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The promise and pitfalls of human rights and transnational trade law in the face of criminalization with exceptions

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DOI

[10.4337/9781839108150.00031](https://doi.org/10.4337/9781839108150.00031)

Publication date

2023

Document Version

Final published version

Published in

Research Handbook on International Abortion Law

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[Link to publication](#)

Citation for published version (APA):

Berro Pizzarossa, L., Hervey, T., & de Ruijter, A. (2023). Abortion law in Europe: The promise and pitfalls of human rights and transnational trade law in the face of criminalization with exceptions. In M. Ziegler (Ed.), *Research Handbook on International Abortion Law* (pp. 374-393). (Research Handbooks in Law and Society series). Edward Elgar Publishing. <https://doi.org/10.4337/9781839108150.00031>

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19. Abortion law in Europe: the promise and pitfalls of human rights and transnational trade law in the face of criminalization with exceptions

Lucía Berro Pizarrossa, Tamara Hervey, and Anniek de Ruijter

INTRODUCTION AND NORMATIVE FRAMING

Europe has long been the site of controversy over abortion rights. Contestation has intensified over recent years, and now the issue seems more polarized than ever.¹ Despite decades of sustained political mobilization and some steps towards liberalization, the full decriminalization of abortion has not been achieved, and threats to sexual and reproductive rights (and consequently to women's² health) have re-emerged in some parts of the region.³ Taken as a whole, the European abortion law landscape offers a very diverse range of approaches to abortion. Although most countries in Europe have gradually eased legal restrictions on abortion, even where more liberal regulations have been adopted, abortions remain inaccessible in practice for many.⁴

Overall, abortion laws across Europe are in dire need of reform if international and regional human rights standards are to be met.⁵ In the international realm, there is an increased recog-

¹ Quita Muis, Tim Reeskens, and Inge Sieben, "Polarisering in Nederland: Opleidingsniveau als scheidslijn?" *Religie en Samenleving* 14 (2019): 124–43.

² In this chapter, we use the socially determined term "women," rather than the biologically determined term "pregnant person," while acknowledging that men and gender non-conforming people may also need access to safe abortion. With notable exceptions such as Ireland, abortion laws still retain "women" as the legal subjects, and the state of abortion access for men and gender non-conforming people in Europe is still under-explored. Contrast this US study, Heidi Moseson, Laura Fix, Sachiko Ragosta, Hannah Forsberg, Jen Hastings, Ari Stoeffler, Mitchell R. Lunn, Annesa Flentje, Matthew R. Capriotti, Micah E. Lubensky, and Juno Obedin-Maliver, "Abortion Experiences and Preferences of Transgender, Nonbinary, and Gender-Expansive People in the United States," *American Journal of Obstetrics and Gynecology*, 224 (2021): 376, or this one focusing on Argentina: Blas Radi, "Reproductive Injustice, Trans Rights, and Eugenics," *Sexual and Reproductive Health Matters* 28 (2020): 396–407.

³ Council of Europe, Women's Sexual and Reproductive Rights in Europe, 2017, <https://rm.coe.int/women-s-sexual-and-reproductive-health-and-rights-in-europe-issue-pape/168076dea>, accessed March 8, 2022.

⁴ Silvia De Zordo, Joanna Mishtal, and Lorena Anton (eds), *A Fragmented Landscape: Abortion Governance and Protest Logics in Europe* (New York and Oxford: Berghahn Books, 2016); Bill Rolston and Anna Eggert, *Abortion in the New Europe: A Comparative Handbook* (Santa Barbara: Greenwood Press, 1994).

⁵ Lucía Berro Pizarrossa and Lorena Sosa, "Abortion Laws: The Polish Symptom of a European Malady?" *Ars Aequi* (June 2021): 587.

inition of the right to abortion. The latest international standards—namely the UN’s General Comment on Sexual and Reproductive Health and General Comment on Science—affirm that the right to sexual and reproductive health (which includes abortion services) is an integral part of the right to health.⁶ States have an obligation, under international human rights law, to repeal or eliminate laws, policies, and practices that criminalize, obstruct, or undermine an individual’s or a particular group’s access to health facilities, services, goods, and information, including abortion.⁷ States should also guarantee access to medicines on the World Health Organization’s Essential Medicines List, which since 2015 includes the abortion medicines (misoprostol and mifepristone).⁸

Part of the regulatory problem in Europe is the lag between laws and relevant technologies.⁹ Most abortion laws in Europe date from the 1970s. Abortion technologies have fundamentally changed since that date, essentially making most abortions a chemical/pharmaceutical intervention, rather than a surgical one. The relative risks to health, and with them, the proper interpretation and application of human rights, have changed, especially consideration of the autonomy and dignity of women. Innovations around telehealth, the growing network of organizations supporting safe self-use of abortion medicines and abortion travels have fundamentally altered the regulatory position.¹⁰ Yet across Europe, laws have not been brought in line with the most recent developments of scientific knowledge or practice.

METHOD AND RESEARCHER POSITIONALITY

As will already be apparent, our approach in this chapter is not to provide an “objective” account of abortion laws in Europe in the sense that the term “objectivity” is usually used in legal scholarship. Indeed, although this is not the place for that discussion in detail, we would dispute that such a position is any more “objective” than ours, because legal doctrinal scholarship tends to assume a hidden and unacknowledged “male norm” in its claimed objective accounts.

Instead, our approach is to be transparent about our positionality, so readers may judge what we write from a standpoint of understanding pertinent aspects of who we are. We write as women, from different generations and different European countries with different legal

⁶ Committee on Economic, Social and Cultural Rights, General Comment No. 22: Right to sexual and reproductive health (Article 12 of the Covenant), UN Doc. No. E/C.12/GC/22 (2016), www.escr-net.org/resources/general-comment-no-22-2016-right-sexual-and-reproductive-health#_ftn12, paras. 56 and 57, accessed March 8, 2022.

⁷ *Ibid.*, paras. 28, 34, 40 and 49 (a) and (e).

⁸ Committee on Economic, Social and Cultural Rights, General Comment No. 22: Right to sexual and reproductive health (Article 12 of the Covenant), UN Doc. No. E/C.12/GC/22 (2016). Available at www.escr-net.org/resources/general-comment-no-22-2016-right-sexual-and-reproductive-health#_ftn12, para. 49, accessed March 8, 2022; Committee on Economic, Social and Cultural Rights, General comment No. 25 (2020) on Science and economic, social and cultural rights Art. 15.1.b, 15.2, 15.3 and 15.4. UN Doc. E/C.12/GC/25 (2020).

⁹ Lucía Berro Pizarossa and Patti Skuster, “Towards a Human Rights and Evidence-Based Legal Frameworks for (Self-Managed) Abortion: A Review of the Last Decade of Legal Reform,” *Health and Human Rights Journal* 23 (June 2021): 199–212.

¹⁰ Lucía Berro Pizarossa and Rishita Nandagiri, “Self-Managed Abortion: a Constellation of Actors, A Cacophony of Laws?” *Sexual and Reproductive Health Matters* 29 (2021): 23–30.

traditions (civil and common law being the usual comparative law shorthand for such differences). We write as mothers, of daughters, sons, and indeed, non-binary individuals. We also write as (academic) lawyers and educators, mindful of our potential impacts as role models for the young people we encounter through our teaching. And we write as activists and strategic litigators. These positions, and the experiences flowing from them, mean we are committed to a human-rights-respecting approach to abortion law, which grants women autonomous control over their bodies, and treats state intervention in such control as “suspect” and in need of justification. This position is the inverse of the legal position across Europe, which essentially treats women’s bodies as subject to the full power of the state embodied in the criminal law when it comes to abortion.

Our method could be described as “law in context,” but our main focus in this chapter is on legal doctrine. We are seeking to offer a comparative account of the meanings of the relevant legal texts. On whom do they impose rights or obligations? What do they permit or prohibit, and with what consequences (in terms of criminal or civil penalties), for whom? Secondary to this core focus is an account of the *implications* of abortion laws in Europe. What are the effects of these laws on the empirical realities of the people to whom the laws apply?

Our account of legal doctrine takes a comparative law perspective and a regional European law perspective. First, we consider national abortion laws in Europe. Obviously, we cannot account for the legal position in some 50 or so different European countries. Rather, we discuss a European “consensus” position, through selected examples, and contrast this by considering the European “outlier” countries. Even the European consensus is far from autonomy-respecting or liberal, and in some countries is moving in the opposite direction, towards a more conservative position than in the second half of the twentieth century.

Second, we consider various European level legal instruments which cover abortion. Here, scholarship often focuses on the Council of Europe, a human rights organization with 47 member countries. Here, there is plenty of legal text, with *human rights law* as a possible route to access abortion. But the underlying structures of Council of Europe law mean these legal provisions offer scant protection to women in “outlier” states, or even in general, because of the generous “margin of appreciation” offered to national legal settlements. By contrast, the European Union offers more robust scrutiny of national laws for compliance with EU-level legal provisions. The last substantive part of the chapter therefore considers the (perhaps unlikely) locus of European Union *trade law* as a possible site for legal contestation through strategic litigation.

EUROPEAN ABORTION LAW: COMPARATIVE PERSPECTIVES

Europe hosts diverse abortion laws.¹¹ In a nutshell, though, the consensus in Europe is that of partial decriminalization or, more accurately, criminalization with exceptions. While 95 percent of women of reproductive age in Europe live in countries that decriminalize abortion to some extent,¹² there is no broad individual right to abortion on request. By contrast, abortion

¹¹ Centre for Reproductive Rights, “The World’s Abortion Laws,” 2021, https://maps.reproductiverights.org/sites/default/files/WALM_2021update_V1.pdf, accessed March 8, 2022.

¹² Centre for Reproductive Rights, “European Abortion Law: A Comparative Overview,” 2021, <https://reproductiverights.org/european-abortion-law-comparative-overview-0/>, accessed March 8, 2022.

is generally a crime for which lawful grounds are established in national laws.¹³ Abortion remains punishable, unless certain circumstances pertain, such as when requirements of gestational age, waiting periods, or specific grounds are met. The specific conditions of decriminalization and consequent access to lawful abortion vary substantially among European countries. To generalize, these usually establish exceptions (rape, fetal abnormalities, risk to life or health of the woman, emergency/necessity), and other alternative requirements, such as a gestational term, mandatory counseling and waiting periods, parental and/or judicial consent in the case of minors, and limitations related to the type and number of health care professionals who must be involved in the procedure.¹⁴

Hence, while traditional classifications consider European abortion law as fairly liberal,¹⁵ we suggest this classification is inaccurate. It is true that, currently, full *formal* prohibition of abortion exists only in a minority of small European countries: Andorra, Malta, San Marino and the Vatican.¹⁶ Ireland, the remaining larger country in this group, left it in 2018 with a new law on abortion, after repealing the Eighth Amendment to the Irish Constitution via a referendum.¹⁷ The Health (Regulation of Termination of Pregnancy) Act 2018, in force as of January 2019, lifts the near total ban on abortion imposed since 1983.¹⁸ In practice, Poland, also a large country, is moving into this group, following a decision of its Constitutional Tribunal, which came into effect in January 2021.¹⁹

The general legal model in Europe—that of exception to criminalization—is based on a series of legal, and consequently practical, barriers to access. Abortion is lawful only within the provisions of the law and any action outside of them is a criminal offense.²⁰ Further, there are concerning indications that the direction of travel in many countries in Europe is away

¹³ Ivana Tucak and Anita Blagojević, “Abortion in Europe,” *EU and Comparative Law Issues and Challenges Series* 4 (2020): 1135–1174; Federico Fabbrini, “The European Court of Human Rights, the EU Charter of Fundamental Rights and the Right to Abortion: *Roe v. Wade* on the Other Side of the Atlantic?” *Columbia Journal of European Law* 18 (2011): 1–54.

¹⁴ Caroline Moreau et al., “Abortion Regulation in Europe in the Era of COVID-19: a Spectrum of Policy Responses,” *British Medical Journal Sexual & Reproductive Health* 47 (2020), <https://doi.org/10.1136/bmj.srh-2020-200724>.

¹⁵ See, for example, Center for Reproductive Rights, World’s Abortion Laws Map, <https://maps.reproductiverights.org/worldabortionlaws>, accessed March 8, 2022.

¹⁶ World Health Organization, Global Abortion Policies Database, <https://abortion-policies.srhr.org>, accessed March 8, 2022. We use the WHO’s database that divides Europe in four regions (Southern, Northern, Eastern, and Western) and includes 44 countries. We acknowledge other configurations exist but we decided to follow the database’s classification for simplicity and easy replicability of the analysis.

¹⁷ Fiona de Londras and Mairead Enright, *Repealing the 8th: Reforming Irish Abortion Law* (Bristol: Policy Press, 2018); Mairead Enright, “‘The Enemy of the Good’: Reflections on Ireland’s New Abortion Legislation,” *feminists@law* 8 (2018).

¹⁸ Ireland, Health (Regulation of Termination of Pregnancy) Act 2018, <https://abortion-policies.srhr.org/documents/countries/07-Ireland-Health-Regulation-of-Termination-of-Pregnancy-Act-2018.pdf>, accessed March 8, 2022.

¹⁹ Polish Constitutional Court, Dz.U.2021.175, reviewing Dz.U.1993.17.78, Article 4a, para 1 (2).

²⁰ See for example, Government of Ireland, Health (Regulation of Termination of Pregnancy) Act (HRTPA), 2018, section 23 (No. 31 of 2018): “It is an offence (1) For a person, by any means whatsoever, to intentionally end the life of a foetus otherwise than in accordance with the provisions of this Act; (2) It shall be an offence for a person to prescribe, administer, supply or procure any drug, substance, ... or other thing knowing/reckless whether it is used for abortion otherwise than in accordance with the provisions of this Act.”

from liberalization, autonomy, or human rights protection, and towards greater restrictions on women's access to abortion.

The European Consensus: Partial (Exception to) Criminalization

The prevailing European legal model works by building in a series of hurdles to be met (legal exceptions) in order for a particular abortion be decriminalized.²¹ In European countries, certain legal grounds permit termination: for instance, according to the World Health Organization's Global Abortion Policies Database,²² 29 countries in Europe permit abortion at the woman's request often based on personal necessity or emergency, but only within limits related to gestational times. In these circumstances, the woman is not obliged to adduce or prove a legal *ground* for termination, such as fetal malformations or risk to health. However, it is not enough for a woman simply to request an abortion. Rather, laws across Europe establish a series of procedural or other legal barriers to access. These *requirements* or *limitations* vary between countries. Requirements typically include cut-off gestational periods, mandatory counseling, mandatory waiting periods, restrictions on where the abortion may lawfully take place, and involvement of one or more health professionals or specialists. Some of the requirements have been modified due to the COVID-19 pandemic. Further restrictions apply to minors. Twenty-six European countries recognize fetal impairment as such a ground for abortion; 22 recognize the woman's health; 17 recognize rape; and 14 recognize incest. The onus is typically on the woman to show that the legal ground for termination is met.²³

The majority of European countries (29) permit abortion within certain gestational periods, which are generally from conception up to ten to 14 weeks. For example, Portugal permits abortion up to ten weeks from gestation;²⁴ France permits abortion before the end of the twelfth week of pregnancy;²⁵ Russia also within 12 weeks;²⁶ Austria for the first three months after the start of the pregnancy;²⁷ and Sweden within 18 weeks.²⁸

Thirteen countries in Europe require compulsory counseling prior to an abortion.²⁹ For example, under the German Criminal Code, mandatory counseling provision for abortions is exempted from criminal prosecution.³⁰ During the COVID-19 pandemic, although abortion care must still be administered in a clinic, Germany has allowed for mandatory pre-abortion counseling to take place over the phone or by video call.³¹

²¹ Pizzarossa and Sosa, "Abortion Laws," 587.

²² World Health Organization, Global Abortion Policies Database.

²³ *Ibid.*

²⁴ Portaria No 741-A/2007 and Lei No 16/2007 (Termination of Pregnancy Act) 2007, Article 8 and Annex II.

²⁵ Code de la santé publique (Public Health Code) 2013, Article L2212-1.

²⁶ Law on the Basics of Health Protection of the Citizens, Article 55.

²⁷ Strafgesetzbuch (Criminal Code) section 97 (1).

²⁸ Law on Abortion 1975.

²⁹ World Health Organization, Global Abortion Policies Database.

³⁰ German Criminal Code, section 218a (1) StGB.

³¹ European Parliamentary Forum for Sexual & Reproductive Rights and IPPF European Network, *Sexual and Reproductive Rights during the COVID-19 pandemic* (2020), www.ippfen.org/sites/ippfen/files/2020-04/Sexual%20and%20Reproductive%20Health%20during%20the%20COVID-19%20pandemic.pdf, accessed March 8, 2022.

Seventeen countries in Europe have compulsory waiting periods.³² Ranging from two to seven days, these legal requirements set the minimum amount of time that must elapse before a person can continue to terminate the pregnancy.³³ The Netherlands, for example, requires a mandatory waiting period of five days. In 2005, a review of the abortion law concluded that a flexible waiting time is preferred.³⁴ Nevertheless, the waiting time period remained obligatory and, although some reform initiatives are being discussed, the requirement is still in place.³⁵

Some 25 European countries authorize abortion only in specially licensed facilities.³⁶ The requirements that abortion take place in a health institution were challenged by the move to remote health service provision necessitated by the COVID-19 pandemic. Some countries, like England, changed the law to allow women to manage the abortion themselves at home after a remote consultation.³⁷ France, Ireland, Portugal, Germany, Austria, and Belgium adopted a similar approach.³⁸ But in others, such as the Netherlands, the prohibition of abortion under the Dutch Criminal code,³⁹ except where the abortion is performed in a licensed⁴⁰ hospital or clinic,⁴¹ was problematic. During COVID-19, the need to attend a designated abortion clinic, or a hospital, presented difficulties for women needing an abortion, as hospitals and clinics were closed or impossible to reach if the woman was legally obliged to remain in quarantine. Litigation was launched by a Dutch non-governmental organization (NGO), Bureau Clara Wichmann, but this was unsuccessful: women in the Netherlands remain bound by law to visit a licensed clinic or hospital before they can be given abortion medication. Countries like Slovakia, Romania, and Lithuania also introduced changes that had the effect of restricting access to abortion, for example, by not classifying abortion as a “life-saving procedure” and thus allowing access to be deprioritized during the pandemic.⁴²

A requirement to involve health professionals is commonly found in European abortion laws. In 31 countries in Europe, abortion must be authorized by one or more health professionals.⁴³ This requirement obviously medicalizes abortion; in the context of national health systems associated with European models of health care, it increases state control over

³² World Health Organization, Global Abortion Policies Database.

³³ Center for Reproductive Rights, *Mandatory Waiting Periods and Biased Counselling Requirements in Central and Eastern Europe* (Geneva: CRR, 2015).

³⁴ Mechteld Visser et al., *Evaluatie Wet afbreking zwangerschap* (Enschede: PrintPartners Ipskamp, 2005).

³⁵ See, for example, “ChristenUnie Wants five-day Mandatory Reflection Period before Abortion, Even in Case of Rape,” *NL Times*, March 2021, <https://nltimes.nl/2021/03/06/christenunie-wants-five-day-mandatory-reflection-period-abortion-even-case-rape>, accessed March 8, 2022.

³⁶ World Health Organization, Global Abortion Policies Database.

³⁷ UK Secretary for Health and Social Care, “Decision: Temporary Approval of Home Use for Both Stages of Early Medical Abortion,” July 19, 2021, www.gov.uk/government/publications/temporary-approval-of-home-use-for-both-stages-of-early-medical-abortion--2, accessed March 8, 2022.

³⁸ Neva Bojovic et al., “The Impact of COVID-19 on Abortion Access: Insights from the European Union and the United Kingdom,” *Health Policy* 125 (2021): 841–58.

³⁹ Criminal Code, Article 296.

⁴⁰ Under the *Wet Afbreking Zwangerschap* (Termination of Pregnancy Act) 1981.

⁴¹ Criminal Code, Article 296 (5).

⁴² Bojovic et al., “The Impact.”

⁴³ World Health Organization, Global Abortion Policies Database.

women's bodies, and it reduces access to abortion on an autonomous basis for women seeking control over their reproductive capacities.

Alongside the requirement for health professional involvement, European abortion laws are characterized by the continued criminalization of other actors who support access to abortion.⁴⁴ For example, the Irish Act does not criminalize the woman herself, even if she procures an abortion outside of the provisions of the Act. However, other people such as family members, support networks, or doctors who assist a woman in obtaining an abortion fall outside of the protection of the law. The criminalization of those who assist goes well beyond the harms the law supposedly seeks to address (coerced abortion) and places those people at risk of a prison sentence of up to 14 years.⁴⁵

In 26 European countries, parental consent is still required for minors to access abortion services.⁴⁶ For example, in September 2015, Spain adopted a law requiring parental involvement in access to abortion by minors.⁴⁷ The conservative Popular Party government, which had tried to eliminate abortion on request in the first trimester and create a grounds-based alternative, led the push for this 2015 restriction. While the larger retrogressive reform was defeated, this challenging new "requirement" interferes with young people's autonomy over reproductive decisions.⁴⁸ A new reform to eliminate this barrier is currently under discussion.⁴⁹

The European Consensus in Practice

All of the requirements or limitations found in abortion laws across Europe undermine women's agency⁵⁰ as a matter of principle. Additionally, and flowing from Europe's approach to abortion law, the legal model in Europe is characterized by a series of *practical* barriers to access arising from the interaction of legal requirements with the sociopolitical position of women. The consequence is that access to abortion is precarious, difficult, or even impossible for certain women,⁵¹ often women who are vulnerable for other reasons, such as socioeconomic class, age, or immigration status. These women are forced to self-manage their abortions.

Access to abortion in practice is undermined by government failures to appropriately address medical professionals' refusal to provide abortion care on grounds of conscience or religion.⁵²

⁴⁴ Lucía Berro Pizzarossa and Rishita Nandagiri, "Self-Managed Abortion: a Constellation of Actors, a Cacophony of Laws?" *Sexual and Reproductive Health Matters* 29 (2021): 23–30.

⁴⁵ Ireland, Health (Regulation of Termination of Pregnancy) Act 2018, section 23.

⁴⁶ World Health Organization, Global Abortion Policies Database.

⁴⁷ Spain, Ley Orgánica 11/2015.

⁴⁸ "La ONU recomienda al Gobierno que no modifique la ley del aborto para las chicas de 16 años," *El Diario*, December 19, 2014, www.eldiario.es/sociedad/expertas-onu-recomiendan-gobierno-modifique_1_4455131.html, accessed March 8, 2022.

⁴⁹ Alejandro Ortega, "¿Qué dice la reforma de la ley del aborto del 2015 que quiere derogar Irene Montero?" *La Razon*, October 7, 2020, www.larazon.es/espana/20201007/cme2oncstzfndocf004mpw3bv.html, accessed March 8, 2022.

⁵⁰ Sam Rowlands and Kevin Thomas, "Mandatory Waiting Periods before Abortion and Sterilization: Theory and Practice," *International Journal of Women's Health* 12 (2020): 577–86.

⁵¹ Lula Mecinska, Carolyne James, and Kate Mukungu, "Criminalization of Women Accessing Abortion and Enforced Mobility within the European Union and the United Kingdom," *Women & Criminal Justice* 30 (2020): 391–406.

⁵² Center for Reproductive Rights, *Addressing Medical Professionals' Refusals to Provide Abortion Care on Grounds of Conscience or Religion: European Human Rights Jurisprudence on State*

In Italy, for example, around 70 percent of doctors refuse to provide abortion care on the grounds of “conscientious objection,” resulting in serious delays or denial of care for people seeking legal abortion.⁵³ Furthermore, there is a lack of providers willing to provide abortion services in the second trimester, even in countries where the law permits this possibility.⁵⁴

The varied bases of only partial decriminalization of abortion in various parts of Europe leads to the practice that women travel to access abortion care in countries in which abortion is legal under more permissive bases or is simply more available in practice:⁵⁵ “abortion tourism,”⁵⁶ or “reproductive exile.”⁵⁷ For example, since 1970, a “hidden diaspora” of more than 170,000 Irish women have traveled to England for abortion.⁵⁸ Similarly, an estimated 300–400 Maltese women travel abroad every year to procure an abortion, usually to England.⁵⁹ It is not the case that women travel only from the European countries with the most restrictive laws. Women from the Netherlands, for example, where criminalization forces more conservative readings of the law, are effectively restricted from access, and consequently travel to seek abortion.⁶⁰

Initiatives like Abortion Without Borders have supported thousands of women, including almost 600 who traveled outside of their countries to have abortions in the second trimester.⁶¹ But the existence in some European countries of strict criminal bans on abortion, coupled with the possibility for women to escape the prohibition by traveling to another European country where abortion is permitted under more permissive terms, has discriminatory effects between

Obligations to Guarantee Women’s Access to Legal Reproductive Health Care (Geneva: Center for Reproductive Rights, 2018), https://reproductiverights.org/sites/default/files/documents/GLP_Refusals_FS_Web.pdf, accessed March 8, 2022.

⁵³ Francesca Minerva, “Conscientious Objection in Italy,” *Journal of Medical Ethics* 41 (2015): 170–3; Elena Caruso, “The Ambivalence of Law: Some Observations on the Denial of Access to Abortion Services in Italy,” *Feminist Review* 124 (2020): 183–219.

⁵⁴ Marwan Habiba, et al., “Late Termination of Pregnancy: a Comparison of Obstetricians’ Experience in Eight European Countries,” *BJOG: An International Journal of Obstetrics & Gynaecology* 116 (2009): 1340–9.

⁵⁵ For a review of abortion travels in Europe, see <https://europeabortionaccessproject.org>.

⁵⁶ Fiona Bloomer and Kellie O’Dowd, “Restricted Access to Abortion in the Republic of Ireland and Northern Ireland: Exploring Abortion Tourism and Barriers to Legal Reform” *Culture, Health & Sexuality* 16 (2014): 366–80.

⁵⁷ Ben Kasstan and Sarah Crook, “Reproductive Rebellions in Britain and the Republic of Ireland: Contemporary and Past Abortion Activism and Alternative Sites of Care,” *Feminist Encounters: A Journal of Critical Studies in Culture and Politics* 2 (2018): 1–16.

⁵⁸ Sydney Calkin, “Healthcare, Not Airfare! Art, Abortion and Political Agency in Ireland,” *Gender, Place & Culture* 26 (2019): 338–361; Sally Sheldon, “How Can a State Control Swallowing? The Home Use of Abortion Pills in Ireland,” *Reproductive Health Matters* 24 (2016): 90–101.

⁵⁹ BBC, “Covid: Locked-Down Women Turn to Pills amid Malta Abortion Ban,” January 9, 2021, www.bbc.com/news/world-europe-55579339, accessed March 8, 2022.

⁶⁰ In the Netherlands, the law allows for abortions to happen until the 24th week, but in reality, abortions are performed until 21 weeks 6 days. See, for example, Volkskrant, “Zij moest naar België voor de abortus van haar ernstig gehandicapte kind, omdat artsen verzwegen dat het ook in Nederland kon,” June 5, 2021, www.volkskrant.nl/nieuws-achtergrond/zij-moest-naar-belgie-voor-de-abortus-van-haar-ernstig-gehandicapte-kind-omdat-artsen-verzwegen-dat-het-ook-in-nederland-kon~b741c8ed/, accessed March 8, 2022.

⁶¹ Abortion Without Borders, press release, 2021, www.asn.org.uk/press-release-abortion-without-borders-helps-more-than-17000-with-abortion-in-six-months-after-polish-constitutional-court-ruling/, accessed March 8, 2022.

women in well-off and low-income groups, between women whose immigration status allows them to leave and re-enter their country of residence without hindrance, and between women who are, and are not, old enough to travel alone, raising serious questions of equality.⁶²

The European Consensus: Direction of Travel

Although Europe has gradually allowed abortion in the past decades, efforts to legalize and improve access to abortion do not always meet the standards of international and regional human rights law, nor is it a linear process towards such standards.⁶³ Especially in countries where governments need to be formed in a multi-party parliamentary democracy, reproductive rights and limits to abortion care form political capital to ensure the participation of religiously inspired political parties. Some notable exceptions notwithstanding, most European nations have recently experienced attempts to move towards greater restrictions on women's access to abortion. This recent turn against liberalization is supported by the underpinning legal model. This model of abortion as exception to criminalization unnecessarily medicalizes abortion, places significant burdens on women seeking to access abortion services, and continues to rely on the most onerous, intrusive, and punitive of state powers to regulate it.⁶⁴ Indeed, while abortion is made available in most European countries, the relevant archaic legal frameworks remain rooted in outdated, punitive, conservative values,⁶⁵ and follow neither the latest scientific evidence nor human rights standards.⁶⁶

Ireland is a paradigmatic example of this trend. After decades of mobilization, strategic litigation, and a national referendum in May 2018, Ireland adopted the Health (Regulation of Termination of Pregnancy) Act 2018. In force from January 2019, the Act lifts the near-total ban on abortion imposed since 1983.⁶⁷ The 2018 Irish Act decriminalizes abortion on request up to 12 weeks of pregnancy after a mandatory three-day waiting period. The law provides no exceptions for cases in which the 12-week limit is crossed during the waiting period, or because of delays due to traveling from rural areas or waiting for further test results ordered by a doctor. After the twelfth week, the procedure for accessing an abortion requires the involvement of an obstetrician and another "appropriate medical practitioner" and is permitted only in cases of a condition likely to lead to death of the fetus, a risk to the pregnant woman's life or health, and an emergency. Two medical practitioners need to be of the opinion that the conditions are fulfilled, which gives doctors significant discretion, especially with terms such as "[risk] of serious harm to health" that are not legally defined. For example, Abortion Support Network reports that in 2017, two women who had attempted suicide more than

⁶² Tamara Hervey and Sally Sheldon, "Abortion by Telemedicine in Northern Ireland: Patient and Professional Rights across Borders," *Northern Ireland Law Quarterly* 68 (2017): 1–33; Fabbrini, "The European Court of Human Rights," 1–54.

⁶³ Pizzarossa and Sosa, "Abortion Laws," 587.

⁶⁴ Aart Hendriks, "Promotion and Protection of Women's Right to Sexual and Reproductive Health under International Law: The Economic Covenant and the Women's Convention Conference on the Interventional Protection of Reproductive Rights: The Right to Health," *American University Law Review*, 44 (4) (1995): 1123–44.

⁶⁵ Sally Sheldon, "The Decriminalisation of Abortion: An Argument for Modernisation," *Oxford Journal of Legal Studies* 36 (2016): 334–65.

⁶⁶ Pizzarossa and Skuster, "Towards a Human Rights," 199–212.

⁶⁷ Ireland, Health (Regulation of Termination of Pregnancy) Act 2018.

once were denied abortions.⁶⁸ Furthermore, nearly 200 people traveled from the Republic of Ireland to England or Wales for an abortion in 2020, when the new law was already in force,⁶⁹ suggesting that the law has not had as liberalizing an effect as one might expect. In Ireland, as elsewhere in Europe, abortions provided outside of the procedure set by the law are criminally prohibited. Thus, Ireland follows the partial decriminalization model relying on criminal law, medical power in the form of strong oversight by doctors, and legal barriers to regulate abortion.⁷⁰ The case of Ireland reveals that, despite steps towards liberalization, the framing of abortion continues to be fetocentric and punitive. The post-repeal landscape has failed to break decisively with this orientation.⁷¹

Furthermore, and more seriously, the basis of the European consensus continues to curtail and profoundly undermine women's sexual and reproductive health, autonomy, dignity, integrity, and decision-making. Even while some European countries have moved away from more punitive laws, the model, where abortion is a crime unless certain requisites are met, lends itself easily as a platform for retrogressive reforms.⁷² A deeply troubling wave of antiabortion campaigns has gained ground in Europe (and globally), a worrying trend documented by the Council of Europe's Commissioner of Human Rights. In keeping with that trend, Europe has recently seen legislative proposals to impose new restrictions on previously more liberal abortion laws in various countries. Prominent examples include Lithuania and Norway in 2018, Slovakia in 2018, Spain in 2014, and Poland in 2016, 2018, and 2020.⁷³

Poland shows how legal restrictions on abortion can repeatedly resurface as a legal and policy position, even after years of more liberal and socially accepted legislation.⁷⁴ The reasons are complex, but one key explanatory factor is that apparently liberal legal approaches remain within a "decriminalization" model. Like many other Central and Eastern European states adopting the Soviet "Siemaszko" model of health care from the 1940s until the late 1980s/early 1990s, Poland introduced access to abortion on socioeconomic grounds ("difficult living conditions") in 1956.⁷⁵ This approach came from the USSR, which had done the same in 1955. The consequence in Poland was a significant reduction in previously widespread illegal abortions, many leading to the deaths of the women concerned (255 reported cases

⁶⁸ Abortion Rights Campaign, *Abortion Law in Ireland*, www.abortionrightscampaign.ie/abortion-law-in-ireland/, accessed March 8, 2022.

⁶⁹ United Kingdom, Department of Health and Social Care, National Statistics Abortion Statistics, England and Wales: 2020, June 10, 2021, www.gov.uk/government/statistics/abortion-statistics-for-england-and-wales-2020/abortion-statistics-england-and-wales-2020, accessed March 8, 2022.

⁷⁰ Sydney Calkin, "Transnational Abortion Pill Flows and the Political Geography of Abortion in Ireland," *Territory, Politics, Governance* 9(2) (2020): 1–17.

⁷¹ Fiona De Londras, "'A Hope Raised and then Defeated'? The Continuing Harms of Irish Abortion Law," *Feminist Review* 124 (2020): 33–50.

⁷² Pizzarossa and Sosa, "Abortion Laws," 587.

⁷³ Human Rights Monitoring Institute, "Lithuanian Parliament To Debate Abortion Ban," 2018, <https://hrmi.lt/en/seimo-zmogaus-teisiu-komitete-kelia-skinasi-siulymas-drausti-abortus/>, accessed March 8, 2022; Reuters, "Thousands Protest in Norway against Restricting Abortion," November 17, 2018, www.reuters.com/article/us-norway-politics-abortion/thousands-protest-in-norway-against-restricting-abortion-idUSKCN1NM0HR, accessed March 8, 2022; "Spain Abandons Plan to Introduce Tough New Abortion Laws," *The Guardian*, September 23, 2014, www.theguardian.com/world/2014/sep/23/spain-abandons-plan-introduce-tough-new-abortion-laws, accessed March 8, 2022.

⁷⁴ Julia Hussein, Jane Cottingham, Wanda Nowicka, and Eszter Kismodi, "Abortion in Poland: Politics, Progression and Regression," *Reproductive Health Matters* 26 (2018): 11–14.

⁷⁵ Act on the Conditions of Lawful Pregnancy Termination 1956, Dz.U.1956.12.61.

a year in 1956; 12 in 1973).⁷⁶ But—crucially—medical professionals retained control over access to abortion.⁷⁷ This control paved the way to what came next. The Polish Solidarity-led democratization movement from the late 1980s included a reassertion of self-regulation for medical professionals. An alliance between the medical profession and the Roman Catholic Church in Poland meant that a strong lobby for reintroducing restrictions on abortion was able to pursue its agenda, leading to the adoption of the Act on Family Planning, the Protection of the Human Fetus, and Conditions Permitting Pregnancy Termination 1993.⁷⁸ Under this Act, an abortion is lawful only if an independent doctor determines that there is a threat to the life or health of the woman or a fatal fetal abnormality, or if the public prosecutor determines that the pregnancy is the result of rape or incest.⁷⁹ Abortions must be performed by a doctor, in a hospital.⁸⁰ A provision reintroducing permitted abortions on socioeconomic grounds in 1996 was struck down by the Polish Constitutional Tribunal.⁸¹ After significant constitutional upheaval, associated with severe challenges to democracy and the rule of law, and with the politicization of judicial appointments, the fatal fetal abnormality exception has also been declared unconstitutional by a decision of the Polish Constitutional Tribunal on October 22, 2020, which was formally published (and became legally binding) on January 27, 2021.⁸² Given that, of the 1,100 official abortions in 2019, 1,074 were on the fatal fetal abnormality ground, the effect is a *de facto* ban on abortion in Poland.⁸³ Consequently, Poland now has one of the most restrictive regimes in Europe,⁸⁴ and many Polish women are forced to seek access to abortion from providers outside of the country.

Poland is a prime example of anti-liberalization strategies that demand stricter vigilance in Europe, and indeed worldwide, given transnational “think tank” support.⁸⁵ Any assumption that a successful process of transition to democracy is feasible without attention to women’s reproductive rights must be carefully scrutinized.⁸⁶ The retrogressive and populist moves in

⁷⁶ Atina Krajewska, “Rupture and Continuity: Abortion, the Medical Profession, and the Transitional State: A Polish Case Study,” *Feminist Legal Studies* 29 (2021): 323–50.

⁷⁷ *Ibid.*

⁷⁸ Dz.U.1993.17.78.

⁷⁹ Dz.U.1993.17.78, Article 4a (1) and (5).

⁸⁰ Dz.U.1993.17.78, Article 4a (3).

⁸¹ Dz.U.1996.139.646; TK K 26/96, OTK 1997/2/19.

⁸² Decision 1/21 Polish Constitutional Court. Dz.U.2021.175. The provision under review, Dz.U.1993.17.78, Article 4a para 1 (2) had decriminalized abortion in cases where there was “a medical indication that there existed a high risk that the foetus would suffer severe and irreversible impairment or an incurable illness that could threaten its life.”

⁸³ Atina Krajewska, “Connecting Reproductive Rights, Democracy and the Rule of Law: Lessons from Poland in Times of COVID-19,” *German Law Journal* 22 (6) (2021): 1072–97.

⁸⁴ *Ibid.*; Atina Krajewska, “The Judgment of the Polish Constitutional Tribunal on Abortion: a Dark Day for Poland, for Europe, and for Democracy,” *UK Constitutional Law Association Blog*, November 12, 2020, <https://ukconstitutionallaw.org/2020/11/12/atina-krajewska-the-judgment-of-the-polish-constitutional-tribunal-on-abortion-a-dark-day-for-poland-for-europe-and-for-democracy/>, accessed March 8, 2022; Atina Krajewska, “Recent Changes of Abortion Law in Poland: in Search of a Silver Lining,” *Social & Legal Studies Blog*, November 23, 2020, <https://socialandlegalstudies.wordpress.com/2020/11/23/abortion-law-in-poland/>, accessed March 8, 2022.

⁸⁵ See for instance, Ordo Juris, involved in the drafting of the 2016 ban, <http://en.ordoiuris.pl/>, accessed March 8, 2022.

⁸⁶ Atina Krajewska, “Connecting Reproductive Rights.”

Poland were made under the guise of “protecting women”⁸⁷ and part of a “broader struggle for equality and human rights for all” in the words of the Ordo Iuris Institute.⁸⁸ The possibility of co-option of human rights standards in European abortion laws is the subject of the section below.

SUPRANATIONAL PERSPECTIVE: COUNCIL OF EUROPE AND EUROPEAN UNION

The Council of Europe is a human rights organization with 47 European Member countries.⁸⁹ Several Council of Europe legal instruments are relevant to access to abortion. These include the European Convention on Human Rights and Fundamental Freedoms (ECHR), covering “civil and political rights,” and the European Social Charter (ESC), covering “economic and social rights.” Article 11 ESC protects the right to the highest attainable standard of health and the right to access health care. The European Committee of Social Rights, which oversees compliance with the ESC, has clarified that States Parties have positive obligations to provide appropriate and timely health care on a non-discriminatory basis, including services relating to sexual and reproductive health.⁹⁰ Access to abortion is thus recognized as a human right in the Council of Europe system. Yet, its recognition in the context of the European Committee of Social Rights has not translated into general recognition in the Council of Europe’s main human rights instrument, the ECHR.

Attempts to apply the ECHR in the field of abortion law have increased steadily. Several ECHR provisions could potentially be engaged: these include Article 2 (right to life); Article 8 ECHR (right to respect for private and family life); Article 9 (freedom of conscience, thought and religion); Article 12 (right to marry and found a family); Article 14 which prohibits discrimination in the enjoyment of the rights and freedoms in the ECHR; and Protocol 12 which establishes a more general principle of non-discrimination. The ECHR is unusual as an international legal instrument, because of the role of the European Court of Human Rights (ECtHR) in its enforcement, and especially because of the ability of private litigants to bring claims before the ECtHR once they have exhausted domestic remedies. However, although the ECtHR has firmly taken the view that it is not appropriate for it to rule that a fetus is

⁸⁷ Inga Koralewska and Katarzyna Zielińska, “‘Defending the unborn,’ ‘Protecting Women’ and ‘Preserving Culture and Nation’: Anti-Abortion Discourse in the Polish Right-Wing Press,” *Culture, Health & Sexuality* 24(5) (2022), <https://doi.org/10.1080/13691058.2021.1878559>.

⁸⁸ Elżbieta Korolczuk, “The Fight against ‘Gender’ and ‘LGBT ideology’: New Developments in Poland,” *European Journal of Politics and Gender* 3 (2020): 165–7.

⁸⁹ The Council of Europe was set up on May 5, 1949 by ten countries (Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, United Kingdom), and joined by Greece and Turkey in August 1949. It now has 47 Member States: Iceland and Germany (1950), Austria (1956), Cyprus (1961), Switzerland (1963), Malta (1965), Portugal (1976), Spain (1977), Liechtenstein (1978), San Marino (1988), Finland (1989), Hungary (1990), Poland (1991), Bulgaria (1992), Estonia, Lithuania, Slovenia, the Czech Republic, Slovakia, Romania (1993), Andorra (1994), Latvia, Albania, Moldova, Ukraine, ‘the former Yugoslav Republic of Macedonia’ (1995), Russian Federation and Croatia (1996), Georgia (1999), Armenia and Azerbaijan (2001), Bosnia and Herzegovina (2002), Serbia (2003), Monaco (2004), Montenegro (2007).

⁹⁰ *International Planned Parenthood Federation – European Network (IPPF EN) v. Italy*, complaint No. 87/2012, decision on the merits of 10 September 2013, paragraph 66.

a human-rights-holder,⁹¹ the ECtHR has been reluctant to explicitly derive a free-standing right of access to abortion from the ECHR. Instead, the ECtHR has shown a determination to adhere to the principle of subsidiarity, making use of the margin of appreciation doctrine,⁹² a widely criticized approach.⁹³ The ECtHR's position is that "a broad margin of appreciation is accorded to the State as to the decision about the circumstances in which an abortion will be permitted in a State."⁹⁴ The margin of appreciation is, in effect, a device by which the ECtHR avoids determining the question of whether a woman's right to an abortion, and her bodily self-determination, has been infringed.⁹⁵ The ECtHR tends to treat abortion litigation on a procedural basis, and to avoid substantive decisions.⁹⁶

Eventually, in the early 2010s, in *ABC v. Ireland* and *P and S v. Poland*, the ECtHR took the view that "Article 8 cannot be interpreted as conferring a right to abortion."⁹⁷ However, the ECtHR has confirmed that women must be able to access services within the laws of the particular country concerned, once that country decides to adopt statutory regulations allowing abortion in some situations, emphasizing that a country must not structure its legal framework in a way which would limit real possibilities to obtain an abortion: once the state, acting within its limits of appreciation, adopts statutory regulations allowing abortion in some situations, the legal framework devised for this purpose should be shaped in a coherent manner which allows the different legitimate interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention.⁹⁸ This wording became the principle underpinning the regulation of abortion by the ECtHR.

Thus, States Parties to the ECHR have a positive obligation to create a procedural framework enabling a pregnant woman to effectively exercise her right of access to lawful abortion.⁹⁹ As a minimum, clear, accessible, and foreseeable legislation; reliable and prompt information about access to abortion; sufficient involvement of women in the decisions being

⁹¹ *Vo v. France*, 8 July 2004, paragraphs 82 and 85.

⁹² Daniel Fenwick, "The Modern Abortion Jurisprudence under Article 8 of the European Convention on Human Rights," *Medical Law International* 12 (2012): 249–76.

⁹³ Ivana Tucak and Anita Blagojević, "Abortion in Europe," *EU and Comparative Law Issues and Challenges Series* 4 (2020): 1135–74, <https://doi.org/10.25234/eclic/11943>; Fabbrini, "The European Court of Human Rights," 1–54; Daniel Fenwick, "'Abortion Jurisprudence' at Strasbourg: Deferential, Avoidant and Normatively Neutral?" *Legal Studies* 34 (2014): 214–45.

⁹⁴ *A., B. & C v. Ireland*, ECHR (Grand Chamber), 16 December 2010, Application 25579/05, paragraph 249.

⁹⁵ Janneke Gerards, "Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights," *Human Rights Law Review* 18 (2018): 495–515; Steven Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (Strasbourg: Council of Europe, 2000).

⁹⁶ Daniel Fenwick, "The Modern Abortion Jurisprudence under Article 8."

⁹⁷ *A., B. & C v. Ireland*, ECHR (Grand Chamber), 16 December 2010, Application 25579/05, paragraph 214 and *P and S v. Poland*, ECHR (Fourth Section), 30 October 2012, Application 57375/08, paragraph 96.

⁹⁸ *A. B. and C. v. Ireland* paragraph 249; *R. R. v. Poland* paragraph 187; *P and S v. Poland*, ECHR (Fourth Section), 30 October 2012, Application 57375/08, paragraph 99; see also *Tysiack v. Poland*, ECHR (Fourth Section), 20 March 2007, Application 5410/03, paragraph 116.

⁹⁹ *P and S v. Poland*, ECHR (Fourth Section), 30 October 2012, Application 57375/08, paragraph 99 and *Tysiack v. Poland*, ECHR (Fourth Section), 20 March 2007, Application 5410/03, paragraphs 116 to 124.

taken, and effective judicial remedies are required.¹⁰⁰ Moreover, *Open Door and Dublin Well Woman v. Ireland* established that the right to receive and impart information about abortion under the Article 10 right to freedom of expression is of crucial value to women, as it affects their health and well-being.¹⁰¹

The ECtHR has generally conceptualized abortion as a battle between different sets of human rights and their holders.¹⁰² This conceptualization of human rights sees the legal and political world as a “market” of rights, competitively asserted against other (market) actors.¹⁰³ Conceptualizing human rights as inherently individualistic and competitive does not sit easily with women’s practical experience.¹⁰⁴ Nor is the balance struck appropriately, especially given an emerging European consensus¹⁰⁵ to the effect that the balance should fall in the woman’s favor, at least when either the grounds (such as a threat to the woman’s health) or where the requirements or conditions (such as in the early stages of pregnancy) for access to abortion are met.¹⁰⁶

Outside the ECtHR, the Council of Europe has adopted various resolutions with increasingly stronger language around abortion. In 2008, Parliamentary Assembly Resolution 1607 on *Access to safe and legal abortion in Europe* asserted that “abortion should not be banned within reasonable gestational limits,” and that “a ban on abortion does not result in fewer abortions but mainly leads to” illegal abortions, that result in a number of adverse effects, such as increased maternal mortality, “abortion tourism,” and social inequalities.¹⁰⁷ In the same vein, the Council of Europe’s Committee on Equal Opportunities for Women and Men invited Member States to decriminalize abortion, if they have not already done so; to guarantee women’s effective exercise of their right to abortion; and lift to restrictions which hinder, *de jure* or *de facto*, access to safe abortion.¹⁰⁸

While these initiatives lend further support to the position that access to abortion is a human right duly recognized in European contexts, none gives any practical assistance to women in Europe seeking to access abortion.

¹⁰⁰ Gerards, “Margin of Appreciation,” 495–515.

¹⁰¹ *Open Door and Dublin Well Woman v. Ireland*, paragraphs 63–80.

¹⁰² Nicola Lacey, “Feminist Legal Theory and the Rights of Women,” in Karen Kopp (ed.), *Gender and Human Rights* (Oxford: Oxford University Press, 2004).

¹⁰³ *Ibid.*

¹⁰⁴ Stephanie Palmer, “Feminism and the Promise of Human Rights: Possibilities and Paradoxes,” in Susan James et al. (ed.), *Visible Women: Essays on Feminist Legal Theory and Political Philosophy* (Oxford: Hart Publishing, 2002).

¹⁰⁵ Spyridoula Katsoni, “The Right to Abortion and the European Convention on Human Rights: In Search of Consensus among Member-States,” *Völkerrechtsblog*, March 19, 2022, <https://doi:10.17176/20210319-085654-0>.

¹⁰⁶ Elizabeth Wicks, “*A, B, C v Ireland*: Abortion Law under the European Convention on Human Rights,” *Human Rights Law Review* 11 (2011): 556–66.

¹⁰⁷ Resolution 1607 (2008), Access to safe and legal abortion in Europe, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17638>, accessed March 8, 2022.

¹⁰⁸ Council of Europe, “Women’s Sexual and Reproductive Rights in Europe” (2017), <https://rm.coe.int/women-s-sexual-and-reproductive-health-and-rights-in-europe-issue-pape/168076dead>, accessed March 9, 2022.

The European Union: The Future

An alternative approach to the human rights focus, which is centered on the ECHR, has been explored by some scholars and activists.¹⁰⁹ Counterintuitively, it focuses not on women as human rights holders, but on women as economic actors, giving and receiving medical services. It frames women as exercising autonomy not against the state *per se*, but to secure access to or to provide medical treatment in a trade or professional context. Bringing this line of legal reasoning together with that involving the ECtHR involves conceptualizing transnational law as “private” rather than “public,” although both conceptualizations can operate in tandem.¹¹⁰ It is an example of feminist activists pushing legal boundaries, revealing the hypocrisies of law,¹¹¹ but also its hidden potentialities.

The European Union (EU) comprises 27 “Member States,”¹¹² which have agreed to a dense set of legally binding arrangements to create *inter alia* among them an “internal market,” in which the factors of production (including services) should circulate with the minimum restrictions consistent with the agreed rules.¹¹³ Three further European states¹¹⁴ also participate in the internal market, with a similar set of rules.¹¹⁵ EU law is unusual, because it creates not only obligations and rights for the EU’s Member States (which is normal for international law), but also rights for individual (economic) actors within the EU.¹¹⁶ What is particularly unusual about EU law is that those rights can—in certain circumstances—be directly enforced by individuals in their domestic courts. Furthermore, domestic courts can (and sometimes must) refer matters of interpretation of EU law to the Court of Justice of the European Union (CJEU).¹¹⁷ These qualities of EU law give it a particular potency, especially in the use of liti-

¹⁰⁹ See Tamara Hervey and Sally Sheldon, “Abortion by Telemedicine in Northern Ireland: patient and professional rights across borders,” *Northern Ireland Law Quarterly* 68 (2017): 1–33; Laura Robinson, *Women’s Right to Choose in EU Law*, University of Sheffield, www.sheffield.ac.uk/sure/301/casestudies, accessed March 9, 2022.

¹¹⁰ See Atina Krajevska, “Transnational Health Law Beyond the Private/Public Divide: The Case of Reproductive Rights,” *Journal of Law and Society* 45 (2018): S220–S244.

¹¹¹ See, e.g., Mairead Enright, Kathryn McNeilly, Fiona de Londras, “Abortion Activism, Legal Change, and Taking Feminist Law Work Seriously,” *Northern Ireland Law Quarterly* 71 (2020): OA7–OA33; Ruth Fletcher, “Abortion Needs or Abortion Rights? Claiming State Accountability for Women’s Reproductive Welfare,” *Feminist Legal Studies* 13 (2005): 123–34.

¹¹² The original six Member States (Belgium, France, Germany, Italy, Luxembourg, the Netherlands) were joined by Denmark, Ireland, and the United Kingdom in 1973. Further expansions in 1980 (Greece), 1986 (Portugal, Spain), 1995 (Austria, Finland, Sweden), 2004 (Cyprus, Czechia, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia), 2007 (Bulgaria, Romania), and 2013 (Croatia). The United Kingdom left the European Union in 2020.

¹¹³ Treaty on European Union *Official Journal* C 202 7.6.2016, p. 13–361; Treaty on the Functioning of the European Union *Official Journal* C 326, 26.10.2012, p. 47–390. This aspect of EU law is a little bit like the US “Commerce Clause.”

¹¹⁴ Iceland, Liechtenstein, Norway.

¹¹⁵ Agreement on the European Economic Area, <https://eur-lex.europa.eu/legal-content/DE/TXT/?uri=OJ:L:1994:001:TOC>, accessed March 9, 2022.

¹¹⁶ Case 26/62 *Van Gend en Loos* ECLI:EU:C:1963:1.

¹¹⁷ Article 267 TFEU.

gation to effect change.¹¹⁸ They set EU law apart from other systems of transnational law, such as World Trade Organization law or bilateral trade agreements.

The law of the EU's internal market, as interpreted by the CJEU, protects patient autonomy and choice, health professionals' access to extra-jurisdictional patients, and also to some extent the principle of non-discrimination within the EU's own human rights framework.¹¹⁹ It has taken some time to reach this position, as it was originally assumed by many governments and others that EU law did not apply to health services, because of the way in which health systems are organized in Europe, on the basis of solidarity rather than private relationships.

The steps taken to reach this legal position include establishing the following: (i) abortion is a "service" in internal market law;¹²⁰ (ii) electronic services in internal market law include medical consultations undertaken through a website;¹²¹ (iii) "remuneration," which is necessary for something to constitute a "service" in internal market law, may be provided by a third party;¹²² (iv) a service provider need not be seeking a profit to count as a service provider in internal market law;¹²³ (v) EU law gives enforceable rights¹²⁴ to both providers and recipients of cross-border services;¹²⁵ (vi) a "restriction" on cross-border services is very broadly construed;¹²⁶ (vii) and justifications, which must be on the basis of objective public interests such as "public policy, in particular the prevention, investigation, detection and prosecution of criminal offences ... public health ... the protection of consumers," or where the service presents a "serious and grave risk of prejudice to those objectives,"¹²⁷ are narrowly construed.¹²⁸

¹¹⁸ R. Daniel Keleman, *Eurolegalism: The Transformation of Law and Regulation in the European Union* (Cambridge: Harvard University Press, 2011).

¹¹⁹ Tamara Hervey and Sally Sheldon, "Abortion by Telemedicine in Northern Ireland: Patient and Professional Rights across Borders," *Northern Ireland Law Quarterly* 68 (2017): 1–33. See, in general, for discussion of EU law as applicable in health contexts, Tamara Hervey and Jean McHale, *European Union Health Law: Themes and Implications* (Cambridge: Cambridge University Press, 2015).

¹²⁰ Case C-159/90 *SPUC v. Grogan* EU:C:1991:378.

¹²¹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (E-Commerce Directive) OJ 2000 L 178/1, Article 1 (2), 2(a), referring to Directive 98/43/EC, Article 1 (2).

¹²² Case 352/85 *Bond van Adverteerders* EU:C:1988:196.

¹²³ Case C-281/06 *Jund* EU:C:2007:816.

¹²⁴ Case 33/74 *Van Binsbergen* EU:C:1974:131.

¹²⁵ Joined Cases 286/82 & 26/83 *Luisi and Carbone* EU:C:1984:35.

¹²⁶ A "restriction" in this context covers "any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within a Member State," see Case C-444/05 *Stamatelaki* EU:C:2007:231, paragraph 25. See Tamara Hervey and Jean McHale, *European Union Health Law: Themes and Implications* (Cambridge: Cambridge University Press, 2015) 77–83; Wouter Gekiere, Rita Baeten, and Willy Palm, "Free Movement of Services in the EU and Health Care," in Elias Mossialos, Govin Permanand, Rita Baeten and Tamara Hervey (eds), *Health Systems Governance in Europe: The Role of European Union Law and Policy* (Cambridge: Cambridge University Press, 2010); Leigh Hancher and Wolf Sauter, *EU Competition and Internal Market Law in the Healthcare Sector* (Oxford: Oxford University Press, 2012).

¹²⁷ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (E-Commerce Directive), Article 3 (4).

¹²⁸ This is a long-established principle of EU law, see Case 71/76 *Thieffry* EU:C:1977:65; Case 340/89 *Vlassopoulou* EU:C:1991:193 and is also enshrined in EU legislation, see Directive 2005/36/EC

The legal position now is that where health professionals are operating within the legal constraints of the jurisdiction in which they are established, any “restrictions” on their ability to provide services to patients in other countries within the internal market must be carefully justified within EU law. The burden of proof lies with the Member State to justify a restrictive policy. Justification is only on a narrow set of grounds, and only where the restrictive policy or practice is proportionate to the public interest it seeks to protect.¹²⁹ In principle, the service of abortion by telemedicine should be treated no different to any other medical service offered across an internal EU border in this regard. Any restrictions must be part of a “proportionate, consistent and evidence-based national law and policy, designed to achieve its stated objectives.”¹³⁰ The approach here is very different from the wide “margin of discretion” discussed above in the context of the ECtHR.

Some EU Member States permit telemedical abortion services. Austria, for example, requires a “personal and direct assessment of the patient,” but so long as this is carried out, the service can lawfully be provided to a patient in another country.¹³¹ For this reason, some organizations carry out their prescribing of abortion pills from Austria. Remote prescribing of abortion pills was seen as problematic in many jurisdictions, although the available medical evidence suggests that it carries very few risks—all the more so when considered alongside the risks associated with carrying an unwanted pregnancy to term,¹³² or traveling to procure an abortion.¹³³ Hervey and Sheldon argued in 2017 that no justification *based on health protection grounds* preventing cross-border abortion services provided by an organization prescribing from Austria would logically stand up to scrutiny in the CJEU, or by a national court of an EU Member State properly applying EU law.¹³⁴ The COVID-19 pandemic has perhaps changed the narratives here to strengthen their view: remote consultation (in general) has been seen to be feasible, and legal changes in many European countries permitted women to take abortion pills at home, and manage the outcomes themselves, although still under the formal care of

of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications [2005] OJ L255/22.

¹²⁹ In Case C-137/09 *Josemans* EU:C:2010:774, paragraph 70, “a restrictive measure can be considered to be suitable for securing the attainment of the objective pursued only if it genuinely reflects a concern to attain that objective in a consistent and systematic manner.” The CJEU adopts a strict scrutiny of public morality as an objective public interest justifying restrictions on free movement of services or goods, with particular care to decline to accept any double standards, see, e.g., Case 121/85 *Conegate* EU:C:1986:114 concerning import of sex toys, and Cases 115&116/81 *Adoui and Cornuaille* EU:C:1982:183 and Case C-268/99 *Jany and Others* EU:C:2001:616 concerning prostitution.

¹³⁰ Hervey and Sheldon, “Abortion by Telemedicine,” 21.

¹³¹ See UVS 30.1.2012, UVS-06/0/2829/2010–23, cited in Hervey and Sheldon, “Abortion by Telemedicine,” note 65.

¹³² MBRRACE-UK, *Saving Lives, Improving Mothers’ Care 2020: Lessons to Inform Maternity Care from the UK and Ireland Confidential Enquiries in Maternal Death and Morbidity 2016–18* (Oxford: Nuffield Department of Population Health, 2021).

¹³³ See, for example, the observations of the UN Human Rights Committee on the International Covenant on Civil and Political Rights (ICCPR) in its views on communication No. 2324/2013, concerning Amanda Jane Mellet, CCPR/C/116/D/2324/2013, at paragraph 7.5 (p 16) to the effect that “many of the negative experiences described that she went through could have been avoided if the author had not been prohibited from terminating her pregnancy in the familiar environment of her own country,” www.ohchr.org/Documents/Issues/Women/WRGS/Mellet_v_Ireland.pdf, accessed March 9, 2022.

¹³⁴ Hervey and Sheldon, “Abortion by Telemedicine,” 21–3.

a health professional.¹³⁵ Although a small group of outlier European countries *restricted* access to abortion under COVID-19,¹³⁶ the overall normalization of remote consultation is likely to have an effect on the question of justification for policies that restrict access to abortion remotely, across an EU internal border. Where countries revert to pre-COVID rules, it will be harder to argue that a policy is proportionate *on health grounds*, given evidence that it did not cause disproportionate health problems during the COVID-19 pandemic.

If there is any available proportionate justification, argued Hervey and Sheldon, it would be on public policy grounds, concerning the moral status of the fetus. However, as they point out, this argument would in effect require a Member State to defend the very controversial position that a fetus is a human rights holder in EU law. That interpretation would be fundamentally incompatible with abortion law in almost every EU Member State/European country, and with the position of the ECtHR. It would also be difficult to defend as such a position would breach not only trade rights of the woman receiving the service, and the (often) woman providing it, but also their rights to respect for private and family life, integrity of the person, human dignity, and so on. Arguably it would breach non-discrimination provisions, not only because only women,¹³⁷ who are members of a protected category in European human rights law and in EU law, seek abortions, but also potentially because women with disabilities and in poverty are more likely to seek cross-border abortion services than women who are able to travel to another jurisdiction.

Attempts by strategic litigation to make use of this potential route to challenge restrictive European abortion laws have so far been unsuccessful. In part, this is because of the uncertainty of litigation as a strategy: in order to succeed, such litigation would need to overcome not only the possibility of a Member State arguing that its law is justified on health or public policy grounds, but also the fact that this litigation would be based on the ‘quasi-constitutional’ provisions of the EU’s founding treaties, setting aside provisions of more technical EU legislation which provide that such legislation should not affect the prohibition of supply or use of abortifacients.¹³⁸

FUTURE/DIRECTION OF TRAVEL

While there are a series of important innovations happening on the ground, there is no room for complacency in an assessment of the future direction of travel of abortion laws in Europe.

In practice, the partial decriminalization or criminalization with exceptions model excludes many people across Europe from access to abortion. European human rights instruments are either empty rhetoric or the institutions interpreting and applying them adopt an extremely deferential approach to national positions. Coupled with anti-liberal reform movements, this deference is worrying: if national governments or legislatures move to more restrictive

¹³⁵ Bojovic et al., “The Impact,” 841–58.

¹³⁶ Poland being one of these, see Atina Krajewska, “Connecting Reproductive Rights.”

¹³⁷ We acknowledge here that some trans men or gender non-binary people might seek an abortion, but would argue that they are also in a protected group.

¹³⁸ Article 4 (4) Directive 2001/83/EC, OJ L 311, 28.11.2001, 67.

approaches, there will be no possibility to rely on European human rights standards to oppose such moves.¹³⁹

Women's bodies have always been threatened by state institutions dominated by the medical profession. This is the case whether those states are moving towards or away from democratization and the rule of law. The contemporary European context is no different. Although European transnational trade law might help medical professionals to provide cross-border access to abortion pills for women in European countries where practical or legal access is restricted, the legal hurdles to be overcome here are significant. As in other contexts, assessing the strategic wisdom of deploying law to challenge patriarchal structures and to assert women's autonomy is a complex, contested, and fraught process, about which feminists express competing views. Using the law—norms that are carved out through the institutions that are made by and through the patriarchy—holds the danger of strengthening the very systems that have made women's bodies subject to state interference and control in an unequal manner as compared to men's bodies.

While these worrisome trends merit a high degree of vigilance,¹⁴⁰ some steps have been taken that may be broadly positive for the future for abortion law in Europe. As we completed this chapter, 62 percent of Gibraltar's citizens have voted "yes" in a referendum intended to approved changes in the law that will allow abortions within the first 12 weeks of pregnancy if a woman's mental or physical health is considered by a doctor to be at risk, or later in cases of severe fetal abnormality.¹⁴¹ The European Parliament strongly condemned Poland on its *de facto* ban on abortion,¹⁴² and has adopted Resolution 2020/2215(INI) *Sexual and reproductive health and rights in the EU, in the frame of women's health*, in which the Parliament urges all EU Member States to ensure universal access to safe and legal abortion.¹⁴³

Furthermore, the COVID-19 pandemic has profoundly disrupted health practice, forcing legal change in ways unimaginable before March 2020. Some legal changes have enhanced

¹³⁹ Every report adopted by the European Parliament was met with great opposition from actors like Citizen Go. For example, this organization collected nearly 60,000 signatures against the Tarabella report on equality between women and men in the European Union. CitizenGO, "Stop Tarabella Relaunching Estrela! No EU Support to Abortion," <https://citizengo.org/en/15605-protection-subsidiarity-and-no-eu-support-abortion>, accessed March 9, 2022.

¹⁴⁰ See Elena Zacharenko, *Anti-Gender Mobilisations in Europe Study for Policymakers on Opposition to Sexual and Reproductive Health and Rights (SRHR) in European Institutions* (Brussels: European Parliament Green Parties, 2020), https://heidihautala.fi/wp-content/uploads/2020/12/Anti-gender-Mobilisations-in-Europe_Nov25.pdf and Borbála Juhász and Enikő Pap, "Study on Backlash on Gender Equality and Women's and Girls' Rights" (Brussels: European Parliament FEMM Committee, 2018), [www.europarl.europa.eu/RegData/etudes/STUD/2018/604955/IPOL_STU\(2018\)604955_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604955/IPOL_STU(2018)604955_EN.pdf), accessed March 9, 2022.

¹⁴¹ "Gibraltar Votes to Ease Abortion Restrictions," *New York Times*, June 24, 2021, www.nytimes.com/2021/06/24/world/europe/gibraltar-abortion-law.html, accessed March 9, 2022.

¹⁴² European Parliament resolution of 26 November 2020 on the *de facto* ban on the right to abortion in Poland (2020/2876(RSP)), www.europarl.europa.eu/doceo/document/TA-9-2020-0336_EN.html, accessed March 9, 2022.

¹⁴³ European Parliament resolution of June 24, 2021 on the situation of sexual and reproductive health and rights in the EU, in the frame of women's health (2020/2215(INI)), www.europarl.europa.eu/doceo/document/TA-9-2021-0314_EN.html, accessed March 9, 2022.

patient autonomy, especially those involving securing access to health care remotely. These changes could result in a move towards a different, less medicalized model for abortion law.¹⁴⁴

The landscape of European abortion laws is also the site of renewed efforts of advocacy, strategic litigation, and interpretation of legal norms.¹⁴⁵ We see increased commitment from legal scholars to analyze and challenge abortion laws, firmly positioning themselves as feminist scholars.¹⁴⁶ Feminist legal activism is a productive disruptive force, challenging the dominant understandings about what is legally and practically possible, and wresting the tools of law from professional “ownership,” to force change for the better in women’s lives.¹⁴⁷ Increased activism also happens outside of legal fields. Initiatives of transnational solidarity based on mutual aid, like Abortion Without Borders,¹⁴⁸ and projects that make use of drones to deliver abortion medicines¹⁴⁹ are also prime examples of the relentless activism of people determined to secure access to abortion across the continent.

European human rights and trade legal settlements offer at least potential opportunities for challenging the lived experience of access to abortion for women in Europe, even if they do not offer much of a platform for challenge to its fundamentally problematic orientation: that of criminalization of abortion unless it falls within a legal exception. Much more work is needed to establish stronger regional standards, expand access, and ensure universal access to safe and legal abortion.¹⁵⁰

¹⁴⁴ Mariana Prandini Assis and Sara Larrea, “Why Self-Managed Abortion Is So Much More than a Provisional Solution for Times of Pandemic,” *Sexual and Reproductive Health Matters* 28 (2020): 1779633.

¹⁴⁵ Silvia De Zordo, Joanna Mishtal, and Lorena Anton, “Introduction,” in Silvia De Zordo, Joanna Mishtal, and Lorena Anton (eds), *A Fragmented Landscape: Abortion Governance and Protest Logics in Europe* (New York and Oxford: Berghahn Books, 2016).

¹⁴⁶ Fiona Bloomer, Claire Pierson, and Sylvia Estrada Claudio, *Reimagining Global Abortion Politics: A Social Justice Perspective* (Bristol: Policy Press, 2020).

¹⁴⁷ Enright, McNeilly, and de Londras, “Abortion Activism,” OA12; see also Ruth Fletcher, “Abortion Needs or Abortion Rights? Claiming State Accountability for Women’s Reproductive Welfare,” *Feminist Legal Studies* 13 (2005): 123–134.

¹⁴⁸ Abortion without Borders, <https://abortion.eu/>, accessed March 9, 2022.

¹⁴⁹ Melanie Ehrenkranz, “Activists Use Robots to Send Abortion Pills to Northern Ireland,” *Gizmodo*, May 30, 2018, <https://gizmodo.com/activists-are-using-robots-to-send-abortion-pills-to-no-1826432802>, accessed March 9, 2022; and Doctors for Choice, Malta, see www.facebook.com/Drs4ChoiceMalta/posts/1063913324143656, accessed March 9, 2022.

¹⁵⁰ European Parliament Resolution of June 24, 2021 on the situation of sexual and reproductive health and rights in the EU, in the frame of women’s health (2020/2215(INI)), www.europarl.europa.eu/doceo/document/TA-9-2021-0314_EN.html, accessed March 9, 2022.