

# The Scales of the European Court of Human Rights: Abortion Restriction in Poland, the European Consensus, and the State's Margin of Appreciation

JULIA KAPELAŃSKA-PRĘGOWSKA

## Abstract

In October 2020, the Polish Constitutional Court held unconstitutional an exception in the Family Planning Act of 1993 that provided for legal abortion in cases of fetal abnormalities. This retrogressive step has led to an almost total ban on abortion in Poland. Drawing on existing Strasbourg case law and other relevant legal material, this paper attempts to anticipate a possible outcome of applications recently filed before the European Court of Human Rights by more than 1,000 Polish women who were denied abortions or who postponed their reproductive decisions out of fear. I focus on two factors that play a determining role in the adjudication of cases related to reproductive rights. The first one is a public interest in restricting abortion—namely, the “protection of morals.” The second is the margin of appreciation doctrine, which determines the degree of freedom that states enjoy in regulating certain issues, such as abortion, and which is highly dependent on the concept of a European consensus. I argue that this consensus—revealed through the domestic laws and practice of 47 Council of Europe member states—shows considerable unity and should thus restrict individual states’ discretion in limiting human rights and freedoms. The European Court of Human Rights, by acknowledging the relevance of a European consensus in abortion regulation, as well as evolving universal standards concerning reproductive rights, would avoid two pitfalls: one connected with analyzing the doubtful public interest in protecting morals, and another with a potential criticism of judicial activism and the court’s imposition of its own moral evaluation of an abortion ban.

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## Introduction

Poland's Family Planning Act of 1993, which provides for legal abortion in three specific situations, has been perceived by international bodies as restrictive and often ineffective. After the country's repeated attempts to ban abortion, the United Nations (UN) Human Rights Committee explicitly called on Poland to refrain from pursuing any legislative reform that would amount to the retrogression of an already restrictive law.<sup>1</sup> Despite this appeal, the country's Constitutional Court, in a judgment issued on October 22, 2020, ruled that one of the grounds for abortion was unconstitutional.<sup>2</sup> It was to be expected that, sooner or later, this restricted access to abortion in Poland would be raised in individual applications to the European Court of Human Rights (ECtHR). This paper attempts to anticipate a possible outcome of abortion-related cases against Poland by drawing on existing Strasbourg case law and other relevant legal material. Given the fact that almost all abortion cases adjudicated by the ECtHR to date have dealt with the problem of real and effective access to legal abortion—and only one (*A., B. and C. v. Ireland*) has concerned the lack of legal abortion per se—this case could serve as a point of reference for future considerations.<sup>3</sup>

This paper addresses the challenges of a dynamic interpretation of the European Convention on Human Rights in this specific context, with a focus on the European consensus and its impact on the margin of appreciation afforded to states.<sup>4</sup> The existence of a consensus has very significant consequences: the more similar the laws of the Council of Europe states are, the less regulatory maneuver is left. Another critically assessed problem relates to the interpretation of a legitimate aim that is traditionally put forward by domestic authorities to justify restrictions on abortion—namely, public morals. I argue that a change of approach and a redefinition of “morals” as a relevant public interest in this context is necessary. I also suggest that the ECtHR should take a broader systemic perspective into account when examining cases against Poland and look into the evolution of inter-

national standards concerning reproductive rights. In other words, would the court pronounce a ban on abortion on embryo-pathological grounds as amounting to a violation of the European Convention on Human Rights because it does not pursue a legitimate aim or does not reach a fair balance between competing interests and rights? Which rights and interests could be weighed on the scales of justice, and which factors would be decisive for the purpose of the balancing exercise?

## Abortion law and practice in Poland

Abortion legislation in Poland's modern history may be described as taking one step forward and two steps back. Between 1956 and 1993, abortion was widely accessible on therapeutic and socioeconomic grounds (when a woman was experiencing “difficult living conditions”).<sup>5</sup> The interpretation of the law varied from a restrictive interpretation in the late 1950s to a permissive reading that allowed abortion on request in the 1960s and 1970s.<sup>6</sup> In fact, for many years, abortion was frequently used as a means of birth control due to a lack of availability and use of contraceptives.

The Family Planning Act of 1993 permitted abortion in three circumstances: (1) when the pregnancy posed a threat to the life or health of the pregnant woman; (2) when prenatal examinations or other medical conditions indicated that there was a high probability of a severe and irreversible fetal defect or incurable illness that threatened the fetus's life; and (3) when there was a reasonable suspicion that the pregnancy was the result of an unlawful act.<sup>7</sup> A step toward liberalization was taken in 1996, when an amendment to the 1993 law allowed abortion in cases where a pregnant woman was experiencing a difficult personal or living situation.<sup>8</sup> This amendment, however, was repealed in 1997 by the Constitutional Court.<sup>9</sup> Over the past few years, access to abortion has increasingly been a subject of national discussion, with repeated attempts to change the act. Legislative initiatives seeking to introduce a total ban on abortion, as well as ones aimed at liberalization of the law, were in-

roduced in 2013, 2015, and 2016. The latest attempt to ban abortion spurred large protests known as the “Black Protests.”<sup>10</sup>

Apart from these debates and changes within the legal framework, the implementation of the 1993 law has raised serious concerns. Access to legal abortion has been impeded by a lack of clear procedural mechanisms, prolonged waiting periods, and the denial of prenatal genetic testing.<sup>11</sup> To date, none of the three judgments of the ECtHR in cases against Poland where violations of the European Convention on Human Rights were found have been properly executed (when it comes to general measures).<sup>12</sup>

Poland has been repeatedly called on by various international human rights bodies to improve the quality of women’s access to health care, in particular to sexual and reproductive health services, and to examine the number of, reasons behind, and consequences of illegal abortions and their influence on women’s safety.<sup>13</sup> Poland has also been urged to ensure women’s access to abortion in cases where it is legal and to ensure that it is not restricted by the use of conscientious objection.<sup>14</sup> International experts have emphasized that restrictive abortion laws increase maternal mortality and morbidity rates, while also failing to reduce the abortion rate.<sup>15</sup>

Instead of implementing these recommendations and improving the accessibility of legal abortion, Poland has taken a step backward. On October 7, 2015, the Constitutional Court delivered a judgment in which it pronounced that a medical practitioner invoking conscientious objection to refuse to perform abortion should not be under a duty to refer the woman to another doctor or health care institution.<sup>16</sup> This decision has raised concerns by UN human rights treaty bodies because it has not been followed by the introduction of an effective systemic referral mechanism.<sup>17</sup>

Furthermore, in October 2020, the Constitutional Court removed fetal defects as a grounds for abortion (the ruling covered various conditions, including lethal defects resulting in nonviable pregnancies or death soon after birth, as well as chromosome abnormalities such as trisomy 18 and

trisomy 21).<sup>18</sup> In practice, this translates into an almost total ban on abortion in Poland, given that an estimated 96% of abortions were previously performed on these grounds. The court’s ruling placed an outright priority on the protection of the life of the fetus, even though the Polish Constitution does not state that the life of every person is legally protected from the moment of conception. In fact, the Constitution’s drafters deliberately intended to leave this matter open, and an attempt to amend this provision in 2006 was unsuccessful.<sup>19</sup> The judgment has spurred a new wave of protests.<sup>20</sup> From a legal point of view, seeking a constitutional review of the Family Planning Act of 1993 is controversial, as such socially important matters should be dealt by Parliament or be decided in a referendum, as was the case in Ireland in 2018. The judgment is yet another example of an abusive use of constitutional procedures to serve political objectives—a practice recently observed in Poland and Hungary.<sup>21</sup> It is also important to point to the controversies around the Constitutional Court’s impartiality and independence, as its composition and appointment of some judges has been questioned by lawyers and scholars and challenged before the ECtHR.<sup>22</sup> These doubts may have a bearing on applications against Poland, specifically on the question of the legality of an interference. If, due to formal and procedural defects, the judgment were to be declared invalid from the moment of its adoption, it would mean that there is no legal basis for the interference in question.

### What rights or interests are on the scales?

Compared to other European countries, Poland is witnessing an unprecedented retrogression in access to safe and legal abortion. Its recent actions are in direct contravention of the recommendations of UN treaty bodies and other human rights bodies. This leads to the question of how the ECtHR would adjudicate when faced with applications filed against Poland by women who were denied abortion on embryo-pathological grounds. As I argue below, the court should be guided by societal attitudes (developments in Polish society and

changes in the perception of reproductive rights), a consolidated European consensus regarding access to abortion, and universal human rights standards. The European Convention on Human Rights, as repeatedly emphasized by the court itself, should be subject to an evolutive (i.e., dynamic) interpretation.<sup>23</sup> In other words, the convention is a “living instrument” that should be interpreted in the light of the present-day conditions.<sup>24</sup>

The European Convention on Human Rights does not explicitly refer to the concept of reproductive health or reproductive rights. What is more, the treaty does not even contain a directly expressed right to health. However, in the light of the ECtHR’s case law, rights related to reproductive rights and their violations fall primarily within the scope of the right to respect for private and family life (article 8). Depending on the facts of a particular case, these violations may also be related to the right to life (article 2) and the prohibition of torture (article 3).<sup>25</sup> Furthermore, they might be related to the prohibition of discrimination (article 14) and other rights and freedoms.

To date, the ECtHR has delivered three judgments against Poland that identify violations of reproductive rights related to prenatal testing and abortion. In all three cases, the violation stemmed from the ineffective application of the existing law preventing access to legal abortion. Recently filed applications, however, challenge a different source of a violation—namely, the illegality of abortion on embryo-pathological grounds.

The only judgment in which the court has had to reflect on similar claims was the case of *A., B. and C. v. Ireland*, which the court ruled on in 2010.<sup>26</sup> At the time, Ireland had a very restrictive abortion law that prohibited abortion in all circumstances except in cases of a threat to the pregnant woman’s life. The first and second applicants in the case had sought abortions for reasons of health and well-being, and they claimed that the inability to obtain an abortion amounted to a violation of article 8 of the convention. In its ruling, the court made it clear that article 8 cannot be interpreted as conferring a right to abortion.<sup>27</sup> At the same time, however, relying on the previous case law, it reiter-

ated that “legislation regulating the interruption of pregnancy touches upon the sphere of the private life of the woman.” It also stated that “not every regulation of the termination of pregnancy constitutes an interference with the right to respect for the private life of the mother.”<sup>28</sup> In the court’s view, a prohibition of abortion sought for reasons of health or well-being is to be regarded as an interference. This conclusion correctly relied on a broad concept of private life within the meaning of article 8 that includes the rights to personal autonomy and to physical and psychological integrity.<sup>29</sup> Because an interference was found, the next step was to assess whether it had been justified. To that end, a limitation clause test of article 8(2) had to be applied—in other words, an examination of legality, legitimate aim, necessity, and proportionality.

As the court noted, the private sphere of a pregnant woman is not unlimited, and “Article 8 cannot be interpreted as meaning that pregnancy and its termination pertain uniquely to the woman’s private life as, whenever a woman is pregnant, her private life becomes closely connected with the developing fetus.”<sup>30</sup> The court thus put on one scale the woman’s right to respect for her private life, and unspecified “other competing rights and freedoms invoked including those of the unborn child” on the other scale.<sup>31</sup> It is important to recall that “other rights and freedoms” do not encompass the right to life or other rights of on the unborn because the court decided to leave this matter to the discretion of each state party to the European Convention.<sup>32</sup> Therefore, a legitimate aim that the impugned restriction was found to pursue was “the protection of morals of which the protection in Ireland of the right to life of the unborn was one aspect.”<sup>33</sup> In this regard, the court relied on its findings in *Open Door v. Ireland*, in which it found that the protection granted under Irish law to the right to life of the unborn was based on profound moral values concerning the nature of life, which were reflected in the stance of the majority of the Irish people against abortion during the 1983 referendum.<sup>34</sup> In the court’s view, these moral values had not changed significantly since then.<sup>35</sup>

When we compare this reasoning to the

current situation in Poland and try to apply it to recently filed applications, we can see some *prima facie* differences. The Family Planning Act of 1993 had been adopted as a compromise between the pro-life and pro-choice camps, and it had been in force for 27 years. It would thus be unjustified to argue that the near total ban on abortion resulting from the recent Constitutional Court judgment reflects the “profound moral views” of Polish society. The judgment has led to a retrogression that hardly reflects the views of the entire (or even a majority of) society.<sup>36</sup> While I share the ECtHR’s opinion that it is not possible to find in the legal and social orders of the contracting states a uniform European conception of morals, including on the question of when life begins, I am not convinced that it is easier to identify “national morals” or a public interest in their protection.<sup>37</sup> Is it possible to determine such morals in pluralistic and complex modern societies that—as repeatedly emphasized by the ECtHR—should share the values of pluralism, tolerance, and broadmindedness?<sup>38</sup> Contrary to other legitimate aims categorized as public interests—namely national security, public safety, the economic well-being of the country, the prevention of disorder and crime, and the protection of health—it is debatable whether morals may be objectively defined as such.<sup>39</sup>

I argue that morals should be treated with great caution (or even distrust) when invoked as a legitimate aim for interfering with human rights and freedoms.<sup>40</sup> Legal moralism, based on a particular belief and worldview, should be avoided as a tool for civil and human rights analyses.<sup>41</sup> The idea of public interest in protecting morals could be maintained if objectified and focused on the protection of the fundamental principles of human dignity, nondiscrimination, and equality.<sup>42</sup> In contrast, the October 2020 judgment of Poland’s Constitutional Court does not reflect the morals of Polish society or any other public interest but rather a populist agenda of the authorities holding political power. What, then, could be the alternative legitimate aim to the public interest in protecting morals? Maybe the ECtHR will eventually have to put on the second scale the protection of rights and

freedoms of others—more specifically, the freedom of conscience and religion of the members of the society who are in favor of the restrictions or the right to life of the unborn. Such an approach would ensure a more objective and liberal interpretation not involving the moralistic preferences of a part of the society (be it a majority or a minority) or of the governing political forces.<sup>43</sup>

### Balancing the scales and setting limits on states’ discretion to restrict abortion

Measures that limit human rights and freedoms not only have to serve a legitimate aim but also need to be necessary in a democratic society and to be proportional (well balanced).<sup>44</sup> A wide margin of appreciation (that is, states’ regulatory discretion) in the context of abortion laws has, for years, been treated as an irrefutable Strasbourg dogma. In order to review its validity, we must examine the constitutive elements of the doctrine of the margin of appreciation.<sup>45</sup>

In cases involving “sensitive moral or ethical issues,” states usually enjoy a wide margin of appreciation when limiting rights and freedoms.<sup>46</sup> However, this does not confer on them an absolute discretion or freedom of action, as the margin may be overstepped.<sup>47</sup> There are two important factors that are taken into consideration in order to determine the breadth of the margin of appreciation accorded to states. One of these is the importance of the right or freedom to the individual. In other words, when a particularly important facet of an individual’s existence or identity is at stake, the margin allowed to the state will normally be narrow.<sup>48</sup> In the abortion context, this consideration should be applied to the particular and specific circumstances of each case. It means that the degree of intensity and gravity of the dangers to the pregnant woman’s health or well-being must be taken into account.<sup>49</sup> Therefore, if there are grave dangers to the health or well-being of the woman wishing to have an abortion (for example, when there is a high probability of a severe and irreversible fetal defect or incurable illness that poses a danger to women’s physical or mental health and well-being),

the state's margin of appreciation is limited and the prohibition of abortion could be considered disproportionate.

Another factor is the level of consensus and its impact on the discretion left to states. The concept of European consensus relies on a comparative analysis of domestic legal systems. As is well established in ECtHR case law, when a substantial majority of Council of Europe states have a similar approach to a given issue, the court *usually* concludes that this consensus decisively narrows the margin of appreciation that states enjoy. Conversely, where there is *no consensus* within member states—either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises *sensitive moral or ethical issues*—the margin will be wider. It should be noted that there does not need to be total uniformity between all 47 member states. A relationship between the consensus and morality therefore cannot be regarded as antagonistic. In other words, the existence of “profound moral views” shared by the majority of society does not override the established European consensus. Such views can only widen the state's margin of appreciation when there is no or little consensus.

Importantly, the comparative method is not mechanically applied like a mathematical equation. It would be an oversimplification to say that the wider the consensus, the narrower the margin of appreciation of given state. This comparative approach has an important role to play for the European Convention's system because it is commensurate with the “harmonizing” role of the convention's case law.<sup>50</sup> European consensus and comparative methodology are crucial for the purposes of a dynamic and evolutive interpretation of the convention because they reflect social changes, scientific development, and so forth.<sup>51</sup> In fact, in a way, they resemble the idea of universality of human rights that should be equally enjoyed regardless of state jurisdiction. This harmonizing exercise, however, has limits. The idea of the universality of human rights on a global—or even a European—scale is often reconciled with cultural diversity, different legal traditions, and

specific contexts.<sup>52</sup>

In the abortion context, states enjoy a certain margin of appreciation when seeking to strike a fair balance between potentially competing rights and interests. There has to exist a pressing social need for certain measures, such as keeping or introducing restrictive abortion laws. Any such measures that interfere with individual rights also need to be proportionate to the legitimate aim pursued.

In *A., B. and C. v. Ireland*, relevant comparative data showed that in 2010 abortion was available on request (according to certain criteria, including gestational limits) in 30 out of 47 member states. Abortion justified on health grounds was available in 40 states and justified on well-being grounds in 35 states. Only three countries prohibited abortion in all circumstances (Andorra, Malta, and San Marino). Moreover, several states had recently extended the grounds on which abortion could be obtained (Monaco, Montenegro, Portugal, and Spain).<sup>53</sup> These data clearly reveal a consensus among “a substantial majority” of Council of Europe member states, as well as a tendency toward a broader accessibility of abortion services.<sup>54</sup> This fact, however, did not have any impact on the court's majority decision.<sup>55</sup> It appears that a “consensus amongst a substantial majority of the contracting states of the Council of Europe” was not considered as relevant (or relevant enough) to narrow Ireland's broad margin of appreciation.<sup>56</sup> This means that Irish authorities had a wide discretion to restrict access to abortion. One might wonder what arguments could be invoked to disregard this strong consensus—that the consensus was not strong enough? It appears that what had overridden the European consensus was “acute sensitivity of the moral and ethical issues raised by the question of abortion” and the “profound moral views” of a majority of the Irish people that, in the court's view, had not changed since the 1983 referendum.<sup>57</sup>

The reasoning offered in the judgment seems to suggest a clash between two issues subject to different European consensus. The court identified “no European consensus on the scientific and legal definition of the beginning of life, so that it was

impossible to answer the question of whether the unborn was a person to be protected for the purposes of Article 2,” and at the same time affirmed the existence of the consensus in favor of greater legal access to abortion.<sup>58</sup> In the court’s view, the latter “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.”<sup>59</sup> Does this suggest that one European consensus takes priority over the other? In fact, it seems that this antagonism is factitious, because even if Council of Europe states do not all determine the legal status of the unborn in the same way, the unborn is protected by law. Nevertheless, the level and scope of protection differs from one state to another. Thus, states that allow greater access to legal abortion cannot be said to give priority to the protection of the right to life of the fetus at the same time.

The considerations presented thus far lead to the conclusion that, in the court’s majority view, the European consensus may be “relevant” or “irrelevant,” even though—when established—it should not be subject to value judgment. In *A., B. and C. v. Ireland*, moral views regarding the nature of life overrode the consensus, allowing Ireland to enjoy a broad margin of appreciation. This leads to the question of whether there is an absolute margin of appreciation in the context of “delicate” matters. The answer is no, since even a wide margin of appreciation may still be subject to scrutiny by the ECtHR. In other words, the margin of appreciation “is not unlimited” and does not give a *carte blanche* to introduce arbitrary measures, as it may be overstepped when such measures are disproportionate.<sup>60</sup> In the *A., B. and C.* judgment, Irish abortion regulations were considered proportionate for two reasons: because they reflected a “lengthy, complex, and sensitive debate” and because they allowed the termination of pregnancy abroad.<sup>61</sup> In the case of Poland, the latter argument might be considered valid, even though equally controversial. The former argument, as already indicated here, would not be applicable because restrictions on abortion have not been preceded by a public debate and were

imposed by the Constitutional Court.

*A., B. and C. v. Ireland* was decided by the Grand Chamber of the ECtHR in 2010. Have the abortion laws in Council of Europe member states undergone any changes since then? Currently, 41 out of 47 Council of Europe countries allow abortion on request or on broad social grounds (i.e., well-being). The most restrictive abortion laws remain in force in Andorra, Malta, and San Marino. Liechtenstein and Poland (since 2021) allow abortion only when a woman’s life or health is at risk or when the pregnancy is the result of sexual assault. In Monaco, a third ground is permitted: a severe fetal anomaly.<sup>62</sup> It means that the European consensus has become consolidated, and Poland is the only country where abortion has been restricted. The key question is whether this even stronger consensus will be regarded as significant and capable of narrowing the margin of appreciation.

### Universal standards and their possible impact on the ECtHR case law

In *A., B. and C. v. Ireland*, the fact that a consensus regarding access to abortion had been found led the court to the conclusion that it was not necessary to look further to international trends and views.<sup>63</sup> However, since this consensus was perceived as not relevant enough to narrow the state’s margin of appreciation, international standards are worth consideration because they may shed some light on the development of reproductive rights and thus influence interpretation of the European Convention on Human Rights.

Reproductive health, as defined by the Programme of Action of the International Conference on Population and Development, concerns the capability of reproducing and the freedom to make informed, free, and responsible decisions.<sup>64</sup> Informed, free, and responsible decision-making is the essence of reproductive rights. Hence, for many years now, the World Health Organization and human rights bodies have been calling for universal access to legal abortion and emphasizing that every illegal abortion is unsafe and poses a threat to women’s health and lives.<sup>65</sup> More recently,

the Committee on Economic, Social and Cultural Rights has explicitly called for the liberalization of restrictive abortion laws.<sup>66</sup> In addition, the Human Rights Committee, in its General Comment 36 on the right to life, in an attempt to reconcile the need to protect the life of the fetus with women's rights, has pointed out that

*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 which violates article 7 [of the Covenant on Civil and Political Rights], 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 is not viable.*<sup>67</sup>

When we apply these considerations to the current Polish law, a lack of legal abortion in cases of fetal abnormalities ought to be regarded as running counter to international standards.

Several UN expert and monitoring bodies have pointed out that in certain circumstances, the denial of abortion services meets the threshold of torture and cruel, inhuman, and degrading treatment.<sup>68</sup> Severe pain or suffering can be physical or mental and, in certain cases, foreseeable.<sup>69</sup> International human rights practice increasingly recognizes the need for adequate health care for pregnant women, as well as their physical and mental well-being. This tendency can be observed not only in UN practice but also in the case law of the European Committee of Social Rights. The committee's approach has been clearly reflected in three cases concerning the conscientious objection of health care professionals, in which the committee emphasized that in the case of pregnancy and motherhood, women are the main beneficiaries of article 11 of the European Social Charter. In this context, the right to adequate health care cannot be impeded by exercising conscientious objection.<sup>70</sup>

It is also worth noting a rather novel approach to considering reproductive rights violations in

the context of gender equality and nondiscrimination.<sup>71</sup> This approach is most clearly established in the case law of the Committee on the Elimination of Discrimination against Women, but it also appears in the jurisprudence of the Human Rights Committee.<sup>72</sup> Although this perspective has not yet appeared in the ECtHR's case law, it is reasonable to assume that it might emerge over time.

Ineffective access to legal abortion has been successfully challenged before different UN treaty bodies.<sup>73</sup> More importantly, these committees, unlike the ECtHR, have also questioned the compatibility of restrictive domestic abortion laws with international human rights standards. In *L.C. v. Peru*, the Committee on the Elimination of Discrimination against Women not only obliged the state under review to guarantee real (and not theoretical) access to legal abortion but also ordered the state to amend its law to allow women to obtain an abortion in cases of rape and sexual assault. But the real milestone decisions were issued by the Human Rights Committee in *Amanda Jane Mellet v. Ireland* and *Siobhán Whelan v. Ireland*.<sup>74</sup> In both cases, fetuses were diagnosed with a fatal condition that would result in death in utero or shortly after birth. At the material time, Irish law provided for a single exception (risk to the life of the pregnant woman) to its general legal prohibition of abortion. Because the facts of these cases disclosed an interference with freedom from torture, inhuman, and degrading treatment, the committee held that the state could not invoke any justification or extenuating circumstances to excuse a violation.<sup>75</sup> The prohibition of torture and inhuman treatment is absolute and thus cannot be reconciled with considerations of striking a fair balance between competing rights or with pursuing a legitimate aim. With regard to an interference with the right to private life, the committee found that the balance that Ireland had chosen to strike between protection of the fetus and the rights of the women was unjustified and unreasonable, as the interference was perceived as intrusive and causing mental anguish.<sup>76</sup> In this way, these were the first—and thus far the only—international decisions to question criminalization and the lack of legal abortion services in cases where a



fetus was diagnosed with a fatal condition.

Given the evolution of international standards with regard to reproductive rights in general, and access to abortion services in particular, the question emerges whether the ECtHR would acknowledge and consider these developments in its jurisprudence. It should be emphasized that preventing unsafe abortions is one of the core obligations identified by the Committee on Economic, Social and Cultural Rights.<sup>77</sup> Therefore, it is hard to fathom how an almost complete ban on abortion is supposed to help to achieve this goal. If this retrogressive step by Poland is accepted by the ECtHR as accordant with the European Convention on Human Rights, then a discrepancy between European and universal standards would emerge. As I argue here, a broader international perspective should be taken into consideration to develop a consistent human rights approach to abortion.

## Conclusion

In this paper, I have attempted to analyze recent international developments concerning access to abortion services in order to anticipate the possible outcome of applications recently brought before the ECtHR against Poland. In *A., B. and C. v. Ireland*, the court left the content of the domestic abortion law to the discretion of national authorities. It relied on a broad margin of appreciation that had not been narrowed down by a strong European consensus. Over time, this consensus has become even stronger, meaning that giving the state nearly unlimited discretion in abortion regulations would run counter to harmonization. If the idea and interpretative function of the European consensus is to be maintained in a meaningful manner, this consensus should either narrow the margin or at least be a decisive factor in determining proportionality. A final reflection concerning the margin of appreciation concerns the methodology that is used to establish the “exact content of the requirements of morals” in a given country. The ECtHR has, on many occasions, presented a standpoint that by reason of “direct and continuous contact with the vital forces of their countries,” state au-

thorities are *in principle* in a better position than the international judge to give an opinion on the “requirement of morals.”<sup>78</sup> The determination of a structural margin of appreciation is based, *inter alia*, on “democratic legitimation” and the quality of the lawmaking process, especially “in matters of general policy, on which opinions within a democratic society may reasonably differ widely.”<sup>79</sup> With this in mind, it is doubtful whether the 2020 judgment issued by Polish Constitutional Court—whose legitimacy is being questioned—should be regarded as instructive on society’s views on abortion. In some circumstances, an exception from a rule is necessary.

By acknowledging the significance of a European consensus and the evolving universal standards concerning reproductive rights, the ECtHR would avoid two pitfalls: one connected with analyzing the doubtful public interest in protecting the convictions of a part of Polish society, and another with a potential criticism of judicial activism and the court’s imposition of its own moral evaluation of an abortion ban.<sup>80</sup> In embracing such an approach, the ECtHR would not anticipate or even channel change—it would simply recognize it.<sup>81</sup>

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