

Communication under Rule 9(2) of the Rules of the Committee of Ministers in the case *P. and S. v. Poland* (App. No. 57375/08)

24 August 2018

1. INTRODUCTION

Pursuant to Rule 9(2) of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, the Center for Reproductive Rights¹ and the Federation for Women and Family Planning² hereby submit information to the Committee of Ministers regarding Poland's implementation of the 2013 judgment of the European Court of Human Rights in the case of *P. and S. v. Poland* (App. No. 57375/08). The information provided in this submission is also relevant to the Committee of Ministers' assessment of Poland's implementation of the related cases *Tysic v. Poland* (App. No. 5410/03) and *R.R. v. Poland* (Appl. No. 37617/04).

For the reasons outlined in this submission we respectfully request that the Committee of Ministers maintain its enhanced scrutiny of Poland's implementation of the *P. and S.* judgment and also continue to monitor implementation of the judgments in *Tysic v. Poland* and *R.R. v. Poland*.

In the latest communication from the Polish authorities on 22 June 2018, the State presents its responses to the decision of the Committee of Ministers' Deputies on 21 September 2017,³ in which the Committee of Ministers requested information on the following items:

¹ The Center for Reproductive Rights is an international non-governmental legal advocacy organization based in New York dedicated to the advancement of reproductive freedom as a fundamental human right that all governments are legally obliged to protect, respect, and fulfill.

² The Federation for Women and Family Planning is a non-governmental organization based in Poland that works locally, regionally and internationally on advancement of women's reproductive rights through monitoring, advocacy and educational activities as well as strategic litigation before domestic and international courts.

³ Communication from the authorities (22/06/2018) concerning the case of *P. and S. v. Poland* (Application No. 57375/08), DH-DD(2018)659, available at <https://bit.ly/2OZVAYC>.

- Measures that would ensure that women seeking lawful abortion care receive appropriate consideration as well as information on steps they should take to exercise this right;
- Measures the authorities will take to ensure that women receive full and credible information about how to access legal abortion services when doctors refuse care on grounds of conscience;
- Action taken against medical providers when they fail to comply with contracts with the National Health Fund;
- The general availability of lawful abortion in Poland;
- Why existing protection mechanisms for patient data were not effective in relation to P. and S. and measures taken to ensure non-repetition; and
- General measures undertaken or envisaged to ensure respectful treatment of minors seeking abortion care.

In its response, Poland has not provided any information on concrete and effective measures it has taken in each of these areas. Nor does the State's response point to plans for effective measures to comply with the Court's judgment and the Committee of Ministers' recent decision. Instead the State's response simply describes the pre-existing legal framework regulating legal access to abortion, doctors' refusals of care, protection of patient confidentiality, and relevant remedial mechanisms

Indeed, no effective measures have been taken by Poland to advance compliance with the Court's judgment and move towards implementation. In this regard, we respectfully refer to our previous submissions dated 22 August 2014 and 13 September 2017, which outlined five critical measures that Poland must adopt to implement the judgment and detailed the manner in which each of these remained outstanding.⁴ To date, these remain wholly outstanding:

- First, no clear and effective procedures have been established to enable women's exercise of entitlements to legal abortion services and ensure that these entitlements are not purely theoretical.
- Second, no measures have been taken to ensure that doctors' refusals of care on grounds of conscience are not allowed to hinder women's access to legal reproductive health services. Instead the law has regressed in this respect.
- Third, no measures have been taken to guarantee the availability and distribution of an adequate number of health care providers willing and able to perform lawful abortions, including by ensuring compliance by medical providers with contractual obligations to the National Health Fund with regard to the provision of lawful abortion care.

⁴ Communication from a NGO (Center for Reproductive Rights (New York) and the Federation for Women and Family Planning (Warsaw)) (22/08/2014) in the case of P. and S. against Poland (Application No. 57375/08), available at <https://bit.ly/2MiJbKL>; Rule 9.2 Communication from a NGO (Center for Reproductive Rights) (13/09/2017) in the case of P. and S. v. Poland (Application No. 57375/08), available at <https://bit.ly/2nGTINy>.

- Fourth, no measures have been adopted to effectively protect the confidentiality of patients' medical information and ensure enhanced accountability for breaches of medical confidentiality.
- Fifth, no steps have been taken to ensure that minors are treated in a respectful manner when seeking lawful abortion care and that adolescents' decision-making is given due weight in such contexts.

As outlined in this submission, Poland has not taken effective measures to address the improvements needed in these five critical areas in order to move towards implementation of the Court's judgment. On the contrary, steps have been taken that have resulted in legal and policy retrogression and imposed new barriers to women's access to legal abortion services in Poland.

As the Committee of Ministers has previously acknowledged, the *P. and S.* case involves "structural and/or complex issues" and the implementation of the judgment is therefore subject to enhanced supervision.⁵ In light of the Polish State's serious and ongoing failures to take effective measures to implement the judgment, we respectfully repeat our request that the Committee of Ministers maintain its enhanced scrutiny of Poland's implementation of the *P. and S.* judgment.

2. EFFECTIVE MEASURES TO ENSURE THE TIMELY AND EFFECTIVE ACCESSIBILITY OF LEGAL ABORTION SERVICES

In *P. and S.*, the Court held that uncertainty about the procedural requirements to obtain a lawful abortion in Poland "resulted in a striking discordance between the theoretical right to [] abortion [in Poland]... and the reality of its practical implementation."⁶ In addition, the Court found that "[n]o set procedure was available to [P. and S.] under which they could have their views heard and properly taken into consideration with a modicum of procedural fairness."⁷

Poland has repeatedly asserted in its communications to the Committee of Ministers that the fact that under the Act on Patient Rights and the Patient Rights' Ombudsman (2008) a woman can file an objection against a doctor's opinion that she does not qualify for legal abortion services offers an effective procedural mechanism through which women can enforce their right to legal abortion care. In its June 2018 submission, Poland also asserts that this complaint procedure is effective and applicable in all circumstances where women are seeking legal abortion care and regardless of the reason for a doctor's refusal to provide care.⁸

⁵ 8th Annual Report of the Committee of Ministers (2014), Appendix 2, p. 59, available at <https://bit.ly/2nED5wz>.

⁶ *P. and S. v. Poland*, App. No. 57375/08, para. 111.

⁷ *P. and S. v. Poland*, App. No. 57375/08, para. 108.

⁸ Communication from the authorities (22/06/2018) concerning the case of *P. and S. v. Poland* (Application No. 57375/08), DH-DD(2018)659, p. 2.

However, the relevant procedure, is not designed to give effect to the Court's judgment in *P. and S.* or to enable women's timely and effective access to legal abortion care. As detailed in our submission dated 2 September 2016 regarding implementation of the *R.R. v. Poland* judgment and our submission of 13 September 2017 regarding the *P. and S.* judgment,⁹ the complaint procedure wholly fails to meet requirements of effectiveness, accessibility and timeliness and therefore cannot be considered an appropriate mechanism through which women can enforce their entitlement to legal abortion care, including in circumstances of sexual assault.¹⁰

- First, the procedure in question was established prior to the Court's judgment in *P. and S.* It was introduced in 2008 in order to respond to the Court's ruling in *Tysic v. Poland*. The mechanism applies to all patients and all medical procedures and is not tailored to the specific needs of women seeking legal abortion services.
- Second, the 2008 law provides that the Medical Board has up to 30 days to issue a decision on complaints regarding a doctor's opinion. This lengthy timeline is wholly inappropriate in situations where women are seeking access to legal abortion services – a situation in which the timely nature of any relevant process is imperative. For women seeking legal abortion care following sexual assault Polish law prescribes that abortion is only legal in the first 12 weeks of pregnancy and this lengthy timeline is particularly problematic for them.
- Third, no procedures for ensuring execution and enforcement of the Medical Board's decisions have been put in place. As a result, women who have obtained a decision recognizing their entitlement to legal abortion services have no way of enforcing the Board's decision.
- Fourth, a range of procedural and rule of law deficits undermine the effectiveness of the complaint procedure. These include the requirement that women must refer to relevant legal provisions that have been breached when filing a complaint, lack of entitlement for women to be heard during the process, and the absence of a right to appeal the Board's decision.
- Fifth, Polish law places no obligation on medical professionals to inform a woman in writing of their opinion that she does not qualify for legal abortion services and of her right to complain.

Data received by the Federation for Women and Family Planning from the Patient Rights Ombudsman's Office indicates that in the years 2011-2015 women filed numerous complaints concerning lack of access to legal abortion care (136 complaints in total). Most of the complaints were dismissed because they did not meet the formal requirements of the complaint procedure outlined above. The few complaints which were considered on their merits were found by the

⁹ Communication from Center for Reproductive Rights in the case of *R.R. v. Poland*, (02/09/2016) available at <https://bit.ly/2KWDAvf>.

¹⁰ Communication from Center for Reproductive Rights in the case of *R.R. v. Poland*, (02/09/2016).

Medical Board to be unjustified. As a result, women who seek to establish their entitlement to lawful abortion through the complaint procedure consider the procedure to be ineffective, inaccessible and humiliating.¹¹

The complaint procedure is also wholly inapplicable and inappropriate in relation to situations similar to the first applicant's in *P. and S.* The complaint procedure is applicable to a situation in which a woman wishes to challenge the opinion of a doctor as to whether she meets the requirements qualifying her for a legal abortion in situations of risk to health or life a diagnosis of a severe fetal impairment. However, in *P. and S.*, the adolescent applicant was a victim of sexual assault and her qualification for legal abortion services was established by a prosecutor's written attestation as required by the law.¹² Willful obstruction and procrastination by health care providers and abuse of the 'conscience clause' undermined her access to abortion services to which she was legally entitled.¹³ Accordingly, in this case there was no 'opinion' of a doctor which the applicant could have challenged through the complaint procedure.

As such, Poland has taken no measures to rectify the shortcomings in the existing complaint procedure and provide an accessible and efficient mechanism through which women can enforce their entitlement to access legal abortion care, including in situations where pregnancy results from sexual assault.

3. EFFECTIVE MEASURES TO ENSURE THAT DOCTORS' REFUSALS OF CARE ON GROUNDS OF CONSCIENCE DO NOT JEOPARDIZE WOMEN'S ACCESS TO LEGAL ABORTION CARE

In *P. and S.*, the Court held that "[s]tates are obliged to organise 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."¹⁴ The Court noted that a critical facet of Polish law in this regard was the legal requirement, "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."¹⁵ The Court found that those minimum legal requirements, which at the time of its judgment were enshrined in Article 39 of the Medical Profession Act, were not

¹¹ For examples of women's experiences (in Polish), please see the website of the Federation for Women and Family Planning, available at <https://bit.ly/2wvtpbR>.

¹² *P. and S. v. Poland*, App. No. 57375/08, paras. 10, 100, 102.

¹³ *P. and S. v. Poland*, App. No. 57375/08, para. 108.

¹⁴ *P. and S. v. Poland*, App. No. 57375/08, para. 106.

¹⁵ *P. and S. v. Poland*, App. No. 57375/08, para. 107.

complied with in practice in the case of *P. and S.* and that the medical staff “did not consider themselves obliged to carry out” the legal services requested by the applicants.¹⁶

Since the Court’s judgment in *P. and S.*, grave retrogressive legal developments have taken place which have severely undermined this minimum legal protection for women who encounter doctors refusing to provide legal abortion services on grounds of conscience.¹⁷ On 7 October 2015, the Polish Constitutional Tribunal ruled that Article 30 and 39 of the Medical Profession Act are partially unconstitutional,¹⁸ holding that the referral obligation imposed on doctors who refuse to provide abortion services on grounds of conscience was unconstitutional. As a result, in such situations doctors are no longer obliged to refer women to another doctor or medical facility where they can obtain a legal abortion. Indeed there is now a harmful vacuum in Polish law with regard to this critical referral obligation on doctors who refuse abortion services on grounds of conscience and their duty to provide women with information on when and in what circumstances abortion is legal and on where services are available. This has severe implications for all women who are seeking timely access to legal abortion services. It can have particularly grave consequences for women who are pregnant following sexual assault, in which case the law prescribes that abortion is only legal in the first 12 weeks of pregnancy.

In its June 2018 submission, Poland omits to acknowledge the implications of these latest jurisprudential developments. Instead it simply points to the Medical Profession Act as regulating doctors’ refusals of care on grounds of conscience and intimates that this is effective in ensuring women’s access to legal abortion services in such situations.

Yet, no effective procedures or mechanisms have been put in place to address the vacuum that now exists and ensure that doctors comply with their remaining obligations under the Medical Profession Act when refusing abortion care on grounds of conscience. Polish authorities have failed to adopt effective measures to enforce remaining regulations and sanction abusive refusals of legal reproductive health services, which remain widespread.¹⁹ The consequences of these failures continue to have egregious consequences for women in Poland seeking access to legal abortion services.²⁰

¹⁶ *P. and S. v. Poland*, App. No. 57375/08, paras. 107-108.

¹⁷ Report by Nils Muiznieks, Commissioner for Human Rights of the Council of Europe, following his visit to Poland from 9 to 12 February 2016, CommDH(2016)23, p. 36, available at <https://rm.coe.int/16806db712>.

¹⁸ The Polish Constitutional Tribunal, case no 12/14. See <https://bit.ly/2BcIKDt>.

¹⁹ As outlined in our previous submission, the independence and impartiality of relevant disciplinary procedures are in doubt. Under Polish law, the National Doctors Board is entrusted with addressing disciplinary cases against doctors who fail to comply with procedural requirements when refusing health care on grounds of conscience. Yet, the National Doctors Board filed the Constitutional Tribunal case described above in which it challenged the constitutionality of procedural requirements, placed on medical professionals who refuse care on grounds of conscience, and compliance with which it is assigned to oversee.

²⁰ Communication from Center for Reproductive Rights in the case of *R.R. against Poland*, (02/09/2016).

To give effect to the Court's judgment in *P. and S.*, Poland must adopt effective measures to ensure that women and adolescents who are refused abortion services on grounds of conscience are referred in a timely manner to an alternative health care professional willing and able to perform the abortion. Legal provisions must also be enacted to explicitly clarify that health care providers who refuse care on grounds of conscience must provide women and adolescents with information on when and in what circumstances abortion is legal and on where services are available. Furthermore, Poland must establish effective procedures and mechanisms to monitor and enforce doctors' compliance with relevant legal provisions and ensure that doctors who fail to comply with these duties are held accountable. It must also ensure that all health care providers are trained on their duty to provide information to women on when abortion is legal and where they can receive this care.

4. EFFECTIVE MEASURES TO ENSURE AVAILABILITY OF LAWFUL ABORTION CARE

As outlined above, in *P. and S.* the Court held that “[s]tates are obliged to organise 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.”²¹ To this end Poland must ensure the availability of legal abortion care and take effective measures to guarantee the distribution of an adequate number of doctors willing and able to perform lawful abortion services throughout the country.

In its recent decision, the Committee of Ministers requested information on the availability of lawful abortion services in the Polish health care system. However, Poland has not provided any information to the Committee of Ministers regarding the availability of legal abortion care in Poland in its June 2018 communication. The State has not taken any effective measures to guarantee the availability and distribution of an adequate number of health care providers willing and able to perform lawful abortion services throughout the country.

Poland should systematically monitor the number of available willing providers and the number of those refusing to provide care in order to ensure that legal abortion care is available in practice to women throughout Poland. Only through regular monitoring and data collection by Polish authorities of the number and distribution of doctors providing legal abortion services and women's experiences of being able to access to these services will it be possible to assess whether legal abortion care is in fact available and accessible to women in Poland.

In addition, and as highlighted by the Committee of Ministers in its decision of September 2017, Poland must also ensure enforcement of medical providers' contracts with the National Health

²¹ *P. and S. v. Poland*, App. No. 57375/08, para. 106.

Fund as a measure towards guaranteeing the availability of legal abortion care throughout Poland.

In its June 2018 communication to the Committee of Ministers, Poland states that refusals to provide legal abortion care by doctors who have entered into contracts with the National Health Fund and simultaneous failure to inform the woman of an alternative health care facility that will provide the care amounts to a breach of contract that can be investigated by the Patient Rights Ombudsman.

While enhanced enforcement of contracts between doctors or health facilities and the National Health Fund with respect to provision of legal abortion care would be an important measure towards ensuring the availability of legal abortion services in Poland, the possibility of filing a complaint for failure to fulfil such contracts is an entirely ineffective procedure for women who seek to enforce their entitlement to legal abortion services in a timely manner.²²

5. EFFECTIVE MEASURES TO GUARANTEE THE CONFIDENTIALITY OF PATIENTS' MEDICAL INFORMATION

In *P. and S.*, the Court ruled that the hospital's public disclosure of the first applicant's wish to obtain an abortion "cannot be regarded as compatible either with the Convention standards as to the State's obligation to secure respect for one's private or family life, or with the obligations of the medical staff to respect patients' rights laid down by Polish law."²³

Despite the gravity of the breaches of patient confidentiality in the case, no measures have been taken to hold those responsible accountable or to prevent similar breaches in the future. No disciplinary measures were pursued against those responsible for breaches of the adolescent applicant's confidentiality and no training programs or other preventative measures have been put in place. Nor have any new measures to ensure effective respect for confidential medical data or enhanced accountability for breaches, been introduced.

In its June 2018 communication, Poland once again details the pre-existing legal framework regarding medical confidentiality that was already in place at the time of the Court's judgment in *P. and S.* It thereby fails to address the fact that it was medical professionals' lack of respect for those legal provisions and failure to ensure accountability for those breaches of confidentiality that resulted in the Court's finding of a separate violation of Article 8. Instead Poland merely states that the ineffective protection of the adolescent applicant's right to confidentiality was due to a "human factor". It asserts that the complaint procedure under the Act on Patient Rights and the establishment of a Patient Rights' Ombudsman were intended to strengthen respect for

²² *Tysic v. Poland*, App. No. 5410/03, para. 118.

²³ *P. and S. v. Poland*, App. No. 57375/08, para. 133.

patients' rights. However, as outlined in Section 3 above, that complaint procedure was established before the Court's judgement in *P. and S.* and was not intended or designed to address all breaches of patients' rights but merely to provide a mechanism through which medical opinions could be challenged.

Poland has still not adopted any measures to redress the serious oversight and enforcement failures that led to the breaches of medical confidentiality in this case. Poland must inform medical providers about their duty to respect and safeguard confidential patient data and regularly train all health professionals about their legal obligations in this regard. Furthermore, it should enforce relevant patient rights regulations vigorously and hold those who breach medical confidentiality accountable. Only through such measures can the State address the violation found by the Court and ensure that similar breaches do not reoccur.

6. EFFECTIVE MEASURES TO ENSURE THAT ADOLESCENTS ARE TREATED IN A RESPECTFUL MANNER WHEN SEEKING REPRODUCTIVE HEALTH SERVICES

In its judgment the Court also held that “no proper regard was had to the first applicant’s vulnerability and young age and her own views and feelings”²⁴ and that “the first applicant was treated by the authorities in a deplorable manner and that her suffering reached the minimum threshold of severity under Article 3 of the Convention.”²⁵ The inhuman and degrading treatment suffered by the applicants was found by the Court to have been caused by a series of actions, including: a) pressurizing the applicant not to have an abortion; b) forcing the applicant to consult with a priest; c) requesting her mother to sign a declaration acknowledging that the abortion could result in the death of her daughter; d) disclosing personal information about the applicant which exposed her to pressure from strangers; e) placement of the applicant in a youth center for ten days against her mother’s will; and f) opening a criminal investigation alleging the applicant had unlawful sexual intercourse with a minor.

In its June 2018 communication Poland has provided no information on any measures taken since the judgment to ensure the respectful treatment of minors seeking legal abortion care.

In order to comply with the judgment and ensure that adolescent girls who seek abortion services are treated in a respectful manner Poland must adopt effective measures that empower minors to make independent and informed reproductive choices and give due regard to their role as decision-makers and ensure that they are treated with respect and dignity when seeking reproductive health services. In this regard Poland must bring its laws into line with international human rights standards and allow adolescents to seek and obtain reproductive health services

²⁴ *P. and S. v. Poland*, App. No. 57375/08, para. 166.

²⁵ *P. and S. v. Poland*, App. No. 57375/08, para. 168.

without having to obtain parental consent.²⁶ It must also introduce youth-friendly reproductive health services that are accessible, acceptable, and appropriate and are provided in a confidential and non-judgmental manner, including through the adoption of guidelines for medical professionals on how to treat adolescent patients who seek sexual and reproductive health care.²⁷

7. CONCLUSION

Since the September 2017 decision of the Committee of Ministers, no measures have been taken towards implementation of *P. and S. v. Poland*. Instead, repeated retrogressive legislative attempts to restrict women's access to legal abortion care have been made and remain underway in Poland and the retrogressive 2015 judgement of the Polish Constitutional Tribunal removed important protections for women seeking access to legal abortion care.²⁸

In its latest communication, Poland notes that a draft law to amend the Act on Patient Rights and the Patient Rights' Ombudsman is under preparation and will address general measures towards implementation of all three judgments against Poland: *Tysic v. Poland*, *R.R. v. Poland and P. and S. v. Poland*. However, the draft amendments prepared by the Ombudsman and published on 30 May 2018 lack proposals to improve the accessibility and effectiveness of the complaint procedure and it is unclear whether proposed changes to the law will remove the many barriers women continue to face in access to legal abortion care.²⁹

In light of the continued failure by Poland to take any effective measures to comply with and implement the Court's judgments in these three cases, we respectfully request that the Committee of Ministers continue to maintain its enhanced scrutiny of Poland's implementation of this judgment and continue to monitor compliance with the two other judgments - *Tysic v. Poland* and *R.R. v. Poland* - for which meaningful action also remain outstanding.

²⁶ Committee on the Rights of the Child, General Comment No. 20 on the implementation of the rights of the child during adolescence, para. 39, U.N. Doc. CRC/C/GC/20 (Dec. 2016); Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Rep. of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of health, Dainius Puras, para. 60, U.N. Doc. A/HRC/32/32 (2016).

²⁷ WORLD HEALTH ORGANIZATION, MAKING HEALTH SERVICES ADOLESCENT FRIENDLY: DEVELOPING NATIONAL QUALITY STANDARDS FOR ADOLESCENT-FRIENDLY HEALTH SERVICES 7-8 (2012).

²⁸ For more information on the retrogressive legislative proposals, see Communication from Center for Reproductive Rights in the case of *R.R. v. Poland*, (02/09/2016) available at <https://bit.ly/2KWDAvf>, the Federation's note available at <https://bit.ly/2yP2VpU>, articles in international media available at: <https://bbc.in/2LrjOYK>, <https://bit.ly/2pExiHN>, <https://bit.ly/2mvfVZh>, <https://nyti.ms/2ISZlqd>, <https://on.ft.com/2uHa4GL>.

²⁹ The draft amendments to the Act on Patients' Rights proposed by the Ombudsman are available at: <https://bit.ly/2BQF7DQ>.