Written observations in application no. 40119/21

M.L. v. Poland

Issue 1. Justified interference in terms of Article 8 § 2 of the ECHR

1. Among the issues raised in this application is the question of justification of interference with Applicants' rights under Article 8 of the Convention on account of the restrictions imposed by the Constitutional Court's judgment of 22 October 2020 (K 1/20) with respect to legal abortion on the ground of foetal defects.
2. With regard to this issue, ENNHRI would like to support the Court in its decision by providing an overview of (1) the applicable legal standards concerning the right to a fair trial and the requirement that the court be 'established by law' within the meaning of Article 6(1) of the ECHR; as well as (2) the CJEU's standard regarding lawfulness of domestic courts and judges.
3. According to well-established case-law, an impugned interference with the rights protected under Article 8 (1) of the ECHR must have a basis in domestic law, which must be given a substantial understanding. It must therefore be adequately accessible and be formulated with sufficient precision to enable those to whom it applies to regulate their conduct and to foresee the consequences which a given action may entail, to a degree that is reasonable in the given circumstances and with appropriate advice if necessary (judgment of 8 April 2021, *Vavřička and others v. the Czech Republic*, application no. 47621/13 and 5 others, para. 266). The requirement for an interference to be "in accordance with the law" relates therefore to the quality of the law and requires also its compatibility with rule of law requirements (judgement of 25 May 2021, *Big Brother Watch and others v. the United Kingdom*, applications nos. 58170/13, 62322/14 and 24960/15, para. 332).
4. The assessment of whether the interference with Applicant's rights was justified under Article 8 (2) of the ECHR requires consideration of whether the imposed restrictions were introduced in compliance with rule of law principles and, as a result, i.a. by a tribunal "established by law" within the meaning of Article 6(1) of the ECHR.

1.1. Requirements of the "court" under the Convention

1.1.1. The requirement of a court "established by law"

5. Given that the requirement of a court "established by law" is rooted in the rule of law[1], the principle of the lawful judge, i.e. the judge appointed in accordance with the law – including all tiers of the normative order – implements the same principle. The expression "established by law" refers, also, not only to the legal basis for the very existence of the court, but also to the composition of the court in each individual case it examines[2]. That inevitably incorporates the process of appointing judges into the requirement of the court being "established by law" within the meaning of Article 6 (1) of the ECHR.

[1] ECtHR, judgment of 28.11.2002, *Lavents v Latvia*, application no., 58442/00, para. 82.
[2] *Lavents v Latvia*, para. 114.

6. The European standard of a "court" requires i.a. that the judicial body is set up in accordance with the intention of the legislature[3]. Not only the legal basis, but also the competence of the court and its composition must be regulated beforehand by legal provisions[4]. In addition, the law should also determine the criteria and procedure for the appointment of judges, which must be complied with in practice when judges are nominated and appointed to the court[5]. The domestic rules governing the participation of a given judge in the examination of a given individual case must be respected, e.g. as regards their term of office, potential incompatibility or reasons for exclusion of the judge[6].

7. All of the above requirements are expressly intended to avoid excessive, arbitrary influence on the judiciary by other branches of power, and, in particular, make it fully immune, in the exercise of the judicial power, from possible interferences coming from the executive. Accordingly, the principle of the lawful judge, is in fact meant to safeguard judicial independence from unlawful interventions of other political powers[7].

8. Not every flaw in the process of appointing judges will render the act of appointment ineffective. However, serious irregularities that may have affected the outcome of the appointment process, undermine the capacity of the appointed persons to fulfil the role entrusted by law to the judge. The Grand Chamber in the *Ástráðsson* ruling set out a three part threshold test of manifest breaches of domestic law pertaining to fundamental rules of the procedure for appointing judges which were not effectively reviewed and remedied by the domestic courts[8]. Such breaches undermine the purpose and effect of the appointment process, disqualify the judge and the court, and constitute a violation of Article 6(1) of the ECHR. An essentially equivalent formula has been adopted by the Court of Justice of the European Union (CJEU) in the *Simpson and HG* ruling[9] (see p. 22-24).

9. It is submitted that defects in the process of appointing judges should likewise be regarded as "flagrant" in the meaning of para. 244 of the *Ástráðsson* ruling, when purposely there has been no effective judicial remedy in the domestic system to formally declare a violation of the law in the appointment process. Therefore, such assessment should be made instead by the European Court of Human Rights itself. To acknowledge its competence to make an autonomous assessment in a given case, the Court should not only explore the relevant legal framework but also the practice of state authorities of circumventing or disregarding the law, or using extra-legal instruments of pressure to obtain the results they wish.

10. In the judgment of 7 May 2021 in the case *Xero Flor v. Poland* the Court has found a violation of the right to fair trial by the Republic of Poland following the reasoning that a court composed in breach of legal provisions concerning the procedure of the appointment of judges cannot be deemed as meeting the requirement of being "established by law" as stated in Article 6 of the ECHR. Such composition leads to a violation of the right to fair trial before an impartial and independent court which is also protected under Article 45 of the Polish Constitution.

11. In *Xero Flor v. Poland,* the Court invoked the three part threshold test established in the *Ástráðsson* ruling and concluded that unlawfully replacing previously appointed judges of the Constitutional Tribunal should be regarded as manifest breaches of the domestic law concerning a fundamental rule of the election procedure *(Xero Flor v. Poland*, para. 275&277). The Court also found that the breaches in the procedure for electing three judges to the Constitutional Tribunal on 2 December 2015 were of such gravity as to impair the legitimacy of the election process and undermine the very essence of the right to a "tribunal established by law" (ibid., para. 287). Furthermore, the

[3] *Lavents v Latvia*, para. 114; see also General Court of the European Union, judgment of 23.01.2018, T-639/16 P, *FV v Council of the European Union*, EU:T:2018:22, para. 72.
[4] *Lavents v Latvia*, para. 114; GCEU, *FV*, para. 68.
[5] Compare GCEU, *FV*, para. 74.
[6] *Lavents v Latvia*, para. 114; GCEU, *FV*, para. 73.
[7] See ECtHR, judgment of 20.10.2009, *Gorguiladzé v Georgia*, application no. , 4313/04, para. 69; ECtHR, judgment of 27.10.2009, *Pandjikidzé v Georgia*, application no. 30323/02, para. 105; GCEU, *FV*, para. 68.
[8] *Ástráðsson* [GC], para. 244 et subseq. See also: judgement of 3 February 2022, A*dvance Pharma sp. z o.o v. Poland*, application no. 1469/20.
[9] CJEU judgment of 26.03.2020, C-542/18 RX-II and C-543/18 RX-II *Simpson and HG*, EU:C:2020:232.

Court observed that there was no procedure under Polish law for challenging the alleged defects in the election process for judges of the Constitutional Tribunal (ibid., para. 288).

12. The standards set by the Court regarding manifest breaches of domestic law pertained to fundamental rules of the procedure for appointing judges, which were not effectively reviewed and remedied by the domestic courts. It is submitted that these standards are of a general nature and may be applicable not only to the process of appointing judges, but also to the process of appointing of the President of the tribunal.

13. ENNHRI notes that the ECtHR judgement in the case *Xero Flor v. Poland* concerned the constitutional complaint procedure (initiated by a private person in his/her individual case on the basis of Article 79 of the Constitution), whereas the K 1/20 judgement of the Constitutional Tribunal of 22 October 2020 was issued on the motion of a group of Members of Parliament. Nevertheless, this does not exclude applying the standard expressed in the *Xero Flor* case to the present case since the defectiveness of the procedure of appointment of the judge is objective in nature and the issue of the status of a person appointed as a judge of the Constitutional Tribunal was addressed by the Court in a general way. Moreover, although the judgment K 1/20 was issued on the motion of a group of Members of Parliament in the abstract control procedure, the judgement directly affected the Applicant in the present case, depriving her of access to legal abortion despite meeting the conditions and the set date.

14. The established case law of the Court on the application of Article 6 (1) to constitutional review procedures could benefit from some reassessment and clarifications. Although it is undisputable that the Convention does not confer the right to constitutional review, the situation where the question of effective remedies against an already launched and concluded procedure of constitutional review which raises doubts as to its compliance with law and the Applicants' rights should be distinguished. In this context, the possible application of Article 6(1) would not consist of a right to launch constitutional review, but to seek an effective remedy from potential interferences with the rights enshrined in the Convention originating from acts delivered by constitutional authorities. A strict reliance on the actualization of individual risk which could initiate individual judicial proceedings would render Convention rights impossible to exercise due to delays in judicial proceedings, which raises doubts also to their proper safeguards in the light of Article 13 of the ECHR.

15. Following the ECtHR judgment in the case of *Xero Flor v. Poland*, the Constitutional Tribunal ruled that Article 6 (1) of the ECHR is inconsistent with some provisions of the Polish Constitution to the extent that the concept of a tribunal used in this provision covers the Constitutional Tribunal and to the extent that it grants the ECtHR the competence to assess the legality of the election of judges of the Constitutional Tribunal[10]. Moreover, Mariusz Muszyński, justifying the judgment in the case P 10/19, indicated "the judgments of the ECtHR are of a purely declarative nature, they are an element of international law and do not have direct effect in domestic law" until the relevant change of national law takes place[11].

1.1.2. The requirements of judicial independence and impartiality

16. In the context of determining whether a body can be considered to be "independent", ENNHRI would like to recall relevant ECtHR standards. Referring to this issue, the Strasbourg Court has considered the manner of appointment of members of national courts and the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence[12]. The latter serves to inspire the confidence in the courts by the public and the parties to the proceedings[13]. The court (judge) must be independent of any external, extrajudicial influence, esp. from the executive, but also from the legislator, i.e. the

[10] See CT judgment of 23.02.2022, case P 10/19.
[11] See CT judgment of 24.11.2021, case K 6/21.
[12] ECtHR judgment of 28.06.1984, *Campbell & Fell v. UK*, application no. 7819/77; 7878/77, para. 78.
[13] See ECtHR judgment of 21.06.2011, *Fruni v. Slovakia*, application no. 8014/07, para. 141; *Ástráðsson* [GC], para. 233.

Parliament[14]. While the requirement of "impartiality" embraces both the subjective aspect – the court must be free of personal prejudice or bias, and the objective aspect – the court must offer sufficient guarantees to exclude any legitimate doubt in this respect[15].

17. Objectively justified, legitimate reasons to fear that a particular court lacks independence or impartiality, preclude considering the authority as meeting the Convention standards[16]. The threshold of a reasonable doubt is therefore sufficient to establish a breach of Article 6 (1) of the ECHR. For this purpose, it is not necessary to prove the factual lack of independence or impartiality of the judge or court. To find a violation of the Convention, the Court may rely on a systemic analysis of the national law and its actual implementation, and does not need to review the conduct of the individual judge in a specific case.

1.1.3. Lawfulness of domestic courts and judges – CJEU's standards

18. ENNHRI recalls the standard concerning lawfulness of domestic courts and judges firmly established in the case law of the CJEU (see esp. *Simpson and HG*; *A.K. and others*[17])[18]. This case law confirms that objectively justified, legitimate reasons to fear that a particular court lacks independence or impartiality, preclude considering the authority as meeting the Convention standards.

19. The recent case law of the CJEU concerning the scope of application of the right to effective judicial remedy enshrined in Article 19 of the Treaty on the EU in the context of national constitutional review procedures (equivalent of Article 6 of the Convention) is also noteworthy. In the judgment of 21 December 2021, the CJEU noted that, although Article 19 may not fully apply to constitutional review organs as there is a strong disparity of models of constitutional review in Member States and such organs are not always to be considered as 'tribunals' in a strict sense of this term, if the national law provides for a universal application of their decisions, and their legal force is binding upon judges in national cases, such organs must meet a minimum of standards linked to the right to fair trail, in particular the principle of independence[19]. In addition to that, in its judgment of 22 February 2022 the CJEU clarified that EU law, with regard to the right to fair trail, does not preclude national rules or a national practice under which the decisions of the constitutional court are binding on the ordinary courts, but only provided that national law guarantees the independence of that constitutional court from, in particular, the legislature and the executive[20].

20. The reasoning applied by the CJEU in the judgments cited above could inspire the Court's clarification on the scope of application of Article 6(1) of the Convention in the context of constitutional review procedures by pointing out their functional link with the individual right to fair trial in case national legislation provides for universally binding force of decisions of constitutional review organs.

Issue 2. Access to abortion in the light of Articles 8 and 3 of the ECHR

21. Notwithstanding the issue of the justification of interference with Applicants' rights under Article 8 of the Convention, the present case raises also questions with regard to the impugned violation of the State's positive obligations stemming from Article 8 and 3 of the Convention.

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[14] ECtHR decision of 18.05.1999, *Ninn Hansen v. Denmark*, application no. 28972/95, para. 20.
[15] ECtHR judgment of 25.02.1997, *Findlay v. UK*, application no. 22107/93, para. 73.
[16] See *Fruni v. Slovakia*, para 141.
[17] CJEU judgment of 19.11.2019, C-585, 624 and 625 *A.K. and others*, EU:C:2019:982.
[18] See i.a. *Ástráðsson* [GC], para. 220–222.
[19] CJEU judgment of 21 December 2021 in joined cases C-357/19, C-379/19, C-547/19, C-811/19 i C 840/19 *EuroBox Promotion*, EU:C:2021:1034, para. 229 ff.
[20] CJEU judgment of 22 February 2022, C-430/21, EU:C:2022:99, RS, para 43 ff.

22. With regard to these issues, ENNHRI would like to support the Court in its decision by providing an overview of (1) applicable legal standards under international human rights law and jurisprudence in relation to women's reproductive rights and access to abortion and (2) the national legislation concerning access to abortion across member states of the Council of Europe.

2.1. Applicable legal standards under international human rights law and jurisprudence in relation to women's reproductive rights and access to abortion

23. The Court has considered abortion issues primarily under the right to private life enshrined in Article 8 of the Convention. The Court has repeatedly confirmed that the decision of a pregnant woman to continue her pregnancy or not belongs to the sphere of private life and autonomy. Therefore, legal regulations on abortion touch upon the sphere of private life (judgment of 26 May 2011, *R.R. v. Poland*, application no. 27617/04, 181; judgment of 20 March 2007, *Tysiąc v. Poland*, application no. 5410/03, para. 106-107; judgment of 16 December 2010, *A., B. and C. v. Ireland,* application no. 25579/05., para. 212). In the context of access to abortion the Court interprets "private life" in a broad way, as encompassing, inter alia, a person's physical and psychological integrity (R.R., 107).

24. However, in light of the ECHR, the right to privacy cannot be interpreted as meaning that pregnancy and its termination are, as a principle, solely a matter of the private life of the mother (decision of 19 May 1976, *Brüggemann and Scheuten v. Germany*, application no. 6959/75). Therefore, States are required to weigh up the various, sometimes competing, interests of the woman and foetus, especially since "it might be regarded as common ground between States that the embryo/foetus belongs to the human race" (judgment of 8 July 2004, *Vo v. France*, application no. 53924/00).

25. Article 8 grants States a wide margin of appreciation for choosing how to regulate access to the abortion procedure, and the Court has allowed States broad discretion to restrict access to abortion. In fact, the Court has never held that the substance of a State's abortion laws violates ECHR, and instead has only found that procedural deficits in enforcing State abortion laws run afoul of Article 8. However, where domestic law allows for abortion in cases of foetal malformation, the State has a positive obligation under Article 8 to ensure that there is "an adequate legal and procedural framework to guarantee that relevant, full and reliable information on the foetus' health is available to pregnant women" (see *R. R. v. Poland*, § 70).

26. Despite States' wide margin of appreciation with regard to abortion law, the margin is not unlimited and does not allow States to introduce arbitrary and disproportionate measures. In the *A., B. and C.* judgment, the Court did not consider Irish abortion law disproportionate due to the fact that those regulations: (1) were introduced after "complex and sensitive debate in Ireland" and (2) did not preclude the termination of pregnancy abroad (*A., B., C.*, para. 238). Therefore, it could be argued that introducing a total ban on abortion in case of foetal abnormalities without prior public debate, ignoring social attitudes toward abortion, in particular the lack of consensus on restricting abortion laws and leaving the decision to the constitutional body rather than to the legislature can be deemed as a disproportionate interference with the right to private life.

27. With regard to possible violations of Article 3, ENNHRI would like to emphasise that the Court, the UN Committee Against Torture, and the UN Human Rights Committee have all recognised that denying women access to lawful abortion or obstructing their access to abortion-related services can in certain circumstances amount to cruel, inhuman, or degrading treatment under international law[21].

28. On the other hand, in the case of *A. B. C. v. Ireland* which concerned the lack of legal abortion *per se*, the Court stated that there was no violation of Article 3 of the Convention, even though in the Court's opinion travelling

[21] For example, the European Court of Human Rights found Article 3 violations in the cases of R. R. v. Poland and P. and S. v. Poland (judgment of 30 October 2012, *P. and S. v. Poland*, application no. 57375/08.) where access to lawful abortion or prerequisite health services was clearly legal in the applicants' cases.

abroad for an abortion can be seen as both psychologically and physically arduous and financially burdensome. In the Court's opinion in the *A. B. C.* case, ill treatment did not attain a minimum level of severity, while according to well-established case law ill treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim. Nevertheless, it still can be argued that the lack of access to legal abortion reaches the minimum level of severity as long as additional circumstances emerge regarding the stage of pregnancy or abruptness of cancellation of planned abortion.

29. ENNHRI would also like to draw the Court's attention to the fact that several European bodies have repeatedly confirmed that, in order to ensure the human rights of all women, States should ensure all women's access to safe and legal abortion care and reform highly restrictive laws that prohibit abortion except in a small number of strictly defined cases. For instance, the Council of Europe Commissioner for Human Rights called on the Council of Europe member states to "reform strict anti-abortion laws and policies and ensure that the principle of non-retrogression is respected by repealing and rejecting laws and policy proposals that seek to introduce new barriers to women's access to safe abortion services"[22]. A Commissioner's opinion expressed in the context of attempts aimed at tightening Polish anti-abortion law states that "adopting legislation restricting the existing law would remove Poland even further from its obligations under international human rights law, as it would endanger women's right to freedom from ill-treatment"[23].

30. In the context of the present case, ENNHRI would also like to highlight the landmark decision issued by the UN Human Rights Committee in the case *Amanda Mellet v. Ireland*[24]. In this case, the Committee found that only providing a pregnant woman seeking abortion with the following two options: carrying to term, knowing that the foetus would most likely die inside her, or having a voluntary termination of pregnancy in a foreign country, constituted discrimination and cruel, inhuman or degrading treatment as a result of Ireland's legal prohibition of abortion. The Committee found also that the State party's denial of access to abortion constituted an arbitrary interference with women's right to privacy.

2.2. United Nations standards on human rights with respect to abortion

31. ENNHRI would like to point out the relevant standards on human rights issues in respect to abortion developed by UN human rights treaty bodies, namely: the Committee on Economic, Social and Cultural Rights ('CESCR'), the Committee on the Rights of Persons with Disabilities ('CRPD Committee'), the Committee on the Elimination of Discrimination against Women ('CEDAW Committee') and the Human Rights Committee ('CCPR').

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[22] The Council of Europe Commissioner for Human Rights, Women's sexual and reproductive health and rights in Europe, https://rm.coe.int/women-s-sexual-and-reproductive-health-and-rights-in-europe-issue-pape/168076dead; see also: Third party intervention by the Council of Europe Commissioner for Human Rights in the case of *K.B. v. Poland* and 3 other applications (applications nos. 1819/21, 3682/21, 4957/21, 6217/21), *K.C. v. Poland* and 3 other applications (applications nos. 3639/21, 4188/21, 5876/21, 6030/21), and *A.L. - B. v. Poland* and 3 other applications (applications nos. 3801/21, 4218/21, 5114/21, 5390/21); The Council of Europe Commissioner's for Human Rights letter to the Parliament of Slovakia, 15 October 2021, https://rm.coe.int/letter-to-the-slovak-national-council-by-dunja-mijatovic-council-of-eu/1680a43530.

[23] https://www.coe.int/en/web/commissioner/-/commissioner-urges-poland-s-parliament-to-reject-bill-which-restricts-access-to-abortion-care; See also: European Parliament's resolution of 26 November 2020 on the de facto ban on the right to abortion in Poland (2020/2876(RSP). The Parliament recalled that women's rights are fundamental human rights and that the EU institutions and the Member States are legally obliged to uphold and protect them in accordance with the Treaties and the Charter of Fundamental Rights of the European Union, as well as international law and noted that the unjustified excess of restrictions on access to abortion resulting from the ruling of the Constitutional Court fails to protect the inherent and inalienable dignity of women, as it breaches the Charter, the European Convention on Human Rights (ECHR), the case law of the European Court of Human Rights (ECtHR), numerous international conventions to which Poland is a signatory, as well as the Constitution of the Republic of Poland.

[24] UN Human Rights Committee, *Mellet v. Ireland*, Comm. No. 2324/2013, UN Doc. CCPR/C/116/D/2324/2013 (2016). See also: UN Human Rights Committee, *Whelan v. Ireland*, Human Rights Committee, Communication No. 2425/2014, CCPR/C/119/D/2425/2014 (2017).

32. While the starting point of their analyses differs reflecting the specific rights enshrined in the respective human rights treaty, they all emphasise that it is an issue of women's human rights to life and to bodily integrity, women's freedom from torture and ill treatment, and women's rights to autonomy and self-determination, privacy, health, equality before the law and equal protection of the law, and non-discrimination. They all emphasise the incisive impact that a pregnancy has on women's individual lives. All four treaty bodies concur in that States have a duty to ensure that women do not have to undertake unsafe abortions, and hence that they may not regulate abortion in a manner that runs counter this obligation. Criminalizing abortion is an example of the latter.

33. The four treaty bodies confirm that States are under the obligation to provide safe, legal and effective access to abortion care. The Human Rights Committee, in its General Comment 36 on the Right to Life, focuses on pregnancies that endanger a woman's life or cause them severe pain and suffering, and concludes that in these cases, restrictions on their abilities to seek an abortion, such as criminalization, are not and cannot be justified. The other three Committees, taking a broader array of women's human rights as starting point, viz. the right to health, to self-determination, and the prohibition of discrimination, conclude that criminalization of abortion as such is a violation of these rights and the ensuing obligations of States. They emphasise that States must reform such laws, and may not take retrogressive measures.

34. The UN CESCR explained, in its General Comment 22 on the right to sexual and reproductive health, that this right entails "the right to make free and responsible decisions and choices, free of violence, coercion and discrimination, regarding matters concerning one's body and sexual and reproductive health"[25]. Thus, the CESCR grounds the right in the individual right to autonomy and self-determination, as laid down in Article 8 of the ECHR.[26] The CESCR also underlines that the right to sexual and reproductive health "is intimately linked to civil and political rights underpinning the physical and mental integrity of individuals and their autonomy, such as the rights to life; liberty and security of persons; freedom from torture and other cruel, inhuman or degrading treatment; privacy and respect for family life; and non-discrimination and equality."[27]

35. The CESCR underlined that criminalization of abortion and restrictive abortion laws undermine autonomy and the right to equality and non-discrimination in the full enjoyment of the right to sexual and reproductive health; hence, States are under an immediate obligation to eliminate these laws.[28] It stresses that "retrogressive measures should be avoided and, if such measures are applied, the State party has the burden of proving their necessity."[29]

36. The UN CRPD Committee and the CEDAW Committee clarified in a Joint Statement that "Access to safe and legal abortion, as well as related services and information are essential aspects of women's reproductive health and a prerequisite for safeguarding their human rights to life, health, equality before the law and equal protection of the law, non-discrimination, information, privacy, bodily integrity and freedom from torture and ill treatment."[30] Moreover, the Committees underlined the importance of women's autonomy in the context of policy and law-making related to, among others, abortion care[31], called upon States parties to repeal health policies and abortion laws that perpetuate deep-rooted stereotypes and stigma[32] and decriminalise abortion and legalise it in a manner

[25] CESCR, General comment No. 22 (2016) on the right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/22 (2 May 2016), para.5.
[26] For this interpretation of Article 8 ECHR see ECtHR, *Pretty v. the United Kingdom*, application no 2346/02, judgment of 29 April 2002, § 61.
[27] CESCR General Comment 22 (supra note 25) para. 10.
[28] CESCR General Comment 22 (supra note 25) para. 34.
[29] CESCR General Comment 22 (supra note 25) para. 38.
[30] Guaranteeing sexual and reproductive health and rights for all women, in particular women with disabilities, Joint statement by the Committee on the Rights of Persons with Disabilities and the Committee on the Elimination of All Forms of Discrimination against Women, 28 August 2018, https://www.ohchr.org/Documents/HRBodies/CRPD/Statements/GuaranteeingSexualReproductiveHealth.DOCX.
[31] Ibid.
[32] Ibid.

that fully respects the autonomy of women, including women with disabilities[33]. This also reflects the development of human rights law on the UN level.

37. The UN Human Rights Committee, in its General Comment 36 (Right to Life) did not preclude the possibility of adoption of regulations on voluntary terminations of pregnancies, but noted that restrictions in access to abortion "must not, inter alia, jeopardise their *[women or girls]* lives, subject them to physical or mental pain or suffering which violates Article 7, discriminate against them or arbitrarily interfere with their privacy".[34] The Committee further noted that "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, and when carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering, most notably when the pregnancy is the result of rape or incest or is not viable. In addition, States parties may not regulate pregnancy or abortion in all other cases in a manner that runs contrary to their duty to ensure that women and girls do not have to undertake unsafe abortions, and they should revise their abortion laws accordingly."[35]

2.3. Overview of the national legislation concerning access to abortion across member states of the Council of Europe

38. ENNHRI conducted a survey in February 2022 regarding access to abortion and received submissions from 26 member institutions[36]. Despite different approaches to the issue of the beginning of human life and the level of protection of the human embryo, the majority of European countries guarantee relatively broad access to abortion within the first weeks of pregnancy. In this context, Polish anti-abortion law, constituting a near total ban on abortion, appears to be very restrictive.

39. Based on the collected replies[37], the legislative basis for abortion varies in those 25 countries[38] (constitution, specific legislation, governmental degree/instruction etc.).

40. Countries that guarantee abortion on demand within certain time limit without additional restrictions or requirements in general do so within 10-14 (in general 12) weeks of pregnancy depending on the country. An additional longer time frame (18-24 weeks) exists if the pregnancy is a result of rape or incest or there is evidence of foetal abnormalities or the pregnancy or childbirth would endanger the physical or mental health or life of the mother or put her in a difficult life situation. Also, if there is a significant risk that the child may get a serious illness, as a result of hereditary predispositions, late abortion is often justified. Often, if the pregnancy turns out to risk the life of the mother, there are no time limits.

41. Some countries guarantee access to abortion on demand within 10-24 weeks of pregnancy as long as additional requirements are met, such as approval of one or two doctors or a competent body, mandatory counselling or a waiting period of 2-5 days between the provision of counselling and the abortion procedure. In the majority of those countries, after the period of 10-24 weeks, additional circumstances must be observed in order to get an abortion. For instance, a longer time period exists when the pregnancy constitutes a danger to the woman's health or when the pregnancy is a result of a criminal act, but also in case of foetal abnormalities. Additionally, some

[33] Guaranteeing sexual and reproductive health and rights for all women, in particular women with disabilities, Joint statement by the Committee on the Rights of Persons with Disabilities and the Committee on the Elimination of All Forms of Discrimination against Women, 28 August 2018, https://www.ohchr.org/Documents/HRBodies/CRPD/Statements/GuaranteeingSexualReproductiveHealth.DOCX.

[34] CCPR, General comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the right to life, CCPR/C/GC/36 (30 October 2018), para 8 (references omitted).

[35] Ibid.

[36] Albania, Belgium, Bosnia and Hercegovina, Croatia, Cyprus, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Latvia, Lithuania, Netherlands, Northern Ireland, Norway, Portugal, Romania, Scotland, Serbia, Slovakia, Slovenia, Spain.

[37] These survey results provide an insight into the situation in some European countries as assessed by NHRIs. They are not intended to provide a comprehensive or exhaustive assessment of the topic.

[38] Two ENNHRI members from United Kingdom contributed via survey to provide information on the national legislation concerning access to abortion in Northern Ireland and Scotland.

countries guarantee access to abortion after 10-24 weeks on broad socio-economical grounds. In case of those late abortions, national laws usually require additional counselling or approval. Some countries allow abortion without time limitation when the pregnancy constitutes danger to a woman's life or health.

42. Moreover, the analysis of all 26 responses to the survey leads to the observation that if the woman is under 18 years of age or has a mental disability or severe mental illness, in several countries written consent of one of the parents or a guardian is either required or advised. In some countries no consent of a parent/guardian is required in such cases, but the parent/guardian will be informed afterwards, unless there are specific reasons not to do so.

43. In some countries abortions cannot be performed in public hospitals but only in private clinics. In some countries only public state approved institutions or hospitals are authorised. In some countries there are geographical difficulties in access to abortion as only very few authorised clinics exist throughout the country.

44. In most cases, the professionals performing abortion must be certified specialists. Usually, they must work in a certified hospital or clinic. In most cases, abortions are performed by doctors, but also midwifes or other gynaecological specialists are allowed to proceed. In most countries, any abortion performed by an unlicensed person is punishable under criminal law. In some countries, medical professionals may refuse performing an abortion based on their personal beliefs, but they are obliged to advice on other personnel who can and will perform it.

45. From a comparative perspective, the Polish anti-abortion laws appear to be very restrictive. It is worth noting that in the past, Poland failed to protect women's rights and was repeatedly criticised for restrictive anti-abortion laws and lack of procedural safeguards guaranteeing real access to abortion[39].

46. ENNHRI would like to emphasise that there is currently a tendency to liberalise national anti-abortion laws. For example, currently, there is a citizen's initiative in the Finnish parliament to simplify the process so that in the future woman's self-determination and own will would be decisive factors instead of the current, at times humiliating and stressful procedure of establishing a specific reason for the abortion and discussing it with medical professionals. In the proposal one would simply ask for it without any permissions. In Norway, the Government has stated that it will establish a committee to review the provisions of the Abortion Act and to examine alternatives to the hospital abortion boards which currently assess applications for abortion after 12 weeks.

47. Moreover, in recent years, Ireland has liberalised access to abortion, including access to a termination in the first 12 weeks of pregnancy subject to certain restrictions.[40] Cyprus has amended anti-abortion provisions and introduced abortion on demand. In 2019, Northern Ireland decriminalised abortion. The French Parliament has just adopted a law that extends the legal period for abortion from 12 to 14 weeks of pregnancy (abortion on demand). Furthermore, in France midwives are now allowed to perform abortions which will increase the effectiveness of women's rights in France. New legislative proposals to enhance access to abortion have also been introduced recently in the Netherlands, where the mandatory reflection period will be skipped and an abortion pill will be provided by the general medical practitioner.

48. On the other hand, unsuccessful attempts to introduce more restrictive regulations regarding abortion can be observed in a few European countries. For example, in Slovakia several draft bills introducing restrictions in access

[39] Commissioner for Human Rights of the Council of Europe, Report following Comissioner's visit to Poland from 11 to 15 March 2019; Human Rights Committee, Concluding Observations: Poland, UN Doc. CCPR/C/POL/CO/7 (2016), CEDAW Committee, Concluding Observations: Poland, UN Doc. CEDAW/C/POL/CO/7-8 (2014); see also: see the Council of Europe's Committee of Ministers' Interim Resolution CM/ResDH(2021)44 adopted by the Committee of Ministers on 11 March 2021 at the 1398th meeting of the Ministers' Deputies.

[40] In December 2018, the Health (Regulation of Termination of Pregnancy) Act 2018 (the "Act") was signed into law by the President of Ireland. The Act provides the legislative framework for the provision of abortion care in defined circumstances from 1 January 2019. Abortion is lawful and free to persons normally resident in Ireland under the following circumstances: 1. On request, following a 3-day waiting period, up to 12 weeks of pregnancy; 2. For reasons of risk to a woman's life or serious harm to her health; or 3. In cases of fatal foetal anomaly. Abortion is criminalised in all other cases, however the criminal provisions apply to the abortion provider and not to the pregnant person who has availed of the abortion service.

to legal abortion were rejected by the Parliament. The public debate around the proposals reflects social attitudes and a lack of consensus on restricting women's rights.

Conclusions

49. ENNHRI submits that the clear implication from the international materials set out above is that a court composed in breach of legal provisions concerning the procedure of the appointment of judges cannot be deemed as meeting the requirement of being "established by law" and such composition leads to violation of the right to fair trial before an impartial and independent court. Moreover, in the situation where the question of effective remedies against an already launched and concluded procedure of constitutional review which raises doubts as to its compliance with law and the Applicants' rights, the possible application of Article 6(1) of the ECHR does not contradict the fact that the Convention does not confer the right to constitutional review. ENNHRI would also like to underline that in the light of ECtHR and CJEU case-law objectively justified, legitimate reasons to fear that a particular court lacks independence or impartiality, preclude considering the authority as meeting the Convention standard.

50. As regards the questions arising under Article 8 and 3 of the Convention in the context of limiting access to abortion, ENNHRI emphasises that the decision of a pregnant woman to continue her pregnancy or not belongs to the sphere of private life and autonomy. Recognizing that States have been allowed a wide margin of appreciation with regard to abortion law, ENNHRI reminds that the margin is not unlimited and does not allow to introduce arbitrary and disproportionate measures.

51. Moreover, ENNHRI would like to draw the Court's attention to the conclusions from the comparative legal analysis of anti-abortion laws which indicate that the majority of European countries guarantee relatively broad access to abortion given certain requirements are met. Also, a tendency is observed among European countries to liberalise national anti-abortion laws which is in line with the principle of non-retrogression.

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