

# DIRITTI COMPARATI

## Comparare i diritti fondamentali in Europa

### THE FRENCH (CONSTITUTIONAL) ANSWER TO *DOBBS. V. JACKSON*

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In 2022, the Supreme Court of the United States in the case [Dobbs v. Jackson](#) overturned the precedent [Roe v. Wade](#) of January 22, 1973. Now, the voluntary termination of pregnancy (abortion) is not a right guaranteed at the federal level - and thus throughout the United States - under the control of the Supreme Court, but each State may prohibit it under the national law. According to the main opinion, within the US Federal Constitution, in fact, there isn't an express right to abortion. Thus, under the new framework, fourteen States have prohibited it, as explained in the [Rapport n° 42](#) issued by Mme Agnès Canayer before the French Senate on behalf of the competent commission asked to examine a proposal to amend the French Constitution by guaranteeing the fundamental right to abortion.

In Europe the echo of *Dobbs v. Jackson* implications brought the adoption of different approaches.

For example, in September 2022, [Hungary](#) introduced the obligation for women deciding to get an abortion to listen to the foetal heartbeat. Conversely, in October 2022, [Finland](#) authorised abortion without requiring any justification from the woman, while in June 2023, even [Malta](#) opened under certain conditions, namely life threatening or the foetus is not viable, to abortion.

Within this second approach, we may classify the French solution, aiming to corroborate the importance in a civil law system to include within the fundamental rights recognised at the highest level the right of each woman to get an abortion. Thus, the French answer to the risk that case-law could provide a misleading interpretation of the constitutional architecture of the rights and freedoms embedding the French values consists of a proposal of *loi constitutionnelle* aiming to introduce firstly the right, then the freedom to abortion.

The legislative *iter* started in February 2023, when the Parliament voted a *proposal* of amendment of the Constitution, that should require a *referendum* to be finally adopted. Thus, a project of amendment has been announced by the President Macron in October 2023, under the initiative of the Prime Minister. The project of amendment, as it came from the government, requires the approval with the majority of 3/5 of the Congress (*ie* joint chambers of the Parliament) without a *referendum* consultation. [Article 89](#) of the French Constitutions states also that in both cases the National Assembly and the Senate shall previously agree on the text.

Regarding the text of the project of amendment, the aim was to expressly guarantee "*la liberté garantie à la femme d'avoir recours à une interruption volontaire de grossesse*". The formula of the new seventeenth paragraph of article 34 of the French Constitution has been then integrated with the [amendment Philippe Bas](#), namely : « *La loi détermine les conditions dans lesquelles s'exerce la liberté de la femme de mettre fin à sa grossesse* ». In particular, the added sentence recalls the balance of parameters expressed within the national legislation on abortion in France. Firstly, the French Code on the Public Health states under article [R4127-47](#) the clinician right to objection, as a direct consequence of the *liberté de conscience* stated under the Déclaration des droits de l'homme et du citoyen in 1789. Secondly, it has argued that the consecration of the existence of the *liberté* should be consistent with the spirit of the [Simone Veil Act of 17 January 1975](#). Therefore, the recognized role of Parliament in establishing the conditions in which this freedom is exercised shall be maintained, as it has been the case since 1975. The aim of the proposals

is founding the guarantee of this freedom in the French Constitution itself. Modifying the Constitution to include the right to abortion is a unique approach within the legislative techniques adopted on the topic in other legal systems. Where abortion is cited in Constitutional charts, in fact, it is to establish its prohibition, like in the [8<sup>th</sup> Amendment of the Irish Constitution](#), then repealed in 2018 by the [36<sup>th</sup> Amendment](#). The latter, however, allows the Parliament to regulate the termination of pregnancy, without establishing any right or freedom to for women, like the French one. Despite few cases, moreover, abortion is not even expressly mentioned, even if it could but easily detected within other guaranteed rights: in Slovenia, for instance, the same right to abortion emerges where its Constitution establishes the "[Freedom of Choice in childbearing](#)", under article 55. While in [South Africa](#) it is recalled by combining the Constitutional sexual and reproductive rights with the right to autonomy. The constitutional protection through a legislative initiative with a constitutional effect of the right to abortion will be shared with some legal systems like Nepal and some states of the US.

After the approval in the National Assembly and Senate, on March 4<sup>th</sup> 2024, the 25th amendment to the 1958 French Constitution – that extensively achieved the 3/5 in the united chambers (*ie* the Congress) with 780 votes - will be signed on March 8<sup>th</sup> 2024, the International Women Day.

It will be interesting to follow the debate at global level and verify whether the French Constitutional right might develop a *domino* effect.