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# Statement of the Poznan Centre for Human Rights on the decision of the Constitutional Tribunal of 22 October 2020 (K 1/20)

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by

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## **Banning abortion, dismantling democracy: a message from Poland**

In October 2020, a near-total ban on abortion was introduced in Poland. This is one of the final steps in an ongoing process of restrictions on the reproductive freedom of Polish women. Change began in 1993, when abortion was limited to three situations: when a pregnancy was the result of a criminal act, when the woman's life or health was at risk, and when there was a high probability of severe and irreversible foetal defect or incurable illness that threatened the foetus's life. This legislation, later called a "compromise", was related to the highly influential position of the Roman Catholic Church in Polish society and politics. "The compromise" was in fact never seriously respected by the state, regardless of the political forces in power: access to legal abortion was often restricted in practice, for example by refusal to perform legal termination, on the basis of conscientious objection, and many women were denied or demeaned while seeking to access the medical services that they were entitled to<sup>1</sup>.

Although in the past there have been several attempts to restrict or liberalise access to abortion, overall this issue was perceived by most politicians as too controversial and too risky to handle. However, in recent years, the situation has dramatically changed. Since 2015, when the conservative Law and Justice Party was elected to power, Poland has faced backsliding of the democratic process<sup>2</sup>. This in-

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<sup>1</sup> See judgments of the European Court of Human Rights: *Tysiąc v. Poland*, 20 March 2007, 5410/03; *R.R. v. Poland*, 26 May 2011; 27617/04; *P. and S. v. Poland*, 30 October 2012, 57375/08 and concluding observations of the UN treaty bodies, more e.g. here: Sękowska-Kozłowska, Katarzyna. 2020, "Concluding Observations of the UN Human Rights Treaty Bodies in the Field of Equality and Non-discrimination. Does a Common Standard Exist and is it Implemented? Example of Poland". *Polish Review of International and European Law* 8(1): 65-89.

<sup>2</sup> See e.g. Wyrzykowski, Mirosław. 2019, "Experiencing the Unimaginable: the Collapse of the Rule of Law in Poland". *Hague Journal on the Rule of Law* 11: 417-422.

cludes, inter alia, attacks on judicial independence, restrictions on media freedom, and state-sponsored homophobia. The most dramatic challenge to democracy is related to the takeover of the Constitutional Tribunal by the ruling party, replacing its three elected judges and changing the law regulating the functioning of this institution and its judges. Since then, the Constitutional Tribunal has been issuing decisions that are seen as politicized, and the legal value of which has been questioned<sup>3</sup>.

This is also the case of the decision on abortion<sup>4</sup>. At the request of a group of ultra-conservative parliamentarians, The Constitutional Tribunal pronounced that the abortion law was unconstitutional in cases of high probability of severe and irreversible foetal defect or incurable illness that threatens the foetus's life. As a result, a near-total ban on abortion was introduced, as until this point around 98% of legal terminations in Poland had been made due to foetal defects. Moreover, the Constitutional Tribunal based its reasoning on the dignity of a human being from conception prevailing over women's human rights. It opened the way for further restrictions on abortion law, in particular in case of pregnancy in result of rape or incest.

After this decision thousands of people protested across Poland, gathering despite pandemic restrictions and their own fears of leaving home. Many individuals were detained by the police. Activists from "All-Poland Women's Strike", one of the driving forces behind these protests, are facing charges and repression. This decision also resulted in a situation of legal uncertainty for many women and medical personnel. As a result of the mass protests, the government did not officially publish the decision of the Constitutional Tribunal, a condition for its entry into force. This unconstitutional situation of legal uncertainty lasted for three months – there was no indication of when the decision would become binding, and doctors were afraid to perform abortions even though they were technically still legal. As a consequence, a movement of support and self-help for women who seek abortion was implemented by civil society and various activists at an unprecedented scale. Additionally, several thousand women joined an action submitting complaints to the European Court of Human Rights. They claimed that uncertainty related to the possibility to terminate pregnancy in case of foetal defects seriously affected their reproductive choices and private life. Twelve of these complaints have already been communicated to the Polish government<sup>5</sup>.

Restrictions on abortion law are another critical example of the situation of human rights violations in Poland since 2015. This decision can be specifically related to attacks on democracy and the rule of law. This is not merely the manifesta-

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<sup>3</sup> See e.g. Radzewicz, Piotr. 2017, "On Legal Consequences of Judgements of the Polish Constitutional Tribunal Passed by nn Irregular Panel". *Review of European and Comparative Law* 31(4): 45-64.

<sup>4</sup> Gliszczyńska-Grabias, Aleksandra, & Sadurski, Wojciech. 2021, "The Judgment That Wasn't (But Which Nearly Brought Poland to a Standstill): 'Judgment' of the Polish Constitutional Tribunal of 22 October 2020, K1/20", *European Constitutional Law Review* 17(1): 130-153.

<sup>5</sup> Applications nos. 1819/21, 3682/21, 4957/21, 6217/21, 3639/21, 4188/21, 5876/21, 6030/21, 3801/21, 4218/21, 5114/21 and 5390/21, Press release issued by the Registrar of the Court, ECHR 217 (2021), 08.07.2021.

tion of strongly-held moral convictions, it is the manifestation of power, and the willingness to eliminate a political culture based on freedom, tolerance and rights of entity, and to establish a new order. We cannot allow it to happen.

The English version of the statement of the Poznan Centre for Human Rights follows.

**Statement of the Poznan Centre for Human Rights (Institute of Law Studies of the Polish Academy of Sciences) on the decision of the Constitutional Tribunal of 22 October 2020 (K1/20)**

We, the undersigned scholars of the Poznan Centre for Human Rights (Institute of Law Studies of the Polish Academy of Sciences), express our strongest objection to the decision of the Constitutional Tribunal issued on October 22, 2020 in the case ref. no. K 1/20. The Constitutional Tribunal, while deciding the case, was composed partly of persons illegally appointed as judges of the aforementioned Tribunal. It declared the **unconstitutionality of the termination of pregnancy due to fetal abnormalities** on the grounds of Article 38 (legal protection of life) in connection with Article 30 (protection of the inherent and inalienable dignity) and Article 31(3) (limitation clause) of the Constitution of the Republic of Poland.

Legal framework concerning admissibility of termination of pregnancy was a ‘compromise’ reached almost 30 years ago between various political actors. Although termed as a ‘compromise’ the hitherto applicable provisions have placed Poland among countries with the most restrictive abortion laws in Europe.

The Constitutional Tribunal, which lacks democratic legitimacy, has not only entered into the exclusive competence of the legislature, but also exceeded the limits of legal discretion and arbitrarily imposed the beliefs and views of some on the whole of society. The reasoning of the Tribunal does not recognize the mental and physical suffering of Polish women and their families caused by forced birth of children with serious, often fatal illnesses.

According to the international human rights protection standards, everyone should be able to decide for themselves, especially in such a sensitive area as reproductive rights. For this reason, the accessibility of prenatal screening and safe abortion procedures are fundamental parts of the legal framework of women's rights that guarantees, among others, the right to respect for private and family life, protection against violence and discrimination, and absolute prohibition of torture and other cruel, inhuman and degrading treatment. The decision of the Constitutional Tribunal grossly violates all these fundamental human rights.

The fact that this decision has been made in a European state, which belongs to the major international human rights protection systems, is another proof that the current Polish authorities are turning away from the fundamental principles and

values protecting human dignity. At the same time, the way and the moment of resolving this extremely sensitive issue is another blow to the already battered social contract, which is based on the trust that constitutional equal protection applies to all citizens, not just those of certain beliefs.

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