Vilnius University Faculty of Law
Department of Public Law

Deimantė Juščiūtė
II study year, LL.M International and European Law programme Student

Master Thesis

Women's Reproductive Rights Under the Human Rights Law: Problematical Aspects
Moterų reprodukcinės teisės pagal žmogaus teisių teisę: problematiniai aspektai

Supervisor: assoc. prof. dr. Vygantė Milašiūtė
Reviewer: assist. prof. dr. Johanas Baltrimas

Vilnius
2022

Abstract

This work analyses women‘s reproductive rights, as a fundamental human rights area. The importance of protecting such rights, including the right to abortion, is demonstrated by revealing their broad concept and significance in the process of ensuring other human rights. In addition, relevant case law of the Supreme Court of the United States of America and the European Court of Human Rights is considered in order to compare the two jurisprudences as well as to determine trends in the area of reproductive rights.

Keywords: reproductive rights, abortion, human rights, jurisprudence, criminalisation, convention

Table of Contents

Introduction

Relevance of the topic. When it comes to women's reproductive rights, the concept is very broad and including various aspects, such as the right to contraception, certain treatments, or access to information about one's body. In addition to that, reproductive rights ensure women's freedom to decide on the reproduction itself. Nonetheless, based on the content of different national laws, the protection of women's reproductive rights has arguably not been a priority for the governments and, moreover, those laws keep demonstrating paternalistic control of women's reproductive behaviour. It is also paramount that although numerous international and regional human rights instruments protect the various elements of reproductive rights, there are none dedicated solely to the latter, taking into consideration their broad nature.

Lately a huge debate has been sparked after a highly restrictive law entered into force in Poland in 2020, introducing a near-total ban on abortion. It can be observed that such decision was highly influenced by the political dependence of the courts as well as the authority of Catholic church. Although EU Parliament has condemned Poland's restrictive law on abortion, the country argues that the EU has no competence over the matters in the national health sector. Subsequently, in 2022, the United States Supreme Court overturned *Roe v. Wade*, the landmark 1973 decision affirming the constitutional right to abortion in the United States. As a result, in the time of one month, 13 states have significantly restricted access to the procedure, meanwhile, at least 12 are do so in the nearest future. Legal and medical experts have evaluated this kind regression on abortion access as a huge, unprecedented leap back in the area of human rights. Considering these landmark situations, jurisdictions of Europe and the United States have been chosen for the purpose of analysis in order to identify differences and similarities as well as to deduce possible interaction between one another.

It is noteworthy that such kind of rulings and legislations must be evaluated as obstructing women's fundamental rights as well as contributing to the systematic discrimination against women. Even though many aspects of women's reproductive rights often fail to be properly implemented, recent events suggest that the right to abortion requires a special attention. Therefore, this aspect will be the one to be discussed on a primary basis in this thesis. Also, it is noteworthy that the scope of this work primary includes voluntary adult abortions, however it can be expanded to situations involving minors or forced abortions in order to disclose certain points. Moreover, this thesis does not discuss in a broad manner the issues specifically concerning people belonging to

marginalised groups (people with disabilities, members of indigenous groups, etc.) considering the limited extent of this work.

Originality of the topic. Even though questions concerning women's reproductive rights, especially abortion, have been raised since back in the days, situations currently happening in Poland and the United States raise the need to evaluate the stance taken by the Government or Judiciary, including how significant of an influence might they have on women's reproductive rights in the future.

Following recent developments in the United States, numerous discussions have been provoked and reached both national and international legislatures in Europe, urging to include right to safe and legal abortion to the EU Charter of Fundamental Rights. It is now especially important to examine the possibilities of effectively promoting women's reproductive rights to avoid pursuing the negative example of the United States by means of regressing in this human rights area.

The aim of the thesis. To demonstrate that women's reproductive rights, including right to abortion, are fundamental human rights which need special protection due to their delicate nature.

Tasks of the thesis. The primary tasks of this work are as follows:

1. To reveal the concept of women's reproductive rights;
2. To demonstrate dependence between women's reproductive rights and other human rights;
3. To establish the significance of safe and legal abortions for effective enjoyment of fundamental human rights protected by international human rights treaties;
4. To analyse relevant jurisprudence of the Supreme Court of the United States of America and the European Court of Human Rights;
5. To determine trends around the globe in terms of ensuring women's reproductive rights, the emphasis being on the right to abortion.

Methods. In order to fulfil the above listed tasks, the following research methods are used in this work:

- Descriptive (to reveal the concept of women's reproductive rights, their relation to other human rights, and to provide an overview of the case-law);

- Logical (to analyse the content of legal acts as well as special literature, and to deduce certain corresponding conclusions);
- Systematic analysis (to examine various sources and to provide objective evaluation on the arising issues when abortions are criminalised);
- Historical (to reveal the development of regulation in the area of women's reproductive rights and to see the occurring changes);
- Comparative (to juxtapose the views of various human rights bodies as well as jurisprudence of the United States Supreme Court and European Court of Human Rights in order to see the differences and similarities).

Most important sources. International treaties concerning human rights (European Convention of Human Rights, The International Covenant on Economic, Social and Cultural Rights, The International Covenant on Civil and Political Rights, Convention on the Elimination of All Forms of Discrimination against Women) and their commentaries prepared by various human rights bodies (Committee on Economic, Social, and Cultural Right, Committee on the Elimination of Discrimination Against Women, United Nations Special Rapporteurs and Human Rights Office of the High Commissioner, Human Rights Committee) as well as case-law of the United States Supreme Court and European Court of Human Rights are the sources most widely analysed in this thesis.

1. Concept of Woman's Reproductive Rights and Their Regulation in International Treaties

Reproductive rights are inextricably linked to human rights, as recognized by international treaties, and reflected in domestic legislation around the world. The effective enjoyment of all these rights is crucial for the women to be able to exercise their human rights and make related critical decisions.

The concept of women's reproductive rights is quite expansive, and it is probably the reason why the definition of such rights varies: while some include a broad list of rights, such as the right to contraception, right to infertility or similar treatments, right to obtain the medical information, others tend to focus on the right to decide whether to reproduce or not, making discussion on abortions the key one. Despite the fact whether reproductive rights are understood in a narrower or broader sense, they shall be viewed as involving the notion of control, that being that women should have a full ability to control what happens to their bodies (Moodley, 1995, p. 9). This was also emphasized by the United Nations (further – UN) after the adoption of the Programme of Action of the International Conference on Population and Development in 1994 (Programme of Action of the International Conference…, 2014) which considerably influenced the evolvement of international and regional human rights standards and jurisprudence related to the reproductive rights which were described as the freedom to make informed, free, and responsible decisions when it comes to reproductive health.

The element of control as well as choice and autonomy are all closely related to other human's rights: the right to life, the right to be free from torture, the right to health, the right to privacy, the prohibition of discrimination and others. For example, women's right to health encompasses their sexual and reproductive health, according to both the Committee on Economic, Social, and Cultural Rights (further – CESCR) and the Committee on the Elimination of Discrimination Against Women (further – CEDAW Committee). Women's reproductive rights have also been acknowledged as a core element of right to health by the UN Special Rapporteur in their Report on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (Report by the UN Special Rapporteur…, 2022). Relevant treaties, recommendations and other documents are further discussed in a broader manner to disclose the current situation in terms of women's reproductive rights as well as desired developments.

To begin with, the Preamble of Convention on the Elimination of All Forms of Discrimination against Women (further – CEDAW treaty) (Convention on the

Elimination of All Forms…, 1979) acknowledges that "the role of women in procreation should not be a basis for discrimination". Furthermore, Articles 10, 12 and 14 states that States Parties shall take all appropriate measures to eliminate discrimination against women to ensure to them equal rights with men in the fields of education as well as health care and to ensure, access to specific information and services related to family planning. Moreover, Article 16 protects women's equal rights in deciding "freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights".

Back in 1994, CEDAW Committee expressed its views regarding women's right to control their family relations in its General Recommendation No. 21 (General recommendation No. 21: Equality in marriage…, 1994), indicating that the "responsibilities that women must bear and raise children affect their right of access to education, employment and other activities related to their personal development. They also impose inequitable burdens of work on women. The number and spacing of their children have a similar impact on women's lives and affect their physical and mental health, as well as that of their children. For these reasons, women are entitled to decide on the number and spacing of their children". In addition to this, it was emphasized that "decisions to have children or not, while preferably made in consultation with spouse or partner, must not nevertheless be limited by spouse, parent, partner or Government". Moreover, CEDAW Committee's General Recommendation No. 24 (General recommendation No. 24: Article 12 of the Convention…, 1999), emphasized the duty of States to prioritise the "prevention of unwanted pregnancy through family planning and sex education" and to amend legislation criminalizing abortion withdrawing punitive measures imposed on women who undergo abortion.

Equally important was the CESCR General Comment No. 14 (General Comment No. 14 on the right to the highest …, 2000) which affirmed "reproductive health means that women and men have the freedom to decide if and when to reproduce and the right to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice". Moreover, in its General Comment No. 22 (General Comment No. 22 on the right to sexual…, 2016), CESCR insisted that the States should "repeal or eliminate laws, policies and practices that criminalize, obstruct or undermine access by individuals or a particular group to sexual and reproductive health facilities, services, goods and information". It is emphasized that access to the full range of sexual and reproductive health facilities, services, goods, and information is severely limited

due to numerous legal, procedural, practical, and social barriers, particularly set towards women and girls.

Furthermore, when it comes to prohibition of discrimination, CESCR states that "due to women's reproductive capacities, the realization of the right of women to sexual and reproductive health is essential to the realization of the full range of their human rights. The right to reproductive health is indispensable to their autonomy and their right to make meaningful decisions about their lives and health. Gender equality requires that the health needs of women, different from those of men, be considered and appropriate services provided for women in accordance with their life cycles" (General Comment No. 22 on the right to sexual…, 2016). It is thus crucial to repeal or reform discriminatory laws, policies and practices in the area of sexual and reproductive health so that the barriers interfering with access by women to comprehensive reproductive health services or goods are removed by means of guaranteeing all individuals access to affordable, safe and effective contraceptives, liberalizing restrictive abortion laws, providing access to safe abortion services and quality post-abortion care, and the key point – to respect the right of women to make autonomous decisions about their reproductive health. The example of discriminatory treatment could be the fact that when it comes to reproductive health, there is not a single medical procedure where men are required to justify their decision to have that procedure or, moreover, are denied fundamental healthcare services. The situation is very different for women, though, as often they are being asked many irrelevant questions beforehand or even forced to change many healthcare professionals to find the one who will be willing to provide certain services. For example, it is much easier to be provided with a vasectomy procedure than with sterilization or fallopian tubal ligation and the main reasons involve the presumptions that women herself or her partner will be desiring to procreate later in time. This is also a good illustration of the obsolete societal norms where the implementation of the will of a woman is being conditioned by various situationally irrelevant factors, resulting into violations of women's reproductive rights when interfering with her freedom to control her own body both by such measures as questioning her own freely made decisions as well as setting grave legal barriers, that being criminalisation of women undergoing abortions, deny of the emergency contraception or failure to prohibit and take measures to prevent violence and coercion targeting women seeking abortion.

Professor Rebecca J. Cook in her article on international human rights and women's reproductive health suggests that to see whether a certain restrictive abortion law violates the protected rights, it is necessary to decide if such law can be deemed as significantly contributing to maintaining "either the oppression of women or culturally

imposed sex-role constraints on individual freedom" (Cook, 1993, p. 78). Moreover, she provides a well justified opinion that such kind of restrictive laws deepens the gender inequality given the fact that women "carry the exclusive health burden of contraceptive failure", meanwhile, they are still required to continue the unwanted pregnancy with all the accompanying moral, social, and legal responsibilities that come during gestational and afterwards parental periods.

What is more, the Human Rights Committee (further – CCPR) has insisted in its General Comment No. 28 (General Comment No. 28: Article 3…, 2000) on The International Covenant on Economic, Social and Cultural Rights (further – ICESCR) (The International Covenant on Economic, Social…, 1996), that the states should "help women prevent unwanted pregnancies, and to ensure that they do not have to undergo life-threatening clandestine abortions". Another paramount notion made by CCPR was that a state may be considered having failed to respect women's rights in terms of Articles 6 (right to life), 7 (right to be free from torture or cruel, inhuman, degrading treatment) and 17 (right to privacy) in cases where, for example, "there is a requirement for the husband's authorization to make a decision in regard to sterilization; where general requirements are imposed for the sterilization of women, such as having a certain number of children or being of a certain age, or where States impose a legal duty upon doctors and other health personnel to report cases of women who have undergone abortion".

Additionally, CCPR expressed in its General comment No. 36 (General Comment No. 36 on article 6…, 2019) on article 6 of the International Covenant on Civil and Political Rights (further – ICCPR) (The International Covenant on Civil…, 1996) that while States may adopt laws or other measures regulating terminations of pregnancy, such measures cannot result "in violation of the right to life of a pregnant woman or girl, or her other rights under the Covenant" as well as put them as a "subject to physical or mental pain or suffering which violates article 7, discriminate against them or arbitrarily interfere with their privacy". CCPR argued that States have a duty to "provide safe, legal and effective access to abortion where the life and health of the pregnant woman or girl is at risk, or where carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering, most notably where the pregnancy is the result of rape or incest or is not viable". States cannot adopt such regulations on abortions which "runs contrary to their duty to ensure that women and girls do not have to undertake unsafe abortions". This is to be assessed as a crucial moment considering that, according to data provided by the World Health Organisation (further – WHO), the fact whether abortion is legal or not does not correlate to the number of induced abortions, since women will still seek them regardless

of its legal status and lawful availability (Safe abortion: technical and policy guidance…, 2015). CCPR also called the States to ensure access for everyone "to quality and evidence-based information and education about sexual and reproductive health and to a wide range of affordable contraceptive methods and prevent the stigmatization of women and girls seeking abortion" as well as "ensure the availability of, and effective access to, quality prenatal and post-abortion health care for women and girls, in all circumstances, and on a confidential basis".

It is beneficial to address here that even though CCPR has repeatedly recognized women's lives and health to be in jeopardize, *inter alia*, due to restrictive abortion laws and acknowledged, for instance, in case *K.L. v. Peru* (2005) that "the refusal of a therapeutic abortion had constituted a violation of article 7 of the ICCPR – enshrining the prohibition on torture or other cruel, inhuman or degrading treatment or punishment" (adoption of views of the Human Rights Committee of 24 October 2005 in case *K.L. v. Peru*), the first draft of General Comment No. 36 set out the thinking of the then Committee's two rapporteurs that the general comment may address, including, the applicability of the right to life to "the unborn" (Press release on the draft…, 2015). This has resulted in International Court of Justice joining various civil society organizations in a general discussion urging CCPR to reaffirm that right to life (Article 6) accrue at birth and do not extend prenatally which is a position to be seen as being in line with the principle of interpretation of treaties, customary international law, the plain text of the ICCPR, the *travaux preparatoires,* and the CCPR's itself previous decisions, General Comments, and concluding observations (Press release on the draft…, 2015). CCPR acknowledged that the "proposals to include the right to life of the unborn within the scope of article 6 were considered and rejected during the process of drafting the Covenant" which is a stance consistent with "the reference in Article 1 of the Universal Declaration on Human Rights to all human beings "*born* free and equal in dignity and rights". Moreover, CEDAW has also argued that "under international law, analyses of major international human rights treaties on the right to life confirm that it does not extend to foetuses" (Report of the inquiry concerning…, 2018). In July 2017, CCPR prepared the revised draft which no longer featured any reference to the unborn, let alone the idea that Article 6 protected prenatal interests, but rather focused on ensuring that the General Comment comprehensively address the rights of women and girls to life and health in relation to abortion, including by expounding on States parties' obligations to provide affordable access to safe abortion (Revised draft of the General Comment No. 36…, 2017) (it is notable that the outcome of these discussions on the

prenatal "right to life" also disputes an opinion of some scholars on abortion being a derogation from right to life (Puppinck, 2013, p. 163)).

It is noteworthy, though, that the fact that CCPR's composition had changed probably had a significant impact on the discussions along with two new decisions being taken in abortion-relation case in 2016 (adoption of views of the Human Rights Committee of 31 March 2016 in case *Amanda Jane Mellet v. Ireland*) and 2017 (adoption of views of the Human Rights Committee of 17 March 2017 in case *Siobhán Whelan v. Ireland*) where CCPR has once again expressed a stance, built on its 2005 findings in *K.L. v. Peru*, that the prohibition of abortion may result in a violation of the prohibition against cruel, inhuman, or degrading treatment under Article 7, a violation of the right to privacy under Article 17, and that it may constitute discrimination as per Article 26. The final version of General Comment No. 36 has thus finally resulted in a reaffirmation of abortion as pivotal in ensuring the right to life of women and girls, due to its critical impact on the prevention of maternal mortality and morbidity.

Moreover, regarding Article 8 (right to respect for private and family life) of European Convention of Human Rights (further – ECHR) (European Convention of Human Rights, 1953), CCPR has noted that its interpretation as well as the identification of the scope of the right to abortion entailed therein, should be based on the relevant rules of international law and underlined that regulations restricting a woman's access to abortion in cases of rape or incest are incompatible with Article 7 (freedom from torture or cruel, inhuman or degrading behaviour) of ICCPR (Zureick, 2015, p. 127). Further interpretation of ECHR made by European Court of Human Rights (further – ECtHR) is analysed later in this work.

It cannot go unnoticed that there are several scholars stating that there is no right to abortion under the human rights instruments and, moreover, that such bodies as ECtHR cannot create a right to abortion because its interpretive power is limited (Puppinck, 2013, p. 156-158). To some extent, this is correct since there is no right to abortion directly enshrined in international treaties. Nonetheless, as it is being developed in this thesis, right to abortion can be regarded as derivative from other fundamental human rights protected by various treaties since the effective implementation of those rights cannot be properly ensured without providing access to abortion, considering various situations where pregnant people may seek such procedure (for example, the Court itself has acknowledged that when abortion is sought for reasons of well-being, it falls within the scope of Article 8. As it will be demonstrated in the further analysis, reasons of health and well-being must be understood in an extensive manner as including not only physical but also psychological

factors). Moreover, regarding the level of interpretation, it is widely accepted that ECHR is a living instrument constantly adapting to the changing perceptions of various life aspects and, moreover, is read, *inter alia*, considering other human rights instruments and taking views of various human rights bodies into consideration. As it was already disclosed in this section, such bodies are quite unanimous when it comes to interpreting reproductive rights. Thus, by recognizing the importance of a European consensus and evolving universal standards concerning reproductive rights, including abortion, the ECtHR would not introduce any change but rather recognize the one already happening. Moreover, even if the statement on abortion not being recognized as a human right is sustained, a firm indisputable emphasis must be on the right to privacy, including, *inter alia*, reproductive control. Quoting the US Supreme Court Justice Ruth Bader Ginsburg, "the decision whether or not to bear a child is central to a woman's life, to her well-being and dignity. It is a decision she must make for herself. When government controls that decision for her, she is being treated as less than a fully adult human responsible for her own choices" (For Justice Ginsburg, Abortion…, 2000).

Even though the above-mentioned treaties and recommendations imply that States have a duty to respect, safeguard, and implement rights pertaining to the sexual and reproductive health of women, women's reproductive health and rights are frequently violated in various forms. According to the UN Human Rights Office of the High Commissioner (further – OHCHR), such violations are significantly influenced by the deeply embedded beliefs and societal values about women's sexuality: due to patriarchal conceptions of women's roles within the family, women are frequently valued based on their ability and willingness to reproduce (Sexual and reproductive health…, 2022). WHO has also noticed that "patterns of reproductive health generally reflect social inequalities in society and unequal distribution of power based on gender <...>" (Closing the Gap in a Generation…, 2008). CESCR supported this view in its General Comment 20 (General Comment No. 20: Non-discrimination…, 2009), stating that various social determinants have an impact on the enjoyment of an array of rights, including reproductive ones.

Reacting to systematic issue of discrimination against women in law and in practice, the United Nations Working Group (further – Working Group, Group) has been established in 2017 which has expressed its concern on the severe challenges to the universality of women's rights in the global community (The United Nations Working Group on the issue…, 2017). Economic crisis and austerity measures as well as cultural and religious conservatism have been named as they key challenges. In the context of rising

fundamentalisms and backlashes against women's human rights, a discourse is constantly being raised at the international level on the termination of pregnancy. Nonetheless, Working Group urged that "the right of a woman or girl to make autonomous decisions about her own body and reproductive functions is at the very core of her fundamental right to equality and privacy, concerning intimate matters of physical and psychological integrity", as protected by Articles 3 and 17 of ICCPR, and thus it is solely the pregnant woman's decision whether to continue a pregnancy or terminate it, considering its possible effect on her future personal and family life as well as enjoyment of other human rights. The Group emphasized that "the intense efforts made by religious lobbies to portray the zygote as a baby" should be disregarded as baseless and that the "entire field of law relating to termination of pregnancy is an area of regression for women's control over their reproductive lives and their bodies". Such laws take their origin from the beginning of the 19th century when the Catholic Church declared that "ensoulment occurs at conception" and, moreover, enacted prohibition contraceptive methods, suggesting that "the issue is the recognition of divine will". As a result of these views, many countries have then adapted their laws accordingly some of which still having such laws in effect. The Group, however, accurately expressed that "those who believe that personhood commences at the time of conception have the freedom to act in accordance with their beliefs but not to impose their beliefs on others through the legal system" as their views are not necessarily shared amongst all individuals, cultures or even religions (the *Roe v. Wade* decision presented by the United States Supreme Court which will be discussed further in this work, included a discussion of the different views on when life begins, for example, many in the Jewish faith believe that life begins at birth contrary to the prevailing view in the Catholic faith that life begins at conception).

To conclude, even though there are many international instruments dealing with human rights, including some inherent elements of women's reproductive rights, women keep experiencing the often denial of equal enjoyment of their rights, the certain status historically ascribed to them being not the least of all possible reasons, as also affirmed by CESCR in its General Comment No. 16 on the equal right of men and women to the enjoyment of all economic, social and cultural rights (General Comment No. 16: The Equal Right…, 2005).

2. Arising Issues When Abortions Are Criminalized

Prior to analysing the particular issues arising when abortions are criminalized, it is beneficial to turn to the notion made by the UN Working Group on the difference between legalization and decriminalisation of abortions, i.e., the repeal of restrictive laws and policies in relation to termination of pregnancy, and discontinuance of the use of criminal law to punish a woman for ending a pregnancy accordingly. Based on this distinction, the Group insisted that "regulation of the medical procedure for termination of pregnancy after the first trimester may provide a balance between the human rights of the pregnant woman and a societal interest in discouraging termination where the pregnancy is more advanced, which involves a more complex medical procedure for the woman, and a more fully developed foetus, <…> though there should never be criminalisation of termination of pregnancy" (The United Nations Working Group on the issue…, 2017). The Group quoted the concluding observation of CEDAW Committee to Myanmar stating that the State should "amend its legislation to legalize abortion not only in cases in which the life of the pregnant woman is threatened, but also in all cases of rape, incest and severe foetal impairment, and to decriminalize abortion in all other cases" (Concluding observations on the combined…, 2016). Thus, even if certain barriers are being created, they must not be of such manner which will force woman to "pursue the course of seeking an unsafe termination rather than continuing the pregnancy".

Despite the fact that many human rights bodies have provided a rigorous guidance on the importance of decriminalizing abortion, naming the access to such medical procedure as crucial to ensure the adherence to human rights standards as well as states' obligation to eliminate discrimination against women and to protect women's fundamental human rights, a handful of countries kept or even newly introduced bans or at least stringent restrictions on abortion. The following issues can thus be identified as most significant ones when abortions are criminalized:

1. **Unsafe abortions are being conducted.** According to WHO's data, criminalisation of abortions does not reduce the amount of such procedures but rather increases the number of women seeking clandestine and unsafe options, suggesting that abortion is an essential health service necessary to the realization of human rights. According to the UN Working Group, "countries where women gained the right to termination of pregnancy in the 1970s or 1980s and are provided with access to information and to all methods of contraception, have the lowest rates of termination of pregnancy" as opposed to states where abortion procedure is criminalized doing a grave harm

to women's health and life as, based on OHCHR's data, almost all deaths from unsafe abortion occur in countries where this procedure is severely restricted in law and/or in practice, meanwhile, such deaths could be entirely preventable should access to abortion services be available (Information series on sexual…, 2020). Even though it is often difficult to obtain comprehensive data on maternal mortality and morbidity caused by unsafe abortions due to the illegal nature of this medical procedure in a number of countries, there is still a consistent demonstration of a link between unsafe abortion and high rates of maternal mortality and morbidity.

2. **Related fundamental human rights are not being ensured.** Denial of access to abortion can condition violations of other basic human rights, such as right to life or prohibition of torture and/or cruel, inhuman, and degrading treatment. The UN Working Group has emphasized that the "right of a woman or girl to make autonomous decisions about her own body and reproductive functions is at the very core of her fundamental right to equality and privacy, involving intimate matters of physical and psychological integrity, and is a precondition for the enjoyment of other rights" (The United Nations Working Group on the issue…, 2017). Similarly, the Special Rapporteur on the right to health has stated that laws criminalizing abortion "infringe women's dignity and autonomy by severely restricting decision-making by women in respect of their sexual and reproductive health" (The United Nations Working Group on the issue…, 2017). International human rights bodies have also consistently recognised that "prohibitions on abortion prevent women and girls from making fundamental personal decisions about their health and lives and may give rise to severe mental or physical suffering by forcing women and girls to continue a pregnancy against their will, seek clandestine and often unsafe abortion or travel to a foreign country to obtain legal care" (The United Nations Working Group on the issue…, 2017).

Regarding health exception, there are arguments coming from some scholars that while termination of pregnancy can be justified in case of saving life of a pregnant person, physical or mental health may not prevail over the "life" of the child as the right to health is a goal rather than right enshrined in ECHR (Puppinck, 2013, p. 179-180). Moreover, it is being questioned whether abortion is a "claim of convenience", especially when the reason of mental health is being relied on. This kind of arguments, however, can be evaluated as not only devaluing the significance and influence of a deteriorating mental health itself (which alone is still often underestimated and stigmatized) in a situation in question but also

undermining the importance of health of a born and autonomous person in favour of the foetus.

3. **It becomes another form of discrimination and creates stigma.** The Special Rapporteur on extrajudicial, summary, or arbitrary executions has asserted that where unsafe abortion leads to death in the context of bans on abortion, this can be equated to "gender-based arbitrary killing, only suffered by women, as a result of discrimination enshrined in law" (Report by the UN Special Rapporteur…, 2017). Moreover, the Working Group has also observed that "in countries where induced termination of pregnancy is restricted by law and/or otherwise unavailable, safe termination of pregnancy is a privilege of the rich, while women with limited resources have little choice but to resort to unsafe providers and practices" (The United Nations Working Group on the issue…, 2017) (for example, due to the need to travel to another country to have the abortion procedure performed) leading into wider discrimination than only the gender-based one. Views expressed by many human rights organisations in a common comment prepared reacting to abortion ban in Poland correspond with the arguments of the UN Working Group as they also argue that the harmful impacts of prohibitions on abortion disproportionately and most severely affect women and girls belonging to marginalised communities, including women and girls with disabilities, migrants, those belonging to ethnic minorities, or of lower socio-economic status and those living in rural communities. Moreover, they insist that those prohibitions on abortion which are introduced as a retrogressive measure, human rights protection for a class of persons who are solely and uniquely affected, is nullified and invalidated (Written comments on behalf of Amnesty International…, 2021).

   Furthermore, CEDAW Committee has observed that "criminalisation has a stigmatising impact on women, and deprives women of their privacy, self-determination and autonomy of decision, offending women's equal status, constituting discrimination" (Report of the inquiry concerning…, 2018). Moreover, in the *Mellet* case (adoption of views of the Human Rights Committee of 31 March 2016 in case *Amanda Jane Mellet v. Ireland*), CCPR has upheld the opinion that that the criminalisation of abortion created shame and stigmatized the actions of the pregnant people, constituting „a separate source of severe emotional pain", meanwhile, UN Working Group has insisted that a significant harm is being done to the effective implementation of women's human rights by stigmatizing a safe and

needed medical procedure" (The United Nations Working Group on the issue…, 2017).

In 2018, CEDAW released a joint statement with the Committee on the Rights of Persons with Disabilities (further – CRPD), accentuating that "a human rights-based approach to sexual and reproductive health acknowledges that women's decisions on their own bodies are personal and private, and places the autonomy of the women at the centre of policy and law-making related to sexual and reproductive health services, including abortion care <…>. Health policies and abortion laws that perpetuate deep-rooted stereotypes and stigma undermine women's reproductive autonomy and choice, ant they should be repealed because they are discriminatory" (Joint statement of CEDAW Committee and CRPD…, 2018).

Apart for the above discussed issues, there are many others emerging from the primary ones, such as clinicians not being able or being reluctant to properly do their job functions due to increased fear of criminal liability if they interpret the relevant laws in what would be afterwards deemed as a faulty manner, or the growing occasions of harassment by anti-abortion protesters stationed at entrances to health and/or family-planning facilities and using such means of manipulation as demonstrating the graphic images (which are, moreover, often modified accordingly to resemble a baby rather that a set of cells which they actually are) of the foetuses, forcing baby dolls and pro-life literature into women arms pleading "not to murder their babies" (Report of the inquiry concerning…, 2018).

It is noteworthy that numerous international human rights bodies have expressed (Written comments on behalf of Amnesty International…, 2021) that the highly restrictive laws on abortions:

- Cannot be considered as meeting the requirement of "in accordance with the law": the legality of retrogressive measures that remove existing human rights protections under domestic law is out of place since under the international human rights law, deliberate introduction of backward steps in law or policy that directly or indirectly impede or restrict enjoyment of a right are almost never permissible (General Comment No. 3: the Nature of States…, 1990).
- Cannot be considered necessary in a democratic society to serve a legitimate aim, and proportionate: various research demonstrate that restrictions on abortions do not result in fewer abortions but rather increases the risk of women

seeking clandestine ones. As confirmed by ECtHR (decision of the European Court of Human Rights of 5 September 2002 in case *Boso v. Italy*) and supported by the CEDAW Committee, "while States may have a legitimate interest in protecting prenatal life, prohibitions on abortion do not further that purpose" (Report of the inquiry concerning…, 2018). Moreover, CCPR has explicitly recognised that "prohibitions on abortion in situations of non-viable pregnancies cannot be considered reasonable" (adoption of views of the Human Rights Committee of 31 March 2016 in case *Amanda Jane Mellet v. Ireland*).

- Cannot be considered as not giving a rise to discrimination on prohibited grounds: restrictions on abortions restrain access to a form of health care what only women and girls or reproductive age require, constituting a discrimination on prohibited grounds and impugning women's equality before the law since such interference affects core aspects of the existence, dignity and identity of women and girls.

To sum up, insisting on the right to life of zygotes and foetuses and equating this right to the right of a born woman to her life, health, autonomy, and entire personhood by criminalizing abortion is one of the most damaging ways of instrumentalizing and politicizing women's bodies and lives, exposing them to risks to their lives or health and depriving them of decision-making autonomy. The responsibilities that women can play in society correlate with their capacity to regulate what happens to their own bodies.

3. Jurisprudence of the United States Supreme Court and the European Court of Human Rights

Over the years there have been numerous cases brought before various courts concerning the question of reproductive rights, right to an abortion being among the most expressed ones. This section seeks to provide an overview of the landmark judgements delivered by the United States of America (further – US) Supreme Court and the European Court of Human Rights along with the comparative analysis, as well as to ascertain trends and developments. It is noteworthy that the factual circumstances and the main arguments of the Court as well as the general overview of the outcomes of the cases can be found in Annex 3 and Annex 4.

3.1. Landmark Cases in the US Supreme Court

One of the first landmark cases related to women's reproductive rights and brough before the US Supreme Court in 1965 (decision of the US Supreme Court of 7 June 1965 in case *Griswold v. Connecticut*) and 1972 (decision of the US Supreme Court of 22 March 1972 in case *Eisenstadt v. Baird*) were the ones concerning contraception. The Court was consistent in its views, ruling that the prohibition of any contraception-related instrument violates the individual's right to privacy and that there can be no differentiation in distribution such instruments to married and unmarried people. The use of contraception has been acknowledged to constitute a fundamental right.

A significant step forward has been taken delivering the judgement in 1973 (decision of the US Supreme Court of 22 January 1973 in case *Roe v. Wade*) where the Court has stated that women have a fundamental constitutional right to abortion which is based on an implied right to personal privacy emanating from the First, Fourth, Ninth, and Fourteenth Amendments. Marriage, contraception, and childbearing were acknowledged as activities covered in the "zone of privacy" which is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy" considering myriad physical, psychological, and economic stresses a pregnant person must face. After reviewing the history of abortion laws, the Court has found that all justifications for banning abortions have become irrelevant over time and, moreover, emphasised that prenatal life is not within the definition of "persons" as used and protected in the US Constitution and thus is not considered to bear constitutional rights of its own.

The Court has also established the so-called "trimesters framework" demonstrating how right to abortion should be balanced against the government's interests in protecting women's health and the potentiality of human life:

- During the first trimester of pregnancy, a woman's privacy right is strongest, and the state may not regulate abortion for any reason;
- During the second trimester, the state may regulate abortion only to protect the health of the woman;
- During the third trimester, the state may regulate or prohibit abortion to promote its interest in the potential life of the foetus, except where abortion is necessary to preserve the woman's life or health.

On the same day judgement was also delivered in case *Doe v. Bolton* which has basically modified the one in *Roe's* case by adding the "health exception" and thus expanding the right to abortion through all three trimesters of pregnancy (decision of the US Supreme Court of 22 January 1973 in case *Doe v. Bolton*).

During the span of years 1976 – 1983, the Court has dealt with several cases concerning parental and marital consent (decision of the US Supreme Court of 1 July 1976 in case *Planned Parenthood v. Danforth*, decision of the US Supreme Court of 2 July 1979 in case *Bellotti v. Baird*, decision of the US Supreme Court of 15 June 1983 in case *City of Akron v. Akron Center for Reproductive Health*), staying consistent in promoting women's reproductive rights by acknowledging that the State has no constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of a physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent. Moreover, woman's right to make the decision was acknowledged to outweigh a father's right to associate with his offspring. The Court has also emphasized that the states cannot require physicians to give women information designed to dissuade them from having abortions, impose a 24-hour waiting period on the pregnant person after the signing of the consent form, or require that all second-trimester abortions be performed in a hospital.

Moreover, in the period of 1979-1986 (decision of the US Supreme Court of 9 January 1979 in case *Colautti v. Franklin* and decision of the US Supreme Court of 11 June 1986 in case *Thornburgh v. American College of Obstetricians and Gynecologists*), the Court has confirmed that only the doctor performing the abortion rather than court or legislature is competent to determine the viability and that states are not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies (by, for example, distributing printed materials on "agencies

willing to help the mother carry her child to term and to assist her after the child is born and a description of the probable anatomical and physiological characteristics of an unborn child") which is a decision that, with her physician, is woman's to make.

Noteworthy that a step back reversing 18 years of policies allowing comprehensive options counselling, has been taken in 1991 (decision of the US Supreme Court of 23 May 1991 in case *Rust v. Sullivan*) where the Court has upheld the rule enacted by Reagan's Administration (notable that this rule was rescinded by Clinton's Administration by executive order in 1993), under which medical staff, using national government provided funds for family planning services, could no longer discuss all the options available to women facing unintended pregnancies but could only refer them for prenatal care. The Court stated that even though the government subsidize one protected right (family planning), it does not have a duty to subsidize analogous counterpart rights (abortion services). It is noteworthy that a judgment of a similar nature (decision of the US Supreme Court of 3 July 1989 in case *Webster v. Reproductive Health Services*) has been also delivered a couple years prior to *Rust*, where the Court has expressed that Due Process Clause did not require states to engage in abortion business and did not create an affirmative right to governmental assistance in the pursuit of constitutional rights.

Even though the US Solicitor General was suggesting using the *Webster* case to overturn *Roe v. Wade*, the Court has declined to do that and, moreover, delivered another landmark judgement in 1992 (decision of the US Supreme Court of 29 June 1992 in case *Planned Parenthood of Southeastern Pennsylvania v. Casey*) which has reaffirmed the basic ruling of *Roe* that the State is prohibited from banning most abortions. Even though *Roe's* "trimester framework" has been rejected, a new criterion of "undue burden" was established, defined it as a "substantial obstacle in the path of a woman seeking an abortion before the foetus attains viability". The "undue burden" criteria as well as "health exception" (as established in *Doe* case) have been affirmed in *Stenberg v. Carhart (Carhart I)* (decision of the US Supreme Court of 28 June 2000) as well as in *Whole Woman's Health v. Hellerstedt* (decision of the US Supreme Court of 27 June 2016).

In 2003, The Partial-Birth Abortion Ban Act was signed into law by President Bush, resulting in cases of *Gonzales v. Carhart* and *Gonzales v. Planned Parenthood Federation of America, Inc.* (*Carhart II*) (decision of the US Supreme Court of 18 April 2007) which have reached the Supreme Court in 2007 after lower instance courts blocked enforcement of the entire Act due to it being deemed as unconstitutional and opposing previous ruling of the Supreme Court in *Roe* (right to abortion), *Casey*

("undue burden" criteria) and *Carhart I* ("health exception") cases. Nonetheless, in a 5-4 decision, the Court upheld the federal ban, undermining a core principle of *Roe v. Wade* that women's health must remain paramount as well as essentially overturning its decision in *Stenberg v. Carhart* (*Carhart I*), arguing that lawmakers could overrule a doctor's medical judgment and that the "State's interest in promoting respect for human life at all stages in the pregnancy" could outweigh a woman's interest in protecting her health. Justice Ruth Bader Ginsburg has expressed a dissenting opinion (Dissenting opinion of Justice Ruth Bader Ginsburg on 18 April 2007 decision), calling the majority's decision "alarming", refusing "to take *Casey* and *Stenberg* seriously" and blurring "the line, firmly drawn in *Casey*, between pre-viability and post-viability abortions". Ginsburg has also emphasized that "for the first time since *Roe*, the Court blesses a prohibition with no exception safeguarding a woman's health" which, moreover, discards Court's earlier invocations of "the rule of law" and the "principles of *stare decisis*". Justice has argued that the Court's judgement "cannot be understood as anything other than an effort to chip away at a right declared again and again by this Court—and with increasing comprehension of its centrality to women's lives" and called the law in question an undue burden due to only serving as a "vehicle that legislators have chosen for expressing their hostility to those rights".

In 2022, the US Supreme Court has delivered its historical ruling in case *Dobbs v. Jackson Women's Health Organization* (decision of the US Supreme Court of 23 June 2022), stating that Constitution does not confer a right to abortion, which has resulted in decisions in *Roe v. Wade* and *Planned Parenthood of Southeastern Pa. v. Casey* being overruled and, moreover, *Roe* deemed as "egregiously wrong". As per the Court opinion, the right to abortion is neither deeply rooted in the nation's history nor an essential component of "ordered liberty". The five factors to overrule *Roe v. Wade* and *Planned Parenthood v. Casey* were as follows:

- they "short-circuited the democratic process";
- both lacked grounding in constitutional text, history, or precedent;
- the tests they established were not "workable";
- they caused distortion of law in other areas;
- overruling them would not upend concrete reliance interests.

Moreover, the Court expressed that since the Constitution is silent on the right to abortion, the question of whether abortion should be permitted or prohibited is one for ordinary political debate rather than constitutional adjudication. Justice Kavanaugh, in his concurring opinion, summarised this argument stating that "on the issue of

abortion, the Constitution is neither pro-life nor pro-choice. The Constitution is neutral <…>". In their co-authored dissent opinion, Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan noted that "as of today, this Court holds, a State can always force a woman to give birth, prohibiting even the earliest abortions. <…> *Dobbs* means that in America, the right of an individual women to control her own reproductive choices and decide whether to "bear a child, with all the life-transforming consequences that act involves" is no longer her own but subject to the will of the general population" (Dissenting opinion of Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan on 23 June 2022 decision).

3.2. Landmark Cases in the European Court of Human Rights

To begin with, it is beneficial to note that an amount of the initial cases brought before ECtHR concerning women's reproductive rights have been deemed as inadmissible, due to being manifestly ill-founded. Nonetheless, the Court has anyway expressed some significant arguments which are worth to discuss here.

First of all, in cases of *Paton v. United Kingdom* (decision of the European Commission of Human Rights of 13 May 1980), *Jean-Jacques Amy v. Belgium* (decision of the European Court of Human Rights of 5 October 1988) and *Boso v. Italy* (decision of the European Court of Human Rights of 5 September 2002), the Court has analysed the attribution of victim status in the matter of pregnancy termination, concluding that potential father, due to being closely affected, may claim to be a "victim", within the meaning of Article 25 of ECHR, meanwhile, medical doctor cannot deemed to be an indirect victim and does not have a mandate to act on behalf of their patient (moreover, in case *Silva Monteiro Martins Ribeiro v. Portugal* (decision of the European Court of Human Rights of 26 October 2004) the Court noted that the right to behave in the public domain in a way dictated by one's belief is not always guaranteed by ECHR and thus medical staff cannot assert or impose on others their personal convictions to justify their actions). Having said that, the Court has affirmed its previous judgements in *Brüggemann and Scheuten v. Germany* (decision of the European Court of Human Rights of 19 May 1976) and *W.P. v. the United Kingdom* (decision of the European Court of Human Rights of 13 May 1980) that since "whenever a woman is pregnant her private life becomes closely connected with the developing foetus", the potential father's right to respect for his private and family life cannot be interpreted so widely as to embrace

the right to be consulted or to apply to a court about an abortion which his wife intends to have performed on her.

Moreover, in *Paton*, ECtHR added that the "life" of the foetus is intimately connected with, and cannot be regarded in isolation from, the life of the pregnant person. If Article 2 were held to cover the foetus and its protection under this Article were, in the absence of any express limitation, seen as absolute, an abortion would have to be considered as prohibited even where the continuance of the pregnancy would involve a serious risk to the life of the pregnant person. This would mean that the "unborn life" of the foetus would be regarded as being of a higher value than the life of the pregnant person. The right to life of a person already born would thus be considered as subject not only to the indicated limitations but also to a further, implied limitatation. The Court has also expressed arguments regarding the personhood of a foetus in *Vo v. France* (decision of the European Court of Human Rights of 8 July 2004), stating that even though there is no European consensus on the scientific and legal definition of the beginning of life as well as on the nature and status of the embryo and/or foetus, relying on the existing case-law, the unborn child is not regarded as a "person" directly protected by Article 2 of ECHR and if the unborn do have a "right" to "life", it is implicitly limited by the mother's rights and interests. The Court, however, noted that ECHR institutions have not "ruled out the possibility that in certain circumstances safeguards may be extended to the unborn child" and that ECHR Article 8(1) cannot be interpreted as meaning solely a matter of private life of the pregnant person but rather the issue of balancing various interests.

In 2007 and 2010 the Court has dealt with the cases of *Tysiąc v. Poland* (decision of the European Court of Human Rights of 20 March 2007) and *A, B and C v. Ireland* (decision of the European Court of Human Rights of 16 December 2010) accordingly, finding the violations of ECHR Article 8, due to states failing to fulfil their positive obligation to ensure the Applicant's rights to respect for private life, by not establishing effective procedures when it comes to termination of pregnancy, especially on the grounds of health exception. Nonetheless, in *A, B and C* case the violation has not been acknowledged in terms of Applicants A and B who relied on social grounds for abortion and could lawfully travel to England for the procedure. The Court has heavily confided here on the "moral aims" of Irish society, as plead by Irish Government, and thus assigned a significant discretion to the latter to balance the conflict between the rights of Applicant A and B and the aim of the State to restrict abortion. Six judges dissented, arguing that the majority should not have afforded the Government such a wide margin of appreciation since European consensus clearly exists whereby the rights of a pregnant person to health

and well-being are given precedence over the foetus' right to life. According to the roles and functions of the Court, the existence of a European consensus should narrow Ireland's ability to prohibit abortion based on "moral values" to harmonise the application of human rights protections across Europe. The dissenting judges considered the majority decision to disregard the obvious European consensus to be "a real and dangerous new departure in the Court's case law".

A turning point in ECtHR's jurisprudence occurred in 2011 while delivering a judgement in case *R.R. v. Poland* (decision of the European Court of Human Rights of 28 November 2011): the Court has not only found a violation of women's right to private life (Article 8), due to Poland's failure to put in place an effective legal and procedural framework that guarantees that relevant, full, and reliable information is available to women to make informed decisions about their pregnancy, but also of prohibition of inhumane and degrading treatment (Article 3). It was recognized that the Applicant have greatly suffered, due to (1) the prolonged denial of prenatal genetic testing, (2) having to endure weeks of painful uncertainty because of the health professionals' procrastination without her concerns being properly acknowledged and addressed by the clinicians, and (3) having been in a situation of "great vulnerability," as she was "deeply distressed by information that the foetus could be affected with some malformation". It was stressed that "the nature of the issues involved in a woman's decision to terminate a pregnancy is such that the time factor is of critical importance". Moreover, the Court has urged that Poland must ensure that women's access to legal reproductive health services is not jeopardized by medical professionals' refusals of care with reference to the "conscience clause" under Polish law.

The Court has kept same position in *P. and S. v. Poland* (decision of the European Court of Human Rights of 30 January 2013) concerning a minor whose pregnancy has resulted from rape and who was denied an abortion. The Court has found that the State caused suffering for Applicant by disregarding her vulnerability, due to young age and her feelings as a rape victim and this kind of behaviour thus constituted inhuman, degrading and humiliating treatment. It was also noted that even though Article 8 does not directly confer a right to abortion, the prohibition of such procedure when sought for reasons of health and/or well-being falls within the scope of the right to respect for one's private life. It is noteworthy that even though this work primarily concentrates on the women of age, decision in this case concerning a minor is considered significant enough to be mentioned as the Court has set standards for the rights of adolescents to reproductive health services. Also, ECtHR, for the first time, addressed the special vulnerability of adolescents in need

of abortion care and confirmed young people's autonomy when it comes to their reproductive health.

It is noteworthy that the execution of the Court's judgments in *Tysiąc v. Poland*, *R.R. v. Poland* and *P. and S. v. Poland* has been supervised by the Committee of Ministers of the Council of Europe which has adopted several decisions due to the Poland's authorities' ongoing failure to fully implement the judgments. In September 2022, the Committee noted that "since the previous examination of these cases in December 2021 the authorities have not provided information demonstrating substantial progress in key areas, such as: effective procedures to access lawful abortion and information thereon; effective access to lawful abortion when the doctor invokes the conscience clause; objection procedure to resolve disagreements as to the existence of medical grounds for lawful abortion or provision of prenatal tests; or statistical data on the number of lawful abortions for 2021" (Interim resolution for execution of the judgments…, 2021).

In 2022, the Court has delivered judgements in cases of *S.F.K. v. Russia* (decision of the European Court of Human Rights of 11 October 2022) and *G.M. and Others v. the Republic of Moldova* (decision of the European Court of Human Rights of 22 November 2022). Even though similarly to *P. and S.* case, these two are also exceeding the scope due to dealing with the matter of forced abortions, they are beneficial to be briefly commented to demonstrate the direction ECtHR has taken: such action as forced abortion despite the reason why and on whose request it has been performed, is to be assessed as an egregious form of inhuman and degrading treatment which had not only resulted in a serious immediate damage to woman's health but had also entailed long-lasting negative physical and psychological effects.

At this day, there are several ongoing cases brought against Poland in 2021, the outcomes of which will most likely land in the list of landmark judgements as the Court is given one another opportunity to promote women's reproductive rights. In July 2021, ECtHR has given notice (Notification of 12 applications…, 2021) to the Government of Poland of 12 applications concerning abortion rights in Poland and requested to provide its observations (it is noteworthy that in total the Court has received over 1,000 similar applications) have been received by the Court. The applications have been classified into three groups of four applications:

- *K.B. v. Poland* and 3 other applications;
- *K.C. v. Poland* and 3 other applications;
- *A.L. - B. v. Poland* and 3 other applications.

All these applications have been conditioned by the judgement delivered in October 2020 by the Polish Constitutional Court which has deemed that provisions of the Family Planning (Protection of the Human Foetus and Conditions Permitting Pregnancy Termination) Act of 1993 concerning legal abortion on the grounds of "severe and irreversible foetal defect or incurable illness that threatens the foetus' life" were incompatible with the Constitution. The Applicants, Polish nationals of a reproductive age, claimed the violations of Article 8 (right to respect for private and family life) and Article 3 (prohibition of inhuman or degrading treatment) of ECHR, arguing that the restrictions introduced were not "prescribed by law" as the Constitutional Court was irregularly composed, given that three members had been elected in breach of the Constitution, and was not impartial (as the current Court is close to the populist Law and Justice government), and that women face a distress caused by the prospect of them being forced to give birth to an ill or dead child.

3.3. Trends and Further Perspectives

The analysis of the US Supreme Court's jurisprudence in the field of abortion laws reveals an evolving pattern: even though there have been some steps backward throughout the history, the general trend was going towards liberalizing reproductive rights, resulting in landmark judgement in *Roe v. Wade* which established a unifying standard, recognizing a woman's fundamental right to choose whether or not to continue a pregnancy and prohibiting states from criminalizing abortion. Many states laws incompatible with *Roe* were struck down by the US Supreme Court in the twenty years following the judgement. Nonetheless, on the grounds of the judgement in *Dobbs*, the US has now become one of four countries (other three being El Salvador, Nicaragua, and Poland) around the world that have regressed in the area of abortion rights since 1994 (With its Regression on Abortion…, 2022). In their dissenting opinion in *Dobbs*, Justices Breyer, Sotomayor, and Kagan recognized that the Supreme Court's decision defied global trends by undermining abortion access and argued that "in light of the worldwide liberalization of abortion laws, it is American States that will become international outliers after today" (Dissenting opinion of Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan on 23 June 2022 decision). Annex 1 provides an overview of the grounds for legal access to abortion in all states of America, as per current legislation.

It is noteworthy that even though the legal doctrine of *stare decisis* is not legally binding, members of the US Supreme Court usually follow it and do not tend to explicitly overturn prior rulings. In fact, the Court itself has written in *Casey* that "overruling *Roe*'s central holding would not only reach an unjustifiable result under principles of *stare decisis* but would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law. The very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable" (decision of the US Supreme Court of 29 June 1992 in case *Planned Parenthood of Southeastern Pennsylvania v. Casey*). Yet, there was always a chance for the abortion rights to change through the subsequent decisions and thus Mississippi was only one of the states which have enacted a law violating previous Supreme Court decisions and was designed as a vehicle to overturn *Roe v. Wade*. It has to be noticed that the overturn of *Roe* means that abortion rights are now be regulated by the state law rather than by the federal one which raises more and more questions on how the decision in *Dobbs* will affect other privacy rights established through the Fourteenth Amendment of the US Constitution, such as the right to obtain contraception means, especially considering that Justice Clarence Thomas' concurring opinion calls to reconsider other "substantive due process rights which owe their jurisprudential logic and precedential weight to *Roe*" (decision of the US Supreme Court of 22 January 1973 in case *Roe v. Wade*).

It must be noticed though that the decision in *Roe v. Wade* was not without its flaws and received some criticism even from those who were eagerly supporting women's right to abortion. Justice Ginsburg expressed the opinion that "*Roe v. Wade* sparked public opposition and academic criticism, in part, <…> because the Court ventured too far in the change it ordered and presented an incomplete justification for its action" (Ginsburg, 1985, p. 376). In 1973, when *Roe* issued, abortion law was in a state of change across the nation. There was a distinct trend in the states "toward liberalization of abortion statutes". The Court declared that a woman, guided by the medical judgment of her physician, had a "fundamental" right to terminate a pregnancy, a right the Court anchored to a concept of personal autonomy derived from the due process guarantee. Nonetheless, some legislatures started adopting measures aimed at minimizing the impact of the 1973 ruling, such as notification and consent requirements.

Justice Ginsburg, however, seconded the opinion of Justice O'Connor who has described the trimester approach as “on a collision course with itself” (decision of the US Supreme Court of 15 June 1983 in case *City of Akron v. Akron Center for Reproductive Health*) considering the constant advances in medical technology. Professor Paul Freund has also shared this opinion on where the Court went astray in *Roe*: even though it has properly invalidated the Texas proscription because “a law that absolutely made criminal all kinds and forms of abortion could not stand up as it is not a reasonable accommodation of interests”, it should have left off at that point and not adopted the so-called “medical approach” (i.e., having set the time frame when the hazards of abortion surpassed those of childbirth, and the time of foetal viability) which “illustrated a troublesome tendency of the modern Supreme Court to specify by a kind of legislative code the one alternative pattern that will satisfy the Constitution (Freund, 1983, p. 1476).

Moreover, it cannot go unseen that *Roe* was lacking a distinct gender-based discrimination theme. Professor Kenneth L. Karst has expressed the opinion that the issue in *Roe* “deeply touched and concerned women's position in society in relation to men” (Karst, 1977, p. 58) arguing that “society, not anatomy, places a greater stigma on unmarried women who become pregnant than on the men who father their children. Society expects <…> that “women take the major responsibility <…> for childcare and that they will stay with their children, bearing nurture and support burdens alone, when fathers deny paternity or otherwise refuse to provide care or financial support for unwanted offspring” (Karst, 1977, p. 57). According to Professor Donald H. Regan, the conflict when it comes abortion is not “simply one between a foetus' interests and a woman's interests, <…> nor is the overriding issue state versus private control of a woman's body for a span of nine months” (Regan, 1979, p. 1606) but also in the balance of a “woman's autonomous charge of her full life's course, her ability to stand in relation to man, society, and the state as an independent, self-sustaining, equal citizen” (Karst, 1977, p. 57).

The judgement in *Dobbs* dedicates an extensive number of efforts to point out the flaws present in *Roe*, including the fact that it ignored “the legitimacy of the States’ interest in protecting foetal life” (decision of the US Supreme Court of 22 January 1973 in case *Roe v. Wade*), however spends barely any time considering the role of abortion in XXI century medicine, or whether the Constitution protects women's right to seek such health care. The effect of the judgement in *Dobbs* is already taking place: thirteen states had "trigger laws" that immediately banned abortion with the overturning of *Roe*,

six more have abortion bans that they haven't enforced since the 1973 decision, however they could start enforcing them again in the absence of *Roe*. Moreover, numerous states which currently allow abortions, have already expressed an intent to restrict them to the maximum extent permitted by any new Supreme Court rulings on the subject, some of the proposed laws even seek to restrict a pregnant person from traveling to another state to obtain an abortion or introduce waiting periods between the time a woman first visits an abortion clinic and the actual procedure (Temme, 2022). It cannot go unnoticed that more and more reports come into light depicting dolorous situations, including raped minors, cancer patients unable to get the abortion or having to travel to a different state for this reason, women incapable or unwilling of carrying their pregnancies, due to various health issues being assessed as not severe enough to have the abortion, socio-economic reasons, or foetus abnormalities. Moreover, it can be only a matter of time when the increased amount of life-threatening abortions will start taking place.

The judgement was widely evaluated by the public community as well as various bodies as a shocking leap back in the history of women's reproductive rights. It cannot, however, go unnoticed that, similar as in Poland's case, ideological shift had a significant influence in deciding *Dobbs* after Justices Brett Kavanaugh (succeeding the retired Justice Anthony Kennedy who has often been the swing vote on many of the Court's most ideologically charged decisions, including preserving *Roe*) and Amy Coney Barrett (who succeeded the late Justice Ruth Bader Ginsburg, an avid advocate for gender equality and women's rights) were appointed by the Trump administration in 2018 and 2020 accordingly. This trend can be seen throughout the judgements of the Supreme Court as the votes are often divided between Democrats and Republicans-appointed justices, however the Court can now generally be seen as one of the most conservative of all times, with a lot of disagreements and increasingly indecisive decisions in place. Moreover, the Supreme Court constantly fails to reach racial, ethnic and gender diversity as it is usually being composed predominantly out of white men.

Last year US Senator Rand Paul introduced Life at Conception Act which seems to implement equal protection under the 14th Amendment for the right to life of each born and unborn human (Life at Conception Act introduced to the United States Senate on 28 January 2021). Quoting Paul, "the Life at Conception Act legislatively declares what most Americans believe and what science has long known - that human life begins at the moment of conception" (Sen. Rand Paul Introduces Life…, 2021). Considering this as well as the fact that the United States even though has signed however never ratified ICESCR or CEDAW treaty (The United Nations Treaty Body Database), it is suggested

that the US tend to assign more protection to foetuses rather than women's rights, including the reproductive ones. Moreover, it is even questionable how much of a real aim to protect foetuses is there and how much these populistic laws, such as Life at Conception Act, seeks for the misogynistic control of women, especially considering the fact that little to no interest is shown in this kind of pro-life activities and proposals in improving maternal mortality rates or generally ensuring the well-being of pregnant people. Moreover, even in *Dobbs* there are extensive arguments in place related to dogmas on morality and traditions, developing throughout the history, however surveys and massive protests demonstrates that, as the Court in *Roe* has also affirmed, public opinions move towards the liberalization.

What is interesting is that three months after the Supreme Court's decision in *Dobbs*, Republican lawmakers have argued that abortions situation is now in line with Europe's one claiming that most of European countries ban abortion after 15 weeks term (Hoctor, 2022). These claims have later resulted in the U.S. Senator Lindsey Graham introducing the Pain-Capable Unborn Child Protection Act in the United States Senate (Pain-Capable Unborn Child Protection Act introduced to the United States Senate on 27 January 2021).

Nonetheless, with the exception of a few European countries with highly restrictive abortion laws, no other European country prohibits abortion after 15 weeks of pregnancy and instead allows abortion on a variety of grounds throughout the pregnancy. Even after the time limit for elective abortion has passed, the procedure is still legal on other grounds, such as broadly defined socioeconomic or health grounds, or grounds of severe or fatal foetal impairment. Even though some European countries' laws continue to include a variety of medically unnecessary procedural and regulatory requirements (mandatory waiting periods or mandatory counselling prior to abortion, criminalisation of abortion performed outside the scope of the law, and onerous third-party authorization requirements being examples of these), most states are moving to expand abortion access by repealing previous historical bans and taking steps to ensure abortion laws and policies are guided by public health evidence and clinical trials. Several European countries and jurisdictions, including Belgium, Cyprus, France, Germany, Gibraltar, Iceland, Ireland, North Macedonia, the Netherlands, Northern Ireland, and San Marino, have implemented reforms to increase access to abortion or remove legal and political barriers to abortion in recent years (European Abortion Laws…, 2020). Moreover, Malta has recently commenced drafting the Bill allowing abortion if mother's life or health at risk which is to be considered as a significant step towards ensuring women's reproductive rights, seeing that Malta is

currently the only country in the EU in which termination is still illegal under any circumstances. Since the Labour Party-led government (which is the initiator of the said law) has a comfortable majority in parliament, it is a high chance that the Bill will be passed (Malta set to ease strict…, 2022). Annex 2 provides a comparative overview of the grounds for legal access to abortion in the European region, as per current legislation.

Compared to other European countries, unprecedented retrogression in access to safe and legal abortion is happening in Poland which chosen direction in the area in question is in contravention of the recommendations of the human rights bodies as well as European consensus regarding access to abortion, and universal human rights standards. It cannot be left unnoticed that the Catholic church has historically held a prominent role in restricting abortion in Poland since back in the days, issuing the first anti-abortion law in the early 1990s refusing the possibility of holding a referendum on the matter since 58 percent of polish citizens did not share the church's views at that time. Moreover, when Poland was about to join European Union, the church stated that it will not advocate for the ascension unless the abortion law was kept intact, and it did stay this way, due to Church's significant involvement in political life as a moral authority, even though the law was breaching EU principles (Grzymala-Busse, 2015, p. 137). In addition to this, when signing the Treaty of Lisbon and the Charter of Fundamental Rights, Poland has also signed an opting-out protocol, affirming that the Charter "does not extend the ability of the European Court of Justice (further – CJEU), or any court or tribunal of Poland <…> to find that the laws, regulations or administrative provisions, practices or action of Poland <…> are inconsistent with the fundamental rights, freedoms and principles that it reaffirms" (Protocol No. 30 on the Application…, 2008). Considering that CJEU had already acknowledged in case of *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others* that abortion constituted a service within the meaning of EU law (decision of the European Court of Justice of 28 November 2011) which would suggest that any national regulation on abortion would fall within the scope of application of EU law and would thus be subject to compliance with the fundamental rights principles contained in the Charter, the Protocol No. 30 becomes yet another argument on Poland's side.

The judgement issued by the Constitutional Court resulted in large-scale protests as it introduced a near-total ban on abortion in Poland considering that, as per Human Rights Watch data, over 90 percent of the approximately 1,000 legal abortions annually performed in Poland were on this ground (Regression on Abortion Harms…, 2022). Women human rights defenders and civil society organizations reported that, apart from the fact that such

restrictive abortion laws are "contrary to international and European human rights standards and public health guidelines as they compromise women's freedom, dignity, health, and lives", the ruling also has a "significant chilling effect as medical professionals fear repercussions even in situations in which abortion remains legal". The nine leading international human rights organizations (Amnesty International, the Center for Reproductive Rights, Human Rights Watch, the International Commission of Jurists, the International Federation for Human Rights, the International Planned Parenthood Federation European Network, Women Enabled International, Women's Link Worldwide and World Organisation Against Torture) have filed third-party interventions (Written comments on behalf of Amnesty International…, 2021) to ECtHR in the above mentioned cases, providing analysis on international human rights law, comparative European law and guidelines from the WHO, and outlining the implications that highly restrictive abortion laws have on the lives and health of women and girls of reproductive age. Main arguments provided in the interventions concur with the ones discussed in section 2 of this work. Additionally, third party intervention was filed by the Council of Europe Commissioner for Human Rights (Third party intervention under Article 36…, 2021), emphasizing the dangers of clandestine abortions and drawing attention that an "insurmountable obstacle to effective access to abortion in Poland is the growing incidence of refusals by healthcare professionals to perform legal terminations or to carry out prenatal testing on the grounds of conscience" which supports the view of ECtHR expressed in case *R.R. v. Poland* that „the combination of severe legal restrictions on abortion in Poland and the criminal prohibition on doctor's performing abortions except in a small number of narrow circumstances gives rise to a "chilling effect" which discourages doctors from authorizing and performing legal abortions" (decision of the European Court of Human Rights of 28 November 2011 in case *R.R. v. Poland*). Moreover, the Commissioner highlighted that "the near-total ban on abortions needs to be seen also in the wider context of the long-standing disregard for women's sexual and reproductive health and rights in general" as the situation in the area of sexual and reproductive health and rights in Poland keeps worsening not only in the area of abortion but also access to contraception, including emergency one or comprehensive sexuality education and, moreover, there are clear trends of intense societal pressure and stigma in the area in question. In addition, the Commissioner argued that constraints on women's sexual and reproductive health and autonomy, including a legal or actual denial of access to abortion care can constitute both violations of prohibition of torture and inhuman or degrading treatment under Article 3 of ECHR and right to respect for private and family life under Article 8. The October 2020 ruling of the Polish

Constitutional Tribunal resulting in a near-total ban on abortions has been evaluated in the intervention as creating „a situation removing Poland even further from its obligations under international human rights law, particularly those stemming from Articles 3 and 8 of the Convention" as well as violating the principle of non-retrogression under international human rights law. Arguments of similar nature have also been expressed in the intervention filed by the UN Working Group on discrimination against women and girls, UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, and UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (The United Nations Working Group on discrimination…, 2021) who have affirmed there is a clear international consensus that States must provide abortion services on broad grounds, including in cases of severe foetal impairment, and must decriminalise abortion in all circumstances. Otherwise, they are to be found in breach of not only right to privacy but also right to be free from inhuman or degrading treatment as well as the right to equality and non-discrimination (it is noteworthy that the latter is a rather novel approach in regard to ECtHR as this perspective has not yet appeared in its jurisprudence, however it has already been established in the case law of the CEDAW Committee and CCPR). Moreover, there is a clear trend towards liberalizing abortion laws in terms of abortions on request. On the other hand, initiatives having retrogressive impacts on the human rights and women, are prohibited under international law. The UN Working Group has thus insisted on maintaining "existing international law guarantees of women's human rights <…> and resist all attempts to derogate from them, including by conservative or religious lobbies".

In July 2022, the European Parliament passed a Resolution on the US Supreme Court's decision to overturn abortion rights in the United States and the need to safeguard abortion rights and women's health in the EU (Motion for a Resolution on the US Supreme Court…, 2022). The Parliament called for the right to "safe and legal abortion" to be added to the EU Charter of Fundamental Rights, arguing that denying the procedure amounted to violence against women and girls. According to the Resolution, "abortion bans and restrictions "disproportionality" affect women in poverty, women of colour, irregular migrants, and LGBTIQ+ people, and all of these legal obstacles do not actually help reduce the number of terminations, but instead force people to travel long distances or resort to unsafe abortions." Members of the European Parliament have thus urged the European Commission and Member States to increase funding for the global defence of women's rights in the event that the United States decides to cut them, and to make the issue a policy priority in the EU's external relations. Although this Resolution is not the first one where

the European Parliament proclaimed the safe access to abortion as a human right (one of the most recent ones was the Resolution of 24 June 2021 on the 25th anniversary of the International Conference on Population and Development (Resolution on the 25th anniversary…, 2021), however there were previous reports and resolutions in older years (such as the ones released in 2002 (Report on sexual and reproductive…, 2002) or in 2010 (Legislative resolution on the proposal…, 2010)) as well calling for legal and easy access to abortion not only in member states but in candidate ones as well), under current legislation, the European Union has no authority to define health policy, which thus remains in the hands of Member States, which becomes an argument commonly used by countries with highly restrictive abortion laws in place.

Even though there are numerous human rights instruments in place guarding different elements of reproductive rights, as discussed earlier in this work, it cannot go unnoticed that there are none dedicated exceptionally to this area. Lately, more and more proposals (Include the right to abortion…, 2022) are being raised to either create a treaty dedicated solely to reproductive rights, the emphasis being on the access to safe and legal abortion as a human right, or at least explicitly include such right to the Charter of Fundamental Rights of the European Union, as supported by the EU Parliament in its Resolution of 2022. Despite the fact which way would be chosen as preferable, the key aim should be to establish minimum standards for abortion access and women's safety on the EU level. Nonetheless, the procedure for changing the Charter must be regarded as time-consuming and laborious as the majority of member states should be in agreement in order for the treaty to even be placed under the revision process and, moreover, changes would require a unanimous approval (Treaty on European Union, 2012). However, given the position of countries such as Poland, unanimity appears unlikely in this case.

With regards to ECtHR and the interpretation of ECHR's Article 8 as well as determination of the scope of the right to abortion enshrined therein, relevant international law rules can be consulted. In this regard, many human rights bodies, such as CCPR or CEDAW Committee, has called numerous times to ensure safe and legal abortions, as has previously been discussed in this work. Yet, ECtHR is quite reluctant to deliver firm judgements, providing the states with broad margin of appreciation (*A, B and C v. Ireland* case may serve as an example here as the Court has relied on another ECHR Member State stepping in to assure the protection of women's access to abortion) or extensively considering the predominant moral perceptions in one State which does not align with a contextual and evolutive interpretation of the ECHR, especially recognizing a changing moral perception of abortion, upheld by the practice of a majority of ECHR-parties

(Katsoni, 2021). It is worth noting that, while it is true that it is impossible to find a uniform European conception of morals in the legal and social orders of the states, including on the question of when life begins, it is highly doubtful that it is easier to identify "national morals" or a public interest in their protection as opposed to other legitimate aims categorized as public interests, namely national security, public safety, the country's economic well-being, the prevention of disorder and crime, and the protection of health, it is debatable whether morals may be objectively defined as such. The concept of public interest in moral protection could be maintained if objectified and focused on the protection of fundamental human dignity, non-discrimination, and equality (Kapelanska-Pregowska, 2021, p. 217). Moreover, margin of appreciation cannot be considered as absolute, especially in the context of delicate matters, such as the one discussed here, by means that margin of appreciation does not give a *carte blanche* to introduce arbitrary measures, as it may be overstepped when such measures are disproportionate (Kapelanska-Pregowska, 2021, p. 219).

In regard to violations of Article 8, they are usually found by ECtHR where abortion was allowed as per national laws, however not accessible in practice, meanwhile, the Court has acknowledged neither the right to have and abortion (*Ribeiro* case) not to practice it (*Amy* case). Nonetheless, even if a state's outright prohibition of abortion does not violate the Convention *per se* (*Ribeiro; A, B and C* cases), states may allow it for the sake of competing rights guaranteed by the Convention. In other words, the Court tolerates abortion if it is justified by a proportionate motive protected by the Convention. It has, moreover, established that "once the state, acting within its limits of appreciation, adopts statutory regulations allowing abortion in some situations", "the legal framework devised for this purpose should be shaped in a coherent manner which allows the different legitimate interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention" (*Vo*; *A, B and C*; *R.R.*; *P. and S.* and *Tysiąc* cases).

When analysing the US Supreme Court's judgement in *Dobbs* and the ECtHR jurisprudence side by side, an overlap can be noticed, that being the "constitutional neutrality" – argument adopted in *Dobbs,* and one heavily relied on in the jurisprudence of ECtHR. Considering a landmark case of *A, B and C v. Ireland* as an example, ECtHR had at least two meaningful grounds to acknowledge a violation of Article 8 of ECHR: (1) Ireland's at-that-time valid laws on abortion did not provide an exception in case there was a threat to the woman's health and well-being, violating the respect for the women's reproductive autonomy and thus making it necessary to examine whether such restriction

of woman's right to privacy can be justified, due to being "necessary in a democratic society", (2) the Court agreed that "where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will normally be restricted" and, moreover, that "there is indeed a consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion on broader grounds than accorded under Irish law" (decision of the European Court of Human Rights of 16 December 2010 in case *A, B and C v. Ireland*). Nonetheless, ECtHR has chosen to award Ireland of broad margin on the argument that "there can be no doubt as to the acute sensitivity of the moral and ethical issues raised by the question of abortion or as to the importance of the public interest at stake" (decision of the European Court of Human Rights of 16 December 2010 in case *A, B and C v. Ireland*) and demonstrated a high level of yielding to the moral opinions within the State even though it can be seen as being inconsistent with its jurisprudence on other rights that raised morally sensitive issues (decision of the European Court of Human Rights of 22 January 2008 decision in case *E.B. v. France*). This led to the conclusion that no rights were violated in terms of Applicants A and B. All in all, ECHR has only explicitly stated in its jurisprudence that laws prohibiting abortion in cases where threat to women's life exists exceed states' margin of appreciation (decision of the European Commission of Human Rights of 13 May 1980 in case *Paton v. United Kingdom)*. Meanwhile, remaining policy choices are subject to the political winds and are decentralized to the states, much like in the US post-*Dobbs*.

Furthermore, what must also be observed is that arguments of ECtHR in cases concerning access to abortion have tended to focus on Article 8 (right to private and family life) and, moreover, the Court has extensively applied the margin of appreciation which has previously been rejected by CCPR (General Comment No. 34…, 2011). Based on the jurisprudence of ECtHR, it is quite easy to see that ECtHR has only acknowledged a violation of Article 8 where abortion is legal under domestic law however inaccessible in practice.

Nonetheless, contrary to Article 8, Article 3 protects an absolute right thus no margin of appreciation can be applied. The ECtHR has held on various occasions that the alleged ill treatment must attain a minimum level of severity to fall within the scope of Article 3 thus all the circumstances of the case must be properly evaluated. The ECHR has, however, acknowledged more than once that ECHR a „living instrument which <...> must be interpreted in the light of present-day conditions" (decision of the European Commission of Human Rights of 7 July 1989 in case *Soering v United Kingdom)* which this demonstrates the need for the ECtHR to adapt its interpretation of the ECHR to societal

and technological changes. Over time, the Court has developed a broader interpretative approach to Article 3, expanding the right beyond the narrow literal interpretation, which is also noticeable when analysing the case law concerting abortion access: up until now, there have been six cases decided by the ECtHR where violation of Article 3 of ECHR has been claimed (*Tysiąc v. Poland* (2007), *A, B and C v. Ireland* (2010), *R.R. v Poland* (2011), *P. and S. v. Poland* (2013), *S.F.K. v. Russia* (2022), and *G.M. and Others v. the Republic of Moldova* (2022)) and even though in all four cases the ECtHR found a violation of Article 8, however violations of Article 3 have been found only in the latter two.

In cases of *Tysiąc* and *A, B and C*, ECtHR arguably must have been more engaged into the specific facts in each case, considering the physical and mental suffering as well risk to life as these factors are deemed as relevant in assessing Article 3 violations, based on previous jurisprudence of ECtHR. It cannot go unnoticed, however, that these judgements might have been under the influence of the political sensitivity of the issue in question since in case ECtHR had found a violation of Article 3 in the said cases, such a finding could have been met with a backlash from States, which the Court may have been hesitant to take at that time (Ghrainne, McMahon, 2019, p. 569).

Nonetheless, in the remaining cases, the ECtHR offered a much deeper analysis of the applicants' circumstances, referring to, *inter alia*, the relevance of physical and mental effects, the sex, age and state of health of the victim, the length of suffering, and feelings of fear, anguish and inferiority capable of humiliating or debasing the victim. Moreover, and of relevance in the abortion context, the ECtHR expressly confirmed that acts and omissions in the field of healthcare policy could in certain circumstances engage State responsibility under Article 3 "by reason of their failure to provide appropriate medical treatment" (decision of the European Court of Human Rights of 30 January 2013 in case *P. and S. v. Poland*). The crucial factor in the ECtHR's reasoning in *R.R*, *P. and S.*, and *G.M. and Others* cases was that the applicants were in situations of great vulnerability which aligns with the views of CCPR in both *Mellet* and *Whelan*. As argued by the Applicant in *Mellet, „*the criminalisation of abortion stigmatizes a woman's actions and person, serving as a separate source of severe emotional pain" (adoption of views of the Human Rights Committee of 31 March 2016 in case *Amanda Jane Mellet v. Ireland*).

The ECtHR has already recognized that denying a woman autonomy over her body and reproductive choices can amount to an Article 3 violation in the context of forced sterilization (decision of the European Court of Human Rights of 12 June 2012 in case *N.B. v. Slovakia*) as well as forced abortion (*S.F.K.* case*)*, however the personal and social

consequences that the ECtHR noted in this context, such as depression and social isolation, may also arise in situations when women are denied an abortion.

Moreover, ECtHR has affirmed more than once that ECHR should be interpreted in light of any relevant rules of international law and the views of CCPR are to be assessed as such rules which ECtHR has frequently relied upon. Two main criteria can be singled out when it comes to the likelihood that the ECtHR will take a Committee's views concerning Article 7 (prohibition of torture or to cruel, inhuman or degrading treatment or punishment) of the ICCPR into the account as an interpretative source: (1) ECtHR has been more willing to refer to the ICCPR/CCPR where similarities between the content of the specific ICCPR right and ECHR rights have been identified which is the case in terms of Article 7 ICCPR and Article 3 ECHR, and (2) ECHR has been more willing to refer to the ICCPR/CCPR where the ICCPR provides more extensive protection to the applicant and it must be agreed that CCPR tends to find more often than the ECtHR a State's restrictive abortion regime to be in violation of the ICCPR (Ghrainne, McMahon, 2019, p. 580).

Three sets of new cases brought before ECtHR against Poland are still in progress and provides the Court with another opportunity for a resolute judgement of recognising the right to abortion under Article 8 of ECHR which is also highlighted in the Brief of European Law Professors as *Amici Curiae* (Brief of European Law Professors…, 2021), cited in the Joint Dissent in *Dobbs*, which anticipates that ECtHR is likely to shift towards applying a narrower margin of appreciation considering the development of European consensus since *A, B and C,* and spreading international trends in favour of more liberal abortion access as well as the argument in the applications on the lack of judicial independence in the composition of the Polish Constitutional Tribunal. Following these cases, it is expected that at least the right to abortion on the ground of health and well-being will be established under the ECHR. The ECtHR could thus seek to model the future jurisprudence based on *Roe* and *Casey* and to narrow the margin of appreciation afforded to the states (Szopa, Fletcher, 2022), especially considering that since the European consensus towards liberalizing of abortion services is getting stronger, as it has already been acknowledged by ECtHR, giving the states a broad discretion in abortion regulations would run counter to this harmonization. Moreover, given the evolution of international standards regarding reproductive rights in general, and access to abortion services in particular, it is only right to expect that the ECtHR would acknowledge and consider these developments in its jurisprudence. However, if this retrogressive step by Poland is accepted by the ECtHR as accordant with the ECHR, then a discrepancy would emerge considering the European as well as universal standards. On the other hand, by recognizing the

importance of a European consensus and evolving universal standards concerning reproductive rights, the ECtHR would avoid analysing and relying on the dubious public interest as well as a potential criticism of judicial activism and the court's imposition of its own moral evaluation of an abortion ban as this way ECtHR would simply recognize the changes that are already hapenning in the area of reproductive rights and abortion, in particular (Kapelanska-Pregowska, 2021, p. 221).

Anti-abortion supporters in Europe tend to use judgement in *Dobbs* to reaffirm that abortion is not a human right and that ECtHR, as an international court, should refrain from centralizing the right to abortion. Nonetheless, considering the current European consensus discussed above, the Court should look into Dobbs as "a tool to reflect upon our own commitment to abortion access as a human right and the inadequacies of its current jurisprudence" (Kapelanska-Pregowska, 2021, p. 221). As demonstrated above, *Dobbs* was not adopted overnight but it has rather been a result of a decades-long campaign and Poland's example shows that Europe is not necessary immune as well which makes it crucial to understand the need to protect women's reproductive rights in Europe by, *inter alia*, narrowing the overexaggerated margin of appreciation being assigned by the ECtHR to the Member States. Quoting Leah Hoctor, Senior Regional Director of Europe for the Center for Reproductive Rights, "globally, there is a clear trend toward greater respect for reproductive rights" (With its Regression on Abortion…, 2022) thus even though the Supreme Court's decision to overturn *Roe v. Wade* may embolden abortion opponents in other countries, but the decision cannot and should not reverse the global trend of abortion liberalization. Rather, the *Dobbs* decision has the potential to evoke the current wave of popular pro-choice movements.

Conclusions

1. Even though the concept of women's reproductive rights is very broad (including, *inter alia*, the right to contraception, the right to infertility or other treatments, the right to obtain medical information), women's right to decide whether or not to reproduce remains the central object of discussions. Nonetheless, the element of control as well as choice and autonomy are significantly related to the effective enjoyment of other human rights.
2. As recognized by international human rights bodies, the following human rights are primarily interdependent with reproductive rights:
    - Right to life (states must take effective measures to prevent maternal mortality, including removing barriers to accessing safe abortion services to avoid women turning to illegal abortions or otherwise jeopardizing their lives or physical and mental health);
    - Right to health (the right of women to sexual and reproductive health is an essential component of women's right to health, including the freedom to make free and responsible decisions and choices about one's body and sexual and reproductive health, as well as unrestricted access to a wide range of health facilities, goods, services, and information);
    - Right to freedom from torture and inhuman or degrading treatment (states are not only required to refrain from such treatment, but also to eliminate sexual and reproductive health laws, policies, and practices that may subject women to intense physical or mental suffering, anguish, or feelings of humiliation, as well as to take proactive measures, such as passing laws, policies, and programs to prevent torture and ill-treatment. Highly restrictive abortion laws have been repeatedly found to violate the prohibition on ill-treatment as human rights bodies have specifically stated that states must legalize abortion to protect women's lives or health, as well as in other situations where carrying a pregnancy to term would cause women significant physical or mental pain or suffering);
    - Right to privacy (wide range of restrictions on women's sexual and reproductive health and autonomy, such as severe legal constraints on abortion, failures to enable women's access to legal abortion services in practice or barriers to access to prenatal testing, violate women's privacy rights. Even though the nature of the protection afforded to the right to

privacy under international human rights law is not absolute, human rights standards require that any such measures limiting women's sexual and reproductive rights meet a number of stringent and cumulative criteria. Human rights bodies have frequently found that state restrictions on women's sexual and reproductive rights fail to strike the right balance and meet these benchmarks);

- Right to freedom from discrimination (states must repeal or reform laws and policies that nullify or impair women's ability to exercise their right to sexual and reproductive health, and laws that prohibit health services that only women require. Mandatory waiting periods, the requirement to travel long distances or abroad, an absence of respectful care, court orders, and third-party authorization and notification provisions are particularly common restrictions with respect to abortion, and other women's reproductive health services that constitute discrimination either from the gender equality perspective, or considering differences between, for example, socio-economic situation of women).

3. Prohibitions on abortion have unique and distinct effects on women of reproductive age as a class of people, first of all, by undermining women's ability to make decisions about their own bodies and futures. Criminalisation of abortion by no means conditions lesser amount of such procedures but rather contributes to the increased numbers of women seeking unsafe clandestine options. It also results in fundamental human rights not being ensured and creates a niche for discrimination and stigma. In addition, secondary issues, such as "chilling effect" on physicians or growing occasions of harassment by anti-abortion supporters, emerge. Prohibition of abortions thus cannot be considered as being in accordance with the law (retrogressive measures in human rights area are not permissible), necessary in a democratic society to serve a legitimate aim, and proportionate (prohibitions on abortion do not contribute to the purpose of States to protect prenatal life), or not providing a ground to discrimination on prohibited grounds. States should thus decriminalize abortion in all circumstances, meanwhile, abortion prohibitions concerning situations involving a risk to women's health or life, severe foetal impairment and non-viable pregnancies, and pregnancies resulting from sexual assault, should be repealed.
4. Even though there are numerous human rights instruments in place guarding different elements of reproductive rights, there are none dedicated exceptionally to

the latter. Moreover, countries choose to opt-out from certain provisions of international treaties (the example of Poland) or not to ratify them (the example of the US). Recently, the European Parliament urged for the right to "safe and legal abortion" to be added to the EU Charter of Fundamental Rights, arguing that denying the procedure amounted to violence against women and girls. Moreover, more and more calls to codify the essence of *Roe v. Wade* judgement has been lately heard in the US which should have been done years ago. Having said that, regardless of whether the right to abortion would be introduced as an autonomous right or as a derivative from other fundamental human rights, it is essential that it would be effectively implemented. It is a matter of human rights to have access to safe and legal abortion and thus, as also urged by authoritative international human rights bodies, denying pregnant people access to abortion constitutes discrimination and violates a number of human rights.

5. The father of a foetus may be assigned the status of a victim, due to his close relation to the matter, however his interests are always outweighed by the ones of woman, considering various effects pregnancy impose on her. There can be thus no other person exercising an absolute veto over the decision to terminate the pregnancy which is for the pregnant person in discussion with her physician to make. Moreover, the potential father's right to privacy and family life cannot be interpreted broadly enough to include the right to be consulted or to file a court application regarding an abortion that his wife wishes to have performed on her.

   Moreover, although one of the most common arguments of anti-abortion supporters relies on "prenatal right to life" to justify restrictions on women's reproductive health and rights, the right to life as enshrined in core international human rights treaties does not apply prior to birth, and international human rights law does not recognize a prenatal right to life. The drafters of the core international human rights treaties rejected claims that the right to life enshrined in those instruments should apply prenatally. Arguably, recognizing the right to life of an unborn foetus would jeopardize women's human rights by allowing a government to prioritize the rights of a foetus over those of a pregnant person.

6. Despite the general trend of progress toward liberalization of abortion and the removal of barriers and restrictions, access to abortion still follows the political swings in some parts of Europe and there are attempts to roll back legal protections for abortion access. At times, this has resulted in the introduction of new barriers, such as mandatory biased counselling and mandatory waiting periods that

individuals must meet before receiving abortion care. In some countries, such as Poland, attempts have been made to outright prohibit abortion or to remove existing legal grounds for abortion.

7. The judgement of the US Supreme Court in *Dobbs* is a relentless retrogressive step in the area of women's reproductive rights as well bodily autonomy since their reproductive choices are now subjected to what is deemed acceptable choice as per the will of the majority. While *Dobbs* neither directly prohibits abortion access nor provides constitutional protection to the unborn through the establishment of foetal personhood, it undeniably weakens abortion access by removing the constitutional ringfence that limited legislative power. Individuals' access to abortion will now be determined by their geographical location, and women from lower socio-economic classes, as well as young and vulnerable people, will be disproportionately affected. Nonetheless, the decision in *Dobbs* is not to reverse the global trend of abortion liberalization but rather to rekindle the wave of pro-choice movements.
8. Despite Europe's condemnation towards *Dobbs*, the right to abortion is currently afforded very little legal protection beyond that afforded to women in the United States post-*Dobbs*, according to current European Court of Human Rights jurisprudence. Up until now, ECtHR squandered an opportunity to recognize the right to abortion based on specific criteria that are compatible with the right to life and the right to privacy. Nonetheless, based on the latest judgements, the position of Court seems to be shifting. If previously violation to privacy was linked to the prohibition of abortion at most, the most recent decisions recognize that denying a woman autonomy over her body and reproductive choices can amount to ECHR Article 3 (prohibition of torture and inhuman or degrading treatment) violation as well. Moreover, the Court has regarded various times that ECHR is a living instrument which suggests that Court's jurisprudence regarding, *inter alia*, women's reproductive rights, including abortion, shall continue to evolve.
9. One of most significant barriers in the jurisprudence of ECtHR is an excessively wide margin of appreciation allocated to Member States even though this doctrine is mostly rejected by other international human rights bodies. Nonetheless, it has already been recognised by the Court itself that considering the established European consensus in favour of access to safe and legal abortion and the general trend towards further removing remaining barriers in law and practice in this field, margin should be narrowed. The ongoing cases initiated against Poland is yet another opportunity for ECtHR to take firm stance and to unambiguously promote

women's reproductive rights, including the right to take full control of what happens with their own bodies. On the other hand, if the ECtHR accepts Poland's regressive step as being in accordance with the ECHR, a disparity with the European as well as universal standards will emerge.

10. Considering barriers, religious power and the argument of morality in general continue to have a strong influence in dictating a woman's role in society both in the United States and Europe. Reproductive rights, including abortion, should, however, be neither a question of religion, nor that of morals not only because these are subjective factors understood and followed differently but also since they have no place in matters concerning individual's health. The elements of control as well as choice and autonomy are the crucial ones in such circumstances.

List of Sources

Legal acts:

1. International Covenant on Economic, Social and Cultural Rights (1966). [1976] 993 UNTS 3.
2. International Covenant on Civil and Political Rights (1966). [1976] 999 UNTS 171.
3. Convention on the Elimination of All Forms of Discrimination against Women (1979). [1981] 1249 UNTS 13.
4. European Convention of Human Rights (1950). [1953] 213 UNTS 221.
5. Protocol No. 30 on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom (2008). 12008E/PRO/30, p. 313-314.
6. Treaty on European Union (2007). [2009] C 326/1, p. 1 – 390.
7. European Parliament. Legislative resolution on the proposal for a Council directive amending Directive 2006/112/EC as regards an optional and temporary application of the reverse charge mechanism in relation to supplies of certain goods and services susceptible to fraud (2010). No. COM(2009)0511 – C7-0210/2009 – 2009/0139(CNS).
8. European Parliament. Resolution on the 25th anniversary of the International Conference on Population and Development (ICPD25) (Nairobi Summit) (2019/2850(RSP)) (2021). No. 2022/C 81/05, p. 315.
9. European Parliament. Motion for a Resolution on the US Supreme Court decision to overturn abortion rights in the United States and the need to safeguard abortion rights and women's heath in the EU (2022). No. B-9-2022-0365.
10. Committee of Ministers of the Council of Europe. Interim resolution for execution of the judgments of the European Court of Human Rights in *Tysiąc*, *R.R.* and *P. and S.* against Poland (2021), Nr. CM/ResDH(2021)44.

Special literature:

1. Bader Ginsburg, R. (1985). Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade. *North Carolina Law Review*, Vol. 63, No. 2, p. 374-386 [interactive]. Available at: https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=2961&context=nclr [accessed 25 November 2022].
2. Brief of European Law Professors as *Amici Curiae* for *Dobbs v. Jackson Women's Health Organization* (2021) [interactive]. Available at: https://www.supremecourt.gov/

DocketPDF/19/19-1392/193093/20210920192331848_Brief%20of%20Amici%20Curiae%20European%20Law%20Professors%20iso%20Respondents.pdf [accessed 17 November 2022].

3. Center for Reproductive Rights. *European Abortion Laws: A Comparative Overview* [interactive] (modified October 2020). Available at: https://reproductiverights.org/wp-content/uploads/2022/10/15381_CRR_Europe_October_2022.pdf [accessed 17 November 2022].
4. Center for Reproductive Rights. *With its Regression on Abortion Rights, the U.S. is a Global Outlier* [interactive] (modified 9 August 2022). Available at: https://reproductiverights.org/us-a-global-outlier-on-abortion-rights/ [accessed 25 November 2022].
5. Cook, R.J. (1993). International Human Rights and Women's Reproductive Health. *Studies in Family Planning*, Vol. 24, No. 2, 1993, p. 73-86 [interactive]. Available at: https://www.jstor.org/stable/2939201?seq=6#metadata_info_tab_contents [accessed 10 September 2022].
6. Freund, P.A. (1983). Storms over the Supreme Court. *American Bar Association Journal*, Vol. 69, No. 10, p. 1474-1480 [interactive]. Available at: https://www.jstor.org/stable/20756487#metadata_info_tab_contents [accessed 25 November 2022].
7. Ghrainne, B.N. and McMahon, A. (2019). Access to Abortion in Cases of Fatal Foetal Abnormality: A New Direction for the European Court of Human Rights? *Human Rights Law Review*, Vol. 19, Issue 3, p. 561-584 [interactive]. Available at: https://academic.oup.com/hrlr/article/19/3/561/5625674 [accessed 1 December 2022].
8. Grzymala-Busse, A.M. (2015). N*ations under God: How Churches Use Moral Authority to Influence Policy*, Princeton: Princeton University Press.
9. Hoctor, L. *Opinion: U.S. abortion restrictions absolutely do not align eith European Law* [interactive] (modified 22 September 2022). Available at: https://reproductiverights.org/washington-post-lindsey-graham-federal-abortion-ban/ [accessed 6 November 2022].
10. Human Rights Watch. *Regression on Abortion Harms Women in Poland* 2022 [interactive] (modified 26 January 2022) Available at: https://www.hrw.org/news/2022/01/26/regression-abortion-harms-women-poland [accessed 10 November 2022].

11. Kapelanska-Pregowska, J. (2021). The Scales of the European Court of Human Rights: Abortion Restriction in Poland, the European Consensus, and the State's Margin of Appreciation. *Health and Human Rights Journal*, Vol. 23, No. 2, p. 213-224 [interactive]. Available at: https://cdn1.sph.harvard.edu/wp-content/uploads/sites/2469/2021/12/kapelańska-pręgowska.pdf [accessed 24 November 2022].
12. Karst, K.L. (1977). Foreword-Equal Citizenshop Under the Fourteenth Amendment. *Harvard Law Review*. Vol. 91, No. 1, p. 1-68 [interactive]. Available at: https://www.jstor.org/stable/pdf/1340515.pdf [accessed 18 September 2022].
13. Katsoni, S. (2021) *The Right to Abortion and the European Convention on Human Rights: In Search of Consensus among Member-States*. Völkerrechtsblog 19 March 2021 [interactive]. Available at: https://voelkerrechtsblog.org/the-right-to-abortion-and-the-european-convention-on-human-rights/ [accessed 24 November 2022].
14. Moodley, A. (1995). Defining Reproductive Rights. *Agenda: Empowering Women for Gender Equity*. No. 27, p. 8-14 [interactive]. Available at: https://www.jstor.org/stable/4065965?seq=1#metadata_info_tab_contents [accessed 10 September 2022].
15. Puppinck, G. (2013). Abortion and the European Convention on Human Rights. *Irish Journal of Legal Studies*, Vol. 3(2), p. 142-194 [interactive]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2320539 [accessed 18 December 2022].
16. Regan, D.H. (1979). Rewriting Roe v. Wade. *Mich. L. Rev*. 77, p. 1569-1646 [interactive]. Available at: https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1344&context=articles [accessed 26 November 2022].
17. Szopa, K. and Fletcher, J. The Future of Abortion Rights under the European Convention on Human Rights in Light of Dobbs [interactive] (modified 30 June 2022). Available at: https://ukconstitutionallaw.org/2022/06/30/karolina-szopa-and-jamie-fletcher-the-future-of-abortion-rights-under-the-european-convention-on-human-rights-in-light-of-dobbs/ [accessed 25 November 2022].
18. Temme, L. Why Was Roe v. Wade Overturned? [interactive] (modified 6 July 2022) Available at: https://supreme.findlaw.com/supreme-court-insights/could-roe-v--wade-be-overturned-.html#relatedcases [accessed 1 November 2022].
19. World Health Organization (2015). *Safe abortion: technical and policy guidance for health systems* [interactive]. Available at: https://apps.who.int/iris/bitstream/handle/10665/173586/WHO_RHR_15.04_eng.pdf [accessed 10 October 2022].

20. WHO Commission on Social Determinants of Health (2008). *Closing the Gap in a Generation: Health Equity through Action on the Social Determinants of Health – Final Report of the Commission on Social Determinants of Health* [interactive]. Available at: https://www.who.int/publications/i/item/WHO-IER-CSDH-08.1 [accessed 27 October 2022].
21. World Health Organization (2022). *Abortion Care Guideline* [interactive]. Available at: https://srhr.org/abortioncare/ [accessed 5 November 2022].
22. Written comments on behalf of Amnesty International, the Center for Reproductive Rights, Human Rights Watch, the International Commission of Jurists (ICJ), the International Federation for Human Rights (FIDH), the International Planned Parenthood Federation European Network, Women Enabled International, Women's Link Worldwide and the World Organisation Against Torture (OMCT) in regard to Application no. 1819/21 – K.B. v. Poland and 3 other applications (2021) [interactive] Available at: https://reproductiverights.org/wp-content/uploads/2022/01/Written-Comments_KB-v-Poland-and-3-other-applications.pdf [accessed 16 November 2022].
23. Zureick, A. (2015). (En)gendering Suffering: Denial of Abortion As a Form of Cruel, Inhuman, or Degrading Treatment. *Fordham International Law Journal*, Vol. 38:99, p. 99-141 [interactive]. Available at: https://www.corteidh.or.cr/tablas/r33546.pdf [accessed 3 October 2022].

C*ase law:*

1. *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others* [CJEU], No. C-159/90, [28 November 2011]. ECLI:EU:C:1991:378.
2. *Brüggemann and Scheuten v. Germany* [ECHR], No. 6959/75, [19 May 1976]. ECLI:CE:ECHR:1976:0519DEC000695975.
3. *Paton v. United Kingdom* [ECHR], No. 8416/78, [13 May 1980]. ECLI:CE:ECHR:1980: 3E.H.R.R.408.
4. *W.P. v. the United Kingdom* [ECHR], No. 8416/78, [13 May 1980]. ECLI:CE:ECHR:1980:0513DEC000841678.
5. *Jean-Jacques Amy v. Belgium* [ECHR], No. 11684/85, [5 October 1988]. ECLI:CE:ECHR:1988:1005DEC001168485.
6. *Soering v. United Kingdom* [ECHR], No. 14038/88, [7 July 1989]. ECLI:CE:ECHR:1989:0707JUD001403888.

7. *Boso v. Italy* [ECHR], No. 50490/99, [5 September 2002]. ECLI:CE:ECHR:2002:0905DEC005049099.
8. *Vo v. France* [ECHR], No. 53924/00, [8 July 2004]. ECLI:CE:ECHR:2004:0708JUD005392400.
9. *Silva Monteiro Martins Ribeiro v. Portugal* [ECHR], No. 16471/02, [26 October 2004]. ECLI:CE:ECHR:2004:1026DEC001647102.
10. *Tysiąc v. Poland* [ECHR], No. 5410/03, [20 March 2007]. ECLI:CE:ECHR:2007:0320JUD000541003.
11. *E.B. v. France* [ECHR], No. 43546/02, [22 January 2008]. ECLI:CE:ECHR:2008:0122JUD004354602.
12. *A, B and C v. Ireland* [ECHR], No. 25579/05, [16 December 2010]. ECLI:CE:ECHR:2010:1216JUD002557905.
13. *R.R. v. Poland* [ECHR], No. 27617/04, [28 November 2011]. ECLI:CE:ECHR:2011:0526JUD002761704.
14. *N.B. v. Slovakia* [ECHR], No. 29518/10, [12 June 2012]. ECLI:CE:ECHR:2012:0612JUD002951810.
15. *P. and S. v. Poland* [ECHR], No. 57375/08, [30 January 2013]. ECLI:CE:ECHR:2012:1030JUD005737508.
16. Notification of 12 applications concerning abortion rights in Poland [ECHR], No. 217, [8 July 2021].
17. *S.F.K. v. Russia* [ECHR], No. 5578/12, [11 October 2022]. ECLI:CE:ECHR:2022:1011JUD000557812.
18. *G.M. and Others v. the Republic of Moldova* [ECHR], No. 44394/15, [22 November 2022]. ECLI:CE:ECHR:2022:1122JUD004439415.
19. *K.L. v. Peru* [CCPR], No. CCPR/C/85/D/1153/2003, [24 October 2005].
20. *Amanda Jane Mellet v. Ireland* [CCPR], No. 2324/2013, [31 March 2016].
21. *Siobhán Whelan v. Ireland* [CCPR], No. 2425/2014, [17 March 2017].
22. The Ruling of the U.S. Supreme Court of 7 June 1965, case No. 381 U.S. 479.
23. The Ruling of the U.S. Supreme Court of 22 March 1972, case No. 405 U.S. 438.
24. The Ruling of the U.S. Supreme Court of 22 January 1973, case No. 410 U.S. 113.
25. The Ruling of the U.S. Supreme Court of 22 January 1973, case No. 410 U.S. 179.
26. The Ruling of the U.S. Supreme Court of 1 July 1976, case No. 428 U.S. 52.
27. The Ruling of the U.S. Supreme Court of 9 January 1979, case No. 439 U.S. 379.
28. The Ruling of the U.S. Supreme Court of 2 July 1979, case No. 443 U.S. 622.
29. The Ruling of the U.S. Supreme Court of 15 June 1983, case No. 462 U.S. 416.

30. The Ruling of the U.S. Supreme Court of 11 June 1986, case No. 476 U.S. 747.
31. The Ruling of the U.S. Supreme Court of 28 June 2000, case No. 530 U.S. 914.
32. The Ruling of the U.S. Supreme Court of 23 May 1991, case No. 500 U.S. 173.
33. The Ruling of the U.S. Supreme Court of 29 June 1992, case No. 505 U.S. 833.
34. The Ruling of the U.S. Supreme Court of 3 July 1989, case No. 492 U.S. 490.
35. The Ruling of the U.S. Supreme Court of 18 April 2007, case No. 550 U.S. 124.
36. The Ruling of the U.S. Supreme Court of 27 June 2016, case No. 15–274.
37. The Ruling of the U.S. Supreme Court of 23 June 2022, case No. 19–1392.

Other sources:

CEDAW Committee

1. General recommendation No. 21: Equality in marriage and family relations (1994) [interactive]. Available at: https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/A_49_38(SUPP)_4733_E.pdf [accessed 12 September 2022].
2. General recommendation No. 24: Article 12 of the Convention (women and health) (1999) [interactive]. Available at: https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_4738_E.pdf [accessed 12 September 2022].
3. Concluding observations on the combined fourth and fifth periodic reports of Myanmar (2016) [interactive]. Available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/MMR/CO/4-5&Lang=En [accessed 15 October 2022].
4. Report of the inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (2018) [interactive]. Available at: https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/GBR/INT_CEDAW_ITB_GBR_8637_E.pdf [accessed 10 September 2022].
5. Joint statement of CEDAW Committee and CRPD on guaranteeing sexual and reproductive health and rights for all women, in particular women with disabilities (2018) [interactive]. Available at: https://www.google.com/url?sa=t&rct=j&q=&esrc= s&source=web&cd=&ved=2ahUKEwjliu6piNv7AhWolosKHYtlDPMQFnoECBsQAQ&url=https%3A%2F%2Ftbinternet.ohchr.org%2FTreaties%2FCEDAW%2FShared%2520Documents%2F1_Global%2FINT_CEDAW_STA_8744_E.docx&usg=AOvVaw2fJRPxaReOzU-ODmYliGHB [accessed 12 November 2022].

Human Rights Committee

6. General Comment No. 34: Article 19: Freedoms of opinion and expression (2011). No. CCPR/C/GC/34 [interactive]. Available at: https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf [accessed 1 December 2022].
7. Press release on the draft General Comment No. 36 on the right to life (2015) [interactive]. Available at: https://www.ohchr.org/en/press-releases/2015/07/human-rights-committee-discusses-draft-general-comment-right-life?LangID=E&NewsID=16234 [accessed 5 October 2022].
8. Revised draft of the General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life (2017) [interactive]. Available at: https://www.ohchr.org/sites/default/files/Documents/HRBodies/CCPR/GCArticle6/GCArticle6_EN.pdf [accessed 5 October 2022].
9. General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life (2019) [interactive]. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/261/15/PDF/G1926115.pdf?OpenElement [accessed 5 October 2022].
10. General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women) (2000). No. CCPR/C/21/Rev.1/Add.10 [interactive]. Available at: https://www.refworld.org/pdfid/45139c9b4.pdf [accessed 5 October 2022].

Committee on Economic, Social, and Cultural Rights

11. General Comment No. 3: the Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant) (1990). No. E/1991/23 [interactive]. Available at: https://www.refworld.org/pdfid/4538838e10.pdf [accessed 12 September 2022].
12. General Comment No. 14 on the right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights) (2000). No. E/C.12/2000/4 [interactive]. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G00/439/34/PDF/G0043934.pdf?OpenElement [accessed 12 September 2022].
13. General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant) (2005). No. E/C.12/2005/4 [interactive]. Available at: https://www.refworld.org/docid/43f3067ae.html [accessed 14 September 2022].

14. General Comment No. 20: Non-discrimination in economic, social, and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights) (2009). No. E/C.12/GC/20 [interactive]. Available at: https://www.refworld.org/docid/4a60961f2.html [accessed 14 September 2022].
15. General Comment No. 22 on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights) (2016) [interactive]. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/089/32/PDF/G1608932.pdf?OpenElement [accessed 14 September 2022].

Office of the High Commissioner for Human Rights of the United Nations

16. Information series on sexual and reproductive health and rights: abortion (2020) [interactive]. Available at: https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WRGS/SexualHealth/INFO_Abortion_WEB.pdf [accessed 2 November 2022].
17. Sexual and reproductive health and rights (2022) [interactive]. Available at: https://www.ohchr.org/en/node/3447/sexual-and-reproductive-health-and-rights [accessed 3 October 2022].

The United Nations Special Rapporteurs

18. Report by the UN Special Rapporteur on extrajudicial, summary or arbitrary executions on a gender-sensitive approach to arbitrary killings (2017), No. A/HRC/35/23 [interactive]. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/156/19/PDF/G1715619.pdf?OpenElement [accessed 15 September 2022].
19. Report by the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (2022), Nr. A/77/197 [interactive]. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/432/64/PDF/N2243264.pdf?OpenElement [accessed 15 September 2022].

The United Nations Working Groups

20. The United Nations Working Group on the issue of discrimination against women in law and in practice. Women's Autonomy, Equality and Reproductive Health in International Human Rights: Between Recognition, Backlash and Regressive Trends Working Group (2017) [interactive]. Available at: https://www.ohchr.org/

sites/default/files/Documents/Issues/Women/WG/WomensAutonomyEqualityReproductiveHealth.pdf [accessed 27 October 2022].

21. The United Nations Working Group on discrimination against women and girls, UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, and UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. Intervention on cases K.B. v. Poland (1819/21); K.C. v. Poland (3039/21); A.L.-B. v. Poland (3801/21) pursuant to Article 36(2) of the European convention on Human Rights and Rule 44(3) of the Rules of Court (2021) [interactive]. Available at: https://www.ohchr.org/sites/default/files/2021-11/AC-Poland-10Nov2021.pdf [accessed 1 December 2022].

Other United Nations sources

22. The United Nations Population Fund Programme of Action of the International Conference on Population and Development Programme of Action (2014) [interactive]. Available at: https://www.unfpa.org/publications/international-conference-population-and-development-programme-action [accessed 10 September 2022].
23. The United Nations Treaty Body Database. Ratification status by country or by treaty [interactive]. Available at: https://tbinternet.ohchr.org/ _layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CEDAW&Lang=en [accessed 17 November 2022].

European Parliament and The Council of Europe

24. European Parliament. Report on sexual and reproductive health and rights (2002). No. 2001/2128 (INI) [interactive] Available at: https://www.europarl.europa.eu/doceo/document/A-5-2002-0223_EN.html [accessed 17 November 2022].
25. The Council of Europe Commissioner for Human Rights. Third party intervention under Article 36, paragraph 3, of the European Convention on Human Rights: K.B. v. Poland and 3 other applications (applications nos. 1819/21, 3682/21, 4957/21, 6217/21), K.C. v. Poland and 3 other applications (applications nos. 3639/21, 4188/21, 5876/21, 6030/21), and A.L. - B. v. Poland and 3 other applications (applications nos. 3801/21, 4218/21, 5114/21, 5390/21) (2021). No. CommDH(2021)31 [interactive]. Available at: https://rm.coe.int/third-party-intervention-by-the-council-of-europe-commissioner-for-hum/1680a460ef [accessed 1 December 2022].

26. News of European Parliament. *Include the right to abortion in EU Charter of Fundamental Rights, demand MEPs* [interactive] (modified 7 July 2022). Available at: https://www.europarl.europa.eu/news/en/press-room/20220701IPR34349/include-the-right-to-abortion-in-eu-charter-of-fundamental-rights-demand-meps [accessed 29 November 2022].

United States Senate

27. Pain-Capable Unborn Child Protection Act introduced to the United States Senate on 27 January 2021 [interactive]. Available at: https://www.congress.gov/bill/117th-congress/senate-bill/61/text [accessed 6 November 2022].
28. Life at Conception Act introduced to the United States Senate on 28 January 2021 [interactive]. Available at: https://www.congress.gov/bill/117th-congress/senate-bill/99/text [accessed 17 November 2022].

Other

29. For Justice Ginsburg, Abortion Was About Equality [interactive] (modified 23 September 2020). Available at: https://www.aclu.org/news/reproductive-freedom/for-justice-ginsburg-abortion-was-about-equality [accessed 20 December 2022].
30. Sen. Rand Paul Introduces Life at Conception Act [interactive] (modified 28 January 2021). Available at: https://www.paul.senate.gov/news/sen-rand-paul-introduces-life-conception-act [accessed 17 November 2022].
31. Malta set to ease strict anti-abortion laws [interactive] (modified 16 November 2022). Available at: https://www.reuters.com/world/europe/malta-set-ease-strict-anti-abortion-laws-2022-11-16/ [accessed 17 November 2022].
32. Center for Reproductive Rights. *After Roe fell: Abortion Laws by State* [interactive] (modified August 2022). Available at: https://reproductiverights.org/maps/abortion-laws-by-state/ [accessed 17 November 2022].
33. Center for Reproductive Rights. *European Abortion Laws: A Comparative Overview* [interactive] (modified October 2022). Available at: https://reproductiverights.org/wp-content/uploads/2022/10/15381_CRR_Europe_October_2022.pdf [accessed 17 November 2022].

Summary

Women's Reproductive Rights Under the Human Rights Law: Problematical Aspects
Deimantė Juščiūtė

This master thesis analyses the concept of women's reproductive rights as well as the issues arising in this area, the emphasis being on the right to abortion. The topic is primarily revealed through the prism of the views of various international human rights bodies as well as the jurisprudence of the Supreme Court of the United States of America and the European Court of Human Rights.

Despite the fact how broadly is the concept of women's reproductive rights seen, the common understanding is that such rights are closely related to the effective enjoyment of other human rights, such as right to life, right to health, right to privacy, right not to be discriminated or right to be free from torture and inhuman, degrading treatment. Even though there is no document dedicated solely to women's reproductive rights, their elements are included into various in international treaties and conventions, such as the European Convention of Human Rights, The International Covenant on Economic, Social and Cultural Rights, The International Covenant on Civil and Political Rights or Convention on the Elimination of All Forms of Discrimination against Women.

Having said that, a huge debate has recently erupted across the globe after Poland introduced a highly restrictive abortion in 2020 as well as following the overturn of a landmark decision in *Roe v. Wade* in 2022 resulting in abortion not being acknowledged as a constitutional right anymore. Legal and medical experts have characterized this reversal in abortion access as a massive, unprecedented step back in the area of women's reproductive rights and human rights in general. Moreover, it cannot go unnoticed that these actions were heavily influenced by the courts' political dependence as well as the authority of the Catholic church or the argument of morality which generally aim to determine a woman's social role.

Despite Europe's condemnation towards *Dobbs* as well as Poland's abortion policies, according to current European Court of Human Rights jurisprudence (one of the main reasons being an excessively broad wide margin of appreciation allocated to Member States), the right to abortion is currently afforded very little legal protection beyond that afforded to women in the United States post-*Dobbs*. Nonetheless, based on recent decisions, ECtHR's position appears to be shifting and broadening. Moreover, the European Parliament recently urged the inclusion of the right to "safe and legal abortion" in the EU Charter of Fundamental Rights, arguing that denying the procedure amounted to violence

against women and girls. Furthermore, calls to codify the essence of the *Roe v*. *Wade* decision have been heard in the United States. Thus, while the US Supreme Court's decision to overturn *Roe v. Wade* may embolden abortion opponents in other countries, it cannot and should not reverse the global trend of abortion liberalization. Rather, the *Dobbs* decision has the potential to spark a new wave of popular pro-choice movements.

Annexes

Annex 1. Comparative Overview of the Grounds for Legal Access to Abortion in the United States (as per August 2022 data) (After Roe fell: Abortion Laws…, 2022)

State	On Request	Threat to Life	Severe Threat to Physical Health	Sexual Violence/ Incest	Lethal Foetal Abnormalities
Alabama		●	●		●
Alaska	●				
Arizona		●	●		
Arkansas		●			
California	●				
Colorado	●				
Connecticut	●				
Delaware	●				
Florida		●	●		●
Georgia		●	●	●	
Hawaii	●				
Idaho		●		●	
Illinois	●				
Indiana		●		●	●
Iowa		●		●	●
Kansas	●				
Kentucky		●	●		
Louisiana		●	●		●
Maine	●				
Maryland	●				
Massachusetts	●				
Michigan		●	●		
Minnesota	●				
Mississippi		●		●	
Missouri		●	●		
Montana	●				
Nebraska	●				
Nevada	●				
New Hampshire	●				
New Jersey	●				
New Mexico	●				
New York	●				
North Carolina		●	●		
North Dakota		●		●	
Ohio		●	●		
Oklahoma		●			
Oregon	●				
Pennsylvania	●				

Rhode Island	●				
South Carolina		●		●	●
South Dakota		●			
Tennessee		●			
Texas		●			
Utah		●		●	
Vermont	●				
Virginia	●				
Washington	●				
West Virginia		●	●		
Wisconsin		●			
Wyoming		●	●	●	

Annex 2. Comparative Overview of the Grounds for Legal Access to Abortion in the European Region (as per October 2022 data) (European Abortion Laws: A Comparative…, 2022)

Country	Banned	On Request Waiting Period Mandatory Counselling	Socio-Economic	Threat to Life	Threat to Health	Sexual Violence
Albania		● ● ●	●	●	●	●
Andorra	●					
Armenia		● ● ●	●	●	●	
Austria		●		●	●	
Azerbaijan		●	●	●	●	
Belgium		● ● ●		●	●	
Bosnia and Herzegovina		● ●	●	●	●	●
Bulgaria		●		●	●	
Croatia		●		●	●	●
Cyprus		●		●	●	●
Czech Republic		●		●	●	
Denmark		●	●	●	●	●
Estonia		●	●	●	●	
Finland			●	●	●	●
France		●		●	●	
Georgia		● ● ●	●	●	●	●
Germany		● ● ●		●	●	●
Greece		●		●	●	●
Hungary		● ● ●		●	●	●
Iceland		●		●	●	
Ireland		● ●		●	●	
Italy		● ● ●		●	●	
Latvia		● ●		●	●	●
Liechtenstein				●	●	●
Lithuania		● ●		●	●	
Luxembourg		● ●		●	●	
Malta	●					
Moldova		● ●	●	●	●	●
Monaco				●	●	●
Montenegro		●	●	●	●	●
Netherlands		● ●				
North Macedonia		●	●	●	●	●
Norway		●	●	●	●	●
Poland				●	●	●
Portugal		● ●		●	●	●
Romania		●		●	●	
Russian Federation		● ● ●		●	●	●
San Marino		●		●	●	●
Serbia		●		●	●	●

Slovakia		● ● ●		●	●	
Slovenia		●		●	●	
Spain		● ●		●	●	
Sweden		●		●	●	
Switzerland		●		●	●	
Turkey		●		●	●	●
Ukraine		●		●	●	●
United Kingdom			●	●	●	

Annex 3. Overview of the judgements delivered by the US Supreme Court

Griswold v. Connecticut (1965)

Facts. In 1879, State of Connecticut passed a legislation which prohibited the use of any contraception-related instrument. Estelle Griswold, the head of the State's Planned Parenthood clinic, brough a case claiming violation of the Fourteenth Amendment after being arrested for providing information, instruction, and medical advice to married people about methods of preventing conception.

Judgement. Connecticut law violates the "right to marital privacy".

Main arguments.

- Case concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees and the law seeking to achieve its goals by means of having a maximum destructive impact upon that relationship. Because a married couple's use of contraception constitutes a fundamental right, Connecticut must have proven that the law in question is compelling and absolutely necessary to overcome that right which the State failed to do;
- The right to privacy, in addition to being fundamental, is substantive and even though the Court had previously rejected the idea that the Constitution protects substantive rights (the ones not explicitly mentioned in the Bill of Rights), in *Griswold* it ruled that substantive rights do exist in non-economic areas like the right to privacy.

Eisenstadt v. Baird (1972)

Facts. Under the Massachusetts statute, distribution of contraceptives was limited only to married couples whose physicians had prescribed them. Appellant William Baird filed an appeal with the Supreme Court after being convicted of violating the statute by displaying contraceptive articles during a lecture on contraception to a group of students and giving a package of contraceptive means to a woman afterwards.

Judgement. Massachusetts statute violates Equal Protection Clause set in the Fourteenth Amendment.

Main arguments.

- Married and unmarried people cannot be treated differently. If, under *Griswold*, the distribution of contraceptive measures to married people cannot be prohibited, a prohibition on distribution to unmarried people is equally

unconstitutional, because the constitutionally protected right to privacy belongs to the individual, not the married couple.

Roe v. Wade (1973)

Facts. Applicant Norma L. McCorvey (legal pseudonym – "Jane Roe") challenged the constitutionality of the criminal abortion laws in Texas which made abortion illegal (except in cases where the mother's life was in danger) as being unconstitutionally vague and abridging her right of personal privacy. Roe claimed that she could not afford to travel to another state and had a right to terminate the pregnancy in a safe medical environment.

Judgement. Women have a constitutional right to abortion which is based on an implied right to personal privacy emanating from the First, Fourth, Ninth, and Fourteenth Amendments.

Main arguments.

- Marriage, contraception, and childbearing are activities covered in the "zone of privacy" protected by the above-mentioned Amendments which is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy" considering myriad physical, psychological, and economic stresses a pregnant woman must face. Due to abortions lying within a pregnant woman's "zone of privacy", such decision and its effectuation are fundamental rights that are protected by the Constitution;
- After reviewing the history of abortion laws, from ancient Greece to contemporary America, three justifications for banning abortions have been found: "a Victorian social concern to discourage illicit sexual conduct", protecting the health of women, and protecting prenatal life. The first two justifications are irrelevant given modern gender roles and medical technology. As for the third one, prenatal life is not within the definition of "persons" as used and protected in the US Constitution, i.e., foetus is seen as a "potential life" rather than as a person and thus is not considered to bear constitutional rights of its own. While some groups regard foetuses as people deserving full rights (a view taken by Texas), no consensus exists thus protecting all foetuses under this view of prenatal life is not sufficiently important to justify the state's banning of almost all abortions;
- The narrower state laws regulating abortion might be considered as constitutional based on the viability factor (i.e., human foetus might be "capable of meaningful life" outside the mother's womb after six months of growth). Right to abortion

should thus be balanced against the government's interests in protecting women's health and the potentiality of human life, establishing for this purpose a framework in which the woman's right to abortion and the state's right to protect potential life shift:

- During the first trimester of pregnancy, a woman's privacy right is strongest, and the state may not regulate abortion for any reason;
- During the second trimester, the state may regulate abortion only to protect the health of the woman;
- During the third trimester, the state may regulate or prohibit abortion to promote its interest in the potential life of the foetus, except where abortion is necessary to preserve the woman's life or health.

Doe v. Bolton (1973)

Facts. As per at-that-time valid Georgia Criminal Law, abortion could only be performed by a duly licensed Georgia physician, when necessary, in "his best clinical judgment" if continued pregnancy would endanger a pregnant woman's life or injure her health, the foetus would likely be born with a serious defect, or the pregnancy resulted from rape. Pursuing being denied an abortion after eight weeks of pregnancy for failure to meet any of the three conditions, Appellant Doe was challenged the constitutionality of Georgia's laws.

Judgement. Georgia's law is deemed as unconstitutional.

Main arguments.

- The ruling modified the one in *Roe's* case by stating that abortion can be performed after the point of viability as well, if necessary to protect woman's health, the definition of which needs to be understood in a broad way since "medical judgment may be exercised in the light of all factors – physical, emotional, psychological, familial, and the woman's age – relevant to the well-being of the patient. All these factors may relate to health." This health exception can be thus considered as expanding the right to abortion for any reason through all three trimesters of pregnancy.

Planned Parenthood v. Danforth (1976)

Facts. Two Missouri-licensed physicians, one of whom performs abortions at hospitals and the other of whom supervises abortions at Planned Parenthood of Central Missouri,

challenged the constitutionality of the Missouri abortion statute, specifically attacking spousal and parental consent provisions.

Judgement. Both provisions are assessed as unconstitutional.

Main arguments.

- The State has no constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of a physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent;
- Woman's right to make the decision outweighs a father's right to associate with his offspring.

Colautti v. Franklin (1979) and Thornburgh v. American College of Obstetricians and Gynecologists (1986)

Facts. Pennsylvania Abortion Control Act required every person who performs an abortion to determine, "based on his experience, judgment or professional competence", that the foetus is not viable. If such person determines that the foetus is viable, or if there is sufficient reason to believe that the foetus may be viable, then he must exercise the same care to preserve the foetus' life and health as would be required in the case of a foetus intended to be born alive, and must use the abortion technique providing the best opportunity for the foetus to be aborted alive, so long as a different technique is not necessary to preserve the mother's life or health.

Judgement. Pennsylvania requirements violate a constitutional right to privacy and deter women from making their own choices concerning abortion.

Main arguments.

- Only the doctor performing the abortion rather than court or legislature is competent to determine the viability;
- The requirement of the Act for the woman to be informed on the "particular medical risks" of the abortion procedure and the possible "detrimental physical and psychological effects" as well as the mandatory distribution of printed material on "agencies willing to help the mother carry her child to term and to assist her after the child is born and a description of the probable anatomical and physiological characteristics of an unborn child" are to be seen as an "attempt to wedge the State's message discouraging abortion into the privacy of the informed consent dialogue between the woman and her physician". The States are not free, under the guise of protecting maternal health or potential life, to

intimidate women into continuing pregnancies" which is a decision that, with her physician, is woman's to make.

Webster v. Reproductive Health Services (1989)

Facts. Appellants, state-employed health professionals and private non-profit corporations providing abortion services, challenged the constitutionality of a Missouri statute regulating the performance of abortions introducing numerous restrictions, such as prohibition to use public employees and public facilities in performing or assisting abortions unnecessary to save the mother's life, prohibition to encourage and counsel to have abortions, and physicians being mandated to perform viability tests upon women in their twentieth (or more) week of pregnancy.

Judgement. None of the challenged provisions of the Missouri legislation are unconstitutional.

Main arguments.

- The provisions have not been applied in any concrete way to restrict abortions, and thus did not raise a constitutional issue and Due Process Clause did not require states to engage in abortion business and did not create an affirmative right to governmental assistance in the pursuit of constitutional rights;
- Viability testing requirements are upheld as State's interest in protecting potential life could exist prior to viability;
- Suggestion of the US Solicitor General to use the case to overturn *Roe v. Wade* is declined.

Planned Parenthood of Southeastern Pennsylvania v. Casey (1992)

Facts. After Pennsylvania has amended its abortion control law, provisions on the parental consent and marital notification as well as 24-hour waiting period prior to the procedure were included. These provisions were challenged by several abortion clinics and physicians.

Judgement. All but one (the marital notification provision) of the Pennsylvania restrictions were upheld, however Roe's ruling was reaffirmed.

Main arguments.

- States may regulate abortions to protect the health of the mother and the life of the foetus and may outlaw abortions of "viable foetuses". Nonetheless, the basic ruling of *Roe* that the State is prohibited from banning most abortions is reaffirmed;

- A new standard to determine the validity of laws restricting abortions is imposed: whether a state abortion regulation has the purpose or effect of imposing an "undue burden", which is defined as a "substantial obstacle in the path of a woman seeking an abortion before the foetus attains viability";
- Trimester framework, set in *Roe*, is rejected, on the basis that states could pass regulations affecting the first trimester, but only to safeguard a woman's health, not to limit a woman's access to abortions.

Stenberg v. Carhart (Carhart I) (2000)

Facts. Nebraska law prohibited any "partial birth abortion" unless that procedure was necessary to save the mother's life was challenged. Violation of the law is considered a felony, resulting into the automatic revocation of doctor's license to practice medicine. Leroy Carhart, a Nebraska physician, claimed the statute to be unconstitutional due to being vague and placing an undue burden on doctors and patients.

Judgement. Nebraska's law is deemed as unconstitutional.

Main arguments.

- The ban is to be seen as failure to include a health exception threatened women's health. Even laws that ban abortions after the foetus is viable must contain a health exception which is necessary not only when the pregnancy itself creates a health risk for the woman but also "where state regulations force women to use riskier methods of abortion";
- The ban's language encompassed the most common method of second-trimester abortion, placing a substantial obstacle in the path of women seeking abortions and thereby imposing an "undue burden".

Gonzales v. Carhart and Gonzales v. Planned Parenthood Federation of America, Inc. (Carhart II) (2007)

Facts. In 2003, the Partial-Birth Abortion Ban Act was signed into law by President Bush, enforcement of which was blocked by lower instance courts due to it being deemed as unconstitutional and opposing previous ruling of the Supreme Court in *Roe* (right to abortion), *Casey* ("undue burden" criteria) and *Carhart I* (lack of health exception) cases.

Judgement. The federal ban is upheld as not unconstitutional.

Main arguments.

- The Act applies only to the specific method of the abortion, i.e., the partial-birth abortion thus the ban is not unconstitutionally vague, overbroad, or an undue burden on the decision to obtain an abortion;
- Since the US Congress found this method never to be medically necessary, a health exception could validly be omitted from the ban, even when "some part of the medical community" considers the procedure necessary.

Whole Woman's Health v. Hellerstedt (2016)

Facts. In 2013, the State of Texas passed a law designed to shut down most of the state's abortion clinics by medically unnecessary restrictions leaving only less than ten clinics opened in the whole state.

Judgement. Texas law must be struck down, due to imposing undue burden.

Main arguments.

- Law does not "confer medical benefits that are sufficient to justify the burdens they impose on women seeking to exercise their constitutional right to an abortion". The requirements set for the abortion clinics to meet the standards similar as for ambulatory surgical centres did not lower the risks of abortions compared to those performed in non-surgical centres and thus are to be seen as essentially arbitrary;
- Justice Ruth Bader Ginsburg affixed that "modern abortions are so safe relative to other medical procedures, including childbirth itself, that any law that made accessing abortions more difficult in the name of safety could not pass judicial review".

Dobbs v. Jackson Women's Health Organization (2022)

Facts. In 2018, Mississippi "Gestational Age Act" was passed, prohibiting all abortions, with few exceptions, after 15 weeks' gestational age. The only licensed abortion facility in Mississippi, i.e., Jackson Women's Health Organization, has challenged the law on the grounds it violates Supreme Court precedent prohibiting states from banning abortions prior to viability.

Judgement. Constitution does not confer a right to abortion. Decisions in *Roe v. Wade* and *Planned Parenthood of Southeastern Pa. v. Casey* are overruled and, moreover, *Roe* is deemed as "egregiously wrong".

Main arguments.

- The right to abortion is neither deeply rooted in the nation's history nor an essential component of "ordered liberty." The five factors to overrule *Roe v. Wade* and *Planned Parenthood v. Casey* are as follows: (1) they "short-circuited the democratic process"; (2) both lacked grounding in constitutional text, history, or precedent; (3) the tests they established were not "workable"; (4) they caused distortion of law in other areas; (5) overruling them would not upend concrete reliance interests.
- Since the Constitution is silent on the right to abortion, the question of whether abortion should be permitted or prohibited is one for ordinary political debate rather than constitutional adjudication. Justice Kavanaugh, in his concurring opinion, summarised this argument stating that "on the issue of abortion, the Constitution is neither pro-life nor pro-choice. The Constitution is neutral <…>".

Year	Case	Right to Abortion	Right to Privacy	Prohibition to Discriminate	Undue Burden	No Mandatory 3rd Party Consent	No Violation Found
1965	*Griswold v. Connecticut*		•				
1972	*Eisenstadt v. Baird*			•			
1973	*Roe v. Wade*	•	•				
1973	*Doe v. Bolton*	•	•				
1976	*Planned Parenthood v. Danforth*					•	
1979	*Bellotti v. Baird*					•	
1979	*Colautti v. Franklin*	•					
1983	*City of Akron v. Akron Center for Reproductive Health*					•	
1986	*Thornburgh v. American College of Obstetricians and Gynecologists*	•					
1989	*Webster v. Reproductive Health Services*						•
1991	*Rust v. Sullivan*						•
1992	*Planned Parenthood of Southeastern Pennsylvania v. Casey*					•	

2000	*Stenberg v. Carhart (Carhart I)*				•		
2003	*Gonzales v. Carhart*						•
2003	*Gonzales v. Planned Parenthood Federation of America, Inc.* (*Carhart II*)						•
2016	*Whole Woman's Health v. Hellerstedt*				•		
2022	*Dobbs v. Jackson Women's Health Organization*						•

Annex 4. Overview of the outcomes of judgements delivered by the ECtHR

Paton v. United Kingdom (1980)

Facts. The Applicant's wife was pregnant and planned to have a legal abortion without his consent. He claimed UK violated, *inter alia*, the right to life (Articles 2 ECHR) by permitting abortion at all and his rights to private and family life (Article 8), due to UK law not requiring his consultation on the abortion and not permitting him to participate in appointing clinical staff involved in the process for approving and carrying out the procedure.

Judgement. Complaint is inadmissible, due to being manifestly ill-founded.

Main arguments.

- Applicant, as potential father, was so closely affected by the termination of his wife's pregnancy that he may claim to be a "victim", within the meaning of Article 25 of ECHR;
- Article 2: the "life" of the foetus is intimately connected with, and cannot be regarded in isolation from, the life of the pregnant woman. If Article 2 were held to cover the foetus and its protection under this Article were, in the absence of any express limitation, seen as absolute, an abortion would have to be considered as prohibited even where the continuance of the pregnancy would involve a serious risk to the life of the pregnant woman. This would mean that the "unborn life" of the foetus would be regarded as being of a higher value than the life of the pregnant woman. The "right to life" of a person already born would thus be considered as subject not only to the indicated limitations but also to a further, implied limitatation;
- Article 8: "any interpretation of the husband's and potential father's right, under Article 8 of the Convention, to respect for his private and family life, as regards an abortion which his wife intends to have performed on her, must first of all take into account the right of the pregnant woman, being the person primarily concerned in the pregnancy and its continuation or termination, to respect for her private life".

Jean-Jacques Amy v. Belgium (1988)

Facts. Applicant, a medical doctor, was introduced a prison sentence due to performing a voluntary termination of pregnancy on a 14-year-old person. He appealed applied to ECtHR, claiming the violations of Articles 2, 3 and 8 of ECHR and urging that the life of the foetus must be weighed against the right to life and the right to privacy of the

mother, that the right to life guaranteed by Article 2 extended to the right to physical and mental health and, moreover, that the Belgian legislation on abortion is to be considered as obsolete.

Judgement. Complaint is inadmissible, due to being manifestly ill-founded.

Main arguments.

- Applicant cannot be deemed to be an indirect victim of the violation of the above-mentioned rights and does not have a mandate to act on behalf of his patient in question.

Boso v. Italy (2002)

Facts. Applicant brought an action against his wife after she terminated her pregnancy despite his opposition. He claimed the infringement of Article 2 (due to foetus being deprived of its life), 8 (due to Italian legislation on the voluntary termination of pregnancy taking no account of any opposition from the father) and 12 (due to the father being prevented from founding a family by affording a woman the possibility of an abortion) of ECHR.

Judgement. Complaint is inadmissible, due to being manifestly ill-founded.

Main arguments.

- Applicant can be assigned the status of a victim, due to being closely affected by the termination of his wife's pregnancy;
- "Even supposing that, in certain circumstances, the foetus might be considered to have rights protected by Article 2 of the Convention", in this particular case the pregnancy was terminated in conformity with national laws which contents allow to state that the fair balance has been struck "between, on the one hand, the need to ensure protection of the foetus and, on the other, the woman's interests";
- It has already been previously acknowledged that the "legislation regulating the interruption of pregnancy touches upon the sphere of private life", since "whenever a woman is pregnant her private life becomes closely connected with the developing foetus", however the potential father's right to respect for his private and family life cannot be interpreted so widely as to embrace the right to be consulted or to apply to a court about an abortion which his wife intends to have performed on her. Thus, any interpretation of a potential father's rights under Article 8 of ECHR when the mother intends to have an abortion should above all consider her rights, as she is the person primarily concerned by the

pregnancy and its continuation or termination. Accordingly, any possible interferences with the right protected under Articles 8 and 12, is justifiable as being necessary for the protection of the rights of another person.

Silva Monteiro Martins Ribeiro v. Portugal (2004)

Facts. The Applicant, then an obstetrics nurse in a hospital of Porto, who was arrested and later charged with the offence of performing illegal abortions, filed an application to ECtHR, claiming various articles of ECHR to be in violation, such as Article 7 (due to Portuguese law on abortions on the basis of which she was convicted, being unjust and obsolete, and violating Articles 2, 3, 8, 13, 14 and 18 of ECHR), Article 9 (due to violation of her freedom of conscience as a woman believing that women should be able to benefit from pregnancy termination services) and Article 14 (due to the fact that in another European State she would not have been convicted on such basis and thus was the victim of discrimination).

Judgement. Complaint is inadmissible, due to being manifestly ill-founded.

Main arguments.

- Articles 7 and 14: the offenses for which the Applicant was convicted, and in particular that of illegal abortion, were clearly defined by the relevant Portuguese criminal legislation. The Applicant could therefore have known that her actions would result in criminal liability. In a delicate area such as the one in question where national laws differ considerably, the Contracting States must enjoy a certain discretionary power;
- Article 9: the right to behave in the public domain in a way dictated by one's belief is not always guaranteed by ECHR. In this case, the Applicant cannot assert or impose on others her personal convictions in this matter to justify her actions.

Vo v. France (2004)

Facts. Applicant's amniotic sack was punctured due to a mix-up with another patient with the same surname, necessitating an abortion procedure on health grounds. Applicant has thus argued that her child's unintentional death should have been classified as manslaughter.

Judgement. No violation of Article 2 (right to life) of ECHR.

Main arguments.

- It is neither desirable, nor even possible to rule on whether a foetus should be considered a person under this article, considering the issue that there is no European consensus on the scientific and legal definition of the beginning of life as well as on the nature and status of the embryo and/or foetus, and, at best, it may be regarded as common ground between States that the embryo/foetus belongs to the human race;
- Relying on the existing case-law, the unborn child is not regarded as a "person" directly protected by Article 2 of ECHR and if the unborn do have a "right" to "life", it is implicitly limited by the mother's rights and interests. ECHR institutions, however, have not "ruled out the possibility that in certain circumstances safeguards may be extended to the unborn child";
- Although legislation regulating the termination of pregnancy touches upon the sphere of private life, protected by ECHR Article 8(1), this provision "cannot be interpreted as meaning that pregnancy and its termination are, as a principle, solely a matter of the private life of the mother" but rather "the issue is determined by weighing up various, and sometimes conflicting, rights or freedoms claimed by a woman, a mother or a father in relation to one another or *vis-à-vis* an unborn child".

Tysiąc v. Poland (2007)

Facts. Tysiąc, a severely visually impaired Applicant, was denied an abortion on the grounds to protect her physical health despite the fact that even though several doctors concluded that the pregnancy and delivery posed a serious risk to her eyesight, they firstly refused to issue a certificate for the pregnancy to be terminated and after they finally did, Tysiąc's request to have the procedure was still declined, resulting into applicant having no other choice than to carry her pregnancy to term, conditioning significant deterioration of her eyesight with the risk of blindness.

Judgement. There has been a violation of Article 8 (right to respect for private and family life) of ECHR.

Main arguments.

- Polish government had failed to fulfil its positive obligation, under Article 8, i.e., to ensure the applicant's right to respect for her private life, by not establishing an effective procedure through which the applicant could have appealed her doctors' refusal to grant her request for abortion;

- The key components of such procedure are as follows: (1) it should guarantee to a pregnant woman the right to be heard in person and to have her views considered, (2) the body reviewing her appeal should issue written grounds for its decision, and (3) recognizing "the time factor is of critical importance" in decisions involving abortion, the procedure should ensure that such decisions are timely.

A, B and C v. Ireland (2010)

Facts. Three women, known as A, B and C, challenged Ireland's restrictive abortion laws, arguing that the criminalisation and inaccessibility of abortion in Ireland endangered their health, well-being and life breaching their rights under the ECHR. The Applicant A considered that having another child would imperil her successful reunification with her first child who was in the care of the state at that moment; the Applicant B was not prepared to become a parent; the Applicant C was in remission from cancer at the moment of becoming pregnant and before she was aware of the latter, she underwent a series of check-ups contraindicated during pregnancy and was not able to get confirmation afterwards whether her life would be at risk if she continued with the pregnancy or how the foetus might have been affected by the said tests.

Judgement. Since Applicants A and B could lawfully travel to England for an abortion and access pre- and post-abortion information and medical care in Ireland, a fair balance was struck and there was no violation of Article 8.

In terms of Applicant C, there has been a violation of Article 8.

Main arguments.

- Regarding Applicants A and B: even though Irish laws prohibiting Applicants from terminating their pregnancies in Ireland for health and wellbeing reasons interferes with their right to respect for their private lives, the Court agrees with the Government's argument that the prohibition on abortion reflects the moral aims of Irish society. Significant discretion was thus assigned to the Government to balance the conflict between the rights of Applicant A and B and the aim of the State to restrict abortion;
- Regarding Applicant C: Ireland failed to comply with its obligations and has violated Applicant's rights as described in the Article 8, due to inadequate medical consultation and litigation options proposed by the Government to establish Applicant C's qualification for a lawful abortion in Ireland: (1) no criteria had been laid down in law by which a doctor or woman could reasonably measure a "real and

substantial" risk to her life, (2) no framework was in place to resolve any difference of opinion between a woman and her doctor or between doctors, (3) Irish courts are not the appropriate fora to determine whether a woman qualifies for an abortion which is legal in the State as this would inevitably result in the Irish constitutional courts deciding on case by case basis legal criteria for medical procedures, meanwhile, as also confirmed by the Irish courts, it is inappropriate to require women to take on such complex constitutional proceedings if they can establish that their life is at risk.

R.R. v. Poland (2011)

Facts. Applicant R.R. was 18 weeks pregnant when following an ultrasound she learned of a cyst on the foetus' neck, however afterwards she was not guaranteed an access to prenatal diagnostic examinations and information, which would have enabled her to decide whether to seek a legal abortion, due to severe foetal impairment. When the Applicant was finally able to obtain the necessary test and received a confirmation on the foetus impairment, she was already in the 25th week of pregnancy and was denied an abortion as the foetus had reached viability, thus she had to carry her pregnancy to term.

Judgement. There has been a violation of prohibition of inhumane and degrading treatment (Article 3 ECHR) and violation of the woman's private life (Article 8), as due to being denied a prenatal genetic examination, she is deprived of the ability to make extremely important and private decisions about her own life.

Main arguments.

- Article 3: the Applicant is acknowledged to have suffered greatly due to (1) the prolonged denial of prenatal genetic testing, (2) having to endure weeks of painful uncertainty because of the health professionals' procrastination without her concerns being properly acknowledged and addressed by the clinicians, and (3) having been in a situation of "great vulnerability" as she was "deeply distressed by information that the foetus could be affected with some malformation". Moreover, R.R. was "shabbily treated by the doctors dealing with her case," which made her treatment humiliating. Her suffering was aggravated "by the fact that the diagnostic services which she had requested early on were at all times available and that she was entitled as a matter of domestic law to avail herself of them". It was stressed that "the nature of the issues involved in a woman's decision to terminate a pregnancy is such that the time factor is of critical importance";

- Article 8: Poland failed to put in place an effective legal and procedural framework that guarantees that relevant, full, and reliable information is available to women to make informed decisions about their pregnancy. Under Article 8 women have the right to make an informed decision about whether to access lawful abortion services and found that access to relevant information is a critical requirement to enable women to exercise this right. It underlined that the right to information is decisive for the exercise of personal autonomy, including in the context of decisions relevant to an individual's health and quality of life;
- Poland must ensure that women's access to legal reproductive health services is not jeopardized by medical professionals' refusals of care with reference to the "conscience clause" under Polish law.

P. and S. v. Poland (2013)

Facts. 14-year-old P. became pregnant after being sexually assaulted by a classmate. With the support of her mother, S., she attempted to have a legal abortion done only to be refused this procedure by doctors' as well as not being provided a referral to a clinician who would perform it. P. and S. has been receiving a distorted information about the legal requirements to access abortion case deliberately provided by the hospital staff which, moreover, has later disclosed P.'s personal and medical data to the press, resulting into her and her mother being harassed by doctors, anti-abortion groups, and representatives of the Catholic Church. At one point P. was removed from her mother's custody and detained in a juvenile centre. P. managed to receive a legal abortion following an intervention from the Ministry of Health in a remote hospital, 500 km from her home, where she was not registered as a patient and did not receive information about the procedure or any post-abortion care.

Judgement. Violations of the rights to freedom from inhumane and degrading treatment (Article 3), to respect for private life (Article 8), and to liberty (Article 5) under the ECHR were found.

Main arguments.

- Article 3: P. was treated by the authorities in a deplorable manner and her suffering was inhuman, degrading and humiliating, with no proper regard for her vulnerability and young age and her views and feelings as a rape victim;
- Article 8: even though the Court has held that Article 8 "cannot be interpreted as conferring a right to abortion", the prohibition of abortion when sought for reasons

of health and/or well-being falls within the scope of the right to respect for one's private life and accordingly of Article 8.

Cases against Poland (2021)

The Court has received over 1,000 similar applications) have been received by the Court. The applications have been classified into three groups of four applications:

- *K.B. v. Poland* and 3 other applications;
- *K.C. v. Poland* and 3 other applications;
- *A.L. - B. v. Poland* and 3 other applications.

Facts. The background of the above cases concerns the application made in June 2017 by a group of parliamentarians to the Constitutional Court to have several provisions of the Family Planning (Protection of the Human Foetus and Conditions Permitting Pregnancy Termination) Act of 1993 concerning legal abortion on the grounds of "severe and irreversible foetal defect or incurable illness that threatens the foetus' life" was unconstitutional". Although these proceedings were discontinued, in November 2019 a similar application was lodged by the parliamentarians once again. In October 2020 the Constitutional Court held that the relevant provisions were incompatible with the Constitution (this judgment came into force on 27 January 2021, after the applications with ECtHR had been lodged).

The applicants of the above mentioned applications to ECtHR are twelve Polish nationals born between 1980 and 1993 arguing the violations of Article 8 (right to respect for private and family life) and Article 3 (prohibition of inhuman or degrading treatment) of ECHR, and claiming that they are potential victims of a violation of their rights as in case of pregnancy they would be obliged to carry the foetus to term, that the restrictions introduced were not "prescribed by law" as the Constitutional Court was irregularly composed, given that three members had been elected in breach of the Constitution, and was not impartial (as the current Court is close to the populist Law and Justice government), and that women face a distress caused by the prospect of them being forced to give birth to an ill or dead child.

S.F.K. v. Russia (2022)

Facts. The 20-year-old Applicant was forced to have an abortion by her parents, even though she had made it clear to them and at the public hospital where the intervention took place that she wanted to continue with the five- week pregnancy. She has lodged a number

of complaints against her parents and the medical personnel, but no criminal proceedings were ever instituted as the relevant authorities found that no elements of a crime could be established and that her parents had acted in the best interests of their child. Before the Court, she submitted that the forced abortion and inadequate medical care before and afterwards, had amounted to inhuman and degrading treatment.

Judgement. There has been a violation of Article 3 ECHR (prohibition of inhuman and degrading treatment).

Main arguments.

- Applicant's abortion has been carried out against her will and thus is in breach of all the applicable medical rules, as well as due to such a forced abortion being contrary to her human dignity;
- This kind of actions are to be evaluated as an egregious form of inhuman and degrading treatment which had not only resulted in a serious immediate damage to her health – that is the loss of her unborn child – but had also entailed long-lasting negative physical and psychological effects;
- There is also a violation of the procedural aspect of Article 3, due to State having failed to discharge its duty to investigate the ill-treatment that the applicant had endured.

Year	Case	Right to Privacy	Prohibition of Inhumane and Degrading Treatment	Right to Liberty	No Violation Found
1988	*Jean-Jacques Amy v. Belgium*				•
2002	*Boso v. Italy*	• (woman's right to privacy)			•
2004	*Silva Monteiro Martins Ribeiro v. Portugal*				•
2004	*Vo v. France*				•
2007	*Tysiąc v. Poland*	•			
2010	*A. B. and C. v. Ireland*	•			
2011	*R.R. v. Poland*	•	•		
2013	*P. and S. v. Poland*	•	•	•	

2022	*S.F.K. v. Russia*		•		
2022	*G.M. and Others v. the Republic of Moldova*		•		