

The Current Landscape and Future of Polish Reproductive Rights

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In spite of increased domestic and international attention to the issue, Poland maintains its restrictive stance on abortion in contrast to its European counterparts which embrace more flexible regimes. Typically, countries with strong Catholic traditions willingly adopt restrictive positions on abortion with Poland being no exception (86 percent of the population identifies as Roman Catholic). The Polish church also yields enormous political influence, rendering any legislative movement on the topic increasingly difficult. The history of the church and Polish government are deeply intertwined due to the church's role as a staunch anti-communist advocate during the Solidarity movement in the late 1980's. In 2015, the conservative Law and Justice party ("PiS") rose to power utilizing strong anti-

abortion rhetoric to align itself with the church.

Poland's current legislation only grants access to abortion in three circumstances: serious threats to the health of the mother, in cases involving a fetal abnormality, and for pregnancies resulting from crimes such as rape or incest. Further, any doctor, or other individual, who aids a woman in obtaining an abortion could be given a three-year prison sentence. This framework has created a climate of fear in which doctors are reluctant to perform even legal abortions.

This article examines the legal issues arising from Poland's latest attempts to restrict access to abortion. First, it canvasses the recent measures taken by the governing party to further restrict abortion access, including its most recent legislative proposal, introduced in 2018 and presently being debated by Parliament. It then examines Poland's track record before the European Court of Human Rights and UN treaty bodies on sexual and reproductive health issues. Finally, it analyzes Poland's most recent measures and proposals for compliance with its human rights obligations. I conclude that Poland continues to be an outlier in relation to its European counterparts in the area of women's reproductive health. The tightening of its already restrictive legislation, two-tier system in accessing abortions, and use of conscience clauses render de facto access to abortion increasingly difficult.

Latest Developments in Poland

Since coming to power in 2015, PiS has limited access to reproductive healthcare by only allowing the "morning after" pill to be sold over the counter, cutting back on comprehensive sex-education, and limiting access to IVF treatments. Tensions reached a boiling point in 2016, when the Polish government introduced a Bill proposing a near-total ban on abortion, except in cases where the woman's life was in danger. The Bill also contemplated the possibility of criminal sanctions against women who chose to leave Poland to terminate their pregnancies. In response, hundreds of thousands of activists took the streets of Poland to protest, in one of the largest demonstrations in the history of the country, and the Bill was abandoned.

However, in 2018, a second Bill was introduced aiming to outlaw abortions in all cases, including the most common reason for which they are sought, foetal malformation. The Bill, titled the "Stop Abortion Bill," has been heavily supported by conservative groups, but overall public sentiment does not align with the parliament's new legislation: a survey provided by Kantar Millward Brown media company found that nearly 75 percent of Poles oppose adding further restrictions to the current laws. Further, an additional survey conducted by the Federation for Women and Family Planning determined that 65 percent of Poles support the right to terminate pregnancies prior to the 12-week mark. In spite of this demonstrated public opposition to the "Stop Abortion Bill", the Law and Justice Party not only continues to move forward with the reforms, but has also been stifling reproductive rights activists through targeted raids on these groups' offices, stripping funding, and conducting public smear campaigns backed by politicians and church-backed groups. In an alarming move, Poland is considering tightening their abortion laws during the pandemic, following the lead of at least seven US States which have cited public health concerns as the reason for their restrictions on abortion.

Against this backdrop, the number of abortions that are carried out outside of Poland's official health care system is on the rise. A 2017 study found that approximately 200,000 Poles receive an abortion each year, compared with official statistics from Poland's Ministry of Health, which stated that 1,061 pregnancies were terminated in 2017. This trend is concerning: when legal abortion is unavailable, women may seek out abortion in circumstances that are unsafe. Moreover, abortion restrictions tend to compound distinctions based on a woman's socio-economic status. A 2017 report published by the Guttmacher Institute found that in countries where abortion is difficult to access through the mainstream health system, well-connected women are able to know about, afford, and obtain safer services, whereas poorer women are more likely to risk unsafe abortions provided by unskilled workers. In Poland, women seeking abortions outside the official system have three options: paying for an illegal abortion, travelling abroad, or ordering abortion pills online. Women with financial means may be able to pay a doctor for an illegal abortion, but poorer women may be forced to turn to less reliable and more dangerous alternatives, such as abortions performed by unqualified providers.

Even those women entitled to a legal abortion face barriers to access. The frequent use by Polish gynecologists of "conscience clauses," encapsulated in Article 39 of the Doctor and Dentist Professions Act, effectively limits the number of professionals willing to perform pre-natal testing and abortions. Nearly four thousand Polish doctors have signed the "Declaration of Faith of Catholic doctors and medical students regarding sexuality and fertility," within which they declare their refusal to provide abortions, contraception, and in vitro fertilisation on religious grounds, as referenced at paragraph 182 of the 2016 Country Visit Report published by the Council of Europe's Commissioner of Human Rights. Because so few physicians are offering the procedure, the physicians willing to provide it find themselves overburdened with a surplus of patients and lack of support. As a result, women entitled to legal abortions have reported undue delays caused by: doctors' refusals to provide an effective referral; unnecessary blood tests; additional psychological examinations; and attempts to dissuade them from prenatal testing.

European Court of Human Right's Decisions Criticizing Poland's Reproductive Healthcare

For over a decade, Poland's restrictive laws have garnered negative attention from international human rights tribunals. To date, the European Court of Human Rights ("ECtHR") has ruled against Poland in three different judgments related to abortion access: *Tysi?c v Poland*, *RR v Poland*, and *P and S v Poland*. The focus of these judgments has been on Poland's failure to provide effective access to abortion in cases in which it is already legal. The current abortion regime in Poland has been found on three occasions to infringe the Convention right to respect for private and family life. The "Stop Abortion Bill" would further lessen the current regime's compliance with the Convention.

The most recent of these decisions, *P and S v Poland*, involved a Polish teenager who sought an abortion after being raped. She faced continuous discouragement by health care providers and was denied an abortion at two separate hospitals. The victim and her mother (the co-applicant) argued that "the absence of a comprehensive legal framework governing the practice of conscientious objection and ensuring access to lawful termination of pregnancy… allowed the doctors to deny the victim her

right to terminate her pregnancy in a respectful, dignified and timely manner" (at para 93). The ECtHR invoked its foundational principle that Convention rights must be "practical and effective" to conclude that women legally entitled to abortion must also have effective access to the procedure. The Court built on its reasoning in *Tysi?c* and *RR*, finding that once a State adopts statutory provisions allowing abortion in certain circumstances, access must also be available in practice. This led the Court to conclude that Poland had breached the victim's right to respect for private life under Article 8 of the ECHR.

In *Tysi?c v Poland*, the complainant had been refused an abortion in spite of a severe eye disability, which she believed would be worsened during childbirth. The ECtHR ruled that Poland did not have an adequate framework available to pregnant women to assert their right to abortion on medical grounds. In effect, the Court concluded that the current Polish legislation "did not contain any effective mechanism capable of determining whether the conditions for obtaining a lawful abortion had been met." Because this created a situation of uncertainty for the applicant that caused severe distress and anguish, the Court found that Poland had breached Article 8.

Thirteen years have passed since the first of these judgments was released, and the most recent, *P and S*, was released in 2013. Poland has not yet taken any measures to respond to these judgments and bring itself into compliance with the Convention. Now, it is seeking to adopt measures that may breach additional internationally-protected rights, not only due to lack of effective access to reproductive care, but because of *de jure* barriers to abortion.

Poland's record with respect to women's reproductive health has also been criticized by various international human rights bodies. To date, no Polish government has enforced the Committee on the Elimination of Discrimination of All Forms of Discrimination Against Women's ("CEDAW's") recommendation to make abortion laws less restrictive, as cited in CEDAW's Concluding Observations on Poland's Combined Seventh and Eighth Periodic Reports. Further, Poland has also failed to set clear standards for the uniform and flexible interpretation of legal abortion. Instead, patients face additional impediments created by the excessive use of conscientious objections by both physicians and health institutions alike.

The CEDAW is not alone in its concern for Poland's backsliding on reproductive health: the UN Committee against Torture ("CAT") was equally concerned with several aspects of Poland's restrictive access to legal abortion in its Concluding Observations of Poland's Seventh Periodic Review. The observations were made at paragraph 33(d), and the recommendations at paragraph 34(d), respectively. Most notably, the CAT stated that the denial of legal abortion may result in physical and mental suffering so severe in pain and intensity that it amounts to torture. The Committee also noted that although there are three sets of circumstances in which abortion is permitted, there is no effective regulation of doctors' conscience-based refusals to perform abortions, no guidelines on how to access legal abortion services, and no obligation on medical healthcare providers to seek additional medical opinions from specialists with regards to patient care. The Committee further echoed CEDAW'S recommendation that Poland ought to decriminalize abortion and provide guidelines on how to

proceed with legal abortions, including oversight of the use of conscience-based refusals by physicians.

Considering the Future of Polish Reproductive Health Care

Legal Implications of the Passage of the "Stop Abortion Bill"

In addition to Poland's ongoing failures to ensure *de facto* access to abortion, Poland now proposes to take legislative measures that would further restrict *de jure* access to abortion to only the narrowest of circumstances. In a 2019 report, the Council of Europe's Commissioner of Human Rights admonished Poland for its latest attempt at narrowing its already restrictive legislation. In particular, the Commissioner criticized the government-sponsored "Stop Abortion Bill", currently at the legislative stage, which would eliminate the most frequent ground on which legal abortions are carried out in Poland: irreversible damage to the fetus, as stated in at paragraph 86 of the Report.

Allowing the "Stop Abortion Bill" to pass would amount to a near-total ban and would violate a number of Poland's international legal obligations. In particular, the passage of this legislation would violate Poland's obligations under Article 12 of the *Convention on the Elimination of All forms of Discrimination Against Women* (the "*Convention*"), which guarantees eliminating any form of discrimination affecting women in accessing health care services, particularly those affiliated with family planning. The CEDAW Committee affirmed that access to health care, including reproductive health is considered a basic right under the *Convention*. The Committee has adopted a General Recommendation stating that state parties' compliance with Article 12 of the *Convention* is central to the health of women and that it requires States to eliminate discrimination against women in their access to health care services, throughout the life cycle, particularly in the areas of family planning, pregnancy, and the post-natal period. The enactment of this proposed Bill would violate Poland's obligations under Article 12 of the *Convention* in disallowing women to access abortion procedures that realize their basic rights to health care. Rather than removing existing barriers to reproductive health services, Poland proposes to create additional legislative barriers by eliminating the most common ground on which abortions are performed.

As of yet, there is no positive right to abortion access under the European Convention. In the 2010 case of *A, B, and C v Ireland*, the ECHR Court did not find that the State had a positive obligation to provide an effective and accessible procedure safeguarding the applicant's interests under Article 8 of the Convention. The first two applicants principally complained under Article 8 about the prohibition of abortion for health and well-being reasons in Ireland. The Court's examination of the conflicting interests of the government and the applicants involved the invocation of a balancing test, where a "broad margin of appreciation" is afforded to the state. In balancing the interests of the first and second applicants, the Court, at paragraph 241, determined that Ireland's impugned prohibition struck a fair balance with respect to the private lives and the rights of the unborn as invoked by the government. Similar to Ireland, Poland's debate with respect to abortion has been lengthy, complex, and sensitive with respect to the content of its laws. The Court in *A, B, and C v Ireland* opted for

allowing the Irish law to prohibit abortion for reasons of health and well-being, while simultaneously allowing women who wish to have an abortion for those reasons the option of travelling to another State to do so. If Poland's "Stop Abortion Bill" were to pass, it is possible that this legislation would not violate future applicants' Article 8 rights if the Court were to affirm the same "broad margin of appreciation" in favor of the state.

Legal Implications in Upholding Two-tier System in Accessing Abortions

Polish women from poorer socioeconomic backgrounds face increased challenges in the accessibility and availability of abortions in a state where abortions are already highly restrictive. It is imperative that all women are informed of the availability and location of safe and legal abortion services, irrespective of socioeconomic status. In its General Recommendations on Article 12, the CEDAW clarified those socio-economic factors that vary for women in general and some groups of women in particular. The CEDAW stated that barriers, which prevent women from accessing health care, include high fees for public health care, and even affordable public transit. They additionally enumerated that in satisfying their reporting obligations, states ought to include in their reports how they supplied free services, where necessary, to ensure safe services affiliated with pregnancy, and the post-natal period. The current legislative landscape, and the proposed passage of the "Stop Abortion Bill," disproportionately affect and ignore women of a lower socioeconomic status in denying them uniform access to a full range of quality health care, available to women with increased finances.

Legal Implications of Upholding Conscience Clauses

Women continue to lack effective access to lawful abortions across the country, even in instances where they are entitled to abortions under the 3 enumerated circumstances. At the moment, Polish legislation provides no explicit obligation for medical professionals who are invoking the "conscience clause" to refer their patients to another medical service provider, although authorities believe that hospitals owe their patients such an obligation. Recourse for ineffective referral can be brought before either the Ombudsman for Patient's Rights, or the National Fund. However, this referral mechanism is insufficient in allowing women to challenge individual practitioners' decisions in a timely way to ensure they are able to access proper care. Time is of the essence given that any delay in providing care can create risks for a woman's life and health. Women without alternatives resort to clandestine abortions or attempt to travel abroad for services. Again, the imposition of additional barriers flies in the face of Poland's obligations under Article 12 of the Convention. In particular, the requirement for preliminary authorization from a hospital for referrals contradicts CEDAW's General Recommendations iterating that state parties ought to eliminate barriers to women accessing health care, rather than create them. In its General Recommendation No. 24 on Women and Health, CEDAW re-iterated that in circumstances where a health care provider objects to performing abortions, States have an obligation to ensure that health care providers are referred to other healthcare providers that are willing to perform these services.

The recognition of conscience clauses also contradicts CEDAW's recommendation that effective measures should be introduced to ensure that women are referred to alternative health providers. The use of conscience clauses must be systemically managed so that they do not impede access to legal abortion care.

The Commissioner of Human Rights at the Council of Europe provided several solutions to balancing health professional's rights to exercise their freedom of conscience, and the rights of women's timely access to both sexual and reproductive health services. The Polish authorities ought to adopt necessary legislation in providing accessibility and availability to abortion services and ensure that these services are geographically apportioned so that women across the country may be able to access them. If hospitals were to adopt uniform standards and procedures, women would be able to take alternative steps to obtain a lawful abortion in the event a health professional invokes a religious conscience clause.

Conclusion

The question remains as to how long Poland can continue to remain out of step with international standards, and neighbouring countries where women face fewer constraints with respect to their reproductive rights. The most recent affront, in the form of the "Stop Abortion Bill", would continue to damage women's autonomy, equality, dignity, and ultimately, their right to a private life and health, as highlighted by a group of United Nations human rights experts. Time will tell whether Poland will listen to the increased advocacy on the part of their citizens, and the continuous reprimands from the international community.

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About the author

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Basia Walczak recently graduated from McGill's Faculty of Law with both common and civil law degrees and is currently articling at a national law firm. She has international experience having worked at the Council of Europe providing support to the Office of the Commissioner of Human Rights, as the only Polish-speaking member of his team. She has also worked at the Canadian Senate as an English Parliamentary Paralegal and Legislative Editor, aiding in drafting and editing several pieces of international legislation including the Canada-European Union Comprehensive Economic and Trade Agreement Implementation Act. Following her call to the Bar, Basia will be pursuing her LL.M. degree, specializing in international law.