows for one party to ban abortion in order to protect the right of the fetus to life under the ECHR, it must logically also enforce this right of the fetus in other state parties. He considers this to be the reason for the ECtHR's sole focus in A., B. and C. vs. Ireland on the question whether there was a violation of Article 10 ECHR, by avoiding to answer the question when the life of the fetus begins under the convention.[168]

Others consider the Margin of Appreciation doctrine to be both useful and necessary: Aaron A. Ostrovsky, for example, argues that the doctrine is a "valuable tool" in a culturally, ideologically and legally diverse Europe, a Europe which cannot yet be understood as a "unified whole" when it comes to human rights protection.[169] While the ECHR would only represent the core European human right standards, it had to be left to the states to decide how to implement those standards on a domestic level in order to preserve national sovereignty and the will of domestic

[161] Meaney, "The European Court of Human Rights and Abortion," 75.
[162] Frese & Olsen, "Spelling It out," 439.
[163] Ibid., 439.
[164] Fenwick, "The modern abortion jurisprudence under Article 8," 273.
[165] Meaney, "The European Court of Human Rights and Abortion," 75.
[166] Ibid.
[167] Glanville Williams, "The Fetus and the Right to Life," *Cambridge Law Journal* Volume 53, No. 1 (1994): 71-80 (79), accessed July 11, 2023, http://www.jstor.org/stable/4507903.
[168] Ibid.
[169] Ostrovsky, "What's so Funny About Peace, Love, and Understanding?," 47.

majorities. Unlike the ECtHR, national authorities have direct democratic legitimation[170] and are therefore better suited to decide on such sensitive moral issues. In the end, the doctrine would simply reflect the very nature of the ECHR as well as the will of the contracting parties when they originally signed the convention. Ostrovsky further argues that since "there may be no such thing as a norm of human rights acceptable by all[171]", the doctrine would be necessary for the ECtHR to issue judgments which are widely accepted. In this context, Donoho argues that the doctrine reflects a problem that has parallels with the international discussion of whether human rights are universal or relative - and the court would use the Margin of Appreciation doctrine to deal with this unresolved question.[172] Ostrovsky therefore deems the doctrine to be a "necessary component of human rights adjudication".[173] He further emphasizes that similar approaches can be found in other jurisdictions, for example in the United States in the Rational Basis Test.[174]

In summary, there are good arguments for using the Margin of Appreciation doctrine and in assessing the European Consensus - especially when considering the nature and limitations of the European Human Rights System. Yet, one would expect that these principles and approaches are applied with consistency and this does not seem to be the case in the context of abortion, as seen in the A., B. and C. vs. Ireland judgement, for example (as explained above).

However, it must be noted that both the ECtHR and the ECJ have not decided on any abortion cases for quite some time. After Grogan, the ECJ only had to decide in 2011 in a related context: It had to deal with the question when life begins with regard to Article 6(2)(c) of Directive 98/44/EC of 6 July 1998 on the legal protection of biotechnological inventions. It is controversial whether the ECJ actually intended to determine in a binding manner for the future when the life of the fetus begins and at what stage the fetus must be protected under the CFR, or whether this was only related to the scope of application of the said directive.[175] Nonetheless, as already explained above in connection with the Grogan case, Fabbrini is of the opinion that

[170] Charles F. Sabel and Oliver Gerstenberg, "Constitutionalizing an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order," *European Law Journal* 16, No. 5 (2010): 511-550 (549), accessed July 11, 2023, https://doi.org/10.1111/j.1468-0386.2009.00521.x.
[171] Ostrovsky, "What's so Funny About Peace, Love, and Understanding?," 63.
[172] Donoho, "Autonomy, Self-Governance, and the Margin of Appreciation," 451.
[173] Ostrovsky, "What's so Funny About Peace, Love, and Understanding?," 63.
[174] Ibid., 60.
[175] Ivana Tucak, and Anita Blagojević, "ABORTION IN EUROPE," *EU and Comparative Law Issues and Challenges Series,* 4 ECLIC 1135 (2020), 1159, accessed July 4, 2023, doi: https://doi.org/10.25234/eclic/11943.

today, in a new case comparable to Grogan, the ECJ would have to take Article 21 CFR into account, which may lead to a different outcome.
Most recently, the ECtHR had to decide on a case which included questions regarding abortion in G.M. and Others v. the Republic of Moldova[176] in November 2022 (without any new developments) and other applications are still pending.[177] The pending applications[178] all concern a Polish provision for abortion in case of fetal abnormalities which was declared void by the Polish Constitutional Court. Meanwhile, some of these applications have been declared inadmissible[179] - while others are still pending.[180]

However, it is debatable whether the courts will actually dare to establish a limited right to abortion in their case law, even if it would be required for equality reasons under Article 21 CFR respectively Article 14 ECHR.

V. Enshrining a (Limited) Right to Abortion in the European Human Rights Regime

As explained above, the ECtHR makes extensive use of the Margin of Appreciation doctrine when it comes to abortion cases. At the same time, the ECtHR does surprisingly not fully consider the strong European Consensus on the issue. Rather, the deviation from its usual approach of taking a strong European Consensus into account, may considered to be arbitrary - which is exactly what the assessment of the European Consensus is supposed to avoid. Finally, the court seems unwilling to provide an answer to the question of whether there could be a (limited) right to abortion read into the ECHR.

The following section will discuss possible advantages to having a right to abortion enshrined into the CFR, as proposed by Resolution P9_TA(2022)0302 of the European Parliament. Therefore, the section first debates the legal nature of an EU fundamental right, before it is assessed whether the right to abortion meets the criteria to be a fundamental human right. Finally, it is discussed here if it would be more feasible from a human rights perspective to

[176] *G.M. and others v. the republic of Moldova*, App. No, 44394/15 (ECtHR, 22 November 2022).
[177] *K.B. v. Poland* and three other applications (nos. 1819/21, 3682/21, 4957/21 and 6217/21), *K.C. v. Poland* and three other applications (nos. 3639/21, 4188/21, 5876/21 and 6030/21) and *A.L. - B. v. Poland* and three other applications (nos. 3801/21, 4218/21, 5114/21 and 5390/21).
[178] "Factsheet – Reproductive Rights," Press unit of the European Court of Human Rights, accessed July 4, 2023, https://www.echr.coe.int/documents/fs_reproductive_eng.pdf.
[179] Concerning application nos. 4188/21, 4957/21, 5014/21, 5523/21, 5876/21, 6114/21, 6217/21, 8857/21.
[180] See for more information: "Group of abortion rights cases against Poland declared inadmissible," European Court of Human Rights, Press Release issued by the Registrar of the Court, accessed July 9, 2023, https://hudoc.echr.coe.int/eng-press?i=003-7669327-10574929.

anchor the right in the CFR than in the ECHR or in a national constitution of an EU member state.

1. The CFR: Quasi-Constitution, a Human Rights Document or Something in between?

In order to answer the question whether the right to abortion should grounded in the European human rights system, this thesis discusses what exactly a fundamental right in the sense of the CFR is - a question also Bart van der Sloot assesses in his article "Legal fundamentalism: is data protection really a fundamental right?"[181]. Why did the EU choose the term "fundamental right" instead of "human right", like it is used for example in the ECHR? And what distinguishes CFR rights from constitutional rights and other rights? The following section provides an answer as to what the legal nature of a EU fundamental right is.

a) Constitutional Rights

Constitutional rights form the foundation of a state. They primarily deal with the vertical sphere, namely the relationship between the individual and the state. They are mainly set up in order to limit the power and influence of the state on individuals and seek to provide freedom for citizens, for example freedom of speech or press.

Furthermore, constitutional rights can unarguably be changed – but the process is usually more difficult than amending ordinary rights, as many states require a qualified majority to amend the constitution, for example. Moreover, constitutional rights are also partly procedural rights, as they usually regulate the democratic voting process, for example.[182]

b) Human Rights

In contrast, human rights have nothing to do with the belonging of a person to a certain state, as the virtue of being human is the only pre-condition for them to apply.[183] They are described

[181] The following questions are discussed in depth by Bart van der Sloot, "Legal Fundamentalism: Is Data Protection Really a Fundamental Right?," in *Data Protection and Privacy: (In)visibilities and Infrastructures* eds. Ronald Leenes, Rosamunde van Brakel, Serge Gutwirth, and Paul De Hert (Springer, 2017), accessed July 10, 2023, doi: https://doi-org.kuleuven.e-bronnen.be/10.1007/978-3-319-50796-5.
[182] van der Sloot, "Legal Fundamentalism: Is Data Protection Really a Fundamental Right?," 13.
[183] Ibid., Kearns, "The EU and Human Rights," 5.

as "{…} claims which every human being has, or is deemed to have, or should have {…}[184]". Although human rights and constitutional rights may overlap to some extent, human rights are generally seen as more important and more essential than constitutional rights, as they touch on the very basic foundations of human life.[185] Also, contrary to constitutional rights, human rights are considered to be universal, as they apply regardless of the national boundaries of a state.[186]

c) Fundamental Rights

In contrast, what exactly falls under the term "fundamental rights" is disputed in academic literature, as the EU never explained why it precisely used the term and how to interpret or define it.[187]

Some argue that EU fundamental rights are quasi–constitutional rights. They consider the CFR to form the de facto constitution of the EU – as, according to Article 6 (1) TEU, the Charter has the same legal value as other EU treaties. Fabbrini, for example, claims that the Charter has "formal status of EU constitutional law[188]". Furthermore, the EU has impacts on individuals in many areas, similar to those impacts that arise from a domestic state. And as states require limitations trough constitutional rights, so does the EU.[189] Moreover, the CFR contains provisions which go beyond what classic human rights documents usually embody: For example, Article 39 CFR contains the right to vote.[190] What also speaks in favor of considering EU fundamental rights as quasi-constitutional rights is the fact that their idea and origin are closely connected to the idea of an EU citizenship.[191]

Others argue that the CFR is equivalent to human rights documents like the ECHR or the Universal Declaration of Human Rights.[192] Accordingly, they call the CFR "EU bill of rights" and "one of the most advanced human rights instruments worldwide[193]". With the Case of Stauder v City of Ulm[194] human rights were first introduced as being a matter of the EU - which

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[184] Louis Henkin, "Constitutional Rights and Human Rights," *Harvard Civil Rights-Civil Liberties' Law Review* 13, no. 3 (1978): 593-632 (595).
[185] van der Sloot, "Legal Fundamentalism: Is Data Protection Really a Fundamental Right?," 14.
[186] Ibid.
[187] van der Sloot, "Legal Fundamentalism: Is Data Protection Really a Fundamental Right?," 16.
[188] Fabbrini, "Roe v. Wade on the Other Side of the Atlantic," 44.
[189] Hans Jarass & Martin Kment, *EU – Grundrechte,* 2nd ed. (München: C.H. Beck, 2019), 5 para.15.
[190] van der Sloot, "Legal Fundamentalism: Is Data Protection Really a Fundamental Right?,"13.
[191] Kearns, ″The EU and Human Rights,″ 5.
[192] van der Sloot, "Legal Fundamentalism: Is Data Protection Really a Fundamental Right?," 15.
[193] Fabbrini, "The Last Holdout," 44.
[194] Case 26/69, Stauder v City of Ulm - Sozialamt, 1969, ECLI:EU:C:1969:57.

was still primarily an economic union at the time.[195] The judgment expressly mentions human rights, as it reads:

"Interpreted in this way the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court."[196]

The wording of the judgement makes it clear that fundamental rights and human rights are closely intertwined and that the ECJ does not clearly distinguish between them. Also, in other EU documents prior to the entry into force of the CFR the terms fundamental rights and human rights were used interchangeably.[197] Considering the above, van der Sloot argues that "fundamental right" means human rights but in the specific context of the EU, seeing the word "fundamental" originating from the "fundamental freedoms" of the EU common market.[198]

Then, there are some who take the middle ground and see the CFR as a mixture of both constitutional and human rights. This is supported by the fact that the CFR was both influenced by shared constitutional traditions of EU Member States and international human right treaties like the ECHR.[199] Also, from a historical point of view, the EU was originally not set up as a human rights organization but as an economic and monetary union - which explains why the CFR does not only contain human right provisions, but also rights that go beyond.[200]

d) Conclusion

In conclusion, the best arguments speak in favor of understanding fundamental rights as equivalent to human rights and in favor of understanding the CFR mainly as a human rights document – but a human rights Charter for the specific context in the EU, as van der Sloot points out.[201] As the EU is an extraordinary international organization, which equals more a

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[195] Kearns, "The EU and Human Rights," 5.
[196] Case 26/69, Stauder v City of Ulm - Sozialamt, 1969, ECLI:EU:C:1969:57, para.7.
[197] Find examples for this in van der Sloot, "Legal Fundamentalism: Is Data Protection Really a Fundamental Right?," 17.
[198] van der Sloot, "Legal Fundamentalism: Is Data Protection Really a Fundamental Right?," 16 and 19.
[199] Julianne Kokott & Christoph Sobotta, "The charter of fundamental rights of the European Union after Lisbon," *EUI Working Papers, Academy of European Law* 2010/6, 2, accessed July 10, 2023, https://hdl.handle.net/1814/15208.
[200] Kearns, "The EU and Human Rights," 4.
[201] van der Sloot, "Legal Fundamentalism: Is Data Protection Really a Fundamental Right?," 19.

federal state than other international organizations[202], it can be concluded that it made sense to create a specific category of human rights for it, that would be more fitting to the EU and its institutions than referring to other preexisting human right documents like the ECHR. Against an understanding of fundamental rights as quasi-constitutional rights speaks the fact that the rights provided for in the CFR seem to have a higher moral status than what would possibly fall in the category of quasi-constitutional laws.[203]

From this, it can be concluded that the discussion on whether a right to abortion should be enshrined in the CFR essentially concerns the question of whether such a right to abortion should be a human right at EU level. Whether the right to abortion should be a human right in general has been widely discussed in the existing literature.[204]

2. Alston: A Proposal for Quality Control

The following section analyzes whether the right to abortion deserves to be classified as an EU fundamental human right. But: What makes a right a fundamental right? In trying to answer this question, the following section describes criteria by Philip Alston, a human rights scholar and practitioner[205], in his Cambridge University Press article "Conjuring up New Human Rights: A Proposal for Quality Control". Alston discusses substantive and procedural criteria that a particular claim must meet in order to deserve classification as a human right. However, Alston primarily refers to the level of the UN and its General Assembly in his article. As this thesis discusses a proposal for a new fundamental right at the supranational level of the EU, the criteria set up by Alston are slightly amended to better fit the EU.

More than seventy years after the adoption of the most important human rights charters and conventions such as the UNCHR and the ECHR, the question arises whether they still offer sufficient human rights protection today. The world has changed and new inventions, developments and crises are shaping people's everyday lives - the climate crisis being only one of the crises that pose new challenges to humanity. In order to meet those challenges, one may consider the proclamation of new human rights. And, indeed, after the adoption of the UN

[202] Borchardt, *Die rechtlichen Grundlagen der Europäischen Union*, para.113.
[203] van der Sloot, "Legal Fundamentalism: Is Data Protection really a Fundamental Right," 18.
[204] For example: Joyce, "The Human Rights Aspects of Abortion," 27-41; Tatyana A. Margolin, "Abortion as a Human Right," *Women's Rights Law Reporter* 29, no. 2 and 3 (Winter/Spring 2007-2008): 77-98; Puppinck, "Abortion in European Law", 29-43.
[205] Margolin, "Abortion as a Human Right," 81.

Charter, gradually more rights than originally enshrined were proposed to equally have the quality and importance of a human right. While some rights were given that label over time - and some were not - by the UN general assembly or other human rights institutions, the question arises as to what exactly makes a right a human right.

a) New Human Rights: A Balancing Act

The discussion on whether a right has the quality of a human right or not leads to the following problem: On the one hand, as explained, consistent human rights protection shall be ensured and continued in an ever-changing world. On the other hand, there are also voices asking for more restraint in proclaiming new human rights - in order to prevent the term "human right" from being devalued ("objection of inflation[206]").

Considering this dilemma, Alston argues that the very idea of human rights is a dynamic concept.[207] Inherent in the universal idea of human rights is the need to consider the creation of new human rights over time.[208] The world is constantly evolving, bringing people into new, unknown circumstances. In accordance, human rights and human rights conventions must adapt, so that human right protection remains consistent. This is particularly relevant in view of the fact that some human rights charters, such as the UN Charter and also the ECHR, date back to the 1948 - 1950s and would presumably have a slightly different content if they were drafted today.[209] Up until today, new treaties and rights have been proclaimed again and again, which have been given the status of "human rights covenants" or "human rights". For example, in 2022, the UN General Assembly adopted Resolution A/RES/76/300, thereby recognizing the right to a clean, healthy and sustainable environment as a human right. In addition, the UN has repeatedly adopted new conventions to expand human rights protection. Some of those have been very well received, for example CRC or CEDAW, which contain human rights specifically for children and women.[210]

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[206] Josef Theilen, "The inflation of human rights: A deconstruction," *Leiden Journal of International Law* 34, no. 4 (2021): 831–854 (832), accessed July 11, 2023, doi:10.1017/S0922156521000297.
[207] Philip Alston, "Conjuring up New Human Rights: A Proposal for Quality Control," *The American Journal of International Law*, Volume 78, No. 3 (1984): 607-621 (607), accessed July 11, 2023, doi:10.2307/2202599.
[208] Ibid.
[209] Ibid., 614; Beta E. Hernandez, "To Bear Or Not to Bear: Reproductive Freedom As An International Human Right," Brooklyn Journal of International Law, Volume 17, Issue 2, (1991): 309-358 (325), accessed July 11, 2023, https://brooklynworks.brooklaw.edu/bjil/vol17/iss2/3.
[210] Margolin, "Abortion as a Human Right," 82.

In contrast, Alston also considers the argument that human rights should only include the "most important" and "most indispensable" rights, as the constant addition of new human rights runs the risk of devaluing the term "human right".[211] Peter and others accordingly argue that in order to preserve the high value of human rights, the label "human right" should only be bestowed very sparingly.[212] Also, Hernandez finds that not all important rights are "{…} predicates to life as human beings[213]", as human rights need to be in her view. Instead, ordinary rights are important, but do not form the fundament of human life.[214] Against this background, Alston goes so far to say that for some, proclaiming new human rights is like "rewriting the Bible"[215]. Or, as Theilen puts it, there is such a thing as an "anxiety about human rights inflation"[216]. Therefore, according to Alston, one should consider finding criteria that a goal or value must fulfil in order to truly deserve the label "human right".

b) Substantive or Procedural Criteria?

Alston discusses whether such criteria should be of substantive or procedural nature.[217] He proposes substantive criteria for setting up new human rights, only to finally reject the application of those, calling it an "unworkable approach".[218] The reason for this is that in the past, both institutions and voices in academic literature have tried to establish such substantive criteria, but the implementation in practice has always failed.[219] This is due to the constantly changing understanding of human rights, which makes it impossible to establish universally acceptable criteria that are objective and rational enough to be of long-term use. According to Alston, such substantial criteria are also far from being "scientifically pure[220]" and would rather belong into the theoretical, philosophical sphere than into the reality of institutions like the UN.[221] To illustrate his arguments, Alston refers to a statement by Richard B. Bilden, who wrote that "In practice a claim is an international human right if the UN General Assembly says it

[211] So also Anne Peters, *Jenseits der Menschenrechte. Die Rechtsstellung des Individuums im Völkerrecht* (Tübingen: Mohr Siebeck, 2014), 396.
[212] Ibid.
[213] Hernandez, "To Bear Or Not to Bear,″ 320.
[214] Van der Sloot, "Legal Fundamentalism: Is Data Protection Really a Fundamental Right?," 13.
[215] Alston, "Conjuring up New Human Rights," 609.
[216] Theilen, "The inflation of human rights: A deconstruction,″ 831.
[217] Alston, "Conjuring up New Human Rights,″ 615.
[218] Ibid., 617.
[219] Ibid., 615.
[220] Ibid., 616.
[221] Ibid.

is[222]".[223] This may indicate a certain degree of arbitrariness in the establishment of new human rights, but in contrast, the UN General Assembly is a body that was established for this very purpose with the will of all parties, and thus has sovereignty over the proclamation of new human rights. Furthermore, states are free to decide whether they want to ratify new UN human right conventions or not and if they want to make reservations to certain provisions in those new conventions.[224]

Therefore, Alston clearly prefers procedural criteria over substantive criteria. By using a certain procedure, it could be at the very least be ensured that human rights were set up in a "defined manner", even though this approach may not directly guarantee the "quality" of the right. His idea is as follows: When a claim is proposed as a new human right, an institution like the UN General Assembly could follow a certain plan ("modus operandi").[225] This plan may include several steps, ranging from the pure consideration of the proposal to studies and comments from governments and NGOS on the proposal, followed by a reflecting phase and so on.[226] By using procedural criteria, the aim of substantive criteria to test new human rights for their necessity and quality could be reached at least indirectly. This is not done on the basis of substantive criteria, but on the basis of a procedure that guarantees a full and comprehensive examination of the right. Alston expects that such a procedure would lead to a higher acceptance of new human rights and may persuade states to comply with obligations arising from it.[227]

Although Alston clearly prefers the procedural approach, his substantive criteria will be used here, as the aim of this paper is to examine whether the EU Parliament's proposal is desirable in terms of content. The proposed substantive criteria set up by Philip Alston are the following: The new proposed human right should

a) Reflect a fundamentally important social value;
b) Be relevant, inevitably to varying degrees, throughout a world of diverse value systems;

[222] Richard B. Bilder, "Rethinking International Human Rights: Some Basic Questions," *Legal Studies Research Paper Series Archival Collection No. 1 Wisconsin Law Review* (1969): 551-608 (173), accessed July 11, 2023, https://ssrn.com/abstract=1551943.
[223] Alston, "Conjuring up New Human Rights," 607.
[224] United Nations, Human Rights, Office of the High Commissioner, *The United Nations Human Rights Treaty System*, Fact Sheet No. 30, 2012, accessed July 9, 2023, https://www.ohchr.org/en/publications/fact-sheets/fact-sheet-no-30-rev-1-united-nations-human-rights-treaty-system, 54.
[225] Alston, "Conjuring up New Human Rights," 619.
[226] Ibid., 620.
[227] Ibid., 621.

c) Be eligible for recognition on the grounds that it is an interpretation of UN Charter obligations, a reflection of customary law rules or a formulation that is declaratory of general principles of law;
d) Be consistent with, but not merely repetitive of, the existing body of international human rights law;
e) Be capable of achieving a very high degree of international consensus;
f) Be compatible or at least not clearly incompatible with the general practice of states; and
g) Be sufficiently precise as to give rise to identifiable rights and obligations.[228]

4. Meeting Alston's Criteria for Establishing Abortion as a Fundamental Right

In the following, the EU Parliament's proposal will be examined based on Alston's substantive criteria.[229] In doing so, the criteria, which refer to the international level of the UN, are adjusted to the supranational level of the EU.

a) Reflection of a Fundamentally Important Social Value

The right to abortion must reflect a fundamentally important social value in the EU. Fundamentally important social values form and develop within a society over a given period of time. They are widely accepted within a group and closely connected with the term "shared morals". Morals – or morality - can be described as the "(…) factual rules in a specific (cultural, territorial and temporal) social system[230]". They form the foundation of a peaceful coexistence. Inherent in the term "fundamental" is that the value does not only arise temporarily as part of a certain trend or temporary social shift. Rather, it must be a value that persists over time and as independently as possible from the usual political developments and changes, natural conditions and social change.

At the level of the EU, these shared fundamental common social values are (inter alia) reflected in the CFR. The CFR expressly refers to the Unions "common values[231]" and "spiritual and

[228] Alston, "Conjuring up New Human Rights," 615.
[229] Please note that in academic literature, the right to abortion as a human right has already been examined on grounds of Alston's criteria: Margolin, "Abortion as a Human Right," 77-98. However, the assessment refers to the right to abortion as a human right at the UN level.
[230] Frischhut, ""EU": Short for "Ethical" Union?," 536-537.
[231] 1st recital CFR.

moral heritage[232]".[233] Furthermore, they find expression in the general aims and values of the EU, which are also laid down in the other primary and secondary law. According to the EU resolution P9_TA(2022)0302, the right to abortion particularly reflects aspects of human dignity (Art. 1 CFR), self-determination, equality (Art. 21 CFR) and physical integrity (Art. 3 CFR) - rights, that are already enshrined in the CFR.

However, the third recital of the CFR asks the EU to respect "the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States".[234] As explained above, the right to abortion does not represent a fundamentally important social value for each individual Member State. It may even strongly contradict their social, moral and religious values, as in Poland and Malta, for example.

Still, those Member States cannot deny that the right to abortion has strong implications for important common EU social values, as they are laid down in the CFR. Furthermore, it is not the opinion of individual Member States that is relevant for this examination, but whether the right to abortion reflects social values in general at an EU level. After all, if rights could only ever be human rights if they were already acknowledged and accepted as such by every single state, proclaiming them would be purely declaratory and would provide no further added value. It should also be taken into account that abortions are a medical service[235] under EU Law, as the ECJ stated in the Grogan decision. And health, at least, is a fundamental shared social value within the EU, see Art. 168 TFEU.[236]

b) Be Relevant, Inevitably to Varying Degrees, throughout a Union of Diverse Values

Furthermore, the right to abortion should be relevant throughout the EU, a Union with diverse values.

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[232] 2nd recital CFR.
[233] Frischhut, ″″EU": Short for "Ethical" Union?," 532.
[234] Ibid.
[235] Also Cooks underlines that abortion is in its essence a medical service, see in Cook, "International Protection of Women's Reproductive Rights," 648.
[236] "EU4Health programme 2021-2027 – a vision for a healthier European Union," European Commission, accessed July 4, 2023, https://health.ec.europa.eu/funding/eu4health-programme-2021-2027-vision-healthier-european-union_en.

The EU is characterized by diversity, as its motto is "United in diversity".[237] EU Member States have agreed on a lot of common values and aims that have gradually gone beyond purely economic goals and have transferred specific competences to the EU (principle of conferral), Art. 5 TEU. However, all Member States kept – besides their national sovereignty - their different national identities and characteristics. Consequently, to meet the criterion stated above, the right to abortion needs to be relevant regardless of those individual characteristics. In this context, "relevant" is understood to mean whether the right or lack of right to abortion is of more or less of equal importance in different EU Member States.

The first argument made in this respect is mainly a biological one. As Margolin puts it: "The relevance of reproductive health throughout the world is indisputable, since it implicates one of the most fundamental facts of human biology[238]".[239] She points out that unwanted pregnancies occur all over the world – and also all over the EU - and access to reproductive choices is relevant no matter in which state pregnant women live in.[240] This argument also applies in a historical context, as Hernandez says "{…} it is indisputable that throughout history women have exercised that option {abortion} and will continue to so whatever the risks[241]". This especially applies to Member States where abortions are not accessible or only accessible under very strict conditions. In this respect, the EU resolution P9_TA(2022)0302 refers to the case of Andrea Prudente. Andrea Prudente was denied access to abortion in Malta, although her life was seriously endangered due to her pregnancy and she had to flee to Spain in order to receive medical treatment. This shows that even if abortion is denied – or criminalized – women will still try to find a way to terminate their pregnancy earlier, preferably under safe conditions in a member state where abortion is legal – but only if they can economically afford to do so.

Therefore, the EU Parliament states that even in Member States where abortions are banned, abortions are still performed - abroad or illegally.[242] Abortion bans do not necessarily lead to fewer abortions, but to unprofessional and potentially dangerous ones. This fact illustrates that even if a member state denies access to abortion for moral, religious and cultural reasons, a (potential) right to abortion is still relevant, as its grant would make a great impact for women.

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[237] "EU Motto," European Union, accessed June 05 2023, https://european-union.europa.eu/principles-countries-history/symbols/eu-motto_en.
[238] Margolin, "Abortion as a Human Right," 82.
[239] Also Cook makes reference to biology, see in Cook, "International Protection of Women's Reproductive Rights," 648.
[240] Margolin, "Abortion as a Human Right," 82.
[241] Hernandez, "To Bear Or Not to Bear," 323.
[242] European Parliament Resolution P9_TA(2022)0302, at [D].

Furthermore, all EU Member States have ratified CEDAW - the convention with the second highest ratification rate worldwide.[243] While CEDAW does not contain an explicit right to abortion (more on that below)[244], it clearly establishes reproductive rights as an important issue and strongly highlights its relevance for women throughout the world (and therefore also throughout the EU).[245]

c) Be Eligible for Recognition on the Grounds that it is an Interpretation of UN Charter or EU Charter Obligations, a Reflection of Customary Law rules or a Formulation that is Declaratory of General Principles of Law

In the following, it will be examined whether the interpretation of the UN Charter, the CFR, the customary law or the general principles of law qualifies the right to abortion as a fundamental right.

This criterion ensures that the new human right is - to some extent - already inherent and anchored in the existing human rights system. The foundation stone for the new human right should already be laid, so to say. Human rights are often interrelated, must be interpreted together and are sometimes even interdependent – which is especially true when it comes to reproductive rights.[246] As Rebecca Cook points out: "{…} women's reproductive health interests often cross the boundaries that separate one legally described right from another". The new human right to abortion should fit into the existing regime and not form an alien element. Also, if this criterion is met, it is more likely that the new fundamental right will be accepted and obtains approval.

In academic literature, it has often been examined whether a right to abortion can be derived from the existing human rights law of the UN. This is partly affirmed[247], for example by Margolin, who points out that the right to abortion is already implicit in Article 3 (right to life, liberty and security of person) and Article 5 (No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment) of the UNCHR.

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[243] Margolin, "Abortion as a Human Right," 82.
[244] Especially Article 16.1 (e) is often interpreted as granting a right to abortion, see for more Hunt & Gruszczynski, "The Ratification of CEDAW," 730.
[245] Margolin, "Abortion as a Human Right," 82.
[246] Cook, "International Protection of Women's Reproductive Rights," 677.
[247] Margolin, "Abortion as a Human Right", 82; Hernandez, "To Bear Or Not to Bear," 325.

Furthermore, hardly any other human right convention is so often interpreted in a way that it contains a right to abortion as CEDAW. Especially Article 12.1, Article 14.2 (a) (b) and Article 16.1(e) are interpreted as implicitly granting such a right. The Committee on CEDAW has confirmed such an interpretation in several instances, for example in 2013 in its General Recommendation No. 30 or in 2018 with regard to the strict abortion laws in Northern Ireland.[248]

As already explained above, there are also rights in the CFR that can be interpreted as providing a right to abortion (under certain circumstances), such as: right to life (Article 2), private life (Article 7) and equality without discrimination (Article 21), human dignity (Art. 1 CFR), self-determination, equality (Article 21 CFR) and physical integrity (Article 3 CFR).[249]

But it should also be noted that neither the ECtHR nor the ECJ have so far confirmed an interpretation of the ECHR to this effect. The question is whether this reluctance is due to the fact that a right to abortion cannot be read into the existing human rights regime - or whether this "tiptoeing[250]" is due to the problem of competence and acceptance of the courts as international tribunals, as described in the section above.

d) Be Consistent with, but not Merely Repetitive of, the Existing Body of International and European human Rights Law

The right to abortion must be consistent with, but not merely repetitive of, the existing body of International and European human rights law.

This criterion is intended to ensure that the new fundamental right does not contradict or collide with the existing European human rights system. It is incompatible with the idea of human rights, which are supposed to be universal[251], if single human rights were in clear contradiction with each other. Not only would states have difficulties in fulfilling their obligations under human rights, but also citizens would not know exactly if and how they are protected. Human rights are supposed to provide security, not confusion. In addition, the criterion ensures that the

[248] Hunt & Gruszczynski, "The Ratification of CEDAW," 729 -730.
[249] Fabbrini, "Roe v. Wade on the Other Side of the Atlantic," 44.
[250] Meaney, "The European Court of Human Rights and Abortion," 75.
[251] Cook, "International Protection of Women's Reproductive Rights," 653.

new human right provides protection beyond what already exists. Human rights protection should be extended.

Margolin argues that the right to abortion is compatible with obligations under CEDAW "{...} as well as with values implicit in the Universal Declaration of Human Rights"[252].

In its resolution, the EU Parliament points out that some rights in the CFR cannot be fully exercised if abortion is prohibited, illustrating them as empty shells. Fabbrini also explains that some rights in the CFR already include a right to abortion. Both necessarily means that the CFR may be compatible with a right to abortion.

However, it may be problematic that the concrete proposal of the EU Parliament is very open in its wording (more on this below). It is questionable whether and to what extent it is compatible with the protection of the life of the unborn. Also, the protection of the life of the unborn is an aspect that falls under the scope of the CFR. The proposal of the EU resolution does not consider this aspect in any way.

On the second aspect of the criterion: A right to abortion would not merely repeat or reaffirm the human rights protection that already exists. As stated above, some rights have implications for the right to abortion and may even demand such a right in very extreme cases. Yet, in the past, European courts avoided to interpret such a right into, or derive a right to abortion from, existing human rights conventions. Accordingly, enshrining the right to abortion in a human rights document like the CFR may remove the need to look to other rights to derive a women's right to abortion.[253] Therefore, it can be argued that a right to abortion would not only restate what already exists, but would lead to more legal certainty and would clearly expand human rights protection for women.

e) Be Capable of Achieving a Very High Degree of European Consensus

According to Alston, the right to abortion must be capable of achieving a very high degree of European consensus. The European Consensus is a trend within the EU in dealing with specific human rights-related issues.-[254] The requirement seeks to ensure that the new human right will

[252] Margolin, "Abortion as a Human Right," 83.
[253] Joyce, "The Human Rights Aspects of Abortion," 39.
[254] Morawa, "The 'Common European Approach'," para.29.

enjoy the greatest possible approval and acceptance within EU Member States. This makes it more likely that Member States will comply with obligations arising from the new right. Furthermore, this criterion must be fulfilled so that Member States do not feel externally determined, since the new human right has already received a certain degree of approval in the EU, and may even be legally implemented in some Member States already.

In the EU, almost all Member States have legalized abortion either on request or on broad social grounds. The most prominent exceptions are Malta and Poland, which maintain highly restrictive abortion laws.[255]

Today, it must be taken into account that especially after the Roe vs. Wade ruling, a counter trend towards more restrictive abortion laws is discernible - which is also referred to by the EU Parliament in its resolution. Margolin also points out in her 2007 article that broad acceptance on anchoring a right to abortion at the international level is very unlikely.[256] This is even more likely to be the case today, years later, against the background of the counter-trend outlined above, as the peak of the trend towards legalizing abortion rights in the EU seems to have been exceeded.

This fact clearly shows that a right to abortion enshrined in the CFR could enjoy a very high level of acceptance in the EU – but, at the same time, could also be met with very strong rejection in a few Member States such as Poland and Malta. With regard to the EU Parliament's proposal, it should be noted that Article 7a, which is to be inserted into the CFR, is a very open proposal in its wording. Such an open wording is likely to be met with rejection even in Member States that already have rather liberal abortion laws (more on this below).

f) Be Compatible or at least not Clearly Incompatible with the General Practice of EU Member States

The right to abortion should be compatible or at least not clearly incompatible with the general practice of EU Member States.

[255] European Abortion Laws: A Comparative Overview," Center for Reproductive Rights, p.2, accessed May 21, 2023, https://reproductiverights.org/european-abortion-laws-comparative-overview/.
[256] Margolin, "Abortion as a Human Right," 83.

Where abortion is legal in an EU Member State, it is usually possible for women to access abortion in practice. Yet, the ECtHR rulings mentioned above, which found violations of the ECHR in purely procedural aspects, have also shown that a theoretical right to abortion and actual access to it in practice may differ. A recent example of this is Italy, where abortions within the first trimester of pregnancy are legally permitted upon request, like in 22 other EU Member States.[257] However, Italian medical personnel is free to refuse and not offer abortions if abortions are not compatible with their own conscience. Since a high rate of medical staff makes use of this exception, it can sometimes be very difficult for women to realize their theoretical right to abortion in practice.[258] Accordingly, in 2016, the CoE stated that in Italy "women seeking access to abortion services continue to face substantial difficulties in obtaining access to such services."[259]

This shows that some Member States are not fulfilling their self-imposed obligation under national law to make abortions accessible - and are thereby conflicting with their own domestic law. Thus, the theoretical national right to abortion degenerates into a hollow right that exists only on paper. The ECtHR has repeatedly pointed this out in its rulings and found violations of the ECHR. A right to abortion enshrined in the CFR may increase the pressure on Member States to grant the right to abortion not only in theory, but also in practice.

Margolin also makes arguments in this respect[260]: Every EU member state has ratified CEDAW. Positive and negative obligations arise from the convention, especially with regard to reproductive freedom. The CEDAW Committee has stated repeatedly in the past that women must have access to safe and legal abortion services. Therefore, Margolin points out that even if a right to abortion is not in line with the current practice of all states, it is clearly in line with fulfilling their international obligations under CEDAW.[261]

In summary, even if a right to abortion were not fully compatible with the practice of all EU Member States, it would be compatible with national and international obligations, making it more likely that EU Member States comply with those obligations.

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[257] Andrea Carlo, "Getting an abortion in Italy can be difficult. Is it about to get much tougher?" euronews, September 29, 2022, accessed July 4, 2023, https://www.euronews.com/my-europe/2022/08/04/getting-an-abortion-in-italy-can-be-difficult-is-it-about-to-get-much-tougher.
[258] Ibid.
[259] Hannah Roberts, "Italy slowly erodes abortion access, riding US wave," Politico, May 13, 2022, accessed May 22, 2023, https://www.politico.eu/article/italy-abortion-access-erodes-riding-united-states-wave/.
[260] Margolin, "Abortion as a Human Right," 83.
[261] Ibid.

g) Be Sufficiently Precise as to Give Rise to Identifiable Rights and Obligations

The right to abortion as set out in the EU resolution must be sufficiently precise to provide identifiable rights and obligations. It must be possible for both states and people to identify which rights and obligations derive from the new human right. States must be able to comply with and to adapt their executive, legislative and judicial measures to the positive and negative obligations that derive from human rights. Furthermore, it must be clear to citizens which rights arise for them, whether and how they can enforce them and how exactly they are protected under the human right. Otherwise, the new human right would only be a theoretical right that is difficult or even impossible to implement in practice and would hardly add any value to human rights protection.

On the one hand, it can be seen as positive that the proposal uses the word "everyone" instead of "women". This means that the right to abortion is not only granted to women, but also to other people who can get pregnant.

Furthermore, the right to abortion shall be - according to the proposal by the EU Parliament - "safe and legal". This clearly imposes an obligation on states to decriminalize and legalize abortion. In addition, according to the proposal of the EU Parliament, it should be ensured that abortions can be accessed safely, which may be interpreted as including the guarantee of access to safe and medically professional abortion services.[262]

On the other hand, the wording of the proposal is very broad and open in relation to its scope. It fails to specify the conditions under which abortions must be legal. It is not clear whether it is intended to mean that states are given discretion as to the circumstances under which they wish to legalize abortions. Can each state decide whether it wants to legalize abortions in the first trimester of pregnancy on request, as most states in the EU currently do, or only when the woman's life is at risk?[263] Or should the EU's proposal be understood to mean that its solely at the discretion of the pregnant person, when and how to have an abortion, even shortly before birth, when the fetus would already be viable outside the woman’s body? The latter interpretation of the proposal could indeed conflict with other rights of the CFR and raises questions regarding the protection of the life of the unborn. Also, it cannot be clearly concluded

[262] As Margolin demands in Margolin, "Abortion as a Human Right,″ 83-84.
[263] Margolin for example favors a right to abortion for "health or any other reason," see Margolin, "Abortion as a Human Right," 83.

from the wording which rights and obligations arise for states, and which rights citizens would enjoy. Consequently, such an open wording may lead to legal uncertainty, leaving it to the ECJ to decide what the right exactly encompasses. However, legal uncertainty is something that contradicts the rule of law, a fundamental principle of the EU laid down in Article 2 TEU. In this respect, the proposal by the EU Parliament may be in contradiction with primary law.

This problem may be solved, for example, by adding a second sentence to the original proposal. This sentence could read as follows: "How and under which circumstances the Member States wish to guarantee this right is left to their discretion. In no case may national legislation conflict with the right to life or physical integrity of the pregnant person."

h) Conclusion

The following is a summary of the results of the previous examination. The criteria established by Alston are partly fulfilled - but also partly clearly not met.

The EU Parliament's proposal fulfils Alston's criteria insofar as the right to abortion could fit to some extent into the existing European human rights regime. Also, from a biological point of view, the right to abortion is consistently relevant in every EU Member State - regardless of whether abortion is theoretically legal in that Member State or not. The proposal is also supported by the relatively broad European consensus on the issue, as abortion is legal in most Member States until the end of the first trimester.

In contrast, the CFR also makes clear that the EU is characterized by its diversity, especially in sensitive areas - and this fundamental principle and motto of the EU could be contradicted by the proposal. It could also be met with very strong rejection from some Member States, albeit few. However, the biggest criticism here is of the wording of the proposal, which is too open and could therefore lead to legal uncertainty.

5. Is the EU level better suited to enshrine Abortion as a Fundamental Right than a Human Rights Organization or Individual Member State?

The following discusses whether the EU may be the best fitting institution to enshrine a right to abortion in its CFR - or should this rather be done at the regional level of the CoE? Or even better be left to the domestic laws of each individual member state?

The EU is an international political organization, which more closely resembles a federal state than other international (human rights) organizations.[264] The reason for this is that Member States have transferred some of their competences to the EU, so that the EU has (limited) legislative powers (conferral of competences) - which other international organizations typically do not have.[265] Furthermore, the EU has established its own legal order, which is independent from those of the Member States. Moreover, EU law is directly applicable.[266] According to the principle of primacy of EU law national judges have to set aside any domestic law that is incompatible with Union law – in this case, EU law will prevail.[267] The EU provides not only an advanced fundamental rights Charter, but also has legislative competences in other fields, especially in the economic area, which is unusual for a human rights institution.[268] This is why Paul Kearns describes the EU as a "hybrid body[269]".

Unlike the EU, the CoE is a pure human rights organization. Kearns calls the CoE in direct comparison to the EU a "monodimensional institution[270]", as it was "only" set up to promote human rights, democracy and the rule of law in the "large" Europe. It was founded in 1950, after World War II and under the impact of its severe human rights violations, in order to support common democratic values in Europe and basic human rights. [271] Unlike the EU, it has no legislative powers and the ECtHR has the status of an international treaty, which equals an ordinary federal right ("Bundesgesetz") in Germany for example. But the ECHR has no higher status than national laws, as EU law have. Currently, it has 46 contracting parties[272] - a

[264] Borchardt, *Die rechtlichen Grundlagen der Europäischen Union*, para.113.
[265] Ibid., para.107.
[266] Ibid.
[267] Ibid.
[268] Kearns, "The EU and Human Rights," 5.
[269] Ibid.
[270] Ibid.
[271] Frese & Olsen, "Spelling It out," 430.
[272] "46 Member States", Council of Europe, last accessed July 4, 2023, https://www.coe.int/en/web/portal/46-members-states.

remarkably larger group than the EU. Some of these Member States are very opposed to abortion, for example Andorra, Malta, Monaco and Liechtenstein.

a) A closely connected Union

A direct comparison with the CoE shows that there might be some advantages in enshrining a (limited) right to abortion in the CFR rather than in the ECHR:

One argument in favor of this is that the EU has far fewer Member States than the CoE (27 against 46). This smaller circle of states lives together in a much tighter space and has therefore culturally and historically more commonly shared values. Furthermore, these 27 Member States have already decided to transfer some very important competences to a common Union, which has limited their own legislative powers. In this way, the EU Member States are already much more closely connected. As explained, the EU is a supranational organization[273] that already has a considerable impact and influence on its Member States – substantially much more than the CoE, whose action is limited exclusively to the area of human rights. This already existing legal connection and the shared willingness to transfer important competences to a shared Union could form a better basis for anchoring a highly controversial right such as the right to abortion.

Furthermore, according to Kearns, "The EU must also keep up with the development of human rights in its Member States and is in a position to unify and harmonise their separate human rights policies[274]". Since a strong European trend towards the legalization of abortion has emerged in recent years (even if a counter-trend is now slowly emerging, see above), the EU seems – according to Kearns - to be the best fitting institution to ground a right to abortion in its CFR. Furthermore, such a strong EU-wide trend may lead to a wide acceptance of the insertion of a (limited) right to abortion in the CFR and may also convince EU Member States that have not yet included such a right in their domestic laws to do so. This very goal of the EU to unify and harmonize existing human rights standards also speaks in favor of enshrining a right to abortion on the level of the EU and to not leave this to the individual Member States.

[273] Borchardt, *Die rechtlichen Grundlagen der Europäischen Union*, para.114.
[274] Kearns, "The EU and Human Rights," 3.

In addition, contrary to pure human right organizations like the CoE, the EU, which was originally set up as an economic and monetary union, also has an economic focus.[275] This fact makes the EU better suitable to enshrine a right to abortion in its Charter - even if this argument may seem contradictory at first glance. But, as the ECJ has pointed out in its Grogan decision, abortion is a medical service that falls within the scope of EU law. A reference to this decision may remove the discussion about abortion from a philosophical, moral and religious sphere and to pull it out of the dirty corner. Classifying abortion as a medical service may shift the tone of the debate, focusing more on health aspects and not morals.[276] It may even lead to the conclusion that abortion is primarily a medical service that falls under the fundamental freedoms of the EU, and that must accordingly be treated like every other medical service. As Joyce puts it in relation to human rights: "The suggestion is simply that, by transforming the language and framework around abortion {…}, an eventual shift in the tone of the debate might occur."[277] In conclusion, this very special nature of the EU as an economic union could be an argument for enshrining a right to abortion at the level of the EU rather than that of the CoE, which lacks the economic and monetary level.

Moreover, as outlined above, the right to abortion can be read into some of the rights in the CFR - a human rights document that Member States have already agreed on. The fact that Member States have made these rights the basis of their union could lead to widespread acceptance among them of a (limited) right to abortion enshrined in the CFR.

b) "United in Diversity" and a Question of Competence

Nonetheless, it must be kept in mind that the EU is such a unique organization because every member state preserves not only its national sovereignty, but also its own particular characteristics, traditions and culture. This becomes clear when one looks at the EU motto, which says "United in diversity", which means that "{…} Europeans have come together, in the form of the EU, to work for peace and prosperity, while at the same time being enriched by the continents many different cultures, traditions and languages[278]". Especially the decision to grant women the right to abortion or not is closely intertwined with the cultural and religious

[275] Kearns, "The EU and Human Rights," 3.
[276] Joyce sees abortion as a "Health right", see Joyce, "The Human Rights Aspects of Abortion," 28.
[277] Ibid., 40.
[278] "EU Motto,", European Union, accessed June 5, 2023, https://european-union.europa.eu/principles-countries-history/symbols/eu-motto_en.

beliefs that prevail in each member state. To remove sovereign decision making away from the Member States might touch on this very core of the EU, running counter to its motto.

What also speaks against this is that as Markus Frischhut puts it, "{…} ethics is (only) used in order to avoid interference of the EU in Member States' competences, especially in sensitive fields, like abortion.[279]" The background to this argument by Frischhut is that ultimately it is not ethics or morals that stand in the way, but that it is a question of competence. The EU can only act within the scope of the competences that were conferred to it (principle of conferral), see Article 5 TEU.[280] These competences are laid down in Article 2 and 6 TFEU - all other competences remain with the Member States. Even though many rights of the CFR have implications for the abortion issue, the CFR itself does not extend the competences of the EU to enact substantive rules on human rights.[281]

Abortion does not fall under the list of competences conferred from the Member States to the EU. Even though the EU has competences in the field of public health since 1994 (see Article 168 TFEU), the nature of this competence is rather complementary, "limited[282]" and of "low intensity[283]".[284] According to Article 6 TFEU, a complementary competence means that the EU can "carry out actions to support, coordinate or supplement the actions of the Member States".[285] This very limited competence clearly not includes the power to take any legislative measures regarding abortion. This was also considered by the EU Parliament in its resolution as it asked the Council to convene in order to revise the treaties.[286]

The procedure to amend the treaties, especially in order to expand the competences of the EU, is laid down in Article 48 TEU. Only the Member States can finally decide about such an amendment. The agreement on the amendment of treaties constitutes a treaty under

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[279] Frischhut, *"*"EU": Short for "Ethical" Union?," 532.
[280] Oliver Bartlett, "The EU's Competence Gap in Public Health and Non-Communicable Disease Policy," *Cambridge Journal of International and Comparative Law* 5, no. 1 (2016): 50-81 (50-51). DOI:10.7574/cjicl.05.01.50.
[281] Borchardt, *Die rechtlichen Grundlagen der Europäischen Union*, para.174; Kearns, "The EU and Human Rights," 5.
[282] Vincent Delhomme, "Emancipating Health from the Internal Market: For a Stronger EU (Legislative) Competence in Public Health," *European Journal of Risk Regulation* 11, No. 4 (December 2020): 747-756 (747), accessed July 11, 2023, doi:10.1017/err.2020.85.
[283] Bartlett, "The EU's Competence Gap in Public Health," 59.
[284] Ibid., 58.
[285] Delhomme, "Emancipating Health from the Internal Market," 747.
[286] European Parliament Resolution P9_TA(2022)0302, at [3].

international law which all Member States must ratify.[287] If only a single one does not ratify it, the amendment cannot enter into force. A ratification of an amendment of the EU treaties in order to confer more competences in respect to health and abortion to the EU seems very unlikely, especially such a ratification by states such as Poland, Malta and Italy. This makes the EU's proposal difficult to implement in practice, so that to date it only has a symbolic effect.

c) Leaving it to the Member States

It could also be argued that it should be left to the Member States themselves to decide whether or not they want to constitutionally guarantee a right to abortion. This conclusion would at least correspond with the current status quo, since the Member States have not yet transferred any competences in this field to the EU. Moreover, this would be in line with the EU's motto "United in Diversity".
However, it can also be argued that the EU is generally better suited to regulate human rights issues - as it is a more objective institution and less subject to political developments and shifts in the left or right spectrum, as individual Member States with their "varying subjective polices[288]" are.[289] Kearns explains that the "{…} EU position is also a usefully superior position, and the EU can act as an instructive and dominant guide for the Member States in the human rights field.[290]" Furthermore, Kearns argues that the EU " {…} can act as a catalyst for the remedying of any national lack of initiative {…} in this realm {of human rights)[291]". Gut– as explained – what Kearns describes is more an idea of the EU than its actual reality, considering its limited competences in the fundamental human rights field.

d) Conclusion

Consequently, it seems like the EU as a supranational organization and "hybrid body[292]" is better suited to guarantee the right to abortion in its legal framework than the CoE or individual Member States in their domestic laws or national constitutions. In favor of this is the fact that the EU may be capable to treat the right to abortion simply as a medical service under EU law,

[287] Heintschell von Heinegg, "Artikel 48 EUV" in *Europäisches Unionsrecht*, eds. Christoph Vedder and Wolff Heintschel von Heinegg (Baden-Baden: Nomos Verlagsgesellschaft, 2012), 228.
[288] Kearns, "The EU and Human Rights," 3.
[289] Ibid.
[290] Ibid.
[291] Ibid.
[292] Ibid., 5.

thereby defusing the tone of the debate. In addition, EU Member States are more closely connected and intertwined as the contracting parties of the CoE, which makes an acceptance of the right to abortion more likely. Leaving the decision whether to grant women a right to abortion or not to the Member States would lead to a human rights patchwork in the EU, which may be not compatible with the right to equality in Article 21 CFR.

VI. Conclusion

After summarizing the content of the EU-Parliaments resolution, the first part of this thesis described how the particular sensitive abortion issue is currently dealt with in the existing European human rights system: although voices in academic literature argue that abortion bans and heavy restrictions on the access to abortion may violate rights of the CFR and ECHR[293], both the ECtHR and the ECJ have not developed a right to abortion in their case law. According to academic literature, abortion bans are especially problematic with regard to the principle of equality, Article 21 CFR.[294] Nonetheless, the CFR expressly requires the Union to respect the diversity and particularities of its Member States, leaving the Member States a Margin of Appreciation when deciding on moral sensitive issues. Furthermore, the thesis explained how the ECJ has already classified abortion as a medical service in its Grogan decision of 1991. Finally, the analysis of the case law of the ECtHR mounted in a critique of the Margin of Appreciation doctrine and its particular application in abortion cases.

The second part examined the concept of EU fundamental rights, as the EU never gave a clear definition for the term. It concluded that fundamental rights are essentially human rights that are particular to the EU level and not quasi-constitutional rights. This leads to the result that the resolution of the EU Parliament calls for the right to abortion to be enshrined as a fundamental human right.

Therefore, the third part investigated on the basis of the criteria established by Alston whether the right to abortion has the quality to be enshrined in the CFR as a fundamental human right. The result was that it meets most of the criteria. However, an anchoring of the right to abortion based on the concrete proposal of the EU Parliament is practically impossible: The wording of the proposal is far too open and could create legal uncertainty.

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[293] See for the CFR Fabbrini, "Roe v. Wade on the Other Side of the Atlantic," 44.
[294] Ibid., 50.

Yet, it was found that the EU level is in principle better suited to anchor a right to abortion as a fundamental right than, for example, the CoE. This is due to the particularities of the EU as a supranational organization, which a pure and specialist[295] human rights body like the CoE lacks.

In conclusion, it can be said that it is generally desirable to enshrine the right to abortion as a human right. Enshrining the right to abortion in a human rights document like the CFR as a "freestanding human right[296]" may remove the need to look to other rights to derive a women's right to abortion.[297] However, it is questionable whether this should be realized on the basis of the EU Parliament's proposal.

Furthermore, the question of whether a (limited) right to abortion should be enshrined at a supranational or international level reflects a fundamental problem of the EU and the CoE. The two institutions operate in a field of tension: on the one hand, they were both created after World War II, the CoE to protect human rights on a regional level and to prevent further wars, the EU initially as an economic community, but later also as a community of common values. They are supposed to stand above the individual states and guarantee human rights as a higher moral authority. On the other hand, they derive their competences and legitimacy from their respective member / contracting states and depend on their acceptance. This results in the problem, as with the abortion question, that it is unclear how much sovereignty Member States are willing to give up in order to provide uniform and broad protection of fundamental rights, independent and detached from cultural, traditional and religious particularities and political shifts. As Kearns put it in relation to the EU: "Member States of the EU have a tendency to enjoy all the economic benefits the EU provides but to resist, or even resent, significant political consequences of their EU membership, whether or not they are connected with economic advantages[298]". Some argue that the question of whether a right to abortion can be guaranteed on the inter- or supranational level also reflects the problem of cultural relativism - an issue as old as when the term "universal human rights" first appeared.[299] This shows that, although a right to abortion enshrined in a binding human rights catalogue like the CFR may be desirable

[295] Kearns, "The EU and Human Rights," 3.
[296] Joyce sees abortion as a "Health right", see Joyce in "The Human Rights Aspects of Abortion," 41.
[297] Ibid., 39.
[298] Kearns, "The EU and Human Rights," 5.
[299] For example Howard Charles Yourow, *The Margin of Appreciation Doctrine in the Dynamics of the European Court of Human Rights Jurisprudence,* (London, New York, The Hague: Martinus Nijhoff Publishers, Kluwer Press, 1996).

from a human rights perspective, the EU Parliament's resolution on the matter is ultimately more of a "symbolic gesture[300]" than a proposal that can be actually implemented in practice.

[300] "European lawmakers demand that abortion be included in EU Charter of Fundamental Rights", *Euronews,* July 7, 2023, accessed June 13, 2023, https://www.euronews.com/my-europe/2022/07/07/european-lawmakers-condemn-us-supreme-court-ruling-that-ended-constitutional-right-to-abor.

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