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**Termination of Pregnancy as the Subject of Proceedings
Against Poland before the European Court of Human Rights**

Keywords: reproductive rights, termination of pregnancy, the European Court of Human Rights, Poland

Słowa kluczowe: prawa reprodukcyjne, terminacja ciąży, Europejski Trybunał Praw Człowieka, Polska

Abstract

In Poland, women in need of termination of pregnancy are exposed, through the practice of application of law, to systemic abuse by public authorities and sometimes institutional abuse by healthcare providers. This results in the search for institutions outside of Poland to protect their reproductive rights. Therefore, it seems reasonable to draw attention to the multifaceted nature of the rationale that the European Court of Human Rights (ECtHR) has indicated in its judgments on the legal and factual state of legal abortion in Poland.

This paper is an attempt to synthesize the manifestations, indicated by the ECtHR, of Poland's violations of the provisions of the Convention for the Protection of Human

Rights and Fundamental Freedoms in matters relating to the termination of pregnancy. An analysis of the content of the judgments of the ECtHR and other source texts is used in this paper as the primary research method.

Streszczenie

Terminacja ciąży jako przedmiot postępowania przeciwko Polsce przed Europejskim Trybunałem Praw Człowieka

Kobiety potrzebujące terminacji ciąży w Polsce narażane są, poprzez praktykę stosowania obowiązujących przepisów prawnych, na nadużycia systemowe ze strony władz publicznych oraz niekiedy instytucjonalne, ze strony podmiotów opieki zdrowotnej. Skutkuje to poszukiwaniem, innych niż krajowe, instytucji ochrony ich praw reprodukcyjnych. Dlatego też wydaje się zasadnym zwrócenie uwagi na wieloaspektowość przesłanek, na jakie wskazywał Europejski Trybunał Praw Człowieka, orzekając o stanie prawnym i faktycznym legalnej aborcji w Polsce.

Celem niniejszego artykułu jest próba syntezy wskazanych przez Europejski Trybunał Praw Człowieka przejawów naruszeń przez Polskę regulacji Konwencji o ochronie praw człowieka i podstawowych wolności w zakresie spraw dotyczących przerywania ciąży. Jako podstawowa metoda badawcza wykorzystana zostanie analiza treści orzeczeń ETPCZ oraz innych tekstów źródłowych.

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I. Introductory remarks

Sexual and reproductive rights are inherent components of the human rights system and their effective protection is one of the primary responsibilities of the state¹. The absence of such protection constitutes a hazard to many of the most essential and intimate aspects of people's lives: it limits individuals' ability to make independent and informed decisions about their bodies, health, sexuality, and having children. When states question the legitimacy of the protection of women's sexual and reproductive rights, through chang-

¹ See: R. Grabowski, *Threat to a Woman's Life or Health as a Premise for Termination of Pregnancy in the Light of Constitutional and Statutory Provisions in Force in Poland*, "Przeгляд Prawa Konstytucyjnego" 2021, no. 6 (64), pp. 383–394.

es in the law and the practice of its application, they contradict gender equality as well as the universal nature of women's rights. The deterioration of the existing standards for the protection of women's sexual and reproductive rights, particularly through the introduction of regressive restrictions on access to abortion, causes widespread protests by women and provokes an increasingly emotionally charged discourse.

The same reactions in Poland were triggered by the Constitutional Tribunal's ruling, issued on October 22, 2020, on the Act of January 7, 1993 on family planning, protection of the human fetus, and the conditions of permissibility of abortion². The Constitutional Tribunal ruled³ that one of the statutory conditions allowing pregnancy termination due to "severe and irreversible fetal impairment or an incurable disease threatening its life" (Art. 4a [1] [2] of the aforementioned Act) was unconstitutional. Thus, the provision of law⁴ that was most commonly used as the legal basis for legal termination of pregnancy was eliminated. The Constitutional Tribunal's ruling shattered the already fragile compromise on abortion⁵ and reopened the extremely complicated discussion on the rules of abortion that would be acceptable to all actors in the decision-making process⁶.

The Constitutional Tribunal's ruling has resulted in the almost complete cessation of legal abortions in Poland. The number of abortions recorded by the state has dropped tenfold. The data presented by the Minister of Health indicate that 107 legal abortions were performed in Poland in 2021, of which 75 procedures were performed pursuant to the embryopathological condition, which was in effect until January 27, 2021, the date the Constitutional Tribunal's ruling took effect⁷. The analogous report for 2020 indicated that 1,076

² Dz.U. 2022 item 1575.

³ Ruling of the Constitutional Tribunal of October 22, 2020, file ref. no. K 1/20.

⁴ The ruling of the Constitutional Tribunal was published on January 27, 2021 and became effective on the same day.

⁵ M. Michalczuk-Wlizło, *Choice of Language in Discussions on Law. Pregnancy Termination in the Legislative Process of the Polish Sejm of the Eighth Term*, "Białostockie Studia Prawnicze" 2022, vol. 27, no. 4, pp. 153–167.

⁶ A. Demenko, *Aborcja w orzecznictwie Sądu Najwyższego USA*, "Czasopismo Prawa Karnego i Nauk Penalnych" 2020, vol. 24, no. 4, p. 5.

⁷ *Dziesięciokrotny spadek liczby aborcji w Polsce w 2021 roku*, <https://www.ekai.pl/dziesieciokrotny-spadek-liczby-aborcji-w-polsce-w-2021-roku> (11.04.2023).

abortions were performed, of which 1,053 were due to a high probability of impairment of the fetus⁸.

The announcement of the ruling in the case pending before the Constitutional Tribunal under file ref. no. K1/20 triggered massive public protests, which lasted for many weeks, in both large cities and small towns⁹. Opposition to the new legal situation of pregnant women in Poland, which in fact resulted in a cancellation of the right to abortion, has been expressed by NGOs that protect human rights. Raising numerous formal and substantive defects¹⁰, it was recalled that the legal situation of citizens is shaped not only by the norms of domestic law, but also international law. One of the most important regional systems for the protection of human rights and freedoms is the system established by the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: European Convention on Human Rights, Convention, or ECHR), which is guaranteed by the European Court of Human Rights (hereinafter: Court of Human Rights, Court, or ECtHR).

The non-governmental organization named Federation for Women and Family Planning initiated the Women's Complaint campaign, which was widely publicized on social media. The initiative, which was also joined by other human rights organizations, encouraged Polish women to file complaints with the Court of Human Rights. Activists prepared a model complaint to the European Court of Human Rights in Strasbourg on the violation of the rights guaranteed by the European Convention on Human Rights. Any person of re-

⁸ *Raport Ministerstwa Zdrowia: 1076 aborcji w Polsce w 2020 r. W tym legalne byłyby 23*, <https://www.rp.pl/kraj/art10701-raport-ministerstwa-zdrowia-1076-aborcji-w-polsce-w-2020-r-w-tym-legalne-bylyby-23> (23.03.2023).

⁹ J. Rak, *The Impact of Morally Injurious Events on the Dynamics of Mobilization for Women's Rights in Poland*, "Przełęcz Politologiczny" 2022, no. 3, pp. 35–45.

¹⁰ E. Kuźelewska, M. Michalczuk-Wliziło, D. Kuźelewski, *Consequences of the Constitutional Tribunal's Ruling of October 22, 2020. On the Citizens' Bill on Safe Termination of Pregnancy and Other Reproductive Rights*, "Studies in Logic, Grammar and Rhetoric" 2022, no. 67 (80); A. Bień-Kacała, *Nieliberalny sąd konstytucyjny w Polsce na przykładzie wyroku Trybunału Konstytucyjnego w sprawie aborcyjnej, sygn. akt K 1/20*, "Przełęcz Prawa Konstytucyjnego" 2022, no. 5 (69), pp. 15–27; D. Szumiło-Kulczycka, K. Kozub-Ciembroniewicz, *Konsekwencje uchybień w obsadzie TK (uwagi na tle orzeczenia w sprawie K 1/20)*, "Państwo i Prawo" no. 8, pp. 81 and n.; A. Rakowska-Trela, *Wyrok czy "niewyrok". Glosa do wyroku Trybunału Konstytucyjnego z 22.10.2020 r. K 1/20, dotyczącego możliwości przerywania ciąży*, "Przełęcz Sądowy" 2021, vol. 26, pp. 106–118.

productive age who can become pregnant is, according to the organizers, a potential victim of the effects of the Constitutional Tribunal's ruling of October 22, 2020 on the system of existing laws regarding the termination of pregnancy¹¹.

II. Cases in the Court

The Convention for the Protection of Human Rights and Fundamental Freedoms¹², which was signed by Poland in 1993, is an act of international law governing the protection of fundamental human rights and freedoms. Shaping the immanent legal order common to all states parties to the Council of Europe, it is considered the most effective instrument for the protection of individual rights and freedoms at the international law level¹³. It also defines procedural norms that allow individual complaints to be brought before the European Court of Human Rights in the event of a potential violation of one of the rights established by the Convention. Despite the fact that none of the provisions of the Convention explicitly refers to reproductive rights, the Court of Human Rights infers protections in this area in the process of exegesis of the law, which is manifested in its extensive case law.

As for termination of pregnancy, the Court has ruled against states where access to the procedure was limited or the existing law was improperly implemented. Poland was a party to three proceedings in which a verdict was reached that recognized the applicants' claims. These were: *Tysiąc v. Poland*¹⁴, *R. and R. v. Poland*¹⁵, and *P. and S. v. Poland*¹⁶.

¹¹ *Skarga kobiet: złóż skargę do Strasburga na „wyrok TK”!*, <https://federa.org.pl/skarga-kobiet> (18.04.2023).

¹² The European Convention for the Protection of Human Rights and Fundamental Freedoms was drawn up in Rome on November 4, 1950 and was ratified by Poland on January 19, 1993.

¹³ A. Bisztyga, *Ochrona praw człowieka w systemie Rady Europy* [in:] *System ochrony praw człowieka*, ed. B. Banaszak, Kraków, 2006, pp. 121; M.A. Nowicki, *Wokół Konwencji Europejskiej. Krótki komentarz do Europejskiej Konwencji Praw*, Kraków 2006, pp. 17–18.

¹⁴ *Tysiąc v. Poland*, application no. 5410/03; ruling of March 20, 2007. The texts of the rulings are available at: www.echr.coe.int (HUDOC database).

¹⁵ *R. and R. v. Poland*, application no. 27617/04, ruling of May 26, 2011.

¹⁶ *P. and S. v. Poland*, application no. 57375/08, ruling of October 30, 2012.

The first, precedent-setting case was *Tysiąc v. Poland* (application no. 5410/03). The subject of the case was the woman's inability to use the procedure for terminating her pregnancy, to which she claimed to be entitled, on the basis of the therapeutic condition set forth in Art. 4a (1) (1) of the Act of January 7, 1993 on family planning, protection of the human fetus, and the conditions of permissibility of abortion, that is, when a pregnancy poses a threat to the life or health of the pregnant woman. The applicant, who had been struggling with a severe visual impairment for years, was denied an abortion on the basis of an internist's certificate attesting that another pregnancy could pose a serious risk of loss of vision. The woman gave birth to a child and her visual condition deteriorated so much that she was declared to have the highest degree of disability and was awarded disability benefits.

Another case adjudicated by the European Court of Human Rights was *R. and R. v. Poland* (application no. 27617/04). During her pregnancy, a woman was repeatedly denied referrals for legally mandated prenatal tests, despite alarming symptoms detected in the fetus during ultrasound examinations. The applicant was eventually given the opportunity to undergo genetic testing of the fetus when she was already 23 weeks pregnant. These tests confirmed a genetic defect in the fetus, but the hospital where she submitted a written request for an abortion refused to perform the procedure, stating that, in the opinion of the physicians, the time limit for termination of pregnancy (24 weeks) allowed by the law in force had been exceeded. The woman gave birth to a child with a very serious genetic defect – the Turner syndrome.

The most recent case, which ended in a final judgment and was filed by Polish women who claimed that the state failed to comply with existing laws regarding the termination of pregnancy, was the case of *P. and S. v. Poland* (application no. 57375/08). The case in question was initiated by the complaint of a minor who became pregnant as a result of rape by a schoolmate and the complaint of her mother. The applicants obtained a certificate from a prosecutor, as required by applicable law, stating that there was a reasonable suspicion that the pregnancy was the result of a criminal act. The minor came to a hospital to have an abortion, but the date of the procedure was delayed. Doctors, invoking the conscience clause and refusing to perform the procedure, did not point out to the applicant any real possibilities for exercising the right to receive the guaranteed medical service from another doctor or

healthcare facility, despite the fact that such an obligation resulted from the then-current wording of the Act on the professions of physician and dentist. The minor eventually succeeded in terminating the pregnancy.

In its rulings in the above cases, the Court found that Poland had violated Art. 8 of the European Convention on Human Rights (the right to respect for private life) due to the lack of an adequate procedural framework guaranteeing the applicants' timely access to medical services, i.e. a procedure for legal abortion (*Tysi*ć) or prenatal testing (*R. and R.*), and the lack of effective access to reliable information on the conditions for permissibility of abortion (*P. and S.*). Also considered a violation of the right to respect for private life was the public hospital's disclosure of the applicant's personal data and the lack of access to an abortion, despite the fact that all statutory prerequisites had been fulfilled (*P. and S.*). The Court made a clearly negative assessment of the lack of any legal remedy to formally challenge medical decisions and independently determine whether the statutory prerequisites for permitting a termination of pregnancy were fulfilled. The Court emphasized that especially in such sensitive procedures as abortion, time is of the utmost importance and delaying any procedures actually results in a woman's inability to exercise her rights guaranteed by law. In the opinion of the Court, the law regulating the permissibility of termination of pregnancy concerns the sphere of private life, since the life of a pregnant woman is inextricably linked to the fetus developing within her¹⁷. Since Art. 8 of the ECHR does not indicate the specific procedures to be followed to enable the exercise of the rights guaranteed therein, the subject of the Court's consideration became an assessment of the provision by the Polish state of a fair and equitable process for women to make decision regarding their rights¹⁸. Indeed, access to reliable information on the abortion conditions and procedures in force is of direct relevance for the exercise of personal autonomy, and the legal definition of the concept of private life (within the meaning of Article 8 of the Convention) is fulfilled by the decision to have a child, as well as not to have a child¹⁹.

The Court's line of jurisprudence indisputably emphasizes that the provisions of the Convention are not intended to provide theoretical or illusory

¹⁷ Application no. 5410/03, Ruling of the ECtHR of March 20, 2007, sec. 106.

¹⁸ *Ibidem*, sec. 113.

¹⁹ *P. and S. ...*, sec. 124.

rights, but rights that are practical and effective²⁰. Finding that the Polish state had failed to provide an effective means of resolving disputes between doctors or between a doctor and a pregnant woman and had excluded the woman from the decision-making process in assessing the impact of pregnancy on her life and health, it subjected the applicant to stress and suffering²¹. Also, the refusal to perform prenatal tests in accordance with the right to medical treatment was qualified as a violation of the right to respect for private life and exposure of the applicant to physical and mental suffering (R. and R.)²².

In cases R. and R. and P. and S., the Court found a violation of Art. 3 of the Convention (freedom from torture and degrading treatment). Failure to provide timely access to prenatal testing was found to fulfill the criteria for the valuation. In the Court's opinion, preventing a pregnant woman from obtaining reliable and exhaustive information about the condition of the fetus fully meets the definition of inhuman and degrading treatment. A state that regulates the termination of pregnancy as an exceptions to the general prohibition must not at the same time create a legal framework that hinders or prevents a pregnant woman from exercising her rights²³ (Tysi c, P. and S., R. and R.). The Court found the treatment of the applicants by medical personnel (R. and R., and P. and S.) particularly egregious. The Court's case law clearly proves that compliance with the European Convention on Human Rights requires Poland to establish an appeal mechanism for cases where there is a discrepancy between the woman and the doctor as to whether a particular actual state fulfills the statutory prerequisites for a legal termination of pregnancy. In the Court's opinion, the approach adopted by the Polish authorities was characterized by delay, confusion, and lack of adequate and objective medical advice and information,²⁴ and the applicants were treated by the authorities in a highly inappropriate manner and their suffering reached the minimum degree of severity, pursuant to Art. 3 of the Convention (P. and S.; R. and R.).

The rulings of the European Court of Human Rights highlight the threats to and violations of human rights that Polish women are subject to because

²⁰ *Ibidem*, sec. 99.

²¹ *Ibidem*, sec. 124.

²² *Ibidem*, sec. 66 et seq.

²³ Tysi c v. Poland..., sec. 116–124; R. and R. v. Poland..., sec. 200; P. and S. ..., sec. 99.

²⁴ P. and S. ..., sec. 108, 164.

of the restrictive but vague laws. The unfavorable situation for women is further compounded by the fact that the existing legal norms, which allow, on the basis of juridical exceptions to the general prohibition, to carry out legal terminations of pregnancy, cannot be effectively enforced due to a lack of procedural guarantees and care on the part of the state for their application. The Court found that Polish law does not provide for any effective procedural mechanisms to assess the fulfillment of these conditions in specific cases, both in the context of a dispute between a pregnant woman and doctors regarding the fulfillment of the conditions for a legal abortion due to a risk to the woman's health²⁵ and in the context of possible deformities of the fetus confirmed by a preliminary diagnosis²⁶. It should also be clearly noted that the Court has never considered whether the European Convention for the Protection of Human Rights and Fundamental Freedoms guarantees the applicants the right to have a legal abortion²⁷, and the Court's competence only covered an assessment of whether the content of the applicable national law and its application do not violate the provisions of the various regulations of the Convention.

None of the three cited verdicts has been fully implemented by Poland despite the obligation to do so. Therefore, it seems reasonable to argue that Poland's failure to implement the verdicts can be seen as a lack of ability or, worse still, willingness of the state to provide effective protection of women's immanent reproductive health rights. It should be recalled that the execution of judgments is a part of the system established by the Convention. The rulings against Poland contained specific recommendations for state authorities that specified the expected changes in the legal system²⁸. Despite the passage of many years, they have not been implemented.

The Committee of Ministers of the Council of Europe, acting pursuant to Art. 46 (2) of the Convention for the Protection of Human Rights and Fun-

²⁵ *Tysiąc v. Poland*..., sec. 119–124.

²⁶ *R and R. v. Poland*..., sec. 200–207.

²⁷ K. Borkowska, *Życie ludzkie jako przedmiot ochrony przepisów prawa ze szczególnym uwzględnieniem momentu objęcia ochroną*, "Security, Economy & Law" 2018, no. 1 (XVIII), pp. 49–50.

²⁸ See: M. Jankowska-Gilberg, *Zakres obowiązków pozytywnych państwa na tle aktualnego orzecznictwa Europejskiego Trybunału Praw Człowieka*, "Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego" 2009, no. 2 (7), pp. 40 and n.

damental freedoms, in overseeing the implementation of final judgments of the European Court of Human Rights, notoriously urges Poland to implement the judgments by adopting clear and effective procedures regarding the steps women must take to gain access to legal abortion, including in cases of conscientious objection, and to ensure that they receive adequate information on these procedures and that hospitals do not impose on them in advance any additional, unnecessary requirements.

III. Discussion

The rich case law of the European Court of Human Rights and its interpretation of the content of individual articles of the Convention when considering individual factual and legal situations have contributed to the semantic detailing of the general clauses contained in the provisions. The Court has developed jurisprudential standards and set a line of interpretation for the Convention's provisions²⁹. Currently, possible complaint may concern not only lack of access to legal abortion or denial of prenatal testing, as in the cases previously adjudicated by the Court, but also violation of rights arising from Art. 3 of the Convention by degrading and inhuman treatment that consists in not being able to terminate a pregnancy in situations of lethal fetal defects and being forced to give birth to a child burdened with serious defects and diseases, or forcing a woman to travel abroad to terminate a pregnancy, as well as the right arising from Art. 8 of the Convention, which guarantees respect for private life, with unlawful and disproportionate interference in private life by denying the possibility of terminating a pregnancy in situations of severe fetal damage and forcing a woman to give birth to a child with serious defects and diseases.

It must be stated that no effective remedy has been introduced to date into the Polish legal system against unjustified medical decisions denying access

²⁹ See: J. Kapelańska-Pręgowska, *The Scales of the European Court of Human Rights: Abortion Restriction in Poland, the European Consensus, and the State's Margin of Appreciation*, "Health and Human Rights Journal" 2021, no. 23, pp. 213–224; B. Ní Ghráinne, A. McMahon, *Access to abortion in cases of fatal foetal abnormality: a new direction for the European court of human rights?*, "Human Rights Law Review" 2019, no. 19 (3), pp. 561–584.

to legal termination of pregnancy. Admittedly, a few years after the judgment in the *Tysiiąc v. Poland* case, the so-called objection was introduced, but it cannot be considered an effective remedy. Pursuant to the Act of November 6, 2008 on patients' rights and the Patients' Rights Ombudsman³⁰, a patient or his or her legal representative may object to a medical opinion or certificate if it affects the patient's rights or obligations under applicable laws. The objection is filed with the Medical Committee acting under the Patients' Rights Ombudsman, which issues a ruling immediately, but no later than 30 days from the date of receipt of the objection. The patient is not entitled to appeal against the Committee's decision. However, the legal institution introduced cannot be considered effective or objective due to, for example, excessive formalism, the fact that the Committee is only composed of physicians³¹, the patient filing a complaint must attach to the complaint a signed certificate issued by the doctor that he or she is challenging³², and also due to the fact that the patient, as a party to the pending proceedings, does not participate in the meeting of the Medical Committee.

Moreover, it seems that in the case of a procedure as sensitive as pregnancy termination, and given that, under the current Polish law, the time for an abortion is strictly limited, the 30-day time limit for a decision is too long and has the effect of limiting a woman's legally guaranteed ability to undergo an abortion. In addition, current Polish law does not require a doctor who has refused to provide a healthcare service that is inconsistent with his or her conscience to indicate the real possibility for an eligible patient to obtain such a service from another doctor or entity. In the opinion of the European Court of Human Rights, the healthcare system and the operation of the conscience clause do not ensure the availability of legal abortions. The European Court of Human Rights has consistently taken the position that a state which, in its domestic law, permits termination procedures only in strictly defined situations must take special care to enable the full effective exercise of the citizens' rights.

³⁰ Dz.U. 2009 no. 52 item 417, as amen.

³¹ Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Report on Mission to Poland.

³² If the doctor refuses to issue an opinion or a certificate, the patient is unable to initiate proceedings before the Committee.

The current legislation on abortion in Poland and the practice of its application lead to violations of fundamental human rights, while successive attempts to further tighten the abortion law in Poland are in clear contradiction to international and European standards of protection and, last but not least, to the will of citizens. In the absence of a scientific or social consensus on the indisputable beginning of life, it seems that the state must not impose a particular moral or religious perspective on the addressees of legal norms. Only those rationales for the permissibility of abortion that are developed as a compromise between women and government can be socially legitimized. One should also bear in mind that the accessibility of all reproductive health services is essential to the protection of women's health and life, and to the protection of their rights to equality, independence, and dignity. The widest possible access to health services, which, after all, is guaranteed by existing laws, counteracts the perpetuation of gender discrimination practices.

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