

Rewriting Reproductive Rights: Applying Feminist Methodology to the European Court of Human Rights' Abortion Jurisprudence

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Abstract

This article adopts feminist methodology to demonstrate how women's rights and reproductive freedom can be enhanced at the judicial level: a process that can lead to legal reform. The practice of feminist judgment-writing is central in achieving this objective. Recently, feminist scholars and practitioners have come together to rewrite landmark judgments concerning women's rights. Examples of these efforts can be found in the Women's Court of Canada and the UK Feminist Judgments Project. Drawing from these reformative experiences, the article rewrites two abortion judgments of the European Court of Human Rights: *A, B and C v Ireland* and *P and S v Poland*. These revisions emphasise the necessity for alternate accounts of women's rights in the courtroom.

Keywords: abortion law, reproductive autonomy, legal reform, adjudication, feminist judgments

Introduction

In this article, I engage in a feminist rewriting of two decisions of the European Court of Human Rights on reproductive rights – *A, B and C v Ireland*¹ and *P and S v Poland*.² In doing so, I draw on concepts from feminist jurisprudence – such as women's agency, reproductive autonomy and intersectionality – to contest the dominant, masculine paradigm that has shaped

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¹ ECHR (GC) 25579/05; [2010] ECHR 2032.

² ECHR 57375/08; [2012] ECHR 1853.

the court's traditional legal reasoning. Feminist legal theory has revealed the masculine bias in law-making, law enforcement and judicial decision-making. While I agree with these feminist critiques of law, I assert that feminist practical reasoning³ can be effective in reconciling legal methods with women's experiences. The emergence of feminist judgment-writing demonstrates that it is possible to formulate a legal sphere in which women's perspectives are implemented. Thus, I suggest that law can be used as both a 'site' and a 'tool' for feminist struggle⁴ – but only if feminism can become the site and tool of legal method.

Thus, the aim of this article is to channel feminist legal theory into practice, and to provide feminist interpretations of facts and concepts to secure tangible legal results for women. In doing so, I am inspired by Eva Brems' edited collection *Diversity and European Human Rights: Rewriting Judgments of the ECHR*,⁵ the efforts of the Women's Court of Canada (WCC)⁶ and the UK Feminist Judgments Project (FJP).⁷ These works represent a "feminist intervention in law":⁸ they debunk existing patterns of social and legal reasoning, whilst introducing feminist perspectives to the legal issues concerned. They demonstrate how to 'feminise' legal rules not only in theory but also in practice, in order to bring tangible change to women's experiences as citizens under the law.⁹

³ K. T. Bartlett, 'Feminist Legal Methods' (1990) *Harvard Law Review* 103(4), p. 829.

⁴ C. Smart, 'The Woman of Legal Discourse', in *Law, Crime and Sexuality: Essays in Feminism* (Sage, 1995), p. 187.

⁵ E. Brems (ed.) *Diversity and European Human Rights: Rewriting Judgments of the ECHR* (Cambridge University Press, 2012).

⁶ D. Majury, 'Introducing the Women's Court of Canada' (2008) *Canadian Journal of Women and the Law* 18(1), pp. 1–12.

⁷ See the Feminist Judgments Project's website: <http://www.feministjudgments.org.uk> [accessed on 26 December 2016].

⁸ R. Hunter, 'The Power of Feminist Judgments?' (2012) *Feminist Legal Studies* 20(2), p. 137.

⁹ An insight into the bias of legal rules, judicial frameworks and human rights is given by Siobhán Mullally and Claire Murray, 'Regulating Abortion: Dissensus and the Politics of Rights' (2016) *Social & Legal Studies* 25(6), pp. 645–650. Mullally and Murray correctly emphasise that the concept of human rights cannot *per se* protect or enhance women's reproductive autonomy; in fact, the recognition of the sanctity of life as a human right has been manipulated to hinder women's access to abortion in countries like Ireland, Poland and Malta. Similarly, in countries where women can request abortions, physicians and doctors are the primary decision-makers with the ability to concede or deny women's choices.

The scope and utility of feminist judgment-writing

Feminist judgment-writing can be understood as a collective project, shared between feminist activists, legal scholars and practitioners, whose objective is to revolutionise legal reasoning. By integrating an understanding of women's lives in their environmental and societal contexts into judicial reasoning, feminist judges reject many of the claims made about the world by mainstream judges. For example, in *Feminist Judgments: From Theory to Practice*,¹⁰ twenty-nine judgment-writers endeavoured to integrate feminist analyses into judicial assessments of facts and interpretations of law in high profile English cases; they demonstrated that it is possible for feminists to engage with the law whilst showing awareness of how law has traditionally worked to restrict women's access to justice.

A striking illustration of the feminist approach to judging is Clare McGlynn's rewriting of *R v A (No 2)*.¹¹ In the original judgment, the issue before the House of Lords was whether alleged prior sexual encounters of a rape complainant with the defendant could be admissible to determine the issue of consent. In her straightforward evaluation, McGlynn goes a long way to protect A, the victim of rape, from further victimisation before the House. She criticises the social and legal distrust of rape complainants, fuelled by myths about women's lack of credibility as witnesses, especially when they are deemed to be 'promiscuous'. McGlynn also emphasises the chilling effects that questioning about sexual history in court has on rape reporting in general.¹² Irrelevant sexual history evidence is likely to mislead the jury and stand in the way of accurate fact-finding. She makes a case that questioning a rape complainant in court about her sexual history may constitute inhuman or degrading treatment in violation of Article 3 of the European Convention on Human Rights (ECHR). In her view, accepting evidence about previous sexual relations with either third parties or the defendant as tending to suggest consent would contravene the (liberal) ideas of women's sexual agency and freedom to give or withhold consent in each individual instance. Such reasoning operates systematically to the detriment of women who are the main recipients of sexual abuse.

¹⁰ R. Hunter, C. McGlynn and E. Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart Publishing, 2010).

¹¹ [2001] UKHL 25

¹² C. McGlynn, 'R v A (No 2)', in Hunter, McGlynn and Rackley (eds.), *op. cit.* n.10, p.212.

Women's sexuality is a large component of their positioning in the eyes of the law. Women's biology and reproductivity is often used to make assumptions about their temperament and disposition and, thus, to draw conclusions about their credibility as parties. However, in other cases, the gendered effects of law and the cultural and social specificity of women's position are merely glossed over in judicial reasoning.¹³ These arbitrary methods of considering gender issues under the law are rectified in feminist judging: women's sexuality is neither omnipresent nor in-existent and gender issues are given appropriate weight when assessing the facts before the court.

The characterisation of women as primarily reproductive beings interferes in particular with the vindication of their rights. Women's reproductive rights claims, for example, are often met with ethical objections that characterise the foetus as a child. As a child, the foetus is seen as deserving the care of a mother who has a moral duty to carry her pregnancy to term in its best interest. In the context of abortion, the debate has been dominated by anti-abortionists' formulation of the foetus as a person in its own right. I argue that this is incoherent with the threshold of personhood set by liberal definitions of the legal person. It is incompatible with the prerequisites of the legal person as autonomous, self-possessed and self-contained; yet, I contend that the exemption of the foetus from these requirements is congruent with the power hierarchies in the biological family, and the "sexual repressions necessary to maintain it".¹⁴ Once a woman is pregnant, the state 'claims' her foetus by attributing personal rights to it; this way, the woman's personhood is taken out of the picture and her main purpose becomes that of upholding the rights of the new 'person'. By treating the foetus as a person, the state demotes the woman's status and contributes to defining her role as a mother whose primary duty is to protect her child.

¹³ See, for example, the case of *Royal Bank of Scotland Plc v Etridge (No 2)* [2001] UKHL 44, in which assumptions were made about the role of women in marital relationships, including the idea that a wife's economic interest is aligned with that of her husband. The actions of solicitors in failing to alert Mrs Etridge about the burdensome transaction, and of the bank in failing to confirm that she had consented to it freely, were justified or ignored.

¹⁴ S. Firestone, *The Dialectic of Sex* (Morrow, 1970), p. 65.

Different feminist methods and approaches to feminist judging

The methods used by feminists to disrupt mainstream judicial approaches differ. Feminist judgments come in diverse formats, from whole rewritings to the partial editing of judgments.¹⁵ The benefit of rewriting entire judgments is that feminist judges attain freedom in structuring their judgment, not having to follow established structures in adjudication. Similarly, they gain control over the substance of the judgment, how the issues are addressed and the weight placed on each claim before the court. This method is the most subversive strategy, in that it counterposes feminist and mainstream judging, while proposing the former as a viable alternative to the latter.

The difference between rewriting and redrafting judgments is one of scope and viability. The structural freedom of the rewritings presented in the FJP, the WCC or the more recent Northern/Irish Feminist Judgments Project,¹⁶ is congruent with the common-law tradition, where judges use their status to legitimise changes in the law or the introduction of new laws. In common law systems, case law is of primary importance and judges use it to evolve the law in different directions, often catering for social and political change. For example, the jurisprudential debate over legal fictions – which can be “exploratory” when the courts attempt to introduce or modify rules – demonstrates that the common law accepts departures from established legal forms and doctrines.¹⁷ Feminist rewritings do not necessarily rely on legal fictions to implement women’s rights and embed feminist theory into the common law; however, the existence of fictions in the common law justifies using feminist contentions as a

¹⁵ For example, the Women’s Court of Canada and the UK and Northern/Irish Feminist Judgment Projects have engaged in whole rewritings of judgments: see (2006) 18(1) *Canadian Journal of Women and the Law*; Hunter, McGlynn and Rackley, *op. cit.* n.10; M. Enright, J. McCandless and Aoife O’Donoghue (eds), *Northern/Irish Feminist Judgments: Judges’ Troubles and the Gendered Politics of Identity* (Hart Publishing, 2017). By comparison, Eva Brems’ edited collection uses a more surgical approach, by modifying existing case law to promote a feminist interpretation of human rights and integrate diversity into legal discourse: *op. cit.* n. 5.

¹⁶ Enright, McCandless and O’Donoghue, *ibid.*

¹⁷ For example, see Ronald Dworkin’s account of judicial decision-making in ‘Hard Cases’ (1975) *Harvard Law Review* 88(6), p.1057, where he describes how judges have responsibility for weighing conflicting legal principles against each other, often to the detriment of strict legal rules. He gives two example of cases, namely *Riggs v Palmer* and *Henningsen v Bloomfield Motors Inc.*, to demonstrate that the early positivist and Hartian accounts of legal rules omit an important aspect of the legal process: not creativity per se, but rational inductive reasoning. I argue that legal fictions help judges make a leap in their decision-making where it is not possible to reach a just conclusion in the face of black letter law or established legal customs.

tool to enhance judicial reasoning: in this context, rewriting judgments and appropriating legal forms and personas becomes a feasible means to attain gender justice.

Civil law systems are not as malleable as the common law. Codified statutes are the driving force in judicial decision-making and judgments rely heavily on existing ordinances. For example, the European Court of Human Rights uses its case law to interpret the European Convention on Human Rights as a living instrument.¹⁸ While the Court's case law acts as precedent for judicial reasoning, it is apparent that decisions under the ECHR follow a more rigid format than common law judgments: they are more predictable and leave little scope for judicial creativity. For this reason, redrafting the Court's judgments has been a more effective way for me to demonstrate to the original judges that they could have reached different conclusions without violating the established formats of their judgments.

While rewriting common law cases from a feminist standpoint is effective to establish completely different yet plausible decisions, the redrafting approach is more suitable for revising European Court of Human Rights (ECtHR) cases. In her edited collection *Diversity and European Human Rights: Rewriting Judgments of the ECHR*, Eva Brems explains the redrafting strategy not as one strictly focused on changing the outcome of decisions, but one that improves the original court's reasoning. She also mentions the pragmatic value of judgments that could have been written realistically by the ECtHR. Brems' focus on the viability of feminist redrafts is important; whichever approach we choose, if feminist judges aim to make a difference in the law, the context in which our judging takes place is paramount. For common law cases, rewritings are effective and credible in a way that would not apply to cases from the ECtHR.

The benefit of feminist judgment-writing: formal vs. substantive equality

Despite the varying feminist approaches to judging, the practice of writing feminist judgments has common, identifiable objectives. Firstly, it aims to implement the concept of substantive – as opposed to formal – equality before the law. Formal equality assumes that we can attain

¹⁸ European Court of Human Rights, 'The Court in brief'. Available at: http://www.echr.coe.int/Documents/Court_in_brief_ENG.pdf [accessed on 25 February 2017].

justice by treating women equally to men under all circumstances, thereby ignoring women's gendered experiences. By contrast, substantive equality aims to produce equitable outcomes for women and men, while recognising that they are subject to different circumstances in life. A tangible defect in the notion of formal equality is the limited importance given to women's reproductive autonomy.¹⁹ Secondly, feminist judgments strive to change legal doctrine by incorporating women's experiences into judicial thinking. Thirdly, they defy essentialism by considering women's diverse experiences as legal persons and interpreting rights considering specific circumstances. For example, in the context of reproductive rights, abortion restrictions are discriminatory against women on various grounds in addition to sex. As well as constituting a form of sexual oppression, abortion restrictions create differential social and economic burdens for women. Thus, abortion access must be understood as an intersectional issue.²⁰ To fully comprehend reproductive rights and abortion claims, it is necessary to expand women's legal personality beyond sexuality and biology. Unfortunately, domestic and international courts have not addressed reproductive rights claims with this holistic approach.

Finally, feminist judges are open to providing alternative accounts of facts. This becomes possible through contextualisation and the realisation that, just like law, facts cannot be considered in a vacuum. For instance, in *YL v Birmingham City Council*²¹ the House of Lords decided by a majority of 3 to 2 that a private care home providing services on behalf of the local authority to an elderly lady with Alzheimer's disease was not exercising "functions of a public nature" under section 6(3)(b) of the Human Rights Act 1998 (HRA). Thus, it could not be subject to a claim under the HRA that her ECHR rights had been breached. By contrast, the feminist judgment by Caroline Hunter and Helen Carr reached the opposite conclusion through an alternative account of the facts of the case.²² Their reasoning positioned YL at the centre of

¹⁹ See also, for example, *Evans v Amicus Healthcare Ltd* [2004] EWCA Civ 727 in which Evans' appeal against a decision that she was not entitled to utilize IVF frozen embryos after her partner had withdrawn consent was dismissed. Evans also lost her appeal at the Grand Chamber of the European Court of Human Rights (*Evans v United Kingdom*, ECHR 6339/05). Both the domestic and European judgments ignored the different meaning of the embryos for Evans and her male partner, and their differential ability to use the embryos in any event. The original judgment is an example of how judicial reasoning resorts to formal equality, which neutralises sexual differences and discriminates against women like Evans in gender-specific situations such as pregnancy.

²⁰ See K. Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics' (1989) *University of Chicago Legal Forum*, p. 139.

²¹ [2007] UKHL 27.

²² C. Hunter and H. Carr, '*YL v Birmingham City Council*', in Hunter, McGlynn and Rackley, *op. cit.* n.10, pp.205-227.

the case as an elderly, disabled woman in need of a home and medical care, the provision of which were functions of a public nature. Their judgment shifted focus from the contractual relationship between the private care home and Birmingham City Council towards YL as a person and the imperative of protecting her dignity and human rights.

In this article I apply the method of feminist judging to the issue of women's reproductivity, a key area in which traditional judging has denied women their autonomy based on sex and gender, focusing on the landmark case of *A, B and C v Ireland* and the recent judgment of *P and S v Poland*.²³ In the next section I explain the factual background and reasoning of the ECtHR in each case, and suggest what the Court should have concluded differently by reference to feminist perspectives. In the following section I offer practical feminist rewritings of those judgments. Contrary to a recent conclusion that abortion violates the ECHR,²⁴ I demonstrate that, by introducing feminist contentions in human rights adjudication, abortion can be interpreted compatibly with the rights enshrined in the ECHR. I avail myself of the same evidence and materials available to the Court at the time of the judgments.

The ECtHR's procedural abortion rights jurisprudence

A, B and C v Ireland²⁵

The applicants in this case believed that they were not entitled to abortion access in Ireland. Each of them was unsure whether travelling abroad for an abortion was legal under Irish law. The first applicant travelled to England on 28 February 2005. She had been involuntarily pregnant for nine and a half weeks. In addition, she was living in poverty and did not have the financial means to support her four children; in fact, her children were in foster care. A was a recovering alcoholic who was battling depression; hence, "a further child [...] would [have jeopardised] her health and the successful reunification of her family".²⁶ In order to obtain an abortion, A was forced to borrow money. She did not inform anyone about her decision to

²³ [2010] ECHR 2032; [2012] ECHR 1853.

²⁴ G. Puppink, 'Abortion and the European Convention on Human Rights' (2013) *Irish Journal of Legal Studies* 3(2), p.142.

²⁵ [2010] ECHR 2032.

²⁶ *ibid.*, para. 14.

travel to England, including the social workers. Upon her return to Ireland she refrained from seeking post-abortion treatment. The second applicant was seven weeks pregnant when she travelled to England. She had become pregnant despite her use of emergency contraception. Like the first applicant, B had difficulty meeting the expenses of travelling abroad for an abortion. She was also afraid that doing so would have legal repercussions. When she sought follow-up care upon her return, she was referred to a Dublin clinic affiliated to the one that had performed the treatment in England. The third applicant had become involuntarily pregnant when her cancer went into remission but, unaware of the pregnancy, she had undergone a series of further tests for cancer. Fearing that these would impact on the foetus, and that the pregnancy would aggravate her condition, she sought an abortion in England. Upon her return, she suffered complications, including bleeding and infection.

The first and second applicants' complaints were grounded on the restrictiveness of Ireland's abortion law. Abortion was criminalised in Ireland under the Offences against the Person Act 1861, which made it unlawful to procure or attempt to procure a miscarriage.²⁷ In 1983, the Eighth Amendment to the Irish Constitution introduced a ban on abortion which recognised the speculative right to life of the unborn.²⁸ Article 40.3.3° provides: "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". As a result, an abortion jurisprudence developed against women's reproductive autonomy, diminishing their subjectivity and agency.²⁹

Additional changes were made to the abortion regime when the case of a 14-year-old abortion-seeking girl caused public indignation. She ('X') had been the victim of rape and, thus, sought to obtain an abortion; however, the public authorities secured an injunction to prevent her from travelling abroad to have the pregnancy terminated. In *Attorney General v X*,³⁰ the injunction

²⁷ Offences against the Person Act 1861, ss. 58 (as amended) and 59.

²⁸ Constitution of Ireland, Article 40.3.3°.

²⁹ See, for example, *A and B v Eastern Health Board & C* [1997] IEHC 176, in which a 13-year-old girl who had become pregnant as a result of rape was forced to undergo an abortion rather than being allowed to make a choice independently. In *Baby O (Suing by Mother and Next Friend IAO) v Minister for Justice, Equality and Law Reform* [2002] IESC 53, a pregnant Nigerian refugee was allowed to be deported notwithstanding the risks that this would pose to the unborn foetus; here, protecting the life of the unborn did not suffice to interfere with the deportation order.

³⁰ [1992] IESC 1; [1992] 1 IR 1.

was overturned by the Supreme Court when it held that it is a woman's right to obtain an abortion where there is "a real and substantive risk" to her life. In that case, X had become suicidal as a consequence of being denied access to abortion. Following the Supreme Court's decision in the X case, a referendum brought the Thirteenth and Fourteenth Amendments into being, which allow women to travel abroad for abortion and receive information relating to abortion services.

In her feminist rewriting of *Attorney General v X*,³¹ Ruth Fletcher demonstrates a responsiveness to the human and constitutional rights of women above and beyond the limitations imposed by Article 40.3.3°. She reinforces the notion that law should be interpreted and applied for its intended beneficiaries, which include women,³² and maintains that, as judges, we should "imagine ourselves in the position of the litigant".³³ This approach allows us to view adjudication not as a vehicle for obedience, but rather for empathy in the face of diversity.³⁴ The power of Fletcher's re-imagination of the X case lies in her analysis of the Irish constitutional framework, whereby X's rights to bodily integrity, equal treatment and liberty must be observed when interpreting Article 40.3.3°. She holds on to the doctrine of harmonious interpretation to suggest that Article 40.3.3° cannot extinguish women's existing constitutional rights. Fletcher's approach to narrowing the purpose of Article 40.3.3°, mapping out women's constitutional rights and dissecting the right to life of the unborn is relevant to my rewriting of *A, B and C v Ireland*. Assessing the entirety of women's human and constitutional rights, our rewritings are unconstrained by literal interpretations of the law; they work expansively and articulate judicial conscience on the basis of women's civil and political rights.

In, *A, B and C*, the applicants argued that Ireland's framework on abortion violated Articles 3, 8 and 14 of the ECHR. The third applicant also complained that the restrictions had placed her life at risk, in violation of Article 2. Under the ECHR, Article 2 establishes the right to life, save in the execution of a sentence where death is prescribed by law; Article 3 protects individuals from inhuman or degrading treatment. Article 8 safeguards their private and family life. Unlike Articles 2 and 3, which are absolute, the right to private and family life can be

³¹ R. Fletcher, 'Attorney-General v X', in Enright, McCandless and O'Donoghue, *op. cit.* n.15, p.379.

³² *Ibid.*, p.380.

³³ *Ibid.*, p.381.

³⁴ *Ibid.*

limited.³⁵ Article 14 prohibits discrimination on any ground in the enjoyment of Convention rights, but can only be triggered when another right is engaged.

In relation to Article 2 the Court dismissed C's complaint. It rejected it as ill-founded, considering that the availability of abortion abroad was a sufficient safeguard of the applicant's right to life. Thus, the Court failed to appreciate the intrinsically inequitable nature of a legislative framework that discriminates against women (like A and B) who do not have the financial means for abortion travel. The Court also rejected the applicants' complaints under Article 3. They argued that the law was discriminatory and stigmatising of women, causing physical, psychological and financial burdens;³⁶ thus, it amounted to inhuman or degrading treatment. By contrast, the Court failed to grasp the importance of their internal perspective and experience of the law: it merely reaffirmed the minimum level of severity required in Article 3 claims. According to its case law, the assessment of the "minimum" depended on factors like duration, mental effects and, "in some cases", sex, age and health of the victim. It did not rest on the social or economic grounds that were central to the first two applicants' claims. Hence, none of the Article 3 claims were upheld. Accordingly, their associated claims under Article 14 were also dismissed as "manifestly ill-founded".³⁷

In relation to their Article 8 claims, the applicants first pointed out that Ireland's means of protecting the unborn affected women's lives disproportionately.³⁸ Further the entirety of abortion law created financial burdens that impacted more on poor women,³⁹ thereby discriminating against them on the grounds of class. In response to these arguments, the Court adhered to the framework of formal privacy rights and, therefore, misconstrued the issue at stake. Although it recognised the notion of private life as encompassing personal autonomy, it nevertheless found it necessary to add the caveat that pregnancy to some extent annihilates women's selfhood:⁴⁰ women's rights are weighed against the right to life of the foetus (where

³⁵ ECHR, Art. 8(2) which states that "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

³⁶ [2010] ECHR 2032, paras.162-163.

³⁷ *Ibid.*, para.165.

³⁸ *Ibid.*, paras.170-172.

³⁹ *Ibid.*, para.173.

⁴⁰ *Ibid.*, paras.212-213.

domestic law recognises it). In other words, the Court refrained from challenging the assertion that a foetus is a rights-bearing individual. Rather than engaging with the question of the substantive right to life of the foetus, the Court relied on the uncertain wording of Article 2, which allows “everyone” to enjoy the right to life. Ultimately, the reproductive rights of the claimants were articulated exclusively upon their “private” sexuality and personal autonomy, rather than the repercussions that denying them abortions would have with respect to their economic and social status.

Although the Court identified that there had been an interference with the applicants’ private lives, the question turned to whether that interference was justified by a legitimate aim under Article 8(2). The Court’s assessment relied on the legitimacy of the state’s protection of the life of the unborn as an aspect of the protection of morals. Since Ireland had implemented legislation, through the use of referendums, to protect the life of the unborn, the Court felt that it could not challenge the legitimacy of the state’s abortion regime. In particular, the alleged moral beliefs of the Irish people were used against the applicants’ claims. Thus, the Court did not examine the gender-specific impacts of such protection. At the same time, it avoided any substantive evaluation of Ireland’s abortion law by observing that, since the ethical issues raised by abortion are of a sensitive nature, states should enjoy a wide margin of appreciation.⁴¹ While it found a violation of Article 8 with regard to the third applicant, it struck down the claims by the first and second applicants.

The Court’s reasoning concerning Ireland’s margin of legislative discretion contradicted past case law where the discretion of Member States had been curtailed by the development of consensus on a certain issue at regional level.⁴² The wide discretion accorded to Ireland relegated the Court to a role that merely considered whether the state had acted within its own conception of human rights. Since the first and second applicants’ complaints sought to affirm the substantive right to abortion, the Court could not go as far as to find a violation. On the other hand, it was more demanding about Ireland’s obligations toward the third applicant. It

⁴¹ *Ibid.*, paras.227-228, 233-238. For a critical evaluation of the ‘margin of appreciation’ doctrine and the conflict between universality and relativity in ECHR jurisprudence see C. Cosentino, ‘Safe and Legal Abortion: An Emerging Human Right? The Long-lasting Dispute with State Sovereignty in ECHR Jurisprudence’ (2015) *Human Rights Law Review* 15(3), p.569, 573.

⁴² Most notably, see the case of *Goodwin v United Kingdom* (ECHR 28957/95, 11 July 2002), where the UK legislation was held to violate the human rights of transsexuals and had to be changed in order to enable legal recognition of their post-operative sex.

held that the authorities had failed to comply with their positive obligation to secure respect for her private life: the failure to implement a “regime providing an accessible and effective procedure by which [she] could have established whether she qualified for a lawful abortion amounted to a breach of Article 8”.⁴³

The Court’s upholding of Ireland’s restrictive law demonstrated that women’s reproductive rights are ultimately in the hands of the state; they do not enjoy protection independently of the domestic laws governing them. This non-interventionist approach precluded the substantive protection of the applicants’ rights as human rights under the ECHR.

P and S v Poland

Poland banned abortion in 1993. The Act on Family Planning, Human Embryo Protection and Conditions for Lawful Pregnancy Termination (hereafter, the ‘Anti-Abortion Act’) resulted from intensive anti-abortion campaigns led by the Roman Catholic Church and was supported by both political forces and medical professionals. The restrictive regime of the Anti-Abortion Act permits abortion in three circumstances, namely when the woman’s life is at risk, the foetus is irremediably impaired or there is suspicion that the pregnancy resulted from rape.

In *P and S v Poland*,⁴⁴ the first applicant was a 14-year-old who had become pregnant as a result of rape. She decided to seek abortion with the help of her mother, the second applicant. The search for a facility that would provide the treatment began when the District Prosecutor issued a permit acknowledging the rape that led to her pregnancy. However, despite P’s legal entitlement to an abortion, she was repeatedly refused referral. First, her mother visited the Hospital of the Ministry of Internal Affairs and Administration in Lublin for a referral; there, she was advised to contact a consultant for gynaecology and obstetrics. Later on, the consultant directed her to a public hospital where a chief physician attempted to set up a meeting between the applicants and a Catholic priest. P was manipulated into signing a statement confirming her willingness to carry her pregnancy to term. The hospital issued a press release of P’s story and she became the focus of national media attention. During her stay at the hospital, P was the target of a harassment campaign by several anti-abortion activists who contacted her privately.

⁴³ [2010] ECHR 2032, para.267.

⁴⁴ [2012] ECHR 1853.

Upon her release from hospital, P was placed in a juvenile shelter whilst her mother was accused of forcing her to get an abortion. P was locked in a room without access to facilities; for days she was separated from her family. Ultimately, she was able to deny the allegation against her mother. She testified to the falsity of the allegation at a court hearing that lasted three hours. After two weeks, P was released from the shelter and returned home. She obtained an abortion at a hospital 500 kilometres from where she resided.

The applicants complained that Poland had breached Articles 3 and 8 of the Convention. The Court admitted submissions from various third parties. The Polish Helsinki Foundation for Human Rights stressed that while the 1993 Act on Family Planning grants women *de jure* abortion access, it is difficult (if not virtually impossible) for Polish women to assert such right *de facto*.⁴⁵ Furthermore, the clause on conscientious objection is more than often invoked on behalf of entire health care facilities.⁴⁶ Similarly, Amnesty International observed that “[the subjection] of a child to sustained and aggravated harassment with a view to getting her to continue an unwanted pregnancy [...] constitutes mental violence”.⁴⁷

The Court’s approach was consistent with its procedural abortion rights jurisprudence.⁴⁸ It focused on Poland’s failure to address the systemic and deliberate violations by health care providers of the applicant’s right to private life; however, it failed to appreciate that those violations derived from a broader landscape of gender relations in Poland, where women’s social status is defined by the religious and moral considerations of political forces. The Court was only able to find a violation of Article 8 insofar as P’s right to abortion was permitted by the 1993 Act: had the case been unaltered, but with no statutory provisions to support P’s access to abortion, the Court would have rejected the Article 8 complaint (as in *A, B and C v Ireland*).⁴⁹ As Erdman explains, the value of procedural human rights protection depends on the state’s

⁴⁵ *Ibid.*, para.58.

⁴⁶ *Ibid.*, para.59.

⁴⁷ *Ibid.*, para.77. However, Amnesty’s emphasis that the first applicant was a child should be distinguished from feminist contentions on women’s reproductive freedom. It is not the vulnerability of the woman that matters (i.e. her status as a “child”), but rather it is her informed choice that should be upheld independently of age. If we replace the word “child” with “woman”, Amnesty’s argument strengthens.

⁴⁸ See, e.g., *A, B and C v Ireland* [2010] ECHR 2032; *Tysiqc v. Poland* [2007] ECHR 219; *R.R. v Poland* [2011] ECHR 828.

⁴⁹ See *A, B and C v Ireland*, *ibid.*, para.242, where the Court concluded that there had been no violation of Article 8 as regarded the first and second applicants, as opposed to the third applicant (para.267).

failure to implement procedural safeguards to secure the rights pre-established through its domestic law.⁵⁰

In assessing the Article 3 claim, the Court reiterated the threshold of “minimum severity”. It took the view that the treatment of P was inhuman because it had been premeditated and had actuated bodily harm; moreover, it was degrading in that it aroused “fear, anguish and inferiority capable of [...] debasing [her]”.⁵¹ I take issue with the fact that the Court did not take the same approach in recognising the inhuman and degrading treatment of the applicants in *A, B and C v Ireland* based on their personal experiences. It appears that the Court’s decision in the present case was unduly influenced by the age of the applicant. The Court depicted her as a “vulnerable and distraught teenager in a difficult life situation”.⁵² Ultimately, I believe that P’s Article 3 complaint succeeded by virtue of her status as a victim and a child. The Court did not articulate its reasoning around P’s agency and right to self-determination; thus, it failed to address the substance of her right to lawful abortion.

Feminist rewritings of the ECtHR’s jurisprudence

The following rewritings show the importance of adopting feminist standards when adjudicating on abortion cases. Their aim is to restore the applicants to the centre of their own narratives and demonstrate awareness of those factors which underpinned their requests for abortions. In my rewritings, I consider factors such as personal autonomy and intersectional discrimination when assessing the legitimacy of states’ restrictions. Similarly, the feminist judgments challenge the masculinist assumptions on proportionality, privacy, discrimination and inhuman treatment and put forward alternative feminist interpretations of these concepts.

As outlined above, the method adopted is inspired by Eva Brems’ edited collection, *Diversity and European Human Rights: Rewriting Judgments of the ECHR*.⁵³ It consists in redrafting parts of the original judgments that constituted the Court’s reasoning and decision-making

⁵⁰ Joanna N. Erdman, ‘Procedural Abortion Rights: Ireland and the European Court of Human Rights’ (2014) *Reproductive Health Matters* 22(44), pp.28-29.

⁵¹ [2012] ECHR 1853, para.158.

⁵² *Ibid.*, para.131.

⁵³ Brems, *op. cit.* n.5.

processes. The redrafted paragraphs are distinguished from the originals by the use of **bold** fonts. In so far as possible, they follow the paragraph numbering of the original judgments.⁵⁴ Deleted paragraphs/fragments are indicated by elipses.

A, B and C v Ireland

C. Article 2 of the Convention

157. The third applicant complained under Article 2 that abortion was not available in Ireland even in a life-threatening situation because of the failure to implement Article 40.3.3 of the Constitution. The Government argued that no issue arose under Article 2 of the Convention.

158. The Court has acknowledged in its case law that Article 2 imposes a positive obligation on the State to safeguard the lives of those within its jurisdiction. The obligation includes taking all necessary measures “to prevent the applicant’s life being unavoidably put at risk” (*LCB v United Kingdom* (1998), § 36, Reports and Judgments of Decisions 1998-III; *Osman v United Kingdom* (1998), § 116, Reports 1998-VIII). In particular, the denial of health care may raise issues when it threatens the individual’s right to life.

Although there is no regional consensus on the point at which life begins, i.e. for the foetus, the Court observes that the right to life of the applicant is protected under international treaties, including the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights and the European Convention on

⁵⁴ I recommend that, in order to gain a comprehensive understanding of the aim of this project, the feminist redraftings should be read alongside the original judgments. It suffices that the reader refers back to the original judgments (e.g. for the paragraphs written in bold) and notes the different approaches adopted in the feminist versions.

Human Rights. Thus, the Court takes into account the consensus under these human rights instruments as a basis for its findings.

The third applicant was entitled to the protection granted by Article 2 where the pregnancy constituted a real and serious threat to her life by reason of her pre-existing condition. In *Attorney General v. X* (1992) I.E.S.C. 1; (1992) 1 I.R. 1, the Supreme Court of Ireland found that the risk to an applicant's life, in that case self-destruction, as a result of continuing the pregnancy was sufficient to derogate from domestic legislation and allow a termination. Similarly, the Court hereby finds that the possibility of serious deterioration in the third applicant's health was a sufficient ground for the implementation of Article 40.3.3.

159. The Court rejects the State's contention that the fact that C, in light of the Thirteenth Amendment of the Irish Constitution, was able to travel to England for abortion defeated her claim. Rather, it accepts that the continuation of a pregnancy would have posed a real and serious risk to C's life and that the State, by failing to take all necessary measures to secure her domestic right to abortion, contributed to that risk.

160. The Court concludes that, due to evidence as to the likely consequences that continuing a pregnancy would have had on C's health, the State failed to fulfil its positive obligations under Article 2.

D. Article 3 of the Convention

161. The Court considers it evident [...] that the applicants suffered serious psychological and physical hardship whilst travelling abroad for abortion. It was also financially burdensome for the first applicant (see paragraph 128).

162. [...] The Court reiterates its case-law to the effect that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum depends on **evidence of the effects that the circumstances of the case had on the applicants, including the extent and duration of the treatment, its physical and mental repercussions and the socio-cultural background**, sex, age, health and **financial status** of the victim [...]. In the above-described factual circumstances [...] and whether or not such treatment is entirely attributable to the State, the Court considers that the facts alleged **may disclose a level of severity falling within the scope of Article 3 of the Convention.**

163. The physical pain associated with the criminalisation of abortion in Ireland is evident from the facts of the case. The first applicant was reluctant to seek medical assistance for fear of the legal implications of having an abortion abroad. Whilst her unawareness of the law is not entirely attributable to the State, third-party submissions (see paragraphs 120-121) demonstrate a lack of procedural efficiency in abortion services in Ireland and a general reluctance to assist women in obtaining abortions and post-abortion care.

164. The second applicant experienced a similar concern when she required medical assistance after passing blood clots. The third applicant suffered complications as a result of an incomplete abortion and was not directed by her GP to seek post-abortion care when it became apparent she was no longer pregnant. In terms of psychological impact on the applicants, the Court accepts that this is by its nature subjective (see paragraph 126) and cannot be measured objectively. However, the Court has previously determined that sexual assaults reach the minimum level of severity required to meet the Article 3 threshold (see, for example, *Aydin v Turkey* (1998) 25 H.E.R. 251; *E v UK* (2003) 36 E.H.H.R. 31; *Maslova v Russia* (2009) 48 E.H.H.R. 37). In those cases, to force an

involuntarily pregnant woman to carry her pregnancy to term would breach the positive obligations of the State under Article 3.

165. The Court is of the view that, regardless of the woman's status as victim of a crime, or the risk to her life and health, it is necessary to acknowledge the impact of an unwanted pregnancy. The forced continuation of an unwanted pregnancy or the clandestine termination of pregnancy are both capable of causing the deterioration of a woman's physical and mental status. Similarly, the conditions under which the first and second applicants travelled abroad were imposed by Ireland's restrictions and contributed to the applicants' mental and physical suffering.

166. The Court considers that the mental and physical effects of the restrictions on the first and second applicants' access to abortion were sufficient to declare the treatment degrading under Article 3. The third applicant's health status was particularly severe prior to her seeking abortion, and the State's failure to safeguard her health may be considered inhuman within the meaning of Article 3.

The Court has not provided in its case law a general standard against which to measure any given treatment. Rather, it acknowledges that considerations regarding ill-treatment change over time. The Court considers that the cost and subsequent stigma associated with travelling abroad for abortion can be interpreted, cumulatively with the abovementioned physical and mental effects, as reaching the *minimum* level of severity required under Article 3.

167. The Court concludes, having regard to the circumstances of the case seen as a whole, that the Irish prohibition had serious effects on the lives of the applicants and that their suffering reached the minimum level of severity under Article 3.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

168. The first and second applicants complained under Article 8 about the restrictions on lawful abortion in Ireland which meant that they could not obtain an abortion for health and/or well-being reasons in Ireland, and the third applicant complained under the same Article about the absence of any legislative implementation of Article 40.3.3 of the Constitution.

[...]

(a) Positive or negative obligations under Article 8 of the Convention?

216. **Since** there are positive obligations inherent in effective respect for private life (see paragraphs 244-246 below), the Court considers it appropriate to analyse the first and second applicants' complaints as concerning **Ireland's positive** obligations [...].

217. The Court has reaffirmed in its case law the right of citizens to effective respect of their physical and psychological integrity (*Maric v Croatia* (dec.) no. 50132/12, 12 June 2014; *VK v Slovakia* (dec.) no. 18968/07, 8 November 2011; *Glass v United Kingdom*, no. 61827/00, 9 March 2004). It observes that the respect of psychological and physical integrity may entail the adoption of measures by the State, including the provision of health care services such as abortion.

218. [...] The essential question [...] is whether the **State's** prohibition is an unjustified interference with **the applicants'** rights under Article 8[...].

219. [...] **The Court must examine whether or not the interference** was justified under the second paragraph of **Article 8** namely, whether **it** was "in accordance with the law" and

“necessary in a democratic society” for the pursuit of one of the legitimate aims specified in Article 8 of the Convention.

(b) Was the interference “in accordance with the law”?

220. The applicants accepted that the restriction was in accordance with the law [...].

221. [...] The Court also considers that it was clearly foreseeable that the first and second applicants were not entitled to an abortion in Ireland for health and/or well-being reasons **within the legislative framework of sections 58 and 59 of the Offences Against the Person Act 1861, as qualified by Article 40.3.3 of the Constitution as interpreted by the Supreme Court in *Attorney General v. X* (see paragraph 158). However, the Court acknowledges that the applicants’ claims relate to their substantive right to abortion under Article 8 as opposed to the existing procedural framework of Irish abortion law. The Court accepts that the Irish framework provided no procedural right to domestic abortion for the applicants but identifies a substantive right to physical autonomy (e.g. abortion) under Article 8 of the ECHR.**

(c) Did the interference pursue a legitimate aim?

222. The Court points out that, in the above-cited *Open Door* case (paragraph 38), it found that the protection afforded under Irish law to the right to life of the foetus was based on profound moral values [...] which were reflected in the stance of the majority of the Irish people [...].

[...]

227. The Court concludes that the impugned restriction therefore pursued the legitimate aim of the protection of morals of which the protection in Ireland of the right to life of the unborn was one aspect.

[...].

(d) Was the interference “necessary in a democratic society”?

[...]

230. The Court must examine whether there existed a pressing social need for the measure in question and, in particular, whether the interference was proportionate to the legitimate aim pursued (see paras. 222-227 above) [...]. **The Court observes that the first and second applicants faced substantial hardship in having to travel abroad for an abortion and, on this basis, proceeds to evaluate the proportionality of the State’s interference.**

231. The Court acknowledges that the impugned prohibition is based on the legal framework implemented under the Irish Constitution, which does not permit abortion for health and well-being reasons. In examining the necessity of the interference, the Court must consider whether there were no lesser means available to the state to achieve the legitimate aim of protecting the right to life of the foetus as part of protecting morals.

While a margin of appreciation could be accorded to the State, the Court observes that the right to life of the unborn could not be accorded primacy to the exclusion of the proportionate protection of the rights of women [...].

232. The Court points out that a number of factors must be considered when determining the **State’s margin of appreciation. These include the applicants’ right to personal autonomy and physical and psychological integrity as affirmed in the Court’s case law. Further, in conjunction with the protection from discrimination under Article 14, the**

Court emphasises Ireland’s duty to make access to abortion under its framework available to all women equally. In this case, the financial hardship imposed on poorer women as a result of the requirement to travel abroad for an abortion cannot be interpreted as necessary in a democratic society.

233. The Court accepts that the State’s interference may be necessary for the fulfilment of the specific needs of the Irish society. However, it clarifies that the protection of morals is based on standards that are by their very nature subjective. In addition, the standards set out by the Council of Europe and its Member States are relevant in adjudicating on internationally recognised human rights such as Article 8.

234. The question is whether Ireland’s wide margin of appreciation on abortion is narrowed by the existence of the international human rights standards set out in the European Convention on Human Rights. The Court relies on the existence of international treaties that guarantee the protection of women’s rights to personal autonomy and integrity, in particular the Convention on the Elimination of all Forms of Discrimination Against Women. [...] The existence of a consensus has long played a role in the development and evolution of Convention protections [...], the Convention being considered a “living instrument” [...]. **Therefore, the increasing importance of human rights protection may be invoked to justify a progressive interpretation of Convention rights, particularly where individuals’ enjoyment of human rights in Member States is hindered by their socioeconomic status.**

[...]

240. In the European Union, abortion access has increased over the past ten years. In Austria, Belgium, France, Great Britain, The Netherlands, Norway and Sweden, abortion access is available upon request within set timeframes. In France, medical or surgical abortions can be performed by doctors in a private practice. In Norway, abortion is available free of charge. In other Member States such as Denmark, Finland, Germany,

Italy, Portugal and Spain, abortion is permitted if the woman can demonstrate some form of distress – either physical, mental or socioeconomic – caused by the pregnancy. Abortion is illegal in a few Member States, including Poland and Malta, where women and physicians who receive or perform abortions can be jailed between 18 months and 3 years.

241. The Court appreciates the varying degrees of permissibility of abortion in the European Union. However, in light of the majority of Member States’ trend towards permitting abortion, Irish women are likely to seek abortion abroad under the Thirteenth Amendment of the Irish Constitution. This means that the legitimate aim claimed by Ireland (i.e. the protection of morals; see paragraph 222 above) is frustrated by the State’s own legal framework giving women alternative, albeit burdensome, means of obtaining abortion. Under this framework, the applicants’ health and well-being was disproportionately affected by the necessity to travel abroad, which has financial implications: it was foreseeable that Ireland’s prohibition would have more severe effects on women in complicated life circumstances.

242. The Court is not therefore persuaded that the interference was necessary to protect the right to life of the foetus as part of the protection of morals. It observes that there may be alternative methods of achieving these aims that do not cause such hardship to abortion-seeking women. The wide margin accorded to the State nevertheless requires it to consider the effects that such interference would have on women.

243. The prohibition in Ireland of abortion for health and well-being reasons exceeds the margin of appreciation accorded in that respect to the Irish State. In such circumstances, the Court finds that it **did not strike a fair balance between the right of the first and second applicants to respect for their private lives and the rights invoked on behalf of the unborn as part of the protection of morals. The Court reiterates that there is no confirmed evidence**

that the interference can achieve the legitimate aim claimed by the State, due to the availability of abortion in other Member States. Ultimately, the protection of morals affects disadvantaged women who cannot afford to travel abroad more than it does wealthier Irish women who can readily seek abortion elsewhere.

(e) The Court's conclusion as regards the first and second applicants

244. The Court concludes that there has been a violation of Article 8 of the Convention.

[...]

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 8

269. The applicants also complained that the above described restrictions and limitations on lawful abortion in Ireland were discriminatory and in breach of Article 14 of the Convention taken in conjunction with Article 8 in that they placed an excessive burden on them as women and, in particular, on the first applicant as an impoverished woman.

The Court's assessment

270. The Court considers it necessary to examine the applicants' complaints under Article 14 in conjunction with Article 8.

Previous case law indicates the principles to be observed when determining a breach of Article 14 in relation to one of the Convention rights. The differential treatment of individuals "in relevantly similar situations" can amount to discrimination if it is not

objectively and reasonably justified. The same applies to States' failures "to treat differently persons whose situations are significantly different" without appropriate justification (*Thlimmenos v Greece* (2001) 31 E.H.H.R. 411 § 44). The Court appreciates that abortion *per se* is a gender-specific issue that is likely to result in discrimination when denied; the Court has previously accepted that "a general policy [...] that has disproportionately prejudicial effects on a particular group may be considered discriminatory *notwithstanding* [emphasis added] that it is not specifically aimed at that group" (*DH v Czech Republic* (2008) 47 E.H.H.R. 59).

271. The Court acknowledges that Ireland's impugned legal framework was aimed at a specific group of persons, namely abortion-seeking women. The Court therefore considers it discriminatory against women on the ground of sex. The framework also had disproportionately prejudicial effects on the applicants, as discussed in relation to their complaints under Article 8 (see paragraphs 216-241). Therefore, the Court rejects the Government's argument that such differential and discriminatory treatment was justifiable and proportionate for the reasons referred to under Article 8 of the Convention. In light of the Council of Europe's goal of achieving gender equality, it is not possible for Member States to set independent thresholds for gender bias and discrimination.

272. In addition, the Court considers Ireland's legal framework to be discriminatory against women on grounds of class. As mentioned in response to the applicants' Article 8 claims, it is evident that the Irish framework on abortion is more burdensome for disadvantaged or impoverished women. Some women may not avail themselves of the rights under the Thirteenth Amendment to travel abroad, for financial reasons; others, upon their return, may be unable obtain post-abortion treatment as submitted by third parties to this application and in the case of the third applicant (see paragraph 163).

273. States must demonstrate that the discriminatory measures were advanced to pursue a legitimate aim. In order to dismiss a complaint under Article 14, the Court must be satisfied that there is a relationship of proportionality between the aim pursued and the measures applied. The Court has previously stated that the impugned prohibition on abortion does not strike a fair balance between the State's aim of preserving unborn life as part of protecting morals and the rights of the applicants (see above, paragraphs 216-242). Similarly, the success of the Article 14 complaints depends on whether discrimination against abortion-seeking women was a proportionate means of achieving such aim.

274. The court observes that the prohibition of abortion on health and well-being grounds denies women, not men, their capacity for responsible decision-making as moral agents because it substitutes their decisions with others' moral values. Whilst the latter are legitimate, the Court does not accept that they must take precedence over women's decisions that affect their identity and bodily integrity.

Further, the Court considers that the prohibition constitutes an affront to women's dignity as autonomous human beings. Since the prohibition only affects women, it results in inequality between men and women in society, in that men enjoy a greater control over their reproductive lives. The evidence submitted by the applicants demonstrates that women's limited control over reproduction has a substantial impact on the quality of their lives by increasing their physical, psychological and financial vulnerability.

The Court concludes that there has been a breach of Article 14 in combination with Article 8, in that the discrimination against abortion-seeking women is not a proportionate means of protecting the life of the foetus or the morals of the Irish people. The State's legal framework had disproportionate effect on the applicants' lives and, therefore, cannot be justifiable under Article 14.

P and S v Poland**II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION AS REGARDS
THE DETERMINATION OF ACCESS TO LAWFUL ABORTION**

[...]

*The Court's assessment***(a) General principles**

94. The essential object of Article 8 is to protect the individual against arbitrary **and unjustified** interference by public authorities. [...] **In certain circumstances there may be positive obligations inherent in the respect for private life.** [...]. The Court has previously found States to be under a positive obligation to secure to their citizens the right to effective respect for their physical and psychological integrity [...], including the provision of an effective and accessible means of protecting the right to respect for private life (see *Tysi c v. Poland*, §110; *R.R. v. Poland*, §184) [...].

95. **The Court has previously held in its case law that Article 8 does not guarantee the right to an abortion in itself. However, it considers that the implications of a continued pregnancy are capable of affecting the private lives of women. In addition, the prohibition of abortion on health or well-being grounds directly conflicts with the right to respect for one's private life as proclaimed in Article 8** (see *A, B and C v. Ireland* [GC], no. 25579/05, § 245, 16 December 2010, § 214).

96. The Court understands that the ethical debate over the status of the foetus cannot be resolved and that it is not desirable for the Court to give a final decision on the point at which life begins. However, the Court finds that there is a consensus amongst a substantial majority of the Contracting States of the Council of Europe that allowing abortion is crucial to the advancement of women's reproductive freedom. Since it is not possible to establish a definitive stance on the life of the foetus, the Court considers that it is more desirable to strike a fair balance between the individual's private life and the public interest, excluding speculative assertions on the interest of the unborn.

97. The Court considers that the religious, moral and ethical views of the Polish people – which may also be held by public authorities – may pose an obstacle to the practical and effective enjoyment of the rights which the Convention intends to guarantee. In the present case, these views constituted a significant impediment to the implementation of the laws regulating abortion; nevertheless, the State is, on all occasions, under a positive obligation to create a procedural framework enabling a pregnant woman to exercise her right of access to lawful abortion (A, B and C v. Ireland [GC], cited above, § 249; R.R. v. Poland, cited above, § 200). [...] Whilst Article 8 does not prescribe a specific procedure for the fulfilment of a state's positive obligations, it is fundamental to determine whether the interests and views of the individual concerned have been taken into account. The Court has [...] held that in the context of access to abortion the relevant procedure should guarantee to a pregnant woman *at least* [emphasis added] the possibility to be heard in person and to have her views considered. This is necessary because medical professionals who hold opposing views also hold a disproportionate amount of power to determine the timing and success of the termination compared to the interested woman. A competent body or person should provide cogent grounds for its decision and take the appropriate measures for the woman's choice to be otherwise observed.

[...]

112. Having regard to the circumstances of the case **and the regional standards developed on the issue of abortion access**, the Court concludes that the authorities failed to comply with their positive obligation to secure the applicants' effective respect for their private life. There has therefore been a breach of Article 8 of the Convention.

[...]

V. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

150. The applicants further complained that the facts of the case had given rise to a breach of Article 3 of the Convention in respect of the first applicant.

[...]

B. The Court's assessment

157. **The Court has established that ill-treatment must attain a minimum level of severity to fall within the scope of Article 3.** The assessment of this minimum level of severity is relative; **it depends on the evidence of the effect that the circumstances of the case had on the individual in question,⁵⁵ including the extent and duration of the treatment, its physical and psychological repercussions, the socio-cultural background, sex, age, health and financial status of the victim.**

[...]

⁵⁵ See the redraft of *A, B and C v Ireland*, above, para.164.

161. The Court takes into account that the first applicant was at the material time only fourteen years old. She was also a victim of rape. However, had the first applicant not been a minor or a victim of rape, the Court would maintain that the circumstances amounted to inhuman and degrading treatment. It considers that the systemic denial of abortion led to a prolonged and humiliating experience whereby P was unable to vindicate her statutory right to abortion. The public authorities disregarded her demand for lawful abortion and exposed her to the unsolicited opinions of religious figures and anti-abortion campaigners when it was clear that she wanted to terminate the pregnancy.

162. In light of the above, the Court has no choice but to conclude that the first applicant was in a situation of great vulnerability. **The Court also observes that the public authorities contributed to aggravate that situation.**

[...]

166. On the whole, the Court considers that no proper regard was had to the first applicant's vulnerability and young age; **most importantly, her views and feelings were set aside and both applicants were put under considerable pressure by the Lublin hospital's medical staff and the police.**

[...]

168. The Court concludes, having regard to the circumstances of the case seen as a whole, that the first applicant was treated by the authorities in a deplorable manner and that her suffering reached the minimum threshold of severity under Article 3 of the Convention.

Conclusion

Feminist legal theory has critiqued the role of law in limiting women's autonomy and reproductive freedom. Feminist scholars, particularly those involved in rewriting judgments,

have exposed the gender bias that is inherent in the law by demonstrating how the latter adopts masculine qualities, experiences and narratives as the legal norm. Consequently, the so-called universality of rights as interpreted in adjudication is best understood as a neutralisation of gender – that nevertheless exists in the social sphere – in the law.

Feminist judgment-writing contends that the implications of legal rules for women's lives are determined by an ideological framework that is entrenched into legal reasoning and decision-making. However, feminist analyses of that framework can challenge the standpoints of actors in the legal process, both by raising awareness of the impact of the law on women's social reality and by proposing alternative methods of reasoning that are less limiting to women's freedom. In this sense, the method of feminist judging provides an innovative tool of struggle against the masculine norms imposed on women through the legal process. Feminist judgments contribute to our understanding of law's potential to deliver gender justice so far as they enable feminist concerns to be heard and acted upon. Rewriting judgments from a feminist perspective allows for a comprehensive account of legal, social, political and other discourses that are active in society and influence individuals' lives; it exemplifies the benefits that feminist reasoning can bring to the law as a living instrument; and it liberates the law from the normative construction of gender by addressing both theoretical and practical feminist concerns regarding women's rights and liberties.

As a result, law remains open to feminist critique and this article shows that feminist reasoning is not incompatible with legal reasoning. Similarly, law does not inherently disqualify women's voices or their experiences of social reality. By interpreting legal rules from a feminist perspective, feminist judges actually implement the concept of substantive equality, which can only be attained if women are able to negotiate the content of their rights according to their own needs. The impact of feminist legal theory in academia combined with the future influence of feminist judgments in legal practice demonstrate that law can be interpreted progressively to develop and expand women's rights and break historical stasis.