Università
Ca'Foscari
Venezia

Master's Degree

in Comparative
International Relations

Final Thesis

The Abortion Right

Abortion Law and the case of Poland

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Academic Year
2020 / 2021

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Abstract

The abortion right: abortion law and the case of Poland

L'argomento della tesi è il diritto all'aborto. Nonostante esso sia uno dei servizi sanitari riservati alle donne a cui esse ricorrono più spesso, non esiste una legge internazionale che lo regoli, ma è anzi troppo spesso inserito nei codici penali nazionali per punire chi se ne avvale in maniera illegale. Inoltre, l'aborto è una delle questioni più controverse e dibattute nel mondo, in quanto, essendo connesso alla vita del feto, gli viene spesso dato un valore morale.

L'elaborato è diviso in tre capitoli, ognuno dei quali analizza un aspetto diverso della questione. Il primo si concentra sulla pratica stessa da un punto di vista medico-scientifico. Vengono mostrati i dati relativi alle interruzioni di gravidanza sicure e non sicure, metodi specifici, trattamenti e contraccettivi e infine, viene esaminata la situazione attuale della disponibilità dell'aborto, durante l'attuale periodo storico caratterizzato dalla pandemia da Covid-19.

Partendo dalle linee guida dell'Organizzazione Mondiale della Sanità sulla sicurezza della procedura dell'aborto, si nota come questo sia uno dei trattamenti sanitari meno rischiosi tra tutti quelli esistenti. Infatti, l'OMS ha dichiarato che i rischi di morte e disabilità collegati alle gravidanze portate a termine, sono più alti di quelli collegati alle interruzioni delle stesse se effettuate in un ambiente sicuro, da medici qualificati e, possibilmente, nel primo trimestre di gravidanza. L'elaborato poi introduce il problema degli aborti non sicuri. Secondo i dati raccolti sia dall'OMS che dalle Nazioni Unite, l'aborto indotto viene eseguito in tre gravidanze su dieci. Di questi, quasi la metà vengono praticati nella clandestinità, soprattutto nei paesi in via di sviluppo. Ogni anno, infatti, si stima che abbiano luogo circa 25,1 milioni di aborti illegali e pericolosi, con la conseguente morte di pressoché 23 mila donne. Queste statistiche dimostrano che la restrizione della legge che garantisce il ricorso all'aborto, non diminuisce il numero di donne che cercano di accedere alle cure, al contrario, provoca disuguaglianze sociali tra chi si può permettere di viaggiare all'estero e di

pagare operatori clandestini, e le donne che vivono in condizioni meno abbienti e non hanno alcun modo di ottenere trattamenti. In aggiunta, aumenta anche l'incidenza di morti e morbilità legate all'aborto non sicuro, così come incrementa il costo che grava sui sistemi sanitari pubblici per il trattamento delle complicazioni causate dalle interruzioni pericolose.

Pertanto, l'accesso all'aborto sicuro e legale, comprese le cure post-aborto e ulteriori informazioni sui metodi contraccettivi, dovrebbe essere un diritto fondamentale per le donne di tutto il mondo e dovrebbe essere regolato dalle politiche sanitarie nazionali e internazionali al fine di raggiungere il massimo livello di salute sessuale e riproduttiva possibile.

Il capitolo analizza poi l'aborto dal punto di vista finanziario. Questo, con tutti i servizi ad esso collegati, dovrebbero essere inclusi nei sistemi sanitari nazionali. In questo modo, tramite i fondi assicurativi statali, sarebbe garantito ad ogni persona che lo richieda, specialmente a quelle più povere e alle adolescenti che non dispongono di un reddito proprio.

Successivamente vengono fornite informazioni sulle cure post-aborto e sui metodi contraccettivi, e, in ultimo, viene studiata la situazione attuale della disponibilità dei servizi abortivi durante la pandemia globale da Coronavirus-19. Questa ha colpito i sistemi sanitari di tutto il mondo, che hanno dovuto affrontare un numero eccessivo di richieste di cure e la riallocazione di forniture e personale. Alcuni studi hanno mostrato come il tasso di gravidanze indesiderate sia cresciuto durante la pandemia, a causa della maggiore incidenza di violenze domestiche conseguenti alle norme per la prevenzione del contagio che obbligavano a restare in casa. A ciò si è anche aggiunta la difficoltà di ottenere metodi contraccettivi, la cui distribuzione globale ha subito ritardi a causa della chiusura delle dogane. Inoltre, nei paesi in cui i servizi sono a pagamento, molte donne, che hanno visto la propria situazione economica deteriorarsi a causa del virus e delle restrizioni che ha portato con sé, hanno deciso di rinunciare alle cure riproduttive, che sarebbero state per loro un ulteriore onere finanziario ragguardevole.

Nel secondo capitolo l'aborto viene valutato dal punto di vista legale. In particolare, vengono analizzate le leggi sull'aborto da una prospettiva storica e geografica; viene

poi preso in considerazione lo stigma e la discriminazione che derivano dalla sua criminalizzazione. Infine, il capitolo si concentra poi sui diritti riproduttivi delle donne che vengono considerati come diritti umani di base, rifacendosi anche ad alcuni commenti di istituzioni internazionali, in particolare, di organi delle Nazioni Unite.

L'aborto ha attraversato varie fasi nel corso dei secoli, è stato esercitato fin dai tempi più antichi, ma è durante la storia contemporanea che si sono sviluppati i primi codici di leggi nazionali che lo regolassero. Come precedentemente menzionato, non esiste una politica internazionale che disciplini l'aborto, ogni stato, infatti, può decidere come comportarsi al riguardo, basandosi sulla propria costituzione e, soprattutto, sui propri valori. L'aborto passa quindi dall'essere perseguito penalmente, completamente o solo in alcuni casi, all'essere incluso nelle politiche sanitarie, e infine all'essere inserito nelle leggi che proteggono i diritti umani e riproduttivi. Nonostante negli anni, quasi ovunque, ci sia stata un'evoluzione verso l'attenzione ai diritti e quindi la conseguente liberalizzazione delle legislazioni sull'aborto, ci sono ancora paesi in cui è completamente vietato e punito dal codice penale.

I primi passi verso il riconoscimento dell'aborto come diritto umano sono stati mossi con l'accordo su un programma d'azione noto come Conferenza Internazionale sulla Popolazione e lo Sviluppo (ICPD), il cui obiettivo era il miglioramento della salute sessuale e riproduttiva di donne e uomini. A seguito dell'ICPD, c'è stato un impegno significativo da parte di numerosi governi per cambiare e migliorare la distribuzione dei servizi abortivi, il rispetto della salute riproduttiva delle donne e della loro autonomia, cercando di eliminare i divieti totali.

Attualmente sono quattordici i paesi al mondo che non autorizzano l'aborto per nessun motivo. Negli stati sviluppati l'aborto è generalmente legale, disponibile e più facilmente accessibile anche su richiesta, o almeno, per motivi sociali ed economici, con tuttavia limitazioni temporali. Nelle nazioni in via di sviluppo, al contrario, interrompere una gravidanza spesso comporta l'avvalersi di metodi illegali. A partire dal 2021, la Corea del Sud, l'Australia del Sud e l'Argentina hanno ampliato lo spettro dei motivi per i quali è lecito ottenere un aborto. Le tre ragioni più comuni per cui l'aborto è legalmente permesso sono: per salvare la vita della donna, per preservare la

sua salute, sia essa mentale o fisica, in caso di malformazioni del feto e nel caso in cui la gravidanza sia il risultato di un atto criminale, per esempio uno stupro o un incesto. In conclusione del secondo capitolo, l'elaborato si concentra sullo stigma causato dalla sua criminalizzazione e sul lavoro delle istituzioni mondiali e regionali per riconoscerlo come un diritto umano.

A seguito di un aborto illegale, possono essere ritenuti penalmente responsabili non solo gli esecutori materiali ma chiunque sia coinvolto, inclusa la donna incinta. Inoltre, l'aborto diventa troppo spesso l'argomento di dibattiti politici in cui, piuttosto che mettere al primo posto la salute delle donne e i loro diritti umani fondamentali, viene dato più valore alla vita del feto. Si crea così una disputa ideologica basata su valori morali, che mette tuttavia le donne in una posizione di subordinazione rispetto agli uomini e di contrasto con i feti. I governi che decidono di criminalizzare l'aborto creano uno stigma sociale, associandogli infatti un senso di ingiustizia e di danno per la società.

Tuttavia, ricordando che la criminalizzazione dell'aborto non diminuisce il numero effettivo delle operazioni, ma incrementa solo le ineguaglianze sociali, la discriminazione e le possibili morti dovute a pratiche clandestine, è facilmente comprensibile che le leggi restrittive sull'aborto siano in conflitto con le norme sui diritti umani. Effettivamente, sono vari i diritti fondamentali che vengono generalmente inclusi quando si parla di aborto, tra questi: il diritto alla vita, il diritto ad essere liberi da trattamenti inumani e degradanti, i diritti di uguaglianza e non discriminazione, privacy e libertà. Inoltre, diversi organismi e tribunali internazionali e regionali hanno sollecitato negli anni i governi nazionali a depenalizzare completamente l'aborto e a liberalizzarlo almeno in caso di rischio per la vita e salute della madre, in caso di malformazioni del feto e in caso di stupro o incesto. Tuttavia, non si sono mai spinti oltre, difatti non hanno mai apertamente invitato gli stati a legalizzare l'interruzione di gravidanza anche per motivi economici e sociali.

In aggiunta, nei paesi in cui il potere è detenuto da forze nazionaliste e conservatrici di destra, anche quando l'aborto è legalmente permesso, vengono create ulteriori barriere che impediscono alle donne di accedere ai servizi ai quali avrebbero diritto. Questo in particolare, è il caso della Polonia, la cui legge sull'aborto è una delle più

restrittive in Europa, i servizi riproduttivi sono di scarsa qualità e a discrezione di parti terze. Alle donne viene solitamente imposto di aspettare periodi obbligatori tra la richiesta e la procedura stessa, di ricevere l'autorizzazione da altri medici diversi da quello che esegue effettivamente l'aborto e, alla fine, potrebbero comunque trovarsi in una situazione in cui viene loro negata l'operazione poichè il limite di tempo previsto dalla legge è scaduto. Per di più, alle donne, specialmente alle ragazze giovani e a quelle che vivono in condizioni più povere e non istruite, non vengono fornite informazioni adeguate ed esaustive sulla legge, col risultato che queste non sono a conoscenza dei loro diritti.

Il terzo capitolo analizza proprio il caso specifico della Polonia, la quale ha cambiato nel 2021 i motivi giuridici per cui è legale ottenere un'interruzione di gravidanza, rendendo la legge più rigida. Il dibattito attorno all'aborto viene studiato sia dal punto di vista parlamentare che politico, includendo tre importanti decisioni della Corte Europea per i Diritti Umani contro la Polonia, e le manifestazioni del 2020.

Lo statuto che regola le interruzioni di gravidanza è stato emendato più volte, passando dall'essere una legge relativamente liberale, al divieto quasi totale punito criminalmente. La Polonia è stata la seconda nazione al mondo nel 1932, dopo l'Unione Sovietica, a legalizzare l'aborto nei casi di rischio per la vita o la salute della madre e nei casi di incesto o stupro. Inoltre, nel 1956, la legge fu modificata per includere anche ragioni mediche o sociali tra quelle per ottenere legalmente un'interruzione di gravidanza. Dopo la caduta del comunismo nei primi anni '90, le forze nazionaliste presero il potere, opponendosi completamente alle precedenti posizioni del governo. In aggiunta, la Chiesa Cattolica cominciò ad esercitare una grande influenza sulla sfera politica, tentando di eliminare la legge che garantiva l'aborto, attraverso la diffusione dei suoi valori conservatori. La questione dell'aborto entrò quindi nella sfera politica.

La legge sulla pianificazione familiare del 1993 era molto più restrittiva della precedente, infatti, vennero eliminati dai motivi legalmente accettati per ottenere un aborto quelli sociali ed economici del 1956, e l'aborto rimase legalmente accessibile solo per tre ragioni: grave pericolo per la vita o la salute della donna incinta, nei casi di stupro o incesto e nei casi di malformazioni del feto. Tuttavia, i gruppi conservatori

non erano ancora soddisfatti. Dal 1993, cercarono più volte di inasprire ulteriormente la legge. Ciononostante, ogni volta, a causa delle proteste massicce guidate dalle associazioni femministe, non si arrivò mai all'abrogazione concreta della normativa sull'aborto.

Le donne polacche, dall'inizio degli anni '90, con il cambiamento politico, hanno sempre avuto molte difficoltà ad accedere ai servizi anche se erano legalmente legittimane ad ottenerli. Sono infatti diventati famosi tre casi della Corte Europea dei Diritti Umani poiché, in ciascuna sentenza, la Polonia venne giudicata colpevole di aver violato i diritti delle donne, le quali non avevano potuto abortire nonostante ne avessero avuto diritto.

Inoltre, il sistema sanitario pubblico polacco ha diversi problemi, i tempi di attesa sono spesso molto lunghi, di conseguenza le persone preferiscono rivolgersi alle numerose cliniche private, che, tuttavia, a causa dell'alta domanda di servizi, sfruttano al massimo la situazione e impongono costi molto elevati. Ne risulta la creazione di disuguaglianze sociali tra persone di classi diverse in merito alla possibilità di ottenere servizi che riguardano la salute e che dovrebbero quindi essere disponibili a tutti senza discriminazione.

Un cambiamento nell'ambiente politico o una diversa e più liberale interpretazione delle leggi non sarebbero sufficienti a modificare completamente l'attuale situazione. Ciò che invece servirebbe, è una trasformazione sostanziale del sistema sanitario nazionale, la copertura delle cure per la salute riproduttiva da parte del sistema assicurativo pubblico, ma soprattutto, la certezza che l'accesso all'aborto venga garantito nei casi legittimi, senza interferenze e senza la possibilità di interpretare la legge a piacimento.

L'ultimo tentativo da parte della destra nazionalista e della Chiesa polacca di vietare l'aborto risale ai primi mesi del 2020, nel pieno della pandemia da Coronavirus-19. Tuttavia, non essendo riuscito a cambiare la normativa seguendo il procedimento parlamentare, il partito conservatore si è rivolto al Tribunale Costituzionale polacco, aggirando di fatto la Costituzione che affida il potere legislativo al solo parlamento. La Corte, con la sentenza del 22 ottobre 2020, ha stabilito che l'aborto, in caso di malformazioni del feto, è anticostituzionale in quanto non rispetta la vita di tutti gli

esseri umani, feti compresi, rendendolo così illegale e passibile di punizione chiunque lo pratichi o aiuti ad ottenerlo, fino a tre anni di carcere.
Questo ha scatenato una grande manifestazione, la gente ha iniziato a protestare nelle strade per giorni e settimane nonostante la pandemia. Sicuramente, il partito al governo del paese aveva pensato che emendare la legge in un momento così delicato, fosse il modo migliore per evitare le proteste, compromettendo tuttavia i diritti dei propri cittadini di esprimere liberamente le loro opinioni. Ciononostante, le manifestazioni sono state enormi, non solo a Varsavia, ma in tutto il paese, anche in molte città di piccole e medie dimensioni. Alle donne si sono unite le società civili, gli studenti, i movimenti LGBT+ e anche gli autisti di taxi e di altri mezzi di trasporto. Il governo, non aspettandosi una risposta tanto partecipata, ha posticipato la pubblicazione della nuova normativa sulla gazzetta ufficiale. Ad ogni modo, essendo la situazione di stallo contro la legge, in quanto il parlamento non si può opporre alla pubblicazione, dopo tre mesi, il 27 gennaio 2021, la sentenza del Tribunale Costituzionale Polacco è stata finalmente pubblicata nella Gazzetta Ufficiale.
Anche se la legge è stata ulteriormente ristretta, non ridurrà il numero di donne che cercheranno un'interruzione di gravidanza, al contrario, aumenterà il problema degli aborti clandestini e non sicuri.
Mentre a livello globale, le riforme legali e politiche stanno compiendo passi avanti nel riconoscimento e nel rispetto dei diritti riproduttivi delle donne, ampliando il campo di giustificazioni legali per cui è possibile accedere all'aborto indotto sicuro, la Polonia è andata nella direzione opposta, facendo passi indietro, minando e peggiorando la situazione delle donne, la loro autonomia e dignità.
Le donne non devono più soffrire a causa delle discriminazioni di genere, devono poter decidere liberamente riguardo al loro corpo e la loro vita in generale. L'aborto deve essere considerato per quello che è, ovvero un servizio sanitario essenziale, la cui disponibilità deve essere garantita a chiunque voglia avvalersene. In ultimo, la sua depenalizzazione dovrebbe essere uno dei punti principali di discussione nell'agenda dei governi, assicurando così alle donne di tutto il mondo la realizzazione e il rispetto dei loro diritti umani fondamentali. L'obiettivo finale prevede dunque che l'aborto venga inserito nella lista dei diritti umani, affinché la salute riproduttiva di ogni donna,

senza discriminazione di reddito, etnia, età o identità di genere, venga protetta e salvaguardata.

Introduction

Abortion is one of the most controversial and debated issues around the world. I began to take an interest in the topic during my stay in Poland with the Erasmus programme for study in the second semester of 2020, just when the debate on abortion had been reignited in the country. Talking to friends and professors there, I realised how lucky I am and how I have always taken for granted the possibility of accessing abortion in the case of an unwanted pregnancy. I only had to look a little outside my walls to realise that the situation is not ideal for everyone, and I was shocked to learn that even in 2021, women in Europe are forced to face discrimination and see their rights questioned. For this reason, I researched on the topic through different types of sources. I first read scientific materials to better understand what the practice consists of from a medical-scientific point of view. I then turned to law books and manuals written by lawyers, experts, and professors in the field. Finally, I decided to study the Polish situation in depth, both from a parliamentary and a political point of view. As the latter is a less objective subject, based on debate, I turned mostly to journals and newspaper articles, as the debate from 2020 it is also a quite recent.

In the first chapter I will firstly focus on the World Health Organisation guidelines for safe abortion procedures. Induced abortion is considered by the WHO to be one of the safest existing health cares. As a matter of fact, when a termination of pregnancy is carried out in a safe environment, by skilled physicians, the risks of dying or contracting morbidity related to the procedure are lower than the ones linked to carrying the pregnancy to term.

I will then move onto the problem of unsafe abortions. According to data collected both by the WHO and the United Nations almost half of the terminations of pregnancy around the world are unsafe and occur in developing countries, leading to the death of an approximated 23 thousand women. These statistics show that the restriction and the unavailability of safe abortion does not decrease the number of women seeking it, on the contrary it causes social inequities between women who can afford to travel

abroad or to pay unsafe providers, and in addition it increases the incidence of deaths and morbidities related to unsafe abortion, as well as the cost put on public health systems for the treatment of complications caused by unsafe abortions.

Therefore, access to safe and legal abortions, including post-abortion care and further information about contraceptive methods, should be a fundamental right for women all around the world and it should be regulated in national and international health policies in order to reach the highest level of sexual and reproductive health. These are indeed the key points I will analyse going further in the chapter. Finally, I studied the current situation of accessing abortion services amid the Covid-19 pandemic. It struck healthcare systems all around the world, which experienced overwhelming demands and reallocation of supplies and personnel. Furthermore, several research, found that the rate of unintended pregnancies grew because of the higher incidence of domestic violence resulting from the stay-at-home regulations, and also because of the difficulty of accessing contraceptive methods. Moreover, where abortion services are charged, because of the severe economic circumstances due to this time period, there has been a heavier impact on women and families boosting the decision to avoid abortion care.

In the second chapter I will firstly describe the historical background of abortion right and laws, and secondly their scenario from a global perspective. Abortion went through various phases since very ancient times, it evolved from being criminally prosecuted, to being included in health policies, to being placed within laws that protect human and reproductive rights. Despite the fact that almost everywhere there has been a development towards the focus on rights, there are still countries in which abortion is completely banned and listed in the penal code. The first steps towards the recognition of access to abortion as a human right have been made through the agreement on a Programme of Action known as International Conference on Population and Development (ICPD) whose goal is the improvement of sexual and reproductive health of women and men. After the ICPD there has been a significant commitment by numerous governments in changing and improving the legal provision of abortion, its services and the respect of everyone's reproductive health and autonomy to overturn complete bans. Currently, there is no international law

regulating abortion and they vary greatly from state to state and only fourteen countries globally do not authorise abortion on any grounds. In developed countries safe abortion is usually legally available and more easily accessible on request with time limits or at least on social and economic grounds, in the developing ones terminating a pregnancy often involves illegal methods. As of 2021, South Korea, South Australia and Argentina took a ground-breaking move legalising abortion under wider circumstances. The three most common grounds on which abortion is legally allowed are to save a woman's life, to preserve her health, in case of foetal impairment, and in case the pregnancy is the result of a criminal act, namely rape or incest.

This study will then focus on the stigma caused by its criminalisation, and by investigating the work of world and regional institutions I will consider it as s human right. As a matter of fact, the provider or anyone involved, including the pregnant woman, could be held criminally liable for the provision of such. Additionally, abortion becomes too often a controversial topic for political debates rather than a matter of women's health and their basic human rights, opposing them to the value of the foetus' life. Thus, it evolves into an ideological dispute based on morality values, which nevertheless puts women in a position of subordination to men. When governments criminalise abortion, they create a social stigma, linking it to a feeling of wrongfulness and harm to society. However, by recalling everything above mentioned it is easily understandable that restrictive abortion laws are conflicting with human rights norms. In fact, many are the basic rights usually included when speaking about abortion, such as the right to life, the right to be free from inhuman and degrading treatments, the rights of equality and non-discrimination, privacy, and liberty. Furthermore, international, and regional bodies and tribunals have called for the decriminalisation of abortion and its provision at least on the four most common legal grounds, but they never went as far as inviting states to permit it even on social and economic basis.

At a national level, in countries where power is held by right-wing nationalist and conservative forces, even when abortion is legally permitted, there are usually additional barriers that hinder women to access the services they are eligible for. This

is especially the case in Poland whose abortion law is one of the most restrictive in Europe, reproductive services are of poor quality and at the discretion of third parties. Women are commonly required to wait mandatory periods, receive the authorisation from other physicians other than the one actually performing the abortion, and, in the end, they may still find themselves in a situation where they are denied the abortion because the time limit imposed by law has expired. Additionally, women, especially young girls and the ones living in poorer and uneducated conditions, lack substantial information regarding the law. In the last and third chapter I will, therefore, analyse the parliamentary and political debate on abortion in Poland, along with three major European Court decisions against Poland, and 2020 demonstrations.

The statute regulating terminations of pregnancy has been changed several times, going from being a relatively liberal law to almost completely criminalising them. Poland was the second nation in the world, after the Soviet Union, to legalise abortion in cases of risk to the life or health of the mother, and in cases of incest or rape in 1932. Furthermore, in 1956, the law was amended to include medical or social grounds among the legal grounds to obtain the termination of pregnancy. After the fall of communism in the early 1990s, nationalist forces took over the power, completely opposing to previous governmental positions. Moreover, the Roman Catholic Church began to exert a great deal of influence in the political sphere, attempting to undermine the already existing abortion law with its conservative values. The abortion issue moved then into the political sphere.

The *Family Panning* law of 1993 was much more restrictive than the previous one, as a matter of fact, the medical or social grounds were deleted, and abortion remained legally available only for three reasons: severe danger to the life or health of the pregnant woman, in cases of rape or incest, and in cases of foetal impairment. However, conservatives were not yet satisfied. Since 1993, they tried several times to further tighten the law. However, due to large-scale protests led by women's groups, there was never any concrete repeal of the abortion regulation.

Polish women, since the beginning of the 1990s, with the political change, always had many difficulties in accessing the services they were entitled to. Indeed, three European Court of Human Rights cases became famous because Poland was found

guilty of having violated women's rights since the applicants did not receive an abortion even though they were eligible for it.

Moreover, Poland has several problems related to the public health care system, waiting times are often very long, with the result that people turn to the numerous private clinics, which place high cost for their treatments. The consequence is the creation of social inequalities between people of different classes in access to services that relate to health and should therefore be available to all without discrimination.

A change in the political atmosphere, or even a different and more liberal interpretation of the laws, would not be enough to completely change the current problematic situation. What would be needed is a substantial transformation in the national health system that would implement coverage of abortion and related services in the public system, but above all the certainty that access to it is guaranteed by those in charge, without the possibility of interpreting the law at will.

The last attempt to ban abortion in Poland happened in 2020, amid the global Coronavirus pandemic. This triggered a large demonstration after the ruling by the Polish Constitutional Tribunal on 22 October. The decision eliminated from the legal grounds to obtain an abortion in case of serious and irreversible foetal impairment. The ruling party appealed to the Constitutional Court because it considered the law unconstitutional as it would not respect the principle of safeguarding the life of all human beings. People started protesting in the streets for days and weeks in spite of the pandemic. Surely the country's ruling party thought that modifying the law at such a sensitive time, was the best way precisely to avoid protests, undermining the rights of citizens to express their opinions. However, demonstrations were huge and not only in Warsaw, but all around the country, also in many small and medium-sized towns. Women were joined by civil societies, students, LGBT+ movements and also taxi and other means of transports' drivers. The political debate around this topic is one of the most heated in the world. Nonetheless, after months of stalling, on 27 January 2021, the judgment of the Polish Constitutional Tribunal was finally published in the Journal of Laws.

Even if the law was restricted, it will not reduce the number of women seeking a termination of pregnancy, on the contrary, it will actually increase the problem of illegal and unsafe abortions.

While globally legal and policy reforms are taking steps forwards the recognition and respect of women's reproductive rights, by broadening the range of legal justifications to access safe induced abortion, Poland went in the opposite direction, taking steps backwards, heightening women's struggle for autonomy and dignity. The goal should be to guarantee positive health outcomes, ensuring that regulations, even if restrictive, are implemented.

The findings of my research and work on the subject highlight the necessity to end women's suffering derived from gender-based discrimination, as they should be the one in charge for the decisions concerning their body and life in general. Abortion must be treated as an essential health service, whose access should be universal and safe. Furthermore, its decriminalisation should be at the centre of the governments' agenda, to assure women around the world the fulfilment of their basic human rights.

I

Abortion Procedure

Abortion is either the intentional or unintentional termination of a pregnancy. In the first case, when voluntary acts are taken to pursue it, it is known as induced abortion, while in the second case it is known as miscarriage.

Induced abortion is performed in three out of ten of all pregnancies, and almost half of them are unsafe and occur in developing countries.[1] Every year indeed it is estimated that 25.1 million unsafe abortions take place, leading to the death of an approximated 22 800 women[2]. Hence access to safe and legal abortion, including post-abortion care and further information about contraceptive methods, should be a fundamental right for women all around the world and it should be regulated in national and international health policies in order to reach the highest level of sexual and reproductive health. A few steps towards the recognition of access to abortion as a human right have been made in the past decades. In September 1994 more than 170 countries alongside with UN agencies and NGOs met in Cairo to discuss about various population issues including family planning, the elimination of unsafe abortion and birth control. They agreed on a Programme of Action known as International Conference on Population and Development (ICPD) whose goal is the improvement of sexual and reproductive health of women and men, becoming the first international document wherein the acknowledgement of reproductive rights as human rights, already stated in national laws, is recognised. Specifically, it affirms "the rights of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children, and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health."[3]

[1] WHO (World Health Organization), "Preventing unsafe abortion", Sept. 25 2020, available at: https://www.who.int/news-room/fact-sheets/detail/preventing-unsafe-abortion [last accessed 7 June 2021].

[2] United Nations, *World Population Policies 2017: Abortion Laws and Policies,* New York, 2020.

[3] ICPD (International Conference on Population and Development), *Programme for Action*, Sept. 5–13, 1994, Ch. 7.3.

Data collected by the World Health Organization (WHO) show that the restriction and the unavailability of safe abortion does not decrease the number of women seeking it, on the contrary it causes social inequities between women who can afford to travel abroad or to pay unsafe providers, and in addition it increases the incidence of deaths and morbidities related to unsafe abortion and the cost to public health systems for the treatment of complications of unsafe abortions.

In this chapter therefore the focus will be firstly on the WHO guidelines for safe abortion, then it will move onto the problem of unsafe abortions. Thirdly it will concentrate on the financial point of view, post-abortion care and contraception methods, and finally it will explore the current situation of accessing abortion services amid the Covid-19 pandemic.

1. **Safe abortion**

Every year almost half of the pregnancies are unintended with the result that women resort to abortion.[4] According to WHO safe abortion occurs when it is carried out by a professional who has the necessary skills, with a method recommended by WHO itself, appropriate to the clinical status of the pregnancy and the woman's preference. Induced abortions can be done either through surgical or medical methods.[5]

Induced abortion procedures begin with the establishment of an actual pregnancy. The most important step is then to determine the duration of the pregnancy and whether it is intrauterine or not.[6] Evaluating the duration is essential because, even though advances have been and continue to be made in medical practice, risks increase with the gestational age[7] and methods differ according to lengths. Health centres staff

[4] WHO, *Safe Abortion: Technical and Policy Guidance for Health Systems,* 2nd ed, Geneva: World Health Organization, 2012, p. 19.

[5] WHO, "Abortion", available at: https://www.who.int/health-topics/abortion#tab=tab_1 [last accessed 7 June 2021].

[6] Intrauterine pregnancy is the condition in which the gestational sac contains either a yolk sac or a foetal pole.

[7] Duration of pregnancy (gestation) "is the size of the uterus, estimated in weeks, based on clinical examination, that corresponds to a pregnant uterus of the same gestational age dated by last menstrual period", see in more detail, WHO, *Medical Management of Abortion,* Geneva: World Health Organization, 2018.

should be trained to establish that by a bimanual pelvic examination and abdominal examination, and only if needed ultrasound testing may also be performed. If health facilities cannot provide abortion, they should, without any avoidable delay, refer women to the nearest centre.

Another key factor to safe abortion is knowing the medical history of the woman in order to avoid risks for complications. This step includes counselling with a health-care provider who should be able to give every information needed (what will be done, how long it will take, possible pain, risks and complications, post-abortion care), every abortion option and they must also be wary of the probability of violence or coercion. If this is the case, staff should talk to the woman alone and redirect her to further appropriate counselling with trained heath-workers. Each woman seeking an abortion, regardless of her social status and her age, must receive understandable information that permit her to decide freely whether to continue the practice or not and what method she prefers. Women who already decided to undergo the procedure should not attend mandatory counselling that advises them to do the contrary. The provision of such should be voluntary and confidential.[8]

Abortions when carried in a secure manner are considered one of the safest medical procedure. Using antibiotics during a surgical abortion reduces the risks of a possible infection, but if not available the procedure can still take place. Moreover, intrauterine infection due to a medical abortion is very unlikely to happen, making prophylactic antibiotics not necessary.[9]

As noted above, abortions can be done either with a medical or surgical method. The latter is more intrusive, and it requires professional skilled health workers. It is usually performed in advanced pregnancies (after 12-14 weeks), WHO recommends the dilatation and evacuation method, through vacuum aspiration and forceps. It is the most effective surgical technique, it is also the safest and faster method, it does not require general anaesthesia and it usually takes up to thirty minutes. Vacuum aspiration only can take place also in first trimester pregnancies. It is highly effective rating from 95% to 100% of success for a complete abortion. It takes only between

[8] WHO, *Safe Abortion*, supra n. 4, p. 36.
[9] Ibid, p. 34.

three to ten minutes depending on the duration of the pregnancy, it is extremely reliable, and it usually does not cause any pain, in fact there is no need for a recovery period.[10] Medical methods are recommended usually for early pregnancies (up to the 14th week) and they provide safe and effective abortion care. The experience of such is similar to a spontaneous miscarriage, with side effects such as cramping, bleeding, nausea and diarrhoea. It is carried out usually through the consumption of either a combination of mifepristone and misoprostol or misoprostol alone. The medications are available worldwide and they are listed in the *WHO model list of essential medicines*[11], therefore medical abortion is considered acceptable also in low-resource settings. In addition, it is easily accessible because it can be supplied at a primary care level and on an outpatient basis, it does not necessarily need the intervention of a skilled surgical provider, women can even take care of certain steps by themselves outside the facility. This method is generally the preferred one by pregnant women. The most effective process is the mix of mifepristone followed by misoprostol, while the use of misoprostol alone is nevertheless safe but less effective. WHO states that "mifepristone is an anti-progestin which binds to progesterone receptors, inhibiting the action of progesterone[12] and hence interfering with the continuation of pregnancy."[13] As for misoprostol "[it] induces cervical softening and dilation and enhances uterine contractions, which aids in expelling the products of conception"[14]. Studies show that there are not any lasting effects on reproductive health for the great majority of women who undergo an appropriately performed induced abortion. The risk of death or morbidities related to a safe procedure is nowadays lower than the risk from carrying a pregnancy to term or an injection of penicillin.[15]

Consequently, to everything that has been pointed out, it is clear how abortion can and must be a safe procedure that every pregnant individual seeking it, regardless of their age, gender identity and social status can access freely. National laws and policies should adjust to the WHO guidelines, and they should implement programmes and

[10] WHO, *Safe Abortion*, supra n. 4, pp. 38-42.
[11] WHO, *Model List of Essential Medicines,* 21st list, Geneva: World Health Organization, 2019, p. 47.
[12] Progesterone is a sex hormone which in women is connected to the menstrual cycle and pregnancy.
[13] WHO, *Medical Management of Abortion,* Geneva: World Health Organization, 2018, p. 1.
[14] Ibid, p. 1.
[15] WHO, *Safe Abortion*, supra n. 4, p. 49.

strengthen services in order to safely manage abortion and protect women's health, dignity and autonomy and other human rights. Protocols should encompass facility capabilities, training of professional health workers, medications, essential supplies, referral mechanisms (for instance as a result of conscientious objection by the provider), confidentiality and privacy of the seeker, special attention to young girls, women with disabilities and who suffered any form of violence, delivery of services without any avoidable delay, post-abortion cares and contraceptive information.

When access to safe abortion is not granted, pregnant women who do not wish to come to term, will address to unsafe abortion. In fact, in both states that legally permit it and the ones that ban it or restrict it, abortion rates are almost the same (respectively 36 per 1000 women and 40 per 1000 women).[16] Where it is highly restricted or even criminalised the incidence of deaths and morbidities related to unsafe abortion is higher. For this reason, regional and international courts and human rights institutions encourage the decriminalisation of abortion and the provision of it at least to protect a women's life, physical and mental health, in case of foetal impairment and in cases of rape or incest. The main goal should be ensuring women to not resort to life-threatening and illegal practices and secure and fulfil them their human rights including the right to non-discrimination and the right to be free from inhuman and degrading treatment.

2. Unsafe abortion

WHO describes unsafe abortion as "a procedure for terminating an unintended pregnancy, carried out either by persons lacking the necessary skills or in an environment that does not conform to minimal medical standards, or both"[17]. In addition, it is important to note that it does not concern the practice itself alone, it involves also pre and post abortion care. In fact, unsafe abortion may lead to complications such as health hazards or even to death. Risks include mental health

[16] WHO, "Abortion", supra n. 5.
[17] WHO, *Safe Abortion*, supra n. 4, p. 18.

related problems and long-term reproductive disease, for instance infertility. Nearly one in four women who went through an unsafe abortion will need medical treatments.[18] As a consequence, there are financial implications too, not only for women but also for the state.

Risks increase with the duration of the pregnancy and the less recommended the method is. Specifically, if it is practiced through obsolete techniques, in particular dilatation and curettage[19], if the provider is not a professional skilled individual or if the woman takes tablets to induce abortion by herself without proper information on the quantity abortions become dangerous. The goal of WHO and states around the world should be the elimination of it because it causes preventable deaths and morbidities that would not occur through a safe provision of it.

Where access to contraception and safe abortion is restricted or denied the rate of unsafe abortions rises. According to WHO every year between 2015 and 2019, approximately 73.3 million, of both safe and unsafe abortion, took place world-wide, meaning that out of 1000 women aged 15-49 years old, almost 39 have had an induced abortion. Among these, the great majority were unintended pregnancies, six out of ten (61%). The rate of unsafe and dangerous abortions slightly decreased from 45% between 2010 and 2014 to one third in 2019.[20] Overall, the regions with the greatest occurrence of unsafe abortions are Africa and Latin America, where three out of four of all of them are unsafe, and Asia, especially south and central Asia, where more than half of the estimated unsafe abortion globally take place, with the result that the incidence is higher in developing countries. In the latter, it was estimated in 2012 that around seven million women each year sought help from medical facilities for complications due to unsafe abortions.[21] As regards to maternal deaths as a consequence from unsafe abortions, research by the WHO shows that in 2008 47 000 women died in dangerous and insecure circumstances among 358 000 cases of reported maternal deaths. The rate, while still high, has decreased from the 69 000

[18] Shah, Ahman, *Unsafe Abortion in 2008: Global and Regional Levels and Trends,* in "Reproductive Health Matters", Vol. 18, No. 36, 2010, pp. 90-101.
[19] Dilatation and curettage are the dilatation of the cervix either with pharmacological treatment or mechanical dilators and the utilization of sharp metal curettes to scratch the walls of the uterus.
[20] WHO, "Preventing", supra n. 1.
[21] Ibid.

deaths in 1990 and 56 000 deaths in 2003.[22] Later data from 2014 estimate maternal death from unsafe abortion between 4.7% and 13.2% per year. The incidences though, highly changes, depending on the region. In developed areas approximately thirty women out of 100 000 die for unsafe abortions, at the same time, in developing areas the number increases up to 220 deaths per 100 000 dangerous procedures with the higher risk in Sub-Saharan Africa with 520 deaths out of 100 000. In Africa in fact, although the occurrence is lower than Asia, amounting to 29% of the global rate, the circumstances in which abortions are performed are the least safe and harmless.[23]

Sexual education, use of reliable contraception methods, provision of safe induced abortion and post-abortion cares could prevent nearly every morbidity and death. As a matter of fact, owing to the increase use of contraceptives, pregnancies either intended and unintended, diminished from respectively 91 and 69 every 1000 women aged 15-44 years in 1995 to 79 and 55 per 1000 women in 2008. Accordingly, also the rate of induced abortions has fallen from 35 per 1000 women in 1995 to 26 per 1000 women in 2008. However, this reduction is subsequent just to the lessening of the incidence of safe procedures, while unsafe abortion has remained almost invariable since 2000.[24]

Pregnant women desiring to obtain an abortion might deal with numerous obstacles. Narrow laws, costs and stigma resulting from social and cultural beliefs are the main barriers to safe abortions. Furthermore, obstructions usually lead to delays in access to services that in turn may hinder abortions due to gestational limits. In addition, fear of legal implications and unavailability of services generate a "chilling effect" and play a significant role in increasing health risks that could be avoided with medical treatments. As it has previously been affirmed, limiting safe abortion does not reduce the number of women seeking it, nor it increases birth rates. In some cases, even if the law allows abortions under certain circumstances, information about methods and lawful grounds are misleading, withheld or not provided. Moreover, legislations regulate abortion through constricting available methods and medicines and the range

[22] WHO, *Unsafe Abortion: Global and Regional Estimates of the Incidence of Unsafe Abortion and Associated Mortality in 2008*, 6th ed, Geneva: World Health Organization, 2008, p. 27.
[23] WHO, "Preventing", supra n. 1.
[24] WHO, *Safe Abortion*, supra n. 4, p. 19.

of health facilities and providers who can supply safe and legitimate practices. Other unnecessary obligation might be third-party authorisation from one or more doctors, law enforcements, parent or partner, mandatory waiting periods, superfluous medical tests and mandatory counselling with the purpose of refraining women from abortion and extracting confessions from women to obtain the name of the practitioner in case of illegal abortion in order to receive care for health complications. Impediments linked to medical facilities usually are the poor availability of services, not guaranteeing referral when health-care providers use conscientious objection and failing to assure privacy and confidentiality. Lastly, high costs are a major barrier. When abortion services are not covered by health insurance fees are charged, creating inequities especially for adolescents, poor women and the ones living in low-income conditions. Providers might even charge additional fees on top of the official ones to assure women with their confidentiality. Opportunity costs (paid employment time missed) and travel expenses to distant facilities or even foreign countries are also to be mentioned.[25]

The refusal in providing life-saving treatment to every woman in need, including women who went through an illegal abortion is considered against the human right to being free from torture and inhuman and degrading treatment.[26] Health-care providers cannot deny cares that should be immediate regardless of the national abortion law.

The most important feature to keep in mind about unsafe abortion are the health consequences. In fact, some 20-30% of unsafe abortions result in reproductive tract infections whose 20-40% are upper genital tract infections. Disabilities can be temporary or lifelong needing medical treatment and one in four women who resort to unsafe abortion suffer from them.[27] Implications following unsafe abortions may occur depending on the professionality and skills of the provider, the used method, the place and its equipment availability where abortion is performed and the health of the woman and her pregnancy status. Usually, the most dangerous method entails the insertion of an external body into the uterus subsequent to dilatation, and the scraping

[25] WHO, *Safe Abortion*, supra n. 4, pp. 94-99.
[26] Ibid, p. 97.
[27] Ibid, p. 20.

of the uterus walls with outdated and inappropriate tools. Fatalities are also the consequence of the rupture of the uterus caused by an obsolete method which consists in the pummelling of the woman's lower abdomen to interrupt the pregnancy. Another way, which is becoming more common in recent times due to the easier access to them, is the incorrect ingestion of substances not knowing the proper dosage or possible side-effects.[28]

Complications related to abortions performed in unsafe conditions include infections that have to be subsequently treated with antibiotics and in some cases evacuation of any residuals, haemorrhage (heavy bleeding), trauma to the internal organs and genital tract (cervix, vagina, uterus) inflicted through the introduction of dangerous objects, sepsis[29] and peritonitis.[30] Lastly, the risk of not completing the abortion is higher when it is not safe, failing to remove from the uterus all of the pregnancy tissue and needing further treatments.

Whenever symptoms are diagnosed medication should be immediate and secure. Signs of complications may be hard to identify because they can be similar to other issues. For this reason, abnormal bleeding, pain or shock must be addressed seriously and health providers must be skilled or ready to refer women to professional personnel. Deaths and disabilities can thus decrease through the improvement of effective post-abortion cares.

At this point a question arises. What can be done to prevent unsafe abortions? Firstly, provision of legal, safe, and free abortion would obviously diminish the number of women resorting to dangerous methods. Additionally, pregnancies can be prevented through a correct and informed use of effective contraception, including emergency contraception pills, hence comprehensive sexuality education should be emphasized. Finally, unsafe abortions are a financial load, it is estimated that it is higher than direct costs of providing post-abortion care.[31] The related costs are overwhelming not only

[28] WHO, *Safe Abortion*, supra n. 4, p. 19.

[29] Sepsis is "a life-threatening organ dysfunction caused by a dysregulated host response to infection", see a complete definition at: https://www.who.int/news-room/fact-sheets/detail/sepsis [last accessed 7 June 2021].

[30] "Peritonitis is inflammation of the peritoneum, the thin layer of tissue covering the inside of your abdomen and most of its organs", see a complete definition at: https://www.healthline.com/health/peritonitis [last accessed 7 June 2021].

[31] WHO, *Safe Abortion*, supra n. 4, p. 26.

for women and their families, but also for the communities and health systems. The burden for treating complications is especially enormous for poor and developing countries. A 2006 study calculated that the annual cost for governments is US$ 114 million in Africa and US$ 130 in Latin America. In Sub-Saharan Africa alone, women and families out-of-pockets costs for post treatments is approximated to US$ 200 million. It also estimated that the annual expenditure for managing minor health issues at the primary care level which is US$ 23 million and US$ 6 billion for post-abortion infertility.[32] In addition, nearly US$ 930 million is the yearly expense for loss of income resulting from long-term disability and deaths by societies.[33] If WHO guidelines about services, health-care providers and methods were to be followed, and through the prevention of unexpected pregnancies by effective contraception a significant amount of money could be saved and invested in other needs.

3. Financing

Access to safe abortion and all the services linked to it, should be managed by national policy and included in the programmes of health systems. This way, domestic financing mechanisms and insurance schemes could guarantee it to every individual seeking it, especially the poorer ones and adolescent who do not have their own income. As aforesaid, supplying legal and secure abortions is highly less expensive than coping with complications resulting from risky and uncertain procedures. WHO highly suggests that the coverage of safe abortion should be incorporated in the state maternal and reproductive health insurance programme, in fact it should never be postponed and either denied in case the woman is unable to pay.[34] In health system funds there should be included expenses for the training of health personnel, the improvement of health facilities, good quality supplies and medications, the implementation of a record-keeping plan, and the constant supervision and evaluation

[32] WHO, *Safe Abortion*, supra n. 4, p. 19.
[33] WHO, "Preventing", supra n. 1.
[34] WHO, *Medical,* supra n. 13, p. 3.

of services. Costs for governments would not necessarily rise and if so, it would be in a small percentage, from the introduction of abortion services in the health budgets because the majority of equipment is the same used for most of emergency obstetric and gynaecological treatments and skilled staff should already be working in the medical facilities. Buying and restocking such tools as manual vacuum aspirators or cannulas and catheters require a minimum expense compared to abortion complications. Tablets for medical induction, infection prevention or pain management should be already available, as well as disinfectants and other antiseptic dispositions. Furthermore, in order to save money and time, the vacuum aspiration method or any form of medical abortion should be preferred to the outdated and more dangerous dilatation and curettage one. Indeed, medical abortion can be managed by the woman herself at home, lowering the need for the participation of professional staff with the result that it is extremely flexible, and more easily accessible being available at lower levels of health services. Similarly, vacuum aspiration can be undertaken by a trained midlevel health professional in an examination room. On the contrary, the dilatation and curettage method requires a skilled physician, an equipped operating room, and more likely future pain medication.[35]

Lastly, it is very important to inform women that is recommended to have an early induced abortion rather than later. In fact, for early induced abortion (under 12-14 week), the most common, safe and effective method is medical abortion, which as mentioned above, is cheaper. Since low-level facilities are more spread on the territory, providing abortion methods at these facilities, is a lesser burden for women and families, who could save time and travel costs.

However, regardless the WHO suggestion of including abortion care in the national health insurance programme, most frequently costumers are asked to pay fees, becoming a barrier for underprivileged and creating other inequities. In addition, abortion seekers may be charged significant informal fees by the health provider. Despite their ability to pay, women should have access to legal abortion services with the purpose of respecting and guaranteeing human rights. Poor and adolescent girls

[35] WHO, *Safe Abortion*, supra n. 4, pp. 79-80.

should be exempted from paying, and when fees are charged, they have to be matched to customers' capability to pay.[36] Moreover, facilities staff should control and make sure that informal fees are not charged, and that everyone in need of help is treated in accordance with human rights with respect and without discrimination.

4. Post-abortion care and contraceptive methods

Post-abortion visits and treatments are not necessarily required following a safe induced abortion, whether it was performed via a surgical or medical method. Further check-ups are recommended only if the used method was taking misoprostol alone, to guarantee that the abortion was successful.[37] At the same time, follow-up care is highly requested subsequent to unsafe procedures, in order to manage incomplete abortions, morbidities or avoid mortalities.

Before leaving the health facility, women should receive proper understandable information about post-abortion services that should be able to provide emotional support and refer women to other community services, visits to address any medical symptoms experienced and evaluation of the recovery, contraceptive counselling, and information regarding future pregnancies.

If after the practice, some conception products are still present in the uterus it occurs an incomplete abortion and the symptoms are usually vaginal bleeding, abdominal pain, and evidence of infections.[38] In addition, if the expulsed product is not congruous with the quantity expected from a previous pregnancy duration test, it can be presumed that the abortion was not successful.[39] It rarely occurs following vacuum aspiration, while it is more common after medical methods. In this case, the failure should be promptly recognized, and it should be treated without any delay, through vacuum aspiration or misoprostol. In this circumstance as well, the woman should get to decide which method to use, taking into consideration also her clinical status.

[36] WHO, *Safe Abortion*, supra n. 4, p. 80.
[37] WHO, *Medical,* supra n. 13, p. 15.
[38] WHO, *Safe Abortion*, supra n. 4, p. 47.
[39] WHO, *Medical,* supra n. 13, p. 16.

All safe methods available and their characteristics are provided in the WHO publications *Medical eligibility criteria for contraceptive use*[40] and *Ensuring human rights in the provision of contraceptive information and services*[41], and health policies should refer to them.

Since ovulation can turn back within just two weeks after an induced abortion and women can become pregnant again, health provider should notify every individual and provide information on appropriate and effective contraceptive methods.[42] Of course the woman is not obliged to start using any contraceptive if she is not willing to, she should be firstly advised, and she can make up her mind later about whether to use it or not and which procedure is best for her needs. Safe abortion must be guaranteed also in case the woman does not accept any form of contraceptives. However, several studies show that women prefer to start using birth control methods immediately after abortion in order to avoid future unwanted pregnancies, especially in the next six months.[43] It is also important for the staff to examine in which circumstances the unexpected pregnancy happened. In fact, in case it occurred due to a contraceptive failure, the personnel must explore if the cause is to be found in an incorrect use of it or if the method was inappropriate itself for that specific individual, ether way counselling should be offered on how to use a suitable method. If the woman was already using a form of birth control and she desires to change it because of any concerns she should be able to do it, if she does not want to modify it, she should be resupplied with the previous mode as needed.

The initiation of all birth control methods is possible right after surgical abortion or the evaluation of a succeeded medical abortion, or even at the time of the first tablet of the medical abortion scheme, in consideration of the woman's medical situation. Intrauterine devices are the better option to prevent unintended pregnancies if placed immediately after the practice. However, as of second trimester pregnancies, special attention should be paid because IUDs might be ejected, not causing health

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[40] WHO, *Medical Eligibility Criteria for Contraceptive Use,* 5th ed, Geneva: World Health Organization, 2015.
[41] WHO, *Ensuring Human rights in the Provision of Contraceptive Information and Services,* Geneva: World Health Organization, 2014.
[42] Ibid, p. 35.
[43] WHO, *Ensuring*, supra n. 41, p. 34.

complications but increasing maternity risks. Also, for second trimester abortion, regarding contraceptive diaphragm and cervical cap, they should not be employed until after approximately six weeks. The least efficient methods are the fertility-awareness-based ones, and they are to be initiated only after the restoration of regular menstrual periods. Finally, the most effective contraceptive method is sterilization, nevertheless, being irreversible and permanent, staff should be particularly careful that women seeking it are not forced to undergo it and that they are not influenced by the ongoing situation.[44] To lower the number of future unintended pregnancies, contraceptive counselling plays a significant role in abortion care by advising women to start appropriate and effective birth control methods immediately after having an induced abortion. If women receive understandable and neat information, it is likely that they will carry on use it properly.

Facilities that provide abortion should also be able to supply the chosen contraceptive method on-site. In case there is no immediate availability, information on how and where to get the selected method have to be received by women. An instance of this is sterilization, which is hardly provided at primary-care level and without further counselling.

Another on-the-spot service in health sites should be the provision of emergency contraceptives and information related to them. For example, it could be useful for women to know that they can keep emergency pills at home for future use, especially if they use condoms as the only way to avoid pregnancies, or if they do not use any kind of contraception method. Additionally, infections and their prevention should be included in the discussion throughout post-abortion counselling, notably in high-risk areas. In fact, women must acknowledge the importance of utilizing condoms even if they already use other contraceptive measures in order to be protected from both unintended pregnancies and sexually transmitted infections. Lastly, facilities should offer HIV testing and referral to a specialist for potential treatments.[45]

The 2013 United Nations wallchart on contraceptive patterns presents the prevalence of any method of contraception worldwide. In 2011, the incidence of women of

[44] WHO, *Safe Abortion*, supra n. 4, p. 52.
[45] Ibid, pp. 52-53.

reproductive age (15-49 years) and who were either married or in a relationship union, who used a birth-control method was estimated to be around 63%. However, the prevalence was not the same in all regions around the world. It was the lowest in Africa (31%), with the minimum percentage in Middle and Western Africa (25%), and the highest in Europe (70%), North America (75%), Latin America and Caribbean area (73%). The country with the highest use was Norway (88%). It was also estimated that the use of modern methods was nine out of ten of all forms of birth control.[46]

Female sterilization was the most frequent contraceptive globally (19%), with the highest incidence in Latin America and the Caribbean. The second most common was IUD (14%), most frequently used in Asia. The pill is more widely distributed worldwide and 9% of women resort to it. There is also a great region-based difference in the preferred method. The pill and male condom are most widely utilized in developed regions, while IUD and female sterilization are typically used in developing regions. In addition, despite being less effective, traditional methods are highly widespread throughout Middle Africa (57%), Western Africa (29%) and Western Asia (33%).[47]

Unmet need for family planning is the number of women who are pregnant, want to end or postpone childbearing and are not using any form of contraceptives. If need for family planning were to be met, unwanted pregnancies and subsequent abortions would diminish. Nevertheless, although having slightly reduced, one in five women aged 15-49 years in least developed areas, has unsatisfied needs. Where induced abortion is legally available on request and the use of modern contraceptive methods is high, for example in Western Europe, the prevalence of the practice has decreased.[48] Except sterilization, other methods are not 100% successful, and women may also become pregnant after forced sexual intercourses. For these reasons women will still need abortion to avoid unintended childbearing and guaranteeing access to it is

[46] United Nations, Department for Economic and Social Affairs, Population Division. *World contraceptive use (wallchart)*, New York, United Nations, 2009.
[47] United Nations, *World,* supra n. 46.
[48] Ibid.

especially important because there might be physical and psychological harmful consequences for both mothers and children.[49]

5. Abortion amid the Covid-19 pandemic

As stated by the Italian health ministry "coronaviruses are a large family of viruses known to cause diseases ranging from the common cold to more serious diseases such as the Middle East Respiratory Syndrome (MERS) and the Severe Acute Respiratory Syndrome (SARS)."[50] They can infect both human and animals and they were first discovered in 1960s. In 2019, a new form of coronavirus syndrome started spreading all around the world, the given name is Coronavirus-2 (SARS-CoV-2), but it is known also as Covid-19. The new pandemic struck everyone globally and healthcare systems experienced new overwhelming demands, resulting in reallocation and reduction of supplies and staff, and sometimes downplaying other existing health services. An example is in fact, how the latter pandemic aggravated the already problematic access to safe abortion and created new challenges to sexual and reproductive health. Instead of taking step-backs in policy measures, governments should focus on making progresses and improving new opportunities to guarantee safe abortion as a matter of respecting human rights. Amid Covid-19, several research, found that the rate of unintended pregnancies grew because of the higher incidence of domestic violence resulting from the stay-at-home regulations, and also as a consequence of the additional difficulty of accessing contraceptive methods, and their lack of supply.[51] Moreover, where abortion services are charged, there has been a heavier impact on women and families causing more distress because of the tough and unstable economic situation, boosting the decision to avoid abortion care. In the current situation more than ever, attention should be paid to women at risk, especially

[49] WHO, *Safe Abortion*, supra n. 4, pp. 22-23.
[50] Ministero della salute, *Covid-19 Questions and Answers,* available at: http://www.salute.gov.it/portale/malattieInfettive/dettaglioFaqMalattieInfettive.jsp?lingua=italiano&id=230, [last accessed 7 June 2021].
[51] Todd-Gher, Shah, *Abortion in the Context of COVID-19: a Human Rights Imperative*, in Sexual and Reproductive Health Matters, 2020, pp. 28-30.

adolescents. In Kenya, for instance, since the primary source of sexual education are schools, and during the pandemic they remain close, the risk for girls to become unintentionally pregnant either because of consensual sexual intercourses, or "survival sex" to receive a payment, or violence increased.[52]

Following the WHO guidelines, several countries recognized abortion as an essential health service. In Europe, France, England, and Ireland for example, decided to provide first trimester induced abortion through telemedicine, and Scotland approved the domestic use of medical methods (mifepristone and misoprostol). In different regions too, India, South Africa, Mexico, and Ethiopia among others, thanks to the commitment of advocates, governments are taking into consideration such policies. Indeed, telemedicine has several benefits, it ensures privacy to abortion seekers, it allows people to receive information without actually going to health facilities and rising the risk of contracting the virus, and lastly it diminishes the presence of crowd in already overloaded hospitals.[53]

United Nations bodies already condemned countries that do not allow safe abortion on basic legal grounds, during the ongoing pandemic, they additionally advised to avoid the introduction of new barriers to access services and eliminate the existing ones.[54] Despite the benefits above listed, and also the fact that forcing a woman to pursue a pregnancy if there are to be mental of physical harm for her is recognized as a human rights violation, not all state administrations believe that abortion should be an essential health service, and they even tried to reduce access.

In Poland for example, the government passed an anti-abortion bill following the Constitutional Tribunal decision that declared abortion in case of foetal impairment unconstitutional in order to protect the life of the unborn. The ruling took place at a time when mass opposition protests were banned due to the anti-gathering measures. Nevertheless, numerous demonstrations occurred, placing people at risk of contracting the virus to fight for their rights. Similarly, in Latin America and the

[52] Thorne, Buitendyk, Wawuda, Lewis, Bernard, Spitzer, *The Reproductive Health Fall-out of a Global Pandemic*, in Sexual and Reproductive Health Matters, 2020, pp. 34-36.
[53] SRHM (Sexual and Reproductive Health Matters), *Accessing Safe Abortion Services Amid the Covid-19 Pandemic,* 2020, available at: http://www.srhm.org/news/accessing-safe-abortion-services-amid-the-covid-19-pandemic/, [last accessed 7 June 2021].
[54] Todd-Gher, Shah, *Abortion in the Context of COVID-19,* supra n. 51.

Caribbean activists are battling to expand legal grounds for abortions and to maintain the very few ones, which face several barriers. Lastly, in the United States abortions seekers are encountering multiple new challenges. In the same way as Poland, thirteen states tried to lower and prevent abortion services by asserting that they are not indispensable. For this reason, clinics were closed for several days. For instance, in Louisiana abortion cares are almost completely charged, not covered by insurance, and restricting laws require pointless waiting period, mandatory biased counselling and parental consent for adolescents, resulting in higher inability for women to access safe abortion. Moreover, Chief Justice John Roberts hinted that in the future further abortion restrictions, brought before the court, may become effective.[55]

The focus, however, should not be only on refraining from approving new restricting laws, states should engage in providing innovative measures and methods to widen access, such as promotion of contraceptive use and early induced abortions via medical methods.

The United Nations Fund for Population Activities (UNFPA) calculated that, due to the lack and reduced supply of contraception because of borders closing (the two biggest producers are China and India), globally approximately 47 million women especially in poorer and middle-income countries, will not use birth controls measures, and almost seven million unwanted pregnancies will follow.[56]

Not only the contraceptive provision is encountering challenges, Covid-19 also generated several problems for equipment resources and health personnel. Indeed, the deliveries of medical articles, such as personal protective equipment, have been delayed because of stalls in international shipping, and to cope with the overwhelming and desperate situation in hospitals, many health care workers, including people working in the maternity ward, have been reassigned to Covid-19 units. Some appointments were moved to later date, creating additional delay that, in later-term abortions resulted in more and new obstacles because of the lessening of methods and increasing of risks. Furthermore, other wards, especially the ones not considered

[55] Ellmann, *State Actions Undermining Abortion Rights in 2020*, in Center for American Progress, 2020, available at: https://www.americanprogress.org/issues/women/reports/2020/08/27/489786/state-actions-undermining-abortion-rights-2020/, [last accessed 7 June 2021].
[56] SRHM, *Accessing Safe Abortion,* supra n. 53.

essential, suffered a shortage in funding that were redirected to stem the pandemic. In developing countries where health systems are already problematic, the health crisis has hit even harder. In Kenya, for instance, after the first case of Covid-19 was declared, a great wave of fear spread across the country. People stopped going to health facilities being afraid of contracting the virus, and even doctors and health personnel stopped showing up for work. As regards of maternity care, the Reproductive Health Department of an hospital in Nairobi, estimated that by mid-March 2020, the amount of patient admitted lowered by 50% and additionally, many women, after giving birth, left the hospital in advance by discharging themselves, even if physicians did not advise for it.[57] This will likely result in women resorting to unsafe practices to avoid hospitals, and worsening of sexual and reproductive health for Kenyan women and increased mortality and morbidity risks.

The closure of borders also affected women who would have travelled to another country to get a legal abortion. An example is Malta, one of the countries with the most restrictive laws globally, in fact abortion is illegal on all grounds, even to save the life of the pregnant woman, where women could not request it abroad anymore and had to resort to ordering abortion pills online. In addition, from the state-wide perspective, accommodation facilities were mostly closed or restricted in their capacity, and transportation services were limited or even closed, making it harder for abortion seekers to reach clinics and travelling long distances to obtain proper cares. The movement restrictions introduced caused extra delay in time-sensitive care such as abortion. For instance, in India where abortion services were already problematic and difficult to access, Covid-19 even worsened them. Indeed, public means of transportations were almost completely interrupted, making it more challenging and expensive to get to medical facilities for most Indian women, who live in low-income situations.[58]

Despite the crisis due to the pandemic and its new challenges, governments all over the world should not forget their commitment to guaranteeing all individuals their human rights. These include of course, right to live, health and non-discrimination,

[57] Thorne, Buitendyk, Wawuda, Lewis, Bernard, Spitzer, *The Reproductive,* supra n. 52.
[58] SRHM, *Accessing Safe Abortion,* supra n. 53.

which are all disregarded when it comes to unsafe abortion. Pregnant individuals who do not wish to continue their maternity should be ensured to not undergo an unsafe practice. Therefore, as a human right imperative, sexual and reproductive health services and access to safe abortion should be ensured through appropriate and reliable measures, existing and recent barriers should be removed and finally abortion should be decriminalised. During this pandemic, policies should include actions to guarantee the contraceptive and medical equipment supply chain and the shifting to self-managed abortion methods in early pregnancies. Meeting these goals is essential for our society as a matter of respect and fulfilment of everyone's rights.

II

Abortion Law and Abortion Right

After the 1994 International Conference on Population and Development (ICPD) there has been a significant commitment by numerous governments in changing and improving the legal provision of abortion, its services and the respect of everyone's reproductive health and autonomy to overturn complete bans. In fact, from 1996 to 2017, the number of countries allowing abortion for all legal grounds broadened and only four countries globally did not authorise abortion on any grounds.[59] As of 2021, South Korea and Argentina both took a ground-breaking move legalising abortion under wider circumstances. The most common grounds on which abortion is permitted globally are to save a woman's life, to preserve her health, in case of foetal impairment, and in case the pregnancy is the result of a criminal act, namely rape or incest.

Despite the provision of safe legal abortion, sexuality education and programmes for family planning are proven to be the best way to avoid maternal mortalities, abortion laws around the world are still very different from one another, permitting an abortion on various grounds or criminalising it.

Recently, moreover, the advent of nationalist governments has reignited the debate over the legality of abortion in many states, unfortunately leading to setbacks in reproductive rights. In addition, abortion too often becomes a controversial topic for political debates rather than a matter of women's health and their basic human rights. Indeed, it is covered in presidential debates in the United States of America, and it is used all over the world in political campaigns both in favour and against it, bringing up the issues of the value of the foetus' life, motherhood, and population control. Thus, it evolves into an ideological dispute based on morality values, which nevertheless puts women in a position of subordination to other human beings.

[59] United Nations, *World,* supra n. 3.

Worldwide there is a big difference especially between developed and developing states. In the firsts, safe abortion is usually legally available and more easily accessible on request with time limits or at least on social and economic grounds, in the latter terminating a pregnancy often involves illegal methods.

A further point of reflection regarding abortion is its decriminalisation. In fact, the provider or anyone involved, including the pregnant woman, could be held criminally liable for the provision of such. According to the 2017 United Nations report about world population policies in ninety-five percent of the countries worldwide the person who performs an illegal induced abortion could be criminally charged, in seventy-one percent of them the woman who receives it can be found guilty, and in sixty-five percent of countries anyone helping the seeker to obtain it could be held criminally responsible.[60] When governments criminalise abortion, they create a social stigma, linking it to a feeling of wrongfulness and harm to society.

Many basic human rights are usually included when speaking about abortion, such as the right to life, the right to be free from inhuman and degrading treatments, the rights of equality and non-discrimination, privacy, and liberty. For this reason, it is easily understandable that restrictive abortion laws are conflicting with human rights norms. Nevertheless, an international law that regulates abortion does not exist. However, many international and regional bodies and tribunals have called for the decriminalisation of abortion and its provision at least on the four most common legal grounds, but they never went as far as inviting states to permit it even on social and economic basis.

At a national level the right to safe and legal abortion is protected in several countries. However, even when abortion is legally permitted, there are often additional barriers that hinder women to access the services they are eligible for and thus resort to unsafe practices. These barriers and obsolete policies should be removed through the implementation of further enabling regulatory that should focus on the respect and fulfilment of women's human, health, and reproductive rights. The goal is to guarantee positive health outcomes, paying extra attention to women with special

[60] United Nations, *World,* supra n. 3.

need, adolescents, victims of violence and women with HIV, providing contraceptive information and assistance, and every treatment a woman may need, and ensuring that regulations, even if restrictive, are implemented.

Therefore, this chapter will examine firstly the historical background around the abortion right and laws, and secondly its scenario from a global perspective. It will then focus on the stigma caused by its criminalisation. Lastly, abortion as a human right along with women's reproductive rights will then be assessed, investigating the work of world and regional institutions.

1. Historical background

Abortion has been practiced since very ancient times by a vast variety of methods. It has not always been legal though. The abortion sphere went through various phases, it evolved from being criminally prosecuted, to being included in health policies, to being placed within laws that protect human and reproductive rights. Despite almost everywhere there has been a development towards the focus on rights, there are still countries in which abortion is completely banned and listed in the penal code.

At the end of the nineteenth century abortion was legally limited almost everywhere because of the expansion of colonies. Indeed, Europe countries such as Great Britain, Spain and France enforced their code on the territories they conquered, lawfully banning abortion. The arguments to prohibit abortion were many, it was regarded as a sin because it violated the religion-driven morality. Furthermore, methods of abortion at the time were dangerous and they usually were carried out in poor condition environments that caused a great deal of killings. Thus, the law had the purpose to protect women's and foetus' lives.

Soviet Union, through its 1920 decree on women's health care, was the first government that modified its abortion law, making it legal and available in all circumstances. This great change was the result of the ongoing economic crisis and

the actions the feminist Alexandra Kollantai.[61] However, just a few years later the Soviet Republic reformed again its abortion law, banning it once more.

The first important changes in constitutions about abortion began in the mid-twentieth century, a period when the topics of political discussions were women's citizenship and the control over their body and their role as mother in society. Additionally, several women's movements were growing globally fighting for their rights. Reactions to feminists' groups varied, fostering political debates between the ones in favour who sought autonomy and justice for women, and opponents who based their argument on protecting the life of the unborn.

Over the years, decisions taken by the courts were different, some have stood by women, giving them the opportunity to decide more independently about whether being a mother or not and liberalizing abortion, while others have remained anchored to the conservative side giving more rights to the foetus. Political debate played a very important role in influencing and shaping constitutional law, making the two interconnected.

In the second half of 1960s courts in Europe and North America started modifying laws on abortion in order to align with their constitutions, and in almost ten years, from 1967 to 1977, some forty-two countries changed their jurisdiction over the subject, liberalizing abortion on certain grounds.[62] Abortion was available either on the indications model, that is after receiving authorisation from a physician as a result of the establishment of particular health situations that would have endangered the life of the mother or the child, or even for juridical and social reasons also attested by a doctor, or on the periodic model, meaning that the practice was allowed up to a specific gestational time, usually the first trimester of pregnancy.

Prior to this period, the liberalisation of abortion was not discussed in constitutional terms, it was more a matter of political debate. As mentioned above, although abortion was criminally punishable, it was still practiced illegally by unsafe and usually unskilled providers. In the United States, Canada, and Western Europe, it was

[61] Berer, *Abortion Law and Policy Around the World: In Search of Decriminalization*, in "Health and Human Rights", Vol. 19, No. 1, 2017, pp. 13-27.

[62] Cook, Erdman, Dickens, *Abortion Law in Transnational Perspective: Cases and controversies*, Philadelphia, University of Pennsylvania Press, 2014, p. 16.

outlawed except for cases where it was recommended by a physician for special health situations. However, not all doctors authorised abortion because they feared legal repercussions. The latter, in search of freedom to practice their profession, in union with the youth and women's movements, began to call for the review of the law on abortion. Liberalisation supporters included also among the reasons for change, the problem of overpopulation. Moreover, the youth movement was looking for a way to break with the traditions of the past by questioning morality and sexuality.

As for feminism, in 1969, the president of National Organization for Women, Betty Friedan, demanding the abrogation of criminalisation of abortion, stated: "There is no freedom, no equality, no full human dignity and personhood possible for women until we assert and demand the control over our own bodies, over our own reproductive process. . . The real sexual revolution is the emergence of women from passivity, from *thingness*, to full self-determination, to full dignity.".[63]

The method decided by feminist groups in 1971 to carry out their fight was that of "speak-out", an action of civil disobedience which consisted of self-reporting for having had an abortion despite the law prevented it, putting themselves at risk of being charged. [64] The first one who moved this way were the French women. In fact, in April 1941, 343 women signed a text written by Simone de Beauvoir and published it on the news magazine *Le Nouvel Observateur.* In the manifesto they affirmed they underwent the practice, thus attracting international attention, and demanding for access to abortion and birth control services. Shortly afterwards, the Western German women's group Aktion 218 (named after the Penal code Section that punishes abortion) also followed the French example. As many as 374 women declared in the magazine *De Stern* that criminalizing abortion only posed women at avoidable risk, humiliating them, disempowering them, and creating a stigma that saw them as criminals for trying to exercise their autonomy, and they also shared their own abortion experiences. In August of the same year, in Italy as well, women called for the legalisation of abortion and the free access to it for every woman regardless of her status and her financial capabilities, through a similar self-incrimination manifesto.

[63] Cook, Erdman, Dickens*, Abortion,* supra n. 62, pp. 18-19.
[64] Ibid, pp. 16-17.

Lastly, United States women signed a petition which was released in the spring of 1972 in the liberal feminist magazine *Ms Magazine.* Feminists were looking for a radical change of the law instead of an incrementation that would have legalised it only under certain justifications, shifting from the penalisation of it to the complete liberalisation. They asserted that it played a significant role towards the emancipation of women and the gender equality.

With the appearance of abortion on the political scene, opposing movements usually led by the Catholic Church, who wanted to maintain the status quo, began to develop. For instance, in 1967 in the USA, the Catholics set up a national association aiming to prevent the softening of criminal restrictions concerning abortion practices. Similarly, in Germany, the Catholic Church opposed the repeal of the abortion law and tried to persuade the public opinion, fearing that their conservative moral values would be called into question, putting the nation at risk. The Central Committee of German Catholics, which was one of the most committed association for the protection of the foetus, affirmed that every human life, even the most defenceless life of unborn children had to be protected, and on this subject, there could be no compromise. The German Catholic philosopher Robert Spaemann also took part in the abortion debate. He insisted that by liberalising abortion there would have been a violation of the legitimacy of the State for the first time since 1949, because il would have gone against its foundation of being a Rechtsstaat, the form of state that ensures the protection and integrity of human rights and freedoms.[65] On the other hand, their opponents asserted that abortion was a matter of human dignity.

It was thus that in the 1970s the debate shifted from the political to the legal one. In fact, those who thought they had not received enough attention and were not satisfied with the current situation, began to bring their claims to courts, turning the discussion to the constitutional level. Tribunals in France, Italy, United States, Austria, and the Federal Republic of Germany revised the constitutionality of abortion laws for the first time. In Italy and United States, courts repealed completely criminalising abortion laws; in France and Austria, they confirmed legislations that guaranteed

[65] Cook, Erdman, Dickens, *Abortion Law*, supra n. 62, pp. 19-20.

access to abortion; on the contrary in 1975 in the Federal Republic of Germany, the Federal Constitutional Court ruled that the law permitting abortion in the early weeks of pregnancy was unconstitutional. In fact, the Tribunal found that the law that allowed abortion even after a dissuasive counselling, was not protecting the life of the unborn child who had to be considered as an independent legal value, and for that reason he or she had to be guarded under the Basic Law's protection for life. By doing so, the Constitutional Court sided with the faction that wanted to keep traditional values and the role of women as a child bearer and mother in society unchanged. The only justifications for terminating a pregnancy that were not open to legal persecution were those that involved a risk to the health of the mother or to her life. These judgments were essential to ensure the fulfilment of constitutional values in future abortion laws.

One of the milestones ruling about abortion was the U.S. Supreme Court 1973 *Roe v. Wade* decision, which struck down the nineteenth century law that banned abortion expect in cases to save a woman's life. The judgment invoked the right of privacy protected by the Fourteenth Amendment[66] in the constitution and asserted that it included a woman's decision to end a pregnancy, after discussing with her physician, and in order to regulate it, the Court established that abortions were allowed in the first trimester period to protect the life of the unborn child only at the point of viability. Although Roe v. Wade may be considered a turning point in pro-abortion law, it still prioritised too much the autonomy of the doctor rather than that of the woman, indeed it stated: "The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician."[67] However, it must be acknowledged that for the first time physical and emotional harms to women resulting from a restricting abortion law was considered in a constitutional sentence.

[66] Citizenship Rights, Equal Protection, Apportionment, Civil War Dept, further information at: https://constitutioncenter.org/interactive-constitution/amendment/amendment-xiv [last accessed 7 June 2021].

[67] Cook, Erdman, Dickens, *Abortion Law*, supra n. 62, p. 22.

Furthermore, the *Roe v. Wade* decision had a great impact all over the world, indeed many groups and organisations that were working for the respect of reproductive rights were encouraged by it.

Over the years, Courts in other countries have also changed their abortion laws to make it available or restricting it, trying to persuade women not to undergo it and to embrace the role of mother rather than to prohibit it. The 1990s were a new period of revision, in the US the 1992 *Planned Parenthood of Southeastern Pennsylvania v. Casey* case reaffirmed the constitutional right of women to decide freely whether to become mothers and their dignity and equality as citizens. The Tribunal was to investigate the constitutionality of a Pennsylvania state law that required women to wait twenty-four hours to be able to obtain an abortion, to receive information that could make them reconsider their decision, to have parental consent for minors, and to inform her spouse about abortion prior the practice. The Court invalidated these restrictions as an undue burden not in accordance with the Fourteenth Amendment. In this case, therefore, the American court took a further step towards respecting women's reproductive rights.[68]

As for Germany, after the reunification, the law had to be reviewed because the precedents were completely opposite. In fact, East Germany guaranteed free access to abortion in the first weeks of pregnancy, while West Germany banned it. The new legislation allowed abortion up to twelve weeks of pregnancy after receiving counselling aimed at persuading the woman to continue the operation. According to the German parliament, this method made it possible to respect both the life of the foetus and women's freedom of decision. However, the Federal Constitutional Court overruled the new law. Abortion thus, remained criminally punishable except in cases where the woman seeking it had received a document attesting to her participation in counselling. In addition, it was available only in the first trimester, and the advisory to receive the immunity from punishments was usually conducted by Catholic lay groups.[69]

[68] Cook, Erdman, Dickens, *Abortion Law*, supra n. 62, pp. 24-25.
[69] Ibid, pp. 26-27.

As far as Eastern Europe is concerned, in the 1990s the fall of Communism led to political changes in the region and women lost the rights they had before. In fact, the Soviet Union counted gender equality among its values, although in reality it was not respected in the private sphere. Abortion was available for free in all Central and Eastern Europe except for Albania and Romania. With the development and expansion of nationalist feelings, traditional values were also restored, including the role of women in society as mothers and carers. Hence, inequality between men and women increased, as did violence against them, and many women stopped working in order to stay at home and look after their families. The reason for this backwardness was that women's emancipation was seen as a Communist scheme to overturn[70]. Strong religious beliefs spread alongside with nationalist movements. In fact, the Roman Catholic Church is the only religion to have a representative in the United Nations, this is because the Vatican is an independent state with diplomatic relations with other countries. Its power is stronger than any other religion.

Furthermore, in Serbia, it was the Orthodox Church that supported nationalist movements and fought to eliminate abortion. Women had to be mothers otherwise they were seen as enemies to their nation. The same concept was also present in the former Yugoslavia, where in the 1990s strong nationalist ideology pressured women to have many children, even though abortion and contraception methods remained legal.

The Christian religion has had an important influence in trying to keep abortion illegal and save the life of the foetus also in many Western European states. Indeed, Malta is one of the four only countries in the world which does not allow abortion on any legal ground, not even to save the mother's life or to safeguard her health. Spain, Portugal, and Ireland also have very strict abortion laws, although they have been loosened somewhat over the years. Women living in these states have often decided to travel to another country that allowed abortions to obtain them, for example Irish women going to the United Kingdom.

[70] Widdows, Idiakez, Ciriòn, *Women's Reproductive Rights,* Houndmills and New York, Palgrave Macmillan, 2006, pp. 20-21.

The latest, with its 1967 *Abortion Act*[71] was one of the first to liberalise abortion, however it did not apply to Northern Ireland, where the practice is regulated by a 1938 Court judgment. In the *R. v. Bourne* ruling the Tribunal decided that "'The law permits the termination of pregnancy for the purposes of preserving the life of the mother. . . if the doctor is of the opinion. . .that the probable consequence of the pregnancy will be to make a woman a physical wreck.".[72] In 1984 there was an attempt to extend the *Abortion Act* to Northern Ireland, but the Northern Ireland Assembly voted against it. In Italy, abortion was liberalised by the *194 law*[73] in 1978 as a result of the strong public pressure. In fact, despite the influence of the Catholic Church and conservative parties, women are entitled to have an abortion on request up to the third month, after which they can only undergo the operation for specific reasons. Anti-choice groups and the Vatican have tried to undermine the reproductive rights of Italian women several times over the years by specifying that a woman's role is to be a mother, but the law has not changed.

Finally, the influence of the Christian religion is also very strong in Central and South America where abortion laws have always been very strict and only in recent years, thanks to the work of rights associations and advocates, they have been evolving towards the respect for human rights, as in the case of Argentina, which has liberalised abortion in 2020 up to the fourteenth week of pregnancy. The only and first country which revised its abortion law to make it less restrictive, in the Latin America and Caribbean region was Cuba, in 1965. Abortion became available and free of charges, included in the national health system, even on request, up to the tenth week of pregnancy. Abortion, in the 1979 Penal Code, is regarded as illegal only if it is performed without the woman's consent, in exchange for money or through dangerous and unsafe procedures.[74]

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[71] Abortion Act 1967, see further information at: https://www.legislation.gov.uk/ukpga/1967/87/contents [last accessed 7 June 2021].

[72] Widdows, Idiakez, Ciriòn, *Women's*, supra n. 70, p. 30.

[73] Further information and full text at: https://www.gazzettaufficiale.it/atto/serie_generale/caricaArticolo?art.versione=1&art.idGruppo=3&art.flagTipoArticolo=0&art.codiceRedazionale=001G0200&art.idArticolo=19&art.idSottoArticolo=1&art.idSottoArticolo1=10&art.dataPubblicazioneGazzetta=2001-04-26&art.progressivo=0 [last accessed 7 June 2021].

[74] Berer, *Abortion,* supra n. 61, p. 21.

In the mid-1990s, two major United Nations conventions marked a turning point in people's reproductive rights, the 1994 International Conference on Population and Development, and the 1995 Declaration and Platform for Action. The first was held in Cairo, where 172 nations signed a programme that focused on the protection of everyone's dignity and human rights including the right to plan one's family. The second took place in Beijing, it clearly stated in the fourteenth paragraph that a woman had the right to control her own sexuality and reproductive choices, and it called on states to lift sanctions against women who have had illegal abortions. [75]

Since the 1990s there has been a gradual liberalisation of abortion laws, but there is still a long way to go. In fact, too many women still resort to illegal and dangerous practices or are forced to leave their own country in order to undergo the end their pregnancies. Even in states where abortion is guaranteed by law, women are often denied services, especially general information. This is due to the great influence of anti-choice groups, which act by trying to undermine women's ability to apply their right to abortion through campaigns and legal proceedings that target late abortions, emergency contraception and parental consent for adolescents. Moreover, in order to respect the rights of the foetus, these groups have recently been engaged in the assisted fertility debates.

However, as abortion is one of the safest health treatments, the only reasons for penalising laws to exist are their deterrent purposes and the protection of unborn children over that of women's life.

Today, abortion constitutionalising has multiple forms, some governments through their jurisdictions, respect women's dignity and autonomy in decision making about whether to become a mother or not for all or some time of pregnancy, other legal systems prioritise foetal life and criminalise abortion in total or with some exceptions to protect the physical or psychological wellbeing of the mother, lacking the autonomy aspect. Recently, rather than being included in the criminal law, some governments incorporated abortion laws in public health statutes, policies, and regulations on sexual and reproductive health care.

[75] Widdows, Idiakez, Ciriòn, *Women's*, supra n. 70, pp. 17-18.

The struggle to ensure women their reproductive rights is a matter of both national and international levels, and it is far from being solved, indeed, despite many years of campaigning contraception has been completely liberalised while abortion has not. Globally, international bodies such as the United Nations human rights institutions, in particular the Human Rights Committee, the Committee on the Elimination of Discrimination against Women, the Committee on Economic, Social and Political Rights, the Working Group on discrimination against women in law and practice, and the Special Rapporteurs on the right to the highest attainable standard of health, and regional ones including the Inter-American Court of Human Rights, the European court of Human rights, and the African Commission on Human and People' Rights (ACHPR), have worked hard and still do so, to progress on law reforms. For Example, the ACHPR took an important and bold step in 2016 and 2017 by calling on states in the African region to decriminalise abortion in accordance with the Maputo Protocol.[76] Lastly, other reasons that might be assessed to soften abortion laws is in favour of women's rights, are over-population and environmental issues.

2. Abortion laws around the world nowadays

According to the Center for Reproductive Rights, 970 million women worldwide are legally entitled to have an abortion on broad grounds because of their home countries jurisdiction, they represent the fifty-nine percent of women of reproductive age, meaning that the remaining forty-one percent (namely 700 million women) lives in states that either highly restrict it or entirely criminalise it.[77] Abortion is not just a health-related matter, its legal status indicates how women are treated and considered in their own societies, if they are given equal opportunities and rights as men and if they have the ability to decide on their reproductive life. Where abortion is restricted

[76] Maputo Protocol: Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, see at: https://au.int/sites/default/files/treaties/37077-treaty-charter_on_rights_of_women_in_africa.pdf [last accessed 7 June 2021].
[77] Center for Reproductive Rights, *The World's Abortion Law*, available at: https://maps.reproductiverights.org/worldabortionlaws [last accessed 7 June 2021].

by law, the incidence of women resorting and dying from unsafe procedures increases, girls usually do not finish their education, and they are more rarely included in public and political life.

There is no international law regulating abortion, and since they vary greatly from state to state it is difficult to classify and compare them, but one can start by placing them in the different legal systems to which they belong. For Instance, most European states including France, Portugal, Belgium and Spain and their former colonies, among others, nations in Latin America and in the Sub-Saharan African region speaking French or Portuguese, follow the civil law system which typically includes abortion laws into their penal code. Their legislations state under which grounds abortion is allowed and free from punishments, and they indicate who might be brought to trial if an illegal abortion were to take place.

As regards of states sticking to common law, of course, abortion laws are generally guided by courts and judges' decisions. The nations that use the common law system are the English-speaking ones, namely the United Kingdom of Great Britain and Northern Ireland, the United States of America, Canada, Australia, New Zealand, Ireland, and their former colonies such as India, Bangladesh, Singapore and countries in the Caribbean and Oceania regions and Africa.

Finally, statutes which can be found into *Shariah*, that is Islamic law, are influenced by religious foundations. In the Qur'an, the religious text of Islam, abortion in not banned, with the result that induced abortion is permitted up until a certain period of pregnancy for specific reasons. Countries which follow the Islamic law are the ones where most of their population is Muslim, for instance Northern Africa and Western Asia nations, Indonesia, Malaysia, and Pakistan.[78]

However, although the three legal systems mentioned above are easily distinguishable, it is often the case that the laws of individual states do not exactly follow the lines of a single model, in fact they may take their cue from other schemes. Furthermore, the complexity of comparing the various existing abortion laws also

[78] United Nations, *World,* supra n. 3, p. 15.

comes from the fact that some states do not adopt a single law but use codes on public health or medical ethics that clarify how to interpret and implement abortion laws.

Worldwide there is only one country that has completely decriminalised abortion, that is Canada through its Supreme Court decision *R. v. Morgentaler* in 1988.[79] The ruling judged unconstitutional the criminalisation of abortion because it violated women's human rights. Although other states have very liberal and rights-respecting laws, they do place a few limits on the freedom to have an abortion.[80] On the contrary, there are currently twenty-four nations that prohibit abortion entirely without exception, which means that ninety million women of reproductive age do not have the freedom to make their own decisions about their bodies, even if they are at risk of death. These include three European countries, Malta, Andorra, and San Marino.[81]

For all other states, the legal grounds under which abortion is permitted are five, namely: to save the life of pregnant women (forty-two countries which only allow it on this base, approximately 360 million women), to preserve their health, mental and/or physical (around 225 million women have the possibility to legally terminate their pregnancy also for this reason), in case of foetal impairment, in case of rape or incest, and for economic or social reasons (roughly 386 million women live in nations that authorise abortion in case the circumstances they live in and the potential impact of carrying on with the pregnancy are a high burden for them) or on request (only seventy-two countries fit into this category).[82]

Safeguarding the life of the mother is the most common justification accepted by global legal systems for obtaining an abortion. Generally, the decision is made by any doctor or, more specifically, by the physician who authorises or performs the procedure. However, some states specify exactly what they contemplate to be life-threatening circumstances for women.

The second most widespread legal reason to obtain an induced abortion is to preserve a woman's health. Whether the term "health" is considered for mental or physical or

[79] See full text and further information at: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/288/index.do [last accessed 7 June 2021].
[80] Berer, *Abortion,* supra n. 61, p. 16.
[81] Center for Reproductive Rights, *The World's*, supra n. 77.
[82] Ibid.

both issues, is not defined in almost one third of the countries that legally allow it. Some jurisdictions indicate clearly in detailed lists which conditions are regarded as a possible injury to the woman's physical health, while others do not specify them leaving more room for doctors to interpret the indications. As regards of the threat to mental health, sixty-nine percent of countries accept it as a legal justification, while only around sixty percent of these explicitly state it in the law. As in the case of physical damage, there is a great difference from state to state in recognising psychological damage, some specifying exactly which are interpreted as such and others not giving a specific definition.[83] The geographical areas where this justification is most widespread are Europe and North America, whereas in Oceania and South America only slightly more than half include this provision in their codes.

Foetal impairment was guaranteed in 2017 as a lawful ground to permit abortion in sixty-one percent of countries according to the United Nations paper on *World Population Policies 2017,* an increase of 20 percentage points compared to 1996. However, this is one of the most heated points of debate between pro-abortion and anti-choice groups as it is a matter of protection of the life of the child. In Latin America and the Caribbean area especially, it is recognised only in thirty-nine percent of the countries.[84]

Many legislations regulate the provision of induced abortion if the pregnancy is the result of rape or incest, in fact it is generally allowed even in countries with restrictive abortion laws. Ninety-five of them precisely mention rape and fifty-seven do the same for incest, while other nations relate to them as "criminal offence". The highest increase of reforms in allowing abortion on this ground has been made in Africa. Although this is one of the most common reasons, there are often specific procedural steps to be followed in order to actually undergo the practice. In some cases, the offence must be taken to court and await a positive decision, in others it must first have been reported to the police or other judicial authorities. In less restrictive laws, women may simply declare that they are victims of rape or incest.[85]

[83] United Nations, *World,* supra n. 3, pp. 18-19.
[84] Ibid, p. 20.
[85] Ibid, p. 21.

The last legal ground is the most difficult to find in global laws on abortion, indeed only thirty-seven percent of countries indicate economic or social distress as justifiable, and thirty-four percent grant abortion on request so that the ultimate decision on the continuation of the pregnancy belongs to the mother. European Union is the region where abortion on the woman's request or broad social grounds is mostly available, twenty-six out of the twenty-eight member nations, excluding Poland and Malta.[86] However, once again, laws vary considerably from state to state, some leaving room for interpretation while others are more specific. In Belarus, Uzbekistan, and Kazakhstan, to name but a few examples, the law expressly states which circumstances are of an economic and social nature, including age, civil status (whether the woman is married or not), and the number of children the pregnant woman already has. In Iceland, in addition, also the instance where the woman has already had too many children in a short time and cannot take care of the future child satisfactorily is cited in the statute. In the case of abortion on demand, the woman does not usually have to justify the reason for having it, but in some countries, as in Belgium, she must declare that she is in a state that causes her stress. Nonetheless, this declaration is seen as a mere formality, and the woman has full autonomy to decide whether to have an abortion. It is important to note that most states that allow termination of pregnancy on demand place gestational time limits to go through the practice, usually within the first trimester, after which, a legal justification from those mentioned above is required.[87]

Criminal culpability for unlawful induced abortion is very common, almost every country around the world specifies in its legislations the provisions for criminal charges ranging from fines to time in prison. Nevertheless, what changes is who is held responsible. Criminal proceeding against the woman who had the abortion are carried out in seventy-one percent of countries, especially in Latin America and the Caribbean (ninety-four percent of states), followed by sub-Saharan Africa (ninety-two percent). Most commonly, in ninety-five percent of countries, charges are brought

[86] Center for Reproductive Rights, *European Abortion Law: A Comparative Overview,* available at: https://reproductiverights.org/european-abortion-law-comparative-overview-0/ [last accessed 7 June 2021].
[87] United Nations, *World,* supra n. 3, pp. 21-23.

against the provider of the illegal abortion, for instance in Central and Southern Asia, Latin America and the Caribbean, and Northern Africa and Western Asia, while in sixty-five percent of nations even other people involved, for example those who helped the woman seeking the abortion, can be held criminally liable, and once again South and Central America is the region with the highest percentage of states following this provision.[88] For these last persons, there are also countries that provide circumstances that can be brought to court, in order to have a mitigated sentence. An instance of this is Ethiopia, where, in case of illegal induced abortion owing to the severe poverty in which the mother lives, it can be considered as a reducing circumstance by the tribunals, and more in Peru, if the termination of pregnancy resulting from rape is performed, the sanction is three months in jail instead of the usual from one to five years for other reasons. [89]

Another key point in abortion laws is gestation limits, which are the time frame within which an abortion can be obtained. They begin on the first day of the last menstrual cycle, which should occur about two weeks before conception, unless the law stipulates that the first day is the day of conception, in which case they are prolonged by two weeks.[90] However, despite numerous studies, it is still difficult to determine the exact moment when the foetus can be considered viable. Prenatal personhood has been debated over the years by the disparate figures who take part in the discussion of abortion rights, including scholars, activists, religious authorities, and tribunals. The issue is often brought up by anti-choice groups only to justify restrictions on women's sexual and reproductive rights by taking away their right to autonomously choose on their life.[91]

They are generally applied to regulate the most advanced ending of pregnancies for a particular indication; indeed, they differ depending on the legal ground and framework. When laws are more restrictive there are usually no time limits, as the woman's life or health must always be saved. Under more liberal laws, however, the

[88] United Nations, *World,* supra n. 3, p. 23.
[89] Ibid, p. 23.
[90] Center for Reproductive Rights, *The World's*, supra n. 77.
[91] De Vido, *Violence Against Women's Health in International Law,* Manchester, Manchester University Press, 2020, p. 59.

limit is usually set between ten and fourteen weeks of pregnancy for abortion on demand, or for social and economic reasons, beyond which abortion is still available under other circumstances, such as foetal impairment and safeguarding of the woman's health. In Europe and Northern America as well as in Central and Southern Asia, gestational limits are highly common, in 2017 more than half of countries worldwide had set them for induced abortion.[92] Since fixing a time can be harmful to mothers, several states in Europe reformed their laws to extend the time limit.

As for authorisation by a third party, several countries may require it to legally access abortion for all instances or only for some circumstances, such as in case of rape or incest, or when the seeker is a minor. The person who grants authorisation depends on the various statutes, in most cases a professional working in the health sector is required. This is the case practically everywhere in North Africa and the Western Asia, while it is almost never needed in Oceania. More than half of the states require the authorisation of two or more doctors, twenty-three percent require the authorisation of only one physician and the rest do not specify the number. In addition, in states such as Spain and Portugal, the authorisation must be given by a healthcare professional other than the one who will then carry out the procedure.

Parental consent for girls under the legal age of responsibility in necessary especially in Central and Southern Asia (sixty-four percent of countries), and also in more developed areas such as Europe and North America, once again Oceania is the region with the less percentage of nations requiring a parent authorisation.

Finally, in some states, especially in less developed regions, or where religion plays a major role at the legal level, such as in North Africa and Western Asia, the consent of the husband is required for married women, whereas it is absent in Europe, North America, and Oceania.[93] Such authorisations are discriminatory in that they portray women as they are incapable of making autonomous important decisions and having an opinion about their own bodies and future.

In addition to the above-mentioned requirements, some legislations require other compulsory stipulations, among which binding waiting periods or counselling,

[92] United Nations, *World,* supra n. 3, p. 25.
[93] Ibid, pp. 27-31.

examination for immunodeficiency viruses (HIV) or other sexually transmitted infections (STIs), and ultrasound viewing or heartbeat screenings.

The time women may have to wait from the moment they request an abortion to when they can receive it, fluctuates from statutes, going from a minimum of forty-eight hours to a maximum of seven days, resulting in avoidable delays and higher risks linked to later abortions. The WHO specifically states that legislation should not impose on women unnecessary postponements because they weaken their rights and chances to decide autonomously.

Mandatory counselling is most ordinarily required in developed countries, in Europe and North America, followed by Central and Southern Asia, globally only twelve percent of states demand it as part of the procedure. The nature of the content of these counselling can be biased, discouraging the woman to go through the termination, as in Germany and Hungary. Influencing a woman's decision over her body and her future, undermines her human rights. In other cases, as in Belgium for example, counselling has the purpose to inform properly the pregnant woman. Specialised healthcare personnel notify her about the rights, assistance and benefits that law assures to unmarried women and their children, and families, along with the alternative of adoption of the unborn child. Furthermore, women are advised on where they can receive aids to overcome their psychological and social issues due to the circumstances.

Globally, only the Russian Federation requires HIV testing in order to obtain the authorisation for abortion, while four nations Cambodia, Ethiopia, Lithuania and Serbia request examination for other STIs. Moreover, North Macedonia before receiving an induced abortion, compels women to view an ultrasound or hear the foetal heartbeat.[94] These requirements are nothing more than additional barriers to discourage access to abortion, even when it is liberalised.

The principle of non-retrogression is present in international human rights law, recent reforms that diminish women's reproductive rights and their possibility to access to safe abortion violate this principle.

[94] United Nations, *World,* supra n. 3, pp. 32-34.

Recently, especially in Europe, many governments tried to restrain the existing justifications to obtain abortion or completely prohibit it. Poland is one example, where abortion is no longer legal in case of foetal impairment, following a court decision that challenged the constitutionality of the law. Others established new barriers so that even when termination of pregnancy is legitimate, it becomes harder to attain it. Moreover, in states such as Italy, the high rate of doctors and health professionals refusing to provide the procedure on grounds of conscience or religion, is not well managed by governments who fail to guarantee women appropriate cares and referral to other physicians, undermining their right to have an abortion, and interfering with their personal life.[95]

In Italy, refusing to practice abortion is accepted by the law, in fact such objection is seen as respecting the rights of all individuals who might think differently based on religion, politics, philosophical ideas or others. However, the jurisprudence specifies that not all healthcare professional and other people involved can rely on it, for example midwives, judicial officers and administrative assistants are exempted, and in any way, they cannot refuse to provide treatments prior and after abortion. In 2013 the Confederazione Generale del Lavoro (CGIL) filed a complaint to the European Committee of Social Rights, based on the 1996 European Social Charter for social and economic rights, because of the high number of conscientious objectors. CGIL claimed that the Article 9 of the Italian abortion law, was not "properly applied in practice" to regulate conscientious objection, yet the number of physicians who refuse to offer abortion services is still very high.[96]

3. Criminalisation and stigma

Abortion can be liberalised with certain restrictions, which then generate legal repercussions, or it can be completely criminalised. The primary cause of the harm to

[95] Center for Reproductive Rights, *European,* supra n. 86.
[96] De Vido, *Violence,* supra n. 91, pp. 69.71.

women's health and well-being can be found in the criminalisation of abortion, as it is often deemed as a particular type of health treatment different from others and subjected to discrimination alongside with those who seek it. Health systems are considered inclusive when abortion is not categorised differently from other health cares, and exclusive when termination of pregnancies is not guarded as a routine health service, and its provision is denied.

Overall penalising termination of abortion creates stigma around it, increases barriers in accessing it, delays treatments and produces a "chilling" effect on health care professionals' work, who might refuse or delay to provide information and care. Practical access to abortion is still difficult even when the law would allow it, in fact substantive freedom and lawful liberty does not mean assured provision of such. In order to put into practice recent and future revision of laws, abortion-related services should be granted by the state, and these should not be excessively expensive and far away, and most importantly they should be available to everyone and not to just a few selected minorities. In addition, restraining abortion options and legal justifications has already been proven to be pointless in trying to reduce the number of women seeking it, on the contrary, it heightens the request for illegal, unskilled, and unsafe practitioners, jeopardizing more women's health and lives.[97]

Abortion is seen as "wrong by nature" and a damage to society because of its social meaning created by its criminalisation. Indeed, by studying how legislations are implemented and interpreted, it is possible to understand how the significance of abortion is constructed. "Social meaning provides a way to speak of the frameworks of understanding within which individuals live; a way to describe what they take or understand various actions, or inactions, or statuses to be; and a way to understand how the understandings change.".[98] The cultural and historical view of abortion therefore implies that the people involved, from seekers to practitioners and assistants, are also stigmatised, prejudiced, and seen as criminals. Obviously, as beliefs differ between societies, cultures and circumstances, the meaning of abortion is contingent

[97] Greasley, *Arguments About Abortion: Personhood, Morality and Law,* Oxford, Oxford University Press, 2017, pp. 203-209.
[98] Cook, Erdman, Dickens, *Abortion*, supra n. 62, p. 347.

to the group or community within which it exists, as some people regard it as a sin to be punished while others as a health matter to be provided.

The regulation of abortion should first and foremost comply with international human rights guidelines, ensuring the respect of freedom and dignity of all individuals regardless of their gender, age, and status.

The Canadian sociologist Ervin Goffman argued that when communities penalise induced abortion they are "spoil[ing the] social identity of those seeking and providing abortion, which has the effect of cutting [them] off from society and from [themselves] so that [they stand as] discredited person[s] facing an unaccepting world.".[99] For this reason, women who seek abortions tend to be excluded from social acceptance, and seen as outcasts and degenerates, doctors are considered as abortionists, and those who support the women's decision, such as their parents, are perceived as negligent. According to this logic, however, legally induced abortion, as when it is necessary to save the woman's life or health, is also overshadowed and frowned upon. Moreover, maternal mortality and morbidity following unsafe practices to terminate pregnancy, as well as psychological harm women experience from stigma, quantify the impact of criminalised abortion.

The justifications behind the criminalisation of abortion are mainly morally based preconceptions about women, their role in society, their sexuality, and the value of foetal personhood. Religions are also very important in the country's decision to penalise people involved in unlawful abortion. According to their values, especially the Christian religion, everyone should observe God's ruling, if someone does not follow His ordinance by committing a sin, then society must make the culpable person pay through a punishment.[100] Additionally, having sex without the intent to procreate is another transgression to be disciplined, as well as denying the unborn child its life on earth, baptism and eternal life in heaven.

Mothers who wish to end their pregnancy are perceived as immoral, unethical, a threat to society, not only by single individuals but also by the state which creates this image through punishment. Its role thus becomes dominant in deciding whether a woman is

[99] Cook, Erdman, Dickens, *Abortion*, supra n. 62, p. 349.
[100] Ibid, p. 351.

worthy of respect or not, and therefore the state is the main culprit in tainting women, inciting hostilities against them, and generating additional gender-based discrimination. In this sex-focused contest, the main targets are young girls and unmarried women who had illicit sexual intercourse outside marriage, along with wives who refuse to give children to their husbands. Womanhood means necessarily being a mother, care and nurture the vulnerable children and having sexual activities only for the purpose of procreation. These ideas are then compounded by even more radical stereotypes such as the fact that a woman should be passive and subordinate to her husband, having no decision-making autonomy, not even to choose what to do with her body and whether to terminate a pregnancy or not.

What is not considered, however, is that the presumed threat to society denying a foetus to come to life, is actually greater if the woman's life or physical and mental health is in danger, for example if the pregnant girl is too young or too old, or if she gets pregnant again right after the previous pregnancy. Moreover, in circumstances such as these, the lives of children and their families would also be jeopardized.

The states duty should be that of promoting and protecting human rights, however by applying criminal law, and failing to ensure women’s their reproductive rights, they contribute to inhuman treatments.

A discriminatory situation is also generated when the law only allows termination of pregnancy in circumstances that endanger the mother's life. Indeed, it means that only her life, and not her health or general well-being, are important to society. A woman must survive, but how she will go on to live, whether with physical or psychological damage, fades into the background. It is important to note though, that men's rights and the importance of their health and well-being are not undermined, and a government can and must control women’s bodies and reproductive choices but may not engage in the same way when it comes to men.

Stereotypes create a separate category for anyone dealing with abortion and link them to characteristics that are considered undesirable. Furthermore, through the criminalisation of the practice itself these people are labelled as criminals and deviants to be separated from the rest of society without taking into account their needs and situations. Stigma can be perceived, experienced, or internalised. Perceived stigma is

related to women's perception of how others feel and behave about her having an abortion or considering having it. When women are actively discriminated against for having had an abortion, ostracized, or even persecuted for having an abortion, that can be defined as experienced stigma. Providers too, can endure it through intimidation, violence, and harassment, by being forced to stop delivering it. Internalised stigma is when the individuals are unable to discern their own beliefs from those given to them by their society and they integrate negative perceptions and experiences into their own self, undermining their self-worth.[101] Stigma causes health professionals to deny or postpone services because they are frightened of repercussions, and it discourages women to seek safe and legal induced procedures because of the possible negative social exposure.

The consequence of stigmatising abortion and those connected with it, is that abortion is no longer regulated according to formal law, but it goes to the level of background rules. When the law is misinterpreted and misapplied by individuals or entire institutions, informal laws are created, and they affect the correct provision of services through delays, unnecessary requirements, and inappropriate information. An example is the regulation of patient privacy, it is common that informal laws oblige doctors to inform the authorities if a woman has undergone an illegal abortion, going against the physician's work ethic, and condemning the patient, especially the poorer ones, since this regulation is generally applied in public health facilities.[102] These regulations develop precisely because of the existence of a criminal law, but they cannot be implemented by criminal procedures.

Decisions regarding reproduction and the responsibility of taking care of a child are significant enough not to be hindered and judged by anyone else who is not the woman herself. Her will and needs must be considered as the main concern for states and societies which should treat abortion services as essential health care not different from any others. To progress in compliance with human rights, laws that criminalise abortion should be repealed, and free access to the procedure should be guaranteed following the WHO guidelines and its approved methods, at primary and community

[101] Cook, Erdman, Dickens, *Abortion,* supra n. 62, p. 355.
[102] Ibid, p. 360.

level at least in the first trimester of pregnancies, making sure that women receive proper information on services and law, and they are not ostracized for terminating their pregnancy.

4. Women's reproductive rights as human rights

In male-dominated cultures, the easiest way to subordinate and control women is through control over their bodies and therefore also over their pregnancies. In this environment the value of the life of the foetus is higher than that of the woman, who, nonetheless, is the only one in need of an abortion being the sole having a uterus.
This is also due to the fact that reproductive rights are not mentioned in the Universal Declaration of Human Rights, and at the regional level, for example in Europe, reference is only made to the importance of protecting reproductive health, and there is no consensus on a guideline to follow. However, reproduction should not be disregarded as it is connected to other political, social, and economic issues and rights. Indeed, women like men, have the right to economic stability and to have the career they wish, and this is linked to the right to be able to decide whether and when to become pregnant, as the economic burden linked to it is considerable. Furthermore, as regards to the social position of women, they have the right to be treated like any other human being and not to be discriminated against based on prejudices about their role in society, being able to decide freely for themselves whether to be in a relationship and have children (rights to contraception, abortion, and reproductive autonomy).[103]
Among reproductive rights, perhaps the most important is the possibility of accessing abortion because, if denied, women are deprived of the chance of deciding independently not only on their reproduction but also on their life, and they are forced to carry a pregnancy to term that could cause them psychological distress and social harm. However, far too frequently women are not the focus of moral and political

[103] Widdows, Idiakez, Ciriòn, *Women's*, supra n. 70, p. 3.

debates on abortion and reproductive rights, the embryo is along with its right to life. A woman's life takes second place to that of the foetus, which is nevertheless connected to that of the mother, and most importantly, up to a certain point in the pregnancy the embryo is scientifically not considered capable of surviving outside the womb. The mother's rights are overshadowed by those of the unborn child, they are conflicting and opposed because of ethical and moral schemes created by the society
The mere fact that one has to distinguish women's rights from Universal Human Rights shows that the latter are aimed at men as the norm. Women are perceived as "the other" and therefore need different rights to cope with their issues, which are, however, not deemed in detail despite their relevance. Women's reproductive rights can be gender-differentiated because women's involvement compared to men's in the reproductive process is significantly greater and so are the burdens that come with it. And yet these very rights are not commonly guaranteed and are often denied.[104]
In the past years, regional and international human bodies have worked towards the recognition of safe abortion as a fundamental human right, and by doing so they influenced high court decisions and legislative developments at the domestic level in liberalising and identifying voluntarily termination of pregnancy and women's reproductive autonomy as constitutional guarantees. The most common rights violations that Courts, United Nations, and regional bodies discovered are the right to be free from torture, inhuman or degrading treatment or punishment, the right to life, and the right to privacy which also considers the respect for reproductive autonomy.
United Nations treaty monitoring bodies have been established over the decades, in order to control and ensure that states parties to the United Nations human rights charters, are following the obligations they are required to. These bodies have expressly specified, through a range of communications, that states that allow induced abortion under their domestic law must also warrant practical access to all the services linked to it. When states fail to act in accordance with this principle, they can be found

[104] Widdows, Idiakez, Ciriòn, *Women's*, supra n. 70, pp. 12-13.

guilty of violating the rights to health, privacy, non-discrimination, and freedom from cruel, inhuman, and degrading treatment.[105]

Among UN treaty monitoring bodies just above mentioned, it is necessary to mention the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) of 1979 and the Economic, Social and Cultural Rights Committee (ESCR Committee) of 1985, both of which focus on violence and discrimination against women.[106]

The CEDAW recognizes access to reproductive health care as a basic right, and in its Article 12, requires state to eradicate discrimination against women especially when it comes to health care. In the 2017 General Recommendation No. 35 (9), indeed it is affirmed that gender-based violence is a "social rather than individual problem, requiring comprehensive responses, beyond specific events, individual perpetrators and victims/survivors.".[107] Furthermore, at point 10 it states, "the Committee considers that gender-based violence against women is one of the fundamental social, political and economic means by which the subordinate position of women with respect to men and their stereotyped roles are perpetuated.".[108]

The ESCR Committee, in its 2000 General Comment No. 14, affirms that states have the duty to respect towards their citizens, the rights as contained in the International Bill of Rights that are "closely related" to the right to health such as "rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement.".[109] Furthermore, it specified that the right to the "highest attainable standard of physical and mental health" present in the Article 12 of the International Covenant on Economic, Social and Cultural Rights

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[105] Fine, Mayall, Sepúlveda: *The Role of International Human Rights Norms in the Liberalization of Abortion Laws Globally*, in "Health and Human Rights", Vol. 19, No. 1, Special Sections: Abortion and Human Rights Drug Control and Human Rights, 2017, p. 71.

[106] De Vido, *Violence,* supra n. 91, p. 3.

[107] Further information and full text at: https://www.ohchr.org/en/hrbodies/cedaw/pages/gr35.aspx [last accessed 7 June 2021].

[108] Ibid.

[109] Further information and full text at: https://www.refworld.org/pdfid/4538838d0.pdf [last accessed 7 June 2021].

(ICESCR)[110] covered also sexual and reproductive freedoms. At point 8, it clearly states "The right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment, and experimentation. By contrast, the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.".[111]

The ESCR Committee upheld again the relevance of protecting reproductive rights in the General Comment No. 22, which focuses entirely on the right to sexual and reproductive health. [112] Once more the focus is on women's ability to make their own decisions about their sexual and reproductive health according to their values, life, and work ambitions, and to self-determinate themselves. Guaranteeing autonomy to women means that states should not interfere with their decision-making process, even indirectly.

United Nations also acknowledged abortion as a human rights concern in their Special Procedures of the Human Rights Council. The General Comment No. 36 on the right to life of the HRC specifies that young girls and women in general "do not have to undertake unsafe abortions", and that it is the state's duty to warrant effective and accessible services linked to prenatal and post-abortion health care for every individual in all circumstances.[113]

Moreover, when Anand Grover was Special Rapporteur on the right to health, he pointed out how abortion services are necessary as part of human rights because they would lessen maternal mortalities, and adverse mental and physical health conditions resulting from unsafe procedure. Furthermore, restring laws contravene women's

[110] Further information and full text at: https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx [last accessed 7 June 2021].
[111] Supra n. 108: https://www.refworld.org/pdfid/4538838d0.pdf
[112] Further information and full text at: http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1a0Szab0oXTdImnsJZZVQfQejF41Tob4CvIjeTiAP6sGFQktiae1vlbbOAekmaOwDOWsUe7N8TLm%2BP3HJPzxjHySkUoHMavD%2Fpyfcp3Ylzg [last accessed 7 June 2021].
[113] De Vido, *Violence,* supra n. 91, p. 202.

sexual and reproductive freedom, alongside with their dignity and equality as human being.[114]

More recently, international organisations not only clarified what the minimum legal justifications for obtaining an abortion should be but went further by calling for states to ensure comprehensive public reproductive health services, including free access to safe abortion. They accused states that punish practitioners and girls or women who underwent illegal abortion of being inconsistent with human rights regulations and exhorted them to abolish criminalisation of interruptions of pregnancies. Restrictive laws only encourage unsafe and dangerous practices and the resulting thousands of annual deaths, permanent disabilities or at best treatable infections, and in no way respect the dignity, autonomy, and other rights of women.

An example of the engagement of institutions at the global level is the 2016 case of *Mellet v. Ireland* in which it was the Center for Reproductive Rights that filed a report to the United Nations Human Rights Committee on behalf of Ms Mellet, who was pregnant with a foetus that had a fatal disease, and she was obliged to travel to Liverpool in the United Kingdom to be able to abort. The HRC made an unprecedented decision by declaring that the Irish law prohibiting and criminalising abortion in almost all circumstances was contrary to the United Nations International Covenant on Civil and Political Rights.[115] The Committee also concluded that being the government of Ireland culpable, it had to offer Ms Mellet an "adequate compensation" and "any needed psychological treatment", and it had to revise its law, and if necessary also its Constitution, in order to allow abortion in cases of foetal impairment. The Human Rights Committee's ruling considered the severe emotional distress, and suffering to the applicant, caused by the Irish statute in violation with her rights to privacy, freedom from cruel, inhuman, and degrading treatment and equality before the law.[116]

As regards of regional human rights bodies, a ground-breaking step forward towards the recognition and respect of women's rights has been taken through the

[114] Fine, Mayall, Sepúlveda, *The Role,* supra n. 105, p. 72.
[115] Ibid, p. 71-72.
[116] De Vido, *Violence,* supra n. 91, pp. 67-69.

implementation of the Protocol to the African Charter on Human and Peoples' Rights also known as the Maputo protocol in Africa, which explicitly requires states to warrant women's right to abortion at least in case of criminal offence such as sexual assault or incest, and when the life or mental and physical health of the mothers are at risk if the pregnancy would be carried on. In addition, also the African Commission on Human and Peoples' Rights, identified in a general comment, how denying access to safe abortion care infringes the rights of confidentiality, privacy, and once again freedom from discrimination and cruel, inhuman, or degrading treatment.[117]

As far as Europe is concerned, both the European Court of Human Rights and the Parliamentary Assembly of the Council of Europe have commented on this. The first, as United Nations treaty monitoring bodies did, stated that if abortion is deemed legal by state regulation, then it must also be accessible, otherwise there would be a violation of the rights already mentioned. The latter also affirmed the importance of women's autonomy in deciding on whether to freely ending a pregnancy or not, and her right to physical integrity and control over her body.[118]

In addition, a Council of Europe human rights treaty was signed in Istanbul in 2011 to prevent and combat violence against women and domestic violence. The convention is at once a human rights law and a criminal law convention, and its purpose is to block gender-based violence, protect victims and punish their abusers. In fact, its backbones are prevention, protection, prosecution, and policies. [119] The Istanbul Convention entered into force in 2014, and as of 2021 forty-five countries ratified it, however Turkey and Poland decided to withdraw in 2021.

The treaty regards the discrimination against women as due to their sex and to the social view, customs, traditions, and behaviours that relegates them to a subordinate role to that of men. Violence is intrinsic in society and its mechanism and is often perpetrated by the state which should have the obligation to prevent it and eradicate these prejudices and cultural schemes.

[117] Fine, Mayall, Sepúlveda, *The Role,* supra n. 105, p. 72.
[118] Ibid, p. 72.
[119] De Vido, *Violence,* supra n. 91, pp. 5-7, 192.

For example, with regard to abortion, when laws and policies permit doctors to decide on behalf of women, or when consent is required from another person such as the partner, there is a clear violation of the principle of equality, given that women are at a disadvantage.

Adequate measures should have the purpose to fulfil every human right, including the right to sexual and reproductive health. Achieving concrete transformations in this direction is a hard and long process because of political interests and the stigma rooted in society, but many civil society and reproductive rights advocates are working toward this goal so that every woman can be free to decide what to do with her body and life.

Past decisions taken by UN treaty bodies, regional institutions, and human rights courts all aim at the elimination of decriminalisation of abortion at the national level, at least when there is a risk for the mother's life and physical or mental health, when the pregnancy is the result of a rape or incest, and in cases of severe malformation of the foetus. States should, however, put women, their health, and their rights first, and remember that denying abortion could be a great source of suffering for the pregnant woman due also to societal stigma and discrimination. One of their obligations is not to interfere in order not to cause further stress, but rather they should ensure that the medical staff give appropriate information, and that the woman is the last one to decide freely how to proceed, without coercion and in accordance with the principle of confidentiality.

III

The case of Poland

Abortion law in Poland is one of the most restrictive in Europe. The statute regulating it has been changed several times, going from being a relatively liberal law to almost completely criminalising the termination of pregnancy. The political debate around this topic is one of the most heated in the world, as religious forces, nationalist parties, civil society, feminist, students, and LGBT+ movements are involved. While globally legal and policy reforms are taking steps forwards the recognition and respect of women's reproductive rights, by broadening the range of legal justifications to access safe induced abortion, as in the case of Argentina, South Korea and South Australia, Poland went in the opposite direction, taking steps backwards, heightening women's struggle for autonomy and dignity.

Obtaining treatments linked to abortion, including pre and post abortion services, can be restricted not only by the law, but also by the failure of the state to guarantee the few services that patients are entitled to through the enforcement of additional and unnecessary barriers. This is the specific case in Poland, where services are of poor quality, undervalued and at the discretion of third parties, often doctors. Women are commonly required to wait mandatory periods, receive the authorisation from other physicians other than the one actually performing the abortion, and, in the end, they may still find themselves in a situation where they are denied an abortion because the time limit imposed by law has expired, or health professionals refuse to perform it for fear of legal repercussions. Additionally, women, especially young girls and the ones living in poorer and uneducated conditions, lack substantial information regarding the law and the assistance they are eligible for.

Moreover, as Poland is a relatively 'young' state, having first been occupied by German forces and then by communist forces until the fall of the Berlin Wall, it has several problems related to the administrative sphere. Especially with regard to public

health care system, waiting times are often very long, with the result that people turn to the numerous private clinics, despite the fact that public health services are free of charge, covered by the national insurance that every citizen is entitled to. The most common medical services provided by private clinics are dental care, surgery, pregnancy, or emergency care. However, the cost of this treatments is quite high. Indeed, what is a financial sacrifice and a source of considerable emotional stress for women, becomes a source of income for speculators. The consequence is the creation of social inequalities between people of different classes in access to services that relate to health and should therefore be available to all without discrimination. This is compounded by the fact that, since abortion is legally available only in cases where the life and health of the mother is at risk and in cases of sexual assault or incest, many women find themselves forced to travel abroad, further increasing their expenses.

The problem then expands to the financial sphere as there are no government controls in private clinics regarding prices, treatment standards, and legal prosecution. It is estimated that doctors who provide private abortion cares, without registering their income in the taxation system, earn about ninety-five million US dollars per year, with almost 150 thousand abortions.[120]

A change in the political atmosphere, or even a different and more liberal interpretation of the laws, would not be enough to completely change the current problematic situation. What would be needed is a substantial transformation in the national health system that would implement coverage of abortion and related services in the public system, but above all the certainty that access to it is guaranteed by those in charge, without the possibility of interpreting the law at will.

Polish abortion law has undergone many changes. As things stand today, it is hard to believe that Poland was the second nation in the world after the Soviet Union to legalise abortion in cases of risk to the life or health of the mother, and in cases of incest or rape in 1932. Furthermore, in 1956, the law was amended in order to include

[120] Chełstowska, *Stigmatisation and Commercialisation of Abortion Services in Poland: Turning Sin into Gold*, in Reproductive Health Matters, Vol.19, No. 37, 2011, p. 98.

medical or social grounds among the legal grounds to obtain the termination of pregnancy, such as “difficult living conditions”.[121]

With the fall of communism in the early 1990s, nationalist forces took over in many central and eastern European states, in complete opposition to the recent past. In Poland, moreover, the Roman Catholic Church began to exert a great deal of influence in the political sphere, attempting to undermine the already existing abortion law with its conservative values. The abortion issue moved into the political sphere, where conflicting values took the centre of the debate instead of women's rights.

The new law of 1993 was much more restrictive than the previous one, in fact, the medical or social grounds were eliminated, and abortion remained legal only for three reasons: severe danger to the life or health of the pregnant woman, as certified by two physicians; in cases of rape or incest, after having reported the fact to authorities and if verified by a prosecutor; and in cases of foetal impairment confirmed by two physicians.

Since 1993, there have been several attempts by the conservative right-wing parties, aided by religious leaders, to further tighten the law. For example, in the spring of 2016, a few months after the PiS (*Prawo i Sprawiedliwość,* Law and Justice) electoral victory in the October 2015 legislative elections, the Polish Bishops' Conference issued a communiqué, read in all the churches, calling on parliament to amend the abortion law. However, due to months of large-scale protests led by women's groups, there was no concrete repeal of the abortion regulation.

Even though the legislation was not changed, Polish women had and still have many difficulties in accessing the services they are entitled to. As a matter of facts, there are three famous court cases that were brought to international attention as these polish women appealed to the European Court of Human Rights for not receiving an abortion, and Poland was found guilty of having violated women’s rights.

The last attempt to ban abortion in Poland was in 2020, at the height of the global Covid-19 pandemic. This triggered a large demonstration by the protest movement

[121] Hussein, Cottingham, Nowicka, Kismodi, *Abortion in Poland: Politics, Progression and Regression,* in “Reproductive Health Matters”, Vol. 26, No. 52, 2018, p. 11.

formed in the aftermath of the ruling by the Polish Constitutional Tribunal on 22 October, rejecting the 1993 abortion law insofar as it provides for the termination of pregnancy, within 12 weeks, for serious and irreversible malformations of the foetus or life-threatening syndromes. The ruling party appealed to the Constitutional Court because it considered the law unconstitutional as it would not respect the principle of safeguarding the life of all human beings.

People took to the streets for days and weeks in spite of the pandemic, which even in Poland experienced a frightening surge in late summer 2020 with many positive cases, many hospitalisations and the health system collapsing. The decision on abortion law has been delegated to the Constitutional Court, skipping the controversial parliamentary process. The ruling came at the height of the second wave of the coronavirus, while the whole of Poland was in a red zone and there were clear restrictions on traffic, shops and restaurants closing times, and so on. Surely the country's ruling party thought that modifying the law at such a sensitive time, was the best way precisely to avoid protests, undermining the rights of citizens to express their opinions. However, from the very beginning the uprising was polycentric. There were protests in Warsaw and all the other big cities in the country, but also in many small and medium-sized towns. Women were joined by the voices of many other people who did not want to see their rights pushed into a corner.

Nonetheless, after months of stalling, on 27 January 2021, the judgment of the Polish Constitutional Tribunal was finally published in the Dziennik Ustaw Rzeczypospolitej Polskiej (Journal of Laws of the Republic of Poland).

Even if the law now allows legal abortion for fewer reasons, it will not reduce the number of women seeking a termination of pregnancy, it will actually increase the problem of illegal and unsafe abortions, or for the lucky ones who can afford it, long journeys abroad to be able to decide freely what to do with their bodies.

This chapter will therefore analyse the parliamentary debate along with three major European Court decisions against Poland, the political debate, and demonstrations around the abortion issue in Poland.

The history of abortion law in Poland begins much earlier than in the rest of the world. During the Second Republic of Poland, when it was an independent state in the period between the two World Wars, the Polish government passed an abortion law in 1932 that was surprisingly advanced for its time. The law legalised termination of pregnancy in cases of risk to the life or health of the mother, and for incest or sexual assault. Russia, which was the first country to liberalise abortion, changed again its legislation 1938, when Stalin reincluded abortion in the penal code. However, in Poland, the law was even extended in 1956 to include medical and social reasons such as "difficult living conditions". The final decision about terminating a pregnancy was left to the woman, who could also decide whether to refer to public or private facilities.[122] Additionally, since other contraceptive methods were not easily accessible or either reliable, termination of pregnancy was the most common birth control approach to avoid having children. Abortions were mostly performed though the dilatation and curettage (D&C) method, which is more invasive and dangerous than recent modern practices.

After the end of the Second World War in 1947, Poland came under the influence of the Soviet Union and remained so until 1989, with the fall of the socialist regime.

One of the main features of the Russian government was the separation of church and state, which was beneficial for women. In fact, although the Catholic Church in Poland had always held a lot of power over politics, being subject to the Soviet Union also meant being part of its universal health care system which supported family planning. The model utilised for the health care system was named after Nikola Semashko, a Soviet doctor, and Commissar of Public Health, who formulated the scheme whose purpose was the centralisation of the health system under the communist state. Access to public health care was guaranteed to the entire population. In the 1970s there were the first economic difficulties which led to the formation of a few private health centres. Indeed, the state could not arrange more resources to health care, so it allowed

[122] Hussein, Cottingham, Nowicka, Kismodi, *Abortion,* supra n. 121, p. 11.

limited private providers to alleviate the burden of public health care which was now pressured by long queues.[123]

Even when, in the so-called post-Stalin thaw, after his death, the influence of the Russian central state eased, the Polish state took steps towards the liberalisation of abortion, guaranteeing it also for socio-economic reasons and, above all, making it accessible in public hospitals thanks to its total coverage by the health-system.

What did not change, however, was the attitude towards sterilisation, which remained illegal under the 1932 law. Sterilisation is one of the contraceptive methods still used worldwide, and can be either male or female, but because of its irreversibility it remains a very controversial issue.[124]

As of other contraceptive methods, in 1959, Poland adopted a new law that compelled physicians to inform women who had just given birth or had a termination of pregnancy about their contraceptive options. This, too, was a decisive step towards respect for human rights, and in order to further promote and legitimise Polish women's need for family planning services, the state began to cover seventy percent of the costs of birth controls prescriptions through its health system. Among the contraceptives covered by national insurance, however, there were only the pill and intra-uterine devices, condoms had to be paid by costumers and were sold in pharmacies. This resulted in a disproportionate increase in the use of oral contraceptives, about six times higher than before the law was passed, which in turn caused a shortage in availability.[125]

In 1989, the Soviet Union capitulated with the emblematic fall of the Berlin Wall. The communist regime also lost power completely in Poland, owing to a failing economy situation and a decade of opposition by the Solidarność trade union (Solidarity). Poland held its first completely free elections within two years in 1991, won by a very large margin by this independent trade union. It was led by Lech Wałęsa, and its members were mostly people associated with the Catholic Church and intellectuals, who followed a policy of non-violent resistance. It was the largest Polish opposition

[123] Mishtal, *Neoliberal Reforms and Privatisation of Reproductive Health Services in Post-Socialist Poland*, in Reproductive Health Matters, Vol. 18, No. 36, 2010, p. 57.
[124] Ibid, p. 56.
[125] Ibid, p. 56.

force to the communist regime. Lech Wałęsa served as the first democratically elected president of Poland from 1990 to 1995. His election was an important milestone for the democratisation of Poland; however, things did not necessarily improve since then.[126]

The new government implemented neoliberal economic principles, a complete overturn compared to the previous ones, as market forces now had primacy over economic and social policy. This resulted in cuts to the social welfare, privatisation, and deregulation. The new economic transformation had a major impact on women's health, worsening their social position and access to reproductive health care. As a matter of fact, maternity leave suffered a huge cut from almost two years to less than four months, most childcare facilities were privatised, and family benefits provided by the state's social assistance were diminished. In these new conditions, many women stopped working because they could not afford to send their children to care facilities.[127]

As studies comparing social services between Eastern European countries have shown, Poland is among the states that experienced the greatest cuts in family and maternity benefits. These were supplemented by reductions in the health system, many basic services that were previously universally covered, were withdrawn from the national health insurance, leaving patients with the obligation to pay. Moreover, subsidies for drugs declined drastically from a hundred percent before 1989 to thirty-five percent in 2004, the lowest average in the European Union. Additionally, the 2006 World Health Report showed that Polish government expense on health care was the second lowest on Europe, after Latvia and, indeed, only nearly ten percent of its total expenditure were allocated to health services.[128]

The nationalist labour union was so influenced by the Catholic church that, policies relating to moral issues, such as access to reproductive health, were now regulated following religious values. It bolstered political efforts to weaken women's rights and to reintroduce women's traditional role in society, as mothers and family carers. In

[126] Mishtal, *Neoliberal*, supra n. 123, p.56.
[127] Ibid, p. 57.
[128] Ibid, p.57.

fact, the heightening of the Church's political role led to the repeal of the previous abortion law, the institution of a Conscience Clause law, which also regarded prescription medicines such as hormonal contraception, and antenatal testing for foetal anomalies, as health professionals could now object to provide services based on religious beliefs. The Family Planning, Human Embryo Protection and Conditions of Permissibility of Abortion Act entered into force in 1993, with the specific purpose to protect conceived children, as a matter of fact it states in the first article "The right to life shall be subject to protection, including in the prenatal phase, to the extent provided in the Act.".[129]

The new law allowed abortion only on three grounds: in case "the pregnancy poses a threat to the life or health of the pregnant woman", when "prenatal examinations or other medical conditions indicate that there is a high probability of a severe and irreversible fetal defect or incurable illness that threatens the fetus's life", and if "there are reasons to suspect that the pregnancy is a result of an unlawful act" such as rape or incest.

The most conservative parties, supported by the Church, thought that the law was not sufficient to protect the life of unborn children, and that there would have been an increase in maternal mortality rates. However, deaths related to abortion procedures actually diminished. In addition, the fact that the law was already restrictive can be seen by data that show that since 1956, only three percent of all abortion procedures taking place in Poland, were performed referring to the three legal grounds, leaving the rest, ninety-seven percent, to be driven illegally.[130]

The law has undergone numerous amendments and many acts have been implemented to expand and clarify it. In particular, the *acty wykonawcze* (executive acts) of 1993, 1994, 1996 and 1999 concern the scope, forms, and procedures for granting pregnant women and women bringing up a child assistance in the field of social and legal care. Several enactments over the years were enforced to regulate school teaching and the scope of content concerning knowledge of human sexual life, the principles of

[129] Full text of the law at: https://maps.reproductiverights.org/sites/default/files/documents/Polish%20abortion%20act--English%20translation.pdf [last accessed 13 June 2021].
[130] Mishtal, *Neoliberal*, supra n. 123, p. 61.

conscious and responsible parenthood, the value of family, life in the prenatal phase and methods and means of conscious procreation included in the programme basis of general education. Moreover, two acts were passed in 1997 to specify the professional qualifications of doctors, who could authorise the termination of pregnancy and state that the pregnancy endangers the life or health of the woman or indicates a high probability of severe and irreversible impairment of the foetus or an incurable disease threatening its life, and also the qualifications of persons other than a doctor authorised to consult a pregnant woman intending to terminate her pregnancy, the establishment of lists of consultees, and the system and procedure for carrying out consultations.[131] Furthermore, in 1996 the Polish Parliament enacted a new regulation which allowed abortion until the twelfth week of pregnancy also if a woman was subject to a condition of incontestable financial or social distress. Additionally, the time limit applied in the case of criminal offence and for serious foetal impairments.[132] However, this act was taken to the Constitutional Court the following year, by conservatives who considered it unconstitutional. The Tribunal ruled in their favour, and this was the first in a series of restrictive decisions taken by this body, which, although it is supposed to be independent according to the Polish constitution, has limited the legislative powers of the parliament regarding abortion. In the 1997 ruling, the Court held that the new legislation contravened the Constitutional provision on the right to life, which had to be applied from beginning of life, while the foetus is still in the womb.

Back in 1991, before the 1993 law was enacted, the court confirmed the then Minister of Health's legislation allowing doctors to refuse to provide abortion services as complying to the freedom of conscience principle in the Polish Constitution. Even hospital managers can decide for all their employees not to offer certain services by invoking the above-mentioned clause, taking away the individual freedom of choice of health professionals as well. In addition, in 1992, it rejected a petition from the

[131] Further information at: http://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19930170078&SessionID=3F612417E7B41E079117A367CA61E445128458B4 [last accessed 13 June 2021].
[132] Widdows, Idiakez, Ciriòn, *Women's*, supra n. 70, p. 23.

public defender objecting to the Polish Medical Association's code of ethics, which forbade physicians from performing abortions except in specific borderline cases.[133] The catholic influence on anti-choice members of parliament meant that they opposed all attempts by the parliament to liberalise the abortion law, and indeed served as a dominant factor in restricting women's reproductive rights. As a matter of fact, it was the Church that played a major role in the 2002 decision to remove contraceptives from national health insurance coverage, and even persuaded doctors to invoke the conscientious objection clause to not provide prescriptions for them. Among contraceptives, sterilisation was the most problematic. This is, in fact, considered a sin by the Catholic Church which therefore, always firmly opposed to its decriminalisation. The law regulating it declares it illegal and provides punitive penalties for health professionals who offer it, of up to ten years in prison, even in cases in which women seeking it have serious contraindications to carry a pregnancy.[134]

As far as other contraceptives are concerned, since most of them had to be fully paid for by users, adding to this the fact that physicians could refuse to prescribe them, and that Polish women were then forced to pay additional unnecessary costs in order to find a doctor willing to give them the prescription, their cost was and still is considerably higher than in other countries of the European Union, where they are covered by the national health insurance. Already in 1999, before 2002, five types of contraceptive pills were removed from the list of subsidised medicines in order to compensate for the declining population and promote natural family planning, and to support this decision these tablets were considered to be for elective rather than medicinal use. Additionally, intrauterine devices (IUDs) and emergency birth controls pills were later removed, leaving only four medicines in the list of state-aided drugs because of their use to cure other treatments such as endometriosis or acne, nevertheless limiting access to them only to patients with such diagnoses.[135]

[133] Widdows, Idiakez, Ciriòn, *Women's*, supra n. 70, p. 23.
[134] Mishtal, *Neoliberal*, supra n. 123, p. 57.
[135] Ibid, p. 59.

Tests during pregnancy to ensure that there are no problems for the foetus and to monitor the pregnancy have also suffered the same fate as contraceptives. In fact, given that these tests could demonstrate actual abnormalities in the unborn child and thus lead to a probable termination of pregnancy, since it was provided for and guaranteed by the 1993 law, the Church has opposed their inclusion in the national insurance plan. These are still completely at the mother's expense, increasing pregnancy related costs, unless expressly requested by the doctor.

Moreover, a new bill was introduced in 1999, backed by the conservative lobby, with the aim of adding to the penal code the possibility of punishing through up to two years' imprisonment, anyone who would cause damage to the life or health of the foetus through pre-birth examinations. Therefore, physicians were very hesitant to practice these tests.

However, examinations of the reproductive system are extremely important as they can also detect diseases in mothers. Cervical cancer in Poland is highly widespread, and mortality connected to this condition has the highest rate in Europe. This is in fact related to the fact that, in Poland no population-based screening system is enforced and less than twenty percent of cervical cancers are discovered at the premalignant stage.[136]

Furthermore, in 2005, the conservative anti-choice lobby in parliament voted against the government's proposal calling for free abortion access, without parental consent, for underage girls. In addition, on that occasion, some pro-abortion journalists and legislators received dolls in the form of foetuses in their tenth week of pregnancy to discourage them from their activist work. The Catholic Church also wrote to every single member of the parliament to reconfirm their position on the matter, stating that allowing abortion "would be a crime against the nation, especially in the light of the very low birth rate". [137]

Poland is also an extremely rural state once one steps outside the more recently developed metropolitan centres. In the countryside, the traditionalist values of religion are even more deeply rooted in society, with the result that appropriate sex education

[136] Mishtal, *Neoliberal*, supra n. 123, p. 62.
[137] Widdows, Idiakez, Ciriòn, *Women's*, supra n. 70, p. 24.

in schools and family planning are lacking. Awareness about termination of pregnancies and other contraceptives is thus very limited, and polish women encounter additional difficulties when it comes to costs, which are often extremely expensive for an average person, especially those living in rural areas.

As above mentioned, since 1989, the decentralisation of the state health system, and the 1993 law, there has been a shift towards the almost total privatisation of the reproductive health sector, thus moving practices from a legal and free level to a clandestine one with prohibitively high prices, resulting in new challenges for women in accessing services.

The private sphere is characterised by informal payments and bribes; however, it is the preferred system used by Poles to obtain even basic care because it is perceived as better quality than the public one. Despite the fact that there is, on paper, a free public health system covered by the Narodowy Fundusz Zdrowia (National Health Fund), public health facilities are overcrowded, waiting times are excessively long, and medical equipment are insufficient and out-dated in technology terms. The poverty of services in the public system is a consequence of government cuts in health spending, besides the extensive migration of health professionals to other countries, especially England, in search of higher salaries and better working conditions.[138]

In addition, public hospitals are also becoming privatised on various levels, including contracts with outside companies to privatise the administration degree, specific assistance sub-contracted to private providers and out-of-pocket payments for patients. Indeed, doctors working in public hospitals can decide for themselves whether they want to handle certain operations privately within the same state-run facilities, without the need to look for a private clinic to practice in.

Doctors, who, according to a 2004 estimate, receive a lower monthly salary than the general average one of 2323 złotys, about 516 euro, are therefore in favour of restrictive abortion law, as they can offer services even if illegally at higher prices. The underpayment issue does not affect only physicians, but also nurses, who, over the years, have periodically protested through major work strikes, hunger strikes,

[138] Mishtal, *Neoliberal*, supra n. 123, p. 57.

blocking of streets and camping in front of governments buildings. However, authorities had always rejected to make any concessions.[139]

For this reason, the few remaining health professionals in Poland have started to increasingly exploit the system of informal cash payments, known as *kopertówki*, to supplement their income. Corruption in health care was already present even under socialist leadership, but it escalated even more after 1989, to the point where it became a fundamentally compulsory practice in order to obtain good quality and quicker services. As a matter of fact, Poles believe that by offering bribes they would obtain finer treatments. These incentives can be totally of cash or at least seventy percent in cash and the rest in gifts such as alcohol or chocolates. These are particularly common for surgical operations in obstetric care, notably the caesarean sections, and other services linked to labour and delivery, despite the fact that they are all completely free of charge in public hospitals.[140]

The corruption in the health system generates income inequalities, favouring wealthier people who can receive better care at the expense of the poorest. In Poland, where the average salary of women is much lower than that of men, the problem of unemployment among women is concerning, and decent health care is paid for through informal fees, it is easy to notice that the most affected group is precisely that of women, and in particular their access to reproductive health care.

To cite Article 68 of the 1997 Polish Constitution "Everyone shall have the right to have his health protected." and again "Equal access to health care services, financed from public funds, shall be ensured by public authorities to citizens, irrespective of their material situation. The conditions for, and scope of, the provision of services shall be established by statute.". [141] Nonetheless, as demonstrated above, the rights mentioned in the constitution are not enforced in reality, and through loopholes and reforms, such as the one fuelled by the Church in 2002 to exclude contraceptives from the national insurance plan, the state has succeeded in removing precise services from

[139] Mishtal, *Neoliberal*, supra n. 123, pp. 57-58.
[140] Ibid, p. 58.
[141] Full text at: https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm [last accessed 15 June 2021].

public health funds and thus limiting access to them to only those who have the ability to pay.

The consequence of the restrictive 1993 law, the uncertainty about its interpretation by doctors to practice their work in national hospitals for fear of, not only legal, but also social repercussions of bad visibility and stigma, was that women started to turn to the clandestine sphere.

As of 2008, the Federacja na Rzecz Kobiet i Planowania Rodziny (Polish Federation for Women and Family Planning) calculated that clandestine termination of pregnancies were between eighty thousand and two hundred thousand per year, while the government which considered only legal abortions, estimated them to be less than two hundred per year.[142] The cost for underground procedures ranges from 1000 to 3000 złotys (nearly 200 to 700 euros). These are usually publicised in newspapers, as for example in the Gazeta Wyborcza, which is the most important polish daily newspaper, and other local publications. Advertisements are easily understandable among women seeking those services, in fact they are usually simple and short, and they provide a phone number along with key sentences such as "all services provided". "menstruation induced", "complex procedures" and "discreet".[143]

Joanna Mishtal, a professor from the University of Central Florida, who took a survey in 2007 in the Gdańsk area and interviewed a sample of almost five hundred women aged eighteen to forty about reproductive health services in Poland, found out that it only takes a call to fix the cost, the location, and the time for the procedure, and it can also be obtained the same or next day.[144]

Another population study from 2009 shows that the average monthly income of a Polish family is about 1114 złotys, about 250 euros. As the price for a surgical abortion procedure can cost up to 1000 euros, only a few people whose earnings are above average can afford to access the clandestine services offered by specialist doctors in private clinics.[145] The situation is considerably worse for people living in the countryside, underage girls, single mothers, whose income is usually not even a

[142] Mishtal, *Neoliberal*, supra n. 123, p. 61.
[143] Ibid, p. 61.
[144] Ibid, p. 58.
[145] Chełstowska, *Stigmatisation,* supra n. 120, pp. 102-103.

thousand złotys per month, and women without work, who obviously cannot afford expensive and remote services.

Medical abortion methods are less expensive, mifepristone and misoprostol pills, for example, can be obtained online through a not-for-profit project that goes under the name "Women on Web". Women can access them after an online consultation, and although it is a non-profit programme, a "donation" of seventy euros, just under 300 złotys, is required for women who can afford it. However, this option also has discriminatory consequences, as only women who have access to the internet and know how to use a computer can receive assistance.[146]

Another way to get around the law is to travel abroad, in countries such as the United Kingdom or Germany, where obtaining an abortion is easier due to less restrictive regulations. Nevertheless, this option is the most expensive since women have to pay for a means of transport and for accommodation.

The result of this situation of strict regulation and uncertainty around its enforcement, since health professionals can decide at their will, is that the polish society is divided between those who can afford to access services and bypass the law and those who have no possibility of receiving appropriate but basic care. The higher a person's income, the higher their immunity to law limitations. Usually, only people from the middle and upper classes can afford to relate to the private sector, while women from poorer circumstances are left with few adequate options when in need of an abortion. In addition, the penal code criminalising illegal abortions is hardly applied to punish those offering abortion services. The prison sentence is up to three years if the woman agreed to it and up to eight years if it was against her will. The reluctance by the state to enforce the law, is easily demonstrated by the fact that advertisements for such services can be found in the country's major newspapers. Moreover, the 2006 Polish Government report on the rate of illegal abortions with the woman's approval, acknowledged only forty-seven cases of such circumstances, a number that in no way represents the reality of the situation (it is estimated that it corresponds to the 0,03 percent of the total legal practices).[147] Therefore, private providers are nor discouraged

[146] Chełstowska, *Stigmatisation,* supra n.120, p. 103.
[147] Ibid, p. 103.

nor scared anymore by the law, on the contrary, they are in favour of keeping things as they are in order to obtain higher revenues at the expense of women's reproductive rights.

If the law loses its regulatory function and fails to reduce the number of termination of pregnancies, it is logical to think that its existence has a purely political significance, which gives power to the conservative right-wing parties and the Catholic Church, who were able to achieve it. This way, they can dominate and manage the public sphere of the country at their will, thus giving importance to their moral values and making them universal to society.

Abortion is one of the most politically debated issues in Poland. Obviously, the Church and like-minded politicians oppose it even in the most critical cases and condemn women who have used it or seek it. In the debates, the conservative group tries to assert its political strength, despite the fact that the Church and any religion should be separated from the “temporal power” of the state, as written in the country's constitution.

Unfortunately, women's rights are opposed with those of the unborn child, who is guaranteed the right to life in the constitution. To fight alongside women for their rights, against retrograde Christian values, there are Polish non-governmental organisations advocating reproductive health, such as the above-mentioned Federation for Women and Family Planning and several women’s movements. Their main purpose is to highlight the consequences that restrictive regulation has on women, on their health and on their economic and social life. Additionally, they are trying to draw international, and especially European attention, to injustice and discrimination that unequal and narrower access to abortion and other reproductive services causes.

Taking abortion as a moral rather than a medical issue, it is regarded as something intrinsically wrong, even in cases of spontaneous termination of pregnancy. The stigma attached to it, partly due to the fact that it is criminalised by the law, makes women themselves feel wrong, which is why they do not even talk about it with close friends or seek help in case of complications.

Therefore, it is very easy for the issue to move to the private level, where the patient's right to privacy is certainly better respected as it is also convenient to those who carry out operations illegally.

However, as Wanda Nowicka, member of the Polish parliament and chair of the parliamentary group on women's rights, as well as cofounder, president and executive director of the Polish Federation for Women and Family, and cofounder of ASTRA (central and east European Women's Network for the Sexual and Reproductive Health and Rights group of the World Health Organisation), said, precisely because doctors can profit from illegal procedures, "A pregnant woman cannot be sure whether a doctor who issues an opinion about her pregnancy is guided by what is good for her, or by his own apprehension, prejudice or interest. . . We are talking about a vast, untaxed source of income. That is why the medical profession is not interested in changing the abortion law.".[148] In Poland, it is precisely because of the stigma around the matter of abortion that one can speak of its commercialisation and shift towards the private sector. The more abortion is seen as something evil and against nature, the more women feel the need to hide it and turn to clandestine systems to solve their "problems".

The polish anti-choice movement started developing in the 1980s, during the communist regime. The time frame of the most intense political battle on abortion rights goes from 1989 to 1993, when the right-wing won.

The victory, at the beginning of the 1990s, of the Solidarność Union brought power and political influence also to the Catholic Church, which began to shape the new-born state's political programme with its moral values. Their view on women and their role in society changed the accessibility of all reproductive health services in Poland, including contraceptives, antenatal examinations, and pregnancy care.

The draft of a new, more restrictive abortion law of 1990 presented at the second congress of Solidarność sparked numerous protests from the Women's Committee of the same party, which was obliged not to proceed with its enactment. The following year, the doctors' association passed the Kodeks Etyki Lekarskiej (medical code of

[148] Chełstowska, *Stigmatisation,* supra n. 120, pp. 99-100.

ethics), supported by the Church, which forced health professionals to make access to abortion even more difficult than what the law actually required at the time (the 1956 regulation provided for abortion on several legal grounds, including social and economic reasons). Once again, women protested in the streets.

In 1992 the Church opposed a referendum by the Social Committee on abortion and its criminalisation. The Committee had collected a petition signed by over a million people to decide on the right to abortion through the national vote, in a referendum. The Conservative-led government ignored the demands of such a large section of the population and never gave its consent to carry it out.[149] It was therefore politics that pushed the practice of abortion into the shadows of illegality and stigmatisation.

In those years, in addition, the way in which abortion was spoken of also changed: whereas previously the woman was mentioned with the term "pregnant woman", she was now referred to as "mother", and the term "foetus" was superseded by the words "unborn child" or "life". These new ways of referring to the subjects of pregnancy termination clearly expressed the views of pro-life groups on the issue. Furthermore, thanks to the development of new technologies it was now possible to take enhanced images of foetuses through intrauterine photographs, which were used as a propaganda tool by anti-choice groups to support their principle of the right to life, even if scientifically they were considered as non-viable foetuses up to the twelfth week of pregnancy. Unfortunately, the new language on termination of pregnancy was also used in drafting official state documents and in the 1993 law. This stigmatisation by official sources created further grounds for discrimination and suffering for women, particularly with the emergence of post-abortion syndrome.[150]

The political discourse on abortion was also exacerbated by the demographic crisis experienced by Poland since the beginning of the 1990s. As previously mentioned, in order to slow it down and reverse the trend, the government introduced in 1999 a pronatalist Profamily Programme. This, in addition to removing many contraceptives from the national insurance fund coverage, established few and poorly organised benefits for families. It was supposed to help and encourage economic development

[149] Chełstowska, *Stigmatisation,* supra n.120, pp. 100-102.
[150] Ibit, p. 102.

through the creation of new jobs, and thus raise the average income to promote the family's choice to have children, increasing fertility rates. Nonetheless, the result of the programme was not what the government had hoped for: birth rates did not increase, and the economy did not get the expected boost. Discrimination against pregnant women and mothers of young children in the workplace was so intrinsic to society that it did not change following the implementation of the above-mentioned scheme. Indeed, the consequence was that many women, in order not to undermine their careers or their incomes, refrained from having children, or at best postponed their pregnancies as much as possible. In those years Poland reached the lowest fertility rate they ever experienced, namely below 1.5.[151]

Government's policies and programmes with population purposes interfere with its citizens private choices, and this is especially true when it comes to women and their reproductive health. Their needs and desires can be overshadowed for the sake of the society and the nation. Women are deprived of the autonomy to decide freely how to realise themselves in life, and the vision of the state is imposed on them, which, being in most cases, and especially in Poland, governed by men, is also male-oriented.

Their rights are not considered as relevant since, even when abortion is legally permitted, it is usually hindered by several barriers. These difficulties are usually created by the state so that women are discouraged to access the services they are entitled for, namely conscientious objections, misleading information or total lack of such, compelling counselling, and authorisation from third parties.

In Poland, doctors and health personnel in general are particularly protected by the law, as they usually have the final say on their patients' reproductive health. As declared by the Committee on the Elimination of Discrimination Against Women of the United Nations in its General Recommendation No. 35 of 2017, when a private citizen acts in accordance with the laws of the state by activities related to governmental authority, including public services offered by private individuals or groups, such as health care or education, then his or her actions shall be regarded as attributable to the state itself. [152]

[151] Mishtal, *Neoliberal*, supra n. 123, p. 60.
[152] De Vido, *Violence,* supra n. 91, p. 70.

Following this principle, three cases decided by the European Court of Human Rights have become famous since all decisions have found the Polish state guilty of not respecting several of the victims' rights, and to have failed to ensure reproductive services guaranteed within the law. In fact, despite Poland being one of the signatories to the European Union's Charter of Fundamental Rights and the Convention on Human Rights, the government with its bigoted and retrograde values and restrictive policies has discriminated against women, undermining the principle of equality, and depriving them of their autonomy and dignity.

All three court cases concern Polish women who, due to different circumstances, were legally entitled to obtain an induced abortion but were denied it, resulting in the creation of traumatic physical and psychological consequences. The United Nations Human Rights Committee, which focuses primarily on the respect for the right to life and freedom from torture, had already expressed concern in its Concluding Observation in 2004 about the abortion situation in Poland. As a matter of fact, the Committee noted that the already restrictive law was not being properly enforced, making access to reproductive health services even more difficult and encouraging illegal operations, increasing risks to the life and health of women. The HRC recommended that the Polish government positively change the law, liberalising it.[153]

To recall which are the legal grounds for obtaining an abortion mentioned in the Family Planning Act of 1993, these include: to save the mother's life of health; in case the foetus has a severe malformation that would cause his or her immediate death after coming to life, and it must be proved through antenatal examinations; and in case of criminal offence after having reported it to state authorities and they had confirmed it. In the first two circumstances, termination of pregnancy can take place until the foetus becomes viable, which is, however, a controversial topic, as there is no shared belief on the matter, whereas in the third case it is only accessible until the end of the third month of pregnancy.

Alicja Tysiac v. Poland, the first case, was decided on by the European Court of Human Rights in 2007. The pregnant woman was eligible to request an abortion

[153] Zampas, Gher, *Abortion as a Human Right - International and Regional Standards*, in Human Rights Law Review, Oxford, Oxford University Press, 2008, pp. 256-267.

because carrying the pregnancy to term would have caused her serious health problems. As a matter of fact, Alicja Tysiac suffered from a very severe form of myopia and, after consulting three ophthalmologists, she was advised to terminate the pregnancy, or her condition would have worsened to the point of becoming completely blind. In addition, her general practitioner had also issued her with a document stating that terminating the pregnancy was necessary because it posed a risk to her health. However, despite the legality of the operation and the medical advice of four health professionals, she was denied access to services in a Warsaw clinic by the head of the gynaecology and obstetrics ward who, as is often the case, decided for the entire hospital staff. Tysiac had to carry the pregnancy to term and give birth to the baby, as she was unable to access services due to a lack of time to revise the physician's decision. Her eyesight deteriorated terribly, she became nearly blind and had to be recognised as a disabled person by the Polish social system.

She denounced the treatment she received at the national court beforehand, but she did not receive any compensation, her case was actually dismissed. She decided to take it to the ECtHR, declaring that the government had violated his rights guaranteed by Articles 3 (prohibition of torture), 8 (right to respect for private and family life), 13 (right to an effective remedy) and 14 (prohibition of discrimination) of the ECHR.[154]

The second case was pronounced on four years later, in 2011, and is known as *R.R. v. Poland*. This time the applicant was a Polish woman who was pregnant with a foetus who was believed to have the Turner syndrome, an acute disability. In this case, the pregnant woman was denied the possibility of further medical tests to ascertain whether the disease was actually present. The inability to access services within the statutory time limit of twelve weeks, because medical staff refused to perform them, deprived her of her right to an abortion.

R.R.'s case was brought to three national courts before going to the European Court. A domestic minor court, despite having declared itself in her favour, had given her a sum of money as a form of compensation that was too low. The Supreme Court thus

[154] De Vido, *Violence,* supra n. 91, p. 72.

cancelled the previous judgment. The case was then transferred to the Krakow Court, which granted her a higher sum. However, R. R. still did feel discriminated as she could not access to the genetic examinations to evaluate the unborn child's medical condition and turned to the ECtHR. She complained that the state had not ensured the respect of her rights, in particular the right to be free from torture and inhuman treatments, and the right to private and family life.[155]

P. and S. v. Poland is the last of the three cases and it was ruled on in 2012. In this case, an appeal to the European Court was lodged by P., an underage girl, and S., her mother who had helped her to seek an abortion. P. was entitled to receive it because she became pregnant as a consequence of a rape by a boy of her same age, and she had gone to the authorities to report it. Although P. did eventually succeed in ending her pregnancy, the process of obtaining it was very long and disparaging to both her and her mother. The procedure was unnecessarily delayed, in fact she was repeatedly given false information by medical staff. As a matter of fact, a physician recommended the mother, Ms S., "to get her daughter married", and another one forced them to sign a document attesting that they were informed about possible bad health consequences after having undergone the procedure, including potential death.[156] Moreover, P.'s privacy was violated several times, although she was a minor. In fact, some pro-life Catholic groups unleashed several confidential information on the young girl and went as far as trying to persuade her to carry on with the termination. The same anti-choice religious groups have also initiated procedures to remove the mother's parental authority. P. also had multiple troubles with the law, and she had to face criminal charges, as she was arrested and sent to juvenile detention after a court had ruled against her. In addition to the various difficulties encountered along the way by P. and S., when P. was granted an abortion, the operation was carried out clandestinely, despite having been legally approved by a court, and in a private facility many kilometres away from the applicants' city of residence.[157]

[155] De Vido, *Violence,* supra n. 91, pp. 72-73.
[156] Ibid, p. 73.
[157] Ibid, p. 73.

The national court to which P. and his mother appealed in the first instance, judged the case to be controversial, and thus legitimised social and Catholic organisations to take part in the discussion. It is worth recalling here that the Polish Constitution in Article 2 (53) sanctions freedom of religion for all its citizens, thus including the possibility of not professing any religion or one other than Christian Catholicism.[158] The government then recommended them to pursue a civil dispute, but the ECtHR ruled that such litigation would have not fit the purpose of awarding P. and S. an adequate compensation, and therefore decided that the case was eligible for it to judge upon.[159]

In *Tysiac v. Poland*, the European Court condemned Poland for not fulfilling the applicant's right to family life as stated in Article 8 ECHR, as the state had not ensured through any accurate investigation whether the woman had actually received all the necessary information and services warranted by law. The state, which in 1997 had passed an act to regulate access to induced abortion, had not specified how to resolve disagreements between patients and doctors, or between doctors themselves. In fact, ECtHR ruled that Poland violated Article 8 ECHR by not providing "a comprehensive legal framework regulating disputes between pregnant women and doctors as to the need to terminate pregnancy in cases of a threat to a woman's health".[160] The situation that women seeking the ending procedure faced, was therefore confusing, leaving plenty of room for doctors to act as they wished.[161]

The 2007 decision stated that not only was Tysiac's physical health endangered by the denial of abortion, but also her mental health, as she had been subjected to "terrible anguish".[162] She was further stressed by the protracted uncertain circumstances, and by not receiving adequate justice and reward at a national level.

Tysiac specifically stated in her petition that the government "violated both substantively, by failing to provide her with a legal abortion, and . . . [procedurally,] . . . by the absence of a comprehensive legal framework to guarantee her rights by

[158] Supra n. 141, at: https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm [last accessed 15 June 2021].
[159] De Vido, *Violence,* supra n. 91, p. 73.
[160] Zampas, Gher, *Abortion,* supra n. 153, p.277.
[161] De Vido, *Violence,* supra n. 91, p. 207.
[162] Ibid, pp. 75-76.

appropriate procedural means.".[163] ECtHR did not recognise the breach in substance, although it did recognise the stress Tysiac experienced, but it ruled in her favour by acknowledging the infringement of the state's positive obligation to set up an efficient instrument through which the pregnant woman could have challenged the physician's decision to deny her lawful reproductive care. In other words, the European Court has been reluctant to make a decision on concrete violations of domestic law, especially when these concern medical issues. ECtHR did not interrogate the health professionals' opinion, nor investigated whether Tysiac was effectively eligible for an abortion under the Polish law, it only concentrated on the dispute between the applicant the doctors.

The Strasbourg Court gave Poland some suggestions on how to actually implement its laws correctly, for example through the creation of an unbiased body to hear the woman's recourse. The pregnant woman, her needs, wishes, and above all her rights cannot take second place, especially when it comes to abortion and other treatments related to it.

The European Court, however, did not recognise violations of the other rights guaranteed in Articles 3, 13 and 14 invoked by the applicant. In particular, for Article 3, the Court gave no explanation as to why it decided not to take it into account. As to Articles 13 and 14, the Court decided that it would not add separate violations because the appeals for both articles had already been secured by the sentence regarding violations of Article 8. [164] However, this shows once again the unwillingness of the ECtHR to take a firm stance on the issue of human rights in the member states, especially with regard to women's rights and the discrimination they suffer from gender-based violence.[165]

In *R.R. v. Poland* the Court declared that Poland had violated Article 8 ECHR, as in the previous judgement, but in addition, it took an unprecedented step by also recognising the infringement of Article 3 ECHR. As a matter of fact, in regard to Article 8, the government was unable to provide "any effective mechanisms that

[163] Zampas, Gher, *Abortion,* supra n. 153, p. 278.
[164] Ibid, pp.278-279.
[165] Ibid, p. 279.

would have enabled the applicant to seek access to a diagnostic service, decisive for the possibility of exercising her right to take an informed decision as to whether to seek abortion or not.".[166]

Article 3 of the European Convention on Human Rights protects people from torture, inhuman or degrading treatment or punishment, and deportation or extradition if there is a risk to face one of the previous treatments in the country of arrival.

According to the Tribunal, R. R. had suffered severe anguish and humiliation because physicians hindered her access to services and did not handle her specific condition with due consideration. The applicant was also deprived of the right to take an autonomous decision because of the delays to obstruct further examinations.[167]

As the ECHR does not have a specific provision on the right to abortion and right to health, the European Court had to rely on several articles to support its decisions in favour of women. In both of the above cases, to be able to punish unnecessary barriers in gaining access to reproductive treatments, the Court had to take into consideration health repercussions as a form of violence on women's life.[168]

Finally, in *P. and S. v. Poland* the Tribunal ruled that Poland was culpable of infringing the applicant's rights according to Article 3 and 8 ECHR, furthermore, also Article 5 ECHR on the right to liberty and security was applied.

Even though P.'s health conditions were not expressively citated, the Court affirmed that civil courts did not provide both P. and her mother with adequate justice as they could not rely on any jurisprudence to compensate for the harm inflicted to a woman by "the anguish, anxiety and suffering entailed by her efforts to obtain access to abortion.".[169] The European Tribunal also blamed the civil courts because their judgments only had a retroactive and compensatory effect. As a matter of fact, Polish civil law had no legal provisions to which a woman seeking an abortion could appeal if she was denied one, or if her rights of private life, family, and confidentiality had been violated.

[166] De Vido, *Violence,* supra n. 91, p. 76.
[167] Ibid, p. 76.
[168] Ibid, p.148.
[169] Ibid, p. 76.

In addition, she received false information with the aim of discouraging the continuation of the procedure, along with inadequate medical advice, therefore her right to make a free and unbiased decision had been infringed. As the law professor Sara De Vido asserted in her book *Violence against women's health in international law* (2020), the requirement to provide adequate and correct information to patients can be considered not only as an "obligation of result" by the state, for it implies the promulgation of regulations compelling health professionals to provide unbiased information to women, but also as a "due diligence obligation", because existing laws must be correctly applied.[170] Due diligence is necessary to prevent further persecution and discrimination for victims, in this case especially gender-based violence, by state authorities.

In *P. and S. v. Poland,* for instance, the medical professionals to whom the girl asked for a termination of her pregnancy, did not feel obliged to proceed with the operation despite the fact that the prosecutor had also issued a document stating that the girl had suffered a criminal offence. According to the law, however, the young girl was eligible for an abortion, and physicians could refuse to carry on the procedure only by invoking the clause on conscientious objection, and anyway they would still have to write their denial in a certificate and guarantee her access to services by referring her to another doctor. Nonetheless, P. was able to receive an abortion only after having suffered discriminatory, humiliating, and dignity undermining treatment, with considerable delay and improper, unobjective health counselling.[171]

Domestic courts must, therefore, ensure that applicants have their cases heard quickly, anonymously and without interference from other parties, as in this case from pro-life religious groups, so that the victim does not suffer from additional and unnecessary distress. Patients must also be guaranteed with the right to challenge the doctors' decision in case they refuse to allow them access to reproductive health treatments, including abortion.

These three cases from a few years ago, when the already restrictive 1993 law was in force, show how the state of Poland has directly and indirectly caused "violence"

[170] De Vido, *Violence,* supra n. 91, p. 213.
[171] Ibid, p.213.

against its female citizens. As a matter of fact, it failed to prevent disparaging behaviours towards women, but rather tolerated and even encouraged them. This situation is the result of backward Catholic-oriented moral values and their stereotyped role of women as mothers deeply rooted in the Polish society, which also contributed to violence against women's right to health, especially their reproductive health. Indeed, the judgments of the European Court of Human Rights, could have focused more on the substantive obligations and been more drastic and aimed at the effective respect for human rights. Nonetheless, these are still significant because they affirmed that women's right to undergo a lawful induced abortion may not be that unrealistic. However, since the way to go is still very long, it must be secured that when abortion is legally allowed, it must also be practically accessible.

Additionally, since procedural rights do not create any limitations concretely on the content of the abortion penal code at the national level, states can escape European judgments and no real change can take place in the approach to reproductive health. The state can even make abortion law more restrictive as it would not face any criminal proceeding at the European level.

An example of this can be found in a measure passed by the Polish government in 2016. The aim of the directive was to convince women who were pregnant with a severely damaged or even unviable foetus to carry the pregnancy to end, even if the child would die right after being born or if it would be born dead. To do this, a payment of 1000 euro was offered to women who accepted, along with access to hospital facilities and medical treatments, psychological assistance, Catholic baptism or a blessing and burial, and support by a specific person who had to coordinate and assist the family.[172] Obviously, this move by the government is part of a series of strategies to decrease the number of legal abortions, particularly those related to foetal disabilities.

This anti-abortion propaganda is a clear example of the intrusion of state authorities into the private lives of their citizens, and also on health professionals, as they are pressured to not provide termination of pregnancies on medical grounds.

[172] Berer, *Abortion,* supra n. 61, p. 10.

As a matter of fact, in 2016 in Poland it was estimated that only a little over one thousand legal abortions took place, while the reality is very far from this number. The number of illegal procedures was calculated to range between fifty thousand to two hundred thousand.[173]

Since abortion is a very sensitive subject that triggers very adverse reactions, any amendment of the law should follow a broad public debate so that the various parties can express their opinion, for example through a referendum. However, the conservative group tried several times to amend the 1993 law to ban abortion completely, in 2011, 2013, 2015 and again in 2016, imposing their view as universal and indisputable, without consulting the opinion of other parties and especially of its citizens, and without any consideration for the terrible impact banning abortion would have had on women's life. On each occasion, in fact, public opinion was raised by feminist groups, which organised large protests and always managed to block the enactment of the draft bill.

Once again in 2018, the abortion debate was reignited when the "Stop Abortion" bill was passed at the parliamentary committee level in March. The Catholic-oriented right-wing party, the greatest supporter of the pro-life movement, sought to remove from legal grounds the guaranteed and legitimate attainment of the termination of pregnancy in the case of serious health problems of the foetus.

In March, after the parliamentary approval, a huge demonstration was organised in which more than ten thousand Poles took part. The movement was recognised by the name #BlackProtest, as people dressed in black to show their solidarity against the authorities' attempts to make abortion unavailable. The demonstrations were supported internationally by more than two hundred groups for the respect of women's rights and reproductive health, which sided with Polish women against the government.[174]

The government tried again in April 2020, amid the Coronavirus pandemic, to introduce severe restrictions on the right to abortion, always with the support of various Catholic religious groups and bishops close to the ruling party *Prawo i*

[173] Hussein, Cottingham, Nowicka, Kismodi, *Abortion*, *s*upra n.121, p. 11.
[174] Ibid, pp. 11-12.

Sprawiedliwość (since 2015), but it had given up once more thanks to protests by feminist movements. Unable to follow the parliamentary route, in October, the government therefore decided to delegate the matter to the Constitutional Tribunal, which is made up for the most part of conservative judges, many of whom are appointed by the government itself in a series of procedural loopholes that have also been denounced by the European Commission. As a matter of fact, according to the Council of Europe Commissioner for Human Rights, it is the parliament, because of its legislative power, that should deal with this issue. The decisions of the Sejm (Parliament) should follow the various stages of the legislative process, and they should be taken after a careful debate in which different opinions are taken into account. The Commissioner for Human Rights also recommended the creation of an assembly gathering polish citizens, based on the model of the already existing Irish one, to study the issue on various levels, namely, the scientific, legal, and social ones. All citizens, of all classes including minorities, would then have the opportunity to be heard on the issue.[175]

The Polish Constitutional Court in its judgment of 22 October 2020 (K1/20) ruled on the removal of point 2 of Article 4a of the *Family Planning, Human Embryo Protection and Conditions of Permissibility of Abortion Act* of 7 January 1993, which legalised abortion in case of foetal impairment. Starting from the date of publication of the Constitutional Court's judgment, induced abortions performed in the event of foetal malformations are ruled by Article 152 of the Criminal Code. This establishes the imprisonment of up to three years for the provider and for those who assisted the woman in seeking the abortion, and in case the termination takes place after the foetus is considered alive, the penalty may increase up to eight years.[176]

It is of fundamental importance to keep in mind that in Poland, about 98 per cent of abortion procedures were performed appealing to the foetal disability reason: out of 1100 legal abortions performed in Poland in 2019, 1074 were for foetal abnormalities.

[175] Commissioner for Human Rights, *increasingly dramatic situation of women*, see at: https://www.rpo.gov.pl/en/content/increasingly-dramatic-situation-women [last accessed 18 June 2021].
[176] Further information at: https://www.legislationline.org/download/id/7354/file/Poland_CC_1997_en.pdf [last accessed 18 June 2021].

According to feminist organisations, between 100 thousand and 200 thousand Polish women per year are forced to resort to clandestine ending of pregnancy, or to go abroad to obtain them (usually to Slovakia, the Czech Republic, Germany, or Ukraine).[177]

By introducing a new justification to be criminally punished, the Constitutional Tribunal has in fact violated its duties as a negative legislator.

In October 2020, Piotr Pszczółkowski, despite supporting the PiS right-wing party, was one of the two judges of the Constitutional Tribunal (along with Leon Kieres) who submitted dissenting opinions. He affirmed that the Parliament only, had the power to introduce the penalisation for a particular act, and he additionally stated that the ruling ignored women's rights and autonomy. In fact, according to Judge Pszczółkowski, the sentence gave priority to the life of the unborn child, despite the very high probability that it would be stillborn or die shortly after birth, without taking into account the distress and suffering that this situation would bring to women and taking away their right to ultimately decide what to do with their own bodies. Women have received discriminatory treatments in that their person is objectified and third parties can now decide for them, imposing them an act of heroism.[178]

The Constitutional Tribunal had already gone beyond its powers in October 2015 (K 12/14) when it ruled that, physicians who refused to perform abortions on their patients were not legally obliged to redirect them to other facilities or doctors who could help them get what they asked for. Following the decision from six years ago, many doctors have also stopped informing their patients of possible risks to their health or that of their child, and even of risks for their lives, by not prescribing further tests to ascertain the physical condition of both mothers and children. In addition, the most common practice utilised by health professionals, to avoid the provision of reproductive services necessary for women to decide whether or not to continue with their pregnancy, was to systematically postpone and delay examinations and appointments in order to exceed the maximum time limit within which it is legal to

[177] Il Post, *Il governo polacco non sa più cosa fare sull'aborto*, see at: https://www.ilpost.it/2020/11/05/il-governo-polacco-non-sa-piu-cosa-fare-sullaborto/ [last accessed 18 June 2021].
[178] Commissioner for Human Rights, *Increasingly,* supra n. 175.

obtain a termination (twelfth week for foetal impairment and criminal offences such as rape or incest).[179]

It is worth noting that the ruling has not been taken in an impartial environment, as a matter of fact the Polish Constitutional Tribunal is largely made up of conservative judges, many of them appointed by the government with procedural forcing, which costed Poland official admonitions from the European Commission. Brussels has launched the so-called "nuclear option" (a procedure that could lead to sanctions), believing that the Constitutional Court, like other judicial bodies has been subjected to the *Prawo i Sprawiedliwość* power, and it has lost its independence, becoming an attachment of the executive.[180] In short, the separation of powers does not exist in Poland. The same has happened between the state and Church, since PiS and the Catholic hierarchies are basically one united force. Indeed, the governing party is leaded by Catholic values, and it receives consensus from it, especially in the rural areas of the country, while the Church gets to have a say in political issues. In addition, further doubts about the impartiality of the ruling arose due to the fact that at the time of the decision, the Court included three judges who were not those who had been legally appointed by the parliament in 2015. Lastly, the presence of Krystyna Pawłowicz, a member of the parliament, in the Court's decision, further increases previous concerns, as she had already spoken out strongly on abortion, openly opposing it and supporting the restriction of legal grounds.[181]

The Constitutional Court, furthermore, not being directly elected by the citizens, should not take such important decisions on abortion, which is not a purely legal topic, but also a scientific and moral one.

Finally, the Polish government and Court also violated the civil rights of freedom, in particular freedom of assembly, as they took action during the Coronavirus global pandemic, when restrictions on gatherings were in place due to the high health risk.

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[179] Commissioner for Human Rights, *Increasingly,* supra n. 175.
[180] ISPI, *Polonia: rivolta delle donne per l'aborto*, governo al bivio, see at: https://www.ispionline.it/it/pubblicazione/polonia-rivolta-delle-donne-laborto-governo-al-bivio-28037 [last accessed 18 June 2021].
[181] Commissioner for Human Rights, *Increasingly,* supra n. 175.

Despite the regulations in place to reduce the spread of Covid-19, a huge protest broke out, coordinated by Polish women, and it was very well attended. Strajk Kobiet (women's strike) is the name of the movement, “to jest wojna” (this is a war) is the motto.[182] It even issued a manifesto calling for a "real Constitutional Court", an "authentic and transparent Supreme Court", "a secular state" and "the resignation of the government", along with more health care and social coverage for the weakest members of society and an abortion law similar to that in force in the rest of Europe.[183] The front of opposition to the pro-life conservatives, gradually widened, becoming a protest of enormous proportions. It started in the capital, Warsaw, and then spread to the rest of the country, in all the other big cities, but also in many medium and small towns. LGBT+ rights organisations, who undergo a continuous discriminatory treatment and are subjected to a harsh delegitimising campaign by state TV, some PiS politicians and the church, stood by the women. In addition, students, several farmers, taxi, and public transport drivers, and much of the so-called civil society also supported the rebellion. It is a horizontal protest, meaning that each local branch of the movement organises it in its own way: roadblocks, sit-ins in front of churches, protests in the streets, marches in front of the government’s buildings. It also proved to be a very radical, angry protest, extreme in its language and gestures. One of the most frequently used words, both in the square and on social networks, is *wypierdalać*, which translates as “fuck off”.[184]

Women are demonstrating in the streets, going on strike, no longer going to work, and entering churches with pro-abortion placards and banners. There is no hesitation in calling sit-ins in front of their doors, desecrating statues of Pope Wojtyła, one of the most important figures in Poland, and writing "abortion without borders" on the walls of their cathedrals.[185] The tone is over the top, but it is a clear reminder of what the recent ruling entails: denial of reproductive rights to women who are forced to travel abroad to obtain abortions.

[182] ISPI, *Polonia,* supra n. 180.
[183] Il Post, *Il governo,* supra n. 177.
[184] ISPI, *Polonia,* supra n. 180.
[185] Ibid.

As a result of the protest, the Church has suffered a huge blow to its credibility and many believers are turning away from it, there are fewer people in church, fewer seminarians, fewer students taking religious instruction. As already mentioned, the Polish Church, which is very active in political life, has been denounced several times in recent years for the many cases of sexual abuse of minors that previously had always been covered up by the hierarchy.

Moreover, it is precisely the high price they have to pay for the lack of services related to reproductive health that the Polish women wanted to highlight. Unfortunately, few of them had the courage to put their faces to the public and tell their stories of suffering and difficulty. Among them, a woman who nevertheless decided to remain anonymous, described her experience in an interview with the BBC published on 27 November 2020. The woman, 21 weeks pregnant, tried to have an abortion because the baby she was carrying lacked vital organs and she was told that it would not survive once born. However, following the Court ruling, although the decision had not yet been published in the official journal, three hospitals refused to let her have the termination of pregnancy. The woman felt extremely frustrated and frightened by the situation itself, and this was compounded by humiliation on the part of her country and hospital staff, whom she even pleaded with.[186]

Following stories like this one, groups opposed to the bill to ban abortion have called it a "barbaric law" because it undermines women's dignity. Among the slogans used to emphasize the inhumanity of the Constitutional Tribunal's decision, the ones that have become most famous are "stop torturing women", "women are not incubators!", "we refuse to die so that you can keep a clear conscience!", or "I refuse to be your martyr".[187]

The radical nature of the protest has brought the young, secular, even brash generation onto the streets. They want to break off completely with the political authority that leads the country, the PiS. In Poland, the only political debate is between only two parties, PiS and *Platforma Obywatelska* (PO Civic Platform). The latter is a centrist

[186] See full interview at: https://www.bbc.com/news/av/world-europe-55077166 [last accessed 18 June 2021].
[187] Ibid.

party, for Europe and good governance, liberal on the economy, moderately open on civil rights and more focused on social rights than in the past. However, many of its members are Catholics. For this reason, it was not Po who led the November protests, which, despite not having an official leader figure, is mainly led by the charismatic Marta Lempart, civil and social rights activist, and lesbian.[188]

Because of its radicality, the movement risks losing the sympathy of the moderates, who consider the assault on the churches inappropriate, as well as the angry and sometimes vulgar language of the protest. Moreover, the demonstrators decided to act in a strong and bold but illegal way by publishing the domicile of the judges of the Constitutional Tribunal on the social channels of the movement. It was undoubtedly a choice dictated by anger, but still very serious and clearly unconstitutional, which cost them the support of the more moderate. However, the mayor of Warsaw Rafał Trzaskowski supported the mass demonstrations through a tweet in which he called on women to reject the Tribunal decision and go on the streets to make themselves be heard.[189]

Jarosław Kaczyński, deputy prime minister and head of PiS, however, did not stop in his battle against abortion, and called on government supporters to defend churches, Poland and patriotism, and his statements were interpreted as an encouragement to clash with the protesters. The supporters of the *Abortion Ban* bill also used very strong and accusatory tones, as a matter of fact, Kaczyński criticised the opposition for dragging people to the streets despite the very high health risks linked to the Coronavirus pandemic. He spoke out harshly about protestants in parliament as well, in early November, affirming "you are exposing a lot of people to death, you are criminals.".[190] He eventually added that the people demonstrating were anti-Polish and he was supported by Krystyna Pawłowicz, a PiS member of the Constitutional Court, who compared the red lightning bolt that has become the symbol of the

[188] ISPI, *Polonia,* supra n. 180.
[189] BBC, *Poland enforces controversial near-total abortion ban,* see at: https://www.bbc.com/news/world-europe-55838210 [last accessed 18 June 2021].
[190] ISPI, *Polonia,* supra n. 180.

women's movement to the SS emblem. The red lightning bolt used by feminist groups was created specifically for this protest and it obviously has no reference to Nazism.[191] Justice Minister Zbigniew Ziobro, also a member of the country's ruling party, reportedly wanted to charge the protest organisers because they did not respect the limits on gatherings imposed to lower the curve of the infection, however the international community did not receive any clear news about actual punishments.[192] The authorities were in fact afraid that a legal offensive, instead of frightening the demonstrators, would have made them even more angry.

The law prohibiting abortion even in the case of foetal malformation, decided on in October, was to be published in the official journal on November 2nd 2020, but the government found itself in a situation of great dilemma because of the huge demonstrations organised in the country. On Tuesday, 3 November, Piotr Mūller, advisor to Prime Minister Mateusz Morawiecki, said they were discussing on how to act, and that they would have taken some time for dialogue with the aim of finding a new position in such a difficult situation.[193] Its publication was therefore delayed for a long time as such strong opposition was not expected, and PiS underhand political move to change the law at such a sensitive time in history, failed miserably.

PiS has been cornered by the opposition, however, it should be impossible for the executive power to revoke a decision of the Constitutional Tribunal and the publication of rulings in the official gazette is mandatory, indeed the government's delay would have to be considered unconstitutional.

The right-wing oriented President of the Republic, Andrzej Duda, tried to de-escalate the social conflict. Through a series of controversial comments, he had said that he understood the anger of the movement and that, in some cases, he understood the choice to undergo an abortion. However, he had also previously described the Constitutional Court's ruling as fair and called abortion in the case of foetal impairments, a "eugenic" treatment, for it discriminates disabled children.[194] He, therefore, submitted to the Parliament a proposal for an amendment to lessen the

[191] Il Post, *Il governo,* supra n. 177.
[192] ISPI, *Polonia,* supra n. 180.
[193] Il Post, *Il governo,* supra n. 177.
[194] Ibid.

restrictions introduced by the Court and allow abortion in cases where prenatal diagnosis shows a high probability of death at the time of delivery. However, Duda's proposal is not acceptable to either the two political sides, the protestants, and the Catholic hierarchies. Stanisław Gądecki, head of the Polish Bishops' Conference, denounced Duda's proposal as "a new form of euthanasia".[195]

Among the opposition's reactions in favour of women's reproductive rights it is worth pointing out the one by Wanda Nowicka, Member of the Polish Parliament, Chair of the Parliamentary Group on Women's Rights and President of the Polish Federation for Women and Family Planning. In an interview on the journal Sexual and Reproductive Health Matters published on November 11th 2020, she affirmed that the Polish Constitutional Tribunal is taken over by the "authoritarian regime" and its decision is not based on the constitution, but it is rather biased by the ruling party. As a matter of fact, she added that the right-wing is destroying the democratic institutions, such as the Constitutional Court, because they are not fully independent, as defined in the constitutional requirements, since they are controlled by the executive power. According to Wanda Nowicka the government acted against basic human rights, especially those of the LGBTQ+ community, women, and other minorities. Even though Poland is a member of the European Union and signatory of its treaties, the polish government did not hold back in challenging them.

As far as Europe is concerned, two members of the European Parliament in particular have expressed their opinions on the October decision, accusing Poland of not respecting, among other things the right to physical self-determination. Evelyn Regner, member of the Austrian Sozialdemokratische party and Chair of the European Committee for Women's Rights and Equality, declared: "Women have a right of self-determination over their own bodies. Poland already has one of the strictest abortion laws in Europe . . . A ban leads above all to illegally performed abortions, with massive health risks for women . . . The attack of the Polish government towards women and LGBTQ+ persons is becoming more and more dramatic. We stand in solidarity with the many Poles against this backward-looking and inhuman policy.

[195] Il Post, *Il governo,* supra n. 177.

Women's rights are human rights and the right to physical self-determination must be enshrined in the European Convention on Human Rights".[196] Evelyn Regner was also joined by Juan Fernando López Aguilar member of the Socialista Obrero Español party and Chair of the European Committee on Civil Liberties, Justice and Home Affairs. He indeed stated: "This decision by the tribunal shows again that the attacks on the rule of law, democracy and fundamental rights in Poland is a matter of most serious concern . . . The Polish government's nomination of judges all coming from the same party facilitated this decision which follows the PiS' statements in the last months. A women's right to decide over her own body should not be unconstitutional in any country of the European Union.".[197]

In spite of the huge internal protests and of the negative response from the European Union, on January 27th 2021, the decision of the Polish Constitutional Court of October 22nd 2020 was included in the official journal, making abortion in the case of severe disabilities of the foetus illegal and criminally punishable.

What was needed was a detailed discussion followed by an agreement between opposite sides, not a conflict amid the particular circumstances due to the pandemic. The responsibility for the country's instability of the last months, lies with the politicians in power, who should have worked together within legal experts, health professionals and women to change the law, for the better, liberalising it rather than further restricting it, so that any pregnant woman looking for a way to end an unwanted pregnancy can obtain adequate services, as quickly as possible and as late as necessary.

Women must not suffer anymore from gender-based discrimination and they should be the ones in charge for the decisions concerning, their body and life in general. Abortion must be treated for what it is, an essential health service, whose access should be universal and safe. Furthermore, its decriminalisation should be at the centre of the governments' agenda, to assure women around the world the fulfilment of their basic human rights. The ultimate goal is for abortion to be regarded as a right whose

[196] See full comment at: https://www.europarl.europa.eu/news/en/press-room/20201022IPR89930/poland-leading-meps-against-the-de-facto-ban-on-abortion [last accessed 18 June 2021].
[197] Ibid.

aim is to protect every woman’s reproductive health without discrimination on their income, ethnicity, age or gender identity.

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