Lech Garlicki
Washington University in Saint Louis, USA
lech.garlicki@gmail.com
ORCID: 0000-0002-6590-2158

https://doi.org/10.26881/gsp.2025.1.07

Same-Sex Unions, Abortion, and the Constitutional Court of Poland: Two Recent Judgments of the European Court of Human Rights

Introduction

At the end of 2023, two important judgments of the European Court of Human Rights (ECtHR) were adopted in Polish cases. Both related to issues that aroused strong social emotions and political controversy. In both of them, the European Court found a violation of Art. 8 of the European Convention on Human Rights (ECHR). In the Przybyszewska case[1] the violation resulted from the lack of comprehensive regulation of the legal status of same-sex couples. In the M.L. case,[2] the violation resulted from the extension of the abortion ban to situation where a severe and irreversible damage to the fetus has been medically established. Although this was one of the three situations in which the Polish legislation permitted abortion, this provision was found unconstitutional by Polish Constitutional Court in 2020.[3] In both cases, the Strasbourg

[1] Judgment of 12.12.2023, *Przybyszewska and others v. Poland* (#11454/17). See: M. Wąsik, *Przybyszewska i inni przeciwko Polsce. Istotny wyrok dla Polski i mała cegiełka w budowaniu podwyższonego standardu strasburskiego dla związków jednopłciowych*, EPS 2024, no. 3, p. 20 ff.

[2] Judgment of 14.14.2023, *M.L. v. Poland* (#40119/21). See: L. Garlicki, *"Aborcyjny wyrok" Trybunału Konstytucyjnego przed Europejskim Trybunałem Praw Człowieka – glosa do wyroku ETPCz z 14.12.2023 r., 40119/21, M.L. p. Polsce*, EPS 2025, no. 1, p. 23 ff.

[3] Judgment of 27.10.2020, K 1/20, OTK ZU A.2021, pos. 4. It is worth noting that, in a departure from the established practice, the operative part of this judgment was delayed. It was published in the *Journal of Laws* only on January 27, 2021, when the Constitutional Court adopted the final text of the reasons for the judgment. The Council of Ministers decided that the judgment had caused social unrest, so the publication should be postponed, because only a reading of the reasons for the judgment would clear up all doubts. The legal basis for such a postponement was explained as follows: "The existing situation bears the hallmarks of a state of extreme necessity. Undoubtedly, the judgment of the Constitutional Court must be published in the *Journal of Laws*. At the same time, however, the situation of very serious social tensions requires considering carefully the appropriate date of this publication. The Prime Minister cannot decide not to publish a judgment of the Constitutional Court made in accordance with the applicable procedure. At the same time, there is no regulation obliging the Prime Minister to publish the judgment of the Constitutional Court within a specified number of days or by a specified date" (Position of the Council of Ministers of December 1, 2020, on the deadline

Court also assessed the status and manner of operation of the Polish Constitutional Court.

However, this is where the similarities end, because both the way in which both cases were resolved, as well as their connection with the existing case-law of the ECtHR jurisprudence, took a different form. In short, it can be said that the judgment regarding the legal status of same-sex couples can be seen as an obvious application of the already well-established position of the ECtHR. On the other hand, the judgment regarding abortion should be read rather as a reaction to the extreme nature of the way in which the new abortion ban had been included into the Polish legal system. The Court carefully avoided formulating more general standards, and limited the violation of the Convention to the finding that the interference with the complainant's rights was lacking a proper legal basis.[4]

1. *Przybyszewska and others v. Poland*: a confirmation of the universality of the European standard

The judgment of December 12, 2023, should be seen as another confirmation of the "positive obligation" of all states parties to the European Convention to regulate the legal status (institutionalization) of same-sex unions, and to ensure them comprehensive recognition and protection. This line of jurisprudence was initiated by the (still very cautious) holding in the Schalk and Kopf case;[5] the ECtHR accepted that the nature of the same-sex unions allows them to be regarded as a form of "family life" and, therefore, includes them into the scope of protection ensured under Art. 8 of the ECHR. Three years later, it was ruled that the legislation on civil partnerships could not establish differences based on the criterion of sexual orientation; so Art. 14 of the Convention was adopted as an additional norm of reference.[6] In 2015, the

for publication of the judgment of the Constitutional Court in the case with reference number K 1/20, MP 2020, item 1104). This argument makes no legal sense, and it echoes the controversy that emerged in 2015–2016, when the newly established PiS government, first delayed and later refused publications of the judgments of the "old" Constitutional Court in the *Journal of Laws* (see: L. Garlicki, M. Derlatka, *Constitutional Courts in the abusive constitutionalism* [in:] *Le constitutionalism abusive en Europe*, dir. P.-A. Collot, Paris 2022, p. 315 ff.). The problem surfaced again in 2024 (albeit in a different political context) when the current Prime Minister refused to publish the judgments of the Constitutional Court.

[4] Let us recall that particularly in cases relating to an infringement of Art. 8 of the ECHR, the Court considers in order whether: 1) the interference had the appropriate legal basis; 2) it served the realization of the public interest set out in Art. 8, paragraph 2 of the Convention; 3) it was "necessary" in a democratic society. A finding that the first of these conditions was not met is sufficient to establish that there has been a violation of Art. 8 of the Convention. The finding of such violation allows the Court to refrain from examining the other factors, in particular, whether the restriction on Art. 8 rights has been "necessary in the democratic society." In politically sensitive cases it allows the Court not to enter into the merits, thus not to take a clear position on the most delicate issues.

[5] Judgment of 24.06.2020, *Schalk and Kopf v. Austria* (#30141/04).

[6] Judgment of 7.11.2013, *Vallianatios and others v. Greece* (#29381/09 – Grand Chamber).

Court held, for the first time, that there is a positive obligation to implement legal institutionalization of same sex couples, and that such institutionalization should ensure "adequate" legal recognition and protection.[7] At the same time, in the finding a violation, the Court relied, to a considerable extent, on the specificity of the Italian context. It was observed that the institutionalization was not only favored by the majority of the Italian population, but also it was supported in the case-law of the national courts. This left a question mark as to whether the ECtHR's holding should be treated as a pan-European standard, applicable also to countries where the society and judiciary hold to less progressive positions. The problem was solved only by the judgment of January 17, 2023, in the Fedotova case.[8] The 2023 judgment was drafted in a way which confirmed that its holding applies to all Member States. Each of the 46 Convention countries is, therefore, bound by the positive obligation to recognize same-sex union in its legal system, and to provide these unions with an "adequate" level of protection.

At the same time, however, legal recognition need not take the form of a "regular" marriage. This position was articulated already in the Schalk and Kopf judgment in 2010 and has been confirmed in several subsequent cases. Thus, Member States retain a significant margin of appreciation regarding the legal form of this recognition.[9]

The Fedotova judgment was officially addressed only to the Russian Federation. Nevertheless, it was also meant as a message to all those Convention countries that had not yet institutionalized same-sex unions. The Court was clear that a lack of appropriate legislation in any country would be regarded as a violation of the Convention. In other words, there was a presumption that further complaints on the lack of institutionalization would be resolved by the simple application of the criteria established in the Fedotova judgment. These criteria left virtually no room for referring to the specificity of the local context, and what is more, since they were established at the level of the Grand Chamber they became binding for decisions made by individual Chambers of the Court.

In the following months of 2023, several chambers successively heard cases concerning Romania,[10] Ukraine,[11] Bulgaria,[12] and finally Poland. The Ukrainian judgment found a violation of Art. 14 of the Convention (prohibition of discrimination) in connection with Art. 8 of the Convention, while in the remaining cases the Court

---

7 Judgment of 21.07.2015, *Oliari and others v. Italy* (#18766/11).

8 Judgment of 17.01.2023, *Fedotova and others v. Russia* (#40972/11). See, among other accounts: L. Garlicki, *Fedotova i inni przeciwko Rosji, czyli sformułowanie ogólnoeuropejskiego standardu nakazującego prawne uznanie związków monoseksualnych*, EPS 2023, no. 2; M. Górski, *"Wykuwanie stali", czyli o kształtowaniu standardu wykładni EKPC na przykładzie kwestii formalizacji związku jednopłciowego*, PiP 2022, issue 12; M. Wąsik, *Wyrok Wielkiej Izby w sprawie Fedotova i inni przeciwko Rosji a podwyższony standard ochrony dla związków osób tej samej płci*, EPS 2023, no. 2.

9 Judgment of 12.12.2023, *Przybyszewska and others v. Poland*, paragraph 99. See: L. Garlicki, *Fedotova…*, p. 28.

10 Judgment of 29.05.2023, *Buhuceanu and others v. Romania* (#20081/19 and others).

11 Judgment of 1.06.2023, *Maymulakhin and Markiv v. Ukraine* (#73135/14).

12 Judgment of 5.09.2023, *Koilova and Babulkova v. Bulgaria* (#40209/20).

focused on Art. 8 and held that it was no longer necessary to consider an objection based on Art. 14. It may indicate the Court's caution in making a broader use of Art. 14 in further case law regarding same-sex relationships.[13]

The Strasbourg Court had no problems with determining the admissibility of the complaints raised in the Przybyszewska case. It was recalled that in all cases, registry offices rejected the relevant applications of same-sex couples, and common courts confirmed the lack of legal grounds for these couples to marry. Constitutional complaints have either been discontinued or have been waiting for consideration by the Constitutional Tribunal for years.[14] There was, therefore, no need to wait for further decisions of the Constitutional Tribunal, and this is additionally confirmed by doubts as to the general context of its functioning and the status of several of its judges (paragraph 52). Moreover, public statements by some other judges call into question their impartiality.[15]

As for the merits of the case, the Court recalled the five principles established in the Fedotova judgment: 1) the Convention requires the adoption of national regulations enabling same-sex couples to obtain recognition and protection of their relationship; 2) there is no obligation to extend the scope of the traditional "marriage" to same-sex couples, providing the national regulation offers an adequate level of recognition and protection; 3) the margin of appreciation that states have under the Convention is "significantly reduced" when it comes to creating institutionalization as such; 4) this margin takes on a "more extensive" dimension when it comes to determining the details of institutionalization, both regarding the "recognition" and "protection" of same-sex relationships; and 5) in any case, it is the state's duty to ensure the "adequate" level of this protection, both in material and financial matters and in other matters constituting an integral element of cohabitation (paragraphs 97–102).

As can be seen from the above, the current case law of the ECtHR has adopted a two-step approach to assessing national solutions. A common starting point is the doctrine of the "margin of appreciation,"[16] which is particularly important for determining whether the national legislator has maintained a "fair balance" between the rights of same-sex couples and relevant public interest considerations. However, the extent of that margin is different in the matter of the very introduction of provisions

---

[13] M. Wąsik, *Przybyszewska*…, p. 25; see, however, different views in the Russian, Romanian, and Bulgarian judgments by the ECtHR.

[14] Decision of the Constitutional Court of 15.12.2021, SK 9/19, OTK ZU A.2022, pos. 19, claiming that a lack of institutionalization constitutes "legislative gap" and, thus, is beyond the scope of review by Constitutional Court. See a similar decision of 1.07.2021, SK 15/17, OTK ZU A.2021, pos. 51 and the dissenting opinions of justices Stelina and Zielonacki in these cases.

[15] The applicants cited the somewhat shocking statements of justice Pawłowicz (paragraphs 46 and 117). It is worth noting that in the M.L. case, too, an accusation of lack of impartiality was laid against this judge, on this occasion referring to her participation as a deputy in parliament in a legislative initiative to restrict abortion regulations in 2017 (M.L. judgment, paragraphs 131 and 174).

[16] On the so-called "margin of appreciation," see: A. Wiśniewski, *Koncepcja marginesu oceny w orzecznictwie ETPCz*, Gdańsk 2008, and many other publications.

institutionalizing same-sex relationships, and different in matters of the selection of the legal form and determining the scope of this recognition.

When it comes to establishing institutional provisions, Member States have virtually no margin in decision-making today. The obligation to institutionalize has today become a European standard and must be met by all Member States. On the one hand, the ECtHR requires that these provisions must comprehensively regulate the status of same-sex couples; thus, it is neither enough to adopt partial provisions regarding various areas of social life, nor to treat these relationships as a special form of private law contracts (paragraphs 112–114). On the other hand, the ECtHR generally disqualified tradition-based arguments intended to justify the lack of institutionalization. In the Przybyszewska case, the Court first questioned the validity of the statistical argument (raised by the Polish government) indicating that the majority of Poles express their disapproval of same-sex couples. At the same time, the Court noted, with disapproval, the contribution of right-wing politicians and public officials to creating an atmosphere of hostility and homophobia (paragraph 117). Furthermore, it was recalled that in the context of Art. 14 of the Convention, traditions and stereotypes cannot in themselves justify differentiations based on the criterion of sexual orientation (paragraph 118). Finally, the argument that cultivating the traditional concept of marriage is an element of Poland's social and legal heritage was considered irrelevant. The Court noted that since the Convention does not require institutionalization in the form of marriage, the institutionalization of same-sex unions does not limit the rights of heterosexual people in any way. Moreover, although the protection of the traditionally understood "family" may be regarded as a legitimate goal of the state, the concept of "family" is dynamic, and its meaning must be adjust to the changing context (paragraphs 119–120).

However, when it comes to the form and scope of institutionalization, the Court's position is less categorical and precise.

First, states remain free to choose between expanding the concept of marriage and establishing a separately designated form of civil union or partnership. In other words, in the opinion of the Court, the differentiation of the form of legal recognition, although it is based on sexual orientation, does not constitute discrimination in the meaning of Art. 14. Second, there remains a considerable margin in determining the scope of institutionalization, i.e. the degree of similarity between the status of marriage and civil partnership. It is true that the Court, already in the Oliari judgment of 2015, indicated that the scope of institutionalization must be "adequate," but to this day the case-law remains limited to indicating, as examples, the areas in which the legal situation of persons in a civil partnership must change. Their list takes into account such material issues (benefits, taxes, rules of inheritance) and moral issues (rights and obligations arising from cohabitation) that "are integral to life as a couple and would benefit from being regulated within a legal framework."[17] Furthermore, it is necessary to ensure recognition of these bonds in administrative and judicial procedures (Przybyszewska, paragraph 114). Therefore, legal recognition "forms part of the development of

[17] See: *Fedotova v. Russia*, paragraphs 190 and 203.

both personal and social identity of partners […] [Civil] partnerships constituting an officially recognised alternative to marriage have an intrinsic value for same-sex couples irrespective of the legal effects, however narrow or extensive, that they produce. Accordingly, official recognition of same-sex couples confers an existence and a legitimacy on them *vis-à-vis* the outside world" (Przybyszewska, paragraph 109). The lack of appropriate regulations leads to the stigmatization of same-sex couples.

A more precise determination of the catalog of necessary elements of institutionalization is a matter for the future. It should be remembered that hitherto almost all the Court's judgments have been focused on the states' obligation to adopt "a regulation" providing general legal recognition to same-sex couples. The nature of court proceedings required caution in making statements about the scope of legal regulations not yet in existence. At the same time, we can also see the ECtHR's restraint in speaking about the most sensitive issues, e.g. to what extent Art. 8 of the Convention also requires granting adoption rights to same-sex couples.[18]

Once again, it must be emphasized that Strasbourg jurisprudence here is dynamic and has only been developing over the past fourteen years. The universal European standard was finally established only three years ago, and now it has to be imposed on about a dozen Convention states that still follow a more "traditional" attitude. The Court is currently entering the second stage of jurisprudence on same-sex relationships, and we do not yet know to what extent today's trends will be strengthened and expanded.

In any case, the general message for Poland is clear: the Przybyszewska judgment fits into an already established case-law and, hence, requires an appropriate response from the Polish legislator. The lack of institutionalization of same-sex relationships leaves them in a kind of "legal vacuum" and constitutes an obvious violation of the Convention.

2. *M.L. v. Poland*: an escape into the Polish context

Such a general message is, however, harder to find in the Strasbourg jurisprudence on termination of pregnancy. Although, in the M.L case, the ECHR found a violation of the Convention,[19] this judgment did not significantly contribute to the development of the earlier (rather timid) case-law.

The first important case was decided by the European Commission of Human Rights in 1976.[20] The Commission accepted that regulations on abortion can constitute an "interference with private life," and therefore enter into the scope of Art. 8. Nevertheless,

[18] For a critical view, see: M. Wąsik, *Przybyszewska*…, p. 24.

[19] Let us recall that the application relates to a woman carrying a fetus diagnosed as having a medical defect justifying a termination, in accord with the relevant regulation from 1993. The day before the procedure, the judgment of the Constitutional Tribunal was published declaring the regulation as not in accord with the Constitution. As a result, the hospital refused to carry out an abortion, and the applicant was forced to have one abroad.

[20] Decision of 19.05.1976, *Bruggemann and Scheuten v. Federal Republic of Germany* (# 6959/76).

"the question to what extent abortion should be subject to punishment is, according to Art. 8, para. 2 of the Convention, left to the discretion of the Contracting States."

The first developed statement of the Court appeared only thirty years later, and only against the background of – rather untypical – Polish cases.[21] In *Tysiąc v. Poland* (2007), the ECtHR held that, under the circumstances of the case, the refusal to terminate a pregnancy for medical reasons violated Art. 8 of the Convention.[22]

Similar conclusions were reached regarding the refusal to terminate a pregnancy affected by a medical abnormality of the fetus and a pregnancy resulting from a crime.[23] In both cases the Court not only found a violation of the "private life" clause of Art. 8, but also held that in the light of the facts there was also a violation of the prohibition of inhuman and degrading treatment enshrined in Art. 3 of the Convention. In neither of these cases did the Court assess whether the legislative determination of the access to abortion was in conformity with the Convention. As it was not challenged that in all three cases the national law allowed abortion, the key question was that the public authorities were not ready to provide a genuine possibility of abortion to any of the applicants. Thus, the finding of the violation was based on the fact that the medical institutions had not duly followed the national law. The question whether the Convention establishes its own "right to abortion," and what the scope of this right might be, has not been considered by the Court.

A partial answer was provided by the judgment of the Grand Chamber of the ECtHR in the case of *A, B, and C v. Ireland*.[24] The Court held that there are no grounds to interpret Art. 8 of the Convention as establishing a separate "right to abortion." Regulation of the admissibility of termination of pregnancy remains the responsibility of the Member States, which have a "broad" margin of appreciation in this matter. However, this margin is not unlimited. "A prohibition of abortion to protect unborn life is not therefore automatically justified under the Convention on the basis of unqualified deference to the protection of pre-natal life or on the basis that the expectant mother's right to respect for her private life is of a lesser stature the Court must decide on the compatibility with Art. 8 of the Convention of the Irish State's prohibition of abortion on health and well-being grounds on the basis of the above-described fair balance

---

21 Abortion was generally permitted in Poland under the Communist regime. Once the transition process has begun, the 1993 Act continued the same approach. However, in 1997, the Constitutional Court held that so-called "abortion based on social reasons" was unconstitutional. In effect, abortion was permitted (free of criminal punishment) only in three situations: 1) direct and serious danger to life or health of the pregnant woman; 2) rape, incest, or other criminal act resulting in pregnancy; and 3) foetal abnormality (defined as "medical findings indicating a high risk that the foetus will be severely and irreversibly damaged or suffering from an incurable life-threatening disease"). In practice these provisions were sabotaged by some public hospitals which refused or unduly limited access to abortion even if warranted by the above-mentioned circumstances.

22 Judgment of 20.03.2007, *Tysiąc v. Poland* (#5410/03).

23 Judgments of 26.05.2011, *R.R. v. Poland* (#27617/04) and of 30.10.2012, *P. and S. v. Poland* (#57375/08).

24 Judgment of 16.12.2010, *A, B, and C v. Ireland* (#25579/05).

test to which a broad margin of appreciation is applicable."[25] In the Irish cases, the Court ruled that this test had been met in regard to A and B (but not – in regard to C). The Court took into account that Irish residents have an easy access to abortion in Great Britain, and that the right to "abortion travel" was confirmed by an amendment to the Constitution of Ireland.

The 2010 judgment resolved the fundamental issues, but the method of establishing a "fair balance" left considerable flexibility in the assessment of national solutions. Moreover, the "constitutionally permitted travel" clause, regardless of its controversial nature, was not suitable for building pan-European standards. It could be assumed that the judgment gave rise to a tacit consensus in the ECtHR that its holding places "social abortion" and/or "abortion on demand" outside the scope of the European standards. At the same time, however, the 2010 judgment should be applied very carefully to abortion justified by reasons that obviously go beyond the scope of natural burdens resulting from the birth of a child.

This was confirmed in the recent Polish cases. As already mentioned, in 2020, the Polish Constitutional Court considered the constitutionality of the 1993 Act and held that its provision of allowing abortion in cases of "severe and irreversible damage to the fetus" was unconstitutional. Several applications were immediately lodged with the Strasbourg court challenging the "conventionality" of the new limitation on access to abortion. Thus, the ECtHR could limit its assessment to the specific problem of "fetal abnormality" and chose not to enter into other aspects of abortion. The Strasbourg Court realized that, although its 2010 judgment can still be regarded as a good law, the European context has changed considerably since the time of its adoption. Today, a question may arise whether the principle of dynamic interpretation of the Convention should not encourage a reconsideration of the 2010 precedent. It is sufficient to mention the evolution of regulations on termination of pregnancy in several European countries, especially in Ireland. The 36th Amendment to the Irish Constitution (2018) was followed by legislative regulation that not only accepted "medical" or "criminal" grounds for termination of pregnancy but also allowed abortion on demand.

That was why the Court decided not to go too far in its reasoning in the M.L. case. Generally speaking, the Court was faced with two possible approaches. On the one hand, the Court could focus on the substantive law and assess whether the re-criminalization of abortion warranted by fetus abnormality could be regarded as "necessary in democratic society" in the meaning of Art. 8 sec. 2 of the Convention. Such an approach, however, would have more universal potential, and it would be necessary to revisit the argumentation established in 2010. On the other hand, the Court could consider the technical side of the extension of the abortion ban in Poland. The change of Polish law was made by the Constitutional Court which struck out one of the provisions of the abortion law. Whereas judicial corrections of the legislative provisions are legitimate under the Convention, the specificity of the Polish situation resulted from the present status of the Constitutional Court. Since the Constitutional

[25] *Ibid.*, paragraph 238.

Court was heavily affected by the reforms carried out by a populist government, its very legitimacy was open to challenges. This was the safest way for the ECtHR because its conclusions could address the legal status of the Polish Constitutional Court, a matter not directly involving the abortion laws in other European countries.

This determined the construction of the ECtHR's reasoning in the M.L. case.

First, as regards the admissibility of the complaint, it was recalled that Art. 8 of the Convention applies to decisions "to have and not to have a child" (paragraph 91), so "legislation regulating the termination of pregnancy touches upon the sphere of a woman's private life" protected by this provision (paragraph 93). Therefore, the complaint is admissible as far as the alleged violation of Art. 8 is concerned.[26]

Second, there was no doubt as to the applicant's *locus standi*. Because the fetus had been diagnosed as having a genetic defect, which had previously justified terminating the pregnancy, and then the procedure was refused, the applicant became a direct "victim" of the change in legal status (paragraph 99). The current case, therefore, differed from other complaints in which pregnant women or women intending to become pregnant claimed that their victim status resulted from the general ban on abortion and the possibility that they would not be allowed to terminate pregnancy should a situation of serious and irreversible damage to the fetus occurs.[27]

Third, the complaint was examined according to a typical pattern: once it was found that the problem fell within the scope of Art. 8 of the Convention and that there had been interference with the applicant's "private life," it was then necessary to consider whether this interference had been made in accordance with the law. The Court confirmed that an assessment of the legality of interference includes both: 1) examining whether there was a legal norm in the national legal system that constituted the basis for interference with individual rights and whether it met the requirements of the expression "in accordance with the law'" (paragraph 156); as well as 2) examining the "quality" of this norm, in particular in terms of its accessibility, precision, and predictability (paragraphs 157–158). There are no obstacles to such a norm being established by a judicial authority; this is a normal phenomenon in today's constitutional reality. However, it should be remembered that the principle of the rule of law requires that a norm interfering with individual rights be established by an authority that in itself meets the requirements of legality (which is itself

[26] At the same time, the Court held that the circumstances of the case did not permit the assertion that an "inhuman or degrading" level of treatment had been reached, and – in consequence – the complaint concerning the violation of Art. 3 of the ECHR was inadmissible (paragraphs 84–85). This was a step back in relation to the position adopted ten years earlier in the R.R. and P. and S. judgments. It should be noted that this part of the judgment was adopted by a 4:3 majority since three judges (Jelić, Felici, and Wennerström) filed a dissenting opinion.

[27] The ECtHR referred to its earlier decision of 16.05.2023, *A.M. and others v. Poland* (#4188/21). The Court declared inadmissibility of complaints when the "victim-status" derived solely from such a potential threat in the future. The A.M. holding may, in my opinion, give rise to some doubts. Although situations of fetal damage are statistically rare, they may affect any woman, and thus a ban on termination of such a pregnancy creates stress and fear, and, thus, interference in the "private life" of any future mother.

"lawful"). Without this, such a body will "lack the legitimacy required in the democratic society" (paragraph 167). Thus, when a change in law results from a court decision, "an assessment of its compliance with the rule of law test in Art. 8 may also require an examination of that judicial body's attributes as a 'tribunal' which is 'lawful' for the purposes of the Convention, including in respect of its composition and the appointment procedure of its members."[28] As we know, this approach was first outlined in the case of *Astradsson v. Iceland*,[29] but then was no need to scrutinize the "legality" of the Icelandic state authorities. Therefore, the findings adopted in the Astradsson judgment required development when, in Polish cases, the ECtHR was confronted with a situation of systemic violation of judicial independence by the state authorities. Hence the broadening of the approach to the "legality" criterion and the clarification of the "compliance with the law" as the requirement that must be met by both the Constitutional Court,[30] and the "new" chambers of the Supreme Court.[31]

Fourth, since the legal change resulted from the Constitutional Court's judgment, the "legality" test had to be applied to this body. The Strasbourg Court found that fulfilling the attributes of a "court" is necessary in all cases where the Constitutional Court's ruling has a direct and binding impact on the rights of an individual protected by the Convention (paragraph 164). This extended the scope of applicability of the "legality test" beyond judgments adopted in the procedure of constitutional complaints or legal questions. The same test is now applicable to the procedures of the so-called "abstract review" where the review is initiated upon the motion of some state organs or similar institutions (such as – in this case – a group of members of parliament). What is decisive is not the procedural form but the impact of a judgment on rights of individuals.

Fifth, the application of the legality test to the realities of the "new" Constitutional Court led to the conclusion that the participation of so-called "fake judges"[32] in the adjudicating panel of the Constitutional Court is incompatible with the requirement of "compliance with the law" (paragraph 173). Therefore, the one of the prerequisites of the legality of interference with a Convention right has not been met (paragraph 175). The ECtHR held that such a finding constitutes a sufficient basis for establishing a violation of Art. 8 of the Convention, and there is no need to go into the merits of

---

28 Paragraph 168 with reference to earlier judgments: of 22.07.2021, *Reczkowicz v. Poland* (#43447/19), paragraph 280; of 6.07.2023, *Tuleya v. Poland* (#21181/19), paragraph 440; of 6.10.2022, *Juszczyszyn v. Poland* (#35599), paragraph 266.

29 Judgment of 1.12.2020, *Gudmundur Astradsson v. Iceland* (#26374/18 – Grand Chamber).

30 See in the judgment of 7.05.2021, *Xero Flor v. Poland* (#4907/21).

31 See in the judgment of 23.11.2023, *Wałęsa v. Poland* (#50849/21), in reference to the Izba Kontroli Nadzwyczajnej i Spraw Publicznych (Extraordinary Review and Public Affairs Chamber) of the Supreme Court. Here the ECHR could refer to the rich jurisdiction of the Court of Justice of the European Union in Polish cases of "judicial reforms."

32 The term "fake judges" applies to three judges (as well as to their successors) who were unlawfully appointed by the "new parliament" controlled by the populist majority in the end of 2015, and took seats already occupied by judges duly appointed by "old parliament" (see: L. Pech, *Dealing with 'fake judges' under EU Law: Poland as a Case Study in light of the Court of Justice's ruling of 26 March 2020 in Simpson and HG*, Reconnect, Working Paper no. 8, May 2020).

the application, i.e. determining whether the current regulation of abortion in Poland meets the remaining requirements of Art. 8 sec. 2 of the Convention.

The manner in which this matter was resolved provokes various reflections. The Court's argument focused on the defects of the Polish Constitutional Court, while carefully avoiding substantive consideration of whether in today's European context the state could extend the ban on abortion to situations of severe and irreversible fetal defects. Thus, the M.L. judgment left a question mark as to whether a change to the Polish abortion law could have gained acceptance by the ECtHR if it had been made by a legitimate body. The existing case-law does not offer a clear answer. On the one hand, it is true that, in the 2010 A, B, and C case, the Strasbourg Court did not question the equally restrictive Irish regulation. On the other hand, however, it must be remembered that, unlike in Ireland, Polish law does not provide a clear guarantee permitting the performance of abortions abroad. Moreover, in the M.L. case, the Court held that the applicant's travel was a source of stress and financial burden (paragraphs 101–102), further contributing to the violation of Art. 8 of the Convention. Therefore, it does not seem that the Irish precedent could be directly and fully controlling in the current situation in Poland. In this perspective, the M.L. judgment may cause some dissatisfaction, and its focus on the specificity of the Polish judicial crisis can be seen as a form of avoiding a broader approach to a fundamental problem.

At the same time, the restraint of the Strasburg is not without benefits. The M.L. judgment definitely goes beyond the context of an individual case. Since the violation of Art. 8 of the Convention resulted from the fact that the change in the law was made by the "defective" composition of the Constitutional Court, the new status of abortion law in Poland is, as such, affected by a defect of a serious and irreversible nature. All actions of public authorities involving the enforcement of this change will automatically be devoid of the feature of "compliance with the law" within the meaning of Art. 8 of the Convention. This applies to both the refusal to perform abortion procedures justified by serious and irreversible fetal defects, as well as the imposition of sanctions – criminal, administrative, or professional – on persons performing the procedure or providing support in making appropriate decisions. In other words, the ECtHR's decision has general effects, and it should be remembered that the Convention is not only directly applicable in Polish law, but also takes precedence over national legislation.

In any case, the current message for Poland is clear: the extension of the abortion ban discussed here was defective in terms of the European Convention on Human Rights and this requires an appropriate reaction from the Polish legislator. The current form and basis of the ban on abortion justified by severe and irreversible fetal defects conflict with the requirements of the Convention.

The general message regarding the judgments of the Constitutional Court is equally clear: none of them, as long as they concern rights and freedoms protected by the Convention and have been (or will be) adopted by a panel including any of the "fake judges," will be able to meet the requirements established in the Convention. Indirectly, this creates a basis for national courts to ignore such Constitutional Court judgments when deciding individual cases.

In this sense, both ECtHR judgments from December 2023 have a similar significance, because both impose on the Polish Parliament the obligation to take legislative action to remedy the currently existing conflict with the requirements established by the Convention.[33] This requires not only legislative institutionalization of same-sex unions and the restoration of abortion regulations to at least the form they existed in before the Constitutional Court's 2020 judgment. It also requires making changes such to the law and practice of the Polish Constitutional Court that will restore its character as a "lawful" body.

Literature

Garlicki L., *"Aborcyjny wyrok" Trybunału Konstytucyjnego przed Europejskim Trybunałem Praw Człowieka – glosa do wyroku ETPCz z 14.12.2023 r., 40119/21, M.L. p. Polsce*, „Europejski Przegląd Sądowy" 2025, no. 1.

Garlicki L., *Fedotova i inni przeciwko Rosji, czyli sformułowanie ogólnoeuropejskiego standardu nakazującego prawne uznanie związków monoseksualnych*, "Europejski Przegląd Sądowy" 2023, no. 2.

Garlicki L., Derlatka M., *Constitutional Courts in the abusive constitutionalism* [in:] *Le constitutionalism abusive en Europe*, dir. P.-A. Collot, Paris 2022.

Górski M., *"Wykuwanie stali", czyli o kształtowaniu standardu wykładni EKPC na przykładzie kwestii formalizacji związku jednopłciowego*, "Państwo i Prawo" 2022, issue 12.

Pech L., *Dealing with 'fake judges' under EU Law: Poland as a Case Study in light of the Court of Justice's ruling of 26 March 2020 in Simpson and HG*, Reconnect, Working Paper no. 8, May 2020.

Wąsik M., *Przybyszewska i inni przeciwko Polsce. Istotny wyrok dla Polski i mała cegiełka w budowaniu podwyższonego standardu strasburskiego dla związków jednopłciowych*, "Europejski Przegląd Sądowy" 2024, no. 3.

Wąsik M., *Wyrok Wielkiej Izby w sprawie Fedotova i inni przeciwko Rosji a podwyższony standard ochrony dla związków osób tej samej płci*, "Europejski Przegląd Sądowy" 2023, no. 2.

Wiśniewski A., *Koncepcja marginesu oceny w orzecznictwie ETPCz*, Gdańsk 2008.

Summary

Lech Garlicki

Same-Sex Unions, Abortion, and the Constitutional Court of Poland:
Two Recent Judgments of the European Court of Human Rights

This is a presentation of two judgments adopted by the ECtHR in December 2023 in two important cases from Poland. In *Przybyszewska and others v. Poland*, the ECtHR found Poland in breach of the positive obligations to provide a comprehensive legal regulation on the status of same-

[33] It is a pity that in none of these judgments did the Court refer to Art. 46 of the Convention. Both offered a good opportunity to demonstrate the systemic nature of the infringements and to delineate the scope of the state's duties to remove violations of the rule of law.

sex couples. The ECtHR reiterated its well-established jurisprudence in that matter, in particular the Grand Chamber ruling in *Fedotova v. Russia* (March 2023). Its applicability to Poland was obvious, and the judgment leaves the Polish government with no alternative but to adopt appropriate changes in the legal system. In the M.L. case, the ECtHR found that the refusal of Polish medical authorities to proceed with an abortion request had violated Art. 8 of the European Convention. The ECtHR observed that the pregnancy in question was affected by a grave and incurable deformation of the fetus. The legal ban on such abortions was imposed, in 2020, not by a legislative amendment but by a judgment of the Constitutional Court of Poland. The "legality" of the Polish Court is, however, dubious in the context of the ongoing rule-of-law crisis in Poland. Therefore, the abortion ban was not adopted by a "lawful" body, and – in consequence – the interference with the applicant's right to private life did not meet the requirement of "legality." The ECtHR ruling was very important for Poland since it has not only invalidated the Polish ban on the abortion in case of the fetal deformation, but also indicated that most of the – previous and future – rulings of the Polish Court would not be accepted by the ECtHR. However, as concerned the European standards, the ECtHR abstained from any discussion on the substantive law on abortion in cases of the fetal deformation.

Keywords: abortion, Constitutional Court of Poland, European Court of Human Rights, fetal deformation, Poland, same-sex couples.

Streszczenie

Lech Garlicki

Związki partnerskie, aborcja i Trybunał Konstytucyjny, czyli o niedawnych rozstrzygnięciach Europejskiego Trybunału Praw Człowieka

Przedmiotem opracowania jest omówienie dwóch wyroków ETPCz wydanych w grudniu 2023 r., a dotyczących Polski. W wyroku *Przybyszewska i inni przeciwko Polsce* Trybunał stwierdził naruszenie art. 8 EKPCz przez brak pełnej regulacji statusu związków jednopłciowych w polskim systemie prawnym. Trybunał nawiązał do ustabilizowanej już linii orzeczniczej (ostatecznie potwierdzonej w wyroku *Fedotova przeciwko Rosji* z dnia 17 stycznia 2023 r.) ustalającej, że wszystkie państwa należące do systemu Konwencji mają obowiązek wprowadzenia takiej regulacji. Tym samym na polskim ustawodawcy spoczywa obowiązek rychłego dokonania zmian prawnych. W wyroku *M.L. przeciwko Polsce* Trybunał stwierdził naruszenie art. 8 Konwencji wobec wykluczenia, na podstawie wyroku Trybunału Konstytucyjnego z 2020 r., możliwości przeprowadzenia aborcji w sytuacji ciężkiego i nieodwracalnego uszkodzenia płodu. Trybunał strasburski ograniczył się do analizy polskiego uregulowania. Wskazano, że skoro zakaz aborcji dyktowanej wadami płodu został wprowadzony przez wyrok Trybunału Konstytucyjnego, a Trybunał ten – w obecnym składzie – nie spełnia wymagań organu praworządnego, to zakaz pozbawiony jest należytej podstawy prawnej. Tym samym dalsze stosowanie tego zakazu będzie – w każdym wypadku – stanowiło naruszenie EKPCz. Trybunał strasburski uchylił się natomiast od analizowania materialnej zgodności polskiego prawa aborcyjnego z Konwencją.

Słowa kluczowe: aborcja, Europejski Trybunał Praw Człowieka, Trybunał Konstytucyjny w Polsce, ciężkie i nieodwracalne uszkodzenie płodu, związki jednopłciowe.