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Meeting: 1331st meeting (December 2018) (DH)

Communication from a NGO (Ordo Iuris Institute for Legal Culture) (17/09/2018) in the cases of P. and S., R.R. and Tysiac v. Poland (Applications No. 57375/08, 27617/04, 5410/03).

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 : 1331^e réunion (décembre 2018) (DH)

Communication d'une ONG (Ordo Iuris Institute for Legal Culture) (17/09/2018) dans les affaires P. et S., R.R. et Tysiac c. Pologne (requêtes n° 57375/08, 27617/04, 5410/03) (**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.



ORDO IURIS
INSTITUTE FOR LEGAL CULTURE

Warsaw, 14 September 2018.

DGI

17 SEP. 2018

SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH

The Secretary of the Committee of Ministers of the Council of Europe

Avenue de l'Europe

F-67075 Strasbourg Cedex, France

**Comments by the Ordo Iuris Institute for Legal Culture concerning
the execution of the ECtHR judgments in cases of P. and S. v. Poland, R. R. v.
Poland and Tysiąc v. Poland.**

17 SEP. 2018

SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH

Dear Madam or Sir, Member of the of the Committee of Ministers of the Council of Europe,

The *Ordo Iuris* Institute for Legal Culture is an independent legal organization incorporated as a foundation in Poland. It gathers academics and legal practitioners aimed at the promotion of a legal culture based on the respect for human dignity and rights. The *Ordo Iuris* pursues its objectives by means of research and other academic activity as well as advocacy and litigation.

The *Ordo Iuris* Institute is among the organizations that are consulted by the Polish Government within the legislative process. Third party interventions (including *amici curiae* briefs) by *Ordo Iuris* Institute have been accepted by Polish courts of all levels, including the Supreme Court of the Republic of Poland. The Institute has been also permitted by the President of the European Court of Human Rights to deliver third party interventions and allowed by the President of the European Committee of Social Rights to submit observations. The *Ordo Iuris* Institute submitted its opinions to the Venice Commission, the Secretary General of the Council of Europe, Commissioner for Human Rights, the Committee on Political Affairs and Democracy of the PACE and constitutional courts of numerous countries. The experts of the Institute are consulted and allowed to deliver interventions in matters of democracy and the rule of law i.a. by the Monitoring Committee of the Parliamentary Assembly of the Council of Europe and by the Department of State of the United States of America. Moreover, *Ordo Iuris* Institute has ECOSOC consultative status with the United Nations.

We hope the **the Committee of Ministers of the Council of Europe** will find our Comments supportive during 1324 session on 18-20 September.



Karina Walinowicz

Director of *Ordo Iuris*

International Law Centre

Comments by the Ordo Iuris Institute for Legal Culture concerning the execution of the ECtHR judgments in cases of P. and S. v. Poland, R. R. v. Poland and Tysiąc v. Poland

Summary:

- ❖ The question of legal recognition of the beginning of protected human life falls within the margin of freedom of the Member States. There is no right to abortion under the Convention, therefore Poland has the right to restrict or even completely exclude access to abortion, protecting the dignity, life and physical integrity of unborn human beings.
- ❖ Restricting access to abortion does not threaten women's life and health, which is clearly evidenced by international research, indicating that Poland is among the top leaders ensuring the highest standards of perinatal care. The mortality rates of the mothers giving birth in Poland are lower than in the countries which guarantee wide access to abortion, e.g. France or Great Britain.
- ❖ The European Court of Human Rights in all of its judgments regarding the abortion cases against Poland (P. and S. v. Poland, as well as Tysiąc v. Poland and R. R. v. Poland) found the lack of procedures ensuring access to legal abortion to be a violation of the Convention. Poland implemented those judgments by the adoption (on 6 November 2008) of the Act on the Patients' Rights and the Patient's Ombudsman, which established two parallel and independent procedures to enable a person an access to abortion. The solutions contained in that Act have never been called in question by the Court.
- ❖ In accordance with the principle of subsidiarity, Poland has the right to decide which measures are most appropriate to implement the positive obligations arising from the Article 8 of the Convention.
- ❖ The Act on the Patients' Rights and the Patient's Ombudsman guarantees all patients, including pregnant women, two procedures to verify doctors' decisions regarding the access to medical actions, e.g. to abortion. Firstly, any patient, including a pregnant woman, to whom an abortion has been refused, may request an opinion of a second doctor or a consultation of a medical council

on her case (Article 6, Paragraph 3, Point 1 of the Act). Secondly, any patient, including a pregnant woman, who has been refused the execution of an abortion, may file a dissent to the Medical Commission at the Patient's Ombudsman (Article 31 of the Act).

- ❖ The rights provided by the Act on the Patients' Rights and the Patient's Ombudsman guarantee, in accordance with the ECtHR case-law, the right to a fair hearing, while the second procedure additionally guarantees getting a written reasoned decision and the possibility to obtain the medical service in the case if the dissent is successful.

1. Introduction

At its meeting on 18-20 September 2018, the Committee of Ministers shall consider the question of general measures to be taken by Poland in order to comply with the judgment of 30 October 2012 in the case of P. and S. v. Poland.¹ In the aforementioned judgment, the European Court of Human Rights stated that hindering the access to legal abortion constitutes an infringement of the right to privacy (Article 8 of the Convention). The case concerned a 14-year-old girl who became pregnant with her boyfriend of the same age. The girl obtained a prosecutor's certificate, stating that the pregnancy was a result of a crime of sexual intercourse with a person under 15 years of age. However, for several months she could not obtain an abortion in any hospital she turned to. Only in July 2008 the girl had an abortion in a hospital indicated by the Minister of Health at a distance of 500 km from her place of residence. According to the Court, if the law permits abortion, it should also establish a procedure to ensure its availability. Therefore, the judgment of P. and S. refers only to procedural issues, and it does not prejudge in which cases abortion should be available.

Before analysing the judgment of P. and S. v. Poland, two general issues should be noted, because of their importance for comprehending the manner, in which Poland protects the rights and freedoms guaranteed by the Convention.

¹As regards individual measures, the judgment was deemed as executed by the Decision of the Committee of Ministers of 21 September 2017 No CM/Del/Dec(2017)1294/H46-19.

2. Poland's Right to Protect Human Life in its Prenatal Phase

Although the ECtHR judgment deals only with procedural issues related to the access to abortion, for a better understanding of the problem it is necessary to address the issue of the protection of human life in the prenatal phase from the point of view of the Convention.

In the light of the ECtHR's well-established case-law, the question of the legal recognition of the beginning of human life – due to the lack of European consensus on the status of the unborn human being – falls within the margin of discretion of the States Parties². The Article 8 of the Convention, which guarantees everyone the right to protection of private and family life, does not imply a substantive right to abortion³. Therefore, Poland has the right to protect the dignity, life and physical integrity of unborn human beings to a greater extent than other Member States, taking advantage of the margin of freedom in this matter. Among the means of protection of human life in its prenatal phase, Poland may limit or even completely exclude access to abortion.

In the light of Polish law, passed within that margin of freedom, the access to abortion became admissible as an exception to the rule, which institutes the criminal prohibition of killing unborn human beings. According to the Article 152 of the Penal Code, abortion is an offence punishable by imprisonment of up to three years, unless there occurs one of the three circumstances excluding its unlawfulness (occurs a justification), provided for in the Article 4a, Paragraph 1 of the Act on Abortion, i.e. when:

- 1) pregnancy is a threat to a pregnant woman's life or health,
- 2) prenatal examinations or other medical reasons indicate a high probability of severe and irreversible impairment of the foetus or its incurable life-threatening disease,
- 3) there is a well-founded suspicion that the pregnancy has occurred as a result of a criminal act.

Polish law does not guarantee the right to abortion, it solely exempts from the criminal liability for an abortion in one of the three cases, specified in the Act. Justifications referred to in the Article 4a of the aforementioned Act are interpreted restrictively, in accordance with the principles of *exceptiones non sunt extendendae* and in *dubio pro vita humana*.

² Judgments of the Grand Chamber of the ECtHR of 8 July 2004, *Vo v. France*, § 82 and 16 December 2010. *A, B and C v. Ireland*, §§ 235 and 237. See also judgment of 10 April 2007. *Evans v. the United Kingdom*, §54; judgment of 26 May 2011, *R.R. v. Poland*, §186; judgment of 9 April 2013, *Mehmet Şentürk and Bekir Şentürk v. Turkey*, §10.

³ Judgment of the Grand Chamber of the ECtHR of 16 December 2010 r. *A, B and C v. Ireland*, §214.

3. No threat to women's lives and health due to restrictions on access to abortion

Furthermore, it should be stressed that restricting the access to abortion does not put in danger the physical and mental integrity of women, which is protected by the Article 8 of the Convention.

According to the UN data, the global Maternal Mortality Ratio in 2015 amounted to 216 per 100,000 births, with a significant disparity between the rate in developed countries (12/100,000) and the rate in developing countries (239/100,000)⁴. Poland – *ex aequo* with Iceland, Greece and Finland – belongs to the top leaders in terms of lowest maternal mortality rates (in 2015 it was only 3 per 100 000 births), which is currently the best result in the world⁵. Poland overtook even such countries as the United States (14/100,000), the United Kingdom (9/100,000), France (8/100,000) or Germany (6/100,000). Compared to 1990, the maternal mortality in Poland fell by 82.4%. Also the research carried out by the University of Washington shows that Poland is a country with one of the lowest rates of death of mothers in the world and one of the few who managed to meet the demands of the Millennium Development Goals (the *Millennium Development Goals* 2015)⁶.

It is also worth noting that in the opinion of many representatives of the medical community, abortion is not medically indispensable to save the woman's life⁷.

4. The Strasbourg Standard on the Access to Abortion

In the light of the case-law of the European Court of Human Rights, the Member States are under positive obligation of providing their citizens with the right to effective respect for their physical and mental integrity, contained in the right for the protection of their private and family life, guaranteed by the Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The Strasbourg Standard in this domain was developed on the basis of actual situations concerning the access to legal abortion in the states, whose legislation did not provide women with any procedure, which would guarantee abortion in cases where it is permitted by law⁸. It requires the establishment of a procedure which will ensure:

⁴ *Trends in maternal mortality: 1990 to 2015 Estimates by WHO, UNICEF, UNFPA, World Bank Group and the United Nations Population Division*, World Health Organization 2015, p. 17, http://apps.who.int/iris/bitstream/10665/194254/1/9789241565141_eng.pdf [24/06/2016].

⁵ *Trends, op. cit.*, s. 70-77.

⁶ N. J. Kassebaum et al., *Global, regional, and national levels and causes of maternal mortality during 1990–2013: a systematic analysis for the Global Burden of Disease Study 2013*, [w:] „The Lancet” - vol. 384 September 13, 2014, s. 998, [http://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736\(14\)60696-6.pdf](http://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736(14)60696-6.pdf) [24/06/2016].

⁷ *Dublin Declaration on Maternal Healthcare*, <https://www.dublinddeclaration.com/> (9.11.2018).

⁸ The ECtHR judgment of 20 March 2007, case Tysiac v. Poland; the ECtHR's Grand Chamber judgment of 16 December 2010, case A. B. and C. v Ireland; the ECtHR judgment of 26 May 2011, case R.R. v. Poland; the ECtHR judgment of 30 October 2012, case P. & S. v. Poland.

- comprehensive examination of the case⁹,
- an individual has been involved in the decision-making process¹⁰,
- hearing also legal representatives of the subject, if she is a minor¹¹,
- access to prenatal examinations where the admissibility of abortion depends on the confirmation of a genetic defect in the foetus¹².

The judgment of 30 October 2012 on P. and S. v. Poland was consistent with the existing line of the Court's case-law.

Referring to its earlier case-law, the Court found that Poland failed to fulfil her positive obligation to establish "a procedural framework enabling a pregnant woman to effectively execute her right of access to lawful abortion" (§ 99). Further, the Court – echoing its comments from other verdicts – recalled that the correctly shaped procedure of the access to abortion should:

- have at least a modicum of procedural fairness (§ 108);
- relevant procedure should guarantee to a pregnant woman at least the possibility to be heard in person (§ 99);
- if a pregnant woman is a minor – allow to speak her parent or legal representative (§ 109);
- be finalised with a verdict, comprising a written statement of reasons (§ 99).

5. Procedures in Place to Ensure the Access to Legal Abortion in Poland

Poland accomplished that standard, even before the release of the judgment in case P. & S., by enacting on November 6, 2008, the Act on the Patients' Rights and the Patient's Ombudsman (hereinafter the 'Act on the Patients' Rights') and by issuing on 10 March 2010 the Minister's of Health Regulation on the Medical Commission, acting at the Patients' Ombudsman's (hereinafter 'the Regulation'), which guarantee as many as two procedures for the verification of a medical opinion or report. Their compliance with the Convention has never been questioned by the ECtHR. The dissent procedure provided for in the Article 31 of the Act on the Patients' Rights ensures that the case is dealt with comprehensively, since the Medical Commission takes its decision not only on the basis of medical records, but can also

⁹ Tysiac p. Polsce, §113.

¹⁰ *Ibidem*.

¹¹ P. & S. v. Poland, §109.

¹² R. R. v. Poland, §66.

Likewise the procedure for requesting a second medical opinion or holding a doctors' consultation, provided for in the Article 6, Paragraph 3 of the Act on the Patients' Rights also meets the requirements of the Strasbourg Court regarding the fulfilment by States Parties of their obligations stemming from the Article 8 of the Convention.

The ECtHR's case-law does not provide any specific guidance regarding the form of the appeal brought by the applicant and the scope of the cases to be investigated by the appellate body. Moreover, the ECtHR itself has repeatedly underlined, that it is not for this Court to indicate the means, which are most appropriate for any State, to comply with its positive obligations¹³.

6. Access to Information about Health Services

Polish law also guarantees the access to information on health services, including non-therapeutic interventions such as abortion. In accordance with the Article 12 of the Act on Patients' Rights, the patient has the right to the information about the kind and scope of health services offered by a provider of health services. On the other hand, pursuant to the Article 14 paragraph 2 pt. 1 of the Act of 15 April 2011 on Medical Activity, a healthcare institution is obliged at patient's request to provide detailed information on health services offered by that institution.

The observance of patients' rights is safeguarded by the Patients' Ombudsman, who can investigate the case on the spot, and in the event of an unlawful withholding the provision of health services, it can issue an administrative decision ordering the necessary actions to be taken within a specified period of time (Article 64 of the Act on the Patients' Rights). The Ombudsman's decision shall be enforced immediately. In the event of non-implementation of the decision, the Ombudsman may impose on the healthcare institution a fine of up to PLN 500,000, i.e. approximately EUR 100,000 (Article 68 of the Act on the Patients' Rights).

7. Reply to Allegations Held by the Helsinki Foundation for Human Rights against the Dissent Procedure via the Medical Commission

¹³ Airey v. Ireland judgment of 9 October 1979, § 26; R. R. v. Poland, §213.

The statement, sent by the Helsinki Foundation for Human Rights to the Committee of Ministers in connection with the procedure of executing the judgment in the case of P. and S. v. Poland, deems insufficient the procedure of filing a dissent with the Medical Commission. Among the alleged deficiencies of the procedure the following are mentioned: "excessive formalism; impossibility to employ the procedure in case of refusal of a doctor to issue an opinion or decision; doubts as to whether the objection concerns the refusal to refer a person for medical testing; lack of guarantees for fast and timely consideration of the objection."¹⁴

7.1. Accusations of Excessive Formalism

According to the HFHR, the procedure stipulated in the Article 31 of the Patients' Rights Act is too formalised, because it requires the applicant to indicate the law, from which his right derives, and to attach a copy of a doctor's certificate or opinion. Both accusations are unfounded. The obligation to indicate the legal regulation on which the applicant's right is based constitutes a mere safeguard against the abuse of the right to dissent and, in particular, against unmeritorious and unreasonably litigious applications.

Such risks of abuse were indicated by non-governmental organizations during the works on the Act on Patients' Rights: "The provisions concerning the patient's right to dissent must be amended adequately to exclude any legal possibility of massive dissent applications. The very idea of granting patients the right to report their discontent with a doctor's rulings to the Medical Commission requires reconsidering, because it can be abused by persons dissatisfied with reasonable medical verdicts. Such abuses on a larger scale can lead to unnecessary public budget expenditures."¹⁵

The second accusation has no foundation in the Art. 31 of the Act on Patients' Rights, which does not require to include a copy of a doctor's verdict or opinion. However, even if such a requirement existed in practice, it is hard to consider it as excessive formalism, given that the Commission's consideration of the dissent requires getting acquainted with the contested verdict or opinion.

¹⁴ Communication from the Helsinki Foundation for Human Rights, 9 August 2018, http://www.hfhr.pl/wp-content/uploads/2018/08/HFHR_COMMUNICATION_P.-AND-S.-V.-POLAND_AUGUST-2018-1.pdf (9.11.2018), s. 5.

¹⁵ Opinion of the Polish Confederation of Private Employers "Lewiatan" about the draft Act on the Protection of Patients' Individual and Collective Rights and the Patients' Ombudsman, 21 February 2008, p. 3, [in:] Archive of the Sejm of the 6th Term, Parliamentary Print no. 283 [http://orka.sejm.gov.pl/Druki6ka.nsf/0/3FF88ECF3F0D4BF5C12573FE003C3949/\\$file/283.pdf](http://orka.sejm.gov.pl/Druki6ka.nsf/0/3FF88ECF3F0D4BF5C12573FE003C3949/$file/283.pdf) [11.09.2018].

7.2. Impossibility to Apply the Procedure if a Doctor Refuses to Issue an Opinion, Verdict, Referral or Certificate

Likewise, the accusation that the procedure cannot be applied, if a doctor refuses to issue an opinion, verdict, referral or certificate, is groundless. As the Government rightly stressed in its Communication to the Committee of Ministers, the Article 31 of the Act on the Patients' Rights also provides a basis for objecting to a refusal of issuing an opinion, a verdict or a referral.¹⁶ In this context, the cited by the HFHR position of the Patients' Ombudsman, who – as subordinate to the Prime Minister (Art. 46 Par. 2 of the Act on Patients' Rights) – is bound by the Government's interpretation of law, is irrelevant.

7.3. Accusation of the Lack of Guarantees for Resolving the Dissent Fast and Timely

The accusation of the lack of guarantees for resolving dissents fast and timely has no real foundations. The HFHR's position does not indicate a single case in which the patient's rights would have been infringed as a result of too long consideration of the dissent. On the contrary, to date cases confirm that the Article 31 of the Patients' Rights Act contains sufficient guarantees that the objections will be dealt with in a timely manner.

In one of the reports for the Council of Europe, Polish authorities reported an example of a woman, who on July 30, 2013 filed with the Ombudsman an objection for being refused to undergo an abortion. Within 48 hours the Ombudsman appointed the Medical Commission, which examined the case within 5 days. Such example shows that the institution of dissent fully satisfies the requirement of the existence of a legally stipulated and practically effective remedy against any medical opinion which is unsatisfactory for the patient.

8. Conclusions and Recommendations

Taking into consideration the above arguments, the Institute for Legal Culture Ordo Iuris would like to ask the Committee of Ministers to close the procedure of supervising the execution of the judgment in the case of P. and S. v. Poland.

¹⁶Communication of the Government of the Republic of Poland of 21 June 2018, p. 2, link: [http://hudoc.exec.coe.int/eng?i=DHDD\(2018\)659E](http://hudoc.exec.coe.int/eng?i=DHDD(2018)659E).