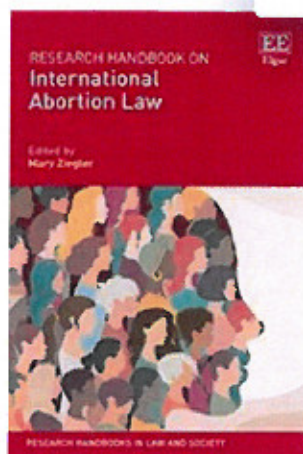


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## Research Handbook on International Abortion Law

Research Handbooks in Law and Society series

Edited by [Mary Ziegler](#)

The Research Handbook on International Abortion Law provides an in-depth, multidisciplinary study of abortion law around the world, presenting a snapshot of global policies during a time of radical change. With leading scholars from every continent, Mary Ziegler illuminates key forces that shaped the past and will influence an unpredictable future.

**Keywords:** Abortion law; reproductive rights; health; and justice; pro-life movement; sexual and reproductive rights; abortion policy; reproduction and the law

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## 14. Abortion law and illiberal courts: spotlight on Poland and Hungary<sup>1</sup>

*Agnieszka Bień-Kacała and Tímea Drinóczi*

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### INTRODUCTION

The constitutional systems of Hungary and Poland offer a powerful example of illiberal constitutionalism. Unlike other scholars, we do not (yet) see either as an authoritarian system,<sup>2</sup> but instead as an illiberal state,<sup>3</sup> whose political system is often described as hybrid<sup>4</sup> and, from the perspective of the leader, a plebiscitary democracy.<sup>5</sup>

The new constitutional model evolving since 2010 (in Hungary) and 2015 (in Poland) has resulted in a gradual but continuous deterioration of democracy, an abuse of the rule of law, and a misuse of human rights principles. In both countries, the captured constitutional courts effectively contributed to building and maintaining the illiberal system, using judicial review and constitutional interpretation to strengthen the hand of populist rulers.

“Illiberal” in the term illiberal constitutionalism neither refers directly to the polity itself nor entails a coherent political philosophy. Instead, illiberal constitutionalism draws on a patchwork of ideas<sup>6</sup> that are heavily influenced and even determined by right-wing populism and

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<sup>1</sup> The research is supported by the National Science Centre, Poland, 2018/29/B/HS5/00232, “Illiberal constitutionalism in Poland and Hungary.”

<sup>2</sup> T. Drinóczi and A. Bień-Kacała, *Illiberal Constitutionalism in Poland and Hungary: The Deterioration of Democracy, Misuse of Human Rights and Abuse of the Rule of Law* (London and New York: Routledge, 2022).

<sup>3</sup> Viktor Orbán proclaimed this goal in 2014: “the new state that we are building is an illiberal state, a non-liberal state. It does not deny foundational values of liberalism, as freedom, etc. But it does not make this ideology a central element of state organization but applies a specific, national, particular approach in its stead.” Viktor Orbán’s speech at the XXV – Bálványos Free Summer University and Youth Camp on July 26, 2014 Baile (Tusnad-Tusnádfürdő). Kaczyński declared: “[T]here will be Budapest in Warsaw” in 2011 when PiS lost the parliamentary election, TVN24, “Przyjdzie dzień, że w Warszawie będzie Budapeszt” (October 9, 2011), [www.tvn24.pl/wiadomosci-z-kraju/3/przyjdzie-dzien-ze-w-warszawie-bedzie-budapeszt,186922.html](http://www.tvn24.pl/wiadomosci-z-kraju/3/przyjdzie-dzien-ze-w-warszawie-bedzie-budapeszt,186922.html), accessed February 25, 2022. After 2015, when PiS won elections, it was made clear that the slogan was meant to become a philosophy, Program PiS 2014, Law & Justice 7, 12 (October 31, 2017), <http://pis.org.pl/dokumenty>, accessed February 25, 2022.

<sup>4</sup> A. Bozóki and D. Hegedűs: “An Externally Constrained Hybrid Regime: Hungary in the European Union,” *Democratization* 25 (2018): 1173–89.

<sup>5</sup> A. Körösenyi, G. Illés, and A. Gyulai, *The Orbán Regime: Plebiscitary Leader Democracy in the Making* (London and New York: Routledge, 2020).

<sup>6</sup> Beyond their political usage, these also appear either in the constitutional text (in Hungary) or in the decisions of the constitutional courts of both states, in the form of reference to conservatism (attitudes towards women’s rights and gender issues), communitarianism and/or sovereigntism (decisions and attitudes of the constitutional court of Poland and Hungary on the relationship between national and EU law, in which they abusively use the concept of constitutional identity). Nevertheless, most recently, both Hungary and Poland have been discussed under the term “illiberalism,” which is understood as a thin ideology. On this latter, see Marlene Laruelle, “Illiberalism: A conceptual introduction,” *East*

of *Roe v. Wade* by the United States Supreme Court.<sup>101</sup> Recently, courts in jurisdictions from Colombia to Thailand have expanded abortion rights.<sup>102</sup>

However, illiberal constitutional courts show that the constitutionalization of the abortion issue can lead to the erosion or elimination of constitutional protections for abortion. It happened in Poland. In countries like Hungary, where there is no abortion decision of the Constitutional Court after its illiberal turn, human rights have already been eroded, and the same may happen to abortion rights, when it would serve the interest of the leading political power. Courts may be captured by ruling parties with narrow, conservative ambitions, especially where reproductive and sexual rights are concerned. Even when popular majorities do not strongly support rights for women, in some cultural contexts, the legislative process may produce stronger protections for abortion rights than do the courts. In other countries where illiberal constitutionalism prevails, there is no meaningful distinction between the ruling party and courts that have been captured by it. Illiberal constitutionalism, then, remind us that a turn to the constitution can undermine sexual and reproductive rights as much as it can expand them.

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<sup>101</sup> On June 24, 2022, overturned by the decision in the case *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 597 U.S. (2022).

<sup>102</sup> See *Roe v. Wade*, 410 U.S. 113 (1973). On the Colombia decision, see "Colombia Decriminalizes Abortion," *New York Times*, February 21, 2022, [www.nytimes.com/live/2022/02/21/world/colombia-court-abortion](https://www.nytimes.com/live/2022/02/21/world/colombia-court-abortion), accessed February 28, 2022. For the Thai decision, see Muktita Sukharno and Mike Ives, "Thailand Legalizes Abortion in First Trimester But Keeps Other Restrictions," *New York Times*, January 28, 2021, <https://www.nytimes.com/2021/01/28/world/asia/thailand-abortion-rights.html>, accessed February 28, 2022.