Editorial

The *Dobbs v. Jackson Women's Health Organization* judgement, issued by the U.S. Supreme Court, in which it overturned *Roe v. Wade,* has attracted much attention and rightly so. Human rights lawyers, especially European ones, have predominantly been critical of the decision, stressing that the right to abortion is an inalienable right intrinsically part of the right of women to bodily autonomy. Most experts have stressed that Dobbs merely has importance for the American context, because in Europe, the right to abortion is deeply engrained in the legal traditions of the states. Whether this is so, remains to be seen.

In essence, the Dobbs judgement does not deal with the right to abortion as such, but with the legislative prerogative and the relationship between democracy and the rule of law. Roe, in all fairness, was issued on shaky grounds. Liberal judges read into the constitution a right to bodily privacy and derived from that a right to abortion. Even the most liberal commentators have agreed that the Court went far and perhaps too far in its judicial reasoning. Although the Supreme Court is now criticised for being too political, the same may be said about Roe.

The justices issuing Dobbs would hold in fact that they are not political, but rather finally crossing out a judgement that was. The justices claim neither to be favour nor against a right to abortion, but believe that the choice to bestow such a right on women should left to the democratic legislator. State or national legislators could adopt a ban on abortion or allow it, under the circumstances the democratically elected regulator sees fit. What the justices reject, however, is a court that, dependent on the political beliefs or moral convictions of the judges so happen to sit on the chamber residing over the matter, invent new rights or obligations. This would mean, in their view, a highly volatile jurisprudence, at the cost of legal certainty. Obviously, in Dobbs, legal certainty also took a blow, but for the current conservative majority, that was a necessary evil. That majority interprets the laws and the constitution through a textual and historic interpretation. The division between the rule of law and democracy, under this interpretation, is that where democratic processes may be volatile, the rule of law and the case law of the courts is stable, where the legislator may be progressive, the judiciary is inherently conservative.

It may be argued that in practice, the positions of judges that suggest a textual and historical interpretation, rather than a teleological interpretation, are forced to take absurd positions. Automatic firearms and tanks did not yet exist when the U.S. constitution was drawn up; of course, the rules must adapted to the situation of present day. Probably, the conservative majority would say, but that is something to do for the democratic legislator. Although the rule of law should offer stability against the volatile

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democratic votes, the practice in American politics is that parliament is in almost permanent deadlock and bipartisan initiatives are rare. The answer should not, however, the conservative majority would say, be that judges use their power to take the seat of the legislator and adopt new rules that would be needed in this day and age. This does not mean that there will be a permanent deadlock, they might argue. Rather, the fact that the Supreme Court is now equally conservative on the issue of guns has led to one of the very few successful bipartisan bills, led by Senator Chris Murphy, setting a number of restrictions on gun control. Let them do the same, the conservative Supreme Court justices may say, with respect to the right to abortion.

One final thing that will be important for the Supreme Court justices is that going against the *stare decisis* principle is obviously a matter of last resort. They would point out not only that Roe went too far in inventing rights, but also that the right to abortion has since not become an inextricable element of American society, counting on wide support. Would it be so that Roe decision and the right to abortion only met resistance when it was issued, but over the course of the time, was gradually accepted as a standard principle of law, counting on wide societal support. Yet this has not been the case; by contrast, the right to abortion is still highly controversial and deeply resented by broad parts of the population. Under the legal reasoning of the conservative justices, this is all the more proof that the issue should be deflected to the legislation.

The reason to take this conservative reasoning more seriously than it has been in Europe is that it may have relevance for the European legal context as well. Most European countries have a better functioning parliament than the U.S. and some have updated their laws and constitution regularly. Others, however, have not. It is not surprising that in countries that have an eclectic parliamentary process, the judiciary is in high esteem and has a strong position to counterbalance the wild and populist proposals that sometimes come to the fore. In addition, Europe's human rights framework is laid down in the European Convention on Human Rights, which is a judge made system par excellence. Although not as old as the U.S. constitution, it was drafted in the wake of the Second World War and its operative part has not been updated since. The European Court of Human Rights has attributed itself the power to interpret the Convention in present daylight and has not been shy in doing so.

For example, although Article 8 ECHR, the right to privacy, was meant to attribute negative rights to citizens, i.e. not to be interfered with in their privacy, and negative duties to states, i.e. not enter the home, body or communications of citizens without good reason, the Court has turned the right to privacy into a provision that grants positive rights to citizens and positive obligations to states. A detailed discussion of this trend is not appropriate here, but to give a few examples:

– Article 12 ECHR protects the right to marry and found a family. However, because this provision has been interpreted very restrictively by the Court and because Article 8 ECHR has been granted a very wide scope, most issues relating to gay marriage, artificial insemination, adoption and other non-traditional forms of marriage

and procreation are dealt with under the scope of the right to privacy. On a similar line, the right to a fair trial is guaranteed under the Convention by Articles 5, 6 and 13 in particular. However, the Court has decided to deal with elements of a right to a fair process directly under Article 8 ECHR. 'It is true that Article 8 (art. 8) contains no explicit procedural requirements, but this is not conclusive of the matter. The local authority's decision-making process clearly cannot be devoid of influence on the substance of the decision, notably by ensuring that it is based on the relevant considerations and is not one-sided and, hence, neither is nor appears to be arbitrary. Accordingly, the Court is entitled to have regard to that process to determine whether it has been conducted in a manner that, in all the circumstances, is fair and affords due respect to the interests protected by Article 8 (art. 8). (…) The decision-making process must therefore, in the Court's view, be such as to secure that their views and interests are made known to and duly taken into account by the local authority and that they are able to exercise in due time any remedies available to them.'[1] Then there is in the protection of honor and reputation. Article 8 ECHR is built on Article 12 of the Universal Declaration of Human Rights, which holds: 'No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation.' All elements have been transferred to Article 8 ECHR, except for the protection of honor and reputation, which was referred to the second paragraph of Article 10 ECHR, containing the grounds on the basis of which states could legitimate their decision to curtail the right to freedom of expression, as enshrined in Article 10 ECHR. It was thus the explicit choice of the authors of the Convention not to include a subjective right to the protection of honor and reputation. Although for a long time, the ECtHR has respected this choice, from 2007 onwards, it has revised its stance and stressed that Article 8 ECHR does provide natural persons with a subjective right to the protection of their honor and reputation. [2]

– Similarly, the right to privacy has, over time, been used to bring back matters under the protective scope of the Convention that were explicitly omitted by the authors of the Convention. For example, although the UDHR contains several provisions that refer to the protection of personality,[3] the Convention does not. The Court has gradually diverged from the intention of the authors. According to the ECtHR, states are under an obligation, *inter alia*, to allow individuals to receive the information necessary to know and to understand their childhood and early development as this is held to be of importance because of 'its formative implications for one's personality'. With regard to the development and fulfillment of one's identity in the external sphere, among others, the Court has not only protected (the creation of) the family sphere, it has also accepted that Article 8 ECHR 'protects a right to personal de-

1 ECtHR, B. v. the United Kingdom, Application no. 9840/82, 8 July 1987, § 63-64. See similarly: ECtHR, R. v. the United Kingdom, Application no. 10496/83, 8 July 1987. ECtHR, W. v. the United Kingdom, application no. 9749/82, 8 July 1987. ECtHR, Diamante and Pelliccioni v. San Marino, application no. 32250/08, 27 September 2011.

2 ECtHR, Pfeifer v. Austria, Application no. 12556/03, 15 November 2007.

3 22 UDHR, 26 UDHR and 29 UDHR

velopment, and the right to establish and develop relationships with other human beings and the outside world'.[4]To give another example, the right to property has not only been rejected from the scope of the Convention as a whole, it has also been rejected from the right to privacy specifically. When drafting the documents, the question was posed a number of times whether or not Article 12 UDHR and Article 8 ECHR should include, besides the concepts already contained therein, a reference to the inviolability of private property. Although the authors of the Convention decided to protect the right to property in an optional Protocol to the Convention, from the start, the European Court of Human Rights has been willing to deal with many issues that relate primarily to the economic positions of the claimants, such as loss or destruction of property (such as homes), family property and inheritance matters, and demission and the right to work.[5] To provide a final example, the Universal Declaration also contains a right to nationality.[6] The principled rejection of such a right under the Convention has been gradually overturned by the Court. It has held, for example, that the concept of private life alone, without reference to the interests of family members, can legitimize a claim for a residence permit or an objection to being extradited if a person's private life is so intrinsically connected to a specific country, among others in relation to language, work, friends, other social contacts, the possibility to develop her personality and explore her identity, the fact that that person's quality of life would be severely diminished by her exclusion from that country's territory, etc.[7]

– Article 8 ECHR has also been one of the primary points of reference with respect to the living instrument doctrine, which the ECtHR uses to provide protection to new rights under the Convention. For example, data protection is not mentioned as such in the Convention. In the beginning, the Court was willing to provide personal data protection under the ECHR with reference to a number of provisions, such as Article 5, 6, 8, 9, 10 and 13,[8] but in later years it has referred almost exclusively the right to privacy when dealing with these cases. Likewise, the Convention contains no minority rights. It is article 8 ECHR that is referred to by the ECtHR when dealing with matters that revolve around these types of cases. The Court has stressed the following, for example, in reference to an applicant: '[O]ccupation of her caravan is an integral part of her ethnic identity as a Gypsy, reflecting the long tradition of that minority of following a travelling lifestyle. This is the case even though, under the pressure of development and diverse policies or by their own choice, many Gypsies no longer live a wholly nomadic existence and increasingly settle for long periods in one place in order to facilitate, for example, the education of their children.

4 ECtHR, Pretty v. the United Kingdom, application no. 2346/02, 29 April 2002, §61.

5 ECtHR, Oleksandr Volkov v. Ukraine, application no. 21722/11, 09 January 2013.

6 Article 15 UDHR.

7 ECtHR, Slivenko v. Latvia, application no. 48321/99, 09 October 2003. ECtHR, Sisojeva a.o. v. Latvia, application no. 60654/00, 15 January 2007. ECtHR, Nasri v. France, application no. 19465/92, 13 July 1995. ECtHR, Aristimuno Mendizabal v. France, application no. 51431/99, 17 January 2006. ECtHR, Rodrigues Da Silva and Hoogkamer v. Netherlands, application no. 50435/99, 31 January 2006.

8 P. de Hert, Human Rights and Data Protection. European Case-Law 1995–1997 [Mensenrechten en bescherming van persoonsgegevens. Overzicht en synthese van de Europese rechtspraak 1955–1997] (Jaarboek ICM, 1997 Antwerpen, Maklu, 1998.

> Measures affecting the applicant's stationing of her caravans therefore have an impact going beyond the right to respect for her home. They also affect her ability to maintain her identity as a Gypsy and to lead her private and family life in accordance with that tradition.'[9] What is more, states may be under the positive obligation to take active measures to respect and facilitate the development of these minority identities.[10] Finally, reference can be made to the right to a clean environment, which is also not contained in the Convention. Yet the Court is prepared to deal with cases revolving around noise pollution, air pollution, scent pollution and other forms of environmental damage under the scope of the right to privacy of the Convention if such pollution affects the quality of life of the application, which the Court itself agrees is a very vague and broad term.[11]

These few examples, far from exhaustive, show how many provisions in the Convention has been stretched over time. It is noteworthy that where the Court diverges from the original text, it is always in a liberal fashion. It never goes to a more restrictive interpretation of the Convention then was envisaged by the authors of the ECHR. While Supreme Court justices in the U.S. are alternately appointed by the Democrats and the Republicans, the European judges are almost all lean towards the liberal side. There is often relatively little discussion when new rights are invented or read into the Convention.

There is criticism from governments that the Court goes too far in pursuing its liberal agenda. Russia, which has now left the Convention mechanism, was one of the most critical voices. To be fair, when Russia joined, it may not have meant to subject itself to the many liberal rights that the Court over time read into the ECHR. Russia is not the only country that has difficulty with the liberal interpretation of the ECHR by the ECtHR. Many conservative countries in the east have voiced similar concerns, such as Poland and Hungary. They stress that the Court goes too far in limiting their democratic powers to adopt more conservative policies, as apparently desired by their population.

In UK the more liberal policies imposed by the ECtHR were used in the Brexit campaign in favour of leaving 'Europe'. Though being a Council of Europe institution, Brexit has had no effect on the competence of the ECtHR, this does not mean that the sentiment has waned. For example, when the ECtHR put a stop to deportations of immigrants to Rwanda, the British government issued a statement that all options were on the table, including leaving the Convention mechanism.[12] Many Western European countries have movements and populist parties that feast on Euro-sceptic sentiment.

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9 ECtHR, Chapman v. the United Kingdom, application no. 27238/95, 18 January 2001, § 73.

10 ECtHR, Aksu v. Turkey, application nos. 4149/04 and 41029/04, 27 July 2010, § 49. ECtHR (Grand Chamber), Aksu v. Turkey, application nos. 4149/04 and 41029/04, 15 March 2012, § 58 & 75.

11 ECtHR, Ledyayeva, Dobrokhotova, Zolotareva and Romashina v. Russia, application nos. 53157/99, 53247/99, 56850/00 and 53695/00, 26 October 2006, § 90.

12 See, <https://www.theguardian.com/politics/live/2022/jun/15/rwanda-flight-asylum-echr-priti-patel-boris-johnson-pmqs-uk-politics-latest> accessed 10 July 2022.

Calls have been made for a Dexit (Denmark), Frexit (France), Nexit (Netherlands) and Swexit (Sweden), just to name a few. The fact that Eurosceptic parties have gained ground was evidenced once more by the recent elections in France. In general, the point of Eurosceptic parties, like that of the Conservative justices in the U.S., is that the prerogative should lie with parliament and democratically elected representatives, not with judges.

It might be argued that the way in which the ECtHR invents new rights is not as eclectic as the U.S. conservative Supreme Court justices fear. ECtHR justices, so it may be pointed out, do not create new rights according to their personal beliefs or moral convictions, but do so with an eye to the developments in Europe as a whole. It will only accept a new right or liberty when most European countries have recognised a certain right and the Court is convinced that there is a European consensus. This may be partially so, but the Court is also very willing to see a European 'trend' when only a minority of countries have adopted a new right or freedom. In addition, when no European consensus emerges, it will point to an 'international consensus', for example, in the cases of Goodwin and I., both against the United Kingdom, in which the Court attached less importance to the 'lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals.'[13] The Court has laid emphasis, on another occasion, the '[] emerging international consensus amongst the Contracting States of the Council of Europe, recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle, not only for the purpose of safeguarding the interests of the minorities themselves, but also to preserve a cultural diversity of value to the whole community.'[14] In fact, these international developments of course can only be witnessed in a hand full of countries, as few liberal democracies around the world have adopted more and wider rights than European countries have.

Thus, perhaps even more so than the American Supreme Court, the European Court of Human Rights has pushed a liberal agenda. While Member States have only signed to a very limited Convention focussed on negative rights and negative duties, they are now faced with the obligation to respect the various new rights, recognition of which may go against the grain of dominent cultural, moral or religious standards in a country. Though it is unlikely that European countries will appoint more conservative justices in the ECtHR, it may have the effect that increasingly many countries leave the Convention structure or simply ignore the more controversial rulings of the Court. The recent judgements of the U.S. Supreme Court may thus also sound the alarm in Europe, especially because of the increased polarisation and the intensified culture wars between liberals and conservatives that can be witnessed in many countries.

13 ECtHR, Christine Goodwin v. the United Kingdom, application no. 28957/95, 11 July 2002, § 85.

14 ECtHR, Aksu v. Turkey, application nos. 4149/04 and 41029/04, 27 July 2010.

This issue is as always packed with interesting insights from all corners of the data protection landscape. Two forewords deal with the effectiveness, usability and human rights impact of body-worn cameras by law enforcement agencies by Sander Flight and by Michael White and Ali Malm. This edition also hosts the three best papers of EDPL's Young Scholar Award. Congratualations to Florent Thouvenin, Brooke Razor and Felix Zopf on behalf of the whole EDPL team! Thanks to Franziska Boehm for chairing the Young Scholars Awards and to the other jury members for assessing the high number of submissions received. In addition, this edition contains two 'regular' articles, namely by Daniel Gill and Jakob Metzger on data access and data portability and an article by Yannick Alexander Vogel on the notion of consent.

The reports section led by Mark Cole and Christina Etteldorf is what makes the journal stand out as always. Etteldorf herself has penned a piece on the DMA and longtime contributor Teresa Quintes provides an insight in the Commission's proposal with regard to child abuse. In addition, six reports cover important developments in European countries. Milica Sikimić has written about the GDPR implementation Bosnia and Herzegovina, Andrés Chomczyk Penedo draws the reader's attention to financial data sharing and the notion of quality data in Ireland, Lara Marie Nicole Eguia discusses the dating app Grindr and the action taken by the Norwegian DPA, Graça Canto Moniz discusses the Portuguese DPA's 'To Do' List for Unsolicited Marketing, Leyla Keser Berber and Ayça Atabey enlighten readers on the recent developments with respect to data transfers in Turkey and Irith Kist signals an important trend in the UK with respect to data regulation, which could serve as a point of interest for the EU. Finally, the practitioners corner contains an analysis by Elisabeth Steindl on the EU rules that are applicable to emotion recognition technologies.

The case note section led by Maria Tzanou contains a case note by Florence D'Ath on the CJEU on the collective action clause in the GDPR.

For those interested in submitting an article, report, case note or book review, please e-mail our Executive Editor Jakob McKernan (mckernan@lexxion.eu) and keep in mind the following deadlines:

- Issue 3/2022: 15 July 2022;
- Issue 4/2022: 15 October 2022;
- Issue 1/2023: 15 January 2023;
- Issue 2/2023: 30 April 2023.

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