Right to reproductive health as legal avenue for access to safe abortion in Ireland, Poland and Croatia

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Abbreviations

CESCR - Committee on Social, Economic and Cultural Rights

CEDAW Committee - Committee on the Elimination of All Forms of Discrimination Against Women

ECHR - European Convention on Human Rights

ECtHR - European Court on Human Rights

CEDAW - International Convention on Elimination of All Forms of Discrimination Against Women

ICCPR - International Covenant on Civil and Political Rights

ICESCR - International Covenant on Economic, Social and Cultural Rights

NHF - National Health Fund

ICPD Programme of Action Cairo - Programme of Action: Adopted at the International Conference on Population and Development, Cairo

PLAC - Pro-life Amendment Campaign

SFRY - Socialist Federative Republic of Yugoslavia

UDHR - Universal Declaration of Human Rights

OHCHR - UN High Commissioner for Human Rights

WHO - World Health Organization

Executive Summary

Fight for access to safe abortion and legal guarantee of it have mainly focused on the right to reproductive choice and women's autonomy. Despite unsafe abortion being a public health concern, abortion is rarely discussed as a matter of reproductive health endangering women's health and lives. While reproductive autonomy remains the pillar of women's access to safe abortion, alone it is insufficient to guarantee legal and effective abortion in societies which have a history of institutionalized gender discrimination and where abortion is a complex social construct. The thesis argues how right to reproductive health can be a legal ground for ensuring effective access to safe abortion, since it imposes positive obligations on states to fulfill elements and conditions of reproductive health care in domestic systems. The thesis analyzes how women's rights are affected by the dynamics of lawmaking and prevalence of socio-cultural factors over scientific achievements in reproductive medicine. Relying on the feminist critique of liberal theory of human rights, the thesis addresses the shortcomings of the theory in the context of access to safe abortion as part of the right to reproductive health in states with historically strong opposition to reproductive rights. The thesis argues that if abortion is part of the right to reproductive health, it is hard to ensure effective access to safe abortion without states considering and addressing socio-economic, political and cultural determinants of women's access to abortion through states positive obligations.

Chapter I of the thesis provides detailed overview of the international legal framework on access to safe abortion and right to reproductive health, while the second part of the chapter deals with substantive law on abortion in Ireland, Poland and Croatia. Chapter II of the thesis outlines the procedural barriers which hinder access to safe abortion, including in jurisdictions which liberalized access to abortion. This Chapter shows how it is necessary to look beyond substantive law to understand underlying legal, social and economic barriers in accessing abortion. Relying on obligatory elements which reproductive health care must satisfy

according to international human rights bodies, this Chapter emphasizes the importance of procedural rights in ensuring effective access to abortion. Chapter III of the thesis analyzes the status of right to health and right to reproductive health in legal systems of Ireland, Poland and Croatia, taking into consideration the peculiarity of this right and its enforcement as a socio-economic right. Chapter IV of the thesis elaborates on the importance of gender-responsive laws and international obligations of the states in ensuring gender equality in domestic health care systems, arguing that denial of abortion is a discrimination against women in health. In addition, it argues that creation of laws and policies on abortion as well as the rest of reproductive health care do not rely on scientific evidence, constituting discrimination against women. Finally, Chapter V of the thesis outlines main recommendations for Ireland, Poland and Croatia in protecting women's access to safe abortion through right to reproductive health. The recommendations are based on implementation of human rights model to health care system, which would require the states to address broader issues surrounding access to abortion such as social, economic, political and historical determinants of reproductive health.

Introduction

a) Gap in the research

Abortion has been progressively liberalized in most of the developed and developing world, and most of the research on legalizing access to abortion focuses on the right to reproductive choice and women's autonomy. While reproductive choice and women's autonomy form indivisible part of women's rights and women's health, grounding access to abortion solely on these two legal concepts is insufficient to provide effective access to abortion in many countries. Reproductive choice is based on the theory of negative rights and prohibition of interference into women's life and privacy. But in societies which showed continued conservative attitude towards women's rights and where discrimination is entrenched, it is hard to ground effective access to safe abortion on the freedom of reproductive choice. The emphasis here is on the effective access to abortion, which is often non-existent regardless of the content of substantive law. Countries with liberal abortion regime, where abortion is still hardly accessible in practice serve as proof of this claim. Women's movement advocacy for access to safe abortion is also based on theory of negative rights or right to reproductive choice which is basically liberal theory of rights. However, little research has been conducted on other aspects of access to safe abortion, in countries with less powerful women's movements and strong gender stereotypes. The thesis explores how access to abortion can be grounded on the right to reproductive health since this right requires the state to uphold its positive obligations in ensuring effective access to abortion, and to address socio-economic, political and cultural determinants preventing access to abortion.

b) Explanation of jurisdictions

Choice of the jurisdictions is based on the following criteria: 1) influence of social, cultural and political determinants on lawmaking on abortion; and 2) lack of consideration for

reproductive health in the debate on abortion. Ireland, Poland and Croatia have three different legal regimes on abortion: Ireland is highly restrictive, Poland is restrictive, and Croatia is liberal. However, the influence of the above-mentioned factors was so strong that procedural barriers make their legal regimes effectively more restrictive. In all of them abortion is inextricable part of national identity due to instrumental position of the Catholic Church in forming their nations. While conservative attitudes over women's rights and access to abortion prevail, these three jurisdictions show certain divergence in the response of women's movements to nationalistic intentions to restrict abortion. Finally, and most importantly, their legal systems show absence of relationship between abortion and women's right to reproductive health.

Chapter I

Access to safe abortion in international human rights framework and in legislation of Ireland, Poland and Croatia

Introduction

Reproductive rights are recognized as a very important group of human rights and their protection by the state is crucial for the exercise of other human rights as well. In the exercise of reproductive rights, making free and autonomous reproductive choices should be guaranteed.[1] With the strong development of and advocacy for women's rights at international level, abortion has been recognized as one of the reproductive choices that women should be able to make freely as part of their reproductive rights. However, World Health Organization (WHO) data show that "25.1 million or 45.1% of abortions each year between 2010 and 2014 were unsafe, the proportion of unsafe abortions being significantly higher in countries with

[1] Committee on Economic, Social and Cultural Rights (CESCR), "General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)," UN Doc E/C.12/GC/22, (2 May 2016), par. 5. "The freedoms include the right to make free and responsible decisions and choices, free of violence, coercion and discrimination, regarding matters concerning one's body and sexual and reproductive health."

restrictive abortion laws."[2] This indicates that restrictive abortion laws result in an increase of unsafe abortions leading to serious consequences for woman's health and life. It also implies that many women are unable or prevented to make free reproductive choices. Discourse on safe abortion has mostly focused on freedom of choice, neglecting the inextricable relationship between abortion and reproductive health. International human rights law contains instruments for protection of health, but no instrument provides explicit protection of reproductive health as a human right and little developments have been achieved in this respect.[3] Despite the fact that women in many countries are unable to realize access to safe abortion by asserting reproductive rights, little attention was drawn to the idea of right to reproductive health in domestic contexts either.[4] Domestic laws which curtail women's ability to access safe abortion were created in a highly politicized discourse on abortion where reproductive health considerations were excluded. Whereas international conventions may help advance women's rights, abortion is perceived as a "domestic" matter raising moral and cultural concerns due to which there is no international consensus on availability of abortion. Consequently, most women are compelled to assert and realize their rights in accessing abortion within their country's legal system.

Cultural and moral concerns about abortion prevail over health concerns, while there are no international instruments to attach abortion to reproductive health of women. International instruments do not define right to reproductive health as such, the same way as domestic legal systems of Ireland, Poland and Croatia provide no or insufficient guarantee of right to

[2] Bela Ganatra et al., "Global, regional, and sub-regional classification of abortions by safety, 2010–14: estimates from a Bayesian hierarchical model," *The Lancet* Vol. 390, No. 10110, (October 2017): p. 2372, accessed 3 Jan. 2018, https://doi.org/10.1016/S0140-6736(17)31794-4.
[3] Lance Gable, "Reproductive Health as a Human Right," *Case Western Reserve Law Review* Vol. 60, No. 4, (2010): p. 959, accessed 21 Sept. 2018, http://scholarlycommons.law.case.edu/caselrev/vol60/iss4/4.
[4] Only eight countries in the world provide constitutional protection of reproductive health or guarantee access to reproductive health care: Ecuador, Fiji, Guyana, Kenya, Nepal, Paraguay, South Africa, and Zimbabwe. *See*: Constitute Project, accessed 2 Sept. 2018, https://www.constituteproject.org/search?lang=en&q=reproductive%20health&status=in_force.

reproductive health. To protect all women from risks arising from pregnancy, it is necessary to recognize abortion as right to reproductive health of women.

Development of reproductive rights and access to safe abortion

Reproductive rights first appeared as the right of parents to make free and responsible decisions on the number of children in the *Proclamation of Tehran (1968)*.[5] Reproductive rights as individual and women's rights, however, developed because of strong advocacy of women's movements internationally and nationally.[6] Reproductive rights were not recognized to all individuals until International Population Conference in Mexico (1984),[7] and reaffirmed at UN Conference on Women in Nairobi (1985).[8] *Report of the Nairobi Conference* acknowledged the importance of reproductive rights for women's ability to exercise other human rights, but the focus was placed on controlling fertility, and not protecting women's health.[9] Therefore, even when reproductive rights were recognized as individual rights, protection of women's health was not the primary objective of these rights.

Reproductive rights as we know them are negative rights which developed on the basis of decisional autonomy of women, and eventually were formulated as reproductive choices

[5] Proclamation of Teheran, Final Act of the International Conference on Human Rights, Tehran, 22 April to 13 May 1968, U.N. Doc. A/CONF. 32/41 at 3 (1968), par. 16, accessed 3 Jan. 2018. http://hrlibrary.umn.edu/instree/l2ptichr.htm.
[6] Gable, "Reproductive Health as a Human Right," p. 970.
[7] Report of the International Conference on Population, 1984, Mexico City, 6-14 August 1984, UN Doc. E/CONF.76/19, par. 17, accessed 21 Sept. 2018, https://www.unfpa.org/sites/default/files/event-pdf/ICP_mexico84_report.pdf.
[8] Chiara Cosentino, "Safe and Legal Abortion: An Emerging Human Right? The Long-lasting Dispute with State Sovereignty in ECHR Jurisprudence," *Human Rights Law Review* Vol. 15, No. 3, (2015): p. 802, accessed 3 Jan. 2018, https://doi.org/10.1093/hrlr/ngv035.
[9] Report of the World Conference to Review and Appraise the Achievements of the UN Decade for Women: Equality, Development and Peace, Nairobi, 15-26 July 1985, UN Doc, (1986) par. 156, accessed 3 Jan. 2018, http://www.un.org/womenwatch/confer/nfls/Nairobi1985report.txt. „The ability of women to control their own fertility forms an important basis for the enjoyment of other rights. All couples and individuals have the basic human right to decide freely and informedly the number and spacing of their children; maternal and child health and family-planning components of primary health care should be strengthened; and family-planning information should be produced and services created."

women make.[10] In 1981, the International Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) defined what constitutes discrimination against women and the measures that the states parties are obliged to undertake to end such discrimination.[11] CEDAW imposes obligation on the states parties to eliminate discrimination on the basis of women's reproductive capacity, and protects right to reproductive choice.[12] CEDAW imposes negative obligation on the states to refrain from discrimination against women in health care,[13] but does not create a positive obligation to provide gender-responsive health care services. The Convention does not explicitly mention abortion but the working of its interpretative body, Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee) explains how denial of abortion breaches women's reproductive rights. General Comment No. 35 of the CEDAW says that "denial of safe abortion and post-abortion care constitutes breach of right to reproductive health."[14] This signified a change in the discourse and international human rights law, where abortion is no longer a reproductive matter only, but a health concern which lawmakers need to address accordingly. CEDAW marks a shift in focus from reproduction, population and fertility to reproductive autonomy to which women are entitled but makes no further suggestions on positive obligations of the states parties in this regard.

A groundbreaking moment in the history of reproductive rights was 1994 International Conference on Population and Development held in Cairo which resulted in *ICPD*

[10] Gable, "Reproductive Health as a Human Right," p. 975. "This approach has been crucial to secure women's rights to make decisions about their reproductive health in many countries without interference from the government or others. The dominant rights discourse under this model focuses on women's reproductive decisions grounded in the primarily negative human rights of decisional autonomy, bodily integrity, privacy, and dignity."

[11] International Convention on Elimination of Discrimination Against Women (CEDAW), adopted on 18 December 1979, accessed 3 Jan. 2018, http://www.un.org/womenwatch/daw/cedaw/cedaw.htm.

[12] ibid, Introduction.

[13] ibid, art. 12(1). "States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning."

[14] UN Committee on the Elimination of Discrimination Against Women (CEDAW Committee), "General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19," CEDAW/C/GC/35, (26 July 2017), par.18.

Programme of Action.[15] ICPD has instrumental value for women's health rights because it confirmed the unbreakable bond between reproductive health and human rights, and defined reproductive health as a human right for the first time.[16] According to the *ICPD Programme of Action*, reproductive health means "freedom to decide on reproduction and a state of well-being," fulfillment of which is conditioned by provision of a range of reproductive health care services.[17] The *Programme* first recognizes women's ability to exercise reproductive freedom is contingent on consideration of socio-economic determinants and human rights principles.

In connection to its conclusions about reproductive health, the *Programme* identified the consequences of unsafe abortion and recognized that significant proportion of abortions carried out were unsafe and resulted in maternal deaths despite trend of liberalizing laws.[18] Even though this instrument indicates the biggest dangers of excluding abortion from available health care services, it gives domestic authorities freedom to decide whether to liberalize abortion laws and under what conditions.[19] Such conclusion points out that there was no compromise on whether abortion is an important element of reproductive health of women. From the inception of right to reproductive health as a human right, religious and cultural opposition prevented acknowledgement of abortion as part of reproductive health.

[15] UNFPA, *Programme of Action – Adopted at the International Conference on Population and Development, Cairo 5-13 September 1994*, (ICPD Programme of Action Cairo), accessed 4 Jan. 2018, https://www.unfpa.org/sites/default/files/event-pdf/PoA_en.pdf.

[16] Gable, "Reproductive Health as a Human Right," p. 988.

[17] ICPD Programme of Action Cairo, par. 7.2. „Reproductive health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes. Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so. Implicit in this last condition are the right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility which are not against the law, and the right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant. In line with the above definition of reproductive health, reproductive health care is defined as the constellation of methods, techniques and services that contribute to reproductive health and well-being by preventing and solving reproductive health problems. "

[18] ibid, par. 8.19.

[19] ibid, par. 8.25. "Any measures or changes related to abortion within the health system can only be determined at the national or local level according to the national legislative process. In circumstances where abortion is not against the law, such abortion should be safe."

The *ICPD Programme in Cairo*, nevertheless, invites the states to "understand and better address determinants and consequences of unsafe abortions as threats to women's health."[20]

Whereas it calls for higher commitment of the states in protecting women's right to health in accessing abortion, the *Programme* does not tackle the consequences of restrictive abortion laws which directly expose women to unsafe abortions. This is a weakness of the *Programme* because it calls the states to consider consequences of unsafe abortions, without reflecting upon the legal and structural causes that expose women to unsafe abortions. Despite its historical importance, it is a soft law instrument in protecting right to reproductive health. This is the case, not only because of un-committal to safe abortion, but because it did not incentivize states to act in their own legal systems.[21] ICPD announced a change in the discourse on reproductive health and pointed out that access to abortion cannot be realized by asserting right to autonomous decision-making and reproductive choice solely.

Right to reproductive health and its importance for access to safe abortion

Right to health is guaranteed in the Universal Declaration of Human Rights (UDHR),[22] and its definition from the Constitution of the WHO[23] was implemented in international human rights instruments and is used today by human rights bodies. Right to reproductive health is not provided explicitly in any of these instruments, or other international human rights conventions. Only after the *ICPD Programme of Action in Cairo,* idea about right to reproductive health emerged and considerations about it as a human right became present in public debate. Reproductive health has instrumental importance for human beings and their

[20] ibid, par. 12.17.
[21] Sara E. Davies, "Reproductive Health as a Human Right: A Matter of Access or Provision?" *Journal of Human Rights* Vol. 9, No. 4, (2010): p. 395.
[22] Universal Declaration of Human Rights (UDHR) (1948), art. 25(1), accessed 2 Sept. 2018, https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf. "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."
[23] Constitution of the World Health Organization (WHO) (1948), preamble, accessed 2 Sept. 2018, http://www.who.int/governance/eb/who_constitution_en.pdf.

existence, and it plays important role in relationship with other human rights and social determinants such as gender and power.[24]

Right to reproductive health is particularly important for resolving the issue of accessing safe abortion, as the most controversial issue at the intersection of reproductive health care and women's rights. Main idea behind abortion as a reproductive right is that it is a matter of woman's private choice which she can make based on her bodily autonomy.[25] It suggests that women can realize their reproductive choice regardless of political, social, or economic conditions.[26] However, outcome of the Cairo Conference showed that these conditions matter much more, and in many cases cultural and religious bias prevail over woman's reproductive choice. Access to safe abortion can be realized through right to reproductive health if it is enforceable and justiciable right, based on human rights principles,[27] because right to health requires addressing these conditions.

The only international convention explicitly guaranteeing right to health, the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that everyone is entitled to "the enjoyment of the highest attainable standard of physical and mental health."[28] Unlike CEDAW, this Covenant imposes both positive and negative obligations on the state, which in the context of right to health translate into access to and provision of health care services.[29] The Covenant does not provide for right to reproductive health explicitly, but provides for explicit protection of maternal health and childbirth care as part of reproductive

[24] Gable, "Reproductive Health as a Human Right," p. 985.
[25] Lisa Smyth, *Abortion and Nation: The Politics of Reproduction in Contemporary Ireland*, (Ashgate 2005) p. 24.
[26] ibid.
[27] Gable, "Reproductive Health as a Human Right," p. 992.
[28] International Covenant on Social, Economic and Cultural Rights (ICESCR), adopted on 16 December 1966, art. 12(1), accessed 21 Sept. 2018, https://www.ohchr.org/en/professionalinterest/pages/.aspx.
[29] Davies, "Reproductive Health as a Human Right: A Matter of Access or Provision?" pp. 391 – 392.

health.[30] The notion of reproductive health was expanded in the General Comments of the Committee on Social, Economic and Cultural Rights (CESCR).

In its General Comment No.14 the CESCR defined the content of the right to health and outlined the crucial principles of this right which are:

- indivisibility of right to health from other human rights,[31]
- connection between right to health and socio-economic factors,[32] and
- socio-economic and political conditions must be addressed to achieve good health.[33]

These principles affirm that reproductive choice is only one aspect of women's access to safe abortion and standing alone serves as no guarantee of effective access to abortion. While in law it guarantees no interference in women's reproductive freedom, idea of reproductive choice is detached from the reality context of many women. For example, because access to abortion in some jurisdictions focuses on reproductive choice solely, rights of women in late-term pregnancies seeking therapeutic abortion are almost invisible. For universality of human rights, it is necessary to create legal, safe and accessible abortion for women in late-term pregnancies as they also enjoy right to reproductive health.[34] International human rights framework does not accommodate the rights of women in such situation, where national legal rules on gestational periods prevent them from exercising their reproductive choice. Grounding laws on right to reproductive health would require apprehension of concerns and needs of women in late-term pregnancies and all other women as well.

[30] ICESCR, art. 12(2)(a).
[31] CESCR, "CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)," UN Doc. E/C.12/2000/4, (11 August 2000), paras. 1 and 3, accessed 2 Sept. 2018, http://www.refworld.org/pdfid/4538838d0.pdf.
[32] ibid, par. 4.
[33] ibid, par. 11.
[34] Joanna N. Erdman, "Theorizing Time in Abortion Law and Human Rights," *Health and Human Rights Journal* Vol 19, No. 1, (June 2017): p. 31, US National Library of Medicine.

General Comment No. 22 of the CESCR defines the content of the right to reproductive health, highlighting the evolution of right to reproductive health within human rights framework.[35] The evolution in the understanding of the right is clear from the beginning of the Comment, where CESCR explicitly underlines grave violations of right to reproductive health which resulted in need to have a Comment focusing on this issue.[36] Recognizing maternal mortality as a violation of right to reproductive health, the Comment characterizes restrictive abortion laws as discriminatory and calls for their liberalization as part of set of actions and policies states parties should undertake to prevent further breaches.[37] The Comment does not exclude reproductive autonomy and freedom in decision-making,[38] but it addresses some contextual and procedural aspects of reproductive health which effectively deny multiple reproductive health care services to women.

General Comment No. 22 of the CESCR explains that restricting or criminalizing abortion discriminates against women in realizing right to health..[39] There is an obligation for the states to abandon any barriers such as authorizations or denial of information, as they hamper the exercise of the right to reproductive health.[40] Reaffirming the nature of the Covenant itself, the Comment explains states have positive obligations among which is adoption of legislative measures which would enable women to realize their right to reproductive health, including safe abortion.[41]

Pregnancy as a condition affects health and life of every woman. Even though abortion is part of reproductive health care, provision of it may protect woman's entire health. This reaffirms

[35] CESCR, "General Comment No. 22 on the Right to sexual and reproductive health," par. 1.
[36] ibid, par.4.
[37] ibid, par. 28. „Preventing unintended pregnancies and unsafe abortions requires States to adopt legal and policy measures to guarantee all individuals access to affordable, safe and effective contraceptives and comprehensive sexuality education, including for adolescents, liberalize restrictive abortion laws, guarantee women and girls access to safe abortion services and quality post-abortion care, including by training health care providers, and respect women's right to make autonomous decisions about their sexual and reproductive health."
[38] ibid, pt. II, par.1.
[39] ibid, par. 34
[40] ibid, par. 41.
[41] ibid, par. 45.

the principle of indivisibility of right to reproductive health from other human rights. UN Human Rights Committee in its Draft General Comment on Article 6 (Right to Life) concluded that abortion must be available to protect woman from risks to her life, physical and mental health.[42] Furthermore, the Committee recognized that causes of clandestine abortions are restrictive and criminal abortion laws, as well as other laws and policies imposing similar procedural barriers.[43] CEDAW Committee affirmed that "right to health includes right to reproductive health care and reiterated that states' compliance with this obligation is essential for the well-being of women."[44] In its General Comment on Right to Health, the Committee joins other treaty-interpreting bodies and emphasizes the importance of liberalizing abortion laws for protection of women's reproductive health rights.[45]

When considering the European context, it is impossible to circumvent the European Convention on Human Rights (ECHR). The Convention does not guarantee right to health because matters such as health and other socio-economic rights are addressed in the European Social Charter.[46] However, this does not mean that claims related to health in the context of access to safe abortion have not been heard before the European Court on Human Rights (ECtHR). While such claims have been argued under many articles, health-related claims have gained most prominence under Article 8 right to private life guarantee.[47] According to the Court, private life within the meaning of the Convention includes "right to the protection

[42] UN Human Rights Committee, "General comment No. 36 on article 6 of the ICCPR, on the right to life: Revised Draft Prepared by the Rapporteur," UN Doc. CCPR/C/GC/R 36, (1 April 2015) par. 7, accessed 3 Jan. 2018, http://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/GCArticle6_EN.pdf. "States parties whose laws generally prohibit voluntary terminations of pregnancy must, nonetheless, maintain legal exceptions for therapeutic abortions necessary for protecting the life of mothers, inter alia by not exposing them to serious health risks, and for situations in which carrying a pregnancy to term would cause the mother severe mental anguish, such as cases where the pregnancy is the result of rape or incest or when the fetus suffers from fatal abnormalities."
[43] ibid.
[44] CEDAW, „CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health)," UN Doc. A/54/38/Rev.1, chap. I, (1999), paras. 1-2, accessed 21 Sept. 2018, http://www.refworld.org/docid/453882a73.html.
[45] ibid, par. 31(c).
[46] CoE/ECtHR, "Health-related issues in the case-law of the European Court of Human Rights," (2015) p. 4, accessed 20 Jan. 2018, http://www.echr.coe.int/Documents/Research_report_health.pdf.
[47] ibid, p.5.

of one's physical, moral and psychological integrity, as well as the right to choose, or to exercise one's personal autonomy."[48] However, the Court's case law on abortion has been scarce and the outcomes of right to health claims in relation to abortion have been unpredictable. This is explained by the Court's approach to abortion on a case-by-case basis which is the reason of absence of general rule in the Court's jurisprudence on whether abortion laws should be liberalized or not within the member states legal systems.[49]

Even though abortion is considered a human rights issue at international level, debates in the domestic settings are too politicized and focus on cultural and religious claims ignoring human rights aspects of abortion are disregarded.[50] Overview of international rights framework shows there is no explicit reference to legal and safe abortion. Right to reproductive health received little attention in international human rights framework despite its importance for protecting right to access safe abortion to *all* women. Reproductive choice and freedom played significant role in liberalization of abortion laws in many countries. However, in some countries reproductive choice does not prevail over cultural and religious commitments, while reproductive health is a heavily avoided topic. Because women seeking to access abortion do not have a specific right to rely on, they resort to other human rights. Denial of safe abortion may constitute violation of another human right which is the reason why these rights have been used by national legislatures and courts around the world to guarantee a woman's right to abortion, including the right to abortion on request.[51]

[48] ibid.
[49] ibid, p.10.
[50] Molly Joyce, "The Human Rights Aspects of Abortion," *Hibernian Law Journal* Vol. 16, (2017): p. 27, Hein Online.
[51] Christina Zampas and Jaime M. Gher, "Abortion as a Human Right - International and Regional Standards," *Human Rights Law Review* Vol. 8, No. 2, (1 January 2008): p. 255, accessed 21 Sept, 2018, https://doi.org/10.1093/hrlr/ngn008.

Women's right to life

Inability of women to realize their reproductive health rights is closely related to right to life, as their health condition may become life-threatening one. In few countries, abortion laws are framed in such way that they put woman's right to life in conflict with the life of the fetus.[52] Due to such conflict, woman's right to health cannot be observed and eventually place woman's life at risk due to health complications. Left without a possibility to realize their right to reproductive health, women are exposed to unsafe abortions, because their right is overcome by the legal protection of the fetus. According to the WHO, "unsafe abortion causes 47,000 maternal deaths annually or 13% of all maternal deaths, and this rate remains unchanged throughout the years."[53] International conventions provide for protection of right to life and interpretation of this right is clear – a woman's right to life cannot be put in conflict with fetal life in the legal system.

International Covenant on Civil and Political Rights (ICCPR) guarantees "every human being has the inherent right to life."[54] and according to the Human Rights Committee this right should not be applied narrowly or in restrictive manner.[55] Adoption of measures assisting women in terminating pregnancy is important for prevention of clandestine abortions as one of the threats to women's right to life under the ICCPR.[56] Reiterating the relationship between restrictive abortion laws and maternal deaths, the Committee confirmed that criminalization of abortion when the woman's life is at risk is in conflict with right to life protection in

[52] *See*: Constitution of Ireland (1937), Eighth Amendment of the Constitution Act, 1983, accessed 21 Sept. 2018, http://www.irishstatutebook.ie/eli/1983/ca/8/enacted/en/print

[53] WHO, *Unsafe abortion: global and regional estimates of the incidence of unsafe abortion and associated mortality in 2008. -- 6th ed.*, (2008), par. 81, accessed 5 Jan. 2018. http://apps.who.int/iris/bitstream/10665/44529/1/9789241501118_eng.pdf

[54] International Covenant on Civil and Political Rights (ICCPR), adopted on 16 December 1966, art. 6(1) accessed 5 Jan. 2018, http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

[55] UN Human Rights Committee, "CCPR General Comment No. 6: Article 6 (Right to Life)," UN Doc, (30 April 1982), paras. 1 and 5, accessed on 5 Jan. 2018, http://www.refworld.org/docid/45388400a.html.

[56] UN Human Rights Committee, „CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)," UN Doc. CCPR/C/21/Rev.1/Add.10, (29 March, 2000) par.10, accessed 21 Sept. 2018, http://hrlibrary.umn.edu/gencomm/hrcom28.htm.

Article 6 of the ICCPR.[57] Criminalization of abortion in cases of rape has been found to be in violation of Article 6, while situations in which abortion on ground of rape is lawful, but is unavailable in practice raise serious concerns about women's right to life.[58]

In its General Recommendation No. 24, CEDAW Committee advises the states to amend legislation that criminalizes abortion in order "to remove punitive effect on women who undergo abortion."[59] Similar to the Human Rights Committee's understanding, CEDAW explains these measures are necessary for protecting woman's right to life because punitive laws lead many women to seek unsafe abortions which increase maternal mortality rate.[60] CEDAW has explicitly named unsafe abortion as an issue in violation of women's right to life.[61] On the other hand, CESCR confirmed that in accordance with principle of indivisibility of human rights, right to life is linked to reproductive health rights.[62] In relation to that, denial of abortion often leads to maternal mortality and morbidity which is a violation of right to life.[63]

Woman's right to private life/privacy

Another aspect of abortion is right to private life or right to privacy, depending on the legal system we are looking at. Privacy is the pillar of reproductive rights and woman's right to control her body, therefore it was the basis for liberalization of abortion in the US.[64] In the European context, there has been little progress on conjoining access to abortion and right to privacy in restrictive national legal frameworks. This right is linked to reproductive health rights because in some jurisdictions, right to health is considered a part of right to private life.

[57] Zampas and Gher, "Abortion as a Human Right - International and Regional Standards," p. 257.
[58] ibid, p. 281.
[59] CEDAW, "General Recommendation No. 24," par. 31(c).
[60] ibid, par. 32(c).
[61] Zampas and Gher, "Abortion as a Human Right - International and Regional Standards," p. 259.
[62] CESCR, „General Comment No. 22," par. 10.
[63] ibid.
[64] Smyth, *Abortion and Nation: The Politics of Reproduction in Contemporary Ireland*, pp. 24-25.

Right to privacy is protected by Article 17 of the ICCPR, which prohibits "unlawful and arbitrary interference with one's privacy."[65] According to Human Rights Committee restricting access to abortion falls under the scope of right to privacy, and it affects woman's physical and psychological integrity, as well as reproductive autonomy.[66] If we look at European context, right to private life has become important in the context of abortion claims before the ECtHR, because the Court affirmed that reproductive health rights fall under the scope of Article 8 protection of private life.[67] In its jurisprudence, the Court ruled that reproductive decisions fall under the scope of private life,"[68] as well as the right to access tests and care necessary for identifying fetal disorder.[69] Importantly, it also held that "once a state allows abortion on certain grounds, it has the obligation to shape regulatory framework in a way which would take into account different legitimate interests and rights deriving from the ECHR."[70] Nevertheless, the Court was very clear that Article 8 does not encompass "right to abortion" itself,[71] but that regulation of termination of pregnancy is closely related to private life of a woman.[72] Consequently, the ECtHR reviews the way regulation of access to abortion affects woman's right to private life, but leaves the issue of lawfulness and accessibility of abortion up to domestic authorities.

[65] ICCPR, art. 17(1).
[66] UN Human Rights Committee, "Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2324/2013*," UN Doc. CCPR/C/116/D/2324/2013, (9 June 2016), par. 7.7, accessed 6 Jan. 2018, https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/CCPR-C-116-D-2324-2013-English-cln-auv.pdf.
[67] ECtHR, "Guide on Article 8 of the European Convention on Human Rights – Right to respect for private and family life, home and correspondence - 1ST Ed.," (31 August 2018) par. 60, accessed 21 Sept. 2018, http://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf.
[68] *P. and S. v. Poland*, App. no. 57375/08, (ECtHR, 2012) par. 111. „The Court is of the view 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. It reiterates that the notion of private life within the meaning of Article 8 applies both to decisions to become and not to become a parent."
[69] *A.K. v. Latvia*, App. no. 33011/08, (ECtHR, 2014) paras. 93-94. "Having regard to the principle of subsidiarity, the Court considers that it was primarily for the domestic courts to investigate the inconsistencies identified above, in proceedings affording to the applicant the necessary procedural safeguards, and to decide whether the antenatal medical care offered to the applicant by Dr L. was compatible with her rights under Article 8 of the Convention in all the circumstances of the case."
[70] ECtHR, "Guide on Article 8," par. 60.
[71] *A,B and C v. Ireland*, App. no. 25579/05, (ECtHR, 2010) par. 214.
[72] *Tysiąc v. Poland*, App. no. 5410/03, (ECtHR, 2007) paras. 105-106.

Woman's right to freedom from cruel, inhumane and degrading treatment

Freedom from cruel, inhumane and degrading treatment is protected by Article 7 of the ICCPR,[73] while the Human Rights Committee has found violations of this right where women were forced to carry out pregnancies resulting from rape or where they had knowledge of fetal defect.[74] The focus of the Committee in these cases is on woman's autonomy. Violations arise in cases of women victims of rape, where the national law denies abortion in case of rape or where abortion is inaccessible. In its General Comment No. 28 on Equality of Rights Between Men and Women, the Committee explained how states should make abortion accessible for women victims of rape, under Article 7 of the ICCPR.[75] Otherwise, denial of abortion in law or in practice in cases of rape can potentially violate women's right to freedom from inhumane and degrading treatment.

The Committee recognizes that denial of abortion requests when the fetus is seriously impaired also jeopardizes woman's autonomy. Human Rights Committee has found that denial of abortion in case of fetal impairment can constitute violation of Article 7 because such situation exposes a woman to serious mental distress.[76] This finding is valuable since mental health is often disregarded in the context of woman's pregnancy. In one of the complaints before the Committee, inability of the woman to obtain information about condition of the fetus for the purpose of obtaining abortion, taken together with stigma arising from criminalization of abortion in cases of nonviable pregnancy, constituted inhumane and

[73] ICCPR, art. 7.
[74] Joyce, „The Human Rights Aspects of Abortion," pp. 32-33.
[75] UN Human Rights Committee, „CCPR General Comment No. 28," par. 11
[76] UN Human Rights Committee, "Views on Communication No. 1153/2003," UN Doc. CCPR/C/85/D/1153/2003, (2005) par. 6.3, accessed 6 Jan. 2018, https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/KL%20HRC%20final%20decision.pdf . „The Committee found that refusal of medical authorities to perform therapeutic abortion in case where they diagnosed the fetus with anencephaly, caused the woman substantial suffering and depression. The Committee reiterated that Article 7 covers physical and mental suffering and that the state breached its obligation under Article 7 by refusing to provide therapeutic abortion."

degrading treatment.[77] Similarly, the ECtHR found that denial of genetical tests for determining fetal impairment resulted in violation of freedom from inhumane and degrading treatment from Article 3 of the ECHR.[78] Treaty-interpreting bodies and courts observe the overall complexity of pregnant woman's condition in countries where abortion is denied in, which is often neglected in domestic health care and legal systems. Recognizing such impact of denial of abortion on women is important because of the threshold of severity that is hard to establish in cases of inhumane and degrading treatment.

Legal framework on abortion in Ireland, Poland and Croatia

Abortion as an inextricable part of national identity – shaping legal history of abortion in Ireland, Poland and Croatia

Most of the Western European countries liberalized access to abortion from 1967 to 1987 through legislative reforms, allowing access to abortion on specific enumerated grounds which differed among the states.[79] These reforms came as a European response to the milestone decision of the US Supreme Court in *Roe v. Wade*.[80] However, some countries in Europe, including Western Europe, did not take this road in regulating abortion. Instead, abortion in these countries was a matter of much complex historical, social and cultural facts which shaped legality of abortion.

Ireland, Poland and Croatia are three Catholic societies where abortion is at the intersection of religion, culture and national identity, but is rarely discussed in the context of reproductive health. Catholic Church is the founding element of national identity since it played determining role in political and historical construction of national identity of the three

[77] Joyce, „The Human Rights Aspects of Abortion," p. 33. *See also*: *Mellet v. lreland*, Communication No 2324/2013.
[78] ibid, p. 34. *See also*: *R.R. v. Poland*, App. no: 27617/04, (ECtHR, 2011).
[79] Laurence H. Tribe, *Abortion: The Clash of Absolutes 1ST Ed.* (W.W. Norton & Co. 1990): pp. 71-72.
[80] ibid, *See also*: Mary Ann Glendon, "Abortion and Divorce in Western Law," (Harvard University Press, 1987)

countries.[81] Such social construct of abortion and national identity played a defining role in legal policy on abortion and health in these three jurisdictions, which is why the upheaval in abortion rights in the second half of the 20th century did not have the same impact on these societies as in most European countries. Abortion in these countries is also strongly linked to the nation's struggle for independence, sovereignty and survival of the nation reinforcing the "need" for restrictive attitude towards abortion.

Catholicism and its strong anti-colonial stance defined Irish society since the 16th century and its conservative attitude towards gender and sexuality, including in the sphere of health.[82] After the Ireland's fight for independence, these values reflected in the "conflation of womanhood and motherhood" which found its place in the constitutional and statutory legal framework.[83] Due to their reproductive and biological role in the society which was crucial for nation-building right after independence, women's role as mothers was reinforced and their individual rights restricted. Women's reproductive role is often used as a tool for achieving nationalist and populist goals, where women are elevated as "physical reproducers of nation."[84] While today this may constitute discrimination against women, it remains an underlying factor of woman's position in contemporary Irish society. Therefore, restrictive abortion law and policy in Ireland today reflect the intention of lawmakers to reaffirm traditional, conservative and Catholic values in Irish society at the exclusion of any other values.

[81] Iga Kozlowska, Daniel Beland, and Andre Lecours, "Nationalism, religion, and abortion policy in four Catholic societies," *Nations and Nationalism* Vol. 22, No. 4. (ASEN, October 2016): p. 825, accessed 21 Sept. 2018, https://doi.org/10.1111/nana.12157 .
[82] ibid, pp. 828-829.
[83] ibid, p. 829.
[84] John A. Harrington, "Citizenship and the Biopolitics of Post-Nationalist Ireland," *Journal of Law and Society*, Vol. 32, No. 3, (September 2005): p. 429, accessed 21 Sept. 2018, https://doi.org/10.1111/j.1467-6478.2005.00331.x. State control over women's fertility is a way of achieving biopolitical goal, especially used by populist and nationalist governments. E.g. promoting the idea of big families, determining legitimacy of families in law.

While protection of fetal life and control of women's reproductive rights was an expression of state's protection of Irish national identity, abortion in Ireland was never historically associated with destruction of the nation itself. This was the case in Poland, where abortion was historically used by external forces as a form of control of Polish women's fertility. During the Nazi regime, abortion was legal for non-German women only, since it was used as part of the depopulation policy.[85] Polish women were often persuaded to undergo abortion, whereas Polish physicians performing abortion were promised exclusion from criminal liability if their patients were Polish women only.[86] Under the strong influence of the Soviet Union, Poland decriminalized abortion in 1956 including for women who had undergone self-induced abortion.[87] Because of such history, liberalization of abortion was largely associated with oppression of the nation. Opposition of the Catholic Church against these external forces, strengthened the link between national and religious identity of the Polish people. Like in the Irish context, Catholic Church played an important role in the fight for independence of Poland which provided legitimacy for implementation of Catholic values in the new democratic legal regime.[88] The association of liberal abortion with oppressive regimes constructed abortion in the public discourse as an issue of national identity – Catholic identity.

Croatia was part of the former Socialist Federative Republic of Yugoslavia (SFRY), which adopted liberal attitude towards abortion and access to contraceptives in its family planning resolution during the 1950s, due to high number of illegal abortions jeopardizing women's

[85] Henry P. David, Jochen Fleischhacker and Charlotte Hohn, "Abortion and Eugenics in Nazi Germany," *Population and Development Review* Vol. 14, No. 1, (March 1988): pp. 81-112, JSTOR. During the Nazi regime, there was a differential treatment of German and non-German women wishing to access abortion, which is visible from the records of the Hamburg Council of Physicians from 1944-1945. The records show separate columns for German and non-German women. Columns for German women cite "serious health impairments and severe illness as reasons for accessing abortion, while the column for non-German women requires them to state their nationality only."
[86] ibid, pp. 100-102.
[87] Kozlowska et. al, "Nationalism, religion, and abortion policy in four Catholic societies," p. 830.
[88] ibid, p. 832.

health.[89] Unlike in other Eastern European countries at the time, women's fertility control was not associated with need to satisfy employment rates, because Yugoslavia had labor surplus since 1960s.[90] However, after becoming an independent state, other issues related to women's fertility gained prominence in abortion discourse in Croatia. Newly formed conservative government raised concern over survival of the nation amidst the armed conflict and low fertility rates in Croatia for which it blamed population policies of the communist regime.[91] The new government depicted abortion as something pertaining to the former communist regime, which was considered anti-Croatian.[92] Apprehension of abortion as something anti-Croatian, led to creation of a strong link between abortion, women's reproductive role and national identity. Catholic Church gained prominence during 1990s and it became one of the most trustworthy institutions among Croatian citizens.[93] However, Croatia shows certain divergence from entrenched attitudes of Irish and Polish citizens towards abortion. Surveys conducted in the past decade show inconsistency in the stance of Croatians towards abortion and related issues, where majority of them considers women have right to choose abortion, but still striking 80.6% of them considers abortion as an ending of human life.[94]

While these three jurisdictions have a lot in common when it comes relationship between abortion with national identity, they diverge in terms of women's movements' attitude towards abortion. Women's rights movements influence forming of the public opinion on abortion, equally as other social groups or institutions such as the Church. Preoccupation with women's basic rights marked the work of the women's movement in Ireland before 1980s

[89] Rada Drezgić, "Policies and practices of fertility control under the state socialism," *History of the Family* Vol. 15, No. 2, (January 2012): pp. 193-194, accessed 21 Sept. 2018, https://doi.org/10.1016/j.hisfam.2009.11.001.
[90] ibid, p. 199.
[91] Jeremy Shiffman, Marina Skrabalo, and Jelena Subotic, "Reproductive rights and the state in Serbia and Croatia," Social Science & Medicine Vol. 54, (2002): p. 634. Elsevier Science.
[92] ibid.
[93] Dalida Rittossa, "Taking the Right to Abortion in Croatia Seriously - One of the Basis Constitutional Rights or a Rudiment of the Right to Reproduction," Cardozo Journal of Law and Gender Vol. 13, No. 2, (2007): p. 297. "84,5% of Croatians put their trust in the Catholic Church."
[94] ibid. "For example, 64.4 % of research participants supported a woman's right to freely decide to have an abortion, but 80.6% of them thought that abortion is an interruption of human life."

which is why the movement was not aggressive or proactive over the access to abortion, despite abortion being criminalized.[95] The movement itself did not have a uniform stance over abortion during the 1980s initiatives to strengthen legal restrictions over abortion.[96] Therefore, absence of strong resistance against restrictive abortion policy allowed for religious and conservative groups to write legal history as we know it today. Polish history of occupation and influence of external forces reflected on the development of the women's movement as well, which was almost non-existent until the beginning of the 1990s.[97] After democratization, many women's groups were formed but struggled in making any impact since feminist action and especially advocating access to abortion were seen as communist legacy and undesirable in the new democratic Polish society.[98] Whereas Irish women's movement was not uniform in taking more aggressive approach in defending right to access abortion, women's movement in Poland did not have sufficient resources to advocate for social and other policies, which resulted in men making decisions about women's health and bodies. Transition affected adversely Polish women's movement because women were preoccupied with socio-economic issues,[99] but this was not the case in Croatia. Feminist groups in Croatia employed advocacy tools and used media to promote women's rights and rebut nationalist and populist ideas about reproductive rights and women's position in the society.[100] Unlike Polish and Irish feminists, Croatian feminists formed cooperation with liberal political groups and used litigation to abolish policies detrimental for women's rights.[101] Providing resistance and

[95] Evelyn Mahon, "Abortion Debates in Ireland: An Ongoing Issue," in *Abortion Politics, Women's Movements, and the Democratic State: A comparative Study of State Feminism*, ed. Dorothy McBride Stetson, (Oxford Scholarship Online, 2003), p. 157.
[96] ibid.
[97] Jill M. Bystydzienski, "The Feminist Movement in Poland: Why so Slow?" *Women's Studies International Forum* Vol. 24, No. 5, (September 2001): p. 502, accessed 21 Sept. 2018, https://doi.org/10.1016/S0277-5395(01)00197-2 .
[98] ibid, p. 506.
[99] ibid, p. 507.
[100] Shiffman et. al. "Reproductive rights and the state in Serbia and Croatia," pp. 636-637.
[101] ibid, p. 637. "An NGO B.A.B.E. filed a complaint before court seeking to outlaw a pronatalist policy of the conservative government which professionalized motherhood and provided for special rights for mothers with four or more children. They claimed the law was discriminatory towards men, and that the law was purely

organized response to conservative populist policies prevented restriction of access to abortion in Croatia.

It is necessary to note how these two important aspects of abortion law developed in Ireland, Poland and Croatia. Understanding the determinants of abortion through country's history and societal developments provides an insight into underlying motives of attitude towards abortion in law. On the other hand, position of women's movements in this context tells about their ability to influence lawmaking and to shape legal history, as well as the responsiveness of the societies to gender issues. Women's movement's role and power in defining access to abortion provides an insight about the conflict of values which intersect in abortion itself, and the ability of women's movements to influence this issue.

Ireland

With one of the most restrictive abortion laws in the world, reproductive choice in Ireland has been completely suppressed. The restrictive nature of abortion law in Ireland stems from the history of constitution-making which defined that natural or divine laws are supreme and prevail over individual autonomy.[102] Irish Constitution which was adopted in 1937, promotes values of Catholicism and nationalism because of the influence Catholic Church had on its framers.[103] The Constitution promotes sanctity of life and conservative attitudes towards woman's position in the society. It is noteworthy that fetal life or life of the unborn was not mentioned in the Constitution of 1937,[104] because procuring abortion or assisting in procuring

rhetorical considering lack of resources for such social policies. Therefore, they claimed such government's move initiated the process of excluding women from the labor force."

[102] Patrick Hanafin, "Reproductive Rights and the Irish Constitution: From the Sanctity of Life to the Sanctity of Autonomy," European Journal of Health Law Vol. 3, No. 2, (June 1996): p. 180, accessed 21 Sept. 2018, https://doi.org/10.1163/157180996X00077.

[103] ibid, p. 179.

[104] Fiona de Londras, „Fatal Fetal Abnormality, Irish Constitutional Law and Mellet v. Ireland," *Medical Law Review* Vol. 24. No. 4. (November 2016): p. 593, accessed 21 Sept. 2018. https://doi.org/10.1093/medlaw/fww040.

abortion was criminalized under the *Offences Against the Persons Act of 1861*.[105] Catholicism played an important role in limiting sexual and reproductive health rights; which is why sale and import of contraceptives were criminalized for a long period of time.[106]

Things started changing in 1970s and 1980s with several attempts to liberalize reproductive health policy of Ireland. Changes started with recognition of right to family planning within marriage in the "activist" decision *McGee v. Attorney General* where the Supreme Court recognized that constitutional right to privacy includes "right to marital privacy."[107] This judgement and establishment of various rights movements at that time resulted from a shift in Ireland's economic policies and accession to the EU.[108] While Ireland persisted with abortion prohibition, there were substantial changes in laws on abortion in other jurisdictions such as the UK and the US.[109] The UK Parliament passed the Abortion Act in 1967 which resulted in increase of the number of Irish women travelling to the UK to obtain a safe abortion.[110]

Due to strong influence of the Church and state's control of the most private aspects of life, it is almost impossible to discuss about reproductive freedom in Ireland. Advocacy for decriminalization of abortion in Ireland is linked to women's fight for access to contraception which was still legal only for married couples. Group of feminist activists *Women's Right to Choose Group* in Ireland, started demanding the legalization of contraception and abortion.[111]

[105] Offences Against The Person Act (1861), ss. 58 - 59, accessed 5 Feb. 2018, http://www.irishstatutebook.ie/eli/1861/act/100/enacted/en/print.html .
[106] Ivana Bacik, "The Irish Constitution and Gender Politics: Developments in the Law on Abortion," *Irish Political Studies* Vol. 28, No. 3, (September 2013): p. 381, accessed 22 Sept. 2018, https://doi.org/10.1080/07907184.2013.823085.
[107] De Londras, „Fatal Fetal Abnormality, Irish Constitutional Law and Mellet v. Ireland," p. 593.
[108] Lisa Smyth, "Narratives of Irishness and the Problem of Abortion: The X Case 1992," *Feminist Review* No. 60, *Feminist Ethics and the Politics of Love*, (1998): pp. 63-64, accessed 5 Feb. 2018, JSTOR.
[109] UK adopted the Abortion Act in 1967, while the US Supreme Court liberalized abortion in 1979 US Supreme Court decision *Roe v. Wade*.
[110] Bacik, "The Irish Constitution and Gender Politics: Developments in the Law on Abortion," p. 383. "Once abortion became legally available in Britain under this Act, the numbers of women travelling to England from Ireland for terminations began to increase significantly, and reached 3,600 in 1981 – the same year that an Irish right to choose campaign was launched. The numbers peaked at over 6,700 per year in 2001 and have fallen since, averaging at about 4,000 in 2011."
[111] ibid.

Despite the potential to introduce major legislative changes, strong opposition of Pro-life Amendment Campaign (PLAC) turned abortion into a constitutional and moral issue placing in question national identity, and pointing out the need to control women's sexual behavior.[112] This is how underlying historical factors were used for presenting abortion as a moral and religious concern whose liberalization would undermine Catholic values in society. Following a referendum, the result of the PLAC was the Eighth Amendment of the Constitution of Ireland which became Article 40.3.3. and which says:

> "The state acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right."[113]

This provision raises many interpretative and legal questions in the Irish legal and health care system. It is evident that the provision places woman's right to life and the life of the fetus in conflict because they have equal right to life, which is a breach of woman's right to life. Textual interpretation of this provision does not give an answer whether women in Ireland have access to abortion on any grounds because there is no indication of what happens when woman's life or fetal life is in danger and more importantly, which one shall prevail. It is considered in general that abortion in Ireland is allowed when a woman's life is at risk,[114] but the vagueness of Article 40.3.3. raises issues on what are life-threatening situations for women and up to which moment fetal life should be protected at the expense of woman's health.

Abortion remained a constitutional issue in Ireland because there were several referenda held and two additional amendments to the Constitution which tried to protect other fundamental

[112] Smyth, "Narratives of Irishness and the Problem of Abortion: The X Case 1992," p. 66.
[113] Eighth Amendment of the Constitution Act, 1983, accessed 5 Feb. 2018, http://www.irishstatutebook.ie/eli/1983/ca/8/enacted/en/html
[114] Bacik, "The Irish Constitution and Gender Politics: Developments in the Law on Abortion," p. 382.

rights of women such as freedom of information and freedom of movement. These amendments stem from judgements of Supreme Court of Ireland and the ECtHR which try to address and accommodate minimal rights of women in reference to the Eighth Amendment. In 1993 decision *Open Door and Dublin Well Woman v. Ireland*, ECtHR found that Ireland breached its obligation under Article 10 of ECHR on freedom of expression by prohibiting dissemination of information about abortion services abroad.[115] Second case was *X v. Attorney General* which showed the practical effect of uncertainty and vagueness of Article 40.3.3. on the life of pregnant woman, a victim of rape. The case raised the issue of whether "risk of suicide would be a sufficient ground for lawful abortion under the Article 40.3.3. of the Constitution."[116] The Court held that pregnancy should be terminated if there is "a real and substantial risk to woman's life."[117] This was the first case that dealt specifically with the interpretation of the vague wording of Article 40.3.3. in which the Supreme Court addressed the issue of absence of secondary legislation which would in detail explain the grounds on which abortion is allowed.[118]

The referendum in 1992 proposed exclusion of risk of suicide as a ground for abortion which was found in *X case*, but this proposition was rejected by the people despite the strong pro-life

[115] *Open Door and Dublin Well Woman v. Ireland*, App. nos. 14234/88, 14235/88 (ECtHR, 1992) par. 73. „The Court is first struck by the absolute nature of the Supreme Court injunction which imposed a "perpetual" restraint on the provision of information to pregnant women concerning abortion facilities abroad, regardless of age or state of health or their reasons for seeking counselling on the termination of pregnancy. The sweeping nature of this restriction has since been highlighted by the case of *The Attorney General v. X and Others* and by the concession made by the Government at the oral hearing that the injunction no longer applied to women who, in the circumstances as defined in the Supreme Court's judgment in that case, were now free to have an abortion in Ireland or abroad."

[116] *Attorney General v. X*, [1992] ILRM 401, [1992] 1 IR 1, par. 22, accessed 5 Feb. 2018, http://ww3.lawschool.cornell.edu/AvonResources/Attorney-20General-20v-20X-20et-20al-20-Ireland.pdf.

[117] ibid. "Proper test to be applied is that if it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health, of the mother, which can only be avoided by the termination of her pregnancy, such termination is permissible, having regard to the true interpretation of Article 40.3.3. of the Constitution."

[118] ibid. „With regard to the issue concerning the question of the inability of the court to make any order where a reconciliation of a conflict between the right to life of the unborn and the right to life of the mother, both dealt with in the Eighth Amendment, arose, it was submitted on this appeal that the word 'laws' contained in that amendment must be construed to mean laws enacted by the Oireachtas, and that since no laws had been enacted by the Oireachtas to vindicate or defend the right of the unborn, following upon the enactment of the Eighth Amendment of the Constitution, the court had no jurisdiction to intervene in that behalf."

campaign.[119] Second proposition which would become the Thirteenth Amendment of the Constitution ensured that women have freedom of movement for obtaining abortion abroad, and its text says that Article 40.3.3. does not prevent women from seeking abortion abroad.[120] Lastly, the third proposition was a guarantee for freedom of expression and information on obtaining abortion services abroad, which became the Fourteenth Amendment.[121] What these amendments tried to provide for women was an option to inform themselves about abortion services outside Irish jurisdiction and access abortion abroad, so that women who seek abortion are left with certain, though very limited, freedom. While these changes provide women with "some" freedom, they expose women to abortion services abroad raising significant health concerns. Whereas abortion abroad may be safe and legal, Irish lawmakes women travel abroad to obtain abortion in disregard of two important risks. First, it disregards the necessary post-abortion care whose availability upon woman's return in Ireland is questionable. Secondly, the law directly exposes women to mental distress and potential complications arising from clandestine abortion or the travel itself. The law itself forces women to travel abroad to exercise right to reproductive health, implying that abortion is not part of reproductive health care in Ireland.

After 2000s, the development of Irish law on abortion was shaped by two opposite currents: tendency of the state to exclude risk from suicide as a ground for abortion and a stronger pro-choice campaign followed by cases of women whose rights were breached and who aimed at challenging the restrictive abortion law. In 2002 referendum, Irish people voted once again against exclusion of risk from suicide as a ground for abortion which entrenched the ruling in

[119] Bacik, "The Irish Constitution and Gender Politics: Developments in the Law on Abortion," p. 388.
[120] Thirteenth Amendment of the Constitution Act, 1992, accessed 22 Sept. 2018, http://www.irishstatutebook.ie/eli/1992/ca/13/section/1/enacted/en/html#sec1.
[121] Fourteenth Amendment of the Constitution Act, 1992, accessed 22 Sept. 2018, http://www.irishstatutebook.ie/eli/1992/ca/14/section/1/enacted/en/html#sec1. "This subsection shall not limit freedom to obtain or make available, in the state, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state."

X case.[122] In the new decade, stronger pro-choice campaign attempted challenging the Eighth Amendment based on lack of clarity, predictability and preciseness, and the fact that it was never supported by a more detailed legislation. After the judgement of the ECtHR in *A, B, and C v. Ireland*, in which the Court held that Irish law did not contain any criteria on what constitutes risk to life of the mother,[123] the need for legislative changes gained significant attention. This led to adoption of *Protection of Life During Pregnancy Act of 2013* which governs the conditions of performing termination of pregnancy in three situations which constitute risk of loss of life of pregnant woman and those are physical illness, physical illness in emergency and risk from suicide.[124] The Act implements the real and substantial risk test adopted by the Supreme Court of Ireland and requires that this assessment is done by a single physician in case of emergency,[125] two physicians in case of physical illness,[126] and three physicians in case of risk from suicide.[127] In all of these situations, the law reminds the physicians about their duty "to preserve unborn human life as far as practicable."[128] This repetition has two-fold impact: it reinforces the conflict of the right to life of the mother and life of the unborn; and it places physicians in position where they may not be certain about the meaning of "as far as practicable." This wording demands from the physicians to go far in preserving the life of the unborn, but in doing so they may expose women to serious health risks which once again confirms the mechanisms for protection of women's right to health in Irish law are absent.

[122] Bacik, "The Irish Constitution and Gender Politics: Developments in the Law on Abortion," p. 391.
[123] *A, B and C v. Ireland*, par. 253. "Moreover, whether or not the broad right to a lawful abortion in Ireland for which Article 40.3.3 provides could be clarified by Irish professional medical guidelines as suggested by the Government, the guidelines do not in any event provide any relevant precision as to the criteria by which a doctor is to assess that risk. The Court cannot accept the Government's argument that the oral submissions to the Committee on the Constitution, and still less obstetric guidelines on ectopic pregnancies from another State, could constitute relevant clarification of Irish law."
[124] Protection of Life During Pregnancy Act (2013), [No. 35 of 2013], Ch. I, ss. 7, 8 and 9, accessed 5 Feb. 2018, http://www.irishstatutebook.ie/eli/2013/act/35/enacted/en/pdf.
[125] ibid, s. 7(1)(a).
[126] ibid, s. 8(1)(a).
[127] ibid, s. 9(1)(a).
[128] ibid, ss. 7.1.a.(ii); 8.1.b and 9.1.a.(ii).

On 25 May 2018 Ireland held a referendum with a proposal to repeal the Eighth Amendment completely and introduce Thirty-Sixth Amendment to the Constitution[129] which would say: "Provision may be made by law for the regulation of termination of pregnancy."[130] The proposition for liberalization of abortion came as a result of strong advocacy for protection of women's health, after several incidents where women were denied abortion despite substantial risks to life.[131] Results of the Referendum showed 66.4% of Ireland's population voted for repeal of the Eighth Amendment,[132] which marked a new path on Ireland's legislative framework on abortion. The new Amendment is yet to be passed by the Parliament, but it is important that the new legislative policy on abortion was prepared in advance of referendum and presented the new grounds on which abortion could be lawfully accessed. According to the *Policy Paper: Regulation of Termination of Pregnancy* prepared by the Parliament's Joint Committee, abortion would be legal in case of risk to physical and mental health, medical emergency, fetal condition which is likely to lead to death before or shortly after the birth, and abortion upon request would be lawful up to 12 weeks of pregnancy.[133] It envisages abolition of the *2013 Act* and introduction of a new legislation in line with the new legislative policy. The success of the *Policy Paper* and the new law depends on the way it will be drafted, consideration for women's reproductive health and its enforcement as well. Nevertheless, the Referendum marks end of one of the longest battles of women for recognition of their reproductive health rights in the world.

[129] „Thirty-sixth Amendment of the Constitution Bill 2018 (bill no. 29 of 2018) - Regulation of Termination of Pregnancy," Irish Elections, (2018), accessed 22 Sept. 2018, http://irelandelection.com/referendum.php?electype=6&elecid=232.
[130] Thirty-sixth Amendment of the Constitution Bill 2018, as initiated [No. 29 of 2018], (7 March 2018), accessed 4 Sept. 2018, https://data.oireachtas.ie/ie/oireachtas/bill/2018/29/eng/initiated/b2918.pdf.
[131] E.g. Case of Savita Halappanavar who died from health complications after being denied abortion of a non-viable pregnancy. *See*: Merge Berer, „Termination of pregnancy as emergency obstetric care: the interpretation of Catholic health policy and the consequences for pregnant women," *Reproductive Health Matters* Vol. 21, No. 41, (2013).
[132] „Thirty-sixth Amendment of the Constitution Bill 2018 (bill no. 29 of 2018) - Regulation of Termination of Pregnancy," Irish Elections.
[133] „Policy Paper: Regulation of Termination of Pregnancy," approved and published by the Government 8 March 2018, accessed 4 Sept. 2018, https://health.gov.ie/wp-content/uploads/2018/03/Policy-paper-approved-by-Goverment-8-March-2018.pdf.

Poland

Current legislative framework on access to abortion in Poland developed in the early 1990s and reflects the ideas and values of post-socialist Polish society in which the Catholic Church is one of the most important determinants in public opinion. Such strong presence of the Catholic Church in public life and policy making is often linked to the Church's role in opposing the socialist regime and supporting independence of Poland.[134] The Church played a significant role in shaping the discourse on abortion and eventually the law on abortion.

Unlike Ireland where criminalization of abortion was deeply entrenched in the law throughout history, changes in Polish abortion law followed the changes in political regimes in the 20th century. From 1932 until 1956, abortion was legal in Poland "when the pregnancy resulted from a crime and when a woman's health and life was at risk."[135] During World War II and Nazi occupation of Poland, abortion on demand was legalized and used to limit fertility of Polish women.[136] In 1956 under the Communist regime, the law on abortion was further liberalized.[137] The fact that the Church opposed and condemned these policies and laws for the protection of Polish nation, gave it legitimacy to advocate for prohibition of abortion in independent democratic Poland.[138] In the 1980s the Catholic Church's strong campaign of condemning legal abortion led to a change in terminology where abortion was no longer

[134] Dorota Szelewa, "Killing 'Unborn Children'? The Catholic Church and Abortion Law in Poland Since 1989," Social and Legal Studies Vol. 25, No. 6, (2016): p. 743, accessed 22 Sept. 2018, DOI: 10.1177/0964663916668247. "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. Trust in the Polish Church was, for example, very different from the situation of the Spanish Church after the fall of the Franco regime – this was because of the Spanish Church's support for Franco."

[135] Wanda Nowicka, "The Struggle for Abortion Rights in Poland," in *Sex Politics: Reports from the Front Lines* Richard Parker, Rosalind Petchesky and Robert Sember eds, (Sexuality Policy Watch 2007), p. 169, accessed 5. Feb. 2018, http://www.sxpolitics.org/frontlines/book/pdf/sexpolitics.pdf .

[136] Szelewa, "Killing 'Unborn Children'? The Catholic Church and Abortion Law in Poland Since 1989," p. 745.

[137] ibid, pp. 745, 747.

[138] ibid. „To sum up, liberalization of abortion became associated with external occupying powers (both in the case of the Nazi and Stalinist regimes) and the physical elimination of the Polish nation (mostly in the case of the Nazi occupation and the depopulation plans). Similarly, the Church's officials often contrast 'natural' (God's) law (and morality) with an 'artificial' (imposed, 'Stalinist') (human) legal order. In other words, the Church presented itself as a defender of the biological continuity of the Polish nation, threatened by the practice of legal abortion, associated with the history of genocide."

represented as a medical procedure, but as "killing unborn children."[139] After transition to democratic regime, the anti-communist and pro-democratic politicians supported the idea of restricting abortion law and presented several legislative drafts on new restrictive abortion law.[140] In 1993, Act on Family Planning, Human Embryo Protection and Conditions of Permissibility of Abortion (*Ustawa z dnia 7 stycznia 1993 r. o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży*) was adopted by the Parliament.[141] It provides that "the right to life shall be subject to protection, including in the prenatal phase."[142] Article 4a.1. of the Act defines that:

> "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."[143]

Besides enumerating the situations when abortion is lawful, the Act prescribes the time limits within which abortion can be performed. In case of risk from fetal defect from subsection (2), "the termination of pregnancy shall be permissible until the fetus is capable of living

[139] ibid, p. 748.
[140] Nowicka, "The Struggle for Abortion Rights in Poland," p. 170.
[141] ibid.
[142] *[Ustawa z dnia 7 stycznia 1993 r. o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży]*. The Family Planning, Human Embryo Protection and Conditions of Permissibility of Abortion Act of 7 January 1993, art.1, accessed 5 Feb. 2018, https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Polish%20abortion%20act--English%20translation.pdf .
[143] ibid, art. 4.a(1).

independently outside the body of the pregnant woman."[144] In other cases, termination can be performed "no more than 12 weeks since the beginning of pregnancy."[145]

Even though the Act remains in force in this form until today, there were attempts to further liberalize and restrict access to abortion. This first occurred in 1996 when the Parliament extended the grounds for lawful abortion to socio-economic grounds which was followed by strong opposition of the Church, pro-life organizations and politicians who linked liberalization of abortion to former oppression regimes.[146] This amendment was challenged by conservative group in the Parliament before the Constitutional Tribunal.[147] In the ruling on Family Planning Act Amendment from 1997, the Tribunal noted "there are no provisions relating directly to life protection in the constitutional regulations in force in Poland."[148] Unlike the Irish Constitution, the Polish Constitution does not have express guarantee of fetal life or protection of life of the unborn, because Article 38 on Right to Life says, "The Republic of Poland shall ensure the legal protection of the life of every human being."[149] This, however, did not prevent the Tribunal from deriving the fetal life protection from other principles. Namely, the Tribunal held that "rule of a democratic state of law requires that constitutional protection of life in every phase."[150] The Amendment was declared unconstitutional by extending the interpretation of right to life to the pre-natal phase. Tribunal's interpretation in relation to women's rights indicates that the Tribunal excluded health and gender considerations since it held woman's rights need to be limited to protect

[144] ibid, 4.a(2).
[145] ibid.
[146] Szelewa, "Killing 'Unborn Children'? The Catholic Church and Abortion Law in Poland Since 1989," p. 751. "The Church reacted strongly against the amendment describing it as 'not only anti-Christian, but anti-Polish and inhumane as well."
[147] ibid, p. 752.
[148] Ruling of the Constitutional Tribunal of Poland on Family Planning Act Amendment, Decision dated 28 May, 1997 (K. 26/96) in Norman Dorsen, Michel Rosenfeld, Andras Sajo, Susanne Baer, and Susanna Mancini *Comparative Constitutionalism: Cases and Materials Third Ed.* American Casebook Series (West Academic Publishing 2016). p. 723.
[149] Constitution of the Republic of Poland of 2nd April 1997, as published in Dziennik Ustaw No. 78, item 483, art. 38, accessed 5 Feb. 2018, http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm.
[150] Ruling of the Constitutional Tribunal of Poland on Family Planning Act Amendment, in *Comparative Constitutionalism: Cases and Materials Third Ed.*, p. 724.

fetal life because "evolving life limits the mother's possibility to enjoy rights and freedoms that are vested in her."[151] Such position is justified on grounds that the life in development stage "makes use of the mother's goods in biological sense."[152] Terminology of the judges requires clarification because they use the term *child* and not *fetus* and equate "developing life" with fetus. On the other hand, it presupposes that a pregnant woman is already a mother and does not use the term "woman" or "pregnant woman." Tribunal's disregard of woman's autonomy, life and health undermines the woman as a human being and human rights-carrier. This neglects woman's rights and particularly right to reproductive health because it assumes the woman is put in subordinated position from the beginning of pregnancy. It implies a certain hierarchy of rights where woman's possibility to enjoy her rights is defined by her condition of pregnancy which, however, justifies limitations on her rights and freedoms. Tribunal's reference to woman's biological "goods" as necessary for development of human life is objectification of woman's body and denial of her right to choice, since the Tribunal held reproductive choices do not comprise woman's right to decide whether to bear a child.[153] Tribunal's argumentation legitimizes objectifying women and their body contrary to human rights law, while ignoring women's health and reproductive freedom.

Polish law criminalizes abortion performed on grounds other than the ones provided under the *Family Planning Act of 1993* and provides specific sanctions for those who perform illegal abortion but does not sanction women.[154] According to Article 152(1) of the Penal Code, "those who terminate pregnancy or assist in termination with the consent of the woman are subject to penalty up to 3 years of deprivation of liberty."[155] The sanctions become more stringent if termination is performed at a later stage of pregnancy or if termination is

[151] ibid, par. 4.3. p. 725.
[152] ibid, par 4.3. p. 725.
[153] ibid, par. 4.3. p. 725.
[154] Act of 6 June 1997, The Penal Code of Poland (as amended, 2016), art. 152(1) and 152(2), accessed 7 Feb, 2018, http://www.legislationline.org/documents/section/criminal-codes/country/10.
[155] ibid.

performed with no consent, in which case the penalty may increase up to 10 years of imprisonment.[156]

An important characteristic of Polish law which distinguishes it from Irish and Croatian legal framework is the legal status of the fetus which is explicitly defined in law. The *Family Planning Act* gives the "conceived child legal capacity," and "right upon birth to seek redress for damages suffered before birth."[157] However, the conceived child attains property rights and obligations upon birth only.[158] This means the fetus and its rights are protected directly by the state. Restricting right to reproductive choice of the woman and imposing limitations on her other rights for reasons of her reproductive capacities and biology. This reinforces the conflict of rights between the woman and the fetus, where the woman is seen through her biological reproductive role and such position in law undermines the autonomy of woman and her right to reproductive health.

Croatia

The most important feature of Croatia's abortion law in comparison to Ireland and Poland, is that it allows abortion on demand. However, in the recent time under the conservative party's leadership and stronger influence of the Catholic Church in public life, there were attempts to restrict access to abortion. Act on health measures for the realization of the right to freely decide on the childbirth of Croatia *(Zakon o zdravstvenim mjerama za ostvarivanje prava na slobodno odlučivanje o rađanju djece)* was adopted in 1978 when Croatia was part of the former SFRY, defining termination of pregnancy as a "medical procedure" which can be performed upon request "up to ten weeks from the beginning of pregnancy."[159] The Act

[156] ibid. „Sanction for termination of pregnancy after fetus' viability is up to 8 years of imprisonment, whereas the penalty in case of termination by use of force after fetus' viability is up to 10 years of imprisonment."
[157] The Family Planning, Human Embryo Protection and Conditions of Permissibility of Abortion Act of 7 January 1993, art. 6.
[158] ibid, art. 6(1)(b).
[159] *[Zakon o zdravstvenim mjerama za ostvarivanje prava na slobodno odlučivanje o rađanju djece (1978) čl. 15(1) i čl. 15(2)]*; Act on health measures for the realization of the right to freely decide on the childbirth of

provides that "abortion can be performed after ten weeks upon the request of the woman where medical commission determines one of the three conditions:

> "(1) there is no alternative for saving woman's life or health during the pregnancy, delivery or after the delivery; (2) when it can be expected that the child will be born with severe congenital physical or mental defects; and (3) when conception is result of a criminal offense of rape and other."[160]

Importantly, this Act provides explicit protection of woman's health and life and guarantees in Article 25 that abortion shall not be conditioned, "when there is an imminent danger to the life or health of the woman."[161] Croatian Act recognizes that pregnancy carries risks to life and health of the woman, therefore, abortion must be guaranteed as part of reproductive health care for women. Since Croatia has liberal law on abortion, there is no criminalization of abortion in the sense of punitive measures which are present in Ireland and Poland. Criminal Law of Croatia (*Kazneni zakon Republike Hrvatske*) provides that "anyone who performs, entices or assists in termination of pregnancy contrary to provisions of the law, shall be sanctioned with up to three years of imprisonment."[162]

In comparison to Poland and Ireland, the Croatian law on abortion places special focus on woman's health and life and gives possibility for abortion to be performed even in the later stages of pregnancy. Whereas the Irish and Polish law focus on human life from conception and presume abortion as ending of a human life, Croatian law defines it as a medical procedure. This consideration is not limited to period during pregnancy only, but it also

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Croatia) (1978), art. 15(1) and 15(2), accessed 5 Feb. 2018, http://www.propisi.hr/print.php?id=9842, *"Prekid trudnoće je medicinski zahvat. Prekid trudnoće se može izvršiti do isteka deset tjedana od dana začeća."*

[160] ibid, art. 22.

[161] ibid, art. 126.

[162] *[Kazneni Zakon i Zakon o izmjenama i dopunama Kaznenog zakona (NN br. 125/2011, 66/2012, i 56/2015) čl. 115(1)]*; Criminal Law of Croatia (as amended, 2011) art. 115(1), accessed 5 Feb. 2018, http://www.wipo.int/wipolex/en/text.jsp?file_id=421367. *„Tko protivno propisima o prekidu trudnoće, trudnoj osobi izvrši, potakne je ili joj pomogne izvršiti prekid trudnoće s njezinim pristankom, kaznit će se kaznom zatvora do tri godine."*

applies after the pregnancy which is an additional advantage for women asserting their right to health when the pregnancy may have adverse effect on woman's health.

This Act has faced several challenges since Croatia gained its independence, mainly because of its socialist legacy.[163] There were two attempts of introducing a more restrictive legislation on abortion in 1995 and 1996, which were part of a set of laws of the Ministry of Health (*Ministarstvo zdravstva Republike Hrvatske*) on family planning, decreasing the number of abortions, abolition of *in vitro* fertilization and sterilization.[164] None of these laws were passed, but this did not stop pro-life groups from advocating a more restrictive law on abortion. In 1991, pro-life organization Croatian Movement for Life and Family (*Hrvatski pokret za život i obitelj*) submitted a request for review of constitutionality of the Act from 1978 to the Constitutional Court of Croatia (*Ustavni sud Republike Hrvatske*).[165] The Act from 1978 is based on the Article 191 of the Constitution of SFRY which guaranteed the "human right to freely decide on family planning."[166] Since there is no such provision in the Constitution of Croatia, the issue brought before the Croatian Constitutional Court was whether the Act from 1978 was compatible with constitutional protection of life in Article 21(1).[167] In its ruling from 2017, the Constitutional Court of Croatia decided that abortion on request in accordance with the conditions set by the Act is constitutional and protects woman's right to privacy, liberty and personality.[168] Constitutional guarantee of right to life in

[163] Nataša Bijelić and Amir Hodžić, "Grey Area: Abortion Issue in Croatia," (CESI, 2014), p. 5, accessed 5 Feb. 2018, https://www.cesi.hr/attach/_p/prijelom_pitanje_abortusa_hr.pdf.
[164] ibid.
[165] ibid, p. 3.
[166] Constitution of the SFRY (1974), art. 191(1), accessed 5 Feb. 2018, http://www.worldstatesmen.org/Yugoslavia-Constitution1974.pdf .
[167] *[Rješenje Ustavnog Suda Republike Hrvatske br. U-I-60/1991];* Decision of the Constitutional Court of Croatia, no. U-I-60/1991, (2017). par. 4.1, accessed 4 Sept. 2018, https://sljeme.usud.hr/usud/praksaw.nsf/7114c25caa361e3ac1257f340032f11e/c12570d30061ce54c12580d100416faf/$FILE/U-I-60-1991%20i%20dr.pdf. *"Hrvatski pokret za život i obitelj iz Zagreba ističe da osporeni Zakon, koji dopušta "umjetni, nasilni prekid života nerođene djece", nije u skladu s člankom 21. stavkom 1. Ustava."*
[168] ibid, par. 46. *"Ustavni sud utvrđuje da je u suglasnosti s Ustavom zakonodavno rješenje prema kojem se prekid trudnoće može obaviti na zahtjev žene do isteka 10. tjedna trudnoće … Stoga, Ustavni sud ocjenjuje da osporeno zakonodavno rješenje nije poremetilo pravednu ravnotežu između ustavnog prava žene na privatnost*

Croatia does not extend to the unborn; it provides that "each human being has the right to life."[169] Unlike the Irish Constitution, Croatian Constitution does not have explicit protection of fetal life, and unlike the Polish Tribunal, the Croatian Court was unwilling to extend the interpretation of the guarantee to the pre-natal phase.

However, the Court held that "the Act is not formally in line with the institutional and legal framework of the health, social, scientific and educational system in Croatia set up after the adoption of the Constitution in 1990."[170] Accordingly, the Court ordered the legislative branch "to introduce legislative changes in the Act within two years, which would determine educational and preventive measures to ensure that abortion is an exception only."[171] Until now, the legislature has not introduced the changes yet, but the holding of the Court implies certain discrepancy. Even though the Court found the Act to be substantively in line with the Constitution, it ordered the legislation to make abortion an exception, which implies potential for limiting access to abortion. The Court insufficiently addressed the need to protect women's right to reproductive health and other rights which may be jeopardized if abortion is further restricted. Finally, the judges did not assist the legislature by introducing guidelines and principles on which the new law should be based, providing space for bending women's rights in favor of conservative government's agenda. Instead, the Court gave freedom to the legislature to determine what measures would be most suitable for making abortion an exception.

(članak 35. Ustava) I slobodu i osobnost (članak 22. Ustava), s jedne strane, i javnog interesa zaštite života nerođenih bića koju Ustav jamči kao Ustavom zaštićenu vrijednost (članak 21. Ustava), s druge strane."

[169] Constitution of Republic of Croatia (as amended, 2010), art. 21(1), accessed 7 Feb. 2018, www.sabor.hr/fgs.axd?id=17074.

[170] Decision of the Constitutional Court of Croatia, No. U-I-60/1991, (2017), paras. 49 and 49.1. *"Ustavni sud ponavlja da osporeni Zakon sadrži pojedine pravne institute ili pojmove koji više ne postoje u ustavnom poretku Republike Hrvatske (primjerice, organizacije udruženog rada, kaznene odredbe izražene u dinarima). Dakle, osporeni Zakon formalno nije usklađen s Ustavom. Nadalje, od donošenja Ustava 1990. godine izgrađen je potpuno novi pravni i institucionalni okvir zdravstvenog, socijalnog, znanstvenog i obrazovnog sustava. Ti sustavi zasnivaju se na drugim vrijednosnim osnovama i načelima, usklađeni su s Ustavom i s međunarodnim standardima kao i s napretkom znanosti i medicine koji su pratile promjene u sustavu zdravstva, obrazovanja i socijalne politike. Drugim riječima, a uzimajući u obzir protek vremena od stupanja na snagu Zakona (gotovo četrdeset godina), očita je "zastarjelost" osporenog Zakona odnosno nužnost njegovog "osuvremenjivanja".*

[171] ibid, par. 50.

Unsafe abortion as a health concern and liberal theory of rights

"Unsafe abortion is a procedure for terminating an unwanted pregnancy either by persons lacking the necessary skills or in an environment lacking minimal medical standards or both."[172] According to a study performed for the WHO, the percent of maternal deaths due to unsafe abortion remains 13% since 1990s and it is estimated that in 2008 the number of unsafe abortions was 21.6 million.[173] Abortion as a medical procedure has developed thanks to advancement of science and technology, so if performed in safe conditions it is as any other part of reproductive health care. However, the dangers of unsafe abortion are extremely high for women's health and lives. The question is why is unsafe abortion so prevalent, despite medical advances in performing abortion and the guarantees of reproductive choice? The answer, perhaps, lies in the fact that political, cultural and religious considerations prevail over medical, gender and health concerns in lawmaking. Also, these considerations prevail or prevent exercise of reproductive choice, which has been disregarded in theoretical contexts.

Relying on the liberal theory of rights which centers on protecting moral choice and equal dignity of all human beings,[174] women have been asserting freedom of reproductive choice and access to abortion. Liberal theory promotes the idea of freedom from interference which in the universal system of human rights translates into state's negative obligations - refraining from interfering into individual freedoms and rights.[175] While negative rights are important for women's legal guarantee of reproductive choice, liberal theory of rights as negative rights

[172] "Preventing Unsafe Abortion," Sexual and Reproductive Health, WHO, accessed 5 Feb. 2018, http://www.who.int/reproductivehealth/topics/unsafe_abortion/hrpwork/en/ .
[173] WHO, *Unsafe abortion: Global and regional estimates of the incidence of unsafe abortion and associated mortality in 2008 Sixth Ed*, (2008) p. 1, accessed 5 Feb. 2018, http://apps.who.int/iris/bitstream/10665/44529/1/9789241501118_eng.pdf.
[174] Martha C. Nussbaum, "The Feminist Critique of Liberalism," *Lindley Lectures University of Kansas* Vol. Freedom and Morality (4 March 1997): p. 4.
[175] Dinah Shelton and Ariel Gould, *The Oxford Handbook of International Human Rights Law*, (Oxford Handbooks Online, December 2013), p. 566, accessed 4 Nov. 2018, DOI: 10.1093/law/9780199640133.003.0025.

has been subject of feminist criticism.[176] The theory fails to address underlying factors of women's inability to enjoy effective access to safe abortion, such as political, social and cultural factors which in some cases prevail over legal guarantees as well. Because liberal theory of rights underpins civil and political liberties, without considering protection of socio-economic rights such as right to health, it is prejudicial towards universality and indivisibility of human rights.[177] Universality and indivisibility of human rights is of instrumental value for women's reproductive rights because they are inextricably related to other women's human rights. Critics of liberal theory consider that right to reproductive choice and right to reproductive health are meaningful only if woman is an equal citizen able to enjoy other rights.[178] Therefore, improvement of woman's socio-economic rights and gender equality are inseparable aspects of guaranteeing women right to reproductive health and access to safe abortion.[179] Right to reproductive health contains negative and positive rights and freedoms which require states to do more than simply not interfering in women's choices. It requires the states to uphold positive obligations and create enabling environment for all women accessing abortion. This implies addressing political, cultural, social and economic factors which cause women's inequality in society and health care.

Conclusion

While unsafe abortion remains a crucial issue for women's health and human rights, there is little effort to introduce access to abortion based on the right to reproductive health. International human rights framework provides certain protection of the right to reproductive health, while explicit conventional guarantee of this right remains absent. The existing guarantee at the international level provides guidance to states on safeguards, conditions and

[176] E.g.: Catherine MacKinnon, Martha C. Nussbaum.
[177] Monique Deveaux, "Normative liberal theory and the bifurcation of human rights," *Ethics & Global Politics* Vol. 2, No. 3 (2009): p. 171, accessed 4 Nov. 2018, https://doi.org/10.3402/egp.v2i3.2055.
[178] Lynn P. Freedman and Stephen L. Isaacs, "Human Rights and Reproductive Choice," *Studies in Family Planning* Vol. 24, No. 1 (1993): p. 19, accessed 4 Nov. 2018, https://www.jstor.org/stable/2939211 .
[179] ibid. pp. 19-20.

elements of reproductive health care, including access to abortion. However, because abortion is a time sensitive health service, women are confined to their domestic legal settings in seeking protection of the right to reproductive health. In Ireland legal and constitutional framework on abortion is undergoing a reform, but for now abortion is allowed only when woman's life is in danger.[180] In Poland, abortion is allowed when woman's life or health is at risk, in case of rape and in case of fetal defect.[181] Unlike in these two countries, in Croatia abortion is legal on demand and is defined as a medical procedure.[182] Analysis of substantive law of these three countries indicates that access to abortion is almost impossible in Ireland, and very limited in Poland, while in Croatia access to it is guaranteed as a medical procedure.

Chapter II

Practical realities determining effective access to abortion

Looking beyond substantive law in assessing effective access to abortion

WHO asserts that one of the main causes of unsafe abortion is that abortion services are unavailable despite being legal on various grounds.[183] According to its study from 2012, access to safe abortion is contingent on numerous factors, most important ones being "laws and policies on abortion, the socioeconomic conditions, the availability of safe abortion services, and the stigma surrounding abortion."[184] It is important to look beyond the text of the constitutional and legislative provisions on abortion, because there are many procedural requirements that have to be fulfilled for accessing abortion services, and that often hinder

[180] Bacik, supra 114.
[181] The Family Planning, Human Embryo Protection and Conditions of Permissibility of Abortion Act of 7 January 1993, art. 4a.1.
[182] Act on health measures for the realization of the right to freely decide on the childbirth of Croatia (1978), art. 15(1) and 15(2).
[183] WHO, *Safe abortion: technical and policy guidance for health systems – Second Ed*, (2012) p. 87, accessed 22 Sept. 2018, http://apps.who.int/iris/bitstream/handle/10665/70914/9789241548434_eng.pdf;jsessionid=D53DDEF8950E596F0317FE55F511ABB8?sequence=1
[184] Ganatra et al., "Global, regional, and sub-regional classification of abortions by safety, 2010–14: estimates from a Bayesian hierarchical model," p. 2373.

women in realizing their rights entrenched in law. Resolving these factors and setting procedural rights in place secures exercise of reproductive choice.

General Comment No. 14 of the CESCR and accessibility of abortion

If we consider abortion as part of women's reproductive health care and a service to which they are entitled, then conditions on provision of health care set in General Comment No. 14 of the CESCR apply to provision of abortion. CESCR sets out elements of health care services which states must ensure: accessibility, availability, acceptability and quality.[185] CESCR reiterated that these apply to reproductive health in its General Comment No. 22.[186] Therefore, in providing abortion, states need to take into consideration the procedural aspects of their laws to ensure compliance with the above-mentioned elements.

Legal status of abortion is the primary determinant of its accessibility, but not necessarily of its availability.[187] Studies have found causal relationship between restrictive abortion laws and higher unsafe abortion rate across the globe.[188] In most of the countries with liberal laws, the number of unsafe abortions is smaller because abortion services are widely available.[189] However, this is not the rule because there are countries where high rates of unsafe abortions persist despite abortion being legal, because of lack of access to and information about abortion services.[190] This means that legality of abortion is not a guarantee of availability of

[185] CESCR, "General Comment No. 14," par. 12.
[186] CESCR, "General Comment No. 22," par. 11.
[187] Kamini A. Rao and Anibal Faundes, "Access to safe abortion within the limits of the law," in *Women's Sexual and Reproductive Rights* Dorothy Shaw and Anibal Faúndes eds., *Best Practice & Research Clinical Obstetrics and Gynecology* Vol. 20, No. 3, (2006) p. 425, accessed 3 Oct. 2018, Science Direct.
[188] Lisa B. Haddad and Naval M. Nour, „Unsafe Abortion: Unnecessary Maternal Mortality," *Reviews in Obstetrics and Gynecology* Vol. 2, Iss.2 (Spring 2009), p. 124, US National Library of Medicine. "The median rate of unsafe abortions in the 82 countries with the most restrictive abortion laws is up to 23 of 1000 women compared with 2 of 1000 in nations that allow abortions. Abortion-related deaths are more frequent in countries with more restrictive abortion laws (34 deaths per 100,000 childbirths) than in countries with less restrictive laws (1 or fewer per 100,000 childbirths)."
[189] Rao and Faundes, „Access to safe abortion within the limits of the law," p. 425.
[190] Haddad and Nour, „Unsafe Abortion: Unnecessary Maternal Mortality," p. 125. „In India, unsafe illegal abortions persist despite India's passage of the Medical Termination of Pregnancy Act in the early 1970s. The act appeared to remove legal hindrances to terminating pregnancies in the underfunded (national) health care system, but women still turn to unqualified local providers for abortion."

abortion, especially safe abortion. Accessibility and availability of safe abortion as part of reproductive health care for women in practice depend on several factors, primarily socio-economic factors. According to the CESCR, availability of reproductive health care services depends on the availability of sufficient number of facilities, trained physicians and other resources which are often denied for ideological reasons.[191] It is necessary for the states to uphold their positive obligations to ensure accessibility and availability of abortion, otherwise legal guarantee of abortion will be insufficient for women to realize their right to reproductive health. In those cases, even if the state does not interfere with woman's reproductive choice, the woman will be forced to exercise her reproductive choice in unsafe and illegal conditions. In countries where women are exposed to unsafe abortions due to legal status of abortion, maternal morbidity and mortality are generally higher.[192]

Factors determining accessibility of abortion in practice

When determining the legal status of abortion in one state, it is important to reflect on the legal language, legal certainty, existence of punitive measures, procedural aspects of the law, medical, ethical and human rights concerns in the law, socio-economic determinants etc. In many cases, it is necessary to look at multiple acts and laws to evaluate the accessibility of abortion in a country. Ireland, Poland and Croatia have three different legal frameworks on abortion. While the first Chapter considers substantive aspects of these legal frameworks, this Chapter focuses on procedural ones, and the factors which determine accessibility to abortion in practice. Analysis of these laws is necessary to understand how these laws directly or indirectly regulate access to abortion, and further limit women's right to reproductive health.

[191] CESCR, "General Comment No. 22," paras. 12-14.
[192] Rao and Faundes, "Access to safe abortion within the limits of the law," p. 426. "Abortion rates overall are not significantly different in developed countries compared with developing countries; what is different is the increased number of unsafe abortions in the developing world, with its attendant risk of mortality and serious morbidity."

Legal certainty

Legal certainty is very important for legal professionals, health practitioners and women accessing abortion services. It is of great importance that the language of legal acts is comprehensible and accessible, and most important of all sufficiently certain to avoid confusion and manipulation.

Constitution, as the highest legal act of a country, rarely mentions abortion. In Ireland, abortion is part of the Constitution, in Article 40.3.3. known as the Eighth Amendment which says that mother and the fetus have equal right to life.[193] Due to its phrasing, the Constitution places in conflict the rights of the unborn and women seeking abortion in life threatening situations, which eventually puts women in uncertain position. In the case of *A, B and C v. Ireland*, the ECtHR found that Supreme Court's interpretation of Article 40.3.3. is not supported by relevant legislation which would define what "real and substantial risk to the life" means."[194] The Court's reasoning indicates that access to abortion is something that cannot be regulated by a mere constitutional provision, but instead there should be detailed and precise legislation on the issue. Consequently, the Court found a violation of Article 8 of the ECHR due to lack of legal clarity on accessing abortion in Ireland.[195]

In attempt to implement the *A, B and C judgement* of the ECtHR and to improve legal certainty, Ireland adopted *Protection of Life During Pregnancy Act* in 2013.[196] This Act implements the Supreme Court's interpretation of Article 40.3.3. and explains in further detail the procedure for accessing abortion services. It is, nevertheless, insufficiently detailed to

[193] Eighth Amendment of the Constitution Act (1983).
[194] *A, B, and C v. Ireland*, par. 253. „While a constitutional provision of this scope is not unusual, no criteria or procedures have been subsequently laid down in Irish law, whether in legislation, case-law or otherwise, by which that risk is to be measured or determined, leading to uncertainty as to its precise application. Indeed, while this constitutional provision (as interpreted by the Supreme Court in the X case) qualified sections 58 and 59 of the earlier 1861 Act those sections have never been amended so that, on their face, they remain in force with their absolute prohibition on abortion and the associated serious criminal offences, thereby contributing to the lack of certainty for a woman seeking a lawful abortion in Ireland."
[195] ibid, par. 268.
[196] Erdman, "Procedural abortion rights: Ireland and the European Court of Human Rights," p. 25.

enable the physicians to assess if the woman is in life threatening condition and if it is entitled to a lawful abortion. The Act is clear on setting three grounds on which abortion is lawful, which is an improvement considering that the jurisprudence of the Supreme Court was not transposed into legislation before.[197] Also, the Act defines the number of physicians that have to give professional opinion on whether a woman's condition satisfies legitimate grounds for abortion, and how a woman may request a review of the opinion.[198] However, the Act is silent on the criteria on which a woman's health condition can be assessed as imposing "a real and substantial risk to her life" since this is the core of the interpretation of Article 40.3.3. Clarifying and specifying situations when abortion is legal is important to allow health care professionals to provide safe abortion in accordance with the conclusions of the UN General Assembly on furthering implementation of the *ICPD Programme of Action Cairo*.[199] This is particularly important where access to abortion is restricted and violation of the law raises concern in the medical profession. The Irish Act from 2013 provides no clarifications on what constitutes health or life risks for a woman, instead confirms the conflict between woman's rights and the fetus she is carrying. From a medical and human rights perspective, it disregards the existence of various deteriorations of woman's health by reducing access to abortion to conflict between woman's life and fetal life. Coupled with criminal punishments for unlawful procurement of abortion, this Act puts physicians in a dilemma whether to accept a legitimate request for abortion when woman's health is in danger, or to refuse it.[200] In such situations, a woman is unable to obtain necessary timely reproductive health care as safe abortion is effectively denied to her even in the case of emergency.

[197] Protection of Life During Pregnancy Act (2013), ss. 7, 8 and 9.
[198] ibid, ss. 7.1(a), 8.1(a), and 9.1(a).
[199] Rebecca J. Cook, Bernard M. Dickens, and Mahmoud F. Fathalla, "Responding to a Request for Pregnancy Termination," in *Reproductive Health and Human Rights: Integrating Medicine, Ethics, and Law* (Oxford Scholarship Online, 2011), p. 347.
[200] ibid, p. 349.

Unlike in Ireland, Polish Constitution does not mention termination of pregnancy, so this issue is regulated at the level of ordinary legislative acts. Instead of uncertainty, Polish laws contain terminology which creates a lot of ambiguity in the medical profession. Under the influence of the Catholic Church, language in the abortion law changed in a way that a woman is presented as a "mother of conceived child", and fetus is the "conceived child."[201] This suppresses woman's identity and autonomy by putting her in the role of the mother even before the child is born and presenting fetus as unborn child to give it some form of capacity. Such phrasing also ignores different wanted and unwanted outcomes of each pregnancy.

The Family Planning, Human Embryo Protection and Conditions of Permissibility of Abortion Act of 1993 provides three grounds for lawful abortion, one of which is "when pregnancy poses a threat to the life or health of the pregnant woman."[202] Similar to Irish case, there is no criteria based on which physicians can assess the woman's condition, since there is no indication whether "health" includes mental or physical health. While this phrasing can be an advantage and imply general health condition including mental health, this is not the case in Poland where the interpretation of this phrasing is very restrictive and at times arbitrary, resulting in denial of abortion to women with legitimate health concerns. Polish NGOs working on the issue reported that "access to lawful abortion on therapeutic and criminal grounds in Poland is absent which is why the number of illegal and unsafe abortions reaches 150.000 annually."[203] The fact that there is no criteria on assessing woman's request for abortion gives space for conflict on opinion between physicians because the *Family Planning Act* requires that another doctor evaluates health risk or fetal defect, not the one performing

[201] Szelewa, "Killing 'Unborn Children'? The Catholic Church and Abortion Law in Poland Since 1989," p. 751.
[202] The Family Planning, Human Embryo Protection and Conditions of Permissibility of Abortion Act of 7 January 1993, art. 4a.1.
[203] CEDAW Coalition of Polish NGOs, "Alternative Report on the implementation of the Convention on the Elimination of All Forms of Discrimination Against Women," (KARAT Coalition February 2014), par. 25, accessed 23 Sept. 2018, https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/POL/INT_CEDAW_NGO_POL_16521_E.pdf.

termination of pregnancy.[204] Despite being legal under certain conditions, for many women abortion in Poland is denied because the law insufficiently protects their right to reproductive health. As a party to ICESCR, Poland must address these deficiencies in laws and practices which impair right to reproductive health or full enjoyment in it.[205]

In Croatia, "abortion can be accessed upon request until the tenth week, after which any request for abortion has to be reviewed and approved by medical commission."[206] Despite the law being liberal in comparison to Ireland and Poland, there is a practice of denying abortion in public hospitals in Croatia.[207] While this law is clear on allowing access to abortion as a medical procedure, there are additional problems arising from the general legal framework on abortion. Firstly, the *Act on Health Measures for the Realization of the Right to Freely Decide on the Childbirth of Croatia* was adopted in 1978 when Croatia was part of the former Yugoslavia, making the Act outdated and not in conformity to current constitutional order of Croatia and other legislation.[208] Secondly, this Act does not provide a system for enforcement of uniform procedure on accessing abortion. Procedure on accessing abortion services and other procedures relevant for reproductive health and refusal of abortion request are not regulated at the state level nor prescribed by the Ministry of Health of Croatia, but are instead regulated by each hospital respectively.[209] Besides having autonomy in drafting rules on procedure, hospitals are not being monitored by the Ministry when implementing those rules and providing abortion, which further reinforces legal uncertainty and lack of clarity, as well

[204] The Family Planning, Human Embryo Protection and Conditions of Permissibility of Abortion Act of 7 January 1993, art. 4a.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."
[205] CESCR, „General Comment No. 22," par. 34.
[206] Act on health measures for the realization of the right to freely decide on the childbirth of Croatia (1978), art. 15.
[207] Bijelić and Hodžić, „Grey Area: Abortion Issue in Croatia," p. 10.
[208] Decision of the Constitutional Court of Croatia, No. U-I-60/1991 (2017), par. 49.
[209] Bijelić and Hodžić, „Grey Area: Abortion Issue in Croatia," p. 10.

as insecurity among women seeking abortion.[210] Ministry of Health admits in one report that "there is no department or a commissioner responsible for implementation of the Act from 1978, and that the hospitals are responsible for enforcement of the right to termination of pregnancy and are under duty to ensure and provide these services."[211]

Case of Croatia shows that the law, no matter how liberal, must be sufficiently certain and detailed to be effective and allow health practitioners to provide abortion services. A decentralized approach to regulation of abortion is not manageable if there are no uniform guidelines, monitoring and enforcement procedures. Whereas Ireland and Poland have insufficiently clear laws in terms of criteria for assessing health condition of women seeking abortion, Croatia has a decentralized approach to this issue and the relevant laws do not define the procedure for accessing abortion in detail.

Criminalization of abortion

According to CEDAW, "states should refrain from obstructing women in pursuing their health goals, which includes laws that criminalize medical procedures only needed by women and which punish women who undergo those procedures."[212] UN Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health reported that criminalization of abortion discriminates against women in realizing their right to health and increases maternal mortality.[213] Imposition of punitive measures for women who seek abortion stems from the persistent stereotyping on women's

[210] ibid.
[211] Bijelić and Hodžić, „Grey Area: Abortion Issue in Croatia," p. 8.
[212] CEDAW Committee, "General Comment No. 24," par. 14.
[213] UN General Assembly, „Right of everyone to the enjoyment of the highest attainable standard of physical and mental health: Note by the Secretary General," UN Doc. A/66/254, (3 August 2011) par. 21, accessed 23 Sept. 2018, https://www.crin.org/en/docs/N1144358.pdf. „Criminal laws penalizing and restricting induced abortion are the paradigmatic examples of impermissible barriers to the realization of women's right to health and must be eliminated. These laws infringe women's dignity and autonomy by severely restricting decision-making by women in respect of their sexual and reproductive health. Moreover, such laws consistently generate poor physical health outcomes, resulting in deaths that could have been prevented, morbidity and ill-health, as well as negative mental health outcomes, not least because affected women risk being thrust into the criminal justice system. Creation or maintenance of criminal laws with respect to abortion may amount to violations of the obligations of States to respect, protect and fulfil the right to health."

role in the society and family, based on which curtailing reproductive freedom and sexual identity of the woman is justified.[214] These laws have disproportionate impact on woman's health and reinforce the most severe forms of discrimination in the health sector. The punitive effect is not always directed against the woman, because physicians risk criminal liability as well. This discourages them from performing abortions creating a chilling atmosphere within the medical profession.

Under the Irish *Offences Against the Person Act* "administering drugs or using instruments to procure abortion and procuring drugs to cause abortion" are felonies punishable by life time imprisonment.[215] The law imposes criminal sanctions for women seeking abortion and self-inducing abortion, as well as to physicians or untrained persons who provide abortion.[216] The Act does not make any reference to the *Protection of Life During Pregnancy Act of 2013*, more specifically, the grounds for *lawful* abortion. Section 22 of the 2013 Act provides criminal liability for "destroying unborn human life" punishable by prison term of up to 14 years.[217] Sections of the *Offences Against the Person Act* which prescribe criminal liability for abortion, do not refer to sections of the 2013 Act which provide for three grounds for lawful abortion.[218] Because of such framing in criminal law which does not explicitly exclude criminal liability for abortion performed under legitimate grounds according to the Act of 2013, punitive effect hampers effective implementation of the 2013 Act.

Criminal laws affect both women and physicians, which results in reluctance of women to seek abortion even when they are entitled to it, and fear within the medical profession to provide abortion even when it is lawful. In Ireland, even those advocating or promoting

[214] ibid, par. 16.
[215] Offences Against the Person Act (1861), ss. 58, 59.
[216] ibid.
[217] Protection of Life During Pregnancy Act (2013), ss.22(1) and 22(2). „It shall be an offence to intentionally destroy unborn human life. (2) A person who is guilty of an offence under this section shall be liable on indictment to a fine or imprisonment for a term not exceeding 14 years, or both."
[218] Offences Against the Person Act. (1861), ss. 58, 59.

abortion as a reproductive health option face criminal liability under *Regulation of Information (Services Outside the State for Termination of Pregnancies) Act of 1995*.[219] This presents incompliance with one of the elements of health care provision under General Comment No. 14, that is information accessibility.[220]

Grounds for lawful and safe abortion in Ireland are very limited, but even in those limited situations, the atmosphere of strict criminal sanctions for physicians and women makes abortion practically inaccessible. In its latest observations on Ireland's compliance with CEDAW, the CEDAW Committee emphasized that "health-care providers and pregnancy counsellors cannot freely provide information on abortion for fear of being prosecuted for violating the *Regulation of Information Act of 1995*."[221] CEDAW Committee issued a recommendation for repealing this law to relieve health-care providers from fear when performing their job.[222] Also, Human Rights Committee addressed the issue of criminalization of abortion and called for the state to amend its laws and decriminalize abortion in "case of rape, incest, fatal fetal abnormality and serious risks to the health of the mother."[223] For women who are not certain about whether their health condition is life-threatening, seeking a mere professional opinion raises risk from criminal sanctions. Criminal laws in Ireland result in breach of multiple human rights obligations of Ireland, particularly right to life, right to health and freedom from discrimination.

[219] Regulation of Information (Services Outside the State For Termination of Pregnancies) Act, 1995, No. 5 of 1995, s. 3. 1(a), accessed 5 Sept. 2018, http://www.irishstatutebook.ie/eli/1995/act/5/enacted/en/print#sec3.
[220] CESCR, "General Comment No. 22," par. 18. "Information accessibility includes the right to seek, receive and disseminate information and ideas concerning sexual and reproductive health issues generally and also for individuals to receive specific information on their particular health status."
[221] CEDAW Committee, "Concluding observations on the combined sixth and seventh periodic reports of Ireland*," (2017) UN Doc. C/IRL/CO/6-7, par. 42, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/IRL/CO/6-7&Lang=En, accessed 5 Sept. 2018.
[222] ibid, par. 43.
[223] Human Rights Committee, "Concluding observations on the fourth periodic report of Ireland*," UN Doc. C/IRL/CO/4, (9 March 2017), par. 9, accessed 5 Sept. 2018, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/IRL/CO/4&Lang=En.

Poland has criminalized abortion except in cases provided in Article 4a.1 of the *Family Planning, Protection of Human Fetus and Conditions of Termination of Pregnancy Act (1993)* which means except where "the pregnancy is a threat to health or life of the woman, irreversible fetal defect or illness, and where pregnancy is result of unlawful act."[224] Unlike the Irish law which penalizes both woman and the physician, the Polish law provides penalties for the physician only.[225] This offence carries punishment of up to two years of imprisonment.[226] While the Irish law imposes stronger punitive effect because it punishes both the woman and the physician, imposing criminal penalties on physicians only can have a more detrimental effect on woman's exercise of the right to reproductive health. A law which punishes only the physician, while regarding the woman as a victim reflects the paternalistic treatment of women in law where they are considered incapable of making autonomous decisions regarding their body and health.[227] Assuming a woman is making irrational choices regarding her life, it implies a duty of the physician and the society to protect her. According to the NGOs from Poland, such punitive laws have stigmatizing and "chilling effect" on physicians completely undermining the effective implementation of the laws.[228] Therefore, placing the burden of criminal liability on physicians only has a two-fold effect where health practitioners work in atmosphere of fear, and women are limited in decision-making on their own health.

[224] The Family Planning, Human Embryo Protection and Conditions of Permissibility of Abortion Act of 7 January 1993, art. 4a.1

[225] ibid, art. 7(2). „A person who causes the death of a conceived child shall be subject to imprisonment for up to 2 years. § 2. The mother of a conceived child shall not be subject to punishment."

[226] ibid.

[227] Samuel W. Buell, „Notes: Criminal Abortion Revisited," *NYU Law Review* Vol. 66, No. 1774, (1991): pp. 1778-1779, accessed 5 Sept. 2018, https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=https://www.google.hu/&httpsredir=1&article=2798&context=faculty_scholarship. Paternalistic law considers woman a victim, incapable of making decisions on her own body and therefore, cannot hold her responsible for decisions about her own body and health. By imposing punitive measure on the physician instead of the woman, law reflects historical denial of women's rights to make decisions for themselves..

[228] „U.N. Human Rights Committee Concerned by Poland's Restrictive Abortion Law," *Center for Reproductive Rights*, (11 April, 2016), accessed 5 Sept. 2018, https://www.reproductiverights.org/press-room/un-human-rights-committee-concerned-by-polands-restrictive-abortion-law.

Since in Croatia abortion upon request is legalized, criminal law on abortion addresses the issue of abortion without the consent of the woman, and on penalties for the consequences of illegal abortion. According to *Criminal Law of Croatia*, illegally performing abortion is punishable by maximum sentence of three years of imprisonment, while in cases resulting in death or serious injury, sentence goes up to 15 years.[229] Therefore, abortion in Croatia is not criminalized if it is performed in accordance with the Act from 1978. Considering that the country still has liberal law on abortion, such criminal sanctions are in line with the existing law.

Punitive measures imposed on women seeking abortion and physicians performing abortion is a violation of negative obligation of the state protecting women from state interference in making reproductive choices. According to workings of the human rights bodies, criminalization of abortion is a violation of gender equality in health care, and potentially a violation of rights to life, health, privacy and freedom from inhumane and degrading treatment.

Conscientious objection

"Conscientious objection in healthcare is used by doctors and nurses who refuse to have any involvement in the provision of guidance or treatment of certain patients due to their religious, moral or philosophical beliefs."[230] Since abortion is often framed as a moral issue, involvement in providing access to abortion may conflict with one's religious or moral views. Conscientious objection is not an issue in itself, but its regulation and insufficient guarantee of

[229] Criminal Law of Croatia, art. 115. *"(1)Tko protivno propisima o prekidu trudnoće, trudnoj osobi izvrši, potakne je ili joj pomogne izvršiti prekid trudnoće s njezinim pristankom, kaznit će se kaznom zatvora do tri godine. (2) Ako je kaznenim djelom iz stavka 1. ovoga članka prouzročena smrt trudne osobe ili joj je zdravlje teško narušeno, počinitelj će se kazniti kaznom zatvora od jedne do deset godina. (3) Tko trudnoj osobi bez njezinog pristanka izvrši prekid trudnoće, kaznit će se kaznom zatvora od jedne do osam godina. (4) Ako je kaznenim djelom iz stavka 3. ovoga članka prouzročena smrt trudne osobe ili joj je zdravlje teško narušeno, počinitelj će se kazniti kaznom zatvora od tri do petnaest godina. (5) Za pokušaj kaznenog djela iz stavka 1. ovoga članka počinitelj će se kazniti.*"

[230] Anna Heino, Mika Gissler, Dan Apter and Christian Fiala, "Conscientious objection and induced abortion in Europe," *The European Journal of Contraception and Reproductive Health Care* Vol. 18, No. 4 (2013): p. 232, accessed 23 Sept. 2018, https://doi.org/10.3109/13625187.2013.819848 .

duty of referral for doctors are important challenges for women accessing abortion. According to CESCR, availability of abortion cannot be hindered by any ideological reasons, including conscientious objection.[231] There is an issue of lack of monitoring of the use of conscientious objection which can lead to its misuse and effective denial of access to abortion. Freedom of religion, or right to abide by one's religion or moral belief can be limited for protecting the rights of others, including women's reproductive rights.[232] In national laws, this is resolved through establishment of duty of referral for health care professionals.

Conscientious objection is guaranteed under the Irish *Protection of Life During Pregnancy Act of 2013* so physicians, nurses and midwives have the right to refuse to carry out or to participate in termination of pregnancy.[233] However, they have to enable the woman to access medical procedure she seeks through exercise of duty of referral.[234] Wording of the duty of referral of the physicians is not expressed strongly enough to protect women's right to reproductive health. Considering that in Ireland abortion is allowed only in case of substantial risk to woman's life, then conscientious objection gives the physician an option to refuse to participate in a procedure which is life-saving for the woman. This is highly disproportionate to woman's right to health and there are many legal and ethical issues arising from such use of conscientious objection. Considering such limited grounds for abortion in Ireland, allowing physicians to exercise it in cases of legitimate requests for abortion makes abortion non-existent in the Irish jurisdiction.

In its *Technical and Policy Guidance for Health Systems*, the WHO explains that right to conscientious objection is an individual right, which cannot be used to delay health care for

[231] CESCR, "General Comment No. 22," par. 14.
[232] Heino et. al. "Conscientious objection and induced abortion in Europe," p. 233.
[233] Protection of Life During Pregnancy Act (2013), s. 17(1).
[234] ibid, s. 17(3).

women seeking abortion.[235] There is an explicit obligation for physicians to observe the duty of referral, and where not possible, they have a duty to perform abortion to protect woman from serious injury to health.[236] Irish law does not provide for limits on the use of conscientious objection when it is necessary to save the life of the woman, so it is hard to defend the validity of right to conscientious objection in the Irish context because it effectively denies emergency care for women.

There is an ongoing debate on the conformity of conscientious objection with professional ethics of the physicians and whether the exercise of conscientious objection can be effectively monitored and assessed. Conscientious objection protects the right to conscience which is completely private and subjective to an individual, so it cannot be assessed as valid or genuine because any such assessment may be unjustified interference.[237] Opposing view is that conscientious objection should be exercised only in accordance with principle of beneficence and non-maleficence towards the patient, where the physicians have a duty to refuse a treatment which is not helpful for the patient or may result in violation of his rights.[238] According to this view, abortion as a procedure requested by the woman patient, is a legitimate request for health care service in which personal belief of the physicians plays no role and cannot be a ground for exercising conscientious objection. While there is significant disagreement over the role and regulation of conscientious objection, it is an issue which

[235] WHO, *Safe abortion: Technical and Policy Guidance for Health Systems*, par. 3.3.6. Right to conscientious objection can be exercised by individuals; in cases where it is exercised health care professionals are obliged to refer the woman patient to another health care professional in the same institution or some other accessible institution. If there is not possibility to refer woman to another institution, health care professional is not allowed to exercise conscientious objection if a woman's life is in danger or she is facing serious health injury.
[236] ibid.
[237] Christian Fialaa and Joyce H. Arthur B., "There is no defence for 'Conscientious objection' in reproductive health care," *European Journal of Obstetrics & Gynecology and Reproductive Biology* Vol. 216 (September 2017): p. 256, Science Direct. Personal beliefs are private and not evidence-based, therefore they cannot be measured for genuineness, but there is a risk they affect medical decisions poorly.
[238] ibid, Basic principles of medical ethics; beneficence demands provision of health care with the intent of doing good and considering patient's needs; maleficence requires that provision of health care does not harm the patient or others. *See also*: "What are the Basic Principles of Medical Ethics?" Stanford University, accessed 5 Sept. 2018, https://web.stanford.edu/class/siw198q/websites/reprotech/New%20Ways%20of%20Making%20Babies/EthicVoc.htm .

cannot be resolved on its own, but in conjunction with other factors. According to research on reproductive health care, laws on conscientious objection can be more effective only if political, economic and social contexts of it are addressed.[239] In that case, physicians' right to conscience and woman's right to health can be exercised without being in conflict.[240] For example, considering criminal liability for physicians and the legal uncertainty of grounds for lawful abortion, physicians may become encouraged to exercise conscientious objection to avoid criminal prosecution and potential loss of career. The most important safeguard against misuse of conscientious objection is duty of referral, which exists in Ireland, but is being under attack in Poland and Croatia.

Physicians in Poland are guaranteed right to conscientious objection under the Article 39 of the Doctor and Dentists Professions Act (*Ustawy o zawodach lekarza i lekarza dentysty*), and there is duty of referral as well.[241] However, duty of referral is no longer mandatory for health practitioners who refuse to perform abortion on grounds of conscience after the judgement of the Polish Constitutional Court (*Trybunal Konstytucyjny*) in the application made by the National Board of Doctors (*Naczelnej Rady Lekarskiej*) in 2015.[242] In their Joint Submission

[239] ibid.
[240] ibid.
[241] *[Ustawy o zawodach lekarza i lekarza dentysty z dnia 5 grudnia 1996 r. (Dz. U. z 2011 r. Nr 277, poz. 1634, ze zm) čl. 39.]*; Act on the professions of a doctor and a dentist of 5 December 1996 (Journal of Laws of 2011 No. 277, item 1634, as amended), art. 39, accessed 5 Sept. 2018, http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20081360857/U/D20080857Lj.pdf . *"Lekarz może powstrzymać się od wykonania świadczeń zdrowotnych niezgodnych z jego sumieniem, z zastrzeżeniem art. 30, z tym że ma obowiązek wskazać realne możliwości uzyskania tego świadczenia u innego lekarza lub w podmiocie leczniczym oraz uzasadnić i odnotować ten fakt w dokumentacji medycznej. Lekarz wykonujący swój zawód na podstawie stosunku pracy lub w ramach służby ma ponadto obowiązek uprzedniego powiadomienia na piśmie przełożonego."*
[242] *[Trybunal Konstytucyjny: Wyrok W Imeniu Rzeczypospolitej Polskiej Sygn. akt K 12/14 (2015)];* Constitutional Tribunal of Poland: Judgement On behalf of Republic of Poland Ref. Act: K 12/14 (2015), accessed 5 Sept. 2018, http://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/8602-prawo-do-odmowy-wykonania-swiadczenia-zdrowotnego-niezgodnego-z-sumieniem/. *„1. Art. 39 zdanie pierwsze w związku z art. 30 ustawy z dnia 5 grudnia 1996 r. o zawodach lekarza i lekarza dentysty (Dz. U. z 2015 r. poz. 464) w zakresie, w jakim nakłada na lekarza obowiązek wykonania niezgodnego z jego sumieniem świadczenia zdrowotnego w „innych przypadkach niecierpiących zwłoki", jest niezgodny z zasadą prawidłowej legislacji wywodzoną z art. 2 Konstytucji Rzeczypospolitej Polskiej i art. 53 ust. 1 w związku z art. 31 ust. 3 Konstytucji. 2. Art. 39 zdanie pierwsze ustawy powołanej w punkcie 1 w zakresie, w jakim nakłada na lekarza powstrzymującego się od wykonania świadczenia zdrowotnego niezgodnego z jego sumieniem obowiązek wskazania realnych możliwości*

to the Human Rights Committee, Polish NGOs expressed concern that such interpretation of the Court effectively repealed obligation of referral, which denies women access to reproductive health care services, even in cases of emergency and threat to life.[243]

Polish health care system experienced serious abuses of the right to conscience clause before the Judgement of the Constitutional Tribunal. According to reports of the Polish NGOs, there are many regions in Poland where it is impossible for women to find a physician who performs abortion which is a consequence of state's lack of regulatory and monitoring practice, as well as state's lack of interest in enforcing the right to access safe abortion.[244] According to the Human Rights Committee's observations from 2016, "conscience clause has been misused by physicians and institutions, which resulted in abortion being unavailable in regions and entire hospitals."[245] ECtHR also held that conscience clause has to be exercised without impairing access to health care services, otherwise the state is in breach of Article 8 of the Convention.[246] The Court found Poland to be in violation of Article 8 because the authorities did not ensure institutional and procedural system for effective access to abortion.[247] However, no efforts have been made to implement the findings of the ECtHR. Conscientious objection is a significant impediment for women accessing abortion together with criminal liability for physicians performing unlawful abortion. In relation to the judgement of the Constitutional Tribunal from 2015, the Human Rights Committee expressed

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uzyskania takiego świadczenia u innego lekarza lub w innym podmiocie leczniczym, jest niezgodny z art. 53 ust. 1 w związku z art. 31 ust. 3 Konstytucji."

[243] "Supplemental Information on Poland for the Periodic Review by the Human Rights Committee at its 118th Session (17 October 2016 - 4 November 2016)," p. 6, accessed 23 Sept. 2018, https://tbinternet.ohchr.org/Treaties/CCPR/.../INT_CCPR_CSS_POL_25283_E.docx

[244] ibid, pp. 4-5.

[245] Human Rights Committee, "Concluding observations on the seventh periodic report of Poland," UN Doc. C/POL/CO/7, (23 November 2016), par. 23, accessed 23 Sept. 2018, http://www.refworld.org/docid/5975bfbb4.html.

[246] *R.R. v. Poland*, par. 206. "For the Court, States are obliged to organize the health services 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 patients from obtaining access to services to which they are entitled under the applicable legislation."

[247] ibid, paras. 213-214. *See also*: *Tysiąc v. Poland*, par. 213.

concern that "the judgement absolved physicians from duty of referral."[248] CEDAW expressed similar concern about the excessive use of the conscientious objection both by individual physicians and hospitals.[249] Considering that only physicians can bear criminal liability for unlawful abortion, exercise of conscientious objection is seen as a "safe option" for physicians who are not certain about the lawfulness of the abortion request in particular case.

Despite having liberalized access to abortion, the rest of Croatia's legal framework on abortion lacks regulation on monitoring the use of conscientious objection by physicians. Regulatory framework on the issue is almost non-existent and has contributed to decentralization of the regulation on the use of conscientious objection in a way that it is completely regulated by hospitals. Right to conscientious objection is guaranteed under the Croatian Medical Practice Act (*Zakon o liječništvu*) which provides "that the doctor has the right to exercise conscientious objection, provided that this does not impose health or life risks to the patient."[250] Also, right to conscientious objection is guaranteed under the Code of Medical Ethics and Deontology Croatia (*Kodeks medicinske etike i deontologije*) as long as it does not jeopardize health or life of the patient [251] In case of invoking conscientious objection, the physician has the obligation of informing supervisors and obligation of referral.[252] Consequently, definition of the conscientious objection conforms to human rights standards set by international bodies. However, Special Rapporteur on Right to Health found that abortion in Croatia is denied because of misuse of conscientious objection in public health

[248] Human Rights Committee, "Concluding observations on the seventh periodic report of Poland," par. 23
[249] CEDAW, "Concluding observations on the combined seventh and eighth periodic reports of Poland," par. 36.
[250] *[Zakon o liječništvu NN 121/03, 117/08* (2003) čl. 20.*];* Medical Practice Act Official Gazette 121/03, 117/08 (2003) art. 20, accessed 5 Sept. 2018, https://www.zakon.hr/z/405/Zakon-o-lije%C4%8Dni%C5%A1tvu. *"Radi svojih etičkih, vjerskih ili moralnih nazora, odnosno uvjerenja liječnik se ima pravo pozvati na priziv savjesti te odbiti provođenje dijagnostike, liječenja i rehabilitacije pacijenta, ako se to ne kosi s pravilima struke te ako time ne uzrokuje trajne posljedice za zdravlje ili ne ugrozi život pacijenta."*
[251]*[Kodeks medicinske etike i deontologije (2015) čl. 2(15).];* Code of Medical Ethics and Deontology (2015), art. 2(15), accessed 5 Sept. 2018, https://www.hlk.hr/EasyEdit/UserFiles/2-izmjene-i-dopune-kodeksa-medicinske-etike-i-deontologije-19122015.pdf. *"Liječnik ima pravo na priziv savjesti ako time ne uzrokuje trajne posljedice za zdravlje ili ne ugrožava život pacijenta. O svojoj odluci mora pravodobno obavijestiti nadreĎene i pacijenta te ga uputiti drugom liječniku iste struke."*
[252] ibid.

care, e.g. exercise of conscientious objection is part of hospital's policy.[253] In Croatia there is no official data on the use of conscientious objection; Institute of Public Health of Croatia (*Hrvatski zavod za javno zdravstvo*) does not monitor the use of conscientious objection because this is regulated and monitored at the level of each hospital.[254] According to Croatian Medical Chamber (*Hrvatska liječnička komora*), hospitals are the responsible institutions for the use of conscientious objection, while the Chamber is not familiar with the use of conscientious objection by gynecologists facing abortion requests.[255] Each hospital in Croatia has its own rules which physicians have to follow when they wish to exercise conscientious objection, and in some hospitals, this can be through a verbal statement, while in most hospitals a written statement that has to be renewed annually is required.[256] There is no monitoring of the use of conscientious objection or official data on the number of physicians exercising this right which points out an important aspect of access safe and legal abortion is uncertain.

Complete autonomy of hospitals in regulating refusal of abortion based on conscientious objection has led to the issue of institutional denial of abortion services by some hospitals, as reported by the UN Special Rapporteur on the Right to Health in 2016.[257] Institutional denial of abortion is a misuse of conscientious objection because conscientious objection is an individual right, and such misuse constitutes breach of right to health because hospitals

[253] Human Rights Council, "Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health on his visit to Croatia," UN Doc. HRC/35/21/Add.2., (2017), par. 73. „In practice, access to safe abortion has been obstructed by the overuse of the legal provisions to deny it on the grounds of conscientious objection. The Special Rapporteur was further informed that while half of gynecologists refuse to provide legal abortion in public hospitals on conscientious grounds, many of them offer the same service in their private practices in exchange for a fee. This calls into question the real grounds for the denial of abortion in public hospitals. Moreover, while legally only individual refusals are allowed, in practice refusals are exercised at the institutional level and, in some cases, as part of a hospital's policy."
[254] Bijelić and Hodžić, "Grey Area: Abortion Issue in Croatia," p. 10.
[255] ibid.
[256] ibid, p. 11
[257] Human Rights Council, "Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health on his visit to Croatia," par. 73.

deliberately hinder access to health services.[258] In its recommendations, CEDAW called the Croatian government to regulate the use of conscientious objection in a way which will not preclude women from accessing safe abortion services, and the necessary care.[259] Conscientious objection, as a right of physicians, has to be exercised and regulated without affecting the women wishing to access abortion services. This means that hospitals which are publicly funded, are under obligation to provide safe and legal abortion, despite their physicians using conscientious objection individually. States are obliged to set in place sufficient safeguards for women accessing health care, primarily through guaranteeing duty of referral. This is applicable to all three states because their regimes of conscientious objection equally hinder exercise of women's health rights, regardless of differences among them.

Procedural rights in accessing abortion

Procedural rules in legislative framework on access to abortion are very important as they can have the effect of liberalizing access to abortion and ensuring procedural rights of women, but also restricting access to abortion even more. In countries where abortion law is restrictive, procedural rules serve as further limitations on access to safe and legal abortion.[260] This can be detrimental for women because procedural rules reinforce the restrictive nature of substantive law on abortion instead of protecting rights of women in deciding about their health. Considering that abortion is a domestic matter, there is deference towards the states to define substantive abortion laws on their own, while procedural rules should be strengthening the rights of women. This is evidenced in the *1994 U.N. International Conference on Population and Development* which recognized that legal grounds for abortion should be defined at the national level, while procedural rules should provide for procedural remedies

[258] CEDAW Committee, "Concluding observations on the combined fourth and fifth periodic reports of Croatia*," UN Doc. CEDAW/C/HRV/CO/4-5, (2015), par. 30, accessed 5 Sept. 2018, https://digitallibrary.un.org/record/805691/files/CEDAW_C_HRV_CO_4-5-EN.pdf
[259] ibid, par. 31
[260] Erdman, "Procedural abortion rights: Ireland and the European Court of Human Rights," pp. 22-30.

such as right to appeal.[261] While procedural rules may be a very weak alternative for protecting women's rights in accessing abortion, they are still strategically important for right to reproductive health. Procedural rules contribute to the legal status of abortion much more than is being discussed. However, these rules should not be mistaken for an alternative of liberalization of access to abortion as they do not provide any substantive guarantee, such as right to health. They merely set in place necessary protections that ensure proper implementation of existing substantive law and consideration of women's rights in reproductive health care. According to the WHO, "the main procedural barriers in accessing abortion include:

- third-party authorizations;
- lack of regulatory approval for certain available methods of abortion;
- restricting the range of health-care providers and facilities that can safely provide services;
- failing to assure obligation of referral;
- mandatory waiting periods;
- censorship of health-related information;
- excluding coverage for abortion from public funding;
- requiring women to provide the names of practitioners before providing them with treatment for complications from illegal abortion."[262]

[261] Joanna N. Erdman, "Procedural Turn in Transnational Abortion Law," *Proceedings of the Annual Meeting (American Society of International Law)* Vol. 104, International Law in a Time of Change (Cambridge University Press, 2010): pp. 377-378.
[262] WHO, *Safe abortion: technical and policy guidance for health systems Second ed*., par. 4.2.2.

Analysis of procedural rights of women accessing abortion in legislative framework of Ireland, Poland and Croatia

Considering three different legal regimes on abortion in these states, peculiarities of procedural rights and safeguards are also different. For example, Ireland and Poland provide stricter procedural requirements in accessing abortion, while Croatian law elaborates more on procedure for accessing abortion in late-term pregnancies which is absent in the former jurisdictions.

Obstacles that women face in Ireland when accessing abortion are more substantive than procedural, considering the very limited grounds for abortion.[263] According to reports of physicians in Ireland, they have never heard of abortions being performed in the public health care institutions, and they witnessed women with life threatening conditions being denied access to abortion in Ireland.[264] Legal framework on abortion in Ireland is specific because of the restrictions on accessing abortion and information on abortion. Women in the country have significant procedural barriers in accessing both, and many of them are often completely denied information about abortion services.[265]

Starting from various forms of authorizations and qualifications of physicians performing abortion, Ireland's legal framework contains very strict procedural rules. *Protection of Life During Pregnancy Act (2013)* provides that the decision on provision of abortion should be brought by two physicians in case of risk of loss of life from physical illness and three physicians in case of risk of loss of life from suicide.[266] In the case of risk of loss of life from physical illness, one of the physicians has to be an obstetrician and the other practitioner of

[263] Liesl Gerntholtz, "A State of Isolation Access to Abortion for Women in Ireland," Human Rights Watch (2010), accessed 5 Sept. 2018, https://www.hrw.org/report/2010/01/28/state-isolation/access-abortion-women-ireland..
[264] ibid.
[265] ibid.
[266] Protection of Life During Pregnancy Act (2013), ss. 7.1(a) and 9.1(a)

relevant specialty,[267] whereas in the case of risk of loss of life from suicide requirements for qualifications of physicians are much more stringent. In that case, "one physician should be an obstetrician at the institution, the second one a psychiatrist practicing at the institution and the third one a psychiatrist practicing at an approved center, or for or on behalf of the Executive."[268] Further on, "at least one of the psychiatrists is someone who provides, or who has provided, mental health services to women in respect of pregnancy, childbirth or post-partum care."[269] Considering that there was a lot of discussion over the interpretation of the Eighth Amendment and whether suicide qualifies as a legal ground for abortion, Ireland retained stricter conditionality for accessing abortion on this ground through procedural rules. Requirements for qualifications of physicians who must provide medical opinion on the woman's health condition restrict the availability of abortion services in some geographical areas which are less developed and where the institution may not have such qualified physicians.

Right of appeal or right to remedy are an important safeguard for woman's right to health and ensuring woman's participation in decision-making on her own health. According to the 2013 Act, "woman can appeal on the physician's opinion to the Executive."[270] After that, the Executive is obliged to form "a committee for review of the medical opinion under issue which will consist of medical practitioners, not later than 3 days after receiving the application for review."[271] The committee consists of practitioners who are drawn from the existing panel for review of the medical opinion, which the Executive is under legal duty to form and maintain.[272] "It delivers the decision within 7 days from its establishment."[273] The procedure itself seems complex and rather uncomfortable since the woman's health and life

[267] ibid, s. 7(2).
[268] ibid, s. 9(2).
[269] ibid, s. 9(3).
[270] ibid, s. 10(2).
[271] ibid, s. 12.
[272] ibid, s. 12(1).
[273] ibid, s. 13.

are placed in the hands of medical experts, whereas her autonomy is undermined to the extent she is unable to freely decide on her health, or to participate in decision-making. The woman's rights are mainly protected through the right to be heard before the committee, which depends on whether the woman requests to be heard.[274]

In Poland, there is a similar but less stringent requirement on authorization of abortion because the *Family Planning, Human Embryo Protection and Conditions of Permissibility of Abortion of 1993* requires that "unless a woman's life is under direct threat, one doctor evaluates if woman's condition satisfies legal grounds for abortion, and another doctor terminates pregnancy."[275] Polish law demands third-party authorizations in case of minors and fully incapacitated women.[276] The law provides for consultation process where the woman has to consult with a physician regarding her health condition, and where she will be provided with information on assistance during pregnancy, childbirth, legal protection of fetal life, contraception among others.[277] While these are general procedural rules, specific requirements apply for women wishing to access abortion on ground of fetal defect, which are significantly more stringent. Prenatal examinations can be accessed in certain cases only:

> "1) when the conceived child is from a family with genetically transmitted defects,
>
> 2) there is a suspicion that the fetus suffers from a genetic disease the effect of which can be cured, controlled or limited during the fetal period,

[274] ibid, s. 14(1).
[275] The Family Planning, Human Embryo Protection and Conditions of Permissibility of Abortion Act of 7 January 1993, art 4a.5.
[276] ibid, art. 4a.4. „The written consent of woman is necessary to terminate the pregnancy. In the case of a minor or fully incapacitated woman, the written consent of her legal representative is required. In the case of a minor over 13, her own written consent is also required. In the case of a minor under 13, the consent of the guardianship court is required, and the minor has the right to express her own opinion. In the case of a fully incapacitated woman, her written consent is also required, unless her mental state renders her incapable of consenting. In the absence of the consent of the legal representative, in order to terminate the pregnancy, the consent of the guardianship court is required. "
[277] ibid, art. 4a.7.

3) there is a suspicion that the fetus is seriously injured."[278]

Two doctors, none of them performing abortion, must confirm the diagnosis about the condition of the fetus.[279] One of the main issues in accessing abortion on grounds of fetal defect are long waiting periods for prenatal examination. Considering that abortion under this ground can be performed up to 12 weeks of pregnancy,[280] waiting periods may result in denial of abortion services in the end. According to NGOs, there are reports of women who passed gestational limit for legal abortion while waiting for prenatal examinations and gave birth to a child who died soon after the birth.[281] In its latest observations on Poland, the Human Rights Committee expressed concern about the need to facilitate the access to prenatal testing in order to determine the fetal defect or illness for the purpose of accessing abortion.[282]

Croatian Act of 1978 provides liberal access to abortion, so there are no stringent requirements as in Ireland and Poland. According to 1978 Act, a woman seeking abortion who fulfills the conditions for accessing abortion, is referred to the doctor who will perform abortion and the woman is not required to undergo any additional procedure.[283] However, a woman who has been pregnant over ten weeks, or a woman who faces health risk in case of abortion, has to submit her case to medical commission of first instance which is obliged to deliver a decision within eight days.[284] In case a woman is not satisfied with the decision, it

[278] ibid, art. 7.
[279] ibid, art. 7.2.
[280] ibid, art. 4a.2.
[281] CEDAW Coalition of Polish NGOs, "Alternative Report on the implementation of the Convention on the Elimination of All Forms of Discrimination Against Women," p. 9.
[282] Human Rights Committee, "Concluding observations on the seventh periodic report of Poland," par. 24.
[283] *[Zakon o zdravstvenim mjerama za ostvarivanje prava na slobodno odlučivanje o rađanju djece (Uredničći pročišćeni tekst, N.N, br. 18/78 i 88/09), čl. 19.];* Act on the Health Measures for Achieving the Right to Freely Decide on Childbirth, (as amended, Official Gazette No. 18/78 and 88/09), art. 19, accessed 23 Sept. 2018, http://www.propisi.hr/print.php?id=9842. "*Trudna žena obraća se sa zahtjevom za prekid trudnoće zdravstvenoj organizaciji udruženog rada koja vrši prekid trudnoće prema svom izboru. Ako su ispunjeni uvjeti za prekid trudnoće trudna žena se upućuje liječniku koji vrši prekid trudnoće.*"
[284] ibid, art. 20, and art. 23. *„Čl. 20: Ako se utvrdi da je isteklo deset tjedana od dana začeća ili da bi prekid trudnoće mogao teže naručiti zdravlje žene, trudna žena se sa zahtjevom upućuje na komisiju prvog stupnja. Kad se u slučaju iz stava 1. ovoga člana radi o maloljetnici koja je navršila 16 godina života, a nije stupila u brak, o upućivanju maloljetnice na komisiju prvog stupnja obavijestit će se roditelji odnosno staratelj*

has the right to appeal to medical commission of second instance, which delivers decision within eight days, without possibility of appeal.[285] Unlike in Ireland and Poland, Croatia's legal system provides for possibility of appeal to two instances, with prescribed time limits for delivering decision. Nevertheless, since there is no monitoring of hospitals in providing abortion services, there is no data on implementation of these provisions, particularly access to timely appeal. The Act does not provide an obligation to provide a decision in writing, which is an important impediment for woman accessing courts. When it comes to authorizations, the law prescribes third-party authorization for minors below 16, while in rest of the cases, there is no explicit requirement for authorization.[286] In Croatia, the law does not provide for specific qualifications on doctors who should give opinion on woman's health condition. It is important to note that woman's right to be heard is not guaranteed in the Act, which means that her right to participate in decision-making on her own health is not present in the law.

Conclusion

Practical realities which define to what extent access to abortion is effective are often an outcome of procedural aspects of legal regulation of abortion. Starting from misuse of legal terminology and non-observance of principle of legal certainty, laws can indirectly limit women in accessing abortion. These include criminal laws on abortion, acts defining procedure for accessing abortion, regulations on qualifications of physicians, use of conscientious objection and authorizations. Also, effectiveness of right to reproductive choice

maloljetnice." „Čl. 23: Postupak po zahtjevu za prekid trudnoće je hitan. Komisija prvog stupnja dužna je odlučiti o zahtjevu za prekid trudnoće u roku osam dana od dana prijema zahtjeva."

[285] ibid, art. 24. *„Čl. 24: Trudna žena koja je nezadovoljna odlukom komisije prvog stupnja može uložiti prigovor komisiji drugog stupnja u roku tri dana. Komisija drugog stupnja dužna je odlučiti o prigovoru protiv odluke komisije prvog stupnja u roku osam dana od dana prijema prigovara. Odluka komisije drugog stupnja o zahtjevu za prekid trudnoće je konačna."*

[286] ibid, art. 18. *„Čl. 18: Uz zahtjev za prekid trudnoće koji podnosi maloljetnica, koja nije navršila 16 godina života, potreban je i pristanak roditelja ili staratelja uz suglasnost organa starateljstva."*

is defined by the extent to which women have participatory role in decision-making and appealing against physicians. Stringent procedure is not uncommon in countries with restrictive law and policy, such as Ireland and Poland, where it reinforces existing barriers. But in countries with liberal laws on abortion such as Croatia, lack of certainty in law and absence of procedural rights and monitoring mechanisms can serve as a stealthy hinderance of effective access to abortion.

Chapter III

Right to health and reproductive health in Ireland, Poland and Croatia

Introduction

Right to health, according to ICESCR, is "right to the highest attainable standard of physical and mental health."[287] It is the definition accepted by all international human rights bodies. As previously mentioned, right to reproductive health is of special significance for women's right to health and other human rights. Applying the standards of health care which had been set in the General Comment No. 14 of the CESCR,[288] UN General Assembly affirmed that women are entitled to "available, accessible, non-discriminatory, and good quality reproductive health care services."[289] Access to safe abortion services falls under reproductive health care services and these conditions apply to provision of abortion. Right to health is not simply right to access health care guaranteed by a country's legislative framework. Right to health and its realities are defined by certain factors which directly influence accessibility to health care services, including abortion. "Right to health is an entitlement to other social, economic, cultural and political determinants of health such as participation in health-related decision-making processes, information on sexual and reproductive health, literacy, nutrition, non-

[287] ICESCR, art.12
[288] CESCR, „General Comment No. 14," par. 12.
[289] UN General Assembly, "The right of everyone to the enjoyment of the highest attainable standard of physical and mental health Note by the Secretary-General," par. 17.

discrimination and gender equality."[290] These determinants have a different interplay in every state, and they influence effective access to abortion.

Right to health and reproductive health are not rights which can be effectively realized at international or regional level. Women can obtain remedies at international or regional level for violation of right to health when this is impossible in their national legal system. However, the crux of the right to health which is access to health care services, remains to be realized at the national level. Therefore, first recommendation of the WHO's High-Level Working Group on the Health and Human Rights of Women, Children and Adolescents is "to strengthen legal recognition of right to health and reproductive health in national legal systems, through constitutions or other legal instruments."[291] Ireland, Poland and Croatia have completely different approaches to upholding right to health and providing access to health care. Also, each of these countries has a different legal notion of right to reproductive health, none of which fully complies with the standards set in international human rights instruments. It is important to analyze these countries' laws to assess what are the guarantees of the right to reproductive health, enforceability of this right, as well as to what extent women can realize right to safe abortion within these legal frameworks.

Right to health and reproductive health in Ireland, Poland and Croatia: Analysis of the legal framework

As a socio-economic right, its framing in the law is different among the countries, and it is not always seen in the charter of rights or the constitution. This means that right to health and reproductive health are not always constitutionally protected rights, and that the state's obligation in providing health care is not the same in all countries. As any socio-economic

[290] ibid, par. 18.
[291] WHO, *Leading the realization of human rights to health and through health: report of the High-Level Working Group on the Health and Human Rights of Women, Children and Adolescents*, (2017) p. 8, accessed 31 Jul. 2018, https://www.ohchr.org/Documents/Issues/Women/WRGS/Health/ReportHLWG-humanrights-health.pdf.

right, its guarantee in the law is not a guarantee of country's ability to fulfill it, which is why socio-economic rights are expressed through obligation of progressive realization.[292] Guarantee of socio-economic rights often depends on the political agenda of the ruling parties and whether accessible health care is part of government's policies. This is particularly important in the context of abortion, as access to abortion is often under attack by different interest groups and political parties. Therefore, if the reproductive health is not entrenched as a legal right, accessibility to abortion, may be affected by political agenda of the ruling parties. Because of its nature as a socio-economic right, according to CESCR, the only way to ensure effective exercise of it is to set the right to reproductive health in law and make it "fully justiciable."[293]

The peculiarity of Ireland's Constitution is absence of socio-economic rights, including right to health.[294] Right to health, therefore, is a political right which should be determined by the democratically elected party, and not by the judges.[295] Ireland's model of socio-economic rights reflects political constitutionalism, where the judges are not given strong power of judicial review in protecting individual rights and where politics precedes law.[296] Right to health is not protected by the Constitution, instead it may be protected by statutory acts upon the initiative of the ruling political party. This means that statutory right to health is a political decision.[297] According to Ireland's judiciary, "legislature or the government imposes statutory discretions and duties in relation to health on statutory bodies, but these are not rights of

[292] Gable, "Reproductive Health as a Human Right," pp. 993-994. "Progressive realization limits a country's obligation to provide services required under the right to health so long as it is making reasonable progress toward fulfilling the right given its resource constraints."
[293] CESCR, „General Comment No. 22," par. 64.
[294] Brigit Toebes, Rhonda Ferguson, Milan M. Marković, and Obiajulu Nnamuchi (eds.) *The Right to Health: A Multi-Country Study of Law, Policy and Practice*, (T.M.C. Asser Press 2014) p. 375.
[295] ibid, p. 376.
[296] Marco Goldoni, "Two internal critiques of political constitutionalism," *International Journal of Constitutional Law*, Vol. 10, No. 4, (October 2012): pp. 928, 929, accessed 31 Jul. 2018, https://doi.org/10.1093/icon/mos033 .
[297] Toebes et. al., *The Right to Health: A Multi-Country Study of Law, Policy and Practice*, p. 378.

citizens."[298] Health care services have to be provided by the Health Services Executive (HSE) only where there is a duty to do so, but there is no obligation on the level or quality of the care which will be provided.[299] In section 7 subsection 1, *The Health Act of Ireland (2004)* establishes a duty of the government (Executive) "to protect right to health through the effective and beneficial use of existing resources, with continuous furtherance of this protection."[300] Therefore, entitlements of right to health as well as right to reproductive health under Irish law are a matter of political willingness and existing resources since legal guarantee of right to health is almost absent.

Besides the fact that right to health is not legally guaranteed, right to reproductive health is particularly difficult to realize for women due to other determinants of this right in Ireland. Social and cultural determinants are shaped by the Catholic Church which has substantial influence on public authorities and medical profession. While the recent referendum in Ireland shows certain progress towards liberalization of access to abortion, the underlying problem in accessibility of reproductive health care services is Church's control over health care. Due to lack of legal obligation of the state in providing health care, the Church has exercised institutional power in this sphere and established itself as an authority in health care and regulation of medical profession.[301] Church's teaching conflicts with right to reproductive health, particularly with family planning options while abortion continues to be labelled as "professional misconduct."[302] Ireland serves as an example how absence of legally enforceable right to health creates spaces for other determinants to control the exercise of right to health.

[298] ibid.
[299] ibid.
[300] Health Act (2004), No. 42 of 2004, pt II, ss 7(1), 7(2) accessed 31 Jul. 2018, http://www.irishstatutebook.ie/eli/2004/act/42/enacted/en/print#sec7.
[301] Orla McDonell and Jill Allison, „From Biopolitics to Bioethics: Church, State, Medicine and Assisted Reproductive Technology in Ireland," *Sociology of Health and Illness* Vol. 28. No. 6, (2006): p. 820, accessed 23 Sept. 2018, https://doi.org/10.1111/j.1467-9566.2006.00544.x..
[302] Toebes et. al., *The Right to Health: A Multi-Country Study of Law, Policy and Practice*, p. 389-390.

Acceptability is an essential element of the right to health according to CESCR, which requires health care services to be mindful of diverse cultures, but also of gender.[303] While majority of the Irish society is Catholic, and the Church plays significant role in setting standards even in medical ethics, gender as a determinant in provision of health care services cannot be excluded. However, in Ireland not only that entitlement to right to health is absent from the law, but reproductive health as an important component of women's right to health is reduced to what is appropriate according to the Church. Due to Church-imposed standards, reproductive choice as one aspect of reproductive health is non-existent. Women who are seeking access to abortion are denied reproductive autonomy and right to reproductive health as such, which raises two concerns. Firstly, it indicates Irish health care system is not gender-responsive and discriminates against women. Secondly, in such context, enforceability of women's reproductive rights is unattainable contrary to Ireland's international obligations.

Unlike in Ireland, right to health in Poland is legally protected at the constitutional level, while many of the patients' rights are defined at statutory level. "All citizens are entitled to protection of health and equal access to health care services" under Article 68 of Poland's Constitution.[304] There is no mention of the right to reproductive health in the Constitution. Article 68(3) guarantees protection of special health care for certain groups, including pregnant women.[305] Protection of pregnant women is further enhanced in Article 18 which says that "motherhood is placed under protection and care of the state."[306] This is not a comprehensive guarantee, because women's health during pregnancy is only one aspect of the right to reproductive health. The Constitution, however, protects private life as well as the right to make decision on one's personal life in Article 47.[307]

[303] CESCR, "General Comment No. 14," par. 12(c).
[304] Constitution of the Republic of Poland (1997), art. 68(1) and 68(2).
[305] ibid, art. 68(3).
[306] ibid, art. 18.
[307] ibid, art. 47.

Abortion as part of family planning is regulated at the statutory level, in *The Family Planning, Human Embryo Protection and Conditions of Permissibility of Abortion Act of 1993*.[308] The Act sets an obligation for authorities to provide women with "social, legal and medical care" but does not provide sufficient protection of woman's personal autonomy.[309] While Polish legal system does not recognize abortion as a reproductive choice, the Act's paternalistic approach limits women's ability to learn and decide about the risks arising from the pregnancy even in the context of risks to their own health or non-viable pregnancy. The Act regulates issues which are part of reproductive health care, but international human rights bodies found that the Act does not protect reproductive health sufficiently. In 2009, the CESCR found that women are forced to seek illegal abortions since "the state does not guarantee basic services in the area of sexual and reproductive health such as family planning."[310] Such health care system impairs not only women's reproductive health, but mental health as well which is especially deteriorating among women in rural areas.[311] Report of Special Rapporteur on Right to Health found that the authorities show disregard and lack of understanding about the impact that abortion has on women's right to health, since there is no official information on the number of illegal abortions and their impact on women's health in Poland.[312] Even the *Act on Patients' Rights and Patients' Rights Ombudsman from 2008*

[308] The Family Planning, Human Embryo Protection and Conditions of Permissibility of Abortion Act of 7 January 1993.
[309] ibid, art. 2(1).
[310] CESCR, "Consideration of reports submitted by States parties under articles 16 and 17 of the Covenant: Poland," UN Doc. E/C.12/POL/CO/5, (2 December 2009), paras. 27-28, accessed 4 Aug. 2018, https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2FC.12%2FPOL%2FCO%2F5&Lang=en.
[311] ibid, par. 24
[312] Human Rights Council, "Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover," UN Doc. A/HRC/14/20/, (27April 2010), par. 47, accessed 23 Sept. 2018, http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.20.pdf.

provides little protection of women's reproductive health rights, because the only explicit guarantee is the right to receive childbirth services.[313]

Croatia's legal system provides protection of right to health at the constitutional level and regulates the details of patients' rights and their entitlements at the statutory level, similar to the Polish case. Article 59 of the Constitution guarantees "right to health care in conformity to the law,"[314] while Article 70 entitles everyone to healthy life.[315] Similar to Poland's Constitution, Croatia's Constitution does not contain legal guarantee on reproductive health, but instead creates state's obligation to protect maternity.[316] On the statutory level, Health Care Act from 2008 (*Zakon o zdravstvenoj zaštiti*) provides state's obligations in providing health care and in detail explains entitlements of all citizens.[317] According to Article 17 of the Act, which lists the measures of health protection, women are entitled to "comprehensive health care, in particular with regard to family planning, pregnancy, childbirth and maternity."[318] Health care of women, including family planning services, falls in the category of primary health care services under this Act.[319] Even though Croatia's legislation does not explicitly mention reproductive health, it enshrines right to health care services peculiar for women which essentially means reproductive health care services.

Report of the Special Rapporteur on the Right to Health says that there are concerns over the realization of women's right to health in Croatia, which include informed consent during

[313] Act on Patients' Rights and Patients' Rights Ombudsman of 6 November 2008, (2008), Journal of Laws 2012.159, 2015.08.28, and 2015.1163, as amended, art. 7(2), accessed 5 Aug. 2018, https://www.bpp.gov.pl/gfx/bpp/userfiles/_public/en_-_wersja_anglojezyczna/ustawa_o_prawach_pacjenta_i_rzpp_w_jezyku_angielskim.pdf.
[314] Constitution of the Republic of Croatia (as amended 2010), art. 59.
[315] ibid, art. 70.
[316] ibid, art. 63.
[317] *[Zakon o zdravstvenoj zaštiti (2008), NN 150/2008]*; Health Care Act (2008), OG 150/2008, accessed 7 Aug. 2018, https://narodne-novine.nn.hr/clanci/sluzbeni/2008_12_150_4097.html.
[318] ibid, art. 17(10). *„Mjere zdravstvene zaštite su: ... 10. osiguravanje cjelovite zdravstvene zaštite žena, a posebno u vezi s planiranjem obitelji, trudnoćom, porođajem i majčinstvom."*
[319] ibid, art. 26. *„Zdravstvena zaštita na primarnoj razini obuhvaća: ... – zdravstvenu zaštitu žena."*

maternity and childbirth care, and access to safe abortion.[320] According to the Rapporteur, the 1978 Act guarantees access to safe abortion, but the biggest challenge in its implementation is overuse of legal provisions that deny abortion, most notably conscientious objection.[321] The Report highlights that in guaranteeing reproductive rights, women should be given primacy and not the family since these rights are human rights and individual rights.[322] Therefore, women's reproductive health rights are not sufficiently entrenched in the law and there are significant threats to this right and its universal protection in the country.

When it comes to social and cultural determinants which influence reproductive health rights in the Croatian society, there is a strong influence of the Catholic Church and some of the policy makers which in the last couple of years led to regression of reproductive health rights. According to the Special Rapporteur, significant part of the society opposes the established standards in protection of reproductive health rights of women which reflects "patriarchal gender stereotypes" and results in deterioration of women's right to health.[323]

The analysis indicates that in Ireland, Poland and Croatia, rights-based approach is missing in the creation of health policy, due to strong influence of cultural factors. There is no comprehensive guarantee of right to reproductive health in the legal systems of these countries, instead women's individual rights are placed in the shadow of maternal care and childbirth. Apart from Ireland, there is a legal guarantee of the right to health and some aspects of woman's right to reproductive health at the constitutional level. However, this protection does not encompass all aspects of reproductive health care and does not provide for guarantee of woman's personal autonomy and physical integrity. Stronger protection of right to health and reproductive health in the law would create less possibility for social, cultural,

[320] Human Rights Council, "Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health on his visit to Croatia," paras. 62, 63, 66, 71-75.
[321] ibid, paras. 71-75.
[322] ibid, par. 85.
[323] ibid, par. 86.

historical or other determinants to define women's entitlements in reproductive health care. This is important for access to abortion as it presents the specific part of reproductive health care where these determinants particularly clash with woman's personal autonomy and physical integrity.

Economic accessibility of abortion

Accessibility according to CESCR includes economic accessibility of health care services for all, and imposition of payments for health care services should be based on equity in order to ensure equal access to all groups within the society.[324] Realization of the right to reproductive health in many cases depends on the affordability of reproductive health care services. Abortion may be legal in the state, yet not publicly funded which substantially hinders possibility for women to exercise reproductive choice. Exclusion of abortion from public funding is defined as a barrier in accessing reproductive health care services.[325] WHO assessed that costs of including abortion in public health funds are minimal since "abortion services require few, if any, additional resources from those that should already be available for emergency obstetric and gynecological care."[326] Furthermore, the WHO assessed that "treatment of consequences of unsafe abortion are more costly than providing legal abortion."[327] The results of WHO's assessment indicate that exclusion of abortion from public health funds is a decision based on regressive policies, and not facts or evidence. Covering abortion services by public health funds reflects rights-based policy in health care system and state's intention to enforce legal guarantee of the right to reproductive health. One of the main reasons why states do not embrace rights-based approach in reproductive health is lack of

[324] CESCR, "General comment No. 14," par. 12(b).
[325] CESCR, "General comment No. 22." par. 28.
[326] WHO, *Safe abortion: technical and policy guidance for health systems – Second Ed.*, par. 3.6.
[327] ibid, par. 3.6.1. „It has been found that abortion is safer and less costly for health care systems when it is provided at earlier stages of pregnancy, which requires health care systems to ensure women access to information about their health condition. E.g. Vacuum aspiration is safer for women and less costly than D&C, whereas newest methods for medical abortion (misoprostol and mifepristone) significantly reduce costs and are flexible for women who cannot easily access health institutions which provide abortion services."

understanding on the contents of right to reproductive health.[328] In Ireland, Poland and Croatia, the laws purport that reproductive health is mostly maternity protection, disregarding many of other aspects of reproductive health, and many groups of women as well. Also, exclusion of abortion as a reproductive health service from public funding is a noncompliance with state's positive obligation stemming from international conventions, particularly ICESCR.

Because Ireland's legal system is not familiar with an enforceable right to health or a policy directive guaranteeing this right, financial accessibility of the right to reproductive health care is hindered.[329] Despite substantial public health funding, large portion of health services is privately funded. In Ireland, health care services are funded publicly and privately, but in some cases, services are funded publicly, whereas provided privately or vice versa.[330] This combination means that the services are funded through taxation and private health insurance, but the recent time has seen a decrease in public funding of health care.[331] Because of such arrangement, around 30% of population is entitled to free medical services, while others must pay for medical services, including primary health care.[332] Legal abortions – carried out to save woman's life are covered by public health insurance.[333] *The General Scheme of a Bill to Regulate Termination of Pregnancy from March 2018*[334] does not provide any suggestions on funding of abortion under the new law which will be adopted after the Referendum which set to repeal the Eighth Amendment. For the new legislative framework to be in line with international human rights standards, and Ireland's obligation to respect right to health,

[328] Gable, "Reproductive Health as a Human Right," p. 967.
[329] Toebes et. al., *The Right to Health: A Multi-Country Study of Law, Policy and Practice,* pp. 380-381.
[330] Brian Turner, „ Health System Funding in Ireland," (Fianna Fail The Republican Party 2013), p. 11, accessed 23 Sept. 2018, https://www.fiannafail.ie/download/health/Health%20System%20Funding%20in%20Ireland(2).pdf.
[331] ibid, p.11-12.
[332] David McDaid, Miriam Wiley, Anna Maresso, and Elias Mossialos, "Ireland: Health system review," *Health Systems in Transition* Vol. 11, No. 4: (WHO, 2009): pp. xxi-xxii, accessed 5 Sept. 2018, http://www.euro.who.int/__data/assets/pdf_file/0004/85306/E92928.pdf.
[333] ibid, p.74.
[334] General Scheme of a Bill to Regulate Termination of Pregnancy (27 March 2018).

abortion should be funded publicly.[335] Despite the new law guaranteeing women right to reproductive choice, accessibility of abortion and effectiveness of right to reproductive choice will require public funding of abortion. Presuming that ending the interference in women's reproductive freedom will ensure access to safe abortion to *all women*, ignores marginalized women and women in poor socio-economic conditions. While Referendum results mark historical recognition of women's reproductive freedom, it would be highly detrimental to exclude consideration of how socio-economic context in which women live affects their ability to access abortion.

There are more social contexts which the new abortion law in Ireland needs to address to make access to safe abortion effective. In Ireland economic barrier overlaps with the ideological barrier, to a certain extent.[336] Namely, for a long period of time the Church provided social services such as health through voluntary hospitals in Ireland.[337] The hospitals were basically religious hospitals, run by religious institutions until this started changing in the 1950s.[338] Eventually, the Church and religious institutions relinquished management of these hospitals in favor of the state, but these hospitals retained the Church's ethical guidance in provision of health care services.[339] After the Referendum, institutional flaws are one the main issues to be resolved - how abortion will be provided in hospitals which are still guided by Church's ethical guidelines. Feminists point out that culture and context influence right to choice, especially when gender inequality permeates culture.[340] Even if the state is no longer interfering directly in women's choice, socially-defined constraints impede women from

[335] CESCR, "General Comment No. 22," par. 41.
[336] CESCR, "General Comment No. 22," par. 14.
[337] Toebes et. al., *The Right to Health: A Multi-Country Study of Law, Policy and Practice*, p. 389.
[338] Marie Coleman, „Church, state and women's healthcare in the Republic of Ireland," QPoL, (2017), accessed 10 Aug. 2018, http://qpol.qub.ac.uk/st-vincents-healthcare-ireland/.
[339] Toebes et. al., *The Right to Health: A Multi-Country Study of Law, Policy and Practice*, p. 393.
[340] Tracy E. Higgins, Gender, "Why Feminists Can't (or Shouldn't) Be Liberals," *Fordham Law Review* Vol 72, No. 5, Art. 12 (2004): p. 1632, accessed 2 Nov. 2018, https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=3966&context=flr.

exercising their choice freely.[341] Feminists emphasize that for any meaningful protection and recognition of women's rights, these social determinants must be addressed by the law.[342] Through fulfillment of their positive obligations, the states should ensure economic and social protection of reproductive health care services for women, including access to safe abortion.

Poland's health care system is different from the Irish one because funding of health care services is primarily public.[343] The biggest source of funding is the National Health Fund (NHF) (*Narodowy Fundusz Zdrowia (NFZ))* which collects money through contributions paid by some Polish citizens based on their employment contracts, and which funds health expenditures.[344] The Health Care Services Financed from Public Sources Act of 2004 (*Ustawa o świadczeniach opieki zdrowotnej finansowanych ze środków publicznych*) defines the scope of health care services and entitlement to publicly funded health care services, but does not mention reproductive health services.[345] The *Family Planning Act of 1993* imposes an obligation on the state to provide reproductive health care and Article 2(1) of the Act lists the forms of care to which this obligation applies.[346] According to the Special Rapporteur on Right to Health, the Act guarantees "free access to information and prenatal tests in particular

[341] ibid, p. 1633.
[342] ibid.
[343] Anna Sagan and Dimitra Panteli (eds), "Poland: Health system review," *Health Systems in Transition* Vol. 13 No. 8. (WHO, 2011) p. xxiii, accessed 5 Sept. 2018, http://www.euro.who.int/__data/assets/pdf_file/0018/163053/e96443.pdf. "Around 70% of health expenditure comes from public sources. Over 83.5% of this expenditure can be attributed to the universal health insurance, and the NFZ accounted for over 91% of public expenditure on individual health care in 2008. The second most important source of public funds is the state budget, followed by the budgets of the territorial self-governments."
[344] Sylwia Nieszporska, „Priorities in the Polish health care system," *European Journal of Health Economics* Vol. 18. No. 1. (2017), accessed 10 Aug. 2018, https://dx.doi.org/10.1007%2Fs10198-016-0831-0 .
[345] *[Ustawa o świadczeniach opieki zdrowotnej finansowanych ze środków publicznych (2004) Dz.U. z 2004 r. Nr 210, poz. 2135. art. 1(1) i art. 2.1(1).];* The Health Care Services Financed from Public Sources Act (2004), OJ from 2004 No. 210, item 2135, art. 1 and art. 2(1), accessed 10 Aug. 2018, http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20042102135/T/D20042135L.pdf . *„Art. 1(1): Ustawa określa: 1) warunki udzielania i zakres świadczeń opieki zdrowotnej finansowanych ze środków publicznych; 2) zasady i tryb finansowania świadczeń, o których mowa w pkt 1." „Art. 2.1(1): Do korzystania ze świadczeń opieki zdrowotnej finansowanych ze środków publicznych na zasadach określonych w ustawie mają prawo: 1) osoby objęte powszechnym - obowiązkowym i dobrowolnym ubezpieczeniem zdrowotnym, zwane dalej „ubezpieczonymi.""*
[346] The Family Planning, Human Embryo Protection and Conditions of Permissibility of Abortion Act of 7 January 1993, art. 2(1).

when there is an increased risk of a fetal defect."[347] The Rapporteur noted the current allocations do not meet the growing needs of Polish society, but did identify issues with economic accessibility of abortion.[348]

In Croatia, health care system is funded similarly to Polish one, where there is a universal health insurance which is in line with guarantee of the right to health in their law.[349] The Health Care Act of Croatia from 2008 *(Zakon o zdravstvenoj zaštiti)* establishes that everyone has statutory right to health care which is to be realized in accordance with the Mandatory Health Insurance Act of Croatia from 2013 *(Zakon o obveznom zdravstvenom osiguranju).*[350] *The Mandatory Health Insurance Act* establishes positive obligation of the state in setting the foundations for provision of health care services through public health fund.[351] According to Article 18 of the Act, insured patients have the right to different forms of health care services, such as primary health care service, specialist-consultative health care, hospital care etc.[352] In relation to these health care services, Croatian Health Insurance Fund *(Hrvatski Zavod za Zdravstveno Osiguranje (HZZO))* covers the costs of health care services that form "preventive health care for women and health care services for monitoring pregnancy and

[347] Human Rights Council, „Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover: Mission to Poland," UN Doc. /HRC/14/20/Add. 3, (20 May 2010), par. 32, accessed 10 Aug. 2018, http://www.hr-dp.org/files/2015/06/05/Special_Rapporteur_on_the_Right_to_health,_Poland.pdf .
[348] ibid, par. 15.
[349] Aleksandar Džakula, Anna Sagan, Nika Pavić, Karmen Lončarek, and Katarina Sekelj-Kauzlarić, "Croatia: Health system review," *Health Systems in Transition* Vol. 16. No. 3, (WHO 2014): p. xx, accessed 24 Sept. 2018, http://www.euro.who.int/__data/assets/pdf_file/0020/252533/HiT-Croatia.pdf?ua=1. "Croatia's social health insurance system is based on the principles of solidarity and reciprocity, by which citizens are expected to contribute according to their ability to pay and receive basic health care services according to their needs."
[350] *[Zakon o zdravstvenoj zaštiti (2015) čl. 3.]* (Health Care Act (2015) art. 3, accessed 11 Aug. 2018, https://www.zakon.hr/z/190/Zakon-o-zdravstvenoj-za%C5%A1titi. *„Čl. 3: Svaka osoba ima pravo na zdravstvenu zaštitu i na mogućnost ostvarenja najviše moguće razine zdravlja, u skladu s odredbama ovog Zakona i Zakona o obveznom zdravstvenom osiguranju."*
[351] *[Zakon o obveznom zdravstvenom osiguranju (2013) NN 80/13, 137/13 čl. 1(1).]* Mandatory Health Insurance Act (2013), Official Gazette 80/13, 137/13, art. 1(1), accessed 11 Aug. 2018, https://www.zakon.hr/z/192/Zakon-o-obveznom-zdravstvenom-osiguranju. *"Čl. 1(1): Ovim Zakonom uređuje se obvezno zdravstveno osiguranje u Republici Hrvatskoj, opseg prava na zdravstvenu zaštitu i druga prava i obveze osoba obvezno osiguranih prema ovome Zakonu, uvjeti i način njihova ostvarivanja i financiranja, kao i prava i obveze nositelja obveznoga zdravstvenog osiguranja, uključujući prava i obveze ugovornih subjekata nositelja za provedbu zdravstvene zaštite iz obveznoga zdravstvenog osiguranja."*
[352] ibid, art. 18(1). *„Čl. 18(1): Pravo na zdravstvenu zaštitu iz obveznoga zdravstvenog osiguranja iz članka 17, točke 1. ovoga Zakona u opsegu utvrđenom ovim Zakonom i propisima donesenim na temelju ovoga Zakona obuhvaća pravo na: (1) primarnu zdravstvenu zaštitu, (1) specijalističko-konzilijarnu zdravstvenu zaštitu, itd."*

childbirth."[353] The rest of the Act does not mention any other health care services for women funded publicly, which means termination of pregnancy is excluded from the publicly funded health care. The Health Insurance Fund covers the costs of abortion only when abortion is necessary for medical reasons.[354] Unlike in Poland, economic accessibility is an important barrier in accessing abortion in Croatia. According to the Special Rapporteur on the Right to Health, "there is a trend of increasing the cost of abortion which in many hospitals is above the country's net minimum salary."[355] The current situation exposes women to unsafe abortions, particularly women in less developed parts of the country.[356] Furthermore, the cost of abortion varies among the regions and hospitals.[357] The policy of funding abortion for medical reasons exclusively is a policy creating discrimination among women who are economically independent and able to exercise reproductive choice and women in poor socio-economic condition. Social inequality affects women's access to abortion much more when the legal guarantee of reproductive choice is not complemented with positive obligation of the state to direct resources to fund legal abortion. Considering that abortion is legal in Croatia, the state should engage in minimizing financial barriers in accessing abortion in accordance with its human rights obligations.

If abortion is legal under any circumstances, the state should act on abolishing economic barriers that hinder the accessibility of abortion since funding is often one of the insurmountable barriers for women. In Ireland, Poland and Croatia here is some form of financial impediment in accessing abortion. While Poland has more restrictive grounds for

[353] ibid, art.19(2). *„Čl. 19(2): Osiguranim osobama u ostvarivanju prava na zdravstvenu zaštitu iz obveznoga zdravstvenog osiguranja iz članka 18. ovoga Zakona Zavod osigurava plaćanje zdravstvenih usluga u cijelosti za: ... 3. preventivnu zdravstvenu zaštitu žena, 4. zdravstvenu zaštitu žena u vezi s praćenjem trudnoće i poroda."*
[354] Nada Bodiroga-Vukobrat, „European network of legal experts in gender equality and non-discrimination-Country Report Gender Equality: How Are EU Rules Transposed into National Law? Croatia" (European Commission, 2016), p. 42, s. 9.8, accessed 11 Aug. 2018, https://www.equalitylaw.eu/downloads/3767-croatia-country-report-gender-equality-2016-pdf-1-32-mb.
[355] Human Rights Council, "Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health on his visit to Croatia," par. 72.
[356] ibid, par.74.
[357] Bijelić and Hodžić, „Grey Area: Abortion Issue in Croatia," p. 6.

abortion, women are facing fewer financial challenges in accessing legal abortion since the law clearly indicates when this service will be covered by the state. With the existing legal framework, Ireland is in similar situation as Poland, since both are countries with significant institutional challenges in providing abortion, rooted in social and cultural determinants of the right to health in these countries. Croatia as the only country of these three which legalized abortion upon request, does not cover the cost of abortion upon request. Current condition indicates that there is a disregard of contingency of the right to reproductive health of women and socio-economic conditions in the lawmaking process.

Enforcement and justiciability of the right to reproductive health

There must be judicial or legal remedy for all socio-economic rights, which should be "accessible, affordable, timely and effective."[358] Making right to reproductive health fully justiciable in national legal system is necessary to protect this right and provide victims with proper remedies under ICESCR.[359] In order not to jeopardize woman's health and timely access to abortion, having such remedies is of instrumental importance. In the context of enforcement of right to reproductive health, it is important that there is a body monitoring law implementation, as well as a possibility for women to participate in decision-making on their health, and to appeal on decisions of medical professionals.

Due to specific nature of right to health in Ireland, whose legal system does not provide any legal guarantee of this right, it is not a right enforceable before courts. This is, perhaps, the most important consequence of political nature of this right. In Ireland, Health Services Executive is the institution which determines the extent and the quality of health care services for those who receive public health care.[360] The involvement of politics in regulation of access

[358] CESCR, „General Comment No. 9: The domestic application of the Covenant," 3 December 1998, UN Doc. E/C.12/1998/24, par. 9, accessed 30 Oct. 2018, http://www.refworld.org/docid/47a7079d6.html.
[359] CESCR, "General Comment No. 22," par. 64.
[360] Toebes et. al., *The Right to Health: A Multi-Country Study of Law, Policy and Practice*, pp. 378-379.

to abortion and other reproductive health care services is reflected in the *Protection of Life During Pregnancy Act from 2013*, which provides the Minister with the power to regulate any matter which arises in the Act, subject to approval by the legislative branch.[361] However, the Health Services Executive plays a significant role in enforcement of the right to access abortion because it is the institution which receives requests for review of medical opinion on accessing abortion, sets the panel for review, appoints medical practitioners to the panel, and the committee for review of decision on abortion.[362] It acts as the monitoring body as well, because it prepares reports on the implementation of the Act for the Minister and for the legislative.[363] It is important that the Act provides for review of medical opinion, and an opportunity to obtain an alternative opinion. However, the certainty of this measure in protecting woman's health is not clear considering the chilling atmosphere among the health care professionals over criminal liability. As previously mentioned, the line between health and life risk is a blurry one, and a decision in favor of woman's health may cost a medical professional whole career.

The Act does not indicate the possibility for review of medical decision by courts, but this possibility is not excluded. A woman can challenge the decision before Irish courts as well as the constitutionality of the law, asserting insufficient protection of her own fundamental rights over unborn life. However, the ECtHR held that constitutional courts are not appropriate forum to determine if a woman satisfies the grounds to access abortion, because this would require the courts to examine essentially a medical issue.[364] Also, constitutional proceedings are too complex for a woman to seek her access to abortion through them.[365] Due to fact that right to health or right to reproductive health is not an enforceable right in Ireland, a woman

[361] Protection of Life During Pregnancy Act (2013), s. 4.
[362] ibid, ss. 10, 11, 12, 13.
[363] ibid, s. 15.
[364] *A, B, and C v. Ireland*, par. 258.
[365] ibid, par. 259.

who claims insufficient protection of health over unborn life, will not be able to succeed in her claim. Protection of unborn life is a constitutional category, whereas woman's right to health is not. Considering the thin line between health risk and life risk, especially in cases of pregnant women, lack of possibility for enforcement of her right to health, may lead to a life-threatening condition and serious impairment to mental health.

Polish and Croatian legal systems provide for state's obligation to protect right to health and make it an enforceable right. Enforcement of the right to health in Poland is in the hands of the public authorities, particularly Ministry of Health and territorial governments.[366] When it comes to access to abortion, the responsibilities of the state are set in the *Family Planning Act of 1993*, according to which, "public administration and local self-government bodies are obliged to provide medical, social and legal aid to women."[367] The scope of the obligation of these authorities is defined by Council of Ministers.[368] The Act, however, does not provide explicitly for a review of medical opinion on whether woman's health condition warrants access to abortion. This represents a barrier in accessing abortion, especially because Special Rapporteur on Right to Health found that the Act is narrowly applied by most doctors which results in denial of abortion even when grounds for it exist.[369] Despite existing legal guarantees of the right to health, procedures for its enforcement are absent in Polish legal system. Such situation results in denial of abortion and inability of women to claim rights breach on the risk to health grounds. This was also an issue in the case *Tysiąc v. Poland (2007)* before the ECtHR where Poland was found in breach of Article 8 protection of private life of the ECHR because "Polish legal system did not provide for any effective mechanism

[366] Human Rights Council, „Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover: Mission to Poland," par. 22.
[367] The Family Planning, Human Embryo Protection and Conditions of Permissibility of Abortion Act of 7 January 1993, art. 2(1).
[368] ibid, art. 2(4).
[369] Human Rights Council, „Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover: Mission to Poland," par. 39.

capable of determining whether conditions for obtaining a lawful abortion had been met."[370] The case indicates practice of narrow interpretation of risks to health under the Act of 1993, since in the case the applicant suffered from myopia and her pregnancy put her in danger of losing her eyesight completely.[371] The ECtHR emphasized in the judgement that civil law remedy for tort which was the only available remedy for the applicant, was *retrospective* and insufficient to protect the applicant before damage to her health became irreparable.[372]

After the judgement was brought, Poland introduced *Patients' Rights and Patients' Ombudsman Act in 2008* which provides for the "right to object to medical opinion through the Patients' Rights Ombudsman which will then submit the complaint to Medical Committee."[373] This provides an opportunity for review of medical opinion, and a possibility for a woman to seek her right through another body. Nevertheless, the Act did not provide sufficient guarantees against abuses and it did not satisfy all necessary conditions for obtaining an effective remedy. Special Rapporteur expressed concern over lack of impartiality of the Medical Committee which consists of three professionals, lack of certainty and obligation to provide a written decision, and no right for women to participate in decision-making.[374] In the end, the Act did not create conditions for women to assert their claims to protect right to health. Enforcement of the right to health is limited, with insufficient safeguards for women, making Poland in breach its obligations under ICESCR.

Enforcement of the right to health in Croatia is highly decentralized, as well as the regulation of provision of health care services. While this decentralization is created in a way to bring rights and entitlements closer to patients, the consequences of such approach in access to abortion led to lack of monitoring of provision of abortion in hospitals and ineffective

[370] *Tysiąc v. Poland*, par. 124.
[371] ibid, paras. 8, 17.
[372] ibid, par. 125.
[373] Act on Patients' Rights and Patients' Rights Ombudsman (2008), art. 31(1).
[374] Human Rights Council, „Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover: Mission to Poland," paras. 44-45.

enforcement procedures. According to the Act on Patients' Rights Protection of Croatia from 2004 *(Zakon o zaštiti prava pacijenata)* each administrative region has a Commission for Protection of Patients' Rights (*Povjerenstvo za zaštitu prava pacijenata*) which will be functioning under supervision of regional bodies.[375] They receive complaints by patients on right breaches and reacts in accordance with them.[376] While these commissions protect patients' rights at the lower level, there is a body which operates closely with the Ministry of Health and monitors implementation of the law at the state level. Commission for the Protection and Promotion of the Rights of Patients within the Ministry of Health *(Povjerenstvo za zaštitu i promicanje prava pacijenata)* is a body which follows the work of regional commissions and provides opinions and recommendations to them.[377] However, there is no evidence on any recommendations in terms of reproductive health care, despite existing concerns over women's ability to realize right to reproductive health. According to the NGOs reports, Ministry of Health as the highest body regulating health care, is not responsible for defining standard procedure for accessing abortion in Croatia, leaving this to hospitals.[378] Croatian Institute of Public Health, which is the monitoring body responsible for collecting and analyzing data on abortions performed in the country, is faced with poor reporting practice by the hospitals and absence of uniform reporting procedure.[379]

[375] *[Zakon o zaštiti prava pacijenata (2004) NN 169/2004 čl. 30.]* Act on Patients' Rights Protection (2004), O.G. 169/2004, art. 30, accessed 11 Aug. 2018, https://narodne-novine.nn.hr/clanci/sluzbeni/2004_12_169_2953.html. *„Čl. 30: U cilju ostvarivanja i promicanja prava pacijenata u svakoj jedinici područne (regionalne) samouprave osniva se Povjerenstvo za zaštitu prava pacijenata (u daljnjem tekstu: Povjerenstvo).“*

[376] ibid, art. 35. *„Čl. 35: Pacijent koji smatra da mu je povrijeđeno pravo utvrđeno ovim Zakonom ima pravo usmeno ili pisanim putem sukladno Zakonu o zdravstvenoj zaštiti izjaviti pritužbu ravnatelju zdravstvene ustanove, upravi ili osobi ovlaštenoj za vođenje poslova trgovačkog društva koje obavlja zdravstvenu djelatnost, odnosno privatnom zdravstvenom radniku.“*

[377] ibid, art. 39. *„Čl. 39: Povjerenstvo za zaštitu i promicanje prava pacijenata ministarstva nadležnog za zdravstvo obavlja sljedeće poslove: – prati provedbu ostvarivanja prava pacijenata sukladno ovome Zakonu, – raspravlja o izvješćima povjerenstava jedinica područne (regionalne) samouprave, – daje mišljenja, preporuke i prijedloge nadležnim tijelima o utvrđenom stanju na području djelokruga rada povjerenstava jedinica područne (regionalne) samouprave, – predlaže poduzimanje mjera za izgradnju cjelovitog sustava zaštite i promicanja prava pacijenata u Republici Hrvatskoj i – surađuje s domaćim i međunarodnim tijelima i organizacijama na području zaštite i promicanja prava pacijenata.“*

[378] Bijelić and Hodžić, "Grey Area: Abortion Issue in Croatia," p. 6.

[379] ibid, p. 7.

Considering the existence of bodies for protection of patients' rights at regional level, they can act within their competence and recommend improvement of these procedures. However, there has been no such initiative or activity. Despite the weaknesses in enforcement of the right, women claiming breach of their rights in accessing abortion have access to courts in Croatia, because of the constitutional and statutory protection of their individual rights.

Conclusion

Reproductive health is an important aspect of women's health care and it is crucial that this right is legally recognized. Despite progress in provision of reproductive health care, including abortion, some countries have not made progress in their legal system because this right is not guaranteed, or is severely limited. This limitation results in denial of women's right to health and can lead women to situations threatening their life. From the analysis of the three countries, certain conclusions can be derived. Firstly, right to health and right to reproductive health can be strong ground for accessing abortion if they are legally guaranteed rights. Secondly, legal recognition of these rights is the precondition of their enforceability before public authorities and courts, and it minimizes the impact of social and cultural determinants of health on individual rights in defining health policies. Finally, all these factors standing, the state must fulfill its obligation in protecting health by involving reproductive health care services in public health funding.

Chapter IV

Gender in health care

The importance of gender responsive laws and policies in protecting women's rights

Poland and Croatia have limited guarantee of the right to reproductive health in their legal framework, and in the case of Ireland there is no legal guarantee of the right to health at all. Having separate reproductive health guarantees in the legal system is very important because

reproductive health contains certain entitlements intended entirely for women, which distinguish it from the rest of health care. Together with rights and freedoms, these entitlements have a direct impact on women's health and lives, and their human rights. Access to safe abortion as part of reproductive health care has been found to improve living conditions of women and their ability to regulate their life and health.[380] *ICPD Programme in Cairo* established an obligation for the states to identify and address the causes of maternal mortality with the final objective of substantial reduction in maternal deaths and promotion of woman's health.[381] In order to achieve this objective, states first need to recognize the nature of reproductive health care and include gender perspective to create adequate laws addressing women's health needs. Laws restricting women's access to reproductive health services are remains of historical inequality and subordination of women, and the society's need to limit women's autonomy. Considering the advancement in reproductive health care technology which introduced safer methods for termination of pregnancy,[382] presence of criminal and restrictive abortion laws indicates that scientific and medical expertise is absent in lawmaking in Ireland, Poland and Croatia which constitutes effective denial of the right to benefit from scientific progress.[383] Gender dimension and scientific evidence have been secluded from

[380] WHO, *Safe abortion: Technical & policy guidance for health systems – Legal and Policy Considerations*, p.1. „Restriction in access to safe abortion services results in both unsafe abortions and unwanted births. Almost all deaths and morbidity from unsafe abortion occur in countries where abortion is severely restricted in law and/or in practice. In countries where induced abortion is legally restricted and/or otherwise unavailable, safe abortion has frequently become the privilege of the rich, while poor women have little choice but to resort to unsafe providers. This results in a large number of unnecessary deaths and morbidities, resulting in a social and financial burden for public health systems. Where there are few restrictions on access to safe abortion, deaths and illness are dramatically reduced."

[381] UN, *Program of Action of the International Conference on Population Development 1994 - 20th Anniversary Ed*., (UNFPA 2014), paras. 8.20. – 8.22.

[382] WHO, *Health worker roles in providing safe abortion care and post-abortion contraception*, (2015), p. 17, accessed 20 Aug. 2018, http://apps.who.int/iris/bitstream/handle/10665/181041/9789241549264_eng.pdf?sequence=1, „While even vacuum aspiration is a primary care procedure, medical abortion (using pills) is non-invasive and simplifies the requirements of place, equipment and health worker skills. It is suggested that the WHO definition of unsafe abortion (an abortion performed by a person lacking the necessary skills or in an environment not in conformity with medical standards, or both) be reinterpreted in light of current technical evidence and to account for the differences in what constitutes a safe environment for these two methods."

[383] UN Human Rights Council, "Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed: The right to enjoy the benefits of scientific progress and its applications*," UN Doc. A/HRC/20/26, (14 May 2012), paras. 7-8, accessed 24 Sept. 2018, https://documents-dds-

legislative process on access to safe abortion, which is deliberate noncompliance with states obligation of progressive realization of right to reproductive health and gender equality.

Nature of reproductive health care

Every person is entitled to the right to health without discrimination, and states have international obligations to include this right in their national legal systems.[384] There are still risks and threats to realization of this right, for many vulnerable and marginalized groups around the world. Regardless of substantial progress in ensuring gender equality in law, some rights are hardly attainable for women. Right to reproductive health, including access to safe abortion, is not protected in many legal systems where laws were not designed to allow comprehensive exercise of right to reproductive health.[385] One of the main reasons of insufficient protection of women's right to reproductive health is lack of understanding of the nature of reproductive health care, its challenges and objectives, which demand gendered perspective.[386] Legal guarantee to safe abortion is absent in many states because lawmakers do not take into account overall health and well-being of women, and design exclusionary and discriminatory health care systems. While the importance of reproductive health for women has been emphasized by human rights bodies, little has been done to raise awareness on the goals and challenges of reproductive health. Abortion has been particularly excluded as a health concern, ignoring comprehensive understanding of pregnancy as a condition and different health outcomes which may take place.

ny.un.org/doc/UNDOC/GEN/G12/134/91/PDF/G1213491.pdf?OpenElement. This right is guaranteed in UDHR and ICESCR.

[384] WHO, *Leading the realization of human rights to health and through health: report of the High-Level Working Group on the Health and Human Rights of Women, Children and Adolescents*, p. 6.

[385] ibid, „The realization of human rights, particularly sexual and reproductive health and rights, including access to safe abortion, remains seriously uneven or unattainable at the country level, risking the reversal of hard-won advances in preventable maternal and child mortality and undermining the health of adolescent children, in particular."

[386] Rebecca J. Cook, Bernard M. Dickens, and Mahmoud F. Fathalla, „Health Care Systems," in *Reproductive Health and Human Rights: Integrating Medicine, Ethics, and Law* (Oxford Scholarship Online 2011), p. 34.

Right to reproductive health contains a set of rights and freedoms, the crux of which are free decision-making and *unhindered access* to different facilities, services, information etc.[387] Its definition underpins a comprehensive and inclusive set of reproductive health care services with unhindered access which states must ensure. Right to reproductive health is guaranteed to everyone, regardless of their sex or sexual identity, but for women this right is a precondition of realization of other human rights because of women's reproductive role.[388] Women's ability to assert civil, political and economic rights is contingent on their ability to exercise reproductive rights which means their ability to decide on their health responsibly and freely.

Patients who receive reproductive health care are in most cases women, and they have faced historical marginalization and inequality in health care as well.[389] Control over their reproductive health rights was part of the systemic discrimination they faced, which is why states are obliged to remove laws and policies which reinforce inequality and stereotyping of women based on their reproductive capacity.[390] To protect women's autonomy and human rights, states need to uphold their obligations and adopt laws which proactively secure women's reproductive rights. Protecting woman's health requires observing women's health needs, which is not always prioritized in the law or the health care system. Instead, societal

[387] CESCR, „General Comment No. 22," par. 5. „The right to sexual and reproductive health entails a set of freedoms and entitlements. The freedoms include the right to make free and responsible decisions and choices, free of violence, coercion and discrimination, regarding matters concerning one's body and sexual and reproductive health. The entitlements include unhindered access to a whole range of health facilities, goods, services and information, which ensure all people full enjoyment of the right to sexual and reproductive health under article 12 of the Covenant."

[388] ibid, par. 25. „The right of women to sexual and reproductive health is indispensable to their autonomy and their right to make meaningful decisions about their lives and health. Gender equality requires that the health needs of women, different from those of men, be taken into account and appropriate services provided for women in accordance with their life cycles."

[389] Cook et. al., „Health Care Systems," p. 39.

[390] CESCR, „General Comment No. 22," paras. 25-29. „Seemingly neutral laws, policies and practices can perpetuate already existing gender inequalities and discrimination against women. Substantive equality requires that laws, policies and practices do not maintain, but rather alleviate, the inherent disadvantage that women experience in exercising their right to sexual and reproductive health. Gender-based stereotypes, assumptions and expectations related to women being the subordinates of men and their role being solely as caregivers and mothers, in particular, are obstacles to substantive gender equality, including the equal right to sexual and reproductive health, and need to be modified or eliminated, as does the role of men solely as heads of household and breadwinners. "

and moral concerns historically associated with women's reproduction and family, are placed in the forefront. Reproductive health care even today does not place women as the central care receivers, instead places them in the shadow of their maternal role and reproductive processes.[391] This essentially means that the system is not designed to enable women to express their individual concerns and needs, because the system treats her and her child's health parallel. Furthermore, reproductive health care should be designed to provide care throughout a woman's life, including all pregnancy outcomes and safe abortion.[392]

As mentioned previously, right to reproductive health includes a range of rights, freedoms and entitlements,[393] but legal frameworks of many countries exclude or limit some rights and freedoms to the detriment of women's health. Confining reproductive health care to some aspects of it is a characteristic of laws of Ireland, Poland and Croatia as well. Poland and Croatia in their constitutions provide for protection of maternity and pregnancy, while Croatia's Constitution provides additional protection over family planning as well.[394] Whereas in Poland motherhood is constitutionally protected guarantee, family planning services are excluded from reproductive health care which has been subject of criticism by human rights bodies.[395] Similarly, human rights bodies found that health care practitioners in Croatia often subordinate woman's individual rights to interest of the family unit.[396] Contrary to both Poland and Croatia, Ireland has no guarantee of reproductive health in its law, extremely limited access to abortion and limited information on family planning services. Therefore,

[391] Cook et. al., „Health Care Systems," p. 45. In most systems, women's reproductive health is part of maternal and child health (MCH).
[392] Marge Berer, "Maternal mortality or women's health: time for action," *Reproductive Health Matters*, Vol. 20. No. 39, (2012): p. 8, accessed 24 Sept. 2018, DOI: 10.1016/S0968-8080(12)39632-8.
[393] CESCR, „General Comment No. 22," par. 5.
[394] Constitution of the Republic of Poland (1997), art. 18 and Constitution of the Republic of Croatia (as amended 2010), art. 63.
[395] CESCR, "Consideration of reports submitted by States parties under articles 16 and 17 of the Covenant: Poland," UN Doc. E/C.12/POL/CO/5, (2 December 2009), paras. 27-28, accessed 21 Aug. 2018, https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2FC.12%2FPOL%2FCO%2F5&Lang=en. Croatia's public health care does not guarantee provision of contraception and family planning services, while abortion is excluded from public health care budget.
[396] Human Rights Council, "Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health on his visit to Croatia," paras. 62, 63, 66, 71-75.

women are not in the center of reproductive health care in these countries, and there is no guarantee that their health risks and needs will be addressed adequately.

One of the key characteristics of reproductive health care is that it is *health-oriented* and does not necessarily deal with ill persons, giving more opportunity for health care recipients to participate in decision-making.[397] This requires adequate law which guarantees woman's right to participate in decisions related to her health and redefines the relationship between health practitioners and women. Medicine as such requires reproductive health care to be inclusive and participatory because patients in reproductive health care have to make "informed choices and decisions" and not simply to consent to treatments.[398] Laws which do not define a process where women have the right to be informed and heard in regards to their health are detrimental for woman's right to decide freely on their health, and eventually indirectly control women's reproductive choices.

While reproductive health care deals with healthy patients, in many cases risks and consequences arising from pregnancy are not negligible. Limited notion of reproductive health care where family planning services and safe abortion are excluded exemplifies ignorance of some health risks, and the impact reproductive health has on the rest of health. Legal liberalization of abortion is an indicator of progress in comprehensive protection of the right to reproductive health, often grounded in public health concern because of the well-known causal relationship between maternal mortality and unsafe abortion.[399] Health risks

[397] Cook et. al., „Health Care Systems," p. 38.
[398] ibid. „There is no other field of medicine in which participation of the 'patient' in health care decisions is as much desired and practised. The ethical principle of respect, a minimal standard for ethical conduct, includes autonomy of capable persons. While in other fields of medicine, patients are required to give their informed consent to the treatment proposed by the health care provider, freely and without undue pressure or inducement, in the case of reproductive health care, clients have to make informed choices and decisions."
[399] David A. Grimes, Janie Benson, Susheela Singh, Mariana Romero, Bela Ganatara, Friday E Okonofua, Iqbal H. Shah, „Unsafe Abortion: The Preventable Pandemic," *Lancet* Vol. 368, No. 9550, (November 2006), pp. 1912-1913, accessed 24 Sept. 2018, https://doi.org/10.1016/S0140-6736(06)69481-6. „Advocacy for increased access to safe legal abortion has increased in countries such as Argentina, Brazil, Indonesia, Jamaica, Kenya, Mexico, Mozambique, Nigeria, Trinidad and Tobago, Uganda, and Uruguay. These efforts are rooted in public health, human rights, and other arguments. Those involved include health and medical professionals, women's

arising from pregnancy or denial of safe abortion are less known. Lack of such knowledge influences forming of public opinion on abortion as a moral issue, and not a health issue for a woman. Opponents of legal abortion mistakenly claim that liberalization of abortion increases the number of abortions performed, while the primary effect of liberalization is putting women away from clandestine and life-threatening abortions.[400] According to WHO, unsafe abortion has a negative impact on maternal health which can be prevented through promotion of family planning services, education and provision of safe abortions.[401] Unsafe abortion exposes women to long-term health impairments such as reproductive tract infections, upper-genital tract infections, increased risk of spontaneous abortions, infertility, ectopic pregnancies etc.[402]

Therefore, women's need to access safe abortion services is present and does not decrease because for many women it is a health care service that can save their life or protect them from long-term health issues. Women continue to resort to clandestine abortion despite risks it carries for their health because of the importance of controlling their reproductive health and because pregnancy itself is a risk for woman's health. The second biggest cause of deaths of women of reproductive age are maternity complications.[403] According to WHO, "15% of all pregnant women will develop a potentially life-threatening complication that calls for skilled care, and some will require a major obstetrical intervention to survive."[404] Due to risks women are exposed to during pregnancy, WHO requires health care practitioners to "focus on woman's health by responding to her needs and respecting her rights, such as right to be

groups, legal and human rights advocates, young people, government officials, and, in some countries, trade unionists."

[400] ibid, p. 1913. „Countries that liberalized their abortion laws such as Barbados, Canada, South Africa, Tunisia, and Turkey did not have an increase in abortion. By comparison, the Netherlands, which has unrestricted access to free abortion and contraception, has one of the lowest abortion rates in the world."

[401] WHO, *Safe abortion: technical and policy guidance for health systems Second ed*., p.18.

[402] David A. Grimes et. all., „Unsafe Abortion: The Preventable Pandemic,." p. 1911.

[403] „Women's Health," Key Facts, WHO, accessed 21 Aug. 2018, http://www.who.int/en/news-room/fact-sheets/detail/women-s-health.

[404] *Managing Complications in Pregnancy and Childbirth: A guide for midwives and doctors – 2nd Ed*., (WHO 2017) p. xi, accessed 24 Sept. 2018, http://apps.who.int/iris/bitstream/handle/10665/255760/9789241565493-eng.pdf?sequence=1.

informed, right to privacy, right to informed consent and her decisions on health and family."[405] Presenting abortion as a moral issue in law and policy, raises stigma about reproductive choices and reinforces misconceptions about pregnancy and risks it carries. Goal of reproductive health care is protecting women's health by creating an atmosphere of participation and inclusion where women's needs are addressed, and their rights are observed.

Protection of health is not only the task of the health care system, but of other sectors such as education as well.[406] Sexual and reproductive health education and access to contraceptives are essential for protection of women's reproductive health and prevention of abortions. *ICPD Programme in Cairo* imposes an obligation for states to develop different ways to resolve causes of maternal deaths.[407] However, reports of human rights bodies show that Ireland, Poland and Croatia have limited access to contraceptives as well as to certain reproductive health care services which results in significant risks to women's health and denies them the possibility to exercise their sexual and reproductive rights. The number of unsafe abortions in these countries indicates that reproductive health care system is not oriented towards prevention of health risks for women.

Reproductive health in international law is defined as a set of rights the realization of which presupposes creation of health care system receptive of women's needs and concerns and focused on protection of woman's health. Therefore, laws and policies must strengthen the use of resources and mechanisms of reproductive health care to provide women as primary patients with the right to be heard, informed and freely decide on their own health.

[405] ibid, C-6.
[406] Cook et. al., „Health Care Systems," p. 36. „Agriculture (nutrition), education, housing, transportation and the general economic level, among other factors, all have their bearing on health. In recognition of the role of other systems in health, the World Health Organization uses the term 'health system' to include all the activities whose primary purpose is to promote, restore, or maintain health."
[407] ICPD Programme of Action Cairo, par. 8.22.

Gender discrimination in health care

Non-discrimination is a principle applicable to provision of reproductive health care, and it includes a number of protected grounds, including gender.[408] CESCR recognized that social determinants of health such as systemic discrimination and inequality based on gender have a strong influence on reproductive health rights, and are usually reflected in laws as well.[409] Previously explained historical connection between national identity and women's reproductive capacity in Ireland, Poland and Croatia is an example of such social determinant which grounded restrictive stance towards abortion. Women's health has been heavily neglected in history and labelled as something trivial, while women's lack of education aggravated their and their children's health condition.[410] This stance towards women's health persists in other countries as well, while absence of compromise on status of abortion is a proof of this. Failure of implementation of *ICPD Programme in Cairo* is evidence of unreadiness of many states to overcome cultural barriers in addressing reproductive and sexual health.[411] Considering international obligations of states to eradicate discrimination, these inequalities should be addressed in laws and policies which would guarantee universal access to reproductive health care. Abortion and many other reproductive health care services are exclusively necessary for women, turning denial of these services gender discrimination. Such discrimination must be addressed strategically by including gender perspective in lawmaking and ensuring women's participation in positions of power and decision-making.

[408] CESCR, "General Comment No. 22," paras. 7-8.
[409] CESCR, "General comment No. 22," par. 8. „In all countries, patterns of sexual and reproductive health generally reflect social inequalities in society and unequal distribution of power based on gender, ethnic origin, age, disability and other factors. Poverty, income inequality, systemic discrimination and marginalization based on grounds identified by the Committee are all social determinants of sexual and reproductive health, which also have an impact on the enjoyment of an array of other rights as well. The nature of these social determinants, which are often expressed in laws and policies, limits the choices that individuals can exercise with respect to their sexual and reproductive health."
[410] Davies, "Reproductive Health as a Human Right: A Matter of Access or Provision?" p. 394.
[411] ibid, p. 396. „The ICPD revealed that that there was a wide gap between global aspirations and the political and cultural interests of many states and their societies. Consider, for example, the Programme of Action's likelihood of success in Egypt when, in 1992, the WHO Regional Office in Cairo published a report stating that "to safeguard young people against sexual misbehavior, early marriages must be encouraged."

International obligations on gender equality in health care

CEDAW obliges states parties to eradicate discrimination in health care and emphasizes the significance of guaranteeing reproductive health care services for women.[412] Gender is a social determinant of health and historical inequality of men and women affected the health care as well. Denying access to safe abortion is one of the primary examples of discriminatory policies in reproductive health care. CEDAW instructs the states to halt activities which obstruct women in protecting their own health, and to eliminate laws which criminalize medical procedures needed only by women.[413] Abortion is a medical procedure which is necessary for realization of women's right to reproductive health, so laws which criminalize it, legitimize punishment for women who seek safe abortion as reproductive health service. Laws restricting women's reproductive health decisions are usually justified with historical beliefs that woman's sexuality must be controlled for family and moral reasons.[414] Laws criminalizing abortion or policies restricting access to it in contemporary time, such as those in Ireland, Poland and Croatia are based on such historical patriarchal beliefs, and not on scientific and medical evidence related to reproductive health of women, and human rights obligations of the states.

It is important to note, however, that CEDAW does not impose any explicit positive obligation on states parties in terms of eradicating discrimination in exercising right to reproductive health. State's observance of principle of non-interference is necessary, but in achieving substantive equality in law and society, negative obligations arising from CEDAW are insufficient. However, positive obligations of the states in Article 2 of CEDAW are applicable to health care.[415] Arising from Article 2, states are obliged to undertake different

[412] CEDAW, art. 12(1).
[413] CEDAW Committee, „General Recommendation No. 24," par. 14.
[414] Cook et. al., „Health Care Systems," p. 35.
[415] CEDAW, art. 2.

measures and activities to achieve gender equality.[416] On the other hand, CESCR is more specific in regard to positive obligations of the state in adopting progressive gender-responsive laws and measures. According to CESCR, "state's failure to ensure substantive equality in the enjoyment of the right to reproductive health constitutes a violation of this right."[417] Constraints on reproductive freedom will continue even if the state discontinues direct interference in women's reproductive rights because of institutionally entrenched discrimination placing women in disadvantaged position. The basis of liberal theory of rights which presupposes equality is achieved once the state stops interfering in rights and freedoms of a particular group[418] guarantees only formal but not substantive equality. Achieving substantive equality in law, and in the context of right to reproductive health and access to abortion requires addressing social, economic and cultural determinants of health. Therefore, the states must observe negative obligations and refrain from discriminating against women in health care, and uphold positive obligations to remedy historical inequality.

Gender discrimination in health care of Ireland, Poland and Croatia

In Ireland, religious institutions have constructed the public image of woman through her maternal function, attributing gender and women's sexuality to a moral and family discourse.[419] Due to widely accepted and naturalized perception of family as patriarchal institution, women have been culturally subordinated and linked to the idea of Irish family, which resulted in politicization of women's reproductive rights.[420] While religious authorities played an important role in shaping public opinion, they exercised power over lawmaking as well. Impact of the Church is visible in the definition of family and position of women as dependent on male family members, their historical inability to realize their economic rights

[416] CEDAW Committee, "General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women," 16 December 2010, UN Doc. CEDAW/C/GC/28, par. 9.
[417] CESCR, "General Comment No. 22," par. 55.
[418] Schwartzman, p. 33.
[419] Smyth, "Abortion and Nation: The Politics of Reproduction in Contemporary Ireland," p. 28.
[420] ibid, pp. 36-37.

due to their inequality in labor market, moral absolutism and finally prohibition of abortion.[421] Because of such systemic discrimination in all spheres of life, Irish women fought for equality much longer than women in other Western European countries, leaving abortion a marginal issue for the women's movement.[422] Even during the campaigns that preceded referenda on abortion liberalization, women activists deliberately excluded women's rights and freedoms from their advocacy campaigns and rejected gendered perspective on the issue.[423] This is not surprising because reproductive and sexual health matters were suppressed in the Irish society which was not willing to move away from patriarchal understanding of women's sexuality. Therefore, women's activism was significantly limited. History of women's movement witnesses that gender as such was never part of the debate in lawmaking or policy-making but was heavily avoided as something not acceptable in Irish Catholic society.

The latest referendum where Irish citizens expressed willingness to liberalize access to abortion shows progress has been made in changing perception about women's rights, and it also confirms opinion of Irish judges in previous judgements on abortion. While decisions of Ireland's Supreme Court show consistency in restricting access to abortion on the grounds of insufficient constitutional protection of individual rights, judges recognized that no interpretation is final and that rights are given in accordance with prevailing ideas and concepts of the time, which eventually change and develop.[424] Therefore, women's rights may not have been sufficiently protected in the past, but that most certainly does not mean that societal developments do not affect and change law and legal developments. Ireland's Constitution has been characterized as deontological and due to superiority of divine laws,

[421] Smyth, "Abortion and Nation: The Politics of Reproduction in Contemporary Ireland," pp. 39-47.
[422] Mahon, "Abortion Debates in Ireland: An Ongoing Issue," p. 157. "There are several reasons for this marginality. First, the women's movement had to face an extended campaign to attain other quite basic rights. To attain these rights, it had to generate extensive broad support for its agenda by being as inclusive as possible."
[423] ibid, p. 162.
[424] Hanafin, "Reproductive Rights and the Irish Constitution: From Sanctity of Life to the Sanctity of Autonomy," pp. 184-185.

many of individual rights were not sufficiently protected, including women's rights.[425] However, the recent changes in public opinion and the willingness among lawmakers to address maternal deaths arising from unsafe abortion, show gradual progress towards rights-based legislation.

Strong connection between national identity and Catholicism in Poland led the Church to exercise stronger influence in public life after democratization, strengthening religious-national identity even more.[426] Prohibition of abortion which occurred in 1993 was influenced by Church's suggestion that abortion was a threat to Polish nation, and therefore was to be prohibited.[427] Women's rights were absent from the public debate which preceded adoption of the *Act of 1993*, because abortion was seen as the conflict between protection of family and nation on one side, and European secularization on the other side.[428] Women's movement after independence was at its inception and was not strong enough to advocate for reproductive rights, while under communist rule, women's movement did not exist and abortion was legalized because of the needs of socialist society.[429] Beside the fact that women's movement was not strong enough to bring changes about perception of abortion, women in Poland faced systemic discrimination and inequality in the same way as women in Ireland. Woman was a mother, and this role was an obligation of every Polish woman, excluding the possibility of reproductive choice.[430] This philosophy brought changes in legislation and legal terminology, where women's rights were limited or placed in the shadow of the rights of fetus and reproductive choice was not recognized by the courts. Conflict

[425] ibid, p. 186.
[426] Kozlowska et. al., „Nationalism, religion, and abortion policy in four Catholic societies," pp. 832–834.
[427] ibid.
[428] ibid, p. 833. "A deputy from the Polish Social-Democratic Union Party noted that the anti-abortion law would embarrass Poland in the West by presenting Poland as a backwards nation. Thus, conservative parliamentarians argued for the restrictive abortion bill as something that will shore up Poland's national identity as one of the last remaining bastions of Catholic tradition in Europe, forcing liberal politicians to address the underlying fear of European secularization and try to dislodge the discussion from the religion–nationalism nexus."
[429] Nowicka, "The Struggle for Abortion Rights in Poland," p. 174.
[430] ibid, p. 182.

between woman's rights and rights of the fetus in laws appears in abortion laws in Ireland and Poland. According to Polish judiciary, pregnancy gives legal grounds for the state to limit women's reproductive rights and choices because pregnancy demands protection of the fetus.[431] The impact of the Church on the position of women in society was such that they were denied rights and treated as unequal citizens once they became pregnant. In such atmosphere, access to safe abortion remained subject of conflict between feminist activists, the Church and the state.

Just like in Ireland, gender dimension of reproductive health care was not a frequent element in advocating for access to abortion in Poland. Most of the arguments of the women's movement in favor of abortion were based on woman's right to control her body and make decisions in relation to it. Considering that women's body was objectified, such arguments of women's activists seem logical. Nevertheless, the activists recently started raising awareness how the current law discriminates against women in provision of health care services, and reinforces economic inequality between women who can afford clandestine abortion and those who cannot.[432] Poland is facing high number of unsafe and clandestine abortions due to ban on abortion which endangers women's health and lives. The state is ignoring this occurrence indicating lack of willingness to uphold its obligations to protect women's reproductive health. The fact that such laws and policies of the state affect all women in Poland was shown by Polish Women's Strike in October 2016, when women protested against the proposal for absolute abortion ban across the country, without any central

[431] ibid, pp.182-183. "... protection of motherhood cannot be considered only from the woman's point of view, and that the child and its development is an equal subject of this protection. Equalizing fetus rights with women's rights confirms the instrumentalization of women's bodies — once pregnant women have no right to decide about pregnancy."

[432] Agnieszka Król and Paula Pustułka, "Women on strike: mobilizing against reproductive injustice in Poland," *International Feminist Journal of Politics* Vol. 20, No. 3, (May 2018): p. 371, accessed 24 Sept. 2018, https://doi.org/10.1080/14616742.2018.1460214. "150,000 illegal abortions per year meant an unregistered and tax-free revenue of US$ 95 million."

organization of the Strike.[433] While protests stopped the ban, government did not make any steps towards improving reproductive health care, leaving gendered perspective out from lawmaking process.

While situation in Croatia is slightly different from the previous two jurisdictions, legal history shows that women in Croatia are severely affected by populist politics as well. Access to abortion is often associated with communist legacy and the current liberal law became subject of opposition by the Catholic Church and pro-life organizations.[434] With the fall of communism, and strengthening of the Church, many societies began questioning gender roles, which affected primarily women who were supposed to focus on home and motherhood.[435] Initial intention of lawmakers in Croatia was to protect life of the unborn in the constitution, but these attempts failed due to women's protests, and the escalation of armed conflict in 1990s.[436] Because of the armed conflict, populist politics raised fear about survival of the nation and claimed woman's appropriate role was the role of the mother which placed reproductive rights of women in danger.[437] In this atmosphere, a newly formed government was creating new laws and policies, many of which dealt with natality, fertility, national identity, women's reproductive role and women's rights. Women's rights activists recognized that new laws were discriminatory against women and patriarchal, which is why they used all resources of new democratic regime to advocate for women's reproductive rights.[438]

[433] ibid, p. 374.
[434] Bijelić and Hodžić, "Grey Area: Abortion Issue in Croatia," p. 5.
[435] Sally N. Wall, Irene Hanson Frieze, Anuška Ferligoj, Eva Jarošová, Daniela Pauknerová, Jasna Horvat and Nataša Šarlija, „Gender Role and Religion as Predictors of Attitude toward Abortion in Croatia, Slovenia, The Czech Republic, and the United States," *Journal of Cross-cultural Psychology* Vol. 30. No. 4, (July 1999): p. 444, accessed 24 Sept. 2018, https://doi.org/10.1177/0022022199030004004 .
[436] ibid, p. 445.
[437] Jeremy Shiffman et. al., "Reproductive rights and the state in Serbia and Croatia," pp. 634-635.
[438] ibid, p. 637. „The power of feminist groups is a function both of their strong organizational capacities and the recently liberalized political system in which they have operated. They have set up monitoring teams on the status of women in the media, on violence against women and on violations of women's rights. They built partnerships with women politicians in opposition parties. They are establishing tighter links with regional counterparts and building a common system of monitoring and lobbying for women's human rights in Southeastern Europe."

However, pro-life organizations demonstrated strong advocacy as well, which eventually led to challenging of the abortion law before the Constitutional Court of Croatia.[439]

Women's rights are still a debatable issue in Croatian society and this reflected on legislation and policy, because the state did not invest effort in protecting women's rights from socio-cultural and religious attitudes.[440] CEDAW Committee noted in 2015 that stereotypical perception about women's role in the society persists in Croatia, and that women are still seen primarily as mothers and wives which hinders their ability to assert other rights.[441] One of the key conclusions of CEDAW was that exclusion of abortion and contraception from publicly funded health care services is discrimination based on sex.[442] Direct consequence of such policy is reinforcement of gender and economic inequality because abortion is inaccessible to women who are financially dependent and live in marginalized areas of the country.

Eradication of discrimination is proposed by many international law instruments, but in the context of health care and women's reproductive rights, CEDAW imposes the most explicit prohibition of discrimination in the exercise of the right to health.[443] CEDAW obliges the states parties to act in order to ensure gender equality in health care and access to it.[444] Their obligation is fortified with the positive obligations arising from Article 2 of CEDAW, which requires consideration of gender and women's needs in all aspects of lawmaking and institutional operation.[445] Ireland, Poland and Croatia signed and ratified CEDAW, and their

[439] Decision of the Constitutional Court of Croatia, No. U-I-60/1991, (2017).
[440] CEDAW Committee, "Concluding observations on the combined fourth and fifth periodic reports of Croatia," par. 9.
[441] ibid, par. 16.
[442] ibid, par. 32.
[443] CEDAW, art. 12.
[444] CEDAW, art. 12(1). „States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning."
[445] CEDAW Committee, "General recommendation No. 28," par. 9.

reservations do not concern Article 2 or Article 12.[446] It is evident that historical and traditional stereotypical views have taken substantial part in policy and lawmaking processes in Ireland, Poland and Croatia, especially when it comes to access to safe abortion. Women are discriminated in health care which functions according to laws and rules characterized by paternalistic and protective attitude towards women and their health. In accordance with their obligations under CEDAW, Ireland, Poland and Croatia should implement a set of measures to achieve transformative equality, which includes transformation of institutions and transformation of society's perception about women.[447] While CEDAW Committee played an important role in protecting women's right to health when states failed to do so, it is hard for women to seek effective and timely realization of right to reproductive health before an international body such as CEDAW Committee. Effective realization of the right to reproductive health is confined to national legal context.

Eradicating gender discrimination in health care

Historical discrimination and inequality of women in Ireland, Poland and Croatia led to gender-specific breaches of human rights and strongly affected the existing fragmented notion of reproductive health care in their legal systems. Where gender roles and gender discrimination continue to play a prominent role in abortion lawmaking and functioning of health care institutions, state is obliged to act upon this without presuming that reproductive choice will be sufficient for women to enjoy their right. In order to ensure women can rely on legal guarantee of their reproductive rights, free from social and cultural constraints, states

[446] "Status of treaties: CEDAW," Depositary, UN Treaty Collection, (Last modified 24 Sept. 2018), accessed 24 Sept. 2018, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en#7.

[447] Simone Cusack and Lisa Pusey, „CEDAW and the Rights to Non-discrimination and Equality," *Melbourne Journal of International Law* Vol. 14, No. 1, (2013), accessed 25 Aug. 2018, http://www5.austlii.edu.au/au/journals/MelbJIL/2013/3.html. „The principle of transformative equality underpins several of CEDAW's provisions. The Committee's approach to transformative equality has centred on two distinct but related categories of obligations. The first category concerns the transformation of institutions, systems and structures that cause or perpetuate discrimination and inequality. The second category of obligations concerns the modification or transformation of harmful norms, prejudices and stereotypes."

should embrace scientific developments and gender equality in lawmaking. Restrictive abortion laws and practices are not based on the developments reproductive medicine attained, but on cultural perception that state has legitimate interest in controlling women's reproductive rights. In order to change this, states should work towards changing power relations and enhancing women's substantive equality so that women can influence and make the lawmaking process mindful of gender equality and scientific developments.

Using scientific evidence in creation of abortion laws

Laws which restricted access to contraception were usually justified with the need to preserve morality and family.[448] Morality was associated with controlling woman's life in the family, therefore limits on reproductive freedom were seen as protection of family. While in many countries little changed because of failure to overcome these stereotypical views, a lot has changed in medicine. Primitive or traditional methods for termination of pregnancy trace back 5, 000 years ago in China, while some of these methods are still used in clandestine conditions.[449] The fact that primitive ways of terminating pregnancy are used today, indicates that for many women safe and advanced methods of abortion are inaccessible and unavailable. Today, reproductive health care provides women with various forms of contraception to control their fertility, but this is not a justification for restricting access to abortion because none of contraceptive methods is 100% effective.[450] Abortion is a procedure which protects women's health since pregnancy is not a harmless condition, so restriction of abortion is discriminatory, gender-specific abuse, exposing women to health risks. One of the

[448] Cook et. al., „Health Care Systems," p. 51. „Some national laws still characterize the provision of birthcontrol information and contraceptives as an offence against morality."
[449] Grimes et. al., „Unsafe Abortion: The Preventable Pandemic," p. 1912. "Nearly 5000 years ago, the Chinese Emperor Shen Nung described the use of mercury for inducing abortion. Although one publication lists over 100 traditional methods used for inducing abortion, unsafe methods today can be divided into several broad classes: oral and injectable medicines, vaginal preparations, intrauterine foreign bodies, and trauma to the abdomen. In addition to detergents, solvents, and bleach, women in developing countries still rely on teas and decoctions made from local plant or animal products, including dung."
[450] ibid, p. 1915. „27 million unintended pregnancies happen worldwide every year with the typical use of contraceptives. 6 million would happen even with perfect (ie, correct and consistent) use."

ways to eliminate such discrimination is to liberalize access to abortion as part of women's right to reproductive health and develop laws and policies in accordance with progressive methods for termination of pregnancy.

As previously stated, reproductive rights encompass several existing human rights, one of which is right to enjoy the benefits of scientific progress.[451] This right is guaranteed in many international instruments, notably the UDHR[452] and the ICESCR.[453] It has particularly important application in the sphere of health, and reproductive health accordingly. Right to enjoy the benefits of scientific progress has to be exercised in accordance with principles set in Article 2 of the ICESCR, one of which is non-discrimination which requires the states to abolish *de jure* and *de facto* discrimination in ensuring full enjoyment of this right.[454] In regards to this, the states have a positive obligation to direct resources of scientific research to fulfill health needs of women and men equally.[455] Research can assist in promoting positive and progressive health policies and solutions. However, as already mentioned, right to health is closely related to other factors including political and cultural ones. Political and cultural factors often prevail over scientific evidence in lawmaking on reproductive health because progressive laws protect women who, however, have little political power.[456] As a result, laws on reproductive health are confined to some aspects of right to reproductive health which are politically or culturally supported,[457] which is also the case in Ireland, Poland and Croatia.

[451] Center for Reproductive Rights, "Reproductive Rights are Human Rights" (2009), pp. 37-38, accessed 6 Sept. 2018, https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/RRareHR_final.pdf .
[452] UDHR, art. 27(1). "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits."
[453] CESCR, art. 15(1)(b).
[454] Yvonne Donders, "The right to enjoy the benefits of scientific progress: in search of state obligations in relation to health," (2011) *Medicine, Health Care and Philosophy* Vol. 14, Iss. 4, (2011): p. 375, accessed 6 Sept. 2018, DOI: 10.1007/s11019-011-9327-y. US National Library of Medicine.
[455] ibid.
[456] Kent Buse, Adriane Martin-Hilber, Ninuk Widyantoro and Sarah J Hawkes, "Management of the politics of evidence-based sexual and reproductive health policy," *Lancet* Vol. 368, No. 9552 (2006): p. 2101, accessed 24 Sept. 2018, https://doi.org/10.1016/S0140-6736(06)69837-1.
[457] ibid, p. 2102. "1993 World Development Report recommended implementation of an essential package of services for sexual and reproductive health, many countries have been forced to sacrifice some components

International guidance

There are few international instruments which provide guidance on creation of laws and policies on abortion, and one of them is WHO's *Safe abortion: technical and policy guidance for health systems*.[458] According to WHO, medical methods for termination of pregnancy made abortion safer and available and they became recommended methods in addition to manual methods such as vacuum aspiration.[459] Medical methods are safer because they are least invasive with high effectiveness.[460] The instrument is very inclusive and mindful of all women in need of abortion so it provides detailed guidance on recommended methods for every gestational phase and instructs health care practitioners on the steps in treatment of women seeking abortion. These technical aspects of abortion are not written in national abortion laws, instead are part of reproductive health care policy of the state. However, in Ireland, Poland and Croatia there is no such policy, even though Ireland might be the first to develop such policy after adoption of a new law following referendum. These technical aspects indicate that abortion as a medical procedure advanced and medicine provides methods which protect women's health and the impact of pregnancy on health. By denying safe abortion to women, states are denying women their right to enjoy benefits of scientific progress in the context of reproductive health.

One of the ways the state restricts access to abortion in practice is by imposing specific qualifications for health practitioners who can perform abortion. This does not only result in scarcity of staff performing abortion, but also in discrimination because abortion is effectively

because of cost and other barriers to service delivery. As a result, some countries implemented maternal health policies such as antenatal care and family planning, but not delivery care or treatment for sexually transmitted infections."

[458] WHO, *Safe abortion: technical and policy guidance for health systems Second Ed.*

[459] ibid, pp. 37-38. Medical methods include treatment by combination of two drugs: mifepristone and misoprostol.

[460] ibid, p. 44. „Mifepristone with misoprostol has been proven highly effective, safe and acceptable for abortions occurring up to 9 weeks since the LMP. Efficacy rates up to 98% are reported. Approximately 2–5% of women treated with the combination of mifepristone and misoprostol will require surgical intervention to resolve an incomplete abortion, terminate a continuing pregnancy, or control bleeding."

denied to women who live in marginalized areas. This is a common occurrence in Poland and Croatia. For liberalization of access to safe abortion, beside relying on advanced medical achievements, a state has to develop strategy for training health care practitioners and enable access to abortion to women living in disadvantaged conditions.[461] Adoption of liberal abortion laws allowing less invasive and progressive abortion methods brings reproductive health care closer to women who live in isolated and marginalized areas. These progressive methods simplified the procedure of termination of pregnancy because most of them can be provided at primary care level or even administrated by women at home following doctor's instructions.[462] This means that some aspects of the procedure can be performed by women themselves, reducing dependence on health care practitioners and physical accessibility of health care institutions. Because of these advancements, the WHO invited for reconsideration of the definition of unsafe abortion.[463] Prevalence of unsafe abortion practices is caused by states denial of abortion and refusal to recognize it as a form of gender-specific health care. Progress in science cannot be ignored by lawmakers and policy makers in regulating access to abortion because of states obligations of progressive realization of human rights under ICESCR.

Increasing women's decision-making power

Beijing Declaration and Platform for Action adopted at the Fourth Conference on Women in 1995 calls for the states to increase the proportion of women decision-makers through positive action and gender mainstreaming in policies at all levels.[464] Imbalance of power between men

[461] WHO, *Reproductive Health Strategy to accelerate progress towards the attainment of international development goals and targets*, WHO/RHR/04.8 (2004), p. 18, accessed 27 Aug. 2018, http://apps.who.int/iris/bitstream/handle/10665/68754/WHO_RHR_04.8.pdf?sequence=1.
[462] WHO, *Health worker roles in providing safe abortion care and post-abortion contraception,* p. 17.
[463] ibid. „It is suggested that the WHO definition of unsafe abortion (an abortion performed by a person lacking the necessary skills or in an environment not in conformity with medical standards, or both) be reinterpreted in light of current technical evidence and to account for the differences in what constitutes a safe environment for these two methods."
[464] *Beijing Declaration and Platform for Action*, adopted on 15 September 1995, paras 186, 189, accessed on 3 Nov. 2018, http://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf.

and women silenced women and excluded them from positions of power and decision-making, resulting in many forms of discrimination. Being aware of such fact, human rights bodies impose on states positive obligation of achieving substantive equality.[465] The obligation requires the states to proactively address discriminatory power structures, as well as the impact these leave on women.[466] States are obliged to remedy "historical causes of gender discrimination in health care, while also empowering women to make reproductive choices."[467] Laws and policies should consider how stereotypes surrounding gender as a social determinant of health shaped reproductive health laws.[468] Historically unequal distribution of decision-making power among men and women denied women the possibility to express their health needs and concerns, especially related to reproductive health. *ICPD Programme in Cairo* imposes an obligation on states to eliminate barriers to women's participation in decision-making, placing it as a precondition of attainment of women's rights and welfare, especially when it comes to reproduction and sexuality.[469] These guarantees on women's decision-making power are reflected in international legal instruments, whereas they are absent in domestic laws. Liberalism, for example, does not consider remedying historical oppression of women or the causes of it.[470] While it does provide for protection of rights against the state, it does not address the root causes of inequality which is detrimental for any historically marginalized group such as women. Despite legal changes providing for gender

[465] Center for Reproductive Rights, "Substantive Equality and Reproductive Rights: A Briefing Paper on Aligning Development Goals with Human Rights Obligations," (2014), p. 7, accessed 3 Nov. 2018, https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Equality_Guide_CNUpdated_2.19.15.compressed.pdf .
[466] ibid.
[467] ibid, p. 8.
[468] WHO, *Reproductive Health Strategy to accelerate progress towards the attainment of international development goals and targets*, p. 18.
[469] ICPD Programme of Action Cairo, par. 4.1. "The power relations that impede women's attainment of healthy and fulfilling lives operate at many levels of society, from the most personal to the highly public. Achieving change requires policy and programme actions that will improve women's access to secure livelihoods and economic resources, alleviate their extreme responsibilities with regard to housework, remove legal impediments to their participation in public life and raise social awareness through effective programmes of education and mass communication. In addition, improving the status of women also enhances their decision-making capacity at all levels in all spheres of life, especially in the area of sexuality and reproduction."
[470] Schwartzman, "Liberal Rights Theory and Social Inequality: A Feminist Critique," p. 33.

equality, the impact of once lawful discrimination against women in the society cannot be annulled or reversed without comprehensive legal, institutional and societal transformations.

Women are not exposed to risks from maternal deaths because medicine does not make abortion safe, but because discriminatory laws which are based on historical link between women's reproduction, sexuality and morality deny women access to *safe* abortion. Empowering women and enhancing their decision-making power leads to shift in power relations and triggers transformation of institutions who may have been discriminatory towards women throughout the history.

Reproductive rights and other human rights

Substantive equality provides consideration of differences between men and women, primarily biological and reproductive ones, which lead or may lead to discrimination.[471] Link between women's reproductive rights and other human rights comes naturally because of their reproductive role. Women's ability to make free and informed decisions on their own reproductive health is a precondition of their equal participation in society and exercise of other human rights. Realization of reproductive rights is also contingent on other rights such as right to information and integrity, among others.[472] Access to safe abortion as part of reproductive health is important for women's exercise of other human rights, primarily civil, political and economic rights which is why laws on abortion need to include human rights approach.

State's denial of abortion can result in breach of many human rights obligations, but it also imposes serious limitations on women's ability to exercise other human rights. "Restricting access to abortion increases maternal deaths which leads to violation of right to life or

[471] Center for Reproductive Rights, "Substantive Equality and Reproductive Rights: A Briefing Paper on Aligning Development Goals with Human Rights Obligations," p. 14.
[472] WHO, *Leading the realization of human rights to health and through health: report of the High-Level Working Group on the Health and Human Rights of Women, Children and Adolescents*, p. 13.

freedom from inhumane and degrading treatment."[473] According to CEDAW Committee, states are under international obligation to respect, protect and fulfill human rights which are linked to women's health.[474] Therefore, states which face significant number of maternal deaths or high rates of unsafe abortion, should uphold their international obligation to fulfill rights by adopting measures that would ensure access to reproductive health care services, including abortion.[475] This is necessary to protect women's right to life and right to physical and mental health, and their ability to enjoy other opportunities and human rights.

Looking from the perspective of human rights, restricting abortion in law has serious repercussions on woman's decision-making, right to privacy and autonomy.[476] CESCR also confirmed that right to reproductive health is the pillar of autonomy and personal integrity, therefore cannot be detached from civil and political rights.[477] Because reproductive decisions are related to the most private sphere of a woman's life, they define her entire life, emotionally and physically. Laws restricting women in accessing reproductive health care were historically used to control women.[478] Such historical facts and practices should not be left to oblivion because despite protection of gender equality, laws in Ireland, Poland, Croatia and many other countries continue to be used for the purpose of controlling women. Women are not able to assert and realize some of the basic human rights, if the law denies them the

[473] CESCR, „General Comment No. 22," par. 10.
[474] CEDAW Committee, „General Recommendation No. 24," par. 13. „The duty of States parties to ensure, on a basis of equality of men and women, access to health-care services, information and education implies an obligation to respect, protect and fulfil women's rights to health care. States parties have the responsibility to ensure that legislation and executive action and policy comply with these three obligations. They must also put in place a system that ensures effective judicial action. Failure to do so will constitute a violation of article 12."
[475] WHO, *Women's health and human rights: Monitoring the implementation of CEDAW*, (2007) par. 2.3, accessed 24 Sept. 2018, http://apps.who.int/iris/bitstream/handle/10665/43606/9789241595100_eng.pdf?sequence=1&isAllowed=y .
[476] Jennifer Templeton Dunn, Katherine Lesyna and Anna Zaret, "The role of human rights litigation in improving access to reproductive health care and achieving reductions in maternal mortality," *BMC Pregnancy and Childbirth* Vol. 17, (Suppl 2), No. 367, (2017): p. 73, accessed 31 Aug. 2018, https://bmcpregnancychildbirth.biomedcentral.com/track/pdf/10.1186/s12884-017-1496-0.
[477] CESCR, „General recommendation No. 22," par. 10
[478] Cook, „International Human Rights and Women's Reproductive Health," p. 73.

right to control their reproductive capacities and make informed decision in relation to that.[479] Due to the inextricable and reciprocal bond between women's human rights and reproductive rights, one set of rights cannot be achieved without the other.[480]

Conclusion

Legal frameworks of Ireland, Poland and Croatia on health are not gender-responsive and definition of reproductive health is confined to what political and religious groups advocate for. There is no apprehension of the nature of reproductive health, while women's individual needs and rights are conflated with maternal needs and rights. Lack of inclusive and non-discriminatory policies result in insufficient protection of reproductive health of women in all conditions and in all ages. Restriction of abortion is still grounded on political and religious justifications, excluding scientific evidence and gender equality from the lawmaking process. Long-term consequences of such laws are stigma and social exclusion of women, health consequences and inability to enjoy in other human rights.

Chapter V

Recommendations

Introduction

Access to abortion is an issue which is often framed as a conflict between women's privacy and autonomy and fetal life.[481] As such, discourse on abortion is based on the idea of individual rights where women should have the right to make reproductive choices without state interference.[482] Some feminists argue that liberal theory of rights is insufficient to protect

[479] Center for Reproductive Rights, "Reproductive Rights are Human Rights," p. 3
[480] ibid.
[481] Tribe, Abortion, *The Clash of Absolutes*, p. 52.
[482] Lynn P. Freedman, "Reflections on Emerging Frameworks of Health and Human Rights," *Health and Human Rights* Vol. 1, No. 4, Women's Health and Human Rights (1995): p. 329, accessed 3 Oct. 2018, JSTOR. "Liberal theory of rights according to which individuals define themselves alone to the opposition of the collective; it

women's rights because it is too individualistic, based on negative obligations and excludes exercise of women's rights from practical realities.[483] Analysis of legal framework and its implementation in Ireland, Poland and Croatia proves that feminist critics are correct in claiming liberal theory of rights is of small importance for accessing abortion as right to reproductive health. Liberal theory is abstract, detached from social contexts, institutional power relations, and the historical context of abortion because it presumes individual rights are sufficient.[484] Laws and policies drafted exclusive of political, social and economic factors of women's existence and participation in societies of these countries, ignore historical discrimination and inequality of women and leave them unaddressed. Liberal theory is insufficient to protect effective realization of access to abortion as right to reproductive health because of the inherent nature of right to reproductive health. It is an inclusive right, inextricably bound zo underlying social determinants of health, among others, social inequalities and unequal distribution of power based on gender.[485] Because these determinants affect right to reproductive health, states have positive obligations under ICESCR to address the inequalities and discrimination in health care.

In countries such as Ireland, Poland and Croatia, where women have been historically discriminated and their needs marginalized, it is hard to talk about fulfillment of their rights and access to safe abortion when institutional and power structures have not changed. It is unrealistic to expect women to access safe abortion by solely asserting reproductive choice, without a system of accountability and enforceability to ensure exercise of their right to reproductive health. Therefore, conceiving right to access safe abortion as a negative right is not enough to enable women to access abortion, because in societies such as Ireland, Poland

reinforces the negative meaning of human rights according to which state cannot interfere in individual's life. It leads to "strict dichotomy between civil and political rights, and socio-economic rights."

[483] Nussbaum, "The Feminist Critique of Liberalism," pp. 5-6.

[484] Lisa Schwartzman, „Liberal Rights Theory and Social Inequality: A Feminist Critique," *Hypatia* Vol. 14, No.2, (Spring, 1999): pp. 34-35, accessed 3 Oct. 2018, JSTOR.

[485] CESCR, "General Comment No. 22," Underlying Social Determinants, paras. 1-2.

and Croatia, theory of negative rights will not reform institutional discrimination and gender inequality.[486] Access to abortion has been specifically seen as a woman's right to privacy into which governments cannot interfere, but this negative right does little to empower women and to ensure they can claim their positive rights such as reproductive health entitlements from which they have been deprived.[487] This is not to say that liberal theory of rights as negative rights is not of great importance for women seeking access to abortion as part of their reproductive freedom and autonomy. On the contrary, it upholds creation of laws and policies based on individual freedom, and eradication of paternalistic laws which victimize women. Nevertheless, liberal theory of rights does not provide an answer or solution for deeply entrenched social and institutional inequality and discrimination. Simply, even if freedom of choice in accessing abortion is legally guaranteed, its exercise is contingent on women's ability to effectively access reproductive health care services. For this reason, liberal theory must be supported with positive obligations of the states, such as the ones parties to ICESCR are obliged to observe.

In its General Comment No. 9, CESCR elaborates on the application of the Covenant in domestic legal systems and the obligations of the states.[488] According to its interpretation, in giving effect to right to health, states parties must ensure fundamentals of international human rights law, primarily justiciability, legal remedy and accountability.[489] In explaining the content of states parties obligations under ICESCR, and specifically obligation of result under Article 2(1), the Committee explains this includes "adoption of appropriate means such as

[486] Schwartzman, „Liberal Rights Theory and Social Inequality: A Feminist Critique," pp. 26-33. "Because liberal theory tends to focus on the ways that the government can infringe on people's rights through its explicit policies and procedures, liberal legal theory often leaves relations of class, race, and gender hierarchy unaddressed, especially when these three hierarchies are intertwined in complex ways."
[487] ibid, pp. 35-36. MacKinnon's critique of right to privacy as a concept which provides limited protection of women's rights and does not allow space for further progress of the rights of subordinated and oppressed groups within the society, particularly of women.
[488] CESCR, "General Comment No. 9."
[489] ibid, par. 2.

legislative, administrative, financial, social and educational measures."[490] However, in elaborating on the meaning of appropriate measures, the Committee provides no definite or absolute answer, and explicitly recognizes the above mentioned list is not an exhaustive one.[491] What matters in defining appropriate measures for guaranteeing rights under ICESCR, is their effectiveness to a given situation. Taking into consideration the interconnection of various factors surrounding access to abortion in laws of Ireland, Poland and Croatia, a more inclusive approach may comply with appropriateness and effectiveness standards under ICESCR. Therefore, a human rights-based approach to law and policy on reproductive health care is necessary for these countries to protect and respect women's right to access safe abortion.

What human rights-based approach in reproductive health care means?

Human rights-based approach in reproductive health is a progressive solution for guaranteeing access to safe abortion in countries where women have faced discrimination in health care and other segments of society, which is the case in Ireland, Poland and Croatia. It aims at providing long-term legal and comprehensive solutions for broader issues women encounter in exercising right to reproductive health. UN High Commissioner for Human Rights (OHCHR) in 2012 adopted a Technical Guidance assisting law and policy makers in implementing human rights principles for protection of women's right to health.[492] The Guidance heavily relies on principles and elements of health care set in the General Comment No. 14 of the CESCR and imposes an obligation on states to take into account social determinants of women's health, including gender discrimination and women's participation

[490] CESCR, "General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, para. 1, of the Covenant)," 14 December 1990, UN Doc. E/1991/23, paras. 3,7, http://www.refworld.org/docid/4538838e10.html, accessed 30 Oct. 2018.
[491] ibid, paras. 4, 7.
[492] Human Rights Council, "Technical guidance on the application of a human rights-based approach to the implementation of policies and programmes to reduce preventable maternal morbidity and mortality - Report of the Office of the United Nations High Commissioner for Human Rights," UN Doc. A/HRC/21/22 (2 July 2012).

in positions of power.[493] In terms of the law itself, the Guidance requires the states to commit themselves to "recognition of right to reproductive health in constitutions and legislation, and creation of accountability mechanisms in law."[494]

Human rights-based approach to health is effective if right to health is justiciable and enforceable right, in order to guarantee women access to legal and judicial remedies through which they can assert positive rights and entitlements.[495] Addressing social determinants of reproductive health which prevent women in exercising their right, will only be possible if women are given an enabling legal environment.[496] Creating such environment requires knowledge about practical realities of political environment, health care system, and women's needs.[497] In order to ensure the laws reflect necessities of women and that reproductive health is defined as comprehensively as it should be, it is of instrumental importance to remove barriers to women's increased political participation and decision-making.[498] Therefore, this approach compensates for the deficiencies in the liberal theory since it removes barriers for women in achieving substantive equality.

Considering that abortion is accessible in some countries on the grounds of right to privacy or negative rights,[499] a question arises as to why is it necessary to frame abortion as right to reproductive health matter and why is it necessary to involve human rights-based approach to health care? Reason is two-fold; firstly, human rights-based approach in health care aims at eradicating discrimination in society and health.[500] Denial of abortion or restricting access to

[493] ibid, paras. 12-18.
[494] ibid, par. 12.
[495] Alicia Ely Yasmin and Rebecca Cantor, "Between Insurrectional Discourse and Operational Guidance: Challenges and Dilemmas in Implementing Human Rights-Based Approaches to Health," *Journal of Human Rights Practice* Vol. 6, No. 3, (November 2014) pp. 459-460, accessed 3 Oct. 2018, https://doi.org/10.1093/jhuman/huu019.
[496] ibid, p. 463.
[497] ibid, p. 464.
[498] ibid, pp. 461- 462.
[499] E.g. The US, Canada, Norway.
[500] WHO, "A human rights-based approach to health," accessed 8 Sept. 2018, http://www.who.int/hhr/news/hrba_to_health2.pdf.

it, as a medical procedure exclusively needed by women, is a clear form of discrimination against women.[501] Secondly, human rights-based approach aims at creating laws and policies strengthening human rights in all aspects.[502] Since reproductive health of women is closely related to women's exercise of other rights and, human rights-based approach would support creation of laws which integrate human rights principles into right to health.[503]

Finally, for enabling women to access abortion and exercise their right to reproductive health, it is important to consider women's right in the context of equality, which would suggest addressing issues and factors which prevented women from being equal in a society.[504] This is where liberal theory of rights is also insufficient to enable women to exercise their rights. That is, for women to effectively exercise right to access abortion, it is necessary to move away from abstractions and address social gaps and issues such as discrimination in the health sector.[505] Liberal theory is considered to require laws to be gender-neutral, which is subject of feminist critique because historical discrimination of women resulted in significant asymmetries of power.[506] Denial of abortion is a gender-specific breach of women's human rights which has to be addressed as such, taking into account social contexts in which this breach occurs. Therefore, liberal theory's detachment from social contexts would suggest that abortion can be effectively guaranteed in Ireland without consideration of Catholic Church's involvement in medical profession. When such condition has dominated medical profession and affected public perception for centuries, addressing it is inevitable in guaranteeing women right to reproductive health and access to safe abortion.

[501] CEDAW Committee, "General Comment No. 24," par. 14
[502] WHO, "A human rights-based approach to health."
[503] ibid.
[504] Schwartman, „Liberal Rights Theory and Social Inequality: A Feminist Critique," pp. 41-42.
[505] ibid, p. 42.
[506] Nussbaum, "The Feminist Critique of Liberalism," p. 20.

Applying human rights-based approach in substantive law on abortion in Ireland, Poland and Croatia

The basis of applying human rights to abortion access in substantive law is introducing right to reproductive health in constitutions and legislation relevant to the issue.[507] Starting from their constitutions, states should introduce a guarantee of reproductive health which would entitle women to access safe abortion. This guarantee, according to the Guidance of the OHCHR, needs to reflect comprehensive understanding of reproductive health.[508] Guarantees which limit the understanding and content of reproductive health deprive women of elements of reproductive health which were set in General Comment No. 22 of the CESCR,[509] and hinder their exercise of this right.

This would suggest that Poland and Croatia should introduce right to reproductive health in their constitutions, or more specifically provide a comprehensive protection of the right to reproductive health. It is necessary to introduce guarantees of right to reproductive health which would ensure women in all phases of their life enjoy protection and can access the necessary services. Constitutions of both countries ensure that motherhood is protected by the state,[510] while there is no guarantee of reproductive health for other women. Poland and Croatia should start by excluding paternalistic attitude towards women in law and introduce inclusive and comprehensive definition of right to reproductive health. Such definition guarantees right to reproductive health to all women, regardless of their age or condition.[511]

[507] Human Rights Council, "Technical guidance on the application of a human rights-based approach to the implementation of policies and programmes to reduce preventable maternal morbidity and mortality," par. 12.
[508] ibid.
[509] CESCR, "General Comment No. 22," part II.
[510] Constitution of Republic of Croatia (as amended 2010), art. 63, and Constitution of the Republic of Poland (1997), art. 18 and art. 71(2).
[511] Lucia Berro Pizzarossa and Katrina Perehudoff, "Global Survey of National Constitutions: Mapping Constitutional Commitments to Sexual and Reproductive Health and Rights," *Health and Human Rights Journal* Vol.19, No. 2, (2017): p. 286, accessed 3 Oct. 2018, NCBI. „Constitution of Nepal guarantees right to reproductive health to all women, without reference to their age, capacity, marital citizenships status, which constitutes an inclusive definition of right to reproductive health."

As previously mentioned, Ireland's Constitution contains no socio-economic rights,[512] but the Constitution provides directive principles on social policy as guiding principles for the legislative branch in creation of laws.[513] These principles guide the legislative branch in creation of new law on abortion, following the May referendum results. In countries such as Ireland, where socio-economic rights are not justiciable, human rights-based approach to reproductive health is of great value. Human rights-based approach to health is founded on the principle of universality and indivisibility of human rights, and the idea that human rights cannot be detached from each other.[514] CESCR emphasized indivisibility of right to reproductive health from civil and political rights such as right to life, freedom from discrimination, right to security etc.[515] Universality of rights is also emphasized in the Preamble of the Covenant itself.[516] This is crucial for the women's ability to assert right to reproductive health in Ireland since criminalization and prohibition of abortion so far infringed on their other human rights. Indivisibility of human rights is important because reproductive health obligations can be found in other human rights which are guaranteed in international treaties and domestic laws, including the constitution.[517] Women in Ireland have faced infringement of many human rights because of the Eighth Amendment, starting from right to life which was placed in conflict with fetal life in the definition itself. After the May Referendum, the Eighth Amendment will be repealed and replaced by a provision which

[512] Toebes et. al., *The Right to Health: A Multi-Country Study of Law, Policy and Practice*, p. 375.
[513] Constitution of Ireland (1937), art. 45.
[514] Adrienne Kols, "A Rights-based Approach to Reproductive Health," *Outlook* Vol. 20, No. 4, (PATH, December, 2003): p. 2, accessed 9 Sept. 2018, https://path.azureedge.net/media/documents/EOL_20_4_dec03.pdf.
[515] CESCR, "General Comment No. 22," par. 10.
[516] ICESCR, Preamble.
[517] IPPF, *IPPF Charter Guidelines on Sexual and Reproductive Rights*, (UK, 1997), pp. 3-4, accessed 9 Sept. 2018, https://www.ippf.org/sites/default/files/ippf_charter_on_sexual_and_reproductive_rights_guidlines.pdf. „Right to life, right to liberty and security of person, right to equality and freedom from discrimination, right to privacy, freedom of thought, right to information and education, right to choose whether to marry or not and to found and plan a family, right to decide whether or when to have children, right to health care and health protection, right to benefits from scientific progress, right to be free from torture or ill treatment etc."

reads: "Provision may be made by law for the regulation of termination of pregnancies."[518] This provides space for the legislative branch to introduce human rights-based approach to law regulating access to abortion. Due to absence of socio-economic rights in the Irish Constitution, the right to reproductive health will not be explicitly provided in the Constitution. The Bill on the new law regulating access to abortion,[519] should incorporate explicit protection of right to reproductive health of a woman as the basis of her assertion in accessing abortion and include obligations of eradicating discrimination against women through positive measures. Despite the lack of constitutional protection of socio-economic rights, directives on social policy guide the legislative branch to create laws in accordance with principle of equality.[520] Access to safe abortion as part of reproductive health care is an entitlement of equality, because it is a medical procedure needed exclusively by women. Having such system in place, women can assert their right to reproductive choice based on constitutional protection of right to privacy which Irish courts have inferred from the constitutional protection of fundamental rights.[521]

In Croatia and Poland, protection of reproductive health is to a certain extent present in the abortion laws. Croatia is yet to adopt a new law on abortion, but the content of the existing one which focuses on protection of reproductive health of women complies with the constitution and should not be subject to substantive changes.[522] Polish Act from 1993 provides for reproductive health guarantee, but restricts access to abortion to certain

[518] Aoife Barry, „Q&A: What will we be asked to vote on in the Eighth Amendment referendum?" The Journal, as of 5 May, 2018, accessed 9 Sept. 2018. http://www.thejournal.ie/abortion-referendum-readers-questions-3985760-May2018/ .
[519] General Scheme of a Bill to Regulate Termination of Pregnancy (27 March 2018), accessed 3 Oct. 2018, https://health.gov.ie/wp-content/uploads/2018/03/General-Scheme-for-Publication.pdf .
[520] Constitution of Ireland (1937), art. 45(2)(i). Also, Constitution guarantees equality before law in article 40(1).
[521] Supreme Court infers right to privacy from article 40. 3. of the Constitution. *See*: *McGee v. Attorney General* (1974), *Norris v. Attorney General* (1984) and *Kennedy and Arnold v. Ireland* (1987).
[522] Decision of the Constitutional Court of Croatia, no. U-I-60/199 (2017).

legitimate grounds.[523] It is necessary to codify comprehensive definition of right to reproductive health and allow access to abortion as part of reproductive health care of women.

Legal access to safe abortion will be ineffective if other laws which regulate abortion are not amended to reflect the new protection of women's rights. This primarily refers to punitive and criminal sanctions facing women seeking abortion and/or physicians performing abortion. In Ireland, the Draft Bill does not provide for repeal of criminal sanctions on those seeking or procuring abortion, which is an issue that lawmakers should address in the future.[524] For the new law to promote positive, inclusive and non-discriminatory reproductive health care, abolition of such punitive sanctions is a precondition. Assuming adoption of liberal law on abortion, criminal and punitive measures for women and physicians performing abortion should be abolished in conformity with the new law. Whereas in Ireland there are prospects of reforming the law, this is not the case in Poland where criminal sanctions affect health professionals only. Despite this being a substantive law issue, it has sensible impact on accessing abortion in practice and procedural rights, especially in connection to exercise of conscientious objection.

Whereas these recommendations seem important, a question arises as to why should the states observe them? In other words, why should states adopt human rights-based approach in protecting women's reproductive health and specifically, access to abortion? Ireland, Poland and Croatia are all parties to international conventions which protect right to health and freedom from discrimination in exercising this right, notably ICESCR and CEDAW.[525] As parties to ICESCR, the states have negative obligation of respecting and protecting right to reproductive health, and positive obligation to fulfill this right by adopting necessary

[523] The Family Planning, Human Embryo Protection and Conditions of Permissibility of Abortion Act of 7 January 1993, art. 4a.1.
[524] General Scheme of a Bill to Regulate Termination of Pregnancy (27 March 2018), Head 20.
[525] E.g., ICESCR art. 12(1) and CEDAW art. 12.

measures, including legislative ones.[526] Abortion is part of reproductive health care and prohibition of abortion in substantive law is a direct infringement of women's right to reproductive health and health in general. Maternal mortality is often associated as a consequence of women's exposure to unsafe abortions, but abortion should not be conceived in law as a tool of preventing maternal mortality, but as a reproductive health service which only women seek, and which gives them control over their lives.[527]

Human rights-based approach application on procedural law on abortion in Ireland, Poland and Croatia

Human rights-based approach should be applied on all laws and policies which regulate access to abortion, especially because these procedural barriers can hinder the effect of substantive law guarantees. Guaranteeing and asserting access to safe abortion based on right to reproductive health has the benefit of addressing and managing wider context of accessing abortion. More specifically, it tackles the practical realities of access to abortion which are defined by socio-economic conditions, political, cultural or religious factors and gender discrimination which may have been pertinent to one society. The case of access to abortion in Ireland, Poland and Croatia was heavily influenced by these factors, and procedural barriers need to be abolished for effective access to abortion.

Having a guarantee of access to abortion in any source of law is not a guarantee of its accessibility, availability and quality. In countries which had a long-time restrictive policy towards abortion influenced by cultural or other social factors,[528] it is necessary to address

[526] "International Human Rights Law," OHCHR, accessed 30 Oct. 2018, https://www.ohchr.org/en/professionalinterest/Pages/InternationalLaw.aspx .
[527] Yasmin and Cantor, "Between Insurrectional Discourse and Operational Guidance: Challenges and Dilemmas in Implementing Human Rights-Based Approaches to Health," p. 461.
[528] Chelsea Morroni, Landon Myer and Kemilembe Tibazarwa, „Knowledge of the abortion legislation among South African women: a cross-sectional study," *Reproductive Health* Vol.3, No.7, (2006) accessed 3 Oct. 2018, DOI: 10.1186/1742-4755-3-7. E.g.: South Africa has a restrictive abortion law before 1996 which exposed women to around 200.000 unsafe abortions annually. In 1996 the new law on abortion was adopted and is one of

these factors directly. Relying on their international obligations, states need to untangle "social determinants of health" which affect women's exercise of this right.[529] In practice this includes reforming laws and institutions and transforming social practices which deny women their rights in practice.[530] Women's rights were at some points invisible, due to preconception that women are defined by their biological role. Concretely in the case of abortion, it is necessary to exclude those provisions which define woman's rights through her motherhood.[531] The latest referendum in Ireland serves as evidence that social perception about abortion as a woman's reproductive health issue is changing. However, human rights-based approach needs to be implemented to complement the shift in public opinion and to reform contextual issues.

Preconceiving woman's rights through her maternal role resulted in creation of paternalistic laws which victimize women and legitimize state's control over their bodies and lives. Ireland, Poland and Croatia should eliminate paternalistic laws which limit women in making decisions on their health and body, and which reinforce historical inequality of women in law and society. Laws should redefine pregnancy to advance the understanding that pregnancy as a condition bringing risks for every woman's health, and that women need to have legal guarantees on their reproductive health. Consequently, pregnancy in law needs to be detached from moral and cultural notions which constrain woman's individual freedom and subordinate her rights to her biological role and reproductive capacities. While Ireland, Poland and Croatia share the impact of social determinants on right to reproductive health, there are differences in procedural barriers. Therefore, it is necessary to present recommendations on procedural barriers for every jurisdiction separately.

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the most liberal laws on abortion in the world. However, abortion remains inaccessible for many reasons, notably stigma and lack of resources in the public health care.

[529] CESCR, „General Comment No. 22," Underlying social determinants.

[530] ibid.

[531] E.g. Poland and protection of motherhood in the Constitution.

Application of human rights-based approach on procedural law in Ireland

The current Act on abortion in Ireland from 2013 shall be repealed according to the Draft Bill of the new liberal law on abortion.[532] Soon to be repealed, the 2013 Act, provided for limited procedural guarantees which intensified an already too restrictive law on abortion. Lawmakers in creation of the new law should rely on human rights obligations from international treaties, and on recommendations from the ECtHR case law on abortion.

Ireland should ensure that abortion will be available and accessible upon adoption of the new law. In satisfying this requirement, the new law should provide strong procedural guarantees for women seeking to access abortion, primarily access to an alternative opinion and appeal procedure without delay. The legislative branch should introduce effective and speedy procedures which would allow women to assert their right, and make sure these procedures are accessible unlike in the 2013 Act.[533] Ideological barriers can impede the effective implementation of the new law, since the Catholic Church exercised control and authority over medical profession in Ireland.[534] The new law should settle the potential conflict between the exercise of conscientious objection and women's right to access abortion in accordance with the General Comment No. 22 and therefore entrench duty of referral for all physicians.[535] Education is an important segment of right to reproductive health; it requires education and training of physicians about inclusion of abortion in reproductive health care for women. Educating health professionals on human rights principles in health care is necessary to

[532] General Scheme of a Bill to Regulate Termination of Pregnancy (27 March 2018), Head 20: Repeals, s. 20(d)
[533] Act of 2013 was adopted to implement the *A, B and C v. Ireland* decision of the ECtHR where the Court found Ireland did not have any procedure, medical or judicial, which would enable the applicant to seek her right. The Act introduced procedure for seeking alternative opinion, but accessibility and effectiveness of this procedure was not sufficient to guarantee women could protect their right to life, especially in emergency situations. This was evidenced in the case of Savita Halappanavar who died after being denied abortion with a legitimate request.
[534] McDonell and Allison, „From Biopolitics to Bioethics: Church, State, Medicine and Assisted Reproductive Technology in Ireland," p. 820.
[535] CESCR, „General Comment No. 22," par. 43.

overcome prevailing influence of the religious structures over medical profession, which propagates abortion is a professional misconduct.[536]

Legal reforms should tackle specifics of rigorous abortion regime in Ireland, such as restrictions on freedom of expression and freedom of information. For women's education and health, it is of utmost importance to remove restrictions on information about abortion services.[537] This is a significant aspect of abortion regime according to CESCR which should be addressed since Ireland is under the obligation to ensure information accessibility on reproductive health care services.[538] In terms of financial accessibility, the new law should ensure abortion is funded publicly, otherwise the new law will not mitigate the economic barriers in accessing abortion. Without publicly funded abortion, it is impossible to consider application of human rights standards to reproductive health care. Liberalization of abortion without public funding reinforces existing power structures where reproductive choice means access to abortion for those in better socio-economic situation.[539] Therefore, women who had the financial opportunity to seek abortion abroad under the old abortion law, would have the opportunity to fund abortion privately on Irish soil. No matter how liberal, the new law will not achieve full and universal protection of access to abortion without further positive action by the Irish state. Finally, Ireland is obliged to ensure that abortion services are provided in accordance with quality requirement of the ICESCR, therefore evidence-based, medically appropriate and progressive methods.[540] This would require involvement of medical profession and women's rights advocates in the law and policy making, to ensure that political and social factors do not prevail over science and medicine.

[536] Toebes et. al., *The Right to Health: A Multi-Country Study of Law, Policy and Practice,* p. 389-390.
[537] General Scheme of a Bill to Regulate Termination of Pregnancy (27 March 2018), Head 20: Repeals, s. 20, subsec. (a), (b), (c).
[538] CESCR, „General Comment No. 22," par. 18.
[539] Schwartzman, „Liberal Rights Theory and Social Inequality: A Feminist Critique," p. 26.
[540] CESCR, „General Comment No. 22," par. 21.

Application of human rights-based approach on procedural law on abortion in Poland

Poland's abortion law is deficient in protecting right to reproductive health and right to access abortion. Referring to these deficiencies as breaches of health protection within Article 8 protection of private life, ECtHR ruled against Poland in several cases and invited the state to reform its abortion law.[541] Recommendations of the Court were never implemented, making Poland in breach of its international human rights obligations. Poland should conform to ECtHR decisions and introduce proceedings which enable women to seek abortion, receive information on the procedure and appeal in a timely manner.[542]

Access to abortion in Poland is substantially hindered by exclusion of duty of referral,[543] therefore the state should restore this duty for all physicians in accordance with its obligations under ICESCR.[544] Poland should adopt recommendations to introduce a system where women's health needs can be reconciled with the physician's right to conscience, since it is a state's obligation to ensure that one's exercise of freedom is not detrimental to another's right.[545] In addition, Poland should equally as Ireland, invest efforts in training health care professionals and introducing them with women's rights and entitlements in reproductive health care.

Poland must satisfy the same obligations as Ireland in addressing socio-economic conditions preventing women from accessing abortion in order to achieve accessibility and affordability of abortion services. The state should ensure that women in rural areas have access to abortion services and that abortion is publicly funded. Furthermore, mechanism should be set in place to ensure that health professionals do not unnecessarily obstruct access to ante-natal tests for

[541] *See*: *Tysiac v. Poland*, *P and S v. Poland*, *R.R. v Poland* etc. ECtHR has found that abortion is not conferred by article 8, but denial of abortion on grounds of health falls in the realm of Article 8 protection of private life. (e.g. par. 96, *P and S v. Poland*)
[542] *P and S v. Poland*, app. no: 57375/08, (ECtHR, 2012), paras: 111-112.
[543] Decision of the Constitutional Court of Croatia, no. U-I-60/1991 (2017).
[544] CESCR, „General Comment No. 22," paras. 14 and 43.
[545] *P and S v. Poland*, app. no: 57375/08, (ECtHR) paras. 106 – 107.

women who suspect fetal defects or disease since this continues to be one of the biggest challenges for women in Poland.

Application of human rights-based approach to procedural law on abortion in Croatia

Just like Ireland and Poland, Croatia is under obligation to introduce procedural guarantees for women accessing abortion, which requires accessible, available and quality services. Due to peculiarity of highly decentralized health care system, Croatia should set in place monitoring and enforcement mechanisms which would ensure application of uniform practices in reproductive health care. This would suggest that law on abortion which is to be created by the legislative branch,[546] firstly needs to set clear standards on provision of abortion services, promoting evidence-based health care practices and services. Secondly, the law should set a reporting and monitoring mechanism for hospitals, considering that there is almost no effective oversight by the Ministry of Health over the hospitals.

Unlike in Ireland and Poland, many of the right to health procedural obligations are already set in Croatian law, but there is no enforcement mechanism. For example, exercise of conscience clause and the duty of referral are expressly stated in the law.[547] Despite this, human rights bodies reported abuse and extensive use of conscience clause, which effectively denies women abortion in practice.[548] The state needs to introduce public funding for abortion. As a country with universal health insurance and liberal access to abortion in law, exclusion of abortion from public funding is discrimination against women in health care and violation of obligation on financial accessibility of health care services.

[546] Decision of the Constitutional Court of Croatia, no. U-I-60/1991 (2017).
[547] Code of Medical Ethics and Deontology of Croatia (2015), art. 2(15).
[548] CEDAW Committee, "Concluding observations on the combined fourth and fifth periodic reports of Croatia," par. 30.

Right to remedy

According to the CESCR, states are obliged to ensure effective remedy for breaches of right to reproductive health, which means justiciability of the right.[549] Remedies are associated with accountability and the right of women to know the content of their right, and the state is obliged to provide legal remedies in this respect.[550] Ireland, Poland and Croatia should ensure women have unhindered access to effective remedies. Abortion as a reproductive health service requires prompt reaction of health care professionals, which is why many usual remedies such as compensation and restitution are not appropriate. The enabling legal environment presupposes existence of legal remedies allowing women to assert their right.[551] According to the ECtHR, time is a crucial factor in exercising right to access abortion and national legal systems have to develop a procedure where women could express their needs and claim their rights within the gestational period during which abortion can be accessed legitimately.[552] In the absence of such procedure, any other legal remedy which addresses consequences of denial of abortion will result in violation of women's rights.[553] These obligations are applicable to Ireland, Poland and Croatia, as states parties to the ECHR.[554] Therefore, these countries are obliged to introduce both independent procedure in which women seeking abortion can be heard without delay, and legal remedies determining accountability for health consequences resulting from abortion denial.

[549] CESCR, „General Comment No. 22," Part VI Remedies, par. 64. „Remedies include, but are not limited to, adequate, effective and prompt reparation in the form of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition as appropriate."
[550] Human Rights Council, "Technical guidance on the application of a human rights-based approach to the implementation of policies and programmes to reduce preventable maternal morbidity and mortality" par. 74(d)
[551] Yasmin and Cantor, „Between Insurrectional Discourse and Operational Guidance: Challenges and Dilemmas in Implementing Human Rights-Based Approaches to Health," p. 463.
[552] *Tysiąc v. Poland*, paras. 117-118.
[553] ibid, par. 118.
[554] Chart of signatures and ratifications of Treaty 005, ECHR, accessed 3 Oct. 2018, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=vnurhX8g.

Conclusion

Access to safe abortion is still not a human right on its own and is not guaranteed by an international human rights treaty, while attempts to reach a global compromise on legalization of abortion failed due to cultural, religious and political divergence. Despite absence of explicit right to abortion, human rights bodies found a strong bond between access to safe abortion and other women's human rights, notably right to life and right to health. Abortion is considered as part of reproductive rights, which developed as negative rights based on women's decisional autonomy and reproductive choice. Abortion has been often framed as moral, cultural or religious issue which is why women and activists sought from states to abstain from interfering with women's right to access safe abortion. In such context, health concerns arising from pregnancy and exposing women to unsafe and clandestine abortions were not prioritized. Only recently, human rights bodies such as CEDAW and CESCR elaborated on states obligations regarding abortion as part of right to reproductive health.

Because of lack of explicit protection of access to abortion at international level, women seeking access to abortion are required to rely on domestic legal mechanisms and guarantees. Analysis of abortion laws and their implementation in Ireland, Poland and Croatia show significant departure from these states' international obligations in terms of gender equality, right to health and reproductive health, right to life, right to inhumane and degrading treatment, right to private life and others. Due to strong connection between national identity and women's reproductive role in histories of these three states, laws do not provide comprehensive protection of right to reproductive health and do not consider risks arising from pregnancy. It can be said that legal frameworks of the three analyzed countries do not sufficiently secure women's individual rights when seeking abortion, because of paternalism in law and lack of positive action by the states. Due to entrenched discrimination against women in health care and law, seeking access to abortion based on negative rights is not fully

effective. Findings of human rights bodies show that Ireland, Poland and Croatia need to uphold their positive obligations in ensuring accessible, available and quality health care to women seeking abortion, while barriers in form of criminal law, misuse of conscientious clause, and legal uncertainty need to be eradicated. For women to be able to seek access to abortion based on right to reproductive health, it is essential to create enabling legal framework and ensure justiciability and enforceability of right to reproductive health. Legal guarantee of right to reproductive health and abortion as part of it is the only way to ensure that women's rights and entitlements in this regard resist attempts of political groups to limit access to abortion.

Ireland is currently undergoing historical abortion law reform and its effectiveness will require strong focus on women's rights, socio-economic aspects of abortion and gender equality. Croatia is also in the time of redefining its liberal abortion law, with very strong influence of conservative groups. Poland experienced attempts of further restriction of access to abortion, which failed due to strong women's movement advocacy. How legal history and lawmaking in these countries will develop is yet uncertain. However, it is certainly an imperative for states to undertake both negative and positive international obligations and introduce abortion laws which would be gender-responsive, clear and certain, based on evidence-based scientific facts, and with sufficient guarantees for human rights.

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