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„Women's Reproductive Rights in Poland – A Question of Women's Human Rights in Europe"

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Lisa-Sophie Horntrich

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CHAPTER I. INTRODUCTION, OUTLINE AND RESEARCH AIM

1. Introduction

Women's reproductive choices have been subject to debates for as long as there were choices to be made. As Women do bare most of the burden of contraception gone wrong, pregnancy, childbirth and raising a child, their choices in reproductive matters are the primary focus of most debates on the issue. The questions which arise out of debates about reproductive health and choices are controversial, highly sensitive, morally influenced and often vigorously contested. Although the decisions on reproduction must be made individually, states have to regulate access to these reproductive services and reproductive health choices. Reproductive rights entail the legal rights and freedoms relating to reproduction and reproductive health as granted by the states. Additionally, there are standards set forth on reproductive rights by international organisations and human rights bodies. As discussions on reproductive rights as a subset of human rights began to develop in conjunction with UN Human Rights Conferences, human rights bodies can have a great influence on the issue. The conviction that reproductive rights are human rights has been subject in public and scientific discourse, some of the latter will be addressed in this thesis.

As human rights protect and safeguard the individual's ability to live with dignity, to enjoy full and equal rights they are key to women's right to self-determination regarding their own health and well-being. Women do need to make their own decisions to live the healthiest life possible which includes their options on reproduction and reproductive healthcare and availability of accurate information. Reproductive freedom can be seen as one of the core concept for human dignity, self-determination and equality.

For the region of Europe, the European Convention on Human Rights (ECHR) is the main and primary treaty set out to protect human rights and political freedoms. Basic human rights are enshrined in Articles 1 to 14 which are used for reference in the judgements of the European Court of Human Rights (ECtHR), a court of justice established from within the Convention. The articles of the Human Rights Convention, like the right to life, the right to respect for private and family life, the right to be free from inhuman and degrading treatment or the right to be free from discrimination can be applicable when it comes to issues like reproduction. There are various cases which were or currently are brought before the European Court of

Human Rights which involve reproductive rights. Some of these cases will be used as case studies later in this thesis.
What mainly links the cases used in this thesis together are two factors: First, they are cases in which women were (at one point during their pregnancy) denied timely and safe abortions even though they were entitled to a termination of their pregnancy by states law. Second, they involve Polish citizens and Polish law.

Within the region of Europe there are considerable differences when it comes to handling the issue of women's reproductive rights. Issues like abortion, assisted human reproduction and surrogacy are approached differently in the various European states. Every country regulates these issues on its own and there is no European-wide unilateral approach. Poland has one of the most restrictive abortion policies within Europe. To understand why Poland's laws are so restrictive and abortion is highly stigmatized in public, one has to consider the states historic development and the social composition of the country and region of Central and Eastern Europe.
The region of Central and Eastern Europe (CEE) has undergone drastic changes in the last three decades. It transformed from a centrally governed, communist regime to a region with separate democratic states which are embedded with their national values and norms. Since the collapse of the Soviet Union, the fall of communism and therefore the end of socialist economy the region of Central and Eastern Europe has transformed itself immensely. During the 1990s there has been a rapprochement with the EU which brought along an assimilation towards the EU's proclaimed core norms and values. The countries of CEE unmistakably oriented themselves on western nations and EU's laws when setting up their newly founded states. They drew inspiration and copied ideas from EU's laws and also tried to implicate norms and values that the western and EU countries hold in high regard. But they are also ultimately linked to their national identity, their culture and religious institutions. In Poland the Catholic Church had a stronghold on moral and ethics for the last centuries. Its influence is deeply linked to the Poles national identity, their perception of right and wrong and their opinion on morally sensitive issues. It is therefore extremely important to implicate the social, political and historical context when talking about the issue of abortion in Poland. The issue of women's reproductive rights and especially abortion is highly stigmatized and the topic is being discussed fiercely in Poland. In 2016 the conservative right-wing government made an attempt to ban all abortions but was stopped by nationwide mass protests of mostly women dressed in black. In the so called "black protests" tens of thousands of people demonstrated in the streets of Polish cities against the total

ban on abortions. As a result, the government did not move forward with the legislation. But the governing 'Law and Justice' party (PiS), supported by the Catholic Church, continues to cut women's reproductive rights. In 2017 the governing party pushed a controversial bill through Polish parliament which limits the access to emergency contraception because a doctor's prescription is now needed before obtaining emergency contraceptives. The latest attempt by the conservative government to further restrict reproductive choices was made in the beginning of 2018. The new proposal would allow abortion in cases where the mother's life is at risk or the pregnancy is a result of a crime but would ban abortions of fetutses with congenital disorders like Down's syndrome or other severe fetal impairments.

As these recent events show the issue of women's reproductive rights in Poland is still highly contested. Because of the social pressure from the Catholic Church and high stigmatization in public abortions are pushed underground. The *Federation for Women and Family Planning* estimates that there are approximately 150,000 abortions performed in Poland each year, contrary to the 1,000 legally performed procedures (http://en.federa.org.pl/). "Women put their health, social standing, future fertility, and lives at risk to end unwanted pregnancies" write Yanda et al. (Yanda, Smith, und Rosenfield 2003, 277). "Providing the option of a safe abortion is a pragmatic, effective means of addressing a women's right to health", which is part of all human rights declarations (Yanda, Smith, und Rosenfield 2003, 277).

This thesis is divided into four chapters and ten sections. The following section explains how the subject of reproductive rights in Poland and as a human rights aspect is approached. It also describes the research question and elaborates the method which was used for the research of this thesis. The third section focuses on the theoretical framework and the aspects involved in the subject area of reproductive rights in Poland and in the international human rights context. This section will elaborate the 'reproductive rights are human rights' concept and feature some of the important works done in this field. Reproductive rights as human rights is the key concept used as basis for this research. The idea that reproductive freedom leads towards women's empowerment and ultimately to equality between the sexes is the basic narrative for this research. The fourth section explains and describes different aspects which are involved and need to be considered when researching the issue of reproductive rights in Poland and within the international or regional context. A brief summary will be given regarding women's rights in Poland during the time period before and after the fall of communism, the Catholic Church as the main religious institution in Poland and their extraordinary status in Polish society,

unlawful abortions in Poland, the European influence on Poland and the concept of women's rights as human rights.

The fifth section of this thesis which concentrates on reproductive rights in Poland, with a description of the historical developments of reproductive rights in Poland in the political context, the most important currently active legislative document as well as other laws and regulations effecting abortions in Poland. Furthermore, the status of the unborn and the future child will be described and the concept of conscientious objection will be explained. In addition to the historical and legal framework of abortions in Poland, the reality of abortions in Poland will be briefly mentioned within the fifth section.

The sixth section will focus on the European Convention on Human Rights, the main rights listed and the issue of abortions under the premise of the Convention. For reference the status of the unborn and the future child under the ECHR will be outlined and rights relating to abortion will be analysed. Consequently, the legal status quo of Poland will be compared to the legal specifications of the ECHR and the ECtHR rulings on the concerned issues in the seventh section.

The eight section analyses the four cases which were selected for this research. The circumstances of each case will be outlined as well as the decisions explained and their implications on the human rights issue illustrated. The selection of the cases was made according to the following criteria: The cases had to involve Polish citizens and had to refer to the issue of abortion.

The ninth section summarizes the four cases and tries to estimate the impact these cases had on the evolution of women's reproductive rights as human rights. In the last chapter a conclusion will be drawn and the research questions will be answered briefly.

I do not aim to draw a full and complete picture of the status quo of women's reproductive rights in the human rights context nor do I claim that this approach, method or theoretical framework are the only possible strategy to analyse the subject. I merely selected the involved aspects as well as authors, articles, books, judgements and legal documents that I deemed most relevant to my research interest.

2. Approach, Research Question and Methodology

This research will focus on women's reproductive rights on the domestic level of Poland and the supranational level of the European Court of Human Rights (ECtHR). The focus will be drawn upon the issue of abortion. The research will include the jurisdiction on the national level of Poland and on the European level, with the ECtHR as an institution on the European level with special focus on human rights. As the ECtHR is based on the European Convention on Human Rights, formally the *Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR), the articles of the Convention serve as the primary source for the research on the legal standpoint of the ECtHR. Additionally, the rulings of the ECtHR in individual cases will be used to demonstrate the status quo. I will conduct a case study on the legal framework of women's reproductive rights in Poland, how the issue of abortion is addressed in the European Convention on Human Rights and the rulings of the European Court on Human Rights regarding Polish cases which involve the issue of abortion. I will use actual cases brought before the ECtHR as examples to visualize the current status quo and pay attention to the standards the ECtHR has developed with the rulings regarding the selected cases.

2.1 Research Question and Research Gap

The principal interest of this thesis is to research the status quo of Polish law on the issue of abortion and how the European Convention on Human Rights addresses this issue. For this research the theory that women's reproductive rights should be regarded as human rights is assumed. Women's reproductive choices should be regarded as a human right and hence the European Convention on Human Rights is an appropriate instrument of the issue of human rights in Europe. The thesis will address the legal status quo in the two entities of Poland and the ECHR/ECtHR as well as compare and highlight the differences and similarities. Furthermore, the third chapter of the thesis will analyse actual cases brought before the European Court of Human Rights by Polish citizens. This analysis will allow an insight into the point of view of the European Court of Human Rights and the implementation their judgements have. Additionally, it will be explained what kind of impact the judgments of the ECtHR in these cases have on the issue of reproductive rights as human rights.

The proposed research questions for this thesis will be formulated as follows:

Q: Does Poland's restrictive abortion law pose a threat for women's human rights?

Poland has one of the most restrictive abortion laws in Europe which means that women's choices on reproduction are limited. Unwanted pregnancies can pose a risk to health and wellbeing of women. "Laws that deny, obstruct, or limit availability of and access to reproductive health services are being challenged as violating basic human rights that are protected by international human rights conventions" (Cook 1993a, 74). "If international human rights law is to be truly universal, it has to require states to take effective preventive and curative measures to protect women's reproductive health and to afford women the capacity for reproductive self-determination. International human rights treaties require international and national law to secure women's rights to: (1) freedom from all forms of discrimination; (2) liberty and security, marriage and the foundation of families, private and family life, and information and education; and (3) access to health care and the benefits of scientific progress" (Cook 1993a, 75). The European Convention on Human Rights is the regional human rights convention which "prohibits discrimination on grounds of sex and requires respect for various rights related to the promotion and protection of health" (Cook 1994).
To find an answer to the question of possible threats to women's human rights because of Poland's restrictive abortion law the following sub-questions need to be answered:

Q1: What is the status quo of the legal regulations regarding abortion in Poland?

Q2: How is the issue of abortion addressed in the European Convention on Human Rights?

Q3: Has the European Court of Human Rights found human rights violations in cases of Polish citizens concerning women's reproductive rights?

Q4: How did those findings contribute to the issue of women's reproductive rights as human rights?

Numerous researchers have previously dealt with abortion policies in Poland during varying time periods as well as with gender equality in Poland before and after the admission to the European Union (e.g. Roth 2013; Sedelmeier 2009; Gerber 2010; Kulczycki 1995; Pailhé 2003; Nowicka 1996, 2001; Mishtal 2009; Fuszara 1991; Czerwinski 2004). There has also been extensive research on women's human rights (Friedman 1995; J. S. Peters und Wolper 1995; Bunch 1990; Cook 1993b, 1995; Fraser 1999). But the research has been insufficient in regards to the human rights aspect of Polish abortion policies. There is a lack of research on if and how restrictive abortion policies can lead to violations of women's human rights. Furthermore, the role of the European Court of Human Rights and the standards it can set in the field of women's reproductive rights have not been analysed to their full extent. During the preparations and search for literature, research which included all of the four cases brought before the ECtHR which were selected for this thesis could not be found. Some literature contained one, two or three of the cases but not all four of them. As some of the judgments on the cases are quite recent this is self-evident but they pose important indicators for the status quo not only of Polish abortion policy but also of the position the ECtHR takes on the issue of abortions.

2.2 Methodology

This thesis consists of case studies on the Polish legal system regarding abortion, the ECtHR's legal regulations and four cases of Polish women brought before the ECtHR alleging violations of their human right's due to the restrictive abortion law and individual circumstances.
The research will be conducted via case study. Case studies as approaches of a qualitative, empirical research are complex but open up possibilities for a variety of data collection methods. Case studies as research methods are defined as follows:

"A case study is an empirical inquiry that investigates a contemporary phenomenon within its real-life context, especially when the boundaries between phenomenon and context are not clearly evident." (Yin 2003, 13).

Yin further defines three types of case studies: explanatory, exploratory, and descriptive. The designs therefore can be single- or multiple-case studies. Methods for this type of research can be qualitative, quantitative or both (see Yin 2003). Yin describes the components of a case study design and their functions in five points: First, a study's questions; Second, the study's theoretical propositions which limit the scope and suggest possible links between the

phenomena; Third, the study's units of analysis; Fourth, the logic linking the data to the propositions; Fifth, Criteria for interpreting the findings – iteration between propositions and data (Yin 1994). He states that the research design links the data which is to be collected and the conclusion which are to be drawn to the initial question of the study. It should provide a conceptual framework and an action plan for getting from the question to the conclusion (see Yin 1994).

In this thesis a qualitative, multiple-case, descriptive case study will be performed. The research questions are lined out in the section above. The theoretical propositions are explained in the next two sections. As a theoretical framework the proposition of women's reproductive rights as human rights will be used. Additional phenomena and involved aspects will be explained in section four. The units of analysis for this research are the Polish legislation on abortion and the ECHR's legislation applicable to the issue of abortion. They will be described later in this thesis. Additionally, individual court cases in front of the European Court of Human Rights will be used to elaborate on the status quo. The logic which links the data to the proposition will be explained and an interpretation of the findings will be given.

I will examine each of the individual study units in depth and pay regards to the particular context. Every research unit represents unique circumstances which need to be explained. The court cases in front of the ECtHR are mere examples of violations of the reproductive rights of individuals in an international court and do not provide basis for a general conclusion on the status of reproductive rights in Poland or in Europe.

3. Theoretical Framework

In the following section I will elaborate on the Women's Human Rights framework that I used for the theoretical positioning of my thesis. For the theory of women's rights as human rights I will mainly draw on the works of Cook (1993), Peters and Wolper (1995), Charlesworth, Chinkin and Wright (1991) as well as Charlotte Bunch (1990). The theory of Women's rights as Human rights will be used in order to analyse the women's reproductive rights in Poland and the cases of Polish women in front of the European Court of Human Rights. This section, as well as section four, will explain the main ideas and coherences.

The United Nations' *Universal Declaration of Human Rights* declares that "all human beings are born free and equal in dignity and rights". Yet, as history and various recent statistics tell, women do not always have the same rights and liberties as men, instead their freedom and equality is often compromised by social circumstances or/and law.

International human rights and the legal instruments surrounding it, like most legal framework, have been developed by mostly men in a male-oriented world (see Cook 1993, 238). Whereas Women's perspective as well as their rights have long been ignored or degraded. Traditionally "human rights formulations are based on a 'normative' male model and applied to women as an afterthought, if at all" state Peters and Wolper in their Introduction of their book *'Women's rights, human rights'* (Peters and Wolper 1995, 2). Human rights were not created in a gender sensitive way and were therefore often criticized as gender-biased. Or as Charlesworth, Chinkin and Wright declare: "International law is a thoroughly gendered system" (Charlesworth, Chinkin, and Wright 1991, 615).

"International human rights law has not yet been applied effectively to redress the disadvantages and injustices experienced by woman by reason only of their being woman. In this sense, respect for human rights fails to be 'universal'", with this statement Rebecca Cook starts the introduction of her article in *Human Rights Quarterly* (Cook 1993b, 231). She states that there has been a failure of human rights groups to address the issue of violations of women's rights and a failure of women's group to fully utilize the human rights law to vindicate women's rights (see Cook 1993). The women's human rights movement originated from women's organizations on the local, national, regional to international levels mostly surrounding issues that affect the daily life of women. The movement on women's human rights includes the efforts that were undertaken to use the human rights framework to "promote the achievement of women's rights in the interrelated areas of political, civil, economic, social, and cultural rights" (Friedman 1995, 19).

Human rights organizations have traditionally been focused on state-sanctioned or –condoned oppression, "which takes place in the 'public sphere', away from the privacy to which most women are relegated and in which most violations of women's rights take place" (Peters and Wolper 1995, 2). This touches on one of the key points of the question of why women's rights as human rights have not been adequately addressed. The divide between the public and private sphere is one of the scenes where the differences between rights violations of men and women are explicitly depicted. Any wrongdoings committed in the private sphere, where the most disregard for women's rights takes place, without direct involvement of state agents, has not been considered a human rights issue for a long time. Women's rights are often violated by

private actors in women's communities rather than state actors as traditionally targeted by human rights law. Women's rights violations take place in the private setting rather than the public sphere, which makes it harder to address them as human rights matters instead of isolated incidences concerning women only. While human rights law has been used to hold governments accountable for the actions of their governmental agents it can also be seen as "condoning" private-agent abuse through "inadequate prosecution of wife abuse, sexual harassment, rape, etc. – and thus be held accountable" (Friedman 1995, 21). Bunch emphasizes that the "human rights community must move beyond its male defined norms in order to respond to the brutal and systematic violation of women globally" (Bunch 1990, 492).

Human rights did not originate from the legal order of modern States, they are part of the moral structure and include shared values like freedom, dignity, fairness, equality, respect and independence.

Human rights were established as the rights for every human being. They entail people's basic rights and freedoms that belong to every person from birth until death. They can not be taken away, although they can sometimes be restricted. People can demand those rights on the sole basis of their existence as human beings. Instead of arguing the disregard of women's issues in the human rights framework some women, especially during the 1980s and 1990s, began to use the human rights framework to advance women's rights. "Instead of claiming rights as women, they claimed the human rights of half of humanity. Failure to 'respect and recognize woman as human' […] then caught the attention of those who otherwise might not have thought about women's rights" (Friedman 1995, 22).

Up to this date, women still do not have equal rights and women's rights have not been fully accepted as human rights. The simple fact of being female constitutes one of the highest risk factors for various crimes. The risk of women and girls becoming victims of various crimes is so much higher that a new word was created to address the issue – gendercide. Gendercide symbolizes the systematic killing of members of a specific gender. Female fetuses are more likely to be aborted than male fetuses; young girls are often fed less, receive health services less frequently and die or become physically and mentally impaired because of malnutrition more often than boys; as adults, women are often denied the right to make choices over their own bodies and experience health challenges like pregnancy and childbirth which carry extended health risks. Complications stemming from pregnancy and childbirth are the leading cause of death in young women between the ages of 15 and 19 years in developing countries (World Health Organization 2009, 12).

The understanding that it is a woman's right to decide if and when she wants to have children has changed and evolved over the last 50 years, at least in the developed world. The 1968 *Proclamation of Teheran* was the first important international document to address the individual's right of making childbearing decisions. In 1979, the *Convention on the Elimination of all Forms of Discrimination Against Women* was first to address family planning. In the 1990s, the questions of sexual and reproductive health and rights, violence against woman and unequal balances of power was highly involved in the global and national discourses of human rights. In 1994, at the International Conference on Population and Development, over 175 governments agreed that making free and informed decisions about pregnancy and childbirth is a basic right.

The protection of women's reproductive health and rights has historically not been very high on the agenda of governments. Women's reproductive health "raises sensitive issues in many legal traditions because it relates to human sexuality and affects the moral order. […] This traditional morality is reflected in laws that attempt to control women's behaviours by limiting, conditioning, or denying women's access to reproductive health services" states Cook (Cook 1995, 256). Although slowly, change is happening in most parts of the world. This also reflects on the women's human rights movement. The women's human rights movement holds the opinion that to deny or obstruct a woman from availability of and access to reproductive health services is violating women's basic human rights protected by international human rights conventions (see Cook 1995, 259). The availability and access to safe abortion services is necessary to ensure that women can make use of their right to health.
Cook holds the opinion that a restrictive abortion law "does have a significant impact in perpetuating women's oppression". She states that a restrictive abortion law "exacerbates the inequality resulting from the biological fact that women carry the exclusive health burden of contraceptive failure" and that it "requires women with an unwanted pregnancy to carry that pregnancy to term with all of the consequent moral, social, and legal responsibilities of gestation and parenthood" (Cook 1993a, 78). "The purpose of such a law is to serve the state's interest in the protection of prenatal life, which becomes more compelling as the pregnancy advances. A restrictive abortion law is only one means of protecting prenatal life, and the question has to be asked whether it is the best means "(Cook 1993a, 78).

I will use the Women's rights as Human rights framework for my research on women's reproductive rights in Poland. I argue that, because of the restrictive abortion law in Poland,

women are denied the choice to self-determination on if and when they want to have children. Their autonomy in matters concerning their own body is severely limited by the state, which constitutes a direct interference of the state into women's private lives. Poland's laws should aim to protect the Polish citizens and their private lives rather than making the protection of prenatal life a priority. Poland and its restrictive abortion policy restrict women's access to effective regulatory procedures and mechanisms regarding pregnancy and childbirth, limiting them in their autonomy and self-determination. Their right to health and their right to freedom are severely restricted because of Poland's restrictive law on abortion. I argue that women's reproductive rights are a woman's basic right to her own body and her health. Women do have the right to health integrity, to equality and equal treatment and a right not to be discriminated against under several declarations and conventions. Reproductive self-determination is the first step to empowering women to take charge of their lives and, as a result of that, will hopefully lead to gender equality.

4. Related issues

As this research touches upon a great variety of subjects the following section will elaborate on relevant literature on the issue of Poland's history with special focus on the period of change from State Socialism to democracy, abortion law and the Catholic Church as a relevant political actor. Furthermore, the EU as a norm generating and norm promoting actor and the EU's influence on its member states will be explained. This section will also include relevant literature on women's rights and women's reproductive rights as fundamental human rights.

4.1 Women's rights in Poland's change from Communism to Democracy

The fall of communism and the following changes were a chance to right some of the wrongs State Socialism has made in the countries of the former Soviet Union. The countries of Central and Eastern Europe showed an interest in democratic systems and implemented the concepts of democracy. Under State Socialism women's rights were clearly defined. Women were equal to men, they had the same rights and responsibilities as men did. Although this commitment to equal rights for men and women was primarily introduced so that women would have an equal role in economic production and place the state above family, it brought alongside opportunities for women. State Socialism increased women's reproductive autonomy and granted women the right to decide for themselves if and when they wanted to have children, by giving them access

to legal abortion for socioeconomic reasons, free of charge. This possibility quickly changed after 1989 and women in CEE countries were often forced back into more traditional roles - into family and reproductive work.

Joanna Caytas published an article focusing on women's rights as a "political price of Post-communist transformation in Poland". She states that the regime change of 1989 tightened and restricted women's rights especially concerning reproductive rights (Caytas 2013). The Polish Anti-Abortion Act of 1993 introduced one of the most restrictive abortion policies in Europe. It extremely limits women's possibilities to have a lawful abortion. On the same hand the Act sets an "absolute legal recognition of the sanctity of the life of the fetus above that of its pregnant mother" (Caytas 2013, 65). She ascribes this order of priorities to the pro-nationalist policies and the fundamentalist doctrines set up by the Catholic Church and the governing parties (Caytas 2013, 65). Women's rights in general "have been the first disposable item to be sacrificed in ideological and religious battles waged by political and professional opportunists, virtually all of whom were male. As a consequence, matters concerning women's health and bodies found themselves usurped by a reconstituted patriarchal establishment for ideological and political purposes after 1989" she states (Caytas 2013, 65). "Women's rights and interests became the first casualties on a path to democracy that has brought reproductive health laws which are far more restrictive than anything the population had endured under communism" Caytas adds (Caytas 2013). Caytas writes that gender-based discrimination in the area of reproductive health can take place on three distinct levels: 1) at the level of the nation state with its legislative authority, 2) at the level of professional self-regulation of physicians, and 3) at the professional and private level of the individual, who faces social pressures as well as financial incentives to conform (Caytas 2013, 88).

In the discourse on women's rights as human rights a distinction between the public and private sphere is also accentuated. Just as Caytas states, gender-based discrimination or violation of women's human rights can take place in a private setting as well as they can be condoned or abetted by the state. Although formally equal to men, women during State Socialism were still faced with inequalities. State Socialism reaffirmed the private sphere as a women's domain and favoured men for jobs which were higher paid and had more responsibilities.

4.2 Progress of women's rights in Poland post 1989

In 2009 Anika Keinz published an article with the focus on women`s movements and activists in regard to gender roles and women`s issues in Poland after the collapse of communism. Keinz

holds the opinion that the discussion about issues concerning women did not start with a western intervention after 1989. She thinks that women did start a discourse on gender-based discrimination while still being under State Socialism. However, the negotiation of women's issues and gender equality in Poland is tied closely to interpretations of democracy. The change to democracy was often associated with a "loss of freedom" for women and generally appeared "as a narrative of loss", writes Keinz (Keinz 2009, 39). Keinz also argues that "historical discourses and hidden codes that operate within public debates about democracy, gender equality, and feminism, in which imaginations of Polish national identity and of Europe" play an important role (Keinz 2009, 39). She furthermore adds that "diverse actors, particular political parties and informal women's networks and NGO's in Warsaw" are crucial for the discussion of women's roles and gender equality in Poland (Keinz 2009, 39)

Keinz thinks that the relationship between gender equality and politics in Poland was problematic because of two reasons: "First, socialist-era policies mandating gender equality, particularly through workforce participation, were perceived as imposed by foreign – Soviet – rule. Second, Catholicism was linked to national identity and nationalism in Poland as socialist state control over public life and the media had channelled nationalist emotions into the realm of religion" (Keinz 2009, 40). The very strong impact of the Catholic Church influenced policies on women's issues and gender equality. The Catholic Church has a long history of putting women into more 'traditional roles' telling them to focus on their reproductive obligations and teaching them to accept their fates as women. Catholic gender roles display a very patriarchal view on society, which is often the foundation of a perceived 'ordinary' family life. Keinz mentions that after 1989, "Christian values have been increasingly used as moral tools to bind the nation and the newly created democratic state with state representatives claiming moral authority by explicitly referring to Catholic values" (Keinz 2009, 40). Political actors and political parties in Poland often base their political programs on catholic values and express this circumstance in order to gain sympathy and hence votes.

Keinz writes that the change from the soviet socialist regime towards democracy was displayed and seen as a process of normalization and therefore a change back to 'normal', traditional, Catholic values. Keinz quotes Peggy Watson when she states that "differentiation of the sexes based on traditional views of what constitutes as a 'normal man' and a 'normal women', function as a vehicle for the transformation in Eastern Europe: freedom is associated with the freedom to act within traditional female and male social roles, undisturbed by the restrictions of a socialist state" (Keinz 2009, 43). The process of Democratization was praised as a return

to natural order and therefore to traditional gender roles all under the influence of the Catholic Church. It was a process of re-masculinization and re-traditionalization of gender roles.
Keinz finished her article with the conclusion that even though women's groups were often associated with socialism they "operate within the European language of rights in order to legitimize their demands" (Keinz 2009, 51). The EU is seen as a "means through which different understandings of social roles could be implemented and as an authority that would teach Polish politicians gender equality and democracy" (Keinz 2009, 51). On the other hand, conservative politicians and their parties stress the importance of the Catholic Church and their traditional values for the national identity of Poland. They frame the EU as "yet another form of foreign rule" (Keinz 2009, 51). Because of the liberal values the EU promotes, some Polish conservatives believe that the EU's ways are not compatible with the traditional Polish way of life which heavily relies on the Catholic Church and their values. One of the issues that separates the EU from Poland is the morally sensitive and highly controversial issue of abortion. Dorota Szelewa is one of the authors who were interested in the abortion law in Poland post-1989 and the role of the Catholic Church in Poland. She states that post-1989 "developments with regard to abortion law in Poland show the influence of the Catholic Church as a very powerful societal actor on the drafting and implementation of one of the most important policies affection women's rights and gender relations" (Szelewa 2016). Szelewa writes that the Anti-Abortion Act of 1993 was a compromise between different social and political actors but also the Polish Catholic Church. For many Poles Catholicism is deeply related to their national identity and therefore good Poles must also be good Catholics and follow the Catholic Church's believes and regulations.

4.3 The Catholic Church, an important political actor in Poland

The Catholic Church historically has a strong stand in Poland. One of the reasons why is because they were the voice of opposition during State Socialism. The Catholic Church was one of the few allowed opposition movements during the Soviet era and therefore still draws from this period, where the church was viewed as a voice for the people against the socialist rule. "In fact, the Church's priests were actively engaged in staging strikes in factories, also participating in the national meetings of the Solidarity trade union" (Szelewa 2016). "After the collapse of State Socialism, the Catholic Church represented, in a way, one of the 'heroes' of the opposition's fight for freedom and therefore gained direct access to public debate and the media, which was in the process of turning its attention from issues of national independence

and religious freedoms to the content of public policies in the new, democratized Poland" as Szelewa writes (Szelewa 2016, 743). They were also actively involved in the making of the new Poland after 1989. Many authors have linked the nation building process in Poland with Catholicism and conservative policies on family and gender related matters (Deacon 1993; Fodor et al. 2002; Pailhé 2003). Especially during the 1990s the Catholic Church in Poland presented itself as the defender of the national identity and the protector of the Polish family. They "presented abortion as infanticide (another variety of genocide)" and set abortion on a level with the Nazis endeavour to reshape society in line with their believes (Szelewa 2016, 758). Szelewa holds the opinion that the Church's strong influence can be seen most effectively "in its victory effecting a shift in the discourse and in official legal language" (Szelewa 2016, 758). "The symbolic victory of the Church over abortion law is evident in the shift in general discourse and in the official language of legal acts, where, for example, 'fetus' has been replaced by 'conceived child' (in the law) or by 'unborn child' (in discourse)" (Szelewa 2016). This fact is also mentioned by Wanda Nowicka in her 1996 article. She stated that Catholic activists used and still use language to persuade the Polish public. "The debates surrounding the anti-abortion law have seen new concepts introduced into official Polish language" (Nowicka 1996, 24). Nowicka calls out the Catholic Church's involvement in the Polish politics of the 1990s as 'Catholic Fundamentalism' (Nowicka 1996). She states that the Catholic Fundamentalism has always been there but became more visible when communism collapsed. With Józef Glemp as a figurehead the Catholic Church became more fundamentalist and held a no-negotiation position on issues like religious instruction in schools or the anti-abortion law (Nowicka 1996). The 'Polish Pope', the admiration he inspired in Poland and his anti-choice position when it comes to abortion further strengthened the Church's position and ambition in this matter. A number of catholic women's organisations and also the Pro-Life Federation gained influence during the 1990s and effectively influenced the discourse on abortion with their anti-choice position by speaking out in various media outlets often using language that would counteract with a women's right to choose and a women's autonomy over their body, for example, by naming the fetus 'conceived child' instead (Nowicka 1996).

But the Church was not only involved in the change of language in law regarding fetuses but also in "eliminating health insurance coverage for contraception in 2002, and began to encourage physicians to invoke conscientious objection to limit contraceptive prescriptions" as Mishtal wrote in her 2010 article on the privatisation of reproductive health in post-socialist Poland (Mishtal 2010, 57). Mishtal puts it this way: "The fall of State Socialism in Poland in 1989 constituted a critical moment that redefined policies regulating reproductive health and

access to care. As the Polish state adopted the discourse and agenda of the Catholic Church in its health policies, reproduction and sexuality became sites of moral governance through the implementation of the Conscience Clause law, which permits healthcare providers to deny medical services citing conscience-based objection". She states that the Catholic Church played an important role in the creation of the new law on women's rights, reproduction and sexuality. She takes a closer look on the so called Conscience Clause law which states that a physician can refuse health services because of "conscience-based objections" (Mishtal 2009). The Anti-Abortion Act of 1993 followed after the Conscience Clause law. The restrictive abortion law was implemented by the Polish government without a referendum despite significant protests and polling evidence showing that the restrictions did not reflect the will of the population. The Catholic Chruch held a strong stance in Polish society not only during socialist times but also in the time of change after the collaps of the Soviet Union. The first serious attempts to restrict abortion were started in 1984 by Cardinal Jósef Glem as he "waged the first serious campaign to outlaw abortion" (Mishtal 2009, 162). After 1989, the Catholic Church was openly and strongly involved in establishing a new state, government and laws. Mishtal argues that the Catholic Church used the Conscience Clause as a political tool to "expand the confines of its centalized power by incorporating subtle forms of regulation through which the ubiquity of power becomes less visible as it is broadly dispersed via a wide range of processes and techniques of control, rather than being directly wielded by the clergy" (Mishtal 2009, 177). Mishtal states that one of the most obvious missteps of Polish post-socialist politics has been the "disregard for women's concerns, including the rejection of Solidarity Women's Section's protests about restriction on abortion in 1990, the rejection of the petition with 1.3 million signatures calling for a referendum on abortion in 1993, the implementation of a law that according to surveys was clearly in conflict with the will of the people, and the denial of the existence of an abortion underground" (Mishtal 2009, 177)

4.4 Obstacles on the path towards an abortion in Poland

One of the problems with Poland's restrictive abortion laws is that it does not eliminate abortion. Women who want, feel the need to or are desperate to have an abortion but can not legally get a medically safe abortion will find different ways to terminate their pregnancy. In 2001 the *Polish Federation for Women and Family Planning* organised a tribunal on abortion rights to "publicise the negative consequences of the criminalisation of abortion in Poland" (Girard und Nowicka 2002, 22). With the use of testimonials of seven Polish women's experiences with

legal and illegal abortions a case should be made to show the risks of the Polish Anti-Abortion Act of 1993. The aim was to show that "restrictive abortion laws make abortion unsafe by pushing it underground, endanger women's health, create a climate where even those services that are allowed by law became unavailable, and contravene standards set by international human rights law" (Girard and Nowicka 2002, 22). Girard and Nowicka list a few of the obstacles women face when they try to have a legal abortion in Poland. The Anti-Abortion Act allows abortions under three circumstances: if the mothers life is endangered due to the pregnancy, if the child will be born with severe damage or incurable disease or if the pregnancy is a result of a criminal act. But there are other factors that hinder women from getting a legal abortion: Girard and Nowicka mention that the Act "does not provide for a particular format for the confirmation of health risk, fetal malformation or criminal circumstances" (Girard and Nowicka 2002). This leaves space for interpretations which could lead to fatal decisions for women. But also physicians can face disasterous consequences when performing an unlawful abortion. "Illegal termination of pregnancy before viability of the fetus (viability is not defined) carries a penalty of up to three years' imprisonment for the person who performs the abortion. Beyond viability, the penalty is a maxismum of eight years' imprisonment" (Girard and Nowicka 2002).

Sterilisation is another controversial topic in Poland. It "remains illegal, physicians who perform it clandestinely can be punished with imprisonment of up to ten years" (Mishtal 2010, 57). The Catholic Church holds a very strong opinion on this issue as well – sterilisation is considered a sin and "any effort to decriminalise it would undoubtedly be opposed" (Mishtal 2010, 57). But not only the Catholic Church is an obstacle on the path of Polish women to autonomy over their bodies. While during State Socialism a lot of reproductive health matters where funded by the state, the new democratic state organised itself around neoliberal economic principles. The new system "gave market forces primacy over economic and social policy and led to social welfare cuts, privatisation, decentralisation and deregulation" (Mishtal 2010, 57). Maternity leave was also cut, childcare facilities were privatised and family cash benefits reduced (see Mishtal 2010, 57).

The change from State Socialism to a neoliberal democracy brought along a privatisation of health care services. "Health care is divided into public and private, with a grey sphere of informal payments" states Mishtal (Mishtal 2010, 57). "Formally, there is a free public health care system via the National Health Fund, but due to cuts in government expenditure and shortage of providers, who have emigrated in pursuit of better wages, public facilities are overcrowded, with long waiting lists, scarce medical supplies and out-of-date technology"

(Mishtal 2010, 57). In 1999 five types of birth control pills were eliminated from the list of subsidised medicines, "deeming their use as elective rather than medical, and making it difficult for many women to continue using them" (Mishtal 2010, 59). These methods of birth control are hence no longer substituted by the state which makes them harder to finance for many Polish women.

After the Anti-Abortion Act of 1993 abortion services in the few cases in which an abortion is legal were completely privatized. Physicians now charge a high fee for performing this service. Mishtal asserts that the ban "represents a legal form of 'privatisation', which led to the migration of patients and doctors to the unregulated private sector" (Mishtal 2010, 60). Agata Chełstowska refers to this circumstance as "the grey zone of private arrangements, in which a woman's private worries became someone else's private gain, and her sin turned into gold" (Chełstowska 2011, 98). She goes even further and states that the combination of "right-wing ideology and neoliberal economic reforms have created reproductive and social injustice" because women with money can afford health services that working class women can not (Chełstowska 2011, 98). "With an estimated 150,000 abortion per year, a rough estimate of US$ 95 million is being generated annually for doctors, unregistered and tax-free" (Chełstowska 2011, 98). She argues that abortion is stigmatised as "morally wrong, legally prohibited, made inaccessible in public hospitals and unacceptable to speak of" so much that the private worries of woman are made into profits in illegal abortions (Chełstowska 2011, 99). Even though the law allows abortions in certain circumstances it can also be interpreted in many ways and also entails other obstacles on a women's path to obtain an abortion. "It is the interpretation and the political intent that pushed legal abortions out of public hospitals and more widely, the public sphere" argues Chełstowska (Chełstowska 2011, 102). She therefore sees "a direct link between the extent of stigmatisation of health service like abortion and the amount of space for growth of its provision on the private sector" (Chełstowska 2011, 102). "The media, the Catholic Church and politicians concentrate on the moral and political aspects of the matter, asserting constitutional right to life of a fetus, and about Christian values, which Poland needs to convince decadent Europe to accept" writes Chełstowska (Chełstowska 2011, 99).

4.5 The EU, a norm generating and promoting institution

The European Union, as a political system sui generis, is built upon specific ideas, values and norms. It is often viewed as a community of norms and values. On their website the European

Parliament states that "*respect for human dignity and human rights, freedom, democracy, equality and the rule of law*" are the EU's fundamental values (https://europarlamentti.info/en/). Values like democracy and human rights have become fundamental for the EU's identity. The EU's dedication to its core values was expressed in various documents. The Copenhagen Criteria exclusively mention certain values as explicit conditions for membership. When countries wish to join the EU, they must guarantee the respect for democracy, the rule of law, human rights and the rights of minorities (EC, Enlargement, Accession Criteria).

In his article, Ian Manner expressed his idea that the EU's power as an international actor originates from its identity as a normative agent and its ability to promote core values in external policies (see Manners 2002). The EU therefore builds its legitimacy upon its power as a normative actor. Bolleyer and Reh picked up this idea in their 2012 paper on the legitimacy of the EU. Their article addresses the question of how the EU as a multilevel policy organisation and entity 'sui generis' can be viewed as a legitimate actor. The authors express their opinion that "EU member states and their peoples largely share the fundamental values underlying their respective political orders" (Bolleyer and Reh 2012, 472). They argue that "legitimacy roots in citizens' affiliation with a balanced set of core values and their structural realization in a polity's institutions, processes and rights" (Bolleyer and Reh 2012, 473). "Such an affiliation is based on the polity's normative or moral – rather than utilitarian – justifiability" they continue. The authors write that the EU faces the challenge of the "co-existence of states and individuals as normative reference points" but also "the (in)compatibility of value configurations across levels in European polity" (Bolleyer and Reh 2012, 473). It is one of the main tasks of the EU to balance values and therefore "needs to decide who should carry which value at what level", say Bolloyer and Reh (Bolleyer and Reh 2012). This pays tribute to the fact that the EU is not a homogenous society and not all countries share the same opinion on every issue. Gender equality is one of the norms the EU tried to promote and incorporate into all of its member states. In his 2009 article named "*Post-accession compliance with EU gender equality legislation in post-communist member states*" Ulrich Sedelmeier asked the question if the new EU members "comply with EU law even after they have obtained membership" (Sedelmeier 2009, 1). He uses the institutionalists approach of positive and negative incentives as key factors of implementing a norm. The possibility of becoming an EU member has previously been proven to be a positive incentive for adopting EU rules in candidate states (Schimmelfennig and Sedelmeier 2004). Sedelmeier concludes that compliance after the accession in the analysed member states is "much better than might have been expected in view of the changing incentive structure" (Sedelmeier 2009, 2). He added that "during the first five years of membership, most

new members outperformed virtually all of the old member states" (Sedelmeier 2009, 2). Sedelmeier focuses on the "transposition of EU legislation into national law and the enforcement powers of domestic equality institutions established to support implementation" (Sedelmeier 2009, 2). He compared pre- and post- accession performance, as well as differences in transposition and enforcement capacities across countries and time periods (Sedelmeier 2009, 2). The states he used for his analysis Czech Republic, Hungary, Slovenia and Lithuania showed deviating explanatory factors that were further analysed.

Although Sedelmeier focused on gender equality at the workplace regarding issues such as equal treatment at work and equal pay, his results can be seen as examples for the implementation of EU gender norms. Sedelmeier exhibited that "despite the decline in the sanctioning power of EU institutions, there is no significant deterioration in the post-accession period compared to the pre-accession period" (Sedelmeier 2009, 13). Sedelmeier identified two different routes that could lead to successful transposition and strong equality bodies: "One is the absence of high adjustment costs" the other option would be "the combination of strong social democratic governments and NGOs specialising in EU gender equality legislation" (Sedelmeier 2009, 14). In his opinion the best way would be a combination of both routes. He also concludes that not only the positive or negative incentives from the EU`s side but also favourable domestic conditions were a crucial part in explaining compliance or non-compliance with EU legislation. He states that the weakening of such incentives "does not necessary lead to a deterioration of compliance if domestic conditions are favourable (Sedelmeier 2009, 14). So domestic conditions and the atmosphere in one country can positively influence or hinder the implication of EU norms, values and also legislation.

Olga Avdeyeva was also interested in the domestic conditions of candidate states in Central and Eastern Europe and how they contribute to the compliance with EU gender norms. In 2009 she published an article "*Enlarging the Club: When do Candidate States Enforce Gender Equality Laws?*". The research of this article focuses on the implication of Gender Equality Laws in the labour market in candidate states before their acceptance into the EU. She discovered discrepancies in the degree of compliance with the EU`s obligations and locates the reasons for these discrepancies in the domestic political systems of the countries. Avdeyeva focused on political actors such as social movement actors, female parliamentarians and parties in national parliaments. She stated that domestic political actors are of high importance to the legislative and institutional reform on gender equality (Avdeyeva 2009). One year later Avdeyeva published another article where she again stressed the importance of domestic

political systems, actors and their capabilities to mobilize, for the level of success when it comes to implementing gender equality norms. Avdeyeva repeated her argument from her 2009 article and describes the process of compliance in two stages: the first stage is the adoption of policies on gender equality, or the transposition of EU directives in domestic legislation; the second stage is the institutional reform which needs the institutional capacity to fully extent its potential. Avdeyeva concluded that there is a gap between legislative and institutional reform. Meaning that the Central and Eastern European countries that became members of the EU are "more likely to transpose policies on gender equality than to establish strong institutions that would enforce these policies" (Avdeyeva 2010, 214). Gender equality rules are therefore transposed but not implemented. She comes back to the domestic political system when she states that "domestic political systems are found to have an impact on both stages of government compliance with international requirements" meaning that governments could stall or reverse the reforms of domestic legislation and implementation (Avdeyeva 2010, 215). Avdeyeva furthermore adds that there are three main variables in the domestic political system which are decisive for the implementation process: Number one is the strength of the women's movement, number two is the ideology of the parties in power and number three is the proportion of female MPs (Avdeyeva 2010). So the women in power positions – in governing positions as well as in a strong civil movements - have a strong influence on the implementation of gender legislation. They can have an impact on the success of gender equality laws.

4.6 Women's reproductive rights intertwined with human rights

To achieve gender equality, gender mainstreaming of all laws, domestic and international is necessary. Instead of a devaluation and denial of women and their rights, women's rights have to be regarded as universal and untouchable. The basis for all rights are human rights. Women's rights have to be integrated into human rights because women's right are human rights.
Arvonne Fraser traces idea of women's human rights back to Mary Wollstonecraft's book *Vindication of the Rights of Women* from 1792 which was published as a response to the announcement of the natural-rights-of-man theory (Fraser 1999, 855). The situation of one gender establishing rule over the other gender has been going on for centuries and is, unfortunately, still adequate today. For hundreds of years, especially before safe and effective birth control, the role of a care-giver in marriage, home and for their family was women's way of ensuring economic survival and social acceptance. Young girls were brought up to become wives and mothers rather than workers or fighters. They were deprived of education making it

even harder for them to escape their traditional roles. By the end of World War II more and more women had become educated and "had obtained enough legal and social freedom to participate in public life, even at the international level" (Fraser 1999, 857). And so they were actively involved in the founding of the United Nations and "the phrase 'equal rights of men and women' was inserted in the UN Charter" (Fraser 1999, 857). The *Convention on the Elimination of All Forms of Discrimination Against Women* became a vital instrument in the fight of acknowledgement of women's rights as human rights. "In the twenty-year period from 1975 to 1995, masses of women moved from portraying themselves as victims at the mercy of male rulers in the private and public sectors to taking leadership roles in demanding their human rights" (Fraser 1999, 902). Charlotte Bunch made an important contribution to the discourse of Women's Rights as Human Rights with her 1990 article in *Human Rights Quarterly*. She states that: "Promotion of human rights is a widely accepted goal and thus provides a useful framework for seeking redress of gender abuse" (Bunch 1990, 487). She advocates that the "specific experiences of women must be added to traditional approaches to human rights in order to make women more visible and to transform the concept and practice of human rights in our culture so that it takes better account of women's lives" (Bunch 1990, 487). Bunch also draws to the attention of the divide between violations of human right in private and public spheres and emphasizes that "the assumption that states are not responsible for most violations of women's rights ignores the fact that such abuses, although committed perhaps by private citizens, are often condoned or even sanctioned by states" (Bunch 1990, 488).

The article of Charlotte Bunch in 1990 represents the decade where transnational women's movements hoped for new gains, for example the recognition of "the right to legal abortion and sexual rights" (Nowicka 2011, 120). Nowicka states that the early 2000s, and especially the War on Terror, set the clock on human rights way back. She argues that this is also the case with women's rights movement, which "have been pushed into a corner" and have had to pull all their efforts into "holding the line" rather than "trying to push the boundaries of progress on unresolved issues" (Nowicka 2011, 120). Nowicka asserts that the accession of Poland and Malta into the EU has had a "chilling effect on the advancement of human rights, especially [on] sexual and reproductive health and rights" (Nowicka 2011, 123). She denounces that the EU's agreement that "questions of moral significance, as well as those related to the protection of human life" and their regulation on a national rather than supranational level, paralyses the EU in its achievements in the human rights sector. The circumstance of member states deciding morally sensitive questions on their own rather than in a EU wide perspective has led to the fact that the EU "does not have any policy regarding sexual and reproductive health and rights in

Europe" (Nowicka 2011, 123). Nowicka furthermore adds that women's groups are increasingly using national and international courts to address violations of the reproductive rights of individuals. This strategy is "aimed at strengthening the implementation of human rights by forcing governments to improve their policies in the area of sexual and reproductive health and rights as well as at expanding the practical application of human rights in the area of reproduction and sexuality" (Nowicka 2011, 124). The European Court of Human Rights is the institution concerned with human rights violations within the region of Europe and its member states.

4.7 Interim Conclusion

Following the literature described in the sections above, it is argued that women's right to autonomy and self-determination is one of their fundamental rights as human beings. Women's rights should be regarded as human rights and entail their right to choices regarding pregnancy and childbearing. Poland's restrictive abortion law strips women of their choices and the Catholic Church is furthering their agenda without paying respects to the women in their congregation.

The EU, as a supranational organisation with supremacy over its member states, has the opportunity to promote values and norms like freedom, human dignity, democracy, rule of law, equality and human rights in the region which is part of their sphere of influence. Their norm promotion is an method which can be used to spread values. All of the organizations within Europe have the chance to accentuate the importance of not only promoting and recognizing but also of implementing regulations that further the cause of women's reproductive rights. The European Court of Human Rights is one of these important outlets that can initiate change, which is why it is used as an example in this thesis. Because although "women's rights are now recognized as human rights, recognition does not mean implementation" (Fraser 1999, 906).

CHAPTER II. LEGAL FRAMEWORK

5. Reproductive rights in Poland

This section will provide a summarized history of the Polish reproductive rights laws focusing on the issue of abortion and the current legal status. It will also include a description of the direct or indirectly involved actors for example the Catholic Church, their role in the Polish society and their influence on women's reproductive rights. The high stigmatisation of abortion and abortion services in Poland needs to be explained within the political context of a changing system and the actors involved in this change.
This section will furthermore give a more detailed description of the Anti-Abortion-Act of 1993 which is still in place upon this date as well as list other relevant paragraphs touching upon the subject of abortion. Additionally, the status of the unborn, the status of the (future) child and a physician's right to object to performing abortion on the basis of conscience will be explained. The last part of this section describes the reality of abortions in Poland.

5.1 Historical development of reproductive rights in Poland

Poland's political history is dominated by wars with their neighbouring countries and foreign rule. The geographical location between Russia and Germany and their access to the Baltic sea made it an arena for fights of power by the surrounding empires. By the end of World War Two the Soviet Union stretched its reach over the Polish country and communist rule was in place until the round-table talks between the Solidarity movement, the Communists and the Catholic Church facilitated the fall of communism in Poland. The first partially free elections were held in 1989 and Poland's transformation from socialism to market economy began. With the opening of EU membership talks in 1998 and Poland's accession into the EU in 2004 new social and economic challenges followed.

As turbulent as the Polish state's history is the Polish abortion history. Abortion legislation was first regulated in 1932, when the Polish state was newly founded after 123 years of partition and occupation by Russia, Prussia and Austria. "The Polish Penal Code of 1932 permitted abortion when the mother's health was at risk and in cases of pregnancies resulting from unlawful intercourse such as rape, incest or intercourse with a minor" (Caytas 2013, 65).

In 1956, when Poland was still under communist rule, abortion in cases of "difficult living conditions" was legalized. "This standard reflected chronic and severe housing shortage during the communist era and amounted to a de facto legalization of abortion on demand" (Caytas 2013, 65). This regulation "did not specify time limits during which an abortion could be lawfully performed and guaranteed the availability of free abortion in all public hospitals" (Caytas 2013, 65). Contraceptives were very hard to come by in Poland throughout the communist era, so abortion became a method of family planning with numbers up 130,000 abortions per year in Poland (Chełstowska 2011, 101). Other authors put the number of performed abortions per year at about 150,000 (Caytas 2013, 73) while Kulczycki speaks of close to 500,000 per year (Kulczycki 1995, 475). The Catholic Church used its influence to demand "an amendment of existing regulations by the Ministry of Health" and the government revised administrative requirements for abortion in 1981 . This new regulation required doctors to provide "more detailed description of the circumstances on which the decision to abort was based in each individual case" (Caytas 2013, 66). Although 'abortion on demand' was still legal and available in public hospitals free of charge, the Catholic Church used their influence on society to stigmatize the issue of abortion.

The Catholic Church has played an important role in Polish society for the last centuries. Catholic religion has been a stronghold for the Polish identity in the turbulent history of the country. Especially under the Soviet Rule the Catholic faith served as a binding agent between Poles and their national identity. When the communist rule weakened the political institutions, the Catholic Church represented a sphere of law and order worth trusting in.

The Catholic Church in Poland had a very unique and important role in the Soviet Union. Contrary to other communist countries in Europe, the Church in Poland obtained a high level of autonomy and freedom in practice. It became a sanctuary of the Polish national identity and influenced society very deeply. The Church gained strength during the period of communism but also contributed to the dissatisfaction of the soviet regime. It gave people an impulse and a chance to unify against the communist regime which was strengthened by the solidarity movement of Lech Walesa. The solidarity movement helped create the Soviets "first legal independent workers' union and evolved into a major social movement for democracy and capitalism, leading to the downfall of communism in Poland in 1989" (Czerwinski 2004, 657). Even after the fall of communism the Catholic Church held power of the political sphere. Their influence is represented in various spheres of the newly founded Polish state. "The Catholic Church represented, in a way, the 'heroes' of the opposition's fight for freedom and therefore gained direct access to public debate and the media, which was in the process of turning its

attention from issues of national independence and religious freedoms to the content of public policies in the new, democratized Poland" as Szelewa describes it aptly (Szelewa 2016, 743).
In Poland the influence of the Catholic Church and its believe system is mirrored in several aspects of society until this day. Besides abortion law this is also the case with "hindering access to publicly funded contraception" as well as "restricting public debate on lesbian, gay, bisexual and transgender rights and on civil partnership", as Szelewa quotes Mishtal and Dannefer, and Keinz (Szelewa 2016, 744; Mishtal and Dannefer 2010; Keinz 2010). After the fall of the communist regime in 1989 the new catholic-influenced government addressed the issue of abortion on demand and abortion as a method of family planning. Because of the important role the Catholic Church played in instituting change during the communist era, which ultimately resulted in the fall of the Soviet regime, the newly founded government was "harbouring a sentiment of profound indebtedness and obligation vis-à-vis the Church" (Caytas 2013, 66). The issue of abortion was one that the Catholic Church had and still has a very strong opinion on and so it was on top of their agenda right after the new government was founded. During the transition period the Church strengthened their impact on the political sphere "in an effort to reverse the communist legacy with its separation of Church and State and secularization of society" (Caytas 2013, 66).
In 1990 new regulations were passed so that now multiple consultations and certifications from four different specialists were required and social or economic grounds were excluded as reasons for an abortion. This especially effected women from rural areas and made it very difficult or nearly impossible for them to fulfil the requirements and obtain a lawful abortion if they wanted to. The regulations of 1990 also introduced a *"Conscience Clause"* which allowed physicians to refuse to carry out abortions on moral grounds. "The result was an almost instant wave of mass declarations of conscientious objections that ended *de facto* the availability of abortion throughout entire hospitals" (Caytas 2013, 68).
In 1992 an even more restrictive bill was accepted which re-introduced penalties for women who had self-induced abortions and also included a complete ban on contraceptives and in vitro fertilization (Caytas 2013, 69). This new bill created a lot of resistance in which 1,3 million signatures were gathered to demand a referendum on this changes in law. But the government and the Sejm rejected the referendum proposal.
The restrictive bills of the early 1990s were partly due to the new form of discourse on abortion: The words 'pregnant woman' and 'fetus' were replaced by 'mother' and 'unborn baby' in the public discourse. An aborted fetus was referred to as an 'unborn murdered child'. These wordings hold symbolic powers and are very strong tools in the process of stigmatizing

abortions. The "emphasis on abortion as an act of infanticide is the prevailing line of argumentation advanced by the Catholic Church and secular Catholic organizations" (Szelewa 2016, 744). These changes have a significant impact on people's way of seeing and talking about the issue. The pro-life movement "helped transform the national consciousness with images of bloody foetuses, thanks to developments in science and intra-uterine photography" (Chełstowska 2011, 102). It was "a lost battle over language", as Chełstowksa quotes Agnieszka Graff (Chełstowska 2011, 102). The new language was not only incorporated into the public discourse but furthermore into state documents and law.

Only a short while later a slightly less restrictive bill was approved. In 1993 the *Act on Family Planning, Human Embryo Protection, and Conditions for the Lawful Termination of Pregnancy* came into force. It is commonly known as the Anti-Abortion-Act. This act is one of the strictest abortion laws in Europe. It only grants abortion in cases of danger to a woman's life or health, if the pregnancy resulted from a reported criminal act or if the fetus would be incurably deformed or have other severe impairments.

The Anti-Abortion-Act of 1993 was not only celebrated by the public but also harshly criticized and many attempts of liberalization were undertaken. One attempt, which would have allowed abortion on social grounds, was opposed by the right-wing president Lech Walesa and did not come to pass. Under the following left-wing president, Aleksander Kwaśniewski, a liberalized abortion bill was enacted in August 1996. This bill provided abortions on social and economic grounds and ended the monopoly of state hospitals with regard to all abortion procedures. It also "removed the preamble of the Act that took the protection of human life from conception, its pro-life verbiage and the given civil rights to the embryo in the Civil Code" (Caytas 2013, 70). The new Act would also provide sexual education in schools and affordable birth control but the medical association did not change its policies accordingly so the implementation of this new legislation was incomplete (see Caytas 2013, 70).

The liberalized Act was challenged only a year later in 1997. The petitioners were of the opinion that the new statute "violated the rights of the fetus, who was deemed a Polish citizen with full constitutional rights who was simply temporarily unable to exercise his or her constitutional and human rights" (Caytas 2013, 71). To hold the option of abortions on social or economic grounds after this petition, the parliament would have needed a two-thirds majority for a change in law. This did not happen due to elections which brought a pro-life majority to the parliament.

In 1997, additions to the Anti-Abortion-Act of 1993 were made which further specified the requirements for abortion. Furthermore in an 1999 amendment to the Polish Penal Code possible penalties for infanticide were added (see Caytas 2013, 72).

Since the 1999 amendments the left-wing politicians have made campaign promises to liberalize the abortion law but never actually accomplished it. In the early 2000s the left-wing government had to form an alliance to get the Catholic Church on board with their EU-accession-plans and sacrificed their abortion liberalization plans for it. In 2002 the women's organizations' coalition, '*Association of Women of the 8th of March'*, actively fought for the right to legal abortions. They published an open letter to the European Parliament signed by "the most influential female entrepreneurs, actors and writers" entitled *'100 Women's Letter'* drawing attention to the agreement between the Polish government and the Catholic Church to support the admission into the EU (Szelewa 2016, 753; Graff 2003, 110). The letter read:

> *"A peculiar agreement has been reached by the Catholic Church and the government concerning Poland`s admission into the European Union. Namely, the Church will support integration with Europe in return for the government's closing the debate on the revision of the anti-abortion law. (...) This is accompanied by a characteristically biased way of speaking. Protection of unborn life is treated as an objective dogma, while abortion on social grounds is spoken of in quotation marks and treated as an 'ideological' claim made by feminists, who attempt to legalize murder" (excerpt from '100 Women's Letter', quoted by Graff 2003,110)*

It was assumed that the government needed the support of the Catholic Church in the national referendum on EU accession to gain the amount of votes that had to be reached for a success in the referendum.

In 2004 a coalition of Catholic parties formed the new government and strived for a total ban on abortion. They did not succeed but drew a lot of attention to the controversial topic. Since then there have been various attempts of pro-life and pro-choice supporters to change the status quo, none of which were successful. The centre-right coalitions of 2007 and 2015 were more interested in maintaining the status quo of abortion legislation. In 2015 the right-wing political Law and Justice (PiS) won 235 of the 460 seats in the lower house of Parliament, meaning it had a clear majority. The PiS is openly supported by the Catholic Church and has a very conservative and strict attitude towards the abortion issue. In July 2016 a proposal for total ban on abortions was submitted to the parliament by the conservative organization Ordo Iuris

Institute and supported by the Catholic Church. This proposal would have included a total ban on abortion and the threat of criminal prosecution for both doctors and women with up to a five-year-prison-sentence. On the day when the bill was debated in Sejm, demonstrations called the "Black Protest" were held. The following weeks more protests and demonstrations under the banner of "Czarny Protest" („Black Protest") were held. On Monday October 3rd 2016 hundreds of thousands of people in over 140 cities and villages in Poland took part in the "Czarny Poniedziałek" („Black Monday") protests. A few days later politicians were distancing themselves from the proposed legislation and so the attempt of a total ban of abortion from 2016 failed.
This means that the regulations from 1993 together with the additional amendments are still in force.

5.2 The Anti-Abortion-Act of 1993

All of the quoted paragraphs are directly drawn from the legal document which is the 1993 *Act on Family Planning, Human Embry Protection and Conditions for the Lawful Termination of Pregnancy*.

> **Article 1:** *The right to life shall be subject to protection, including in the prenatal phase, to the extent provided in the Act.*

This article protects the right to life from the moment of conception onwards. The prenatal phase of human life is specifically mentioned, a pro-life move, to give more weight to the belief that human life starts with conception not with birth or at any other time.

> **Article 2:** *Public administration and local self-government bodies, within the limits of their respective competences, as specified in particular regulations, shall be obliged to provide medical, social and legal aid to pregnant women, […]*
>
> 2. *Public administration and local self-government bodies, within the limits of their respective competences, as specified in particular regulations, shall be obliged to provide citizens with free access to methods and measures of conscious procreation.*
>
> *2a. […], shall be obliged to provide free access to information and prenatal examinations, especially when there is an increased risk or suspicion about the occurrence of a genetic or developmental fetal defect or an incurable illness that*

imperils the fetus's life.

Public institutions and health services are instructed to provide medical, social and legal aid to woman as well as methods and measure of conscious procreation free of charge and information about possible health risks for the fetus. They are instructed to give information on matters of intentional procreation and thereby help people to get pregnant and have a child without genetic or developmental defects.

> **Article 3:** *1. Public administration and local self-government bodies shall cooperate with and offer help to the Catholic Church, other churches and religious organizations, as well as social organizations that organize care for pregnant women, arrange foster families or contribute to the adoption of children.*

The Catholic Church and other churches who are involved in care for pregnant women or adoption services are specifically mentioned and should be assisted by public institutions.

> **Article 4:** *1. Courses on the sexual life of an individual, principles of conscious and responsible parenthood, the value of the family, life in the prenatal phase, as well as on methods and measures of conscious procreation shall be introduces into school curricula.*

This article refers to sexual education in schools. It does mention the responsibilities of parents, the value of family, life in the prenatal phase and methods of conscious procreation but does not mention that students should be educated about issues like for example sexually transmitted diseases, different ways of contraception or unwanted pregnancies.

> **Article 4a**: *1. A termination of pregnancy may be performed only by a doctor, when:*
> *1) The pregnancy poses a threat to the life or health of the pregnant woman,*
> *2) Prenatal examinations or other medical conditions indicate that there is a high probability of a severe and irreversible fetal defect or incurable illness that threatens the fetus's life,*
> *3) There are reasons to suspect that the pregnancy is a result of an unlawful act,*

Here the specific circumstances in which legal abortions can be performed are listed. They are worded very ambiguously and leave room for interpretation of the individual cases or situations. In the following sections additional requirements, the exact timeframes and procedures are described.

2. In the cases referred to in paragraph 1 (2), the termination of pregnancy shall be permissible until the fetus is capable of living independently outside of the body of the pregnancy woman; in the cases referred to in paragraphs 1 (3) or 1 (4), if not more than 12 weeks have elapsed since the beginning of the pregnancy.

3. In the cases referred to in paragraphs 1 (1) point 1 (2), the termination of the pregnancy shall be performed by a doctor at a hospital.

4. The written consent of a woman is necessary to terminate the pregnancy. […]

5. A doctor, other than the one who terminates the pregnancy, ascertains that the circumstances referred to in paragraphs 1 (1) and 1 (2) have occurred, unless the pregnancy is a direct threat to the woman's life. The circumstances referred to in paragraph 1 (3), shall be ascertained by the public prosecutor. […]

8. Separate regulations shall apply to private clinics where termination of pregnancy is performed, with respect to professional and sanitary requirements for the premises and the equipment of the private clinics, as well as with respect to the medical documentation and management of those clinics.

9. The Minister of Health and Social Welfare after consultation with the Polish Chamber of Physicians and Dentists will determine, by regulation, the professional qualifications of doctors that entitle them to perform a termination of pregnancy, as well as the qualifications of doctors referred to in paragraph 5.

Article 4b: *Persons covered by social insurance and persons entitled to free health care on the basis of other regulations shall be entitled to free pregnancy termination in a public health care institution.*

This article states that abortions performed in the specific circumstances mentioned above should be performed in public hospitals and are free of charge. Women who want to terminate their pregnancy have to fulfil all of the conditions mentioned in article 4a to obtain a legal abortion in a public hospital. The terms of a legal abortion are set quite high, making it difficult to obtain a lawful termination of pregnancy.

The Anti-Abortion-Act is unmistakably very critical of abortions and can definitely be considered pro-life. The name itself points out that the people behind this law are of a pro-life

attitude by calling it the *Act on Family Planning, Human Embryo Protection and Conditions for the Lawful Termination of Pregnancy* or also the abbreviation Anti-Abortion-Act.
The language in this statutory speaks of education on 'life in the prenatal phase' and does not mention education on sexually transmitted diseases, methods of contraception or unwanted pregnancies. Some terms in the various articles of this law are very general and vague, although "it enumerates very specifically the authorities whose concurring certification is required in order to perform a lawful abortion, namely three doctors or one doctor and a public prosecutor" (Caytas 2013, 70). The Act also restricts the access to prenatal testing and introduced certain changes to other legal statutes like the Polish Civil Code.

5.3 Additional statutes effecting abortion

In 1997 additions to the 1993 Anti-Abortion-Act were made. The Constitutional Tribunal's ruling of May 28, 1997 Paragraph 4(a) of the amended Act provides:

1. *An abortion may be carried out only by a physician where*
    1) *Pregnancy endangers the mother's life or health;*
    2) *Prenatal tests or other medical findings indicate a high risk that the fetus will be severely and irreversibly damaged or suffering from an incurable life-threatening disease;*
    3) *Strong grounds support the belief that the pregnancy resulted from a criminal act.*
2. *In the cases listed above under 2), an abortion may be performed until the fetus is capable of surviving outside the mother's body; in the cases listed under 3) above, that time shall be until the end of the twelfth week of pregnancy.*
3. *In the cases listed under 1) and 2) above the abortion shall be carried out by a physician working in a hospital. (…)*
4. *Circumstances in which abortion is permitted under paragraph 1, sub-paragraphs 1) and 2) above shall be certified by a physician other than the one who is to perform the abortion, unless the pregnancy entails a direct threat to the woman's life.*

Constitution:

> **Article 38 of the Constitution:** *The Republic of Poland shall ensure the legal protection of the life of every human being.*

The Constitution of Poland protects the lives not only of all Polish citizens but of "every human being". This section does not specify conditions of this protection or when human life begins or ends. The Constitutional Tribunal added the protection of "life at every stage" (Federation for woman and planning, supra note 57).

Penal Code:

The Penal Code from June 1997 further restricted lawful abortions by prison sentences for damages caused to "the body of the conceived child" or to its health, which resulted in further limitations to the availability of prenatal testing (Penal Code of 6 June 1997 (Pol) art. 157a. Journal of Laws 1997, no. 88, item 553).

Civil Code:

> ***Article 8 §2*** *of the Polish Civil Code reads: A conceived child shall also have legal capacity, however, it shall enjoy its property rights and obligations provided it is born alive.*
>
> ***Article 446****: Upon birth, the child may demand redress for damages suffered before birth.*

This gives the fetus the rights of a citizen even before it is born and thereby creates a conflict between the rights of the mother and those of the fetus, in which the rights of the fetus may outweigh the rights of the mother.

5.4 The status of the unborn in Polish law

As the Act of 1993 is called the Act on *'Family Planning, Human Embryo Protection and Conditions for the Lawful Termination of Pregnancy'* it gives away the intention of protecting human embryos. The first Article reads: "The right to life shall be subject to protection, including in the prenatal phase". With this first article it is made clear that the intention of protection for a prenatal phase is of high priority.
In 1997 the constitutional court of Poland, the Constitutional Tribunal, declared that abortion at any stage of a pregnancy would violate the person's right to life and that the 'conceived child' must be protected from abortions because it is entitled to the constitutional protection of its life

and health. This statement of the court not only spoke out against abortion but declared the fetus as a person and a subject of the state before birth. Following, the fetus obtains "legal capacity" and could potentially "'claim redress' against 'the mother'" (see Holc 2004, 755). Holc states that the Court introduced a new category of citizens, 'the fetal citizens', whose rights are recognized and thereby have to be protected by the state. The fact that the fetus is now considered a person and a citizen means that the child now has "the possibility of acquiring its property inheritance from the mother" and an abortion would violate "its rights in a manner that is contradictory to the principles of a democratic legal state and the principles of equality" (Holc 2004, 755). The Polish legal system ultimately makes the fetus a citizen giving them all constitutional rights of a citizen including the right to life, right to health, property and equality. This regulation gives the fetus de facto citizen status even before birth and therefore equates the fetus' life with the pregnant women's. Korolczuk describes these circumstances as a "recontextualization of the fetus – positioning it firmly in the public sphere rather than in the women's body and making it into a citizen-subject" (Korolczuk 2016, 129).
As Holc concludes: "If access to abortion is a *rozterek* – an essentially irresolvable issue- whenever the state declares an equal interest in both the fetus and the pregnant women, then apparent 'solutions' will always carry with them some kind of instability or ambivalence" (Holc 2004, 777)

5.5 The rights of the (future) child in Polish law

The legal regulations regarding fetus' and embryos in Poland are very much "oriented towards the future". The recognition of fetus' as citizens gives them the right to be protected by the state. This 'fetal citizenship' would entail future rights, "including the right to 'undisturbed development' and achieving success in life" which are now guarded by the state, "as it does yet not have the possibility to act on them" (Korolczuk 2016, 129).
"Constructing the fetus as a privileged medical and legal subject blurs the difference between human beings and fetuses, thus challenging the constitutive categories of citizenship" states Korolczuk (Korolczuk 2016, 129). As the fetus legally becomes a citizen before birth, with all the rights this citizenship includes it becomes subject to the state and therefore is entitled to the state's protection.

5.6 Practicing abortion in Polish law

The provision of abortion care represents an ethnical challenge for the involved physicians and care givers. In countries where abortions are considered a crime, providing abortions is not only a moral question for the physician himself/ herself but also a question of a possible penalty. Physicians can refuse to perform any activity that the individual considers incompatible with their own religious, moral, philosophical or ethnical beliefs. Even when the legal requirements are met, a physician can still refuse to take part in a medical procedure based on their own beliefs which include religious, ethnic, moral or philosophical grounds. They can also refuse the discrimination of women with complications resulting from an induced abortion or even a spontaneous miscarriage. These two possible forms of refusal to perform abortions are aside from the legal framework that grants or prohibit abortions. A physician's conscientious objection is one of the difficulties surrounding the issue of abortions because it poses an ethical dilemma between the protection and promotion of a woman's right to choose over her own body and the defence of a physician's right to act upon their own moral conscience.

For Polish physicians a so called '*Conscience Clause'* exists which can be invoked by physicians and even hospital directors on behalf of their entire facilities to not perform abortions. It is regulated under section 39 of the Medical Profession Act. Section 39 of the Medical Profession Act states that a doctor may refuse to carry out medical service, invoking her or his objections on the ground of conscience. The doctor is obliged to inform the patient of this objection and inform the patient where they can obtain the requested medical service.
In Poland doctors did not actively help to stop the policy restrictions on abortions up to this date. They did not gather and get involved in any of the protests as a group. Because physicians' organizations where banned under communism they were not as involved in the political discussion of legal abortions right after communism ended and important changes were made. Nowadays they often use the option of 'conscientious objection' to avoid getting involved with the politics of abortion. Although all over Poland medical facilities and physicians invoked the Conscience Clause to not perform abortions, the *Federation for Women and Family Planning* (FWFP) estimates that up to 200 000 clandestine abortions are performed annually (Nowicka 2001, 226–27). Because of the stigmatisation of abortions very few of the women and health personnel interviewed for a qualitative study of Mishtal and de Zordo admitted to having or performing clandestine abortions but when asked proxy questions they show knowledge about abortion services (De Zordo and Mishtal 2011, 33). The refusal of physicians to perform

abortions in public health facilities forces women into the private medical sectors where doctors do perform abortions. Clandestine abortions in a private practice are very cost intense for women and highly lucrative for physicians as they often cost more than a monthly wage of a doctor (De Zordo and Mishtal 2011, 33). The defamation of abortions in Poland, especially from the Church's side, pushes abortion services into the private or even illegal sector where women have to pay more and are exposed to greater risks whereas physicians can earn more.

5.7 Reality of abortions in Poland

The current Polish law allows abortions in three circumstances: when the women's life or health is in danger, when the fetus shows a serious, incurable deformity which threatens the life of the fetus and when the pregnancy is the result of a criminal act like rape or incest (which has to be reported and acknowledged by state authorities and the pregnancy has to be less than 12 weeks along). The Polish Anti-Abortion-Act of 1993 is one of the strictest abortion laws in Europe.
It outlawed 97% percent of abortions that had been performed previously (see Mishtal 2010, 60). "Since 1956 only 3% of all abortions had been performed for these reasons [see circumstances listed above]. Hence, 97% of abortions were likely to be driven underground" (Mishtal 2010, 60).
When comparing abortion statistics from before and after the enactment of the Anti-Abortion Act a very high discrepancy becomes obvious. From 1965-88 when abortion was legal and accessible the annual number of abortions was around 130,000 - 150,000 (see Caytas 2013, 73; Chełstowska 2011, 103). These only show the number of abortions performed in public hospitals. When also considering abortions performed in private, Caytas puts the number of estimated abortions performed under communism at "twice or even three times as large as the reported figures", which would mount up to 300,000 – 450,000 per year (Caytas 2013, 73).
From 1988-93 the number of legal abortions rapidly dropped from 105,333 to 685 (Chełstowska 2011, 101). That is a decline of 99% in only six years. "From 1993 to today, the number of legal abortions remains minimal, between 124 and 499 annually" (Chełstowska 2011, 101). This rapid decline in abortions without drastic improvement of availability of other birth control options or an extremely increased birth rate can only be explained by an immensely profitable underground abortion market.

Because of the strict abortion law that only allows abortions in very specific reasons, Polish women had to find other ways of ensuring that a pregnancy was their own choice. Today private

health care providers almost have a monopoly on abortion services because of the very high stigmatisation of abortions and of women who have made the decision to terminate their pregnancy. The stigmatisation has reached a level where "it has been pronounced to be morally wrong, legally prohibited, made inaccessible in public hospitals, and unacceptable to speak of, even between the closest of friends" (Chełstowska 2011, 99). This stigmatisation forces women to look for solutions in the 'private sector'. The public enviousness against abortion and the stigmatization directly links to the growing and highly lucrative private abortion economy.

But the illegal underground abortion market brings along a very high risk factor for the women in need of using it. Without the save environment of a hospital there is a greater risk for infections and a higher risk of complications without the possibility of judicial repercussions in form of medical malpractice claims.

The costs of illegal abortions are higher than the average monthly wage: "In 2005, the average monthly wage was PLN 2500 ($770), while the average price of a surgical abortion was PLN 3000 ($930) and for a pharmacological abortion PLN 900 ($280)" (Caytas 2013, 74). Chełstowska also researched the price of abortions and found it to be between 1,500 and 4,000 PLN (380 - 500 up to 1,000 EUR) for a surgical abortion and 400 – 1,000 PLN (100 – 250 EUR) for a medical abortion (Chełstowska 2011, 102). Although the prices are varying they are very high compared to an average monthly wage and hence not within the price range of many Polish women. This creates social inequality for Polish women who can or cannot afford this medical service.

Moreover, since the abortion services are almost only available from private sector providers and not from public hospitals the prices (as well as the quality of care) are not regulated. Instead they can be set by each provider themselves without much competition from other facilities because women in need of this procedures are in desperate situations and therefore do not have the time and resources to search for or gain access to alternatives.

When now considering that there are 80,000 – 200,000 illegal abortions performed per year at a cost of 3000 PLN each, that would generate an estimated amount of PLN 240-600 million [56 – 140 million EURO] in the clandestine abortions market each year – completely unregistered, unregulated, ungoverned and tax-free.

In 2003, there were only 1000 – 1500 licensed gynaecologists in Poland (see Caytas 2013, 75). Since the illegal underground abortions are most likely performed by one of those licensed physicians in a private setting the PLN 240-600 million would be distributed among those gynaecologists, resulting in an income from unlawful abortion practise at around "$38,000 – $ 95,000 per year in a country where the average annual wage is $9,240" (Caytas 2013, 75).

The very high costs of illegal abortions create another obstacle for many women but at the same time cause serious incentives for the physicians performing these procedures.
The stigmatisation and illegality of abortions in Poland opened up the possibility for a highly lucrative clandestine market which is flourishing without any government regulations of price, quality of care or accountability for all of it.

6. Reproductive Rights under the ECHR

In this chapter a brief history of European human rights laws and its most important document the *European Convention on Human Rights and Fundamental Freedoms* will be provided. It will also contain a summary of the Convention and an overview of the articles which it entails. This introduction is intended to explain the direct link of Human Rights and Fundamental Freedoms for the issue of women's reproductive rights. Because when it comes to reproductive rights the European Convention on Human Rights can contribute to enforcing these rights, as will be shown later on.

The *European Convention on Human Rights and Fundamental Freedoms* was first drafted in the 1950s by the Council of Europe, opened for signature in November 1950 and came into force in 1953. The Council of Europe was founded after the Second World War as means to protect human rights and the rule of law as well as to promote democracy. The Convention was drafted as a way to secure basic human rights for anyone within their borders, their own citizens as well as people of other nationalities. It is largely based on the *United Nations Universal Declaration of Human Rights* which was proclaimed by the United Nations General Assembly in Paris on 10th December 1948 "as a common standard of achievements for all peoples and nations" („Universal Declaration of Human Rights" 2015).
The Convention also shows a strong link to democracy with the incorporation of traditional civil liberties. It is the general believe that only democracy and the freedom it beholds can guarantee the protection of human rights. A state has to be part of the Council of Europe to be invited to sign the *European Convention on Human Rights and Fundamental Freedoms*. Today all 47 Member States of the Council of Europe have signed the *European Convention on Human Rights and Fundamental Freedoms*. It is enforced by the European Court of Human Rights in Strasbourg and the Council of Europe itself.

The European Convention on Human Rights is split into two sections: the first part consists of numbered 'articles' which protect basis human rights and the second part deals with the procedural matters. This research will focus on the articles and judgements that were derived from them rather than the procedural settings.

6.1 The main rights protected by the Convention

The substantive rights protected by the Convention comprise Articles 2 till 14. All of these articles will be briefly outlined below with a focus on the rights which are relevant to the issues of abortion. Although **Article 1 – 'Obligation to respect Human Rights'** - occurs to be a mere formal statement, it is indeed of crucial importance in the Court's interpretation of the other Articles. It contains a positive obligation on individual states to ensure security for each and everyone of their citizens.

Article 2: the right to life

This Article protects the basic right of every person to their life. The Court has ruled that states have three main obligations under this Article: first, a duty to refrain from unlawful killing; second, a duty to investigate suspicious deaths; third, a positive duty to prevent foreseeable loss of life (under certain circumstances) (White, Jacobs, and Ovey 2006).

Paragraph two of this Article mentions death resulting from defending oneself or others from unlawful violence, arresting a suspect or fugitive, or suppressing riots or insurrections. It is stated that this "shall not be regarded as inflicted in contravention of this Article" (*European Convention on Human Rights*, Article 2)

This article does not specify a temporal limitation of the right to life, it does not mention if the prenatal phase is included or excluded in the right to life. Although in the Case of *Vo v. France*, the European Court of Human Rights declined to extend the right to life to an unborn child.

Article 3: torture, inhuman or degrading treatment

Article 3 prohibits torture and "inhuman or degrading treatment or punishment". This right is absolute and there are no exceptions or limitations to it. But the Court stated multiple times that there is a minimum threshold which has to be reached to constitute a violation of this article. The threshold is individually defined by the Court for each case.

Article 4: slavery and forced labour

Article 4 for prohibits slavery, servitude and forced labour but excludes labour "to be done in the ordinary course of detention", "any service of a military character", "any service enacted in cases of an emergency or calamity threatening the life or well-being of the community" and

"any work or service which forms part of normal civic obligations" (*European Convention on Human Rights*, Article 4). For Article 4 to be violated "the work must be compulsory, thus unpaid work per se does not come within this provision" write Clements and Read (Clements and Read 2003, 22). There has not yet been a case which invoked Article 4 of the ECHR.

Article 5: liberty and security

Article 5 secures people's right to liberty and security and states that "no one shall be deprived of his liberty". But there are a few exceptions included, for example: the lawful detention of a person after conviction; lawful arrest or detention for non-compliance with the lawful order, for the purpose of bringing him before court for reasonable suspicion, for the prevention of the spreading of infectious diseases, of persons of unsound mind; to prevent his effecting an unauthorised entry into the country; or the detention of a minor for the purpose of educational supervision or bringing him before court.

Article 6: the right to a fair trial

This Article guarantees a person's civil right to "a fair and public hearing within a reasonable time by an independent and impartial tribunal". It also includes the statement that a person charged with a criminal offence shall be presumed innocent until proven guilty and minimum rights to this person. These minimum rights for a charged person include to be made aware of the nature and cause of the accusation against him, time to prepare for his defence, legal assistance to defend himself in court, to examine witnesses against him and the assistance of an interpreter if needed.

Article 7: no punishment without law

Article 7 ensures that criminal offences cannot be charged if the act or omission was not illegal at the time it was committed. So, there cannot be retroactive criminalisation of acts and omissions. It also states that there shall not be prejudice in the trial and punishment of persons for acts they committed which were criminal according to "the general principles of law recognized by civilised nations".

Article 8: the respect for private and family life, home and correspondence

Article 8 protects ones right to respect his private and family life as well as his home and his correspondence. It guarantees that these rights are also protected from public authority. Exceptions can be made in situations where national security, public safety or the economic

well-being of the country are at stake or to prevent disorder or crime, for the protection of health and morals or for the protections of the rights and freedoms of others.

This Article has a positive underline. It ensured citizens right for privacy from others and even from the states interference. The wording differs from the wording of Articles 2 to 7. It refers to the 'respect' for private and family life. The word 'respect', as it is not very precise, gives a lot of space for interpretation of this Article. It also gives notice to the continuing evolution of concepts of privacy and family life (Cohen-Jonathan 1993, 405).

The concept of private and family life covers "the physical and moral integrity of the person, including their sexual life" (White, Jacobs, and Ovey 2006, 244). A statement like this was made by the European Court of Human Rights in the judgement of the *Case of X and Y v. Netherlands* (CASE OF X. AND Y. v. THE NETHERLANDS, no. 8978/80 1985, 22). The Court furthermore confirmed that private life is a term "not susceptible to exhaustive definition" but will nevertheless include important parts of a person's life such as "gender identification, name and sexual orientation and sexual life" (CASE OF BENSAID v. UNITED KINGDOM, no. 44599/98 2001, 47). For a better understanding of the term family life one must acknowledge what constitutes a family in the Convention's understanding. In general, the Convention and Court have considered a family to include "husband and wife and children who are dependent on them, including illegitimate and adopted children" (White, Jacobs, and Ovey 2006, 247).

Article 9: freedom of thought, conscience and religion

This Article acts as a safeguard for freedom of thought, conscience and religion. It attests every person the right to choose or change their religion, belief and freedom. It also pledges to shield this right from interference or limitations. The only possible limitations are "prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others".

The Convention has a very wide interpretation of the believes which this Article protects. However the broad interpretation, this right has been invoked in "relatively few complaints; of these most have involved religion, prison restriction and conscientious objection" (Clements and Read 2003). The conscientious objection mentioned here can also include a physician's objection to perform abortions. The issue of conscientious objection in reproductive health care related settings has not been brought before the Court very often. One example is the case of two pharmacists who refused to fill prescriptions for contraceptives (CASE OF PICHON AND SAJOUS v. FRANCE, no. 49853 2001). The case was declared inadmissible.

Article 10: freedom of expression

The Convention states that Freedom of expression "shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers". The second section of this Article mentions certain restrictions to this right which include national security, territorial integrity, public safety, prevention of crime, protection of health and morals. The Convention expresses its dedication toward free speech but also sets boundaries and priorities.

Article 11: freedom of assembly and association

This Article protects the right of freedom of a peaceful assembly and freedom of association with others which includes the right to form and join trade unions. This article was raised in cases which have been "dominated by disputes concerning public assemblies, marches and trade unions" (Clements and Read 2003, 24).

Article 12: the right to marry

This article states that "men and women of marriageable age have the right to marry and found a family, according to the national laws governing the exercise of this right". It could be seen as an addition to Article 8, the right to family life. This Article does not include same-sex marriage. The Court has argued that this law was intended to apply only to different-sex marriage and thus far has not revoked this concluding.

Article 13: the right to a remedy

Article 13 ensures peoples right to "have an effective remedy before a national authority" in cases where the Convention has been violated. This article was used multiple times to accuse the national courts of not providing applicants with sufficient mechanisms to seek justice. It was also used in several of the cases which will be described in this thesis later on.

Article 14: freedom from discrimination

Article 14 prohibits any and all discrimination. It bans discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. But this article's protection is limited to discrimination with respect to rights under this Convention. The applicant must

prove discrimination in dealings with other rights guaranteed in one or more Articles of this Convention.

Reproductive Matters under the ECtHR

Because the topics relevant to this research are not directly addressed in the European Convention on Human Rights, judgements from the Court will be used to explain, express and illustrate the Court's point of view. This research does not deem to imply that the Court's judgements on these individual cases constitute directives of the Court on reproductive matters but as rulings they show the approximate setting of the Court on the issues concerned.

6.2 Abortion according to the ECtHR

In the argumentation process of the case *Vo v. France* it was discussed whether abortion contradicts Article 2 – 'the right to life'. One opinion was that abortion does not constitute one of the exceptions mentioned in paragraph 2 of Article 2 and would hence have to be illegal under the Convention. The European Commission answered that abortion is "compatible with Article 2, para. 1, sentence 1 in the interests of protecting the mother's life and health" (Pichon 2006, 435).

In the Case of *H v, Norway* the Court stated explicitly that abortions which were carried out before or during the 14th week of the pregnancy did not violate the Convention (Eur. Comm., *H. v. Norway*, 168-69, para.1).

The most important aspect when considering the issue of abortion is the balance between various interests. There is a conflict between the right to life of the mother and the fetus, which needs to be balanced out. States do have the freedom to legalise, restrict or ban abortion. They therefore have to take all of the different and legitimate interests and rights involved into account. The Court decided to leave the decision of abortion issues to the national courts because "[…] the central issue requires a complex and sensitive balancing of equal rights to life and demands a delicate analysis of country-specific values and morals" (*D. v. Ireland*, ECtHR 27 June 2006, para. 90).
The Court stated that "once the State, acting within its limits of appreciation, adopts statutory regulations allowing abortion in some situations", "the legal framework devised for this purpose

should be shaped in a coherent manner which allows the different legitimate interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention (Puppinck 2013, 145; CASE OF P. AND S. v. POLAND, no. 57375/08; 2012, Abs. 99; CASE OF A.,B. & C. v. IRELAND, no. 25579/05 2010, Abs. 249; CASE OF R.R. v. POLAND, no. 27617/04; 2011, Abs. 187).

In situations where national governments legalise abortion, the Court evaluates the balance between the differing interests and rights. Some of these rights and interests as identified by the Court are the interests and rights of the mother, the unborn child, the father, of medical staff, of society, etc. (Puppinck 2013, 145). When trying to find a balance between these varying interests, a situation could arise in which the wishes of the pregnant woman may not always be prioritized.
Since it is the state's decision if an unborn child is recognised as a person, it falls within the scope of the state to balance the life of the unborn with the life of the pregnant woman. It is a near to impossible task to balance one person's life with another one's but the pregnant woman and the unborn are ultimately linked until the child is born. The most significant factors in this decision are the importance of the will of the mother and the life of the unborn child.

The cases in front of the ECtHR with regards to the issue of abortion are always extreme cases. They are cases which often include severe medical problems where the life or the health of either the mother or the child was at stake or cases which include a criminal action.
Cases of abortion which were motivated by the will of the pregnant women and not health reasons, are often called 'abortions on demand'. The Court "explicitly excluded this ground when it declared that Article 8, which protects individual personal autonomy, does not contain any right to abortion" states Puppinck (Puppinck 2013, 146). He furthermore added that "the legal arguments supporting the conventionality of carrying out an abortion on demand are very weak or even inexistent" in the Convention and the Court (Puppinck 2013, 146). But abortion on demand is a 'blind spot' in the case law of the ECtHR since the cases brought before it where extreme cases which often involve 'more pressing reasons' than demand.

Overall the Convention does not include or create a right to abortion. Abortion interferes with the granted principle of the right to life which is guaranteed in the ECtHR but it also interferes with the personal sphere of a woman and her autonomy over her own body. So if a state

legalised abortion it still remains subject, under the Convention, to an obligation to "protect and respect competing rights and interests" (Puppinck 2013, 146).

However, article 2 'the right to life' is not the only article of the Convention worth considering when talking about the issue of abortion. In the case of *Brüggemann and Scheuten v. Germany* in 1976 the Commission stated that Article 8 is also applicable to the issue of abortion. They stated that "[…] legislation regulation the interruption of pregnancy touches upon the sphere of private life, since whenever a woman is pregnant her private life becomes closely connected with the developing foetus" (CASE OF BRÜGGEMANN AND SCHEUTEN v. GERMANY, no. 6959/75 1976). This ruling was confirmed in the case law of *R. R. v. Poland* when the Court stated that 'the right to decide on the continuation of pregnancy' was a woman's choice and "[…] the decision of a pregnant woman to continue her pregnancy or not belongs to the sphere of private life and autonomy" (CASE OF R.R. v. POLAND, no. 27617/04; 2011, 181).
So the Court stated that the right to private life entails 'the right to decide on the termination of a pregnancy' but also stated that this right is not absolute (CASE OF P. AND S. v. POLAND, no. 57375/08; 2012). In the same statement of *P. and S. v. Poland*, it was confirmed that Article 8 cannot be interpreted as coinciding with a right to abortion.

Following the arguments brought on in the section above, states like Ireland, Malta, San Marino or Poland can use Article 2 of the Convention in recognizing their responsibility to protect life from conception, as they have. They can invoke the Convention in their argumentation for guaranteeing the right to life and safeguarding unborn children from abortion.

6.3 The status of the unborn under the ECtHR

The 'principle of sanctity of life' is the most basic and primary ideal of the declarations drawn up to protect human rights. It is guaranteed in the 1948 *Universal Declaration of Human Rights* and is also part of the European Convention on Human Rights embedded in Article 2.
When the Convention was drafted, abortion (on demand) was widely illegal and it was considered a direct violation of the right to life of the unborn child (Puppinck 2013). "The central question was, and still is, whether or not the unborn child is a 'person' within the meaning of Article 2" Puppnick phrases it (Puppinck 2013, 144).
The ECtHR has never taken a strong stand regarding the rights of an unborn child. In the cases *X. v. United Kingdom* and *VO v. France* the Court has decided that the 'right to life' does not

include the unborn. The Court noted that there is a "divergence of thinking on the question of where life begins". It furthermore argued that the unborn did not have an absolute right to life because "the 'life' of the fetus is intimately connected with, and it cannot be regarded in isolation of, the life of the pregnant women" (CASE OF X. v. UNITED KINGDOM, no 6084/73 1975). That is why "pregnancy cannot be said to pertain uniquely to the sphere of private life" because it concerns not only the private life and choices of the pregnant woman (CASE OF BRÜGGEMANN AND SCHEUTEN v. GERMANY, no. 6959/75 1976, 59).
In the case of *Vo v. France* the Court stated that "[…] if the unborn [did] have a 'right' to 'life', it [was] implicitly limited by the mother's rights and interests" (CASE OF VO v. FRANCE, no. 53924/00 2004, 80). Although the Court did not rule out that under certain circumstances safeguards may also include the unborn. However, it was ruled that the fetus does not have an absolute right to life, because of the need of protecting the mother's life. If the fetus would have an absolute right to life this would mean prioritizing the fetus's life over the one of the pregnant woman.

Since there is no consensus about the legal definition of the beginning of life, the question of when the right to life begins has not yet been answered by the ECtHR. However, the Court has stated that "Article 2 is silent to the temporal limitations of the right to life" (CASE OF VO v. FRANCE, no. 53924/00 2004, 75). The ECtHR has instead declared that "the issue of when life begins comes within the States' margin of discretion" (Pichon 2006, 436). This leaves every state out on its own when it comes to deciding about the rights of fetuses. A clear statement from the ECtHR could give clarity and guidance to the member states but could also upset those with different opinions. The delicate decisions in this difficult moral domain would interfere with the personal space of women, men and families.

Another argument could be made that a fetus which is viable, could in fact be covered by the phrase 'everyone' in Article 2. Since it is able to live outside of a woman's womb it could be considered to fall in the sphere of 'the principle of sanctity of life'. Once a fetus becomes viable outside a woman's body the two could theoretically be separated and therefore be considered as two lives worth protecting.

The term 'unborn' and its legal status as described above refers to embryos in vivo, so inside a woman's body. The legal status of embryos in vitro (meaning: in a glass; outside the normal biological context), has received even less attention from the ECtHR. In the case *Evans v.*

United Kingdom, Miss Evans claimed that the conditions of the UK Human Fertilisation and Embryology Act 1990 which required her former partner's consent before implementing the embryos, discriminated her rights under Article 8 and Article 14. The Court concluded that the embryos created in the course of IVF treatment as commenced by Miss Evans and her former partner, did not have the right to life under Article 2. In the case of *Costa and Pavan v. Italy* the Court pointed out that "the concept of 'child' [could] not be put in the same category as that of 'embryo'" (Koffeman 2015, 21; CASE OF EVANS v. UNITED KINGDOM, no. 6339/05, 2007, 56, 46; COSTA AND PAVAN v. ITALY, no. 54270/10, 2012,62).

The Convention did never explicitly exclude nor include prenatal life from their scope of protection. Therefor an unborn child can be protected by Article 2 of the Convention but does not necessary has to be. Instead the Court carefully examines and decides in each case separately. Nevertheless, the Court has indeed allowed states to exclude the unborn from the protection of Article 2, overall leaving it to the states to determine when the right to life begins.

6.4 The rights of the (future) child under the ECtHR

The Convention does not include a specific section on children's rights and over all few specific references concerning the rights of the child. The Convention does not list a particular group of individuals as beneficiaries of its rights but guarantees these rights for all of the subject of the participating nations, to everyone within their jurisdiction. Children, although not specifically mentioned, are part of the beneficiaries of the Convention. Article 8 is the most relevant to the issue of children and future children under the Convention.

Since Article 8 enshrines the respect for a person's private and family life, home and correspondence it contributed to the advancement of children's rights in general. The wording of Article 8 (1) contains negative obligations on the state preventing it from interfering with a person's privacy, but it also entails the state's duty to ensure the safety of these rights from others.

The Court does not provide a clear or strict definition of what constitutes a family but it strengthened a broad interpretation when it first ruled that family life was worthy of protection under the Article 8 ECHR in 1979, in the ruling for the *Marckx* judgement (CASE OF MARCKX v. BELGIUM, no. 6833/74 1979, 31). The Court does not discriminate between children born within marriage and children born outside of marriage. It defines family ties rather

loosely as the existence of personal ties rather than formal requirements like marriage or a common household.
It is important to state that the Article does not entail the right to found a family or to have children. It only safeguards, respects and protects already existing families.

The Court recognised that family does not only include genetic but also social, moral or cultural relations and for example may also incorporate material interests such as inheritance rights.
The relationship between parents and children may also be an important part of the issue of the rights of the child. In cases where the rights under Article 8 ECHR of parents and those of a child are at stake, the Court decided that the rights of the child must outweigh the rights of the adults (CASE OF YOUSEF v. THE NETHERLANDS, no. 33711/96 2002, 73).
The principle was also applied in cases where children claimed to have a right to know their genetic origins, although the Court has entitled states to balance out the rights of the child against those of the parents.

6.5 Practicing abortion under the ECtHR

To practice or to refuse to practice abortions is not regulated in the Convention. Just like there is no right to an abortion under the ECHR, there is no right to practice or object it. Doctors and other medical professionals cannot invoke such a right or complain of their conviction for practising illegal abortions. The Court has previously rejected applicants who brought cases of physicians being convicted of performing illegal abortions.
The issue of conscientious objection, "the refusal to participate in an activity that an individual considers incompatible with his/her religious, moral, philosophical or ethical beliefs", is not addressed in the Convention (Zampas and Andión-Ibañez 2012, 232). The issue of objecting to reproductive health matters was first brought before the Court via the case of *Pichon and Sajous v. France*. Two pharmacists who refused to fill prescriptions for contraceptives brought the case in front of the European Court of Human Rights. Their case was declared inadmissible, but it was the first time the Court came in contact with the issue of conscientious objection. Another time was the case of *R.R. v. Poland* in 2004 which will be described in detail later on in this thesis. The Court confirmed that "the freedom of conscience of health professionals in the professional context" must be upheld in regards to abortions (CASE OF R.R. v. POLAND, no. 27617/04; 2011, 206). However it also added that this freedom of conscience does not protect "each and every act or form of behaviour motivated or inspired by a religion or a belief" and

stated that states have an obligation "to organise the health service system in such a way as to ensure that an effective exercise of the freedom of conscience of health professionals in the professional context does not prevent patient from obtaining access to services to which they are entitled under the applicable legislation" (CASE OF R.R. v. POLAND, no. 27617/04; 2011, 206).

In other cases where public health care institutions claimed conscientious objection the European Commission of Human Rights stated that "the right to freedom of conscience is by its very nature an individual right and therefore it cannot be exercised by an institution" (Zampas and Andión-Ibañez 2012, 241). As Zampas and Andión-Ibañez accentuate the Commission draws a distinctive line between religious freedom and the exercise of conscience, "the former being applicable to institutions, such as churches, the latter soley an individual right" (Zampas and Andión-Ibañez 2012, 241).

7. Polish Reproductive Law vs. ECHR and ECtHR

The previous research for this thesis has analysed the legislative status quo in Poland and in the European Convention on Human Rights as well as began to describe decisions of the ECtHR in various cases. This section will summarize and highlight the most important aspects for further evaluation.

As described in the sections above Poland allows terminations of pregnancies in three circumstances: When the life or health of the pregnant women is endangered, when the fetus will most likely be born with irreversible damage or other severe impairments or when the pregnancy is a result of a criminal act. The circumstances of danger to a women's life or health as well as severe malformations of the fetus have to be validated by a physician. The criminal act has to be certified by state authorities before the women can obtain a legal abortion. Furthermore, there are timely restrictions which have to be considered. Overall, the Polish law is very restrictive on terminations of pregnancies and can it can therefore be said that abortion is mostly banned in Poland. Although abortion is mostly banned women do not face penalties for illegal termination of pregnancies. Meanwhile, Physicians can claim conscientious objection and thereby refuse to participate in abortions for moral, ethical or religious reasons. The legal circumstances and the stigmatisation in the public discourse are some of the reasons for very high numbers of clandestine abortion which create a highly lucrative market which is completely unregulated and ungoverned. The private worries of women become someone else's

private gain, as Chełstowska described it (Chełstowska 2011).

The European wide perspective is more difficult because of its diversity. There is no uniform regulation in place which would apply to several if not all European states. The EU does not have regulations concerning the issue of abortion, abortion services and conscientious objection. Instead the European institutions decided that the morally sensitive issue of abortion should be regulated on the domestic level rather than the supranational level. The states themselves need to balance out the individual and general interests which are involved in circumstances of abortions. The European law allows for a diversity between the legal regulations on reproductive matters which results in differing legislations on abortion issues in the European states.

The ECtHR "generally leaves States a wide margin of appreciation in the area, which extends both to the States' decision to intervene in the area and, once they have intervened, to the detailed rules they set down in order to achieve a balance between the competing public and private interests" (Koffeman 2015, 317). Hence, it falls within the scope of the states to balance the interests involved in the issue of abortion, the private and public interests as well as the interests of the pregnant woman and the interests of the fetus.

Applicants with cases concerning reproductive rights before the ECtHR have mostly invoked Article 2 and Article 8 (right to life and right to private and family life) when claiming their human rights have been violated. Other articles like Article 3, the right to be free from unhuman and degrading treatment, and Article 13, the right to be free from discrimination were also added in the claims brought before the ECtHR regarding the issue of abortion.

The ECHR does not clarify what is meant with "life" in article 2, the right to life, and also does not specify when it begins or ends. There is no European legal consensus on the matter and the Court has not yet set standards on these issues. Up till now the Court has evaluated matters relating to the beginning of life on a case-by-case basis.

Just as there is no clear answer to the question of when `life´ as it is addressed in the Convention begins there is no clear answer to the question if there is a right to have an abortion under the Convention. In the case of *A, B, and C v. Ireland* the Court has concluded that Article 8 cannot be interpreted as entailing a right to abortion. However, it has furthermore stated that the prohibition of abortion in circumstances when health or well-being is endangered is in fact subject to the right to respect for one's private and family life. In the case of *Tysiąc v. Poland* the ECtHR "reasoned that because Polish law recognized a right to therapeutic abortion, the case was better decided from the perspective of what the state is positively required to do to

effectively guarantee this right" (Erdman 2012, 23). Multiple Times the ECtHR stressed the importance of the state's positive obligation to provide legal and procedural framework enabling a pregnant woman to effectively exercise her right to access to a lawful abortion when the state's requirement for abortions are met.

The issue of practicing abortions is equally not directly addressed in the convention and as been evaluated for each individual case. There are however domestic standards which structure state obligations and duties of health care providers which guide the "legal and policy frameworks on conscientious objection to sexual and reproductive health services and related ethical and legal standards and practice in European countries" (Zampas and Andión-Ibañez 2012, 246). These domestic regulations draw from international and regional human rights standards and arise out of international agreements. "They are guided by the principle that states and public institutions have a positive obligation to ensure that women are able to access sexual and reproductive health care services provided for by law" (Zampas and Andión-Ibañez 2012, 246; Cook, Arango Olaya, and Dickens 2009). But still, the absence of a comprehensive legal and policy framework on conscientious objection "is putting women's health and lives at risk and violating their human rights" (Zampas and Andión-Ibañez 2012, 255). International and regional human rights bodies would be the wright institutions to address, guide and advance the progress in this field.

III. JUDICIAL CASES

8. Cases in front of the European Court of Human Rights

8.1 Tysiac v. Poland

The case of Tysiac against the Republic of Poland was initiated in January 2003. Miss Alicja Tysiac ("the applicant") launched a complaint against the Republic of Poland on the grounds of violation against Article 8 of the Convention. She also based her case on Article 3, 13 and 14. Her third pregnancy posed the risk of severely impairing her eyesight, so she wanted to terminate the pregnancy, but the option of a lawful abortion was refused multiple times, leaving her almost blind after the delivery.

8.1.1. The circumstances of the case

Miss Alicja Tysiac suffered from severe myopia with -0.2 degrees in the left and -0.8 degrees in the right eye. Myopia, or nearsightedness is a condition in which the visual images come to a focus in front of the eye, resulting in defective vision of distant objects. Before her pregnancy a state medical panel ranked her disability of medium severity. When she became pregnant in February 2000, she was worried about the possible impact of the delivery on her health, so she consulted her doctors. Three different ophthalmologists concluded that "due to pathological changes in the applicant's retina, the pregnancy and deliver constituted a risk to her eyesight" (CASE OF TYSIAC v. POLAND, no. 5410/03; 2007, 3). But they refused to issue a certificate for the termination of the pregnancy, even though Miss Tysiac requested it. The Polish law only allows for pregnancies to be terminated when the pregnancy endangers the pregnant woman's life or health, when the fetus is at risk of having severe and irreversible impairment or when the pregnancy is a result of a criminal act. The applicant believed that the pregnancy posed a severe risk to her own health, as various doctors told her, so she thought she qualified for a lawful termination of pregnancy.

An additional medical professional issued a certificate which stated that her third pregnancy constituted a threat to the applicant's health as there was a risk of rupture of the uterus, given her caesarean section with her previous pregnancies as well as the applicant's short-sightedness and significant pathological changes in her retina. The applicant was of the opinion that this

certificate would enable her to terminate her pregnancy lawfully, so she visited the State hospital in Warsaw. A doctor examined the applicant visually but did not examine her ophthalmological records and subsequently noted on the back of the certificate that "neither her short-sightedness nor her two previous deliveries by Caesarean section constituted grounds for therapeutic termination of the pregnancy" (CASE OF TYSIAC v. POLAND, no. 5410/03; 2007, 3). The doctor furthermore told the applicant that she could have up to eight children if they were delivered by C-section. Miss Tysiac's third pregnancy was therefore not terminated, instead she gave birth to the child by C-section in November 2000.

After the delivery, her eyesight deteriorated. An ophthalmologist determined in March 2001 that the deterioration of the applicant's eyesight had been caused by recent haemorrhages in the retina and suggested that she should learn braille. In September 2001 the applicant was declared significantly disabled, that she needed constant care and assistance in her everyday life and the social-welfare centre issued a certificate stating that she was unable to take care of her children as she could not see from a distance of more than 1,5 meters.

The applicant lodged a criminal complaint against the physician in the state hospital who refused to perform the termination of the pregnancy. She stated that following the pregnancy and delivery, she had sustained severe bodily harm which almost made her blind. The appointed prosecutor concluded that there was no causal link between the doctor's actions and the deterioration of the applicant's vision.

Failing to obtain redress in Poland, Miss Tysiac filed a case at the European Court of Human rights alleging the following violations of the European Convention on Human Rights:

- **Article 8:** Her "right to due respect for her private life" as well as "her physical and moral integrity" had been violated by the State's failure to provide her with a legal therapeutic abortion and to provide a comprehensive legal framework to guarantee her rights. She argued that by not providing her with a legal abortion and "with respect to the State's positive obligations, by the absence of a comprehensive legal framework to guarantee her rights by appropriate procedural means" her article 8 rights had been violated. The applicant declared that "the facts of the case had disclosed a breach of the right to effective respect for her private life" (CASE OF TYSIAC v. POLAND, no. 5410/03; 2007 supra note 2, 67, 76, 80).

- **Article 3:** Her right to be free from inhuman and degrading treatment had been violated due to the state's failure to ensure access to legal therapeutic abortion and to establish procedural safeguards. The state should have made an abortion possible in

circumstances which threatened her health and general well being (CASE OF TYSIAC v. POLAND, no. 5410/03; 2007 supra note 2, 65)

- **Article 13:** The inadequate Polish legal framework governing abortion violated her right to effective domestic remedies by depriving her of reasonable procedural protection to safeguard her rights (CASE OF TYSIAC v. POLAND, no. 5410/03; 2007 supra note 2, 133).

- **Article 14 & Article 8:** Because the state failed to reasonably accommodate her disability during the investigation of her case, her right to be free from discrimination on the ground of disability in the enjoyment of her right to private life was violated. She furthermore claimed a violation of her right to non-discrimination on the ground of sex (CASE OF TYSIAC v. POLAND, no. 5410/03; 2007 supra note 2, 139).

8.1.2 Decisions

In the case of *Tysiac v. Poland* the European Court of Human rights concluded that:

Article 8 of the Convention is applicable to the circumstances of the case because it relates to the applicant's right to respect for her private life.

- The Republic of Poland had violated the applicant's rights under Article 8. They determined that the "legislation regulating interruption of pregnancy touches upon the sphere of private life, since whenever a woman is pregnant her private life becomes closely connected with the developing foetus" (CASE OF TYSIAC v. POLAND, no. 5410/03; 2007 supra note 2, 106). They furthermore added that "private life includes a person's physical and psychological integrity and that the State is also under a positive obligation to secure to its citizens their right to effective respect for this integrity". The Court stated that while "the State regulation on abortion relate to the traditional balancing of privacy and the public interest, they must (…) also be assessed against the positive obligations of the State to secure the physical integrity of mothers-to-be" (CASE OF TYSIAC v. POLAND, no. 5410/03; 2007 supra note 2, 107). The Court found Poland to have violated the positive obligations under Article 8 because they failed to provide procedural safeguards to ensure that women have access to lawful

abortions.

- As for Article 3, the Court concluded that there has not been a violation of this article (CASE OF TYSIAC v. POLAND, no. 5410/03; 2007 supra note 2, 66).

- The Court also concluded that Articles 13 (the right to an effective remedy) and 14 (the prohibition of discrimination), do not need to be reviewed as that "no separate issues arise" under Article 13 or Article 14 of the Convention (CASE OF TYSIAC v. POLAND, no. 5410/03; 2007 supra note 2, 135, 144).

The Court awarded the applicant 25,000 Euros in non-pecuniary damages but rejected her claim for just satisfaction for pecuniary damage stating that it cannot speculate on the physician's conclusion concerning the future deterioration of Miss Tysiac's eyesight.

8.1.3 Human Rights Implications

The Judgement of the European Court of Human Rights in the case of *Tysiac v. Poland* is in accordance with other decisions by international human rights bodies that recognize that denying women lawful termination of pregnancies in certain circumstances is a violation of their human rights. The UN Human Rights Committee concluded that a state's failure to enable a women to benefit from a therapeutic abortion can cause depression and emotional distress and thus constitutes a violation of Article 7 (freedom from torture or cruel, inhuman or degrading treatment or punishment) (CASE OF K.L. v. PERU 2005).

In this case the Court reiterated the following principles with respect to Article 8:

- It agreed that the legislation regulating abortion "touches upon the sphere of private life" which was previously stated to include a person's right to physical and psychological integrity (CASE OF TYSIAC v. POLAND, no. 5410/03; 2007 supra note 2, 106).
- It reaffirmed that the state has a positive obligation to secure a pregnant woman's physical integrity, including by adopting a comprehensive legal framework which "must, first and foremost, ensure clarity of the pregnant woman's legal position" (CASE OF TYSIAC v. POLAND, no. 5410/03; 2007 supra note 2, 116).
- It furthermore added that the "legal prohibition on abortion, taken together with the risk

of their incurring criminal responsibility under Article 156 § 1 of the Criminal Code, can well have a chilling effect on doctors when deciding whether the requirements of legal abortion are met in an individual case" and that these provisions should "be formulated in such a way as to alleviate this effect" (CASE OF TYSIAC v. POLAND, no. 5410/03; 2007 supra note 2, 116). Especially in cases with disagreements if the preconditions for legal abortions are met or not, procedural safeguards are needed.

- The Court reiterated that "measures affecting fundamental human rights be, in certain cases, subject to some form of procedure before an independent body competent to review the reasons for the measure and the relevant evidence" and that "a comprehensive view must be taken of the applicable procedures". The procedure should "guarantee to a pregnant woman at least the possibility to be heard in person and to have her views considered". It also stated that "the time factor is of critical importance" in cases involving decisions about a termination of pregnancy. The "procedures in place should therefore ensure that such decision are timely so as to limit or prevent damage to a woman's health which might be occasioned by a late abortion" (CASE OF TYSIAC v. POLAND, no. 5410/03; 2007 supra note 2, 117, 118).

The fact that the European Court of Human rights held that Poland had to instate procedures that would ensure that women have access to legal abortion is a very big step towards the recognition of women's rights over terminations of pregnancies.

8.2 R.R. v. Poland

The Case *R.R. v. Poland* was brought before the European Court of Human Rights in 2004. The applicant, R.R., was concerned that carrying her pregnancy to term would result in a child with severe genetic abnormalities. She was deliberately refused genetic tests during her pregnancy by doctors who were opposed to abortion. The applicant tried to obtain relevant genetic tests, so that she may have had the opportunity to make an informed decision if she would have wanted to continue the pregnancy. Only when the time limit for a lawful abortion was passed, the tests confirmed that she was carrying a fetus with genetic abnormality. The child was born with Turner Syndrome.

8.2.1 Circumstances of the case

In February 2002, R.R. was 18 weeks along in her pregnancy, an ultrasound performed by the applicant's gynaecologist detected a cyst on the fetus's neck. The applicant told her doctor that she wished to have an abortion if the suspicion her doctor expressed proved to be true. Additional tests were needed to confirm severe foetal disability. The applicant went to a public hospital where she had another ultrasound and was recommended to get genetic examination by way of amniocentesis in order to confirm the suspicion. In a private health clinic she received another ultrasound by which another physician came to the same conclusion and was recommended to get genetic testing again. A specialist in genetic tests, who lived 300 kilometres from her hometown, confirmed the diagnosis and recommended that the applicant should obtain a formal referral from her doctor, so that she could have the test carried out in a public hospital in her hometown to get insurance coverage. Her gynaecologist refused to issue a referral on the basis that, in his opinion, the fetus' condition would not qualify her for an abortion under the provisions of the 1993 Anti-Abortion Act. During the following weeks, the applicant visited multiple doctors who performed additional ultrasounds and was also hospitalized for non-conclusive diagnostic testing on multiple occasions. Although the doctors recognized that she needed genetic screening, they refused to issue a referral. Instead she was told "that termination of pregnancy would entail a serious risk to her life and that the two caesarean births which she had previously had constituted the most important risk factor in deciding whether she should have a genetic test at all" (CASE OF R.R. v. POLAND, no. 27617/04; 2011, 19).

As she was unable to find a doctor willing to provide her with access to the tests she was legally entitled to receive, R.R. returned to the genetic specialist. The doctor advised her that if she could not get the necessary referral, she should go to a public hospital and demand emergency care. The applicant followed this advice and at last, in the 23rd week of her pregnancy, was able to undergo genetic testing which she had to pay for herself.
As she had to wait for the results of the test another two weeks, the pregnancy would then have been 25 weeks along. The applicant submitted a written request for an abortion at a local hospital but received no response. She submitted another request 10 days later but then was told that it was too late as she was now 25 weeks along and the fetus was now viable. In July of 2002, R.R. gave birth to a baby girl suffering from Turner Syndrome.
In November of 2003, R.R.'s gynaecologist disclosed information regarding her health and

private life in a press interview. Furthermore, he made negative and hurtful comments about her personality.

Two weeks after giving birth, R.R. filed a criminal case against the doctors who had treated her. The investigations were discontinued. When she appealed the findings, the court rejected her claim that the doctors were acting as public agents who were obligated to protect her rights. She then filed a civil case against the doctors and hospitals. The Court concluded that her gynaecologist violated her rights by disclosing confidential information about her pregnancy to the media but dismissed the other claims.

In 2004 the applicant filed a complaint with the European Court of Human Rights stating that her following rights have been violated:

- **Article 3:** Her right to be free from torture and cruel, inhuman or degrading treatment had been violated because she was denied necessary medical treatment causing her great medical and physical suffering. She also claimed that Poland violated her Article 3 rights by failing to enact adequate legislation and regulations to ensure doctors provide timely prenatal examination and abortion as legally permitted as well as by failing to undertake a thorough and fair investigation of the failure to provide adequate and timely medical care to her.

- **Article 8:** She claimed that her right to respect for private life had been violated by the doctors who failed to provide her with full information about her and her fetus' health status, forcing her to continue her pregnancy. She additionally claimed that her Article 8 rights had been violated because the authorities denied her "access to genetic tests in context of her uncertainty" and failed to provide legislation regulation to guarantee her rights (CASE OF R.R. v. POLAND, no. 27617/04; 2011, 91).

- **Article 13:** The applicant alleged that the state failed to carry out investigations into the inhuman and degrading treatment she faced from doctors and their lack of care that forced her to carry out her pregnancy. She claimed that this failure constitutes a violation of her right to effective remedy.

- **Article 14:** R.R. argued that she was subject to sex discrimination because of the substandard treatment she received due to her pregnancy.

8.2.2 Decisions

In the case of *R.R. v. Poland* the ECtHR ruled that:

- **Article 3:** The applicant alleged that "the repeated and intentional denial of timely medical care had been aimed at preventing her from having recourse to a legal abortion". The Court stated that "ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3". In this case, the Court found that "the determination of whether the applicant should have access to genetic testing […], was marred by procrastination, confusion and lack of proper counselling and information given to the applicant". They emphasized that six weeks elapsed between the first suspicion and the confirmation by way of genetic testing and that "no regard was had to the temporal aspect of the applicant's predicament". The Court agreed that the applicant had been humiliated and that her suffering reached the minimum threshold of severity under Article 3. Therefore there had been a breach of the provision under Article 3 (CASE OF R.R. v. POLAND, no. 27617/04; 2011, 153, 159, 160, 161, 162).

- **Article 8:** The Court concluded that "neither the medical consultation nor litigation options relied on by the Government constituted effective and accessible procedures which would have allowed the applicant to establish her right to a lawful abortion in Poland". The Court furthermore stated that Poland did not comply "with its positive obligations to safeguard the applicant's right to respect for her private life" and therefore declared that there had been a violation of the applicant's Article 8 rights of the Convention (CASE OF R.R. v. POLAND, no. 27617/04; 2011, 210, 211, 214).

- **Article 13:** The applicant argued that the Polish authorities failed to create legal mechanisms that would have allowed her to challenge the doctor's decision which constitutes a violation of Article 13 of the Convention. The Court declared that the states failure to provide an adequate legal framework for the determination of disputes, "overlaps with the issues which have been examined under Article 8 of the Convention".

It found that there had been a "a violation of this provision on account of the State's failure to meet its positive obligations" (CASE OF R.R. v. POLAND, no. 27617/04; 2011, 215, 218). The Court stated that it did not deem it necessary to examine separately if there has been a breach of Article 13 of the Convention.

8.2.4 Human Rights Implications

In this ruling the Court stated that Poland's treatment of women who want to obtain an abortion and the extensive obstacles they face in the process constitutes for 'inhuman and degrading treatment'. This states that Poland's legal framework in the context of abortion, fails to ensure women's right to be free from all form of torturous, cruel, inhuman or degrading treatment. It was the first ruling where the European Court of Human Rights stated that in the medical context of abortion women can be faced with mistreatment which could stretch to torture or inhuman and degrading treatment. The Court stated that the humiliation and suffering R.R. had endured as reached a level where it constituted inhuman and degrading treatment. The denial of services which the applicant would have needed to make an informed decision as to whether to seek an abortion, were seen as incorrect handling that caused suffering to the applicant.

It was also the first time that an international human rights body has stated that prenatal examinations in connection with abortions should be regarded as a right. The Court furthermore stated that there should be legal framework, regulations and procedures in states that allow for conscientious objection so that patients still have access to lawful reproductive health care services. The Court also ruled that there has been a violation of Article 8, the right to respect for private life.

The Court's rulings in this case could be seen as a victory for ensuring access to safe abortion. The Court's decision accentuates the fact that states do not only have the obligations to regulate but also to subsequently ensure the practice of abortions. With the finding that denial to obtain reliable information, prenatal diagnostic services and access to safe abortion can mount up to inhuman and degrading treatment, the Court clearly recognized that women do severely suffer if they do not have the autonomy and possibility to choose for themselves.

8.3 Z. v. Poland

The case of *Z. v. Poland* was brought before the court in in September 2008. Z. filed a complaint on behalf of her daughter claiming that her Article 2 right, her Article 3 right, her Article 8 right, her Article 13 right as well as her Article 14 right had been violated. Z.'s daughter was repeatedly denied diagnostic care and necessary treatment for her ulcerative colitis (UC) during her pregnancy. Because of her untreated condition the fetus and she died.

7.3.1 Circumstances of the case

Z.'s daughter, a Polish woman in her twenties, was informed that she was pregnant in May of 2004. During the first trimester of her pregnancy Z.'s daughter also began experiencing symptoms of ulcerative colitis. Ulcerative Colitis is a disease that causes inflammation in the bowel area. The symptoms she experienced were nausea, abdominal pains, vomiting and diarrhoea with blood. Her doctor told her these symptoms were related to her pregnancy and did not perform additional tests. As the symptoms rapidly worsened she was admitted to a hospital only a few weeks later where she was diagnosed with UC. She received only minimal treatment with steroids and was sent home afterwards. A few days later she was hospitalized again. The doctors did not carry out further diagnostic tests, for example a full endoscopy, to determine the extent of her UC. Instead she was sent to another and another hospital, totalling six weeks in four different hospitals. She developed abscesses which had to be surgically removed while more extensive testing and an aggressive treatment were denied due to possible harm for the fetus. Z.'s daughter was told by doctors that they could not treat her because their "conscience did not allow" them to. They furthermore refused to refer her to a doctor that would give her the treatment she needed. The refusal to treat her properly as well as the refusal to refer her to another physician greatly endangered the fetus' and the pregnant woman's life. In September of 2004 she was hospitalized with symptoms of organ dysfunction and sepsis. The doctors also diagnosed that her fetus had died and had to be surgically removed from her uterus. Despite surgeries including the removal of her appendix and uterus, her kidneys failed and the sepsis progressed. She died on September 29, 2004.

After several investigations in Poland including a criminal investigation into possible unintentional homicide, two disciplinary actions which found no evidence of malpractice and a

compensation claim in civil court, the applicant filed a claim with the European Court of Human Rights.

The Applicant argues that Poland violated the following rights under the Convention:

- **Article 2:** Her daughter's right to life had been violated as Poland has failed their duty to protect life and provide her daughter with adequate treatment. Z. argued that Poland did not clarify that the rights of the pregnant woman trump the protection of the fetus, leaving it to the physicians to decide if they treat the pregnant woman if the treatment poses a risk to the fetus. She also claimed that her daughter's death had not been investigated effectively. Additionally, she held Poland accountable for the doctors who intentionally withheld information and care from her daughter which led to her death.

- **Article 3:** Z. claimed that her daughter's right to be free from torture and cruel, inhuman or degrading treatment had been violated. Z. argued that Poland subjected her daughter to cruel, inhuman or degrading treatment because of the insufficient treatment her daughter received and the months of pain and suffering she had to endure because of her physicians' lack of care.

- **Article 8:** The applicant claimed that her daughter's right to respect for private life had been violated because of "the doctors' failure to provide her and her daughter with adequate information about her daughter's health and the treatment options available to her, in particular in view the continuation or termination of her pregnancy" which "violated her daughters' right to autonomy, and in particular to take decisions regarding her own physical health" (CASE OF Z v. POLAND, no. 46132/08; 2012 supra note 2, 115). She furthermore claimed that the authorities had failed to provide her with timely access to her daughter's medical records (CASE OF Z v. POLAND, no. 46132/08; 2012 supra note 2, 114).

- **Article 14:** The applicant "complained under Article 14 of the convention, in conjunction with Articles 2, 3 and 8, that her daughter had been discriminated against on the basis of her pregnancy". Z. claimed that her daughter's doctors "had not provided her with the standard of care that would have been given to a non-pregnant woman or to a man with ulcerative colitis". She also declared that her daughter "had been subjected to discriminatory treatment because of various aspect of the Polish legal system, in

particular the restrictive abortion laws, the unregulated practice of conscientious objection and the right to life given to the foetus" (CASE OF Z v. POLAND, no. 46132/08; 2012 supra note 2, 128, 129, 131).

8.3.2 Decisions

In the case of *Z. v. Poland* the ECtHR declared the complaints admissible and concluded that:

- **Article 2:** The Court concluded in the aspect of the absence of legal framework to regulate a balance between the pregnant woman's right to life versus the fetus' right to life and the lack of regulation concerning conscientious objection, that "the applicant's complaints concerning the regulatory framework must be rejected as manifestly ill-founded".

  The Court decided that Poland had dealt with the investigation into the applicant's daughter's death adequately and "that the domestic authorities dealt with the applicant's claim arising out of her daughter's death with the level of diligence required by Article 2 of the Convention". They concluded that there has been "no violation of Article 2 in its procedural aspect" (CASE OF Z v. POLAND, no. 46132/08; 2012 supra note 2, 105, 112).

- **Article 3:** The Court determined that "it is not its function to question the doctors' clinical judgement as regards the seriousness of Y's condition or the appropriateness of the treatment they proposed" and if "the quality and promptness of the medical care provided to Y had put her health and life in danger". So the complaint was rejected as manifestly ill-founded (CASE OF Z v. POLAND, no. 46132/08; 2012 supra note 2, 137, 138).

- **Article 8:** The Court stated that Article 8 "can be understood to denote a positive obligation on the authorities to make a full, frank and complete disclosure of the medical records of deceased child to the latter's parents" and that in this complaint "falls within the scope of Article 8 of the Convention". It concluded that "the applicant failed to substantiate her allegation that Article 8 of the Convention had been breached" and that there appear to be no violations of the rights and freedoms set out in the Convention. The applicant's claim is considered "manifestly ill-founded" and was rejected by the

Court (CASE OF Z v. POLAND, no. 46132/08; 2012 supra note 2, 122, 124, 125). Z.'s claim that the doctors did not provide adequate medical information was also rejected by the Court (CASE OF Z v. POLAND, no. 46132/08; 2012 supra note 2, 126, 127).

- **Article 14:** The Court concluded that the applicant did not provide sufficient data to support her claim of discrimination against her daughter on the grounds of her being pregnant. Therefore, the Court rejected this claim (CASE OF Z v. POLAND, no. 46132/08; 2012 supra note 2, 133, 134, 135).

8.3.3 Human Rights Implications

All of the claims the applicant launched were rejected by the European Court of Human Rights. The Court concluded that there had been no violation of Article 2, Article 3, Article 8 or Article 14 of the Convention.

8.4 P. and S. v. Poland

The Case of *P. and S. v. Poland* was brought before the European Court of Human Rights in May of 2009. In April of the previous year P., then a 14-year old Polish girl, had been raped. Because of her youth and the fact that she had been raped, P. and her mother S. decided that an abortion would be the best option for the girl. Although she was legally entitled to an abortion under Polish law, she was denied timely and professional medical care, harassed by clergy and health care personal and deprived of her right to a lawful abortion.

8.4.1 Circumstances of the case

In April of 2008, the then 14-year old girl, P., was raped by a classmate. P. and her mother, S., reported the rape to the police and went to a health clinic for an examination. Even though she was only 14 years old and had been raped, she was not offered emergency contraception, which could have prevented her pregnancy. When P. found out that she was pregnant several weeks later, she decided to get an abortion. Although she was legally entitled to an abortion under

Polish law because the pregnancy resulted from a criminal act, she was approached by medical professionals and the clergy in an attempt to prevent her from and talk her out of terminating the pregnancy. P. obtained a certificate from the Family District Court stating that her pregnancy was the result of a crime which would allow her to legally terminate her pregnancy. Her mother visited a number of hospitals in their hometown to seek assistance for her daughter. The specialists she asked for a medical referral for an abortion refused. A doctor in one of the hospitals told P. and her mother that they needed a priest, not an abortion and arranged an unrequested meeting between P. and a catholic priest. Her confidential medical information was revealed to the priest without her consent.

After traveling to another city and receiving a referral, the doctor who was to perform the termination of pregnancy was contacted by the priest and other pro-life activists and told that P. was being coerced by her mother to have the abortion despite not wanting it herself. So the physician refused to perform the procedure. When they left the hospital they were further harassed by anti-abortion activists to an extend that they needed police protection. They were interrogated by the police, P. was removed from her mother`s custody and placed in a juvenile centre. In the juvenile facility she was not provided with timely medical treatment when she complained of pain and bleeding. When she finally was taken back to the hospital she was again faced with harassment by journalists and anti-abortion activists.

Weeks after the rape, the criminal report and only a few days before the pregnancy was 12 weeks along (which is the deadline for abortions in cases of rape), the Ministry of Health intervened and allowed the girl to get an abortion in a hospital 500 kilometres away from her home. Although the termination of pregnancy was legal, the hospital refused to admit P. as a patient and so the abortion was conducted in a clandestine manner. P. was also told to leave the hospital immediately after the procedure without information on the procedure itself or post-abortion care.

The Polish Family Court filed a suit against P. for engaging in statutory rape because she had sexual intercourse with a minor under the age of 15, even though she was the victim of the rape. Her parents were suit because they allegedly coerced her to have an abortion. S. filed a criminal suit against the doctors and the priest who had disclosed P.'s confidential information, a case against various doctors and others for coercing P. to continue her pregnancy, a case because P.'s right to liberty was violated when she was taken into custody at the juvenile shelter and another one arguing that P. and S.' physical integrity was violated. All of the suits were discontinued.

When filing a complaint before the ECtHR the applicants claimed that their following rights under the Convention had been violated:

- **Article 3:** P.'s right to be free from torture and cruel, inhuman or degrading treatment had been violated because she was denied access to emergency contraception and hindered multiple times in obtaining a lawful abortion. She received biased information, her confidential medical information was passed on to non-medical persons which caused her mental suffering and harassment. They did not provide her with information about the abortion procedure or post-abortion care.

- **Article 8:** Her right to respect for private life was violated because of "the absence of a comprehensive legal framework guaranteeing her timely and unhindered access to abortion". The applicants did not argue that P.'s rights had been violated because she had not been allowed access to an abortion but because "the State's actions and systemic failure in connection with the circumstances concerning the determination of her access to abortion, seen as a whole, as well as the clandestine nature of the abortion, had resulted in a violation of Article 8" (CASE OF P. AND S. v. POLAND, no. 57375/08; 2012 supra note 2, 80). The applicants furthermore claimed that the disclosure of P.'s medical and personal data violated her Article 8 right.

- **Article 5:** The applicant's complained that the removal of the daughter, P., from her mother's custody, was unlawful and violated her Article 5 right (the right of liberty and security). She was not provided with timely medical care and her confidential medical information was disclosed to outside personal. P. also argued that she was provided with false and manipulative information about the applicable procedure and requirements for lawful abortion which further violated her right to respect for her private life.

- **Article 13:** P. alleges that her right to effective remedy had been violated. P. and S. argue that the administrative and civil remedies available to them did not provide sufficient redress for the violations that occurred.

- **Article 14:** P. claims that her Article 14 right, the right to be free from discrimination, had been violated because she was repeatedly denied adequate medical treatment due to her pregnancy. She argues that the differential treatment based on her pregnancy was a form of sex discrimination, which she had to endure.

8.4.2 Decisions

The ECtHR declared the complaints admissible and concluded the case of *P. and S. v. Poland* with the following decisions:

- **Article 3:** The Court stated that an "ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3". In this case, the court asserted that "no proper regard was had to the first applicant's vulnerability and young age and her own views and feelings". It concluded that the applicant "was treated by the authorities in a deplorable manner and that her suffering reached the minimum threshold of severity under Article 3 of the Convention", therefore there had been a violation of the Article 3 provision (CASE OF P. AND S. v. POLAND, no. 57375/08; 2012 supra note 2, 166, 168, 169).

- **Article 8:** The Court concluded that Poland did not provide procedural instruments and a legal framework for pregnant women seeking abortions which would vindicate her right to respect for private life. It furthermore stated that, "effective access to reliable information on the conditions for the availability of lawful abortion, and the relevant procedures to be followed, is directly relevant for the exercise of personal autonomy" and concluded that "the authorities failed to comply with their positive obligation to secure to the applicants effective respect for their private life" which constitutes a breach of Article 8 of the Convention (CASE OF P. AND S. v. POLAND, no. 57375/08; 2012 supra note 2, 110, 111, 112).

  As for the disclosure of the applicant's medical and personal data the court found "that the disclosure of information about the applicant's case was neither lawful nor served a legitimate interest". Therefore the Court concluded that the Article 8 had been violated additionally (CASE OF P. AND S. v. POLAND, no. 57375/08; 2012 supra note 2, 135, 137).

- **Article 5:** The Court stated that "by no stretch of the imagination can the detention be considered to have been ordered for educational supervision" as the government argued. The Court "is of the opinion that if the authorities were concerned that an abortion would be carried out against the first applicant's will, less drastic measures than locking up a 14-year old girl in a situation of considerable vulnerability should have at least been considered". They concluded that the applicant's detention was "not compatible with Article 5 § 1 of the Convention" (CASE OF P. AND S. v. POLAND, no. 57375/08;

2012 supra note 2, 148, 149).

- **Other alleged violations:** The other alleged claims did "not disclose any appearances of a violation of the rights and freedoms set out in the Convention" and were therefore rejected.

8.4.3 Human Rights Implications

In the judgment of this case the ECtHR found that the ill-treatment of P and the disregard of her physicians to her vulnerability and her youth constitute a violation of article 3. The Court saw the treatment of the applicant as suffering and concluded that her human right to be free from inhuman and degrading treatment had been violated by the acts committed by her physicians. The Court also concluded that the authorities did not sufficiently protect the applicants right for private life. The Court reaffirmed that if regulations allowed abortions in certain circumstances there must also be procedures ensuring the access to legal abortion in these circumstances. The applicant's private life had been infiltrated because of the actions of doctors and pro-life activists. By giving private medical data to someone outside the medical personal involved in this case the physicians caused further harm to the applicant's private life. The detention of the applicant into a juvenile facility constituted another rights violation in the Court's opinion.

The Court placed special emphasis on the fact that because of the youth and the criminal act which led to the pregnancy, the applicant was especially vulnerable. It spoke out about the vulnerability of young rape victims and their right to personal autonomy in matters of reproduction. Hereby the Court strengthened young people's right for self-determination on reproductive matters as well as questioned the requirements of a criminal act for access to legal abortion.

The Court also addressed the practice of conscientious objection, which is of high importance in this case. It reiterated its statement from the ruling in the case of *R.R. v. Poland*, which stressed the importance of regulations of the practice of conscientious objection. The regulations should allow for physicians to object on moral grounds but at the same time ensure that patients obtain adequate health services. The Court did not specify the requirements which should be in place but it stressed the importance of safeguards to ensure patients access to legal

services while maintaining a physician's right to object.

The ruling in this case emphasized the Courts opinion that reproductive health care services which are legal must also be accessible. It furthermore initiated reasoning on behalf of young rape victims especially highlighting their self-determination on reproductive matters. The Court yet again stressed the importance of an extensive legal regulation of the conscientious based objection in the medical field of reproduction.

9. The Cases and the implications they could have

The cases of *Tysicac v. Poland, R.R. v. Poland, Z. v. Poland* as well as *P. and S. v. Poland* constitute important milestones in the discussion of women's reproductive rights in Poland and also contributed to the cause of recognition of reproductive rights as human rights.

The four cases selected for this thesis all include stories of women who had to suffer through mental and physical pain relating to their pregnancy. Miss Tysiac was denied access to legal abortion on health grounds and became almost completely blind after the birth of her child. Although she was entitled to a termination of pregnancy because her own health was at risk she was not provided with effective access to legal abortion and her physicians relied on the insufficiently regulated practice of conscientious objection. The Court held the Polish government responsible for the failure to fulfil its positive obligation to ensure the applicant's respect for private life and the failure to establish an effective procedure though which Miss Tysiac would have been able to obtain a lawful abortion.

R.R. was denied access to prenatal genetic testing multiple times which would have enabled her to decide whether or not she wanted to continue with the pregnancy. She was denied an abortion, which she was legally entitled to, because her physicians refused to perform the medical procedure. The ECtHR concluded that she had to suffer from inhuman and degrading treatment and her right to respect for private life had been violated.

In the case of *Z. v. Poland*, the mother of a pregnant women was the applicant after her daughter died as a result of being denied access to medical care because of possible risks to the fetus. The pregnant woman was diagnosed with a serious colon disease but when she sought medical help her doctors refused to give her the adequate treatment because of fear of harming the fetus. The physicians were more concerned with the possibility of harming the fetus than with the

pregnant woman's medical needs. After being denied the adequate treatment she miscarried and died shortly after that. The case was brought before the ECtHR but all of the claims were rejected.

P. and S. filed a complaint against Poland before the ECtHR after P., the daughter, had to go through immense hardship to obtain an abortion. The girl, then 14 years old, was raped by a classmate, which was reported to the police and she was referred to a health clinic for an examination. She was not provided with emergency contraception and so she learned of her pregnancy shortly thereafter. Even though P. was legally entitled to an abortion under Polish law because of the criminal act she was subjected to, she was denied a timely and safe abortion and instead had to face harassment by the clergy and health care personal and at one point was even removed from her mother's care. The Court concluded that there had been violations of the girl's human rights. The Court emphasized that because of the youth and vulnerability after her endurance she was exposed to inhuman and degrading treatment and her private life had been impaired by the actions of others. They emphasized her right for personal autonomy and self-determination in reproductive matters and stressed that reproductive health services which are legal must also be accessible.

The circumstances of these cases show that it is more difficult for women to obtain a lawful abortion in Poland than it would seem when only looking at the legislative regulations. The legal framework does not guarantee access to legal abortions even in circumstances where the requirements seem to be met. It perpetuates gender discrimination because it prevents women from exercising their human rights to life and health. Ensuring women do have access to reproductive healthcare as well as legal and safe abortions is necessary to protect their rights to autonomy, preserve their dignity and enhance equality. Polish law might allow for abortions in certain circumstances but the reality of access to reproductive services is more complicated. Because although legal, abortions are not always accessible. Westeson states that "in the Polish cases, the Court could rely on decisions that had been made by the Polish parliament – to allow reproductive health services, albeit in narrow circumstances – and did not have to address whether abortion as such, regardless of domestic legislation, is a human right". She furthermore adds that assessing "whether laws are complied with, legal certainty is guaranteed, and theoretical rights can be accessed in practice is much closer to the Court's traditional 'comfort zone' than taking a stand on general issues related to women's health and dignity" (Westeson 2013, 176). The Court did not take an unmistakable stand on the issue of women's reproductive health or their reproductive choices but it stressed the importance of procedural rights which

would guarantee access to lawful reproductive health services. Erdmann argues that procedural rights, set forth by the European Court of Human rights, have the opportunity to "demand that women be treated with respect, worth, and dignity, and may thus advance human rights values distinct from, even at odds with, those that underlie the laws they implement" (Erdman 2014, 28). Chiara Cosentino stated that during the last 35 years the European Court of Human Rights had been consistent in its judgements regarding issues of abortion. It has "safeguarded women's interest in taking decisions concerning their body and life against other individuals' rights, such as foetuses and partners" but has also "often preferred to allow a broad margin of appreciation, showing an unwillingness to get involved in any sort of interference with States' sovereignty on such a delicate matter" (Cosentino 2015, 569). So although the decisions in the cases used for this thesis the European Court of Human Rights recognized the violations of the women's human rights and stressed the importance of regulations on proceedings to object their physicians opinions and obtain a lawful abortion the Court did not directly state that women's reproductive rights are human rights. The Court did embrace the rights set fourth in the Convention in connection with the cases. It also stressed the importance of access to pregnancy-terminations in cases where the requirements for legal abortions are met. The Court relied on the domestic regulations of Poland to argue the cases while also urging the government to improve procedural standards.

IV. CONCLUSION

10. Conclusion

"Mankind has managed to send rockets to the moon and to outer space, yet there are deeply rooted problems on earth that continue to reduce the potential of half of the world's population and deprive the human race of untold resources" stated Maja Kirilova Eriksson 18 years ago. This is still true today. Women still do not enjoy the same rights and freedoms as men do and so they will not "gain full dignity until their human rights are truly respected and protected" (Eriksson 2000, 3). Because women were silenced throughout history their issues were not raised and their stories not told for so long. International and domestic laws remain gendered systems which marginalise women. Slow progress is being made and women's rights are put in the spotlight by individuals and organisations who constantly promote the issue of women's human rights.

While international organisations have recognized the dangers caused by unsafe abortions to the life and health of women there have been little successful attempts to set international standards on the matter. The core problem of the issue of reproduction is the balance between various interests involved in the matter. Domestic interests and international standards, public interests and private interests as well as the interests of the pregnant women and the interests of the fetus have to be balanced out. Cosentino notes a conflict between two individual rights: "the right to life of the foetus and the right to private life of the woman" (Cosentino 2015, 571). How these interests are balanced out, hence, how the status quo of the legislation regarding abortion in Poland in the European Convention on Human Rights is, is described in the sections above. The first research sub-question (Q1) was therefore answered in the sections on reproductive rights in Poland (section five). The second sub-question was answered in the section of reproductive rights under the ECHR (section six). Subsections in section five furthermore explained legal abortions in Poland, which legal documents are involved in regulating the issue and the reality of abortions in Poland. Poland's current abortion regulation, the so called Anti-Abortion Act of 1993, allows abortions in three circumstances: First, when the life or health of the pregnant woman is at stake. Second, when the fetus will most likely be born with severe and irreversible impairments. Or third, when the pregnancy is the result of a criminal act like rape or incest. Additionally, timely limits on the availability of an abortion in these circumstances are in place.

The subsections of section six elaborated on the main rights of the ECHR, the aspects involved in the abortion issue as well as the Convention's and Court's perspectives on the matter. Even though the Convention does not mention abortion specifically some of the articles can be applicable in cases where reproductive rights are involved. Article 2, the basic right to life, as well as Article 3, the right to be free from inhuman or degrading treatment, Article 8, the right to respect for private and family life, can all be applied in cases concerning women's reproductive rights. The Court has not yet recognized the right to an abortion as a human right but has ruled in cases where people claim their rights have been violated because they were denied a termination of pregnancy. Some of these cases where mentioned in the explanations on abortion under the ECHR and the status of the unborn or the future child under the ECHR. Four cases where selected for a more in depth analysis on how the Polish abortion policy affects women's human rights.

The section on the regulations of abortion in Poland lists the relevant legal documents and paragraphs touching upon this subject. However, the legal conditions are not the only factors waging in on abortion in Poland. As the issue is highly stigmatized and the public opinion is polarized the reality of pregnancy terminations in Poland differs from the legal regulations making it even harder for women to obtain a legal abortion. Instead, the practice of conscientious objection and the lucrative clandestine abortion market are incentives for denying women lawful, timely and safe abortions. Consequently, women have to seek reproductive healthcare service in the clandestine abortion market where the procedures are illegal, expensive and unregulated.

The denial of legal and safe abortions can lead to violations of women's human rights. According to Eriksson this can happen in two different ways: First, the denial of abortions forces women to carry out unwanted pregnancies. Second, it is a violation of women's right to reproductive self-determination (Eriksson 2000, 277; Cosentino 2015, 569). Both of these possibilities have happened to the women who brought the cases before the ECtHR which were used in this thesis.

The cases brought before the European Court of Human Rights which were selected for this research were cases in which there was a conflict between the State's right to regulate and legislate abortions within it's domestic law and the rights of the women who were prevented, in law or in practice from accessing abortion services (see Cosentino 2015, 572). The four chosen cases are individual cases each embedded within its context. The case of *Tysiac v. Poland* involves a Polish woman who was severely visually impaired due to her pregnancy and

was denied an abortion for health reasons. Because she was denied an abortion, her eyesight worsened, leaving her almost blind after the delivery of her child. The Court concluded that Poland had failed to fulfil its positive obligation under Article 8 of the Convention, to ensure the applicant's right to respect for her private and family life. The court stated that there were no effective procedures established through which the applicant could have objected her doctor's refusal for a therapeutic abortion. Although the Court specified some of the core elements of such a procedure, no such procedure was implicated into Polish legislation.

A few years later, in the case of *R.R. v. Poland,* a woman brought complaints against Poland before the ECtHR claiming that her rights had been violated because she was repeatedly refused diagnostic tests. Although multiple doctor's recognized the need for genetic testing the applicant's request for the tests was stalled, preventing her from obtaining timely information about her fetus which hindered her from obtaining a legal abortion. The cases did not primarily revolve around abortion, "but centers on the right to information in the reproductive healthcare context" (Westeson 2013, 174). In the judgement on this case the Court again stressed the importance of procedures which would allow women access to timely and safe legal abortions.

The case of *Z. v. Poland* was put forward by the mother of a pregnant woman who died after healthcare providers denied diagnostic care and treatment in fear of harming the fetus. After numerous hospitals refused medical care, the woman miscarried and died. The Court decided that the claims of this case were "manifestly ill-founded" and declared the allegations inadmissible.

The case of *P. and S. v. Poland* involved a then 14-year old girl who was raped and sought an abortion afterwards. She was denied access to an abortion, even though it would have been legal, and instead harassed by clergy and medical personnel. The Court emphasized the vulnerability of the young girl but stressed her right to self-determination in regards to her reproductive rights.

In three of the four cases the Court has found violations against the women's human rights. Research sub-question three (Q3) can therefore be answered as follows: Yes, the Court has found Poland responsible for human rights violations in cases which involve women's reproductive rights. In three judgements the Court emphasized that the women's right to respect for private and family life had been violated (CASE OF TYSIAC v. POLAND, no. 5410/03; 2007; CASE OF R.R. v. POLAND, no. 27617/04; 2011; CASE OF P. AND S. v. POLAND, no. 57375/08; 2012). In two cases the Court also found a violation of Article 3, the right to be free from inhuman and degrading treatment (CASE OF R.R. v. POLAND, no. 27617/04; 2011; CASE OF P. AND S. v. POLAND, no. 57375/08; 2012).

With these rulings the Court has set important examples on the issue of women's reproductive rights. The ECtHR has acknowledged that disregard for women's choices in reproductive matters can lead to inhuman and degrading treatment and it can violate women's right to respect for private and family life. In all of the cases mentioned in for the case study of this thesis the Court relied on the existing domestic standards for their judgements.
Sub-question 4 (Q4) can therefore be answered as follows: The regulations in Poland were used to decide if there is a system which protects women's rights to therapeutic abortion when the legal requirements are met. The Court did not try to establish new rules but tried to safeguard existing regulations in the Polish legal system and the European Convention on Human Rights. The Court has stressed the importance of procedural regulations to safeguard access to legal abortions in cases where the circumstances allow a lawful pregnancy termination. In the judgement of *P. and S. v. Poland* the Court furthermore accentuated the autonomy and right to self-determination of women in reproductive matters.

In all of the four cases discussed in the sections above the medical personnel refused abortions to the four women. Some of those refusals were based on conscientious objection. The case of *R.R. v. Poland* was the first case in which the ECtHR had to discuss conscientious objection in the abortion context. In its judgement the Court emphasized "that the state must put procedures in place so that services are available and accessible regardless of whether individual doctors refuse to perform them" writes Westeson (Westeson 2013, 174). In addition to stressing the importance of safeguarding access to legal abortions the Court also highlighted that there need to be adequate legislation regulating the handling of objections based on conscience. The state needs to balance the women's right for access to legal healthcare services with the physicians right to conscientiously object to perform abortions (see Westeson 2013, 174). To balance these interests out the state needs extensive legislation on the issue of conscience based objection to abortions. In her conclusion Westeson argues that "medical professional and societies around the world should push for recognition of progressive international medical guidelines in the field or reproductive health care, as a way to legitimate and normalize these standards in the domestic sphere. Once these standards have become part of the domestic legal order, human rights courts may follow suit. In this way, medical professionals can also contribute to the evolution of human rights norms related to abortion and, thereby, advance women's rights" (Westeson 2013, 176).

To answer the overall research question of this thesis all of the collected material had to be evaluated. As the European Court of Human Rights has found human rights violations which have resulted from Polish abortion legislation or the lack of sufficient regulatory mechanisms the answer to the question is yes. Yes, the restrictive Polish abortion policy can pose a threat to women's human rights. Because women are limited in their access to reproductive choices and reproductive health services their human rights have been violated. The legislation is restricting women's right to self-determination and autonomy. It also hinders women from exercising their right to health and well-being and therefore deprives them of the core concept of human rights – human dignity.

10.1 Limitations, implications and personal comment of the author

This thesis has obvious limitations. The situation of women's reproductive rights is far more complicated and there many more factors who influence the issue on the domestic as well as on the international level. I do not claim that my findings are universal or that they lead to a general conclusion about issues like women's reproductive rights in Poland or women's rights as human rights. This is mere research for my thesis, subjects that I deemed relevant to my research interest and areas that seemed to be important to answer my research questions. The conclusions drawn cannot be generalized and are a result of the specific process of my research and the respective circumstances.

The research frame could be further widened, more aspects could be included and more legislative documents could be analysed. I chose the theoretical framework, the approach, the spectrum of developments and legal regulations as well as cases on what I found relevant and with merit for my research. Other researchers might approach the subject differently.

I do however stress the importance of addressing the issue of women's reproductive rights. All over the world women do suffer if they do not have access to safe reproductive health care. Within Europe Poland has one of the most restrictive abortion policy making it extremely hard for Polish women to obtain a lawful termination of their pregnancy. Instead they have to travel abroad or raise a large sum of money to obtain a clandestine abortion. The stigmatization of abortions in Poland is another obstacle for women and another reason why nothing is changing. Further research should be done on the instruments which can be used to further the cause of recognizing women's reproductive rights as human rights. Because recognizing women's reproductive rights as their right to self-determination and autonomy furthers the emancipation and empowerment of women and will hopefully lead to gender equality.

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Abstract English

The right of every human being to decide on matters concerning their own bodies should be regarded as a basic human right – but not always self-determination is possible. The issues of pregnancies and terminations of pregnancies are dangerous and highly stigmatized topics in which mostly women are faced with disadvantages of biased legislations. This thesis focuses on women's reproductive rights on the domestic level of Poland and the supranational level of the European Court of Human Rights. Special interest is given to the issue of abortion on both levels. Four cases brought before the ECtHR, *Tysicac v. Poland, R.R. v. Poland, Z. v. Poland*, and *P. & S. v. Poland* demonstrate the situation of abortions and its regulation on the level of Poland as well as the ECtHR's dealings with the topic. In several cases the Court assessed the circumstances which the applicants had to endure as contradictory to the human rights which are protected by the European Convention on Human Rights. By analysing the cases and their judgements it can be concluded that the ECtHR is advocating for comprehensive and adequate regulations on pregnancy terminations and on physician's conscientious objection to abortions. Safeguarding women's reproductive rights ensures autonomy and self-determination and promotes the pursuit of equality of the sexes.

Abstract Deutsch

Das Recht der Menschen über ihren eigenen Körper zu bestimmen sollte ein grundlegendes Menschenrecht sein – doch nicht immer ist eine eigenständige Entscheidung möglich. Vor allem Schwangerschaften und Schwangerschaftsabbrüche stellen ein gefährliches und stark voreingenommenes Thema dar, bei welchem vor allem Frauen die Nachteile der einseitigen Gesetzgebung zu spüren bekommen. Für diese Arbeit wurde der Fokus auf die reproduktiven Rechte von Frauen in der polnischen Gesetzgebung und im Rahmen des Europäischen Gerichtshofs für Menschenrechte gerichtet. Speziell das Thema Abtreibung wird auf beiden Ebenen betrachtet. Vier ausgewählten Fälle, *Tysiac v. Polen, R.R. v. Polen, Z. v. Polen* und *P. & S. v. Polen* verdeutlichen den Sachverhalt der Abtreibungen und deren Regelung auf der Ebene Polens und den Umgang des Europäischen Gerichts für Menschenrechte mit der Thematik. In mehreren Fällen beurteilte das Gericht die Umstände welche die Klägerinnen erdulden mussten als Menschenrechtswidrig. Durch die Analyse der Fälle und deren Urteile wird deutlich, dass der Europäische Gerichtshof für Menschenrechte sich für umfassende Richtlinien im Umgang mit der Abtreibungsthematik und Verweigerung von medizinischem Personal Abtreibungen durchzuführen, einsetzt. Die Gewährleistung von reproduktiven Rechten für Frauen führt zu Autonomie und Selbstbestimmung für Frauen und fördert somit das Bestreben nach einer Gleichstellung der Geschlechter.