

Abortion laws: the Polish symptom of a European malady?

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The recent decision of the Polish Constitutional Tribunal to eliminate the possibility of legal abortion in cases of fatal fetal abnormality denotes a wave of anti-abortion sentiments gaining ground in Europe. This dangerous trend benefits from the great diversity among domestic abortion laws and state responses during the COVID-19 pandemic.

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- 1 The provision under review, Art. 4a par. 1 (2) of the Act for Family Planning and the Protection of the Foetus (1993), had decriminalised abortion in cases where there was 'a medical indication that there existed a high risk that the foetus would suffer severe and irreversible impairment or an incurable illness that could threaten its life'.
- 2 'Poland abortion: Top court bans almost all terminations', *BBC* 23 October 2020, www.bbc.com/news/world-europe-54642108 (accessed 22 March 2021).
- 3 J. Todd-Gher & P.K. Shah, 'Abortion in the context of COVID-19: a human rights imperative', *Sexual and reproductive health matters* (28) 2020, Issue 1.
- 4 Q. Muis, T. Reeskens & I. Sieben, 'Polarisering in Nederland: Opleidingsniveau als scheidslijn?', *Religie en Samenleving* (14) 2019, Issue 2, p. 124-143.
- 5 S. De Zordo, J. Mishtal & L. Anton (eds.), *A fragmented landscape: Abortion governance and protest logics in Europe* (Protest, Culture & Society, Vol. 20). New York/Oxford: Berghahn Books 2016.

1 Introduction

On 27 January 2021, decision 1/20 entered into force in Poland. The decision, adopted by the Constitutional Court in the previous year, declared the unconstitutionality of the domestic statutory provision that allowed women to access abortion in cases of fatal fetal abnormality.¹ According to the Polish National Health Fund, abortions on these grounds made up 98% of the legal abortions performed in Poland each year.²

This decision came amidst the COVID-19 pandemic, which has revealed and exacerbated the existing inequalities within diverse sectors of society around the world.³ Abortion services have not been exempt from these effects and have become increasingly, and unevenly, difficult to access. In this context, states in Europe have opted for very different approaches to the accessibility and administration of these services.

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Europe has been the site of contestation of abortion rights for the past decade, and now the matter seems to elicit more polarization than ever.⁴ Despite decades of sustained political mobilization, the full decriminalization of abortion has not been achieved and, even where more liberal-aligned regulations have been passed, abortions remain inaccessible for many.⁵

In this paper, we argue that the Polish Constitutional Court decision and the unequal access to abortion during the pandemic are symptomatic of a broader problem in the European context. We show that Europe hosts a very diverse landscape of abortion regulation that is, overall, in dire need of reform if international human rights standards are to be met, and that the substantially different approaches to abortion access during the COVID-19 pandemic has deepened existing inequalities. We argue that the Polish experience is part and parcel of a regional backlash against sexual and reproductive rights that builds on the remaining legal barriers and current regulations.

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2 International human rights standards

In this section, we will briefly introduce the international obligations regarding sexual and reproductive rights at the international level and the European level.

Sexual and reproductive rights have gained increased recognition in the international arena.⁶ In the 1990s, two international conferences consolidated the framing of sexual and reproductive rights as human rights. In 1994, the International Conference on Population and Development (Cairo Conference) introduced a comprehensive approach to sexuality and reproduction in connection to human rights.⁷ A year later, the Beijing Conference adopted the concept of sexual rights, and expanded the Cairo definition to cover the right to exercise control over, and make decisions about one's sexuality. Both conferences' declarations recognized

the obligations of states to translate their assumed international commitments into national laws and policies.⁸

The initial push led to their gradual incorporation and elaboration by the bodies monitoring the international human rights treaties (Treaty Monitoring Bodies, TMB). These TMB's have increasingly interpreted human rights provisions in relation to abortion and contributed to the development of international human rights standards on the issue through general and country-specific recommendations. In this section, we describe international human rights standards and the obligations of states in relation to the legal framework on abortion.

The right to sexual and reproductive health, including abortion services has been recognized as an integral part of the right to 'the highest attainable standard of health'. In 2000, the UN Economic, Social and Cultural Rights Committee (ESCR Committee) recognized that Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) on the right to the highest attainable standard of health includes 'sexual and reproductive freedoms'.⁹ It adopted General Comment No. 22 (GC 22), which is fully dedicated to the right to sexual and reproductive health, in 2016, 'considering the continuing grave violations of this right'.¹⁰ GC 22 adopts a 'life-cycle approach', projecting the concept of sexual and reproductive health beyond 'maternal health' and recognizes that sexual and reproductive health is indivisible from and interdependent with other human rights. The recognition of sexual and reproductive rights as constitutive part of health was also highlighted by the Committee on the Elimination of Discrimination Against Women (CEDAW Committee) in General Recommendation 24 (GR 24) on Women and Health.

Sexual and reproductive rights and, consequently, access to abortion are also linked to the enjoyment of civil and political rights and freedoms. Access to abortion has direct bearing on personal autonomy and the person's self-determination. The ESCR Committee rejects all forms of coercive practices related to sexual and reproductive health. In addition, ESCR GC 22 affirms the individual right to the unhindered access to a whole range of health facilities, goods, services and information,

- 6 L. Berro Pizarrossa, 'Here to stay: The evolution of sexual and reproductive health and rights in international human rights law', *Laws* (7) 2018, Issue 3; L. Berro Pizarrossa, 'Peer-reviewing abortion laws: lessons from the Universal Periodic Review', *ESR Review: Economic and Social Rights in South Africa* (19) 2018, Issue 3, p. 4-8.
- 7 Report of the International Conference on Population and Development, Cairo 5-13 September 1994 (United Nations publication, Sales No. E.95.XIII.18), chap. I, resolution 1, annex.
- 8 L. Berro Pizarrossa & K. Peruhodoff, 'Global survey of national constitutions: Mapping constitutional commitments to sexual and reproductive health and rights', *Health and Human Rights Journal* (19) 2017, Issue 2, p. 279-294.
- 9 UN Committee on Economic, Social and Cultural Rights General Comment No. 14 (2000) on the right to the highest attainable standard of health, par. 2, 8, 11, 16, 21, 23, 34 and 36.
- 10 UN Committee on Economic, Social and Cultural Rights, General Comment No. 22: Right to sexual and reproductive health (Art. 12 of the Covenant), *UN Doc E/C.12/GC/22* (2016) (hereinafter: GC 22). Available at www.escr-net.org/resources/general-comment-no-22-2016-right-sexual-and-reproductive-health, par. 4 (accessed 22 March 2021).
- 11 GC 22, par. 33 and 45.
- 12 GC 22, par. 28, 34, 40, 49 (a) and (e).
- 13 GC 22, par. 10.
- 14 UN Human Rights Committee, General Comment 36, Article 6: Right to Life, *UN Doc CCPR/C/GC/36* (2018).
- 15 UN Committee against Torture (CAT), Concluding Observations: Paraguay, par. 22, *UN Doc CAT/C/PRY/CO/4-6* (2011); Concluding Observations: Paraguay, par. 22, *UN Doc CAT/C/PRY/CO/4-6* (2011).
- 16 UN Committee against Torture (CAT), Concluding Observations: Poland, par. 23, *UN Doc CAT/C/POL/CO/5-6* (2013).
- 17 While international human rights documents often refer to 'women's access to abortion', we include any person with the capacity to become pregnant regardless of their gender identity.
- 18 GC 22, par. 25.
- 19 On the conceptualization of sexual and reproductive health as a matter of gender-based violence, see S. de Vido, *Violence against women's health in international law*, Manchester: Manchester University Press 2021.
- 20 UN Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation No. 24.

- 21 CEDAW, Concluding observations: Russian Federation, par. 35, *UN Doc CEDAW/C/RUS/CO/8* (2015); CEDAW, Concluding Observations: Slovakia, *UN Doc CEDAW/C/SVK/CO/5-6* (2015).
- 22 CEDAW, Concluding Observations: Slovakia, par. 31, *UN Doc CEDAW/C/SVK/CO/5-6* (2015).
- 23 GC 22.
- 24 CEDAW, Concluding Observations: Slovakia, par. 30 and 31, *UN Doc CEDAW/C/SVK/CO/5-6* (2014).
- 25 CEDAW, Concluding Observations: Hungary, par. 30, *UN Doc CEDAW/C/HUN/CO/7-8* (2013); and CEDAW, Concluding Observations: Russian Federation, par. 35, *UN Doc CEDAW/C/RUS/CO/8* (2015).
- 26 CEDAW, General Recommendation No. 24: Article 12 of the Convention (Women and Health), *UN Doc A/54/38/Rev.1* (1999).
- 27 UN Human Rights Committee, *LMR v. Argentina* (*UN Doc CCPR/C/101/D/1608/2007*).
- 28 UNGA. Report of the Office of the United Nations High Commissioner for Human Rights on Practices in Adopting a Human Rights-based Approach to Eliminate Preventable Maternal Mortality and Morbidity. *UN Doc A/HRC/18/27* (2011), par. 30.
- 29 CEDAW, General Recommendation No. 24, Women and Health, *UN Doc A/54/38/Rev.1* (1999), par. 14.
- 30 GC 22, par. 43.
- 31 GC 22, par. 43.
- 32 GC 22, par. 49.
- 33 L.O. Gostin, J. Monahan, J. Kaldor, M. DeBartolo et al., 'The legal determinants of health: harnessing the power of law for global health and sustainable development', *The Lancet* (393) 2019, Issue 10183, p. 1857-1910.
- 34 *International Planned Parenthood Federation – European Network (IPPF EN) v. Italy*, complaint No. 87/2012, decision on the merits of 10 September 2013, § 66.
- 35 D. Fenwick, 'The modern abortion jurisprudence under Article 8 of the European Convention on Human Rights', *Medical Law International* (12) 2012, Issue 3-4, p. 249-276.
- 36 I. Tucak & A. Blagojević, 'Abortion in Europe', *EU and Comparative Law Issues and Challenges Series* (4) 2020, p. 1135-1174; F. 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) 2011, Issue 1; D. Fenwick, 'Abortion Jurisprudence' at Strasbourg: Deferential, Avoidant and Normatively Neutral?', *Legal Studies* (34) 2014, Issue 2, p. 217.
- 37 ECtHR (Grand Chamber) 16 December 2010, 25579/05 (*A. B. & C v. Ireland*), par. 249.
- 38 ECtHR (Fourth Section) 30 October 2012, 57375/08 (*P. and S. v. Poland*), par. 99.

and the obligation of the state to adopt appropriate legislative measures in order to achieve the full realization of sexual and reproductive rights.¹¹ In this regard, states must repeal or eliminate laws, policies and practices that criminalize, obstruct or undermine an individual's or a particular group's access to health facilities, services, goods and information. ESCR GC 22 refers explicitly to the need to repeal laws that criminalize abortion,¹² and recognizes that not doing so can result in a violation of the right to life or security, and in certain circumstances can amount to torture or cruel, inhuman or degrading treatment.¹³

In addition, the Human Rights Committee has recently reaffirmed in its recent General Comment 36 on the Right to Life (HRC GC 36) that deficient abortion laws can infringe the right to life. This General Comment interprets Article 6 of the International Covenant on Civil and Political Rights (ICCPR) – one of the most important and widely ratified international human rights treaties – and is arguably the most crucial component of the puzzle of international human rights law in terms of abortion. It holds that 'although States Parties may adopt measures designed to regulate voluntary terminations of pregnancy', they must still ensure that:

- restrictions on abortion do not jeopardize women's lives, or subject them to physical or mental pain or suffering;
- safe, legal and effective access to abortion where the life and health of the pregnant woman or girl is at risk is provided, or where carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering (particularly in the case of rape);
- women and girls do not have to undertake unsafe abortions;
- barriers to the effective access to abortion are eliminated.¹⁴

The importance of the access to abortion for the enjoyment of civil and political rights has also been confirmed by the Committee against Torture (CAT Committee), which has found that some restrictions that put women and girls' health and lives at risk or that may cause them severe physical or mental pain or suffering can constitute violations of the Convention against Torture (CAT Convention). This is certainly the case in relation to victims of

sexual violence, particularly girls, or persons carrying non-viable fetuses.¹⁵ Also, the limitation of women's access to abortion as a consequence of insufficient regulation of conscientious objection can constitute a violation of the CAT Convention.¹⁶

The realization of the right to sexual and reproductive health, in connection to women's reproductive capacities is essential to the realization of the full range of their human rights.¹⁷ The CEDAW Committee has repeatedly acknowledged that the violations of women's sexual and reproductive health rights are rooted in patriarchal values pertaining to women's sexuality, and that these are a violation of article 16 that protects women's right to decide the number and spacing of their children. GC 22 also recognizes that the right of women to sexual and reproductive health is indispensable to their autonomy and their right to make meaningful decisions about their lives and health.¹⁸ Instances where women's only option is to terminate a pregnancy through unsafe abortions is considered as a form of gender-based violence.¹⁹

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The TMB have identified various obstacles to the access of abortion. The first relates to the criminalization of the practice. Besides the HRC GC 36 and ESCR GC 22, the CEDAW Committee urged states to amend legislation criminalizing abortion 'when possible' and to withdraw punitive measures imposed on women who undergo the practice.²⁰ Furthermore, the CEDAW Committee has repeatedly condemned laws that impose mandatory counselling as part of the pregnancy termination process, as they 'restrict women's access to abortion'.²¹ The CEDAW Committee has insisted in its recommendations that such requirements should be repealed.²² Similarly, ESCR GC 22 explicitly refers to mandatory waiting periods as barriers that are to be eliminated.²³ The CEDAW

Committee has also called for the removal of waiting periods, as they are ‘medical-ly unnecessary’. It urges the revision of requirements²⁴ and access to safe abortion without subjecting individuals to mandatory counselling, deeming the imposition of these requirements to be ‘aimed at restricting women’s access to abortion’.²⁵

The CEDAW GR 24 notes that the limitation of women’s access to health services based on the authorization of husbands, partners, parents, or health authorities is a significant barrier to the pursuit of their health goals, discouraging them from seeking the information and services guaranteed by law.²⁶ The judicialization of the access to abortion when it is allowed as an exception to criminalization is also considered unjustified delay and, thus, a violation.²⁷

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Another barrier to the access to abortion is the lack of regulation of conscientious objection, recognized as such by the four committees discussed. The international standards are quite clear on this topic. Firstly, the obligation to protect, requires states to prohibit and prevent private actors from imposing practical or procedural barriers to health services. In this regard, states must organize health services in a manner that ensures that ‘the exercise of conscientious objection by health professionals does not prevent women from obtaining access to health services’.²⁸ Secondly, the CEDAW Committee clarified that ‘if health service providers refuse to perform such services based on conscientious objection, measures should be introduced to ensure that women are referred to alternative health providers’.²⁹ According to GC 22, states must appropriately regulate this practice to ensure that it does not inhibit anyone’s access to sexual and reproductive healthcare, including by requiring refer-

als to an accessible provider who is capable of and willing to provide the services being sought.³⁰ And thirdly, states must guarantee the performance of services in urgent or emergency situations.³¹

What, then, are the obligations of states in relation to the access to abortion? As with all human rights, states have the obligation (1) to respect the individuals’ right to sexual and reproductive health by refraining from directly or indirectly interfering with it, (2) to protect the enjoyment of the right by preventing third parties from directly or indirectly interfering with it, and (3) to fulfil the right, by providing safe abortion care. Regarding the latter obligation, ESCR GC 22 includes the provision of medicines according to the World Health Organization Essential Medicines List – which includes misoprostol and mifepristone – among the core obligations of the states.³² Moreover, GC 22 encourages innovations such as telemedicine as a permanent option rather than a provisional measure exclusively connected to pandemic-related needs.

The abovementioned non-exhaustive list of international human rights standards can, and should, guide the implementation of human rights in Europe as well as internationally. While more progress is necessary at the international level, the current standards suffice to provide the grounds for updated abortion laws and policies that better reflect human rights standards and scientific developments.³³

3 The regulation of abortion in Europe, and states’ responses during the COVID-19 pandemic

Standards in relation to sexual and reproductive rights are also found at a regional level. Although the European Convention does not concern economic, social and cultural rights, article 11 of the Economic and Social Charter grants the right to the highest attainable standard of health and the right to access health care. The European Committee of Social Rights has clarified that States Parties have the positive obligation to provide appropriate and timely care on a non-discriminatory basis, including services relating to sexual and reproductive health.³⁴ The consequences of regarding the right to health as a directive principle rather than as an entitlement are becoming apparent.

- 39 ECtHR (Fourth Section) 30 October 2012, 57375/08 (*P. and S. v. Poland*), par. 99 and ECtHR (Fourth Section) 20 March 2007, 5410/03 (*Tysiack v. Poland*), par. 116-124.
- 40 J. Gerards, ‘Margin of appreciation and incrementalism in the case law of the European Court of Human Rights’, *Human Rights Law Review* (18) 2018, Issue 3, p. 495-515.
- 41 Resolution 1607 (2008) – Access to safe and legal abortion in Europe, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17638> (accessed 10 March 2021).
- 42 None of these bans have stopped people from needing and seeking access to abortion. In Ireland, for example, since 1970 a ‘hidden diaspora’ of more than 170,000 Irish women have travelled to England for abortion (S. Calkin, ‘Healthcare not airfare! Art, abortion and political agency in Ireland’, *Gender, Place & Culture* (26) 2019, Issue 3, p. 338-361) and an increasing number of women were self-managing their abortions (S. Sheldon, ‘How can a state control swallowing? The home use of abortion pills in Ireland’, *Reproductive Health Matters* (24) 2016, Issue 48, p. 90-101. Similarly, in Malta, an estimated 300-400 Maltese women travel abroad every year to get an abortion, usually to the United Kingdom, ‘COVID: Locked-down women turn to pills amid Malta abortion ban’, *BBC* 9 January 2021, www.bbc.com/news/world-europe-55579339 (accessed 28 January 2021).
- 43 Ireland, *Health (Regulation of Termination of Pregnancy) Act*, 2018. Available at <https://abortion-policies.srhr.org/documents/countries/07-Ireland-Health-Regulation-of-Termination-of-Pregnancy-Act-2018.pdf> (accessed 22 March 2021).
- 44 Albania, Austria, Belarus, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, France, Germany, Greece, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Montenegro, Norway, Portugal, Romania, Russian Federation, Serbia, Slovakia, Slovenia, Spain, Sweden, The Former Yugoslav Republic of Macedonia, Ukraine, United Kingdom.
- 45 Centre for Reproductive Rights, *The world’s abortion laws*, 2014. Available at www.reproductiverights.org/sites/crr.civicactions.net/files/documents/AbortionMap2014.PDF.
- 46 Law on Sexual and Reproductive Health and Abortion.
- 47 Spanish Law on Sexual and Reproductive Health and Abortion. Available at <https://abortion-policies.srhr.org/documents/countries/01-SPAIN-LAW-ON-SEXUAL-AND-REPRODUCTIVE-HEALTH-AND-ABORTION-1995.pdf> (accessed 22 March 2021).
- 48 Dutch Criminal Code. Available at <https://abortion-policies.srhr.org/documents/countries/02-Netherlands-Criminal-Law.pdf> (accessed 20 April 2021).

- 49 C. Moreau, M. Shankar, A. Glasier, S. Cameron & K. Gemzell-Danielsson, 'Abortion regulation in Europe in the era of COVID-19: a spectrum of policy responses', *BMJ sexual & reproductive health* 2020.
- 50 Section 218a (1) StGB (German Criminal Code). Available at <https://abortion-policies.srhr.org/documents/countries/01-GERMANY-PENAL-CODE-2015.pdf> (accessed 22 March 2021).
- 51 A. Heino, M. Gissler, D. Apter & C. Fiala, 'Conscientious objection and induced abortion in Europe', *The European Journal of Contraception & Reproductive Health Care* (18) 2013, Issue 4, p. 231-233.
- 52 CRR, *Addressing Medical Professionals' Refusals to Provide Abortion Care on Grounds of Conscience or Religion: European Human Rights Jurisprudence on State Obligations to Guarantee Women's Access to Legal Reproductive Health Care*, 2018, https://reproductiverights.org/sites/default/files/documents/GLP_Refusals_FS_Web.pdf.
- 53 F. Minerva, 'Conscientious objection in Italy', *Journal of Medical Ethics* (41) 2015, Issue 2, p. 170-173.
- 54 R. Taylor, E. Sully, Z. Ahmed & A. Bidlecom, 'Estimates of the potential impact of the COVID-19 pandemic on sexual and reproductive health in low- and middle-income countries', *International Perspectives Sexual and Reproductive Health* (46) 2020, p. 73-76.
- 55 See for instance Todd-Gher & Shah 2020.
- 56 S. Cousins, 'COVID-19 has "devastating" effect on women and girls', *The Lancet* (396) 2020, Issue 10247, p. 301-302.
- 57 M. Stevis-Gridneff, A. Haridasani & M. Pronczuk, 'Coronavirus Created an Obstacle Course for Safe Abortions', *The New York Times* 14 June 2020, www.nytimes.com/2020/06/14/world/europe/coronavirus-abortion-obstacles.html (accessed 22 March 2021).
- 58 Z. Gabrižová, 'COVID-19 restricts access to abortions in Slovakia', *EURACTIV* 29 April 2020, www.euractiv.com/section/all/short_news/COVID-19-restricts-access-to-abortions-in-slovakia/ (accessed 22 March 2021).
- 59 Lithuanian health minister tells women to "reconsider" having abortion', *LRT* 15 April 2020, www.lrt.lt/en/news-in-english/19/1163688/lithuanian-health-minister-tells-women-to-reconsider-having-abortion.
- 60 Moreau et al. 2020.
- 61 European Parliamentary Forum for Sexual & Reproductive Rights and IPPF European Network, *Sexual and Reproductive Rights during the COVID-19 pandemic*, 2020. Available at www.ippfen.org/sites/ippfen/files/2020-04/Sexual_and_Reproductive_Health_during_the_COVID-19_pandemic.pdf (accessed 22 March 2021).

The European Court of Human Rights (the ECtHR) has been reluctant to explicitly derive a free-standing right of access to abortion from the European Convention of Human Rights (ECHR). It has shown a determination to adhere to the principle of subsidiarity, making broad use of the doctrine of the margin of appreciation,³⁵ an approach that has been widely criticized.³⁶ The Court has stated that 'a broad margin of appreciation is accorded to the State as to the decision about the circumstances in which an abortion will be permitted in a State'.³⁷

However, the Court has confirmed that women must be able to access services within the laws of the particular state once the state decides to adopt statutory regulations legalizing abortion, emphasizing that it 'must not structure its legal framework in a way which would limit real possibilities to obtain an abortion'.³⁸ Moreover, the state acquires a 'positive obligation to create a procedural framework enabling a pregnant woman to effectively exercise her right of access to lawful abortion'.³⁹ By now, the Court has made clear that states should provide for clear, accessible and foreseeable legislation; reliable and prompt information about access to abortion; for sufficient involvement of women in the decisions being taken, and for an effective judicial remedy.⁴⁰

The Council of Europe Parliamentary Assembly Resolution 1607 (2008) – 'Access to safe and legal abortion in Europe' – is another important instrument. The Parliamentary Assembly asserts that 'abortion should not be banned within reasonable gestational limits', and that 'a ban on abortion does not result in fewer abortions but mainly leads to' illegal abortions that result in a number of adverse effects, such as increased maternal mortality, 'abortion tourism', and social inequalities.⁴¹

While traditional classifications of abortion regulations give the general impression of a rather liberal regulatory environment, Europe hosts very diverse domestic approaches to abortion. At the domestic level, full formal prohibition of abortion exists only in Andorra, Malta, San Marino and the Vatican.⁴² Ireland left this group in 2018 when it adopted a new law on abortion after repealing the Eighth Amendment to the Irish Constitution via a referendum. The Health (Regulation of

Termination of Pregnancy) Act 2018, in force as of January 2019, lifted the near total ban on abortion, which had been in place since 1983.⁴³ That said, all European States retain criminal laws on abortion (in some form).

Out of the 47 states in Europe, 31 allow for abortion when requested by an individual,⁴⁴ in most cases within a gestational limit ranging from 10 to 18 weeks, allowing for elective termination of pregnancy in the first trimester.⁴⁵ For example, the latest Spanish law⁴⁶ allows for abortion on request until the 14th week and in some specific instances after this period.⁴⁷ Other states in Europe allow for abortion on defined legal grounds. The most common grounds are fetal impairment (n 32/47) and risk to the health of the woman (n 26/47).

The generalized approach embraces partial decriminalization or exception-based criminalization. That is the case in the Netherlands, for example, where abortion continues to be regulated as a crime

Despite the apparent permissive laws adopted by these states, barriers remain present. The generalized approach embraces partial decriminalization or exception-based criminalization. That is the case in the Netherlands, for example, where abortion continues to be regulated as a crime (Criminal Code, Section 296). This provision states that unless it is carried out under the provisions of the Termination of Pregnancy Act abortion remains a crime.⁴⁸ This means that abortion remains punishable under the law in certain circumstances, for example when requirements of gestational age, waiting periods or specific grounds are not met. The specific conditions of decriminalization and access vary substantially among states, but generally establish exceptions (rape, fetal abnormality, risk to life) or a term (10, 12, 14 weeks for example) and include mandatory counselling and waiting periods, parental and/or judicial consent in the case of minors, and limitations related

to the type and amount of providers that need to be involved in the procedure.⁴⁹ We found that in 36 of the 47 European states, women require the authorization of health professionals, with at least 13 states compelling women to undergo mandatory counselling or receive mandatory information from their doctors prior to an abortion; and 16 states imposing compulsory waiting periods. For example, the German Criminal Code requires mandatory counselling provision for abortions to be exempted from criminal prosecution.⁵⁰

In 23 states where abortion is legal, invoking conscientious objection is protected by law.⁵¹ Access to abortion is undermined by government failures to appropriately address medical professionals' refusals to provide abortion care on grounds of conscience or religion.⁵² For example, in Italy state authorities are failing to ensure that refusals (which amount for 70% of doctors) do not result in delays or denial of care for women seeking legal abortion care.⁵³ While some European governments may give the impression of embracing a liberal approach to abortion rights, in practice, conscientious objection has turned into a very effective restriction.

The conditions resulting from the COVID-19 pandemic seem to have intensified the differences among European states in relation to access to abortion

The conditions resulting from the COVID-19 pandemic seem to have intensified the differences among European states in relation to access to abortion. Due to the disruption of supply chains, individuals experience increased difficulty when attempting to obtain contraceptives. Quarantines and movement restrictions prevent people from visiting healthcare facilities, and healthcare workers' time and attention are largely diverted to COVID-19 patients.⁵⁴ Access to abortion has, hence, become increasingly difficult.⁵⁵

This has been and remains a rapidly changing scenario, in which European states have taken drastically different approaches. A number of governments have limited healthcare services to 'essential services', excluding abortion from them.⁵⁶

For example, Austria, Croatia, Germany, and Romania did not recognize abortions as essential services, prohibiting abortion clinics to operate and abortion services to be provided, in line with the COVID-19 measures.⁵⁷ Other states have not formally constrained access but instead have opted for 'discouraging' techniques. For instance, the Slovak government has announced that it 'does not recommend' women accessing care at this time,⁵⁸ and the Lithuanian Minister of Health has declared that 'women seeking abortion services should use their time in lockdown to reconsider their decision'.⁵⁹ Finland and Denmark are among other countries that, on the other hand, have continued to provide access to safe abortion services without any changes in the availability of surgical abortions.⁶⁰

In addition to the limited capacity of health facilities, the reduced mobility imposed by lockdowns acts as an additional barrier to access to abortion services. Some countries have partially modified their approach and introduced exceptional practices in an effort to facilitate availability and access to abortion. For example, Germany has allowed for mandatory pre-abortion counselling to take place over the phone or by video call, although abortion care must still be administered in a clinic.⁶¹

In most states, however, seeking an abortion requires a visit to a healthcare facility. In the Netherlands, women appealed to the judicial system to request access to abortion services that would not require, or would significantly reduce, the need for physical mobility and/or interactions with others.⁶² The Court of The Hague refused this appeal and will not allow for women to access the abortion pill outside of abortion clinics.⁶³ In Spain, women must visit a clinic on two different occasions to get an abortion, one to complete the mandatory intake paperwork, and one to perform the procedure. Only Galicia and Catalonia have started to offer virtual intake services.⁶⁴ In the UK, at-home management of abortion was effected in 2020 as exceptional measures to curb the exposure to the virus and maximize health resources. Ireland and France enabled the use of telemedicine for at-home abortions during the first trimester.⁶⁵

During the pandemic it has become apparent that even in cases where abortion is lawful and services are regularly provided, 'business as usual' is not good enough.

62 See news report of the case of access to abortion during COVID-19 here www.vnva.nl/nieuws/algemeen/request-to-dutch-minister-to-guarantee-access-to-abortion-care-during-the-COVID-19-measures/ (accessed 22 March 2021).

63 'Court rejects plea for easier access to abortion pills', *DutchNews.nl* 11 April 2020, www.dutchnews.nl/news/2020/04/court-rejects-plea-for-easier-access-to-abortion-pills/ (accessed 22 March 2021).

64 Women's Link Worldwide, *Barriers to access to abortion in Spain*, 2021 www.womenslinkworldwide.org/en/files/3151/barriers-to-access-to-abortion-in-spain.pdf (accessed 22 March 2021).

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67 B. Rolston & A. Eggert, *Abortion in the New Europe: A Comparative Handbook*, Berlin: Lehmanns 1994.

68 Lithuanian Parliament To Debate Abortion Ban', *Human Rights Monitoring Institute* 26 March 2018. Available at <https://hrmi.lt/en/seimo-zmogaus-teisiu-komiteje-kelia-skinasi-siulymas-drausti-abortus/> (accessed 9 March 2021); 'Thousands Protest in Norway against Restricting Abortion', *Reuters* 17 November 2018. Available at www.reuters.com/article/us-norway-politics-abortion/idUSKCN1NMOHR (accessed 28 February 2021); 'Spain abandons plan to introduce tough new abortion laws', *The Guardian* 23 September 2014. Available at www.theguardian.com/world/2014/sep/23/spain-abandons-plan-introduce-tough-new-abortion-laws (accessed 9 March 2021).

69 See for instance: European Parliament, *Study: Backlash on Gender Equality and Women's and Girls' Rights*, June 2018, [www.europarl.europa.eu/RegData/etudes/STUD/2018/604955/IPOL_STU\(2018\)604955_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604955/IPOL_STU(2018)604955_EN.pdf), and L. Sosa, 'Beyond Gender Equality? Anti-Gender Campaigns and the Erosion of Human Rights and Democracy', *Netherlands Quarterly of Human Rights* (39) 2021, Issue 1, p. 3-10. Available at <https://doi.org/10.1177/0924051921996697>. The issue has been extensively discussed in the political sciences: R. Kuhar & D. Patternote (eds.), *Anti-Gender Campaigns in Europe: Mobilizing against Equality*, Washington DC:

Rowman & Littlefield 2017; M. Verloof & D. Paternotte (eds.), 'The Feminist Project under Threat in Europe', *Politics and Governance* (6) 2018, Issue 3.

70 See for instance the case of Hungary. European Parliament, Questions for written answer 14 May 2020. Available at www.europarl.europa.eu/doceo/document/E-9-2020-002981_EN.html (accessed 15 March 2021).

71 'Slovak parliament narrowly rejects tightening of abortion rules', *Reuters* 20 October 2020, <https://www.reuters.com/article/uk-slovakia-abortions/idUKKBN2752M1> (accessed 22 March 2021).

72 See: <https://rm.coe.int/women-sexual-and-reproductive-health-and-rights-in-europe-issue-pape/168076dead>.

73 J. Hussein, J. Cottingham, W. Nowicka & E. Kismodi, 'Abortion in Poland: politics, progression and regression', *Reproductive Health Matters* (26) 2018, Issue 52.

74 P. Žuk & P. Žuk, "Murderers of the Unborn" and "Sexual Degenerates": Analysis of the "Anti-Gender" Discourse of the Catholic Church and the Nationalist Right in Poland', *Critical Discourse Studies* (17) 2020, Issue 5, p. 566, 569.

75 J. Mishtal, *The Politics of Morality: The Church, the State, and Reproductive Rights in Postsocialist Poland*, Ohio: Ohio University Press 2015, p. 141.

76 Law on Family Planning (Protection of the Human Foetus and Conditions permitting Pregnancy Termination) 1993 s.4(a).

77 See: Special Rapporteur on the Right to Enjoyment of the Highest Attainable Standard of Physical and Mental Health, *UN Doc A/HRC/14/20/Add.3* (2010); CEDAW, Concluding Observations: Poland, *UN Doc CEDAW/C/POL/CO/6* (2007); Concluding Observations: Poland, *UN Doc CEDAW/C/POL/CO/7-8* (2014); Concluding Observations: Poland, *UN Doc CEDAW/C/ISL/CO/7-8* (2016); UN Committee on the Rights of the Child (CRC), Concluding Observations: Poland, *UN Doc CRC/C/POL/CO/3-4* (2015); UN Committee on Economic, Social and Cultural Rights (E/C), concluding Observations: Poland, *UN Doc E/C.12/POL/CO/6* (2016); UN Committee on Economic, Social and Cultural Rights (E/C), concluding Observations: Poland, *UN Doc E/C.12/POL/CO/5* (2009); UN Human Rights Committee (HRC), Concluding Observations: Poland, *UN Doc CCPR/C/POL/CO/7* (2016); Concluding Observations: Poland, *UN Doc CCPR/C/POL/CO/6* (2010); UN Committee on the Rights of Persons with Disabilities (CRPD), Concluding Observations: Poland, *UN Doc PD/C/POL/CO/1* (2018); UN Committee against Torture (CAT), Concluding Observations: Poland, *UN Doc CAT/C/POL/CO/7* (2019) and Concluding Observations: Poland, *UN Doc CAT/C/POL/CO/5-6* (2013).

The more innovative measures, such as telemedicine, show that a simpler and less hospitalized approach to abortion is not only possible but, in many cases, preferable in the long term.⁶⁶ These measures suggest that the current limitations are unnecessary, and that abortion care can be safely provided outside of the burdensome requirements set by current regulation, calling into question requirements such as mandatory counselling or reflexion periods.

Europe has recently seen legislative proposals to impose new restrictions on previously more liberal abortion laws in various countries

4 The backlash in Europe and the case of Poland

This review suggests that, although states in Europe have gradually allowed abortion in the past decades,⁶⁷ efforts to legalize and improve access to abortion do not always meet the standards of international human rights law nor is it a linear process. In fact, Europe has recently seen legislative proposals to impose new restrictions on previously more liberal abortion laws in various countries. Lithuania and Norway in 2018, Slovakia in 2018, Spain in 2014 and, of course, Poland in 2016, 2018 and 2020.⁶⁸ This trend resonates with warnings that reproductive rights are under threat in Europe and around the world.⁶⁹ Anti-gender campaigns continuously challenge abortion, sexual education and gender-based violence laws, a situation that has even led to Member States refusing the ratification of the Istanbul Convention.⁷⁰

The emergency measures aimed to contain the spread of COVID-19 that limit mobility and that have, indirectly, resulted in the limitation of democratic debates, have created the perfect opportunity for some governments to introduce new and stricter restrictions on abortion. In October 2020, the Slovakian parliament discussed a proposal for restrictions that would have required women to wait 96 hours before an abortion, banned clinics from 'advertising' abortion services, and required women to justify their reasons for seeking an abortion. The proposal –

rejected by a very narrow margin – is one example of several bills proposing restrictions on sexual and reproductive rights during 2019 and 2020.⁷¹ These proposals evince a dangerous wave of anti-abortion campaigns gaining ground in Europe, a worrying trend documented by the Commissioner of Human Rights from the Council of Europe.⁷² In this landscape, the decision of the Polish Constitutional Tribunal is one component of a larger trend developing at the national (and regional) level that openly challenges sexual and reproductive rights.

Poland serves as a perfect example of how the issue of abortion and legal restrictions can repeatedly resurface, even after years of liberal and socially accepted legislation.⁷³ As a part of the Eastern Bloc, the law prohibiting abortion was amended to legalize the practice at the end of the Stalinist period in 1956 and remained in force until the end of the communist era.⁷⁴ In the late 1980s, gradual restrictions, such as the need for permission from three doctors and a psychologist to access the practice, were put in place, increasing the cost and causing delays that excluded women from the legal time limit.⁷⁵ Since then, conservative parties and the Catholic Church began campaigning for more restrictive laws, which resulted in the passing of the ban on abortion in 1993. This ban made abortion illegal in Poland, only providing for three exceptions and always within the first twelve weeks: when it resulted from rape or incest, when it constituted a threat to the life or health of the woman, or when there was irreversible damage to the fetus.⁷⁶ The ban effectively eliminated the economic and social grounds that, until then, allowed for an abortion.

Since the 1993 ban was adopted, multiple human rights bodies have critiqued Polish abortion regulations for the lack of a uniform and non-restrictive interpretation of the conditions for legal abortion, the extensive use of the conscientious objection clause by medical personnel and the increase in unsafe, clandestine abortions.⁷⁷ The cases before the ECtHR regarding Poland clearly indicate that the obstructive behaviour from medical practitioners and barriers to abortion services prevent women from accessing abortion even when their situations fall within the few exceptions that permit lawful

interventions.⁷⁸ In *Tysiack v. Poland*, the high risk of blindness resulting from the pregnancy was not considered by Polish authorities as meeting the requirements for therapeutic abortion.⁷⁹ The ECtHR held that in case of a therapeutic abortion states must assess the traditional balancing of privacy and the public interest against the positive obligations of the state to secure the physical integrity of the woman,⁸⁰ and that an effective system to decide whether the criteria are met must be put in place.⁸¹ In *RR v. Poland* the Court found Poland in violation of article 3 ECHR, considering the denial to prompt medical diagnosis on the unviability of the fetus and forcing the women to carry the pregnancy to term as degrading treatment.⁸² In *P. and S. v. Poland*, a child victim of rape was obstructed from accessing a lawful abortion, faced criminal charges herself and her personal medical details were released by the hospital, also resulting in a violation of article 3 ECHR. Unfortunately, none of these obstructions to the access to abortion are exclusive to the Polish situation.⁸³

The cases before the ECtHR regarding Poland clearly indicate that the obstructive behaviour from medical practitioners and barriers to abortion services prevent women from accessing abortion even when their situations fall within the few exceptions that permit lawful interventions

The Catholic Church had significant political influence in the Polish context since the systemic transformation in 1989, and since the Law and Justice party (PiS) assumed government in 2015, any progressive reform in the sphere of sexual and reproductive rights has been firmly opposed.⁸⁴ Besides promoting anti-refugee and anti-migrant sentiments, ‘the defense of the traditional family’ was part of the party’s political narrative, challenging ‘gender ideology’ coming from the West and putting forward a nationalist and anti-Europe discourse.⁸⁵

In 2016, the PiS presented a legislative proposal for the prohibition of abortion, seeking to eliminate all exceptions but one: threat to life of the mother. The bill also raised the possibility of the prosecution of miscarriages and created a new crime called ‘fetal murder’. The Special Rapporteur in the Field of Cultural Rights warned that ‘fundamentalist and anti-choice discourse during the debate related to changes in the abortion law reaffirmed stereotypical cultural attitudes towards women’.⁸⁶ During the parliamentary debate, Polish women campaigned against the proposal and organized the ‘Black Protests’ in which over 140,000 women and men marched to protest the ban.⁸⁷ The 2016 legislative proposal was then shelved, and the attempt to adopt more restrictions with the ‘Stop Abortion’ proposal was again unsuccessful in 2018.⁸⁸

On 19 November 2019, 119 Polish deputies from three different parliamentary blocs – PiS, PSL-Kukiz and Konfederacja – brought an action before the Constitutional Court to oppose eugenic abortion. On 22 October 2020, the Polish Constitutional Court, issued decision 1/20 declaring the unconstitutionality of Article 4a par. 1 (2) of the Act for Family Planning and the Protection of the Foetus (1993), which allowed women to access abortion on the grounds of fatal fetal abnormality, arguing that it is contrary to the dignity and life of the human being, guaranteed by the Polish Constitution. The decision entered into force on 27 January 2021, and has been the subject of polarized critiques.⁸⁹

Since coming to power in 2015, the PiS party has initiated a judicial reform by replacing judges, yet the former judges have not recognized their removal nor their newly installed replacements. This has resulted in political and legal disputes concerning the composition of the Constitutional Tribunal, the non-publication of its judgments, its review of the law and its impact on the effectiveness of constitutional review of new legislation. These legal disputes raised the concerns of the European Union regarding the respect of the rule of law in Poland.⁹⁰ While a detailed discussion of the legitimacy of the Polish Constitutional Tribunal exceeds the purpose of this article, it should be noted that the selective and strategic politicized appointments in combination with the issuing of decisions on controversial matters

78 S. Palmer, ‘Abortion and Human Rights’, *European Human Rights Law Review* 2014, Issue 6, 596, 4.

79 ECtHR (Fourth Section) 20 March 2007, 5410/03 (*Tysiack v. Poland*), 45 E.H.R.R. 42.

80 ECtHR (Fourth Section) 30 October 2012, 57375/08 (*P. and S. v. Poland*), at 107.

81 ECtHR (Fourth Section) 30 October 2012, 57375/08 (*P. and S. v. Poland*), at 127.

82 ECtHR (Fourth Section) 26 May 2011, 27617/04, 53 E.H.R.R. 31,161 (*R.R. v. Poland*).

83 See for instance, ECtHR (Grand Chamber) 16 December 2010, 25579/05 (*A., B. & C v. Ireland*) and ECtHR 24 June 2014, 33011/08 (*A. K. v. Latvia*).

84 Mishtal 2015.

85 Żuk and Żuk 2020, p. 567.

86 UN Human Rights Council, Visit to Poland – Report of the Special Rapporteur in the field of cultural rights, *UN Doc A/HRC/43/50/Add.1* (21 February 2020).

87 ‘Black Monday: Polish women strike against abortion’, *BBC* 3 October 2016, www.bbc.com/news/world-europe-37540139 (accessed 10 March 2021).

88 ‘Polish Women Protest Proposed Abortion Ban (Again)’, *The New York Times* 23 March 2018, www.nytimes.com/2018/03/23/world/europe/poland-abortion-women-protest.html (accessed 10 March 2021).

89 For a critical take on the decision, see: [https://oko.press/nowa-wojna-z-kobietami-uyrok-zakazujacy-aborcji-opublikowany-przez-tn-analizujemy-jego-tresc/](https://oko.press/nowa-wojna-z-kobietami-wyrok-zakazujacy-aborcji-opublikowany-przez-tn-analizujemy-jego-tresc/), and for a more moderate opinion by the ombudsperson: www.rpo.gov.pl/pl/content/oswiadczenie-rpo-trybunal-aborcja (accessed 22 March 2021).

90 See: https://ec.europa.eu/commission/presscorner/detail/el/MEMO_16_2644 (accessed 22 March 2021).

where legislative attempts to revise legislation had been unsuccessful, are matters of high concern.⁹¹

5 Final considerations

Altogether, the highly diverse domestic regulations, coupled with the lack of a unified approach and inconsistent responses to the COVID-19 pandemic, have exacerbated an already heterogeneous and unequal landscape of abortion provisions in Europe. While many countries have adopted measures to ensure abortion access during the pandemic, others have failed to recognize abortions as essential services or have used the crisis caused by the COVID-19 pandemic to opportunistically place further restrictions to the access.

However, the pandemic did not create, but worsened the disparities in abortion access in Europe. The regulations in force and the requirements/barriers to access are unsupported by scientific evidence, run contrary to international standards and place an unnecessary burden on people who seek abortion care. Furthermore, the traditional configuration of abortion regulation (as a crime unless certain requisites are met) has lend easily to platform retrogressive reforms.

Undoubtedly, the decision of the Polish Constitutional Court represents a serious backlash to abortion rights in Europe. However, this decision needs to be seen and analyzed amidst a series of other setbacks that unveil a worrisome trend to curtail abortion rights, as it is a prime example of a series of strategies that demand examination. As we saw in Section 4, it was the change in strategy – from the parliament to the courts – what finally brought to force the restrictions proposed. This is not only a testament to the unrelenting search for fertile ground for retrogressive measures, it is also increasingly relevant for the region as these strategies are supported by ‘think-tanks’ acting transnationally.⁹²

Moreover, anti-abortion activism has adopted a new so-called ‘women centered’ agenda that, given their lack of success in outlawing abortion completely, now

supports the imposition of burdensome barriers that effectively erode access.⁹³ The retrogressive proposals in Poland were made under the guise of ‘protecting women’⁹⁴ and part of a ‘broader struggle for equality and human rights for all’ in the words of one such ‘think-tank’ behind the abortion ban proposal.⁹⁵

In the context of an increased abortion ‘lawfare’⁹⁶ these trends highlight the need to revise and strengthen the legal frameworks protecting and promoting sexual and reproductive rights in Europe, and establishing uniform and non-restrictive interpretation of the conditions for legal abortion. A strong commitment to human rights and the attunes of domestic law to the international standards discussed in Section 2 can prevent the misuse of human rights language in anti-abortion campaigns. Effectively implementing human rights standards will require a substantial critique and reform of criminal legal approaches to abortion – including those that are exceptions or term-based like the ones discussed above – and call into question why voluntary abortion is the sole medical procedure regulated through criminal laws.

The relentless attempts of erosion of sexual and reproductive rights – of which Poland is a sadly successful example – demand more vigilance than ever

The relentless attempts of erosion of sexual and reproductive rights – of which Poland is a sadly successful example – demand more vigilance than ever. There is still great uncertainty regarding the future spread and consequences of the COVID-19 pandemic, but possibly the innovations introduced (such as delivery of medicines, no-touch protocols and video-calls) can serve as catalysts for further policy and legal change.

91 A. Melinschka, ‘Polish Constitutional Tribunal Abortion Judgment’, *Human Rights Pulse* 14 December 2020. Available at www.humanrightspulse.com/mastercontent/blog/polish-constitutional-tribunal-abortion-judgment (accessed 10 March 2021). E. Łętowska, ‘A Tragic Constitutional Court Judgment on Abortion’, *Verfassungsblog* 12 November 2020, <https://verfassungsblog.de/a-tragic-constitutional-court-judgment-on-abortion/>.

92 See for instance: Ordo Juris, involved in the drafting of the 2016 ban, <http://en.ordoiuris.pl/> (accessed 22 March 2021).

93 See for instance, L. Cannold, ‘Understanding and responding to anti-choice women-centred strategies’, *Reproductive Health Matters* (10) 2002, Issue 19, p. 171-179; L. Finer & J.B. Fine, ‘Abortion law around the world: progress and pushback’, *American Journal of Public Health* (103) 2013, Issue 4, p. 585-589.

94 I. Koralewska & K. Zielińska, “Defending the unborn”, “protecting women” and “preserving culture and nation”: anti-abortion discourse in the Polish right-wing press’, *Culture, Health & Sexuality* 2021, p. 1-15.

95 E. Korolczuk, “The fight against “gender” and “LGBT ideology”: new developments in Poland’, *European Journal of Politics and Gender* (3) 2020, Issue 1, p. 165-167.

96 Term coined by Siri Gløppen to show the increased use of courts and parliaments both to propose and oppose legal change on sexual and reproductive rights. See S. Gløppen et al., ‘Sexual and Reproductive Rights Lawfare: Global battles’. Project concept note available at www.cmi.no/projects/1836-sexual-and-reproductive-rights-lawfare (accessed 18 March 2021).