FEMALE BODILY AUTONOMY: TIME TO END THE DEBATE

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List of abbreviations

Sr	Wetboek van Strafrecht – Criminal law code
WAZ	Wet afbreking zwangerschap – pregnancy termination law
GW	Nederlandse Grondwet – Dutch constitution
SG	Staten-Generaal – States-General
UDHR	Universal Declaration of Human Rights
ECHR	European Convention on Human Rights
FvD	Forum voor Democratie – Forum for Democracy
PVV	Partij Voor de Vrijheid – Party for Liberation

1. Introduction

The year is 2022, and in the West, we live a life ripe with modern luxuries. Among these luxuries one could also count the existence of fundamental human rights since these are not prolific all over the world. In a variety of declarations and treaties multiple rights have been awarded universal protection.[1] To be able to live a free and worthy life, these rights are deemed fundamental and essential. Without the protection of these fundamental rights, one's aims in life could be severely restricted by other people or by the state in undesirable ways.

One of these luxurious rights safeguarding a full and worthy human experience relates to the lives of women and their right to bodily autonomy. There are many issues to be addressed when it comes to the equality of men and women, yet one topic stands out like a sore tooth in the legal field, and this is the right to abortion. Generally, if a country has rules regulating the right to abortion, these rights are not found in the constitution. They are laid down in a country's criminal law code, either because the act of abortion is considered a crime, or because it is exempted from criminal prosecution under certain conditions. In countries where abortions are currently allowed under specific circumstances, the 'right' to abortion is tentative. As we have witnessed in Poland,[2] and as we are witnessing in the US,[3] the present political climate is reversing liberties already granted in the past century. As a consequence, the right to abortion is only very minimally secured. Although, in the Netherlands, the debate has not yet reached the same point as in the US, the right to abortion is still merely based in the fact that it is stipulated not to be criminalized under certain conditions.[4] In view of the changes in other countries with regard to this right, it is important to safeguard it as a fundamental right before the political debate decides otherwise. At the moment the Netherlands has a liberal approach towards abortion rights. This approach is based on the second feminist wave in the 20th century. The achievements made by this movement have not changed since then. We are now in the fourth feminist wave; however we are still fighting for the same issues.

The main research question of this thesis therefore is:
What solution is there for insufficient protection of the right to abortion in the Netherlands?

The following sub questions will be addressed to answer the main research question:

I. What is the historical development of the right to abortion in the Netherlands?
II. What are the consequences of the legal qualification formulated with respect to abortion rights?
III. What is female bodily autonomy and why does it matter?
IV. Should the right to individual self-determination be protected by constitutional law in the case of abortion?

[1] Universal Declaration of Human Rights 1948, p. 1-6.
[2] European Commission 2021.
[3] Kasakove 2022.
[4] Nederlandse Omroep Stichting 2022.

1.1. Demarcation and method

This thesis focuses on the legal system in the Netherlands. Some comparisons may be drawn to countries that have changed their abortion laws in recent years. There have been countries that have expanded the right to abortion and there are those that have criminalized abortions. Although it is not possible in this thesis to pay attention to all the intricacies of all the various legal systems involved, it would seem imprudent to ignore these changes in the world around us. As will become clear, we will speak of a 'right to abortion' throughout this thesis. This, however, merely means that, in practice, an abortion may be performed by a physician under the specific circumstances. Nowhere in Dutch law is there an actual right to abortion which is created for a pregnant person to enforce when they wish to terminate their pregnancy.

Chapter two will deal with the question 'What is the historical development of the right to abortion in the Netherlands?' as well as the question 'What are the consequences of the legal qualification formulated with respect to abortion rights?' A short historic overview will be provided of the creation and developments of the regulations regarding abortions in the Netherlands and its historical position in the criminal law code. An insight is provided into the ideals which inspired the current legal approach to abortion laws. An explanation will be provided of the status of a constitutional right to abortion as against its current place in the criminal code.

In the third chapter, the question 'What is female bodily autonomy and why does it matter?' is answered. In this chapter an enquiry into the concept of autonomy is put forth. A variety of philosophical theories are explored to further understand the consequences of this concept in the context of political and legal justice. The focus of these perspectives will be the application of these ideals to the idea of a right to abortion.

Chapter four will look at the question 'Should the right to individual self-determination be protected by constitutional law in the case of abortion?' An argument will be provided for including 'individual self-determination' in the Dutch constitution. This will be approached through the perspective of international human rights law. Arguments in favour of this new constitutional law will be discussed, as well as possible criticisms.

The fifth and final chapter will answer the main research question: 'What solution is there for insufficient protection of the right to abortion in the Netherlands?' To answer this question, we will look back at our series of sub questions. This will allow space to reflect on the answers provided in the chapter two through four and how, together, they provide an answer to the main question.

Please note, that this thesis revolves around legal and political positions regarding abortion. It does not concern itself with any type of medical qualifications with respect to abortion. Nor does it defend or denounce moral arguments about the practice of abortion. It will prove to be impossible to completely ignore these questions in every respect, but it is not our intention to delve into the medical or moral particulars.

2. Abortion law in the Netherlands

It is believed that abortions have been performed since antiquity.[5] Using a variety of techniques across the world and throughout history, women have been aborting pregnancies for as long as records show. The discussion concerning the (il)legality of this act has, however, hardly reached its final stage. Up until the French Revolution abortions were prohibited in all of Europe. During the 19th and 20th centuries, the first codifications regarding abortions were processed. These codifications paved the way for the current political debate.

In this chapter the following questions are answered: 'What is the historical development of the right to abortion in the Netherlands?' and 'What are the consequences of the legal qualification formulated with respect to abortion rights?' First an historic overview is provided of the history of abortion law in the Netherlands, followed by the developments leading to the current legal requirements under which abortions are permitted in the Netherlands. An insight is provided into the ideals behind safeguarding abortion rights. This is followed by an explanation of the current legal codification of the ban on abortions,

2.1. The history of abortion regulations in the Netherlands

Dutch abortion law has known a rather turbulent history. In the Netherlands, this widely debated topic was codified for the first time in 1911. Article 296 Sr (Wetboek van Strafrecht – Criminal law code), paragraph 1:

> Hij die een vrouw een behandeling geeft, terwijl hij weet of redelijkerwijs moet vermoeden dat daardoor zwangerschap kan worden afgebroken, wordt gestraft met gevangenisstraf van ten hoogste vier jaar en zes maanden of geldboete van de vierde categorie.
>
> He who provides a woman with a treatment, even though he reasonably must suspect that this will terminate a pregnancy, will be punished with a prison sentence of up to four years and six months or a monetary fine of the fourth category.[6]

Article 296 is laid down in the Dutch criminal law code. Therefore, as of 1911, the act of performing an abortion or performing a treatment which will consequentially lead to an abortion has officially been considered a crime.

This does not mean, however, that no more abortions were performed. As with many practices that are criminalized, the practice went 'underground', and illegal abortions were still performed despite the new codification.[7] Towards the end of the 1960s, the practice of performing an abortion gradually became more tolerated. After 1958, most of the convictions based on article 296 were given in cases in which the person performing an abortion was not a physician.

Illustrative of this policy of tolerance was that, from 1971 onwards, illegal abortions were performed in the 'Mildredhuis', the first abortion clinic in the Netherlands.[8] This period was marked by the second feminist wave, which, in the

[5] IsGeschiedenis 2022.
[6] Art. 296 lid 1 Sr.
[7] Historiek 2021.
[8] Historiek 2021.

Netherlands, was spearheaded by the (in)famous group of women called the 'Dolle Mina's'. They fought, amongst other things, for the right to self-determination for women, more specifically regarding the right to abortion. A shift in liberal thinking resulted in a codification of the right to abortion in 1981 in the WAZ (wet afbreking zwangerschap – pregnancy termination law). Article 2 of this law states:

> Een behandeling, gericht op het afbreken van zwangerschap, mag slechts worden verricht door een arts in een ziekenhuis of kliniek, waaraan door Onze Minister vergunning tot het verrichten van dergelijke behandelingen is verleend.
>
> A treatment, intending to terminate a pregnancy, may only be performed by a physician in a hospital or a clinic, which has been granted a license by Our Minister to perform such treatments.[9]

This article permitted physicians to legally perform abortions in the Netherlands. To accompany this new law, a revision of article 296 Sr was required. Paragraph 5 of this article was added in 1981 and came into force in 1984, it reads:

> Het in het eerste lid bedoelde feit is niet strafbaar, indien de behandeling is verricht door een arts in een ziekenhuis of kliniek waarin zodanige behandeling volgens de Wet afbreking zwangerschap mag worden verricht.
>
> The act referred to in the first paragraph is not punishable, if the treatment is performed by a physician in a hospital or clinic where such procedures may take place in accordance with the Pregnancy termination law.[10]

With these new laws codified, Dutch society codified the right for physicians to perform abortions if they met the requirements set out above.

2.2. Safeguarding 'My body my choice'

The Netherlands has had a more liberal stance towards abortions since these codifications in the last century. However, the problem is that due to the placement and the phrasing of these laws, the right to abortion is still in a vulnerable position. The criminalization of abortions based on art. 296 paragraph 1 Sr, is a law which was established over a hundred years ago. This was before women were allowed to actively participate in political decision making, they had not even yet been awarded the right to vote. The law regulating the ability for a woman to make an autonomous decision about her body, the decision to terminate a pregnancy, was drafted by men. This law was drafted without regard for the wishes of women and is an effective way to control a woman's body. The Dolle Mina's coined the famous phrase 'baas in eigen buik', which loosely translates to 'my body my choice'.[11] This was the incentive at the time, in the political debate to liberalize the legal conditions under which abortions were permitted. The current Dutch abortion law does not, however, do justice to this statement by the Dolle Mina's. The liberal ideal contained in this phrase, is that women have the power to decide over their own bodies in the way they see fit. The phrasing of the laws explained above do not in fact give a woman who wishes to terminate her

[9] Art. 2 WAZ.
[10] Art. 296 lid 5 Sr.
[11] Historiek 2021.

abortion the power to do so. It merely decriminalizes the act of performing an abortion in the case that this is done by a physician.

The Netherlands is not the only country to have based their abortion laws on these liberal ideals. For the past 60 years Poland had one of Europe's most liberal abortion laws. Recent drastic changes, however, have resulted in Poland having one of the strictest abortion bans in Europe. Previously they allowed women to terminate pregnancies if they were struggling with "difficult living conditions". As of January 2021, however, abortions are only legal in case: (1) there is danger to the woman's life or health, (2) the pregnancy was the result of a criminal act. A woman's choice concerning her own body is completely disregarded in this new formulation.[12]

What does such a drastic change as witnessed in Polish policy changes have to do the Dutch abortion regulations? The similarity is in the possibility of this change happening in the Netherlands as well. With right-wing populism rearing its head all over Europe, the Netherlands has been no exception.[13] Parties such as FvD (Forum voor Democatie – 'Forum for Democracy') and PVV (Partij Voor de Vrijheid – 'Party for Liberation') have gained new ground and new voters.[14] They claim they stand for things such as radical equality and liberty. A recent vote in the House of Representatives, however, illustrates these parties have a different position where it comes to abortion in the Netherlands. Their perspective does not in fact support the liberty of a woman wishing to terminate their pregnancy. Illustrative of this position is their stance during a recent vote which took place in the House of Representatives. Currently, after a woman has spoken to her physician requesting an abortion, there is a mandatory 5-day reflection period. The woman is sent home and forced to wait 5 days in which she can think about her request and potentially change her mind. Only after these 5 days have passed, will the physician schedule the procedure. Recently a vote took place in the House of Representatives to abolish this '5-day reflection period', the majority voted to abolish this rule so now the next phase of changing this law has commenced. During this vote, however, the FvD voted to maintain this '5-day reflection' regulation. Amongst the PVV it was a close call, but only a slight majority voted to abolish the regulation.[15] This vote is illustrative of the policies within these types of parties with regards to abortion rights.

2.3. Current legal qualification of abortion rights in the Netherlands

If we wish to implement a change in the Dutch legal protection with regard to abortion, it is important to understand how the legal qualifications work. The Dutch legal system has a variety of qualifications for its laws and regulations. The various types of laws depend on the procedure followed to create them. The Dutch constitution dates to 1814, when it was initially drafted after the end of the French occupation.[16] Throughout the past two centuries there have been a variety of revisions and additions made to the constitution, often reflecting changes in society at large. For example, in 1922 women acquired the constitutional right to vote.

Besides the constitution, the Netherlands has many 'wetten in formele zin', 'laws in the formal sense' (formal laws). How does a law qualify to become a 'formal law'? Formal laws are established according to a certain procedure laid down in article

[12] Amnesty International 2022.
[13] Te Velde 2011.
[14] Te Velde 2011.
[15] Redactie Politiek 2022.
[16] De Nederlandse Grondwet 2022.

82 GW (Nederlandse Grondwet – Dutch constitution). A formal law can only be created through a constitutional legislative procedure performed by the government and the 'Staten-Generaal' (SG)[17]. The criminal law code, which regulates the decriminalization of abortion under specific circumstances, is a law in the formal sense. The WAZ is also a law in the formal sense.

The constitution and the formal laws are the backbone of the Dutch legal structure from which all other laws and regulations come forth. Because of their importance there are strict procedures in place which govern the process to implement any revisions or additions. As in many countries, the procedure to amend the constitution is the strictest, this has both benefits and disadvantages. The process to change a law in the formal sense is also bound to a strict procedure, but such amendments are slightly different and a little easier than a constitutional amendment.

The process of changing a law in the formal sense is as follows.[18] According to the main procedure a new law is proposed by a minister. This can be either to change an already existing law or to create a new law. Along with the proposed law, the minister includes an explanatory memorandum. The first stage of the proposal is done by the 'ambtelijk voorportaal', comprising a consultation by a group of government functionaries. After this, the proposal is sent to the 'onderraad' (lower council), which consists of a deliberation by the main ministers involved in the subject matter of the proposed law. Once this is concluded, the proposal is sent to an advisory body which delivers an official advice about the potential regulatory pressure that the new or changed law might create. After these preparatory procedures, the minister who is spearheading the proposal sends it to the council of ministers. This council of ministers consists of all the ministers who have been directly appointed by the prime minister. The next step is to send the proposal to the advisory department of the Council of State. This is an essential step in the proposal's trajectory. This advisory department tests whether the new law can be executed and whether it is enforceable. Most importantly, the members of the council investigate whether the proposal is not at variance with the constitution. The importance of this step will be touched upon later. Once this advisory department has checked the proposal it is officially submitted to the House of Representatives by the king and the ministers. In the next phase, there is a written report, followed by an oral debate. A vote will then take place to make the final decision about the proposal. After this phase, the proposal is sent to the Senate, the members of which also have a written and an oral procedure concluded by a vote. Both these votes are decided according to a general majority, which means the requirement is minimum 50% + 1. If the law is accepter, it is ratified by the king and the ministers signing it into action.

The creation or amendment of a constitutional law follows a similar procedure. There are however some distinct differences in the details of the procedure just described.[19] The reason for this is that the weight of a constitutional change is more significant. The process in the House of Representatives and in the Senate requires two proceedings each. In other words, when a constitutional proposal reaches the House of Representatives and then the Senate, the process in the first proceeding is the same as with a regular law. Both chambers must approve of the proposal with a vote resulting in a general majority (50% + 1). Once this has been completed, dissolution of the House of Representatives is mandatory to get to the next phase. In

[17] Parlementair Documentatie Centrum 2022.
[18] Parlementair Documentatie Centrum 2022.
[19] Parlementair Documentatie Centrum 2022.

the Netherlands, this is often combined with the regular four-year election of the House of Representatives, in order to prevent from unnecessary dissolutions of parliament. The Senate is not forced to dissolve. Once the new House of Representatives has been formed anew, the second phase of the proceedings starts. Once again with a written and an oral treatment, the proposal is discussed. This phase is concluded by a final vote. This vote however requires a different majority. It must be a reinforced qualified majority, meaning that in this case a majority of two thirds is required.

In the current legal format, there are two laws regulating the access women in the Netherlands have to abortions. The first is the old ban on performing abortions laid down in art. 296 paragraph 1 Sr. The second regulation is the exemption of this criminalization of the performing physician under strict circumstances. As was stated in the introduction, there is no law in the Netherlands that actually grants the right to a pregnant person to terminate their pregnancy if they so wish. Both the current regulations can be qualified as laws in the formal sense. Meaning they have gone through the procedure described in the section above. This also means that in order to change these laws only a general majority (50% + 1) would be required. In the Netherlands the House of Representatives has 150 members. Meaning that if the political climate were to change, as is witnessed in other countries, a mere 76 votes would be required to change or remove this scant right to abortion that is currently in place.

If the right to abortion was protected by constitutional law which was created by and for women to protect their (bodily) autonomy, then the risk of male dominated political opposition to this right will pose less risk. As was explained in the section above, the proceedings for changing a constitutional right are far stricter than those concerning laws in the formal sense. The main distinction being the amount required for the majority vote. If the right to an abortion was enshrined in the constitution, the number of votes required to revise this right would be much higher. A majority of two thirds would be required, meaning that 100 votes (out of 150), compared to the current 76 votes, would have to be cast in opposition to the right to an abortion. With the current legal qualifications regarding the right to abortions in the Netherlands it is fair to say that the idea of ‘my body my choice’ is barely protected.

2.4. Conclusion

In this chapter the current legal status of abortions in the Netherlands is analyzed. This started with an historical overview of the developments that lead to the current abortion laws. It is clear that there is no absolute right for a woman to have an abortion. The performing physician is merely exempted from criminal prosecution as long as they adhere to the strict regulations that are in place. The ideal propagating the right to abortion, ‘my body my choice’, is important in determining the sufficiency of protection provided in the laws. Furthermore, an explanation was provided of the legal qualifications of these laws, the laws regarding abortion are laws in formal sense. The implication of this is that no grand majority is required to amend or abolish this right. In the case that the political climate changes even more, following it current trend of right-wing populist parties, this leaves the right to abortion in a vulnerable position. As is illustrated by the situation in Poland, these non-constitutional rights are sorely protected against unforeseen restrictive changes.

3. Autonomy of the female body

We all like to think that we are in control of our lives. That we decide what we want to do, and then have the power to act on that decision. Women, however, have historically not been in a position of control over their lives in terms of freedoms, rights, and opportunities in comparison with men. Especially with regards to their bodies this is an ongoing battle for women of all ages, backgrounds, and ethnicities around the world. The quote below by Margaret Atwood concerning the current debate in the US about the potential overturning of Roe v. Wade illustrates this issue succinctly.

> Women who cannot make their own decisions about whether or not to have babies are enslaved because the state claims ownership of their bodies and the right to dictate the use to which their bodies must be put.[20]

Autonomy, as the possibility of being able to decide, will therefore make all the difference where it comes to abortion policy. This chapter will focus on understanding the concept of autonomy. Especially what this means with regard to women's bodies. An answer will be provided to the question 'What is female bodily autonomy and why does it matter?' As a background to this, an explanation will be provided of Rawls' take on distributive justice. This theory inspired the egalitarian-feminist movement to specifically apply this theory to women, their place in society and their rights. Okin argues for radical re-examination of current gendered societal structures by applying these theories of justice in advancement of abortion rights.

3.1. Understanding autonomy – a philosophical enquiry

Before applying it to the question at hand, it is best to go back to the meaning of the word 'autonomy' itself. Its etymology can be traced back to the ancient Greek 'autonomia'. The word 'autos' may be translated as 'self', and 'nomos' as 'law'. A literal translation would, in other words, be something like 'self-induced law', or 'self-governance'. Accordingly, the definition provided by the dictionary is as follows:

> 1: the quality or state of being self-governing
> especially : the right of self-government
> The territory was granted autonomy.
> 2: self-directing freedom and especially moral independence
> personal autonomy
> 3: a self-governing state[21]

In this thesis, we focus especially on the second definition, that takes personal autonomy as its main element of consideration. What is personal autonomy, and what does it mean to have personal autonomy?

Immanuel Kant was the first in the tradition of Western philosophy to provide a theory on autonomy.[22] He believed that human beings were all individual moral agents, capable of creating their own moral policies. When enacting our agency, however, we are all, according to Kant, subject to a universal moral law, the 'Categorical

[20] Atwood 2022.
[21] Merriam-Webster 2022.
[22] Buss, Sarah; Westlund, Andrea 2018.

Imperative'. This 'imperative' limits our individual moral agency to cases in which our actions would defy this universal moral maxim. This means that our autonomous will is defined and limited by the same universal moral standards. We have the autonomous ability to decide what is good and bad in our own life as long as the decision does not negatively limit another person's autonomy.

This theory of autonomy has fueled a variety of liberal political theories. One philosopher who drafted a theory within this tradition that is relevant to the current topic is John Rawls. His book *A theory of Justice*[23] (1971) was written in the Kantian tradition. The book provides an alternative to the utilitarian approach to social distribution in society. Rawls poses the thought experiment called 'the original position'. This experiment challenges the thinker to select fundamental principles on which one believes society should be based. The key point here, is that the thinker is shrouded in what Rawls refers to as the 'veil of ignorance'. The idea is that, while selecting these fundamental principles, thinkers cannot know in which position they themselves will be when this imagined society is formed. They must decide without knowing their status, wealth, ethnicity, gender, etc. By challenging the thinker with this experiment, Rawls tries to coax the thinker into creating the most unbiased societal principles using impartial rationality. He believes that, since they do not know in which part of society they would supposedly fall once the curtain is lifted, such thinkers will refrain from providing privilege to one 'class' of people. The consequence of this is that people will opt for a society which treats all completely equal and fair. Rawls claims the thinker would in fact create a society in which those who are least well off have their prospects maximized, because it could be the thinker who falls into that group.

Rawls deduces what he calls "two principles of justice" from this thought experiment:

> **1.** Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all".
>
> **2.** Social and economic inequalities are to be arranged so that they are both:
>
> > **(a)** to the greatest benefit of the least advantaged, consistent with the just savings principle, and
> > **(b)** attached to offices and positions open to all under conditions of fair equality of opportunity.[24]

The first principle is referred to as the 'greatest equal liberty principle'. This principle focusses on distributing rights and principles. Among the equal liberties which Rawls identifies are two that are of importance to our current research. The first is the 'liberty of conscience', which allows for freedom of thought. The second is 'freedom of the person', contained in which is both psychological and physical freedom of oppression and assault. Both of these freedoms are significant and will be expounded at a later stage. The second principle is of little relevance to the current research and will therefore not be explicated further.

Following the Kantian tradition that regards humans a rational, moral agents, it can be argued that humans are capable of 'good' autonomous decision making. Rawls extends this perception of human autonomy to the field of justice. According to his

[23] Rawls 1999.
[24] Rawls 1999.

theory, unbiased humans are to be expected to create equal societal foundations for the purpose of protecting themselves and in extension their own autonomy regardless of their place in that society.

3.2. Female (bodily) autonomy – an egalitarian-liberal feminist perspective

Rawls' theories of distributive justice inspired the egalitarian-liberal feminist perspective of autonomy. It is important when addressing these gendered issues to understand the egalitarian-liberal feminists' construction of female (bodily) autonomy. Egalitarian-liberal feminism divides the meaning of freedom into two strands of autonomy.[25] First, there is 'personal autonomy': meaning the ability to choose how to live one's individual life. this is to be distinguished from 'political autonomy', which implies the ability to co-create the conditions in which this individual life is led.

According to egalitarian-liberal feminism, it is currently not possible for women to act on their personal autonomy. This is due to the lack of sufficient political autonomy in present-day society. Egalitarian-liberal feminists argue that the reason for this is the underrepresentation of women in democratic processes, and therefore the lack of people with the authority to create the conditions allowing for personal autonomy. If we were to apply Rawls 'original position' experiment to this problem of underrepresentation, it becomes clear that this underrepresentation will be eliminated. It is unlikely for anyone to choose a position in where they know they will lack governmental representation. According to this perspective, our society is governed by a so called 'gender system'.[26] This means that our laws and policies are infused by paternalistic and patriarchal values. As a consequence, female autonomy within legislation is close to non-existent. Egalitarian-liberal feminists believe that the state is responsible for addressing this issue. In their view the government should even actively promote and protect female autonomy, which implies that a passive faciliatory stance by the government is insufficient. A state must actively engage with and enforce autonomy for women as a basic condition in their society. They argue that if a state does not act upon this responsibility, that it is misusing its power. Especially laws regulating birth-control and abortion options are of interest here.

By imposing restrictions or regulations regarding these topics, a very fundamental choice in a woman's life is state-controlled. An abortion ban forces a woman into a state of pregnancy followed by motherhood. This brings with it a whole new series of oppressions and forms of control. When a woman becomes pregnant the wheels of control start churning. She is expected to attend to provide for the child in every way possible, physically, financially, and emotionally she is responsible for the well-being of her child. This means that near the end of her pregnancy she will take time off work for delivery and recovery. This time off might be covered financially by her employer, this does not however account for loss of opportunity for promotion, a pay rise, etc. For fathers the paid leave they are provided after their partner has a child is extremely small. In the Netherlands this has recently been change, a father has 5 days off straight after delivery, and 5 weeks within the first 6 months. A woman has 10 weeks of paid leave after her birth, this is due to physical recovery and caring for the child. But it also forces the mother to be the main care giver because the father will not have the ability to spend as much time as home as she does. Due to high costs

[25] Baehr 2021.
[26] Baehr 2021.

in childcare, it might make more sense financially for one parent to stay at home while the other works. Even today, often the decision will be made in favour of the male partner to continue working, this is because men often earn more, he has not had to take time off work to deliver a baby, so he has been able to keep climbing up the ladder. Maybe when the child reaches a certain age the mother could consider going back to work. At this point however she been out of the workforce for a substantial amount of time. Meaning that she has missed years of development and growth, this will also impact her salary when re-entering her field of work. In the scenario where this mother would have rather terminated her pregnancy but was not allowed due to state-controlled abortion restrictions, this means that her forced motherhood has snowballed into a financial dependency on their (often) male counterpart. In the long term, this accordingly results in the proliferation of the male's career and status of men rather than women, which ultimately again increases the possibility for men influence rules and regulations that will adversely affect the lives of women and thus to prolong the dependency relationship.

How to break this vicious cycle of influence and control? According to some egalitarian-liberal feminists such as Susan Moller Okin, who wrote *Justice, Gender, and the family*[27] (1989), a radical application of Rawls' theory of distributive justice is due in order to alter the situation. Okin states that if we analyze the social institutions of sex and gender-based family constructs through Rawls' veil of ignorance, we will ultimately structure this aspect of society very differently. She believes that the two principles of justice which Rawls has established are infringed upon in the current gender system. This gender system assigns specific roles within societies and/or family institutions to people of specific genders. Which means that you are no longer free to choose your own occupation and shape your own life. This hardly allows for equal liberties for every individual. According to Okin, we should consider the alternative possibility in which "gender could no longer form a legitimate part of the social structure, whether inside or outside the family".[28] At the moment, women do not have equal basic liberties with men. Therefore, applying this first principle of justice conceived by Rawls already fails. If it were the case that family systems were not based around gender this would enable more possibilities for women to actively participate in their societies' politics. By having female voices represented in the democratic system, moreover, former patriarchal institutions might be transformed. This will only every be possible if equality is achieved in family life between man and women. However, current legal regulations such as, for example, paid leave after delivery already determine the perpetuation of this inequality.[29] By not providing men and women with equal access to paid paternity or maternity leave it is reinforcing current societal structures. This forces men to work sooner after becoming a father which creates a cycle of the father providing financial support to his family and the mother is forced into the role of default parent.

If we circle back to the start of this chapter, where we outlined the meaning of the word 'autonomy', we may now restate the question in terms of whether a woman can ever have the self-directing freedom and moral independence in a society that is governed by patriarchal laws. Having women equally represented in governing bodies and leadership positions in government may not be enough. Our societies are governed

[27] Okin 1989.
[28] Okin 1989.
[29] Okin 1989.

by centuries old legal traditions and laws. The laws where created, in most cases, by men and therefore often result in beneficial treatment of men. To facilitate the changes required, critical scrutiny must rather be applied to the laws and regulations which maintain the old patriarchal status quo. As was explained in the previous chapter, the right to abortion in the Netherlands is a law which was established over a hundred years ago. This was before women were allowed to actively participate in political decision making, they had not even yet been awarded the right to vote. The law regulating the ability for a woman to make an autonomous decision about her body, the decision to terminate a pregnancy, was drafted by men. This law was drafted without regard for the wishes of females and was in essence a way to control a woman's body. It forces a woman to become a mother against her wishes, to bear responsibility for her child financially, emotionally, and practically. In contrast there is no law which can force a man to become a father and to bear those same burdens. Even if the man actively chooses to participate in his role as father, this does not negate the almost unavoidable gender roles which are then imposed upon him and the mother of his child. The position of a woman in these circumstances is so completely unequal to that of the man. If we were to apply Okin's perspective of radical application of the principle of justice, our laws need to provide and protect this equality.

3.3. Conclusion

This chapter has provided insight into the philosophical concept of 'autonomy'. Autonomy is the ability to make (moral) decisions about one's own life and the ability to act upon those decisions without excessive restrictions. This perception of autonomy inspired Rawls to question societal structures. In answer to his thought experiment called the 'veil of ignorance', he coined two 'principles of justice'. The first principle promotes equal access to individual liberty. This idea inspired the egalitarian-liberal feminist movement to apply these ideals to the current patriarchal societal norms and to question the paternalistic status quo. Susan Okin applies Rawls' ideas in a radical way, she argues that the whole gender system which structures our society needs to be re-examined. According to Okin, the patriarchal norms and values which govern our society make it fundamentally impossible for women to be equal to men. A restructuring is required with regards to the right to abortion to provide equality with regards to this topic. If we don't approach this subject with the inclusion of women's voices, it will remain an ultimate tool to control women's body and with that many other aspects of this gendered social life.

4. The right to individual self-determination

In the present situation, the only Dutch law that regulates what an individual does with their own body, is a law that only effects women. The decision to have an abortion, however, cannot be separated from the autonomous individual who makes the choice. So how do we translate concepts of autonomy into the legal sphere? International human rights laws aim to protect various individual liberties. There is, at this time, no similar law regarding the liberty to choose what to do with one's own body as one sees fit. In the Dutch debate on the topic of abortion, those who are in favour of a woman's autonomy in making the decision speak of 'zelf-beschikkingsrecht'. This translates directly into self-determination.

This chapter aims to provide an answer to the question 'Should the right to individual self-determination be protected by constitutional law in the case of abortion?' At first, an explanation will be provided of the current concept of self-determination under international law. This is followed by an argument in favour of adapting this concept to be applicable at a more individual level, so that it will provide better protection for women seeking abortions in the Netherlands. Finally, some counter arguments will be provided in opposition of this proposal. These counter arguments will be discussed and refuted in the final section of this chapter.

4.1. Self-determination – current legal application

The concept of self-determination finds its roots in 18th-century patriotic and nationalistic rebellions. The American and the French revolution were inspired by the idea of John Locke regarding sovereignty and the natural rights of man.[30] In the 20th-century, the concept of self-determination was solidified in post war Europe as a right of nations in the Charter of the United Nations. Article 1, paragraph 2 states:

> To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;[31]

The self-determination referred to in this charter is referred to as 'internal self-determination'.[32] It provides the citizen of a state the right to choose their own government, and their own governing procedures without interference from an outside state. This concept forms the basis for international law and codes of conduct between states. Over time the concept of 'external self-determination' was formulated.[33] This form of self-determination grants the people of a place the right to determine their own political status and the right to create their own independent nations.

The 'self' which is referred to in the context of (international law) when speaking of self-determination, is thus a people. The term does not refer to the philosophical 'self' in the sense of an autonomous individual person. There is, in fact, no law in the international legal sphere which protects an individual's right to self-determination.

If we look at the Universal Declaration of Human rights (UDHR) and the European Convention of Human Rights (ECHR) we will find no reference to the concept of 'autonomy' or 'self-determination' either. The rights protected in these

[30] Dahbour 2012.
[31] UN Charter 1945.
[32] Hannum 1998.
[33] Hannum 1998.

treaties cover the topics of various freedoms such as speech, religion, expression etc. One freedom significantly not included however is the freedom to make decisions about one's own body. Article 3 UDHR and article 5 ECHR cover the 'right to life, liberty and security of person', this right might come closest to the protection of the autonomy that we seek. However, the application of these articles is directed at protection of privacy, not at autonomy. In fact, a similar right in the US Constitution was the center point for the landmark case Roe v. Wade, which is currently in the process of being overturned due to tenable misinterpretation of the constitution.

Since we cannot find protection in international treaties, we must turn our attention to the Dutch constitution. Article 11 GW regulates the 'inviolability of the human body', it states:

> Ieder heeft, behoudens bij of krachtens de wet te stellen beperkingen, recht op onaantastbaarheid van zijn lichaam.
>
> Everyone has the right to inviolability of his body, subject to restrictions to be set by or pursuant to the law.[34]

So, in this article of the constitution, we find the first inkling of the protection of individual rights regarding a person's body. In the MvT (Memorie van Toelichting – Explanatory Memorandum), the lawgiver clarified that this article intends to protect an individual's right from for example medical interference, for example. An individual cannot be forced into a specific medical treatment, nor can a doctor treat you without your explicit consent. The article does not, however, provide the right to access to any treatment you want. Medical professionals are in fact allowed to refuse a treatment when their personal beliefs and convictions are in conflict with providing that treatment.[35] They are only obliged to provide treatment in a life-threatening situation. If you wish to have an abortion and there is no lifesaving reason for a physician to provide the treatment, then they can in fact refuse the treatment. Art. 11 GW, in other words, does not provide sufficient protection to those women who would seek to terminate their pregnancy for any other reason than a life-threatening situation. Furthermore, there is no other law in the current constitution which would enable a woman to enforce the procedure.

4.2. Individual self-determination – a new constitutional right

It is time for the traditional, patriarchal, institutionalized values which control female bodies, to make room for autonomous decisions by women. Following Okin's theory, we might say it is time to radically break with institutionalized patriarchal norms and values. By continuing to follow the legal framework laid down in the previous century, we are propagating this paternalistic societal oppression. If we perceive the topic of abortion as though we were behind the veil of ignorance, we would, according to Rawls, choose a societal structure in which we are all equal. Since there are no rules which can force a man to carry, birth and care for a child, there ought to be no rule which can force a woman to do those things. Rawls argues that everyone behind the veil would promote liberty and autonomy for everyone on equal terms.

For this reason, it is necessary to rethink the right to abortion from the viewpoint of autonomous equality, independently of your background. I would argue that a new

[34] Art. 11 GW.
[35] KNMG 2022.

legal concept called ‘individual self-determination’ ought to be introduced. The intent of this right would be to enshrine the right to (bodily) autonomy for all individuals. The right to individual self-determination would aim to protect an individual from state interference or from some breach by a third party, whether this is an institution or an individual. How does this right to individual self-determination differ from the current protections with regard to the right to abortion in the Netherlands?

First of all, it would ensure the protection of female (bodily) autonomy in a way the current law fails to do. It is no longer based on outdated patriarchal views with regard to women and their ability to make autonomous decisions. It does not stem from the idea that women require protection from anything, not even themselves. It would become possible for a woman to enforce her will to terminate her pregnancy, regardless of what other people think about that decision.

Secondly, the law would be written, checked, and voted into effect by not just men, as in previous legislation, but by women. Okin’s argument that women need a seat at the table to create the kind of fair and just society proposed by Rawls would be fulfilled.[36] This would signal a clear break with the gender system in relation to abortion laws. Women would be deciding about topics which affect women.

Finally, I would propose placing this new law directly into the Dutch constitution. The most common path would be to create a ‘regular law’, this would follow the process of a law in the formal sense as was explained in chapter 2. There are, however, some things to consider about implementing this right. The concept law which I am proposing called the ‘individual right to self-determination’, is based on Rawlsian ideas of equality and autonomy.[37] These ideals of personal autonomy and fundamental equality are inherent rights for every individual regardless of their social status. The individual right to self-determination could therefore be classified as a fundamental human right, for their aim is to protect basic inherent rights. Within the Dutch legal construct, human rights are awarded a place in the constitution.[38] The importance of human rights and the need to protect their special status requires the stricter formation process described in chapter 2.[39] The proceedings require two readings, two phases of revision and two rounds of voting by both the Senate and the house of representatives. Essential is also the majority required, which would be the strengthened majority.

4.3. Individual self-determination – critique

This proposal is far from straightforward, and there are many pitfalls on the road. In this section, I will address and counter some of the possible criticisms. There will, most likely, be many more criticisms of the proposal laid out in the previous section. The three which I shall mentioned below are the ones I would consider the main critiques, which is why it is important to explain and counter them.

Firstly, the main criticism offered by pro-life campaigners is based on the rights of the unborn child.[40] Depending on which view is proposed ‘life begins at conception’, and this life is worthy of protection. With regard to the proposed law, we are attempting to protect autonomy. There may be life after conception, but can one speak of autonomy? Can we speak in Kantian terms of an ‘individual moral agent who is

[36] Okin 1989.
[37] Rawls 1999.
[38] De Nederlandse Grondwet 2022.
[39] Parlementair Documentatie Centrum 2022.
[40] Artsenkrant 2020.

capable of making decisions based on ethical considerations?'[41] I would argue that in the case of an unborn fetus, there might be signs of life, but there can hardly be signs of autonomous thought.

Secondly, what about the rights of the father? This thesis has made a clear argument in favour of the woman's choice, but does this mean that a father can have no opinion on whether or not he will have a child? To this potential counterargument, I would bring that I have argued not against individual men potentially discussing a woman's choice to bear a child, but against the paternalistic and patriarchal values enslaving and controlling a woman's decision in such a way that she loses her autonomy.[42] This does not eliminate the importance of the father's autonomy to express his desires with regards to his future child. It simply means that a woman cannot be forced to bear a child that she does not want because outdated male opinions believe she ought to.

Thirdly, if we are protecting autonomous decision making does this mean a pregnancy can be terminated at any time, in other words, can we just decide what we want to do whatever we want, regardless of the consequences? As stated in the introduction, I do not wish to delve into medical particulars regarding abortions, since that is not the point of this thesis. For that reason, at this point in time, I suggest maintaining the current time span with which abortions are permitted in the Netherlands.[43] This is currently 24 weeks; the point of this thesis is not to stretch this period or to change the definition of what falls under a legal abortion. It is simply to better protect the right of a woman to choose to have an abortion. Furthermore, the Dutch constitution is not limitless. Nearly all articles which award a certain freedom to a citizen end with the phrase:

behoudens bij de wet gestelde beperkingen en uitzonderingen

subject to limitations and exceptions provided for by law[44]

In the case of individual self-determination, I would propose including such a clause to prevent social disorder. The idea behind this clause is that any freedom which is included in the constitution should not be so limitless that it breaches someone else's freedom. But considering an abortion only really has an effect on the body of the women carrying a baby there should be no reason to implement this clause in those cases. However, by creating this new article in the constitution it could potentially have consequences for the debate regarding euthanasia, or even for example regarding vaccination policies during a pandemic. For this reason, I believe it would be imprudent not to include this clause in the law I am proposing.

4.4. Conclusion

In this final chapter, the concept of self-determination in international law is touched upon. As becomes clear, the 'self' which is referred to in this terminology is not the 'self' in any philosophical sense, but rather it refers to a group or nation of peoples. This however allows room for a new interpretation and application of the concept of 'self-determination' in law, namely that of individual self-determination. This is the legal concept which I propose ought to be implemented as a law in the Dutch constitution in order to protect a woman's right to bodily autonomy and in extension the right to

[41] Buss, Sarah; Westlund, Andrea 2018.
[42] Okin 1989.
[43] Rijksoverheid 2022.
[44] De Nederlandse Grondwet 2022.

abortion. By doing this we can finally leave behind the outdated paternalistic laws which have governed this topic for the past century. It would fall within the constitution, because it is an inherent right every human being should have access to and would therefore qualify as a human right in broader terms. There are possible counterarguments to be made against this proposal. The three main counterarguments are touched upon briefly and refuted in turn. Finally, the possible consequences this law could have for other ‘autonomous bodily decisions’ is underlined, and a solution is proposed how to potentially curb the effects.

5. Conclusion

In this thesis, an answer has been provided to the main question we started out with: What solution is there for insufficient protection of the right to abortion in the Netherlands?

In chapter two, an overview was provided of the historic development of abortion laws in the Netherlands. What started out as an illegal act at the start of the 1900's, was later decriminalized in the 80's. A historical outline was given discussing the movement which brought about this change, which simultaneously illustrated why the issue is not yet resolved to this day. The same rights, the same ideals and the same slogans are still being used 40 years later to fight for the right to abortion. Finally, this chapter provided an insight into the Dutch legal system which organizes the importance of the most fundamental laws with a view to their respective weight.

Chapter three dived into the concept of autonomy, starting with the Kantian understanding of autonomy within humans to mean 'individual, moral agents'. This concept inspired John Rawls and his Theory of Justice. If we are to place these agents behind a veil of ignorance, without them knowing their social standing, what laws would be chosen to govern their society? It would be laws that do the least possible harm to those who are in the minority because you never know whether you might not be part of this minority. These ideas inspired the egalitarian liberal-feminist movement. More particularly, Susan Okin used these ideas to argue against maintaining a patriarchal society and in turn argued for a liberated society where, quite literally, have a seat at the table. Without women's voices in important positions the perpetual cycle of control over women's lives and bodies will not be broken. In order to break this cycle, Okin argues that we must break with the gendered system, which starts even within the nuclear family and will find its effects throughout the whole of society. Without women's participation, the debate around abortions will remain a source of control and oppression.

In the fourth and final chapter, I proposed a new understanding of the legal concept of 'self-determination'. Under the current meaning the self does not in fact refer to an individual who has the right to determination, but to populations of peoples. By reinterpreting this concept of 'self' in the philosophical sense, I have argued for an individual right to self-determination. This legal concept would protect individual autonomy with respect to one's body without fear of government or third-party interference. This would allow a woman in the Netherlands, for the first time ever, to actually have a right to abortion, instead of this act only being decriminalized. There are, as always, some possible counterarguments to be made. However, the concept of individual autonomy as leading principle cannot easily be overthrown.

In conclusion, currently the protection of the right to abortion in the Netherlands is currently insufficient. A possible solution is to include a new law in the Dutch constitution which protects an individual right to self-determination. The liberal principles that once decriminalized the act of abortion under certain circumstances are still applicable to this day. It is time to finally put this legal debate to rest and to allow women full autonomous control over their bodies.

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