Rights, Lawfare and Reproduction: Reflections on the Polish Constitutional Tribunal’s Abortion Decision

Abstract
In 2020, the Constitutional Tribunal of Poland held that the legislation which permitted abortion in cases of ‘fatal foetal anomaly’ was an unconstitutional interference with the right to life of the foetus. This article examines the recent decision banning abortion on the grounds of foetal anomaly, arguing that this decision is part of a broader scheme of Polish and transnational anti-abortion lawfare. This lawfare seeks both to (re)shape Polish law in an anti-abortion mould, and to take advantage of ‘gaps’ in European and international human rights law standards on abortion in order to claim rights-compliance for law and policy that, in reality, restricts access to abortion in a manner incompatible with international human rights law.

Key words
Polish Constitutional Tribunal, abortion, lawfare, women’s rights, reproductive rights, Poland, international human rights law

Introduction
Since 1993, abortion has been lawful in Poland on three grounds only: where the pregnancy posed a risk to the life or health of the pregnant person, where prenatal examinations or other medical conditions indicate that there is a high probability of a severe and irreversible foetal defect or incurable illness that threatens the foetus’ life (which we will call ‘fatal foetal anomaly’), and where there are reasons to suspect that the pregnancy is a result of an unlawful act (i.e. rape or incest). These ‘grounds’ are subject to stringent procedural requirements for accessing abortion and since 1993 ‘social’ reasons as grounds for accessing lawful abortion are no longer recognised.

1 Family Planning, Protection of the Foetus and Conditions for the Admissibility of Abortion 1993, Art 4a para 1(2) (Poland); Ustawa z dnia 7 stycznia 1993 r. o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży, 4a ust. 1 pkt 2
In reality, abortion has long been highly inaccessible in Poland, even for people who ‘satisfy’ these legislative grounds.\(^2\) This is not only because of the narrow way in which the legislative grounds are interpreted and applied, but also because the grounds themselves are overly restrictive, as indicated by the fact that around 74% of women who left Poland to access abortion abroad stated that they sought to end their pregnancy for socio-economic reasons.\(^3\) For years, women\(^4\) without the means to pay for private abortion have struggled to access abortion within the very narrow confines of the law, and feminist networks of care and activism have been key to enabling abortion travel and safe self-management of abortion through the use of medication.\(^5\) In 2019 for example, slightly over one thousand abortions were performed legally in Poland, which equates to 1 per cent or less of all abortions among Polish women before the recent change in law.\(^6\)


\(^3\) Ideologia, ‘Aborcja w Polsce i na Świecie. Fakty i liczby.’ https://ideologia.pl/aborcja-w-polsce-i-na-swiecie-fakty-i-liczby/#:~:text=100%2D200%20tys.,oscyluje%20wok%C3%B3%C5%82%207%2D13%20tys.

\(^4\) Throughout this piece we use the terms women, woman, people, pregnant women, pregnant woman, and pregnant people interchangeably to recognise that abortion law has direct effects on the reproductive autonomy of all those who are or can become pregnant, regardless of their gender identity.

\(^5\) See for example Human Rights Committee, Concluding Observations: Poland (27\(^{th}\) October 2010) UN Doc. CCPR/C/POL/CO/6, para. 12; Committee on Economic, Social and Cultural Rights, Concluding Observations: Poland (2\(^{nd}\) December 2009), UN Doc. E/C.12/POL/CO/5, para. 28; Committee against Torture, Concluding Observations: Poland (23\(^{rd}\) December 2013) UN Doc. CAT/C/POL/CO5-6, para 23; Report of the Working Group on the issue of discrimination against women in law and in practice on its visit to Poland (25\(^{th}\) June 2019), UN Doc. A/HRC/41/33/Add.2, paras 49-54.

there were between 100,000 and 200,000 unlawful abortions in Poland, and many more Polish women (15% of all abortions) travelled to avail of abortion.\(^7\)

International human rights bodies have frequently criticised Poland for its failure to make abortion available, either through overly restrictive ‘grounds’ or by failing to regulate conscientious objection and the disruptive behaviours of objecting physicians.\(^9\) However, even as international human rights bodies were recognising the human rights violations inherent in the Polish law and its implementation in practice, domestic anti-abortion politics were growing in prominence and ambition. In autumn 2020 this campaign recorded a significant success. In proceedings initiated by legislators who had failed to reform the law in Parliament, the Constitutional Tribunal held that legislation which permitted abortion in cases of ‘fatal foetal anomaly’ was an unconstitutional interference with protection of the right to life of the foetus, and thus the grounds for access to lawful abortion were reduced to two.\(^10\) Events since the Constitutional Tribunal decision show clearly the serious impact that even a seemingly-modest (although, for women, devastating) anti-abortion advance has on the real-life availability of abortion care. Since January 2021, when the judgment came into effect, women have been denied abortions on still-lawful grounds (risk to health or life) by doctors who claim to fear prosecution and who do not understand the limited legal effects of the decision.\(^11\)

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\(^7\)Ideologia (n 3).


\(^9\) See for example CEDAW, Concluding Observations: Poland (2\(^{nd}\) February 2007) UN Doc CEDAW/C/POL/CO/6, para 25; CEDAW, Concluding Observations: Poland (14\(^{th}\) November 2014) UN Doc CEDAW/C/POL/CO/7-8, para 36; CAT, Concluding Observations: Poland (29\(^{th}\) August 2019) UN Doc CAT/C/POL/CO/7, para 34(e).


\(^11\) Various reports on this issue are available through charities like Abortion without Borders (Aborcja bez Granic) and news reports. See for example: Magdalena Chrzczenowicz, ‘Po wyroku TK z pomocy
precisely the domino effect on access to abortion that anti-abortion activism seeks to achieve. No doubt prompted by the logical implications of the Tribunal's decision, several lawyers and legal organisations have already warned that the decision will lead to further restrictions of abortion, but politicians vowed not to consider it at this time.

In this paper, we argue that this decision is part of a broader scheme of anti-abortion lawfare in Poland. We argue that such lawfare seeks to achieve two things. First to (re)shape Polish law in an anti-abortion mould. Second, to take advantage of 'gaps' in European and international human rights law standards on abortion in an attempt to claim that law and policy restrict access to abortion.


abortion in a manner incompatible with international human rights law is, in fact, rights-compliant.

I. Abortion in Poland: A Long History of Lawfare

Comoroff and Comoroff characterise lawfare as “the resort to legal instruments, to the violence inherent in the law, to commit acts of political coercion, even erasure”; as something “put to work…to make new sorts of human subjects…[by] those equipped to play most potently inside the dialectic of law and disorder”. This describes pithily the decades-long efforts to make abortion effectively inaccessible in Poland, and to re-narrate the Polish constitutional order as one in which the foetus is centered as the primary rights-holder in abortion law and policy. Such a manoeuvre had been successful in other jurisdictions, notably in Ireland, and is a powerful mode of shifting the politico-legal discourse on abortion from one of reproductive autonomy to one of pronatalism in which abortion is an exceptional, marginal, and heavily regulated medico-legal event, quite at odds with the empirical reality of abortion as a part of everyday reproductive life.

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16 See for example Sydney Calkin and Monika Ewa Kiminska, ‘Persistence and Change in Morality Policy: The Role of the Catholic Church in the Politics of Abortion in Ireland and Poland’ (2020) 124(1) Feminist Review 86


The everyday unavailability of abortion under the 1993 Act is one product of the long campaign of what Dorota Szelewa has described as the “re-masculinization of public discourse and re-traditionalization of gender roles which followed the collapse of state socialism in 1989”\(^\text{19}\). In the context of the transitional state, restricting abortion became a major conservative priority, and concerted efforts were made to ensure that newly-democratic Poland would represent a sharp reversal of the situation under the previous law when abortion was widely available without gestational limit and on extremely broad grounds.\(^\text{20}\) As a result, there has been a consistent effort to make abortion less and less available in law and in practice. This took a number of forms, not all of which were ‘law’ per se. In 1990 the Minister for Health introduced an executive act imposing strict ‘procedural’ requirements (including consultation with three medical practitioners and a psychologist) to access abortion, and permitting ‘conscientious objection’ by healthcare workers without regulating it in order to ensure access to and continuity of abortion care.\(^\text{21}\) In December 1991 the Supreme Chamber of Medicine adopted a Code of Medical Ethics\(^\text{22}\) that permitted abortion as a matter of medical ethics on far narrower grounds than the law then in force (which allowed abortion in broad circumstances). These executive and administrative changes did not, of course, unsettle the legislative text per se, but they operated as effective limiters on the availability of abortion. Indeed, this was their function.\(^\text{23}\) They thus represent classical machinations of lawfare—they constituted the use, by those with formal or informal juridical power, of law and law-like instruments to construct a new legal subjectivity for the foetus and marginalise women, especially those who sought to end their pregnancies.


\(^{21}\) Executive Act of the Minister of Health and Social Welfare of 30 April 1990 on the qualifications of the doctors performing termination of pregnancy and the mode of issuing the medical documents certifying the conditions allowing for performing the treatment, Journal of Laws, no 29, item 178.


\(^{23}\) See Szelewa (n 21); Krajewska (n 2)
At the same time, extensive lawfare was also ongoing in the legislative sphere, including by seeking to recognise legal capacity in the foetus from conception and to make any attempt to end foetal life a criminal offence,\textsuperscript{24} and trying to restrict abortion except in cases where there was a risk to the pregnant person’s life.\textsuperscript{25} This was the legislative atmosphere in which the Family Planning, Protection of the Foetus and Conditions for the Admissibility of Abortion 1993 was adopted, which both outlined the grounds for access to abortion (mentioned above) and prescribed procedural requirements including certification by an independent doctor, certification by a prosecutor where pregnancy resulted from a criminal act, requirements that abortion be carried out in hospitals, and gestational limits to apply in certain circumstances. The same act criminalised abortion if not conducted in compliance with its provisions.\textsuperscript{26} At the same time, legal instruments began to use terminology such as ‘conceived child’ and ‘mother’ instead of foetus and pregnant woman.\textsuperscript{27} Thus, even though the 1993 law did not prohibit abortion entirely, its provisions and procedures were sufficient to make abortion effectively unavailable for most women, and the lawfare objective of constructing the foetus as a legal subject (and by extension the pregnant woman as a ‘mother’) was well advanced.

The 1993 law did not signal the end to legislative lawfare attempts, however. In 1997, so-called procedural requirements for accessing abortion were tightened,\textsuperscript{28} and in 2011 a Bill to prohibit

\begin{footnotesize}
\textsuperscript{24} The ‘Unborn Child Protection Bill’ 1989.
\textsuperscript{25} See the analysis in Wanda Nowicka, “Roman Catholic fundamentalism against women’s reproductive rights in Poland” (1996) 4 Reproductive Health Matters 21. It is worth noting that prior to 1989 abortion law in Poland was much more liberal and abortion was more accessible to women; the Conditions of Lawful Pregnancy Termination (1956) decriminalised abortion for women and also established socio-economic grounds for abortion. For extended analysis see Krajewska (n 2).
\textsuperscript{26} Article 7, The Family Planning, Protection of the Foetus and Conditions for the Admissibility of Abortion 1993 (n 1)
\textsuperscript{27} Ibid.
\end{footnotesize}
abortion completely was introduced to Parliament, which rejected it.\textsuperscript{29} Similar attempts either to limit or to prohibit abortion entirely were made in 2013,\textsuperscript{30} 2015,\textsuperscript{31} 2016,\textsuperscript{32} 2017 – 2019.\textsuperscript{33} All were unsuccessful, but all demonstrated the tenacity of anti-abortion campaigners and their persistence in seeking to ensure that the law constrained abortion to the greatest extent possible even though, in reality, the 1993 Act and the practices, interpretations, and discourses in which it was embedded were such that publicly-funded abortion was largely inaccessible to women in Poland. This resulted from legal and procedural barriers, institutional and physician objection, and a practice of some physicians claiming conscientious objection in the public sphere but performing abortions for payment in private settings, sometimes clandestinely.\textsuperscript{34} Although these legislative efforts were not successful, they were all underpinned by argumentation (about the constitution, about rights, and ‘protecting’ women) that reappear in arguments before the Constitutional Tribunal considered in Part III below.

II. European and International Human Rights Law on Abortion

\textsuperscript{29} Obywatelski projekt ustawy o zmianie ustawy o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży oraz niektórych innych ustaw, druk nr 422, 2011.

\textsuperscript{30} Obywatelski projekt ustawy o zmianie ustawy o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży, druk nr 1654, 2013. Bill by Kaja Godek (see below)

\textsuperscript{31} Obywatelski projekt ustawy o zmianie ustawy o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży oraz niektórych innych ustaw, druk nr 3806, 2015. The bill was formulated by STOP Abortion, pro-life organisation with Kaja Godek as their leader (prominent pro-life activist in Poland). The bill was rejected by the Parliament, though majority of the Law and Justice Party voted in favour of it.

\textsuperscript{32} Obywatelski projekt ustawy o zmianie ustawy z dnia 7 stycznia 1993 r. o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży oraz ustawy z dnia 6 czerwca 1997 r. - Kodeks karny, druk nr 784, 2016.

\textsuperscript{33} Obywatelski projekt o zmianie ustawy z dnia 7 stycznia 1993 r. o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży, druk nr 36, 2019.

\textsuperscript{34} For women with capacity to pay, ‘informal’ abortion provision is available with many physicians refusing to provide abortion in the public health setting but providing it for a fee and without official documentation. See for example Wanda Nowicka ‘Ustawa antyaborcyjna w Polsce – stan prawny i rzeczywistość. In: Nowicka W (ed) Prawa Reprodukcyjne w Polsce: Skutki ustawy antyaborcyjnej (Warsaw: Polish Federation for Women and Family Planning 2007)
Parallel to these domestic political developments, pro-choice advocates turned to international human rights bodies—often in collaboration with NGOs like the Helsinki Foundation of Human Rights or Centre for Reproductive Rights—to try to internationalise attempts to secure access to safe, lawful abortion in Poland. Article 9 of the Polish Constitution places a direct obligation on the state to respect and act in accordance with international laws to which Poland is a party, including international human rights law. This complements Article 27 of the Vienna Convention on the Law of Treaties which makes it clear that a party may not invoke domestic law in order to justify failure to perform an international obligation, and means in practice that where there is inconsistency between domestic and international law, the state should bring its domestic law into line with its international obligations. As has been the experience in other settings, efforts to establish incompatibility with international human rights law can thus be read as an attempt to develop a further argument for domestic law reform.

The European Court of Human Rights was a key focus of these efforts, but while the Court found Poland to be in violation of the Convention in important cases such as Tysiac v Poland and RR v Poland. The case of Tysiac concerned the refusal of a public hospital to perform abortion on severely visually impaired Ms Tysiac’s third pregnancy which involved a serious risk to her eyesight. The applicant claimed that this violated Article 8 (the right to private and family life), Article 3 (the right to be free from torture, inhuman and degrading treatment) and Article 13 (the right to effective remedy). In RR, the applicant complained of Poland’s failure to guarantee her

35 See broadly Gesine Fuchs, ‘Using strategic litigation for women’s rights: Political restrictions in Poland and achievements of the women’s movement’ (2013) 20(1) European Journal of Women’s Studies 21

36 The Constitution of the Republic of Poland, 2nd April 1997, Article 9: ‘The Republic of Poland shall respect international law binding upon it.’

37 See the extensive work on this undertaken in the Abortion Rights Lawfare in Latin America project, hosted by the Centre on Law and Social Transformation in the University of Bergen: https://www.lawtransform.no/project/abortion-rights-lawfare-in-latin-america/

38 ECtHR, Tysiac v Poland, App no 5410/03, 20th March 2007.

39 ECtHR, RR v Poland, App no. 27617/04, 28th November 2011.
access to prenatal diagnostic and relevant information which would have enabled the applicant to decide whether she should seek a legal abortion on the ground of fatal foetal anomaly. The judgments were modest and confirmed the Strasbourg court’s tactic of ‘deciding not to decide’ whether the ECHR guarantees women a right to access abortion in any circumstances. Instead, the Court held that whether and to what extent abortion is legally permitted is a matter for the state to decide—in this case Poland—but that if abortion is legally available under domestic law, it must be accessible in practice. In other words, the Court adopted a highly proceduralised approach to access to abortion, later reinforced in *P and S v Poland* and *A, B and C v Ireland*, but failed to lay down (and has still refused to establish) even a minimum entitlement of access to abortion in situations of exigency like risk to the life or health of the pregnant person, or severe or fatal foetal diagnosis. This approach clearly left space for regression in national abortion laws—space that, as will be shown in Part III, anti-abortion advocates have sought to take advantage of in Poland—and lags behind international human rights law.

Although it is commonly stated that there is no “right to abortion” in international human rights law, the reality is that there is now a considerable corpus of international standards that makes it very clear that states have a substantial set of obligations relating to abortion, and that restricting access to abortion can constitute a violation of internationally protected rights. Foremost among these standards is the obligation to take steps to reduce maternal mortality and morbidity, and to

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42 ECtHR, *P and S v Poland*, App No 57375/08, 30th October 2012.


44 CESCR, General Comment No 22 on the right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social and Cultural Rights) (2nd May 2016), UN Doc. E/C/12/GC/22,
ensure that women do not have to resort to unsafe abortion.\textsuperscript{45} States must review and, where necessary, revise their laws to ensure that this obligation is met.\textsuperscript{46} It is discriminatory to refuse to make available health care that only women need,\textsuperscript{47} and there is a growing recognition that the full decriminalisation of abortion is required to ensure that women’s rights are respected, protected and fulfilled.\textsuperscript{48}

Across the human rights treaty bodies and special procedures, there is a growing realisation that dominant modes of regulating abortion—including criminalisation and restrictive ‘grounds’—are harmful to and incompatible with rights, including the right to life. The clearest statement of this to date is paragraph 8 of the UN Human Rights Committee’s General Comment No. 36 on the right to life,\textsuperscript{49} in which the Committee made very clear states’ substantial human rights obligations

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  \item para 49; Committee on the Rights of the Child, General Comment No. 4 on adolescent health and development (1\textsuperscript{st} July 2003), UN Doc. CRC/GC/2003/4, paras. 6, 9, 24 and 30-3.
  \item \textsuperscript{45} HRC General Comment No 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life (30\textsuperscript{th} October 2018), UN Doc. CCPR/C/GC/36, para 8.
  \item \textsuperscript{46} ibid; CESCR, General Comment No 22 on the right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social and Cultural Rights) (2\textsuperscript{nd} May 2016), UN Doc. E/C/12/GC/22, para 28.
  \item \textsuperscript{48} CESCR, General Comment No 22 on the right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social and Cultural Rights) (2\textsuperscript{nd} May 2016), UN Doc. E/C/12/GC/22, para. 20, 34.; CEDAW, General Recommendation 35 on gender-based violence against women, updating general recommendation no 19 (14\textsuperscript{th} July 2017), UN Doc. CEDAW/C/GC/35, para. 18; CEDAW, General Recommendation 33 on women’s access to justice (23\textsuperscript{rd} July 2015) UN Doc. CEDAW/C/GC/33, para. 51(I); Committee on the Rights of the Child, General Comment 20 on the implementation of the rights of the child during adolescence (6\textsuperscript{th} December 2016) UN Doc. CRC/C/GC/20, para. 60; Working Group on the issue of discrimination against women in law and in practice (8\textsuperscript{th} April 2016) UN Doc. A/HRC/32/44, paras. 82, 107; HRC General Comment No 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life (30\textsuperscript{th} October 2018) UN Doc. CCPR/C/GC/36, para. 8.
  \item \textsuperscript{49} Human Rights Committee, General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life (2018) ibid.
\end{itemize}
in respect of access to abortion. This paragraph demonstrates the substantial obligations that states bear in respect of abortion:

Although States parties may adopt measures designed to regulate voluntary termination of pregnancy, those measures must not result in violation of the right to life of a pregnant woman or girl, or her other rights under the Covenant. Thus, restrictions on the ability of women or girls to seek abortion must not, inter alia, jeopardize their lives, subject them to physical or mental pain or suffering that violates article 7 of the Covenant, discriminate against them or arbitrarily interfere with their privacy. States parties must 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 where the pregnancy is not viable. In addition, States parties may not regulate pregnancy or abortion in all other cases in a manner that runs contrary to their duty to ensure that women and girls do not have to resort to unsafe abortions, and they should revise their abortion laws accordingly. For example, they should not take measures such as criminalizing pregnancy of unmarried women or applying criminal sanctions to women and girls who undergo abortion or to medical service providers who assist them in doing so, since taking such measures compels women and girls to resort to unsafe abortion. States parties should remove existing barriers to effective access by women and girls to safe and legal abortion, including barriers caused as a result of the exercise of conscientious objection by individual medical providers, and should not introduce new barriers. States parties should also effectively protect the lives of women and girls against the mental and physical health risks associated with unsafe abortions. In particular, they should ensure access for women and men, and especially girls and boys, to quality and evidence-based information and education on sexual and reproductive health and to a wide range of affordable contraceptive methods, and prevent the stigmatization of women and girls who seek abortion. States parties should 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. (Internal footnotes removed)50

This paragraph indicates very clearly the direction of travel in international human rights law and the growing realisation that restricting access to abortion is per se incompatible with women’s enjoyment of a wide range of reproductive rights that are now firmly established as a matter of international human rights law. It also shows the significant evolution of rights standards since the first, then-momentous, articulation of reproductive rights in the ICPD. This includes the findings in Meller51 and Whelan52 that where abortion is not available in cases of fatal foetal anomalies this can result in violations of Article 7 of the ICCPR and thus meet the threshold for cruel, inhuman and degrading treatment.

It is quite clear that the ECtHR’s approach to abortion is out of step with the rest of international human rights law, although some domestic courts have begun to postulate that denial of abortion in cases of fatal foetal anomaly is incompatible with the ECHR,53 and there are tentative indications that the Court may itself be moving in that direction.54 Importantly, though, quite apart from the ECHR, Poland is a state party to the ICCPR, and paragraph 8 of General Comment No. 36 summarises Poland’s key obligations relating to abortion, and thus the international human rights

50 HRC General Comment No 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life (2018) ibid, para. 8


53 See for example the UK Supreme Court decision in Re an Application by the Northern Ireland Human Rights Commission for Judicial Review [2018] UKSC 27 finding obiter that prohibiting abortion in cases of fatal foetal anomaly and rape was incompatible with Article 8 (but not Article 3) ECHR. For analysis of the case see e.g. Jane Rooney, “Abortion in Northern Ireland: A Missed Opportunity to Consider Article 3?” (2019) 41(2) Journal of Social Welfare and Family Law 225.

standards to which it is domestically bound under Article 9 of the Constitution. Given this, one might have expected that a legislative provision permitting abortion in cases of fatal foetal abnormality would survive constitutional scrutiny. As we now show, however, human rights law was used for an entirely different end in this case.

III. The Constitutional Tribunal and the Rights Distortion

International human rights law featured heavily in the argumentation before the Constitutional Tribunal, including in *amici curiae* briefs submitted by several anti-abortion organisations including Ordo Iuris, ADF International, and the European Centre for Law and Justice. These *amici curiae briefs* emphasised to the Court that neither international nor European human rights law provide for a right to abortion and argued that the right to life of the foetus is protected by international human rights law, a proposition with which the Tribunal effectively began. In contrast, and tracking the logic of such briefs, and especially that of Ordo Iuris (supported by a wide international coalition of anti-abortion advocates), the Tribunal constructed the foetus as a

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55 HRC General Comment No 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life (30 October 2018) UN Doc. CCPR/C/GC/36


59 K 1/20 judgment (n 11), Part I, 6. – 6.4.

60 K 1/20 judgement (n 11) Part I, para. 6.2. The opinion was supported by following actors: prof. dr Manfred Spieker, MaterCare Europe, Slovakia Christiana, Association for Life and Family, HFI, Federação Portuguesa pela Vida, C-Fam, Pro Vita & Famigia, Human Dignity Center, American Association of Pro-Life Obstetricians and Gynecologists, Family Watch International, International
rights-bearer and concluded that permitting abortion in cases of fatal foetal anomaly violated a constitutionally protected foetal right to life. Reaching this conclusion required the Tribunal to establish that the foetus is a rights bearer, and that abortion violates the foetal right to life and cannot be justified on the basis of the rights of pregnant women.

The foetus as rights bearer

It is generally accepted that international human rights accrue at birth. It is thus remarkable that the Constitutional Tribunal concluded that the foetus has an internationally protected right to life prior to birth. Reaching this conclusion required it to engage in a rather startling reconstruction of international provisions. With respect to Article 6 of the International Covenant on Civil and Political Rights, the Tribunal held that as Article 6 recognises “[e]very human being” as having a right to life while using the term “human person” throughout the rest of the Covenant, Article 6 should be recognised as being broader than the other provisions (‘human person’) and as including the foetus. As a result, it found, that the foetus has a right to life under the ICCPR. In interpreting Article 2 of the ECHR, which also protects the right to life, the Tribunal referred to the Preamble the UN Convention on the Rights of the Child (UNCRC) and the Declaration on the Rights of the Child (which predates the UNCRC) and their statement that “the child…needs special safeguards and care, including appropriate legal protection, before as well as after birth” (our emphasis). Reading this in conjunction with Article 6(1) of the UNCRC (“States Parties shall ensure to the maximum extent possible the survival and development of the child”) alongside Article 2 of the ECHR, the Tribunal concluded that a foetal right to life was protected also by the European

Organization for the Family, Crossroads Pro-Life, Människovärde, In the name of the family, Free Society Institute, Femina Europa, Campagne Quebec – Vie, Catholic Voice, CENAP, Culture of Life Africa, European Life Network, National Association of Catholic Families (NACF), Society for the Protection of Unborn Children, Population Research Institute, Voto Catolico Colombia, Vigilare Foundation, Personshood Alliance, Personshood Education, Precious Life, Cleveland Right to Life


62 K 1/20 judgment (n 11), Part III, para 3.3.4.
Convention. Drawing on this, the Tribunal concludes (seemingly inconsistently with its own earlier jurisprudence on international human rights) that Article 38 of the Polish Constitution, read in conjunction with the protection of human dignity in Article 30, guarantees protection of the foetus, equating this to foetal right to life.

This initial step—of recasting the foetus as a rights bearer under international human rights law—is critical to the Tribunal’s overall conclusion. Without recognising a foetal right to life, the Tribunal cannot proceed to any assessment of whether, and if so how, abortion impermissibly restricts foetal rights. This creation of a new legal subjectivity, that of the foetus, was at once a distortion of and a move towards human rights discourse. Its distorting effects are, of course, evident in its overall conclusion and the way in which it was reached.

The over-weighting of textual differences between one provision of the ICCPR and others, the Tribunal’s apparent disregard of the fact that provision that would have recognised a “right to life….from the moment of conception” was rejected during negotiation of the ICCPR, and the treatment of non-binding text (from the Declaration on the Rights of the Child and the Preamble to the UN CRC) as decisive interpretive aides for Article 2 of the ECHR are manifestations of cynical, perhaps even bad faith, modes of interpretation, especially when seen alongside General Comment No. 36 of the Human Rights Committee, which indicates very clearly that the Tribunal’s reading of Article 6 ICCPR is untenable. In his dissent, Justice Kieres describes the Tribunal’s interpretation of international law as ‘superficial’, noting the lack of engagement with relevant

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63 Ibid

64 Constitutional Tribunal Decision, K 16/10, OTK ZU nr 8/A/2011 (11th October 2011) Part III, 5.1.: the tribunal states that the Convention on the Rights of the Child understands ‘child’ to be a ‘physical person from the moment of birth until it reaches legal maturity [18 years of age in Poland]’.

65 Part III, paras. 3.2. and 4.

authorities such as Mellet, Whelan and R.R. v Poland, as well as currently pending B.B. v Poland, so it cannot be said that the Tribunal judges were unaware of the unorthodox character of their interpretive approach.

However, and importantly, this critical lawfare move is enabled by the long-standing habit in European and international human rights law of failing to clearly state that the foetus does not have internationally protected rights. This is evident in ECtHR cases like Paton v United Kingdom, Vo v France, or A, B and C v Ireland, in which the Court did not extend protection to the foetus

67 Mellet v Ireland (n 54).

68 Human Rights Committee, Whelan v Ireland (n 55).

69 ECtHR, RR v Poland, App No. 27617/04, 26th May 2011.

70 ECtHR, BB v Poland, App No. 67171/17 (pending).

71 App No. 8416/78, (13th May 1980) at para 22: “The Commission considers that it is not in these circumstances called upon to decide whether Article 2 does not cover the foetus at all or whether it recognises a ‘right to life’ of the foetus with implied limitations. It finds that the authorisation, by the United Kingdom authorities, of the abortion complained of is compatible with Article 2 (1), first sentence because, if one assumes that this provision applies at the initial stage of the pregnancy, the abortion is covered by an implied limitation, protecting the life and health of the woman at that stage, of the ‘right to life’ of the foetus”.

72 App No. 53924/00 (8th July 2004), para 85: “the Court is convinced that it is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention (“personne” in the French text). As to the instant case, it considers it unnecessary to examine whether the abrupt end to the applicant’s pregnancy falls within the scope of Article 2, seeing that, even assuming that that provision was applicable, there was no failure on the part of the respondent State to comply with the requirements relating to the preservation of life in the public-health sphere”.

73 A B & C v Ireland (n 46), at para 237: “Of central importance is the finding in [Vo] that the question of when the right to life begins came within the States’ margin of appreciation because there was no European consensus on the scientific and legal definition of the beginning of life, so that it was impossible to answer the question whether the unborn was a person to be protected for the purposes of Article 2….It follows that, even if it appears from the national laws referred to that most Contracting Parties may in their legislation have resolved those conflicting rights and interests in favour of greater legal access to abortion, this consensus cannot be a decisive factor in the Court’s examination of whether the impugned prohibition on
but also did not expressly settle the question of whether the foetus has a right to life under Article 2. It is also visible in the copious general comments and other interpretive and adjudicatory outputs of treaty monitoring bodies that articulate state’s obligations in respect of access to safe abortion, but never clearly state that the foetus does not have internationally protected, legally enforceable rights. This, of course, reflects deep disagreements that exist in and among international actors and states, but it does leave space for manipulation by anti-abortion activists with precisely the kind of effect that we see in the decision of the Constitutional Tribunal.

While it may be a matter of legal common sense, building on everything from the UDHR’s references to all humans being “born free and equal in dignity and rights” to the content of UNHRC General Comment No 36, the absence of a clear and unambiguous authoritative statement from international human rights bodies that the foetus does not have a legally protected right to life means that there is always space for anti-abortion activists to distort international human rights law by claiming that it does.

The Invisible Woman

Having established that Article 38 of the Constitution protected a foetal right to life, the Tribunal noted that constitutional rights are subject to a hierarchy and that the right to life is likely to triumph

— abortion in Ireland for health and well-being reasons struck a fair balance between the conflicting rights and interests, notwithstanding an evolutive interpretation of the Convention”.

74 See for example Human Rights Committee, General Comment No. 36 of the International Covenant on Civil and Political Rights, on the Right to Life (30th October 2018) UN Doc. CCPR/C/GC/36, para 8; CESC, General Comment No 22 on the right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social and Cultural Rights) (2nd May 2016) UN Doc. E/C/12/GC/22; CEDAW, General Recommendation 35 on gender-based violence against women, updating general recommendation 19 (14th July 2017), UN Doc. CEDAW/G/GC/35, para 18; CEDAW, General Recommendation 33 on women’s access to justice, (23rd July 2015) UN Doc. CEDAW/G/GC/33, para. 51(I); UN Committee on the Rights of the Child, General Comment 20 on the implementation of the rights of the child during adolescence, (6th December 2016) UN Doc CRC/C/GC/20, para. 60; Human Rights Committee General Comment No. 28: Article 3 (The Equality of Rights between Men and Women) (29th March 2000) UN Doc. CCPR/C/21/Rev.1/Add.10, para. 20.
other rights, such as the right to property, other economic rights or the right to health of other people. In this context, of course, ‘other rights’ and ‘other people’ are primarily the rights of pregnant women and women, but in spite of this—and as noted in two dissenting opinions—there was remarkably little engagement with women’s rights in the judgment, including the rights articulated in international human rights law as outlined in Part II above.

Although the Tribunal stressed that its decision related only to the legality of abortion for fatal foetal abnormality, the court’s lack of serious engagement with women’s rights opens the door to a much wider interpretation of the decision, and in particular to the implications of identifying the foetus with constitutionally protected rights to life and to dignity. According to the Tribunal, abortion can only be constitutionally justified if it meets the standard of absolute necessity, so that the foetal right to life cannot be restricted or limited to protect rights or values of lower ranking, i.e. by implication the rights of pregnant people. However, pregnant women’s constitutional rights are not inevitably ‘lower’, even if a hierarchy does exist. As Atina Krajewska points out:

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75 K 1/20 judgment (n 11) Part III, para 4.2.

76 K 1/20 judgement (n 11) dissenting opinion of Justice Leon Kieres, para 4.6. and more broadly dissenting opinion of Justice Piotr Piotra Pszczółkowski.

77 See the Act (n 1), the two other grounds include unlawful act (rape, incest) and life or health of the mother.

78 K 1/20 judgement (n 11) Part III, para 4.2.

women are also holders of also hold the rights to dignity, freedom, life, privacy, health, the prohibition of torture and degrading treatment, and the special protection of mothers before and after birth. At least some of these—including rights to life, dignity, and freedom from torture and degrading treatment—must be understood as having ‘equal’ standing to any foetal right to life. Nevertheless, the Tribunal barely engaged with these rights, which are clearly implicated by recognising a constitutional protection for foetal life. While creating a new legal subjectivity for the foetus, the Constitutional Tribunal was simultaneously invisibilising the woman as a rights holder in pregnancy, and reducing her to “her biological, purely mechanical role in preserving the life of another”. As Susan Bordo puts it, where “this is the given value, against which [a woman’s] claims to subjectivity must be rigorously evaluated…her valuations, choices, consciousness are expendable”. In sharp contrast with its reading of the Constitution vis-à-vis

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80 Polish Constitution 1997, Article 30

81 ibid, Article 31 para 1

82 ibid, Article 38

83 ibid, Article 47

84 ibid, Article 68

85 ibid, Article 40

86 ibid, Article 71 para 2

87 Importantly, a construction of women’s and foetal rights to life as ‘equal’ can have the effect of reducing women’s right to life to a form of ‘bare life’ protection that does little to protect life beyond the aspiration of ‘staying alive’. This was the experience in Ireland under the now-repealed 8th amendment to the Constitution. See generally Fiona de Londras and Mairéad Enright, *Repealing the 8th: Reforming Irish Abortion Law* (2018; Policy Press).

88 Atina Krajewska & Rachel Cahill-O’Callaghan ‘When a Single Man Wants to Be a Father: Revealing the Invisible Subjects in the Law Regulating Fertility Treatment’ (2020) 29(1) Social & Legal Studies 85, 88


90 Ibid.
foetal life, the Tribunal failed to examine these established rights of pregnant women in light of international human rights law, not to mention in light of the realities of unwanted continuation of pregnancy. Instead, the Tribunal largely simply ignored women. In fact, the way it engaged with women was by interpreting the constitutional right to special protection of mothers before and after birth as obliging the state to protect the life of the foetus. The Tribunal established ‘a correlation’ between ‘being a mother’ before birth and ‘being a child before birth’. It then equated being a ‘child’ with ‘being a human’ further meaning that the right to life includes the life of the unborn foetus. Thus, the Tribunal concluded, protecting the life of foetus is essential for guaranteeing a woman’s right under Article 71 para 2 to receive state support and special protection before birth.  

Here again, the Tribunal’s finding has echoes of common tropes found in anti-abortion argumentation and lawfare, especially the pseudo ‘pro-woman’ argument that the wellbeing of pregnant women is inextricably and always bound up with, and contingent on, the protection of foetal life. The implication is that by proscribing abortion, the state is ‘protecting’ women and unborn life. Thus, not only are women’s rights ‘barely mentioned’, but there is a complete failure to appreciate—or at least to acknowledge—the wider-reaching implications of this judgment for women’s rights and for the availability of abortion. 

It is quite clear that the Tribunal’s insistence that its decision related only to abortion on the grounds of fatal foetal anomaly is deceitful deceiving; that may be the statutory provision that was under consideration, but the court’s reasoning has implications that very clearly go well beyond that and are likely to make the other grounds for access to abortion vulnerable to challenge. The

91 K 1/20 judgment (n 11) para 3.3.2.


94 A Krajewska (n 82)
effect of this—an effect produced and no doubt intended by the arguments put to the court—is to render women’s constitutional rights displaced during pregnancy (i.e. subject to the superior right to life of the foetus), with the likely exception of the right to life, and even that may be considered capable of satisfaction by merely ensuring than that a woman does not die in pregnancy. In other words, in this effect is to reduce the woman’s right to life to an entitlement to bare life, again in contrast with the richer understanding of the right to life articulated in particular by the UN Human Rights Committee in General Comment No 36. That this would be the result is neither fantastical nor unforeseeable; after all, this was precisely the effect of the constitutionalisation of a foetal right to life in Ireland, a situation that the European Court of Human Rights seemed satisfied to accept as in principle compatible with the ECHR.

Conclusion: The International Aspirations of Polish Anti-Abortion Lawfare?

The analysis of the Constitutional Tribunal’s decision that we present here demonstrates that the success of key advocates’ strategy lay, at least partly, in presenting an argument that their desired outcome is compliant with human rights. This is so notwithstanding the fact that international human rights law very clearly and unambiguously requires states to ensure abortion is available where a pregnancy is not viable, i.e. in precisely the circumstances impugned in the case.

The accuracy of the rights-related claims made in this case is less important than their manipulability; than their ability to perform abortion denial as rights protection. As already mentioned, this turn to rights – the attempt to make politico-legal debates on abortion regulation about ‘balancing rights’ on the one hand and ‘protecting women’ on the other—is a key part of conservative anti-abortion advocacy on a global scale. The Polish decision shows that, with the

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95 Human Rights Committee, General Comment No. 36 (n 48)


97 A B & C v Ireland (n 46)
right circumstances (including an extremely conservative court\textsuperscript{98}), such efforts can succeed, but of course their incompatibility with the reality of international human rights law will nevertheless quickly be pointed out. What, then, can anti-abortion lawfare activists do about it? They can seek to further exploit silences in international human rights law (including, as already mentioned, on whether the foetus has a right to life). They can assert more boldly that abortion regulation is a zone of sovereign decision-making in respect of which the ECtHR requires nothing more than procedural protection for whatever access to abortion is determined by national lawmakers. And they can seek to contrive a lack of clarity or a sense of disagreement in international human rights law. Indeed, as international standards become clearer and more concrete—as evidenced by General Comment No 36 already discussed in Part II—the strategic need for normative muddying becomes greater. It is therefore important, and alarming, to note that the Constitutional Tribunal decision has emboldened conservative anti-abortion advocates in Poland to turn their attention to attempts to build an alternative normative framework in international human rights law.

This is especially clear in the ongoing attempt to undermine the Council of Europe’s Istanbul Convention on Violence against Women (the Istanbul Convention) and replace it with a new ‘Convention on the rights of the family’ that would protect foetal life and have the effect of constructing abortion not as an essential health care or a rights-affirming option for women, but as a danger to women, an example of violence detrimental to the life of the family, and contrary to the rights of the family.\textsuperscript{99} The new convention proposes denunciation of the Istanbul Convention, full protection of foetal life from the moment of conception, and criminalisation of ‘perpetrators


\textsuperscript{99} This is part of the larger ‘Yes to family, no to gender’ project prepared by Ordo Iuris and Christian Social Congress, https://en.ordoiuris.pl/family-and-marriage/citizens-initiative-yes-family-no-gender-underway ; see also draft text to the Convention on the rights of the family https://ordoiuris.pl/sites/default/files/inline-files/Convention on the rights of the family.pdf
of violence’ who perform ‘forced abortions or illegal abortions’. 100 Ordo Iuris, a considerable proponent of this approach, describes the Istanbul Convention as a product of “radical leftist and gender ideology” 101 and frames this attempt at norm entrepreneurship as part of a wider project to “halt the progressive erosion of the institutions of national and international law, which, in the intention of their creators, were meant to uphold the inviolability of human dignity and the right to life...[to] protect our country against the trends that consider abortion, artificial in vitro insemination or euthanasia, i.e. activities inherently connected with the annihilation of human life as ‘human rights’”. 102

Clearly, seen as a project of international law-making this is very unlikely to succeed. Even in the unlikely event that states were to denounce the Istanbul Convention and sign up to a new convention of this kind, this new instrument would have limited international status and of course could never replace the concluding observations and general comments of treaty monitoring bodies as authoritative interpretations of international human rights law. Nor do its promoters think it can. Instead, their advocacy for such an instrument should be understood as the kind of distorting lawfare it is: an attempt to create an alternate touchstone in international human rights law to which anti-abortion advocates can continue to refer as if it were authority. This is already a well-recognised technique in anti-abortion advocacy and indeed evident in, for example, claiming that the Preamble of the UNCRC is authority for the proposition that human rights are accorded to foetal life, as we saw in this case. It is also a technique that is visible in some states’ attempts to halt the continuing development of international human rights law on abortion. In recent months this was epitomised by the non-legally-binding Geneva Consensus Declaration on Promoting Women's Health and Strengthening the Family, signed by 32 countries (including Poland) on 22 October 2020 103--the same day as the Constitutional Tribunal’s decision was announced. The

100 Convention on the rights of the family, ibid, Article 5 and Article 37.

101 This appears in several places throughout the project, see for instance ‘Yes to family, no to gender’ https://ordoiuris.pl/projekty-aktow-prawnych/tak-dla-rodziny-nie-dla-gender


Geneva Consensus Declaration seeks to promote a restrictive reading of international human rights law, and commits its signatories to *inter alia* “[r]eaffirm[ing] that there is no international right to abortion, nor any international obligation on the part of States to finance or facilitate abortion”. In communicating this Declaration to the Secretary-General of the United Nations, the United States (its major proponent) restated that “The United States, along with our like-minded partners, believes strongly that there is no international right to abortion and that the United Nations must respect national laws and policies on the matter, absent external pressure”.104 Significantly, Ordo Iuris was one of the organisations invited by the United States to attend the signing ceremony for the Declaration.105

If, as Krajewska and Cahill suggest, invisible legal subjects could acquire their social and legal visibility through human rights litigation,106 anti-abortion advocates seek to be prepared to reach for international ‘standards’ with which to resist any such attempts. As we saw in this case, this kind of advocacy can succeed in shifting the terrain in domestic law. Indeed, reading these developments through a lawfare lens suggests that this is precisely the aim. To achieve their intended effect, such techniques do not have to reflect law accurately; they merely have to be sufficient to clothe anti-abortion rhetoric in law-like threads. Attempts to create this international human rights counter-law are pursued not in any realistic expectation of undoing the steady evolution of IHRL on abortion and abortion related matters, but to create a counter-narrative rooted in ‘law’ to which anti-abortion activism can reach for to legitimate its arguments as rights-based. In this way they are a classical iteration of lawfare, and must be recognised as such.

The Constitutional Tribunal’s decision shows not only that selective and misrepresentative presentations of abortion-related standards in international human rights law can be used to

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106 A Krajewska & R Cahill-O’Callaghan (n 91) 88
legitimate abortion-restrictions in domestic law, but also that there is a need for vigilance against attempts to muddy the waters about when, how, and to what extent women who seek abortion enjoy protection from international human rights law. It also, importantly, throws a light on the (potentially juridogenic\textsuperscript{107}) productivity of silences in the international human rights corpus. It makes very clear the costs of the European Court of Human Rights’ refusal to recognise and protect substantive rights relating to abortion as part of the Convention. It exposes the normative spaces left by pragmatic silences in international human rights law. Importantly, it makes clear the productivity of compromise references to foetal life made in preambular text. Such compromise text may have been conceded to in the expectation by some that its non-binding nature would minimise its effects, but as the Constitutional Tribunal decision shows, for proponents of anti-abortion lawfare such text can be leveraged in the right case at the right time to restrict the availability of abortion.

\textsuperscript{107} Carol Smart, \textit{Feminism and the Power of Law} (1989; Routledge), 12.