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Conscientious Objection in relation to reproductive health care
Poland before the European Court of Human Rights

by

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Abstract: The paper discusses the notion of personal and religious objection or conscientious objection (CO) and its repercussions on women's health when it comes to access to legal abortion. Conscientious objection has been defined as a refusal to participate in an activity that an individual considers incompatible with their religious, moral, philosophical, or ethical beliefs. The aim of the article is to demonstrate that even when fulfilling the requirements for legal abortion, the access to this medical procedure maybe severely impeded by the use of conscientious objection by the health professionals. Conscientious objection in the context of access to reproductive health care is at the center of legal and policy debates around the world, especially in the countries which still retain highly restrictive laws that forbid women's access to abortion except in extremely limited conditions, as illustrated by the case of Poland, where abortion is banned except in three circumstances.

Introduction

Although there is no single human rights instrument dedicated to reproductive rights, various elements of reproductive rights are protected by the main United Nations (UN) and regional human rights instruments, such as, for example, the UN Convention on the Elimination of All Forms of Discrimination against Women which obligates the States Parties to ensure "access to health care services, including those related to family planning" and mentions appropriate services in connection with pregnancy and the right to decide on the number and spacing of children[1]; or article 12 of the International Covenant on Economic, Social and Cultural Rights, which protects the general right to the highest attainable standard of

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[1] UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, article 12 and 16.

health[2]. In its General Comment No. 14, concerning the right to the highest attainable standard of health, the Committee on Economic, Social and Cultural Rights defined reproductive health as meaning "that women and men have the freedom to decide if and when to reproduce and the right to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice as well as the right of access to appropriate health-care services that will, for example, enable women to go safely through pregnancy and childbirth"[3]. Another important document, also adopted by consensus and endorsed by the United Nations General Assembly is the Beijing Declaration and Platform for Action, adopted in 1995 at the Fourth World Conference on Women[4]. Furthermore, the 2005 World Summit Outcome, adopted by the United Nations General Assembly in 2005[5], and the commitment to both sexual and reproductive health in the outcome document of the 2010 United Nations Summit on the Millennium Development Goals, adopted by the United Nations General Assembly in 2010[6], further confirmed the commitment to reproductive health. In June 2012, the United Nations reaffirmed its commitment to reproductive rights in the United Nations Conference on Sustainable Development, Rio+20[7].

Reproductive rights are especially difficult as they touch upon the female body directly. A body that for centuries has been stereotyped. Stereotypes can be understood as a generalized view or preconception of attributes or characteristic possessed by, or the roles that are or should be performed by members of a particular group[8]. As a generalization, stereotypes do not take into account the abilities or characteristics of individual members of the social group. As such, by solely belonging to a certain group, perceived always as a homogenous one, the individual has to share the same characteristic, values and needs as other members of the group. Gender stereotypes are concerned with the social and cultural construction of men and women, due to their different psychical, biological, sexual and social functions; conventions that underwrite the social practice of gender[9]. Gender stereotyping becomes problematic when it operates to ignore individuals' characteristics, abilities, needs and wishes. Stereotypes are dangerous in private life, with their special contribution to violence against women, but they are even more dangerous when all the state policies are built on stereotypes of inferiority of women, or motherhood as an inherent aim of every women or for example women as "intrin-

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[2] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, article 12.

[3] UN Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4, par. 14, footnote 12.

[4] United Nations General Assembly Resolution A/RES/50/203.

[5] United Nations General Assembly Resolution A/RES/60/1.

[6] United Nations General Assembly Resolution A/RES/65/1.

[7] UN Doc. A/CONF.216/16.

[8] Cook, Rebecca J., Cusack Simone. 2010. Gender Stereotyping: Transnational Legal Perspectives. Philadelphia: University of Pennsylvania Press. p. 10.

[9] *Ibidem*, p. 20.

sically unreliable", what results in belief that women are more likely to lie about cases involving sexual assault[10].

The ability to become pregnant is a highly stereotyped phenomenon. According to Catharine A. MacKinnon, the capacity for and the female role in child-bearing had become the source of many of the social disadvantages to which women are subjected[11]. The most common stereotype is the one that motherhood is women's natural role and destiny, thus all women should be treated only as mothers or potential mothers, and not according to their individual needs. Stereotypes limit the ability of individual women to make autonomous decisions about their health and their private that could conflict with their role as mothers or future mothers.

The stereotypes had become unfortunately a basis of many legal systems, which have not adequately conceptualized pregnancy and legalize abortion. As the creation of laws, belonging to the so-called "public domain" has mainly been the male domain, the social conception of pregnancy that has formed the basis for its legal treatment has not been evolved from the point of view of the pregnant woman, but rather from the point of view of the observing outsider[12], usually men. Thus, criminal abortion laws hurt no men the way they hurt only women[13]. They make women criminals for a medical procedure only women need, or make others criminals for performing a procedure on women that only women need[14]. Male providers can avoid liability by refusing to perform the procedure, relying on Conscientious Objection (CO), while pregnant women who seek to abide by the law must continue the pregnancy. And forced motherhood is gender inequality[15].

The explanation provided by Katherine MacKinnon, although accurately describing the widely held view (and its consequences) that the main social role of a woman is to become a mother, it misses one important element of CO – religion. Conscientious objection, or as referred to by Christiana Fiala et. al – dishonourable disobedience[16] – in reproductive health care is usually defined as the refusal by health care professionals to provide a legal medical service or treatment for which they would normally be responsible, based on their objection to the treatment for personal or religious reasons[17]. Conscientious objection derives from the right to freedom of thought, conscience and religion, and it is a relatively new phenomenon

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[10] *Ibidem*, p. 16.

[11] MacKinnon, Catharine A. 1991. "Reflections on Sex Equality Under Law." *Yale Law Journal* 100(5): p. 1308.

[12] *Ibidem*, p. 1309.

[13] *Ibidem*, p. 1321.

[14] *Ibidem*, p. 1319.

[15] *Ibidem*, p. 1319.

[16] See Fiala, Christian, Gemzell Danielsson, Kristina, Heikinheimo, Oskari, Guðmundsson, Jens A. and Arthur, Joyce. 2016. "Yes we can! Successful examples of disallowing 'conscientious objection' in reproductive health care." *The European Journal of Contraception & Reproductive Health Care*, 21(3): 201-206.

[17] Fiala, Christian, Joyce, Arthur. 2017. "There is no defence for 'Conscientious objection' in reproductive health care." *European Journal of Obstetrics & Gynecology and Reproductive* Biology 216: p. 254.

that began only with the legalization of abortion in the UK and the United States[18]. As such, the most commonly invoked basis for CO are not stereotypes, but rather religious grounds. However, in the author's opinion, it is highly important not to be eluded by this simple explanation – it is not only religion that prohibits some professionals from carrying out their duties, but rather stereotypes that were born in a certain social environment, as there is no doubt that religion influences the way we form stereotypes as a society, considering that Christianity is still prevalent in Europe. Although CO was supposed to be a consensus between patients' rights and doctors' individual ethics, if not well regulated, e.g. allowing the patients to receive the medical procedure timely, it places doctors in a privileged position, while undermining the patients' rights, further increasing their already vulnerable position, as they are the ones who fear for their life and health.

Abortion in Europe

Despite a wide variation of provisions, abortion is legal in most European countries. Only six European countries retain highly restrictive abortion laws and do not permit abortion on request or on broad social grounds: Andorra, Malta and San Marino do not allow abortion at all, while Liechtenstein allows abortion only when a woman's life or health is at risk or the pregnancy is the result of sexual assault. Two states, Monaco and Poland, allow abortion only when a woman's life or health is at risk, the pregnancy is the result of sexual assault or involves a severe fetal anomaly[19].

However, one of the biggest obstacles in exercising the right to legal abortion is the Conscientious Objection (CO). Invoking CO is granted by law in twenty-one countries in the European Union, as well as Norway and Switzerland. Refusing to perform abortion on moral grounds is not legally granted in Sweden, Finland, Bulgaria, the Czech Republic, and Iceland[20].

It is a term taken from military CO; however, it has very little in common with it. For example, soldiers are drafted into compulsory service, are relatively powerless, and accept punishment or alternate service in exchange for exercising their CO. While doctors choose their profession, enjoy a position of power and authority, and rarely face discipline for exercising CO[21]. Therefore, it may represent an abuse of medical ethics and professional obligations to patients.

As was mentioned beforehand, European countries may be divided based on the access to legal abortion. We can further divide the European states between those which allow the medical staff to invoke CO and those which do not allow such an

[18] *Ibidem*, p. 255.

[19] Center for Reproductive Rights. European Abortion Laws: A Comparative Overview. 2021. https://reproductiverights.org/european-abortion-law-comparative-overview-0/ [last accessed: 20.06.2021].

[20] Tamma, Paola. "Even where abortion is legal, access is not granted," European Journalism Data Network, https://www.europeandatajournalism.eu/eng/News/Data-news/Even-where-abortion-is-legal-access-is-not-granted [last accessed: 04.10.2021].

[21] *Ibidem*.

invocation (e.g. Romania v. Sweden)[22]. Going further, there are countries which provide a legal framework for CO (e.g. Portugal)[23] and those which only allow it, without enacting adequate legislation, enclosing any referral mechanism to ensure access to legal abortion in cases of CO by medical practitioners (e.g. Poland, as demonstrated subsequently).

The impact of CO on woman's life will thus differ according to the country she lives in. In a country with a restrictive abortion law, the woman who qualifies to a legal abortion may be forced to travel to another region or even country, forced to organize her travel and funds. It may also have a negative impact on her private and work life, as she may need to take leave of absence. She might also have to recourse herself to the clandestine abortion, risking her live and health. But that would only apply to a woman having enough financial resources – as clandestine abortions are expensive, the ban on abortion has even more negative effect on women with limited means[24]. As a result, a woman will be denied the right to make a decision and she will be ultimately forced to give birth against her will.

However, even in a country that provides a sufficient legal framework for CO and the medical personnel appropriately refer the patient to another doctor and she receives service promptly, refusals are still inherently wrong and harmful. The provider is deliberately refusing to do part of their job for personal reasons, thereby abandoning patients, while still expecting no negative consequences. Finally, the act of refusal may also have a negative psychological impact on woman by undermining her dignity and autonomy, and sending a negative message that stigmatizes her and the health care she needs, as granting CO also gives legitimacy to the religiously-based assumption that abortion is wrong.

Thus, CO in general poses a threat for women to access safe abortion and it is a serious obstacle, in those countries where abortion is permitted only on certain grounds, it can actually impede women to access abortion at all, making a right guaranteed by law completely illusory, which is reflected in the case-law of the European Court of Human Rights (ECHR).

Access to reproductive healthcare in the case-law of the European Court of Human Rights on the example of Poland

The European Court of Human Rights' jurisprudence regarding women's reproductive health and rights continues to evolve and until now has been developed under the scope of article 3 (prohibition of torture and degrading treatment), article 8

[22] See Fiala, Christian, Gemzell Danielsson, Kristina, Heikinheimo, Oskari, Guðmundsson, Jens A. and Arthur, Joyce. "Yes we can!"… op. cit.

[23] See Chavkin, Wendy, Swerdlow Laurel, Fifield Jocelyn. 2017. "Regulation of Conscientious Objection to Abortion: An International Comparative Multiple-Case Study", *Health and Human Rights Journal* 19(1): 55-68.

[24] Autorino, Tommaso, Mattioli, Francesco, Mencarini Letizia, 2020. "The impact of gynecologists' conscientious objection on abortion access", *Social Science Research* 87, https://doi.org/10.1016/j.ssresearch.2020.102403 [last accessed: 04.10.2021].

(right to respect for private and family life), article 13 (right to an effective remedy) and article 14 (prohibition of discrimination) of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention)[25].

The following sections are dedicated to the analysis of three judgements – all of them concern access to medical procedure, autonomy, exercising the right to decide about one's own body and life, and unfortunately long-lasting stereotypes, unwillingness of doctors to perform legal abortion and inherent risks related to the invocation of CO. All the judgments have also one more thing in common – the State accused of violation of the rights protected by the Convention is Poland, which is still one of those few countries in Europe that does not provide access to legal abortion, except in three circumstances. According to the 1993 Law on Family Planning, Protection of the Human Foetus and Conditions Permitting Pregnancy Termination (the 1993 Act):

> An abortion can be carried out only by a physician where:
> 1. pregnancy endangers the mother's life or health;
> 2. prenatal tests or other medical findings indicate a high risk that the foetus will be severely and irreversibly damaged or suffering from an incurable life-threatening disease;
> 3. there are strong grounds for believing that the pregnancy is a result of a criminal act[26].

In the cases of malformation of a foetus, an abortion can be performed until such time as the foetus is capable of surviving outside the mother's body; in cases of pregnancy being a result of a criminal act, until the end of the twelfth week of pregnancy. Circumstances in which abortion is permitted in first and second case shall be certified by a physician other than the one who is to perform the abortion. The circumstances in the last case shall be certified by a prosecutor[27]. Termination of pregnancy in breach of these conditions constitutes a criminal offence, although it applies only to the one who terminates a pregnancy in violation of the Act or assists in such a termination. The pregnant woman herself cannot be punished for an abortion performed in contravention of the 1993 Act.

Under the Medical Profession Act of 199628, a doctor may refuse to carry out a medical procedure, citing their objections on the ground of conscience. They are obliged to inform the patient where the medical procedure concerned can be obtained and to register the refusal in the patient's medical records. Doctors employed in health-care institutions are also obliged to inform their supervisors of their refusal in writing[29].

[25] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5.

[26] Ustawa z dnia 7 stycznia 1993 r. o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży, Dz.U. 1993 nr 17 poz. 78 (The Family Planning, Human Embryo Protection and Conditions of Permissibility of Abortion, Act of 7 January 1993), article 4(a).

[27] *Ibidem.*

[28] Ustawa z dnia 5 grudnia 1996 r. o zawodach lekarza i lekarza dentysty, Dz.U. 2011 nr 277 poz. 1634 (Act of 5 December 1996, the professions of doctor and dentist).

[29] *Ibidem*, article 39.

In the cases Tysiąc v. Poland[30], R.R. v. Poland[31], P. and S. v. Poland[32] the Court had to decide whether the State's failure to provide effective mechanisms for a woman to obtain a legal abortion safeguarded by law constituted a violation of applicants' rights to private and family life (article 8 of the European Convention) and the prohibition of inhuman or degrading treatment (article 3).

Tysiąc v. Poland

The case Tysiąc v. Poland is a landmark decision as it is one of the first times that the Court had to pronounce on the access to abortion in one of the Member States. The judgment, which became final in 2007, was so powerful in Poland that until now Alicja Tysiąc is one of the faces of the pro-choice movement in Poland. Alicja Tysiąc is a Polish woman who has suffered for many years from severe myopia. Before the pregnancy, she was diagnosed as suffering from disability of medium severity. In February 2000 she became pregnant. She was already a mother of two, who were born through Caesarean section[33].

When she discovered that she was pregnant for the third time, she consulted several doctors in Poland to determine what impact this might have on her sight. Although doctors concluded that there would be a serious risk to her eyesight if she carried the pregnancy to term, they refused to issue a certificate authorizing termination. During the pregnancy, her sight deteriorated significantly. She received a referral for a termination on medical grounds, but the gynecologist refused to perform it. There was no procedure through which Ms Tysiąc could appeal this decision and she gave birth to the child[34].

Six weeks after giving birth the applicant was informed that she was at serious risk of going blind. While doing a counting-fingers test, she was only able to see from a distance of three meters with her left eye and five meters with her right eye, while before the pregnancy she had been able to see objects from a distance of six meters[35]. In 2001 the disability panel declared that she needed constant care and assistance in her everyday life[36]. Moreover, she was not entitled to a disability pension as she had not been working the requisite number of years before the disability developed because she had been raising her children[37]. With respect to the article 8 of the European Convention, the Court established and recognized that "legislation

[30] *Tysiac v. Poland*, Appl. No. 5410/03, Council of Europe: European Court of Human Rights, 20 March 2007.

[31] *R.R. v. Poland,* Appl. no. 27617/04, Council of Europe: European Court of Human Rights, 26 May 2011.

[32] *P. and S. v. Poland,* Appl. no. 57375/08, Council of Europe: European Court of Human Rights, 30 October 2012.

[33] *Tysiąc v. Poland, op. cit*., par. 9.

[34] *Ibidem*, par. 9-15.

[35] *Ibidem*, par. 16-17.

[36] *Ibidem*, par. 18.

[37] *Ibidem*, par. 19.

regulating the interruption of pregnancy touches upon the sphere of private life, since whenever a woman is pregnant her private life becomes closely connected with the developing foetus"[38].

Subsequently, the Court decided that the state has a positive obligation to effectively secure the physical integrity of a pregnant woman, including by adopting a comprehensive legal framework regulating the termination of pregnancy that takes into account the woman's views and it is not structured in a way which would limit real possibilities to obtain legal abortion[39]. Moreover, the Court further noted that the legal prohibition on abortion, taken together with the risk of criminal responsibility, can have a chilling effect on doctors when deciding whether the requirements of legal abortion are met in an individual case. The provisions regulating the availability of lawful abortion should be formulated in such a way as to lessen this effect[40]. And finally the Court recognized that the State is required to ensure that measures affecting fundamental human rights of pregnant women are subject to some form of preventive procedure at the national level that should meet the following minimum requirements: (1) the procedure is performed by an independent and competent body[41]; (2) a pregnant woman is heard in person and her views are considered[42]; (3) the independent body issues the grounds for its decision in writing[43], and (4) the decision is timely[44].

The Court concluded that it has not been demonstrated that Polish law as applied to the applicant's case contained any effective mechanisms capable of determining whether the conditions for obtaining a lawful abortion had been met in her case. Hence, the Court concluded that the authorities failed to comply with their positive obligations to secure to the applicant the effective respect for her private life, and therefore there has been a violation of Article 8 of the Convention[45]. Although in relation to article 3 the Court simply noted that the facts alleged did not disclose a breach of article 3, in a four years' time span, in the case R.R. v. Poland, the Court made the article 3 the central point of its reasoning.

R.R. v. Poland

The case R.R. v. Poland concerns the second premise for a legal abortion – the malformation of the foetus. The applicant stated that she was deliberately refused genetic tests during her pregnancy by doctors who were opposed to abortion. The woman and the doctors suspected a severe genetic abnormality in the foetus[46]. R.R.

[38] *Ibidem,* par. 106.

[39] *Ibidem*, par. 116.

[40] *Ibidem*.

[41] *Ibidem*, par. 117.

[42] *Ibidem*.

[43] *Ibidem*.

[44] *Ibidem*, par. 118.

[45] *Ibidem*, par. 120-130.

[46] R.R. v. Poland, *op, cit*., par. 9.

tried desperately to obtain the relevant genetic tests, allowing her to make an informed decision about whether or not to terminate her pregnancy. She saw five different doctors and went to several hospitals and clinics, she even travelled to doctors in other regions than her own – at one point she was even hospitalized for a few days, during which time the doctors only carried out irrelevant tests[47]. Only when it was too late for an abortion, in the twenty-third week of pregnancy a genetic test was performed, and the applicant was told that she had to wait two weeks for the results[48]. The results confirmed her suspicion that the foetus she was carrying had a genetic abnormality[49]. However, on that date the doctors refused to carry out an abortion, saying that it was too late as the foetus was able to survive outside the mother's body[50]. The child was subsequently born with Turner syndrome[51].

The Court stated that the right of access information about one's health falls within the ambit of the notion of private life and that during pregnancy the foetus' condition constitutes an element of the pregnant woman's health[52]. The effective exercise of this right is often decisive for the possibility of exercising personal autonomy, also covered by Article 8 of the Convention[53]. In relation to article 3 of the European Convention, which contains the prohibition of inhuman and degrading treatment, the Court observed that the ill-treatment must attain a minimum level of severity if it is to fall within the scope of article 3. The assessment of this minimum level depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim[54]. The Court recognized that the applicant found herself in a situation of great vulnerability[55]. As a result of the procrastination of the health professionals, she had to endure weeks of painful uncertainty concerning the health of the foetus, her own and her family's future and the prospect of raising a child suffering from an incurable condition. She suffered severe anguish through having to think about how she and her family would be able to ensure the child's welfare, happiness and appropriate long-term medical care[56]. As the Court noted: "it is a matter of great regret that the applicant was so shabbily treated and humiliated by the doctors dealing with her case"[57]. Thus, in the Court's opinion, the applicant's suffering reached the minimum threshold of severity under article 3 of the Convention and therefore there has been a breach of that provision[58].

[47] *Ibidem*, par. 12-26.
[48] *Ibidem*, par. 28.
[49] *Ibidem,* par. 33.
[50] *Ibidem*.
[51] *Ibidem*, par. 37.
[52] *Ibidem,* par. 197.
[53] *Ibidem*.
[54] *Ibidem,* par. 148.
[55] *Ibidem,* par. 159.
[56] *Ibidem*.
[57] *Ibidem*, par. 160.
[58] *Ibidem*, par. 161-162.

P. and S. v. Poland

The last case chosen for the analysis, P. and S. v. Poland, is especially remarkable as it touches upon a whole set of important issues, such as unlawful detention, the reproductive rights of adolescents and disclosure of the applicant's personal and medical data. The timeline starts on 8th April, when P., fourteen years old at that time, is raped by a classmate**.** On 9th April, P. for the first time goes with her friend to a public hospital. The medical staff tells her that they could neither examine her nor provide medical assistance because she was a minor and she needs the consent of her legal guardian. The case is being reported to the police and her parents are notified[59].

As the rape resulted in pregnancy, on 20th May the prosecutor issues a certificate stating that the first applicant's pregnancy had resulted from unlawful sexual intercourse with a minor under 15 years of age[60]. The mother of P., the second applicant in this case, contacts Dr. O, a regional consultant for gynecology and obstetrics, to ask for a referral for an abortion[61]. He tells her that he is not obliged to issue a referral and advises the second applicant to "get her daughter married"[62]. After an argument, the doctor tells her to report to Jan Boży Hospital.

On 26th May, the applicants refer to that hospital. They are told that they have to wait until the head of the gynecological ward, Dr. W. S., returns from holiday[63]. On 30th May Dr. W.S. returns from holiday and she says she needs time to make a decision. She asks them to return on 2nd June. She then calls the second applicant separately to her office and asks her to sign the following statement: "*I am agreeing to the procedure of abortion and I understand that this procedure could lead to my daughter's death*"[64].

On 2nd June the first applicant returns to the hospital alone, as her mother is working. Dr. W.S. takes her to talk with the Catholic priest, K.P. The applicant is not asked if she wishes to see the priest and what her faith is[65]. The priest tries to convince her to carry the pregnancy to term. He asks her to give him her phone number, which she does. The applicant is given a statement written by Dr. W.S. to the effect that she wants to continue with the pregnancy and she signs it. She will later say that she signs it as she does not want to be impolite to the doctor and priest[66]. The second applicant arrives to the hospital. Dr. W.S. tells her that she is a bad mother and that she will adopt both P. and the baby that will be born[67]. The

[59] *Ibidem*, par. 6.

[60] *Ibidem*, par. 8-10.

[61] *Ibidem*, par. 11.

[62] *Ibidem*, par. 13.

[63] *Ibidem*, par. 14.

[64] *Ibidem*, par. 15.

[65] *Ibidem*, par. 17.

[66] *Ibidem*, par. 19.

[67] *Ibidem*, par. 20.

first and the second applicant leave the hospital as the doctor says she will not perform an abortion.

On an unspecified date the Jan Boży Hospital issues a press release to the effect that it would not perform an abortion in the applicants' case. Journalists who contacted the hospital were informed of the circumstances of the case. The case becomes national news. A number of articles are published by various local and national newspapers. It is also the subject of various publications and discussions on the internet[68]. On 3rd June the applicants go to Warsaw and contact the doctor recommended by a non-governmental organization and P. is admitted to the hospital. On 4th June they are informed that P. has to wait three days before having an abortion. The same day P. receives a message from the priest that he is working on her case. She also receives numerous texts from unknown parties. The priest comes to the hospital in Warsaw together with an anti-abortion activist. They are allowed to talk with P. in her mother's absence[69]. The doctor who admitted the girl to the hospital says that they are receiving a lot of pressure to discourage the staff from performing the abortion[70]. On 5th June the applicants decide to leave the hospital. They are harassed by anti-choice activists waiting at the hospital entrance. The police arrives and takes both applicants to the police station[71].

On the same day the applicant are questioned from 4 p.m. to 10 p.m. at the police station. The officers show them the family court decision restricting S. parental rights and order to place P in a juvenile shelter[72]. P. is taken to the police car, driven around Warsaw. As no juvenile shelter accepts her, the girl is driven back to her hometown, where around 4 am she is placed in a shelter, in a locked room, without her mobile phone[73]. On 6th June the priest visits her and tells her that he will lodge an application with the court requesting to transfer her to a single mother's home run by the Catholic church. Later that day the first applicant starts to experience bleeding. She is taken again to the Jan Boży Hospital. A number of journalists come to see her and try to talk to her[74]. On 14th June she is discharged from the hospital and due to the court decision, she is allowed come back home with her parents[75]. Meanwhile, between 9th and 13th June, the second applicant, S., files a complaint with the Office for Patient's Rights of the Ministry of Health asking to help her daughter obtain a legal abortion that she is entitled to[76]. On 16th June S. is informed by a Ministry Official that the issue was resolved and that her daughter can undergo an abortion. However, she will have to go to Gdańsk, 500 km from her hometown. On 17th June the Ministry of Health sends a car for the applicants and

[68] *Ibidem*, par. 23-24.

[69] *Ibidem*, par. 25-26.

[70] *Ibidem*, par. 27.

[71] *Ibidem*, par. 28.

[72] *Ibidem*, par. 29.

[73] *Ibidem*, par. 30

[74] *Ibidem*, par. 32.

[75] *Ibidem*, par. 33-38.

[76] *Ibidem*, par. 39.

they are driven to Gdańsk. The first applicant has an abortion there in a public hospital. The applicants submitted that the trip to Gdansk and the abortion were carried out in a clandestine manner, despite the termination being lawful. When the applicants came back home, they realize that information about their journey to Gdańsk has been put on the Internet by the Catholic Information Agency that day at 9 a.m.[77].

Firstly, the Court observed that there is a consensus amongst majority of the Member States of the Council of Europe towards allowing abortion and that most Member States have resolved the conflicting rights of the foetus and the mother in favor of greater access to abortion[78]. The existence of the European consensus means that there exists an agreed practice between the Member States and this has a legitimizing potential.

As in the case of P. the CO was one of the crucial factors in her access to legal abortion, it is also reflected in the reasoning of the Court. The Court noted that States are obliged to organize their health service system in such a way as to ensure that the effective exercise of freedom of conscience by health professionals in a professional context does not prevent patients from obtaining access to services to which they are entitled under the applicable legislation[79]. In this regard, the Court noted that Polish law has acknowledged the need to ensure that doctors are not obliged to carry out services to which they object, and put in place a mechanism by which such a refusal can be expressed. This mechanism includes elements allowing the right to conscientious objection to be reconciled with the patient's interests, by making it mandatory for such refusals to be made in writing and included in the patient's medical record and, above all, by imposing on the doctor an obligation to refer the patient to another physician competent to carry out the same service. However, it has not been shown that these procedural requirements were complied with in the case of P. or that the applicable laws governing the exercise of medical professions were duly respected[80].

The Court found that the staff involved in P.'s case did not consider themselves obliged to carry out the abortion expressly requested by the applicants on the strength of the certificate issued by the prosecutor. The events surrounding the determination of the first applicant's access to legal abortion were marred by procrastination and confusion. The applicants were given misleading and contradictory information. They did not receive appropriate and objective medical counselling which would have due regard to their own views and wishes. No set procedure was available to them under which they could have their views heard and properly taken into consideration with a minimum of procedural fairness[81]. Thus the Court stated that there has been a violation of the article 8 of the European Convention.

[77] *Ibidem*, par. 41.

[78] *Ibidem*, par. 97.

[79] *Ibidem*, par. 106.

[80] *Ibidem*, par. 107.

[81] *Ibidem*, par. 108.

In analyzing the breach of article 3 of the Convention, the Court pointed out the very young age of the applicant at the material time and the fact that the medical certificate issued immediately after reporting the rape confirmed bruises on the applicant's body and concluded that physical force had been used to overcome her resistance[82]. These circumstances, together with the state of unwanted pregnancy, created a situation of great vulnerability for the applicant[83]. This state was aggravated by the way the applicant had been treated by the medical and law-enforcement authorities, who failed to provide protection to her, having regard to her young age and vulnerability. It is also striking that that the authorities decided to institute criminal investigation on charges of unlawful intercourse against P. who, according to the prosecutor's certificate and the forensic findings, should have been considered to be a victim of sexual abuse[84]. Thus, the Court concluded that the suffering of the applicant reached the minimum threshold of severity under article 3 of the Convention and that there has therefore been a breach of that provision[85].

International obligations of Poland

As was mentioned beforehand, although reproductive rights are not expressed in one single human rights instrument, various elements of reproductive rights are protected by the main United Nations and regional human rights instruments, such as for example the UN Convention on the Elimination of All Forms of Discrimination against Women or the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Poland as a state party to these international treaties has taken responsibility to comply with international standards, including those developed by diverse treaty bodies.

In previously mentioned General Comment No. 14 on the right to the highest attainable standard of health, expressed in the article 12 of the International Covenant on Economic, Social and Cultural Rights, the Committee on Economic, Social and Cultural Rights, not only defined the reproductive health, but also noted that in order to fully safeguard and realize women's rights to health, the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health is necessary. The Committee also underlined that "it is also important to undertake preventive, promotive and remedial action to shield women from the impact of harmful traditional cultural practices and norms that deny them their full reproductive rights"[86].

In 2010, the Human Rights Committee, the body of independent experts that monitors implementation of the International Covenant on Civil and Political

[82] *Ibidem*, par. 161.

[83] *Ibidem*, par. 162.

[84] *Ibidem*, par. 165.

[85] *Ibidem*, par. 169.

[86] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14…, op. cit*. par. 21.

Rights by its state parties, reviewed Poland's sixth periodic report. In its Concluding Observations, the Committee called for greater information on the use of the conscientious objection clause. The availability of such information would make it possible to monitor the effects of the clause being used: "the Committee is concerned that, in practice, many women are denied access to reproductive health services, including contraception counselling, prenatal testing and lawful interruption of pregnancy. It notes with concern that procedural safeguards contained in article 39 of the Act of 5 December 1996 on the Medical Profession ("conscience clause") are often inappropriately applied"[87] and that Poland "should introduce regulations to prohibit the improper use and performance of the "conscience clause" by the medical profession. The State party should also drastically reduce medical commissions' response deadline in cases related to abortions"[88]. In 2016, the Human Rights Committee reiterated its concerns about widespread use of CO in Poland, noting that: "(a) the so-called "conscience clause" in article 39 of the Act on Medical and Dental Professions has, in practice, often been inappropriately invoked, with the result that access to legal abortion is unavailable in entire institutions and in one region of the country; (b) as a result of the judgment of the Constitutional Tribunal of October 2015, there is no reliable referral mechanism for access to abortion following the exercise of conscientious objection; and (c) in some areas of the State party, few if any health providers are willing to offer legal abortion services"[89].

The other UN treaty body, Committee on the Elimination of Discrimination against Women, responsible for monitoring the implementation of the Convention on the Elimination of All Forms of Discrimination against Women, in 2014 was also concerned about the extensive use, or abuse, by medical personnel of the conscientious objection clause in Poland and recommended the state party to "establish clear standards for a uniform and non-restrictive interpretation of the conditions for legal abortion so that women may access it without limitations owing to the excessive use of the so-called conscientious objection clause by doctors and health institutions and ensure effective remedies for contesting refusals of abortion, within the revision of the Act on Patient Rights"[90].

Furthermore, Poland as a member state of the Council of Europe and a party to European Convention on Human Rights is obliged to respect and comply with the judgements of the ECHR. The attitude of Poland, however, continuous to shift further from the views expressed by the ECHR. As a response, on 11th March 2021, the Committee of Ministers, made up of the Ministers for Foreign Affairs of the Council of Europe member States, which ensures continuous supervision of the ex-

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[87] HRC, Concluding Observations of the Human Rights Committee on Poland's 6th Periodic Report, UN doc. CCPR/C/POL/CO/6, 2010, par. 12.

[88] *Ibidem*.

[89] HRC, Concluding Observations of the Human Rights Committee on the seventh periodic report of Poland, UN doc. CCPR/C/POL/CO/7, par. 23.

[90] CEDAW, Concluding observations on the combined seventh and eighth periodic reports of Poland, UN doc.

CEDAW/C/POL/CO/7-8, 2014, par. 37(b).

ecution of judgments and decisions of the ECHR issued an Interim Resolution calling on Poland to adopt clear and effective procedures on steps women need to take to access lawful abortion[91]. The Interim Resolution relates to Poland's implementation of the three judgments that were the object of analysis in this article and the lack of compliance with them. It urges the Polish authorities to ensure that lawful abortion and pre-natal examination are effectively accessible across the country without substantial regional disparities and without delay caused by the refusal to perform it due to the use of the conscience clause or to restrictions due to the COVID-19 pandemic.

Conclusions

Sexual and reproductive rights, including the right to sexual and reproductive health, are essential elements of the human rights framework. Without it, our ability to make autonomous and informed decisions about our bodies, our health, our sexuality, and whether or not to reproduce, is seriously weakened.

The right to enjoyment of the highest attainable standard of physical and mental health is enshrined *inter alia* in articles 12 of the International Covenant on Economic, Social and Cultural Rights and the Convention on the Elimination of All Forms of Discrimination against Women. Although the European Convention on Human Rights does not include the right to health, as the ECHR has repeatedly noted, the Convention is a living instrument. Thus, the Court's jurisprudence regarding women's sexual and reproductive health and rights continues to evolve and until now has been developed under the scope of article 3 (prohibition of torture) and article 8 (right to respect for private and family life) of the European Convention. In all the cases presented above the applicants had a right to obtain a legal abortion, yet this right was denied to them. Although the Polish Law provides that if a doctor wants to refuse a medical treatment based on their conscience, they need to issue a written statement and above all – refer a patient to another doctor, in none of the analyzed cases, though the doctors clearly refused the abortions due to their religious beliefs, were the patients were referred to another doctors or hospitals. On the contrary, the medical staff did all they could to prevent access to lawful abortion.

The analysis of the three cases against Poland provides an overview of an evolution in the approach of the Court to the cases concerning the women's reproductive rights, setting some standards that should be taken into account by the Member States. First of all, in the case Tysiąc v. Poland the Court stated that under Article 8 of the Convention, "private life" includes decisions to have or not to have children and decisions by a pregnant woman to continue her pregnancy or not. And the States are under positive obligation to provide an efficient legal framework and

[91] Council of Europe, Committee of Ministers, Interim Resolution CM/ResDH(2021)44, Execution of the judgments of the European Court of Human Rights Tysiąc, R.R. and P. and S. against Poland, Adopted by the Committee of Ministers on 11 March 2021 at the 1398th meeting of the Ministers' Deputies.

mechanisms to make the rights envisaged in the Convention effective, not only theoretical or illusory.

Furthermore, the Court noted that the legal prohibition on abortion, taken together with the risk of criminal responsibility, can well have a chilling effect on doctors when deciding whether the requirements of legal abortion are met in an individual case. As such, the States, once they decide to allow abortion, they must not structure their legal framework in a way that would limit real possibilities to obtain it.

In the case R. R. v. Poland the Court agreed with the applicant that the way she was treated by the medical staff, intentionally delaying genetic tests that would confirm or exclude the possibility of the malformation of the fetus, resulting in hindering her the possibility of making an informed decision about termination of her pregnancy amounted to degrading treatment and constituted violation of art. 3 of the Convention.

In the case P. and S. v. Poland the Court observed that the freedom of thought is not an absolute right and that States are obliged to organize their health service system in such a way as to ensure that the effective exercise of freedom of conscience by health professionals in a professional context does not prevent patients from obtaining access to services to which they are entitled under the applicable legislation.

Thus, the analysis of the case-law of the ECHR makes evident that access to legal abortion is demonstrably affected by a high prevalence of conscientious objection and strict and clear regulations are necessary if the conscientious objection is not to jeopardize the women's reproductive rights.

Moreover, it has to be noted that the access to the ECHR is not effortless, as it requires time, determination and unfortunately money. As such, not everyone can afford to have his or her case heard by the ECHR. The fact that there are three similar cases that were ultimately delivered to the ECHR can well mean that there may be thousands of similar stories that we will never hear about.

This is somehow demonstrated by the official data by Polish Ministry of Health: in 2017 there were 1057 procedures of legal abortion nationwide. In 1035 of those cases the termination was caused by embryopathological factors; 22 procedures were conducted in order to protect the life and health of the pregnant woman and no abortion was carried out on grounds of the registered pregnancy having been caused by a criminal act[92]. And according to the Polish NGO dealing with reproductive health, Federation for Women and Family Planning, only 10% of hospitals perform legal abortions[93].

[92] Sprawozdanie Rady Ministrów z wykonywania oraz o skutkach stosowania w 2017 r. ustawy z dnia 7 stycznia 1993 r. o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży, Druk sejmowy nr 3185 Warszawa, 10 stycznia 2019 r. [Report on the Implementation of the the Family Planning, Human Embryo Protection and Conditions of Permissibility of Abortion, Act of 7 January 1993 in 2017] p. 105.

[93] ASTRA Network 2020. *The fight hidden in plain sight. Sexual and reproductive health and rights in Central and Eastern Europe and Central Asia.* Warsaw: ASTRA Network Secretariat. p. 82.

It is hard to believe that in a whole year there have not been any single cases of rape that would result in an unwanted pregnancy. Especially having in mind that the statistical data on sexual assaults in Poland is also quite alarming. Have the victims been refused legal abortion due to CO? Have they turned towards the clandestine abortion in Poland or travelled to the Czech Republic or Germany to have the abortion performed there? Have they given birth to the child they did not want?

In the upcoming years the situation may worsen significantly considering the recent ruling of the Polish Constitutional Tribunal. On 22nd October 2020 Constitutional Tribunal issued a ruling (K 1/20) finding abortion on the grounds of "severe and irreversible foetal defect or incurable illness that threatens the foetus' life" unconstitutional. As represented by the data from 2017, most of the lawfully performed terminations of pregnancy in Poland were done on the premise of severe and irreversible fetal defect or incurable illness that threatens the foetus' life. The issue of the ruling and its subsequent publication on 27th January 2021 sparked massive protests in Poland. The ruling clearly violates international treaties Poland is a party to. In particular, it fails to take into account the need to protect the inherent dignity of women and it violates the prohibition of cruel treatment and torture, the right to the protection of private life and the right to health. It also goes contrary to the judgments of the ECHR, which establish the minimum and necessary standards of reproductive health care. As such, one of the pending issues towards regulation of sexual and reproductive rights should be more comprehensive regulation, if not a complete removal of conscientious objection, especially in the countries where access to legal abortion is highly limited, as CO makes this access completely illusory.