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# RIGHTS, LAWFARE AND REPRODUCTION: REFLECTIONS ON THE POLISH CONSTITUTIONAL TRIBUNAL'S ABORTION DECISION

Magdalena Furgalska and Fiona de Londras\* 

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

**Keywords:** Polish Constitutional Tribunal, abortion, lawfare, women's rights, reproductive rights, Poland, international human rights law

## 1. INTRODUCTION

Since 1993 abortion has been lawful in Poland on three grounds only: (i) where the pregnancy poses a risk to the life or health of the pregnant person; (ii) where prenatal examinations or other medical conditions indicate that there is a high probability of a severe and irreversible foetal defect or incurable illness that threatens the life of the foetus (which we will call 'fatal foetal anomaly'); and (iii) where there are reasons to suspect that the pregnancy is the result of an unlawful act (rape or incest).<sup>1</sup> These 'grounds' are subject to stringent procedural requirements for obtaining access to abortion, and since 1993 'social' reasons as grounds for accessing lawful abortion are no longer recognised.

In reality, abortion has long been highly inaccessible in Poland, even for people who 'satisfy' these legislative grounds.<sup>2</sup> This is not only because of the narrow way in which the legislative grounds are interpreted and applied, but also because the grounds themselves are overly restrictive, as indicated by the fact that around 74 per cent of women who left Poland to access

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<sup>1</sup> Family Planning, Protection of the Foetus and Conditions for the Admissibility of Abortion Act 1993 (Poland), art 4a para 1(2) (Ustawa z dnia 7 stycznia 1993 r. o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży, 4a ust. 1 pkt 2).

<sup>2</sup> Atina Krajewska, 'Rupture and Continuity: Abortion, the Medical Profession and the Transitional State: A Polish Case Study' (2021) 29 *Feminist Legal Studies* 323, <https://doi.org/10.1007/s10691-021-09465-3>.

abortion abroad stated that they sought to end their pregnancy for socio-economic reasons.<sup>3</sup> For years, women<sup>4</sup> without the means to pay for a private abortion have struggled to access abortion within the very narrow confines of the law, and feminist networks of care and activism have been key in enabling abortion travel and safe self-management of abortion through the use of medication.<sup>5</sup> In 2019, for example, slightly over one thousand abortions were performed legally in Poland, which equates to 1 per cent or less of all abortions among Polish women before the recent change in the law.<sup>6</sup> In the same year there were between 100,000 and 200,000 unlawful abortions in Poland, and many more Polish women (15 per cent of all abortions)<sup>7</sup> travelled to obtain abortion.<sup>8</sup>

International human rights bodies have frequently criticised Poland for its failure to make abortion available, either as a result of overly restrictive ‘grounds’ or by failing to regulate conscientious objection and the disruptive behaviour of objecting physicians.<sup>9</sup> However, even as international human rights bodies were recognising the human rights violations inherent in the Polish law and its implementation in practice, domestic anti-abortion politics were growing in prominence and ambition. In autumn 2020 this campaign recorded a significant success. In proceedings initiated by legislators who had failed to reform the law in Parliament, the Constitutional Tribunal held that legislation that permitted abortion in cases of ‘fatal foetal anomaly’ was an unconstitutional interference with the protection of the right to life of the foetus; thus the grounds for access to lawful abortion were reduced to two.<sup>10</sup> Events since the Constitutional Tribunal decision show clearly the serious impact that even a seemingly modest (although, for

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

<sup>4</sup> Throughout this article we use the terms ‘woman’, ‘women’, ‘people’, ‘pregnant woman’, ‘pregnant women’ and ‘pregnant people’ interchangeably to recognise that abortion law has direct effects on the reproductive autonomy of all those who are or can become pregnant, regardless of their gender identity.

<sup>5</sup> See, eg, Human Rights Committee (HRC), Concluding Observations: Poland (15 November 2010), UN Doc CCPR/C/POL/CO/6, para 12; Committee on Economic, Social and Cultural Rights (CESCR), Concluding Observations: Poland (2 December 2009), UN Doc E/C.12/POL/CO/5, para 28; Committee against Torture (CAT), Concluding Observations: Poland (23 December 2013), UN Doc CAT/C/POL/CO5-6, para 23; Report of the Working Group on the Issue of Discrimination Against Women in Law and in Practice on its Visit to Poland (24 June 2019), UN Doc A/HRC/41/33/Add.2, paras 49–54.

<sup>6</sup> Eurostat, ‘Legally Induced Abortions by Mother’s Age’ 8 March 2018, [http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=demo\\_fabort&lang=en](http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=demo_fabort&lang=en); see also Puls Medycyny, ‘Oficjalne dane o legalnej aborcji w Polsce: 1110 zabiegów przerwania ciąży w 2019 r.’, <https://pulsmedycyny.pl/oficjalne-dane-o-legalnej-aborcji-w-polsce-1110-zabiegow-przerwania-ciazy-w-2019-r-999603>.

<sup>7</sup> Ideologia (n 3).

<sup>8</sup> See broadly Julia Hussein and others, ‘Abortion in Poland: Politics, Progression and Regression’ (2018) 26(52) *Reproductive Health Matters* 11.

<sup>9</sup> See, eg, Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW), Concluding Observations: Poland (2 February 2007), UN Doc CEDAW/C/POL/CO/6, para 25; CEDAW, Concluding Observations: Poland (14 November 2014), UN Doc CEDAW/C/POL/CO/7-8, para 36; CAT, Concluding Observations: Poland (29 August 2019), UN Doc CAT/C/POL/CO/7, para 34(e).

<sup>10</sup> Wyrok Trybunału Konstytucyjnego z dnia 22 października 2020 roku, K 1/20 Planowanie rodziny, ochrona płodu ludzkiego i warunki dopuszczalności przerywania ciąży, K 1/20, orzeczenie 4/A/2021: Constitutional Tribunal, Decision, 22 October 2020, *Family Planning, Protection of the Foetus and Conditions for the Admissibility of Abortion*, K 1/20, Judgment 4/A/2021. The decision came into force on 27 January 2021 when the written judgment (4/A/2021) was published.

women, devastating) anti-abortion advance has on the real-life availability of abortion care. Since January 2021, when the judgment came into effect, women have been denied abortions on grounds that were still lawful (risk to health or life) by doctors who claim to fear prosecution and who do not understand the limited legal effects of the decision.<sup>11</sup> Conferring the foetus with a constitutional right to life is having precisely the domino effect on access to abortion that anti-abortion activism seeks to achieve. No doubt prompted by the logical implications of the Tribunal's decision, several lawyers and legal organisations have already warned that the decision will lead to further restrictions in abortion, but politicians vowed not to consider it at this time.<sup>12</sup>

In this article we argue that this decision is part of a broader scheme of anti-abortion lawfare in Poland.<sup>13</sup> We argue that such lawfare seeks to achieve two objectives: first, to (re)shape Polish law in an anti-abortion mould; second, to take advantage of 'gaps' in European and international human rights law standards on abortion in an attempt to claim rights compliance for law and policy that, in reality, restricts access to abortion in a manner that is incompatible with international human rights law.<sup>14</sup>

## 2. ABORTION IN POLAND: A LONG HISTORY OF LAWFARE

Comaroff and Comaroff characterise lawfare as 'the resort to legal instruments, to the violence inherent in the law, to commit acts of political coercion, even erasure'; as something 'put to

<sup>11</sup> Various reports on this issue are available through charities like Abortion without Borders (Aborcja bez Granic) and news reports; see, eg, Magdalena Chrzczonowicz, 'Po wyroku TK z pomocy inicjatywy Aborcja Bez Granic skorzystało 17 tys. Osób', *Oko Press*, 24 April 2021, <https://oko.press/od-wyroku-tk-z-pomocy-aborcjynego-dream-teamu-skorzystalo-17-tys-osob>; Justyna Dobroczy-Orasz, 'Lekarze odmawiają aborcji w obawie przed ściganiem. Co na to wiceminister sprawiedliwości?', *Wyborcza*, 13 May 2021, <https://wyborcza.pl/7,82983,27080657,lekarze-boja-sie-kwalifikowac-do-aborcji-wiceminister-sa-godnie.html>; Dominika Wantuch, 'Polka zmuszona do donoszenia ciąży, która zagraża jej życiu. Lekarze boją się zakwalifikować ją do aborcji', *Wysokie Obcasy*, 12 May 2021, <https://www.wysokieobcasy.pl/wysokie-obcasy/7,163229,27072849,zakaz-aborcji-nie-tylko-w-przypadku-wad-plodu-lekarze-odmawiaja.html>.

<sup>12</sup> See statement from lawyers (Batory Organisation) and news reports: Fundacja im Stefana Batorego, 'Stanowisko Zespołu Ekspertów Prawnych w sprawie rozstrzygnięcia Trybunału Konstytucyjnego dotyczącego aborcji', 26 October 2020, <https://www.batory.org.pl/wp-content/uploads/2020/10/Stanowisko-ZEP-ws.-rozstrzygnięcia-TK-10.2020.pdf>; Tomasz Molga, 'Zakaz aborcji dzieci poczętych w wyniku z gwałtu? Trybunał dał wyraźną wskazówkę', *Wiadomości WP*, 28 January 2021, <https://wiadomosci.wp.pl/zakaz-aborcji-dzieci-poczetych-w-wyniku-zgwaltu-trybunal-dal-wyrazna-wskazowke-6602128190815104a>; Alicja Deneka, 'Orzeczenia TK w sprawie zakazu aborcji nie można uznać za istniejące z uwagi na nieprawidłową obsadę Trybunału, w której zasiadali tzw. dublerzy [WYWIAD]', *Gazeta Prawna*, 24 October 2020, <https://prawo.gazetaprawna.pl/artykuly/1494370,adwokat-monika-sokolowska-wyrok-tk-w-sprawie-aborcji-jakie-konsekwencje-wywiad.html>. Polish politicians and pro-life legal organisations like Ordo Iuris state that their priority was to ensure that (firstly) abortion for fatal foetal anomaly was non-legalised as this ground resulted in the highest number of legal abortions in Poland each year.

<sup>13</sup> On strategies of anti-abortion lawfare see Siri Gloppen, 'Conceptualizing Lawfare: A Typology and Theoretical Framework' (2017) Working Paper, Centre on Law and Social Transformation, University of Bergen.

<sup>14</sup> For a clear statement of the incompatibility of the decision with international human rights law see the statement of UN human rights experts: UN Office of the High Commissioner, 'Poland Has Slammed the Door Shut on Legal and Safe Abortions', 27 October 2020, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26434&LangID=E>.

work ... to make new sorts of human subjects ... [by] those equipped to play most potently inside the dialectic of law and disorder'.<sup>15</sup> This describes pithily the decades-long efforts to make abortion effectively inaccessible in Poland, and to re-narrate the Polish constitutional order as one in which the foetus is centred as the primary rights holder in abortion law and policy.<sup>16</sup> Such a manoeuvre had been successful in other jurisdictions, notably in Ireland,<sup>17</sup> and is a powerful mode of shifting the politico-legal discourse on abortion from one of reproductive autonomy to one of pro-natalism in which abortion is an exceptional, marginal and heavily regulated medico-legal event, quite at odds with the empirical reality of abortion as a part of everyday reproductive life.<sup>18</sup>

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

<sup>15</sup> Jean Comaroff and John Comaroff, *Law and Disorder in the Postcolony* (University of Chicago Press 2007) 30–31.

<sup>16</sup> See, eg, Sydney Calkin and Monika Ewa Kiminska, 'Persistence and Change in Morality Policy: The Role of the Catholic Church in the Politics of Abortion in Ireland and Poland' (2020) 124 *Feminist Review* 86.

<sup>17</sup> On the centring of the foetus in Irish abortion politics see Lisa Smyth, *Abortion and Nation: The Politics of Reproduction in Contemporary Ireland* (Routledge 2005).

<sup>18</sup> Fiona de Londras, 'Constitutionalizing Fetal Rights: A Salutory Tale from Ireland' (2015) 22 *Michigan Journal of Gender and the Law* 243; Fiona de Londras and Máiréad Enright, *Repealing the 8th: Reforming Irish Abortion Law* (Policy Press 2018).

<sup>19</sup> Dorota Szelewa, 'Killing "Unborn Children"? The Catholic Church and Abortion Law in Poland since 1989' (2016) 25 *Social and Legal Studies* 741, 742.

<sup>20</sup> Act of 27 April 1956 on the Conditions of Legalising the Termination of Pregnancy, *Journal of Laws* 1956, no 12, item 61. See generally Małgorzata Fuszara, 'Legal Regulation of Abortion in Poland' (1991) 17 *Signs* 117.

<sup>21</sup> Executive Act of the Minister of Health and Social Welfare of 30 April 1990 on the Qualifications of the Doctors Performing Termination of Pregnancy and the Mode of Issuing the Medical Documents Certifying the Conditions Allowing for Performing the Treatment, *Journal of Laws*, no 29, item 178.

<sup>22</sup> Resolution of the Extraordinary II National Assembly of the Doctors of 14 December 1991.

<sup>23</sup> Szelewa (n 19); Krajewska (n 2).

lawfare – they constituted the use, by those with formal or informal juridical power, of law and law-like instruments to construct a new legal subjectivity for the foetus and marginalise women, especially those who sought to end their pregnancies.

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

The 1993 law did not signal the end of legislative lawfare attempts, however. So-called procedural requirements for accessing abortion were tightened in 1997,<sup>28</sup> and in 2011 a Bill to prohibit abortion completely was introduced to Parliament, which rejected it.<sup>29</sup> Similar attempts either to limit or to prohibit abortion entirely were made in 2013,<sup>30</sup> 2015,<sup>31</sup> 2016,<sup>32</sup> 2017–19.<sup>33</sup> All were unsuccessful, but all demonstrated the tenacity of anti-abortion campaigners and their

<sup>24</sup> The Unborn Child Protection Bill 1989 (Projekt ustawy o ochronie prawnej dziecka poczętego 1989).

<sup>25</sup> See the analysis in Wanda Nowicka, 'Roman Catholic Fundamentalism against Women's Reproductive Rights in Poland' (1996) 4 *Reproductive Health Matters* 21. It is worth noting that before 1989 abortion law in Poland was far more liberal and abortion was more accessible for women; the Conditions of Lawful Pregnancy Termination (1956) decriminalised abortion for women and also established socio-economic grounds for abortion. For extended analysis see Krajewska (n 2).

<sup>26</sup> Family Planning, Protection of the Foetus and Conditions for the Admissibility of Abortion Act 1993 (n 1).

<sup>27</sup> *ibid.*

<sup>28</sup> Act of 5 December 1996 on the Medical Profession, *Journal of Laws* 1997, no 28, item 152.

<sup>29</sup> Obywatelski projekt ustawy o zmianie ustawy o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży oraz niektórych innych ustaw, druk nr 422, 2011.

<sup>30</sup> Obywatelski projekt ustawy o zmianie ustawy o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży, druk nr 1654, 2013. Bill by Kaja Godek (at n 31 below).

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

<sup>32</sup> Obywatelski projekt ustawy o zmianie ustawy z dnia 7 stycznia 1993 r. o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży oraz ustawy z dnia 6 czerwca 1997 r. – Kodeks karny, druk nr 784, 2016.

<sup>33</sup> Obywatelski projekt o zmianie ustawy z dnia 7 stycznia 1993 r. o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży, druk nr 36, 2019.

persistence in seeking to ensure that the law constrained abortion to the greatest extent possible, even though, in reality, the 1993 Act and the practices, interpretations and discourses in which it was embedded were such that publicly funded abortion was largely inaccessible for women in Poland. This resulted from legal and procedural barriers, institutional and physician objection, and the practice of some physicians claiming conscientious objection in the public sphere but performing abortions for payment in private settings, sometimes clandestinely.<sup>34</sup> Although these legislative efforts were not successful, they were all underpinned by argumentation (about the constitution, rights and ‘protecting’ women) that reappear in arguments before the Constitutional Tribunal considered in Section 4 below.

### 3. EUROPEAN AND INTERNATIONAL HUMAN RIGHTS LAW ON ABORTION

In parallel with these domestic political developments, pro-choice advocates turned to international human rights bodies – often in collaboration with non-governmental organisations such as the Helsinki Foundation of Human Rights or Centre for Reproductive Rights – to try to internationalise attempts to secure access to safe, lawful abortion in Poland.<sup>35</sup> Article 9 of the Polish Constitution places a direct obligation on the state to respect and act in accordance with international laws to which Poland is a party, including international human rights law.<sup>36</sup> This complements Article 27 of the Vienna Convention on the Law of Treaties, which makes it clear that a party may not invoke domestic law in order to justify its failure to perform an international obligation, and it means in practice that where there is inconsistency between domestic and international law, the state should bring its domestic law into line with its international obligations.<sup>37</sup> As has been the experience in other settings, efforts to establish incompatibility with international human rights law can thus be read as an attempt to develop a further argument for domestic law reform.<sup>38</sup>

The European Court of Human Rights (ECtHR) was a key focus of these efforts, with the Court finding Poland to be in violation of the European Convention on Human Rights (ECHR)<sup>39</sup> in important cases such as *Tysi c v Poland*<sup>40</sup> and *RR v Poland*.<sup>41</sup> The case of

<sup>34</sup> For women with the ability to pay, ‘informal’ abortion provision is available with many physicians refusing to provide abortion in the public health setting but providing it for a fee and without official documentation; see, eg, Wanda Nowicka ‘Ustawa antyaborcyjna w Polsce – stan prawny i rzeczywistość’ in Nowicka Wanda (ed), *Prawa Reprodukcyjne w Polsce: Skutki ustawy antyaborcyjnej* (Polish Federation for Women and Family Planning 2007).

<sup>35</sup> See broadly Gesine Fuchs, ‘Using Strategic Litigation for Women’s Rights: Political Restrictions in Poland and Achievements of the Women’s Movement’ (2013) 20 *European Journal of Women’s Studies* 21.

<sup>36</sup> Constitution of the Republic of Poland, 2 April 1997, art 9: ‘The Republic of Poland shall respect international law binding upon it’.

<sup>37</sup> Vienna Convention on the Law of Treaties (entered into force 27 January 1980) 1155 UNTS 331, art 27.

<sup>38</sup> See the extensive work on this undertaken in the Abortion Rights Lawfare in Latin America project, hosted by the Centre on Law and Social Transformation, University of Bergen: ‘Abortion Rights Lawfare in Latin America’, *Lawtransform*, 30 June 2017, <https://www.lawtransform.no/project/abortion-rights-lawfare-in-latin-america>.

<sup>39</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms (entered into force 1953) (ECHR) 213 UNTS 221.

<sup>40</sup> ECtHR, *Tysi c v Poland*, App no 5410/03, 20 March 2007.

<sup>41</sup> ECtHR, *RR v Poland*, App no 27617/04, 28 November 2011.



*Tysi c* concerned the refusal of a public hospital to perform an abortion on severely visually impaired Ms Tysi c's third pregnancy, which involved a serious risk to her eyesight. The applicant claimed that this violated Article 8 of the ECHR (the right to private and family life), Article 3 (the right to be free from torture, inhuman and degrading treatment), and Article 13 (the right to effective remedy).<sup>42</sup> The applicant in *RR* complained of Poland's failure to guarantee her access to prenatal diagnostic and relevant information, which would have enabled her to decide whether she should seek a legal abortion on the ground of fatal foetal anomaly.

The judgments were modest and confirmed the Strasbourg court's tactic of 'deciding not to decide' whether the ECHR guarantees women a right of access to abortion in any circumstances.<sup>43</sup> Instead, the Court held that whether and to what extent abortion is legally permitted is a matter for the state to decide – in this case Poland – but that if abortion is legally available under domestic law, it must be accessible in practice. In other words, the Court adopted a highly proceduralised approach to access to abortion,<sup>44</sup> later reinforced in *P and S v Poland*<sup>45</sup> and *A, B and C v Ireland*,<sup>46</sup> but failed to lay down (and has still refused to establish) even a minimum entitlement of access to abortion in situations of exigency such as risk to the life or health of the pregnant person, or severe or fatal foetal diagnosis. This approach clearly left space for regression in national abortion laws – space that, as will be shown in Section 4, anti-abortion advocates have sought to take advantage of in Poland – and lags behind international human rights law.

Although it is commonly stated that there is no 'right to abortion' in international human rights law, the reality is that there is now a considerable corpus of international standards that makes it very clear that states have a substantial set of obligations relating to abortion, and that restricting access to abortion can constitute a violation of internationally protected rights. Foremost among these standards is the obligation to take steps to reduce maternal mortality and morbidity,<sup>47</sup> and to ensure that women do not have to resort to unsafe abortion.<sup>48</sup> States must review and, where necessary, revise their laws to ensure that this obligation is met.<sup>49</sup> It

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<sup>42</sup> ECHR (n 39) art 8(3).

<sup>43</sup> Fiona de Londras, 'When the European Court of Human Rights Decides Not to Decide: The Cautionary Tale of *A, B & C v Ireland* and Referendum-Emergent Constitutional Provisions' in Panos Kapotas and Vassilis P Tzevelekos (eds), *Building Consensus on European Consensus: Judicial Interpretation of Human Rights in Europe and Beyond* (Cambridge University Press 2019) 311.

<sup>44</sup> See, eg, Joanna Erdman, 'The Procedural Turn: Abortion at the European Court of Human Rights' in Rebecca J Cook, Joanna N Erdman and Bernard M Dickens (eds), *Abortion Law in Transnational Perspective: Cases and Controversies* (University of Pennsylvania Press 2014).

<sup>45</sup> ECtHR, *P and S v Poland*, App no 57375/08, 30 October 2012.

<sup>46</sup> ECtHR, *A, B & C v Ireland*, App no 25579/05, 16 December 2010.

<sup>47</sup> CESCR, General Comment No 22 on the Right to Sexual and Reproductive Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights) (2 May 2016), UN Doc E/C/12/GC/22, para 49; Committee on the Rights of the Child (CommRC), General Comment No 4 on Adolescent Health and Development (1 July 2003), UN Doc CRC/GC/2003/4, paras 6, 9, 24, 30–3.

<sup>48</sup> HRC, General Comment No 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life (30 October 2018), UN Doc CCPR/C/GC/36, para 8.

<sup>49</sup> *ibid*; CESCR (n 47) para 28.



is discriminatory to refuse to make available healthcare that only women need,<sup>50</sup> and there is growing recognition that the full decriminalisation of abortion is required to ensure that women's rights are respected, protected and fulfilled.<sup>51</sup>

Across the human rights treaty bodies and special procedures, there is a growing realisation that dominant modes of regulating abortion – including criminalisation and restrictive 'grounds' – are harmful to and incompatible with rights, including the right to life. The clearest statement of this to date is paragraph 8 of the UN Human Rights Committee's General Comment No 36 on the right to life, in which the Committee made very clear the substantial human rights obligations of states in respect of access to abortion. This paragraph demonstrates the substantial obligations that states bear with regard to abortion.<sup>52</sup>

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

<sup>50</sup> CEDAW, General Recommendation No 24: Article 12 of the Convention (Women and Health) (20 August 1999) UN Doc A/54/38/Rev.1, Ch I, para 11.

<sup>51</sup> CESCR (n 47) paras 20, 34; CEDAW, General Recommendation 35 on Gender-based Violence against Women, updating General Recommendation No 19 (26 July 2017), UN Doc CEDAW/C/GC/35, para 18; CEDAW, General Recommendation 33 on Women's Access to Justice (3 August 2015), UN Doc CEDAW/C/GC/33, para 51(I); CommRC, General Comment 20 on the Implementation of the Rights of the Child during Adolescence (6 December 2016), UN Doc CRC/C/GC/20, para 60; Working Group on the Issue of Discrimination Against Women in Law and in Practice (8 April 2016), UN Doc A/HRC/32/44, paras 82, 107; HRC (n 48) para 8.

<sup>52</sup> HRC (n 48) para 8 (internal footnotes removed).

This paragraph indicates very clearly the direction of travel in international human rights law and the growing realisation that restricting access to abortion is per se incompatible with women's enjoyment of a wide range of reproductive rights, which are now firmly established as a matter of international human rights law. It also shows the significant evolution of rights standards since the first, then-momentous, articulation of reproductive rights in the International Conference on Population and Development (ICPD). This includes the findings in *Mellet*<sup>53</sup> and *Whelan*<sup>54</sup> that where abortion is not available in cases of fatal foetal anomaly, this can result in violations of Article 7 of the International Covenant on Civil and Political Rights (ICCPR)<sup>55</sup> and thus meet the threshold for cruel, inhuman and degrading treatment.

It is quite clear that the approach of the ECtHR to abortion is out of step with the rest of international human rights law, although some domestic courts have begun to postulate that denial of abortion in cases of fatal foetal anomaly is incompatible with the ECHR,<sup>56</sup> and there are tentative indications that the Court itself may be moving in that direction.<sup>57</sup> Importantly, though, quite apart from the ECHR, Poland is a state party to the ICCPR, and paragraph 8 of the Human Rights Council's General Comment No 36 summarises Poland's key obligations relating to abortion, and thus the international human rights standards to which it is bound at the domestic level under Article 9 of the Constitution.<sup>58</sup> Given this, one might have expected that a legislative provision permitting abortion in cases of fatal foetal abnormality would survive constitutional scrutiny. As we now show, however, human rights law in this case was used for an entirely different end.

#### 4. THE CONSTITUTIONAL TRIBUNAL AND THE RIGHTS DISTORTION

International human rights law featured heavily in the argumentation before the Constitutional Tribunal, including in *amici curiae* briefs submitted by several anti-abortion organisations, which included Ordo Iuris,<sup>59</sup> ADF International<sup>60</sup> and the European Centre for Law and

<sup>53</sup> HRC, *Mellet v Ireland* (17 November 2016), UN Doc CCPR/C/116/D/2324/2013.

<sup>54</sup> HRC, *Whelan v Ireland* (12 June 2017), UN Doc CCPR/C/119/D/2425/2014.

<sup>55</sup> International Covenant on Civil and Political Rights (entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 7.

<sup>56</sup> See, eg, the UK Supreme Court decision in *Re an Application by the Northern Ireland Human Rights Commission for Judicial Review* [2018] UKSC 27 (finding *obiter* that prohibiting abortion in cases of fatal foetal anomaly and rape was incompatible with Article 8 (but not Article 3) ECHR). For analysis of the case see, eg, Jane Rooney, 'Abortion in Northern Ireland: A Missed Opportunity to Consider Article 3?' (2019) 41 *Journal of Social Welfare and Family Law* 225.

<sup>57</sup> See the analysis in Bríd Ní Ghráinne and Aisling McMahon, 'Access to Abortion in Cases of Fatal Foetal Abnormality: A New Direction for the European Court of Human Rights?' (2019) 19 *Human Rights Law Review* 561.

<sup>58</sup> HRC (n 48).

<sup>59</sup> Ordo Iuris, 'Opinia amici curiae Instytutu Ordo Iuris w sprawie stwierdzenia niezgodności określonych artykułów ustawy z dnia 7 stycznia 1993 r. o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży z Konstytucją RP', 16 October 2020, <https://ordoiuris.pl/ochrona-zycia/opinia-amici-curiae-instytutu-ordo-iuris-w-sprawie-stwierdzenia-niezgodnosci>; see also K 1/20 judgment (n 10) Part I, para 6.1–6.2.

<sup>60</sup> See K 1/20 judgment (n 10) Part I, para 6.3.

Justice.<sup>61</sup> These *amici curiae* briefs emphasised to the Court that neither international nor European human rights law provide for a right to abortion and argued that the right to life of the foetus is protected by international human rights law,<sup>62</sup> a proposition with which the Tribunal effectively began its interpretation of international human rights norms. In contrast, and tracking the logic of such briefs and especially that of *Ordo Iuris* (supported by a wide international coalition of anti-abortion advocates<sup>63</sup>), the Tribunal constructed the foetus as a rights bearer and concluded that permitting abortion in cases of fatal foetal anomaly violated a constitutionally protected foetal right to life. Reaching this conclusion required the Tribunal to establish that the foetus is a rights bearer, and that abortion violates the foetal right to life and cannot be justified on the basis of the rights of pregnant women.

#### 4.1. THE FOETUS AS RIGHTS BEARER

It is generally accepted that international human rights accrue at birth.<sup>64</sup> It is thus remarkable that the Constitutional Tribunal concluded that the foetus has an internationally protected right to life prior to birth. Reaching this conclusion required it to engage in a rather startling reconstruction of international provisions. With regard to Article 6 of the ICCPR, the Tribunal held that as Article 6 recognises '[e]very human being' as having a right to life while using the term 'human person' throughout the rest of the Covenant, Article 6 should be recognised as being broader than the other provisions ('human person') and as including the foetus. As a result, it found that the foetus has a right to life under the ICCPR.<sup>65</sup> In interpreting Article 2 of the ECHR, which also protects the right to life, the Tribunal referred to the preamble to the Convention on the Rights of the Child (CRC) and the Declaration on the Rights of the Child (which predates the CRC) and their statement that 'the child ... needs special safeguards and care, including appropriate legal protection, *before as well as after birth*'.<sup>66</sup> Reading this in conjunction with Article 6(2) of the CRC ('States Parties shall ensure to the maximum extent possible the survival and development of the child') alongside Article 2 of the ECHR, the Tribunal concluded that a foetal right

<sup>61</sup> European Centre for Law and Justice, *Amicus Curiae* Brief Submitted to the Constitutional Tribunal of Poland in the Case K 1/20, 16 October 2020, <http://media.aclj.org/pdf/Amicus-Curiae-Brief-to-the-Constitutional-Tribunal-of-Poland-K-1.20-ECLJ-October-2020.pdf>.

<sup>62</sup> K 1/20 judgment (n 10) Part I, paras 6.3–6.4 and Part III, para 3.3.4.

<sup>63</sup> *ibid* Part I, para 6.2. The opinion was supported by the following actors: Prof Dr Manfred Spieker, MaterCare Europe, Slovakia Christiana, Association for Life and Family, HFI, Federação Portuguesa pela Vida, C-Fam, Pro Vita & Famiglia, Human Dignity Center, American Association of Pro-Life Obstetricians and Gynecologists, Family Watch International, International Organization for the Family, Crossroads Pro-Life, Människovärde, In the Name of the Family, Free Society Institute, Femina Europa, Campagne Quebec – Vie, Catholic Voice, CENAP, Culture of Life Africa, European Life Network, National Association of Catholic Families (NACF), Society for the Protection of Unborn Children, Population Research Institute, Voto Catolico Colombia, Vigilare Foundation, Personhood Alliance, Personhood Education, Precious Life, Cleveland Right to Life.

<sup>64</sup> For a comprehensive analysis see Rhonda Copelon and others, 'Human Rights Begin at Birth: International Law and the Claim of Fetal Rights' (2005) 13(26) *Reproductive Health Matters* 120.

<sup>65</sup> K 1/20 judgment (n 10) Part III, para 3.3.4.

<sup>66</sup> Convention on the Rights of the Child (entered into force 2 September 1990) 1577 UNTS 3 art 2 (emphasis added).

to life was protected also by the European Convention.<sup>67</sup> Drawing on this, the Tribunal concluded (seemingly inconsistently with its own earlier jurisprudence on international human rights<sup>68</sup>) that Article 38 of the Polish Constitution, read in conjunction with the protection of human dignity in Article 30, guarantees protection of the foetus, equating this to a foetal right to life.<sup>69</sup>

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

The over-weighting of textual differences between one provision of the ICCPR and others, the Tribunal’s apparent disregard of the fact that the provision that would have recognised a ‘right to life ... from the moment of conception’ was rejected during negotiation of the ICCPR,<sup>70</sup> and the treatment of non-binding text (from the Declaration on the Rights of the Child and the preamble to the CRC) as decisive interpretive aides for Article 2 of the ECHR are manifestations of cynical, perhaps even bad faith, modes of interpretation. This is especially so when seen alongside General Comment No 36 of the Human Rights Committee, which indicates very clearly that the Tribunal’s reading of Article 6 of the ICCPR is untenable. In his dissent, Justice Kieres describes the Tribunal’s interpretation of international law as ‘superficial’,<sup>71</sup> noting the lack of engagement with relevant authorities such as *Mellet*,<sup>72</sup> *Whelan*<sup>73</sup> and *RR v Poland*,<sup>74</sup> as well as currently pending *BB v Poland*,<sup>75</sup> so it cannot be said that the Tribunal judges were unaware of the unorthodox character of their interpretive approach.

However, and importantly, this critical lawfare move is enabled by the long-standing habit in European and international human rights law of failing to state clearly that the foetus does not have internationally protected rights. This is evident in ECtHR cases such as *Paton v United Kingdom*,<sup>76</sup>

<sup>67</sup> K 1/20 judgment (n 10) Part III, para 3.3.4.

<sup>68</sup> Constitutional Tribunal Decision, K 16/10, OTK ZU nr 8/A/2011 (11 October 2011) Part III, 5.1 (the tribunal states that the CRC understands ‘child’ to be a ‘physical person from the moment of birth until it reaches legal maturity [18 years of age in Poland]’).

<sup>69</sup> K 1/20 judgment (n 10) Part III, paras 3.2 and 4.

<sup>70</sup> See the analysis in Copelon and others (n 64).

<sup>71</sup> K 1/20 judgment (n 10) dissenting opinion of Justice Leon Kieres.

<sup>72</sup> *Mellet v Ireland* (n 53).

<sup>73</sup> *Whelan v Ireland* (n 54).

<sup>74</sup> *RR v Poland* (n 41).

<sup>75</sup> ECtHR, *BB v Poland*, App no 67171/17 (pending).

<sup>76</sup> ECtHR, *Paton v United Kingdom*, App no 8416/78, 13 May 1980, para 22 (‘The Commission considers that it is not in these circumstances called upon to decide whether Article 2 does not cover the foetus at all or whether it recognises a “right to life” of the foetus with implied limitations. It finds that the authorisation, by the United Kingdom authorities, of the abortion complained of is compatible with Article 2(1), first sentence because, if one assumes that this provision applies at the initial stage of the pregnancy, the abortion is covered by an implied limitation, protecting the life and health of the woman at that stage, of the “right to life” of the foetus’).

*Vo v France*<sup>77</sup> and *A, B and C v Ireland*,<sup>78</sup> in which the Court did not extend protection to the foetus, but also did not expressly settle the question of whether the foetus has a right to life under Article 2. It is also visible in the copious general comments and other interpretive and adjudicatory outputs of treaty monitoring bodies that articulate state obligations in respect of access to safe abortion, but never clearly state that the foetus does not have internationally protected, legally enforceable rights.<sup>79</sup> This, of course, reflects deep disagreements that exist in and among international actors and states, but it does leave space for manipulation by anti-abortion activists with precisely the kind of effect that we see in the decision of the Constitutional Tribunal.

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

#### 4.2. THE INVISIBLE WOMAN

Having established that Article 38 of the Constitution protected a foetal right to life, the Tribunal noted that constitutional rights are subject to a hierarchy and that the right to life is likely to triumph over other rights, such as the right to property, other economic rights, or the right to health of other people.<sup>80</sup> In this context, of course, ‘other rights’ and ‘other people’ are primarily the rights of pregnant women and women, but in spite of this – and as noted in two dissenting opinions<sup>81</sup>—

<sup>77</sup> ECtHR, *Vo v France*, App no 53924/00, 8 July 2004, para 85 (‘the Court is convinced that it is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention (“*personne*” in the French text). As to the instant case, it considers it unnecessary to examine whether the abrupt end to the applicant’s pregnancy falls within the scope of Article 2, seeing that, even assuming that that provision was applicable, there was no failure on the part of the respondent State to comply with the requirements relating to the preservation of life in the public-health sphere’).

<sup>78</sup> *A, B & C v Ireland* (n 46) para 237 (‘Of central importance is the finding in [*Vo*] that the question of when the right to life begins came within the States’ margin of appreciation because there was no European consensus on the scientific and legal definition of the beginning of life, so that it was impossible to answer the question whether the unborn was a person to be protected for the purposes of Article 2. ... It follows that, even if it appears from the national laws referred to that most Contracting Parties may in their legislation have resolved those conflicting rights and interests in favour of greater legal access to abortion, this consensus cannot be a decisive factor in the Court’s examination of whether the impugned prohibition on abortion in Ireland for health and well-being reasons struck a fair balance between the conflicting rights and interests, notwithstanding an evolutive interpretation of the Convention’).

<sup>79</sup> See, eg, HRC (n 48) para 8; CESCR (n 47); CEDAW, General Recommendation 35 (n 51) para 18; CEDAW, General Recommendation 33 (n 51) 51(I); CommRC (n 51) para 60; HRC, General Comment No 28: Article 3 (The Equality of Rights between Men and Women) (29 March 2000) UN Doc CCPR/C/21/Rev.1/Add.10, para 20.

<sup>80</sup> K 1/20 judgment (n 10) Part III, para 4.2.

<sup>81</sup> K 1/20 judgment (n 10) dissenting opinion of Justice Leon Kieres, para 4.6, and more broadly dissenting opinion of Justice Piotr Piotra Pszczółkowski.

there was remarkably little engagement with women's rights in the judgment, including the rights articulated in international human rights law as outlined in Section 3 above.

Although the Tribunal stressed that its decision related only to the legality of abortion for fatal foetal abnormality,<sup>82</sup> its lack of serious engagement with women's rights opens the door to a much wider interpretation of the decision and, in particular, to the implications of identifying the foetus with constitutionally protected rights to life and to dignity. According to the Tribunal, abortion can be constitutionally justified only if it meets the standard of absolute necessity, so that the foetal right to life cannot be restricted or limited to protect rights or values of lower ranking – by implication the rights of pregnant people.<sup>83</sup> However, the constitutional rights of pregnant women are not inevitably 'lower', even if a hierarchy does exist. As Atina Krajewska points out,<sup>84</sup> women also hold the rights to dignity,<sup>85</sup> freedom,<sup>86</sup> life,<sup>87</sup> privacy,<sup>88</sup> health,<sup>89</sup> the prohibition of torture and degrading treatment,<sup>90</sup> and the special protection of mothers before and after birth.<sup>91</sup> At least some of these – including rights to life, dignity and freedom from torture and degrading treatment – must be understood as having 'equal' standing to any foetal right to life.<sup>92</sup> Nevertheless, the Tribunal barely engaged with these rights, which are clearly implicated by recognising a constitutional protection for foetal life. While creating a new legal subjectivity for the foetus, the Constitutional Tribunal was simultaneously invisibilising the woman<sup>93</sup> as a rights holder in pregnancy, and reducing her to 'her biological, purely mechanical role in preserving the life of another'.<sup>94</sup> As Susan Bordo puts it, where '*this* is the given value, against which [a woman's] claims to subjectivity must be rigorously evaluated ... her valuations, choices, consciousness are expendable'.<sup>95</sup> In sharp contrast with its reading of the Constitution vis-à-vis foetal life, the Tribunal failed to examine these established rights of pregnant women in the light of international human rights law, not to mention in the light of the realities of an unwanted

<sup>82</sup> Family Planning, Protection of the Foetus and Conditions for the Admissibility of Abortion Act (n 1); the two other grounds include unlawful act (rape, incest) and the life or health of the mother.

<sup>83</sup> K 1/20 judgment (n 10) Part III, para 4.2.

<sup>84</sup> Atina Krajewska, 'The Judgment of the Polish Constitutional Tribunal on Abortion: A Dark Day for Poland, for Europe, and for Democracy', *UK Constitutional Law Association*, 12 November 2020, <https://ukconstitutionallaw.org/2020/11/12/atina-krajewska-the-judgment-of-the-polish-constitutional-tribunal-on-abortion-a-dark-day-for-poland-for-europe-and-for-democracy>.

<sup>85</sup> Constitution of the Republic of Poland (n 36) art 30.

<sup>86</sup> *ibid* art 31(1).

<sup>87</sup> *ibid* art 38.

<sup>88</sup> *ibid* art 47.

<sup>89</sup> *ibid* art 68.

<sup>90</sup> *ibid* art 40.

<sup>91</sup> *ibid* art 71(2).

<sup>92</sup> Importantly, a construction of women's and foetal rights to life as 'equal' can have the effect of reducing women's right to life to a form of 'bare life' protection that does little to protect life beyond the aspiration of 'staying alive'. This was the experience in Ireland under the now repealed 8th amendment to the Constitution. See generally de Londras and Enright (n 18).

<sup>93</sup> Atina Krajewska and Rachel Cahill-O'Callaghan, 'When a Single Man Wants to Be a Father: Revealing the Invisible Subjects in the Law Regulating Fertility Treatment' (2020) 29 *Social & Legal Studies* 85, 88.

<sup>94</sup> Susan Bordo, *Unbearable Weight Feminism: Feminism, Western Culture, and the Body* (University of California Press 1993) 79.

<sup>95</sup> *ibid*.

continuation of pregnancy. Instead, the Tribunal largely simply ignored women. In fact, the way in which it engaged with women was by interpreting the constitutional right to special protection of mothers before and after birth as obliging the state to protect the life of the foetus. The Tribunal established ‘a correlation’ between ‘being a mother’ before birth and ‘being a child before birth’. It then equated being a ‘child’ with ‘being a human’, further meaning that the right to life includes the life of the unborn foetus. Thus, the Tribunal concluded, protecting the life of the foetus is essential for guaranteeing a woman’s right under Article 71(2) to receive state support and special protection before birth.<sup>96</sup>

Here, again, the Tribunal’s finding has echoes of common tropes found in anti-abortion argumentation and lawfare, especially the pseudo ‘pro-woman’ argument that the wellbeing of pregnant women is inextricably and always bound up with, and contingent on, the protection of foetal life.<sup>97</sup> The implication is that by proscribing abortion, the state is ‘protecting’ women *and* unborn life.<sup>98</sup> Thus, not only are women’s rights ‘barely mentioned’,<sup>99</sup> but there is a complete failure to appreciate – or at least to acknowledge – the wider-reaching implications of this judgment for women’s rights and for the availability of abortion.

It is quite clear that the Tribunal’s insistence that its decision related only to abortion on the grounds of fatal foetal anomaly is deceiving; it may be the statutory provision that was under consideration, but the court’s reasoning has implications that very clearly go well beyond that and are likely to make the other grounds for access to abortion vulnerable to challenge. The effect of this – an effect produced and no doubt intended by the arguments put to the court – is to render women’s constitutional rights displaced during pregnancy (that is, subject to the superior right to life of the foetus), with the likely exception of the right to life, and even that may be considered capable of satisfaction by merely ensuring that a woman does not die in pregnancy. In other words, the effect is to reduce the woman’s right to life to an entitlement to bare life, again in contrast with the richer understanding of the right to life articulated, in particular, by the UN Human Rights Committee in General Comment No 36.<sup>100</sup> That this would be the result is neither fantastical nor unforeseeable; after all, this was precisely the effect of the constitutionalisation of a foetal right to life in Ireland,<sup>101</sup> a situation that the European Court of Human Rights seemed satisfied to accept as in principle compatible with the ECHR.<sup>102</sup>

<sup>96</sup> K 1/20 judgment (n 10) para 3.3.2.

<sup>97</sup> On the ‘pro-woman’ turn in anti-abortion rhetoric see Paul Surette and Kelly Gordon, *The Changing Voice of the Anti-Abortion Movement: The Rise of ‘Pro-Woman’ Rhetoric in Canada and the United States* (University of Toronto Press 2015).

<sup>98</sup> This is a classic manoeuvre in what Browne and Nash term ‘heteroactivism’: Kath Browne and Catherine Jean Nash, ‘In Ireland we “Love Both”? Heteroactivism in Ireland’s Anti-Repeal Ephemera’ (2020) 124 *Feminist Review* 51; Catherine Jean Nash and Kath Browne, *Heteroactivism: Resisting Lesbian, Gay, Bisexual and Trans Rights and Equalities* (Zed Books 2020) 72.

<sup>99</sup> Krajewska (n 84).

<sup>100</sup> HRC (n 48)

<sup>101</sup> On the pregnant person’s right to life as a guarantee of bare life see, classically, Ruth Fletcher ‘“Pro-Life” Absolutes, Feminist Challenges: The Fundamentalist Narrative of Irish Abortion Law 1986–1992’ (1998) 36 *Osgoode Hall Law Journal* 1.

<sup>102</sup> *A, B & C v Ireland* (n 46).



## 5. CONCLUSION: THE INTERNATIONAL ASPIRATIONS OF POLISH ANTI-ABORTION LAWFARE?

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

The accuracy of the rights-related claims made in this case is less important than their ability to be manipulated; than their ability to perform abortion denial as rights protection. As already mentioned, this turn to rights – the attempt to make politico-legal debates on abortion regulation about 'balancing rights' on the one hand and 'protecting women' on the other – is a key part of conservative anti-abortion advocacy at the global scale. The Polish decision shows that, with the right circumstances (including an extremely conservative court<sup>103</sup>), such efforts can succeed but, of course, their incompatibility with the reality of international human rights law will nevertheless quickly be pointed out. What, then, can anti-abortion lawfare activists do about it? They can seek to further exploit silences in international human rights law (including, as already mentioned, on whether the foetus has a right to life). They can assert more boldly that abortion regulation is a zone of sovereign decision making in respect of which the ECtHR requires nothing more than procedural protection for whatever access to abortion is determined by national law-makers; and they can seek to contrive a lack of clarity or a sense of disagreement in international human rights law. Indeed, as international standards become clearer and more concrete – as evidenced by General Comment No 36 (discussed in Section 3) – the strategic need for normative muddying becomes greater. It is therefore important, and alarming, to note that the Constitutional Tribunal decision has emboldened conservative anti-abortion advocates in Poland to turn their attention to attempts to build an alternative normative framework in international human rights law.

This is especially clear in the ongoing attempt to undermine the Council of Europe's Istanbul Convention on Violence against Women<sup>104</sup> (the Istanbul Convention) and replace it with a new 'Convention on the Rights of the Family', which would protect foetal life and have the effect of constructing abortion not as essential healthcare or a rights-affirming option for women, but as a danger to women, an example of violence detrimental to the life of the family, and contrary to the

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<sup>103</sup> This is a culmination of what is known as the Polish constitutional crisis and the crisis of the Constitutional Tribunal; see, eg, Anna Młynarska-Sobaczewska, 'Polish Constitutional Tribunal Crisis: Political Dispute or Falling Kelsenian Dogma of Constitutional Review' (2017) 23 *European Public Law* 489; Michał Ziółkowski, 'Constitutional Moment and the Polish Constitutional Crisis 2015–2018 (a Few Critical Remarks)' (2018) *Przełąd Konstytucyjny* 4.

<sup>104</sup> Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (entered into force 1 August 2014) 3010 UNTS 107.

rights of the family.<sup>105</sup> The new convention proposes denunciation of the Istanbul Convention, full protection of foetal life from the moment of conception, and criminalisation of ‘perpetrators of violence’ who perform ‘forced abortions or illegal abortions’.<sup>106</sup> Ordo Iuris, a considerable proponent of this approach, describes the Istanbul Convention as a product of ‘radical leftist and gender ideology’<sup>107</sup> and frames this attempt at norm entrepreneurship as part of a wider project to ‘halt the progressive erosion of the institutions of national and international law, which, in the intention of their creators, were meant to uphold the inviolability of human dignity and the right to life ... [to] protect our country against the trends that consider abortion, artificial in vitro insemination or euthanasia, i.e. activities inherently connected with the annihilation of human life as “human rights”’.<sup>108</sup>

Clearly, seen as a project of international lawmaking, this is very unlikely to succeed. Even in the unlikely event that states were to denounce the Istanbul Convention and sign up to a new convention of this kind, this new instrument would have limited international status and, of course, could never replace the concluding observations and general comments of treaty monitoring bodies as authoritative interpretations of international human rights law. Nor do its promoters think it can. Instead, their advocacy for such an instrument should be understood as the kind of distorting lawfare it is: an attempt to create an alternative touchstone in international human rights law to which anti-abortion advocates can continue to refer *as if it were authority*. This is already a well-recognised technique in anti-abortion advocacy and is indeed evident in, for example, claiming that the preamble to the CRC is authority for the proposition that human rights are accorded to foetal life, as we saw in this case. It is also a technique that is visible in the attempts by some states to halt the continuing development of international human rights law on abortion. This was epitomised in recent months by the non-legally binding Geneva Consensus Declaration on Promoting Women’s Health and Strengthening the Family, signed by 32 countries (including Poland) on 22 October 2020<sup>109</sup> – the day on which the Constitutional Tribunal’s decision was announced. The Geneva Consensus Declaration seeks to promote a restrictive reading of international human rights law, and commits its signatories to, *inter alia*, ‘[r]eaffirm[ing] that there is no international right to abortion, nor any international obligation on the part of States to finance or facilitate abortion’. In communicating this Declaration to the Secretary-General of the United Nations, the United States (its major proponent) restated that ‘[t]he United States, along with our like-minded partners, believes strongly that there is no international right to abortion and that the United Nations must respect national laws

<sup>105</sup> This is part of the larger ‘Yes to Family, No to Gender’ project prepared by Ordo Iuris and Christian Social Congress: ‘Citizens’ Initiative “Yes to Family, No to Gender” Underway’, *Ordo Iuris*, 22 July 2020, <https://en.ordoiuris.pl/family-and-marriage/citizens-initiative-yes-family-no-gender-underway>; see also Draft Convention on the Rights of the Family, [https://ordoiuris.pl/sites/default/files/inline-files/Convention\\_on\\_the\\_rights\\_of\\_the\\_family.pdf](https://ordoiuris.pl/sites/default/files/inline-files/Convention_on_the_rights_of_the_family.pdf).

<sup>106</sup> Draft Convention on the Rights of the Family, *ibid* arts 5 and 37.

<sup>107</sup> Ordo Iuris (n 105).

<sup>108</sup> Ordo Iuris, ‘Life Protection’, <https://en.ordoiuris.pl/life-protection>.

<sup>109</sup> Geneva Consensus Declaration on Promoting Women’s Health and Strengthening the Family, <https://www.hhs.gov/sites/default/files/geneva-consensus-declaration-english.pdf>.

and policies on the matter, absent external pressure'.<sup>110</sup> Significantly, Ordo Iuris was one of the organisations invited by the United States to attend the signing ceremony for the Declaration.<sup>111</sup>

If, as Atina Krajewska and Rachel Cahill-O'Callaghan suggest, invisible legal subjects could acquire their social and legal visibility through human rights litigation,<sup>112</sup> anti-abortion advocates seek to be prepared to reach for international 'standards' with which to resist any such attempts. As we saw in this case, this kind of advocacy can succeed in shifting the terrain in domestic law. Indeed, reading these developments through a lawfare lens suggests that this is precisely the aim. To achieve their intended effect, such techniques do not have to reflect law accurately; they merely have to be sufficient to clothe anti-abortion rhetoric in law-like threads. Attempts to create this international human rights counter-law are pursued not in any realistic expectation of undoing the steady evolution of international human rights law on abortion and abortion-related matters, but to create a counter-narrative rooted in 'law' to which anti-abortion activism can reach to legitimate its arguments as rights based. In this way they are a classical iteration of lawfare, and must be recognised as such.

The Constitutional Tribunal's decision shows not only that selective and misrepresentative presentations of abortion-related standards in international human rights law can be used to legitimate abortion restrictions in domestic law, but also that there is a need for vigilance against attempts to muddy the waters about when, how, and to what extent women who seek abortion enjoy protection from international human rights law. It also, importantly, throws light on the (potentially juridogenic<sup>113</sup>) productivity of silences in the international human rights corpus. It makes very clear the costs of the refusal by the European Court of Human Rights to recognise and protect substantive rights relating to abortion as part of the ECHR. It exposes the normative spaces left by pragmatic silences in international human rights law. Importantly, it makes clear the productivity of compromise references to foetal life made in preambular text. Such compromise text may have been conceded in the expectation by some that its non-binding nature would minimise its effects, but as the Constitutional Tribunal decision shows, for proponents of anti-abortion lawfare such text can be leveraged in the right case at the right time to restrict the availability of abortion.

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<sup>110</sup> Communication of Ambassador Kelly Craft to Secretary-General of the United Nations, 2 December 2020, <https://usun.usmission.gov/geneva-consensus-declaration-on-promoting-womens-health-and-strengthening-the-family>.

<sup>111</sup> Ordo Iuris, 'Geneva Consensus Declaration: An Important Day for the Protection of Life in Poland and Worldwide', 22 October 2020, <https://en.ordoiuris.pl/family-and-marriage/geneva-consensus-declaration-important-day-protection-life-poland-and-worldwide>.

<sup>112</sup> Krajewska and Cahill-O'Callaghan (n 93) 88.

<sup>113</sup> Carol Smart, *Feminism and the Power of Law* (Routledge 1989) 12.