

Not Just Abortion

Karolina Kocemba

2023-12-20T12:30:27

On 14 December 2023, the European Court of Human Rights (“ECHR”) ruled in the case [M.L. v. Poland](#). The ECHR decided that the restrictions on abortion rights that Poland had violated Article 8 (right to respect for private and family life) of the European Convention on Human Rights (“Convention”). The judgment is one more step and, surely, not the last in the rather intense battle over abortion law in Poland. On 22 October 2020, the Polish Constitutional Court (“CC”) restricted the already narrow right to abortion in Poland. The CC’s decision resulted from right-wing legal mobilization, and it ignited counter-mobilization by women’s rights advocate groups that turned to the ECHR for protection. The 14 December decision is thus the result of a string of mobilizations within which NGOs, populist power, law and religion, constitution, and the rule of law clash. However, contrary to the hopes of the initiators of the case, this is not a European *Roe v. Wade* moment. The ECHR again refused to affirm that Article 8 can be interpreted as conferring a right to abortion, as it did in the case of [A., B., and C. v. Ireland](#). Nevertheless, the ECHR made significant findings regarding rule of law violations and claimed that the Polish CC did not meet the requirements of an independent court. Thereby, the ECHR indicated a desirable direction for further reforms in Poland.

Dynamics of legal mobilization against abortion

The judgment of the Polish CC banning abortion on the grounds of fetal abnormalities is one of the most influential and commented on in the history of the court. It caused mass protests across the country, and resulted in a practical abortion ban. Because of the chilling effect, in a few situations, doctors were afraid to terminate pregnancies for fear of criminal consequences. As a result, [several women died](#) in the hospitals due to sepsis caused by abortion abandonment. The judgment was the result of years of [right-wing legal mobilization](#), relying on citizens’ initiatives, pressure on policymakers and led by fundamentalist organizations with significant support from the Polish Catholic Church. It seems that, at the time, [the abortion ban itself was not the goal](#) of the Polish populist government. Changing the abortion law through parliament would have provoked protests and a negative effect on the electoral outcome. Instead, the Law and Justice Party members of parliament decided to switch the parameters of the issue from political to legal and use the CC, packed by judges elected by the party-controlled majority.

After the CC decision, the activists’ attention turned to the ECHR. However, any intervention by the ECHR would require recognition that the right to abortion is a human right protected by the Convention, which historically judges have refused to do. [Federa](#), the prominent NGO in the field of reproductive and abortion rights in Poland, initiated a campaign called „[Skarga Kobiet](#)“ (Eng. Women’s Complaint) to direct complaints by Polish women who felt affected by the CC decision. Federa created a webpage where they posted a ready-made template and instructions for

filling out the complaint. In effect, women sent more than 1,000 complaints. This was the [first complaint in the history of the ECHR](#) to be filed in such large numbers by a social movement coordinated through social media by human rights lawyers. It resulted in two ECHR judgments.

Tale of two ECHR abortion judgments

In the first judgment on 6 June 2023, in the case [A.M. v. Poland](#), the ECHR ruled that eight abortion rights cases were inadmissible. All the applicants did not have to terminate their pregnancies but were afraid that they would not receive adequate medical care from the state if the fetus was found to have defects. ECHR argued that applicants did not provide enough medical evidence, thus, „consequences for the applicants were hypothetical and were too remote and abstract.“

The second ECHR judgment, in the case [M.L. v. Poland](#), issued on 14 December 2023, also concerned a woman affected by the CC's "abortion judgment." An applicant had an appointment at the hospital to terminate a pregnancy due to a fetal defect (Down's syndrome), which was canceled as CC judgment came into effect. Then, she had to travel to a private clinic in the Netherlands for the procedure. The applicant claimed that this situation violated Article 3 (prohibition of inhuman and degrading treatment) and Article 8 (right to respect for private and family life). The ECHR found that Poland had violated only Article 8 in this situation. Its decision was based on two arguments – an incorrectly selected panel of the Polish CC and the direct effect of the judgment on the applicant.

In its reasoning, the ECHR emphasized that since the Convention is a constitutional instrument of the European public order, States Parties are obliged to ensure a level of control over compliance with the Convention that at least preserves the foundations of that public order. One of the fundamental components of European public order is the principle of the rule of law, and the entire Convention is inspired by it. The ECHR replicated its reasoning from the judgment [Xero Flor vs. Poland](#) of 2021, claiming that the constitutional judges who ruled were elected improperly and illegally, and their presence meant that this judgment was an illegal interference. Arbitrariness and irregularities in the procedure for the selection of constitutional judges have negatively affected the legitimacy of the CC in democratic society, so its decision does not meet the rule of law requirements. Since the CC does not meet the requirements of an independent and impartial court, the judgment of 22 October 2020 cannot be considered to have been made in accordance with the law.

The second main argument of the ECHR was a claim that although the applicant was not a party to the proceedings before the CC, the judgment had a direct negative impact on the applicant, particularly her right to respect for private life. The applicant was, therefore, directly affected by the CC judgment and later legislative change. It was, thus, not a complaint *in abstracto*. The violation was actual and direct. The ECHR also referred to the socio-political context and pointed out that the CC's judgment sparked mass protests. Although it should be a standard, the Polish CC, in its judgments on abortion, ignored the real consequences of its judgments. Also, the Polish government in the present case (as a party) indicated that the case

did not directly concern the applicant and should not be considered. Thus, ECHR judgment is a reminder on adjudication standards, including consideration of a social context.

The applicant claimed that the CC judgment caused her severe and real emotional suffering, which is a violation of Article 3. Despite the ECHR agreeing it could cause psychological and emotional suffering, it considered the given circumstances were not sufficient to violate Article 3 of the Convention. At the same time, the ECHR still refrained from directly indicating a right to abortion that could set a European standard. Although in the commented case, ECHR claims that “the prohibition of abortion in Poland on the grounds of fetal malformation, where abortion is sought for reasons of health and well-being comes within the scope of the applicant’s right to respect for her private life,” at the same time stated that “Article 8 cannot be interpreted as conferring a right to abortion.” Right-wing organizations often use this argumentation in the legal mobilization against reproductive rights – for example, in the described case, Ordo Iuris and the European Centre for Law and Justice were third-party interveners and underlined that there is no written right to abortion.

The impact of the ruling

Although the December ECHR judgment is more about the rule of law than abortion itself and does not set a European standard in this area, it may have practical consequences and set the course for the new Polish government.

First of all, the judgment can be an excuse for the new government to liberalize abortion laws. Lawyers representing claimant M.L. and human rights activists Agata Bzdy# and Kamila Ferenc already pointed out at a [press conference](#) that Polish abortion law must be changed as soon as possible. Since the ECHR recognized a human rights violation, Poland must ensure that such violations are no longer occurring. Therefore, it is not enough to restore legal abortion in a case of fetal defects as it was before the CC judgment. In their opinion, it is necessary to bring it up to the European standard – to provide access to abortion regardless of the reason until the 12th week of pregnancy. Thus, the ECHR judgment could contribute to the most significant liberalization of abortion law in Poland in 30 years. The government has already commented on the judgment – new Equality Minister Katarzyna Kotula said she is convinced that the judgment shows that [Poland must move in the direction of liberalizing abortion law](#). At the same time, she announced inspections of hospitals and demanded fines for refusing legal abortions.

A liberalization of abortion law is also expected by Polish society – the CC’s judgment, which drastically restricted abortion, not only triggered some of the largest mass protests in Poland since 1989 in 2020 but also unleashed an intense public abortion debate, which may have also led to high support (83.7 percent) for liberalizing the abortion law. Moreover, according to Poland’s parliamentary elections exit poll [abortion and women’s rights were the second most important issues for voters](#) (only the economic situation was more significant), and women’s turnout was the highest in history at 73.7 percent.

Secondly, we can interpret the ECHR judgment as a signal to the new Polish government on how it could resolve the problem of the CC as an obstacle to [the restoration of the rule of law](#). After elections, there are ongoing debates on what should be done with the CC – whether to [remove judges defectively elected](#), or leave them, which will ensure their legitimization, and can lead to a blockade of new government changes. The CC has already issued a problematic judgment stating that [fines by the Court of Justice of the European Union against Poland violated the constitution](#). The fines related to the refusal to suspend the Turów mine and the activities of the disciplinary chamber for judges. The CC announced another ruling (in January) on the possibility of dissolving the public media, which [scholars](#) and the new government often describe as not independent and propaganda. In the abortion judgment, the ECHR hinted at what to do, and we can interpret it as a signal that the CC composition could be changed again.

Finally, the judgment may be of great value in the doctrinal and theoretical conceptualization of the relation between the rule of law and human rights. The European debate on the rule of law tends to frame the issue through the lens of judicial independence, which can sound somewhat abstract to citizens. Showing the material effects of taking away and limiting a fundamental right through politically controllable courts can stimulate civic identification with the judiciary. In this sense, despite the lack of constitutionalizing of the European right to pregnancy termination, the ECHR's ruling is an important step in the public debate.

