

Submission by the Council of Europe Commissioner for Human Rights

under Rule 9.4 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements

in the cases of

***Tysi c v. Poland* (application no. 5410/03, judgment of 20 March 2007)**

***R. R. v. Poland* (application no. 27617/04, judgment of 26 May 2011)**

***P. and S. v. Poland* (application no. 57375/08, judgment of 30 October 2012)**

Introduction

1. This submission by the Council of Europe Commissioner for Human Rights (hereinafter, “the Commissioner”) is addressed to the Committee of Ministers of the Council of Europe, in accordance with Rule 9.4 of the Rules of the Committee of Ministers¹, in the context of the supervision of the execution of the judgments of the European Court of Human Rights in the cases of *Tysi c v. Poland* (application no. 5410/03), *R. R. v. Poland* (application no. 27617/04), and *P. and S. v. Poland* (application no. 57375/08).
2. Each of these cases relates to one of the three different situations where a legal abortion is possible under Polish law. The case of *Tysi c v. Poland* concerned the existence of a risk to the pregnant woman’s health. The case *R. R. v. Poland* concerned the possible malformation of the foetus as legal ground for abortion. *P. and S. v. Poland* concerned the failure of the authorities to provide reliable information on the conditions and procedures for accessing lawful termination of a pregnancy resulting from rape. In all three cases, the Court has found violations of Article 8 of the European Convention on Human Rights (right to respect for private and family life) on account of the lack of access to legal abortion; and in the latter two cases it has also found violations of Article 3 of the European Convention on Human Rights (prohibition of torture and inhuman or degrading treatment) on account of the way in which the authorities had treated women who sought a legal abortion or prenatal genetic testing in connection with legal abortion.
3. According to her mandate, the Commissioner fosters the effective observance of human rights; assists member states in the implementation of Council of Europe human rights instruments, in particular the European Convention on Human Rights; identifies possible shortcomings in the law and practice concerning human rights; and provides advice and information regarding the protection of human rights across the region.²
4. The protection of women’s human rights and gender equality have been priority issues for the Commissioner and have been addressed extensively in the framework of both her country visits and thematic work. Advancing and protecting women’s sexual and reproductive health and rights is an essential component of member states’ obligations to respect and guarantee women’s human rights and advance gender equality.
5. The present submission aims to assist the Committee of Ministers in its examination of the three cases and to draw attention to the continuing problems regarding women’s access to sexual and reproductive health and rights in Poland, and notably safe and legal abortion care. The submission is based on the Commissioner’s work on Poland, most notably her June 2019 report following her visit to Poland in March 2019.³ It also draws on the recommendations of the Issue Paper on women’s sexual and reproductive health and rights in Europe, published by the Commissioner’s Office in 2017⁴, as well as the Commissioner’s continuous monitoring of the human rights situation in Poland.
6. Section I of the present written submission focuses on the legal framework and practice regarding access to lawful abortion, the use of the so-called “conscience clause” (i.e. conscience-based refusals to perform abortion), and the question of available remedies. Section II comments on the prevalence of abortions in Poland and the limited availability of legal abortion care in some parts of the country, as well as the shortage of official, up-to-date data in this regard. In Section III, the Commissioner seeks to place these issues within the context of women’s sexual and reproductive health and rights in Poland in general, analysing certain worrying developments in this regard. The three sections are followed by the Commissioner’s conclusions.

¹ [Rules of the Committee of Ministers](#) for the supervision of the execution of judgments and of the terms of friendly settlements (adopted by the Committee of Ministers on 10 May 2006 and [amended on 18 January 2017](#)).

² [Resolution](#) (99)50 on the Council of Europe Commissioner for Human Rights, adopted by the Committee of Ministers on 7 May 1999.

³ [Report](#) by Dunja Mijatovi c, Commissioner for Human Rights of the Council of Europe, following her visit to Poland from 11 to 15 March 2019, CommDH(2019)17, 28 June 2019.

⁴ “Women’s sexual and reproductive health and rights in Europe”, [Issue Paper](#), December 2017.

I. Legal framework and practice on access to lawful abortion, the use of the conscience clause in Poland, and the issue of available remedies

7. The Commissioner recalls that Poland's legislation on pregnancy termination remains one of the most restrictive in Europe, limiting its legality to three circumstances only: when there is a risk to a woman's health or life, a severe foetal impairment, or when the pregnancy is the result of sexual assault. Outside these three situations, abortion is criminalised and doctors or anyone else who performs an abortion risk a sentence of imprisonment for up to three years.
8. All of the previous Commissioners have expressed concern at either the scope or the practical operation of Poland's legislation on access to abortion, and particularly the use of the conscience clause, noting that it resulted in severe and insurmountable obstacles for women's enjoyment of their right to access safe and legal abortion care.⁵ In this respect, the Commissioner notes that until 2015 doctors invoking the conscience clause were under a legal obligation to refer women seeking abortion care to an alternative facility or practitioner and to justify and duly note their decision in the medical records. However, in October 2015, Poland's Constitutional Tribunal declared this duty to be unconstitutional, finding it to violate the freedom of conscience and religion protected by the Polish Constitution, and observed that the legislator should have established other, more practicable ways of informing patients about how they can effectively access the medical care to which they are entitled.
9. No official data on the prevalence of the use of the conscience clause to refuse lawful abortion has been collected since 2014. In the absence of such data, the Commissioner takes note of reports indicating that the practice of invoking this clause has become increasingly common in Poland in recent times. In this connection, she notes in particular that since 2014 almost 4,000 Polish doctors have signed a "Declaration of Faith of Catholic doctors and medical students regarding human sexuality and fertility", through which they expressed their commitment to following "divine law" in their professional work and to reject abortion, contraception and in vitro fertilisation. The Commissioner has received reports that in some healthcare facilities – including public ones – virtually all doctors have signed up to that declaration. Although the Polish authorities consider that health care institutions are under an obligation to refer patients faced with medical professionals invoking the conscience clause to other providers of medical services and to provide information in this regard, the Commissioner considers that the legislation currently in place does not provide for an explicit obligation to do so and that the practice in this regard is not established and far from uniform.
10. As regards the means of appeal that are available in Polish law against refusals to perform medical services related to sexual and reproductive health, it does not appear to the Commissioner that these can be considered effective. According to the authorities, these remedies include the filing of an objection with the Commissioner for the Rights of the Patient (a procedure introduced in 2009 following the judgment rendered in the case of *Tysiąc v. Poland*), as well as complaints to the National Health Fund. With respect to the former, the Commissioner notes that already in 2016, her predecessor observed that this general procedure was too complicated, long and ineffective, and did not constitute a timely and effective mechanism by which pregnant women could challenge a refusal to provide prenatal testing or legal abortion services.⁶ The scope of the measure is general, which means that it applies to objections against any type of medical act and is not specific to sexual and reproductive health services. The time-limit of 30 days for the medical board (commission of physicians) to issue its decision can hardly be considered timely in the case of prenatal testing or abortion. The right of the woman to be heard by the medical board is not guaranteed, and even a positive decision of the medical board offers no clear guarantee for the woman to be able to obtain the relevant services. As for complaints to the National Health Fund, the Commissioner concludes that this mechanism, which concerns service providers' non-

⁵ [Report](#) of the Commissioner for Human Rights, Alvaro Gil-Robles, on his visit to Poland (18-22 November 2002), CommDH(2003)4, 19 March 2003; [Memorandum](#) to the Polish Government: Assessment of the progress made in implementing the 2002 recommendations of the Council of Europe Commissioner for Human Rights, CommDH(2007)13, 20 June 2007; [Report](#) by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe, following his visit to Poland from 9 to 12 February 2016, CommDH(2016)23, 15 June 2016; Commissioner Muižnieks' [letter](#) addressed to the Polish Prime Minister, CommHR/NM/sf 001-2018, 19 January 2018.

⁶ Commissioner's 2016 [report](#), CommDH(2016)23, *op. cit.*, paragraphs 185-6.

compliance with their contractual obligations with the Fund generally, can hardly be regarded as a tool that could offer women a timely and effective remedy with regard to their access to abortion or prenatal testing. The lack of trust put by patients in both these legal measures is further evidenced by the very low number of objections and complaints filed annually by pregnant women in respect of doctors' refusals to provide sexual and reproductive health services.

11. The Commissioner recalls that at the examination by the Committee of Ministers of the *Tysiąc* and *R. R.* cases in September 2014, the Polish authorities undertook to amend the law to simplify and speed up the objection procedure by the end of 2016, a commitment which they reiterated in a communication sent to the Committee in August 2016.⁷ However, the Commissioner is not aware of any progress in this area and notes that the legal framework governing the filing of objections with the Commissioner for the Rights of the Patient currently remains unchanged.

II. Prevalence of abortions in Poland and availability of legal abortion care across the country

12. The Polish authorities have argued that the number of abortions in Poland has grown prominently in the past decade, effectively doubling since 2008. According to figures collected by the Ministry of Health, there were 1,040 terminations of pregnancy legally carried out in Poland in 2015, 1,098 in 2016, and 1,061 in 2017.
13. However, the data given on the subject by Polish and international women's rights NGOs paints a rather different picture from the official statistics. Regarding abortions carried out outside of Poland's public health system, while those groups place the number of such abortions anywhere between 80,000 and 150,000 annually, the estimation by the Ministry of Health was at approximately 10,000 per year in 2007. The UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health estimated clandestine abortions in Poland at anywhere between 80,000 and 180,000 per year in 2010.⁸
14. Moreover, the Commissioner notes that the overwhelming majority (about 95%) of all legal abortions carried out in Poland are based on the legal ground of high probability of severe and irreversible foetal damage or incurable illness of the foetus. Meanwhile, she has learned from the authorities that in 2018, not a single request for the termination of pregnancy resulting from rape had been registered in Poland, and that only one such request had been recorded in the preceding year. The Commissioner sees the low official number of legal abortions and the rare incidence of requests for termination of pregnancy as a result of sexual assault as warning signals that due to intense societal pressure and the stigmatisation of women and girls seeking an abortion, clandestine and potentially unsafe abortions or abortions carried out abroad may be taking place in high numbers.
15. The Commissioner further notes that the available data on access to abortion, when broken down according to geographical lines, appears to indicate very limited availability of this medical service in some Polish regions. Notably, access to legal abortion appears to be severely limited or outright unavailable in certain hospitals, and virtually absent in one large administrative entity – the Podkarpackie region in south-eastern Poland. According to an official government report, out of the 1,061 legal abortions performed in Poland in 2017 none were carried out in that region, while only 2 such procedures were performed there in 2016.⁹ As mentioned in the Commissioner's 2019 report, the authorities excluded the possibility that the decision to rely on the conscience clause could be taken by entire institutions, stressing that it was always the personal decision of the individual professional concerned. However, they admitted the possibility that in some of the approximately 800 hospitals in Poland, abortions and related care services could not be obtained, and moreover acknowledged the limited availability of abortion services in the Podkarpackie region.

⁷ 1208 DH meeting, 23-25 September 2014, [Decision](#) cases No. 14, *Tysiąc* and *R.R. against Poland*

⁸ [Report](#) of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Addendum. Mission to Poland, A/HRC/14/20/Add.3, 20 May 2010.

⁹ See <http://orka.sejm.gov.pl/Druki8ka.nsf/0/6F82FBB36BAA945CC125839200434FC7/%24File/3185.pdf> (in Polish), on p. 106.

16. A closely related problem is the shortage of official data on access to sexual and reproductive health services, which in the Commissioner's view hinders both access to these services in practice and the proper analysis of the situation. She notes that the Polish authorities do not currently collect, analyse or make public information on the number, availability and geographical distribution of health care providers and medical professionals who are prepared to perform safe and legal abortion or, inversely, those who refuse to carry out sexual and reproductive health services by relying on the conscience clause. As observed in the Commissioner's last report, the Polish authorities considered the collection of such information to be neither practicable nor relevant in light of the Constitutional Tribunal's 2015 ruling and – in their view – the fully functional system of referral.¹⁰ While unofficial lists of signatories of the aforementioned "Declaration of Faith" have been circulated on the internet and could be consulted by patients keen to know where it would be futile to seek help, the Commissioner points out that such information cannot be regarded as official. As mentioned before, there is also no up-to-date official data on the prevalence of the use of the conscience clause to refuse lawful abortion, or official estimates of the annual number of clandestine abortions or abortions performed abroad.

III. Additional observations on the general situation with regard to women's sexual and reproductive health and rights in Poland

17. The Commissioner considers that a proper analysis of the issue of access to safe and legal abortion must be placed in the more general context of the situation of women's sexual and reproductive health and rights in Poland. In this regard, she wishes to draw the attention of the Committee of Ministers to several worrying regressive trends concerning women's sexual and reproductive health and rights in Poland in recent years, notably:

- **Initiatives to further restrict the existing legislation on accessing safe and legal abortion**

18. A citizens' bill proposing a total ban on abortion except in cases of danger to the woman's life, introduced in the Polish Parliament in 2016, resulted in protests by hundreds of thousands of demonstrators in October of that year. Although the bill was eventually voted down, it was soon followed by another citizens' bill labelled "Stop Abortion", filed in 2017, which proposed to remove the possibility of terminating the pregnancy in case of severe foetal impairment, including in cases where such impairment is fatal; this time, the bill was allowed to proceed and it currently remains pending in the lower house of the Parliament. During her country visit in March 2019, the authorities told the Commissioner that they were neither involved in, nor supported, citizens' bills attempting to change the legislation on access to abortion, as they considered the existing state of the legislation to be adequate and the result of a "delicate compromise". The Commissioner's position remains that adopting legislation restricting the existing law would remove Poland even further from its obligations under international human rights law, as it would endanger women's right to freedom from ill-treatment and go against the principle of non-retrogression prohibiting any measures that diminish existing rights in the field of health.¹¹

- **Restricting access to emergency contraception**

19. Problematic access to safe and legal abortion in Poland is aggravated by the difficult access to the emergency contraceptive pill whose over-the-counter sale, declared safe and allowed in almost all European Union countries – including in Poland since April 2015 – was made available only on prescription in July 2017. The Polish authorities justified this move by concerns about consumer safety, including the need to curb abusive use of the pill by minors. However, the Commissioner notes that during the two years of authorised over-the-counter sale of the pill, the authorities have not collected any consequential data regarding its sale or the allegedly adverse effects, while non-official surveys have found that minors constituted no more than 2% of the pill's buyers in Poland. The Commissioner was informed about many hurdles that women

¹⁰ Commissioner's 2019 [report](#), CommDH(2019)17, *op. cit.*, paragraph 70.

¹¹ "Commissioner urges Poland's Parliament to reject bill which restricts access to abortion care", [statement](#), 23 March 2018.

and girls currently face in obtaining prescriptions for emergency contraception, including: refusals by doctors motivated by the conscience clause; long waiting times or the high cost of gynaecological appointments; the requirement for minors to have their legal guardian's authorisation to seek such consultations; or the failure by some pharmacists to keep a stock of, or to deliver, the pill. She also notes that an informal network of volunteer physicians was created to help women access emergency contraception in good time. As mentioned in the Commissioner's 2019 report, the authorities currently have no plans to make emergency contraception available again without a prescription. However, considering that the focus of the authorities should be placed on preventing unwanted pregnancies rather than on limiting women's choices, the Commissioner recommends that they take all necessary measures to remove barriers in access to contraception for all women throughout Poland.

- **Lack of comprehensive, age-appropriate and evidence-based sexuality education**

20. In his 2003 report on Poland, former Commissioner Álvaro Gil-Robles¹² noted that compulsory education on sexual and reproductive health had been removed from the Polish school curricula in 1999 and replaced in secondary schools by programmes on preparation for family life. The issue was again addressed by former Commissioner Thomas Hammarberg¹³ who, in his 2007 Memorandum, observed that attendance in such classes was not mandatory and, moreover, that some teachers conducting these classes were not required to have any specific qualifications on teaching sexuality education. Decisions concerning the attendance of minor pupils were taken by their parents and, as of 2008, the ratio of those attending such classes ranged from just 46.3% to 77.2 % depending on the type of school. Concerns about parents exempting their children from such classes and reports of teachers lacking sufficient training and knowledge in the field of sexual and reproductive health and rights were again raised in the 2016 country report by former Commissioner Nils Muižnieks¹⁴. Other human rights mechanisms, such as the UN Committee on Economic, Social and Cultural Rights or the Working Group on Discrimination Against Women in Law and in Practice, have also expressed concern in the past about shortcomings in the provision of sexuality education in Poland.

21. In October 2019, a citizens' bill labelled "Stop paedophilia" which may have a negative impact on the provision of sexual education in Polish schools, was introduced in the Polish Sejm and allowed to proceed. The Commissioner urged the Polish Parliament to reject the bill¹⁵ and, generally, reiterated her recommendation to the Polish authorities to ensure that mandatory, comprehensive sexuality education that is age-appropriate and evidence-based be taught in all schools in Poland.

- **Criminalisation of assistance to abortion**

22. As the authorities reminded the Commissioner during her last country visit, pregnant women in Poland do not incur criminal liability for an abortion performed in contravention of the applicable law, nor are they penalised for seeking abortion services abroad. However, the Commissioner notes that assistance in unlawful abortion is a criminal offence punishable by up to three years imprisonment and it reportedly accounts for a dozen or so convictions each year. The Commissioner observes that in October 2017, the Office of the State Prosecutor issued an instruction drafted by an institute external to the prosecution service, urging all subordinate prosecutors to more actively prosecute anyone helping pregnant women in carrying out abortions outside of the Polish legal regime e.g. by providing abortion medication, financing or facilitating travel to have an abortion abroad, assisting in contact with abortion clinics, or providing any information in this regard. Civil society representatives informed the Commissioner that the circulation of the instruction was followed by an increase in the number of investigations opened, although the Commissioner was informed that the State Prosecution Service did not collect statistical data on the number of investigation proceedings conducted under this legal provision.

¹² Commissioner for Human Rights from 15 October 1999 to 31 March 2006

¹³ Commissioner for Human Rights from 1 April 2006 to 31 March 2012

¹⁴ Commissioner for Human Rights from 1 April 2012 to 31 March 2018

¹⁵ The Commissioner's [tweet](#) of 18 October 2019.

Conclusions

23. March 2020 will mark thirteen years since the adoption of the judgment in *Tysi c v. Poland*, the first of the three key cases against Poland concerning access to safe and legal abortion before the European Court of Human Rights. Also, more than seven years have passed since the adoption of the judgment in *P. and S. v. Poland*, the last of these cases. The Commissioner regrets that although it has been a long time, the Polish authorities are yet to take adequate measures to ensure access to lawful abortion throughout Poland.
24. The Commissioner's work on Poland and her exchanges with various interlocutors there leave her with the impression that the situation in the area of sexual and reproductive health and rights in Poland has not only failed to improve, but has in fact worsened in recent years. She considers that much remains to be done to ensure women and girls' access to sexual and reproductive health and rights in Poland as an essential component of guaranteeing women's human rights and advancing gender equality. There is a need to ensure their effective access to safe and legal abortion, including access to reliable information on the conditions and procedures in that regard. In particular, there is a need to urgently address important shortcomings in the legal and institutional framework of conscience-based refusals which seriously hamper the practical enjoyment by women and girls in Poland of their sexual and reproductive health and rights, even in those very limited situations where abortion is legal. Moreover, while the Commissioner noted in her 2019 report the shifting general attitudes to the question of abortion and the increasing public support for a woman's right to terminate pregnancy up to 12 weeks, as evidenced by opinion polls, she stresses that women seeking an abortion in Poland remain confronted with high societal pressure and stigma.
25. The Commissioner therefore considers that the Polish authorities should:
- urgently adopt and effectively implement the necessary legislation to ensure the accessibility and availability of legal abortion services in practice, in particular by
 - introducing clear, effective and uniform procedures for women to access lawful abortion, including the timely referral to an alternative and willing provider in the event of a refusal by the medical professional to perform an abortion on grounds of conscience,
 - putting in place concrete and practical measures to provide women seeking lawful abortion with adequate information on the steps they should take to exercise their rights, in particular when pregnancy results from a criminal act,
 - amending the law to simplify and speed up the procedure for filing an objection with the Commissioner for the Rights of the Patient,
 - addressing, through awareness-raising programmes and strategies, the gender stereotypes and the stigma surrounding abortion that contribute to impeding access to legal abortion services,
 - monitor and make publicly available the number, availability and geographical distribution of health professionals who are prepared to perform safe and legal abortion, as well as those who refuse to carry out such services by relying on the conscience clause,
 - monitor, collect and make publicly available data on the use of the conscience clause to refuse lawful abortion and statistical estimates on the prevalence of clandestine abortions and abortions carried out abroad.
26. Lastly, the Commissioner recalls her recommendation that the Polish authorities guarantee access to safe and legal abortion care by making abortion legal on a woman's request in early pregnancy, and thereafter throughout pregnancy to protect women's health and lives and ensure freedom from ill-treatment. The Issue Paper on women's sexual and reproductive health and rights in Europe provides detailed recommendations in this regard as well as on other topics concerning women's sexual and reproductive health and rights.