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CONSEIL DE L'EUROPE

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Date: 02/11/2021

DH-DD(2021)1139

Meeting: 1419th meeting (December 2021) (DH)

Communication from NGOs (Center for Reproductive Rights and the Federation for Women and Family Planning) (21/10/2021) in the cases of R.R., TYSIAC and P. and S. v. Poland (Applications No. 27617/04, 5410/03, 57375/08).

Information made available under Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1419e réunion (décembre 2021) (DH)

Communication d'ONG (Center for Reproductive Rights and the Federation for Women and Family Planning) (21/10/2021) relative aux affaires R.R., TYSIAC et P. et S. c. Pologne (requêtes n° 27617/04, 5410/03, 57375/08) ***[anglais uniquement].***

Informations mises à disposition en vertu de la Règle 9.2 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

CENTER *for* REPRODUCTIVE RIGHTS

Federation for Women and Family Planning

Communication under Rule 9(2) of the Rules of the Committee of Ministers in the cases *Tysiąc v. Poland* (App. No. 5410/03), *R.R. v. Poland* (App. No. 27617/04) and *P. and S. v. Poland* (App. No. 57375/08)

21 October 2021

Introduction

Pursuant to Rule 9(2) of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, the Center for Reproductive Rights[1] and the Federation for Women and Family Planning[2] hereby submit updated information to the Committee of Ministers regarding Poland's implementation of three judgments of the European Court of Human Rights regarding access to legal abortion and associated reproductive health care and information, *Tysiąc v. Poland* (App. No. 5410/03) and *R.R. v. Poland* (Appl. No. 27617/04), and *P. and S. v. Poland* (App. No. 57375/08).

The three judgments became final in 2007, 2011, and 2013 respectively, and 14 years have now passed since the first of these landmark judgments. Yet no effective measures to give effect to these judgments have been adopted by the Polish authorities. Instead, regressive developments have taken place since 2020 that undermine the effective implementation of these judgments.

The three judgments each address distinct but overlapping issues regarding the ongoing and serious failures of the Polish authorities to ensure that access to legal abortion in Poland becomes a practical reality for women and adolescent girls and is not merely a theoretical entitlement. Although each of these three judgements mandate some of the same implementation measures, they also each involve distinct and separate issues which can only be addressed by specific implementation measures.

- ***Tysiąc v. Poland*** concerned a woman whose continued pregnancy posed a serious risk to her eyesight and her health but who was denied a medical certificate attesting to her entitlement to a legal abortion. The Court's judgment centered on the absence of an effective procedure by which women can challenge and resolve disagreements with and between doctors concerning their right under domestic law to an abortion on medical grounds.

[1] The Center for Reproductive Rights is an international non-governmental legal advocacy organization based in New York, Washington, DC, Geneva, Bogotá, and Nairobi dedicated to the advancement of reproductive freedom as a fundamental human right that all governments are legally obliged to protect, respect, and fulfill.
[2] The Federation for Women and Family Planning is a non-governmental organization based in Poland that works locally, regionally and internationally on the advancement of women's reproductive rights through monitoring, advocacy and educational activities as well as strategic litigation before domestic and international courts.

- ***R.R. v. Poland*** concerned medical providers' repeated failures to guarantee the applicant's entitlement under domestic law to prenatal diagnostic tests, which prevented her from being able to legally obtain an abortion on indication of risk of severe fetal impairment. The Court held that Poland must put in place an effective legal and procedural framework that guarantees that relevant, full and reliable information is available to women enabling them to take informed decisions about their pregnancy in a timely manner. The Court emphasized that Poland must take steps to address what it termed a "striking discordance" between the theoretical legal right to abortion services and its practical realization. The Court also held that Poland must ensure that women's access to legal reproductive health services is not jeopardized by medical professionals' refusals of care on grounds of conscience.

- ***P. and S. v. Poland*** concerned an adolescent girl whose legal entitlement to an abortion after she was sexually assaulted was established by a prosecutor as required by Polish law. However, she faced repeated arbitrary and harmful behavior by medical professionals and other state authorities which severely hampered her access to legal abortion care and resulted in disclosure of her confidential medical information. The Court recognized that medical professionals "did not consider themselves obliged" to provide legal abortion care based on the prosecutor's certificate and held that the adolescent girl was treated by the authorities in a deplorable manner.[3] The judgment requires Poland to take measures to guarantee effective access to reliable information on the conditions for, and effective procedures enabling access to, legal abortion care. It also necessitates strengthening enforcement policies and procedures for holding health facilities and professionals accountable for failures to comply with obligations to provide legal abortion care.

As such, and as repeatedly outlined in our previous submissions,[4] and as further underscored by the decisions of the Committee of Ministers,[5] the three judgments require the adoption of the following measures:

- An effective and timely procedure for women to challenge and resolve disagreements with and between doctors regarding their entitlement to legal abortion care and to exercise their rights in this regard;

[3] P. and S. v. Poland, App. No. 57375/08, para. 108.
[4] *See* Communication from NGOs (Center for Reproductive Rights and the Federation for Women and Family Planning) (29/01/2021) in the cases of R.R., Tysiąc and P. and S. v. Poland (Applications No. 27617/04, 5410/03, 57375/08) (29 January 2021), Communication from an NGO (Center for Reproductive Rights and Federation for Woman and Family planning) (25/02/2021) in the cases of R.R. v. Poland, Tysiąc v. Poland, P. and S. v. Poland (Applications No. 27617/04, 5410/03, 57375/08) (24 Feb. 2021); Communication from a NGO (Center for Reproductive Rights/Federation for Women and Family Planning) (22/01/2020) in the cases of R.R., Tysiąc and P. and S. v. Poland (Applications No. 27617/04, 5410/03, 57375/08); Rule 9.2 Communication from two NGOs (Center for Reproductive Rights and Federation for Women and Family Planning) (22/02/2019) in the case of P. and S. v. Poland (Application No. 57375/08), DH-DD(2019)235; Communication from the Center for Reproductive Rights and the Federation for Women and Family Planning in the cases of P. and S., R.R. v. Poland, (24/08/2018); Communication from the Center for Reproductive Rights in the case of P. and S. v. Poland, (13/09/2017); Communication from the Center for Reproductive Rights in the case of P. and S. v. Poland, (28/09/2017); Communication from the Center for Reproductive Rights in the case of R.R. v. Poland, (02/09/2016); Communication from the Center for Reproductive Rights and the Federation for Women and Family Planning in the case of P. and S. v. Poland, (06/10/2014).
[5] *See* Interim Resolution CM/ResDH(2021)44; CM/Del/Dec(2020)1369/H46-20, 1369/H46-21; CM/Del/Dec(2019), 1340/H46-13, 1340/H46-31; CM/Del/Dec(2018), 1324/H46-15; CM/Del/Dec(2017), 1294/H46-19.

- Effective measures to guarantee women access to reliable information on the conditions and effective procedures for their access to legal abortion care;
- An effective legal and procedural framework that guarantees that full and reliable information is provided to women and adolescent girls enabling them to take informed decisions about their pregnancy;
- Effective measures to ensure that refusals of care by medical professionals based on the conscience clause do not undermine or delay women's access to legal abortion services or prenatal testing;
- Strengthened enforcement procedures and measures to hold health facilities and professionals accountable for any failures to comply with legal obligations to provide legal reproductive health services and information;
- Effective measures to enhance protection of patient data confidentiality;
- Targeted measures to ensure that the needs of adolescents who are seeking legal abortion services are met and that they are treated with respect and due consideration for their vulnerability.

Only once all of these measures have been adopted by the Polish authorities, can these three judgments be considered implemented.

In its latest submission, the Polish authorities have once again outlined information previously provided to the Committee of Ministers on the existing legal framework in Poland regarding refusals of care by health professionals, the complaint procedure under the Patient's Rights Act, and the enforcement of contracts with the National Health Fund.[6] However, the submission does not contain any new information attesting to substantial progress in the adoption of effective measures since the Committee of Ministers' last examination in March 2021 that would give effect to the Court's three judgments or to the interim resolution and decisions of the Committee of Ministers.

The State continues to take the view that the existing legal frameworks are adequate for discharging its obligation to implement these judgments. However, this view disregards the fact that common to the three cases were shortcomings in existing legal frameworks and accountability and enforcement mechanisms which resulted in arbitrary behavior by health care professionals who failed to apply existing legal provisions entitling women to abortion services or prenatal testing, disregarded clear legal obligations or provided the applicants with misleading and inaccurate information about how to obtain legal reproductive health services. As such, the violations at the heart of these cases were largely the result of inadequate legal protections, rule of law deficits, and entrenched enforcement failures and require reforms of existing legal frameworks and procedures, as outlined above. In the following sub-sections, we respond to claims made by the State in its recent submission that its existing legal framework is adequate for implementing the three judgments.

More than 14 years after the first of these three judgments, none of the measures outlined above have been enacted which would enable women and adolescent girls to obtain timely access to legal abortion care and associated reproductive health services and information and put in place effective mechanisms and procedures for women and adolescent girls to exercise their rights under Polish law

[6] Communication from the authorities (13/10/2021) concerning R.R, TYSIAC, P. and S. group of cases v. Poland (Application No. 27617/04, 5410/03 and 57375/08).

to these health services. Instead, regressive developments have taken place since the October 2020 ruling by the Constitutional Tribunal.

In light of the absence of any meaningful action on the part of State authorities to implement the Court's judgments and give effect to the interim resolution and decisions of the Committee of Ministers, we respectfully **urge the Committee of Ministers to maintain its enhanced scrutiny of all three cases and urge the State authorities to adopt the measures required by the judgments** to address prevailing legal barriers and enforcement deficits and enable women and adolescent girls to exercise their rights under Polish law to obtain reproductive health services. We respectfully urge the Committee of Ministers to conduct the next examination of all three cases in six months' time.

1. Regressive developments following the 2020 ruling by the Constitutional Tribunal

On 22 October 2020, Poland's Constitutional Tribunal considered a petition challenging the provision of the 1993 Act[7] allowing for abortion in situations of "a high risk of severe and irreversible fetal defect or incurable illness that threatens the fetus' life" as inconsistent with Art. 38 in conjunction with Art. 30 in conjunction with Art. 31 sec. 3 of the Constitution of the Republic of Poland filed by members of the Polish Sejm and formally supported by the Prosecutor General. The Tribunal announced that it considered those provisions unconstitutional.[8] On 27 January 2021, the Tribunal's decision was published in the Journal of Laws and took legal effect.

The Constitutional Tribunal's decision must be seen in the context of the ongoing erosion of the rule of law in Poland. The independence and legitimacy of the Constitutional Tribunal has been severely undermined by reforms to the judiciary adopted since 2015. The Constitutional Tribunal can no longer be considered an "independent and impartial court." The European Commission has noted that, "the constitutionality of Polish laws can no longer be effectively guaranteed. The judgments rendered by the Tribunal under these circumstances can no longer be considered as providing an effective constitutional review."[9] The Parliamentary Assembly of the Council of Europe, in its resolution adopted in January 2021, reiterated that "the Constitutional Tribunal seems to be firmly under the control of the ruling authorities, preventing it from being an impartial and independent arbiter of constitutionality and the rule of law."[10] As such, the October 2020 ruling of the Constitutional Tribunal cannot be considered to constitute an effective or legitimate constitutional review as required by rule of law principles.

The Tribunal's ruling has exacerbated the chilling effect that Poland's highly restrictive abortion law and the criminalization of abortion continues to have on the provision of legal abortion care in Poland.

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[7] Act of 7 January 1993 on Family Planning, Human Foetus Protection, and Conditions of Legal Pregnancy Termination, Art. 4a sec. 1 point 2.
[8] The Constitutional Tribunal of Poland, Case no. K 1/20 (2020), https://ipo.trybunal.gov.pl/ipo/view/sprawa.xhtml?&pokaz=dokumenty&sygnatura=K%201/20#komparycja_20359.
[9] Reasoned Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law (COM/2017/0835 final - 2017/0360 (NLE)), paras. 92-113 and 175(1). *See also* European Commission, 2020 Rule of Law Report Country Chapter on the rule of law situation in Poland, SWD(2020) 320 final (30 September 2020), p. 3, https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1602579986149&uri=CELEX%3A52020SC0320; European Parliament resolution of 26 November 2020 on the de facto ban on the right to abortion in Poland (2020/2876(RSP)).
[10] Parliamentary Assembly of the Council of Europe, Judges in Poland and in the Republic of Moldova must remain independent, Resolution 2359 (2021) Provisional Version, point 12.1, https://pace.coe.int/en/files/29000/html. *See also Xero Flor w Polsce sp. z o.o. v. Poland* (Appl. no. 4907/18), Eur. Ct. H.R. (2021).

This chilling effect has been recognized by the European Court of Human Rights in *Tysiąc v. Poland* and *R.R. v. Poland*.[11]

The ruling has in effect extended the scope of the prohibition of abortion and criminal liability for those who perform or assist women in accessing abortion care outside the law. As a result, the number of doctors reluctant to authorize or provide legal abortion care have increased, thereby further undermining women's access to legal abortion care in Poland. There have also been reports of women who despite having obtained a medical certificate attesting that they meet the legal requirements for an abortion due to risks to their health or life, have nevertheless been denied care and faced difficulties in obtaining legal abortion care in Poland.

In the course of 2021, the Federation for Women and Family Planning provided legal assistance to several women who were denied legal abortion care in situations when their health or life was at risk, including as a result of an ectopic pregnancy. Their experiences demonstrate how the longstanding failures to put in place an effective regulatory framework for access to legal abortion has been further exacerbated by the 2020 ruling.

In May 2021, a joint meeting of the parliamentary Women's Rights and Reproductive Rights Committees was held in the Polish Parliament to discuss the consequences of the 2020 Constitutional Tribunal ruling.[12] Three Polish gynecologists and a psychiatrist presented expert testimony and pointed out that following the ruling their patients' health and life have been placed at serious risk, access to prenatal testing has become very difficult, and women are afraid of becoming pregnant.

As a result of the ruling many women who need abortion care have decided to travel to another country to access abortion. According to Abortion Without Borders, a network of organizations in Poland and abroad helping Polish women to access abortion care, 1080 women residing in Poland had an abortion in the second trimester of pregnancy in another country since the 2020 Constitutional Tribunal ruling.[13]

Furthermore, in the course of 2021, the Federation for Women and Family Planning has assisted around 300 women in accessing abortion care in Polish hospitals, following a severe fetal impairment diagnosis. In order to establish their entitlement to an abortion, the women had to obtain a certificate from a psychiatrist attesting to a serious risk to their health and find a hospital that accepts such medical certificates. While this indicates that a few hospitals in Poland provide legal abortion care to women who wish to end a pregnancy following a severe fetal impairment diagnosis based on the risks posed to their health, there is no evidence to suggest that the majority of the around 1000 women who

[11] In *Tysiąc v. Poland*, the Court noted that "the legal prohibition on abortion, taken together with the risk of their incurring criminal responsibility under Article 156 § 1 of the Criminal Code, can well have a chilling effect on doctors when deciding whether the requirements of legal abortion are met in an individual case," *see Tysiąc v. Poland* (App. No. 5410/03), para. 116. *See also R.R. v. Poland* (Appl. No. 27617/04), para. 193.

[12] For the transmission from the meeting *see* https://www.sejm.gov.pl/Sejm9.nsf/transmisja.xsp?documentId=49DA3D594BB1E8BEC12586CD0024D229&symbol=TRANSMISJA_ARCH&info=T&fbclid=IwAR3uNb5LZrqfwUMepsE0GlN_J-f0ZBP0mF0nZMzCoK38WqwHzHzQQaOn-wg.

[13] Aborcja Bez Granic pomogła 34 tysiącom osób w dostępie do aborcji od wyroku TK (21 Oct. 2021), https://aborcyjnydreamteam.pl/2021/10/aborcja-bez-granic-pomogla-34-tysiacom-osob-w-dostepie-do-aborcji-od-wyroku-tk/.

would previously have obtained legal abortion care following a severe or fatal fetal impairment diagnosis will still be able to obtain legal abortion care in Poland. The women who have been able to obtain legal abortion care in these circumstances, have relied on the intensive involvement of the Federation in securing access to care.

The 2020 Constitutional Tribunal's ruling and the Government's efforts to prohibit women from obtaining abortion care in situations of fatal or severe fetal impairment wholly undermine Poland's obligations to comply with the judgments of the European Court of Human Rights. In *R.R. v. Poland*, the Court clearly instructed Poland to take steps to ensure women's effective access to legal abortion care in situations of severe or fatal fetal impairment. Instead of adhering to the Court's ruling, the Polish Government has sought to ban abortion in this situation, fundamentally contradicting the spirit of the judgement.

2. Official data on legal abortions is not evidence of effective implementation of the law

In the latest submission, the State has again claimed that the official data on legal abortions "show that pregnancy termination procedures are effectively carried out in Poland."[14] It refers to the number of legal abortions in the years when the events in the cases took place: 138 abortions in 2000, 499 abortions in 2008, in comparison to the number of legal abortions in 2015 (1040), in 2016 (1098), in 2017 (1057), in 2018 (1076), in 2019 (1110), and 2020 (1076) and notes that the numbers have increased significantly over the years.[15]

However, the official data on legal abortions is by no means evidence that the law is being fully and effectively implemented and that women who meet the legal requirements for access to abortion services obtain the care they are legally entitled to in practice. While the overall number of abortions has increased, it is still disproportionately low seen in the context of the approximately 9 million women of reproductive age living in Poland. For women seeking legal abortion care following sexual assault or because of a risk to their health or life, the situation has deteriorated since the events in these cases.

For women whose health is at risk, as was the case in *Tysiąc,* the number of legal abortions on grounds of risk to health or life has dropped from around 80 in 2000 to 21 abortions in 2020. There are indications that since January 2021 a number of legal abortions have been provided to women who had received a severe fetal impairment diagnosis and obtained a medical certificate attesting that continuation of the pregnancy would pose a risk to their health. However, this would merely represent a shift of a small number of abortions that might previously have been recorded as performed under the indication of a severe fetal impairment to the health ground. Prior to the 2020 Constitutional Tribunal's ruling most legal abortions in Poland were performed on indication of risk of a severe or fatal fetal impairment and totaled around 1,000 abortions in recent years. At this time there is no indication that a similar number of women will be able to access legal abortion care under remaining legal grounds.

[14] Communication from the authorities (13/10/2021) concerning R.R, TYSIAC, P. and S. group of cases v. Poland (Application No. 27617/04, 5410/03 and 57375/08), p. 7.
[15] *Id.*

For survivors of sexual assault, like the applicant in *P. and S.,* legal abortion care remains inaccessible in practice as demonstrated by official statistics. Since 2008, between 0 and 3 legal abortions on indication of sexual assault were performed each year in Poland. In 2010, 2011, and 2017, no legal abortions were performed in Poland for women who were pregnant as a result of sexual assault.

Survivors of sexual assault who wish to end a resulting pregnancy and who are unable to obtain the care they need in Poland as a result of prevailing barriers will find other ways to do so. According to information obtained from Women on Web, a non-profit, online telemedicine service, in 2020, more than 2,300 women in Poland obtained medical abortion pills from Women on Web, and around 35 of the women explained that their pregnancy resulted from rape.[16] These women would have been entitled to abortion care in Poland but instead sought care from one, among several online telemedicine service.[17]

Furthermore, in the latest submission, the State authorities have yet again failed to provide information about the availability of lawful abortion across the country, together with an assessment of possible regional disparities in this regard, as requested by the Committee of Ministers in its decision of March 2020.[18]

As we outlined in our previous submissions, there are important regional disparities in Poland in access to legal abortion care on indication of risk to health or life. In 2020, there were six voivodships where no abortions on these indications were performed, and eight voivodships were the number of abortions performed on these grounds ranged from 1 to 2.[19]

3. Complaint procedure is not an effective mechanism for women and adolescent girls to enforce the right to legal abortion care and prenatal testing

In its recent submission, Poland reasserts that the complaint procedure established in 2008 under the Patients' Rights Act corresponds to the requirements arising from the *Tysiąc* and *R.R.* judgments and is a sufficient and effective mechanism through which women can exercise their rights to legal abortion care and prenatal testing.[20]

[16] Letter from Women on Web International Foundation on file with the Center for Reproductive Rights (Jan. 2021). For data from Women on Web International Foundation concerning the years 2018 and 2019, *see* Rules 9.2 and 9.6 - Communication from a NGO (Center of Reproductive Rights/Federation for Women and Family Planning) (22/01/2020) in the cases of R.R., Tysiac and P. and S. v. Poland (Applications No. 27617/04, 5410/03, 57375/08), https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016809a521c.
[17] *See, e.g.,* womenhelp.org, tabletka-poronna.pl, women-rights.org, poronne.org.
[18] CM/Del/Dec(2020)1369/H46-20, point 5.
[19] The letter with public information from the Ministry of Health published on https://federa.org.pl/dane-mz-aborcje-2020/.
[20] Communication from the authorities (13/10/2021) concerning R.R, TYSIAC, P. and S. group of cases v. Poland (Application No. 27617/04, 5410/03 and 57375/08).

However, as we have previously outlined,[21] and based on the Committee of Ministers' previous assessment of the complaint procedure,[22] it continues to fall short of what is required to implement the Court's judgments in these two cases.

As we have highlighted repeatedly in previous submissions, the complaint procedure suffers from a series of shortcomings, namely:

- It is not tailored to the specific needs of women seeking time-sensitive legal abortion services or prenatal testing and its general nature fails to meet the particular needs of pregnant women seeking to establish or enforce their legal entitlements to abortion care and prenatal testing.
- The time frame of up to 30 days to issue a decision on complaints fails to ensure that women receive a timely decision through an effective urgent procedure.
- It is overly cumbersome and formalistic as it requires patients to refer to the legal provisions that have been breached. As a result, the vast majority of complaints filed have been declared inadmissible on procedural grounds.
- The Medical Board's decisions are final and not subject to judicial review. This wholly undermines basic rule of law requirements and contradicts standard practice in other jurisdictions.
- Additional procedural and rule of law deficits also undermine the effectiveness of the relevant procedure. These include the lack of entitlement for women to be heard during the process.

The ineffective nature of this procedure is clearly demonstrated by the very small number of complaints filed since 2013 regarding access to legal abortion and the fact that only very few of these have been upheld.[23] According to the information obtained from the Commissioner for Patients' Rights in December 2020, only five complaints were filed in 2020 and only one complaint was filed in 2019 concerning access to legal abortion services. Out of these six complaints, one complaint was found unjustified by the Medical Board after 19 days; one complaint was withdrawn by the patient herself; two complaints, filed with legal support of the Federation for Women and Family Planning, were found justified and their examination lasted 8 and 6 days respectively; one complaint was found inadmissible on procedural grounds after 30 days; and one complaint filed in 2020 was pending at the time of the Commissioner's response. [24] The Commissioner for Patients' Rights has previously

[21] Communication from NGOs (Center for Reproductive Rights and the Federation for Women and Family Planning) (29/01/2021) in the cases of R.R., Tysiąc and P. and S. v. Poland (Applications No. 27617/04, 5410/03, 57375/08) (29 January 2021); Communication from a NGO (Center of Reproductive Rights/Federation for Women and Family Planning) (22/01/2020) in the cases of R.R., TYSIAC and P. and S. v. Poland (Applications No. 27617/04, 5410/03, 57375/08); Rule 9.2 Communication from two NGOs (Center for Reproductive Rights and Federation for Women and Family Planning) (22/02/2019) in the case of P. and S. v. Poland (Application No. 57375/08), DH-DD(2019)235; Communication from Center for Reproductive Rights and Federation for Women and Family Planning in the cases of P. and S., R.R. v. Poland, (24/08/2018; Communication from Center for Reproductive Rights in the case of P. and S. v. Poland, (13/09/2017); Communication from Center for Reproductive Rights in the case of P. and S. v. Poland, (28/09/2017); Communication from Center for Reproductive Rights in the case of R.R. v. Poland, (02/09/2016).
[22] *See* Interim Resolution CM/ResDH(2021)44; CM/Del/Dec(2020) 1369/H46-21; CM/Del/Dec(2019), 1340/H46-31.
[23] *See* Communication from the authorities (02/10/2020) in the cases of R.R. and TYSIAC v. Poland (Applications No. 27617/04, 5410/03), DH-DD(2020)863; Communication from the authorities (04/01/2021) in the case of P. and S. v. Poland (Application No. 57375/08), DH-DD(2021)19, p. 5-6.
[24] Reply from the Commissioner for Patients' Rights to the Federation for Women and Family Planning, 30 December 2020, RzPP-DPR-WPL.0133.33.2020.UM.

confirmed that between 2013 and 2018 only three complaints were filed concerning access to legal abortion services, none of which were considered admissible.[25]

The cases from previous years also illustrate the complaint procedures' shortcomings and ineffectiveness as a mechanism to ensure women have *timely* access to abortion care. The examination of the complaints by the Medical Board were generally too lengthy and failed to ensure that women who seek abortion care receive a prompt decision on their complaint.

As a result, some women who had filed complaints to the Medical Board decided to seek legal abortion care in other health facilities before the decision in their case was issued. For example, in 2020, the Federation for Women and Family Planning assisted two women[26] in filing complaints concerning denial of legal abortion care due to the doctor's miscalculation of the duration of their pregnancies. The Medical Board found their complaints admissible; however due to the lengthy examination of the complaints, the women decided to travel more than 300 km to obtain abortion care within the strict legal time limits. The Medical Board adopted the decisions upholding both complaints only after the women had obtained legal abortion care in the other hospitals.

In one instance when women decided to not await the outcome of the complaint procedure and finally obtained an abortion from a health facility, this led the Medical Board to dismiss as inadmissible their complaints of initially having been denied care. For example, in November 2020, a woman who had initially been denied legal abortion care in a hospital but had subsequently been able to obtain care from another health facility saw her complaint dismissed as inadmissible.[27] She then filed a further complaint to the Commissioner for Patients' Rights in December 2020 who following an official inquiry issued a report in June 2021 (seven months after the complaint was filed), concluding that the woman had been subject to violations of her rights because she had been denied a legal abortion on the indication of severe fetal impairment before the Constitutional Tribunal's ruling took legal effect.

The ineffectiveness of the procedure is also borne out by the fact that women who were denied abortion care they are legally entitled to have not wished to pursue complaints. In 2021, the Federation assisted a number of women who were denied legal abortion care in situation of risk to their health or life. None of the women wished to file an official complaint to the Medical Board as their primary concern was to urgently find a doctor who could provide abortion care.

As the Committee of Ministers has repeatedly concluded, the current complaint procedure is inadequate in discharging the State's obligation to establish an effective and timely mechanism for women to enforce their legal rights to reproductive health care.[28] Polish authorities have taken no measures to adopt necessary reforms and until the complaint procedure is reformed Poland will not have implemented these judgments and provided an effective procedure for women to establish and exercise their right to legal abortion care and related reproductive health services.

[25] Reply from the Commissioner for Patients' Rights to the Federation for Women and Family Planning, 23 December 2019, RzPP-DPR-WPL.0133.42.2019.KBI.
[26] Personal data on file with the Federation for Women and Family Planning.
[27] Personal data on file with the Federation for Women and Family Planning.
[28] Interim Resolution CM/ResDH(2021)44; CM/Del/Dec(2020)1369/H46-21.

4. Refusals of care and enforcement failures continue to impede access to legal abortion care

As we have repeatedly outlined in our previous submissions,[29] the practice of refusals of care based on the conscience clause by health professionals continue to undermine women's access to legal abortion care in Poland in contravention of the Court's judgments which require the State to ensure that such refusals do not prevent women from obtaining the reproductive health care to which they are legally entitled.

The invalidation in 2015 by the Constitutional Tribunal's judgment of the referral obligation on health professionals who invoke the conscience clause significantly undermined Poland's compliance with the Court's judgments. However, a series of other shortcomings in the regulation and enforcement of refusals of care based on the conscience clause also continue to impede compliance with the Court's judgment and the Committee of Ministers' decisions.

The Committee of Ministers has previously called on the Polish authorities to establish in secondary legislation a duty on health facilities to refer a woman who has been refused abortion care based on the conscience clause to another facility which will provide the service. In March 2020, the Committee of Ministers specifically encouraged Polish authorities to adopt the amendment to "the Medical Professions Act so as to provide explicitly that a healthcare provider has an obligation to provide information to patients on how to obtain healthcare services which were not performed due to the use of the conscience clause."[30] As we reported in our previous submission, in 2020, the Sejm failed to adopt this amendment.[31] Instead, the amendments to the Medical Professions Act adopted by the Sejm last year removed an obligation requiring a doctor who invokes the conscience clause to justify the refusal in the medical records. The doctor invoking the conscience clause is still obliged to note it down in the medical records.[32]

Furthermore, evidence to date demonstrates entrenched disregard by health professionals and institutions for legal obligations and failures to apply the law on abortion and the regulations regarding the conscience clause. In particular, we recall that a number of hospitals continue to institutionally refuse to provide abortion care on grounds of conscience in contravention of Polish law. State authorities have taken no measures to sanction these breaches and hold health facilities accountable.

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[29] Communication from NGOs (Center for Reproductive Rights and the Federation for Women and Family Planning) (29/01/2021) in the cases of R.R., Tysiąc and P. and S. v. Poland (Applications No. 27617/04, 5410/03, 57375/08) (29 January 2021); Rules 9.2 and 9.6 - Communication from a NGO (Center of Reproductive Rights/Federation for Women and Family Planning) (22/01/2020) in the cases of R.R., TYSIAC and P. and S. v. Poland (Applications No. 27617/04, 5410/03, 57375/08); Rule 9.2 Communication from two NGOs (Center for Reproductive Rights and Federation for Women and Family Planning) (22/02/2019) in the case of P. and S. v. Poland (Application No. 57375/08), DH-DD(2019)235; Rule 9.2 Communication from a NGO (Federation for Women and Family Planning, The Center for Reproductive Rights) (24/08/2018) in the cases of P. and S., R.R. and Tysiac v. Poland (Applications No. 57375/08, 27617/04, 5410/03), DH-DD(2018)814; Communication from Center for Reproductive Rights in the case of R.R. v. Poland, (02/09/2016).

[30] CM/Del/Dec(2020)1369/H46-20, point 4.

[31] Projekt ustawy o zmianie ustawy o zawodach lekarza i lekarza dentysty oraz niektórych innych ustaw. Print no. 172, http://orka.sejm.gov.pl/Druki9ka.nsf/0/D7FDC1A357FE57C4C12584F6003ABEF4/%24File/172.pdf; Głosowanie nr 97 na 14. posiedzeniu Sejmu, 16.07.2020, http://www.sejm.gov.pl/Sejm9.nsf/agent.xsp?symbol=glosowania&NrKadencji=9&NrPosiedzenia=14&NrGlosowania=97.

[32] Ustawa z dnia 16 lipca 2020 r. o zmianie ustawy o zawodach lekarza i lekarza dentysty oraz niektórych innych ustaw, http://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20200001291/O/D20201291.pdf.

Furthermore, there continue to be entire regions of Poland where legal abortion care is inaccessible as no health facilities or doctors are providing the care. For example, in 2018 and 2019 no abortions were performed and in 2020 only one abortion was performed in Podkarpackie voivodship, a region with a population of women of reproductive age of more than 500,000.[33] Recent research found that only one hospital in Rzeszów, the capital city of that region, declared that in principle it does offer abortion services while four other hospitals declared they do not provide legal abortion services.[34]

The State has again argued that health facilities that have signed contracts with the National Health Fund are obliged to provide all medical services included therein and to indicate another health facility that will provide the services refused based on the conscience clause.[35] However, Polish authorities are not currently monitoring the practice of refusals of care by health professionals which would enable it to organize its health system in a manner that would ensure that women can in practice obtain the reproductive health services to which they are legally entitled, as required by the Court's judgments. The State should establish effective systems to monitor the number and location of health professionals who invoke the conscience clause, whether systematically or on an *ad hoc* basis, and to adopt other necessary measures to ensure that access to legal abortion care and other reproductive health services is not hindered or undermined by the refusals of care based on the conscience clause.[36]

Finally, as we have emphasized in previous submissions, the complaint procedure under the Patient's Rights Act is wholly inapplicable and unsuitable to situations in which women are refused legal abortion care on grounds of conscience or religion.[37] Since doctors have an entitlement under Polish law to refuse care on grounds of conscience or religion, it is unclear on what basis a complaint could be made by women seeking to enforce their right to legal reproductive health care when doctors invoke the conscience clause.

5. Inadequate information on how women and adolescent girls can exercise their right to legal abortion services

[33] In this region more than 3,000 doctors signed the conscience clause declaration attesting to their unwillingness to perform legal abortions. Madeline Roache, *Poland Is Trying to Make Abortion Dangerous, Illegal, and Impossible*, FOREIGN POLICY (Jan. 8, 2019), available at https://bit.ly/2rzWvZa.

[34] *See* the results of monitoring conducted by the Federation for Women and Family Planning, available at https://federa.org.pl/dostepnosc-aborcji-rzeszow/.

[35] Communication from the authorities (13/10/2021) concerning R.R, TYSIAC, P. and S. group of cases v. Poland (Application No. 27617/04, 5410/03 and 57375/08).

[36] For information on minimum measures that States should adopt under international human rights law where they choose, as a matter of domestic law or policy, to allow medical professionals to refuse to provide care, *see* Center for Reproductive Rights, *Addressing Medical Professionals' Refusals to Provide Abortion Care on Grounds of Conscience or Religion: European Human Rights Jurisprudence on State Obligations to Guarantee Women's Access to Legal Reproductive Health Care* (2018), https://reproductiverights.org/sites/default/files/documents/GLP_Refusals_FS_Web.pdf. *See also* Grimmark v. Sweden (2020) App. No. 43726/17; Steen v. Sweden (2020) App. No. 62309/17.

[37] *See* Communication from NGOs (Center for Reproductive Rights and the Federation for Women and Family Planning) (29/01/2021) in the cases of R.R., Tysiąc and P. and S. v. Poland (Applications No. 27617/04, 5410/03, 57375/08) (29 January 2021); Rules 9.2 and 9.6 - Communication from a NGO (Center of Reproductive Rights/Federation for Women and Family Planning) (22/01/2020) in the cases of R.R., TYSIAC and P. and S. v. Poland (Applications No. 27617/04, 5410/03, 57375/08); Communication from Center for Reproductive Rights and Federation for Women and Family Planning in the case of R.R. v. Poland, (02/09/2016).

The applicants in all three cases faced obstacles in access to legal reproductive health services as a result of contradictory or even misleading information about the requirements they had to fulfil and the procedures they had to follow.

However, the State has again provided no information on measures taken or envisaged to ensure that women and adolescent girls seeking legal abortion care receive appropriate and adequate information on how to exercise their right.

There are currently no comprehensive national guidelines in place for health facilities and professionals on the provision of information about legal abortion care, the requirements and steps that patients must follow, and where legal abortion services can be obtained throughout Poland. The absence of such guidelines has resulted in some health facilities imposing additional requirements on women seeking legal abortion care without any basis in law. In 2020, the Federation for Women and Family Planning undertook an assessment of access to legal abortion care in three cities (Trójmiasto,[38] Zachodniopomorskie,[39] and Lublin[40]). The assessment found that in every region at least one hospital did not provide legal abortion at all or in some instances arbitrarily refused to provide legal abortion care. Additionally, information received from hospitals indicated that they impose many barriers and requirements that have no basis in law, including mandatory psychological consultation in the perinatal hospice, additional medical tests and repetitive medical examinations, obtaining particularly hard to get certificates and approvals, and convening medical consultations within health facilities to ascertain the woman's eligibility for legal abortion care.

Furthermore, the assessment also demonstrated that women continue to encounter many barriers in access to necessary and essential information about how and where to access legal abortion care. In 2020, the Federation for Women and Family Planning intervened in over 150 cases concerning arbitrary denial of legal abortion services or the imposition of additional unlawful barriers in access to legal abortion. Since the 2020 Constitutional Tribunal's ruling, the need for precise information on legal access to abortion has dramatically increased. The Federation estimates that it answered around 8,000 phone calls and 5,000 e-mails from women inquiring about how to access abortion care, how the ruling may have impacted their entitlements to prenatal testing and if they may be prosecuted for undergoing an abortion outside the formal health care system.

As we have previously outlined, while the Recommendations[41] of national consultants in the field of obstetrics, gynaecology and perinatology concerning care for women seeking lawful abortion seek to support patients' rights, they give rise to concerns in practice. For example, the Recommendations outline that abortion care should be provided by local hospitals. In practice this has been interpreted by some hospitals to mean that they should only provide abortion care to women who reside in the

[38] Federation for Women and Family Planning, available at https://federa.org.pl/dostepnosc-aborcji-trojmiasto/.
[39] Federation for Women and Family Planning, available at https://federa.org.pl/dostepnosc-aborcji-zachodniopomorskie/.
[40] Federation for Women and Family Planning, available at https://federa.org.pl/dostepnosc-aborcji-lublin/.
[41] Recommendations of 8 May 2019 of national consultants in the field of obstetrics, gynaecology and perinatology, concerning the care of patients who decide to terminate the pregnancy in circumstances indicated in the Act of 7 January 1993 on family planning, human foetus protection, and conditions of legal pregnancy termination, https://federa.org.pl/wp-content/uploads/2019/02/zalecenia_konsultant%C3%B3w_krajowych_terminacja_ci%C4%85%C5%BCy.pdf.

same town where the hospital is located. Furthermore, since the Recommendations are not legally binding, it appears that many hospitals do not follow them.

The absence of comprehensive national guidelines for health facilities and professionals, public information campaigns, leaflets for women seeking legal abortion care or any other measures that would provide women and adolescent girls with accessible information on how they can exercise their right to legal abortion care and where this care is available, means that Poland has not implemented a key requirement arising from the Court's judgments and the Committee of Ministers' decisions.

6. Failures to enforce National Health Fund contracts

In its latest submission, Poland informs that in August 2021 the Ministry of Health sent a letter to the President of the National Health Fund outlining how health facilities have obligations under contracts with the National Health Fund to provide legal abortion services and if the service cannot be provided they are "obliged to immediately take steps to maintain the continuity of services" and to inform the regional branch of the Fund about such case and actions that have been undertaken. At the same time, the Ministry of Health requested the President of the National Health Fund "to actively monitor performance by individual healthcare entities of contractual obligations concerning pregnancy termination procedures in individual regions and their availability (to the extent that these treatments are permissible in the light of the provisions of the Law of 1993)."[42]

Research conducted by civil society in recent years indicates that a significant number of health facilities were not providing legal abortion services and would therefore in principle be in breach of their contractual obligations to the National Health Fund. In 2019, legal abortions were provided by only 10% of the health facilities contracted by the National Health Fund to provide these services.[43] Moreover, the Federation's experience suggests that following the 2020 Constitutional Tribunal's ruling there are even fewer health facilities across Poland performing legal abortions under National Health Fund contracts.

The State also noted that the National Health Fund is responsible for ensuring compliance by health facilities with their contractual obligations and that any complaints can form the basis for the initiation of an "explanatory procedure" by the Fund.[44]

However, the National Health Fund has demonstrated limited interest in investigating reports of breaches of contractual obligations. As we have previously outlined, in 2019, the Federation for Women and Family Planning sent a letter to the National Health Fund outlining information obtained directly from hospitals regarding the additional barriers and requirements that many hospitals impose on women seeking legal abortion care without any basis in law. The National Health Fund replied that it only investigates complaints from individual patients.[45] In 2019, the Federation for Women and Family Planning filed a complaint to the National Health Fund on behalf of a woman who was denied

[42] Communication from the authorities (13/10/2021) concerning R.R, TYSIAC, P. and S. group of cases v. Poland (Application No. 27617/04, 5410/03 and 57375/08).
[43] Federation of Women and Family Planning, available at https://federa.org.pl/terminacja-ciazy-2019/.
[44] Communication from the authorities (13/10/2021) concerning R.R, TYSIAC, P. and S. group of cases v. Poland (Application No. 27617/04, 5410/03 and 57375/08).
[45] Replies addressed to the Federation for Women and Family Planning from the National Health Fund, DK-WŚ.401.1.2020, DK-WŚ.401.2.2020, DK-WŚ.401.3.2020, DK-WŚ.401.4.2020.

legal abortion care with reference to the conscience clause and who was not referred to an alternative provider or facility. The National Health Fund replied that it does not address cases regarding the conscience clause. While it indicated that the failure of the head of the hospital to refer the patient to another health facility breached contractual obligations, no sanction was imposed.

Furthermore, as we have previously emphasized in our submissions,[46] it is entirely inappropriate and misleading to suggest that women seeking urgent access to legal abortion care could viably seek to complain about contractual breaches as a mechanism to enforce their legal entitlements to abortion care. The possibility to make a complaint to the National Health Fund seeking the institution of an "explanatory procedure" does in no way constitute an effective remedy for women seeking to enforce their legal right to abortion care. Not only is the decision to initiate this procedure entirely at the discretion of the Fund, but the process may be lengthy and will only take place *post facto* and cannot result in the timely issuance of an order to provide legal abortion care to a woman or adolescent girl. As such, it is by its very nature wholly ineffective as a mechanism by which women and adolescent girls can enforce entitlements to legal abortion services in a timely and preventative manner.[47]

In light of this, the request by the Ministry of Health to the President of the National Health Fund to actively monitor compliance with the contractual obligations does not indicate the establishment of an effective monitoring mechanism for ensuring compliance with these contracts and for holding those responsible for any failures accountable.

7. Ensuring respect for patient data confidentiality and respectful treatment of adolescents seeking legal abortion services

As further elaborated in our 2020 submission, the State has taken no measures to ensure accountability for the breaches of patient data confidentiality or to redress the serious oversight and enforcement failures that led to the breaches of medical confidentiality in the *P. and S.* case. Despite the gravity of the breaches of patient confidentiality in the case, no measures have been taken to hold accountable those responsible or to prevent similar breaches in the future. Furthermore, no targeted training programs or other preventative measures have been put in place to prevent similar violations in the future.

In its 2019 decision, the Committee of Ministers called on the Polish authorities to adopt measures to enhance the effective implementation of existing mechanisms for protection of patient data confidentiality. However, the Polish authorities have adopted no such measures to date.

Furthermore, the State authorities have provided no information on measures adopted or envisaged to specifically address the situation and needs of adolescents seeking legal abortion care who are particularly vulnerable. This requires the adoption of targeted and specific measures including guidelines and training programs for health professionals.

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[46] Communication from NGOs (Center for Reproductive Rights and the Federation for Women and Family Planning) (29/01/2021) in the cases of R.R., Tysiąc and P. and S. v. Poland (Applications No. 27617/04, 5410/03, 57375/08) (29 January 2021); Rule 9.2 Communication from two NGOs (Center for Reproductive Rights and Federation for Women and Family Planning) (22/02/2019) in the case of P. and S. v. Poland (Application No. 57375/08), DH-DD(2019)235; Rules 9.2 and 9.6 - Communication from a NGO (Center of Reproductive Rights/Federation for Women and Family Planning) (22/01/2020) in the cases of R.R., TYSIAC and P. and S. v. Poland (Applications No. 27617/04, 5410/03, 57375/08).

[47] Tysiąc v. Poland, App. No. 5410/03, para. 118.

Instead of adopting positive measures to address the particular situation and needs of adolescents, Polish authorities continue to consider regressive measures that would jeopardize access to reproductive health information and education for adolescents. A draft bill known as "Stop Pedophilia" is still pending before the Polish Sejm.[48] The draft bill is the result of a civic initiative led by "Pro-Right to Life" and proposes to amend Art. 200b of the Penal Code.[49] The bill seeks to ban "demoralization and sexualization of children."[50] The proposed amendment would threaten all persons – doctors, educators, teachers, health professionals - who are engaged in providing any form of sexuality education, information or sexual and reproductive health care to adolescents with a 3-year prison sentence. If endorsed, this draft amendment would deprive adolescents of access to information and education about their sexuality and could further undermine their access to sexual and reproductive health information and services.

[48] Obywatelski projekt ustawy o zmianie ustawy z dnia 6 czerwca 1997 r. – Kodeks Karny (Druk nr 3751), http://orka.sejm.gov.pl/Druki8ka.nsf/0/4094EBA51C8F3D31C1258455004AC1BF/%24File/3751.pdf. In April 2020, the Sejm debated the draft bill and decided to send it to two parliamentary commissions for further debate.

[49] Art. 200b §1. Whoever publicly promotes or approves of the pedophile behavior is subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years. §2. The same punishment shall be imposed on anyone who publicly propagates or approves of the minors' sexual intercourse. §3. If the perpetrator commits the act specified in §2 by means of mass communication, he/she shall be subject to the penalty of deprivation of liberty for up to 3 years. §4. The proposed amendment reads: "Whoever promotes or approves of a minor undertaking sexual intercourse or other sexual activity, acting in connection with his occupation or professional activities related to upbringing, education, treatment or care of minors or acting on the premises of a school or other establishment or educational institution, is subject to the penalty of deprivation of liberty for up to 3 years." *See* https://bit.ly/2JkH10L.

[50] *See* the substantiation for the "Stop Pedophilia" draft bill (p. 3, 5, 7, 8), available at http://orka.sejm.gov.pl/Druki9ka.nsf/0/B43A98E392CAAB89C12584BA004470EB/%24File/39.pdf; the analysis by the Legal Culture Institute "Ordo Iuris": https://ordoiuris.pl/rodzina-i-malzenstwo/analiza-projektu-zlozonego-przez-komitet-inicjatywy-ustawodawczej-stop.

Annex

Official statistics on legal abortions in 1993 – 2020 by indications for abortion[51]

Year	Total number	Reasons for legal abortion			
		Social reasons	Risk to a woman's life or health	Serious fetal impairment	Pregnancy resulting from unlawful act
1993	685	–			
1994	782	–	689	74	19
1995	559	–	519	33	7
1996	505	–	457	40	8
1997	3,047	2,524[52]	409	107	7
1998	310	–	211	46	53
1999	151*	–	94	50	1
2000	138	–	81	55	2
2001	124	–	63	56	5
2002	159	–	71	82	6
2003	174	–	59	112	3
2004	193	–	62	128	3
2005	225	–	54	168	3
2006	340	–	82	246	12
2007	322	–	37	282	3
2008	499	–	32	467	0
2009	538	–	27	510	1
2010	641	–	27	614	0
2011	669	–	49	620	0
2012	752	–	50	701	1
2013	744	–	23	718	3
2014	971	–	48	921	2
2015	1,040	–	43	996	1
2016	1,098	–	55	1,042	1
2017	1,057	–	22	1,035	0
2018	1,076	–	25	1,050	1
2019	1,110	–	33	1,074	3
2020	1,076	-	21	1,053	2

* Although the Government's report indicates the total number of abortions for 1999 as 151, the number of abortions listed under each ground only totals 145.

[51] Annual reports of the Council of Ministers on the implementation and the effects of application in the years 1994-2018 of the Act of 1993. Center of Healthcare Information Systems (data of 2020); the Information from the Center of Healthcare Information Systems on the number of legal abortions in 2019 on file with the Federation for Women and Family Planning, https://federa.org.pl/terminacja-ciazy-2019/; the letter with public information from the Ministry of Health published on https://federa.org.pl/dane-mz-aborcje-2020/.

[52] In 1997, amendments to the 1993 Act that permitted abortion on social grounds were briefly in force from 4 January 1997 until they were invalidated by the Constitutional Tribunal in May 1997.