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GENDER AND EQUALITY: RESTRICTIVE ABORTION LAWS AS A FORM OF HUMAN RIGHTS VIOLATION OF MARGINALISED PERSONS

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ABSTRACT

States when introducing laws regarding abortion, have a certain margin of appreciation left to them and, as there is no European consensus, they highly depend on the principle of cultural relativity. Restrictive laws; however, as well as the application of conscientious objection can pose a significant barrier to the realisation of human rights of vulnerable groups. Such laws can be found discriminatory as they relate only to certain groups, such as women seeking the procedure. Moreover, by definition, vulnerable groups require additional monitoring and protection due to being especially prone to becoming a subject of a number of abuses. When faced with certain laws and policies; however, women are not equipped with adequate protection or mechanisms that would enable full enjoyment of their rights. This paper analyses the profile of vulnerable groups with a focus on women and rape victims, provides an overview of the relevance of employing an interdisciplinary, socio-legal approach with an emphasis on feminism and intersectionality, as well as discusses different human rights aspects, relevant to the discussion on restrictive abortion laws and conscientious objection. Furthermore, it provides a brief comparative analysis of laws in chosen states and focuses on situation that can be observed in Poland. Lastly, the subject of stigma and marginalisation is covered as it is closely connected to the notion of cultural relativity and application of chosen laws in states. For the purpose of the research paper, a socio-legal interdisciplinary approach has been applied to understand the complex nature of the issue and conclude that abortion should be

recognised as a right as restrictive laws carry inherent risks.

Keywords: human rights, abortion, conscientious objection, vulnerable groups, stigma, marginalization

An interdisciplinary approach to analysing human rights issues in regard to marginalised groups as well as the cultural roots of the stigma assigned to them; socio-legal research conducted for a better understanding of the implications of chosen abortion laws and the application of conscientious objection by healthcare providers.

[Laws criminalizing abortion] infringe women's dignity and autonomy [...] such laws consistently generate poor physical health outcomes, resulting in deaths that could have been prevented, morbidity and ill-health, as well as negative mental health outcomes, not least because affected women risk being thrust into the criminal justice system. Creation or maintenance of criminal laws with respect to abortion may amount to violations of the obligations of States to respect, protect and fulfil the right to health [...] perpetuates discrimination and generates new forms of stigmatization¹.

INTRODUCTION

The right to the highest attainable standard of health is one of the human rights legally granted to all individuals regardless of their status, such as race,

gender, sexual orientation, or profession.¹ Such right is based on the non-discrimination and equal treatment provisions in accordance with international human rights standards.² However, many individuals still struggle with social stigma and marginalisation that affect their access to justice as well as social and healthcare services in regard to sexual health. Therefore, there is a barrier to achieving equality and protection by vulnerable groups, such as women and rape victims.³ In certain States, abortion is legally available in very limited circumstances, such as in case of rape, however, in practice, even those who lawfully should have access to the procedure, cannot obtain it due to procedural barriers, including healthcare providers' conscientious objection, lack of laws prescribing rules where a professional has an obligation to direct a patient to the nearest clinic performing the procedure (having denied one themselves), or the informal pressure from the governing party and its sympathisers on the healthcare providers who, being scared for their jobs and future, decide to deny women their reproductive rights.⁴ Interestingly, the case of Poland, exemplifies how selected policies,

institutionalising violence against women, may further deter individuals from asserting their rights and access justice against the issues faced on the heavily politicised arena within which medical professionals are forced to operate in contemporary Poland.⁵ An instance of such a policy is having a 'registry' of pregnancies⁶ and tracking what happens to them, even if a woman chooses to legally undergo the procedure abroad. In this regard a question may be posed of a different nature; can an EU MS prosecute or bully women for lawfully exercising their reproductive rights in another State where the procedure is legal and rightfully available?

This paper will focus on chosen abortion laws as a form of discrimination against vulnerable groups, which is both a human rights violation and a form of violence that very often derives from a false belief of hierarchy and stigmatisation.⁷ An interdisciplinary, socio-legal approach will be applied in order to understand the close relationship between moral reasoning, as well as cultural relativity, and the enjoyment of human rights by chosen groups. This work will discuss vulnerable groups as well as the influence of social

¹ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR), art 12(1).

² International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 14(1).

³ WHO, *Sexual health, human rights and the law* (2015).

⁴ For further analysis, see designated section below.

⁵ Liliana Religa, 'CEDAW and Poland: Backtracking on Gender Equality' (2019) <

<https://www.boell.de/en/2019/12/10/cedaw-and-poland-backtracking-gender-equality>> accessed 4 April 2022; Human Rights Watch, "The Breath of the Government on My Back" Attacks on

Women's Rights in Poland' (2019) <<https://www.hrw.org/report/2019/02/06/breath-government-my-back/attacks-womens-rights-poland>> accessed 4 April 2022.

⁶ Bezprawnik, 'Od dziś wchodzi w życie rejestr ciąż. Wyjaśniamy, co się w nim znajdzie, a także, jakie są skutki jego istnienia' (2022)

<<https://bezprawnik.pl/co-oznacza-rejestr-ciaz/#discussion>> accessed 27 July 2022; Dziennik Gazeta Prawna, 'Minister zdrowia tworzy rejestr ciąż. Opozycja: Jeszcze mniej kobiet zdecyduje się na dziecko' (2022) <<https://www.gazetaprawna.pl/wiadomosci/kraj/artykuly/8438592,rejestr-ciaz-polskie-prawo-lewica-dzietnosc.html>> accessed 27 July 2022.

⁷ WHO (n 4).

stigma on access to healthcare services and justice in order to argue that restrictive abortion laws constitute a human rights violation, while the right to abortion should be recognised. Additionally, after a brief comparative analysis of relevant laws, attention will be paid to Poland due to the ongoing conversation in the country regarding the implementation of further restrictions that could significantly threaten women's human rights enjoyment. Among European countries, Poland is argued to have the strictest laws as well as the most problematic access to sexual health services due to the state's policy and legal guidelines that prevent women and vulnerable groups from exercising their rights.⁸ Thus, it will contribute to the conversation regarding the threats that restrictive laws on reproductive rights pose to vulnerable groups. Moreover, a section will be devoted to identified risks of human rights violations connected to restrictive or poorly regulated abortion laws. It will be concluded that such laws carry inherent risks, while the right to abortion should be recognised at supranational level in an effort to approximate the laws among European States and ensure equality and dignity of choices among individuals.

Vulnerable Groups

Vulnerable groups are understood as disadvantaged persons whose human rights need special monitoring due to the high

probability of abuses and violations.⁹ Groups such as women or rape victims are often faced with discrimination based on social stigma and hierarchical marginalisation. Thus, not addressing injustices towards such persons only perpetuates them and in doing so, erases any real hope for true equality and human rights enjoyment. Reichert argues that 'the idea that all things are equal within the application or distribution of human rights remains idealistic and outright naïve' and; therefore, it is crucial to take all factors into consideration while applying and monitoring the non-discriminatory access to justice and social services.¹⁰

Women's status in societies all over the world is very often perceived as inferior and submissive as communities are still based on a deeply rooted model of 'natural order' and assigned gender roles.¹¹ Women and their needs remain marginalised and unheard in the male-centred world where female voice is very poorly represented.¹² Besides systemic inequalities found within various sectors and institutions, first human rights documents were not free of male-gendered language encoding cultural hierarchisation. The Universal Declaration of Human Rights¹³ was widely criticised for its male-focused language by the use of the word 'man' and the pronoun 'he'.¹⁴ The 'unintentional discrimination', being a form of cultural violence found in the language of legal documents, only

⁸ Human Rights Watch (HRW), 'Poland: Reject New Curbs on Abortion, Sex Ed. Don't Manipulate Pandemic to Endanger Women, Adolescents' (2020) <<https://www.hrw.org/news/2020/04/14/poland-reject-new-curbs-abortion-sex-ed?fbclid=IwAR3wUC9ny4TggAsIyqWxYk8dyL1KeLtz35sUX9ELnVonsUgMN6qlcpv8454>> accessed 22 May 2020.

⁹ Elisabeth Reichert, *Understanding Human Rights: An Exercise Book* (Sage Publications Inc, 2006).

¹⁰ Katherine Van Wormer, 'Concepts for Contemporary Social Work: Globalization, Oppression, Social Exclusion, Human

Rights, Etc.' (2005) 3(1) *Social Work and Society International Online Journal* 1.

¹¹ Charlotte Bunch, 'Women's Rights as Human Rights: Toward a Re-Vision of Human Rights' (1990) 12(4) *Human Rights Quarterly* 486.

¹² Reichert (n 10).

¹³ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).

¹⁴ Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press, 1999).

strengthens the notion that women are still kept out of conversations central to human rights standards.¹⁵ The issue had started to be acknowledged and in 1979, the United Nations adopted the Convention on the Elimination of All Forms of Discrimination Against Women which recognised the vulnerable position of women and stated that it is necessary to elevate their status to that of men.¹⁶

Furthermore, a special attention should be paid to rape victims who not only have suffered from gendered violence but have also become later on a subject of social stigma and discrimination. It is argued that we live in a rape culture where the perpetrator is victimised, and the victim is being blamed and shamed upon.¹⁷ It has been found that ‘negative attitudes towards women, belief in rape myths, and perceived target behavior (e.g. responsibility) were related to stigmatization of rape victim and predicted more favorable perceptions of the rapist’.¹⁸ Thus, rape victims, who in most cases are women, need to be acknowledged as a vulnerable group of persons faced with social stigma and discrimination affecting their equal access to justice and social services. Self-stigma of sexual assault victims derives from the society enforcing conservative gender role beliefs and; therefore, inflicting the victim herself/himself with the false belief of responsibility for being abused.¹⁹ Furthermore, due to the feeling of shame and embarrassment, such persons are unlikely to report a crime and seek help from social and legal services.²⁰ Thus, a conclusion can be drawn that

stigmatisation of vulnerable groups affects individual’s access to justice and; therefore, their human rights enjoyment. The identification of women and rape victims as vulnerable groups is relevant to the conversation on restrictive abortion laws as in many cases the procedure is legal in very few cases (such as rape) and often even then, the victim might not have access to abortion due to procedural reasons and conscientious objection of healthcare providers.

The Intersecting Identities

The relevance of employing a socio-legal theory and looking at the situation of women when accessing their reproductive rights through the lenses of feminism an intersectionality, is central to understanding the power relations between the ‘law-makers’ and law ‘subjects’ as well as the gendered nature of violence against women who are deprived of their own body autonomy and dignity. Feminists stress the relevance of considering intersectionality in the discourse, the importance of particular cultural context over universalisms and essentialisms, and the belief that gender is inherent to power relations codified by existing laws and policies.²¹ The notion challenges presumptions about masculinity and femininity, examines power dynamics in connection to gender and hierarchy, exposes gender-based violence (GBV) and the absence of equality, and addresses marginalisation of selected groups who are situated outside of the discussions

¹⁵ Reichert (n 10).

¹⁶ Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) UNGA Res 34/180 (CEDAW).

¹⁷ Gerdi Weidner and others, ‘Rape: A sexual stigma?’ (1983) 51(2) *Journal of Personality* 151.

¹⁸ *ibid.*

¹⁹ Annie Hendricks, ‘Attitudes of Men and Women Toward Sexual Assault: The Role

of Stigma, Self-Stigma, and Gender Roles’ (Honours thesis, University of Southern Mississippi 2019).

²⁰ WHO (n 4).

²¹ For more perspectives on feminist theory and its place within the bigger socio-legal approach, see for example Rosemary Hunter, ‘Feminist approaches to socio-legal studies’ in Naomi Creutzfel and others (eds), *Routledge Handbook of Socio-Legal Theory and Methods* (1st ed, Routledge 2019).

concerning laws and policies on their own bodies. It also deconstructs gender as well as all its assigned norms as a social and political creation.²² Crucially, it should be highlighted that the idea applies to any group of individuals whose voice is ignored or silenced (such as rape victims) due to individuals' voice being seen as inferior and un-noteworthy. While a detailed analysis of various sub-groups of oppressed individuals by restrictive abortion laws is greatly outside of the scope and focus of this work, it shall be briefly highlighted, how intersectionality is central to understanding the violence and damage caused to women of different backgrounds when denying them access to their core reproductive rights, and consequently, justice.

The feminist theory explains that 'when women are noted, they are viewed through the eyes, comments and reflections of men or male youth'.²³ It seems rather clear, however, that women are not the sole underrepresented and 'forgotten' minority in the judicial system whose voice is inaccurately reflected or outright ignored. The societal construct of one's identity and what such implies in their eyes is frequently used to frame discourses in criminal justice and laws (e.g., victim-abuser, dominant-submissive, violent-submissive etc.). Intersectionality is a method for study, advocacy, and policy formulation to address several types of discrimination and better comprehend how different identities affect access to one's opportunities, rights and justice. In order to research, understand, and address the ways that gender intersects with other

identities (as well as the ways in which these intersections contribute to specific experiences of privilege and oppression) the idea of intersectionality should be employed.²⁴ 'Since violence is used to control women in patriarchal societies, it is important to understand the nature of patriarchy and its relationship to other forms of oppression such as racism, colonialism, heterosexism, etc. Violence against women of color is affected by the intersection of racism and sexism and the failures of both the feminist and antiracist movements to seriously address this issue.'²⁵ Making progress through intersectional feminism requires acknowledging the multiple specific challenges that women from various backgrounds experience in order to address GBV given that they are victims of several forms of oppression and violence,²⁶ numerous of which may come into play when discussing reproductive rights and the representation of the voices of women in discussions on their bodies and autonomy as full-pledged, equals, subjects of law in their own right, enjoying the same status and recognition as that of white middle-class men.

An effective response to GBV necessitates addressing the complex, multifaceted identity and oppression situations that each survivor experiences, and each perpetrator of violence initiates. Social identities (social class, race or ethnicity, gender, and sexual orientation, among others), oppressive institutions (racism, colonialism, heterosexism, class stratification, gender inequality, and

²²ibid.

²³ Loraine Gelsthorpe, 'Feminist Perspectives on Gender and Crime: making women count' (2003) 53 CJM 8.

²⁴ ibid; Association of Women's Rights in Development, 'Intersectionality: A Tool for Gender and Economic Justice' (2004) <https://www.awid.org/sites/default/files/atoms/files/intersectionality_a_tool_for_gender_and_economic_justice.pdf> accessed 17 August 2022.

²⁵ Kimberle Crenshaw, 'Intersectionality, Identity Politics, & Violence Against Women of Color' (1991) 43(6) Stanford Law Review 1241.

²⁶ María N Rico, 'Gender-based violence: a human rights issue' (1997) <https://repositorio.cepal.org/bitstream/handle/11362/5860/S9700545_en.pdf?sequence=1&isAllowed=y> accessed 20 July 2022.

ableism, among many others),²⁷ and the manner in which they overlap, are the three fundamental components of intersectionality.²⁸ Restrictive abortion rights as well as lack of practical access to the procedure even in the harshest of cases, when it is theoretically lawfully allowed, constitute a form of violence which especially targets women (and their intersecting identities) as merely passive subjects of relevant laws and policies, developed in line with normative understandings of ‘morals’ defined through the lenses of the political, religious or cultural majority (often male representation) and imposed onto the disadvantaged groups, kept outside of the conversations, and often heavily oppressed due to their intersecting protected characteristics. Oppression can be defined as the systematic mistreatment of a particular group of people that is accepted by society. This system of advantage allows privileged groups to exert control over targeted groups by limiting their rights, freedom, and access to necessary resources and social power. Given that societal structures are built to encourage oppression, oppressive behaviours and environments frequently become normalised over time. Such as in case of normalising favourism towards the male and ‘traditional’, ‘moral’ voice representation in more conservative societies, when deciding upon women’s rights and fate (such as visible when for example studying the case of Poland under the current populist government).

²⁷ Larger societal dynamics and structures like these, increase exclusion and promote inequality. The dominant group(s) in society creates these structures, which are founded on cultural norms. Terminology, social interactions, institutions, laws and regulations, as well as common sayings and gendered language in law (such as gendered descriptions of sexual offenses and the language used to describe the victim-perpetrator relationship) are all ways that they are upheld.

The case of rape culture and rape laws, which appear to have been a way of protecting a man's 'property' and its value in the eyes of the system and the society, rather than the woman, is an illustration of the relevance of intersectionality. For instance, if a married woman is raped, it is her husband who was wronged; if she is not married, it is her father (rape law derives from the monetary value of a woman - the pure and mysterious virgin). It further seems that, therefore, it is now the male agent that decides on the aftermath and women’s faith, after being ‘wronged’. It is the husband, the father, the state (the ‘pater’) that exercises control and has the final say over to what extent vulnerable groups’ voices are being heard and represented in the legal system.

While violence can take a variety of forms, the subject of reproductive rights and restrictive abortion laws, seems to draw on the considerations of violence of structural, organisational, institutional, psychological, gender-based, sustained and planned, official, encultured, linguistic, and representational nature among others. Women and rape victims, as the ‘subordinated’ and ‘pre-defined’ groups, derive their constructs of identity from the perpetuated stigma and norms, strategically created to fit the agenda of those on the top of the pyramid of power-relations. ‘The patriarchal state’s initial preoccupation with women’s morality and decency is a form of institutional violence that makes women primarily responsible for the violence directed against them.’²⁹ Furthermore, it is argued that ‘[s]ystemic

²⁸ Learning Network, ‘Intersectionality’ (2015) <https://www.vawlearningnetwork.ca/our-work/issuebased_newsletters/issue-15/PlainText_Issue15_0.pdf> accessed 11 July 2022.

²⁹ Rosa L Fregoso, ‘The Complexities of “Femicide” on the Border’ in INCITE! Women of Color Against Violence (ed), *Color of Violence* (Duke University Press 2006).

violence is thus something like the notorious ‘dark matter’ of physics, the counterpart to an all-too-visible subjective violence. It may be invisible, but it has to be taken into account if one is to make sense of what otherwise seem to be ‘irrational’ explosions of subjective violence.³⁰ Therefore, it is crucial to challenge established norms, portrayed identities, and overlapping traits that have an impact on violence and injustices that people encounter, which are frequently deeply ingrained in culture, legislation, and language, and to address them within society as a whole.

Abortion

The laws regarding abortion vary considerably among states. However, when analysing European countries, especially EU Member States, a clear tendency is visible; an overwhelming majority allows abortion upon request, with only very few countries where abortion is legal in case of broad socio-economic reasons.³¹ In accordance with the WHO report, safe and accessible abortion is essential to protecting women’s human rights.³² Berer suggest a division of abortion availability into: (1) when there is a risk to life; (2) in case of rape or sexual abuse; (3) in case of serious foetal anomaly; (4) when there is a risk to physical and sometimes mental health; (5) for social and economic reasons; and (6) on request.³³ In the majority of European

countries, such as Germany, France or Ireland, and many Eastern countries, abortion is legal upon request³⁴ and it has been proven that legalisation of the medical procedure as well as adequate sexual education helped in decreasing social stigma and consequently, a number of unsafe abortions on the black market.³⁵ In other states, for instance in the United Kingdom (or Finland), the procedure is slightly more restricted as it is legal only due to socio-economic reasons, while illegal abortion is prosecuted,³⁶ which has raised some questions regarding women’s rights and the freedom of choice.³⁷ On a global scale, abortion is legal upon request in many states, such as Russia, Australia, Canada or China; whereas, it is forbidden or heavily restricted in most of Africa or South America.³⁸ Nevertheless, the practice of developed countries, and the vast majority of EU Member States, indicates that the need for available and accessible abortion upon request is generally recognised. From the European perspective; however, the most problematic situation can be now observed in Poland.

Concerning the available reports and commentary on the quickly deteriorating situation in Poland, many sources and media reports are available only in Polish while international rapporteurs fail to acknowledge the whole picture of the tragedy happening in the country, and the

³⁰ Slavoj Žižek, *Violence: Six Sideways Reflections* (Deleuze 2008) 2.

³¹ Susheela Singh and others, ‘Abortion Worldwide 2017: Uneven Progress and Unequal Access’ (2018) <https://www.guttmacher.org/sites/default/files/report_pdf/abortion-worldwide-2017.pdf> accessed 22 May 2020.

³² WHO (n 4).

³³ Marge Berer, ‘Abortion Law and Policy Around the World: In Search of Decriminalization’ (2017) 19(1) *Health and Human Rights Journal* 13.

³⁴ Center for Reproductive Rights, ‘The World’s Abortion Laws’

<<https://reproductiverights.org/worldabortionlaws>> accessed 24 August 2020.

³⁵ WHO (n 4).

³⁶ Berer (n 34).

³⁷ Jaimie Todd-Gher and others, ‘Anti-abortion laws are an attack on our right to live with dignity and decide what happens to our bodies’ (2019) <<https://www.amnesty.org/en/latest/news/2019/09/anti-abortion-laws-are-an-attack-on-our-right-to-live-with-dignity-and-decide-what-happens-to-our-bodies/>> accessed 22 May 2020.

³⁸ Center for Reproductive Rights (n 35).

variety of factors affecting it. Such, however, is crucial to understanding the broader political and legal arena as well as overarching issues of exerting control and violence against women and selected other vulnerable groups in the country. Starting with the authorities' and Polish catholic church's (as supported by its sympathiser organisations such as Ordo Iuris) political propaganda concerning CEDAW and the Istanbul Convention Action against Violence against Women and Domestic Violence³⁹ by spreading strategic disinformation that it codifies 'gender ideology' and 'anti-Christian values' in order to convince the electorate that the legal instruments should be 'abandoned'.

³⁹ Ordo Iuris, 'Międzynarodowy sprzeciw wobec Konwencji stambulskiej. Ordo Iuris publikuje wyrok bułgarskiego Trybunału Konstytucyjnego' (2020) <<https://ordoiuris.pl/rodzina-i-malzenstwo/miedzynarodowy-sprzeciw-wobec-konwencji-stambulskiej-ordo-iuris-publikuje>> accessed 13 July 2022; Alicja Deneka, 'Konwencja stambulska. Czy jest i dlaczego rząd nie powinien jej wypowiadać' (2020) <<https://prawo.gazetaprawna.pl/artykuly/1486907,konwencja-stambulska-przemoc-wobec-kobiet-polskie-prawo-protesty.html>> accessed 13 July 2022; Centrum Praw Kobiet, 'Konwencja stambulska' <<https://cpk.org.pl/konwencja-stambulska/>> accessed 13 July 2022; Sejm Rzeczypospolitej Polskie, 'Interpelacja nr 11427 do prezesa Rady Ministrów w sprawie sposobu realizacji przez Rzeczpospolitą Polską obowiązków wynikających z Konwencji Rady Europy o zapobieganiu i zwalczaniu przemocy wobec kobiet i przemocy domowej (CAHVIO, Konwencja Stambulska)' (2017) <<https://www.sejm.gov.pl/sejm8.nsf/InterpelacjaTresc.xsp?key=3953A083>> accessed 13 July 2022.

⁴⁰ Piotr Pacewicz, 'Rodzić po ludzku? Raczej wcale, nie w tym kraju. Strach lekarzy przed donosem zabija

Alongside severely restricted abortion rights (see below), bullying medical professionals helping women exercise their reproductive rights,⁴⁰ violating women's privacy by introducing a mandatory registry of pregnancies (so that one's pregnancy or its 'loss' can be tracked and traced),⁴¹ restricting access to the 'day after pill' and real sex education at schools (most schools have a subject of 'knowledge of living in a family'), introducing prison punishment for teachers accused of spreading 'sex education', among others (see below). The general background and interconnected issues of gender-based violence and targeting groups of protected characteristics, prone to abuse and

położnictwo' (2021) <<https://oko.press/rodzic-po-ludzku-strach-lekarzy-przed-donosem-zabija-poloznictwo/>> accessed 6 June 2022; Justyna Dobrosz-Oracz, 'Lekarze odmawiają aborcji w obawie przed ściganiem. Co na to wiceminister sprawiedliwości?' (2021) <<https://wyborcza.pl/7,82983,27080657,lekarze-boja-sie-kwalifikowac-do-aborcji-wiceminister-sa-godnie.html>> accessed 6 June 2022; RP, 'Szpital odmówił aborcji. "Lekarze obawiają się odpowiedzialności karnej"' (2021) <<https://www.rp.pl/ochrona-zdrowia/art19170571-szpital-odmowil-aborcji-lekarze-obawiaja-sie-odpowiedzialnosci-karnej>> accessed 6 June 2022.

⁴¹ Adrian Dąbek, 'Lekarka o rejestrze ciąży: będzie wiadomo, która usunęła za granicą' (2022) <<https://www.medonet.pl/zdrowie/wiadomosci,lekarka-o-rejestrze-ciaz--bedzie-wiadomo--ktora-usunela-ciaze-za-granica,artykul,96963682.html>> accessed 11 July 2022; Karolina Kowalska, 'Ginekologdy: rejestr ciąży będzie miał działanie psychologiczne, zniechęci do zachodzenia w ciążę' (2022) <<https://tvn24.pl/polska/rejestr-ciaz-ginekologdy-przepisy-wzbudzaja-strach-moga-zniechecic-do-zachodzenia-w-ciaze-5739832>> accessed 11 July 2022.

discrimination, subject to the imposed and 'morally'-driven laws and norms propagated by the executive, are of key relevance to the discussion on intersectionality, restrictive abortion laws,⁴² and women's lack of access to their reproductive rights, as forms of violence which could be argued to constitute human rights violations as argued below.

The current government, has now decided to target the youngest with its misinformation and indoctrination to institutionalise and further embed the structural violence, starting with the mindsets of the youngest,⁴³ via strategically designed textbooks and curriculum. Biology books have seen a big restriction on the size of the chapters devoted to evolution,⁴⁴ reproductive

system, and sexual health, including considerations of one's bodily autonomy.⁴⁵ Such seems to resonate with the preached teachings of the Polish catholic church, strongly supported by the executive, and further deeply rooting the gender-based discrimination and violence perpetuated against women and minorities. For instance, it seems to be a common practice to preach 'wife's obedience' during a Sunday mass and promote silence in face of domestic abuse.⁴⁶ Most recently, however, the public spoke up against the questionable messages contained in the politically rewritten history books, where material about some figures, villainised by the governing party, has been manipulated. In the recently approved changes to the history textbook, one can find a variety of

⁴² Lack of sex education and punishing educators institutionalises violence exemplified by oppressive abortion laws and denying women dignity, bodily autonomy and integrity, as well as the belief that they have the right to decide about themselves.

⁴³ See the guidance and conclusions on the relevance of sex education and the teachings of bodily autonomy, as a tool for creating a safe and inclusive society battling inequalities: Dunja Mijatović, 'Comprehensive sexuality education protects children and helps build a safer, inclusive society' (2022) <<https://www.coe.int/en/web/commissioner/-/comprehensive-sexuality-education-protects-children-and-helps-build-a-safer-inclusive-society>> accessed 13 July 2022.

⁴⁴ See also the newly approved educational material on questioning evolution during religion classes: Eska, 'Kontrowersyjne teorie na temat ewolucji w podręczniku. Internauci przecierają oczy ze zdumienia' (2021) <<https://www.eska.pl/olsztyn/kontrowersyjne-teorie-na-temat-ewolucji-w-podreczniku-internauci-przecieraja-oczy-ze-zdumienia-aa-T5wR-fZYg-jul11.html>> accessed 13 July 2022; eDziecko, 'Rodzice otworzyli podręcznik od religii, a tam argumenty przeciwko ewolucji. "W

szkołach się na to godzą?" (2021) <https://www.edziecko.pl/starsze_dziecko/7,79351,27609215,rodzice-otworzyli-podrecznik-od-religii-a-tam-argumenty-przeciwko.html> accessed 13 July 2022.

⁴⁵ See for example the starting debates in 2006 in Łukasz Sakowski, 'Reforma edukacji – rząd chce usunąć ewolucję biologiczną z wymagań ogólnych!' (2016) <<https://www.totylkoteoria.pl/reforma-edukacji-ewolucja-biologia/>> accessed 12 July 2022; or Olga Szpunar, 'Antykoncepcja zniknęła z podręcznika biologii. Czy pojawi się modlitwa o seksualną wstrzemięźliwość?' (2020) <<https://wyborcza.pl/7,162657,26329928,antykoncepcji-nie-ma-w-podreczniku-biologii-czy-pojawi-sie.html>> accessed 12 July 2022; WP, 'Na lekcji biologii pokazano zaskakujący slajd. "Antykoncepcja niszczy człowieka"' (2021) <<https://kobieta.wp.pl/na-lekcji-biologii-pokazano-zaskakujacy-slajd-antykoncepcja-niszczy-czlowieka-6684137431256032a>> accessed 12 July 2022.

⁴⁶ Centrum Praw Kobiet, 'Mąż bije żonę. Polacy na to: milcz! A Kościół?' <<https://cpk.org.pl/media/maz-bije-zone-polacy-na-to-milcz-a-kosciol/>> accessed 23 July 2022.

strongly biased and politically-charged views representative of the conservatives in the states. Most notably, equating the 'gender ideology' and feminism with Nazism.⁴⁷

After ongoing protests and rejecting the proposed retrogressive bills on abortion and sex education in 2018 and 2019, the documents were 'unfrozen' at the beginning of April 2020, regardless of the Covid-19 pandemic and limited protest options.⁴⁸ The 'Stop Abortion Bill' would 'amend the criminal code, eliminating access to abortion in cases of severe or fatal foetal anomaly, further limiting what is already Europe's most restrictive abortion laws'.⁴⁹ Not only is abortion restricted to very few cases, but it is also hard to access as very few doctors are willing to perform the procedure. What is more, the 'Stop Pedophilia' bill is targeting, already restricted, sexual education by criminalising educators who are found guilty of 'promoting or approving of' sexual activities when talking to minors.⁵⁰ Consequently, subjects such as contraception, sexual health or safe abortion would not be allowed either which would lead to only strengthening the deeply rooted stigma in culture and society while forcing women to seek illegal help.

Lastly, another troublesome prospect of amending current abortion laws in regard to conscientious objection in Poland has been discussed in media.⁵¹ A new provision is to be introduced stating that a doctor, who refuses to perform a procedure, does not have to inform a patient of where she can seek help, even if

the abortion is allowed, in a given case, under current legislation. What is more, a term of 'conceived life' is to be introduced in order to justify one's conscientious objection as if under the right to life of a foetus.⁵² A patient; therefore, can be denied access to reproductive services without referral to a facility where a procedure is refunded by NFZ and done in safe and legal conditions. Women are about to be deprived of any leftovers of the voice that was given to matters concerning their body, dignity and future. As we read in the article, it is unthinkable that taxpayers cannot access essential services and are left at the mercy of doctors' whim.⁵³ Especially affected will be vulnerable women who cannot afford travelling abroad to seek help in a form of a safe and legal abortion as well as essential care afterwards. The policy, under current authorities, has been described as sectarian due to the lack of division between the church and public facilities, such as schools, hospitals and workplaces. Such policy constitutes a major threat to personal liberties, human rights protection as well as the democracy that should be present in a European State of the 21st century.⁵⁴

Human Rights Violation

It is rightfully observed that

[t]he abortion involves the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy. Protecting access to abortion effectuates vital constitutional

⁴⁷ Aleksandra Lewandowska, 'Feminizm i gender równe nazizmowi? Takie bzdury znajdziemy w podręczniku do nowego przedmiotu' (2022) <<https://kobieta.wp.pl/feminizm-i-gender-rowne-nazizmowi-takie-bzdury-znajdziemy-w-podreczniku-do-nowego-przedmiotu-6777949842406080a>> accessed 9 July 2022.

⁴⁸ HRW (n 9).

⁴⁹ *ibid.*

⁵⁰ *ibid.*

⁵¹ Magdalena Chrzczonowicz, 'Szpitale z katolickim sumieniem. Decyzją PIS kobieta nie dowie się, gdzie legalnie przerwać ciążę' (2020) <https://oko.press/pis-usuwa-nakaz-by-lekarz-informowal-kto-wykona-legalna-aborcje/?utm_medium=Social&utm_source=Facebook#Echobox=1590583493> accessed 30 May 2020.

⁵² *ibid.*

⁵³ *ibid.*

⁵⁴ *ibid.*

values, including dignity, autonomy, equality, and bodily integrity. [...] Without the right of reproductive choice, women cannot participate equally in the nation's social, political and economic life.⁵⁵

Even though there is no consensus in regard to whether there is any right to abortion at all,⁵⁶ the majority of Western, European and some Eastern States enable access to the procedure upon request and recognises inherent human rights violations in relation to restrictive and punitive abortion laws. In accordance with Amnesty International policy, punitive abortion laws as well laws limiting the access to education, in regard to sexual health and reproductive rights, pose a major barrier to the full enjoyment of human rights.⁵⁷ Such laws deprive women of the freedom of choice, dignity and personal security as they force them to seek unsafe abortions or continue pregnancies that can be damaging to one's physical and mental health.⁵⁸ The bodily autonomy of

such persons is compromised and as we read in the policy, women's rights to 'life, health, privacy, sexual and reproductive autonomy, the freedom of conscience, the freedom from discrimination, and the freedom from inhuman or degrading treatment'⁵⁹ are violated.⁶⁰ Furthermore, an interesting point may be raised that in cases such as Poland where even when the procedure is available in theory as a matter of law, due to procedural issues with practical accessibility as well as the effect of stigma and indirect pressures from the executive, individuals may not be able to exercise their reproductive rights. Such could result in death of a victim (see the case of a mother forced to carry a terminal pregnancy, die, and orphan her children as a result of it)⁶¹ and rights to life considerations, or in cases of raped women either committing suicide, having been denied the procedure, or developing severe mental health problems, and giving up on their careers, education, or future family life.⁶² The assigned stigma as well as

⁵⁵ Ravi Chhikara, 'The Conflicting Jurisprudence Behind the Laws on Abortion' (2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3560034> accessed 24 August 2020.

⁵⁶ As shown by various opinion of international organisations as well as jurisprudence of the ECtHR which recognised violation under Article 8 ECHR only due to procedural grounds only but did not argue the existence of the right to abortion in general; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (adopted 4 November 1950, entered into force 3 September 1953) ETS No.005 (ECHR), art 8. See for example *Tysi c v Poland* App no 5410/03 (ECtHR, 20 March 2007); *RR v Poland* App no 27617/04 (ECtHR, 26 May 2011); *ABC v Ireland* App no 25579/05 (ECtHR, 16 December 2010); *P and S v Poland* App no 57375/08 (ECtHR, 30 October 2012).

⁵⁷ Amnesty International, 'Body Politics: A Primer on Criminalization of Sexuality and Reproduction' (2018) <<https://www.amnesty.org/download/Documents/POL4077632018ENGLISH.PDF>> accessed 30 May 2020.

⁵⁸ *ibid.*

⁵⁹ *ibid.*

⁶⁰ Judith Bueno de Mesquita and others, 'Conscientious objection: Protecting sexual and reproductive health rights' (2008) <<https://core.ac.uk/download/pdf/20607633.pdf>> accessed 30 May 2020.

⁶¹ Agata Szczerbiak, 'W Polsce bez zmian. Agnieszka zmarła, bo lekarze czekali, aż płód obumrze' (2022) <<https://www.polityka.pl/tygodnikpolityka/spoleczenstwo/2152254,1,w-polsce-bez-zmian-agnieszka-zmarla-bo-lekarze-czekali-az-plod-obumrze.read>> accessed 11 July 2022.

⁶² Paweł Wroński, 'Dożycie za przerwanie ciąży z gwałtu? Sejm wkrótce zajmie się projektem' (2021) <<https://wyborcza.pl/7,75398,27759063,d>

societal pressure on victims wanting to exercise their basic reproductive rights, may have severe repercussions for individuals' life and well-being.

Furthermore, according to international standards, any form of discrimination constitutes as a human rights violation.⁶³ Therefore, marginalising women and their rights should be addressed as any other form of crime. By denying provision of accessible healthcare services due to personal beliefs and moral reasons, from which many laws derive, the right to the highest attainable standard of health is also violated.⁶⁴ The right to safe and legal abortion is argued to be a basic right of women as it enables them to preserve their human dignity and freedom of choice

which are granted based on the non-discrimination provisions.⁶⁵ Moreover, even though international law leaves to states a certain margin of appreciation when introducing relevant abortion laws, international human rights standards as well as general recommendations call upon states to enable equal access to safe and legal abortion for women, no matter their status.⁶⁶ Further on, in the European context, as under the ECHR regime the doctrines of the margin of appreciation and cultural relativism, are not free of certain limitations and applicable tests qualifying the use of the principles.⁶⁷ At EU level, several voices have been echoed arguing that the abortion ban is an attack on women's fundamental rights,⁶⁸ and puts their lives at risk,⁶⁹ and thus, it is strongly

ozywocie-za-przerwanie-ciazy-z-gwaltu-sejm-wkrotce-zajmie.html> accessed 13 July 2022; Agata Komorowska, 'W imieniu dzieci skazanych na życie' <<https://agatakomorowska.pl/w-imieniu-dzieci-skazanych-na-zycie/>> accessed 13 July 2022; RP, 'Protesty po śmierci kobiety, której odmówiono aborcji' (2021) <<https://www.rp.pl/polityka/art19064841-protesty-po-smierci-kobiety-ktorej-odmowiono-aborcji>> accessed 13 July 2022; WHO (n 4).

⁶³ ICCPR, art 14. While the right to freedom of discrimination has been recognised as a free-standing right by the Council of Europe (Protocol 12 ECHR) whose jurisdiction would be applicable to the majority of European States (further exemplified by EU's position and applied to EU MS under the Charter of Fundamental Rights and Freedoms) violation of non-discrimination provisions would most likely be found where revealing potential infringements of other fundamental rights on the basis of a less favourable treatment of a specific group of individuals due to their protected characteristic.

⁶⁴ ICESCR, art 12(1).

⁶⁵ Todd-Gher and others (n 38).

⁶⁶ WHO, 'Preventing unsafe abortion' (2019) <[https://www.who.int/news-](https://www.who.int/news-room/fact-sheets/detail/preventing-unsafe-abortion)

[room/fact-sheets/detail/preventing-unsafe-abortion](https://www.who.int/news-room/fact-sheets/detail/preventing-unsafe-abortion)> accessed 22 May 2020.

⁶⁷ See the analysis in for example Mattias Kumm, 'Democracy is not enough: Rights, proportionality and the point of judicial review' [2009] Public Law & Legal Theory Research Paper Series 1; Paul Mahoney, 'The relationship between the Strasbourg court and the national courts' in Katja s Ziegler and other (eds), *The UK and European Human Rights: A strained relationship?* (Hart Publishing 2015); George Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26(4) Oxford Journal of Legal Studies 705; Jack Donnelly, 'Cultural Relativism and Universal Human Rights' (1984) 6(4) Human Rights Quarterly 400.

⁶⁸ European Parliament News, "'The abortion ban in Poland is an attack on women's and fundamental rights'" (2021) <<https://www.europarl.europa.eu/news/en/press-room/20210128IPR96601/the-abortion-ban-in-poland-is-an-attack-on-women-s-and-fundamental-rights>> accessed 3 January 2022.

⁶⁹ European Parliament News, 'Polish de facto ban on abortion puts women's lives at risk, says Parliament' (2020) <[https://www.europarl.europa.eu/news/en/press-room/20201120IPR92132/polish-de-facto-ban-on-abortion-puts-women-s-](https://www.europarl.europa.eu/news/en/press-room/20201120IPR92132/polish-de-facto-ban-on-abortion-puts-women-s)

recommended that EU citizens enjoy safe access to legal abortions and be able to exercise their reproductive rights without the threat of prosecution.⁷⁰ MEPs adopted a resolution urging MS to decriminalize abortion, eliminate and oppose barriers to safe and authorized abortions, and ensure that everyone has access to SRHR services, which should be provided without restriction. On the basis of religion or conscience, doctors should not deny women access to abortion care since doing so could risk the patient's life.⁷¹

Additionally, special attention needs to be paid to rape victims who are often a subject of human rights violations. First and foremost, rape is a criminal act defined under The Rome Statute of the ICJ⁷² and should not be dismissed and inadequately criminalised due to gendered power relations within the country. Rape victims tend to avoid seeking help and justice or speaking about the crime due to the rape culture of blaming the victim and excusing the perpetrator.⁷³ Thus, the stigma in itself constitutes indirectly as a human rights violation as it restricts one's access to relevant laws and services. In case of rape resulting in pregnancy, the abused persons have to go through a painful process of

psychological evaluation and third-party interference when seeking the medical procedure.⁷⁴ Moreover, in some states rape victims are denied abortion even though the contemporary law includes provisions enabling the performance of the procedure in cases of pregnancy resulting from a criminal act.⁷⁵ Due to such limitations, the sexual assault victims are forced to seek help on the black market or abroad and by doing so, they are compelled to put their health and well-being in jeopardy. Laws and practices that force persons to sacrifice their health can be argued to be an indirect human rights violation.⁷⁶

Various international bodies held that women's right to life may be violated when faced with restrictive abortion laws that force women to compromise their health and safety while seeking unsafe abortion that can expose them to the risk of death and injury.⁷⁷ What is more, the CESCR Committee⁷⁸ has called upon states to 'amend restrictive abortion laws or to increase access to legal abortion to reduce maternal deaths'.⁷⁹ In its General Comment 22, the Committee stated that '[s]tates must reform laws that impede the exercise of the right to sexual and reproductive health',

lives-at-risk-says-parliament> accessed 3 January 2022; European Parliament News, 'Poland: no more women should die because of the restrictive law on abortion' (2021)

<<https://www.europarl.europa.eu/news/en/press-room/20211108IPR16844/poland-no-more-women-should-die-because-of-the-restrictive-law-on-abortion>> accessed 3 January 2022.

⁷⁰ European Parliament News, 'Right to safe and legal abortion must be safeguarded, MEPs demand' (2022) <<https://www.europarl.europa.eu/news/en/press-room/20220603IPR32144/right-to-safe-and-legal-abortion-must-be-safeguarded-meps-demand>> accessed 11 June 2022.

⁷¹ European Parliament resolution of 7 July 2022 on the US Supreme Court decision to overturn abortion rights in the United

States and the need to safeguard abortion rights and women's health in the EU (2022/2742(RSP)).

⁷² Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, art 7(g).

⁷³ WHO (n 4).

⁷⁴ WHO (n 67).

⁷⁵ *P and S v Poland* (n 57).

⁷⁶ WHO (n 4).

⁷⁷ Amnesty International (n 58).

⁷⁸ UN CESCR Concluding Observations: Philippines (E/C.12/PHL/CO/4) 24 November 2008; Concluding Observations: Argentina (E/C.12/ARG/CO/3) 14 December 2011; Concluding Observations: Rwanda (E/C.12/RWA/CO/2-4) 10 June 2013.

⁷⁹ Amnesty International (n 58).

such as laws criminalising abortion.⁸⁰ Furthermore, states must 'ensure access to safe abortion and post-abortion care services irrespective of whether abortion itself is legal'.⁸¹ The Committee, in various concluding reports and observations has held that it is essential to ensure that pregnant girl's voice is always heard and respected.⁸²

'[C]riminal laws penalizing and restricting induced abortion are the paradigmatic examples of impermissible barriers to the realization of women's right to health and must be eliminated.'⁸³ It is believed that laws criminalising abortion have a 'severe impact on mental health'⁸⁴ and can be the source of a violation of the

right to privacy.⁸⁵ The CRC Committee has stated that it is essential to provide confidential access to legal abortions, especially for adolescent girls,⁸⁶ while the CEDAW Committee has pointed out that criminalisation of procedures and services that only women need, constitutes as a violation of women's reproductive rights as well as a violation under the non-discriminatory provisions.⁸⁷ In addition, the HRC has stated on numerous occasions that punitive abortion laws are, indeed, discriminatory and violate women's rights.⁸⁸ 'The criminalization of or other failure to provide services that only women require, such as abortion and emergency contraception,⁸⁹ constitute discrimination

⁸⁰ UN CESCR General Comment No. 22 on the right to sexual and reproductive health (E/C.12/GC/22) 2 May 2016.

⁸¹ UN Committee on the Rights of the Child, General Comment No. 15: The rights of the child to the highest attainable standard of health (CRC/C/GC/15) 17 April 2013.

⁸² UN CRC Concluding Observations: Morocco (CRC/C/MAR/CO/3-4) 19 September 2014; Concluding Observations: Kuwait (CRC/C/KWT/CO/2) 29 October 2013; Concluding Observations: Sierra Leone (CRC/C/SLE/CO/3-5) 30 September 2016; Concluding Observations: United Kingdom of Great Britain and Northern Ireland (CRC/C/GBR/CO/5) 12 July 2016; Concluding Observations: Kenya (E/C.12/KEN/CO/1) 19 November 2008; Concluding Observations: Kosovo (UNMIK) (E/C.12/UNK/CO/1) 19 November 2008; Concluding Observations: Ireland (CRC/IRL/CO/3-4) 1 March 2016.

⁸³ UNGA (n 1).

⁸⁴ *ibid.*

⁸⁵ *Karen Noelia Llantoy Huamán v Peru* (Communication No. 1153/2003, 22 November 2005, CCPR/C/85/d/1153/2003); *L.M.R. v Argentina* (Communication No. 1608/2007, 28 April 2011, CCPR/C/101/D/1608/2007).

⁸⁶ UN CRC General Comment No. 20 on the implementation of the rights of the child during adolescence (UN Doc. CRC/C/GC/20) 6 December 2016.

⁸⁷ CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health) (UN Doc. A/54/38/ Rev.1, chap. I) 1999; CEDAW Committee, 'Statement of the Committee on the Elimination of Discrimination against Women on sexual and reproductive health and rights: Beyond 2014 ICPD review' (2014)

<<https://www.ohchr.org/Documents/HRBodies/CEDAW/Statements/SRHR26Feb2014.pdf>> accessed 30 May 2020.

⁸⁸ Dainius Puras and others, 'Joint Statement by UN human rights experts, the Rapporteur on the Rights of Women of the Inter- American Commission on Human Rights and the Special Rapporteurs on the Rights of Women and Human Rights Defenders of the African Commission on Human and Peoples' Rights' (2015) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16490&LangID=E>> accessed 30 May 2020.

⁸⁹ See ongoing debates in Poland concerning everyday-use and emergency contraception as often prompted by the 'Ordo Luris' organisation known for its radical and far-rights views: Izabela Nowak, 'Tabletka „dzień po” – kontrowersje wokół antykoncepcji

based on sex, and is impermissible.⁹⁰ International legal bodies remain concordant when assessing various human rights violations posed by the limited access to abortion.⁹¹ Another similar statement reads as follows:

A wide range of laws, policies and practices undermine the autonomy and right to equality and non-discrimination in the full enjoyment of the right to sexual and reproductive health, for example criminalization of abortion or restrictive abortion laws.⁹²

The denial of the procedure, in some cases, can also be seen as a violation of the right to freedom of inhuman or degrading treatment.⁹³ The failure to ensure the access to safe and legal abortion is one of them.⁹⁴ The Committee has also held that criminalizing abortion and preventing women from accessing legal services is a violation of the right to be free from cruel, inhuman or degrading treatment, the right to privacy and non-discrimination.⁹⁵

[V]iolations of women's sexual and reproductive health and rights, such as [...]

forced pregnancy, criminalization of abortion, denial or delay of safe abortion and post-abortion care, forced continuation of pregnancy, [...] are forms of gender-based violence that, depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment.⁹⁶

International legal bodies agree that in some instances, the denial of abortion may constitute as a form of ill-treatment⁹⁷ and call upon states to decriminalise abortion and remove any barriers that limit the access to a safe procedure for it is essential for the full realisation of women's human rights.⁹⁸ States are to liberalise their laws as to allow abortion in all circumstances.⁹⁹ Countries, such as Poland, due to their 'restrictive' and 'convoluted' laws, have been called upon to liberalise such laws¹⁰⁰ as they have been a concern of the CEDAW Committee due to 'making women dependent on the benevolent interpretation of a rule which nullifies their autonomy', which is a dangerous

awaryjnej' (2021) <<https://www.heydoc.pl/s/article/Tabletka-dzien-po-kontrowersje-wokol-antykoncepcji-awaryjnej>> accessed 13 June 2022; Ordo Luris, 'Doustna antykoncepcja postkoitalna i aborcja farmakologiczna: charakterystyka produktów, podstawowe zagadnienia obrotu w Polsce w ujęciu prawa farmaceutycznego z uwzględnieniem sytuacji międzynarodowej' (2021) <<https://ordoiuris.pl/ochrona-zycia/doustna-antykoncepcja-postkoitalna-i-aborcja-farmakologiczna-charakterystyka>> accessed 13 June 2022.

⁹⁰ Puras and others (n 89).

⁹¹ *ibid.*

⁹² UN CESCR General Comment No. 22 (n 81).

⁹³ *Karen Noelia Llantoy Huamán v Peru* (n 86).

⁹⁴ *ibid.*

⁹⁵ *Mellet v Ireland* (Communication No. 2324/2013, 9 June 2016, CCPR/C/116/D/2324/2013); *Whelan v*

Ireland (Communication No. 2425/2014, 12 June 2017, CCPR/C/119/D/2425/2014).

⁹⁶ CEDAW General Recommendation No. 35 on gender-based violence against women, updating General Recommendation No. 19 (UN Doc. CEDAW/C/GC/35) 14 July 2017.

⁹⁷ UNGA Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (UN Doc. A/HRC/31/57) 24 February 2016.

⁹⁸ Amnesty International (n 58).

⁹⁹ CEDAW General Recommendation No. 24 (n 88).

¹⁰⁰ UN HRC Concluding Observations: Poland (CCPR/C/POL/CO/7) 23 November 2016; Concluding Observations: Poland (CCPR/CO/82/POL) 2 December 2004; UN CEDAW Concluding Observations: New Zealand (CEDAW/C/NZL/CO/7) 27 July 2012; UN CRC Concluding Observations: Zimbabwe (CRC/C/ZWE/CO/2) 7 March 2016.

occurrence that needs to be addressed.¹⁰¹ Moreover, states are to fulfil their obligations and to provide protection to vulnerable groups, such as marginalised girls and women, from discrimination and inequality that can derive from certain abortion laws.¹⁰² It was stated that [p]reventing unintended pregnancies and unsafe abortions requires States to adopt legal and policy measures to guarantee all individuals access to affordable, safe and effective contraceptives and comprehensive sexuality education, including for adolescents, liberalize restrictive abortion laws, guarantee women and girls access to safe abortion services and quality post-abortion care including by training health care providers, and respect women's right to make autonomous decisions about their sexual and reproductive health.¹⁰³

What is more, 'the good practice found in many countries which provide women's access to safe abortion services, on request during the first trimester of pregnancy', abortion in 'exceptional cases later in pregnancy and abortion "on request" without limits for adolescents' was recommended.¹⁰⁴ States should 'repeal laws that criminalize and unduly restrict abortion and policies based on outdated stereotypes [...] and to counter all stigma against abortion'.¹⁰⁵ It was further emphasised that 'criminalization of abortion perpetuates stigma and discrimination and infringes women's dignity and bodily integrity' and; therefore, states are to 'ensure that their laws, policies

and practices are built on their human rights obligations and on the recognition of women's dignity and autonomy.'¹⁰⁶

Lastly, attention needs to be paid to the subject of conscientious objection which is closely related to the accessibility of abortion as procedural aspects (see Poland in Section 3) may make it considerably harder for women to obtain abortion, even if legal in given circumstances. Thus, not only restrictive laws, but also excessive use of conscientious objection can pose a major barrier to women's realisation of their human rights.

In regard to the WHO report, conscientious objection by healthcare providers might pose a major threat to equal treatment and non-discrimination policy.¹⁰⁷ It can also be analysed in terms of power-relations of patients and healthcare providers who are using their power and position to assert dominance over those seeking help by not providing it in cases when they do not condone patient's behaviour or status.¹⁰⁸ Conscientious objection is claimed by a number of healthcare providers, such as 'obstetricians and gynaecologists, but also pharmacists, nurses, anaesthesiologists and cleaning staff'.¹⁰⁹ Moreover, 'some public health institutions have informally refused to provide certain reproductive health services based on the beliefs of individual hospital administrators'.¹¹⁰ However, in accordance with Article 18, even though 'the rights to freedom of thought, conscience and religion' remain protected, the freedom to manifest one's religion or

¹⁰¹ *ibid.*

¹⁰² Amnesty International (n 58).

¹⁰³ UN CESCR General Comment No. 22 (n 81).

¹⁰⁴ Amnesty International (n 58); OHCHR, 'Unsafe Abortion is Still Killing Tens of Thousands of Women around the World – UN rights experts warn' (2016) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20600&LangID=E>> accessed 30 May 2020.

¹⁰⁵ Amnesty International (n 58).

¹⁰⁶ *ibid.*

¹⁰⁷ WHO (n 4).

¹⁰⁸ Amy Allen, 'Feminist Perspectives on Power' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Fall 2016 Edition).

¹⁰⁹ Christina Zampas and others, 'Conscientious Objection to Sexual and Reproductive Health Services: International Human Rights Standards and European Law and Practice' (2012) 19(3) *European Journal of Health Law* 231.

¹¹⁰ *ibid.*

beliefs ‘may be a subject to limitations’,¹¹¹ such as in case of exercising conscientious objection which infringes one’s human rights, such as the right to not be discriminated against or the right to the highest attainable standard of health.¹¹² Persons, no matter their gender, status or profession, should be able to obtain ‘access to services to which they are entitled under the applicable legislation’.¹¹³ Not only adults but minors too are granted the enjoyment of human rights in regard to their sexual health and well-being, regardless of healthcare provider’s personal views and beliefs. ‘States have particular responsibility to ensure that adolescents are not deprived of any sexual and reproductive health information or services due to providers’ conscientious objection [...] with a special focus on women being a vulnerable group’.¹¹⁴

‘Conscientious objection is very often poorly regulated or widespread’ and; therefore, can leave a number of ‘loopholes’ for healthcare providers to abuse women’s rights and deny performing the procedure.¹¹⁵ States have a minimum core obligation to have procedural regulations in place as to ensure effective referral mechanisms that would not have a detrimental effect on women’s access to adequate information and safe procedure.¹¹⁶ Thus, the situation in Poland, discussed in a section above, can be seen in violation of such an obligation.

To date, international and regional human rights bodies have not recognised a right of health care providers to refuse to provide medical services (including abortion services) on grounds of “conscience” or required that states permit conscientious objection to medical services

under domestic law. However, when states legally permit conscientious objection, human rights law requires that they put in place a regulatory framework to ensure that women’s access to services is not undermined by refusals and in practice, is guaranteed.¹¹⁷

In regard to an argument that is commonly used when justifying conscientious objection, human rights, and most notably the right to life as it is a precondition of the existence of other rights, do not apply prenatally.¹¹⁸ ‘No international human rights body has ever recognised a foetus as a subject of protection under [...] Article 6(1)’ or other relevant provisions.¹¹⁹ The granting of such right prenatally has been greatly criticised and found incompatible with women’s rights.¹²⁰

Social Stigma and Access to Justice

It is written in the WHO report that women with unwanted pregnancies are often forced to resort to unsafe abortion due to the limited access to the procedure. The restrictive factors are poor availability of services; stigma; restrictive laws; high cost; conscientious objection of healthcare providers; and unnecessary requirements, such as mandatory waiting periods, counselling, provision of misleading information, third-party authorization, and medically unnecessary tests that delay care.¹²¹

Social stigma as well as self-stigma are especially prominent in states where abortion is not available upon request. Such countries often have a conservative ruling party and strong religious influences, such as in case of Poland. The

¹¹¹ ICCPR, art 18.

¹¹² ICCPR, art 14(1); ICESCR, art 12(1).

¹¹³ *P and S v Poland* (n 57); *Yazgül Yilmaz v Turkey* App no 36369/06 (ECtHR, 1 February 2011).

¹¹⁴ UN Committee on the Rights of the Child (n 82).

¹¹⁵ Amnesty International (n 58).

¹¹⁶ *ibid.*

¹¹⁷ Bueno de Mesquita and others (n 61); Amnesty International (n 58).

¹¹⁸ Amnesty International (n 58).

¹¹⁹ *ibid.* See for example *H v Norway* App no 17004/90 (ECtHR, 19 May 1992); *VO v France* App no 53924/00 (ECtHR, 8 July 2004).

¹²⁰ *ibid.*

¹²¹ WHO (n 67).

stigma and marginalisation derive from the false belief of hierarchy and women being subordinate to men and their wishes.¹²² The underrepresentation of the female voice leads to discrimination that is seen as justifiable due to ‘moral standards’ present in conservative societies which tend to enforce their views and policies on individuals, especially vulnerable groups. As discussed in Section 2, vulnerable groups are defined as persons who due to their status and social stigma are often a subject of discrimination and marginalisation, constituting as human rights violation based on the equal-treatment provisions.¹²³ Such groups are at high risk of experiencing injustices, especially when seeking ‘illegal help’ in a form of abortion that is criminalised. Due to high level of stigma and discrimination, one could call them ‘target groups’. Moreover, such persons may restrain themselves from seeking medical help when faced with complications after having an illegal procedure. Groups such as women, with a special focus on sex workers and rape victims, who tend to be inculpated for their status, suffer from injustices, unequal access to legal and social help as well as restricted access to healthcare services due to cultural normalisation of stigmatising and marginalising of those whose practices are seen as ‘immoral’ or incompatible with our own.¹²⁴

Social stigma can be seen as directly responsible for any form of marginalisation and discrimination as it is rooted in the culture of normalising certain behaviours and elevating persons of certain gender, status or profession, while denouncing

others. The inferior status of vulnerable groups, such as women and rape victims is entrenched in culture, tradition and history while national and religious institutions use gender-biased justifications to violate persons’ human rights and not answer for them legally.¹²⁵ By justifying and normalising social stigma as well as marginalisation, harmful and violent tendencies and behaviours are only strengthened. Negative attitudes toward vulnerable groups found within the society and social and healthcare services, leave the persons practically helpless against the systemic injustices.¹²⁶ Weitzer explains that ‘stigma has been described as an imputation of inferior status to those who have either a visible discrediting trait (e.g. physical disability) or some perceived moral defect’ based on which they are discriminated against.¹²⁷ However, stigma is also described as an outcome of a relationship between two actors rather than a natural or inherent occurrence.¹²⁸ Similarly to assigning gender roles, stigmatisation is a social construct that derives from certain norms, beliefs and ideas prominent in the society and is repeated as a pattern for socially acceptable treatment of those in vulnerable positions, such as women, sex workers and rape victims.¹²⁹

The vulnerability of certain groups makes them a common target of violence and abuses. The perpetrators feel empowered to do so as the system fails to address the crimes and does not ensure successful human rights monitoring for those in disadvantaged positions.¹³⁰ Workers of social and public services to whom women are supposed to turn to when seeking help, are often guilty of

¹²² Van Wormer (n 11).

¹²³ Reichert (n 10).

¹²⁴ WHO (n 4).

¹²⁵ Mariachiara Di Cesare, ‘Women, marginalization, and vulnerability: Introduction’ (2014) 70(2-3) *Genus* 1.

¹²⁶ Ronald Weitzer, ‘Resistance to Sex Work Stigma’ (2018) 21(5-6) *Sexualities* 717.

¹²⁷ *ibid.*

¹²⁸ *ibid.*

¹²⁹ Alexander Wendt, ‘Constructing International Politics’ (1995) 20(1) *International Security* 71.

¹³⁰ WHO (n 4).

discrimination and abuses themselves. In 2012, Ms Lorraine Morris was arrested for managing a brothel after reporting violence against her worker. Meanwhile, the abusive client was not charged, but Ms Lorraine lost her home and all her savings.¹³¹ The case is one among many that can be found. Widely spread and deeply rooted social stigma normalises such occurrences and makes the abusers feel justified, if not even proud for asserting dominance over someone in a vulnerable position due to her/him being deemed as 'unequal, unworthy or socially unacceptable'.¹³² Such practices limit women's access to justice as well as social and healthcare services as, due to considerable discrimination and social stigma, they are afraid and ashamed of seeking help. It is argued that one's health and well-being can be affected due to marginalising and stigmatising people who 'are perceived as having socially unacceptable sexual practices or characteristics' such as being a sex worker or having been 'raped due to sexually provocative behaviour'.¹³³ Furthermore, the unequal access to healthcare services due to conscientious objection is highly dependent on the creation of stigma and normalisation of marginalising behaviours based on it.¹³⁴ Additionally, it is used as a tool against women exercising their right to have access to healthcare services. Thus, social stigma can be argued to be the one of the main factors responsible for

restricting the enjoyment of human rights by vulnerable groups and limiting one's options of seeking help and justice.

CONCLUDING REMARKS

Restrictive abortion laws, including allowing excessive conscientious objection and improperly regulated referral procedures, can be argued to constitute a human rights violation of vulnerable groups. Both of them derive from social stigma and normalisation of marginalising behaviours against disadvantaged persons whose status or practices are perceived as socially unacceptable or inferior. Women and rape victims are constantly exposed to various injustices and prevented from seeking help and justice. In some states, such as Poland, abortion and conscientious objection remain a problematic subject that is closely connected to women's rights violation and social stigma that strengthen the already hierarchical and gender-biased society. The international human rights and European standards; however, call upon states to amend their laws and policies in compliance with non-discrimination provisions as well as resolutions regarding protection and monitoring of human rights of vulnerable groups. Restrictive abortion laws carry inherent risks and; therefore, the right to abortion should be recognised as to unify the laws and safeguard the human rights of women.

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¹³¹ English Collective of Prostitutes, 'Arrested for reporting violence' (2016) <<https://prostitutescollective.net/arrested-for-reporting-violence/>> accessed 22 May 2020.

¹³² WHO (n 4).

¹³³ *ibid.*

¹³⁴ Reichert (n 10).

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