When Legal Uncertainty Violates Reproductive Rights

A.R. v. Poland and the Dynamics of Transnational Legal Mobilization

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In 2020, the Polish Constitutional Court prohibited abortion sought on the grounds of fetal defects. While the ruling was announced, it was not published for three months, creating a period during which neither pregnant people nor medical providers could be certain of the current legal situation, which could change at any time. Accordingly, on 13 November 2025, the European Court of Human Rights (ECtHR), in *A.R. v. Poland*, ruled that this instability failed to meet the legal certainty required under Article 8 of the ECHR. The situation arose from the delayed and, at that time, unpredictably timed publication, and was intensified by the ongoing constitutional crisis. Crucially, the case reveals a deeper dimension of legal uncertainty, as both pro-choice and anti-choice actors were actively involved in the *A.R.* case, seeking to shape the law in opposite directions. The resulting uncertainty is thus not only a product of institutional dysfunction but increasingly a terrain of transnational contestation shaped by competing forms of legal mobilization. This dynamic, in turn, is reflected in the European-level initiative My Voice, My Choice, which explicitly aims to stabilise standards where national systems have become fragmented and uncertain.

Legal uncertainty

In November 2020, at 15 weeks of pregnancy, the applicant A.R. learned that her wanted pregnancy was affected by Edwards' syndrome – a genetic disorder (trisomy 18) that is treated as a lethal fetal condition. This diagnosis came after the Polish Constitutional Court had already announced its October 2020 ruling excluding fetal impairment as a ground for abortion, yet before that ruling was officially published three months later in the Journal of Laws in January 2021. Domestic law requires its promulgation "immediately" and without undue delay. In practice, such judgments are indeed published almost immediately, since they only become binding upon publication in the Journal of Laws. In the case at hand, the absence of a deferred entry-into-force date meant that the three-month delay left the applicable abortion framework in a state of legal uncertainty. Publication could occur at any time, and once it did, the applicant would immediately lose the ability to access a legal abortion domestically. The timely risk was exacerbated by the context of the COVID-19 pandemic: borders could potentially close again, making it impossible for the applicant to travel abroad when time was of the essence. The ECtHR noted that the delay occurred amid mass protests, triggered by the Constitutional Court's ruling, further intensifying uncertainty about the new restriction's practical reach. Faced with this combination of factors, the applicant decided to have an abortion in the Netherlands, bearing both the financial costs and the psychological burden of having to leave her country, healthcare system, and family support network.

The Court acknowledged that this forced travel – in a time-sensitive situation and without family support – constituted a serious additional source of anxiety, a decision in line with earlier case-law (notably *A, B and C v. Ireland*and *M.L. v. Poland*). The ECtHR did not frame the core of the complaint as a right to abortion as such but as a challenge to the prolonged, state-induced uncertainty surrounding a previously available medical option, thus falling under Article 8 ECHR (respect for private and family life). The applicant's private life and personal autonomy were infringed because the delayed publication of the Constitutional Court's judgment created a lack of legal foreseeability exacerbated by the rule-of-law problems affecting the Constitutional Court itself – most notably

an improperly constituted bench – issues already identified in *M.L. v. Poland* and *Xero Flor v. Poland*. The ECtHR stressed that the uncertainty was not abstract: it also shaped medical practice. Even before publication of the respective ruling, some hospitals refused to perform abortions on the grounds of fetal impairment, which made the applicant's assessment of her situation entirely unattainable.

In addition, the ECtHR rejected the claim under Article 3 – prohibition of torture and inhuman or degrading treatment. The applicant argued that the prospect of being forced to carry to term a pregnancy involving a severely ill or dead fetus caused her intense anguish and distress. However, the ECtHR ruled that complaint had been framed in overly general terms.

Legal mobilization around abortion

This case is the result of an extensive legal mobilization around abortion that unfolded on two fronts: strategic litigation and third-party interventions. First, the *A.R.* case emerged directly from the grassroots initiative "Women's Complaint" (Skarga Kobiet), in which the pro-choice organization FEDERA strategically coordinated individual complaints in Strasbourg. After the 2020 restrictions on abortion, FEDERA, campaigning for sexual and reproductive rights, encouraged women of reproductive age in Poland to send complaints to the ECtHR. The organization published a template application on its website, and around a thousand women made use of it. Potential applicants were invited to complete a pre-filled template and add details about their personal circumstances. The applicant, *A.R.*, was one of these individuals, and her case was handled by lawyers associated with FEDERA – Agata Bzdyń, Kamila Ferenc, and Monika Gąsiorowska, who also represented other applicants in cases arising from the Constitutional Court's abortion ruling. The ECtHR had already examined previous cases stemming from this campaign, including *A.M. and Others v. Poland* and *K.B. and K.C. v. Poland*. Unlike earlier complaints that were dismissed as too hypothetical, *A.R.*'s case involved what the Court considered a concrete harm: in a wanted pregnancy, serious fetal abnormalities were detected after the Constitutional Court's ruling.

Secondly, legal mobilization also took the form of third-party interventions. These involved both right-wing organizations engaging in counter-mobilization and human rights defenders, including NGOs, scholars, and medical bodies. The ECtHR received eleven *amici curiae*, among them opinions from international right-wing organizations such as the European Centre for Law and Justice, Alliance Defending Freedom, and the Polish one, Ordo Iuris. All three framed their submissions around the premise that the unborn child is a rights-bearing subject: they argued that "eugenic" or disability-related abortions violate human rights, that States may – and even should – protect fetal life from conception, and that restricting access to abortion on grounds of fetal abnormality falls squarely within the State's margin of appreciation. Yet the ECtHR did not engage with the arguments put forward by the right-wing organizations, and its reasoning closely aligned with the submissions defending reproductive rights – making the judgment an example of successful pro-choice legal mobilization.

Post-2020 Poland: abortion access in a climate of legal uncertainty

Although this ECtHR judgment represents an important success for pro-choice legal mobilization, it is only a battle won, not the war over access to abortion. The 2023 Polish parliamentary elections, won by a centrist-liberal-left coalition, initially raised hopes that the legal situation on abortion would change. However, after the failed vote on decriminalizing abortion – and with a president who is even more conservative than his predecessor – there is little realistic prospect of legislative reform in the short term.

At present, women are largely dependent on guidelines issued by the Ministry of Health on the interpretation of existing law. Under that law, abortion is still permitted where the pregnancy results from a crime or where the life or health of the pregnant person is at risk. According to the Ministry's 2024 guidelines, health explicitly includes mental health. In practice, this means that a psychiatric certificate can

enable access to a legal abortion. Yet these ministerial guidelines on the medical grounds for abortion are fragile instruments, highly vulnerable to right-wing counter-mobilization – which right-wing legal NGOs such as Ordo Iuris are already pursuing on multiple fronts. For example, they circulated their own guidance to hospitals, explicitly suggesting that doctors and hospitals do not have to follow the Ministry's guidelines, which additionally creates the environment of legal uncertainty. Nevertheless, the guidelines remain a useful temporary tool, given that the number of legal abortions has increased. However, they could be reversed very quickly if a right-wing government were to return to power. What is more, women still depend on the goodwill of individual doctors, many of whom continue to invoke the conscience clause. As the *A.R.* judgment shows, some hospitals cancelled procedures even before the ruling had been published. In conditions of legal uncertainty, doctors tend to prioritize protecting themselves from potential criminal liability over caring for their patients. The deaths of several women following delays in care driven by such fears demonstrate that it is women who bear the cost of this uncertainty.

A way forward: the quest for common European standards

One potential source of hope for improving the European standards on abortion is the ongoing legal mobilization at the European level represented by the European Citizens' Initiative, My Voice, My Choice. The initiative seeks to establish an EU-level standard for safe and accessible abortion care and has already received support from Members of the European Parliament as part of the EU's gender equality agenda. A public hearing on the initiative is scheduled for 2 December 2025 in the European Parliament. The Initiative can be seen as a response to the growing legal uncertainty surrounding abortion, visible not only in the ECtHR's *A.R.* case but also across several European jurisdictions. In countries such as Poland, Italy and Hungary, right-wing legal organizations actively challenge existing regulations at administrative levels, thereby effectively constraining reproductive rights. As a result, even where abortion remains formally lawful at the statutory or constitutional level, doubts arise as to whether it can be accessed in practice. In this context, the case illustrates how reproductive justice depends not only on substantive guarantees but also on legal clarity and consistent implementation in practice.

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