

Supplemental information to the Communication under Rule 9(2) of the Rules of the Committee of Ministers in the cases *Tysic v. Poland* (App. No. 5410/03), *R.R. v. Poland* (App. No. 27617/04) and *P. and S. v. Poland* (App. No. 57375/08)

24 February 2021

The Center for Reproductive Rights and the Federation for Women and Family Planning respectfully submit brief supplemental information to the Communication under Rule 9(2) of the Rules of the Committee of Ministers in the cases *Tysic v. Poland* (App. No. 5410/03), *R.R. v. Poland* (App. No. 27617/04) and *P. and S. v. Poland* (App. No. 57375/08) to complement the information already submitted to the Committee of Ministers on 29 January 2021. This information briefly outlines the chilling effect that Poland’s Constitutional Tribunal’s “decision” of 22 October 2020 (case no. K 1/20) is already causing following its publication in the Journal of Laws on 27 January 2021. In these few weeks reports have already emerged of denial of abortion care to women who are entitled to obtain care under the law because the pregnancy poses a risk to their health, further extending and exacerbating the obstacles that women face in accessing legal abortion care in Poland as required by the judgments of the European Court of Human Rights.

As we have outlined in our Communication of 29 January 2021, the Constitutional Tribunal’s announcement, resulting in a *de facto* ban on abortion care, must be seen in the context of the erosion of the rule of law in Poland. The independence and legitimacy of the Constitutional Tribunal has been severely undermined by reforms to the judiciary adopted since 2015. The Tribunal can no longer be considered an “independent and impartial court.” The European Commission has noted that, “the constitutionality of Polish laws can no longer be effectively guaranteed. The judgments rendered by the Tribunal under these circumstances can no longer be considered as providing an effective constitutional review.”¹ The Parliamentary Assembly of the Council of Europe, in its resolution adopted in January 2021, reiterated that “the ‘constitutional crisis’ has not been resolved and the Constitutional Tribunal seems to be firmly under the control of the ruling authorities, preventing it from being an impartial and independent arbiter of constitutionality and the rule of law.”² As such, the October 2020 announcement of the Constitutional Tribunal cannot be considered to constitute an effective or legitimate constitutional review as required by rule of law principles.

¹ Reasoned Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law (COM/2017/0835 final - 2017/0360 (NLE)), paras. 92-113 and 175(1). *See also* European Commission, 2020 Rule of Law Report Country Chapter on the rule of law situation in Poland, SWD(2020) 320 final (30 September 2020), p. 3, <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1602579986149&uri=CELEX%3A52020SC0320>; European Parliament resolution of 26 November 2020 on the de facto ban on the right to abortion in Poland (2020/2876(RSP)).

² Parliamentary Assembly of the Council of Europe, Judges in Poland and in the Republic of Moldova must remain independent, Resolution 2359 (2021) Provisional Version, point 12.1, <https://pace.coe.int/en/files/29000/html>.

Following its publication on 27 January 2021 when it took effect, the Tribunal's announcement has exacerbated the chilling effect that Poland's highly restrictive abortion law and the criminalization of abortion continues to have on the provision of legal abortion care in Poland. This chilling effect has been recognized by the European Court of Human Rights in *Tysiąc v. Poland* and *R.R. v. Poland*.³ As we have outlined in our previous submissions, as a result of the chilling effect as well as regulatory deficits, the lack of effective and timely complaint procedures, the high numbers of refusals of care based on the "conscience clause", and the intense level of stigma that surrounds abortion in Poland, many women who qualify for legal abortion are not able to access these services in practice.

Since the Tribunal's announcement has in effect extended the scope of the prohibition of abortion and criminal liability for those who perform or assist women in accessing abortion care outside the law, the number of doctors reluctant to authorize or provide legal abortion care is likely to increase, thereby further undermining women's access to legal abortion care in Poland. Since the publication of the Tribunal's announcement in late January, there have been reports of women who qualify for legal abortion because the pregnancy poses a risk to their mental health and who despite having obtained a medical certificate attesting that they meet the legal requirements, have nevertheless been denied care and faced difficulties in obtaining access to legal abortion care in Poland.

In addition, unfounded and arbitrary investigations have been initiated into the practices of hospitals, raising further concerns about the chilling effect of the further criminalization of abortion on the provision of legal abortion care in Poland. For example, in January 2021, an investigation was initiated by the District Prosecutor's Office into a hospital in Białystok, a city in eastern Poland, following a motion by the "Pro Life Foundation" and requesting the hospital to provide medical documentation of all patients who obtained abortion care in the hospital after 22 October 2020 and before 27 January 2021 (i.e. during the period before the Tribunal's announcement was published in the Journal of Laws and took effect). The District Prosecutor's Office has initiated an investigation into abortions that were legally performed during this period without providing any information indicating the likelihood that a crime had been committed. After the investigation was exposed in Polish media, the National Prosecutor's Office closed the investigation calling it erroneous and unjustified.⁴

The announcement from the Constitutional Tribunal and the Government's efforts to prohibit women from obtaining abortion care in situations of fatal or severe fetal impairment wholly undermine Poland's obligations to comply with the judgments of the European Court of Human Rights. In *R.R. v. Poland*, the Court clearly instructed Poland to take steps to ensure women's effective access to abortion care in situations of severe or fatal fetal impairment. Instead of adhering to the Court's ruling, the Polish Government has sought to ban abortion in this situation, fundamentally contradicting the spirit of the judgement.

³ In *Tysiąc v. Poland*, the Court noted that "the legal prohibition on abortion, taken together with the risk of their incurring criminal responsibility under Article 156 § 1 of the Criminal Code, can well have a chilling effect on doctors when deciding whether the requirements of legal abortion are met in an individual case," see *Tysiąc v. Poland* (App. No. 5410/03), para. 116. See also *R.R. v. Poland* (App. No. 27617/04), para. 193.

⁴ *Po publikacji DGP kontrola zabiegów cofnięta. Nadgorliwość okazała się błędem* (10 February 2021), <https://serwis.gazetaprawna.pl/orzeczenia/artykuly/8092337,sledztwo-w-bialymstoku-prokuratura-aborcja-wyroktk.html>.